25/85

IN THE PRIVY COUNCIL No. 65 of 1984

ON APPEAL
FROM THE COURT OF APPEAL IN HONG KONG

BETWEEN:-

KONG CHEUK KWAN — Appellant

- and -

THE QUEEN — Respondent

RECORD OF PROCEEDINGS - PART I
VOLUME II - Pages 592 - 851

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INDEX OF REFERENCE

In the High Court of Hong Kong

No. 5

SUBMISSION BY COUNSEL OF NO CASE TO ANSWER

No.5 Submission by Counsel of No Case to Answer

2.37 p.m. Court resumes

Accused present. Appearances as before.

MR. STEEL: As your Lordship has no doubt surmised I wish on behalf of Captain Kong and my learned friends on behalf of other defendants to make a submission to your Lordship that the defendants have no case to answer.

May I start my submissions by telling your Lordship at least one or two things that I am not going to say, to clear them out of the way. I accept that my client, and I suspect this is common ground, owed a duty of care to passengers, of course, of his own craft and the passengers of the other craft, not to injure them.

I also accept, for I am anxious at this stage to accept everything that my learned friend on behalf of the prosecution could pray in aid, that there is no need for him to show that any criminal conduct on behalf of any of the accused was the only cause or sole cause of the collision nor do I envisage at least at the moment any problem about what the crime of manslaughter is.

Your Lordship is aware that it was at least in recent years in England a standard practice to define to a jury that gross negligence was equivalent to recklessness. That approach was put into somewhat of a turmoil by some recent decisions in Taylor and Caldwell. And again anxious, I hope to adopt an approach which my learned friend Mr.Lucas can live with at this stage of the case, I would accept without qualification the direction which is suggested in the latest supplement to Archbold, the latest direction as to what the prosecution have to establish in order to prove involuntary manslaughter. Your Lordship will find it under paragraph 20-49 of the supplement. Paragraph 20-49.

As your Lordship observes, it comes towards the bottom of the page, left-hand page there under sub-paragraph 7, and what is being suggested is a direction to the jury in

the light of the decisions in Caldwell and Lawrence so as to pull the threads of recklessness and gross negligence together and the suggested direction is as follows:-

> "The defendant is guilty of manslaughter if the Crown have proved beyond all reasonable doubt (1) that at the time that he caused the deceased's death there was something in the circumstances which would have drawn the attention of an ordinary prudent (and therefore sober) individual in the position of the defendant to the possibility that his conduct was capable of causing some injury, albeit not necessarily serious, to the deceased (including injury to health), and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible; and (2)" - and this is the important aspect, the second part of it - "that before the act or omission which caused the deceased's death the defendant either failed to give any thought to the possibility of there being any such risk or, having recognised there was such a risk, he nevertheless went on to take the risk (or was guilty of such a high degree of negligence in the means he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment). "

Now, as I say, I will be surprised if that approach to the law is something with which, as I put it, Mr. Lucas cannot live - with which he cannot live.

Now my Lord, it follows from that that it is an essential ingredient of the offence which the prosecution have to prove before the jury that the defendants, and if I may for the moment treat them as a bunch, were reckless or criminally negligent in the navigation of one or other vessel. It is my submission that either no evidence has been adduced or relied upon by the Crown to prove that ingredient or, in the alternative, that the evidence is so weak and unreliable that no reasonable jury, properly directed, could convict. My Lord, I think that that is the appropriate mode of approaching the question of whether there is a case to answer.

Your Lordship may feel it desirable just to see the two most recent decisions on no case. Firstly, if I may remind your Lordship of a recent decision in this jurisdiction, The Attorney General v. LI Nai-ho in 1980 Hong Kong Law Reports at page 792 of which a xerox copy has been given to your Lordship.

Now my Lord, this is a slightly unusual case because it was an appeal against a decision of a judge who was not sitting with a jury and so it was an appeal on the basis that the judge had failed,as we will see, to somehow split himself in two sufficiently as judge on the one part and jury on the other. But the Court of Appeal here, as your Lordship sees, were invited to consider a case where the respondents were charged with conspiring to aid and abet other persons to land in Hong Kong without the permission of an immigration officer. AT the conclusion of the evidence for the Crown the trial judge ruled that none of the respondents had a case to answer.

> "The trial judge based his ruling upon an examination of the evidence of the two main Crown witnesses and reached a finding as to their credibility. The Attorney General appealed by way of case stated."
>
> It was held "the proper approach to a submission of no case to answer was to uphold the submission if either:- (a) there was no evidence to prove an essential ingredient of the alleged offence; or (b) when the evidence adduced by the Crown had been so discredited by cross-examination was so manifestly unreliable that no reasonable tribunal could safely convict upon it. The question therefore to be considered is whether the evidence adduced by the Crown is such that if no further evidence is adduced, a reasonably jury, properly directed, may convict."

And the material upon which that formulation of principle was reached is set out and I needn't, I think, read it.

Firstly, as your Lordship sees from the right-hand page of the xerox - page 793 of the report - from the Practice Direction issued in England by Lord Parker, the Lord Chief Justice in 1962, and two subsequent decisions

or rather two subsequent judgments in the decision of YAU Ka-ping in this jurisdiction, and, effectively, the headnote is taken out of those quotations, the material basis for an application of no case.

My Lord, the matter has been taken a little bit further more recently in another decision which may be of persuasive assistance to your Lordship. The case of Galbraith, a decision of the Criminal Division of the Court of Appeal in England, 1981 Vol.2 All England at page 1060. My Lord, I don't think I need to read the headnote because it is picked up in the body of the judgment of Lord Lane. Your Lordship might just like to see the facts. It is there summarised in one sentence on page 1961, just above letter B.

The facts of the case were these. On the 20th November, 1978 at the Ranelagh Yacht Club, in the early hours of the evening a fight broke out in the bar. "There were a number of people present, amongst them" - then the people named. "Knives were used. At least three men were stabbed, Darke fatally, Bindon seriously, and Dennis less so. There was in these circumstances no doubt that there had been an affray. The only question for the jury to decide was whether it had been established with a sufficient degree of certainty that the applicant had been unlawfully taking part in that affray." And there was a submission of no case at the close of the Crown's evidence which was rejected and the principal ground of appeal was that he was wrong to do so.

And they then go on to debate or rather Lord Lane does in his judgment some differences of view that had crept into the English decisions about what the proper test was and his view is made plain on that difference of approach at page 1062, just below letter E.

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) When the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two (schools of) thought is to be preferred."

That is the dispute that he has resolved. My Lord, I am content to accept that of course, that qualification as a basis for approaching this submission that I make to your Lordship.

Now my Lord, in order to formulate this submission that I do make, that either there is no evidence or the evidence is so tenuous that its inherent weakness and vagueness and so on could not lead a reasonable jury, properly directed, to convict, to make that point I must go back to the beginning, if only briefly, to remind your Lordship how the Crown present their case in opening it to the jury.

The first point which was made loud and clear and has been time and time again ever since is that the defendants' accounts of what happened are untrue and they are not part of the case for the prosecution in the sense that they rely upon them in establishing the truth. That said, the prosecution say that their approach rested on a matter or upon a basis of common sense in the light of three specific features. Firstly, the fact of the collision, the fact it had taken place at all, and, secondly, as your Lordship will remember it was expressly dealt with, the concern of passengers at imminent danger over a prolonged period of time in contrast to tranquility in the wheelhouses, and, thirdly, a failure of both vessels to take any or any material avoiding action.

Now my Lord, since the Crown treat the defendants' accounts of what happened as self-serving, as merely exculpatory, I am going to approach this application upon the basis that not only do the prosecution not adduce them as evidence to establish the offence as such, at least of the truth of what happened,nor can I rely upon them at this stage in submitting no case. So again, my learned friend, I suspect, could not complain that I in a sense inhibit myself at this stage in that way.

My Lord, logically that must be right. I shall have to return to it at a later stage as to whether the assumption is in fact correct but logically it must be right as appears from a decision of, again, the English Court of Appeal in the Criminal Division, Storey, which your Lordship will find in 1968 Criminal Appeal Reports at page 334. Storey and Anwar. My Lord, I will try and take this case shortly. Just quickly reading the headnote.

> "The police found on entering the defendant's flat a very large quantity of cannabis (resin). In a voluntary statement not on oath the defendant gave the police the explanation that it belonged to a man who had brought it into her flat against her will, and the explanation, if true, would have afforded a complete answer to the charge. At the close of the case for the prosecution a submission was made by the defence that there was no case to answer, but the submission was overruled by the judge.
>
> Held, that the judge's ruling was right, as the defendant's statement to the police was not evidence of the truth of the facts therein, but only of her reaction to the police enquiries, and the defendant's unsworn explanation did not nullify the evidence of possession suggested by the presence of the cannabis resin in her flat."

It follows, of course, as night follows day, that in making a submission of no case the fact that the defendant had made a voluntary explanation to the police was not material upon which the judge could act in considering whether there was a case to answer, and the point is

developed, if I may just take it briefly, at page 337, the break in the page at the bottom, when it had been submitted that the voluntary statement furnished an answer.

> "The Court has given careful consideration to this important point. We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered..."

And accordingly they went on to conclude that the judge was wrong to have regard to the voluntary statement in having - sorry, was right not to have regard to the voluntary statement in coming to the conclusion that there was a case to be answered. So, my Lord, I approach this submission on the basis that whatever my client may have said and, indeed, any of the other defendants may have said is not material.

No, my Lord, let me just deal with the three elements to the prosecution's presentation of their case. Firstly as I have said, they rely upon the fact of the collision. Perhaps more than that, the general destination of each of the two vessels who had come into collision and the evidence that they were at collision, proceeding at speed and evidence to show that there was an angle of indent somewhere between 50 and 80 degrees.

Now my Lord, in the absence - if I may pause just there - in the absence of any substantial eye-witness material that fact or those facts do not as a matter of law give rise to any inference of improper navigation

against one or other of these vessels. I say that simply because even if - and let me accept again for the purposes of argument the principle of res ipsa loquitor or something akin to it - it is perfectly valid in criminal law as it is in civil law, the principle has no application whatsoever to collisions whether between cars or between ships.

Of course one can think of many examples where the mere fact of the accident could give rise to an inference of improper conduct. If a car driven off the road in perfect weather conditions and injures somebody on the pavement, that of itself may give rise to an inference of negligence. If a ship drives into a ship at anchor, again that calls for an explanation. But what doesn't call for an exaplanation is an impact - when I say it doesn't call for an explanation, it does not set up any prima facie case against any specific person - is an impact between two moving objects.

My Lord, for the purpose of what I call the road traffic cases, can I refer your Lordship briefly to the most commonly cited case on that topic, Alexander v. Adair, a Scottish case reported in 1938. My Lord, we can read the headnote.

> "The drivers of two motor cars were charged in one complaint with driving their cars without due care and attention and without reasonable consideration for other persons using the road, contrary to section 12 of the 1930 Act. The motor cars, while travelling upon road which crossed at right angles, had collided about the centre of the road junction. Apart from the drivers there was no eye-witness of the collision. Neither driver gave evidence. Each road was visible from the other for a distance of 50 yards from the junction. The Sheriff-substitute, upon a consideration of the real evidence in the case, found that both drivers were travelling at the crossing at a high rate of speed and that neither was keeping a proper lookout, and he convicted both. "
> A case having been stated at the request of one of the drivers - Held that, as the evidence was consistent with fault

on the part of the other driver only, the conviction fell to be quashed.

The point is developed again very briefly at page 31 of the report. My Lord, at the break of the page in the judgment of Lord Justice Clerk (Aitchison).

"No one except the drivers saw the accident happen, and there is in the case, so far as I can see, no fact proved from which the inference can be drawn that the appellant was driving at an excessive rate of speed, or that he was failing to keep a proper lookout, or that he was negligent in any respect in the performance of any of the duties that attach to the driver of a motor car. The only facts proved are (1) the fact of collision, and (2) the position of the vehicles after the accident happened. Both vehicles were approximately at the south-east corner of the crossing. These facts are neutral facts. They are consistent with fault on the part of both drivers, or with fault on the part of one only to the exclusion of the other. In that state of the evidence the learned Sheriff-substitute had no material before him on which he could find a verdict of guilty against either of the drivers. Neither of the drivers gave evidence, and a suggestion has been made that, in the absence of explanation, the Sheriff-substitute was entitled to draw an inference of guilt. But the appellant was not bound to give evidence. The prosecutor was put to proof of the charge, and there was not even a prima facie case to answer. If the circumstances of the case were such that the charge could not be brought home to either of the parties, the result must just be that both the parties are acquitted. I can see no answer to this appeal, and the question in the case, whether the Sheriff-substitute was entitled to convict, must be answered in the negative."

Lord Pitman said: "I agree. On the facts proved I think it would be very difficult for the Sheriff-substitute to hold that neither was to blame. On the other hand, I do not see that anything is proved which

necessarily pointed to the guilt of both of them. When one pleads guilty and the other does not, the latter is entitled to point to the fact that for all that is proved he may have been proceeding perfectly quietly whilst the other may have been going at 60 miles an hour without looking where he was going. In any case, nothing having been proved against the appellant, the Sheriff-substitute ought not, in my opinion, to have convicted."

Now my Lord, let me go on now, of course, to the second element of the Crown's case because they say, well, that is not the position here because we've got some eye-witnesses and we can put some flesh on these bones. So be it, I will come to that. But in case I forget it, the principle that I have just adumbrated, namely, that a collision of itself gives rise to no inference of fault against any specific person is a principle which I would merely say finds its place throughout all decisions in Admiralty. I know of no case in which the court has held that there is a prima facie case, let alone the application of the principle of res ipsa loquitor, to any collision between vessels unless one vessel is at anchor. I don't believe there to be an exception to that rule. And of course if the principle of res ipsa loquitor or its equivalent that there is a prima facie inference of negligence has no application in civil law to a given set of facts, equally it cannot find its place in the criminal law upon the same set of facts.

My Lord, as I say, the prosecution say "well, it isn't simply a case of a collision unexplained. We have got some eye-witnesses to add flesh to the bones". In brief, my point on this is that even if one was able to sort out the impressions of the twenty or so eye-witnesses that had been called out in court you would still - and the jury reasonably directed, would remain none the wiser.

There are three classes, I think, of witnesses who had been called. There are, firstly, the passengers. They, if I may say so and it is no criticism of them, have - and I am sure your Lordship would agree with this submission - given evidence which is inconsistent and somewhat vague. They have given almost every variation of the thing over the last

second or so. They have not given any support to the case which has been put at the forefront of the prosecution's opening that there was a prolonged period of anxiety below decks in comparison with some tranquility above. And one would not expect from people who are mere passengers, without maritime experience and without any particularly good view, one would not expect anything other than relatively weak and inconsistent material. I just add in parenthesis, of course, so far as Captain Kong is concerned, we haven't had the like experience of having witnesses in the form of passengers called from the Goldfinch.

Then the next class of witnesses. And again, I quite accept your Lordship is not here at this stage to try and form a view of credibility or reliability in detail but your Lordship must at this stage take stock of the extent to which matters are inconsistent and weak and unreliable. We have the seamen from the two ships who give evidence about the last seconds again. They furnish material for two possibilities: (1) that one ship was in a straight line over the last few seconds and the other turning or, alternatively, if we are only talking about a few seconds, to account for the angle of blow there must be two ships turning. Again one is in the bracket of the last second or so.

Now the third group of eye-witnesses are the people you would expect, on the fact of it, to have the most say. The defendants, I, of course, recognise, represent fifty percent of the complement of the wheelhouse but only fifty percent. Your Lordship and the jury have heard called the two radio officers and they add nothing by way of eye-witness information. I say 'nothing' because they add nothing to the fact that they (a) saw nothing, (b) felt nothing and (c) to the extent that they recorded times the prosecution don't accept them, so they add nothing. Neither your Lordship nor the jury have heard a word from the other two members of the wheelhouse, the chief engineers.

Now that is the eye-witness material. As I say, even if assuming, as I hope I try to do, everything in the prosecution's favour, even if the reasonable jury could formulate a clear view from that material of what happened over the last few seconds,

that doesn't begin to assist in formulating a view of what had gone wrong. In my submission, that material adds nothing to the fact of the collision and the fact of the speed and the fact of the angle of blow. It doesn't establish any inference of negligence against anybody and, in my submission, the jury would have to be so directed.

So one comes to the third element of the prosecution's case which is simply this. Neither ship took avoiding action. Now if that means that they didn't manage to avoid each other, that is not only a statement of the obvious but, of course, it adds nothing to the submissions I have been already making that the fact of the collision does not give rise to any inferences.

But if it is being said - sorry, if the prosecution desire to say that Captain Kong or Captain Coull or whoever it may be should have done a specific thing but they did not, then, in my submission, the prosecution put in front of themselves an insuperable hurdle because they have asserted time and time again, and they continue to do even today, that the primary facts do not have to be established, they do not have to open or establish where the collision happened, they do not have to open or establish where the ships were in the minutes leading up to the collision. Indeed so far as the collision position is concerned, they haven't even put in any evidence other than the original log, an official log of the Goldfinch. And your Lordship will also remember that they have not developed the application of the collision regulations to any specific set of primary facts.

My Lord, in my submission, that is a fatal flaw. It is a fatal flaw for the simple reason that in any maritime collision analysis one has got to go through the stages of establishing the primary facts - what were the positions, courses and speeds of the vessel in the period, say, from two or three miles apart up to collision - before you can then go on to the stage of saying what was the consequent obligations upon each vessel to keep out of each other's way. And you have got to do that before you can analyse which ship failed to comply with those obligations. You have got to do that in order to establish fault and you have got to do that first in order

to establish whether the nature of that fault was reckless or criminal.

That process, in my respectful submission, cannot be short-circuited and if it is short-circuited, my learned friend on behalf of the prosecution must in a sense be seeking a misdirection to the jury on that topic if he is to get home in seeking to prove this offence.

My Lord, it, of course, is an idle comment in a sense to say that even in a civil action the defendant is entitled to know precisely what it is said the plaintiff says he did wrong. That is the thing that we never really unearth in this process of prosecution here, and the reason it can't be done is because one has never sought or the prosecution have never sought to establish the primary facts.

My Lord, I put it that way because albeit the crime of manslaughter is of course quite distinct from civil responsibility - in fact the former can't exist without the latter - you can't somehow sidestep the need to consider what in fact would be civil responsibility and go on to the criminal aspect of it first.

I would wish to develop that point briefly by referring your Lordship to a case which is on my learned friend Mr.Lucas's list of authorities, a case I suspect to be very familiar to your Lordship. Bateman. Bateman reported in 1925 Criminal Appeal Reports at page 8. I am sorry, my Lord, I think the copies are available to your Lordship.

My Lord, this decision, of course, is the precursor - I am so sorry, let me hand up a spare copy. Now my Lord, this, of course, is the precursor to the more famous decision Andrews about the scope of the crime of manslaughter. And indeed Lord Atkin in Andrews quotes from the decision of the Lord Chief Justice in this case and gives it approval. And your Lordship sees from the headnote on the first page, the conclusion of the case:-

> "To support an indictment for manslaughter by negligence the prosecution must prove (1) a duty to take care, (2) failure to discharge that duty, and (3) that the

death was due to that default, and further, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

My Lord, what is missing in this case is stage two. What they have failed to prove, in my respectful submission, is the failure to discharge the duty to take care. Now what happened in this case and what is strikingly absent in the present is that the prosecution made it entirely plain what their allegations and negligence were. Your Lordship will find that at page 10.

They made three charges of negligence in relation to an attempt or an unsuccessful attempt to abort and they are set out there, (1), (2) and (3) and then it goes on

"For the defence it was contended that (1) and (2) were, in the difficult circumstances of the case, not inconsistent with a fair degree of care and competence, and that to have moved the patient at an earlier date would only have accelerated her death. At the hearing of the appeal, counsel for the appellant relied mainly on the following grounds:- Misdirection in law, misdirection and non-direction on the facts and that the verdict was against the weight of the evidence.

Before we deal with the directions of the learned judge to the jury, it may be well to consider generally the law on this subject. In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not

discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A's negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a criminal court, on the contrary, the amount and degree of negligence are the determining questions."

So, as I say, it is a condition precedent to the crime satisfying the jury that the nature of the negligence was such as to amount to a crime that they have established what the negligence was. In my respectful submission, if one were seeking to consider in this case questions of civil liability in order to, in a sense, form a foundation of what constituted the reckless or criminal conduct, one cannot find it. There has been no attempt to achieve it. It has been expressly disclaimed.

This judgment, of course, goes on to deal with the classic passage in which the epithets of "culpable", "criminal", "gross", "wicked" and so on negligence are dealt with and the need to establish a disregard to the safety of life and property which amounts to a crime against the State and not just a matter for compensation.

My Lord, I make the point again by turning on just two pages to page 13. Right in the middle of the page the Lord Chief Justice says:

> " The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State...."

My Lord, I say that the jury will need to be directed to that effect and your Lordship would have to tell them that in a sense, by default, the prosecution have wholly failed to establish matters of civil liability because they have never reached first base. They have never sought to advance a case which establishes the primary facts. They kick out of the window all the material upon which the jury could probably make a conclusion about it. They are only left with the minutia, and the unreliable minutia, of the evidence of the eye-witnesses.

Now, my Lord, I said at the beginning of the submissions that it was logical to disregard the defendant's own account in submitting no case, but there are two points about it that I have to deal with.

The first is a point that I apprehend my learned friend Mr. Lucas wishes to make. I think the point is put this way: the statements of the defendants are contended to be deliberate lies.

Let me assume he is right. Let me assume also that that's not done for any other motive than to avoid detection and as an apprehension of guilt. Let me assume that they are clearly proved to be lies. Let me assume everything in my learned friend's favour that all these stories are a cock-and-bull story from beginning to end. Now what the prosecution say is, "Fine, that makes them corroborative."

My Lord, my respectful submission is that that is a misconception of what is meant by the general principle that lies can constitute corroboration. It is confusing two quite distinct jurisprudential aspects of the effect of an untruth.

The first of those aspects is that obviously a witness's credibility is in issue and a witness's credibility is dependent on a variety of factors - his memory and the extent to which he can see things and very importantly, of course, his veracity. And if as I have assumed the defendant is telling lies, obviously those lies would seriously undermine the credibility of the defendants. And that's perhaps another good reason why I am right

in making my submissions at this stage to have no regard to what they have said. The lies destroy the credibility. They do not establish any affirmative case. Indeed to the contrary, the whole nature of the test of credibility is since a man told a lie on one occasion,his evidence on another occasion is equally unreliable.

Now there is then the question of corroboration. And there is an exception to that general rule, namely, the rule that a lie does not establish any affirmative proposition and it arises and only arises, I would respectfully submit, when a witness's account requires to be corroborated. In those circumstances, the lies of a second witness can constitute that corroboration. It again, I say, is a condition precedent that there should be an account which can be, and requires to be, corroborated.

My Lord, I hope I make that submission plain from -- and it is ironic that the leading case on the topic is Lucas, 1981 2 All England, page 1008.

Does your Lordship have that?

As your Lordship sees in the headnote:

> "The fact that a jury may prefer an accomplice's evidence to that of the defendant does not of itself provide corroboration of the accomplice's otherwise uncorroborated evidence. It is only if the accomplice's evidence is believed that there is any necessity to look for corroboration of it.
>
> For a lie told by a defendant out of court to provide corroboration against him that lie must be deliberate, it must relate to a material issue, the motive for it must be a realisation of guilt and a fear of the truth, and it must be clearly shown to be a lie by evidence other than that of an accomplice to be corroborated, i.e. by admission or by evidence from an independent witness..."

Now, my Lord, we can turn over, I think now - I don't think the facts matter for this purpose - to page 1010. I notice that the number has been cut off. The left-hand

section of the second page of the Xerox copy and we can pick it up right at the bottom below "j":

> " The fact that the jury may feel sure that the accomplice's evidence is to be preferred to that of the defendant and that the defendant accordingly must have been lying in the witness box is not of itself something which can be treated by the jury, as corroboration of the accomplice's evidence. It is only if the accomplice's evidence is believed that there is any necessity to look for corroboration of it. If the belief that the accomplice is truthful means that the defendant was untruthful and if that untruthfulness can be used as corroboration, the practical effect would be to dispense with the need of corroboration altogether.
>
> The matter was put in this way by Lord MacDermott in Tumahole Bereng v. R (1949):
>
> > 'Nor does an accused corroboate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said.' "

And then he describes the confusion that has arisen about the circumstances in which lies can give rise to corroboration and he says in certain circumstances they can so constitute corroboration and goes on, just under "e" :

> "To be capable of amounting to corroboration the lies told out of court...."

And then he describes the nature of the lie which has to be established and I presume everything in my learned friend's favour. A classic example of the direction which incorporates the principle with which my

learned friend relies is over there at the last page of the judgment. The way in which the direction had gone was this:

> "'If you think that Chapman's story about the disappearance of the van and its contents is so obviously untrue that you do not attach any weight to it at all - in other words, you think Chapman is lying to you - then I direct you that that is capable of corroborating Thatcher because... if Chapman is lying about the van, can there be any explanation except that Thatcher is telling the truth about how it came to disappear?.... My direction is that it is capable in law of corroborating Thatcher. Similarly in the case of Baldwin, if you think that Baldwin's story about going up to London and buying these goods...is untrue - in other words he has told you lies about that - then.... that, I direct you, so far as he is concerned, is capable of amounting to corroboration of Thatcher.' "

Now the difficulty that my learned friend, I would respectfully suggest, has got into is that since he protests that the defendants' own stories are untrue, he is not in a sense putting forward any story or account which can be corroborated. He can't rely on a lie as corroboration of guilt generally. That is pulling oneself up with one's own boot-straps. Again, in my respectful submission, assuming the defendants have lied in their statements to the police, that does not assist the jury at all because it does not corroborate anything because there is no story to corroborate.

My Lord, my last point, and I have been anxious to develop these matters quickly, is that, as I said, I am wondering whether I am right in tying my hand behind my back, in one sense, by saying that my own client's statement is not relevant to the submission of no case.

I had told your Lordship that Storey's case logically says obviously not. Because if it is a self-serving and exculpatory statement, it obviously can't be prayed in aid at the end of the prosecution's case because it's not admissible as evidence of truth. But the

difficulty that has arisen - my learned friend Mr. Corrigan drew my attention to a recent decision of the Hong Kong courts where they have diverted from the line of reasoning in the United Kingdom. My Lord, the decision is CHENG Chiu v. The Queen, 1980 Hong Kong Law Reports, page 50.

Now again, let me try and take the point quickly rather than summarily read it. As I understand the point, it is this: the learned Court of Appeal found, if I may say so, with some considerable justification that the English approach was very difficult to cope with and they were not very happy with the notion that a jury should be told when the prosecution, for one reason or another, put in a voluntary statement as part of their case, but at the same time deny its truth. They found it very difficult to envisage how a jury would understand the difference between a statement which was there in order to show what the defendant's reaction to the facts had been when first questioned and the statement which was evidence of the truth. And one of the cases cited, and indeed referred to in the judgment, was Storey's case.

And may I just, I think, for this purpose, refer your Lordship just to one passage of the judgment of the learned Chief Justice, page 57 - the broken page?

> "What causes us anxiety in these three cases...."

that's a reference back to Donaldson, Pearce and Storey -

> "...is the suggestion that a statement which is adduced by the prosecution and contains a denial by the defendant, is evidence not of the truth of the denial but only that the defendant made it and of his reaction or attitude. We are concerned by the difficulty of explaining to a jury that evidence should be taken into account for some purposes but not for others. This may be unavoidable in some situations..."

and so on. And then he goes on to develop that point. At the bottom of the page:

" For these reasons, we take the view that, if we have correctly analysed the English law as being - that a self-serving statement admitted at the instance of the Crown is evidence not of the truth of its contents but only of the defendant's attitude at the time - that law ought not to be followed in Hong Kong. Once evidence of a denial has been admitted, it should be there for all purposes. It should be for the jury to attach to it such weight as they think fit, as part of the general evidence which is put before them. "

My Lord, the difficulty is that these are lacunas, it seems to me, as to what their status is at the termination of the prosecution's case and in particular whether I am entitled to pray in aid the statement in order to make my submissions of no case.

But if Storey is not to be followed, again logically, I would be entitled to pray in aid and my submission about that would be simply this that Captain Kong says in his statement that his log book entry is inaccurate and incomplete and confused, but that his statement contains a full description of what happened and, in my respectful submission, taken at face value, constitutes a complete answer to the charge. Because if that is the material which is added to the material which has been adduced and relied upon by the prosecution, no jury, in my respectful submission, and I don't think this is a point in relation to Captain Kong alone, but for convenience' sake could conceivably find, if properly directed, that there had been a failure to appreciate a risk at all, or that the risk had been appreciated and it had been just deliberately run, or that there had been a failure of due care which elevated itself out of the normal albeit sad, run of negligence leading to collision into something approaching anything like the disregard for life safety which deserves punishment and it is a crime against the State. Indeed, no doubt that is one of the reasons why the prosecution treat the document as self-serving.

My Lord, it is for all those reasons, that is my respectful submission, that these proceedings should be annulled and that they should go back to the forum which perhaps they should never have left - the disciplinary

tribunal of the Marine court appointed by the Governor for a thorough investigation with its own substantial disciplinary powers.

My Lord, I submit the defendants, and in particular, of course, Captain Kong, have no case to answer.

COURT: Mr. Steel, I asked Mr. Pyrke if Captain Kong,as he says he did, saw the Flying Flamingo and, it was obviously a dangerous situation he'd got, he then proceeded to sort of check the part of the foil indicators, the revolution counter and some other instrument and it was only after that, according to his own statement, he gave the order to stop the engines. Now his answer was, "Well, I wouldn't have done. I would have been keeping a very clear lookout. I wouldn't have been looking down at instruments at that stage." Is that not evidence that he should have appreciated that that was a dangerous position?

MR. STEEL: I cannot seriously believe that, if I may assume your Lordship's point to be right, that what, I would submit, in those circumstances, could only constitute a venial fault, would have been the subject of a manslaughter charge.

And I cannot conceive a reasonable jury, properly directed, concluding that a fault over the last few seconds which arithmetically could be shown to have causative significance nonetheless amounted to not just negligence, but gross negligence.

But, my Lord, the more important point is this: isolating the last few seconds, particularly with ship collisions, can give a grossly distorted picture, and unfair picture. It is only possible to draw a fair view of what happened and what went wrong by looking at a material time period.

Let me take two examples. Suppose, for the sake of example, that at the time which your Lordship is speaking, that up to that moment the navigator had been acting on a stand-on-rule and it may be - again take for example the situation in which there is a vessel which is standing on and is entitled to and for some reason the navigator puts a blindfold on

himself so he can't see the other ship at all. That would be a fault, but it wouldn't be a causative fault because he would continue to stand on.

Now what I would submit that the civil courts in collision cases are so reluctant to do, and which is what the prosecution here have only done,is to analyse the last moments. The reason they do that is because, first of all, it's not possible to form a clear and accurate view of what the obligations are at the late stage, unless you look back earlier; secondly, unless with vessels approaching and obliged to obey particular steering rules, the civil courts only look, or almost only look, to who has created the situation of danger and they pay scant regard, I am not saying no regard but scant regard, to the attempts that are made at the very late stage to extricate ships from danger.

Now my Lord, if ever there was going to be a case of a collision between two ships which justified the bringing of a manslaughter charge and a conviction upon it, it could only be upon the basis that, having established the primary facts, you could then observe who it was who created the situation of danger and it would be very unsafe, because one of the difficulties being the mathematical difficulties of assessing what happens over a matter of the last few seconds, very unsafe to leave a jury to debate the propriety or otherwise of actions taken over the last few seconds.

In the sense the speculation that your Lordship puts me, because all the various theories for the purpose at this stage of the case are but speculations, all the various theories would require your Lordship to conclude that the jury could safely be invited to and indeed safely could conceivably convict a man for manslaughter where he has not responded at the last few seconds to a situation of danger which is not of his own creation. That could be the only basis upon which he could be blamed as is a matter of civil law for the point that your Lordship is making. And in those circumstances, if one seeks to have regard to Storey, then I say it is an entirely exculpatory statement, as indeed the Crown have, in a sense, so asserted from the beginning.

If one disregards the statement, one is left with nothing - merely the collision, merely a few eye-witnesses for the last two seconds - without any material and certainly without any case in order to, as I say, establish the primary facts, therefore establish civil liability, therefore go on to consider who has been reckless, if at all, or has been criminally negligent, if at all.

If one starts at the last few seconds, you are effectively jumping a step and that step cannot be jumped in any -- it just cannot be jumped and the jury would have to be told so.

No civil court would conceivably try and establish - I am not talking about proportions of blame, but conceivably establish heads of blame on the basis of looking at what happened in the last few seconds. It's an impossible exercise. And if it is an impossible exercise as a matter of civil law, it must follow, in my submissions, that it's an impossible exercise in so far as the charge of manslaughter is brought arising out of the same incident.

COURT: Would not the jury say on the basis of the evidence, "Here we have a vessel which is somewhat unusual in that despite it is a very high speed vessel, it can stop very quickly. If the captain or the lookout sees there is a danger, whether or not he has created it, nevertheless he is under a duty to do something about it."?

MR. STEEL: My Lord, again let's....

COURT: In these vessels that can be done even if it is in fact in the last few seconds.

MR. STEEL: Let's take that example again. Let's assume, for the purposes of argument, that the man has decided to stand on anticipating some actions from the other ship, assume that that is the obligation. I am entitled to make an assumption of that kind, with respect, for the sake of argument. These vessels are capable of stopping quickly. It makes the job all the more difficult rather than easier because, albeit he has some liberty to take actions in earlier stage, he would not be in breach of the collision regulations if he stands on, not a breach of the collision regulations, and he must stand on until the

moment when the other ship can't avoid hitting him which may be a distance of two hundred feet or possibly less depending on their relative approach. This is, if they are actually head-on, their relative approach is twice their speed and therefore the stopping distance would in a sense be when the other ship is only a hundred feet away. Now supposing he goes on and he does not slow down but takes starboarding action, in other words, he keeps going, now again to the civil court it is inevitable that the error, if error it is, of the stand-on vessel is of such a venial character that it might not attract any blame at all, or if it did, it would have been of such a tiny proportionate fault that no jury could seriously begin to regard it as criminally negligent.

My Lord, I do submit to your Lordship that one has got to view these things on the basis that there may be an explanation for the continued approach of the vessel at speed up to a very close range because of the respective starting positions of the vessels.

And I submitted, or rather - I think probably the word is "submitted" and I shouldn't have done - to Captain Pyrke that the courts are very loath and very slow to pillory a man who has stood on to a late stage. My Lord, I say that that's good law. I don't know if I need to cite authority on the proposition. Now I continue to submit to your Lordship that even if your Lordship felt that there was some material which could possibly form a basis for criticizing lookout and speed, that is not enough to justify your Lordship leaving the case to the jury. Indeed, my learned friend produced an authority, which is on his list, which in a sense touches on that very topic.

If - and of course I am only making these submissions on the basis that I am entitled to pray in aid my own client's statement - if that material can be read in an exculpatory manner, either in its entirety or in a manner which is only consistent, at worst, with a venial civil fault, then the case must not be left to the jury, in my respectful submission. It must not be left generally at large. That's what I say to the point your Lordship puts me. But, of course, the main burden in my theme has been that both prosecution and defence for this purpose,

subject to the corroboration point, is to leave out of account the defendants' statements, and there you are left with nothing.

My Lord, I don't think I can....

COURT: Except the evidence of the passengers on the Flamingo who said that they saw this vessel coming straight towards them and they appeared to do nothing.

MR. STEEL: My Lord, that is a summary of some of their evidence. Whether it is appropriate at this stage to go through it or -- what I do say to your Lordship is that the passengers have a variety of stories. They see the ship in different places. They see the ship doing different things. Some have seen it to starboard and heading towards them, i.e., at an angle. Some have seen it abeam and heading towards them and some have seen it to starboard but heading across. Some have seen the other ship turning. Some have not.

Now what I submitted to your Lordship earlier was that the evidence from the passengers not surprisingly is inconsistent and rather weak. They don't have a good view. They don't view forward. All they can really see is a very late stage and what they do see is mutually contradictory and one thing that is - the only common thing to their stories is that they are seeing things very much of the last moment before they can really do anything to look after themselves.

And I do say most urgently to your Lordship that what you learned from the passengers' statements adds not a tittle to what the facts of the collision itself, the angle of blow and the fact that the vessels are proceeding at speed. Those facts on themselves do not give rise to any inference of negligence against any specific person. You may think that those are at fault. You may think that one was at fault. It has been pointed out in a sense the analysis of this. It doesn't help you to resolve the question who did what wrong. And the passengers don't help in that at all, not at all. It wouldn't be safe for a jury to -- no reasonable jury could seriously conclude that what the passengers saw was something which enables them to establish that somebody had committed some conduct of a criminal character.

The seamen add very little and the radio officers add nothing. The chief engineers we never see. It is a very empty barrel.

COURT: Yes, thank you, Mr. Steel.

MR. STEEL: My Lord, may I just add one topic - my learned junior reminds me, of course, Captain Pyrke, I think, was observing that not merely are the courts reluctant to challenge a man's abilities over the last few seconds approaching a collision by careful mathematical analysis, but also the phrase "agony of collision" is commonly found in the collision cases and that's apt to cover the situation in which a person has, on reflection, taken the wrong action to an agonizing decision that he has to take in the face of mounting danger which is not of his own creation and that must be borne in mind considering the point that your Lordship is putting to me about what Captain Kong said he did at the last moment.

COURT: Yes.

(SUBMISSIONS OF NO CASE BY MR. AIKEN RE: 2ND ACCUSED - NOT TRANSCRIBED.)

12.52 p.m. Court resumes

All accused present. Appearances as before. JURY ABSENT.

MR. LUCAS: May it please you, my Lord. My Lord, may I start off, before I go into the arguments in any depth, by correcting three things, as a matter of urgency, which I think should be corrected, which have been said two by my learned friends and one, with respect, my Lord, by yourself as a matter of law.

It has been said to you constantly throughout this case, throughout this submission, that the question of whether there is gross negligence or not with all the tests to be applied by your Lordship at this stage is: has the Crown shown there is gross negligence. In other words, your function at this stage is to decide whether there is gross negligence or not.

With the greatest of respect and there has been enormous change in the law of manslaughter negligence which I will go into

later and I will go into it later, my Lord, because I suspect and I am sorry that I will have to go back to the first principles in the submission because it seems to me that the first principles are being missed.

Insofar as negligence is concerned, it has never been the law it has never been anything else but the law that the question of whether negligence amounts to gross negligence is a matter for the jury. It has been that way since Bateman's case, it continued through Andrews' case, that was the situation in Caldwell's case. The question of whether negligence goes beyond the civil and moves into its criminal sphere is a matter for the jury and that for your Lordship and if I may refer you very quickly to the references on that particular topic, first of all, my Lord, in Andrews and the DPP. It is in actually the headnote. The words read as follows ;-

> "Where a person is indicted for manslaughter for having, while driving a motor car, unlawfully killed a man, the judge, in directing the jury, should in the first instance tell them that the facts must be such that in their opinion the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment, he should then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous drugs ..., etc. "

But it's a matter for the opinion of the jury and it is a jury's question and has been a jury's question.

My Lord, I am coming to page 582 of that report. 576, the headnote. If you have the 1937 Appeal Cases and it's the 4th line down in the headnote which sets out:

> "...should in the first instance tell them that the facts must be such that in their opinion...."

A jury's question. It's always been a jury's

question. The difficulties that we have got into in manslaughter in this particular area was because of the epithets used to direct that the question was theirs and theirs alone and if your Lordship would be kind enough to look at page 562, 9/10ths of the way down the page :-

> "In explaining to juries the test which they should apply to determine whether the negligence, in this particular case, amounted or did not amount to a crime, judges have used many epithets such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But whatever epithet be used and whatever an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury.... "

That is taken from Lord Atkin's actual statement. Got the headnote? That's where the head note gets it from. It's clear there that this particular issue is a jury issue.

In relation also moving from 1937 back in time to 1925 if your Lordship would look at Bateman's case which is reported in the 1925 Criminal Appeal Reports, page 8, because Lord Atkin was in fact citing from the previous case when he used this expression It's repeated at page 11 of that report :-

> "But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects...."

Now, I'll come back to these cases in a moment. I'm just simply pointing out that at page 11 of Bateman's case, 9/10ths of the way down that particular page, the second last -- it's the last sentence, "in the opinion of the jury" and if we move forward in time to Caldwell's case which is reported -- My Lord, I'll come back to discuss all the three of these cases at some length, I am afraid, but because I think in view of what has been said during the course of the submissions -- it's not Caldwell and I do apologize, my Lord; it's Lawrence's case which is in the 1981 1 All England Reports at page 974. You'll read the headnote, last line :-

"It is for the jury to decide whether risk created by the accused's driving was both obvious and serious, the standard being that of the ordinary prudent motorist....."

MR. CORRIGAN: I hope my learned friend is not suggesting that this is a case of manslaughter. It's statutory reck-
10 lessness.

MR. LUCAS : I'm sorry.....

COURT: But I think it's relevant....

MR. CORRIGAN: The case is statutory reck-lessness, my Lord. It's not common law manslaughter.

COURT: Are you suggesting the test is...

MR. CORRIGAN: My Lord, I didn't deal with it because it bears no relation to the crime of manslaughter. It's been
20 discussed by academics and all sorts of people.

COURT: It's referred to a great deal in articles.....

MR. CORRIGAN: It certainly is, yes, and discounted as being to do with a statutory crime of reckless driving.

COURT: It's not discounted, it may not be relevant but it certainly is discussed.

30 MR. LUCAS: Sorry, this is no debate. My Lord, may I be permitted to go on with my submission?

MR. CORRIGAN: It's not manslaughter.

MR. LUCAS: I know it's not manslaughter. I don't need my learned friend to tell me it's not manslaughter. I am conscious of the facts in Caldwell's case. I'll be grateful if I may be permitted to proceed.

40 So insofar as the suggestion is that the test at this stage of the proceedings -- or, insofar as the suggestion is that the question of whether it is manslaughter

sufficient to warrant a conviction or otherwise of manslaughter be a matter for your Lordship, with respect that is not so.

Another matter that was raised by my learned friend is a suggestion that causation one looks at in some civil sort of sense whether someone was 20% to blame or not or otherwise. There is a case of Queen against Hennigan reported in 1971, Appeal Case - Sorry 1971 3 All England Reports and before I am interrupted, this is also a case of dangerous driving, reckless driving causing death by dangerous driving and the question there raised was this: the charge was -- had the dangerous driving caused the death, and what is clear reading from -- just reading the headnote very briefly:

> "On a charge of causing death by dangerous driving contrary to s.1 of the Road Traffic Act 1960 it is only necessary for the prosecution to show the accused's dangerous driving was a cause of the accident and was something more than de minimis; it is not necessary to show that it was a 'substantial' cause in the sense that, on an apportionment of liability in a civil action the accused would, for example, be held at least one-fifth to blame for the accident. In this context, if the word 'substantial' is used it must be taken as indicating no more than that the dangerous driving, as a cause of the accident, was something more than de minimis.

And reading from the Chief Justice Lord Parker at page 134, second paragraph:

> "In view of the point that is made, it is really unnecessary to go into the facts in full in this case. Quite shortly what happened was that Mrs. Lowe driving a Vauxhall car with two passengers emerging from a road called Old Road in order to cross the Wigan to Ashton Road and go into Nicole Road opposite. Old Road and Nicole Road were minor roads and indeed there was a 'Give Way' sign where Mrs. Lowe was approaching. The evidence was that she stopped at the entrance and then moved forward and her evidence was that

she had looked to her left towards Wigan and that the only traffic that she saw was a long way away down by a railway bridge. However, she had only just got astride the middle of the road when a Ford Cortina driven by the appellant from Wigan towards Ashton crashed into her broadside and unfortunately as a result Mrs. Lowe's two passengers were killed.

There was a considerable body of evidence that the appellant was driving at a fast speed; estimate went up to 80 miles an hour, and almost immediately before the accident he appears to have overtaken a Jaguar, regaining his side of the road and then crashing into Mrs. Lowe's car. It at once occurred to one that if this was a civil action, Mrs. Lowe might be held substantially to blame, emerging from a minor road, because she clearly was at fault; on the other hand the appellant in a restricted area at night - it was 11 p.m. - was clearly going too fast, and dangerously too fast.

The trouble that has arisen in this case in regard to a direction that the judge gave when the jury, after retirement, came back and asked a question. In the course of the summing-up he told the jury must be shown that the appellant's manner of driving caused the collision and that the collision caused the death..."

And he goes on to say -- reading from page 135, it really sets out the point in this case, my Lord:

"What is said, as the court understands it, is that that conveyed the impression to the jury that they could find the appellant guilty if he was only little more than one-fifth to blame. The court would like to emphasise this, that there is of course nothing in S1 of the Road Traffic Act 1960 which requires the manner of the driving to be a substantial cause, or a major cause, or any other description of

cause of the accident. So long as the dangerous driving is a cause and something more than de minimis, the statute operates. "

When we talk in terms of causation in crime, we do not seek - notwithstanding the statutory interpretation my learned friend points out - in those circumstances, we talk in terms of causation and apportionment of blame, the question is and the fact that seems to be accepted by my learned friend, Mr. Corrigan, is this: there was some negligence - it may not have been - it was minor negligence, your Lordship should not go beyond that point because we have to show gross negligence, which, with respect, is not so.

Secondly, in any event, it was not only minor negligence but it was -- if you apportion blame, a minor part of the accident and therefore causation doesn't somehow apply. With respect, that is not the position.

The third point I wish to raise at this stage is that a comment made by your Lordship where you indicated that it was that the negligence is gauged on the consequences of it. With respect, that is not so.

