

JERSEY / JUDGMENT

# Corbin v Dorynek and Flath

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Negligence - re: seeking damages. [2022]JRC047 Royal Court (Samedi) 16 February 2022 Before : Sir Michael Birt, Commissioner, and Jurats Ronge and Hughes. 2019/168 Between Giles Robert Piers Corbin Plaintiff And Michal Bartolomiej Dorynek First Defendant Tyson Werner Hermann Flath Second Defendant 2019/178 Between Tyson Werner Hermann Flath Plaintiff And Michal Bartolomiej Dorynek First Defendant Advocate D. J. Benest and Advocate J. N. Heywood for Mr Corbin. Advocate C. Hall for Mr Dorynek. Advocate S. A. Franckel for Mr Flath.

## judgment

commissioner: 1. Sunday 9th July 2017 was a sunny day with good visibility and little or no wind, with the consequence that the sea was calm. At about 4:15 p.m. that day, with no other vessels in the immediate vicinity, a jet ski (“the Jet Ski”), driven by Mr Flath and a speedboat (“the Speedboat”) driven by Mr Dorynek collided in the southern part of St Brelade’s Bay (“the Bay”). Mr Corbin was a passenger on the Jet Ski and suffered life changing injuries to his left leg as a result of the collision. 2. Mr Corbin has instituted proceedings (Court file 2019/168) against Mr Dorynek as First Defendant and Mr Flath as Second Defendant, seeking damages for negligence against both of them. Mr Flath has brought proceedings against Mr Dorynek (Court file 2019/178) seeking damages for negligence in respect of the injuries which he (Mr Flath) also suffered. 3. The Court sat for seven days commencing 4th October 2021 to determine issues of liability in respect of both of these proceedings. Shortly before the hearing, Mr Dorynek admitted liability to both Mr Corbin and Mr Flath on the basis that he had failed to keep a proper lookout. He also abandoned a plea of contributory negligence against Mr Corbin. Thus the remaining key issues for the Court to determine were whether Mr Flath had also been negligent and, if so, the apportionment between him and Mr Dorynek in respect of Mr Corbin’s claim and the level of contributory negligence on the part of Mr Flath in relation to the claim brought by him against Mr Dorynek. 4. This judgment sets out our conclusions on these issues. The uncontested factual background 5. Mr Dorynek was the owner of the Speedboat, which was a Malibu Fletcher open speedboat of some 17 feet in length, powered by a single 90 horsepower Yamaha outboard motor. The Speedboat was built in

1987. Mr Dorynek’s boating experience was comparatively limited. 6. On the day in question, Mr Dorynek had agreed to take Lina Stukaite (who he had known for a few weeks) and two friends of hers for a trip on his boat. The two friends were Andrea Allen and Kristina Krasauskaite. They left St Helier on the Speedboat at around lunchtime and stopped to fish occasionally. In due course, they decided to go to St Brelade’s Bay. Mr Dorynek spoke on the

phone to a friend of his, Mr Karol Jakubowski, who was on the beach with his children. It was agreed that Mr Dorynek would come into the Bay and pick them up for a ride. He duly went into shallow water opposite the Oyster Box restaurant and Mr Jakubowski put his children on the Speedboat together with two children of a friend of his. There were accordingly five adults and four children on the Speedboat as it left the shore. None of them were wearing lifejackets and no kill cord was in use. We will describe what happened next when we consider the evidence relating to the incident, but the collision took place shortly afterwards. 7. The Jet Ski was a Seadoo GTX which had been purchased new in April 2017 by Mr Flath, together with his friend Nathan Robson and Nathan Robson's brother. Mr Robson was also the owner of a Mastercraft speedboat. It was decided that day to go from St Helier to the Bay in both the Mastercraft and the Jet Ski and Mr Corbin was amongst the party. They left St Helier harbour some time after noon with Mr Flath driving the Mastercraft with Mr Corbin and others on board, whilst Nathan Robson drove the Jet Ski. They anchored in the Bay near Rocquette Beacon and the Jet Ski was secured alongside the Mastercraft. Mr Corbin had to attend a prize giving at the Royal Jersey Golf Club at 5:30 p.m. and had originally planned to go ashore in the Bay and get a taxi back to his car at St Helier harbour. However, Mr Flath suggested that he could take Mr Corbin directly to St Helier on the Jet Ski and this was agreed. They set off from the Mastercraft shortly after 4:00 p.m. and the collision occurred not long afterwards. 8. Immediately after the collision, Mr Dorynek headed back to the beach because, he said, the Speedboat had taken on water and he was concerned as to whether there was a hole in it. He deposited Mr Jakubowski and the four children on the beach and then turned to head back out again. However, he was informed by Mr Robson that those on the Jet Ski had been taken ashore and that Mr Dorynek should follow him back to the beach. Following the collision, Mr Corbin had been picked up by a vessel called Oberon belonging to Mr Geoffrey Blackstone. Oberon had called the emergency services and had taken Mr Corbin ashore. The police and ambulance attended and Mr Corbin was taken to hospital. 9. Mr Dorynek was subsequently charged with operating a ship without due care and attention or without reasonable consideration for other people contrary to Regulation 9(2) of the Harbours, Inshore Safety (Jersey) Regulations 2012. He pleaded guilty on a written basis to the effect that he had failed to keep a proper lookout for the Jet Ski. He was fined by the Royal Court on 15th February 2019. Evidence in relation to the collision

(i) Mr Corbin

10. Mr Corbin said that he had owned a boat since the age of twenty-five and knew the Bay extremely well. The Mastercraft was anchored about 100 metres to the south-east of the Rocquette Beacon. He had accepted Mr Flath's offer to run him back to St Helier marina and he had told Mr Flath that he did not wish to get his clothes wet.
11. They set off from alongside the Mastercraft at about 4:10 p.m. with Mr Flath driving and Mr Corbin seated immediately behind him. Initially, they went to the west in order to look at a Sunseeker which was anchored at the northern end of the bay which lies immediately to the

east of the Les Jeteuses headland ("the Headland") which forms the western arm of the Bay. Mr Corbin was undertaking renovations to his boat and the Sunseeker had apparently also been renovated. However, there was no one on board and they passed some 10 metres from its stern. They passed it slowly and then turned in a southerly direction in order to follow the channel between the Headland and the rocks in St Brelade's Bay. He said they went quite close to the Headland, rather closer than he would normally go. He estimated they passed about 100 metres from the Headland. They were travelling slowly, no more than 5 knots.

12. Once they got past the Headland and reached the southern limit of the 5 knot speed limit zone for jet skis, which he considered was formed by a line between Grosse Tête and La Cotte Point, the Jet Ski changed direction towards the south-east and increased its speed. Whilst they were in the 5 knot limit zone, he and Mr Flath were talking. They both turned their heads to the right in order for this to occur. They were talking about the renovations to his boat and he accepted in cross-examination that they may have been joking. He said that they did not talk after the Jet Ski sped up. The collision occurred about 30 seconds after the increase in speed. Although he had estimated in his written statement that the Jet Ski was doing some 10 to 15 knots after it speeded up, he accepted that it might well have been 17 knots.
13. He was looking back over his right shoulder into Beauport Bay where there were boats at anchor. He then heard screaming. He turned and saw the bow of the Speedboat about 5 metres away at an angle of about 40° off the port bow of the Jet Ski. It was in the opposite direction to where he had been looking back at Beauport. He only saw it for about half a second before impact. It was in front of the Jet Ski and banking hard to its starboard with its starboard gunwale low in the water because of the angle of turn. He had estimated its speed at 25 knots in an earlier statement but accepted that he had only seen it for a split second before the collision and he was not dogmatic about its speed. It was not at an angle of 90° from the port bow of the Jet Ski.
14. He was thrown into the water when the Speedboat struck the Jet Ski. He immediately realised that his left leg had been severely injured. He managed to get back to the Jet Ski which had stopped and was helped back on board by Mr Flath and subsequently taken ashore by Mr Blackstone in his boat.
15. During the course of his oral evidence, he placed pins on a large chart which was in court and this was subsequently photocopied for the parties. P1 was the point of departure where the Mastercraft was anchored; P2 was where the Jet Ski turned to the south having passed the stern of the Sunseeker; P3 was where the Jet Ski increased speed from 5 knots and made a modest turn towards the south-east; and P4 was his estimate of the point of collision. In cross-examination, it was put to him that he had made no mention in earlier statements of any change in course at P3 when the Jet Ski increased its speed. He accepted that this was so. He could not specifically recall the change of direction, but considered that there must have been a modest turn because the Jet Ski had hugged the southern end of the Headland by about 100 metres, and must therefore have turned towards the south-east in order to head

back to St Helier. However, he accepted that it could have been straighter between P2 and P4 than he had indicated on the chart. He said that Mr Flath was an experienced skipper and had stuck to the 5 knot speed limit within the zone. He did not accept that any conversation had continued after the Jet Ski had sped up. However, it is to be noted that at paragraph 19 of his witness statement, he said that he and Mr Flath were chatting intermittently with their heads on the starboard side and that, based on his previous experience on jet skis, had they been travelling much faster than his estimate of 10-15 knots, they would not have been able to maintain an easy conversation due to the combination of wind, engine and water noise. This would suggest that they were conversing after the Jet Ski had increased speed. Similarly, in his witness statement to the police dated 13th November 2017, made in connection with the criminal proceedings against Mr Dorynek, Mr Corbin said at paragraph 9 that he estimated they were going at 10 - 15 knots and were talking from time to time with their heads on the starboard side. They were not having to shout and could be heard easily. That again would suggest that the conversation continued after the increase in speed. (ii) Mr Dorynek

16. Mr Dorynek explained how, having picked up Mr Jakubowski and the four children, who were aged between 4 and 7, he drove the Speedboat in a south-easterly direction towards the middle of the Bay. At this time he was in the 5 knot zone for boats, which he said he knew was 200 to 300 yards from the beach. When he reached the limit of the zone, he turned towards the south and increased his speed. He considered that the maximum speed of the Speedboat was 30 knots (although somewhat confusingly he referred later in cross-examination to a maximum speed of 27 knots) and he had the throttle in the halfway position, which would be half speed. He therefore estimated his speed at approximately 15 knots. He then started to zig zag in order to amuse the children. He marked this in a very approximate form on one of the photographic images of the Bay in the court bundle. He did not know the exact number of zig zags but he thought about 10. It involved heading approximately 45° offline towards the east and then towards the west, whilst overall heading broadly south. After the first set of zig zags, he went south in a straight line for a short while before starting to zig zag again for a broadly similar number of times. By the end of the second phase of zig zags he thought he was some 700 to 1,000 metres from where he had begun the first set of zig zags.
17. During the first set of zig zags, he saw the Jet Ski on the far side of the Bay. It was about 400 to 500 metres away. In re-examination, he clarified that the Jet Ski was behind him at this time. During the second set of zig zags, he saw the Jet Ski for a second time. It was now about 250 metres away and it was in a 5 - 6 o'clock position from him; in other words, almost directly astern of his boat. The Jet Ski was going faster than he was. He lost sight of the Jet Ski after the second sighting. In his statement of 6th July 2018 (which he incorporated by reference in his witness statement), he said at paragraph 24 that on the first occasion he saw the Jet Ski, it appeared to be moving very quickly, overtaking other vessels heading in a similar direction and going much faster than the Speedboat.

18. After the end of the second set of zig zags, he could not recall whether he had then gone south in a straight line for a while or not; but he then turned approximately 30° to his starboard, i.e. to the west, as he was intending to go out to Corbière. In his witness statement of 6th July 2018, he put it at 30-40°. Whilst travelling in a straight line on this path after the turn, he looked around three times, left and right. He did not see the Jet Ski on the first two occasions. On the third time, he saw the Jet Ski on his right hand side. It was about 4 to 5 metres away at 1-2 o'clock to his boat and this was about 4 seconds before the collision (in his statement of 6 July 2018 referred to at para 25 below, he put it as about 3-4 seconds before the collision). He shouted and waved and reduced speed to a quarter by moving the throttle back to the one-quarter position. He thought the Jet Ski would see him and take avoiding action but it did not. He therefore turned hard to starboard to try and pass behind the Jet Ski but his boat struck the Jet Ski and his bow went up in the air. It then came down again and his boat was facing towards the beach. He thought the angle when he hit the Jet Ski was less than 30° off the port bow of the Jet Ski.
19. It was accepted by all parties that the Jet Ski could not have been 4-5 metres away some 4 seconds before the collision. Mr Dorynek must have been mistaken either about the distance or the period of 4 seconds. It was further agreed that at a speed of 17 knots, the Jet Ski would be travelling at 8.5 metres per second. Accordingly, if it was only 4-5 metres away when Mr Dorynek saw it, the collision would have occurred in less than a second. This would have been insufficient time for Mr Dorynek to react and turn the wheel and for the Speedboat to turn to starboard in the way that it did. Accordingly, we find that, to the extent either figure is correct, it would be the period of 3-4 seconds.
20. He accepted that none of the passengers were wearing life jackets and that the kill cord on the Speedboat was disabled, although he had not done this and it must have been like that when he purchased it.
21. He said he was not coming from behind the Jet Ski and did not hit it at 90°.
22. Not surprisingly, he was questioned about earlier statements which were not consistent with the evidence he gave in his witness statement and his oral evidence. On the day of the accident he was seen by PC Forde, whose notebook records him saying: "There were 4 of us in the boat in total. We were just cruising on the coastline since about 2pm. I saw the jet ski coming fast in our direction so I was waving at him to get his attention. Jet skis have more ability to move quickly in directions. So I was waving at him to move direction, and he just came into the boat. We went into each other. It was 50/50...." There was therefore no mention at that stage of the fact that there were four children and another adult in the boat or of any zig zagging, or of the fact that he had seen the Jet Ski on two occasions prior to seeing it immediately before the collision.
23. He was interviewed later that evening by PC Jenkinson and PC Forde at the police station, Mr Dorynek by then having spoken with a legal adviser on the phone. During this interview he indicated that he had seen the Jet Ski coming from his right for some 20 – 30 seconds. He

also said that bigger boats have the right of way and that, after the collision, the two people on the Jet Ski remained on the Jet Ski and just drove off. Again, he made no mention of the additional people in the Speedboat or of the zig zags or of having seen the Jet Ski other than immediately before the collision for some 20-30 seconds.

24. Mr Lee Battrick, a marine surveyor, was instructed by Mr Dorynek's insurers to prepare a report and he saw Mr Dorynek on 14th July 2017. Mr Dorynek supplied a handwritten statement which he had written out and the relevant parts read as follows: "In about 4-4.30 we start cruising from the shallow water to deep sea. In half way in bay I change direction to the rocks on the right (on Corbiere side). Before change direction I checked if is normal on my right hand side). Then after few seconds I saw jet ski coming on right hand side of my boat on full speed. The driver of the jet ski have been coming in our direction and after 30-40 seconds when I saw him first time we had collision. On that time I had  $\frac{3}{4}$  -  $\frac{1}{2}$  speed. I have been tried to avoid an accident or wave and scream. I can't remember if I have been change direction and speed. I was expecting that the driver jet ski he sees me because he had at least half a minute to avoid the collision. Bigger boats always got priority to go first. Big boat like mine is hard to change direction very quickly. Jet ski always has to give way to bigger vessels. Jet ski is a high risk boat like motorbike on the land. Drivers of jet skis got more accidents than rest of sea users. I think the jet ski driver didn't look where he is going or he thought he gonna (illegible) before my boat. Maybe he is being using waves from my boat to jumping..." Again, there is no mention at this stage of the extra passengers (other than the three women), of the zig zagging, or having seen the Jet Ski other than 30-40 seconds before the collision on his right hand side. Mr Dorynek said in evidence that he did not see the Jet Ski continuously for 30-40 seconds before the collision as suggested in his police interview and in his statement for Mr Battrick. His explanation was that, when referring to this period, he had meant the period which had elapsed since he saw the Jet Ski on the first of the two occasions referred to at para 17 above, although he had of course not mentioned these two separate sightings at this stage.
25. It was only on 6th July 2018 that Mr Dorynek signed a statement which is broadly consistent with the oral evidence which he gave before this Court and which disclosed for the first time the picking up of Mr Jakubowski and the children, the zig zagging and the first two sightings of the Jet Ski behind the Speedboat referred to earlier. In evidence, Mr Dorynek put most of the inconsistencies down to the fact that he did not have an interpreter at the interviews with the police and was not writing in his mother tongue when he made the statement to Mr Battrick. However, he had specifically confirmed at the end of the interview with the two police officers on 9th July 2017 that he was happy with the way the interview had been conducted. (iii) Lina Stukaite
26. Miss Stukaite signed a witness statement dated 5th June 2020 which referred to, and exhibited, her statement to the police dated 3rd August 2017. These were admitted as her evidence in chief and she was cross-examined briefly. She described the Speedboat, which we have been able to see from photographs. The steering console is located towards the

stern with a bench seat behind it for the helmsman and a guest. At the front of the console there is a plastic windscreen and the front vertical face of the helm console forms a back rest for a wooden bench seat with room for two people. In front of this seat, there is a triangular seat of plastic decking in the bow. She said that she sat next to Mr Dorynek on the stern bench behind the console. After they had picked up Mr Jakubowski and the children, he and the 4 children sat on the plastic decking in the bow. Andrea Allen and Kristina Krasauskaite continued sitting on the wooden bench in front of the console as they had before going into the Bay, Andrea Allen on the right and Kristina Krasauskaite on the left.

27. She said that on leaving the beach Mr Dorynek motored slowly for a while before subsequently speeding up but only slightly. She felt he was driving carefully as none of the passengers, including the children, were wearing life jackets. She was looking to the left out of the boat towards Ouaisne and Mr Dorynek was blocking her view to the right as he was standing beside her. She said that Andrea had screamed and her attention was then drawn to the right side of the boat. In a split second she saw a dark Jet Ski crash into the front right side of the Speedboat. There was a huge bang and the boat tipped over with her side (the left side) tipping almost vertically up. She shut her eyes and the boat then landed back upright with a heavy thud. The children appeared to have fallen at the feet of Kristina and Andrea. There was water in the boat and there was concern that it had been damaged. Accordingly, Mr Dorynek headed back to shore. Although she had not mentioned it in her police statement, Miss Stukaite confirmed in her witness statement that the Speedboat had zig zagged as it headed away from the shore before the collision. She also clarified that, although she had referred in her police witness statement to Mr Dorynek having waved and shouted immediately before the collision, this was only what he had told her subsequently. She herself could not recall having seen him wave or heard him shout. (iv) Mr Flath
28. Mr Flath signed a witness statement dated 5th June 2020 and also gave oral evidence. He had also given a statement to the police on 30th November
2017. In his witness statement, he explained that he had extensive experience of leisure boat activities having regularly engaged in wakeboarding, water skiing and general powerboat handling since he was a teenager. From 2011 onwards, he also had extensive use of jet skis, often ferrying people to and from St Aubin, St Brelade and St Helier. He would estimate the number of times he had driven jet skis in St Brelade's Bay to be in the hundreds.
29. He said that after leaving the Mastercraft with Mr Corbin as his passenger, he went towards the Sunseeker which was at anchor and passed about 10 metres astern of this before turning towards the south and heading in a direction of about 190°. He did not exceed the speed limit of 5 knots. As he did so, he maintained a constant visual lookout ahead and to both sides by turning his head slightly to port and starboard and by using his peripheral vision.

30. Once they had got to the limit of the speed limit zone for jet skis (which he considered to be between La Cotte Point and Grosse Tête) he altered course to approximately 150° and increased speed to approximately 20 mph (17 knots). Before turning on to 150°, he checked over his shoulders but did not see the Speedboat or anything which presented any risk.
31. Once on the course of 150°, conversation between him and Mr Corbin ceased because of the noise. They had been discussing Mr Corbin's plans for the renovation of his boat when within the 5 knot limit zone, but this ended shortly after they passed the end of the Headland as it was difficult to maintain a conversation over the wind and engine noise. He said that when navigating on a steady course, he only looked forward and relied on his peripheral vision which could be increased by small turns of the head, which is what he did on this occasion. He considered it dangerous to turn to look behind because his shoulders would have to rotate when using a jet ski at any significant speed, which would be liable to cause the jet ski to change course or lose control. His habit was accordingly only to make significant movements to look behind him when he was preparing to alter course.
32. After some 20-30 seconds (he put it at 30 seconds in his witness statement) he heard screaming to his left. He looked over his left shoulder and saw a boat at about 90° which was upon them. He had no time to do anything. He thought about accelerating but did not believe that he actually did accelerate. He was thrown into the water as the Speedboat hit the Jet Ski and, as he was wearing a kill cord, the Jet Ski stopped.
33. In his witness statement he said that the Speedboat appeared to be in the midst of performing a banked turn to starboard when he saw it. He had not been aware of the presence of the Speedboat until he heard the screams. He was confident that if the Speedboat had been ahead of the Jet Ski prior to the collision, he would have seen it.
34. He was questioned about earlier versions of the incident which he had given which were not consistent with his oral evidence and witness statement. First, there was a transcript of the call made to the ambulance service by Mrs Blackstone from the boat, Oberon. Mr Flath was put on the phone at one stage and when asked what had happened he said: "...basically what happened is we're there totally minding our own business. He was parallel to us. I saw him I saw him. Sorry he saw me I saw him. We're kind of parallel with each other and for some reason he decided to turn but he actually just completely turned into the side of us." Mr Flath said in evidence that by 'parallel' he meant in line with his shoulder, i.e. at 90°.
35. Mr Flath was seen briefly later that evening at the hospital by PC Jenkinson. The officer's notebook records Mr Flath's comments as follows: "Heading straight out to sea running parallel to Mansell's old house. Could see speedboat running parallel but ahead, he [clearly meaning Mr Flath] was looking to turn left on large arc back towards town. But was still going parallel. Boat was out of his field of vision as he had passed it. Next thing he heard was 'wow, wow'. He saw the boat to his left, accelerated to get out of the way. Cleared rider but not passenger."