There is clear authority which says that the jury should disregard from their minds when assessing whether negligence is gross or not the consequences of it. There may be gross negligence which does not cause any harm at all although obviously in a manslaughter case that isn't so, but the reverse is also true. If you gauge on the consequences, the extent of the negligence, what it means is this, a minor degree of negligence by someone which causes death would always be gross negligence and that is not so. If it is a minor degree of negligence, it is the sort of degree that the jury must say to itself, 'This does not come within the criminal responsibility area.' What I would take up on that particular area is this: the consequences or, more important, the potential consequences of an act is extremely relevant as to whether the act itself is grossly negligent.

Take, for example, my Lord, if I am driving -- I have a two stroke motor boat

and I start that motor boat off with a Bikini clad girl sitting on my lap and I start the engine and take off from Sai Kung. I am a pilot in a 747. An air hostess sits on my lap as we take off. Same act. The consequences, the potential harm, make a difference as to the amount of care.

To put it in another way, if someone hands me a tennis ball and says, "Whatever you do, don't throw it up and down in the air." or if someone gives me a very valuable Ming vase, the act of throwing it in the air is the same act; the consequences are such that anyone doing one could be considered grossly negligent whereas doing the other not.

The fourth point that I would like to dispose, if I may, is this, if we follow my learned friend Mr. Aiken's argument through, that it doesn't matter what the tests are when you pass your examinations to get some sort of professional qualification. If after you have passed the tests, everyone else is slovenly, then you base your standards on the slovenry not the tests. So if I do medicine and pass my examinations and do extremely well and I go to a place where every other doctor in town is drunk and I behave just as they do, then we will say, "Well, in those circumstances, the test really is not worth it."

What does everyone else do in this situation? We have the evidence in this particular case of Mr. Young. No one seems to take a notice of Mr. Young but Mr. Young took bearings at the time -- took notes at the time of what was going on as he steered his boat backwards and forwards and we've relied on him throughout.

The standard is not that, and I'll come back to what the standard is in a moment, but in relation to those four issues. I hasten, my Lord, at this stage before I actually start my address, to put those if I may debate because they do not apply, one, it is for the jury to decide, not your Lordship, what is gross or what negligence if there is negligence. Accept negligence, that's it.

Two, causation is, we do not operate in civil terms, although everyone is anxious

that we should do, for some extraordinary reason, in this court and causation means just that, if provided it was not de minimis, then that is the end of it.

Thirdly, the consequences do not necessarily indicate gross negligence because that would mean every bit of negligence that leads to death would be by definition manslaughter. It is not but the consequences of an act vary according -- the question of whether an act is negligent or not varies according to the circumstances, conditions and also to the consequences of the act and if it is shown during the course of this trial or if my learned friend is satisfied that he has shown that all people in travelling backwards and forwards to Macau behave in a slovenly manner, that is a matter for concern but it does not, with respect, absolve his crime if they follow that plea.

COURT: In the civil field I am sure that the test is we hire here -- what the law in the civil field that if in fact a professional practice is carried out.

MR. LUCAS: I'll come to this point now which was originally my basis of submission. What has happened, my Lord, to manslaughter negligence is the advent of the motor vehicle and if you examined -- stand back and examined my Lord, if you look and it's a great deal of solace in the old case, Andrews' case, Andrews and the DPP took a sudden veer from the previous law. Let's examine the law as it is for the moment, and I'm afraid that has always been, there are two types of negligence, manslaughter -- act which causes death where a reasonable person considers some harm might come. In other words, the situation, the example that we are always given, if I push him, it's an assault, some harm did not come up, didn't expect it, if he falls and knocks his head, dies, manslaughter, that's the sort of situation, unlawful act.

Then we had situations where there were not unlawful acts, per se, the doctor who was dealing with someone who died, act not unlawful, it was a negligent situation.

Now, up until 1925 what we had in that group of cases, that type of case, was a situation which was very straightforward. You see, if you look at -- we may go back to

Andrews case. If you look at Andrews case and the submission is interesting because at page 578 of that particular case, the submissions are :-

> "If du Parcq,J. was correct in directing the jury that if the accused had done anything that was expressly forbidden by statute and by so doing had caused or accelerated the death of another , he would be guilty of manslaughter, it follows that if a motorist drives his car without due care and has the misfortune to cause the death of a person he would be guilty of manslaughter."

Now, up until that stage, that in fact was unlawful. What Andrews case resulted from was the judge directing the jury in the context of this: an unlawful act caused death, that particular unlawful act happened to be not an assault in the terms that we talk about but happened to be a piece of drive(?). Now you will notice that in that case the gentleman is referred to as a motorist. I'll come back to that in a moment because when you talk about -- and if you read the judgment carefully no one ever answered the question as to why. You see, it seems up until that stage at page 581 of that judgment in that Lord Atkin says when he's discussing manslaughter generally - he says it's a very different area, he says:-

> "In the present case it is only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, that is, the omission of a duty to take care."

Now, with the greatest of respect, that is a major change and a major deviation from the situation. The reason for it I think, with respect, is to be found in the words, the different use of the words and the description of the man who drives the motor vehicle, because if you look at Bateman's case 1925 as opposed to 1937 pictured in time and look at, my Lord, at page 13 of that judgment where the learned -- page 13, last paragraph down that page, the learned trial judge, his direction is set out, he said :-

> "I want first of all to explain the law to you. The law is that anybody

that causes the death of anybody else - it does not only apply to a doctor, it applies to motor drivers, railwaymen, signalmen, it applies to a number of people - anybody causing the death of anybody else is criminally responsible."

The motor driver who is ranked in the doctors, motor drivers, etc. has ceased to be a motor driver in 1937 with the Andrews case because in 1937 he's become a motorist he's no longer a professional man and the deviations that had been taken in the law since that time had been in order to, in my humble submission, had been in order to deal with the situation which is totally foreign to the common law. The advent of the situation where a category of persons which were limited and specialists in the old days has now changed so it encompasses all and we have the extraordinary situation of, one, having to say, "Well, a careless driving is an offence. It causes death. By definition, that's manslaughter." That's so unfair. So they came before the judge and the law changed. It changed to the point, my Lord, that eventually motor manslaughter disappeared as a change and then we had all the machinations(?) that eventually arrived in Caldwell's case and we had the situation where as in Caldwell's case, they finally said reckless is too high because bear in mind what this implies. We always look at it in the context of motor cases. It can never have been really seriously suggested. It can never have been very seriously suggested that recklessness applied to doctors. Can you imagine the swash-buckling doctor who was negligent where the Crown would have to prove recklessness in the context of that?

You see, the test, if you exclude from the subsequent cases, the motor driving hiccup, as it were, then it is my submission that when you talk in terms of negligence in those who are professionally responsible for their work, one should look at the Bateman test in the cases before that, before the law got into that place and that page 12 of the Bateman's case, may I set out and I submit to you, is the test :-

"The law as laid down in these cases must be thus summarised:

If a person holds himself out as possessing a special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the judge to direct the jury what standard to apply and for the jury to say whether that standard has been reached. The jury should not exact the highest, or a very high standard, nor should they be content with a very low standard. The law requires a fair reasonable standard of care and competence. "

From those skills, my Lord, may I repeat, from those who profess to hold out a special skill, knowlege and they have a responsibility, not contractual, to use diligence, to use care, to use skill and caution when dealing in his job. If it's a boring and dull job, but I found out from Mr. Pyrke it is not compulsory, they don't have to work, if it is a job that doesn't suit, if you take upon yourself the responsibility in a specialist type area, a specialist type situation, then in those circumstances, that is the test and the constant dragging across of similes as to motor vehicles. We are all motor vehicle drivers, that doesn't make us specialists or professionals. We have a professional skill required in doing particular vocations. The fact that we have passed a driver's test does not acquaint us, with respect, with a man who has had to have actually a number of years' sea experience and has passed four or five certificates to achieve the job of helming or sitting as a lookout, in a hydrofoil.

We are seeking to demonstrate in this court. and I submit we have done so, that the special skills required have not been exercised. Now, it's still a matter for the

jury. I am talking in terms of directing the jury. In directing the jury, the jury should be told that. That is the test. That is the requirement.

If you go back on the cases before this, the old cases where the law was started and remember, my Lord, we are talking in terms of days when the offence was capital at one stage, we are talking about Queen against Taylor. My Lord, I have a reference - it's at page 1055 of 3 CAR and 672.

> "Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct. In a case of manslaughter, etc. "

The facts are set out in the paragraph half way down the page starting with Clarkson :-

> "This prosecution is instituted by the Corporation of the Trinity House and their object is only that justice should be brought home to the defendants, if they have committed any offence, but there is undoubtedly a feeling on the part of the corporation against the mode of navigating large steam vessels on the river Thames. With respect to the law on the subject, I apprehend that the rule as to the mode of traversing the river Thames is to be the same as that applicable to the mode of passing along any of the Queen's common highways. Therefore I submit, that if it shall turn out that the speed at which, or the manner in which, the defendants were navigating the vessel and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they will be responsible for the offence of manslaughter if his death happened in consequence."

And then at the following page 1006, Parke, B. said :

"The law has been stated most correctly. There is no doubt that those who navigate the river Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on the public highway, either by furious driving or by negligent conduct."

It's way back -- it's Queen against Williamson. I am not sure if you have that case, my Lord.

(Counsel confer privately)

My learned friend has asked me to read out:

"Clarkson said, that, after such an intimation from his Lordship of his opinion, under the circumstances, and considering the difficulties which beset the case, he should take upon himself to withdraw the prosecution."

"I believe this case would, at the end, be one of considerable doubt; and I think the learned counsel has incurred no blame in not offering any evidence against the defendants."

And a verdict of not guilty was returned. The difficulties are one thing. I'm talking about the principle established which is approved by Mr. Baron Parke.

In the case of Queen against Williamson, another boat case, my Lord. This was in circumstances in which the boat was forced to actually subside and I just read from the second page. I'm sorry, does your Lordship have it?

COURT: Yes.

MR. LUCAS: Just page 98 of the Report, Williams J, at the bottom :-

"The words of the inquisition are, that the prisoner, 'through his negligence, recklessness, and want of skill and proper caution, and by the overloading of the said boat, &c. committed the injury.' If any one of these causes is proved, it will be sufficient. If the circumstance of

the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable for he should have contemplated the danger of such a thing happening. If the fact of the defendant standing up in the boat was the cause of the catastrophe, then it may be gross negligence on his part to have done so, because he is supposed to be acquainted with the force and velocity of the tide, and the danger of crossing it under the circumstances."

In other words - may I just pause there for a moment, my Lord? As I understand that, it capsized was a fact. The reason it capsized, the reality of whether overloading or his standing up was -- but the judge said in those circumstances what we are dealing with basically there is alternative forms of negligence and given that situation, as far as I am concerned, he is guilty of both offences in any event. I will take the next step if you consider it would produce a situation such as that and bear in mind this, my Lord, you see, we are not able, we don't -- people keep talking about civil action, we cannot serve interlocutories or things of this nature, what we talk in terms of is crime which is not committed in Queen's Road Central. We have two boats heading towards each other in a situation which may have been caused by a variety of reasons. What is and if you reach a point and I will develop this later, you reach a point where you say, "Well, one could be wholly responsible but the other not," then the Crown is in difficulty.

If, on the other hand, you can say in relation to both these boats - well, we have two boats on a converging course for a considerable distance, one of them or both of them failed to keep a proper look-out at least, they were both - by what proportion matters not, that's a matter for the Crown - negligent by definition.

So those two boats, there is evidence of negligence, the question as to whether it's gross negligence is for a jury and that is a different question all together but to suggest that because you can't say in a criminal case this was a deliberate attempt

to ram someone or it was a close shave or was grossly negligent and that by definition leaves the matter wide open, with respect, it cannot be so.

What we are talking about is a situation where we can say in relation to a particular situation, we don't have the question mark about who is responsible, a la the case that my learned friend cited and I'll come to that in a moment, we have a case where it can be shown on the best possible reading, two boats on a converging course which failed to take any action are by definition responsible and have failed to have a proper look-out. It may well be that one went off using the chicken(?) theory of our friend and did that but that does not absolve from responsibility the others from keeping a look-out. And were there another circumstance, it's another question and a question for the jury.

But you will notice, my Lord, that right up until the House of Lord's decision in Andrews, the test was we were talking in professional terms, we are talking about people who have a professional responsibility who have to, in those circumstances, use, exercise caution and care not recklessness, the recklessness came in at a later date has now disappeared but it is interesting to know the historical background to it because it is, in my submission, that in the context of this case when one goes back to those cases and the summing-up that is presented in Archbold was accurate that it's accurate in these sort of terms.

The next case is the Queen against Lowe, the engineer who left his pit. He was engaged to draw up people. He handed over the responsibility to someone else, a child who couldn't do it; the child failed; he was found guilty of manslaughter.

There was a case of the Queen against Trainer. I think your Lordship has a copy. The case of Trainer, my Lord, is a case involving two persons charged. I'm sorry, one of the problems with photostating, if of course, you photostat part of the book and never remember to make a note on them where they came from. It's difficult to give a proper reference.

MR. AIKEN: 4F and F.

MR. LUCAS: 4F and F doesn't help us to find it.

MR. AIKEN: 1864.

MR. LUCAS: This was an indictment against the engine driver and fireman of the Railway Train and they were jointly charged for the manslaughter of the persons killed while travelling in a preceding train, by the prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger, so as to make it mean not "stop", but proceed with caution; that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution, and that their train was being driven at an excessive rate of speed, and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train they did their best to stop, but without effect.

It was held amongst other things that the fireman was bound to obey instructions of the engine-driver and so far as -- sorry, that's item 4, the headnote, set out in the next page, page 489. The headnote reads -- shall I read it?

MR. AIKEN: My Lord, I am just asking him the form that it was held -- it saves time.

COURT: Yes, it may save time but one thing I don't like is two counsel on their feet at the same time and if anybody has got an objection to make, would they please get on their feet and say so? Having been an advocate myself, there is nothing more annoying than mutters in the background.

MR. AIKEN: My Lord, all I would ask then

is that one, two and three are read out.

MR. LUCAS: Reading:

"1. That the special rules, so far as not consistent with the general rules superceded them;

2. That the construction of the rules, taken together, was for the Court;

3. That if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible. "

Those are the three my learned friend wants me to read.

"4. That the fireman, being bound to obey the directions of the engine-driver, and so far as appeared, having done so, there was no case against him.

5. That even as against the engine driver, although, there being evidence of excessive speed and insufficient look-out, there was perhaps some slight evidence, it was so slight, that it would be reserved for the Court of Criminal Appeal whether there was any case or not."

Now, going down that page about a third of the way down :-

"These general rules and regulations threw upon both of them, however, the duty of 'looking-out', but it was the engine-man who was directed to attend to and act upon signals, the fireman obeying his orders."

And then I'm just reading the parts that I consider relevant. The facts of course are quite different. This was at page 490 at about just before half-way down on page 490:-

"It reached Rusham gate about six minutes after the preceding train had passed, and the signal was such as to allow it to pass, and it accordingly went on.

The prisoner did not know that the preceding train had stopped at Egham, or that it was to do so; indeed, it appeared that its doing so was not anticipated by anyone, as it was to turn out two card sharpers."

I like that expression.

"The stoppage delayed it two or three minutes at Egham Station, when the second train passed the two signal stations before reaching Egham; the signal was red, which by the special regulations did not mean "stop" but "proceed slowly". There was evidence that the prisoners' train was going at from forty to fifty miles an hour as it passed Rusham.

But the witnesses for the prosecution varied greatly as to that, and it appeared that, at all events after passing the second or "auxiliary" signal the speed was slackened. The prisoners' train not having to stop at Egham, and not knowing that the preceding train was to do so, or had done so, went right through the station. There was a curve in the line, and also great dust raised by the preceding train, both of which circumstances, added to the position of the tender, rather tended to obstruct the view of the line."

Jumping from there now to the next paragraph:

"The prisoners remained at their posts doing their best...."

and I emphasize that, my Lord, we have a situation where

"doing their best, but about 130 yards beyond Egham Station their train ran into the preceding one and smashed the last carriage of it in which the deceased persons were, and they were killed."

And at the bottom of that page

"Best, in stating the case for the prosecution, stated it was a case of 'culpable negligence' against the prisoners. He referred to the book of

rules and regulations above cited, and its requisitions of caution. Instead of this, he stated, at the time of the accident the train was running at a rate of between forty and fifty miles an hour, and, in short, the case against the prisoners was one of reckless driving. The signals were all in order; the signalmen did their duty; but the prisoners did not pay proper attention to the signals, and did not check the train until it was too late. "

That was not - clearly not so and at the end of the day reading at page - going onto page 491:

"There was some evidence" - this is the third paragraph down, a third of the way down - "There was some evidence that a good lookout had not been kept, so as to observe the preceding train in time to stop the second. But it also appeared that there was a curve in the line and likewise a great deal of dust, so as to make it difficult to see a train when it had passed, and that three minutes only had elapsed after the first train passed Egham before the collision point."

And at the bottom of that page:

"The learned judge said he should hold that in a criminal case" - the second last paragraph, my Lord - "an inferior officer must be held justified in obeying the directions of a superior, not obviously improper or contrary to law - that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, those orders not appearing to him, at the time, to be improper or contrary to law."

My Lord, just pausing there for the moment, we are talking about an order situation - we're also talking in terms of negligence of the slightest kind - it is being suggested here that there were orders obviously implied, but there is no evidence

of any orders. You see, what we tend to forget in this case - it seems my learned friends tend to have forgotten - is this.

The first ever written record signed by the 1st and 2nd accused as to what happened in this accident is in the log book signed by the 2nd accused who says in that thing that he called out and drew attention to the collision situation. That changes in statement No.2 to say "I was writing in the log book" but somewhere or other plucked out of - and then I will go into that little detail, that matter in some detail later on - but plucked out of the air, as it were, are the orders, the implied orders.

COURT: What do you mean by orders? Orders from?

MR. LUCAS: What is being suggested is that D2 - since Captain Kong runs the boat, D2 is filling in the log in his presence and in his view and he doesn't look, he is either doing that with the approval of the master, he must be doing that with the approval of the master, therefore he is not the man in charge, he has got the implied approval of the master, therefore he is not negligent in doing it.

COURT: I took the main thrust of the argument as being Captain Kong says he was aware of this other vessel coming. He had it in sight.

MR. LUCAS: That is the next point on, with respect, my Lord. You see, my learned friend wants his cake and eat it because he says, well, "I wasn't looking so I've got no idea what was going on. By the way, Captain Kong had it in sight anyway." How on earth he could possibly know that?

And once again, we are using - I mean, the separation of the various cases must be strictly adhered to from all points of view. My learned friends cannot use the statements of the other defendants as part of their case just as I cannot use it against them. The evidence is that he was writing in a log book. He says by implication and says so in statement No.2 "I didn't see it". He doesn't say "I know that Captain Kong saw it". No evidence of that.

COURT: But in his statement he says he saw it.

MR. LUCAS: He saw it way out, then looked away. My learned friend says by implication that is under orders or by permission or whatever. The master runs the boat. He is the captain of the ship, therefore he is entitled to permit me to go ahead and do this and I am not behaving badly in doing that. What I am simply suggesting is that Trainer's case is very certainly distinguishable that negligence was nil because by saying they were doing their best in those circumstances the whole case comes to a close anyway. The circumstances are entirely different and, in any event, there is no evidence to support the contention of orders before this court.

The case of R. v. Benge reported in 4F & F 504 at page 665. It is simply the first case I can find which puts - "There was contributory negligence by someone else" - my Lord, I don't think we need to be concerned with this case, it will drag the thing on longer than I wish, but it simply says that there was contributory negligence between a fireman and a foreman on the side of a road and the question was whether they were guilty - one could be guilty of manslaughter or not. And as far back as that provided that he was a substantial part of a cause of the accident, a cause that - notwithstanding contributory negligence, he can be guilty of manslaughter. It is a repeat of the case that replies and that applies in the manslaughter situation.

And then there is a case of R. v. Pittwood and this is - we have moved into the 20th century, 1902 Times Law Reports at page 37. In that particular case at page 38 is the judgment. Mr. Justice Wright -- Sorry, perhaps I could read it, my Lord, and hand it up. Mr. Justice Wright had this to say - this was a case involving a man whose job it was to watch a crossing and put down the bars when a train was coming.

"Mr. Justice Wright without calling upon the prosecution, gave judgment. He said he was clearly of opinion that in this case there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public. In his opinion there were three grounds on which the verdict could be supported:- (1) There might be cases of misfeasance and cases of mere non-feasance. Here it was quite clear there was evidence of misfeasance as the prisoner directly contributed to the accident. (2) A man might incur criminal liability from a duty arising out of contract... (3) With regard to the point that this was only an occupation road, he clearly held that it was not, as the company had assumed the liability of protecting the public whenever they crossed the road. There was no ground for stating a case on any grounds urged on behalf of the prisoner."

My Lord, it has taken me a long time to get back to Bateman's case. What I am suggesting is this. There has been considerable change in the law of negligence recently. One should, with respect, look at those changes as being a hiccup caused by the advent in the general use of a motor vehicle which got us into all the sort of trouble that we have had. It has been brought back onto lines and proper lines because clearly the suggestion - let's just take an example - the suggestion that in order to convict a surgeon of manslaughter one has to prove recklessness would be absurd, but that is the state of the law - the state the law got itself into.

We are back to a gross negligence situation but a gross negligence situation which depends on the circumstances and the responsibilities and the duties of those involved. In other words, look at the cases and he, as Bateman says, who takes - holds himself out as having a special skill is expected to exercise that with diligence and with caution. He has set himself up to do so. He has a responsibility to those - he has a duty of care too, so that I would suggest and submit, with respect, it becomes difficult to apply the test properly if one thinks in motor terms, if one thinks in the terms that I am suggesting to your Lordship.

When I submit it is suggesting the test to the jury. The bold statement made in Archbold - in the supplement to Archbold, properly read and properly explained, is the direction. No question about that. If one has and bears in mind the background to that direction and bears in mind the historical development of the Common Law until this concept, then it is my submission that you simply at this stage say in relation to negligence, there being evidence of negligence, it is for you to determine what gross negligence is. It is not recklessness because that would be absurd.

The test is and I would submit that it's set out - it's set out fairly clearly - "if he accepts responsibility...." Sorry...My Lord, I do apologise. I have lost that particular passage. I might come back to it at a later stage.

Now my Lord, in the context of this there has been a great deal of criticism about the Crown case. You see, it has always been the Crown case that the hydrofoils collided at full speed after holding a direct collision course for a period of time during the passage - during which the danger of collision was apparent or certainly would have been apparent if proper lookout was maintained by those in control of those vessels. Both vessels could at all times have taken evasive action which would have prevented the collision. If those in charge were aware of the risk but chose to ignore it and deliberately chose to achieve a close passing of the vehicle or try deliberately to achieve a close passing or if they are oblivious of the risk by virtue of their failure to keep a proper lookout, then in those circumstances, they are grossly negligent.

Now that is the case because we don't - cannot specify in civil terms two hydrofoils collide at full speed after holding a collision course for a period of time during which it was apparent the collision - during which the danger of collision was apparent. Certainly it was apparent and should have been apparent to those on board if a proper lookout was being kept, both vessels could have taken action to do something about it.

If those in charge of the vessels were

either aware of the risk but chose to ignore it or, the theory raised by my learned friend, deliberately try to achieve a close passing of the vehicles or they are oblivious to the risk, then they are grossly negligent and they are grossly negligent, my Lord, because this is the answer to Mr. Corrigan's point.

Mr. Corrigan says this: Look, there is evidence in this case which suggests a sudden act by D1's boat which was unexpected, and in those circumstances, how can we be said to be anything else but a little bit negligent. Well, and then he suggests you stop the case.

We have already, I think, gone past that point. What must be said in those circumstances is this. You have the responsibility by virtue of your professional skills, holding yourself out, as you were, to do this thing, to do not your slovenly best or not at all, you have the responsibility to exercise all the caution that Captain Pyrke and the M Notices and all those who deal with this suggest you should; and if you don't do that, that is grossly negligent.

And if put on that basis - I mean, the consequent result, if it was that situation, can be dealt with in another matter, in another way. It doesn't make the guilt any different. What it does mean, it may be subsequent to that things may take a different course. But given the situation we are talking about, given the test as I submit it to be, it is no answer to say that it is only a little negligent.

Because if it is only a little negligent - if we talk in driving, my daughter has got a driver's licence, that is a very different situation from the type of person we are talking of. If he is bored, with respect, or if it is tedious, with respect, and he doesn't want to do it properly with respect, he can't come along to this court or any other court and say, well, everyone else does it. He should come to this court and hold himself out frankly. If he does prove to be what we suggest to you, then he is negligent.

You see, my Lord, let us also - it has been suggested to us constantly that we have

not proved the primary facts and, therefore, one can't draw any inferences. Now perhaps I was in a different court but the fact is we have a series of witnesses who have given evidence that they saw these boats coming towards them in a direct line at collision course. They say that there was no deviation on one and no deviation on the other. Edmund TSANG gives it 5 or 6 or 7 blocks. Another man says 10 seconds. They are heading towards each other at speed.

Now whatever caused that boat, if it turned before and it may have done, to turn that way the reality of it is the other one should have seen it. You do not pay your 747 flyer of aeroplanes to deal with the milk rounds, the easy ones anyone can do. He is paid to be able to handle the emergency situation, to bring the skill and caution and ability. Otherwise, my Lord, instead of putting these people on board these boats why not have walla wall drivers, the people who ferry us backwards and forwards, between various wharves, being brought up on the water and do an admirable sort of job.

It is in the context of Bateman, the historical background etc. that we realise that is the situation. And given that situation, do I need to expand the amount of evidence there is where people say that they saw a boat coming directly at them from over that direction?

Now there is also of course the turn given by two seconds. Now it is a matter for the jury whether they put that turn at the end or the beginning or possibly, given the situation we do have in this case of the sickle having been seen and noticed, that it may well be that the time between the end of the sickle and the run in fits with - although it is given as a matter of seconds - fits with the rest of the evidence. That certainly is a matter that the jury could take into consideration, that there could have been before the straight run in this situation.

My Lord, we are being criticised for being in the wrong forum. What better forum than a situation like this where you do not have the facilities provided by the civil law? We talk in terms of an area where we have to prove and constantly have to prove by virtue of

circumstantial evidence and every other type of evidence by inferences, what happened, and juries deal with this sort of situation each day. Properly directed, they find no difficulty in it and I have no doubt that a jury would have thought it simple and straightforward to do.

The other matters that have been raised. If I might - we have got the jury coming back at two.

COURT: Yes. Well, I think perhaps we will adjourn now. It looks the jury will have to wait for a while. We could try and telephone them but I think probably we can't. So I think we will adjourn now till two. You may be going to come on to it, Mr. Lucas, but I would like to hear from you what is the negligence you say Mr. Ng is guilty of and how was it a substantial cause of the....

MR.LUCAS: A cause?

COURT: A cause. As I understand it, the Crown's case on its own is that he was failing to look out anyway. There may be...

MR. LUCAS: My Lord, just before you leave the bench, may I come back to the situation where the first statement that was made was in that log book. The log book claims that D2 warned D1. When we are fixing up a story, let's not put too fine a point on it, the first story told was "I warned him". Pyrke said it is silly. You can draw inferences from that.

The next time that we have a statement it says he wasn't keeping a proper lookout. Sorry, he wasn't keeping a lookout. However, there are very large question marks about that particular statement because of all sorts of factors. We have the evidence of an expert who says, and no one seems to disagree with him except D2 - D3 and D4 said that the man on the left hand side should be keeping a lookout - D2 has a function to perform as a lookout according to Captain Pyrke. There is no evidence apart from a second statement that he was not and that is doubtful in the extreme.

It is clear, in my submission, that they are both responsible on their boat for avoidance of collisions. There is no sound

heard by the other man - I mean, the radio officer hears nothing.

COURT: What is his duty? His duty surely is to keep a lookout according to the evidence and to warn their helmsman who in this case was the captain of any significant matter.

MR. LUCAS: Right.

COURT: Now assuming he didn't keep a lookout, what other evidence is there? He says in his own statement he warned the captain but how did that cause - if he failed to keep a lookout and assuming he failed to warn the captain, how was that a cause of the collision?

MR. LUCAS: You see, my Lord, if you and I are responsible, jointly responsible - I will come to Merriman's case in a moment - jointly and severally responsible for doing something, namely, to see that a boat is safely steered between us, I to keep a lookout and you to drive, and that boat fails to avoid a collision and for whatever reason, now unless - there may well be an explanation it may well be that he just stood back and did nothing about it.

COURT: If the helmsman did see and failed to take proper action, how was the lookout negligent?

MR. LUCAS: Let's take the extreme case. If the helmsman did see and was trying a close passing situation and the man next to him did nothing, then he is responsible in any event under the Russel case. You cannot just stand by when you have a duty to perform.

First of all, we want some evidence from him if that is the case. Secondly -- well, there is no evidence at all. All we have now is that these two people drove into - one helmsman who has a limited responsibility to look in this area and the second man standing next to him who has a general responsibility to warn of danger - without a sound from him they drive into the side of a boat. Now isn't that evidence of negligence? It's not a question of what could he have done. You look at it as the evidence stands because otherwise, my Lord, we would have to get into that boat and prove by depositions something quite different.

COURT: What could he have done?

MR.LUCAS: It is not a question, my Lord, of what could he have done. You jump the issue, with respect. There are two people responsible for lookout and guiding that boat. The main responsibility for proper lookout is on him. It is clear since they took no deviation - no deviating course that there was not a proper lookout kept or, alternatively, there is no evidence of this, the man went off on a frolic of his own. We can't second guess that situation. We talk in terms of this stage. Prima facie he has failed to keep a lookout.

COURT: But if the helmsman did in fact see the other vessel.....

MR. LUCAS: If he saw the other vessel, as in his fixed-up story, at least he should shout out "My God, we are going to hit this. Let's turn."

COURT: But how do we know he didn't?

MR. LUCAS: Well, then he can say, "Well, I did that and this idiot did nothing about it". But we have got to get to that stage. He has got to do something. Captain Pyrke was asked the question. If you see a man driving into a wall, then you have got to do something to exercise your duty. You can then say, well, I did my best.

COURT: And you say the onus is on him to do that.

MR. LUCAS: No. What I am saying is this. Prima facie there is a failure to keep a lookout. Prima facie the obligation is on him to keep that lookout. We cannot speculate as to what happened inside that boat but what we do know at the first opportunity when he was looking for an excuse he said "I warned him about this incident", so he at least feels that his duty and responsibility is to at least do that. And if he does that, he is okay. There is no evidence that he did that.

COURT: Except his first statement.

MR. LUCAS: A first statement which he says is nonsense. He has now changed that story and denies it to be true. You see.....

COURT: But assuming.....

MR. LUCAS: My Lord, with respect, what you are saying is what my learned friend is telling us, that we have to prove, prove this case without inferences.

If I have a responsibility - if I am sitting at your left side and you are helming the boat - and it is clear at the very least that there was no proper lookout kept because nothing was done to avoid this accident - we are both responsible. My responsibility is there. Your responsibility is overall. There is a crash. Prima facie there is a failure on that person - on both to have kept a proper lookout. The responsibility is mainly on him.

Now if in fact there is subsequent evidence - I mean, you can draw that inference. You are not asked to speculate that there might be a third person who ran up into the cockpit and did something or pulled the engine, that is the evidence as it now stands. There is his responsibility.

It is interesting to note that in a concocted story he saw -- You see, Captain Kong in order to - what is basically - I mean, we talk in terms of exculpatory statements. With respect, how these can be considered exculpatory statements. I never said they were. I said they were statements which contained lies. They are not true.

Captain Kong in that first statement says in his confession and avoidance statement basically "I did it but". "I was driving along and through some mechanical fault sharp turned to the right, went into the side of this boat after struggling for a long time with the controls." And D2 in that same concocted story said "And by the way, I told him what is happening".

Captain Pyrke says it is a responsibility of that second officer to say, if he sees

some fool-driving on board at least to call out. And we have no evidence that he did anything. In fact he doesn't say he did anything. He said he was sitting there reading - writing in these things.

Do I have to go to the next step -- You might well say, well, look, this man next to me - there is no evidence of this - this man next to me deliberately did this. He drove straight out. Now if that is the case my Lord, then no one is suggesting, no one is suggesting that in those circumstances, if the man went completely off the road, then in those circumstances the other man he may have responsibility to do something about it but at the end of the day, causing the accident, no.

But we talk in prima facie terms and we come to this area of - there must be at some state - it is not a reversal of onus. I will come to this in a moment - there must be some explanation....

COURT: Well, 2 o'clock perhaps.

1.09 p.m. Court adjourns

2.06 p.m. Court resumes

Accused present. Appearances as before Jury absent.

MR. LUCAS: May it please you my Lord. There is the question of the jury.

COURT: Yes.

MR. LUCAS: They have been asked to sit outside. I understand that my learned friends propose to reply on certain matters. I will be - I have estimated half an hour so that makes an hour at least. The question is what we will do with the jury.

COURT: How long do you think you might be, Mr. Steel?

MR. STEEL: How long would I be, my Lord? I was going to, if necessary, seek your Lordship's leave to respond to one or two points of law my learned friend made to you in his address. It shouldn't take more than ten or fifteen minutes. I can't

give your Lordship any other assistance. It may be.....

COURT: Well, if we assume Mr. Lucas submits to 3 o'clock, would it be a reasonable assumption that we would not finish the addresses until something like four?

MR. STEEL: That looks so.

COURT: Well, in that case I don't think there is any point in keeping the jury.

MR. STEEL: It may be convenient then to invite them to go away until tomorrow.

COURT: Yes.

MR. STEEL: It might also be convenient, if possible - I know that one of the jurors is reluctant to sit a little earlier.....

COURT: Well, yes, he has had a bit of time off though, hasn't he? I don't think we would be imposing on anybody if we ask them to come back at 9.30. (To Clerk) Would you ask the jury to come back at 9.30 please? Give them my apologies and say that we are very sorry. Yes, Mr. Lucas.

MR. LUCAS: May it please you my Lord. May I take up the point that we finished just prior to lunch. If your Lordship would be good enough to look at 1972 Criminal Law Review, I'd like to start and develop the answer to the question from there. 1972 Criminal Law Review, page 46. There is a series of cases spread out on three pages. The particular case is Rabjohns v. Burgar.

> "B was charged with driving without due care and attention. He was driving his car on a dry road, on a fine day with good visibility. His car collided with the concrete wall...."

COURT: Sorry, I've got the wrong one. I've got Butty v. Davy.

MR. LUCAS: A page before, my Lord. Two pages. 46 as opposed to 48.

COURT: Oh, yes.

MR. LUCAS: There is a series of cases there relating to that expression that my learned friend Mr. Aiken doesn't like me to use and I would avoid using it except when I read it.

"B was charged with driving without due care and attention. He was driving his car on a dry road, on a fine day with good visibility. His car collided with the concrete wall of a bridge he was crossing. B offered no explanation of the accident saying: 'I remember driving over the bridge and that's all I can remember.' There were two skid marks behind the car. The justices refused to accept a submission of no case to answer. B declined to give or call any evidence and relied on the matter already submitted. The justices, found that there was insufficient evidence to convict. Held, allowing the prosecutor's appeal, that although res ipsa loquitur could not apply, unless and until something is suggested by a defendant by way of explanation, the facts may be so strong that the only inference is that there has been careless driving.

Commentary. The doctrine of res ipsa loquitur is a rule of evidence applicable in actions in the tort of negligence. It applies where the thing which caused the accident is under the management of the defendant and the accident 'is such as in the ordinary course of things does not happen if those who have the management use proper care....' In such a case 'it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care'... In that it embodies a principle of common sense, the 'doctrine' of res ipsa loquitur is just as applicable in the criminal as in the civil law of evidence.

It seems desirable, however, to avoid the use of the expression in the criminal law, for one view, perhaps the predominant view in England, is that the effect of res ipsa loquitur

in a civil case is to cast a legal burden of proof onto the defendant to satisfy the court that he was not negligent. It would be contrary to the principle of Woolmington so to hold in a criminal case.

The effect of the doctrine varies according to the facts of the particular case. To quote du Parcq L.J.

'The words res ipsa loquitur...are a figure of speech, by which sometimes is meant that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of those facts, found that negligence was not proved would be giving a perverse verdict. Sometimes the proposition does not go as far as that but is merely that on proof of certain facts an inference of negligence may be drawn by a reasonable jury...'

It seems clear that similar evidence would have a similar effect in criminal law. Thus the present case fell into the first of du Parcq L.J.'s two categories - a jury which had found negligence not proved would have been giving a perverse verdict."

And going to the bottom of the page.

"If a case falls into the first of du Parcq L.J.'s categories, as did the present, then if the accused does not offer an explanation either the magistrates will convict him or the High Court will order them to do so if they perversely acquit and there is an appeal; but there is no onus on the accused to prove anything. If he fails to offer an explanation he is (theoretically) bound to be convicted; but all he need do to escape from this position is to offer an explanation which might reasonably be true and which is consistent with his having taken due care. If the court thinks that the explanation might reasonably be true - even though they think it is probably not true - the case against him is not proved beyond reasonable

doubt and he should be acquitted."

Butty v Davy puts the real situation, My Lord. Once again information relating to a car.

> "Held, dismissing the appeal, that in a criminal case, unlike a civil case, it was not incumbent upon the defendant to show that he had skidded without fault on his part. In the instant case, as the justices had found that the vehicle was driven at a speed not excessive for the condition then prevailing, the suggestion that the unexpected slipperiness of the road due to rain...was not a fanciful explanation and accordingly there was no reason to interfere with the decision..."

Once again, the prima facie case was raised and was stopped by itself. But if we go to Wright and Wenlock:

> " W was charged with driving without due care and attention after his car had left the road and collided with a telegraph pole. The accident occurred at night at a bend on a narrow, twisting unlit country road. The prosecution brought evidence to show that the car was well maintained and with tyres in good condition. W had been unable to explain how the accident occurred. It was submitted on behalf of W that there was no case to answer as the presumption of res ipsa loquitur did not apply on its own to prove a case. The justices dismissed the information and the prosecutor appealed.
>
> Held, allowing the appeal, that although the principle of res ipsa loquitur had no application in criminal cases, the facts of a particular case may be such that in the absence of some explanation the only proper inference is careless driving. The prosecution do not have to negative every possible explanation in order to find a defendant guilty where no explanation is offered."

There is an evidentiary shift of proof. You see, my Lord, we don't have to negative every possibility. The question you are asked is this: what could D2 do?

Now let us start with what we are seeking to prove. What we say is the people who controlled this particular boat either didn't appreciate the risk and were grossly negligent, they appreciated the risk but were negligent in the way that they tried to avoid it, or they appreciated the risk and decided to take it.

COURT: Just before you go on, Mr. Lucas, you said that people in control of this boat. In what way was the 2nd accused in control?

MR. LUCAS: My Lord, they have overall responsibility: one, the helmsman, to keep a lookout within the vicinity, the other man to stand by and warn him of risks. He is not there as an ornament. If he is there to be a lookout, he really has a function to perform, to draw to the attention of the captain that there is a risk and something should be done about it; or if he doesn't appreciate the risk as the man who is keeping a lookout, then he is negligent; or if the man next to him is running the risk and he does nothing about it.

Now the situation you are talking about is this: it is possible that the other man went mad, in other words, he deliberately turned around and drove at the other boat deliberately. Now that is a possibility. We don't have to negative that sort of speculation.

COURT: No, correct.

MR. LUCAS: Now what we say is this if it's apparent on the face of it that these two men, one helming the boat and the other keeping a lookout, collided in circumstances where they fitted one of these three propositions and they have the joint responsibility of lookout and control, then in those circumstances it is not for us to negative every other possibility. The function of the man standing there is to say, "Look, dangerous situation approaching. Watch out." You see, it could be...

COURT: And you are saying that....

MR. LUCAS: He discharges it by giving, as in these cases - if he gives an explanation

that even if the court doesn't believe it -- but we cannot be expected to negative every explanation. That's what is said here. What they say is, "Look, there are all sorts of explanations available. Res ipsa loquitur doesn't apply." The courts say, "Well, that's all very well, but the Crown is not bound to negative every possibility. They are alleging, as against this particular boat and as against these people, that they have joint responsibility for the proper navigation as deck officers, they are both on duty, of that boat."

COURT: Yes. Well, isn't that right - doesn't the Crown have to show that, now take the 2nd accused for the moment, the lookout, that he failed in that duty....

MR. LUCAS: Yes.

COURT: ... and that the failure was a cause of the collision?

MR. LUCAS: Well, let us stop there. What can he do in the normal situation? He either failed to appreciate -- the only thing he can do, I suppose, is to shout "Look out! Dangerous situation ahead!"

COURT: To a helmsman who could see the other vessel approaching?

MR. LUCAS: Well, he may not have appreciated the risk. He has got different....

COURT: Well, he may not, he may, he may not have rammed into a.....

MR. LUCAS: Yes, he may not. We could deal with them jointly and individually. The whole point of Merriman is that you look at them individually and find out whether they are individually negligent. Right? Now if I am a lookout and I see a dangerous situation, then the question is: did I appreciate it? In which case, I should have called out. If I didn't appreciate it, I was negligent and that the joint and several responsibility of the other man has got nothing to do. You cannot talk in joint terms. You look at the individual. Merriman says that....

COURT: Well, I agree, I agree, you can't.

MR. LUCAS: Right. Now you are saying: what could he do? He could have done in the normal course of events one thing at least, he could have given warning. The fact that he'd failed to give that warning is a lack of responsibility. Either that meant he didn't appreciate the risk, or he appreciated the risk and was prepared to take it. It could have meant -- of course, you have got another situation, the far end of the scope. if this was what my learned friends called the "chicken" situation and he sat there cheering the other chap on saying nought about it, in those circumstances, he is aiding and abetting the actual act of that. That is a different.....

COURT: No evidence.

MR. LUCAS: No evidence. That is a different situation. There is no evidence of this man having taken -- you see....

COURT: The point - I am afraid I am going to bring you back to it. Does not the Crown have to prove that his failure to warn, and assume for the moment there was a failure to warn, that that failure to warn was a cause of the collision?

MR. LUCAS: We have to show that his conduct was negligent.

COURT: And that conduct resulted in the collision.

MR. LUCAS: That conduct was partially responsible for the collision, yes.

COURT: Now what evidence is it that the failure to warn the helmsman .....

MR. LUCAS: The failure to warn is clear. There was no evidence.

COURT: All right, yes, assuming there is a failure to warn for the moment, where is the evidence that that was a cause of the collision?

MR. LUCAS: The fact of the collision. The fact is that a collision took place. The responsibility was to avoid that collision.

If the man said, "I did what I could do, therefore, there was no collision." then we are out of court. But if he stands there and does nothing because he himself was negligent - you see, it may be that the other man can see it as well; it may well be that he had tunnel visions looking straight down. We don't know. And so the primary responsibility is on this man.

COURT: The captain says he did see the other vessel.

MR. LUCAS: The captain, my Lord, with the greatest respect, produces a statement which plays no part in D2's case in the first instance. You are using the evidence of the statement of D2. I constantly have this concept that what is good for the goose is not good for the gander. We are dealing with a separate case in that man, a separate case. I don't care what D2 said or what D1 said because it's our Crown's submission that it's a pack of lies. So discount that. We can't have it both ways. We can't rush backwards and forwards and collect evidence. Here is a man whose overall responsibility is to keep watch. There is a collision. Now there may be an explanation for that collision, but the evidentiary burden shifts and, without some sort of explanation as to why, you cannot say outright that's the end of the matter. That is exactly what Wright and Wenlock had said in short.

There is a point of time. If you say, "Look,there has been a collision. The person mainly responsible to avoid collisions is the watch-keeping officer." it may be that there are series of factual situations which make it someone else's fault, but given the situation we have, that collision was obviously, at the very least, a failure to keep a proper lookout. There is absolutely no evidence of a warning. The man at the first opportunity tried to pretend there was a warning which indicates, with respect, something. It cannot be that the Crown is then turned and asked for to explain every factual possibility.

COURT: In his first statement he says there was a warning. As I understand it, the

Crown's case is that after that they got their heads together concocted up a....

MR. LUCAS: No, no, the Crown's case is -- when I say the first statement, I am talking about the log book. There was a meeting which both of them played a very active part in which resorts in them, it is interesting, in what it is, in my submission - it will be my submission to the jury - an ex post facto rationalization of what happened. They have a boat coming towards them in a direct line. They veered off to the right and then running towards this boat and collided with it. Given that situation, they called -- one said, "It's mechanical failure. It can't be my fault. It's the boat's fault.", and the other man said, "And I warned him anyway." Without seeking to speculate as to what that means, what I am saying is this: he sees his responsibilities of giving a warning and he says now, "I didn't look." Now how many sort of possibilities we have to negative. Lookout, failure to lookout caused the accident. His responsibility was to keep a proper lookout. There has been a failure. Whether it was a deliberate -- whether he took the risk or not does not matter. As long as we bring it to its lowest denominator, that is enough.

You see, what your Lordship is doing is this saying, "Look, it may well be that the other man was off on a frolic of his own, and what could the man do physically to stop the accident?" The answer may well be "No." But that's the explanation, an evidentiary explanation that this is what these cases are talking about. You are not expected to negative speculations of that sort. It may well be that the other man relied totally and completely on this watch-keeping officer and was just looking for rubbish and the responsibility was all on him, in which case it is for the other man to offer some sort of explanation.

There comes a time where there is an evidentiary shift in proof basically. There comes a time when an explanation is called for. You see, it is not necessary

for the court to say that negligence was the only possible inference unless some rebutting evidence in explanation was tendered.

Now we have, because of the very nature of criminal offences, the limitation that crime is not committed publicly. We deal with situations in the context of this sort of crime. Duty to keep a watch. Failure to keep a watch proved. No way that we can show -- what we have done is this we have said in evidence from a witness that he heard no shout at all beforehand, so we have negative him taking any -- the radio officer heard nothing, now all right, so there are suggestions of noise and stuff, but that's a matter for the jury. So at this moment there are two people. The watch-keeping officer D2, a responsible man who uses as an excuse that he did give a warning but suddenly changed his story to something else, clearly does not - there is no evidence of any warning. Now if he can say, which he is entitled to do or can prove by the Crown case, "Look, isn't it a fact, Mr. Radio Officer, that immediately before the event there was a loud shout?" Nothing has been put to him in that nature. What has been put is that he was so engrossed in writing out figures that he didn't see any. Isn't it a fact that immediately before this accident this other captain said "Bend aside." and went straight heading down the other boat? There is no evidence of that. At what stage do we need to exercise -- because reading Archbold...