36. Mr Flath was at a loss to explain what he had said to the officer. He said he did not, in fact, see the Speedboat until the last moment and had not passed it at any stage. He said that he was very stressed at the time of the conversation at the hospital. He was still in his original clothes and his friend, Mr Corbin, was fighting for his life.
  37. There is also an entry in the police log by PC Fitzgerald on 9th July 2017 at 17:35 which reads: "A brief account has been taken from the rider. He states that he was heading to town out of the bay, the speedboat came from the left and rider saw it at the last minute and tried to shout at the boat. The boat never changed direction so the rider accelerated to try and get out of the way of the boat however was t-boned by the boat." This is more consistent with his evidence at trial in saying that he saw the Speedboat at the last minute, but is inconsistent in referring to his shouting at the boat and the suggestion that there was perhaps time for the Speedboat to change direction.
  38. Mr Flath was interviewed by the police under caution on 1st August 2017. What he said then was broadly consistent with his evidence in his witness statement and in Court. He confirmed that when he was driving a jet ski he would just look forward and rely on his peripheral view. He would not look left or right unless he was turning. He did not see the Speedboat until he heard the scream, at which point he looked and it was only about a second before the Speedboat struck the Jet Ski. He did not, however, mention the turn to port as he increased speed on leaving the 5 knot zone. Furthermore, he said that he remembered laughing and giggling with Mr Corbin after the Jet Ski had picked up speed. That is inconsistent with his evidence at trial to the effect that conversation ceased once the Jet Ski increased speed.
  39. Mr Flath gave a police witness statement on 30th November 2017. This was broadly consistent with his evidence at trial when he spoke of the Speedboat coming 'out of nowhere'. However, he again made no mention of the turn to port to follow a course of 150° or of looking over his shoulder at the time he made the turn. On the contrary, at paragraph 17 he said: "...just as we departed past the western headland line...within which there is a 5 knot speed limit, I increased the speed incrementally to approximately 20 miles an hour. I neither saw nor heard any sign of any other vessel which might pose a threat to our passage. As I was proceeding in a direct straight line without deviation I did not need to turn my head to look either side of me as my peripheral vision was clear on both sides." It was only in his witness statement for these proceedings dated 5th June 2020 that, for the first time, Mr Flath mentioned the turn to port on to a course of 150° past the end of the Headland and that he checked over his shoulder before making the turn.
- (v) Hearsay evidence
40. The Court was referred to a number of statements from persons who did not give evidence. The only material ones, for our purposes, were as follows.

41. Mr Jakubowski gave a statement to the police on 10th October 2017 and a witness statement on 5th June
2020. He confirmed that when he and the four children got on to the Speedboat, he and three of the children sat on the plastic decking at the bow facing astern and that one of the children sat on the wooden bench in front of the console with two of the women. As a result, he did not see anything of the collision. He did not know the speed at which Mr Dorynek was travelling but he felt comfortable with it and nothing caused him concern. He recalled that the boat turned to its right. He could not remember how long after that the collision occurred, but after a while he felt an impact. At the time he did not know what had caused the impact but the Speedboat stopped. As he was facing backwards he had not seen anything approach or make contact with the boat, although the impact had enough force to make the child who was sitting with the women fall off the seat.
42. Kristina Krasauskaite gave a witness statement to the police on 2nd August 2017. She said that she and Andrea Allen were sitting on the wooden seat in front of the console, with her on the left and Andrea Allen on the right. Mr Jakubowski (although he was not known to her) and the four children sat in the bow. They set off slowly but then Mr Dorynek speeded up slightly. There came a time when the boat turned to the right so as to be not quite parallel with the seafront at St Brelade. She believed they were heading to a tiny bay around the corner from St Brelade, although she did not know its name. This would seem to be Beauport Bay. She suddenly saw the Jet Ski really close to the boat on the right hand side of the boat. It was only a split second and Andrea screamed at the same time. The boat almost tipped over such that Andrea's side, which was the starboard side, was virtually in the water.
43. The most detailed statement was that which Andrea Allen gave to the police on 3rd August 2017. She drew a sketch of where everyone was sitting and confirmed that she and Kristina were on the wooden seat immediately in front of the console and she was on the starboard side. The man and children were sitting on the plastic seat in the bow. After heading out slowly the Speedboat picked up a bit of speed. She said that they came round in a bit of a loop and were heading back towards the Bay, although they were still a long way from the beach. As the Speedboat was heading back in she could see the Jet Ski, which she had seen earlier where various boats were at anchor. The Jet Ski was coming out of the Bay in a straight line. It was quite far away from them when she first noticed it. It looked as if it was going more quickly than the Speedboat but she could not put a speed on it.
44. She did not think anything of it at first as they were approaching. She thought there was plenty of room for either one to change direction. About 10 to 20 seconds later she thought the two vessels were getting a bit close. She described the speed of the Speedboat as fast enough to give the kids a bit of a ride but not as fast as it had been earlier when it had just been the four of them. It then got to a point when she realised there would be a collision. She said it felt like a movie as she knew that there was going to be a collision. She said the Jet Ski obviously had not seen the Speedboat. Two or three seconds before she knew there was going to be a collision, she screamed and went into panic mode and there was then an

impact. The boat tilted towards her side and she thought it was going to go over, but after a second or two it levelled itself. She noticed the boat had water in it and the boat headed back to shore in case the collision had caused a hole in it.

45. When she referred to the Speedboat heading back towards the Bay, she was clearly mistaken as the intention was to head out towards Corbière which involved heading in a broadly south-westerly direction. When she was seen by PC Forde immediately after the incident, she was recorded by the officer as expressing the direction of the Speedboat's travel in somewhat different terms when she said: "As far as I can remember, the jet ski was coming out of the bay and we were further out, going across the bay. I wouldn't say anyone was to blame really, we were just expecting the jet ski to avoid the boat." [Emphasis added] We were informed that it has not proved possible to establish Ms Allen's current whereabouts in order for her to give evidence.
46. None of the passengers provide any support in their evidence for the suggestion by Mr Dorynek that, immediately before the collision, he shouted and waved at the Jet Ski and neither Mr Corbin nor Mr Flath has ever mentioned hearing a male shout.
47. Finally, we were provided with a copy of a police interview which Mac Galvin, who was 13, had given on 24th August
2017. It would appear that he was on Mr Blackstone's boat and saw the incident. He said that the Jet Ski and the Speedboat '...were both sort of going at a triangle and they were gonna meet in the middle and of course I thought one of them will move away but the boat turned in and cut the jet ski off....'. Later in the interview he said: "They were quite a way out at sea and so I just saw them sort of veering towards each other like thinking nothing is gonna happen. Just slowly coming together and then the boat when they're about three metres apart it looked from I where I was the boat sort of swerved inwards..." However, he described both vessels as coming into the Bay at the time, whereas it is clear from all the other evidence that they were in fact leaving the Bay. He was also viewing the incident from some distance away. Ultimately, therefore, we feel that we can place little weight on his evidence other than his impression that the two vessels were slowly coming together, which is consistent with Andrea Allen's evidence. The Colregs
48. Because some of the experts, whose evidence we refer to shortly, refer to the International Regulations for Preventing Collisions at Sea 1972 ("the Colregs"), we think it convenient to set out the relevant Rules at this stage.
49. The Colregs are generally applicable rules at sea, in the same way that the Highway Code is applicable on land. The relevant Rules for present purposes are as follows: "Rule 5. Look-out Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision. Rule 6. Safe Speed Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing

circumstances and conditions.... Rule 7. Risk of Collision

- (a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.... Rule 8. Action to Avoid Collision

- (a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
- (b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.... Rule 13. Overtaking

- (a) Notwithstanding anything contained in the Rules of this Section, any vessel overtaking any other shall keep out of the way of the vessel being overtaken.
- (b) A vessel shall be deemed to be overtaking when coming up with another vessel from a direction more than 22.5 degrees abaft her beam, that is, in such a position with reference to the vessel she is overtaking, that at night she would be able to see only the stern light of that vessel but neither of her sidelights.
- (c) When a vessel is in any doubt as to whether she is overtaking another, she shall assume that this is the case and act accordingly.
- (d) Any subsequent alteration of the bearing between the two vessels shall not make the overtaking vessel a crossing vessel within the meaning of these Rules or relieve her of the duty of keeping clear of the overtaken vessel until she is finally passed and clear.... Rule 15. Crossing situation When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel. Rule 16. Action by give-way vessel Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear. Rule 17. Action by stand-on vessel

- (a) (i) Where one of the two vessels is to keep out of the way, the other shall keep her course and speed. (ii) The latter vessel may, however, take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.
- (b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision....” When we refer hereafter to a Rule, it is to the relevant Rule of the Colregs.

50. It was common ground that breach of a Rule does not automatically mean that a helmsman has been negligent. The Rules are guidance as to what constitutes good seamanship in the same way that the Highway Code is a guide to motorists on the road. The test for liability remains whether a helmsman has been negligent; in other words, whether his conduct has fallen below that of a reasonably prudent and careful helmsman of the vessel in question in the prevailing circumstances.
51. In *Morley v Reed* [2012] JRC 127A, this Court approved at [34] certain observations of the English Court of Appeal in the case of *Goad v Butcher* [2011] EWCA Civ 158. At [9] – [10] of *Goad*, Moore-Bick LJ said: “9... A failure to observe the [Highway Code] may be evidence of negligence, but whether it is will depend very much on the circumstances in which the act in question was committed and who is the claimant....
10. Mr Butcher had a duty to take reasonable care to avoid causing injury to other road users whom he should reasonably have foreseen might be affected by his actions. That means he had a duty to act as a reasonably prudent and careful driver of a slow moving and lengthy vehicle....
14. In *Clayton v Lambert*...this court emphasised that one cannot infer negligence from the mere fact that an accident occurred and that judges must take care not to hold a motorist liable in negligence just because the accident might have been avoided if a different decision had been taken....” As Commissioner Clyde-Smith said in *Morley*, the test is not one of perfection; it is simply to act as would a reasonably prudent and careful driver. That approach is equally applicable in the context of collisions at sea. The test therefore is whether a helmsman has acted as would a reasonably prudent and careful helmsman of the vessel of question. Breach of the Rules does not necessarily lead to a finding of negligence, but it is a relevant circumstance which the Court must take into account when determining whether the helmsman has been negligent. Expert evidence
- (i) Naval architects
52. The Court heard evidence from three naval architects: Mr William Leschaeve on behalf of Mr Corbin, Mr David Cannell on behalf of Mr Dorynek, and Dr Andrew Humphries on behalf of Mr Flath. All three experts are eminently well qualified, although Mr Leschaeve accepted in cross-examination that his experience was more with larger craft and he might have less experience of small craft than the other two experts.
53. After they had each prepared a report, they met to identify points of agreement and disagreement which are recorded in a joint statement dated 25th February 2021. They agreed that the Jet Ski was hit on her port side by the bow of the Speedboat, that the speed of the Jet Ski at the time of the collision could be taken as approximately 17 knots, and that the first point of impact between the bow of the Speedboat and the Jet Ski was where the bow tow ring (sometimes referred to as the D ring) of the Speedboat hit the moulded plastic rubber band of the Jet Ski and caused a significant indent. However, they disagreed on two key points upon which they were asked to opine, namely the speed of the Speedboat at the

moment of impact and the likely angle of impact. Mr Leschaeve considered that the Speedboat was travelling at a speed of 10-15 knots and that the angle of impact was 30-50° measured from the bow of the Jet Ski. Mr Cannell considered that the speed of the Speedboat was 8 knots and the angle of impact was about 65°. Dr Humphries considered that the speed of the Speedboat at point of impact was in the region of 20 knots (with a speed before the turn to starboard of 21-25 knots) and the angle of impact was 90°. As can be seen, there was a considerable difference of opinion between them on these two aspects.

54. Mr Leschaeve prepared a report dated 25th September 2020 and also gave oral evidence. Unfortunately, he had not been asked to prepare a supplemental report after the meeting of the experts. He had not personally inspected the damage to both vessels; he had relied on photographs of the damage. He said that speed and angle of impact calculations were normally carried out using the Minorsky method using a ratio based on energy absorption of the damage on both vessels. However, whilst this was traditionally used for steel hulls, it could not easily be applied to GRP hulls because GRP had differing properties depending on the method of manufacture. As the standard approach could not be used, he had therefore carried out a qualitative review relying on the witness statements, the GPS data available, the collision damage and the injury to Mr Corbin.
55. As to the speed of the Speedboat at impact, he noted that it was carrying more passenger weight than it was designed for and estimated that it would have to be travelling at a minimum of 5.4 knots to achieve semi-displacement. Although it was common ground that the GPS data on the Speedboat was not accurately recording the location of the vessel, he considered that it was reasonable to use its data as to speed. The data on the day of the accident recorded the speed as between 20 and 15 knots for most positions and 6.5 knots for one position. He considered it reasonable to conclude that the maximum speed on the day was in the region of 22 knots. Although an accurate estimate was almost impossible to obtain, he considered that the Speedboat was likely travelling at between 10 and 15 knots at the moment of impact. In his oral evidence, he said that, having heard the oral evidence of the witnesses as to fact, he inclined towards the lower part of that range.
56. As to the angle of impact, the evidence showed scraping marks on the Jet Ski running aft and upwards which indicated that the relative travel between the bow of the Speedboat and the port side of the Jet Ski was in the aft direction with respect to the Jet Ski. Having regard to the nature of the damage and the fact that the impact on the left leg of Mr Corbin was roughly in line with his femur, he estimated that the angle of impact would have been between 30 and 50° off the port bow of the Jet Ski; less than 90° in any event.
57. In oral evidence he said that if, as Dr Humphries suggested, the Speedboat had been travelling at 20 knots and had struck at an angle of 90°, the damage would have been very different and the Speedboat would probably have flown over the Jet Ski. Nor did he accept the suggestion of Dr Humphries that the Speedboat could have a turning circle of as little as 6 metres. He did not agree that the use of Computational Fluid Dynamics ("CFD"), which was used by Dr Humphries, was of assistance in this case and its effectiveness depended entirely

on the input assumptions.

58. On behalf of Mr Dorynek, Mr Cannell prepared a report dated 28th September 2020 and a supplemental report dated 12th March 2021 following the meeting of the experts. He said that he based his assessment of the vessels' impact speed and the angle of contact solely on the physical damage to both vessels and the severe injury to Mr Corbin's left leg and the bruising to Mr Flath's left thigh. He inspected the damage to both vessels personally and took photographs. In particular, he analysed the various points of damage on the Jet Ski. At appendix 9 of his report he marked five points. Point 1 was the agreed first point of impact when the D ring on the bow of the Speedboat struck the Jet Ski. Point 2 was further aft and higher where the D ring caused further heavy damage to the laminate at the top of the footwell combing of the Jet Ski. Points 4 and 5 were further aft where damage was caused by the bow of the Speedboat as it fell. Point 3 was a point in space which had been calculated by Mr Cannell as the point at which the bow of the Speedboat ceased to rise and began to fall.
59. From his modelling, which rotated the vessels relative to one another over a range of angles, he estimated that, in order to replicate the damage to each vessel and the severe leg injury to Mr Corbin and the bruising on the outer upper thigh of Mr Flath, the angle of impact was approximately 65° off the bow of the Jet Ski on the port side. In his oral evidence, he accepted that he could not be absolutely precise and that it could be 57- 60°. Contrary to Dr Humphries, he did not consider that the damage to the bow of the Speedboat was symmetrical. He explained in some detail in his supplemental report why the damage to the bow of the Speedboat was indicative of an impact more on the port side of the Speedboat's bow.
60. As to speed, by reference to the distance between Points 1 and 2, Mr Cannell calculated the relative speeds of the Speedboat to the Jet Ski as 1:2.109; in other words the Jet Ski was going 2.1 (in round terms) times the speed of the Speedboat. In his report, by estimating the deceleration force at 0.9g and having regard to the estimated position of Point 3, he considered that the Speedboat at impact was doing 7 mph. However, following the meeting of experts it was agreed that the Jet Ski should be taken to be doing 17 knots. Application of the formula therefore resulted in a speed at impact for the Speedboat of 8.1 knots. Mr Cannell also accepted, following the joint meeting, that the deceleration force could be 1.4g (rather than 0.9g) which was consistent with a speed of 8.1 knots. Mr Cannell did not accept that the impact could have occurred at an angle of 90° with the Speedboat doing 20 knots as estimated by Dr Humphries. He said that if this were the case, Mr Flath would not be alive as he would have been sitting in line with the first point of impact; and at 90° the Speedboat would have carried on and struck him. Furthermore, the damage was, in his experience, consistent with his estimate of speed and angle. It was not consistent with Dr Humphries' estimate of the angle and speed at impact. If, as Dr Humphries suggested, the Speedboat had collided with the Jet Ski at a speed of 20 knots at an angle of 90°, the damage to the Jet Ski would have been much greater than it was.

61. Nor did he agree that the angle of impact could be less than 55° (as suggested by Mr Leschaeve) because in those circumstances he estimated that the Speedboat would miss Mr Flath altogether and therefore not have caused the bruising to his leg which he had suffered. He accepted that the positioning of P3 was an assessment on his part, but he was confident of its positioning. He accepted that one could not be wholly accurate, but he would only accept half a knot either side of 8.1 knots as a possible margin of error. He accepted that, if Mr Dorynek had slowed down before impact, then of course his speed prior to that would have been greater than the speed at impact and there would also be some loss of speed due to the sharp turn. Thus, the speed of the Speedboat before these measures would have been more than 8.1 knots.
62. As to the speed of which the Speedboat was capable, he noted that there was pre-existing damage to the propeller and other minor pre-existing damage to the hull which would have reduced the effectiveness of the engine. Furthermore, the Speedboat was overladen. He would estimate its maximum speed with one person and half a tank of fuel at 26 mph. The maximum speed on the day would therefore have been less than that. He would have thought one would lose about 4 knots because of the extra weight on this occasion. He agreed that the position of the throttle was not an exact guide to the actual speed in relation to the maximum speed. With reference to the water in the Speedboat after the incident, he considered this was likely to have come over the transom as the bow went up on impact and the transom therefore lost freeboard.
63. On behalf of Mr Flath, Dr Humphries prepared a report dated 28th September 2020 and a supplemental report dated 25th March 2021 following the meeting of experts. He inspected the damage to the vessels and considered that the damage to the stem of the Speedboat was symmetrical as between the port and starboard sides, which suggested to him that the Speedboat struck the Jet Ski at an angle of 90° (measured from the bow of the Jet Ski). In order for this to occur, the Speedboat must have been travelling at a greater speed than the Jet Ski given the undisputed fact that the Speedboat had turned hard to starboard immediately before the collision. Dr Humphries used CFD to estimate the turning circle of the Speedboat as well as its trim and heave at various speeds.
64. In his report, he considered that the maximum speed of the Speedboat with five adults and four children aboard was some 30 knots. He referred to the evidence of Kristina Krasauskaite to the effect that she could see the sea in front and the boat did not angle upwards. Using CFD, he calculated the maximum trim angle was 6.5° at a speed of 15 knots and that at greater speeds the trim angle reduced. He concluded that the evidence of Miss Krasauskaite supported the view that the Speedboat was travelling at a speed closer to 25 knots than 15 knots. However, he accepted in cross-examination that the trim of the Speedboat would have been at the same angle at 10 knots as at 20 knots.
65. On the assumption that the Speedboat was travelling at 25 knots and the Jet Ski was travelling at 15 knots, he carried out various calculations to show the possible angle of approach between the two vessels prior to the hard turn to starboard and a collision at an

angle of 90°. He concluded that the most likely scenario was that the Speedboat approached the Jet Ski from the Jet Ski's port quarter at an angle of 135° (plus or minus 7.5°) measured from the bow of the Jet Ski. He produced a helpful chart to illustrate this. He stated that this explained why the Speedboat was not seen by Mr Flath until immediately prior to the collision when one of the female passengers on the Speedboat screamed. If the Speedboat had been travelling more slowly than the Jet Ski, it must have been in front of the Jet Ski and Mr Flath would be bound to have seen it earlier than he did.