May I take your Lordship to Archbold? We talk in terms of res ipsa loquitur and all those, the simple fact is that the criminal law, by definition, causes a lot of people to say constantly -- would you refer, my Lord, to.....

COURT: Well, yes, I understand that. But I say does not the Crown have to take the matter a step further and have direct evidence to show that the only explanation of these facts must be that there was no proper lookout....

MR. LUCAS: Yes.

COURT: ...that there was no warning...

MR. LUCAS: That there was no proper lookout. You see, my Lord...

COURT: ... and therefore...

MR. LUCAS: Look, we have evidence which says that a number of people on another boat saw a collision arise. They continued on a straight course and in fact hit each other. Now other than having a confession to the fact "I saw it and did nothing about it", doesn't that indicate and demonstrate a lack of proper lookout? Now the lack of proper lookout caused the accident. The lack of proper lookout caused the death. What your Lordship is suggesting is that we have to show not only a lack of proper lookout, which must be inferred, but also negative any other factual situation. And that's not for us because there is a limit to the inferences as Archbold says at 9-1. My Lord, it is page 824 of the new edition.

> "Circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than the latter; for, in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence."

Now in this particular case, let us assume the man is by himself. There is a boat which heads towards another boat in a direct collition course for a considerable period of time - I am talking about a similar situation, my Lord - and there is in fact a collision. Anyone keeping a proper lookout would have seen that. One assumes everyone keeping a proper lookout would have taken steps to avoid the collision. There was no physical step to avoid the

collision. Do we have to negative anything more than that? Do we have to say we also have evidence that nothing was said inside the cockpit that anyone heard?

COURT: Yes. Well, assume for the moment that there is evidence that there was no warning - in the Supplement to Archbold paragraph 20-49 on "Gross negligence":

> "...a jury can properly be directed to the following effect..."
>
> " The defendant is guilty of manslaughter if the Crown have proved beyond all reasonable doubt (1) that at the time that he caused the deceased's death there was something in the circumstances which would have drawn the attention of an ordinary prudent (and therefor sober) individual in the position of the defendant to the possibility that his conduct was capable of causing some injury..."

MR. LUCAS: Yes.

COURT: Now does the jury not have to be satisfied beyond a reasonable doubt that there was a failure to -- that there was a duty to warn the captain, but the defendant failed in that duty and that failure was a cause of the accident?

MR. LUCAS: Well, we have to -- That there was a failure of that duty is inferred from the impact itself, unless it's....

COURT: Well, yes, assuming that there is evidence upon which the jury can satisfy themselves on the first two steps....

MR. LUCAS: Yes.

COURT: ... now doesn't there have to be evidence that they can satisfy themselves beyond a reasonable doubt on the third one, that this man, taking him individually, that his conduct, or negligence, whatever it was, or lack of warning was a cause of the accident?

MR. LUCAS: Well, that is talking in terms of negativing every possible evidentiary burden. Now let me, if I may, my Lord, compare -- would your Lordship be kind

enough to look at Criminal Appeal No.672 of 1978 Attorney General v. YIU Wun-ying?

COURT: Have you got a copy? Is it reported? It's not reported.

MR. LUCAS: Sorry, it's on the list. 672 of 1978.

MR. CORRIGAN: What is this list of authorities to which reference has been made? If I know that the Crown has certain authorities, I might be able to deal with them. What is this list of authorities? I would be grateful to know. I was never supplied with any list of authorities, therefore, I couldn't make any argument before the Crown.

MR. LUCAS: I have it because of matters that arose yesterday. (To Clerk): I wonder, could you get 672 of 1978? It's the case of Attorney General v. YIU Wun-ying.

(Clerk and Court confer)

COURT: We can't get it here, I am afraid. We've got to go to the source of all information at Jackson Road.

MR. LUCAS: May I just read it slowly to you , my Lord?

COURT: Yes.

MR. LUCAS: This was a case in which Justice Cons was listening to an appeal from magistracy.

> " The respondent to these proceedings was charged before a magistrate with two offences relating to a little girl of three years: indecent assault and an act of gross indecency. There was little direct evidence against him, but what there was showed that the girl had visited him during that period of five minutes within which the offences had taken place, that the offences were comitted by a person of the same blood group as the respondent and that when confronted by the girl's mother the respondent has acted and spoken in a way which,

if not explained, could well indicate guilt."

You see, you are placing upon the Crown an impossible evidentiary burden because if the man was in the cockpit by himself, you are suggesting that we must negative every possibility.

In this particular case we can show that he had a duty of care to keep a proper lookout. We can show that there was an impact which indicates that there was - on the fact of it - an inference can be drawn: a failure to keep a proper lookout. We can show that in the context of that the evidence does not indicate that he took any steps at all. In fact his final statement, for what it's worth, and it's not worth a great deal, is that he didn't see anything at all. Now given that situation, how on earth, what else could possibly be done by the Crown in the position posed by yourself? Someone to stand there and watch his lips and say, "I stood there and watched his lips and they didn't move".....

COURT: No, I am not saying that.

MR. LUCAS: Well, I am sorry, my Lord, what could....

COURT: What I am saying is: assuming for the moment that there is the evidence of a failure to warn either because he didn't see it or because for some reason he saw it and didn't say it to the captain, assuming for the moment that there was a duty to warn and there was a failure in that duty, now doesn't the jury have to be satisfied that those two things caused or were part of the cause of the collision?

MR. LUCAS: Yes.

COURT: Well, now what evidence is there that the failure to warn was a cause of the collision?

MR. LUCAS: The inference that he didn't take any steps to let anyone know. You see, I mean ,what you are saying therefore is this - we are talking about joint and several responsibilities in the context of a charge of this sort. The man is individually guilty as well as jointly

guilty in the context of Merriman. He has failed in his responsibilities and he is part of the cause, just as we have the two boats together being the cause, the total cause, with responsibility being apportioned between those two. Those two boats in failing to take action caused this accident. His conduct with the driver of the boat on the face of it, without some evidentiary shift or explanation, on the face of it both individually, because he did not speak, and jointly, because they didn't operate as a team as they should have done, he is a cause of the accident. We divide again. We have them on separate counts because it may well be...

Let us take this situation. Two cars in the sort of situation we are talking about, one comes out into a road like this and comes into a main road and shouldn't, the other one is travelling too fast and shouldn't be. A car veers round and kills someone on the road. In those circumstances you charge two counts clearly and separately because the particulars of negligence in this car are you are driving eighty miles an hour, the particulars of negligence in this particular car are that you come onto a main road. The acts of the two are different.

In the joint situation, if we have two men, one navitating and one driving, and they are both responsible for lookout, then first of all we must prove individual guilt. They don't get convicted by themselves jointly and there is no magic in having them jointly charged. I will come to that in a moment.

What we say in relation to D2 is this: there has clearly been a failure to take care of proper lookout. That failure of proper lookout demonstrates itself, infers itself, shows itself obviously from the failure to take any evasive action by you. There was evidence to say that you did nothing. There may well be a factual explanation which the Crown can't disprove, but there is a limit to what the Crown has to prove as in the cases that we are talking at the moment.

I am sorry, you keep coming back to: did it cause? Yes, it caused. His failure to look out just as the other man's failure to look out jointly and severally caused the accident and death. If they have taken steps - if the man fails to respond to his warning, then he has done all he need do and he is no longer responsible for the accident. If the man has gone berserk and there was nothing to do, then he is not severally liable for the accident because it then becomes the act of one. If, on the other hand, the responsibility is joint and several and the collision occurs, then severally that man must demonstrate surely that he has taken some steps to exercise his duty of care.

We are entitled to say, as these cases demonstrate, if the facts are so obvious, then without an explanation it must be negligence. The question of "gross" comes later. It must be negligence then without an explanation -- that is what these cases are saying without an explanation.

You are saying to the Crown, contrary to these decisions, that the onus is on us to negative every possible explanation and that can't be right.

You see, if it is the failure to look out that causes the accident, and that's simple and straightforward enough, and two people are responsible for keeping that lookout, then those two people have caused individually and jointly the accident and they are responsible. Other explanations can be offered. Now that's not shifting the onus of proof. It's just bringing into the Common Law common sense. Criminal Law says, "Look, we don't expect you to prove anything, but if you have a situation as they did in Wright and Wenlock where:

> '...the facts of a particular case may be such that in the absence of some explanation the only proper inference is careless driving.'

in the absence of any explanation in this particular case, there is clearly a failure to keep a proper lookout."

Now that may be because he did not see it,

that may be because he saw it and ran the risk, it may be because they jointly saw it and did it, that is a matter -- but on the face of it - that is what has to be shown and that has to be thereafter an explanation. It matters not whether there be one person in that cabin or not. Unless and until it becomes a situation where one could either dissociate himself from responsibility by saying, "I am not duty-bound to do this. He is the captain. He should have done it. Don't listen to Captain Pyrke. It is none of my business." or alternatively he could say, "The man went absolutely berserk and decided to ram the other boat and there was nothing I could to." - explanations called for certainly, but in the context of us comes the case as Mr. Justice Cons said:

> "...the respondent has acted and spoken in a way which, if not explained, could well indicate guilt...." -

we are entitled to draw this sort of inference. I mean, the whole case is but.....

COURT: Do you not....

MR. LUCAS: Do I not distinguish between D2...

COURT: We get back to it. If you had a situation where a person - back to your motor-car - a person driving along and there was somebody on the road. There's evidence that he failed to sound his horn giving him warning and he hit this person. In the absence of any explanation, you could say, "Well, that is reasonable, we think, the jury think, that if he had given a warning, the accident wouldn't have happened. If he had sounded his horn, the pedestrian would probably have heard it and got out of the way." Can you say the same thing here that a jury can say, "Because the lookout did not warn the captain, we must assume, in the absence of an explanation, that that was a cause, a cause to the accident"?

MR. LUCAS: Yes, we can say it because he was either negligent because he did not see it, in which case that's negligence and is

a cause to the accident because - you see, my Lord, let us pose this question: why is the lookout there? What is his function? He's not to stare at things going past.

COURT: He is there to warn the captain.

MR. LUCAS: His function is to warn the captain. Now he fails to warn the captain. Now it can be because he didn't see it, or he saw it and decided to take a chance, or because he was party to an escapade. But he had - that is the only thing that the man can do -- if he says to this court, if he said in his statement: "I warned this captain" and that statement is true, then there is nothing more the Crown can do. You see, I put it to you, my Lord, it is significant that at the opportunity given to fix up a story the watch-keeping officer said, "I warned the captain." "Now why should he have to warn the captain in a mechanical situation?", Captain Pyrke commented. That's his duty. Now he failed in that duty. There is no evidence that he carried out that duty.

COURT: Assuming that is a reasonable inference that he failed to warn.....

MR. LUCAS: Assuming he failed in that duty....

COURT: ...for whatever reason.

MR. LUCAS: ....for whatever reason, then he and the other man, the driver, also jointly failed in that duty. He failed in his duty as well. He has got the duties, at some stage, whether tunnel vision or not...

COURT: You are then saying at that stage -- having got past the first two steps, the duty of care, the failure to comply with that duty, aren't you then saying we then join the helmsman and the lookout and say that they then jointly caused the accident?

MR. LUCAS: Yes, individually and jointly. If they both failed to see it, that's it. I can see if....

COURT: You look at them jointly, of course. I follow your argument entirely.

MR. LUCAS: If you look at them individually because -- but you can look at them jointly as well. The jury is perfectly entitled to do that. It is another matter. But let us look at them severally in the first instance. He has a responsibility. There was a failure to keep a lookout and he has failed in his responsibility - one of the factors in the collision. It's a situation which cries out for the type of explanation - you see, the jury, my Lord, can find as a fact that there was a failure to warn.

COURT: I wouldn't disagree wtih that, surely.

MR. LUCAS: Right. Now having found that there was a failure to warn and that there should have been a warning, then there was negligence and it is a question for them whether it's gross. And it may well be, if there was an explanation -- the other explanation might be, "Well, look, I relied on this man totally. He is the watch-keeping officer. My job is to look for logs that are directly ahead of me and, therefore, I didn't see it. He didn't warn me and that is my explanation for this accident." That's not the explanation given. The other man blames Captain Coull - Kong blames Coull in his second statement - because of this constant sort of turn-around situation. But it is a concept.

One of the difficulties in this case is this, my Lord, one tends to think and pose the question to yourself in the terms that you posed to me before lunch: what could he have done? In other words, if someone was driving distractedly, what could the man next door have done? We cannot speculate except to suggest that these people were doing their jobs in the normal way.

COURT: I agree that the only thing you could do was to warn.

MR. LUCAS: Yes. And his failure to do that, now that can be found as a fact of negligence. Now the jury could well go on to say in relation to that situation. "Well, look, we don't really think that the warning would have made a blind bit of difference in the factual situation of

this case; in which case, as a matter of law, as we, the jury, are not satisfied that his conduct contributed to it, then we are talking in terms of the man having gone berserk, we are talking about there was nothing you could do about in this sort of situation and so on."

COURT: Well, not necessarily so perhaps. Surely there is a possibility that the Captain could have ignored the warning.

MR. LUCAS: Well, there is.

COURT: He simply said, "Well, I am satisfied I am going to miss him and I can see it ahead of me. It's all right. I have got the situation in control."

MR. LUCAS: So then factually hasn't caused. That there has to be there without speculating - introduce it to try and negative. There is no evidence of that at all. You keep drifting, with respect, my Lord, to areas of speculation.

COURT: What I am putting to you is: are you not suggesting that the jury should be invited to speculate that the lack of a warning was the cause or a cause of the accident?

MR. LUCAS: No, all I'm saying is this...

COURT: Don't they have to be satisfied about that?

MR. LUCAS: Yes. Straightforwardly you can say to them, "As a matter of fact, you have to find that it was a failure of the lookout that causes this accident. The man....

COURT: The failure to warn.

MR. LUCAS: ...had failed to look out in the general sense which caused it."

COURT: Are we agreeing that the lookout itself, that doesn't matter, it's the warning? You look you see something and it is the warning....

MR. LUCAS: Right. There must be the warning, as of question of fact, and if there was no warning, then you go to the next step

and say that failure to warn, or that failure to take other steps -- I mean, let's assume the man is driving.....

COURT: Well, assume we reach the stage there were no other steps you could have taken, no other reasonable steps.

MR. LUCAS: Let us assume, my Lord, that the captain has decided to go into a brick wall and he is off in a madman's dream that we are talking about. Now I would have thought, given that situation, if you were the first officer, you must just push him away and knock him away from that wheel. You might call out to the engineer, "Switch Off." There is an engineer sitting there. I mean, the fact is there is an engineer there available to be called to. It's not just the captain. The warning can be a general warning. If the man is off on a frolic of his own, pull the engines, do something, say something, push, shout, pull the engines, take some step, but you must at least warn. And if the captain said "Well, I think in my view we'll miss it." well, okay, that is not your responsibility. If the man is going mad and going into a brick wall, then, as an officer on board a plane or a ship or anything else, then you try and do something or take some steps, particularly when you have an engineer. We are talking about a long run-up and a stopping or a slowing down situation. Why not call out to the engineer, Mr. X....

MR. AIKEN: My learned friend is doing just what he shouldn't do. The jury mustn't speculate. There is no evidence what the deck officer can do in respect to giving engineer orders. It's pure speculation. He is hypothesizing. The jury mustn't do that. That is the cause of my submission. Mr. Lucas, with great respect, is doing it himself.

MR. LUCAS: With the greatest respect, my Lord, we have evidence there was an engineer there whose function is to watch the engines and we have evidence that the engines were pulled by someone at a later stage.

COURT: But are we not speculating? If he had shouted to the engineer, "Stop the engines", if he had grabbed the wheel, if he had done this, if he had that, that might have prevented the collision. It might.

MR. LUCAS: He has a duty to do something and there was a duty....

COURT: No, no, no, I am not talking about duty at the moment. We are talking about whether his failure to do his duty, assuming for the moment he failed to do his duty, don't the jury have to be satisfied beyond a reasonable doubt that that failure was a cause of the collision? Now I think the point is well taken. It may be if he shouted to the engineer, it may be if he grabbed the wheel, it may be if he just shouted the warning to the helmsman, it may be, but doesn't the jury have to be satisfied it did, that failure did....

MR. LUCAS: What your Lordship is suggesting then is this that he could tie a bandage round his eyes, sit there all the way in the car and, if they hit anything, say, "Well, how could I be negligent? I didn't see it."; or tie a gag around his mouth and say, "I saw it before but I didn't shout because I couldn't shout." I mean, he either has a duty to keep a lookout or he doesn't; and if he fails in that duty, that's what we are talking about, if he fails in that duty and something happens, now it may not have happened had he given the proper warning. What we do know is between the men severally, they were negligent. His negligence....

COURT: Yes, given that, yes, indeed, certainly severally.

MR. LUCAS: No, jointly.

COURT: You take them as a unit, the captain and the deck officer as a unit, I think you can certainly say, well, this is right, that the failure to keep a lookout or the failure to do their duty, the two of them, between the two of them, the jury could come to the conclusion that that caused the accident. But are

you not saying that, as a proposition of law, that if a person fails in his duty and that failure may have caused death, then that is sufficient?

MR. LUCAS: Failure partially. It's partial cause, not the whole cause of the death, yes.

COURT: No, a cause.

MR. LUCAS: A cause of the death, my Lord, because otherwise the situation must be that a watch-keeping officer can never be responsible for anything that happens because he hasn't got the wheel.

How can you have the duty and responsibility to keep a lookout, a failure to keep that lookout, an accident that happens after the event and you say well -- you see, my Lord, it may well be -- let's put it from the other point of view. Let us take the helmsman. He looks up, sees the risk and calculates negligently and wrongly that he's going to pass by 15 and 16 feet. He in fact passes at 10 feet. He is lucky but he is still negligent and if he did not pass 10 feet but hit, he would have been guilty of manslaughter, negligent and caused the death.

In our particular case, the failure may or may not have assisted but certainly the failure was a factor in causing this collision unless someone says to you, "Ah, it would not have made any difference to me whether it was called to or not," or some other explanation is given. He must expect that a proper warning given in proper time would have been responded to.

That's not speculation. The man is sitting there keeping a lookout. He sees the dangerous situation and he calls out. The other man doesn't respond. Then he can say, "Well, I didn't cause the accident." If he fails to call out, he is partially responsible for the accident. He is negligent as well as the other man. That must be the position. It cannot be anything else but it is a question for the jury to decide. It is not a question to be

decided at this stage because, whatever the situation is, negligence there clearly is and the question is whether that negligence attributed to the death of Mrs. Wu. Clearly it is. Because if it changes when you have a joint - how can it change when you have a joint situation, a joint charge?

COURT: Because I think there you can say, "Well, jointly the two of them together had a duty to keep a lookout, they had a duty to avoid anything that was coming or to take suitable action to avoid it and there was a collision, therefore they failed in that way. If they complied with their duty, if they did what was required, there would not have been a collision," and in the absence of any explanation, I quite agree, in the absence of explanation, you could say that.

MR. LUCAS: In that case, a mariner says that they are both responsible because it works both ways. My Lord, there's something that has been brought to my attention, and it hadn't occurred to me, by my learned friend and that is this: You are assuming, in the context of all this, that the captain does have the ship in sight and properly assessed, it may well be - let's take this situation - it may well be that the Captain for whatever reason is looking away.

COURT: It may be.

MR. LUCAS: It may be and for good and sufficient reason looking away, the engineer attracts his attention and he is looking away and there man sees this thing coming up and doesn't give the warning.....

COURT: It may be.

MR. LUCAS: Yes, it may be, my Lord. The reality of it is that is a failure to keep a proper lookout. You are saying, when the Captain sees it, how can you say he is responsibile because the position is he clearly is wholly responsible.

COURT: If you take the situation where

assuming there was evidence, assuming for the moment that the Captain's statement -- that I can look at the Captain's statement, the jury can look at the Captain's statement and let's face it from a common sense point of view as to exactly what they were going to do and in assessing the case against the 2nd defendant, assuming for the moment there is evidence that the Captain did see this other vessel and did take some action, albeit ineffective action, now, under those circumstances, can the jury be satisfied beyond reasonable doubt that a warning given to the Captain who was also the helmsman by his deck officer would have avoided the collision? I am sure the answer to that is no.

MR. LUCAS: My Lord, please, may I first of all say I sincerely hope that you'll tell the jury not to look very firmly at each of the statements and assess?

COURT: I've no doubt I would, Mr. Lucas.

MR. LUCAS: But you are accepting factual situations. I am placing my case on these statements being untrue. There are different factual situations where it would not in fact make a difference but that has to be explained. That's what these cases are about. It has to be explained. What I am talking about is this situation.

Now, given that situation, 45 degrees at each other long run-up type of situation, then in those circumstances, negligence on both parts individually and separately, if the situation is that they are both turning and the Captain has got things under his control and is taking steps on his own account and contrary to the evidence because, if you remember, the evidence is not that at all from the civilian witnesses, given that situation, it may well be that someone can say to you, "Well, I looked across, I saw the position totally under control and I didn't do anything about it." it's an explanation and it may not be true as in this case it is suggested but that could be quite remote. There are

situations which call for that sort of explanation but what you have in this case, my Lord, is not that at all.

What you have in this case is statement No.1 in the log book, "Look at me. I am a super chap. I have done my duty. I warn the Captain that we are having a mechanical defect and veering to the right" because clearly he sees that is his duty. Statement one.

Statement two is: "I saw nothing at all at any stage, nothing to do with me. I spent some number of minutes writing 10 figures."

Now, can we not also do this, my Lord, because one of the things that is important in this case is this, when you are talking about this particular area, they all fuse and run in together, lies, in the context of this. You see, you may well say to the jury, "Look, members of the jury, the evidence is, that this man - the expert says he should keep a proper lookout - he himself said when he first gave his first explanation - let's face it, that's after the event when they tried to fit things together, give themselves an excuse - he made himself look good by saying - he blames Kong for it, of course, but it's his signature, he signed it - he says, 'Dear me! I had warned the Captain.'" So at that stage he felt that there was something to be kept. Now, as time goes by, and it's no longer Captain Pyrke but it's the police, suddenly he says, "It's nothing to do with me. As a matter of fact, I didn't see anything at all," and we will demonstrate, I'll submit to the jury, that that is not true.

Those series of distortions, lies, can't bring us to the point that I am also talking about in relation to corroboration. You see, my Lord, we tend to forget when we talk in terms of corroboration and lies with corroboration as to what that actually means.

Corroboration, and I am sorry if I have to go to the definition but it really is its basis. What is being suggested is:

corroboration only comes into existence simply because a girl's evidence needs corroboration. The definition of corroboration is an independent fact which tends to support the evidence. In other words, it is -- using the terms of Baskerville, evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that it has been committed but also the defendant committed it. The test applicable to determine the nature and extent of corroboration is thus the same whether the case falls within the rule of practice at common law, which is what we are talking about here, or within that class of offences for which corroboration is required. Then reading on - the whole tenor of their Lordship's observations is to the effect that where the suspect and corroborating witnesses may be in collusion, the evidence which makes it more likely that the accused is guilty can afford corroboration to suspect the witnesses' evidence - "The corroboration need not be direct evidence that the defendant committed the crime. It is sufficient if it's merely circumstantial evidence of this connection with the crime."

If, and I intend to put this in these terms to the jury, if a man, given the opportunity to explain away a possible misconduct or breach of duty or responsibility, chooses to lie about that, it brings into question his guilt. When we talk in terms of lie, it is as probative a matter as can be, it can be so much so that it can be corroboration because, as Mr. Justice Cons(?) said, "It reaches a point where conduct is such that it caused -- that it is probative by itself."

Let us look at this piece of evidence. We have a man who has a duty to take care, we know that there was a failure to take care because the boat collided. We know someone died as a result. We say that it could have been avoided and was not.

COURT: So you know it's as a result of that.

MR. LUCAS: Yes, and then, my Lord, we go to the

person concerned, we then look at the evidence to see whether in fact that person has done anything on the evidence to discharge his duty and responsibility, the answer is no. Does he give any explanation because we are in a point where the evidentiary burden is in dispute? Answer no. Insofar as an explanation which fits within these types of cases but it goes a step further than that and lies about that, that little fact of lie is as corroborative and as a directive piece of evidence as you can get.

COURT: What is it corroborative of?

MR. LUCAS: It corroborates that he has failed to keep a proper lookout, he personally has failed to keep a proper lookout and has been responsible in part for this accident.

COURT: It shows that he has been negligent.

MR. LUCAS: It shows that he has been negligent, that negligence partially caused that collision. It can't be divorced, his negligence was not keeping a lookout. If it proves that and the failure to keep a lookout caused a death, then the only question is: was it gross.

COURT: You are not forced to go to say that the cause of the collision was the joint failure to warn and the negligence....

MR. LUCAS: Quite right, the joint and several.....

COURT: I can see you may have these difficulties that A says, "I did not warn him" or admits that, "I didn't warn him," but that was the cause of the collision and the other chap says, "I wasn't warned." and that's the cause of the collision. In other words....

MR. LUCAS: Well, then it's a matter for the jury to assess but they have got -- until there is an explanation for the conduct, the facts are such that you cannot but say anything else to them that, "Save for an explanation there was clearly negligence on your part and that caused the injury." Along with negligence on the part of him which caused injury and certainly joined them together,

negligence which caused death, that, you see, my Lord, there is a Victorian Case, King against Russel, reported in the Victorian Reports 1933....

MR. AIKEN: My Lord, again I am in difficulties. I asked for a list to be supplied by my learned friend. There is a list....

MR. CORRIGAN: Is there a list of these cases? I have asked earlier and I have still had no reply. Is the court supplied with a list? Why wasn't Counsel for the defendant?

MR. LUCAS: My Lord, I can explain the series of events. There was the first indication that the cases were.. (inaudible) cases. It was from my learned friend, Mr. Aiken. I indicated that I was proposing at that stage to lead the cases in relation to negligence but I could not anticipate at that stage what was going on and what's happening. I then received from my learned friend, Mr. Steel, some authorities and then I responded by giving him a list of cases which has been added to since quite a lot by me to the court as the afternoon has developed. The cases that I have originally sought to put before the court were to be the old motor vehicle cases and the cases relating generally to negligence, Bateman, etc. I have been remiss in supplying this copy to everyone, the list of authorities and I apologize.

The simple fact is that it is a submission of no case to answer made by -- let's get this in perspective if I may. This is a submission of no case to answer made by my learned friends where I have no notice of what the application was based upon. Is it being suggested that a week before the application was made that I should anticipate every argument and supply them with a view that I will take of their arguments. I am afraid, with respect, my Lord, I don't see that is either feasible or plausible or very sensible.

COURT: No, I think the Crown is not entitled to know what the defence is at any stage.

Sorry, this reference, the reference that I have got here is a tax case. I presume it's not right.

MR. LUCAS: Page 59, it's certainly not a tax case. Page 59. Victorian Law Reports 1933. The facts of the case were this:

> "The prisoner was charged with the murder of his wife and their two young children, who met their deaths by drowning. The jury asked to be directed as to the responsibility of the prisoner on the assumption that his wife took the children into the water without his assistance, while he stood by 'conniving to' the act. The jury found the prisoner guilty of the manslaughter of his wife and the children. "

In other words the wife jumped into a swimming pool, carried the two children and she died and he was found guilty of manslaughter.

> "The jury might properly find that the accused had shown his assent to his wife's purpose, and must be taken to have found that though the act immediately resulting in all three deaths was that of the wife, the accused was present 'conniving to' that act. The legal result of that finding was, in the circumstances, that the accused was guilty as a participator or principal in the second degree."

By Mr. Justice Mann :-

> "On the facts supposed, by his deliberate abstention from taking active steps to save his children, and by giving the encouragement and authority of his presence and approval to his wife's act of drowning them, the prisoner became an aider and abettor in that crime and liable as a principal in the second degree."

Another situation. Mr. Justice McArthur said :-

> "The prisoner's gross and culpable neglect of his duty to take all

reasonable steps to save the young and helpless children in his care and control rendered him guilty of their manslaughter, notwithstanding that the immediate cause of their deaths was the act of a third party. His merely standing by and doing nothing while his wife committed suicide did not make him guilty of her manslaughter."

And McArthur J. goes on to explain his views at page 81

"If you are in charge of a child and the child was seen by the father to go across the street and a bolting horse was seen coming towards him and he did nothing knowing that the child's life was in jeopardy and that child died then he is guilty of manslaughter."

COURT: It's the same as the example I gave with a person driving the car, a pedestrian looking the other way, standing on the road, he fails to sound his horn or to take an evading action, fine, you can say it is manslaughter.

MR. LUCAS: No, it is different in this extent. He does nothing. Different situation. You see, if a man jumps into a swimming pool and drowns himself -- or a child, a young child falls into a swimming pool and drowns in my presence, I am not guilty of anything because I have no duty or responsibility to him. If the child, on the other hand, is my child, then I have a duty and responsibility, then in those circumstances, I am guilty of manslaughter.

In other words, the duty imposed insists on you taking some step to avoid the act of the death. The duty imposed on the officer on that bridge is to keep a proper lookout, and partially the reason for this accident or wholly the reason for this accident was failure to keep a proper lookout. Unless there is some explanation as to what he did in relation to this duty, then, in those circumstances.....

COURT: You see, with your drowning case, surely you have got evidence there that the man was standing there, he must have seen his wife doing what she did with the children and there is ample evidence which the jury could say that failure caused those deaths. If the captain of this hydrofoil had a heart attack and fell against the wheel and the vessel speeded up, you could well say that the first officer had a duty to do something about it because his -- any failure to do caused the collision, the failure to stop the wife jumping into the pool caused death, the failure to sound your horn and go into the pedestrian, that caused his death, but here surely there is another step, you have got to show the failure to warn caused the collision. That might mean that the first officer could tie a blindfold over his eyes and head off to Macau, if there's an accident, simply say, "I didn't see anything," and therefore..

MR. LUCAS: But that can't be right because how can you have a duty -- I mean it is all based on duty and responsibility. Surely, you must accept that you have a duty and once you have a duty, you have the duty to take an active step, that is the explanation. My Lord, I don't see how you can say, 'Look, I accept there was a failure to keep the lookout. I accept he had a duty. I accept that there is no evidence that he did anything about this duty. I accept that the failure to look out caused the accident but the answer is he did not cause it.' He is as much part of keeping lookout - in fact more so than the helmsman. What are you suggesting, that is in those circumstances, could be the situation? They collided with another ship on the face of it. That was a failure.....

COURT: They collided. The ship?

MR. LUCAS: The boat. An officer on board that boat had a duty to keep a lookout. He failed in that duty or he took a chance or he was part of the exercise but, in any event, he certainly did take no steps and he has no explanation for that failure on his part to do anything.

He is as much, if the thing starts rolling downhill and he doesn't take off and steer it away or takes some effort to get someone else to do it, he is as much responsible as the other man and to exclude him on the basis -- because what has been suggested is that they both failed to keep a lookout but the simple fact is that the man who actually sits at a wheel doesn't see it. He is negligent because he has got the wheel. The same man with the same responsibility standing next to him doesn't have the wheel and therefore he is not responsible. They are both under an obligation and a duty to care. They both failed in the obligation. You would, I mean -- I am sorry but you would reach a point where you have one man sitting there with a blindfold and he is not guilty of negligence and the other man who conscientiously relies on the man next to him but simply because he has got the wheel in his hand, he is guilty or more particularly and more extraordinarily if he followed it through, two people with a duty to keep a lookout, what makes the difference is one man - let's assume for a moment, they both did not see it absolutely for some extraordinary reason, neither one of them saw it, right, that is negligence.

Now, does it mean that the man who was holding the wheel is more negligent than the one who was not? Does the mere fact of holding the steering make Kong guilty of the offence and the second one not? That just can't be right either. I mean if you follow it through and take the end examples of the situation, that's what you find yourself - the blindfolded man and the man who has got the wheel are responsible.

My Lord, I can't labour on this any more. I no doubt can but I don't feel I should.

COURT: I think the point has been well and truly argued.

MR. LUCAS: My Lord, may I go back to a number of matters that were raised about -- Let us start on the concept of exculpatory

statements. What has been suggested, as I understand it, is that the court cannot look at exculpatory statements at the stage because they somehow don't exist.

First of all, can we please define what an exculpatory statement is? As a matter of law, an exculpatory statement, a statement which says, "I am not guilty of offence," is not admissible because it is not one of the exceptions to the hearsay. An exculpatory statement does not play any part in evidence at all. Would we look at the case referred to by my learned friend, Mr. Steel, in the Queen against Cheng Chiu, that is the judgment by the Chief Justice, that is at page 54 of that report?

You'll notice that the judge in that case called for the statement, read it and came to the conclusion that it was a self serving statement and ruled that it was not admissible. So if I am arrested by the police and I say I am not guilty of this offence, that is not admissible at all and unless it has some evidentiary effect and it is a statement made contrary to interest.

Now, it was admitted in the Storey's Case on the basis that it showed the reaction of the accused on the first arrest which may in their terms have some basis. Of course, there may be some suggestion that it had some probative value. It was a statement in that case against interest. For the life of me, I can't see what it was because in that particular case I think what the lady said was this:

> "The drugs were brought into my house at 10 o'clock by X and I was sitting on my bed and we were arguing about them when you turned up."

Now, my Lord, that statement is exculpatory in two senses. It is a denial of factual guilt, it is a denial of possession. The goods were still in the hands of whoever it was who brought them in.

The concept of an exculpatory statement

is looked at at the same page 54 in the same case and at the bottom of the page it reads :-

> "Admissibility and self-serving statements.
>
> The statement, which the first defendant made to the police, contains admissions of acts which amounted to the theft of the pouch of diamonds, but a denial of robbery, the offence with which he was charged. Thus, it can properly be described as exculpatory, or self-serving."

Now, if the test is that that is an exculpatory statement, in other words, "I am not guilty of robbery. I am guilty of theft," it is also probative as to guilt. It is a statement produced which goes part of the way to proving the guilt of the person concerned.

Now, when we talk in terms of exculpatory statements, we are talking in terms of statements, in my view, which have some probative effect. If it is not that, then it is not admissible, in any event. Once they have a probative effect, then they are statements for whatever purposes and, my Lord, a statement, which is proved to be a lie, once again is a probative piece of evidence - it does not stand alone, you see. The complaint is we have not particularized. It has never been suggested -- I have suggested that these statements have been put and given by these accused persons in order to serve their aims and that those statements are lies. That is a long way away from the exculpatory statement of any sort. What we say is that you can draw an inference from the statements, lies being probative as to guilt and say to yourselves in relation to those statements, "Look, these are lies."

Now, also for some extraordinary reason, we seem to have jumped the most important of the statements, I would have thought, and the statement is, in the real sense of the word, the logbook. The first document that is presented to the authorities is a logbook which reads as follows :-

> "I was driving along and the thing mechanically sheered to the right and

I warned him that it was going to happen," says the second officer.

That statement, once you put up together with the story - fixing up a story after the event, once you have the fact that their subsequent stories deny that to be true, that statement is not an exculpatory statement in the context we are talking about. It is a probative bit of evidence as the man who stands up on the -- and says, "I saw this thing coming," it is....

COURT: If it is a statement which says, "Look, this accident was caused by a mechanical failure. It was not negligence on my part." it must be an exculpatory statement and how does it change in character later on because they go back and say something else...

MR. LUCAS: The term, exculpatory statement, in my submission, is a statement that serves the interest of the accused person, "I am not guilty of this offence," that is an exculpatory statement. Statements beyond that are statements which are put in by the Crown. So we don't have to put them in. We put them in on the basis that they tend to demonstrate. They either contain admissions and qualifications.

The first statement, you see, my Lord, is an admission. It is an admission that the Goldfinch did a hard starboard turn and collided with the Flamingo.

COURT: Yes, it may be but I mean that is -- there is no point denying it. Everybody knew that it happened. It wasn't an exculpatory statement as to -- I mean, well, the turn, everybody knew that the Goldfinch hit Flamingo, it wasn't an exculpatory statement as to why it hit.

MR. LUCAS: Yes, it was a confession and avoidance. You see, look, the story now being told is this - by the same witness who told the story at all - is that there was a gradual turn which was mirrored by the other boat. On the day after the event, the story told is of a sharp turn, an uncontrollable turn, a turn which has been described as a possible and technical turn which went on for some time and collided with the other boat and the only thing that happened is at the last moment there was a switching off of the engine. That's the story told. So that story, combined with the

subsequent statements, where there was a change in those stories - this was not true, etc. - are matters which the court is entitled to look at but, in any event, the local case says you can, but in any event they are talking about different situations. You are certainly entitled to look at that at this stage and say of these they demonstrate a shift in the stories as they go along. At one state there is no suggestion of the Flamingo doing anything but just coming straight on in a normal way and "for a mechanical reason our boat was veered into and caused this damage to the other boat towards the starboard and at the last minute there was in fact a turn to starboard."

Now, it is probative in this context. Our expert says that he found the boat showing a turn to port after the accident. Our expert also says that the impact was a very broad impact, 50 to 70 - 60 to 80, two experts. Let's take the medium one. Had there not been this turn immediately before to port, the angle would have been broad.

Now, statement number one talks yes. The boat was found, Goldfinch was found, the angle of its turn is such that it's turned to the last which appears just prior to the collision....

COURT: The Goldfinch....

MR. LUCAS: The Goldfinch has turned just prior to collision slightly to the left but it's still on its foils or close to, according to Captain Pyrke. So the first story is Goldfinch travelling, no complaint about Flamingo at all -- the Goldfinch was travelling along and suddenly - forget the ex post facto rationalisation as to why - suddenly the boat takes a hard turn to the right which continues for some time because I am resting with the steering and unfortunately nothing can be done so I turn off everything and at the last minute port to the port - confirmed by Captain Pyrke.

Then we have, of course, the witnesses, the civilian witnesses who give a story

which is of a long run up collision type of course and given an angle broader than that, by and large, than that given by Captain Pyrke.

Now, if one takes the situation that in order to rationalise the situation you found yourself in, you take the situation of confession and avoidance. You take the facts that you can't do anything about and you add the mechanical failure and the shout for help so it is confirmatory and insofar as it is a statement, it is a statement which is probative as to guilt by itself per se and the second statement and the subsequent statements, which if we can demonstrate are in fact untruths, come within the Lucas' principle, mainly that when a person lies, that can be probative as well, just as the evidentiary burden moves where there is nothing more that can be done, lies can be probative as to guilt and the suggestion that one talks in terms of not looking at the statements at all at this stage and therefore not, you'd have the extraordinary situation then maybe that it may well happen that at the case to answer stage the court cannot look at statements and therefore would have to find no case to answer because of a failure at that stage whereas if the case was then to run its full course, a jury could quite properly convict and that cannot be in all seriousness or sense the law so that let us (a) to find our terms (b) accept the fact that these are not in the strict terms of the word and when we talk in terms of Storey's Case, exculpatory statements, the definition has been extended by the learned Chief Justice here to confession and avoidance statements be named as exculpatory.

Now those statements are probative as to guilt and those are not -- they are one of the exceptions of the hearsay rule in any event and they are evidence.

And as I keep on seeking to remind you, well, there is no evidentiary change in rules for Crown or defence. The law is: the thing is either admissible or it is not. It is admissible as an exception to the hearsay rule if it is against interest. What a man said on a previous occasion is not admissible as evidence against him unless it is an admission of guilt.

So the court here when it takes a distinction and talks in terms of exculpatory

statement that exculpatory statements in the qualified sense,"I am a thief not a robber." That type of statement is probative as to guilt, it is admissible as evidence, otherwise, it would not be before you. It doesn't change character or personality at the halfway mark. If we follow the thing through to its natural understandable conclusion, we will have the extraordinary situation, as I say, of a judge being in a position of convicting him whereas your Lordship would be forced to find no case to answer.

Now, I'll take that particular point no further. I don't think it needs taking any further.

In relation to the other statements, you see, let us follow that particular line. Those statements are admitted as evidence. Now, those are statements of D3 and D4. They are admitted as evidence on the same basis because they are admissions, the Crown alleges, against interest. If those are not exculpatory statements in the sense that they are sought by them to be an excuse as to why, we say, in the context of negligence, they demonstrate the negligence that we are complaining about, they didn't see what they say -- what they say in the statements are that they behaved in a manner which Captain Pyrke would suggest is not proper practice, putting it no higher than that, so that our case is negligence.

In relation to these accused specifically, negligence of a particular type, fail to keep a lookout, they produced statements which demonstrate that in this particular case -- Sorry, we produced Captain Coull's -- I do apologize, my learned friend Mr. Corrigan.....

MR. CORRIGAN: ... I have been trying to find out since the Crown case started whether my learned friend, as he told the jury at the beginning, says that statements of my client, never mind anybody else's, are a pack of lies. I am still waiting to hear. He told the jury.

MR. LUCAS: I told the jury that but I'll tell you that. I have told the jury from the outset.

MR. CORRIGAN: Inaccuracy or not.

MR. LUCAS: Captain Coull's statement is not possible or feasible.

MR. CORRIGAN: These are deliberate lies.

MR. LUCAS: I can't get into the man's head: I am simply saying that those statements are not true. They have been checked by the experts and they are not true. Whether they are not true because of a deliberate lie or because of some abberation at the time or because of a direct failure of recollection, that is the position. Those statements are not true. An explanation that has been called for as to the conduct has been demonstrated they are not true and that is probative as well in the same sort of context in relation to the D3. He makes statements in a spread over three days after lots of discussions which on first sight because he talks in terms of just over three or four miles away, produced a situation which is not good practice, according to Captain Pyrke, he changes that and that second situation is demonstrated to be not good practice and in our terms negligent by Captain Pyrke and we say, in relation to that, that demonstrates -- that they demonstrate negligence which is -- what we are seeking to prove is negligence. We don't have to go any higher than that and the gross -- I'm sorry.

COURT: Yes, Mr. Corrigan.

MR. CORRIGAN: I am still trying to find out whether my learned friend says that these statements are untrue, whether they are inaccurate or what. I can't understand it.

COURT: He says they are untrue. He cannot say that they are deliberate lies. He simply says they are demonstratively untrue.

MR. CORRIGAN: He has just said he regards them in the same light as the statements of the 1st defendant. Do I understand him?

MR. LUCAS: The same light in the sense, my Lord, that they are probative.

COURT: Are they not probative as showing the reaction at the time of making the statement? Isn't that the basis upon which they show the reaction? Therefore

if they are simply incorrect, are honest and genuine mistakes - the statements - then they are not probative. If they are deliberate lie, then it is probative as showing the reaction of the person making that statement.

MR. LUCAS: No, my Lord. With respect, the concept of the reaction -- You see, if you put a statement in on the basis of reaction, you put it on two bases. It is admissible on two bases. These statements are not objected to. It is either admissible on the basis suggested by Storey or it is admissible as an exception to the hearsay rule.

Frankly I don't really quite understand what the - especially if you look at the Storey-type situation, the Storey-type situation, the Storey-type situation where the woman said just before you arrived he brought the drugs into this house and I have just been arguing about it. Now for the life of me, my Lord, I find it difficult to see what the reaction in that is. But so be it, that is what is being held. But whatever the situation is, it is admissible as evidence as either an exception to the hearsay rule for reaction or as an exception because it is probative on the basis and is therefor probative; or alternatively it is admissible because it is inaccurate and inferences can be drawn from that.

COURT: Storey says it is admissible to show the reaction.

MR. LUCAS: I am not quite sure what that means frankly. I mean, I find that - you see....

COURT: Well, doesn't it mean this that the jury is entitled to say right, at the time when taxed with this offence this person didn't tell the truth, he lied, why should he lie if in fact he is not guilty of this offence. Why lie? Whereas if you say when taxed with this offence that person made an explanation which we can show is untrue but we can't say is deliberately untrue. Now a person could quite easily make a statement which

is untrue, which is not correct but it doesn't affect the credibility later on except you can say, well, why was it incorrect.

MR. LUCAS: Surely you can because then - unless there is an explanation as to why, then it is probative. You see, with respect, the fact.....

COURT: Is this not somewhat academic in the light of CHENG Chiu? I mean, the statement is before the Court. There seems to be strong authority in saying how it has got there and why it has got there it doesn't matter. It is there and it is for the jury to attach such weight to it as they think fit.

MR. LUCAS: That being the case, I will take the matter no further.

My Lord, in relation to the joint and several charges in the Merriman situation, may I just.....

COURT: What is the reference to Merriman?

MR. LUCAS: Yes, my Lord. The prosecutor's bundle. I must say that I can't find it.

COURT: If you have a situation where you've got two people, one driving and one looking out, each have a duty, somewhat different duty, a duty of care, and the jury says we are satisfied that each of them failed in that duty but we can't say, looking at each one separately, that that failure was the cause of the collision. If the jury was in that situation, they say we are satisfied both of them did fail in their duty of care but we can't say, looking at them individually that such failure on each one's part was the cause of the collision. Would they not have to acquit both?

MR. LUCAS: No. My Lord, what you say is this. Let's assume a situation where a jury find themselves in a position where it says, in a burglary case, nine of us think it is burglary and three think its handling....

COURT: I think that is different. In that situation where you have got a combination - you have got two persons each has got a duty of care and provided both exercise it everything will be all right. Both failed to exercise it and as a result of their joint failure there is a collision but we can't say that failure in itself caused the collision or that failure caused the collision. Taken the two together.....

MR. LUCAS: If they combined together and the joint failure caused the collision, then they are both jointly guilty.

COURT: Jointly.

MR. LUCAS: Jointly.

COURT: This is..where is this Merriman case?

MR.LUCAS: Merriman talks in terms of the.. Let me start, if I may, then....

COURT: Is that referred to in...?

MR. LUCAS: Sorry, Merriman is 1973 Appeal Cases at page 584. Sorry, my Lord, do you not have the...?