66. He further calculated, using CFD, that the Speedboat would have been tilted severely to starboard when making a turn with a turning circle diameter of approximately 12 metres. This would be sufficient to allow water to come in over the starboard gunwale, which would explain the ingress of water described by the passengers on the Speedboat. Furthermore, the fact that the Speedboat was heeled over to starboard at impact meant that the D ring on the stem of the Speedboat hit the coaming of the Jet Ski at more or less the same time as the upper stem of the Speedboat struck Mr Corbin's leg. This also explained why Mr Flath did not suffer more serious injury.
67. In his supplemental report, he accepted that the pre-existing propeller and hull damage to the Speedboat meant that perhaps the maximum speed of the Speedboat with 5 adults and 4 children aboard would be closer to 27 knots than the 30 knots he had originally estimated. However, apart from this, he maintained his conclusions during his evidence.
68. He did, however, accept in his report that it was the first time that his firm had employed CFD to help analyse a collision between two vessels, although he emphasised that CFD had only been applied to determine and illustrate the running attitude of the two vessels and the turning characteristics of the Speedboat, all with each vessel in isolation. He also accepted in evidence that it was the first time he had used CFD to calculate a boat's turning circle. However, he felt that the results were consistent with the other available evidence and was confident of its use in this case.
69. He accepted in cross-examination that in his report he had assumed a speed of 15 knots for the Jet Ski. On the basis that the speed of the Jet Ski was 17 knots, this would mean that the Speedboat would have been travelling at some 24 knots.
70. As to the water which came into the Speedboat, he accepted that it was possible that water had come over the transom upon sudden deceleration, as Mr Cannell had suggested, but he thought that, if that had occurred, it was unlikely that a significant amount of water had entered the Speedboat in this manner. In the first place, upon a hard turn to starboard, the stern would rise and the bow would tilt down. Secondly, the Speedboat had a well immediately forward of the transom in which the outboard engine was installed and could be tilted into. Forward of the well was a further moulded coaming which was the height of the gunwale and essentially watertight. Accordingly, whilst some water would no doubt break over the transom into the well upon a sudden deceleration, he thought it unlikely that much of that water would then find its way up and over the coaming and onto the deck of

the Speedboat. The two outboard engines would also obstruct a proportion of the stern wave before it smacked into the transom. He remained therefore of the view that the ingress of water was most likely caused by water coming over the starboard gunwale as the Speedboat tilted to starboard. (ii) Seamanship experts

71. Each party also called an expert witness on matters of seamanship. Mr Corbin called Mr Patrick Yeoward of Brooks Bell LLP, Mr Dorynek called Ms Candi Abbott of Marine Resources Limited, and Mr Flath called Mr Lee Mosscrop. We are satisfied that all three witnesses have the appropriate qualifications and experience to give expert evidence on matters of good seamanship. Mr Yeoward's experience is largely as a Master of various vessels over some 20 years and he accepted that he had limited experience of jet skis (more correctly referred to as personal watercraft). Ms Abbott and Mr Mosscrop both have considerable experience of personal watercraft. Both are Royal Yachting Association ("RYA") powerboat and personal watercraft instructors and, indeed, Ms Abbott is the author of the RYA Personal Watercraft Handbook.
72. Following the production of their respective reports, the three experts met and prepared a Joint Statement which sets out their points of agreement and disagreement. This is a most helpful document and records a reasonable degree of agreement. All three experts agreed that the Speedboat was overladen according to the builder's guidance, that its kill cord should have been in use, and that all on board should have been wearing lifejackets. However, they all also agreed that these matters were not causative of the collision. The Joint Statement also pointed out that there are three possible scenarios arising from the evidence at that stage (consisting of the witness statements but not the oral evidence).
73. The three scenarios are as follows: (i) There was a crossing situation in accordance with Rule 15, in which event the Speedboat was the give-way vessel and the Jet Ski was the stand-on vessel ("Crossing situation"). (ii) There was an overtaking situation in accordance with Rule 13, in which the Speedboat was overtaking the Jet Ski. In that event, the Speedboat was the give-way vessel and the Jet Ski was the stand-on vessel ("Speedboat Overtaking situation"). (iii) There was an overtaking situation in accordance with Rule 13, in which the Jet Ski was overtaking the Speedboat. In that event, the Jet Ski was the give-way vessel and the Speedboat was the stand-on vessel ("Jet Ski Overtaking situation").
74. In the Joint Statement, the experts proceeded on the basis of the witness statements; in particular that of Mr Flath that he did not see the Speedboat until the last moment before the collision when he heard a scream. The experts considered whether Mr Dorynek and/or Mr Flath had failed to comply with various of the Rules in the three different scenarios referred to in the preceding paragraph. However, for the most part, any such failures were a consequence of a failure to keep a proper lookout in accordance with Rule 5. To take a simple example, in the event that the Jet Ski was overtaking the Speedboat, all the experts agreed that Mr Flath did not keep a proper lookout. They also agreed that, on this scenario, Mr Flath also failed to comply with Rule 8 (action to avoid collision), Rule 13 (keeping clear on overtaking) and Rule 16 (action by give-way vessel). However, the failure to comply with

Rule 8, Rule 13 and Rule 16 in these circumstances was all a consequence of Mr Flath's failure to keep a proper lookout, so that he did not see the Speedboat until immediately prior to the collision. As he did not see the Speedboat until this late point, he naturally did not take any of the actions required by Rules 8, 13 and 16. We think it helpful, therefore, to concentrate in this summary on the opinions in the Joint Report as to whether each vessel was keeping a proper lookout. We also propose to concentrate more on their opinions in relation to Mr Flath because Mr Dorynek has admitted liability by failing to keep a proper lookout, whereas Mr Flath denies liability.

75. If there was a Crossing situation, all three experts agreed in the Joint Statement that Mr Flath did not keep a proper lookout as required by Rule 5. Similarly, in the Jet Ski Overtaking situation, all three experts agreed that Mr Flath did not keep a proper lookout. In the Speedboat Overtaking situation, Mr Yeoward and Ms Abbott agreed that Mr Flath had not kept a proper lookout, but Mr Mossdrop disagreed. He considered that the decision by Mr Flath not to attempt to look directly behind him in the circumstances was consistent with maintaining a proper lookout as required by Rule 5.
76. Given that the disagreement between the experts in relation to whether Mr Flath kept a proper lookout relates only to the Speedboat Overtaking situation, we propose to concentrate on that aspect.
77. In evidence, both Mr Yeoward and Ms Abbott maintained their view that, in order to keep a proper lookout, Mr Flath should have periodically looked behind him and should have seen the Speedboat even if it was behind him. Ms Abbott in particular gave clear evidence on this topic. She reiterated that keeping a proper lookout for the purposes of Rule 5 involved keeping an all round lookout because vessels could approach from all angles. She disagreed with Mr Flath (and Mr Mossdrop) that it was dangerous for the driver of a jet ski to turn to look behind because the driver's shoulders would have to rotate which would be liable to cause the jet ski to change course or lose control. It was only necessary to turn the neck and head and perhaps turn the upper body slightly. This would not involve any risk of a change of course. It was, in her opinion, not keeping a proper look out simply to look forward when steering a straight course using only peripheral vision and possibly subtle or slight turns of the head to either side. This would not enable a rider to be aware of anything which was behind the craft.
78. Although from what was said in the Joint Statement, there appeared to be a significant difference of opinion between Mr Mossdrop on the one hand and the other two experts on the other, this difference narrowed considerably when Mr Mossdrop gave evidence. During the course of cross-examination by Advocate Hall, he accepted that it was necessary for a helmsman of a jet ski to keep an all round lookout, including astern, because danger from other vessels could come from any direction. He accepted that Mr Flath should have kept an all round lookout including to his port and starboard quarters and astern.

79. He maintained his view that it was not possible for a helmsman to turn right round so as to face directly astern, but he accepted that, by turning his head so as to look over his shoulder and using his peripheral vision, the helmsman of a jet ski could see up to 180° behind him. Thus, he in effect accepted that Mr Flath could have checked astern or on his port or starboard quarters without running any risk of inadvertently changing course by rotating the handlebars.
80. On his evidence, Mr Flath looked over his shoulder when he made his turn on to 150° and increased his speed from 5 knots to 17 knots, but he did not thereafter look anywhere other than ahead or to the side to the extent of his peripheral vision and small turns of the head. He did not therefore look astern or to his port or starboard quarter once he had increased speed.
81. Before leaving the expert evidence, we would add this. During his cross-examination of Dr Humphries and Mr Mossdrop, Advocate Benest suggested that they were not giving their evidence bona fide and were in effect hired guns giving evidence in a way designed to help their client. That accusation got Advocate Benest precisely nowhere. We are quite satisfied that both Dr Humphries and Mr Mossdrop were expressing their bona fide independent opinions and the fact that we have not ultimately found in accordance with their opinion does not alter this. Is liability proved against Mr Flath?
82. Mr Flath's evidence is that he did not see the Speedboat until moments before the collision, at which time it was too late to do anything about it. We need to consider first whether we accept this evidence in view of the fact that he gave different versions earlier on.
83. In the telephone call from Oberon to the Emergency Services (see para 34 above), Mr Flath said that the Speedboat was 'parallel' to the Jet Ski and that the Speedboat turned into the side of the Jet Ski. In evidence, Mr Flath explained that by 'parallel' he meant opposite his shoulder. We accept that this may have been what he meant.
84. His comment to PC Jenkinson later that evening (see para 35 above) is more difficult to reconcile with his evidence that he did not see the Speedboat until immediately before the collision. What he said to PC Jenkinson suggests that the Jet Ski and the Speedboat were running parallel with the Speedboat ahead, that the Jet Ski overtook the Speedboat, and that the Speedboat then struck the port side of the Jet Ski. This can only have happened if, after the Jet Ski had overtaken the Speedboat, the Speedboat increased its speed so as to catch up with the Jet Ski once again before turning into it. There is no evidence whatsoever to support this version of events. None of the passengers on the Speedboat or Mr Dorynek suggest that there was any increase in speed other than the original increase back in the centre of the Bay when the Speedboat increased its speed from 5 knots, some 200 metres from the beach, and turned south before undertaking its zig zags. It seems to us inconceivable that no one would have mentioned it if the Speedboat had increased its speed after being overtaken by the Jet Ski. We cannot therefore place any reliance on what Mr Flath said to PC Jenkinson.

85. We bear in mind the cautionary words of Stewart J in *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at
- [96] in relation to the uncertainty of memory and the fact that a witness may believe a new narrative and convince himself that this is what occurred. Nevertheless, we are satisfied on the balance of probabilities that Mr Flath did not see the Speedboat until a second or so before the collision as he describes.
86. The question then is whether he failed to keep a proper lookout as required by Rule 5. If there was a Crossing situation or a Jet Ski Overtaking situation, all the experts are agreed that he did not. We agree. In either of those situations, the Speedboat would have been visible for some time and Mr Flath should have seen it.
87. We also find that Mr Flath failed to keep a proper lookout even if there was a Speedboat Overtaking situation. Both Mr Yeoward and Ms Abbott are of this opinion and we accept their evidence. We found Ms Abbott's evidence particularly helpful, including her evidence that it was perfectly possible for the helmsman of a jet ski to keep a proper lookout behind without inadvertently altering course by moving the handlebars as suggested by Mr Flath. Indeed, in his evidence, Mr Mossdrop accepted that keeping a proper lookout required a periodic look astern or to the quarter and that this could be satisfactorily achieved by the driver of a jet ski looking over his shoulder and using his peripheral vision.
88. If, as he asserts, Mr Flath did look over his shoulder as he turned slightly to port to come on to a course of about 150° when he accelerated, he should have seen the Speedboat which, whatever its exact location, must have been visible to someone keeping a proper lookout. He was therefore negligent in the way he carried out this lookout. On his own admission, once he had increased speed and was running in a straight line, Mr Flath did not look astern or towards his quarter and we find that he should have done. He was exiting a busy bay and proper seamanship required him to keep a periodic all round lookout. His failure to do so after he increased speed to 17 knots meant that he fell below the standard of a reasonably prudent and careful driver of a jet ski in the circumstances of this case.
89. It follows that we find that Mr Flath was negligent by failing to keep a proper lookout, even in a Speedboat Overtaking situation. In our judgment, he was also negligent in each of the Jet Ski Overtaking situation and the Crossing situation. All the experts agreed that in these two situations, he failed to keep a proper lookout in accordance with Rule 5. Given that he was exiting from a busy Bay at some speed, we find that his failure to keep a proper lookout so as to avoid the risk of collision was negligent. He fell below the standard of a reasonable and prudent driver of a jet ski in the circumstances. It follows that he was negligent no matter which of the three scenarios was the correct one.
90. Furthermore, we have no hesitation in concluding that his negligence was causative of the collision. A jet ski is a highly manoeuvrable craft which, according to the evidence, could accelerate to considerable speed very quickly, change course easily and stop very quickly. He himself accepted that, if he had seen the Speedboat earlier, he would have stopped,

altered course or turned away. We have no doubt that, had he kept a proper lookout, he would have seen the Speedboat in time to take action so as to avoid the collision. In other words, but for his negligence, the collision would not have occurred.

91. It follows that Mr Flath is liable to Mr Corbin along with Mr Dorynek, who has admitted liability. Apportionment and contributory negligence
92. As part of our task of deciding on apportionment and contributory negligence, we think we should determine which of the three scenarios we find to be the case.
  - (i) Not a Speedboat Overtaking situation
93. We consider first whether it was a Speedboat Overtaking situation. We have come to the clear conclusion that it was not.
94. First, and most significantly, even if the Speedboat was travelling faster than the Jet Ski as Dr Humphries suggests, his evidence does not suggest that there was an overtaking situation within the meaning of Rule 13. That Rule (see para 49 above) defines an overtaking situation as one where a vessel is coming up with another vessel from a direction more than 22.5° abaft the beam of that other vessel.
95. As discussed at para 65 above, Dr Humphries concluded that, on the assumption that the Speedboat was doing 25 knots and the Jet Ski 15 knots, the most likely angle of approach by the Speedboat was one of 135° (plus or minus 7.5°) relative to the Jet Ski's bow. However, his report (at pages 166-168) illustrated by the chart at Bundle 5, Tab 6 shows that, even in that case, at all times during the 30 seconds prior to collision, the position of the Speedboat would have been only 9° abaft the beam of the Jet Ski. It was not therefore overtaking the Jet Ski within the meaning of Rule 13; it would have been a crossing situation. The chart has not been redrawn on the basis of the Jet Ski travelling at 17 knots, but any increased speed by the Jet Ski (being on this hypothesis the slower vessel) would reduce the differential speed between the two vessels and therefore could not increase the amount by which the Speedboat would be abaft the beam of the Jet Ski.
96. Secondly, in any event, we do not accept the opinion of Dr Humphries that the Speedboat was travelling faster than the Jet Ski. We are more convinced by the evidence of Mr Leschaeve and Mr Cannell to the effect that the Speedboat was travelling at a slower speed than the Jet Ski's speed of 17 knots. We would summarise our reasons for rejecting Dr Humphries' conclusion as follows: (i) It seems to us that his conclusion was based very substantially on his opinion that the Speedboat struck the Jet Ski at an angle of 90°. He based this upon his view that the damage to the bow of the Speedboat was symmetrical. However, Mr Cannell disagreed that the damage was symmetrical and gave detailed reasons as to why the damage suggested to him that the impact was more on the port side of the Speedboat's bow. Although Mr Leschaeve was not specifically asked about this, he must have been of a similar view to Mr Cannell to reach the conclusion which he did as to the angle of impact. If Dr Humphries was wrong about the angle of 90°, it undermines the rest of his conclusion.

- (ii) Dr Humphries repeated on a number of occasions, in his report and in evidence, that if the Speedboat was travelling at a slower speed than the Jet Ski, it must have been in front of the Jet Ski and Mr Flath would be bound to have seen it. As he did not see it, the Speedboat must have been behind the Jet Ski and therefore travelling at a faster speed. We do not find that a convincing reason. Although in their oral evidence both Mr Flath and Mr Corbin said that conversation between them (which had caused them both to look to the right) had stopped once the Jet Ski speeded up, that was not what Mr Corbin had said in his witness statement and police witness statement (see para 15 above), nor what Mr Flath had said in his police interview (see para 38 above). We think it probable that the reason why Mr Flath did not see the Speedboat was that he was looking to the right as he conversed with Mr Corbin. Even if this was not so, the fact that Mr Flath did not see the Speedboat ahead to his port does not mean it was not there. It is often the case that in a road traffic accident, a driver will have failed to see the other car even though it ought to have been visible to him; it means simply that the driver did not look properly. (iii) In our view, Dr Humphries did not give a satisfactory explanation as to how the damage to the port side of the Jet Ski opposite and aft of the passenger seat (e.g. points 4 and 5 on Mr Cannell's drawing) was caused if the impact was at angle of 90°. Conversely, we found such damage to be readily explicable in accordance with the evidence of Mr Leschaeve and Mr Cannell if the approach of the Speedboat was at the sort of angle which they described so that the Speedboat was impacting partly against the direction of movement of the Jet Ski. This would also be consistent with Mr Dorynek's evidence that the Speedboat was facing the shore immediately after the collision. (iv) Although none of the experts was able to carry out any practical experiments, we were impressed with the evidence of Mr Leschaeve and Mr Cannell that, if the impact had been at 90° with the Speedboat travelling at that point at 20 knots, the damage would have been far greater and there would have been a serious injury to Mr Flath, given that the agreed first point of impact by the D ring was exactly opposite Mr Flath. We did not find Dr Humphries' explanation, that the angle of heel would explain this, to be convincing. In any event, even if the angle of heel could explain the lack of serious injury to Mr Flath, it did not explain the comparatively minor damage to the Jet Ski caused by an impact at 90° with an overladen Speedboat travelling at 20 knots.
- (v) Whilst not pretending to be conversant with the merits of CFD, we noted that Mr Leschaeve did not agree that it could be used in the way which Dr Humphries had purported to use it and we also noted his admission that this was the first occasion on which he had so used it. (vi) We accept that caution must be applied when considering a person's assessment of speed, particularly when that person has little maritime experience, but nevertheless, there is no evidence to support the assertion that the Speedboat was travelling faster than the Jet Ski and such evidence as there is suggests the opposite. Thus, Mr Dorynek said that the Jet Ski was going faster than he was (para 17 above); Ms Stukaite said that Mr Dorynek speeded up only slightly when he left the 200 metre zone; Mr Jakubowski said that he did not know the speed at which Mr Dorynek was travelling but he felt comfortable with it and nothing caused him concern; Ms Krasauskaite referred to Mr Dorynek speeding up 'slightly' after

starting off slowly; and Ms Allen said that the Speedboat was going fast enough to give the kids a bit of a ride but not as fast as it had been earlier when it had just been the four of them and that she thought the Jet Ski was going more quickly than the Speedboat. Mr Corbin and Mr Flath were unable to give any real evidence about the speed of the Speedboat. Although Mr Corbin had estimated its speed at 25 knots in an earlier statement, he accepted in evidence that he had only seen it for a split second before the collision and we do not think that any weight can be placed on such a sighting. Furthermore, Dr Humphries suggested in his evidence that, if the Jet Ski was doing 17 knots, the Speedboat must have been doing 24 knots. This was only three knots less than his revised figure of the maximum speed that the Speedboat could have achieved of 27 knots and this too seems somewhat inconsistent with the evidence of the people on the Speedboat. (vii) Finally, if it was indeed the case that the Speedboat was catching up the Jet Ski approaching from an angle of 135° as suggested by Dr Humphries, and assuming that Mr Dorynek only saw the Jet Ski at the last moment, it seems inconceivable that he would not have turned to port (i.e. away from the Jet Ski) rather than towards it; it would have been the instinctive thing to do. As Dr Humphries said in evidence, if he had turned to port in these circumstances, the collision would have been avoided.

97. Putting these matters together, we find that the Speedboat was not overtaking the Jet Ski within the meaning of Rule 13, nor was it travelling at a speed greater than the Jet Ski.
98. In the circumstances, we do not think it is essential to determine the exact speed of the Speedboat or the angle of impact. Having said that, we consider that Mr Cannell's estimate of speed is too low. His calculation of the impact speed depends very much on where he has placed the imaginary point 3 (being his estimate of where the bow of the Speedboat ceased moving upwards after the initial impact and began to fall), but this cannot be fixed with precision. Furthermore, we think that the impression to be derived from the evidence of the people on board the Speedboat suggests a speed (prior to the hard last minute turn to starboard) greater than would be the case with an impact speed of 8.1 knots. Zigzagging at such a comparatively slow speed would not provide much entertainment for the children and Mr Dorynek's evidence was that they were travelling at half speed, albeit that this was based on his estimate of the position of the throttle. On balance, we think that the speed of the Speedboat prior to the hard starboard turn and the possible reduction of the throttle from one-half to one-quarter was likely to have been between 10 and 15 knots. As to the angle of impact, we do not think anything turns on whether it was on the 30 - 50° estimated by Mr Leschaeve or the 57 - 65° estimated by Mr Cannell. Either way, we find that, being the slower vessel, the Speedboat would have been somewhere off the port side of the Jet Ski but forward of the Jet Ski's beam, so that it would have been visible to Mr Flath had he been keeping a proper lookout. When Mr Dorynek turned hard to starboard, the result was that the impact occurred an angle of not less than 30° and not more than 65°. (ii) Crossing or Jet Ski overtaking?