COURT: 1973 Appeal cases.

MR. LUCAS: 1973 Appeal Cases.

COURT: No, I don't.

MR. LUCAS: My Lord, are you suggesting a situation where they both are demonstrably negligent that the Crown then has to seek in that situation to apportion? Because that is what you are talking about.

COU T: No, I am not.

MR. LUCAS: Yes, you are.

COURT: No, I am not. What I am saying is this, if the jury can't be satisfied that the negligence of either of them caused the accident, in other words, they can't say that man was negligent and because he was negligent there was a collision in

respect of either of them. They can say jointly.

MR. LUCAS: What they can say - if they say this man was negligent inasmuch as he didn't keep a proper lookout, then he is responsible. This man failed to keep a proper lookout, he is responsible. Jointly they are responsible, severally they are responsible. You see, you are making, with respect, the same point that my learned friend Mr. Corrigan made. What he suggests is that unless we can show 75 percent we are not in a criminal area. The failure to keep a lookout is a joint responsibility. If they jointly failed, they are jointly guilty. If they severally failed, they are severally guilty as well.

COURT: I can understand your argument on the jointly. But it seems to me it does not mean that the Crown must show that, say, these two must be treated together as one entity - this helmsman and the lookout.

MR. LUCAS: Because what you are saying is, look Mr. prosecutor, you don't have to just simply prove that they are both negligent. You have to prove that individually by himself this accident would have happened without the other one being there.

COURT: No, you have got to prove that his negligence caused - that he was negligent and that negligence caused the...

MR. LUCAS: Well, the failure...It is a failure to keep a proper lookout which causes the accident. That is what caused it. That is our case. There was a failure to keep a proper lookout. If one of them kept a proper lookout and the other one did not and failed to do something about it, that is another question as well. But the failure to keep a proper lookout --You see, can I go back to Merriman and also, if I may then, since it seems to be important, there is a case of The Queen v. Hughes(?) which is Criminal Appeal Reports, the date....

COURT: Is Merriman in the All England Reports?

MR AIKEN: My Lord, yes. 1972 (3) All England Page 42.

MR. LUCAS: Let me, if I may, start and sort of differentiate between the two types of cases we are talking about. Where Hughes (?) case - what happened in that case was two persons were ch rged with causing death by driving in a manner dangerous to the public. They were charged on the same indictment but in different counts. Each was causing death to the same person by driving in a manner dangerous to the public. The acts of dangerous driving being different. So what happened was that you had this situation.

Two vehicles, one comes out of the road, the other one swerves to avoid and there is an impact and someone is killed down the way. We then look at the case itself and say, well, there is someone dead. Two persons contributed to that death. One, the speeding motorist and one, the one that came into the middle of the road. Now in those circumstances they are not charged with the same offence. Thre is a different offence because the particulars are different. If, however, because when you say in the particulars you A, B are guilty of manslaughter inasmuch as you failed to keep a proper lookout resulting in the death of Madam Wu, the collision and the death of Madam Wu, now that is one situation where you must separate the counts. The other situation is where you have people involved in a joint exercise in which case Merriman says that you can charge them both with the same offence. Merriman at page 5....

What happened in that case, my Lord, was this. There were two brothers jointly charged with an offence and one of them pleaded guilty to the offence and the other did not. So there was a joint charge there. And there was the case - Do you remember this Scaramanga case which said that it had to be a joint enterprise?

Once again you see, one of the points of this particular argument really comes to this, my Lord, we have slowly moved away from the technicalities of indictments, the realities and technicalities of the indictments. The situation is this. Scaramanga said you have got to prove a joint enterprise in order to charge jointly. Merriman came along and brought some sanity into the law. It went away from the - I mean, it went away from the mid 18th century which we'd slowly slipped back into and came back into real terms and at page 591 in, sorry, the Appeal Cases. I am in fact reading from Lord Morris's judgment.

In this particular case it is "The point of law which was certified by the Court of Appeal was thus expressed:", and then there is an indented paragraph. Do you have that, my Lord?

> "Whether it is open to a jury, when trying a joint charge to which one defendant has pleaded guilty, to convict the remaining defendant of committing independently the offence which is the subject-matter of the joint charge."

It is, again, Lord Morris's judgment. First, second, third part of it in this.

COURT: Yes.

MR. LUCAS:

> "Whether it is open to a jury, when trying a joint charge to which one defendant has pleaded guilty, to convict the remaining defendant of committing independently the offence which is the subject-matter of the joint charge.
>
> My Lords, I would unhesitatingly answer that question in the affirmative and if authority points to a different conclusion I would say that such authority should no longer be followed. But in answering the question it is important to consider what is meant by a 'joint charge'. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count.

Each person is, however, being charged with having himself committed an offence."

In our case, negligence causing death.

"All crime is personal and individual though there may be come crimes (of which conspiracy is an example) which can only be committed in cooperation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established. It might be established in different ways. A's guilt might be proved by showing that he wounded C. A's guilt might be proved by showing that though he did not himself touch C he caused and directed B to do so; or it might be shown that A and B jointed together with a common purpose of wounding C so that in effecting that common purpose each was but the accepted agent of the other. So, unless there is some special statutory provision, there is no magic in speaking of a joint charge. If the language of the law is to be used then a joint charge is also a several charge. Indeed, if in one count there is a charge that A and B wounded C it is always possible for either A or B to submit that circumstances are such that each should be separately tried. The court would decide what course would in all the circumstances be fair and reasonable and in the interests of justice."

Now the interests of justice -- What is being suggested here, my Lord, is that you - by your Lordship is that we have to quantify the negligence really.

COURT: No. What I am saying, Mr. Lucas, is this, or asking you, what would be the situation if the jury said we are satisfied this collision is caused by negligence. We are satisfied that A and B were negligent. We can't say that A's negligence in itself caused the accident. We can't say that B's negligence in itself caused the accident but we can say that the two put together caused the accident, A and B.

MR. LUCAS: In that case it is a joint act of both. If they say, on the other hand, that one is more responsible than the other - you talk in terms of causation. Don't you go back then to the de minimis rule of Hennigan's case. We say to the jury this. Look these two failed to keep a lookout insofar as you are concerned. You might feel that both of them jointly are responsible in which case they are both guilty. You may feel, on the other hand, that one of them is really the guilty person, the most guilty person, and the other person's negligence, although there, is slight. It is de minimis in the context of that.

COURT: Would the jury not then say "we are satisfied that A's negligence did cause the accident although B's negligence helped it along its way, contributed, but nevertheless it was A's negligence which caused the accident?

MR. LUCAS: In which case they simply say B, then your negligence didn't. If your negligence contributed in a more than a de minimis situat on, then you are responsible. Youare responsible individually as well as jointly. My Lord, one of the joys about the law at the moment, I hope, is that we do not involve ourselves at the end of the day and get caught by technicalities of the sort - because justice means justice in both ways - which would result in the sort of situation where simply because of technicality your Lordship may find yourself directed to say to a jury to acquit in those circumstances. There is, of course, available to the court...

COURT: I don't think this is technicality. I think it is fundamental.

MR. LUCAS: If it is fundamental, my Lord, if it is fundamental, there is in relation to that the power in the court to amend and correct even at this stage the indictment and permit separate individual counts against all four - an amendment accordingly.

COURT: No, I don't think that is required.

MR. LUCAS: If your Lordship is suggesting that there may be a direction along those lines, in other words, that you have to quantify the negligence of the two people on the boat, on each individual boat, and you may find yourself in a position where you cannot make up your mind although you think they are jointly responsible, that you cannot make up your mind they are individually responsible, and the effect of that may be, the consequences, the technical consequences we are talking about, in those circumstances, my Lord, if you are considering that, then I submit that the proper course to take as well as thinking is to permit an amendment of the indictment along those lines. It is not without precedent at this stage. It has been done. It has been in fact done in a Hong Kong decision where the....

COURT: No, I don't think it is a case for that. Anyway, I think that we have covered it over and over again, I don't think there is any point....

MR. LUCAS: My Lord, I am sorry, but if I may, I must ask your Lordship to consider, if the result of your deliberations are at the end of this day that there is a possibility that you may direct contrary to my submission on this particular point leading to the possible consequences we have mentioned, albeit briefly, that you consider the cases of The Queen v. Radley which is in....

COURT: This is on amendment?

MR. LUCAS: This is on amendment, my Lord.

COURT: Surely if the indictment was amended

and charged each individually and separately, then so far as the Crown is concerned on the proposition I put to you, that would be the end of the Crown's case because then there would be no question of considering it jointly.

MR. LUCAS: You see, my Lord, with respect, it is the ramifications of it that concern me because it is in fact a concept that implies a thinking that we have to quantify responsibility in the individuals in the particular boat. Now that type of thinking if followed through, leads to all sorts of consequences on the Crown case which I am not considering going into.

COURT: But it seems to me if - assuming for the moment that that argument was right, if the accused were separately charged, then you would have to say, the jury would have to say surely, considering the negligence of A we cannot say that his negligence in itself caused this accident, there had to be the negligence of somebody else combined with it. There had to be two. Both had to be negligent.

MR. LUCAS: My Lord, that ignores the cases of the two people on the boat in the old case and the two people on the train. They are jointly charged but they are also severally and individually liable. In the Hennigan case which is basically where we started some considerable time ago the quest on is asked by the jury, "Look, we have been asked to make up our mind whether or not this negligence caused the accident and we can't make up our mind", said the jury, "because frankly we think the other driver was more to blame". And the court said, and properly so, I would submit, that so long as the dangerous driving is a cause, the failure to keep a look-out is a cause, then it matters not - sorry, let me read that again.

"There is nothing in the Road Traffic Act which requires the manner of the driving to be a substantial cause, or a major cause, or any other description of cause, of the accident. So long as the dangerous driving is a cause and

something more than de minimis, the statute operates. What has happened in the past is that judges have found it convenient to direct the jury in the form that it must be, as in one case it was put, the substantial cause."

But you cannot ask the jury and you cannot seek to ask the Crown to go beyond the point of providing evidence of negligence. The quest on then is for the jury "Was this negligence gross?"

COURT: Well, that is one of the points for the jury. But surely the next point for the jury is if it was negligence, if it was gross negligence, did it cause the accident.

MR. LUCAS: Yes, the failure to look - no, sorry, you jump a step. The failure to look out caused the accident. They both - either both or separately or jointly failed to keep a lookout.

COURT: You see, the failure to look out caused the accident but surely that is a fact that the jury must be satisfied of, that the failure to look out caused the accident.

MR. LUCAS: The failure to look out or alternatively a lookout and taking the chance or the other circumstances, not just sort of simply a failure to look out. That is the bottom line, as it were.

If they are both looking out of two windows and not looking ahead and they have this collision, their failure to look out, that causes the accident. You don't have to quantify in those circumstances. If they kept the lookout but took a risk, they are both responsible for it and individually responsible for it, you have to quantify in those circumstances.

The conduct of taking no avoiding action stems from the fact either that they saw it and did nothing about it or they failed to see it. If they failed to see it it was a result of a responsibility and duty to do so. The evidence is that neither - certainly at the last moments no one did anything about it. Neither did the man who was standing next shout out nor did the driver till the last

minute do anything else but plough into this thing and turned the engines off at the last moment.

Now if at the end of the day they were tried separately and it was shown that the navigator, the man sitting at the side had been looking out the window or reading a newspaper or doing his crossword or doing whatever it is and there was an impact, had he been looking out, had he not been negligent there may not have been - that was a cause and one of the causes of the accident. You see, I can understand the argument possible reversed but not this one.

COURT: We have been over this - I think we have dealt with this....

MR. LUCAS: But my Lord, if in fact there is some suggestion of a direction along those lines, then the cases are....

COURT: Well, I don't intend to amend the indictment.

MR. CORRIGAN: We are supposed to be dealing with a submission of no case....

MR. LUCAS: The question has arisen by his Lordship. I answered the questions. The case of Radley - I might also mention a Hong Kong case where at the end of the Crown case a similar act was taken by the then DPP.

COURT: I can't see there is any possibility of it here, Mr. Lucas. It seems to me that if I did so, if I thought that that was the position, then an amendment in those lines would be the end of the Crown's case. The proposition I put to you was, is there any - is it possible for me to say to the jury "You've got to look at these two jointly. In other words you can't be satisfied - there is no question of being satisfied of A's negligence in causing the collision or B's negligence in causing the collision but you might be satisfied that A and B combined in negligence caused the collision."

MR. LUCAS: You might be satisfied that they both stood there when this manoeuvre took place.

COURT: You are suggesting that that would be - it would be in order. You could say the two of them combined is sufficient.

MR. LUCAS: But you see, the evidence of the two combined or individually is sufficient. That is the point. You see, look if for example - we have been working on the assumption that no one saw anything at all but let's assume that they are both in the wheelhouse watching the boat ahead and they both know that they are going to go close but they think that they are going to miss individually and separately and jointly. In other words, they both make a wrong and negligent assessment of the risks involved.

Now in those circumstances, surely they are both responsible for the action. The negligence is theirs. They have both made an assessment. They are satisfied that - they have seen the risk but they are prepared to take it.

COURT: It can't be right surely. If they are both aware of the risk.....

MR. LUCAS: And decide to take it.

COURT: Surely then the person who takes it is the person who has got control of the vessel.

MR. LUCAS: No, the person -- Look, I am standing next to a man who is clearly going to take a close, not only close but in fact it is going to hit, so he misread the situation. If I stand there and say nothing to him as watchman, either I have misread the situation as well which makes me negligent because I could have put him right and did that, in those circumstances, surely we are both - I have seen the risk and I am prepared to take the chance. He is doing it. He is going straight on. Now I think to myself. He thinks to himself. Let's take this situation. He thinks to himself. I am going to miss this thing. I am going to close - sorry, I am going to close shave this but I will be all right.

The other chap feels that that is the position and he goes along with him. He could and should warn the other man of the risks. If the man then takes the risk so be it because the situation may well be that the man hasn't seen it or appreciated it, doing other things. He has got to work on the assumption that the other man hasn't seen it surely.

COURT: As I say, I think we have been over this and I am afraid we are now desperately short of time. I don't want to confine it but we are, I think, becoming acutely embarrassed. Is there anything else?

MR. LUCAS: No.

COURT: Thank you.

MR. STEEL: My Lord, it is very late. I would be very very quick, just one or two points I want to make. Perhaps I will try and make this as quickly as I possibly can because I don't believe that this is the opportunity to debate what the proper direction should be. I am not being invited to do that. My learned friend has gone into some considerable detail in the..

COURT: Well, it was probably because of my invitation which, in fact, probably was not right but I was....

MR. STEEL: My Lord, if that is not the opportunity to debate it then I will say nothing now at all.

Perhaps I would observe in the context of the last point which your Lordship has been raising with my learned friend. It is really not a matter perhaps for me to deal with, but your Lordship will have noted with interest that in the decision of Trainer where the prosecution was made against the engine driver and the fireman who were both travelling on the same vehicle and where there was tentative evidence of excessive speed and poor lookout, the judge came to the conclusion that the fireman had no case to answer but felt that the driver possibly had.

It is a remarkable ending to any case that I have ever come across because as your Lordship will have seen and can we note in passing, at page 490 of the report that the nature of the case being made against the two people was really the same. And right at the bottom of the page in the third sentence of that paragraph -

> "Best, in stating the case for the prosecution, stated it was a case of 'culpable negligence' against the prisoners. He referred to the book of rules and the regulations above cited and its requisitions of caution. Instead of this, he stated, at the time of the accident the train was running at a rate of between 40 and 50 miles an hour, and, in short, the case against the prisoners was one of reckless driving."

And the case came to a remarkable end at page 493 when - page 116 of the actual report. It's three quarters of the way down the page.

> "Best submitted that there was a case for the jury.
>
> Willes, J. - What is it?
>
> Best - First, the excessive speed; secondly, the disregard of signals; thirdly, the neglect to put on the 'brake' soon enough; and
>
> The learned Judge, after hearing him, said he would not refuse to leave it to the jury, being so pressed to do so; but he should, in the event of the prisoner's conviction, reserve the case for the Court for Crown Cases Reserved.
>
> Philbrick submitted that there was, at all events, no case as against his client, the fireman, who was bound by the rules to follow the direction of the engine-driver.
>
> The learned Judge so held, and accordingly the prisoner was about to be acquitted, when
>
> The foreman of the jury interposed and said that the jury were all of opinion that there was no case of culpable negligence against either of the prisoners.."

In the High Court of Hong Kong

No.5 Submission by Counsel of No Case to Answer

(continued)

Now I only raise it to draw your Lordship's attention to the very simple point that if there was some concept of joint liability for negligent navigation of a ship or negligent and reckless driving of an engine, that would have been a very simple answer to the point. And as your Lordship rightly says, if you carve the indictment up that merely exacerbate the problem.

COURT: Yes, thank you.

(Submission by Mr. Aiken is not transcribed)

No.6 Ruling by Court 24th March 1983

No. 6

RULING BY COURT

24th March, 1983

9.43 a.m. Court resumes

All accused present. Appearances as before. JURY ABSENT

RULING BY COURT ON SUBMISSIONS OF NO CASE TO ANSWER BY ALL ACCUSED:

COURT: I find that there is a case to go to the jury in respect of the 1st, 3rd and 4th accused. I find that there is no case to go to the jury in respect of the 2nd accused Mr.Ng. I don't think it is appropriate for me at this stage to go into the reasons for that decision, except that they are basically what I indicated yesterday on the question of causation.

(Application by counsel for the 2nd accused to submit on cost on the next day)

MR. STEEL: Before the jury are recalled, can I just raise two points very briefly?

COURT: Yes.

MR. STEEL: One is if the remaining defendants are not called to give evidence, I would formally object to my learned

friend Mr. Lucas making a further speech. He has a right to do so. May I just refer your Lordship to paragraph 4-419 of Archbold?

COURT: Yes, I am aware of it.

MR. STEEL: You are familiar with it. Now, my Lord, certainly my friend has a right and I can't stop him doing it. I just formally would object to it on the basis that there are no compelling reasons why the normal practice should be not followed. It could only be on the basis that it is a complicated case. I would say that would be in some contrast to the way in which the case was opened.

The other thing I just wanted to raise was this: in the course of my speech yesterday about the question of whether there was no case, I indicated that I was content to accept in full the suggested ruling to the jury on what manslaughter is in Archbold. It is not clear to me whether my learned friend Mr. Lucas is quibbling about it. Judging from one or two things he said yesterday, he appeared to be so. And if my learned friend is saying that the ruling or direction should be different, perhaps I want to know what he is suggesting the amendment to that direction should be because I felt from what I heard yesterday when he was dealing with the questions of law and meaning of recklessness and so on, that he was almost challenging the root branch development of laws in certainly Bateman's case and I wasn't quite clear where he was taking us. May I just take one example? He drew your Lordship's attention to a passage in Bateman which dealt quite rightly with the standard of care to be expected from those who held some professional qualifications, but then never went on to read the end of the paragraph which simply says: "the foregoing observations deal with civil liability"; and there were various points which negatived the other cases he referred to. I am not for a moment being aware where he was going. If he was trying to say that the suggested direction in Archbold is wrong, I would like to know what he says is wrong about it.

MR. LUCAS: May it please you, my Lord. On the first point, the discretion is mine in so far as I must exercise my mind about it. I have done so as I have been warned by my friend. But the rulings in this court have been where matters are of some complication, if the prosecutor feels that it's a matter which he should address on, he should do so. In this particular case there is the civilian witnesses' evidence, and the general picture, in my view, requires my discretion that I address. I have done so in the past, my Lord. I am sorry....

COURT: Have the civilian witnesses said anything which was not expected?

MR. LUCAS: It's not a question of not expected, my Lord. It's a question of putting the case together. At the end of the day one has to be confronted with the evidence as it has actually happened, as it has come out during the course of the case. I mean, the Crown is entitled to put to the jury...

COURT: But what case then would you say -- I mean, if it is an exceptional and unusual course, when do you say it should not be done?

MR. LUCAS: My Lord, it is not an exceptional and unusual course. That particular case talks in terms of exceptional and unusual course. The reality of it is, where indeed when it comes for the Crown in this Colony to not address, except in situations whe e there is really a two men confrontation and resulting in something or other where it's as simple as the case is and requires no analysis, once one starts to suggest that there is analysis required both as to law or facts, then it is a matter of discretion. May I put it this way? It's a discretion in respect of which I would not be directed against. I do not, with respect, feel the court can do anything more to indicate a view in those circumstances. I have the conduct of the Crown case and in the circumstances I may be criticized for exercising my discretion. Given the particular circumstances of this case, the analysis that would be required in relation to both the evidence of experts

and the witnesses generally and also the law, it is my discretion, I feel that I must address the jury.

It is a case, my Lord, which has been criticized throughout by my learned friends as being in the wrong venue. They are talking in terms of taking criminal proceedings in a situation where -- during the course of addresses, they constantly referred your Lordship to the suggestion of a wrong forum and there is criticism, in fact, during the course of this case, of the whole prosecution system. They suggested in those circumstances that it's a simple, straight and uncomplicated matter for which the jury requires no help or assistance from the Crown. I dispute it. It is my right and my discretion in respect of it. It is a discretion that I must consider and give reasons for and I am giving reasons for it at this stage.

COURT: Well, I don't know that you have to give reasons.

MR. LUCAS: Well, that's correct, but I am prepared to do so. One carries responsibilities, obligations and duties. Provided one indicates that one has considered the matter - I don't think my learned friend would suggest anything more than this - it's a case where there should be an address. And also we are not happily bound by everything that happens in United Kingdom. The practice in this Colony in prior cases far less complicated than this, quite properly so, is to address.

We have an added factor in this particular Colony. We have a multi-national community whose familiarity or otherwise with proceedings in this court are quite different. One of the problems I feel about the judges' ruling and suggestion by some judges that we do not outline as to law or open as to law at all is it overlooks and forgets local conditions. I am not a practitioner of United Kingdom. I am a practitioner of Hong Kong dealing with a jury that is multi-national who comes from all parts of the globe. For some jurors, their natural language is not

English. Now given that situation and having listened to the cases quoted and referred to me, I suggest, in those circumstances, if we follow slavishly the practice and conduct in United Kingdom, with respect....

COURT: Well, as you say, it is entirely up to you.

MR. LUCAS: Thank you.

On the second point, my Lord, what I suggested to your Lordship yesterday was this that the ruling -- that there is nothing in Archbold that I quarrel with in the final analysis as to summing-up, but it doesn't end in the phrase as used in the direction there. There has to be explanation which involves, in my view, bringing to the attention of the jury the standard of care that is required. The standard of care that is required is a professional standard and the gross negligence will be measured as against that. The object of taking your Lordship back through the case was to make it clear that when giving the direction as to law then your Lordship should indicate as well that, when thinking in terms of gross negligence in the terms of professional navigators, their standard is that of a competent professional navigator and that the general public are entitled to seek and obtain from those who hold themselves as having some sort of speciality the care and diligence that is required from a man of that qualification.

MR. STEEL: My Lord, I quite accept my learned friend has a discretion whether to make a final speech. I was merely reminding the court that the practice in England is different. As I understand, the right should only be exercised....

COURT: Mr. Lucas, what you are saying is, I presume, then, when it says in Archbold, the....

MR. LUCAS: I don't have the Supplement, my Lord. I am sorry.

COURT: Well, I'll read it out:

"...at the time that he caused the deceased's death there was something in the circumstances which would have drawn the attention of an ordinary prudent (and therefore sober) individual in the position of the defendant to the possibility that his conduct was capable of causing some injury...." -

etc., that that should be -- "drawn the attention of the ordinary prudent individual", this should be the ordinary prudent deck officer or master in this case?

MR. LUCAS: Yes, bringing it back on professional terms.

MR. STEEL: My Lord, there is no difference between this or that at all. I don't think I know what my friend meant. My learned friend was referring to a series of cases from the last century which seem to me to be merely touching on the source of an event which might be categorized as grossly negligent or reckless. We have, for example, the man who left the pump and left it in the attendance of a small boy and skived off. We have the example of a man who was an unlicensed waterman who took an unseaworthy ship out on a river and then tipped it over. Then he referred to the case of Pittwood which is the only argument, as far as I can see, that's advanced by counsel that the defendants have known a duty. Again, I concede to that, but what was troubling me is that I didn't see where we were all going. I can see the duty, I can see the obligation was to take a reasonable care as a deck officer on board.

MR. LUCAS: My Lord, there were in fact other people involved in this particular argument one of whom said the test was the average man who travels....(inaudible) It's quite a different situation. I was directing at that situation.

COURT: Thank you. We'll get the jury back.

(Clerk and court confer.)

COURT: I am sorry, whereas Mr. Li has arrived, Mr.Connery has not. He has been held up by the fog, I am pleased to say. He will be coming by M.T.R. and should be here in about ten minutes. As soon as he is here, we'll resume.

In the High Court of Hong Kong

No.6
Ruling by Court
24th March 1983

(continued)

9.59 a.m. Court adjourns

10.08 a.m. Court resumes

All accused present. Appearances as before. JURY PRESENT.

DIRECTION BY COURT TO JURY TO RETURN A VERDICT OF NOT GUILTY AGAINST THE 2ND ACCUSED

JURY RETURNS A VERDICT OF NOT GUILTY AGAINST THE 2ND ACCUSED

2ND ACCUSED RELEASED.

COURT: Yes?

MR. LUCAS: I close my case.

COURT: Yes, Mr. Steel?

MR. STEEL: My Lord, I do not propose to call any evidence. May I just make one observation out of your Lordship's ruling to the jury? The decision is that my Lord has found no case to answer. My submission is that your Lordship has ruled that there was no material whatsoever against Mr. Ng.

MR. LUCAS: Well, sorry, as a matter of law.

MR. STEEL: Yes.

MR. LUCAS: As a matter of law. With respect, my Lord, it is your ruling you made. Qualifications speech at this stage is not appropriate.

MR. CORRIGAN: Well, I take exception to my learned friend Mr. Lucas's last remark. The ruling has been given. The ruling is that there is no case to answer against the 2nd defendant.

COURT: Yes.

No. 7

PROSECUTION'S CLOSING ADDRESS

COURT: That is correct, Yes, the only doubt is, members of the jury, I found that there is no case for Mr. Ng to answer legally. Yes, Mr. Corrigan?

MR. CORRIGAN: My Lord, neither the 3rd nor the 4th defendant elect to give evidence and neither do they call any evidence. That is their case.

MR. LUCAS: My Lord, may I have permission to stand over here to address the jury?

COURT: Yes.

(Mr. Lucas goes to the back of the well in court to address the jury)

MR. LUCAS: Members of the jury, it is now for me,as the first counsel, to address you on behalf of the Crown. My learned friends will follow shortly making submissions to you and then after that his Lordship will sum up and it will be time for you to deliberate and come to a verdict.

Members of the jury, I would like to make, if I may, just one general observation. I think it is important because in the context of these courts where there is very little separation between us and the jury in the sense that we sit almost upon each other, a crammed space, no place after or during the adjournments for you to separate yourself and stand away from us, you tend to see us, by definition, in our relaxed moments. There is a great deal of humour amongst us and it may sometimes be thought by some, I suggest to you, that we don't take the whole thing very seriously. Let me assure you, members of the jury, that we are very conscious of the responsibilities which we carry and we are also very conscious of the responsibilities which you carry. We spend our lives in these court-rooms, we come day in and day out appearing in this type of scene and naturally, during the adjournments, we tend to relax somewhat; but we are conscious, as I say, of the responsibilities that we carry and even more so the responsibilities that you carry.

Do not consider for one moment that anyone taxes your task lightly or that it is a light one. It is a difficult one. It is a complicated one. Because, members of the jury, you are brought into this court-room and asked to judge the facts in a case and decide whether a person is guilty or not guilty of a specific charge, in this case manslaughter. You, members of the jury, are the only judges of fact in this court-room.

His Lordship is the judge of law and he binds us all by his rulings. So that, if my Lord should say to me and my learned friends that his view of the law is "X", "Y", "Z", then we are bound by it. In relation to the law, if I should venture a view of the law to you which his Lordship subsequently disagrees with or rules the other way, then that is the end of the matter. You must accept the law from him, because he is the sole judge of law, his decision as to what the law is, what interpretation it carries.

But you are the sole judges of fact and no one, not even his Lordship can direct you. He can offer opinions about things, he can offer views about things which you can adopt naturally, but you are the sole judges of facts and you must decide the facts. And having decided what the facts are, you must then apply the law to them as given by his Lordship to decide whether these people are guilty or not guilty of the charge of manslaughter.

Now the responsibility to prove the case is, of course, on the Crown. When these men stand before you at the beginning of this trial in the dock, they are innocent of any charge. As far as you are concerned, you know nothing about them. You should wipe from your mind anything that you heard about this case outside and we start, as it were, with these men, as far as you are concerned, innocent of any charge, not guilty of any charge. The Crown then has to set out and prove to you that they are guilty and we have to do it, members of the jury, by evidence in this court-room - and I'll emphasise the word "evidence" for just a moment - evidence, members of the jury, led in this court-room through witnesses of one sort or another.

We have to prove our case according to a standard. There is a phrase that you heard time and again. You heard it in movies. You read it in books. You see it on T.V. We have to prove our charge beyond a reasonable doubt. We have to satisfy you so that you are sure of their guilt.

Now, members of the jury, what does that mean? It means, members of the jury, that if you have a reasonable doubt at the end of the day, then these men are entitled to a verdict of not guilty individually, jointly, whichever. If on the other hand you have no reasonable doubt, and I use the words reasonable doubt because it is a doubt with reason -- you are not entitled to say to yourself, members of the jury, sit boot-faced(?), cross your arms and say, "Well, I wasn't there. Now can I be a hundred per cent sure? Therefore, I am going to acquit."

Your function is to determine, using the common sense. You see, you are brought into this court-room not as experts. No one asked you any questions when you came into this court-room whether you knew anything about navigation, whether you could operate one of these things, these ruler things that we have seen in this court-room, whether you could read a map or do these things with pinchers. What we ask you to do is -- we bring in members of the community and we ask those members of the community to bring their common sense into this room and use the same common sense that they use in their everyday affairs and examine the evidence as put before you to determine whether there is guilt or not.

So when you talk in terms of reasonable doubt, we don't have to prove with mathematical certainty anything. We don't need a video tape because it's impossible.

Members of the jury, crime is not committed in Queen's Road Central. There is not a video tape in the cabin of either one of these two Flamingo boats. We have to develop and build the case for you from the evidence here. Now you are not just bound by evidence. You are entitled to say to yourself, "Well, put two and two together, it comes to four. It makes sense." Particular situation makes sense because having heard certain facts, it is difficult to accept that any other circumstances

could possibly arise.

It is the word "circumstantial" evidence that everyone sort of gets concerned about. It is a word in thrillers that everyone is doubtful. But often circumstantial evidence is better than direct evidence because people's memories may fail, but facts don't change.

If you have a situation, members of the jury, where, for example, you were standing outside a room. You know that the room has only one door. There is no window in it. You see two people go in alive and well. You hear three gunshots and you see the second chap run out carrying a gun. You grab that man with a gun and you go back inside the room and you find that the other man that was alive a moment before with three bullet holes in his back dead and you get a forensic scientist who takes the bullets out and says, "Those are the bullets that came from that particular gun."

Now you don't need a video tape to come to the conclusion that that particular man killed the man that's left in that room. And if that man produces a statement to you which says, "I was proving this gun and I shot him by mistake." Now one bullet, maybe. Two bullets? Three bullets? You can look at the combination of factors and you can look at the statement and you can say, "Well, it just is made up. Inferences are clear."

You can draw inferences, members of the jury, as clearly as you do in your everyday existence and your everyday life. You can put facts together and come to a conclusion.

Now let us take our particular case for a moment. Now we have a log book which puts, and evidence which puts, the time at 9.26; and we know that if the Flamingo came from Hong Kong direct to the point where the impact took place, it would take about twenty-six, twenty-seven minutes, if it didn't stop. We know that it did stop for one, two, or three minutes. We also know, do we not, that if the Goldfinch was running a direct line on a course, it would get there at about the same time? But if one of those boats has stopped for two or three minutes, we have time -- there is additional time. It's not explained

by drawing lines on a board. Inferences like that, common sense, that you can draw and you can say, "Well, we weren't there, but look at that, it makes sense, it fits."

You have the advantage in this court of having heard an expert give evidence.

Now one of the other thing about this is this -- with the greatest respect to Captain Pyrke, and I put him forward as an expert with his expertise, he gives opinions.

And like anyone else, if you accept his opinion, you can adopt it. If you accept my submission, you can adopt that. But at the end of the day, this is not a case for an expert. It's a case for the man who sits in the jury-box, the man who brings his normal common sense into this court-room and brings with him his experience of life who assesses the expert's evidence and says in relation to that expert, "Well, I accept that one. I will adopt his. I am not bound to. I will adopt it." Now, you see, constantly we have this business: you are not supposed to be experts, you are not bound by the expert, but listen and adopt the things that you hear if they are accurate.

Now, I have also said you must operate on evidence, evidence from the witness box. Now, evidence must come from the mouth of the witness. You see, I can say to a witness apropos, "How drunk were you?" Witness says, "I was not drunk. What are you talking about?" "Weren't you drunk on that night?" Answer, "No". Unless there is anything else, the only evidence is the word of that man, no, there is no evidence of alcohol, unless the Crown produces some evidence to indicate that story is not true, there is no evidence. Evidence does not start from the bar table. You can't give evidence. I can't give evidence. It is for a witness to give evidence. I can put suggestions to a witness. But if the witness does not agree with those suggestions, then, members of the jury, that is the end of it unless there is other evidence.

Let us take a situation in our case. My learned friend, Mr. Steel, says to Captain Pyrke, "Let us assume the following, that the Goldfinch was 1.55 miles north of Ching Chau and let us assume that the Flamingo did not come straight after the separation line

but went across. We know where the collision point is approximately. So draw a line across that part." And then there was the discussion about collision regulations, crossing regulations and that sort of thing. Now, that is grand if we have any evidence at all of 1.55 miles.

The only thing we have, members of the jury, is this: the gentleman who was Mr. Young, I think, on the Sao Jorge who was on that jetfoil said between 9.13 and 9.15 he saw a boat about half a mile away north of it, about.

Now, suddenly, my learned friend who up until now has taken a great deal of pains to say that people can't accurately assess distances -- suddenly about half a mile away becomes half a mile. We then draw the line -- We then have the sighting of the Sao Jorge up north of that line 1.05 and a half a mile, makes it 1.55, draw a line and there we are.

The trouble of that is (A) he puts the witnesses at that sort of estimation you can't work on, (B) Captain Pyrke says, "If he was half a mile north at th t stage, he would continue on a bit further north anyway. And then finally in the statement of the 1st accused who gave a statement, remember, sometime after the event, he puts his distance at 1.2/1.3 miles north of Ching Chau, another figure.

So 1.55 is a figure that comes from a series of assumptions. But what I am saying is this: where is the evidence for anyone to say 1.55 north of Ching Chau if there is a statement from the 1st accused that - if there is anything in the statement, he says, "I was 1.3/1.4 miles away," not 1.55 or 1.5.

So the lines change, the times change if you take into consideration the other factors. You can draw inferences as to why and you can say to yourself, "Well, all this is all very well but it is built on nothing. There is no evidence of that particular distance." That being the case, we use our common sense and ignore it.

You see, members of the jury, also when you come into this court room, we ask you to bring your understanding. We ask you to bring your knowledge of the way people react and operate, the way human beings behave, your knowledge of the world. You are men of the

world and that is what you are doing.

Now, men of the world know that, members of the jury - and our kids do it and we do it a lot when we grow up. You come home and you find your child has put his hand into a sweet pot that he's not supposed to and has broken it, and his reaction, if he has been caught, is: "I did it but...,"if he is not caught, often to deny it altogether.

We don't change that much as we get old frankly and the "I did it but" syndrome is with us. I mean if you have an accident between two cars on the road in Hong Kong and you can bet your life that no one is to blame. The chap that runs into the back says "Yes, I ran into the back of you but, man, you just stamped on the brake so quickly, I didn't have a chance to do anything else," or alternatively the other chap says, "Yes, I stamped on my brake but there was a woman in front, we couldn't do anything about it," or "You are going so fast, you fool that you slid into the back of it," and so it goes on, the "I did it but" syndrome.

But when you think in terms of "I did it but", remember this, the stories usually bear a relationship to the facts. You see, in the collision situation I am talking about, you wouldn't say, "Well, you came in from the other corner and slid into the back of me," or you wouldn't say, "You weren't behind me at all." You rationalize the situation that you had and put the best complexion on it for yourself. That is a normal reaction. Maybe, it is not commendable. Maybe, humans are frail and we should not do this sort of thing but you know and I know that kids do it, we do it and that nothing changes a great deal as we get older.

Now, in this particular case, you have to decide, members of the jury, whether these accused persons were grossly negligent and their negligence caused the death of Madam Wu.

Now, the Crown case is that these two boats had held for a considerable period of time a collision course. The Crown case is that they more or less in that sort of situation held and continued to hold a collision course. The Crown case is that it was a bright clear day and that if a proper look-out had been kept by

the boats, some evasive action could have and should have been taken and was not taken and that people who operate these boats are qualified men and that we are entitled to expect of them a certain standard.

Now do we then seek to prove this case? We say we prove the case by saying, "Well, of course, first of all, we look to Captain Pyrke and say, Captain, what are the proper standards? Tell us what a man should do. What are the ways that things operate?" And when we say, "Well, people often don't do it." I mean when we put ourselves into the hands of a 747 pilot, we are putting in the hands of a helmsman of one of these boats, we are doing it and he has to be a qualified person and that person is required to exercise caution, skill and diligence and we say in this particular case that he has not done so, not just marginal, it is not just a slip, what we say is the conduct in this case is more than the ordinary negligence that you have. The conduct in this case is gross. It is the sort of thing which is horrific. When you say to yourself, "Look, one can make the odd slip but to do this is so extraordinary, it's so extraordinary that you would call it gross and his conduct to a professional man of this nature is a gross lack of duty of care because what could have happened - either they didn't see each other which means a lack of care, either they saw each other but didn't think there was any risk which indicates a lack of professional skill of the grossest nature or they saw each other and were prepared to take the chance which indicates another gross and when we talk in terms of passing at that sort of speed in that sort of boat, also grossly negligent.

Now, you do not judge, members of the jury, let me make this clear, you do not judge a man's negligence on the results. You judge it without those results. Simply because a person dies doesn't mean it's gross negligence but what you can say to yourselves is this, that varying on the responsibility so is the standard of care required to go up. You have to, if I hand you a Ming vase and say, "Don't throw it in the air," and you do, you are being grossly negligent. If you throw a tennis ball into the air, you are not. It varies in proportion to the damage you do.

We are talking about people who are taking on board people to travel backwards and forwards to Macau through a heavy, heavy traffic sea and these people have to hold themselves out as possessing a special skill and knowledge to get the job and they are expected to use caution, they are expected to use diligence and skill and care. Now, if they are marginally beyond that mark, then it is not gross negligence but if you feel at the end of the day that it is conduct which takes itself beyond the normal or negligent and takes it into an area where you think it really is an offence to society, conduct of that nature, then in those circumstances, you are asked to return a verdict of guilty of manslaughter.

You see, members of the jury, you have two functions as jurors. At the end of the day, you are here to see that if there is a reasonable doubt, these persons get acquitted, and a doubt with reason. You are also here to say -- be here to represent the community. You are the end point of the whole machine, as it were, the focal point of this machine, the law and force of the machine comes to you. It is for you to judge and you represent the community as a whole and for you having sworn now that if you are satisfied at the end of the day that one or all three of these men acted in a grossly negligent manner, then you have a duty to return a verdict of guilty of manslaughter.

We know from Captain Pyrke that there are certain standards applied elsewhere and we know from Captain Pyrke that he holds those same standards as being the proper standards. You do not base your judgment on the slovenly. If you are a doctor and you go to a place where all the doctors are drunks and you behave as they do, that does not forgive you if you are grossly negligent. If there is any suggestion that other people do not do things, it doesn't permit you to behave in a particular way.

Remember the only witness that we have heard from, apart from Captain Pyrke, of course, was Mr. Young. You know how much care he took. He took soundings, radar, all the other things. That is how he operates, in a purely and strictly professional manner. Surely he is driving the boat 10 knots faster but he acted in a professional conduct.

The problems are caused in cases where they are the milkround jobs where there is no routine where people are not doing their jobs properly that you have situations of gross negligence if that is what it simply was and no more.

Before I go on to the evidence, members of the jury, I would like to sort of, if I may, dispose of what I would call a few red herrings. It has been put to you the map, the drawings, the measure, 1.55 etc. all that sutff. Members of the jury, I have already mentioned this: it's based on nothing except assumptions, it doesn't assist you. Captain Pyrke told us, "Look these collisions regulations are not navigational matters at all, they are visual matters."

So insofar as you have had drawn across in front of you this map, you don't need it, members of the jury and it does not prove anything because it is based on a number of assumptions. There's one line on that map that I would submit to you that you can rely on and that is the line drawn by the man who did it properly, did it at the time through the radar and that is the course of the Sao Jorge and he tells you where he was at the particular time and what he does do by the way is: give a time such that if the time of 9.26 is right, he would have been either around the place or just near it. In fact, he passed the Flamingo at 9.27 further along. So we have suddenly a bit of time to play with.

So actually, what I am saying at this point, however, is: ignore the map, ignore the lines except the one line where it has been done not from assumptions, it has been done by the man on the spot using the machines that are fixed to do this sort of thing.

It's also put to the various witnesses this business about no one can judge distances it's notoriously inaccurate, don't take any notice of it, it seems to -- with the greatest of respect to my learned friend, he wants it both ways, he wants to accept the half a mile from Mr. Young as being written on tablets from the mountain, on the other hand, any other measurement is written off as being inaccurate.

First of all, let's think about this. The

statements that are given by the accused are given after the event with time to think about it after lots of discussions and sometimes with solicitors -- on one occasion with the solicitors, they are given after time and consideration and they are given by people whose business it is to sail ships. Not talking about me judging the distance of this court from which I can't, we are talking about professionals who give their views and they are speaking after the event when they have had time to brood about it, think about it. When you look at these statements, look at them not from the point of view, "Well, these distances are necessarily inaccurate," but these are statements made by people who are professionals who had made statements a long time after the event and this is what they tell the police took place.

The collision regulations were mentioned and one of the things put by my learned friend was this - the collision regulations - they bear no common sense basis, do they? I mean there is no reason why you should drive passing the right or left, that's quite right. There is no reason why you should drive a car on the left or the right hand side of the road either but we do, we do it because by that method we can control the movements, our movements of cars and we know the rules and we know how to behave and operate. That's what we are talking about and they have the basis of common sense to that extent.

Now, the other thing is, there has been mentioned throughout this case of what a boring job it is, how tiring it is to keep watch and references were made to a book about seamanship. Members of the jury, this job is not compulsory. You see, I mean you are a seaman, you take on a professional job and you go ahead and do it professionally. You are expected to do your job. Captain Pyrke doesn't suggest that the watch-keeping officer stands there a la Falklands. What he suggests is that if you see something that could cause you harm or damage, bearing in mind fast going travelling ships, that you should keep your eye on the thing, if there is an awful lot of stuff out there that you don't have to worry about but the stuff that you do worry about, keep your eye on - that doesn't require that sort of concentration because there are a limited number of things

that can affect you - that the ones that do affect you, then, in those circumstances, do something.

Look what we have to do really when we think in terms of this, we tend to -- possibly sort of tend to relate ourselves to analogies in relation to cars and the car analogy was made, it bears no relationship with cars. There's no road as such and the fact is: we are talking about the sort of tests to drive a car which my daughter is about to sit - God help her so - and she'll probably get it but that doesn't make her the sort of driver that one would consider a professional or skilful one and those who get in with her better love her dearly. Frankly, on my own experience, certainly. The reality of it is don't think in terms of car terms, think in terms of a highly specialized piece of equipment being driven by people who have to be highly qualified to get it onwards where clearly navigation collisions and the danger of navigation is impressed upon those people all the time.

Those rules are rules of good sense. They are rules which apply but they are not navigational rules. You look, you see and you see, according to Captain Pyrke, he says, "Yes, distances are a bit hard but you can tell aspects. You can tune green or red. That sort of thing, you can spot instantly. You can make that sort of decision if you've got that sort of ability at all." Those are the decisions when you start looking at these statements, you look at them from that point of view, not that these statements are made by professionals, they are made after a considerable period of time, they are made thoughtfully and they are the things that they present to us as being voluntarily made by themselves.

Now, we, the Crown, allege that these two ships approached each other for a considerable distance without taking avoiding action and eventually collided. Now, that means, as I have said, that either they didn't see each other or they saw each other and failed to appreciate the risk or they saw each other and decided to take the risk or a combination of all three, perm any two if you like.

Now, this situation from either point of view, from any point of view, is grossly negligent from both boats. What we know for certain is there is such a mass of evidence. What do we

know for certain? We know this, that it was a perfect, perfect day, visibility stretched as far as you can see, flat, calm, beautiful sea, mirror type situation. We know approximately where it happened. We know it was Captain Kong's second last day at work for this particular company. We know that the final angles given to us by the experts are between -- and there does seem to be a great deal of dispute as to -- between 50 and 80 degrees' impact, Flamingo struck by the Goldfinch at that angle. We know that they are both flying up until just a moment before when there may have been just some change in the Goldfinch. We know that from Mr. Young that the times that they give are inaccurate. We know also that after the event there was a meeting which involved the 1st accused and the 3rd accused and some others and we know that during the course of that meeting there were discussions as to what to say to the authorities. We know that the following day the 1st accused and the 2nd accused, the man who has now been acquitted, we know that he went and signed, they both signed the log book which gave a description of what they said happened. We know that after some time the accused, the 1st accused gave a statement contradicting the first log and we know that D3 and D4 gave statements to the police after the event.

Now, what evidence do we have about this run-up?