99. There was general agreement before us that it was not necessarily very easy to determine this issue because of the lack of clarity as to the exact course and speed of both vessels before the collision, particularly the Speedboat. Three witnesses gave relevant live evidence – we do not include Ms Stukaite as her evidence did not really assist on any significant point. As to the three witnesses, we were of the clear view that Mr Corbin was a truthful witness doing his best to help the Court. However, as with Mr Dorynek and Mr Flath, there was a risk that he had turned things over in his mind repeatedly since the accident and had become convinced of the truth of something which may not necessarily be accurate. We have borne that in mind. We found both Mr Dorynek and Mr Flath to be less satisfactory witnesses. They had both given previous versions of events which differed materially from their current evidence and we did not find their respective explanations for this variance to be very satisfactory. We also found it not easy to follow some of their oral evidence. However, we do not find that either of them were deliberately lying to us, although Mr Dorynek clearly lied to the police initially when he said there were only three passengers and himself aboard the Speedboat at the time of the collision.
100. There is clear evidence that at some time after the end of the second set of zig zags, the Speedboat turned 30 - 40° to starboard in order to go towards Corbière. Not only is this the unchallenged evidence of Mr Dorynek, but it is supported by the statements from Mr Jakubowski, Ms Krasauskaite and Ms Allen, as described at paras 41-45 above. In determining whether there was a Crossing situation or a Jet Ski Overtaking situation, we are satisfied that, if one starts from the moment when the Speedboat turned 30 - 40° to starboard, the vessels were in a Crossing situation rather than a Jet Ski Overtaking situation. We would summarise our reasons for this conclusion as follows: (i) There is no evidence from any source to suggest that during this period the Jet Ski was at any time 22.5° abaft the beam of the Speedboat. Mr Dorynek's evidence, which we shall consider shortly, refers to the period during the zig zags prior to the 30 - 40° turn and no one gives evidence of seeing the Jet Ski behind the Speedboat after the turn. Indeed, there is evidence to suggest otherwise. (ii) The possible angles of approach between the two vessels militate against a Jet Ski Overtaking situation. We accept that they can only be approximate given the lack of clarity in the evidence but, if we assume that the Speedboat was heading approximately south (180°) before the 30 - 40° turn to starboard, this would mean that it was heading on a course of 210° - 220° after the turn to starboard. Conversely, if Mr Flath is right, the Jet Ski was on a heading of approximately 150° after its slight turn to port at P3 on leaving the 5 knot zone. However, neither Mr Corbin nor Mr Flath had mentioned the turn at P3 in their witness statements and it is possible that the Jet Ski took a straighter line between P2 (near the Sunseeker) and P4 (the point of collision). We do not have any evidence of what the course would be directly from P2 to P4 but, looking at the charts in evidence, it would appear to be in the region of 160 - 170°. (iii) On this basis, the angle between the courses followed by the respective vessels would appear to be a minimum of approximately 40° (210° minus 170°) and a maximum of approximately 60° (220° minus 160°). Given the evidence, which we accept, that the Jet Ski was travelling at 17 knots for approximately 30 seconds

before impact, these figures would suggest that it is extremely unlikely that at any point during this time the Jet Ski would have been 22.5° abaft the beam of the Speedboat. In this respect, we derive some assistance from the chart prepared by Dr Humphries to which we have referred above. This chart was prepared on the basis of an angle between the two approaches of 45° and a speed differential between the vessels (25 knots for the Speedboat and 15 knots for the Jet Ski) of 10 knots. In those circumstances, the chart shows that at no point in the 30 seconds was the faster vessel 22.5° abaft the beam of the slower vessel. On our finding, the speed differential in the present case is less (17 knots for the Jet Ski and 10 – 15 knots for the Speedboat). We find therefore that it is even less likely that, whether the angle of approach is 40° or 60°, the Jet Ski would have been 22.5° abaft the beam of the Speedboat at any point during this period so as to become an overtaking vessel within the meaning of Rule 13. (iv) We bear in mind that Ms Allen did not give oral evidence and her evidence has therefore not been tested by cross-examination. Nevertheless, she gives a detailed statement which strongly suggests a Crossing situation rather than a Jet Ski Overtaking situation. We have summarised her evidence at paras 43-45 above. It seems clear to us that, when speaking of the Speedboat coming round in a bit of a loop and heading back towards the Bay (her statement) or going across the Bay (her comment to PC Forde immediately after the incident), she is referring to the 30

- 40° turn to starboard which we have been discussing. She was seated on the starboard side of the seat immediately in front of the console of the Speedboat. Her view would therefore have been ahead and to starboard. Her view would not have been behind unless she turned to look in that direction and she makes no mention of having done this. She describes having the Jet Ski in her vision for a material time. She sees the Jet Ski coming out of the Bay in a straight line but does not think anything of it at first as she thought there was plenty of room for either vessel to change direction. Some 10 to 20 seconds later she thought that they were getting a bit close, but thereafter it got to a point when she realised there would be a collision. Two or three seconds before the collision, she screamed. We infer from her evidence that the Jet Ski was visible continuously from the Speedboat for a period of at least 15 – 30 seconds and that, given her position in the Speedboat and the direction she was facing, the Jet Ski was likely at all times to have been forward of the Speedboat's beam and certainly not more than 22.5° abaft its beam. In other words, her evidence is, in our view, inconsistent with a Jet Ski Overtaking situation and consistent with a Crossing situation.
101. For these reasons, we conclude that, if one starts from point of the 30 - 40° turn, there was a Crossing situation. However, if, prior to the turn, there was a Jet Ski Overtaking situation, the fact that the Speedboat changed course does not affect the existence of that Overtaking situation. By reason of such a significant change of course, the Speedboat would be in breach of her duty as stand-on vessel under Rule 17(a)(i) to keep her course and speed, but, as Rule 13(d) makes clear, once there is an Overtaking situation, any subsequent alteration of the bearing between the two vessels does not make the overtaking vessel a crossing vessel. Thus, if prior to the 30 - 40° degree turn the Jet Ski was overtaking the Speedboat within the meaning of Rule 13, the turn by the Speedboat did not change that situation and

the Jet Ski would still have been an overtaking vessel at the point of collision. There would therefore have been a Jet Ski Overtaking situation at that point.

102. We must therefore consider whether there was a Jet Ski Overtaking situation prior to the 30 - 40° turn; in other words, was the Jet Ski coming up with the Speedboat from a direction more than 22.5° abaft the Speedboat's beam? We find that there was not for the reasons which follow.
103. We begin by accepting the evidence of Mr Corbin and Mr Flath that the Jet Ski kept to the 5 knot speed limit until it had passed the southern end of the Headland. There appears to have been some confusion as to the exact location of the southern limit of that zone. Mr Flath thought it was between La Cotte Point and the Grosse Tête Rock, whereas, in an email received from the Ports of Jersey during the trial and admitted in evidence by agreement, it is said that the southern limit for the zone for jet skis at the time was between La Cotte and the southern end of the Headland. We do not think that anything turns on exactly how far south of the Headland the Jet Ski increased speed to 17 knots, not least because the exact location of the point of collision is not known either. It was not put to Mr Flath or Mr Corbin that the Jet Ski had not observed the 5 knot limit or had increased speed prior to passing the Headland. Furthermore, we draw comfort from the fact that Mr Corbin gave evidence that the Jet Ski did not increase speed until past the Headland. Given that Mr Dorynek had admitted liability shortly before the trial, the whole emphasis of the submissions made on behalf of Mr Corbin during the trial was to establish liability against Mr Flath. If Mr Flath had exceeded a speed of 5 knots within the 5 knot zone, we would expect Mr Corbin to have said so.
104. The only direct evidence that the Jet Ski was possibly in an Overtaking situation in relation to the Speedboat came from Mr Dorynek, who said that he first saw the Jet Ski during the first set of zig zags. At that time the Jet Ski was some 500 metres behind him. The second time he saw the Jet Ski was during the second set of zig zags, at which point the Jet Ski was about 250 metres away and was in a 5 - 6 o'clock position from him; in other words, almost directly astern of his boat. It was submitted on the basis of this evidence that the Jet Ski was coming up on the Speedboat and was in a position more than 22.5° abaft the Speedboat's beam. It was therefore overtaking the Speedboat within the meaning of Rule 13.
105. We find it very difficult to place any weight on Mr Dorynek's evidence in this regard for the following reasons: (i) Mr Dorynek made no mention of either of these sightings prior to his statement on 6 July 2018, which was a year after the collision. Before then he had spoken to PC Forde at the scene, had been interviewed at the police station on the day of the collision, and had made a hand written statement to Mr Battrick, all without mentioning these two sightings. (ii) Indeed, the clear import of what he was saying at the police interview and in his statement for Mr Battrick was that he had seen the Jet Ski for some 30 - 40 seconds before the collision and had expected the Jet Ski to change direction because the Jet Ski had at least half a minute to do so. (iii) He said that, on the first occasion he saw the Jet Ski, it was travelling at speed and overtaking other vessels. This was during the first set of zig zags

and can only have been at a time when the Jet Ski had not yet passed the end of the Headland so as to leave the 5 knot zone. This evidence is therefore wholly inconsistent with our finding that the Jet Ski did not exceed the speed limit in the 5 knot zone and we cannot accept it. Furthermore, if the Jet Ski was travelling at speed at this point and so was beyond the Headland, there was only some 30 seconds to go before the collision. In our judgment, that would have given insufficient time for the Speedboat to complete its first set of zig zags, go straight in a southerly direction for a while, carry out the second set of zig zags, turn 30 – 40° to starboard and then carry on for a while in that direction before turning hard to starboard immediately before the collision. (iv) It is very difficult to make sense of the second sighting to the effect that during the second set of zig zags, he saw the Jet Ski some 250 metres behind him at 5 - 6 o'clock. If, as he says, the Jet Ski was travelling at speed, this means, given our finding about the Jet Ski keeping to the speed limit, that the Jet Ski was south of the end of the Headland at this point. This would mean that, in order for the Jet Ski to have been at 5 or 6 o'clock, the Speedboat must have been travelling almost due east. This could only have been one of its zigs (or zags) in an easterly direction and would mean that the zig zagging must have been more pronounced than Mr Dorynek suggested in evidence, when he accepted a suggestion that each zig zag was in the region of 45° off from a southerly direction.

- (v) Even if at some point during a zig to the east, the Jet Ski was at a position of 5 or 6 o'clock to the Speedboat, given the erratic course which the Speedboat was steering because of its zig zags, this would not put the Jet Ski in an overtaking position. The essential course of the Speedboat was to the south and there is no evidence that the Jet Ski was in a position of 5 or 6 o'clock when the Speedboat was heading south. Indeed, such a suggestion would be inconsistent with all the available evidence. A vessel cannot put another vessel into an overtaking position by veering off its main course so that, momentarily, the second vessel is 22.5° abaft the beam of the first vessel before the first vessel resumes its course. Furthermore, in these circumstances, the second vessel would not be 'coming up' with the first vessel. (vi) The timing also raises difficulties in relation to Mr Dorynek's version. The evidence of Mr Flath and Mr Corbin, which we accept and has not been challenged, is that they were on a straight course at 17 knots for approximately 20 - 30 seconds. Similarly, as described above, the evidence of Ms Allen suggests that some 15 – 30 seconds elapsed from when she saw the Jet Ski (which was after the Speedboat had made its 30 - 40° turn) until the collision. In those circumstances, it is difficult to see how the Jet Ski could have been travelling at speed in a position of 5 – 6 o'clock relative to the Speedboat when the Speedboat was still zig zagging and had not yet made its 30 - 40° turn. (vii) All in all, we find that there are considerable difficulties in accepting Mr Dorynek's evidence and squaring it with the other available evidence. It may be that he saw the Jet Ski whilst carrying out the zig zags, but we reject his evidence as to the speed and relative position of the Jet Ski.