Now, members of the jury, let me start off by saying this. Thre is no question that there are conflicts in the evidence of the civilian witnesses and the sailors, that there are conflicts and they vary from each other. Now, members of the jury, if you care to compare them all bit by bit, what you are left with at the end of the day is this: there is ample evidence, ample evidence, members of the jury, that the impression left is of this long straight run-up into a collision position with the exception of the two sailors. Now, impressions -you might say, "Well, that's a bit, a bit off, impressions over all impressions" I'll go through the civilian witnesses in a moment bit by bit. But before you start thinking in terms of writing off people simply because they contradict each other, let me say this, that

human memory as to details is fallible, of course, but you are often left -- although you may all disagree as to the particulars, you can all come to the view of an impression which is unanimous and consistent with each other.

You see, look, members of the jury, let me give you this little test to do. You have been asked and you have actually sworn an oath to sit listen to the evidence and come to at the end of the day a finding. Now, you are charged to do that. You have done it conscientiously, you've sat there, you've listened, you've done it for three weeks, try this test, and no one doubts for one moment that you can give a proper and fair verdict; system operates on the basis that you can and do and will do just that. However, if you care to, when you go into the jury room, take this little test, sit down and try and write down the names or, try now, the names of the witnesses that we called and what order they were called or, forget that, try and remember, if not their names, the number of witnesses that were called and on which days they were called, try and remember the dates we had off, what time we finished, try and remember all those factors and just see the variations that you'll find between you but that doesn't prevent you from reaching a proper and fair verdict.

You see, we don't have video type minds that photograph things for instant record. We see different things in different ways but if you have a bunch of people who have - "Look, I can't remember exactly where it was but it was coming straight up,"and someone else says, "I cannot remember where it exactly was but it was on a collision course." and you hear that from people, no suggestion of dishonesty has ever been made, more particularly what is it going to be suggested: were they all mistaken? Members of the jury, we rely on those sort of recollections each day ourselves. We don't have to give it in inches.

If someone runs into the side of my car, members of the jury, I can discuss it with my passenger and we can say between us that the thing was going too fast but when we try and decide which lamp-post it was at and where it was in relation to it, we will be left with an overwhelming impression of what it was all about.

Now, we had witnesses. There's one witness, superb witness, members of the jury, the chap that was with his friend Cheuk, I'll come to him, I can't remember his name, you see. Now, remember him and he talks about this thing going for five to six blocks, using the American five or six blocks' concept.

If you run through the evidence of those witnesses and just let me run through them so I can remind you. The first witness was in fact the husband of Mrs. Wu and he said that when he saw it, it was almost on top of him, he was sitting downstairs, it was like that, aiming for his back, right, that sort of angle, talks about a brilliant visibility everything else, he can't be sure of the angle, he only saw it a short time before.

Now, the next man was Mr. Cheuk. Now, Mr. Cheuk, by the way, when we talk in terms of distances, he is the gentleman who said, "Well, I'm not too good at distances but it was about the diagonal of the Hong Kong Stadium." Long, diagonal of a football stadium is quite a distance. So that is his recollection and his diagram as he looks - that. They are all talking about the boat by the way, this one, that keeps on going straight, no question, that they all sort of say that.

He, when asked by my learned friend, Mr.Steel, about this, said, "Well, I saw the whole of the left hand side of the boat." Impressions - "Directly coming at me. The diagonal of the Hong Kong Stadium and I can see the whole of the port side of the boat." As he spoke to his friend he said, "Why is it sailing in this manner?" Now, he talks the time there is six seconds, etc. He talks in terms of no turning of either boat.

Mr. Edmund Tsang is the man I was thinking about. He talks in terms of four to five hundred yards, 6 to 7 blocks away and he talks about a collision situation, a long run in and a collision situation.

Now, he says that he had time, he spoke to his friend about it, they discussed it. Now, don't talk about seconds because how long is a second, how long have I been talking and how long did it take me to say what I mean to say, how long have you been here, how late were

you, minutes when we start talking in that sort of assessment, members of the jury; you are asking too much of a human mind. We don't compute, we think. We observe, we absorb. That's the human mind. That's what makes it different from computers and makes it maybe inaccurate but leaves us still with the sort of impressions that we know what is going on.

Now, we have also the evidence of -- granted, Mr. Ho Ngau. He is the sailor and he talks about this, as far as I recall, and then we have Mr. Marriott.

Now, Mr. Marriott, no doubt, a great deal will be said about him. Do you remember when I opened to you at the begining of this case, I said then, "We have a man who has got some experience at sea and he will tell you all sorts of things. He will tell you it came towards him and it was coming straight at him." When he got into the witness box, in all fairness to Mr. Marriott, he put the accident way off the side of the map and gave the point of impact and the time indicated totally incorrect, but what he did say was this, "I saw the thing when it was miles away, say, a few miles away. I next saw it when it was almost on top of me," and he says this, "It took me a while to take it in. Things like that don't happen." That is the sort of feeling that you get, you know. You don't measure that. You can't put seconds on it. You can't put the time on it. That sort of thing don't happen and it did happen, members of the jury, because bear this in mind, you see, look, what is out in those waters?

There are junks, there are big ships, there are rocks, there are islands, there are all sorts of things, pleasure crafts. What we have is in this broad expanse of sea two boats from the same company which are clearly visible to each other, miles away, collide. Extraordinary situation, absolutely absurd situation so absurdities really do follow; what are the odds of hitting it at all, and secondly, what are the odds frankly of hitting each other.

You see, members of the jury, they are boats that travel very fast, boats which are a danger to each other as Captain Pyrke explained. If you run on a street and you are dodging around, you are O.K. provided you haven't got

another man running down the street towards you and then you are in trouble of running into him.

In the context of Mr. and Mrs. Marriott, their response was that this thing was coming straight up, 30 or 40 feet away.

Evidence as to that last business, negligence. Accept that. But it was safely away granted he is out of his course, he is out of everything else but things like that just don't happen, fair enough.

Sandra Marriott says something like that and then, of course, we have the seamen and then we have Mr. Kwok Sum. Now, he is an interesting man. He is the man who turned up last, remember, came in after the event. I mean he would have failed your test because you have all forgotten Mr. Kwok Sum. After all,the evidence has been given, he came in at a late stage to give evidence of what happened. He's the man downstairs who had read his newspaper, had a nap, looked out of the window and he saw this thing several hundred yards away. He was surprised at the way it was travelling. He said, "It's going to collide. " just as Mr. Tsang upstairs said, "It's going to collide." They saw it - "It's going to collide." and lo and behold, it did.

Now, the radio officer does not tell us anything about the collision itself nor does his friend, Lo. He told us about the meeting and then we have the last two sailors. Before we get to the last two sailors, let me ask this question, members of the jury, you can, if you wish, take all those witnesses and do a pattern and you can, if you wish, if you seek to demolish - and it is easy to demolish - you can put them up and compare them but are you not left in the situation that the jury is left in?

Look we can't remember every word that was said. We are not expected to remember every word. We remember the salient points. We remember the evidence generally. We know what this case is about. We are in a position we understand it and we can give a verdict, we cannot pass an exam on it but we can give a verdict. The overwhelming impression of those people is that, well, you say, "Is there

anything to support that? Is there anything that we hang our head on?" The answer to that, members of the jury, is this. Yes, we have a piece of what I call physical evidence, the stuff that you can touch and taste and lean on if you like. That piece of evidence is the evidence of the experts, the angle being a fairly broad angle, they say, right?

Now, let us take another piece of evidence: when the boat, the 'Goldfinch' was in fact found, it had the instruments on a port turn, right? That is the evidence. It could have had later, it could have had all sorts of things - we know the suggestions - but it could have been the way it was the last moment. Our expert, Captain Pyrke, says to you -- had there been a port turn at the last moment and the thing was coming down - do you remember the evidence is just before the actual collision, this one is coming down - it could have been a broader angle. In other words, the 60 or 60 to 80 degrees could have been broader.

Now, let us go back to the point I was making earlier. Do you have anything to support that proposition. It is not just the impressions of those witnesses. It is not just the angle of the blow and the mechanical part of the thing but we can go to the very source itself. We can go to the man who was there, who in his logbook -- remember "I did it but" when I told you when you are thinking up excuses, you rationalize it and put the best complexion.

There's been a meeting the night before at the Hong Kong Hotel that one of the witnesses told us about and at the Hong Kong Hotel this man is said to have said that they are arranging a story. Now they are not going to arrange a story that is going to put them into trouble. Common sense indicates that they are looking for the best story. In other words, let us take the situation as it is, what story can we give to sort this thing out and the 3rd accused said, "He came in....(inaudible)" So the logbook.

Let us look at that piece of paper. It is extremely relevant which is this exhibit which is taken from the logbook which sets out the extract. What does that -- it is only a few lines there which are relevant or important, that relevant and important they are because

he says:

> "0926 V/L sheered to star'd at rate of 5°/Sec approx. D/O advised master of the incident and at the same time master tried to put the vessel on course again but no response. With port flap pushing forward and starboard flap aft and rudder on port helm. Stop engine."

So this story is the other boat, no suggestion of the other boat moving at that stage, the other boat was coming straight on and suddenly for a mechanical reason he does a sharp turn, fights against it and banks and he says, and this is the point I am interested in, he does a port turn just before it.

Now, put those facts together, with your impression of the witnesses and what do you have? You have - you just don't ignore the evidence of honest witnesses who saw what they saw and are left with that impression, you test it against the expert and it fits almost except their angles are a bit broader but then if you look and find out the reason, it may be broader, may be broader, is because of the way this thing was aiming them. Given that situation, you look then at the man who is steering the boat when he writes his official log and he says, "I put it to port just before collision."

Now, members of the jury, this leaves us, of course - no doubt my learned friends would point out - the two sailors, the two men sitting on the back of this side who give the story of a sharp turn and an instant impact. Bearing in mind that those two men are sitting at the back of the boat looking backward, when they look, what brings it to their attention, when they are apart and they are sitting down, what brings it to their attention first is the turn, the wake so that whatever time factor we are involved in and they did say so before -- immediately after the impact, whatever time factor we are talking about, the time factor does not start from the beginning of the turn. It couldn't do because they wouldn't see what one man describes as a signal. It couldn't be because they couldn't see what one man describes as the turn into the Macau Ferry Wharf.

So it may be, members of the jury, that the stories do not - it's the view that you can take - the stories are, "Look, one chap sees the thing do a sharp turn fits the Captain's story. The other sees it coming towards it."

Now, that doesn't fit exactly because he's talking about appearance but certainly talks of a sharp turn and remember he is telling us a story which he now denies. I mean, this isn't even written for D1 on the tablet. It's written by D1 and denied by D1 for various reasons which I'm coming to in a minute but the first rationalisation of the situation by the 1st accused when confronted with the realities of an accident is to have a meeting and after that meeting to go along and sign that statement. No suggestion of turn by the other boat, no suggestion of anything else but a veer, a sharp veer, a veer th t is so sharp that our expert says, "It couldn't be." the impression being a boat out of control and "that's why I went off my course and went into the other one."

Now doesn't that give us a view of what may have happened or did happen on that day? Doesn't that fit - you see, we are not, members of the jury, we are not marine experts but we don't have to be. We don't have to draw plans on a map especially when the plans on the map work on assumptions but we do have to use our common sense. We do have to think in human and personal terms, and in human and personal terms there's this man's story. I didn't produce it, you didn't produce it, he did. And why does he produce it, members of the jury? Does he produce it because he says "I was a bit confused at the time"? Amazing this confusion actually but we will come to that in a moment because it seems to permeate right through, this confusion, always leave yourself a way. He gives a reason for changing this that he was confused but that is what he did and he did it after consultation. He did it after discussion.

Now take a motor vehicle case. If you are hit in the back, you don't invent someone coming from the right. You either say you were going too fast or "someone leapt in front of me" or etc. The permutations are enormous. But you take the basic facts which you at that stage feel you cannot dispute and add to them.

Now that changes later on as the story changes. But it all comes together. It involves, of course - when you do this, you say to yourself, well then, there are some conflicts in the witness's statement but there will be conflicts in those stories just as there will be conflicts in your recollections of what happened in this courtroom. But it doesn't affect the fact that you are capable and able of doing your job and doing it effectively, properly and well. And that is what you have been charged with and I am sure that is what you will do because you are the same sort of human being that stands on the side of a boat, looks out and is left with that sort of impression.

Now, we know also - members of the jury, you see, the other thing that fits is this, that story doesn't fit the straight line syndrome at all. That doesn't fit the straight line syndrome, can't fit the straight line syndrome but let's look at the times, for instance. Let's accept for the moment in my suggestion to you that the one man who can tell you accurately what was going on before the accident is Mr. Young, the man with a radar, the conscientious navigator who is doing his job as he should be doing. He sees the Flamingo at 9.27, the accident could have been 9.26 and that fits because if the Flamingo takes 27 minutes to get to the spot where the accident took place or thereabouts on other trips, then it is fair enough to assume, and no one is disputing this, but if the Flamingo stopped to get rid of rubbish, backed up, came onwards, forwards again before starting, we have got a bit of time to play with. We also have, if we are going to look at Mr. Young's evidence that there was a half mile separating them, we also have the evidence of Mr. Young who says it was going in that sort of line. So it's sort of heading due north, northish.

Now anything could happen after that. But the reality of it is there is time for some sort of - that type of thing. Not a straight line. There is time for something to have happened.

Members of the jury, also if you for the moment talk not in times because, you see, both the

sailors can't be right and Mr. Tsang can't be right about the length of time they are coming straight in. So if you say well, the sailors sitting at the back, they don't notice anything until it turns well and truly starboard, this they couldn't do because of the sickle shape. By the time they look around their impression is the accident happened straight away. But remember the other man, the man who got behind under the seat and held on. He had time. Mr. Tsang had time. Marriott went looking for his kid. He had time. So that, members of the jury, that time factor - and the fact that the times on the overall route are such that it does not account - it doesn't provide for a straight line situation and provides for the possibilities that we talk about in the Crown case.

Now whatever the evidence or whatever the situation - I mean, I am putting to you this proposition, members of the jury - but whatever the proposition, the situation you find as a fact, what you can find as a fact whatever happened before etc. doesn't really concern you because the Crown case doesn't have to go back to that. The Crown case is, look there was a long run-up, there was a period of time, a considerable period of time when these two boats were on a collision course, and that the witnesses who were on board that boat say that it was running straight and didn't deviate before the event and the other one was coming at an angle towards them of about 45 degrees. There is overwhelming evidence of that.

Now what does that demonstrate, members of the jury? Forgetting all the rest, it demonstrates that either they didn't see each other, because the other thing is absolutely certain, except for momentarily before the collision happened, there is no evidence of any immediate act to avoid the collision. You see, there has been a suggestion at one stage that it may be that the Goldfinch was forced into a position of turning in by the conduct of the Flamingo Now think about that for a bit.

You see, members of the jury, if the Flamingo was travelling along in a straight line and the Goldfinch had to make a sudden emergency turn a la the Macau situation and he collided with it, it means that he deliberately - not

deliberately, I am sorry - he turned from a course that would have been safe because had he not turned and done this incredible turn that the sailors are talking about it would have gone behind.

You see, if this one is going in a straight line here and in order for this boat to turn into it at that angle, if that is what is being suggested, that is a crossing situation, and he was forced to turn to starboard into the boat, then he had made an enormous error of judgment. If he had gone straight on he would have missed by a mile. He would have missed behind. If he is turning in for that reason, then he has turned and caused the collision, because the turn - it only takes a second for it. This thing is a hundred feet long, travels at 54 feet a second. It takes a second for half that boat to disappear if that is what is being suggested. And I will come to that in a minute because there is absolutely no evidence of that. There is a bang and it is caused by this boat sliding into and banging the other one.

But insofar as the Crown's case is concerned, it is this. There is no doubt at all, forget a reasonable doubt, that there was a collision running for a considerable period of time, that the witnesses as to that are accurate, their impressions are accurate and that you can so find. Also you know that these boats can stop and these captains are familiar with their boats. They drive them day in and day out. They come in and out of wharves. It is not as if stopping suddenly is a big event. It is a run-of-the-mill event. My Lord asked that, putting it down as such. Normal sort of stuff, like coming into the wharf. 250 feet stops you altogether. Going down on the hull stops the speed from 32 to God knows what in a very short space of time. There was none of that by either one. There was no deviation.

Now if they saw each other and proceeded to go on, they are taking an unacceptable risk and being grossly negligent. If they didn't see each other, either way, then they are being grossly negligent. If they said we see each other but we are going to take a chance anyway, then that, in the circumstances, this type of situation is also grossly negligent.

You are dealing not with an ordinary craft. You are dealing with a craft that carries an awful lot of people, travelling at high speed. To take that sort of chance, not a dodgem car, this is life. These are sailors. These are qualified men who are supposed to be doing their job.

Let's look at it in fairness. Let's look beyond the first statement of D1 and let's look, as the Crown has done throughout this case, and look and see if we can find some explanation in the evidence or statement of Mr. Kong who -- By the way, you don't - I repeat again, we put these statements before you to indicate that they have been made by these people. We do not say that they are accurate or true. We simply say these are the statements made by these persons at that particular time. Make of them what you will. We say they are at least not accurate.

Now in relation to the 1st accused he gives his statement on the 3rd of August. Not the day after or two days later, 3rd of August he gives a statement to the police. And if you'd look at that statement, members of the jury, his story is set out at page 3 of it. Page 3, at the top of the page, he started the paragraph there by saying - first of all, he says that "I found Ching Chau was quite far away from my boat, in my estimation between 1.3 and 1.4 miles." Not 1.55. Not 1.55. 1.3, 1.4 makes a difference if you draw a straight line onto the map, members of the jury. It makes an enormous difference to the sort of situation we are talking about because eventually if you go 1.55, of course, you end up in a gray area and all sorts of things would happen. 1.3, 1.4 changes the complexion altogether. Well, let's leave that because we have already dealt with that.

The next paragraph, "I estimated" - sorry, going on - "I estimated that both vessels had passed Fan Lau Tsui about 4 to 5 miles away" and then "a jetfoil passed on our right". "At that time I found that my boat had deviated in the normal course to the north". Now, interesting sort of concept because the normal course is about 1.3, 1.4 but he says that he is 1.3, 1.4 and he deviated north. They then altered course to the starboard, heading towards Siu Ah Chau.

"Then I found the hydrofoil in the opposite direction to ours was travelling in a straight line."

Now our expert who reads this thing is a nautical man, takes "in a straight line" as being "head-on", "directly ahead". "At that time the distance was about 4 miles. I remained on the same speed and route until we were two miles away, and then I altered course to the starboard side slowly towards Niu Tou. I put the position of the boat from the opposite direction at 10 to 15 degrees portside of our boat. We kept on sailing. However, I noticed that there was no significant change in the relative position between my boat and the boat from the opposite direction. At that time we were about half a mile away. So I altered my course 7 degrees to the starboard side. Then I maintained my speed and the turning of the helm until the relative position of the opposite ship was about .2, .3 miles to about 30 degrees to the portside. I then checked the rudder indicator, the revolution indicator and the flap indicator on the switchboard in front of me. When I saw the opposite vessel again she was about two to three hundred feet away, about 2 to 4 points on the portside. Under these circumstances she was trying to pass me from my bow. I at once ordered to shut the engines."

Now when first read by Pyrke, he said "Well, it looks to me as though the suggestion was it was straight ahead, that the boat Goldfinch was turning and as the Goldfinch turned there was a mirror turn by the other boat. That is the only way you can explain it." There is no evidence to suggest that is right nor if you'd look at this - members of the jury, you see, it is all very well to say, well, the old regulation used to be that if you saw a boat on a collision course and you had the right of way you had to hold on and do nothing and leave it to the other boat to get out of the way until you reached the point where you realised that the other boat couldn't get out of the way by itself, and then you yourself had to take appropriate action. The agony of the moment sort of situation. That statement, whatever it says, doesn't talk about agony of the moment, watching something at the last minute and then turning. What he actually did was looked out and checked his machines, checked his instrument. No suggestion in that statement

whatever else it does say. And if you want to interpret 7 degrees helms as 7 degrees one way or another, 7 degrees doesn't really matter. The fact is read that statement because you have in effect story one, mechanical failure; story two, straight ahead; story three, variation. Straight ahead doesn't necessarily mean straight ahead. It means over to one side; and story combination of agony of the moment situation, poor chap had to turn into an accident.

It is read by someone and it is interpreted in the way that Captain Pyrke interpreted it and then various variations were put on. But there is nothing in that statement to suggest, in my submission, that this was a situation where a man realised that he was in a collision situation with the other boat and he was waiting to see what the other boat would do and at the last minute, he was going to take some sort of action. Not a bit of it. What did he say? "I then checked the rudder indicator, revolution indicator and flap indicator on the switch-board in front of me and then I saw the opposite vessel again. It was two or three hundred feet away." Looked away. Now, agony of the moment? Where? You just can't put that sort of situation. Sure the rule used to exist but it had changed by the way. But you can't put that suggestion to Captain Pyrke and make it evidence. You have got to have something, members of the jury, to lean on, to hang your hat on, somewhere, somehow, something to say, well, there.

The sailors, two sailors on the boat who were looking out the back say "well, there was a sudden turn and we collided." That sudden turn, if that is right, that sudden turn was into and took a considerable time longer than is suggested here and turned into the crash.

In relation to the meeting -- Now when you look at this statement you also bring your common sense to bear on the other passengers because the same man who is giving his explanation on - this explanation to the police at that stage says at page 6 - we don't have to be sailors to read this part, members of the jury. We can read it as human beings with the normal common sense that we have in our everyday affairs and look at it.

About the 5th line from the top, "Up until 7 to 8 pm that night I received several telephone calls from my colleagues, asking me to meet them at the coffee shop of the Hong Kong Hotel at 10 o'clock that night." That is not the evidence of the radio officer. The suggestion there is "someone else, not my idea". "I cannot recall if I had asked them over the phone the reason for this meeting."

Now members of the jury, you know, I mean, how much does one have to swallow to accept that sort of evidence. I didn't ask the reason. He has just had this horrific collision in the middle of the ocean. He gets calls, according to him, from a number of people who want to meet him that night. He doesn't remember if he asked what it was all about. And then it goes on to say - read further down.

"About 10 o'clock my colleagues arrived...the first engineer, 1st mate and radio operator who were in the same shift with me and the 1st engineer and 1st mate of the opposite vessel, 'Flying Flamingo'. I cannot remember if a person was specially appointed to preside at the meeting nor can I remember the subject that we discussed." Dear me! "I can vaguely remember" - vaguely remember - "we talked about the collision and our health."

Members of the jury, please bring to bear your knowledge of everyday affairs when you read that particular statement. Didn't know what it was all about, "I vaguely remember it was to discuss our health." Now, you know, at what stage are we supposed to start considering? And then, member of the jury, this man who signs the first log, he says at page 8 - it was put to Captain Pyrke - well, he said when he came to see you - Wait a minute. Sorry, Mr. Lee, he made it clear that the log at that stage, he told you, was inaccurate and wrong. Now read that statement, page 8.

"Q: On July 12 in the shipping company you put down in the deck log of that boat record about the collision of "Flying Goldfinch", do you think the record that you had written is correct?

A: Because at that time my mind was very confused, I am not sure whether it is correct or not."

Now then he goes on at page 9. "How (why?) do you think it was incorrect?" "Because at that time my mind was confused." He gives reason. He says his mind was confused. It is interesting that confusion, members of the jury. It is a confusion which says "that accident wasn't my fault". I was confused enough to say that this boat had mechanical problems. I was confused enough to say that it wasn't my fault at all. It is an amazing bit of confusion especially when you bear in mind that the radio officer told you that he was a very active participant and was asking people to fix a story. That is what we are talking about because we have - there is no question that the coffee shop meeting took place and it took place on that particular night involving the crews of these boats excluding Captain Coull. And the following day, lo and behold, down they go and write this log, putting a complexion on it, knowing where it is going. And when the thing -- Because at this stage, you see, it is now - time has marched on, things have changed, so we have a second story, and a second story which you can read, which is read by the expert as being the head-on situation which puts the blame on the Goldfinch -Flamingo.

We have shifted from a situation where he blames the mechanics. We have shifted from a situation where he blames the steering of the boat. We are now blaming the other boat, the mirror situation. And then trailed across all this mirage of stories is another one. The agony of the moment. Goodness me! There is an old regulation which says - an old regulation which says but that old regulation has no part in this statement..Secondly, members of the jury, in the circumstances of this particular case it would have meant an avoiding situation altogether.

You see, members of the jury, the law is a very sensible and logical thing. The law says to you, look, in the course of evidence in a criminal trial where proof is always on the Crown and heavily on the Crown, and we know the crime is not committed in the front - in Queen's Road Central, we allow juries to use their common sense and draw inferences from the facts and also to say to themselves, and quite rightly say, "Look, this man is lying. Why?" There is as much - there is a probative value in a lie. You see, let's take the first story. It is very interesting that

he puts it as a sudden sheer to the right by his boat. Isn't it interesting that he talks about turning to port?

Now we have got "I am very confused." Here is another story for you but, by the way, I am still confused because he goes on to say... Sorry, my Lord?

COURT: Would that be....

MR. LUCAS: If I may just finish this point then I will move on and then stop.

He goes on to say, by the way, although I am writing the statement now I am confused at the moment. In fact I have been confused throughout. Dear me! Extraordinary, isn't it? We are not talking about ten minutes after the event. We are not talking even the following day. This man who ran and conducted a meeting at the Hong Kong Coffee Shop, organizing a story amongst his friends on the night of the actual impact and didn't go into hospital until the Monday after and doesn't - gives his statement to the police in August, considerable time later, says "I am still confused".

What does that indicate, members of the jury? Does it not support -- You see, we are not asking you to take a pack of lies and say as a result of these lies therefore the other story must be right and you make up a story. What we have is a story put by civilian witnesses which fits, makes sense, fits the facts that are provable in a physical sense, fits the realities, fits the time and we have a story which then at the end of the day he puts which fits those and then he changed it. But we can say to you in relation to the second story, that second statement which tends to have shifted, he has moved from blaming the motor vehicle, he has moved from blaming the veering part of the machine, he has moved to blaming the other boat and the other boat is supposed to have either mirrored his thing or his conduct involving turns. And there is no evidence of anyone about a turn from the Flamingo except that at the end of the day there was found one of the things pulled back. There is no doubt it could have happened as my learned friend suggested, this, because there is no evidence of deviation. Consistently throughout, straight line one boat, this boat coming on a collision course. My Lord....

In the High Court of Hong Kong

No.7
Prosecution's Closing Address
(continued)

11.38 a.m. Court adjourns

11.58 a.m. Court resumes

Accused present. Appearances as before
Jury present.

MR. LUCAS: May it please you my Lord.

Members of the jury, if I may -- I am sorry I have taken so long but if I may continue just one particular aspect. I will - God help me having told you to discard maps - remind you of one thing on that map and that is this. There is at the bottom of Fan Lau Point a traffic separation. There is an obligation on boats going to Hong Kong, in other words, the Goldfinch direction, to go south on the southern line. So if you are north of your course you have to somehow get down to that traffic separation point, to go underneath Lantau.

Now the officers on board both boats of course are conscious and aware of this. Must be. We have the boat helmed by Mr.Ho and the watchman, watch-keeping officer, Captain Coull. Now both of those men in their statements say that they have a responsibility - the man in the left hand seat has a responsibility to keep a lookout. No dispute there. No argument as to that, that they have an obligation. Captain Coull of course is the man who is running late on his Sunday morning. Boats hold up for him to get there. Captain Coull is the man who has in front of him an open newspaper. Mr.Ho is the man who is driving the boat. Now they see ahead of them another boat - hydrofoil and they have an obligation which they understand, with respect, because they say so in their statements, to keep a lookout on it. Now look, when we talk in terms of lookout we are not talking about a terribly onerous task. Bear in mind that the responsibility is to see to it that those ships that can affect you are usually watched carefully until they are out of range. You see, members of the jury, this company doesn't employ walla walla drivers to drive these hydrofoils. It employs fully certificated captains and first officers. You do not employ an expert for the milk runs. You employ the expert for the unusual situation.

You see, when you do training of any

sort, the simple basic stuff we can all do, it is to handle the emergencies that one is trained for. And if the emergencies involve possible injury to life, that is a very different proposition. You see, if a man has a responsibility to carry a hundred odd passengers and all he is being asked to do is, look keep your eye up, not all the time, but if there is something that may affect you -- Now there is a boat you recognise, see it a long way ahead, up ahead of you, that could cause you - just keep a glance on it and see what happens, where it goes, what it does because it could affect you bearing in mind that it may have to go south in order to get to its proper position. If it has drifted north of its lot, go south.

Now they - these two officers give us stories which, one, is impossible inasmuch as Captain Coull told us that it was 45 degrees; and if in fact it was it could never have hit. And Mr. Ho gives a story which is contradictory because on one hand he said it is safe; on the other hand, if you draw a line from where he says it was it is not safe. It is clear that up until the moment before all this took place, these two men for whatever reason were failing in their duty, their responsibility. They were failing to keep a proper lookout. They have a responsibility for the unusual.

Do you remember the evidence of Captain Pyrke? He said that when the - on the channel trips they talk to each other. They are concerned about other fast boat. It is not the route. They are concerned about other fast boat. They are concerned and must be trained for the unusual situation. You cannot sit in that seat and keep your eyes closed. You have a function to perform, particularly its captain.

Now you have a graph prepared for you by Captain Pyrke. Well, there are many things that he did prepare for us in this case. It is helpful to this extent. You see, what is drawn on this thing and it is the - I am not sure what the number is but you have it.

There are two sheets on a graph piece of paper, whatever the number is, and it shows

on the second sheet a curve on the bottom end. It is worked on as this. The line that runs straight up and down the page, the centre of the page, is in fact the Flamingo coming towards you. At the bottom has been drawn a 3-degree turn, not a 5-degree turn, a 3-degree turn to turn it 45 degrees and then come in in a steady course.

Now if you look at the first dot line you will see a circle and it is marked 19 1/4 seconds. What that indicates is this. That is, taking the statement of Mr. Cheng who stands on the boat, as he says, and sees diagonally across on a collision course 500 yards away another boat heading on a collision course, and he says if that is correct, if it is a 3-degree turn, Captain Pyrke's graph demonstrates that from that point they would have been in view of each other for 19½ seconds. And if in fact the turning point was broader, in other words, sharper, 5 degrees per second or 4 degrees, 5 degrees per second they would have been in view of each other for 33 seconds. Obviously it is the situation.

Now members of the jury, remember that we are dealing with craft that can stop and all that you have to do to have avoided this collision at this speed was to put it on its hull. Now Captain Pyrke has explained to us that you have an obligation to make sure you don't get into collision situations. I mean, if you have available to you, and you are carrying the live of people, a safe course out, then the common diligent, prudent sensible person would take it. You don't flick a coin when you are dealing with this sort of safety factor.

Now the reality of it is that either they were not and did not see them, having seen them first -- you see, one of the things that is important is this. There is around the place a fast moving boat. They both know that. They both know that it has to at some stage or other go south. Also, they are trained. They are examined. They are taught that you'd look for the - if it can affect you, keep your eye on it. He's not doing this. There are not one a minute going by, or one every ten seconds going by. We are talking about a dozen hydrofoils passing each other sporadically. Keep an eye

on the thing. It's not an onerous task particularly. It is not a twenty minutes' trip on a warship by any stretch of the imagination.

Now if Mr. Ho is right about his directions, then he was getting into a dangerous situation and not bothering to look. If he's looked up and if he's thought it was safe, it was green to green and he ignored it and just went on driving and didn't do anything about it without looking, then he has failed in his responsibilities again because it's not, you see, as though one of these things could suddenly go and bump you. They can't fly sideways. They have to turn and in order to turn they have to be in view. And if you are just glancing across at the one or two things -- that's all he has to do. We are not asking him to take a movie shot at everything that travels along that place. We are saying to him, as a reasonably prudent human driving this machine, "Look,there is only one thing about the place that could cause you too much trouble and that's another fast-going thing that's coming in the opposite direction."

Now you are trained. You know what the regulations are. You know what lookout is terrible important. Look,it's important not because it's made up capriciously. You don't make rules up just to bother and annoy people. You make them up because of the necessity to make them up for collision and potential collision situation. You are expected to exercise the degree of skill that an expert in your particular field would use.

Now if you say, "Well, gosh, it's boring." then get out of the job. If you say, "Well, it's all a bit dull.", get out of the job. If you say it's tiring -- and how could it be tiring? Because it's not the sort of thing -- no one said in relation to these two anyway - but it's not the sort of job that -- really we are not talking about a terribly onerous responsibility. We are saying these two men are jointly responsible, the captain sitting in the left-hand seat who says, "I am responsible for keeping a lookout" and the other man says, "I, both of us together jointly, am responsible to take a look"; and they clearly didn't keep a proper lookout.

Now they could have stopped that boat. There was ample time. They are not allowed to sort of

take a chance, members of the jury.

You see, if I get into a 747, I expect that man to be able to handle emergency situations. That's what he is paid for. Before I get into one of these things, I expect him to operate properly, effectively, to be able to handle emergency situations that arise, especially when you got this length of time. It's not happening instantaneously. It's not a bump. Bearing in mind, this thing cannot veer off suddenly and bang into you. The angle of the blow demonstrates that it was a run-up situation.

The reality was that the people who are not paid, who are outside, who are outside looking around saw the situation.

During the course of any part of that time if that had been seen and some efforts had been made by this crew, and they had an obligation to do it, there would not have been that accident either.

Now if they had seen it and ploughed on, then in those circumstances they were grossly negligent because they had taken themselves into a serious situation of danger which, they didn't avoid it, had actually happened, but even if they had avoided it, it was the wrong thing to do. It was grossly negligent. You don't take chances. Say, the thing had missed by ten or fifteen feet. It doesn't make them any more careful. It just makes them lucky, but negligent. In this situation, they were unlucky and negligent and that is their responsibility, members of the jury.

We are entitled to expect the caution and diligence of a trained person to do what is not an onerous task. Now if they didn't see it -- and I opened this case on the basis of the tranquility down below and the rushing around upstairs. Well, you see, if people standing at the back and that the people inside, the old man that popped down out of sight, saw it, does it not indicate a situation which was - to use the word "seeable" would be ridiculous - that should have been seen by those whose function it is to see it? We are not saying to someone who's sitting there as a passenger down below, "It's funny you didn't see that boat coming towards you. It was going towards you for thirty-three seconds."

What we are saying is to the people who are up the top -- and remember all this business about not having a clear view and all the rest of the stuff. Captain Pyrke says in relation to Captain Coull this: that he would see it up to about there. He has got a wide angle from the front windows from where he's sitting.

Now Captain Coull would have a situation, "Well, this thing came in from behind and somehow I must have either missed it altogether in tracing." It's not so.

Isn't it clearly ridiculous that these two charged with the responsibility of a full load of people, travelling to Macau, took no deviating action at all? And isn't it clear that if that is the case and they have a duty and responsibility, not Captain Pyrke saying it, members of the jury, they themselves saying it in their statements, they have a responsibility to keep a proper lookout: "If I see a boat within the dangerous spot". All the right answers are given. They were not done. They know what the answers are. They gave the answers. They accept that they have the responsibility and they failed in their duty. Now that duty, members of the jury, is as clear as a bell and the consequences are such, it is such a gross act of neglect in a profession.

It's not asking your wife to look to see if there is a parking place in the car. We are talking in that sort of lookout. We are talking about a captain and a first officer, people trained and supposed to have the ability to take ships to sea, deep sea, who are trained that you have on the open seas extraordinary situations arising and in order to prevent those extraordinary situations arising there are straightfoward simple things to do. And we don't ask a great deal of you, but if you follow those simple basic rules, you would be okay. Not a great deal is asked. The situation is that it didn't happen.

They have taken a situation: we have got 132 people on board that day, travelling at fifty-four feet a second, can stop in two hundred and fifty feet, whatever the situation was in relation to where the Goldfinch came, whatever permutations you -- and permute any fifteen different varieties of situations,

once you have that boat crashing into the other without this boat taking any steps at all, it is by definition, absolutely by definition, beyond carelessness, but a reckless situation. You don't blindfold yourself to sit at the steering wheel. You don't blindfold yourself as you sit in a watch-keeper's chair. You can't. That's your job. That's what you are being asked to do: to keep a lookout. There are two people. They have a function. They are taught their function and they failed to do it and that it is not the sort of thing, members of the jury, that is a capricious thing. You know, there are some irritating little jobs that we have, we all have, which really don't make a lot of sense whether we do them or not. This one does make sense. This one is important. Keep a lookout. And not against the world.

You see, they are as aware of the fact. They exercised a new speed to get out of trouble. Great, provided the other boat doesn't have the same speed. They have in their view a craft, a craft that can cause them danger. That craft is sighted ahead and coming towards them. They are conscious of the fact that that craft may have to go to the south because it must be to the north of their course. Now given that situation, keep your eye on the boat just in case. What else? It's not as if he was suggesting he has got fifteen other duties. No one suggested that he has got anything else to do except to keep a glance at the things that can affect them.

To permit a situation where at the end of the day you are asked for an explanation you have so clearly no idea what's going on, you give an explanation which just doesn't make sense. It couldn't have happened that way.

Captain Coull could not have seen what he said he saw. Now that statement, members of the jury, is also not taken on day 1. That statement is taken some time afterwards. It's the 4th of August. We are talking about 11th of July. It's a long time. He has had a few weeks to think about what has happened. And what did he say? His explanation on page 2, first paragraph:

> "Prior to the collision on that day, I was sitting in my seat looking out of

the window around and I recalled that I first sighted a hydrofoil.... approaching in the opposite direction ...about four to five miles distance and 10° to 15° starboard ahead of my ship. At the time, our ship had just passed Fan Lau Point."

And then:

"Shortly prior to the collision... I caught sight of the other approaching vessel about 45° to starboard and two to three cables from our vessel. I did not do anything special but keeping a look out."

Now even that is absurd. First of all, it doesn't work; and secondly, he didn't do anything.

"...I was sure that both vessels will pass on a reciprocal course about 500 to 600 feet apart, seconds later, shouted out a warning and banged those at the collision."

MR. CORRIGAN: Stick to the evidence, please.

MR. LUCAS: Well, "A few seconds later, the Deck Officer shouted out a few words in Chinese, I turned round..."

MR. CORRIGAN: That's not what you said.

MR. LUCAS: Page 4:

"Q: On your first sighting of 'Flying Goldfinch' off Ching Chau up to the time of collision, have you been keeping a close look out on that ship?

A: No, I only saw the vessel from time to time.

Q: During the period, did you notice the approaching vessel was keeping on its course?

A: It was swaying slightly from side to side.

Q: Do you think and consider this to be normal?

A: Yes, for the 'Goldfinch'.

Q: The moment you heard your Deck Officer HO shouted out a few words

in Chinese and you looked across to him, what actually was he doing?

A: He was standing up, his hands were either on the wheel or the foil.

Q: Did you see him make any move?

A: No. "

And then:

"Q: On your last sighting of the approaching hydrofoil where you claimed was approximately 45° starboard and two to three cables off, are you sure of the relative bearing at that time?

A: No.

Q: What is your estimation of the relative bearing at that time?

A: I was not watching all the time. "

Page 5:

"Q: Do you consider the helmsman on a high speed vessel should always keep a sharp look-out?

A: Yes. "

Mr. Ho gives a contradictory story, one he says it's safe and would pass five or six hundred feet, that's at page 3, but it turns out that he has in fact sighted that something is unsafe and he had done nothing about it and he sees it when it comes at the last moment.

Now he goes along to the meeting. He says, at page 5:

"The purpose of my attendance in that evening was purely to record the time, location of the collision and the units of the rescue vessels which arrived at the scene. At that time, Capt. KONG was sitting together with his 1st Engineer and 1st mate...whilst I was recording down all the timings."

Page 6:

"(I) just heard them mention about

'Flying Goldfinch' on the right hand side. I did not question them why they bumped our vessel. Capt. KONG also did not mention about the corroboration of statements."

And then he gives at page 12 the answer, the proper answer, because he realizes what he should do:

"Q: When you are steering a vessel, how can you be sure that another vessel coming from the opposite direction would not collide with your vessel?

A: Usually I would check the opposite vessel's bearing, if it is opening (bearing) and the bow of the opposite vessel was not heading towards our vessel, then there would be no danger of collision."

And then he is asked at page 15 what action he would take when he sees some other boats.

"A: I would check bearing for a few more times and to pay special attention whether its navigation route is changed.

Q: Up to what stage your special attention would stop?

A: Under normal circumstances, it will last until I am satisfied that there is no danger of collision. "

He knows his responsibilities. He knows what he is supposed to do.

Members of the jury, we are not talking in terms of thousands of vehicles rushing around on a road in a small area. We are talking about a broad expanse of sea on a clear clear day with the only danger -- the possibility of a dangerous situation is a boat coming towards him from the other direction a fast boat which makes it a special danger. It's heading towards Hong Kong and has to go south at some stage, north of its course, and they don't look.

Members of the jury, if they didn't see that, the captain who was there in overall command

of the ship as watchman, watch-keeper, didn't see that, if the helmsman Mr. Ho failed to keep his eye on that, keep a glance on it, between them they did nothing, then they had failed in their responsibilities and duties and that is clearly negligence. Members of the jury, it is for you in the context of the professional to say, "Well, this is gross negligence", bearing in mind the consequences of it.

You see, the fact, as I have said, that someone died doesn't make it gross negligence, but your responsibilities are if I go out on a row-boat and I sit a pretty girl on my lap and start rowing, the consequences of any negligence in doing that is slim. If a 747 captain puts the air-stewardess on his lap on a take-off, a different proposition. It is the possibility of harm that makes you more careful. Must do. Should do. Your responsibilities create and should create in you a greater diligence. You have to be more careful of the Ming vase than you have to be of a tennis ball, if you are asked to carry it. It's just that simple. If you have a boat-load full of people and your task is not onerous and you are being paid to do a job which is to keep a proper lookout and keep those passengers safe and you failed, in our submission, members of the jury, that is gross negligence.

So in this particular case, for whatever reason, I submit to you that there was, as the witnesses said, a collision situation, a long drawn out situation, drawn out, bearing in mind how quickly these things can stop and how quickly they move, a long drawn out situation leading to a collision where neither of those boats deviated or changed course. Now we can't get in the cabins and find out why. We can't get in, but what we can say to you is, "Look, here is the bottom line, members of the jury. They didn't change course. They went into each other. It demonstrates that, unless they are mad, it demonstrates in relation to each boat that there was no proper lookout."

It's no good blaming the other chap, you see, because they don't know. Soon as this other boat came travelling along and suddenly something actually does go wrong with the steer. Say, something does catch on the side of the foils and it swirls it. Say, something remarkable happens. You can't say,

"Well, it's all right. It's all a terrible accident. It's his fault." If you have time to do something about it, you can do it. So you don't think in terms of blames on both in the situation. You take the individual and the boat and say of them, "Look, whatever the reason for this, they could have done something about it. They failed to do it." In our view, it's negligence and what's more, it's the sort of negligence that takes itself out of the civil compensation, the bumping-type situation, into the area of manslaughter.

And the facts presented in this case, members of the jury - we do not and have not, members of the jury, presented to you with a computer print-out. We have not been able to show you a video film. We never can. It just doesn't happen. Just as Mr. Marriott said, that sort of thing shouldn't happen or doesn't happen. Things like that don't happen in these courts. We present you with a number of witnesses who give the impression, and rightly so, of this long run-up. We confirm it with what I call the physical evidence. We confirm it by the reactions of the 1st accused. We confirm it by the fact that the times are wrong and give some time for something to happen. We made various suggestions as to why there might be a crossing. We can't say why, but I mentioned the traffic separation..And then at the end of the day, members of the jury,we say to you, "From this, use your common sense."

You have a duty, members of the jury, to these accused persons to be satisfied beyond a reasonable doubt, but a doubt with reason. You have a duty also, members of the jury, to the community that you represent to give, and you have sworn on oath to this effect, to give a true and just verdict on the facts presented to you in this case.

The facts presented to you in this case, members of the jury, are overwhelmingly of negligence of the grossest type by all these three accused and given that situation, the verdict is clear.

Members of the jury, thank you for your patience. Thank you, my Lord, and I am sorry that I have been so long.

No. 8

DEFENCE'S CLOSING ADDRESS

No.8
Defence's
Closing
Address

MR. STEEL: Members of the jury, it is now my turn to address you on the case of Captain Kong.

I am afraid that you may be today a little shell-shocked because you are going to have to listen to a fair amount and I know that you are anxious to return to the ordinary normal working day and therefore I am going to be as quick as I possibly can.

But you'll appreciate, as it has been said by Mr. Lucas, that these defendants, not just Captain Kong, but the others as well, are charged with a very serious offence indeed, only murder would be a more serious offence against the person, and Captain Kong and indeed Captain Coull and Mr. Ho are entitled to your most earnest consideration as to their position.

If I may, I'll start by marking two preliminary points. The first is what you are not concerned with.

You are not concerned, of course, with civil liability. No doubt, as a result of this accident, a lot of other claims came in from people who were injured or from relatives of those who died and the liability of these particular people to pay damages, or their employers to pay damages, as a matter of law, had got nothing to do with you at all. It may well be that those are matters which are being dealt with elsewhere.

Nor are you concerned with discipline. That is a matter for a marine court which has already been constituted and has in the past for....

MR. LUCAS: Sorry, that is not right.

MR. STEEL: That is a matter for a marine court whether constituted or not and the marine court will have the power to deal with certificates of these people, if they think it appropriate after careful maritime

expert analysis, and other powers of fine and censure and so on.

You are only concerned with the criminal responsibility, if any, of these defendants.

Now as my learned friend Mr. Lucas said, all questions of law are for my Lord. If I say anything about the law, you must regard it as potentially suspect until confirmed by what my Lord says to you later. But one or two things I think I can say with some confidence: it may be that you think or suspect that one or more of the defendants were negligent, that is not the point because, firstly, it doesn't matter what you think probably happened, you have got to be sure; and secondly, it matters not that an error was negligent, just in the sense of being a failure to take proper care - we are all negligent from time to time, I regret to say, and sometimes people get hurt as a result of our negligence on the roads, in the sea and so on - what you have got to be sure about is that these defendants, or who most particularly, of course, I am concerned with Captain Kong, was criminally negligent; that is to say that you somehow feel that it is a matter for, not for compensation, albeit compensation can never constitute a complete reimbursement to a person who has been injured, but a matter which constitutes a crime against the State deserving not just of the need to offer compensation but punishment.

Now very often, although not always, that kind of criminal behaviour is very similar to the normal everyday meaning of recklessness.

We have had some examples put by my learned friend that if somebody doesn't even appreciate the existence of some risk, if he is driving down in that Queen's Road at eighty miles an hour on a Saturday afternoon blissfully unaware of the risks that lie before him, then obviously that's a reckless conduct. If he appreciates a risk, but nonetheless decides to run it, he sees the lights have turned red and says, " Well, I'll give it a go because it may be the others haven't been too quick off the mark.", that again would be reckless.

And then, of course, as I say, not just

recklessness, but also there can be circumstances in which a man, having appreciated a risk, seeks to extricate himself from the risk that he has seen, but does it in such a fantastically silly way that he should be regarded as grossly negligent.

And in due course you will be given directions about the law on those topics. What you have got to be sure about is that one, or more, of the defendants with which I am concerned has been grossly negligent or reckless in one of the ways I have indicated.

Now let's go back to the start of this case when we come to look at the facts.

When this case was opened for the prosecution, you'll remember, you weren't given much in the way of detail. You weren't even told what collision regulations were. You were given no discussion as to how the collision came about. You weren't even given a statement of what it is said each individual person did wrong. On the contrary, you were told, in a sense, that the detail wasn't necessary, navigational expertise was not required, it's just a matter of common sense.

And that struck me, perhaps at the time maybe you as well, as a surprising way of challenging a man's professional conduct. One would expect that they would be tested by a bit more than just common sense.

Now the way the case is presented to you is simply this: they say there has been a collision, one; two, there were some passengers on board one of the vessels who exhibited considerable concern over a considerable period of time of an impending collision and that is in strong contrast to the attitude in respect of wheelhouses; and three, in fact neither ship took avoiding action. That's the way the case has been opened and that's the way the case has been closed.

Now let's just take the collision first. As my learned friend says, there were certain things that were beyond debate. There was a collision. One of the vessels was by and large east-bound and the other vessel was by and large west-bound. They were both going at full speed, which is normal, and they did considerable damage to each other.

In addition, there was evidence as to the angle at which they came into collision. But even there, rather remarkably, there was a disparity in the prosecution account. On the one hand, you have Mr. Tang who came along and told us that the angle was between sixty and eighty degrees, that there was a contact between the bow at the Goldfinch and the super-structure of the Flamingo first and then contact at flap-level and therefore the angle must have been more than fifty degrees. That was his evidence. And secondly, he said the difference in level of the damage on the flaps was accounted for by the fact that the Flamingo must have been listing to port as she made a port turn. In contrast, you have Mr. Pyrke, Captain Pyrke, he puts the angle at fifty to seventy degrees with contact probably at the flaps first and that the angle, at least in his statement, was more likely to be fifty degrees and that the difference in level was accounted for by the loss of speed of Goldfinch. So you have two different appreciations of the angle of blow.

One aspect my learned friend seems to make a lot of it, I am not sure what it leads to - that Captain Pyrke of course accepts if Goldfinch had been turning to port, it must mean that she was at a broader angle a little bit earlier. But if the turn was only going on for a second, we are only talking about two degrees. So for the life of me I do not see any great significance in that.

So let's just pause there. There is a collision with all that material. What do you learn from it?

Well, one thing that I would say to you that you can glean nothing from is the fact that it was the Goldfinch's bow that hit the side of the Flamingo, any more than you would learn from anything from the facts that it has been that way, that the Flamingo's bow impinging onto the side of the Goldfinch. It's purely a matter of chance which happens as they approached each other. So that sort of idea that may have been sowed in your mind that the beak of the Goldfinch having struck the flap of the Flamingo suggests,

or imports, or brings an innuendo that it's the Goldfinch that has hit the Flamingo is the wrong way of looking at it. I do most earnestly assure you.

What do you learn from the collision itself? Because one thing that the experts, whether agreed or not, cannot tell you is what direction the vessels are heading. Now subject to what my Lord may say to you later, I say that is a matter of law. The fact that there is a collision between two moving objects, whether cars or ships, does not give rise to an inference of error on the part of any individual at all, let alone criminal error and let alone in circumstances where the individual concerned has given a reasonable explanation which is consistent with no criminal error.

So we come to what is, I think, the corner-stone of the prosecution case. The corner-stone of the prosecution case is: I, the prosecution, have called a large number of passengers and others and their evidence proves, and this is my note of what Mr.Lucas said, "beyond a reasonable doubt that there was a long straight run-up to collision." Well, I was hoping not to have to do it, but I am disposed to say that that is at least one conclusion which you couldn't conceivably reach from the material that you've had from the passengers.

If one looked for a common thing, and it's difficult to find one,if one looked for a common thing between the accounts of all the passengers, it would be that things happened very quickly. What cannot be extracted from their evidence is the notion that for a prolonged period of time these two ships were approaching each other on straight courses up to collision and that people could see that and, in a sense, take action to try and look after themselves in some stark contrast to what was happening on the bridge.

Let's be sure that we are not at cross-purposes about a prolonged period of time. I am contrasting the notion that these witnesses saw and can only have seen about the last second or two and not a period of time something like twenty or thirty seconds, half a minute, or even more, of vessels approaching each other on straight courses.

Let's just go back, if we may. Would you forgive me if I use the models for this purpose to see what each individual has said. We have been through this. I am afraid it's important.

Mr. CHOI Chung-fai, you will remember, somehow felt he saw out of the corner of his eye the other vessel coming. You put an estimate of one or two seconds before collision when he took notice of it. And then he put them almost like that.

Mr. CHEUK Yee-yu observed the other vessel, as he put it, several seconds before the collision, he put the vessels like that, and had, he said, time to grip the railing before collision.

Mr. Tsang put the vessels, I think, like that. And as my learned friend says, he had first observed her four or five hundred yards away, but when the range had reduced to about two hundred yards, he and his companion were conscious of the risk of collision and were able to grip the rail, although they were later injured.

Now just pausing there, Mr. Tsang is the only witness who speaks of distances with anything approaching five hundred yards and straight courses over a prolonged period of time.

Now one thing that you would have thought, if that represents an accurate picture of what happened, is that you would have at least heard from one passenger, even not a dozen, from the Goldfinch, you haven't heard from any of them, that not only they could see things from this ship or this, but at some time earlier they had been subjected to a ninety-degree turn and it is very surprising that we have heard nothing from the passenger of the Goldfinch.

Just finishing the passengers, Mr. HO Ngau, he put the time at about one or two seconds and put the positi ns like that.

We then have Mr. and Mrs. Marriott.....

Sorry, then we heard the other seaman CHAN Shek. He put them like that a few seconds before the collision.

Then we have Mr. and Mrs. Marriott who would agree that's the relative positions. And Mr. Marriott remembers how his attention was brought to the other vessel one or two seconds before the collision by his wife screaming; and indeed Mrs. Marriott told you that she had drawn Mr. Marriott's attention to the other vessel.

I gather my learned friend was disposed to accept that the evidence from the passengers is rather vague and contradictory.

I am not complaining or expressing surprise about that. I would not expect passengers to have any good and clear picture of what was going on not the least because they don't necessarily have a particularly good view; and secondly, because of course they are not used to making assessment of relative positions at sea. But I do say to you that the only common thing is the sense of quickness in these observations because all the other sightings are contradictory. Some are saying that they see the vessel ahead. Some see it at a right angle. Some see the side of the other ship. Some see the bow. Some see her turning, some do not.

And you may find it illuminating just to have a reflection upon one diagrammatic demonstration of an approach, namely, Captain Pyrke's diagram which you remember showed a seventy-degree turn into the other vessel. And he has set out on that diagram for you what their respective positions were 2 2/3 seconds before collision on that analysis and he puts it like that with a distance of about two hundred and forty-five feet between the vessels and a bearing of about twenty-five degrees.

Now I don't say that that's what happened. It may be. But what I do say is that it gives you some guideline to the period of time which these passenger witnesses were talking about. If that 's a potential position at 2 2/3 seconds before collision, it merely emphasizes how short the period was in which these passengers were able to observe the other ship.

I suggest to you that the way this case was opened, and then perhaps more forcibly put only a short while ago, that you can confidently reach the conclusion that these two

vessels were approaching each other at right-angle courses over a prolonged period of time to the manifest observation of the passengers is a case which is not remotely made out and it is the corner-stone of my learned friend's case. Without it, it all evaporates and crumbles.

It's true also, as my learned friend had to try and explain, that this image of a prolonged period of approach at right angles is inconsistent with the observations of the seamen. That by itself is slightly surprising because if you thought you were looking for somebody who would have a fair or better recollection of approach and time at sea, it would be the seamen rather than the passengers. And yet there again one thing that comes out loud and clear from the seamen's evidence is that the two on the Flamingo did not discern any alteration of course, whilst the two on the Goldfinch discerned a sharp but short alteration of course immediately before the impact.

Now, that is not only inconsistent with my learned friend's case but it is also inconsistent, one with the other, because if the period of turn of the Goldfinch is short, how do you have 50 or 70 degrees?

Those are the eye witnesses that my learned friend relies upon to prove his case. He says he proves it beyond reasonable doubt that these two vessels were adopting a remarkable - there is no doubt about it - remarkable approach course off Lantau at right angles to each other for something like - it must be half a minute, or more, certainly not less, and I say first that the material that he relies upon is hopelessly inadequate and I would rather gather my learned friend who was conscious of some difficulties about it is inconsistent with what the seamen have to say and what you have been deprived of is material from the wheel-house.

Now, leave aside the defendants because my learned friend says all their stories are untrue and inaccurate. We have had two radio officers who came. They saw nothing which is not surprising because they were facing the wrong way. Even their times are challenged and I must come back to that. You have not

heard a word from the other man sitting in each wheelhouse facing forthwith with a perfect view of what's going on, the two chief engineers.

So, in short, the eye witness material is vague, inconsistent and covers the last second or two. It doesn't help you any more than the fact of the collision itself to form a view as to what their relative approach was over the last half a minute or more.

My Lord, I was going to turn to something else.

COURT: ...adjourn to 2 o'clock.

MR. STEEL: My Lord, that would be, I think, desirable.

COURT: Adjourn to two o'clock.

12.57 p.m. Court adjourns

2.05 p.m. Court resumes

All three accused present. Appearance as before. JURY PRESENT.

MR. STEEL: I can summarise the point that I was trying to make before lunch and it is this, that the prosecution is seeking to make out their case that there was a prolonged period with these vessels doing that, without any passenger from the Goldfinch being called to give evidence and by choosing the odd man out from the material that they have called from the Flamingo, the exception to the general rule, most people were only conscious of the presence of the other vessel for a matter of a second or two. If you agree with me about that or even if you think I am possibly right about that, that is the end of the case.

Let me go on to another feature and that is whatever may be this story and my learned friend, Mr. Lucas, on behalf of the prosecution, asks you to say the vessels did not take any steps to avoid each other and all you have to do is to use your common sense and that tells you that not only should they have done but they were criminally negligent in not doing so.

But whilst common sense, of course, has its part to play, as Captain Pyrke has told us, it is just not enough. You have got to proceed if you really want to form a view of what happened and who is to blame either criminally or otherwise. You have got to proceed by stages. You must form a view about what were the positions and causes of these vessels over a substantial period of time leading up to the collision, say, three or four miles away, then form a view as to what regime of collision regulation is applied to that situation, then from a view which it failed to comply, if any, and only if you have got to that stage canyou go onto the rationalisation of whether any fault that you have formulated in your own minds was of a criminal or grossly negligent character. You must do it stage by stage and unless you are sure of each stage, you will never get to the end.

Now, my learned friend - the prosecution don't invite you to carry out that exercise; it is not part of their case; indeed, they expressly say, "No, we don't want to bother with where the collision happened precisely. We don't want to bother where the ships were, six or seven minutes earlier, say. We are happy that you should fly on this point by the seat of your pants and form a feeling for it."

Well, with respect, I would suggest that that is unrealistic and unfair to these professional people who should be tested not by common sense alone but by common sense and by the navigational rules which they are commanded to obey.

You may think it is all emphasizes really that the approach of the prosecution is to emphasize prejudicial matters without really making any attempt to test these people's conduct by really what happened. Innuendo and prejudice are really more important, it would appear, than the primary facts.

I can't help feeling that if a civil court couldn't determine from the material you have been furnished with probably what went wrong, it is difficult to see how you can form a view as to what certainly went wrong.

Now, the suspicion and prejudice case, of course, is fed in particular by my learned friend's points which he worked up into some enthusiasm about, the meeting at the Hong Kong Hotel, and you'll remember that at least one of the participants there as opposed to the defendants or some of them was called, namely, one of the radio officers although you didn't hear, once again, from either of the chief engineers who were present at the meeting.

I just in parenthesis remind you that the radio officer himself, when he gave his statement to the police, was at pains to tell us and in the end police agreed with him, that he was under arrest when he gave that statement and yet was not cautioned and, no doubt was anxious to distance himself from any suggestion of impropriety that had been made to him and the general picture that he left was a little confused perhaps and the general picture was that the parties were there waiting for Captain Coull who they thought might come and in fact did not. There was intermittent and repetitive discussion about the events of the day and you may well feel that Captain Kong both there and at the next stage when he went to make up his log book the following morning was indeed trying to put a good and better light on the events and, in doing so, committed a story which was both inaccurate, untrue and incomplete and to that not only he but Mr.Ng put their name.

Just taking the story in the log book for a moment, it is not only inconsistent with the defendant's case as Captain Kong is saying - he says that's not right - it is also inconsistent with the prosecution's case - it is difficult to see how one can derive from it leaving aside the nature of the starboard turn, any indication from it that these vessels were somehow approaching each other for a very long time at right angles.

Now, in considering the events at the Hong Kong Hotel, I just would like you to put the matter in perspective and context. These people had just been involved in a collision, they were hurt, no doubt frightened and shocked and confused and silly thinking very often arises in the evening of an accident and no doubt Captain Kong, as my learned friend said, felt for that human failure of looking for excuses, "I did it but" and began to think ex post facto

of some rationalization of the final turn to starboard. It also may be that he was attempting to bolster a case which he thought was all right. Just take an example, he was saying in the log book that an order was given to the chief engineer to stop the engines. It doesn't really matter whether that order was in fact given because it wasn't, on any view, given until almost the last moment, the chief engineer in fact did it so it matters not very much whether the master had ordered him to do it then or not.

Now, it's gilding the lily now to be a matter of praiseworthy but it's a matter that happens, I am afraid, only too frequently but even if you came to the conclusion - let's put it at its highest - that the whole purpose of the exercise was to pull the wool over people's eyes as to what had happened, that doesn't mean any more than -- you'll have to regard Captain Kong's subsequent statement with considerable wariness because his credibility, his veracity as a witness would therefore be put in some question but what it doesn't do, in my respectful submission, and you will be directed about this by my Lord, what it doesn't do is prove a story. The lie, even a deliberate lie, whatever the motive, doesn't substantiate guilt particularly where, as here, the nature of the matter, which is the person maybe lying to avoid, would be just as much concerned with civil liability as criminal liability. It does not support nor confirm the guilt of Captain Kong any more than it would be of Mr.Ng who was also the signatory to the document.

So let's come on to the statement that Captain Kong made to the police subject, of course, to the question whether you feel that you can put such credence on it. One thing, however, it can't be and that is completely untrue because it is the only material that is before the court which makes it clear that Captain Kong had the Flamingo in sight and in mind at all material times and accordingly that it wasn't necessary for Mr. Ng as the look-out to bring the other vessel to Captain Kong's attention and my Lord would direct you about the significance of that observation but one thing that follows from it is that you cannot

treat this material given to the police in August as all a culpable story.

And it is perhaps not surprising that when the story had been given, the police neither before nor afterwards formed the conclusion or the suspicion even that Captain Kong had been guilty of some offence.

And you also must bear in mind, when you come to consider the content of the document, that Captain Kong had already given his story to the Marine Department under the veil of complete confidentiality so you would have nothing to fear from holding back and yet the appearances are that the story he tells is a consistent one without the benefit of a solicitor present.

What he tells you is that he comes to a positi n off Ching Chau to shape(?) for the South of Fan Lau and alters course because he's got too far to the north and there's nothing wrong...(inaudible) - he's perfectly entitled to be there, he does not break any rule and he goes on and when the range to the Flamingo closes to about two miles, he alters course to port to put her on the port bow and Captain Pyrke was quite confident and clear about this. that is a perfectly proper manoeuvre so that the vessel would pass clear port to port but now he finds that the bearing is steady and so the vessels are on collision courses and he is the stand-on ship, he must keep going and when he comes to a relatively close proximity to the other vessel, he puts it at half a mile, maybe a little bit more, maybe a little bit less. He explains he alters course to starboard. You may think that the most sensible reading of his statement is he altered course by 7° or helm.

Now, of course, that involves some porting from the Flamingo and you have heard at the very least material which is consistent with that, namely, the finding of one of the flaps of the Flamingo frozen in the port turning position after the collision and I would say to you that that statement, if it is taken at face value, is a complete answer to any charge of gross negligence. It would, in my submission, even be an answer to any charge of negligence because a stand-on vessel, as I have said to you, it was suggested at one stage, is a difficult rule to deal with - he doesn't have to turn earlier, if he decided to stand-on as

he is entitled to do under the rules, then the moment comes when I would put it, although reading from a book, in this way, it must always be a matter of difficulty for the officer in charge of a vessel which has to keep her course and speed to determine when the time to take action has come. If he acts too soon, he may disconcert any action which the other vessel may be about to take and blame people for so doing and yet the time may come and when he must take action. The precise point when he should cease to keep his course and speed is difficult to determine and some latitude is allowed to him in determining this. The conduct of a prudent seaman in such circumstances is not to be tried by mathematical calculations subsequently made and that, of course, bites on a civil action therefore even more where you are concerned with criminal liability.

So on material consideration of his statement, if you accept it as a reasonable account of what happened and it is the only full account, then you would have to say that there is no question here of him having failed to appreciate risks or had deliberately run some risk or in some other respect had been guilty of gross and criminal negligence.

Let's put aside his story in its entirety and go to the other material. I, of course, recognize in the -- some points that I was putting to Captain Pyrke about what may have happened are in part speculation and, of course, themselves open to some degree of error. I am not saying for one moment that one has to assume that the vessel was 1.55 miles off a particular place or the collision occurred in precisely a particular place.

What I was seeking to do was to try and build up some kind of picture and I took a position of 1.55 miles off Ching Chau because that seemed to fit in with what Mr. Young was saying. It may be that as Mr. Young saw the vessel a little earlier on, the distance may be a little bit greater, maybe as much as two miles which is where Captain Coull saw the vessel. So what? The point is still the same, the vessel starts off from a position making somewhat of a dog-legged approach to Fan Lau, perfectly proper, indeed common, it seems as a mode of navigation from Macau to Fan Lau and, again, something that would be well and truly anticipated by vessels coming the other way because they would

appreciate, as Mr. Lucas had made the point, that it would have to come down again to get back into a position to make for the lanes.

I ought to, however, say something about the times because I know that troubles one member of your group. They are difficult to reconcile and my learned friend has made no attempt to try and reconcile them, he just leaves it in the air, again the innuendo being that there must be something rather sinister about it.

The most likely explanation is that the Sao Jorge times are 10 minutes fast. If the Sao Jorge's times are right, we've lost 10 minutes and in 10 minutes both these vessels can travel five miles and we cannot lose five miles on both these vessels. It will not be the first time that clocks on different vessels are different. It is indeed unusual to find them the same.

What is slightly more puzzling perhaps is the 9.15 position recorded in the log book of the Flamingo. The explanation there may be that the stoppage to get rid of the rubbish occurred just after Fan Lau and that would bring the times of the two ships coincident but even if you are satisfied that the Sao Jorge has got its times absolutely right, where does it lead one? It doesn't really lead one anyway. It doesn't help form a view as to what happened. It may help support the view that the Goldfinch had got a bit further to the north but the idea that it travelled on for another 2½, 3 or 4 miles is fanciful.

So I would invite you to put completely out of your mind the innuendo that there is something sinister or strange or subtle in the difficulty about the times.

I was disposed to invite you, as a possibility, to consider that the Goldfinch was about 1½ maybe a bit more miles north of Ching Chau and she was facing the on-coming Flamingo which had started off just south of Fan Lau. We have some idea about the position of the collision. We know it may be a little further to the south because of the tide.

Now, the seamen on both vessels considered that both vessels continued in a straight line until almost the last and we know the vessels came into collision at an angle of

about 50°, maybe a bit more so that they were passing on that view, very close. That is a classic crossing case.

And if the Goldfinch stands on, it is obliged to stand on until the Flamingo can't avoid the collision by its own action and since the Flamingo in fact did nothing, it follows that a collision was going to happen albeit it might have been at a slightly different speed or a different angle. That's what the rules say.

So how can it be said, if that is the right picture, that the navigators of the Goldfinch were guilty of some criminal negligence in making at worst a bad last second decision not to alter to starboard perhaps a little bit earlier or perhaps to reduce speed because they are mutually inconsistent, she must do one or the other.

Just the sort of fault, if it is a fault, which might attract an absolute minimum of blame in any civil suit, and what I have been trying to suggest to you and indeed to Captain Pyrke is that the picture must be something like that. If Captain Kong is right about his distances, then we get an end-on case. If Captain Coull is right about his distances, then we have got a crossing case and the crossing case looked the more likely because, amongst other things, it was consistent with Mr. Ho's observations and even if I am wrong that it wasn't crossing, it's end on, the one thing that would be expected of the Goldfinch is to turn to starboard which is what she did.

We had a further discussion, you'll remember, yesterday when some suggestions I had been putting were challenged on the basis that you would expect the Flamingo to be making a straight line from Fan Lau to the mountain of Macau or when you look again at that document, as I am sure you will, you'll find that that line passes about half a mile off Ching Chau which is not only unusually close, it is much closer than that vessel had ever passed or indeed any of these vessels had ever passed Ching Chau in any record in the log books. There's also, as you have noted, a suggestion which is inconsistent with the collision position or the amended collision position.

Now, I make it plain there, in making these

submissions, I am not seeking to say that anybody else has been guilty of the crime of manslaughter. I am not here to excuse or accuse anybody else. Others will be speaking on behalf of Captain Coull and Mr. Ho later and I say in terms that there isn't the material to form a view beyond reasonable doubt that this collision was brought about in the manner I have just described but by the same token I say to you there is a material here which is more than enough to satisfy you as a matter of probability that Captain Kong is not guilty of gross negligence, because the account that I am suggesting is by no means a fanciful one, it is a very likely one and if you agree with me, you must agree also with the conclusion that the Goldfinch must not attract blame by way of criminal negligence or you would say that if this is the righ picture or anything like it, it was the obligation of the Flamingo to keep out of her way, to turn to starboard early and not to port, to keep a careful eye on us and looking at the other side of the coin, if the story truly was that somehow we were coming along on reciprocal courses and we, the Goldfinch, suddenly jumped across into them and clouted them with our snout (a) it's extraordinary surprising that there isn't a word of complaint in the log book of the Flamingo as it must have struck them as absolutely astounding but it does involve the proposition that we, to use the motto phrase of Mr. Ho, were mentally unbalanced and you won't be quick to form a conclusion which involves a view that we are mentally unbalanced.

Exactly the same analysis could be made of the picture that my learned friend has been trying to draw, namely, these two vessels coming along at right angles. What is the rule there? The rule there is exactly the same. This ship must keep out of the way, this ship is entitled to keep coming. It does not add anything to the assertion of fault against the Goldfinch to draw up the picture that for a long period of time these vessels were crossing at right angles.

Well, there are a whole variety of possibilities. There is insufficient material to find the primary facts. I am not here to fight a collision action with my learned friend, Mr. Corrigan. I am here to face a charge of manslaughter from the prosecution. There is no material to find fault against my client or

Captain Coull or Mr.Ho let alone of a criminal character.

I invite you, of course, to materially deliberate on the conduct of Captain Coull, a man of good character, a qualified master mariner, professional man, he is not an extra master but a professional man and when you have calmly thought about it, you will find that the case against him is flimsy, unconvincing and confusing, and I would invite you, in those circumstances, to be clear, confident in a verdict of not guilty. Thank you very much.

(Closing address by Mr. Corrigan on behalf of the 3rd Defendant and the 4th Defendant, subsequently acquitted, not transcribed)

2.44 p.m. Court adjourns
24th March, 1983.

25th March, 1983
9.50 a.m. Court resumes

All three accused present. Appearances as before. JURY PRESENT.

(Closing address by Mr. Corrigan continues on behalf of the 3rd and 4th Defendants, subsequently acquitted, not transcribed)

11.20 a.m. Court adjourns

No. 9

JUDGE'S SUMMING-UP

No.9
Judge's
Summing-Up
25th March
1983

IN THE HIGH COURT OF JUSTICE
CRIMINAL JURISDICTION

Case No. 292 of 1982

Transcript of a tape-recorded summing-up delivered by The Honourable Mr. Justice Penlingtonon 25th March, 1983 at the trial of Regina v. KONG Cheuk-kwan,HO Yim-pun and John COULL, charged with manslaughter.

Members of the jury, we now come to the all but last stage of the trial, that is where I have to sum up the matter to you. What I shall do is first of all tell you of general principles which are applicable to criminal trials generally, then matters of law which apply to this particular trial because of the charges and then to go through some of the evidence that we have heard.

Now the first thing I must say to you is what has already been said and is probably well-known, and that is that in all criminal trials, the onus lies on the Crown to prove its case against each of the accused and that onus is to prove its case beyond reasonable doubt which means simply that before you can convict any of the accused of these offences, you must be sure that he is in fact guilty. I don't think I need say any more than that because I think that is a perfectly clear and easily understood concept and it is, of course, common sense. It would be obviously quite wrong for anybody to be convicted if the jury was not sure that was the right verdict.

The second thing is that as has also been said, you must reach your verdict entirely on the evidence that you have heard. That can either be in the form of what he said in the witness-box or where certain evidence is not in dispute, it can be agreed between counsel for the Crown and for the defence. But, in fact, in this case I think apart from one witness, a Mr. Ohn, who no longer I think is relevant, virtually all the evidence you have heard has been given on oath or affirmation from the witness-box and that and that alone is what you must base your verdict on.

Anything which is said to you by counsel or by myself as to the facts of the matter is only said to try and assist you to bring certain matters to light. Any comments made by anybody other than the witness is not evidence.

This particular matter naturally at the time received a great deal of publicity. While it is unfortunate, of course, that the witnesses, the eye-witnesses in particular, are now giving evidence about something which happened nine months ago, in that way it is fortunate in that that publicity is now, of course, well in the past and perhaps you may have forgotten the accounts that you undoubtedly must have read or seen on television or in the newspapers at the time.

It was, I think, the subject of considerable comment, no doubt typical tea-shop or cocktail party gossip, and I have no doubt all sorts of rumours as to the cause of this collision were going around. If by any chance you have heard any of those rumours at the time or anything has been said to you, then you will no doubt dismiss them entirely from your mind.

There have been statements produced by each of the accused. These statements were made and have been produced as being perfectly voluntary statements. They are, as counsel for the third and fourth accused has told you, evidence against the maker only.

It is rather difficult concept and it does, I must admit, call for a certain amount of mental gymnastics because the statement is before you and the natural thing is to read it in the same way as you would consider evidence but, of course, it is not evidence in that what is contained in those statements has not been said from the witness-box. Counsel for the Crown or for the other accused have not had the opportunity to cross-examine on it and it is therefore evidence only against the person who made it.

These statements are, however, fundamentally an explanation as to what happened, a statement of what happened, and an explanation given by the person who made it, and you may think perhaps, made with the purpose of showing that they were not to blame for this accident. As I

say, you must bear in mind that they are not evidence which has been tested on oath in the witness-box.

When you consider your verdict, you may draw certain inferences. Once you have found that certain facts have been proved, you are entitled to infer from those facts various other matters. In a criminal trial, however, you may only infer things which are - or you only infer things which have no other reasonable explanation.

If fact A and fact B have been proved, you can only infer fact C if the e is no other reasonable explanation. If there is another reasonable explanation then you can't be certain that that is a proper inference to draw in a criminal trial.

You must consider the evidence against each of the accused separately. Now as you will see from the indictment, there are two counts. First, against the 1st and 2nd accused who were the Captain and First Officer of the 'Goldfinch'. The other one, which is similarly worded, against the 3rd and 4th accused, the Deck Officer and Captain of the 'Flamingo'.

You will be required notwithstanding the fact that those counts, one count against the 2nd and 3rd accused, one against the 3rd and 4th accused, nevertheless, you will be required to bring in a separate verdict in respect of each of them and you must consider the evidence against each of them. You must not simply say well, for instance, the 3rd and 4th accused were together on the bridge of one ship and they must be either guilty or innocent together.

Now this brings me to the 2nd accused who is no longer here. He was the Deck Officer of the 'Goldfinch' and on my direction you have acquitted him. I think I should tell you briefly why.

It is because not only must the Crown prove in this case that the accused have acted in a negligent manner or have failed to act in a manner which involved gross negligence, they must prove that that negligence caused the collision and therefore the death of Madam Wu. In my view, at the close of the Crown's case, there was not sufficient evidence for you to have been sure that his alleged negligence

caused that death. You will remember he was the Deck Officer, he was not helming the 'Flying Goldfinch', he was not the Captain of the vessel.

It seems that Captain KONG was, according to his statement, aware of the other vessel and you have heard expert evidence from Captain Pyrke that in his view if the Deck Officer was satisfied that the Captain or the helsman had seen the other vessel, then he was under no obligation to draw his attention further to it although, of course, he might do so. That being so,as I say, I consider that you could not reasonably have found Mr NG guilty and that was why I directed that you should acquit him.

Now this offence of manslaughter is a somewhat strange one in that it can arise under very different circumstances. It usually arises where somebody has deliberately done something wrong. They have attacked somebody, they have thrown a stone over a railway bridge and hit somebody down below, there has been a deliberate act which is quite clearly an act which was very likely to cause injury.

But here we have the case of manslaughter by negligence. There is no allegation that any of these accused deliberately wished to cause this collision and thereby the death of Madam WU. It is manslaughter by negligence.

The direction I give you, which I've had typed because I think this is not a trial involving a test of memories so I am going to give you a copy of this before you retire, but I will read (it) out, this is the direction on the question of manslaughter by negligence. That is that the defendant and, of course, each of them considered separately, is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course, you must be satisfied that each of the accused did cause the deceased's death, there was something in the circum tances which would have drawn the attention of an ordinary prudent individual and in this case you would consider the ordinary prudent Deck Officer or helmsman in the position of the defendant, to the possibility that his conduct was capable of causing some injury albeit not necessarily serious

to the deceased including injury to health, which doesn't apply here, and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible and that, secondly, before the act or omission which caused the deceased's death, the defendant either failed to give any thought to the possibility of there being any such risk or having recognized that there was such a risk he, nevertheless, went on to take the risk, or was guilty of such a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion, your opinion, such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.

Now,as has been said to you, all of us, perhaps almost everyday, do something which if you reflected about it you may say, "Well perhaps that wasn't the proper thing to do." This may be involved in your work, the manner you drive a motor-car, the manner you cross the road.

We all make mistakes. Some of them could be mistakes which could involve injury to other people, but these mistakes if they do result in injury are not brought before the criminal courts unless they are matters which or mistakes which are of a very gross nature that if you have been negligent in a duty which you owed to anybody, it is not merely an oversight, not merely a trivial mistake, it is a gross error.

Now, there is this question of a duty of care. Undoubtedly, the accused were trained, qualified mariners. They were employed, as it has been said to you by counsel for the Crown, they were employed to drive or assist in the navigation of these very high speed vessels, travelling backwards and forwards to Macau, carrying quite substantial numbers of people, and those passengers were entitled to expect those vessels would be navigated in a proper and professional manner.

Undoubtedly, each of the accused did owe a duty of care towards those passengers and it is a duty to exercise professional care, not just the degree of care that anybody would exercise if they were suddenly put behind the wheel of one of these vessels.

There has been quite a lot said to you about things like boredom and difficulties, but these men are expected to show a high degree of skill in navigating these vessels.

The question is then, firstly, did they not exercise that high degree of care? Was it such an omission as to be gross negligence in your view and finally, as a result of that, did they cause the collision and the death of Mrs. WU?

It is a test which goes considerably beyond what would be the situation if this was a civil trial. If we were just considering the question of whether the passengers were entitled to damages, there it would only be, on a balance of probability for a start, the onus of proof and the degree of negligence would not have to be anything like as high as we are looking for in a criminal trial.

Now so far as the evidence is concerned, that has been gone through in considerable detail by counsel and I don't propose to go through it in any great detail. Nevertheless, I think I must do so to some extent.

The evidence really can be divided into various categories. First of all, the passengers, their accounts: then the seamen, the sailors who were on this vessel, then the people who were on the bridge; and then the expert evidence given to you by Mr. TANG and Captain Pyrke together with all the supporting diagrams and charts.

Now the passengers all came, as has been commented upon, from the "Flamingo". You had Mr. NG whose wife was tragically killed. Really you may think that his evidence was of little value in trying to assess what happened at the time.

You had then Mr. CHOI who was part of his group and he was on the upper deck on the starboard side, about two or three seats from the bow end. You will remember that we had the diagrams on the board. He said he saw the other hydrofoil coming at speed but he didn't see it until it was fairly close. He said one or two seconds later there was a collision.

Now in assessing the evidence, particularly

of the passengers, you will no doubt bear in mind that estimates of distance and times and speeds, but particularly distance and speed, are likely to be far from accurate.

If somebody is asked, especially if there is a vessel coming towards them at high speed, and if they are asked how far it was away, their estimate is very rough indeed and so probably is their estimate of time.

So you will bear that in mind when you are considering the passengers' evidence in particular and probably the other evidence although whe e it is a trained mariner, of course, perhaps that is not quite the case.

He said that he shouted out and then he became unconscious. Madam WU was on his right and he was looking towards her. He said he could only see the bow coming straight at him. He did not notice any change of course of either the "Flying Flamingo", which he was on, or the "Flying Goldfinch". But he really had no great impression of exactly what part of the "Goldfinch" he saw.

Then we had Mr. CHEUK who was also on the upper deck, standing at the railing at the rear, he saw the other vessel coming and remarked to a friend, Mr. CHAN, "Why does it come in such a way?". He stopped talking, grabbed the railing and the collision occurred.

He said there were several seconds between seeing the vessel and the collision. He said about six seconds. Again, you may perhaps think that that's a fairly rough estimate. It was quite clearly all over in a very short time. Again, he said that neither vessel seemed to make any change of course.

May I say perhaps at this stage, you did hear other evidence that if there is a change of course, and it is made using rudder alone, unless it is a violent change, a real skid, a passenger may not feel it because the vessel would not heel over. He might notice a change in the direction of the wake but he would not feel the change of course.

If the vessel changes course using the foils then, of course, it banks the same way as an aeroplane does and a passenger would probably feel that. Anyway, he said that he

didn't feel any change of course of either vessel or see any change of course.

Then we had Mr. TSANG, Mr. Edmund TSANG who is a travel agent, also on the upper deck, and he said that he saw the other vessel coming quite some distance away. He said six or seven blocks, five or six hundred yards.

He didn't fear anything at that stage but when it was about two hundred yards away, he did fear a collision. He said that at that stage he could see the port side of the "Goldfinch", he could see the foils.

If he could see the portside, of course, that means that the "Goldfinch" must have been turning to the right. But he said that, nevertheless, although he could see the port side, both vessels seemed to be going in a straight line.

About two hundred yards, he ducked down as a collision seemed imminent. He said that he could see Macau from where he was, it was a beautiful clear day, and that the "Flamingo" seemed to be going straight towards it.

Then we had Mr. MARRIOTT who was a mariner of some sort, an amateur mariner like some of us, and he said that he was there on the upper cabin. They passed the tip of Lantau. A jetfoil passed them, which was probably the "Sao Jorge", and they stopped off the south-west point of Lantau to remove some "lap sap" from the foil.

He again said that the vessel seemed to be going straight towards Macau. He saw a vessel five to six miles away leaving Macau and it seemed to be going to the north, that is to their right-hand side, but he did not see it again until his wife suddenly screamed.

He then saw the bow coming straight towards them and he said very close, thirty to forty yards away. It was foilborne, which seems to be beyond dispute, and he did not notice any turn. He grabbed hold of his son and there was a collision which he said he thought was north-west of Ching Chau.

Mrs. MARRIOTT gave much the same evidence.

She said that other passengers were pointing at the oncoming vessel and she had no impression of either vessel turning.

Then finally we had a Mr. KWOK Sum who was also a passenger. He was looking through the window in the lower cabin. He said he saw the other boat coming towards them several hundred yards away. Again, perhaps that's not an accurate estimate of distance but he said several hundred yards away. He was surprised, it was flying towards them, he shouted out. There was a collision. He said that he did not notice that either boat was turning but he could see the bow of the "Goldfinch".

Then we have the seamen on the vessels and these people are, of course, as I think it is quite clear, not trained seamen. They assist in tying up and untying the vessels but, by and large, their job seems to be selling soft drinks and attending to passengers' comfort. However, they do make this voyage very very often indeed.

Mr. Ho said that he was in the bar of the "Flying Flamingo", facing the stern, which stopped and then became foil-borne again and he was looking to starboard and he saw the "Flying Goldfinch" coming. This was because something was said to him by a passenger. He was shocked, he shouted out several times - I think he said five or six. Well, it may be right, it may not. He left the bar and lay on the floor. He then heard the collision. So he had time to take some action. He said the Flying Goldfinch seemed to be turning to its right. He could see its port side and he said that the stern wake - and of course he was looking backwards - of the Flamingo was straight.

We had Mr. CHAN Shek, also on the upper deck of the Flamingo, he gave similar evidence of his attention being drawn by a passenger to something, saw to starboard the Goldfinch coming towards them at a slanting angle. He said it was two hydro-foils' lengths away when he saw it. I am sorry, he said that it was coming at him at a slanting angle and I think, as has been said, he gave a demonstration in court of the way in which he saw this other

hydrofoil coming towards him. He said he stood up and then there was a collision.

Now there is one thing which seems to emerge from that evidence and also from the evidence of the examination of the Flamingo afterwards. These are of course matters entirely for you to decide. You are the sole judges of the fact, but you may feel that there is a large body of evidence which shows that the Flamingo was going in a straight line. The passengers didn't feel any movement, any turning. The two sailors looking backwards say that the wake seemed to be straight. The only evidence, apart from what Captain Kong said of a turn, was that the port - the starboard hydrofoil was down which would lift the starboard hydrofoil and cause a turn to port, but the rudder was amidships and the port hydrofoil was neutral.

You have heard evidence given which will come to you later on about how vessels can turn. I think Captain Pyrke said the maximum turn was about four degrees, using rudder and both flaps. So here the rudder is amidships, one flap is neutral, the other one is down, giving lift on that side. But, certainly, there is no evidence whatever from any of the passengers or crewmen that the Flamingo was turning to port to any appreciable extent.

Then we have the evidence of the two seamen on the Goldfinch. Mr. LO Kei said he was looking backwards, he saw the wake turn like a sickle. Before that it was straight. He turned and looked over the port side, and you may think that he wouldn't do that unless it was an appreciable turn, and he saw a small part of the stern of the other boat. The turn to starboard only lasted a short time, a few seconds. He did not notice any other turns after leaving Macau, and he said as soon as he turned round, virtually, there was a collision.

Mr. LEUNG Pui was also facing the stern. He also saw the wake turn to starboard, looked ahead and saw part of the other hydrofoil - the stern, it was very close. He grabbed the railing and there was a collision. He estimated the time at about three seconds.

So there you have two witnesses who, although

not qualified mariners, are seamen. Both say that the Goldfinch did make this turn to starboard shortly before the collision. The passengers on the Flamingo, one or two of them do refer to a turn to starboard, but most of them say the vessel seemed to be coming straight towards them.

But, members of the jury, you will of course take into account the fact that both these vessels were travelling at high speed, over fifty feet a second. If the Goldfinch was in fact turning towards the Flamingo and appeared to be coming straight at them, that may well have been the impression that a passenger will get. If it was not turning, if it was going in a straight line, they may not well have had this impression of just seeing the bow. And therefore if it was in fact turning to starboard, as the two sailors on board say, the account given by the passengers of just seeing the bow coming towards them is by no means impossible, and in fact you may think it is very likely.

We then had some evidence by a seaman, a trained navigator, who was not on either vessel. He was Mr. George Young, captain of the jetfoil, SAO JORGE, whose evidence is important as possibly establishing the courses that these vessels were on.

And he said he left Macau at five minutes past nine and he was taking radar bearings. He passed the Goldfinch between the two outer beacons in Macau harbour, I am sorry, he saw the Flying Goldfinch going out between the beacons, and the jetfoil, because it was quite a bit faster, passed the Goldfinch between 0913 and 0915. It was heading for Lantao and he said he thought it was .55 miles on their port. He himself was north of Ching Chau by .9 miles so - no, one mile, I am sorry, one mile - north of Ching Chau, so that would put, according to his estimate, the Flying Goldfinch ... Am I right on that?

MR. LUCAS: 1.05.

COURT: 1.05, 1.05 miles north of Ching Chau, so that would put the Goldfinch 1.55 miles north of Ching Chau. And he said his own heading was 086 which is almost due east, just slightly north of east, but of course he couldn't estimate what the Goldfinch's heading

was, except that it was heading towards the traffic separation zone, south of Lantao.

He passed the Fan Lau light himself at 0931, but before doing that he passed the Flying Flamingo north of Niu Tou. So he overtook one vessel and passed the other. And he marked his course on the chart P27 which you will have in front of you.

He said that the tide at the time was flooding and we have an estimate of about one and a half knots, that is, nautical miles an hour. So there was this tide, not a particularly fast tide, but there was a tide running up the river which would carry anything in the river north at one and a half miles an hour.

We then had the two radio operators. Mr. Woo who was the radio operator on the Flamingo, he said he was in a separate cabin behind the bridge. Mr. Ho, the third accused, was the first officer; Captain Coull, fourth accused, was the captain.

Captain Coull took the vessel out and then at Green Island he handed over to Mr.Ho. Captain Coull was on the left hand side where the radar is. Mr. Ho was behind the wheel.

He gave you some evidence that there was a newspaper open in front of Captain Coull although, of course, he could not say whether in fact he was reading it. Well, as has been suggested to him and he agreed, that there was space beside the radar, there were lots of other things there like logs, perhaps a pack of cigarettes, anything at all. There was, however,in front of Captain Coull, an open newspaper.

He said the vessel stopped, it then started again, and he kept a log of passing various points, and he said they passed Fan Lau at 9.15. He didn't know the bearing or the distance.

He said that at the time of the collision he was at his desk behind his radio and he didn't hear any conversation on the deck, but he was knocked unconscious by the collision. He certainly didn't see anything. When he recovered he sent out a distress signal, and

really that is the only evidence he can give about this matter.

Mr. L0 was the radio officer on the Flying Goldfinch. He said he left at 9.07. He was sitting on the starboard side of the bridge. He recorded being abeam of Ching Chau at 9.27. Captain Kong was at the helm. Mr. Ng was in the left hand seat, deck officer.

He again saw nothing and he heard nothing until the loud noise of the collision. He said that he looked at his watch, he was also made unconscious, he looked at his watch and he said the time then was about 9.26. He thought he had been unconscious for about a minute. That estimate of time, you may think, is perhaps not accurate.

So really his evidence is of no great assistance except that he says he heard nothing, no conversation between Captain Kong and the first officer before the collision. There was some evidence that there is a level of noise on these decks. There is engine noise, possibly the loudspeaker from the radio, but it is not very noisy.

He then gave evidence that the same evening he went to a meeting at the Hong Kong Hotel at the request of Captain Kong. Captain Kong was there, Mr. Ho, Mr.Ng and the chief engineers. He said that Captain Kong said that his boat was going five degrees to starboard at the time. There was a conversation between Captain Kong and his chief engineer, and it was decided that Captain Kong did tell the engineer to stop the engines before the collision. And he asked Mr. Lo to say that he heard that order. He said that some of the people present had been injured, including himself, and that of course everybody was rather depressed which is understandable.

He said that the following day he gave Kong a list of times and events of the trip. He said he would have been aware of any severe change of course before the collision, he would feel it, but he did not do so. He said he did not hear Captain Kong say the Flying - the Goldfinch was out of control before the accident.

He did say it sheered to starboard and you have heard that that is a nautical

expression which seems to imply a violent, uncontrolled turn. He said he had no doubt that the two suggestions made - that there was a sheer to starboard, and then there was an order to stop engines - were fabrications. And he said that Captain Kong, however, did not seek to blame Captain Coull for the accident. He said that later on Captain Kong telephoned him and asked him to remember to say that he heard him order the engineer to stop the engines.

This meeting in the hotel is really only relevant to this extent, that when you examine Captain Kong's explanations contained, first of all, in his entry in the log, and secondly, in his statement, you will bear in mind the evidence given as to this meeting in the hotel in deciding what weight you can put on those statements. It is not in any way direct evidence of what happened out in the Pearl River estuary on that day. It is only of value in assessing the weight, the reliability of Captain Kong's statement.

Then we had evidence from two experts who obviously had put a great great deal of time into their examinations following the accident. First of all, we have Mr. Tang and his evidence was as a marine surveyor, not as a navigator, and he said he examined both vessels. He said that that examination, and you have the photographs yourself, showed that the Flying Goldfinch hit the Flamingo in the engine room and missed the forward and aft cabins. While this was undoubtedly a tragic accident involving loss of life, I think quite clearly from the evidence that if the Goldfinch had hit the Flamingo slightly further aft into the main cabin, then the loss of life could well have been very much higher indeed.