106. Apart from Dr Humphries' evidence (which we have rejected), there is nothing other than Mr Dorynek's evidence to put the Jet Ski in an Overtaking position before the 30 - 40° turn. The fact that, after it speeded up to 17 knots, it was going faster than the Speedboat does not mean that there was necessarily an Overtaking position. It is often the case in a Crossing situation that one vessel is going faster than the other. Putting these matters together, there is in our judgment no satisfactory evidence that the Jet Ski was in an Overtaking position for the purposes of Rule 13 relative to the Speedboat prior to the Speedboat making its 30 - 40° turn. We find on the balance of probabilities that it was not.
107. It follows that we must consider the issues of apportionment and contributory negligence on the basis that the two vessels were in a Crossing situation prior to the collision. This means that the Speedboat was the give-way vessel (because the Jet Ski was on its starboard side) and the Jet Ski was the stand-on vessel.
108. Mr Dorynek has admitted that he did not keep a proper lookout and is liable in negligence to Mr Corbin. We have also found that Mr Flath did not keep a proper lookout. We find that he probably did not make the slight turn to port onto 150° at P3 as he stated. Mr Corbin made no mention of this turn in his witness statement or his witness statement to the police. The first time that he mentioned it was in his oral evidence and even then he accepted that he could not specifically recall it, merely that he considered that it must have happened. Mr Flath also made no mention of this turn until his witness statement for these proceedings in June 2020, nearly three years after the incident. We think it more likely that Mr Flath steered an essentially straight course between P2 and P4. In these circumstances, as it was all in a straight line, his own evidence was to the effect that he would only have looked forward using his peripheral vision with small turns of the head to port and starboard.
109. If, contrary to our finding, Mr Flath did alter course as he said in evidence, we find that he either did not look over his shoulder on making the turn as he states or that, on so looking, he simply failed to see the Speedboat which would have been plainly visible to him in a position forward of his beam on his port side. As we have already indicated at paras 82-91 above, we find that Mr Flath failed to act as would a reasonably prudent and careful helmsman and is liable in negligence.
110. In our judgment, the collision would not have occurred if either Mr Dorynek or Mr Flath had kept a proper lookout. This was also the view of Ms Abbott in her report. It is noteworthy that Ms Allen was able to see the Jet Ski for at least 15 - 30 seconds before the collision which gave ample time for either vessel to take avoiding action. If she could see the Jet Ski for that period of time, there was no reason for Mr Dorynek not also to have done so. He was at the helm and was standing on the same side of the Speedboat as Ms Allen was sitting. There was nothing to obscure his view. He should have seen the Jet Ski earlier than he says he did.
111. Similarly, if Ms Allen could see the Jet Ski for that period of time, there was nothing to prevent Mr Flath from seeing the Speedboat for a similar period. As we have found at para 98 above, the Speedboat was on the port side of the Jet Ski and was forward of its beam.

There was therefore no reason whatsoever for Mr Flath not to have seen it. As mentioned earlier at para 96(ii), we consider that the probable explanation for his failure to do so was that he was in fact still talking intermittently to Mr Corbin after increasing speed to 17 knots and this caused him to look to his right; he simply failed to look in the other direction to see the Speedboat (as he should have) or, if he did so look, he simply failed to notice the Speedboat. If he had been acting as a reasonably prudent and careful driver of a jet ski, he would have seen the Speedboat much earlier and in time to take action so as to avoid the collision.

112. Given that both Mr Dorynek and Mr Flath failed to keep a proper lookout and that this was the cause of the collision, it is certainly strongly arguable, as Advocate Benest submitted, that responsibility should be allocated equally between them. However, we think that some weight should be given to the fact that this was a Crossing situation and that it was the duty of the Speedboat to give way. It is particularly important that a helmsman keep a lookout for vessels to which he may have to give way. It is also clear that Mr Dorynek was ignorant of this Rule and believed that the bigger vessel had the right of way. Furthermore, on his evidence, he had seen the Jet Ski earlier and should have been alerted to the need to keep a lookout for its whereabouts. In our judgment, these matters increase his level of responsibility.
113. We do not think we have sufficient evidence to find that Mr Dorynek additionally contributed to the collision by the actions he took on seeing the Jet Ski just before the collision. If he had, as he says, spent time waving and shouting before deciding to make his hard turn to starboard, that would have delayed his avoiding action unnecessarily. However, for the reasons set out at para 46 above, we find on the balance of probabilities that he did not do so. Although in his written closing submissions, Advocate Franckel placed some weight on a response of Mr Dorynek in cross-examination, when he appeared to accept that if the Jet Ski was 30 metres away when he saw it 4 seconds before impact there would have been ample time for him to steer and avoid the collision, we do not think, given Mr Dorynek's comparative lack of boating experience, that we can place much weight on this response.
114. Furthermore, there was no satisfactory expert evidence before us as to whether, with the two vessels' relative approach courses and speeds, there would have been sufficient time for Mr Dorynek to take action to avoid the collision and whether, if such action was possible, it fell below the standard of the reasonably careful (but not perfect) helmsman not to have taken it sufficiently quickly when faced with a crisis situation. In the first place, there is in our view some uncertainty as to exactly how long before the collision Mr Dorynek saw the Jet Ski. In his statement of 6th July 2018, he said 'probably about 3/4 seconds' whereas in evidence he said about 4 seconds; but estimates of time in a crisis situation are notoriously unreliable. Secondly, it is very difficult to know how far away the Jet Ski was when Mr Dorynek saw it. Whilst it is agreed that the Jet Ski was travelling at 8.5 metres per second, this does not mean that it was 34 metres away 4 seconds before impact, as much would

depend on the angle and relative speed of approach of the two vessels.

115. The only expert to touch upon this issue in his report was Mr Mosscrop, who stated at para 7.37 that if the assessment of 3-4 seconds was correct, that would give sufficient time for the Speedboat to alter course and avoid the collision, although far too close for safety. However, he did not explain the basis for this conclusion and was not asked about it in evidence. Ms Abbott was asked by Advocate Franckel whether, if the Jet Ski was 30-50 metres away when Mr Dorynek saw it, this would have given sufficient time for the Speedboat to avoid the collision. Unfortunately there was no clear response, not least because, having asked for and examined a transcript of this part of her evidence, it seems that Ms Abbott misheard Advocate Franckel and thought he was referring to 30-50 seconds rather than 30-50 metres. She was also proceeding on the assumption that Mr Dorynek had waved. She said that the Speedboat did the right thing in turning to starboard and slowing down, but never expressed a clear view on whether the Speedboat could or should have avoided the collision on seeing the Jet Ski some 3-4 seconds before impact.
116. In the circumstances we do not consider that we have sufficient material before us to find on the balance of probabilities that Mr Dorynek was additionally negligent in relation to his actions in the crisis situation once he saw the Jet Ski a matter of seconds before the collision. His negligence was not to see the Jet Ski until that point because he failed to keep a proper lookout.
117. Doing the best we can to achieve a fair outcome having regard to the degree of fault or blameworthiness on each side and the causative effect of each party's negligence, we conclude that a fair allocation of responsibility as between Mr Dorynek and Mr Flath is 60% to Mr Dorynek and 40% to Mr Flath. By parity of reasoning, Mr Flath is guilty of 40% contributory negligence in relation to his claim against Mr Dorynek.
118. As can be seen, we have proceeded on the basis of accepting Mr Dorynek's evidence to the effect that, even if he saw the Jet Ski on a couple of occasions earlier on, he did not see it again until some 4 seconds before the collision. Although, as pointed out earlier, he has been somewhat inconsistent in his evidence in this respect, we find on the balance of probabilities that this was the case and we accept his evidence in that regard. If we had found that in fact he saw the Jet Ski for some 20-40 seconds immediately before the collision but had assumed that the Jet Ski would change course because the Speedboat had the right of way as the bigger vessel (as might be inferred from his police interview and what he said to Mr Battrick), we would have allocated a greater degree of responsibility to Mr Dorynek on the basis that he had failed to comply with Rule 15 despite seeing the Jet Ski in good time and that this was a cause of the collision. In those circumstances, we would have held him to be responsible as to two thirds and Mr Flath responsible as to one third. However, on the basis of our finding of fact, our allocation of responsibility is as set out in the preceding paragraph.

119. If we had concluded that there was a Jet Ski Overtaking situation, so that it was the duty of the Jet Ski to give way rather than the Speedboat, we would have allocated responsibility as to 60% to Mr Flath and 40% to Mr Dorynek, with a 60% finding of contributory negligence against Mr Flath in relation to his claim against Mr Dorynek. Although Mr Flath would bear the greater degree of responsibility as overtaking vessel, Mr Dorynek would still have been guilty of a substantial degree of negligence. He would not have maintained his course and speed as the stand-on vessel, as Rule 17(a)(i) requires, when he made the 30 - 40° turn, which would be aggravated by the fact that he did so in circumstances where he did not keep a proper lookout and did not know where the Jet Ski was.
120. Had we found that this was a Speedboat Overtaking situation, we would have allocated responsibility as to 60% to Mr Dorynek and 40% to Mr Flath, with a corresponding 40% contributory negligence finding against Mr Flath in his claim against Mr Dorynek. Whilst primary responsibility would rest with Mr Dorynek as the give-way vessel, the failure of Mr Flath to keep a proper lookout so that, in his words, the Speedboat came 'from nowhere', in circumstances where he would have seen the Speedboat if he had been keeping a proper lookout and could have taken avoiding action, means that he must still bear a substantial proportion of the responsibility.

## Conclusion

121. In summary, for the reasons we have given, we give judgment on liability in favour of Mr Corbin against both Mr Dorynek and Mr Flath. As between the two defendants, we allocate responsibility as to 60% to Mr Dorynek and 40% to Mr Flath.
122. In relation to Mr Flath's claim against Mr Dorynek, we hold Mr Dorynek to be liable to Mr Flath but with a finding of 40% contributory negligence against Mr Flath. Authorities Harbours, Inshore Safety (Jersey) Regulations 2012. Regulations for Preventing Collisions at Sea 1972. Morley v Reed [2012] JRC 127A. Goad v Butcher [2011] EWCA Civ 158. Stewart J in Kimathi v Foreign and Commonwealth Office

[2018] EWHC 2066 (QB).

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CASE PAGE <https://chat.esheria.ai/case-law/jersey/corbin-v-dorynek-and-flath-2022>

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