And you heard that - and I think Captain Pyrke also said that because it hit into the engine room, it hit the actual engines which of course were very solid and bolted down, and because of that the bow did not penetrate as far as it would have if it hit the cabins.

He said the Goldfinch hit the Flamingo with its foil first and then the bow hit, and that the Goldfinch turned as it went into the Flamingo, due to the momentum of the foils touching and swinging it round, and also, no doubt, due to the fact that of course the Flamingo

was going forward at a very high speed, and this would tend to turn the Goldfinch as she hit and lost its own momentum.

He estimated the angle of blow between sixty and eighty degrees. You have heard Captain Pyrke say that he would not agree with that. He thought it was not such an angle, not such a sideways-on blow, it was more acute. He estimated at about fifty degrees. Mr. Tang said sixty to eighty. And he said that it could not have been more acute or the bow of the Goldfinch would have hit further aft into the Flamingo.

He examined the controls of the Flamingo and he found the rudder was neutral, amidships; the port, the port flap... the port flap fully down?

MR. CORRIGAN: Starboard flap.

COURT: Starboard flap, yes, that's right, I am sorry I've got this wrong. The starboard flap fully down and the port flap neutral. As I have said to you already, that is an indication of a turn to port, but a very slight turn to port.

And you also have the statement by Mr. Ho, the deck officer, who was actually at the helm, that at the time just before the collision he had his hands on the levers which raise and lower these flaps, and it may well be that at the moment of impact or just immediately before, he did pull these levers or one of them back, and that would account for the foil being in that position. He also said that at the time of the collision the hydraulics would have frozen and that, therefore, there could be no possibility of those, the controls, being moved after the collision.

So there seems to be fairly clear evidence that at the time of the collision the rudder was neutral and the flaps were in those positions. That would seem, perhaps, to indicate that if the Flamingo was turning to port it was a slow turn indeed.

He said the engine controls were fully ahead, and that again tallies with the evidence that there was no slowing down of the Flamingo. And he said he is quite satisfied that at the time of the collision both vessels were foil-borne although he said there may have been, it may have been that the

Goldfinch was coming down in that it seemed to hit somewhat lower, it seemed to be a little lower. This could be accounted for either by it being lower on its foils, or that the Flamingo was turning slightly to port, therefore the starboard side was slightly higher.

He said he also examined the Goldfinch. He found the rudder ten degrees to port, the starboard flap was down and the port flap was up, but only to a very small extent. This would indicate a turn to port, not a maximum turn, but a fairly sharp turn to port. But as he said, the hydraulics on the Goldfinch were working and therefore those controls could have been altered after the incident.

He said he examined the Goldfinch on the 16th of July and he found that there was no mechanical defect in it, that the steering was in order. There was no mechanical failure which would account for the collision.

Then we had Captain Pyrke's evidence. We also had some evidence, I may say, from Inspector Ling who simply produced the statements which had been recorded. Those statements are before you to be given such weight as you think fit. There is no question at all that those were anything else except perfectly voluntary statements.

And then finally, we had the evidence of Captain Pyrke who is a fully qualified mariner, highly experienced, and in particular, experienced in these particular vessels. He has been on the deck of hydrofoils on many occasions, and he has in fact driven one. As has been said very fairly by Mr. Corrigan, and I think quite rightly,Captain Pyrke gave his evidence in a very fair, proper and impartial manner.

He told you that if you do everything possible to turn one of these vessels that 5 degrees per second is almost impossible to obtain, that, in any event, would only turn the vessel through a complete 360 degrees in 72 seconds, well over a minute. So although these are not large ships, they are not easily manoeuvrable compared with, for instance, an ordinary speedboat which can turn very quickly indeed. Because they are on these foils they can go at a high speed without using a great deal of power which makes them very economical

no doubt, but because of that they are not easily turned. The main safety feature about them, you may think,is the other factor which he told us about, and that is that they can be stopped very quickly when you considered that the vessel is travelling at something like 35 miles an hour. Depending on the skill of the operator, they can be stopped in something like 250 feet which is only 3 times their own length. He said that it does depend on the skill of the operator, and depends on whether you also use foil and rudder. If you use foil and rudder, that also assists in the stopping. But it is quite clear, I think, that these vessels can be stopped quickly and that that does not involve any great discomfort to the passengers. You may think that in an emergency situation that is what should be done. But because they are not highly manoeuvrable, the main way to avoid an imminent collision is to come off the foils onto the hull when there is a dramatic drop in speed.

I think Captain Pyrke said later on that from full ahead to dead stop in the water it would take 7 to 8 seconds. Now that means a complete dead stop. If these vessels had collided even if they were going on their hulls, even if they were still going forward, theremight have been a collision but there certainly wouldn't have been the violent collision that we had here.

He said if you try and turn the vessel any tighter than that, you risk the vessel stalling, it no longer becomes foil-borne and drops into the water.

Now he told you that as a general principle navigators and mariners assess the risk of collision by taking the bearing of another vessel. If that bearing is closing or opening, if it is going that way, or that way, then there is not a risk of collision. You are either going to pass in front or behind the other vessel. If the bearing is constant, then there is a risk of collision.

He also told you of course that it is not easy to judge a bearing accurately with the naked eye and if there is any doubt, you should check with the radar, which of course is much more accurate, and if there is a doubt, and the regulations which I shall come to mention a doubt, if there is a

doubt, then of course you must assume the worst. If there is a doubt as to whether the bearing is constant, then you should assume it is and take appropriate action.

And that appropriate action is that if the other vessel is coming on your right, on your starboard side, he has got the right of way and you must turn to your right to go behind it; if there is a head-on situation, that is if the two vessels are going straight towards each other, then each vessel must turn to the right and pass port to port; if they are directly head-on, that is the situation - if the angle is small, one, two, three degrees, that should be taken as a head-on situation; if the angle is larger, four or five degrees, you have got a grey situation, it might be or it might not be; over that, it is a crossing situation. And as I say, the vessel which has got the other on its right must give way. But he said it is difficult, especially four or five miles away, to accurately estimate what the bearing is, to decide whether it is a head-on situation or a crossing situation. And again if you are in doubt, you should take it that your possible error is that the - that you should take it that you should adopt the safe course. In other words, if you are in doubt, assume the worst and do something about it. Don't just say, "Well, I'll keep going and will see if things sort themselves out." You should take action if you are either satisfied what action you should take, or if you think, "Well, there is a possible risk here, I'd better do something about it." And what you do, you should do early and it should be a positive action. You should not just make a slight change in course. You should make a positive definite change firstly because that will obviously avoid the collision, or possible collision, better and also it will let the other vessel know that you have seen him and are doing something.

He said that a seven-degree turn is not a substantial turn, but altering the rudder by seven degrees, that would be, because, as he said, ten degrees is about the maximum. It will go further, but ten degrees is about the maximum you should use. So a change to seven degrees of helm would be a substantial change.

This is the sort of thing where, if you are in doubt of course, as I have said to you,

you must give the benefit of the doubt to the accused.

He said that on the Macau run, a passing distance of five to six hundred feet on a clear day would be just acceptable. It would be a minimum, in his view, as a safe crossing distance. Five to six hundred yards would of course be perfectly safe.

He did, however, say to you that a starboard crossing, that is the vessels crossing green to green, should always be looked at with more care. If it is a starboard crossing, the mariners in each vessel should exercise a little more care than if it was a port to port crossing which is the one laid down in the regulations.

He said that if the hydrofoils saw each other at three miles away and decided they should alter course - at three miles away, they should alter course then and there. They should not leave it any later. Their approach speed is about a mile a minute. If, however, nothing is done and danger is seen at about half a mile, both vessels should come down onto their hull, they should not at that stage leave it to a change of course, that at half a mile the safe thing to do is to come down onto the hull.

He mentioned that it was difficult to judge bearings unless there was a good horizon. And on this particular day, the sun at nine-thirty would have been fairly high, it was mid-July, but that the Flying Goldfinch coming from Macau would of course be going into the sun, whereas the Flamingo would have the sun behind it. And you may think perhaps that in that situation it was even more reason why the Goldfinch should have been using its radar because Captain Pyrke says both vessels should have been using radar to check bearings.

He said he assessed the angle of blow at about fifty degrees. One of the reasons for that was that there were certain objects within the cabin which seemed to have been thrown forward at about a forty-five degree angle. And his estimate, having examined the vessels, his estimate was somewhat different to Mr.Tang's in that he put it at, as I say, fifty degrees angle of blow. That of course is relevant as to the course the vessels were following at the time of collision.

He produced a diagram, which is the graph which I think you have a copy of, and on that he has plotted the possible, and it is of course only the possible turning angle of the Goldfinch and he has plotted their possible courses and he said that if the Goldfinch had not turned the way it did,then assuming now it was where he said it was, then it would have passed about five hundred and forty feet away from the Flamingo.

These are, of course, as has been said to you, estimates. They are based on what was seen by other vessels, based on what was said in the statements. You must allow for a substantial degree of error, and if there is anything about which you feel you cannot be sure, again the accused are entitled to the benefit of any doubt.

He said that if the Flying Goldfinch was 1.55 miles north of Ching Chau when passed by the Sao Jorge, its course to the point of collision would be 093 degrees, almost due east. If the Flamingo had left the traffic separation zones south of Lan Tao and headed straight towards Macau, its course would be 270 and therefore the difference in heading would be only three degrees. That would be, if they were coming towards each other, a head-on situation.

MR. CORRIGAN: Seven degrees.

COURT: Seven degrees, was it? I am sorry. Seven degrees.

Well, in that case, it would not be a head-on situation, but each vessel in that sort of situation should alter course to the starboard.

He said that if she had headed direct from Macau, she would have needed a small change of course after leaving the traffic zones - the traffic zones' bearing, if you are going straight along them, is 263 - but, of course, if she went down onto the hull to clear rubbish and was carried slightly north by the tide, she would need a slightly larger change of course.

He then said something in evidence which I think is important. He said this, "You must be sure of the approach angle to know what rule

to apply and you must know what rule to apply to be sure who made the mistake." That, I think,members of the jury, is something you will bear in mind. He said, and this is what Mr. Ho had said in his statement, that if Mr. Ho had had his first sight of the Goldfinch at four to five miles at a bearing of ten degrees and his second sighting of her was at three quarters of a mile at twenty degrees, that that would be an opening bearing, not constant..

Mr. Ho then says, of course, he saw the Goldfinch again finally at two hundred feet at a forty-degree bearing, and you may think that that simply cannot be right because if that was right, there would not have been a collision.

However, he did plot the courses as stated by Mr. Ho and he said that one plots those courses, the Flamingo would have passed in front of the Goldfinch by three quarters of a mile.

He said the ships should have a good lookout at all times. It should be done both visually and by the use of the radar, but he said the primary lookout should not be the helmsman. He talked to you about tunnel vision, which you could understand, with very fast vessel, that the helmsman tends to look dead ahead, he is looking for rubbish in the water, he tends not to look to the sides; whereas the lookout, because he is not actually steering the vessel, is in a much better position to look round, look backwards and to look round. And he said that in all vessels the primary lookout should not be the helmsman except possibly in small ships which had a good all-round visibility, and we know that these hydrofoils there is not a particularly good all-round visibility.

Now I then come to the - it's now a little late, but I think I'll only be about another ten minutes and I think rather than stop at this stage and start again, I'll try and continue.

I come to the statements made by the accused.

First of all, Captain Kong, and he first of all made a statement in his log, this was

the following day after the meeting in the restaurant, and he quite clearly in that statement says that the cause of the collision was that his vessel sheered to starboard in a violent manner and that he could not control it.

> "9.26 vessel sheered to starboard at a rate of five degrees per second approximately. Deck officer advised the master of the incident. At the same time the master tried to put the vessel on course again, but no response. The port flap pushed forward and starboard flap aft and rudder on port helm. Stop engine. Vessel collided with Flying Flamingo. "

So that is his account of what happened made the day after the accident.

We now know, I think, or even have this strong evidence from Mr. Tang that there was no mechanical defect which would account for an uncontrollable turn to port - to starboard of that sort. And you have heard the evidence about the stopping of the engines.

The deck officer certainly did not hear that.

However, that is what Captain Kong says in his statement.

Then on the 3rd of August he made a more detailed statement and it is a full account of what happened, quite detailed. He said that he did see the other vessel, that at this stage he had deviated to the north and he altered course to starboard heading towards Siu A Chau. He found the hydrofoil coming from the other direction and his were travelling in a straight line at about four miles away. He maintained the same speed and route until they were two miles away. He then altered course to the starboard slowly towards Niu Tou. He thought the other vessel was about ten to fifteen degrees on his portside and

> "there was no significant change in the relative position between my boat and the boat from the opposite (direction). At that time (we) were about half a mile away. So I altered the course 7° to the

starboard side and then maintained my speed and turning of the helm until the relative position of the opposite ship was about 0.2 or 0.3 miles away about thirty degrees to port."

You may think that at that stage, to anybody, it was a highly dangerous situation. It seemed to indicate there a constant bearing and a very close distance.

"< Under the circumstances she was trying to pass me from my bow. I at once ordered to shut the engines and saw both hands of the first engineer were on the control handles. I tried to give out warning to the other boat, but both of my hands were controlling the rudder and flap. And my boat kept on swinging to the starboard and we then collided violently."

So what he is saying there is that he altered course to starboard, did it twice, but that the bearing of the other vessel remained constant, and indeed it must have remained constant because there was the collision. And if that was so, then the Flamingo in turn must have been also turning and turning to port which is contrary to regulations. And I have already said something to you about the evidence of the Flamingo turning to port.

Captain Kong also said in his statement that when the other vessel was 0.2 to 0.3 mile away, very close, he checked the radar indicator, the revolution indicator and the flap indicator on the switchboard in front of him. You may find that somewhat surprising that in view of the obvious dangerous situation at that stage he was checking his instruments. Captain Pyrke said that he would regard that as a highly dangerous situation and that the safe course is to stop the engines and come down off the foils.

then we had Mr. Ho who made a long statement, a great deal of it of course is about his background. It is perhaps not all that important. But he said that he saw the other hydrofoil coming from the opposite direction, about four to five miles away, ten degrees on the starboard. He said that weather conditions were fine and they had passed Fan Lau. He did not pay any particular attention to it.

Shortly afterwards he again saw the hydrofoil. It was then about twenty degrees off the starboard side, about three quarters of a mile away, or slightly more than half a mile, and they were going direct towards Taipa, which is what the passengers seem to agree, and they had not changed course. He said that :

> "I did not feel that the other hydrofoil had changed its route and under the circumstances, I presumed that if both hydrofoils maintained their route, the other hydrofoil would pass ours about five to six hundred feet away safely. It was very common, so I did not pay attention to it, but looked at the sea in front of me and the two side mirrors to see if any other vessel was over-taking. Later, when I noticed the other hydrofoil again, I discovered that it would cut across our bow. At that time, it was at forty degrees on our starboard side about two hundred feet away. I shouted out, 'Why is that.' I then stood up, held the two foil levers with both of my hands."

Then there was the collision.

So what he is saying in his statement really is this that he saw the other vessel when it was quite a distance away, it was a clear day, he did not think there was a risk of collision and, therefore, he was under no obligation to change his course. Then if he continued on his way, the other vessel continued, they would pass safely. And of course if there is no risk of collision and there is no reason why the navigator should think there is a risk of collision, there is nothing wrong with that. If there is no risk of collision, even if there is a passing on the starboard side, he can continue.

What Captain Pyrke says is, however, that he should keep the other vessel in sight until it has passed and there is no possibility that there can be a collision.

He was asked a lot of questions about his statement and he said he agreed that radar, if used to check the bearings, is more accurate than using just the naked eye, which of course is what Captain Pyrke says, but he said that the radar is on the left-hand side and the

helmsman is not in front of it and therefore he cannot use the radar. And I think quite clearly, on any view, it is the officer on the left-hand side, be it the captain or the deck officer, the non-helmsman, the lookout, who should be using the radar.

He then said, and this was something which has been cited, referred to quite often, he was asked :

> "Under these circumstances, if you pay no more attention to the vessel on your starboard side again, will it be very dangerous if it changes course to cut across (in front) of your bow suddenly?"

His answer was :

> "Yes, but I do not expect the other vessel to cut across (in front) of our bow like this. If it does, that means the personnel on board must have been mentally unbalanced."

And really at the end of the day that is what he is saying, that he thought he was on a safe course and he thought, if he had thought of it at the time, certainly on reflection, that from the position when he saw the other vessel, that the only way they could collide was if the other vessel did something absolutely insane.

Then we have Captain Coull who was the captain of the Flamingo and although he was not the helmsman, as captain of course he has responsibility for the safety of his vessel, overall responsibility, as indeed does Captain Kong. Captain Kong was not only the master of the Goldfinch, he was also the helmsman. Captain Coull says that he was on the portside and he handed over the vessel to Mr.Ho at Green Island. He was sitting in his seat looking out of the window and he first saw the hydrofoil approaching in the opposite direction at the position between one or two miles north of Ching Chau. Now I assume from that he means the other vessel was north of Ching Chau at about four to five miles distance, ten to fifteen degrees starboard ahead of the ship. They had just passed Fan Lau Point.

He does not say anything then until almost before the collision.

"Shortly prior to the collision, the last time I caught sight of the other approaching vessel was when it was approximately 45° starboard and two to three cables" -

now "cable", you remember, is two hundred yards -

"from our vessel. I did not do anything special but kept a look out."

So the other vessel was then, he says, something like forty-five degrees to starboard and four to six hundred yards away.

"At that moment, I was sure that both vessels will pass on a reciprocal course about five to six hundred feet apart." -

which Captain Pyrke says is a minimum, but nevertheless a safe passing distance.

"A few seconds later, the Deck Officer shouted out a few words in Chinese, I turned round to him and asked what was wrong, then there was a 'BANG', I fell backwards."

So again what Captain Coull is saying to you in his statement is that the other vessel was on their starboard but he thought that it was not on a collision course and that if they continued their course, they would pass safely green to green.

You may well think that he could have kept a better lookout because there certainly seems to be a gap between the first time he saw the other vessel and the second time he saw it when it was four to six hundred yards away and then again a gap between that sighting and when the deck officer Mr. Ho shouted out and when obviously it was probably too late to do anything. What he is saying is this that he thought that there was no danger of collision and that, therefore, there was no need to do anything and that if it had not been for this inexplicable al eration of course of Goldfinch, there would not have been a collision.

Now, you have been told something about the international regulations for the prevention of collisions at sea. These are the mariners' by-laws so far as avoiding collisions is concerned.

They lay down the laws, the rules of the sea. As has been said, they are not - some of them - not particularly logical; most of them, of course, are extremely logical. They lay down what people should do in certain situations and it is common sense what they lay down.

Where it comes, of course, to the question of what you should do if you are both going straight towards each other, then somebody has got to lay down: you turn right or you turn left. It does not matter much as long as you both know what the rule is, and the rule is, of course: you turn right.

Now, again because this is not a memory test, I had these regulations copied and I will let you have them when you retire but I will just mention one or two things which are important.

Rule 5 is '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 so as to make a full appraisal of the situation and of the risk of collision. Keep your eyes open, in other words, and if you have got some radar, use it.

Every vessel shall proceed, Rule 6, at a safe speed.

Now, these vessels are somewhat different from others, in that the safe speed is governed by the fact that they must be on their foils. So normally when they are cruising along, the safe speed has got to be a fast one and they either go on their foils at a fast speed or they go on their hulls at a very slow speed. There is not really much in between. But if you are in doubt, if you have got a hydrofoil, then you must come down off the foils because if the foil-borne speed is not safe, then you have to go to a safe speed even if this does mean a very substantial reduction in speed.

In determining a safe speed, various factors shall be taken into account: the state of visibility, which we know was good, the density of other traffic and the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions. Well,

we know that they can stop quite quickly but they cannot turn very quickly.

It goes on, additionally, by vessels operated with operational radar, the various defects, possible errors which can come with the use of a radar.

Rule 7, 'Risk of collision'. You shall avoid collision by all means available and if there is any doubt, such risk shall deem to exist. Very common sense, nothing illogical about that. And such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably - and that word 'appreciably' is important - change.

As Captain Pyrke has said, if you look at the other vessel and it has the same bearing or near the same bearing, you are in danger.

Rule 14, 'Head-on situation'. We have been through that. If they are head on, then you alter co rse to the right and you have had Captain Pyrke's evidence as to what he considers is a head-on situation.

"Crossing situation", Rule 15: the vessel which has the other on its starboard side shall keep out of the way.

And if you are the give-way vessel, Rule 16, that is the vessel which has got to give way, you shall keep clear and take early and substantial action to keep clear.

And Rule 17, the stand-on vessel, the vessel which has got the right of way, shall maintain her course and speed but you may take appropriate action to avoid collision if it becomes apparent that the other vessel is not taking appropri te action itself.

And if you have decided that the collision cannot be avoided by the action of the other vessel, you shall take such action as will best avoid the collision and you may think that the evidence in this case points very strongly to that other action being to come down off your foils.

A power-driven vessel which takes action in a crossing situation in accordance with the Rule to avoid collision shall, if the circumstances of the case admit, not alter course to port for a vessel on her port side. In other

words, whatever you do, unless there is no other conceivable action, you do not turn to port.

Those are the Rules and, as a matter of law, I direct you that those are the rules which professional mariners should obey but they do, of course, nevertheless give a wide discretion within the rules. You cannot just simply state, "I was sticking exactly to the rules." There is an overall discretion particularly on the master of the ship to take proper action.

It has been said to you by Crown Counsel in opening the case that this was an inexplicable collision. These things, however, do happen. There was a famous instance in the late 1800s where an admiral in the middle of the Mediterranean on a clear day gave certain orders, as a result of which, two battle cruisers collided with each other and there was great loss of life. Totally inexplicable.

Because it is totally inexplicable, you cannot imagine how it could have happened. You remember Mr. Marriott giving evidence about watching the other hydrofoil coming towards him and his first reaction, "This can't happen."

You must not, however, say, "Well, because it was inexplicable, because it must have been negligence, therefore, somebody must be to blame." You have got to look at the evidence bearing in mind the law. Look at the evidence in respect of each of these accused and only if you are satisfied that that particular accused is grossly negligent and that gross negligence was a cause - it does not have to be the sole cause - was a cause of this tragic accident, only then can you convict him of this very serious crime of manslaughter.

Members of the jury, it is highly desirable that, when you reach your verdict, you will be unanimous. If, however, having given it as much consideration as you think you can, you find that cannot be unanimous, you may return a verdict by a majority which can be six to one or five to two. Four to three is not a majority. It is simply a disagreement.

In considering your verdict, you will have all the exhibits before you and if at any time you wish to get any further directions on the law from me or any assistance as to the evidence which has been given, please tell the clerk who will be with you and we will come back.

Gentlemen, are there any other matters which you would like me to raise or any errors and omissions you feel I've made?

MR. LUCAS: My Lord, there is one matter. The concept of handing copies of the Collision Regulations, Captain Pyrke has given evidence on it, you have directed on it, it seems with respect, the extension of handing copies of law to them, and given that situation, I don't think it is for the jury -- the jury can listen to opinions expressed perhaps on that but no further.

COURT: Any views on that, Mr. Steel?

MR. STEEL: ... I abide by your Lordship's guidance on it....

COURT: Members of the jury, it is a rule of practice that the habit - not that it has become a habit here - of giving members of the jury copies of law is not to be encouraged. I sometimes wonder whether it does not turn it into a memory test but if you feel - I won't give you these regulations - but if you feel at any time you would like to have them, please let me know.

Are there any other matters? (Pause) No.

Well, members of the jury, we will provide some lunch for you here. This is, I think, a rather charming old building but it was never designed as a court-room, so, I am afraid, we do not have a proper jury room for you to retire to, so the procedure is that we will leave you here. We will provide some lunch but, in any event, we will not reconvene until 2.30. As I say, if there's any assistance which you wish at any time, please let us know.

(Usher sworn.)

1:32 p.m.Court adjourns pending deliberation by the jury

No. 10

VERDICT AND SENTENCE

No.10
Verdict and
Sentence
25th March
1983

25th March, 1983

11.50 a.m. Court resumes

All accused present. Appearances as before.
JURY PRESENT.

11.51 a.m. Court sums up to the jury.

1.32 p.m. Court adjourns pending deliberation by the jury

5.00 p.m. Court resumes

All accused present. Appearances as before.
JURY PRESENT.

CLERK: Mr. Foreman, would you please stand up? I am going to ask you to return your verdicts separately. Now, on the first count of manslaughter against the 1st accused, KONG Cheuk-kwan, have you agreed upon your verdict?

FOREMAN: Pardon and the name?

CLERK: 1st accused, KONG Cheuk-kwan. Have you agreed upon your verdict?

FOREMAN: The verdict is guilty unanimously.

CLERK: Thank you. Onthe 2nd count of manslaughter against the 3rd accused, HO Yim-pun, have you agreed upon your verdict?

FOREMAN: Mr. Ho, not guilty unanimously.

CLERK: On the 2nd count of manslaughter against the 4th accused, John COULL, have you agreed upon your verdict?

FOREMAN: Not guilty, five to two majority.

CLERK: Thank you.

MR. LUCAS: My Lord, there is nothing known about the 1st accused.

COURT: Yes, the 3rd and the 4th accused to be discharged.

3rd and 4th accused discharged

MR. STEEL: My Lord, I wonder if you would permit me to say a few words on behalf of Captain Kong.

COURT: Yes.

MR. STEEL: May I tell your Lordship a little bit about him? He was born in 1953. It makes him some 30 years old. Following his secondary education in 1971, he embarked upon a sea-faring career and studied at the Hong Kong Technical College on a cadet course and, having obtained his certificate, joined World Wide Shipping as a deck cadet and thereafter all the time with World-Wide Shipping he served respectively as third, second and finally chief mate and in the years he obtained, of course, the appropriate Certificate of Competency for those appointments. He also obtained a Certificate of Efficiency as a life boat man, his Radar Observer Certificate in 1974, his Fire Training Certificate in 1975, his Radio Certificate in 1977, a Radar Certificate in 1977 and an Electronics Navigation Certificate in 1978 and he obtained his Master Certificate in 1980 having shortly before got married and in the period before and after his obtaining a Master Certificate he served as a chief officer on the "World Mandate", one of the World Wide Shipping fleet, and I wonder your Lordship would allow me to just tell your Lordship how the master of that vessel described him in the final confidential report to World-Wide Shipping before he left the company to join the Hong Kong Macau Hydrofoil Company. Mr.Marsden, the Master of the "World Mandate", said about his Chief Officer:

> "Without meaning to be rude in any way, Mr. Kong is the most 'Untypical Chinese Officer' that I have had the pleasure to sail with. He is amazingly cheerful, relaxed and extremely co-operative at all times, very reliable and dependable, completely honest and sets a first-class example of performance for other Deck Officers to follow.

Although fairly recently promoted to Chief Officer Mr. Kong is technically very competent and extremely hard-working. More importantly, he appears to have few problems with the Deck Crew and obtained their willing co-operation at all times. I believe the Pumpman is resentful of the Chief Officer's insistence in controlling the Cargo/ Ballast operations but that is the responsibility of the Chief Officer.

Strictly sober at all times.

In my opinion Mr. Kong is promotable to Master now although he does not hold the D.T.I. Certificate. As is my practice with Chief Officers, Mr. Kong handles the vessel in both Loaded and Ballasted condition approaching and leaving port, also anchoring and shows himself to be fully competent and capable in this respect. Having sailed solely with the Company since the start of his sea career, he is fully conversant with all the paper work and so on."

My Lord, as your Lordship knows, he then joined the Hong Kong Macau Hydrofoil Company and shortly before this accident had resigned in order to make himself available to join the jetfoil company running to Macau in competition with the hydrofoils.

And it follows, as your Lordship would appreciate, that the whole of his adult life has been devoted to developing his skills as a mariner and obtaining the qualifications.

My Lord, he is a man not just of good character, I would say to your Lordship, but a man of quality and he has now found himself having on one short period of time felt dismally short of the standards to be expected of him as I suppose we all do from time to time and as a consequence has caused death and injury.

This man's career -- this man's sea-going career is in ruins. He is unemployable in his chosen and professional career. He is a man who has effectively no qualifications left at all and it is as if the last ten years or so have been wiped away and he has lived with

his dreadful accident now for nine months and I have no doubt the memories of that day and of the dead and injured have been and continue to be a great source of anguish to him although he has received commendable and loyal support from his family and particularly his wife who has been here during the course of this trial.

Perhaps, the verdict would exercise part of, no doubt, the feeling of shame that he has a welcome release but, my Lord, he is, in my respectful submission, a man of, this particular and dreadful incident aside, unimpeachable character.

May I just say one word about - maybe one matter that is in your Lordship's mind, his somewhat over-elaborate exercise in his log-book to try and clear his yardarm, thus when it commends itself to your Lordship - I appreciate - is conceived and concurred to be wrong by Captain Kong although I hope your Lordship will bear in mind the timing of that event, the shame and dismay which enveloped him no doubt at the time but I certainly would wish to dispel the notion perhaps spurred by Inspector Ling that the pain or injury that he was sustaining then and since was but a fabrication and a pretence.

I have before me a medical report on Captain Kong from Dr.Lee who was in charge of him at the Canossa Hospital which records that Captain Kong has been suffering from a whiplash injury due to the hydrofoil collision. He'd been having physiotherapy all along but his symptoms have never cleared and, therefore, manipulation of his spine under general anaesthesia was performed in January of this year and he has continued physiotherapy since.

My Lord, he is a man of good character. He is not, if I may say so, a criminal in the normal sense of the term, nor is he, I would venture to suggest, to be treated as equivalent to a man who has committed the crime of manslaughter whilst engaged in some unlawful act itself at the time of the accident.

My Lord, manslaughter, as your Lordship has observed in summing-up these matters to the jury, has a broad spectrum if it would be realistic to make suggestion at all.

The offence that your Lordship is faced with here is what I would call the lower end of that spectrum and naturally it is deserving of punishment, that is, of course, the concommitant of the verdict but I would say that the public are not in need of protection from him. Even a short period of imprisonment will have a devastating impact on this young man. I hope that your Lordship will feel in a position to be lenient and merciful.

COURT: Captain Kong, it is always sad and distressing, this is, of passing sentence on somebody who has up to one said occasion a blameless career, no convictions of any sort and I have taken into account everything which has been said by Mr. Steel on your behalf which you have up to now been honest, reliable and hard-working and that you have had a good career at sea which has unfortunately inevitably come to an end. That in itself, of course, is a severe punishment alone.

However, I am satisfied that this accident was caused by what at the very best was an act of gross carelessness. It may well be that perhaps it wasn't more than that and what is also obvious is that while it was tragic enough with the loss of life, it could indeed have been far worst and passengers on vessels such as this have the right to expect much more.

However, I do take into account the fact that this is manslaughter by negligence as you weren't engaged on an unlawful enterprise, it was just something which you did while engaged in doing your job. It is quite true that some people in certain occupations have a higher risk of facing criminal charges than others but nevertheless, as has been said, there is no compulsion to take up those occupations.

I must take into account that there was an effort, I think, to cover up the true version of what happened but I do take into account also that certainly, at the first instance, you did not seek to blame the other vessel and the other accused, although the second version did tend to perhaps do that.

Taking those factors all into account, I feel that a custodial sentence is nevertheless

inevitable. However, I don't think it needs to be a particularly long one. You will be sentenced to eighteen months' imprisonment. Are there any other matters?

(Application by Mr. Steel on behalf of his client, the 1st defendant, for bail pending appeal granted. Terms of bail to remain the same. 1st defendant to report twice daily to police in Fanling)

COURT: Members of the jury, this has been a difficult case indeed, an unusual case involving a lot of evidence which to anybody was not easy to follow. It has been a long trial. We have had interruptions. Some of you have not been well during the course of the trial and I know probably all of you have been under pressure to keep offices and jobs going - Mr. Lee, in particular. We are all very grateful to you for the obvious care and attention you have given to the case while it has been going on and for the careful consideration I have no doubt you have given to your verdicts. Thank you very much indeed. I now make an order for you to be discharged from jury service for a period of five years. Thank you very much.

5:30 p.m. Court rises

25th March, 1983

In the High Court of Hong Kong

No.11
Particulars of Trial
25th March 1983

No. 11

PARTICULARS OF TRIAL

[rule 37]

FORM VI

CRIMINAL PROCEDURE ORDINANCE
(Chapter 221)

Criminal Appeal No.455 of 1983
(On Appeal from High Court
Criminal Case No.292 of 1982)

R. v. KONG Cheuk-kwan

Particulars of Trial

1. Date of trial: 7-11/3/83, 14-18/3/83 & 12-25/3/83
2. Name of trial judge: Mr. Justice Penlington
3. Verdict: Guilty (Unanimous)
4. Sentence and any orders made consequent thereon:

   Imprisonment for eighteen (18) months
5. Copy of the list of exhibits: Attached.
6. Whether a certificate under Sec.82(2) was given: No
7. Names of counsel and/or solicitor for appellant:

   The appellant was defended by David William Steel, Q.C. and K.M.Chong instructed by P.T.Young & Co.
8. Whether appellant bailed before trial, if so in what amount, and whether with sureties, if so in what amount:

   The appellant was granted bail in sum of $55,000 cash without surety and appellant was further granted bail on same terms pending the outcome of the appeal.
9. Previous criminal record: Clear record.
10. Dialect: Punti.

(K.W.CHUNG)
for Registrar, Supreme Court.

Dated the 25th day of March, 1983.

No. 12

DECLARATIONS

No.12
Declarations
18th-25th July
1983

I, DETTY YUEN, of THE SUPREME COURT HONG KONG, do solemnly and sincerely declare that, having been required by the Registrar of the Supreme Court to furnish to him a transcript of the shorthand notes relating to the trial of Regina v. (1) KONG Cheuk-kwan and three others, Case No.292 of 1982, which shorthand note is now produced and shown to me marked "DY", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "DY", and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: Detty Yuen

Court Reporter

Declared at the Supreme Court in the Colony of Hong Kong this 18th day of July, 1983

Before me:

Sd: Illegible

Commissioner for Oaths

In the High Court of Hong Kong

No.12
Declarations
18th-25th July 1983

(continued)

I, HELEN HO, of THE SUPREME COURT, HONG KONG, do solemnly and sincerely declare thst having been required by the Registrar of the Supreme Court to furnish to him a transcript of the shorthand note relating to the trial of Regina v. KONG Cheuk-kwan and others, Case No.292/82, which shorthand note is now produced and shown to me marked "HH", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "HH", and I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: Helen Ho

Court Reporter

Declared at the Supreme Court, in the Colony of Hong Kong this 18th day of July, 1983.

Before me:

Sd: Illegible

Commissioner for Oaths

I, MIRANDA SHUI, of THE SUPREME COURT, HONG KONG, do solemnly and sincerely declare that having been required by the Registrar of the Supreme Court to furnish to him a transcript of the shorthand note relating to the trial of Regina v. KONG Cheuk-kwan and others, Case No.292/82, which shorthand note is now produced and shown to me marked "MT", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "MT", and I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: Miranda Shui

Court Reporter

Declared at the Supreme Court, in the Colony of Hong Kong this 19th day of July, 1983

Before me:

Sd: Illegible

Commissioner for Oaths

In the High Court of Hong Kong

No.12
Declarations
18th-25th July 1983

(continued)

I, AMY CHAN of THE SUPREME COURT, HONG KONG, do solemnly and sincerely declare that having been required by the registrar of the Supreme Court to furnish to him a transcript of the shorthand note relating to the trial of Regina v. KONG Cheuk-kwan and three others, Case No.292 of 1982, which shorthand note is now produced and shown to me marked "AMY", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "AMY", and I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: Amy Chan

Court Reporter

Declared at the Supreme Court, in the Colony of Hong Kong this 22nd day of July, 1983.

Before me:

Sd: Illegible

Commissioner for Oaths

I, Susan KWONG of THE SUPREME COURT HONG KONG, do solemnly and sincerely declare that having been required by the Registrar of the Supreme Court to furnish to him a transcript of the shorthand note relating to the trial of Regina v. KONG Cheuk-kwan and three others, Case No. 292 of 1982, which shorthand note is now produced and shown to me marked "SK", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "SK", and I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: S. Kwong

Court Reporter

Declared at the Supreme Court,
in the Colony of Hong Kong this
22nd day of July, 1983.

Before me:

Sd: Illegible

Commissioner for Oaths

In the High Court of Hong Kong

No.12
Declarations
18th-25th July 1983

(continued)

I, AGNES LIU of THE SUPREME COURT, HONG KONG, do solemnly and sincerely declare that having been required by the Registrar of the Supreme Court to furnish to him a transcript of the shorthand note relating to the trial of Regina v. KONG Cheuk-kwan and three others, Case No. 292 of 1982, which shorthand note is now produced and shown to me marked "AL", and purporting to have been signed and certified by me, I have made a correct and complete transcript thereof to the best of my skill and ability in pursuance of the said requirement, which said transcript is now shown to me marked "AL", and I make this solemn declaration conscientiously, believing the same to be true, and by virtue of the provisions of the Oaths and Declarations Ordinance, 1972.

Sd: A. Liu

Court Reporter

Declared at the Supreme Court, in the Colony of Hong Kong this 25th day of July, 1983

Before me:

Sd: Illegible

Commissioner for Oaths

No. 13

In the Court of Appeal of Hong Kong

No.13
Notice of Application
16th April 1983

NOTICE OF APPLICATION

CRIMINAL PROCEDURE ORDINANCE
(CHAPTER 221)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

To: the Registrar,
Courts of Justice,
Hong Kong

PART I

Particulars of Appellant	Full Name: KONG CHEUK KWAN	Aged on conviction: 30
	Present Address: 13, Village House, Ping Kong Tsuen, Sheung Shui, N.T.	
Court where tried and/or sentenced	Name of Court: High Court Name of Judge: Hon.Mr. Justice Penlington	Date of (i) Conviction: 25/3/1983 (ii) Sentence: 25/3/1983

Particulars of Offences and Sentences appealed against	Offence	Sentence
	Manslaughter, contrary to Common Law and Section 7 of the Offences against the Person Ordinance, Cap.212.	18 months imprisonment
	Particulars: Kong Cheuk Kwan and Ng Yui Kin on the 11th day of July 1982 on board "the Flying Goldfinch", a Hong Kong registered vessel, unlawfully killed Wu Yuk Ngan (H.C.Case No.292 of 1982)	

Offences taken into consideration: Nil

Total Sentence: 18 months imprisonment

PART II

The Appellant is apply for -

~~EXTENSION OF TIME in which to give notice of application for leave appeal~~

~~EXTENSION OF TIME in which to give notice of appeal~~

Leave to appeal against CONVICTION

~~Leave to appeal against SENTENCE~~

~~BAIL~~

He ~~is~~/is not seeking LEGAL AID.

PART III

The Grounds are set out in the attached Grounds of Appeal settled by Leading Counsel.

Signed: C.K.Kong

Date: 16th April 1983

This notice was handed in by the Appellant today

(Signed) P.T.Yeung & Co.
Date: 19th April 1983

Received in the Registrar's office

Date: 20 APR 1983

No. 14

PROVISIONAL GROUNDS OF APPEAL

In the Court of Appeal of Hong Kong

No.14
Provisional Grounds of Appeal
11th April 1983

R. v. KONG

Set out below are provisional grounds of appeal. Leave will be required in that some of the grounds raise issues of fact. In effect, a transcript of the full trial will be needed.

1. The learned Judge failed to hold that the Defendant had no case to answer in that :-

(a) the fact of the collision did not give rise to any inference of improper navigation against any one vessel.

(b) the eye witness material could not assist the jury in formulating a view that any particular vessel had been improperly navigated: alternatively, such evidence was inherently weak, vague, inconsistent and unreliable.

(c) the Crown adduced no evidence to establish the position of collision or the relative approaches of the two vessels; accordingly it was impossible for the jury to know which were the relevant collision regulations.

(d) the statement made by the Defendant to the police was irrelevant for the purpose of considering "no case"; alternatively it was exculpatory.

~~2.---The learned Judge failed to give any reasons for his decision that the Defendant had a case to answer.~~

3. The learned Judge improperly informed the jury that he had decided there was no case for the Co-Defendant Ng to answer because "there was insufficient evidence against him"; and/or that there was not sufficient evidence for the jury to be sure that his alleged negligence caused the collision, he ought to have told the jury that there was no case in law against Ng.

4. Having found that Ng had no case to answer, the learned Judge failed to tell the jury that the reason why Ng had no case to answer was that, since the Defendant was at all material times aware of the approach of FLYING FLAMINGO, any failure in look-out was not causative and, accordingly, since the only evidence that the Defendant was so aware was his own statement to the Police, that statement must be treated as true: alternatively, the learned judge should have directed the jury that the statement was not evidence of the truth of its contents as the same was self-serving.

5. The learned Judge improperly directed the jury in that:

(a) he failed to give any or any adequate

(b) he failed to direct the jury that a breach of the collision regulations did not per se constitute gross negligence

(c) he failed to direct the jury that failure to comply with the course of action recommended by Captain Pyrke was not necessarily gross negligence.

(d) having indicated that a particular situation might be categorised as highly dangerous, he failed to direct the jury that failure to cope with or respond to that situation was not necessarily gross negligence, particularly if the situation of danger was not of the persons own making.

6. The learned Judge improperly permitted Captain Pyrke to give expert evidence when he had already investigated the collision and made a full report on the same to the Governor, most of the material forming the basis of that report not being admissible or available at the trial: further the learned Judge inaccurately summarised the evidence of Captain Pyrke in his summing up.

2 Essex Court,
Temple, E.C.4.

11th April, 1983

In the Court of Appeal of Hong Kong

R. v. KONG

No.14
Provisional Grounds of Appeal
11th April 1983

(continued)

MESSRS. P.T. YEUNG & CO.
810-811 INTERNATIONAL BDG.

Cr.App. 455/83

Hon. Huggins, V.-P.,

Submitted for directions please.

Sd: David Ho
(DAVID HO)
26.5.83

Complete transcript
A.A.H.
28/5/83

No. 15

GROUNDS OF APPEAL

IN THE COURT OF APPEAL ON APPEAL
FROM HIGH COURT CASE NO. 292 OF 1982

THE QUEEN

V.

KONG CHEUK KWAN
and Others

GROUNDS OF APPEAL

1. The learned Judge failed to hold that the Defendant had no case to answer in that :-

(a) the fact of the collision did not give rise to any inference of improper navigation against any one vessel.

(b) the eye witness material could not assist the jury in formulating a view that any particular vessel had been improperly navigated: alternatively, such evidence was inherently weak, vague, inconsistent and unreliable.

(c) the Crown adduced no evidence to establish the position of collision or the relative approaches of the two vessels; accordingly it was impossible for the jury to known which were the relevant collision regulations.

(d) the statement made by the Defendant to the police was irrelevant for the purpose of considering "no case"; alternatively it was exculpatory.

2. The learned Judge failed to give any reasons for his decision that the Defendant had a case to answer.

3. The learned Judge improperly informed the jury that he had decided there was no case for the Co-Defendant Ng to answer because "there was insufficient evidence against him"; he ought to have told the jury

that there was no case in law against Ng.

4. Having found that Ng had no case to answer, the learned Judge failed to tell the jury that the reason why Ng had no case to answer was that, since the Defendant was at all material times aware of the approach of FLYING FLAMINGO, any failure in look-out was not causative and, accordingly, since the only evidence that the Defendant was so aware was his own statement to the Police, that statement must be treated as true.

5. The learned Judge improperly directed the jury in that:

(a) he failed to give any or any adequate direction on the distinction between negligence and gross negligence.

(b) he failed to direct the jury that a breach of the collision regulations did not per se constitute gross negligence.

(c) he failed to direct the jury that failure to comply with the course of action recommended by Captain Pyrke was not necessarily gross negligence.

(d) having indicated that a particular situation might be categorised as highly dangerous, he failed to direct the jury that failure to cope with or respond to that situation was not necessarily gross negligence, particularly if the situation of danger was not of the persons own making.

6. The learned Judge improperly permitted Captain Pyrke to give expert evidence when he had already investigated the collision and made a full report on the same to the Governor, most of the material forming the basis of that report not being admissible or available at the trial.

Sd: David Steel
DAVID WILLIAM STEEL Q.C.,
11th April, 1983

2 Essex Court,
Temple, E.C.4.

No. 16

JUDGMENT

Certified TRUE copy
Sd: Betts
(J.BETTS)
Acting Registrar, Supreme Court
17 DEC 1984

1983, No.455
(Criminal)

IN THE COURT OF APPEAL

BETWEEN

THE QUEEN

and

KONG CHEUK KWAN Appellant

Coram: Court of Appeal (Hon.McMullin, V.-P., Li and Silke, JJ.A.)
Date: 9th March, 1984

J U D G M E N T

McMullin, V.-P.:

On the 11th of July, 1982, the "Flying Flamingo", a hydrofoil ferry owned by the Hong Kong and Macau Hydrofoil Co.Ltd., left Hong Kong at about 8:37 a.m. and made for Macau by one of the regular routes which took it, heading west, through the waters along the South shore of Lantau Island.

At about 9:00 a.m. on the same morning, the "Flying Goldfinch", another hydrofoil of very similar size and design and owned by the same company, left Macau for Hong Kong. Both craft were on regular scheduled trips and both were carrying passengers. Sailing conditions were ideal. It was a bright sunning morning, the sea was calm and visibility - estimated at about 12 miles - was, for practical purposes of navigation, unlimited.

At approximately 25 or 26 minutes after nine, these two vessels, foil-borne and travelling at close to maximum speed, came into collision with each other in the open sea, at a point

approximately 1½ miles due north of the island of Ching Chou. There were no other craft in their immediate vicinity. The bow of the Goldfinch struck the Flamingo on her starboard side amidships just forward of the main passenger saloon, breaching the hull and causing extensive damage to the engines resulting in instant failure of the hydraulic system whereby the rudder and foil flaps were frozen in their final position as at the moment of impact.

At the time of the collision Captain Kong Cheuk Kwan, the present applicant, was at the helm of the Goldfinch and Ho Yin Pun, the deck officer of the Flamingo was at the helm of that vessel. The Flamingo's captain, John Coull, who had taken the vessel out of Macau harbour, and had then given the helm over to Mr.Ho, was on the lookout duty at the latter's side in the wheelhouse.

Aboard the Goldfinch this lookout duty was being performed by Ng Yui-kin, the 1st mate. Captain Kong and Captain Coull are certificated master-mariners and their subordinates, on duty with them on that date, are both navigationally qualified officers. Mr. Ho is a certificated second mate and Mr. Ng holds a first mate's ticket. After the collision, the Flamingo was in a sinking condition. Her passengers were hastily transferred to the other vessel which was eventually towed into Hong Kong harbour. The Flamingo drifted northward with the tide and sank at a point on the Mainland some five or six miles north of the presumed point of collision. She was subsequently raised and moved to the hydrofoil dock where she and the Goldfinch were examined by Mr. Tang, a senior ship surveyor employed by the Marine Department.

Two passengers on the Flamingo, a man and a woman, lost their lives and several other people were injured as a result of this accident. The deceased woman, Madam Wu Yuk Ngan, is named as the victim in both charges of the indictment, in the first of which Captain Kong and Mr. Ng are charged with manslaughter, Captain Coull and Mr. Ho being similarly charged in the second.

The trial extended from the 7th to the 25th of March, 1983. Seven passengers from the Flamingo

gave evidence for the Crown as did two seamen from the Goldfinch, two seamen from the Flamingo, and the radio officers of both vessels. No passenger from the Goldfinch was called either by the prosecution or the defence.

At the conclusion of the prosecution case, Counsel for all defendants - Mr.Steel for the 1st, Mr. Aiken for the 2nd, and Mr. Corrigan for the 3rd and 4th - submitted that there was insufficient evidence against their respective clients to put them to their defence. The trial Judge ruled that Ng Yui-kin, first mate of the Goldfinch, had no case to answer and he subsequently directed a verdict of acquittal. The other three defendants were called upon to answer to the charges but none of them elected to give evidence and Counsel then made their final submissions. By unanimous verdict, Captain Kong was convicted as charged and Mr.Ho, the deck officer of the Goldfinch, was acquitted. Captain Coull was acquitted by a majority of five against two.

There is no doubt that in choosing to charge all four officers on navigational duty on the two vessels on this occasion the prosecution were shouldering an onus of a somewhat complicated kind. On the one hand it was not suggested that it was permissible simply to point to an apparently inexplicable occurrence and to invoke anything equivalent to the maxim 'res ipsa loquitur', and on the other, there was the need to pin-point the nature of the negligence attributable to each defendant, bearing in mind the international regulations applicable to the avoidance of collisions at sea, and the shifting array of responsibilities and duties which may arise in different situations under those regulations.

Moreover, the Crown was faced from the outset with the possibility - realized in the event - that none of the defendants would testify but that, if any one of them did so, the prosecutor must be prepared to deal with the extra-judicial statements made by each defendant prior to the trial. These statements contain the only attempt to explain the accident available to the Crown at the time when the trial commenced.

Captain Kong, the present applicant, made a statement to the police on the 3rd of August, 1982. His first mate, Mr. Ng, had already

done so on the 1st of August. Captain Coull and Mr.Ho (3rd and 4th defendants) had also been interviewed by the police and they, separately, made statements on the 4th of August. Each of these statements, other than that of Mr.Ng, purported to give an account of the circumstances leading to the collision. Mr.Ng professed himself to have been busy in making up the log of the Goldfinch immediately before the collision occurred and thus not to have witnessed anything of significance relating to the approach of the other vessel.

Each of the other three defendants, however,purported to explain the incident in a manner which was clearly intended to rebut any suggestion of negligent behaviour on his part.

These statements have played a somewhat equivocal part in the trial. They appear to have been admitted in evidence, though it is not clear in what manner they are produced and exhibited. Certainly they were referred to frequently, and commented upon both in Counsel's addresses and in the summing-up. They were also made available with the other exhibits for scrutiny by the jury at the conclusion of the evidence.

Mr. Lucas for the Crown made it clear both in his opening and in his closing address that the prosecution were not relying upon any of these statements as to the truth of any part of their contents. Nevertheless they figured prominently in the Crown's case in as much as they were resorted to by Mr. Lucas principally to demonstrate that the accounts contained in them left the events which they described unexplained save in terms of gross negligence on the part of the maker of the statement.

Thus a major part of the evidence - some 420 pages of transcript involving 19 witnesses- consists of the evidence of the testimony of Captain Pyrke, a senior ship surveyor called as an expert in marine matters by the Crown. This evidence - occupying 174 pages of the transcript - is almost wholly concerned with an exploration of the possibilities raised by the factual content of these several statements taken in the context of the duties and obligations impo ed by the 1972 International Regulations For Preventing Collisions At Sea, and considered in

relation to the other evidence led by the Crown. This included the oral testimony of the crewmen and passengers, and it included also, as essential basic data, the presumed position of the vessels at the moment of impact and the angle at which the Goldfinch had struck the side of the Flamingo. Captain Pyrke was in effect asked to consider the situation described in these three statements and the action allegedly taken by the several defendants from the moment when the vessels first sighted each other, at which point of time there was, by the consensus of opinion of all three defendants, a distance of four to five miles between them uninterrupted by other traffic and unaffected by any defect in visibility.

We do not think it would be helpful to enter into all the details of this evidence or of the defendant's statements. Clearly much of what Captain Pyrke had to say was, of necessity, hypothetical. These craft travel at very high speeds. It is common ground that the Goldfinch and the Flamingo were closing upon each other at a pace which consumed the space between them at a rate of something over a mile per minute so that the period of mutual surveillance disclosed in the defendant's statements was little more than 4 minutes at the most from first sighting.

The substance of the statements of Captain Coull and Mr. Ho is that they were aware of the approach of the Goldfinch four to five miles ahead of them. The Goldfinch was heading on a straight course towards Tai Pa and the other vessel was on a reciprocal course and steady bearing which, in the opinion of both of them, would cause the two craft to pass each other starboard to starboard at a distance of about 5-600 feet. According to these statements, the collision was caused by a sudden turn to starboard by the Goldfinch in what, according to Mr. Ho, appeared to be an attempt to cut across the bow of the Flamingo when the vessels were a few hundred feet apart.

Captain Kong's account of the matter was that at four miles the vessels were both travelling "in a straight line" and he maintained speed and bearing until they were about two miles apart and then changed course by 10-15 degrees to starboard so as to put the other vessel upon his port-side. Finding

that the relative bearing of the two boats had not altered when they were only half a mile apart, he then altered the course by a further 7 degrees to starboard and kept on at this bearing and at the same speed until they were .2 or .3 of a mile apart with the Flamingo at what he described as 33 to 45 degrees on his portside. At that point he looked down to check his instruments and when he looked up again the Flamingo was only two to three hundred feet away and appeared to be trying to cut across his bow. He then ordered the engineer to shut down the engines and a few seconds later, with his vessel still swinging to starboard, they collided with the Flamingo.

This account clearly sought to lay the blame upon the Flamingo for not turning to starboard as he had done but instead altering to port in such a way as to offset his manoeuvres - correct under the relevant regulations - from the time he first altered the course when the vessels were two miles apart.

Captain Pyrke was extensively examined by Mr. Lucas and cross-examined by all defence counsel. Mr. Lucas was concerned to demonstrate that even having regard to the contents of the statements and considering the performance alleged in them against the bedrock data of time, position, speed and angle of impact, there must have been a very high degree of negligence on both sides. The difficulty about that was, of course, that the bedrock data were themselves of a distinctly suppositious character. The exact location of the collision was never established with complete accuracy. The position 1.5 miles north of Ching Chow Island was fixed by reference to certain sightings of the two vessels by the chief officer of another foil borne craft, the Sao Jorge, a jetfoil belonging to the Far East Hydrofoil Co.Ltd., which passed the Goldfinch shortly after both vessels had left Macau and which later passed the Flamingo shortly before the collision, after the latter vessel had cleared Fan Lau point on the southern tip of Lantau. It was this officer's duty to mark the times of passing various landmarks in a log kept for that purpose and the data thus recorded were resorted to for the purpose of trying to fix the position of the collision. The time of sighting of a smoke signal at 9:34 a.m. by

another hydrofoil, the Flores, was also enlisted for this purpose.

This manner of fixing position was further complicated by the fact that the tide was flowing northward at the time, and the endeavour to establish the location of the collision as nearly as possible relied also in part on making an allowance for the northward drift of the disabled Flamingo to the point at which she sank, regard being had to the rate of flow of the tide at the time of the collision.

Again, both of the marine experts who gave evidence, Captain Pyrke and Mr.Tang, were working on an angle of impact between the vessels which was deduced from the damage to both vessels and the disposition and alignment, following impact, of some of the interior furnishings of the Goldfinch. This angle was estimated variously as being between 60-80 degrees (Mr.Tang) and 50-70 degrees (Captain Pyrke).

It is not difficult therefore to appreciate that Captain Pyrke was being pressed for fairly definite answers concerning what had happened prior to the accident and as to what was done or not done, or what should have been done, by the three defendants upon a slender basis of facts which also included the variety of imponderables. Amongst the latter was, for example, the same northward flow of the tide which has already been mentioned and its possible effect upon the heading of the two vessels from the moment of first sighting up to the point of impact. Captain Pyrke prepared a number of graphs which are in effect time and motion studies purporting to follow out suggestions put to him by Counsel on the basis of the somewhat exiguous facts contained in the statements. It is perhaps not surprising that there can be found in his evidence answers which give support at times to the Crown and at other times to the defence view of the collision.

Mr. Steel, both at the trial and also before this court, has throughout maintained with forceful reiteration: a) that it was not possible for the Crown to ascribe even civil liability - much less criminal responsibility - to any of the defendants without first having established sufficient primary facts in regard to the initial position of the

vessels at the time of first sighting and their respective bearings thereafter up to the point of impact; b) that without such facts it is not possible to say with certainty who was at fault under the International Regulations; more particularly to say which was the "stand-on" vessel under Rule 17 of those regulations whose right it would have been to maintain course without alteration until it had become apparent that the vessel at fault was doing nothing to observe her duty to avoid collision; c) that the prosecution had not shown sufficient primary facts, the evidence of the eye witnesses being inadequate and somewhat confused and covering only the last few seconds before the impact; d) that the prosecution did not purport to rely on the contents of any of the defendants statements; e) that nevertheless his client's statements contained the only account of the occurrence which gave anything like a coherent explanation of how the critical situation had been brought about. This statement had furthermore been relied upon to some extent by the trial judge in finding that Ng Yui-kin had no case to answer. If such statement were true, it established, he said, the Goldfinch as the "stand-on" vessel and the Flamingo as the "give-way" vessel which had therefore been responsible for creating the risk which had resulted in the collision. These were the principal reasons urged by Counsel in support of the first Ground of Appeal which was that the Judge was wrong to have ruled a case to answer against his client.

It may be said at once that, if the prosecution had been proposing to bring home its charges solely by showing that all the defendants had displayed a very high degree of negligence in their manner of navigation from the moment when they first became aware of each others approach, it would be difficult to support the finding of case to answer in the absence of evidence to establish with sufficient certainty the relative positions of the two craft at the outset and the manoeuvres performed by each of them thereafter. There was no independent observer who could speak of these matters and the Crown was certainly not relying on the contents of the defendant's statements insofar as these might be regarded as proposing

innocent explanations for what had occurred.

Although Mr. Lucas seemed at one stage prepared to maintain that the inexplicable character of the incident coupled with what he regarded as the demonstrated falsity of the tendered explanations was sufficient to establish gross negligence from the outset, he made it clear that the Crown's primary position was that that degree of negligence had been satisfactorily proved in relation to that short space of time - to which he referred as the "circle of danger" - and which, as we understood him, would have been entered at the point when the vessels were half a mile apart and therefore some 30 seconds only from collision.

The prosecution, while not relying on Captain Kong's statement as an innocent explanation of his conduct were fully entitled to have regard to any part of it which told against his interests as one professing to have acted responsibly. What Captain Kong's statement shows is that having seen the other vessel behaving in an unusual and irresponsible manner the only action which he took was to alter course to starboard by a further 7 degrees. As to this at least Captain Pyrke's evidence was unequivocal. Such a manoeuvre under such circumstances was, he said, useless. The only safe course according to him which either vessel could have taken at that stage was to cut the engines and drop upon the hull. there was evidence, accepted by both sides, that these craft are easily manoeuvrable but, more importantly, that they are capable of stopping with dramatic suddenness in a distance of about 250 feet by cutting the engines and going down off the foils.

The Judge stressed this aspect of the evidence. He pointed out that Captain Pyrke had said that these hydrofoils can come to a complete stop from full speed ahead in 7-8 seconds, and a little later he said: "He said" (that is Captain Pyrke said) "that if the hydrofoils saw each other at three miles away and decided they should alter course - at three miles away they should alter course then and there. They should not leave it any later. Their approach speed is about a mile a minute. If, however, nothing is done and danger is seen at about half a mile, both vessels should come down on to their hull,

they should not at that stage leave it to a change of course, and that at half a mile the safe thing to do is to come down onto the hull." (emphasis added). It is conceded by the Crown that the reference to the need to alter course at 3 miles in that passage is incorrect. What the Captain had in fact said was that when the vessels were three to four miles apart, what they should do was, at a reasonable distance and in ample time, alter course to starboard so as to pass portside to portside in the proper manner. But that mistake in no way dilutes the importance of the concluding part of that direction with its emphatic insistence upon the need to come down upon the hull instantly once the danger of collision has become imminent.

There was therefore, for the jury's consideration, an admission that, on being presented with a situation of extreme danger, and irrespective of how that had come about - and irrespective also of any failure on the part of the other vessel - the applicant, on his own admission, had failed to take the only course which, on the expert evidence he should immediately have taken. But that was, of course, not all that the jury had to consider. There was also the evidence of the passengers and the seamen.

In his opening speech Mr. Lucas had sought to contrast what he described as "pandemonium", among the passengers at the observed approach of the Goldfinch with an apparent lack of concern, demonstrated by a lack of immediate action, prevailing in the wheel-house. Mr.Steel took issue with him on this and it may be said that if at the outset Counsel for the Crown was hoping to be able to demonstrate that these dramatically described and opposite conditions had prevailed for the full half minute which would emcompass the traversing of his "circle of danger" - the witnesses for the Crown did not go so far. All the passengers who observed anything at all spoke of seeing the other hydrofoil approaching at very high speed. The length of time from sight to impact was variously estimated. The least of these purely time estimates was one or two seconds (Mr. Choi Hung Fai) and the greatest about ten seconds (Mr. Kwok Sum). But there were other descriptions of a possibly more reliable

and revealing character. One of the witnesses standing at the starboard rail on the deck of the Flamingo said he saw the other hydrofoil when it was at a distance equivalent to the "diagonal of the Hong Kong Stadium" - clearly a substantial distance - which gave him time to comment to his friend on the manner in which the other hydrofoil was approaching. Another gave the first sighting distance as six or seven "American city blocks" or 4-600 yards. This witness was able to exchange a few words with his friend and then, when the Goldfinch was about 200 yards away, they both ducked down and lost sight of her until the crash. According to this witness, there was time for his impression of the approaching vessel to change from one of appreciation of it as a "beautiful sight" to one of accute alarm.

A crew member who was in the upper saloon heard someone near him say: "Why is this vessel sailing in such a manner?". He turned and looked out the window and saw the Goldfinch. He then had the time to shout out in alarm five or six times and then to leave the bar where he had been standing and lie flat on the floor between the seats. He said that one or two seconds later the other vessel struck.

Other passengers saw less or were less coherent. None of them spoke of any change in direction in the course of either vessel. There were, however, two seamen of the Goldfinch who, shortly before the collision, were sitting on the upper deck facing towards the stern. They both described a sharp turn to starboard by their own vessel which showed in the wake a very short time before the impact. One described it as bending in a sickle shape from a previously straight line. The other noticed this bend in the wake when the Flamingo was about 100 feet away.

The statements of Captain Coull and Mr. Ho alleged a perfectly straight course after clearing Fan Lau on the southern tip of Lantau and this received support from Mr. Tang when he inspected the Flamingo and found that all the controls had been frozen in position at the moment of impact. He noted that the starboard foil flap was depressed by 10 mm. and the port flap was up

by the same amount. This indicated, he said: "Slight port turning; if it has any movement - very slight." In cross-examination later, he said that, since he had also found the helm of the Flamingo in a neutral position, his findings could be consistent with a perfectly straight course of travel by the Flamingo up to the point of impact.

There was another factor to which the jury were entitled to have regard. Mr. Lo Kam-sing, the radio officer of the Goldfinch, described a meeting held by Captain Kong on the evening of the 11th July after the accident to which he and several other crew members of both hydrofoils were summoned by Captain Kong. Deck Officer Ng Yui-kin (the 2nd defendant) and Chief Engineer Lam Hok-chung were the other people present from the Goldfinch. Those present from the Flamingo were the first mate Ho Yim-poon (the 3rd defendant) and Chief Engineer Yuen Wing-yiu. Captain Coull did not attend. The purpose of this meeting was to agree upon an account of what had happened. Captain Kong wanted it established that there had been a sudden inexplicable and uncontrollable "sheer" to starboard by the Goldfinch shortly before the impact and also that he had ordered the engineer to shut down the engines immediately that occurred. Mr. Ho did not speak of any general consensus on these points, but he was clear that the 2nd defendant was prepared to support Captain Kong in this account of the matter and the upshot was that the latter added an entry to the log for the 11th of July, the relevant part of which is as follows:

> "0902 Dep Macao with 32 passengers and 8 crew. 0903 FAOP. 0907 Passing No.1 Beacon A/C 087(-) 0922 Passing Ching Chow at 1.3' off. 0926 V/L sheered to star'd at rate of 5°/Sec.approx. D/O advised master of the incident and at the same time master tried to put the vessel on course again but no response. With port flag pushing forward and starboard flap aft & rudder on port helm. Stop engine. Vessel collided with 'Flying Flamingo'. "

This entry, together with other details subsequently noted, was signed by Captain Kong and by Mr. Ng.

Between the date of that meeting and the making of the several statements to th police, the Flying Goldfinch was examined by Mr. Tang and it became apparent that there had been no mechanical failure or defect in her equipment which could have accounted for any such sudden and uncontr turn to the right. It was conceded at the trial that this story in the log was a fabrication.

In dealing with this invention the Judge directed the jury not to regard this written entry as direct evidence of how th collision had occurred. He said: "It is only of value in assessing the weight - th reliability of Captain Kong's statement." This was no doubt a reference to the full statement made by Captain Kong several wee later to the police. What must be noted however is that both stories describe, the in very different terms, a turning to starboard, while the statements of Mr. Ho and Captain Coull described a straight and undeviating course for the Flamingo.

All of these statements were before the jury and in Hong Kong such statements when admitted in evidence are there for al purposes whether in part self-serving or n A jury in Hong Kong is entitled to give such statements whatever weight they think may be justified (Cheng Chui v. The Queen 1980 H.K.L.R.50). It is true that Mr. Luc more than once informed the jury that the Crown did not present these statements as embodying the truth. He was primarily concerned to use their contents for the purpose of demonstrating, via the evidenc in Captain Pyrke, that they did not relie any of the defendants of the imputation o negligence. It was this which caused Mr. Steel to describe the approach of the prosecution as an exercise in destruction The law, as it stands, in Hong Kong, can make the prosecution approach to such statements as these appear ambivalent, an it may be that Mr. Lucas so expressed him to avoid the appearance of ambivalence. However that may be, it is clear that the was matter in these several statements wh was capable of being construed as constit an admission against the interest of the maker and however they were described by counsel for the Crown, and notwithstandin the "destructive" use to which he put the

they were before the jury whose task it was to consider them and form an estimate as to their value and as to what extent, if any, they could be relied upon as revealing in whole or part the truth.

Thus there was before the Judge at the stage of the submission of no case, and before the jury ultimately, a body of evidence tending to show that the Goldfinch had made a turn to starboard at a very late stage with the apparent intent of cutting across the bow of the other vessel which had, up to then, been travelling in a straight line and that it was this which had either (on the defendant's story) brought a dangerous situation - itself the result of inadequate lookout on both vessels - to the pitch of disaster; or else, (on the Flamingo version) had produced disaster from a situation which up to then had threatened nothing of the kind.

There remained the reality that even on the latter view of the matter it should have been open to the helmsmen or masters of both craft to avoid disaster by going immediately down upon the hull on the first perception of the crisis, or at any rate within the 30 seconds still remaining after the moment when, on any rational reckoning, the existence of a crisis ought to have become apparent to any one keeping lookout. Even if such action had been taken by either vessel in the last 10 seconds it seems clear, assuming that the other vessel held on its way, that there could have been no collision; and if taken by both vessels simultaneously this would, at worst, have resulted in damage greatly less than that which occurred.

Mr. Steel, arguing from the perspective of these Collision Regulations and the lack of data to establish headings and bearings throughout the entire passage of these vessels up to the last half mile considered the jury's verdict to be inexplicable. Indeed, it is often not very profitable to try to construe the verdict of a jury. But in the shortened perspective of the last 30 seconds, this verdict may perhaps not appear especially inscrutable. The jury had been told by Captain Pyrke that the heaviest responsibility

for keeping lookout fell not on the helmsman, whose attention should be directed to the waters directly ahead and circumscribed by what the witness called "tunnel-vision" owing to the need to watch out for obstructions in the vessel's immediate track, but on the officer sitting or standing to the helmsman's left and charged specifically with the task of general surveillance. The helmsman on the Flamingo was the Deck Officer Mr. Ho, the lookout Captain Coull. The situation on the Goldfinch was the reverse of that. In the case of the first mate, Ng Yui-kin, there was the admission by Captain Kong in his statement that he had seen and had been observing the Flamingo throughout her approach. It was this which caused the Judge to accede to the submission of No Case in regard to Mr. Ng. He took the view that once the mate was aware that the helmsman, Captain Kong, had observed the Flamingo, there was no need for him to inform the Captain of anything further so that there was no evidence to show anything in the conduct of Mr. Ng which could reasonably be regarded as causative of the accident. Indeed, he so informed the jury upon their return following the conclusion of the No Case submissions, in explaining to them the absence of the second defendant from the dock. A point is taken on this by Mr. Steel, to that we will return.

As to the remainder of the verdict, it may reasonably be read against the contents of the statements of Captain Coull and Mr.Ho both of which alleged a straight course for the Flamingo and an expectation, from the apparent bearing of the other vessel, that there would be a starboard to starboard passing at 5-600 feet which, on Captain Pyrke's evidence would have been safe. Mr. Ho's statement said that he had then concentrated on what lay immediately ahead and he accounted for the collision by an attempt on the part of the Goldfinch to cut across his bow which he observed when she was only 200 feet away. Captain Coull on his showing had not perceived the crisis until he heard Mr. Ho cry out, and by then the Goldfinch was upon them.

The acquittal of Mr. Ho, the helmsman of the Flamingo, would suggest that the jury had found the immediate cause of the collision in a late and unexpected turn to starboard by the Goldfinch, something which the lookout rather than the helmsman should have seen. There was some evidence from the radio officer

of the Flamingo that Captain Coull was seated beside Mr. Ho with some papers including a newspaper lying on a flat surface in front of him. There was no evidence that he had actually been reading the newspaper. The verdict in his case obviously reflected some dissatisfaction with his performance of the duty of lookout. But as a verdict of acquittal, it would accord with the view that there was an acceptance by the majority that the real blame for failing to take effective action in the critical last 30 seconds lay with the other vessel.

Mr. Steel drew our attention to a number of statements - some 11 or 12 in all - in the summing-up which he categorised as factual errors damaging to his client's case. Although this was keenly disputed by Mr. Lucas, there clearly were some instances of mis-statement or misunderstanding of the evidence. Thus, for example, the Judge said that Captain Pyrke's evidence was, that on reciprocal courses, five to six hundred feet would be a minimum safe crossing distance. In fact, what the witness said was that that would be just acceptable if the vessels were passing each other starboard to starboard. There was a confusion at this point since the Judge went on at once to tell the jury that "five to six hundred yards would of course be perfectly safe". This latter was a reference to Captain Pyrke's opinion as to what a safe distance would be on reciprocal crossing courses, the vessels having altered course while still 3-4 miles apart.

Again, there is some confusion where the Judge is dealing with a rather complicated series of questions and answers the general purport of which was to test certain hypotheses put to Captain Pyrke by counsel as to what action had been and what should have been taken on certain assumptions deriving from some of the statements and including assumptions as to the angle of impact and the headings of the two vessels at earlier stages in their approach to the point of collision. Concerning all this Captain Pyrke had plotted a variety of courses on graph paper, Mr. Steel's complaint is that the Judge misunderstood and to some extent misrepresented the possibilities elicited

thus in evidence. A further objection is that the Judge also pointed out that Captain Pyrke had said that both vessels should have been using radar to check bearings, without reminding the jury that the witness had related the superior accuracy of such checking, over visual checking, to radar equipment which was gyro-stabilized, which was not the case on these two hydrofoils.

It might have been that these matters would have had a serious bearing on the jury's verdict if the Crown's case had depended substantially on showing gross negligence in the manner of navigation of the vessels from the moment of mutual sighting and thereafter throughout the course of sailing up to the point of impact. Within that perspective the emphasis laid on what Counsel alleged was a perfunctory treatment of the collision regulations by the Judge is understandable. Mr. Steel stressed the need to support such a charge as this by demonstrating where the responsibility lay for the creation of the risk. He argued that the Crown's concentration on the final moments was an attempt to discharge a criminal onus by the application of a doctrine vanished even from the field of civil law - the concept of the "last opportunity". But, with respect, that seems to misconceive the whole thrust of the prosecution case which was that, whatever had gone on before entry into the "circle of danger", there had thereafter been, on such facts as were available, an adequate and mutual opportunity of avoiding disaster by stopping the engines and going down off the foils. This part of Captain Pyrke's evidence was strongly underlined by the Judge more than once, (see pages 19 and 21 of the Summing-Up) and there is no doubt that it was emphasized by that witness himself as the sovereign remedy against disaster in such crises of close encounter between foil-borne craft, however caused. The evidence at the conclusion of the Crown's case for consideration by the Judge, and the evidence ultimately for consideration by the jury, was a body of circumstances which included the following :

1. A collision in the open sea in ideal sailing conditions between two vessels under the control of qualified professional navigators;

2. Evidence from the seamen on the Goldfinch that her straight progress was fairly sharply altered by a turn to starboard very shortly before the impact;

3. An admission by Captain Kong in both his written explanations that he had altered course to starboard. The earlier statement mentioning a turn of a drastically sharp character;

4. An admission that, with collision imminent, he had taken time to consult his instruments instead of at once going down on the hull;

5. The explanation given by Mr.Ho and Captain Coull which alleged a straight course to some extent supported by the testimony of the passengers. These statements were adverse to the 3rd and 4th defendants to the extent that they did not account very satisfactorily for want of earlier vigilance, and the jury were entitled to consider that aspect of these statements as telling against the maker's interests. They were obliged also to consider them in their entirety, including the explanation that there had been a very late alteration of course by the Goldfinch, as an endeavour on the part of Captain Coull and Mr.Ho to explain an apparent want of vigilance;

6. The evidence of Captain Pyrke as to the capacity of these craft to stop in a very short distance in a matter of seconds.

Against all this the jury had nothing further to go on in the form of sworn testimony by the applicant or the other defendants. It is not, we think, possible to say that there was not sufficient matter indicating a high degree of negligence to go to the jury for their consideration.

We would, however, add that we cannot agree with Mr. Lucas in his contention that in such cases as this the Judge must always leave the case to the jury, provided he is

satisfied that there is evidence of some degree of negligence in the conduct of the accused, - something more than minimal negligence - so that it would be for them to say whether in all the circumstances they regard it as sufficiently grave to be criminal. It must surely be left within the Judge's discretion to take the case away if he is satisfied that the evidence could not reasonably be regarded as indicating anything more than a question of private compensation between individuals.

There remains, however, a final and a formidable objection on the law. Mr. Steel presented it as a short answer to the case against his client which avoids all necessity to investigate the facts or to examine the juris-prudential basis of manslaughter or its history. This is a point which concerns the direction given early on in the Summing-up to the jury on the vital matter of the proper test for manslaughter by a negligent act or acts.

The Judge was, no doubt, well aware that the current state of the law of manslaughter by negligence presents pitfalls for the unwary trial Judge and his concern that the jury should be properly instructed is evidenced by the carefully chosen formula which he caused to be prepared in writing and copies of which were put in the hands of the jury subsequent to its oral delivery in the course of the Summing-up.

That formula corresponds closely with what appears in the text of Archbold (44th Ed.) para. 20-49. Mr. Steel says that it is quite simply wrong in that it is materially different from the model direction provided by Lord Diplock in Reg. v. Lawrence [1981] 1 All E.R.974 (at page 982) as approved by the House of Lords in Reg. v. Seymour [1983] 2 All E.R. 1058. The decision of the House of Lords had not yet been announced at the date of the Summing-up in the present case. This direction, Counsel says, must now as a matter of law be strictly adhered to in all cases where the Crown seeks to bring home a charge of manslaughter based on conduct which is said to have been criminally negligent.

Seymour was a case in which the charge was causing death by reckless driving, but it is now common ground that, at least since the decision of the House of Lords in Jennings v. United States Government [1983] Appeal Cases 624,

the degree of negligence which must be established in order to prove the Common Law offence of manslaughter based upon the negligence of the accused is no different from that which must be shown in support of a charge of causing death by reckless driving, notwithstanding that the statutory offence is regarded as the less serious of the two. The kind of negligence to be proved to establish manslaughter may in many cases properly be described as recklessness, although this state of mind may not accurately describe the mens rea in all cases of causing death by negligent conduct (see the speech of Lord Atkin in Andrews v. Director of Public Prosecution [1937] A.C. at page 583).

The"model direction"in Lawrence was propounded by Lord Diplock in this way (page 982) :

> "In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road, or of doing substantial damage to property; and, second, that in driving in that manner, the defendant did so without having given any thought to the possibility of there being such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it."

The particular direction given to the jury on this point in the present case was admittedly one of fundamental importance to their understanding of how to set about the task of estimating the conduct of the applicant, and since this passage has been strongly criticised on several scores, it will be helpful to set it out in full before considering its apparent sources and the manner in which it is said to have misstated the law.

> "The direction I give you, which I've had typed because I think this is not a

trial involving a test of memories so I am going to give you a copy of this before you retire, but I will read(it) out, this is the direction on the question of manslaughter by negligence. That is that the defendant and, of course, each of them considered separately , is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course, you must be satisfied that each of the accused did cause the deceased's death, there was something in the circumstances which would have drawn the attention of an ordinary prudent individual and in this case you would consider the ordinary prudent Deck Officer or helmsman in the position of the defendant, to the possibility that his conduct was capable of causing some injury albeit not necessarily serious to the deceased including injury to health which doesn't apply here, and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible and that, secondly, before the act or omission which caused the deceased's death,the defendant either failed to give any thought to the possibility of there being any such risk or having recognized that there was such a risk he, nevertheless, went on to take the risk, or was guilty of such a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion, such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."

The words from "firstly" down to "negligible" are in the main a paraphrasing of what was said by Lord Diplock in the passage from his speech in Lawrence which immediately precedes the announcement of the "appropriate direction". The reference to "some injury" albeit not necessarily "serious" etc., reflects the opinion of the Court of Appeal in Reg. v. Stone and Dobinson [1977] 64 Cr. App. Rep.186; while the concluding words: "or was guilty of such a high degree of negligence...." etc. are clearly a composite made-up of some of the expressions used by Hewart L.C.J. in the case

of Bateman [1925] 19 Cr. App. Rep.8 (at pages 11 and 12 of the report) later approved by Lord Atkin in Andrew's case and amplified by him in reference to the term "reckless" (page 583 of the report) which he regarded as being closest to the ideal epithet to cover the mens rea of manslaughter. Lord Atkin suggested that the term might not fit the state of mind of one who perceived a risk and endeavoured to avoid it by means which were themselves so negligent as to justify a conviction.

The debate as to whether "recklessness" and "gross negligence" are equivalent and equally appropriate terms to denote the high degree of negligence required for manslaughter in all cases continues especially at the academic level (see Archbold: 41st Edition, page 1421, para. 20-49 and Glanville Williams: Textbook of Criminal Law, pages 227 and 229).

These terms have certainly been used as equivalent in cases such as Reg. v. Lamb [1967] 2 Q.B. 981 and Reg. v. Cato [1976] 1 All E.R. 260 and there is no need to contribute to that particular part of the controversy in the present case since the term "reckless" was not employed anywhere by the trial Judge. He did refer to "gross negligence" and it has not been contended before us that that was anything other than a proper description of the very high degree of negligence which the Crown must show to support its charge. Mr. Steel's complaint is that in giving the direction which has been set out above, rather than something substantially on the lines of Lord Diplock's "appropriate direction" the Judge had wholly failed to bring home to the jury the high degree of negligence which they must find before convicting. There had been, Counsel said, a failure to draw any effective distinction between negligence and gross negligence.

In support of this contention Counsel points, firstly, to the direction set out above. His objection to that is, as it seems to us, the more serious objection and we will return to it after considering the other two points made in this connexion.

The first of these latter two points is

directed at what was said by the Judge very shortly after giving his principal direction on negligence. He is still dealing with the concept of criminal negligence and he says:

> "We all make mistakes. Some of them could be mistakes which could involve injury to other people but these mistakes if they do result in injury are not brought before the criminal courts unless they are matters which or mistakes which are of a very gross nature that if you have been negligent in a duty which you owed to anybody, it is not merely an oversight, not merely trivial mistake, it is a gross error."

This contrast between "trivial mistakes" and "gross error" must, Mr.Steel says, have left the jury with the impression a) that anything which was not a mere trivial mistake must amount to a gross error; and b) that since the applicant and his colleagues were still before the jury - although Mr. Ng, upon the Judge's direction, gone out of the case - the Judge was suggesting that the error of the remaining defendants must have been a gross error. As to this latter point, the jury had been warned that the verdict must turn solely upon the evidence and that neither the Judge's views nor those of counsel constituted evidence. The first part of that objection (a) above) would seem to have been adequately disposed of by what the Judge said a few sentences later when, having pointed out the high duty of care which, as Mr. Steel concedes, was owed to the passengers of these vessels by the navigators of them, he said:

> "The question is then, firstly, did they not exercise that high degree of care? Was it such an omission as to be gross negligence in your view and finally as a result of that, did they cause the collision and the death of Mrs. Wu?"

Counsel's next point relates to what was said by the Judge when he apprised the jury of his reasons for directing the acquittal of Mr. Ng. This appears on page 4 of the Summing-up:

"It is because not only must the Crown prove in this case that the accused have acted in a negligent manner or have failed to act in a manner which involved gross negligence: they must prove that that negligence caused the collision and therefore the death of Madam WU. In my view, at the close of the Crown's case, there was not sufficient evidence for you to have been sure that his alleged negligence caused that death. You will remember he was the Deck Officer, he was not helming the "Flying Goldfinch", he was not the Captain of the vessel.

It seems that Captain KONG was, according to his statement, aware of the other vessel and you have heard expert evidence from Captain Pyrke that in his view if the Deck Officer was satisfied that the Captain or the helmsman had seen the other vessel, then he was under no obligation to draw his attention further to it although, of course, he might do so. That being so, as I say, I consider that you could not reasonably have found Mr. NG guilty and that was why I directed that you should acquit him."

A subsidiary point taken on this was in effect that the Judge, having relied on the statement of Captain Kong in absolving Mr. Ng, should have regarded that statement as true, the implication being that it was illogical to have founded the acquittal of Mr. Ng upon it, without advising the jury that they ought to regard it as containing the truth in Captain Kong's regard as well. That point - not relevant to the matter of present concern - has already been dealt with by the invocation of the decision in Cheng Chiu v. The Queen. The jury, no less than the Judge, were entitled to have regard to every admission or assertion of fact contained in the statement and to give to each what weight they thought it deserved. Moreover, the part of it relied upon by the Judge was not of itself self-exculpatory.

The substantial objection on this passage, however, is that the Judge, in the first three or four lines, appears to suggest that whereas

gross negligence must be shown in relation to an omission to act, negligence of any kind is sufficient to render criminal any positive act which may have caused the risk complained of. This was no doubt a slip of the tongue and if nothing more were to be said as to the main direction on negligence which followed closely after that, it would seem most unlikely that the jury, if indeed they were misled to any degree by it, would not have been put right by reference to the need to show gross negligence in the passage (quoted above) which follows that main direction.

It is to that direction, however, that we must finally turn.

Mr. Steel points out that while the second part of the trial Judge's direction is drawn upon the model proposed by Lord Diplock in Lawrence and closely follows the wording of the second limb of that direction, the first limb of that direction - which counsel maintains to be essential to the whole - does not appear anywhere in the summing-up: and further that the part of the Judge's direction commencing with the words: "firstly, that at the time he caused the deceased's death..." is drawn substantially from that part of Lord Diplock's argument which immediately precedes the "model direction" itself. There was, in other words, counsel says, a failure to point out that the jury must be satisfied that the applicant had navigated the vessel" in such a manner as to cause an obvious and serious risk of causing physical injury to some other person."

Undoubtedly the earlier part of the written direction given by the trial Judge would seem, on the face of it, to mean that provided the jury were satisfied that the defendant's conduct had involved even a small risk of minor damage they could nevertheless convict him on the charge. Although the language used by the Judge reflects to some extent that used by Lord Diplock in approaching his "model" direction, it obviously proposes a test of a very much less stringent character than that which appears in the first limb of that direction, viz: "an obvious and serious

risk of physical damage". It is to be presumed that this phrase means, and was intended to mean, an obvious risk of serious physical damage, i.e. that it corresponds with the "kind of serious harmful consequences" referred to by Lord Diplock earlier. It is true that he qualified this description by contrasting it with a risk of a negligible nature which a prudent person might safely disregard - the phrase adopted by the trial Judge in the present case - but in view of the proposed model that was, presumably, not intended to suggest that anything above a mere negligible risk would suffice to fix the risk - taker with criminal negligence, but only to underline the correlation between the gravity of the perceived risk and the likelihood of the prudent individuals avoiding it. This nexus between degree of risk and degree of negligence is emphasized again by Lord Diplock in Caldwell (1981) 1 All E.R.961 at (p.966).

When Seymour's case went to the House of Lords the need to emphasize the high degree of risk which, if taken, would support the allegation of recklessness on the part of the accused was further fortified in the concluding paragraph in the speech of Lord Roskill - the leading speech with which the majority, including Lord Diplock, agreed. There is no doubt that this paragraph expresses the ratio of the case since it answers the question posed for consideration by the House. The question and the answer are as follows :

Question posed to the House :-

"Where manslaughter is charged and the circumstances of the offence are that the victim was killed as the result of the reckless driving of the defendant on a public highway; should the trial Judge give the jury the direction suggested in R. v. Lawrence in its entirety; or should the direction be that only a recognition by the defendant that some risk was involved and he had nonetheless gone on to take it would be sufficient to establish the commission of the offence?"

Lord Roskill's answer :-

"I would therefore answer the certified question as follows:
'Where manslaughter is charged and the circumstances are that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in R. v. Lawrence but it is appropriate also to point out that in order to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high." (emphasis added)

This decision has been criticised as self-contradictory (See the analysis of it by Professor J.C.Smith in the Criminal Law Review (1983) at page 742). With due respect to that opinion we do not think that any contradiction is involved if the terms used by Lord Diplock in the "Lawrence direction" are understood in the way suggested earlier in this judgment. If, that is to say, a very high risk of death and an obvious risk of serious physical injury can, for practical purposes, be said to be the same. But the effect of Seymour undoubtedly is to oblige a direction to the effect that the risk of death must be very high and it is to this risk that the attention of the jury must be drawn in considering whether the conduct of the accused amounts to criminal negligence.

Such a direction was not given in the present case which is scarcely surprising since the authoritative explication and endorsement of Lawrence was not yet available for the guidance of the trial Judge - anymore than it was at that date for the enlightment of the editors of the leading manual of procedure and practice most frequently consulted by practitioners. The question is whether the direction in its entirety can be said to have sufficed to put the jury on the right track.

It must not be overlooked that what Lord Diplock proposed in Lawrence was "an appropriate direction". While this was said in Seymour to be appropriate also where the charge was manslaughter, we do not understand that case as going so far as to say that the

failure to follow this formula exactly in all cases of "negligence manslaughter" will necessarily vitiate a conviction. Part of the concern caused in academic circles by the decision of the House of Lords in Seymour is due to the apprehension that, if it is to be applied generally in all cases, it might be said to have narrowed the mens rea of the offence of manslaughter, thus outflanking - without expressly disapproving - such cases as Stone v. Dobinson (supra) and Gray v. Barr [;971] 2 All E.R. 949 (see Smith Loc.cit. page 744).

A possible question therefore remains as to whether this "high risk of death" is a prescription which is to be confined to cases alleging recklessness in the driving of motor vehicles on the highway. That is to some extent an anomalous area of criminal negligence inasmuch as two distinct offences persist side by side the ingredients of which are said to be identical (R. v. Jennings) requiring precisely the same degree of recklessness to substantiate them, yet one of which - manslaughter - is said to be the graver offence involving a higher degree of moral turpitude (per Lord Roskill in Seymour).

Secondly, and perhaps more tellingly, it is to be noted that, although the Court of Appeal in Seymour's case when approving the "Lawrence direction" said, a) that that direction was of general application to all offences resting on a basis of recklessness; b) that it should be given to juries without being in any way diluted; c) that"it is no longer necessary or helpful to make reference to compensation and negligence", none of these propositions was expressly endorsed in the House of Lords where, by contrast, having amplified the formula of Lawrence by an explicit reference to a "high risk of death", the direction given by the trial Judge in that case was approved as "admirably clear" and a proper reflection of the decision in both Lawrence and Andrews (page 1063). That direction included a direction on the lines of Bateman and Andrews.

In the present case, the Judge appended to his partial quotation of the "Lawrence direction", a further direction based on Bateman and Andrews, posing the test of negligence

of such a high degree "as to go beyond the mere matter of compensation..etc." in relation to the means taken to avoid the risk. This, while undoubtedly an excrescence (as Mr. Steel put it) on the plan "Lawrence direction", was of all the expressions used by the Judge the one which was most likely to convey a lively appreciation of the kind of negligence required to support the charge. This was followed shortly afterwards by a reference to the high degree of care which was demanded of the defendants by reason of their special skill as qualified navigators. Mr. Steel conceded that a high degree of care - related to that skill - was required of the defendants. In relation to this the Judge said (page 6 of the Summing-up): "The question is, then, firstly did they not exercise that high degree of care? Was it such an omission as to be gross negligence... It is a test which goes considerably beyond what would be the situation if this was a civil trial".

Lord Atkin in Andrews while noting the element of circularity in Lord Hewart's formula in Bateman (1937 A.C. at page 583) went on to say:

> "But the substance of the judgment is most valuable and in my opinion is correct. In practice it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence whether in driving vehicles or otherwise."

Eminent academic opinion of much more recent date puts the matter this way:

> "Whatever may be thought of the definition in Bateman, it has been frequently approved since; and one can say positively that any direction to the jury worded in these terms is safe from attack on appeal (Glanville Williams: Textbook of Criminal Law, at page 224). See also Smith and Hogan 4th Ed., to the same effect, at page 319).

Be these opinions prescient or not in relation to the course which the law of manslaughter may take following Seymour, it does not seem to this court that this concluding clause of the Judge's written

direction in any way diluted what was correctly reproduced from the "Lawrence direction" but was, on the contrary, most likely, taken together with his several references to gross negligence (at pages 4 & 6 and emphasized again at the close of the Summing-up at page 31), to repair its earlier deficiency by concentrating the attention of the jury on the facts, which included evidence of a very late and drastic manoeuvre by a skilled navigator which the jury were entitled to regard either as creating a risk where none had existed or else as adopting a grossly negligent manner of dealing with a situation involving some risk, whether that was caused by the applicant or by the other navigator, or by both of them together. The final reference to gross negligence (p.31) given just before the jury repaired to their task must have been extremely helpful in drawing to their attention the gravity of the burden to be discharged by the prosecution. That is as follows :

> "You must not,however, say, "Well, because it was inexplicable, because it must have been negligence, therefore,"somebody must be to blame." You have got to look at the evidence bearing in mind the law. Look at the evidence in respect of each of these accused and only if you are satisfied that that particular accused is grossly negligent and that gross negligence was a cause - it does not have to be the sole cause - was a cause of this tragic accident, only then can you convict him of this very serious crime of manslaughter."

For these reasons we allow the application and dismiss the appeal.

Sd: Illegible

David Steel, Q.C. & R. Walters (Hampton, Winter & Glynn) for the Applicant.
Max Luca, Q.C. & Jenkyn-Jones for Respondent/Crown

In the Privy Council

No.17
Order granting Leave to Appeal to H.M. in Council 25th June 1984

No. 17

ORDER GRANTING LEAVE TO APPEAL TO H.M. IN COUNCIL

L.S.

AT THE COURT AT BUCKINGHAM PALACE
The 25th day of June 1984

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 24th day of May 1984 in the words following viz:-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Kong Cheuk Kwan in the matter of an Appeal from the Court of Appeal of Hong Kong between the Petitioner and Your Majesty Respondent setting forth that the Petitioner prays for special leave to appeal from a Judgment of the Court of Appeal of Hong Kong dated 9th March 1984 which dismissed the Appeal of the Petitioner against his conviction in the High Court of manslaughter: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment of the Court of Appeal of Hong Kong dated 9th March 1984 and for further or other relief:

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of Hong Kong dated 9th March 1984:

" AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREAS the Governor or Officer administering the Government of Hong Kong and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N.E. LEIGH

IN THE PRIVY COUNCIL No. 65 of 1984

O N A P P E A L
FROM THE COURT OF APPEAL IN HONG KONG

B E T W E E N:-

KONG CHEUK KWAN Appellant

- and -

THE QUEEN Respondent

RECORD OF PROCEEDINGS - PART I
VOLUME II - Pages 592 - 851

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