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Kwok v. British Columbia Ferry Corp.

Between
George Kwok in his own right and as personal representative of Kim Ying Kwok, Michael Mann Ko Kwok and Martin Mann Bon Kwok Deceased, and Nelson Kwok, by his Guardian ad Litem, the Public Trustee for the Province of British Columbia, Plaintiffs, and British Columbia Ferry Corporation, Wayne L. Holmes, William M. Chemko and George Kwok, Defendants, and George Kwok, Third Party

[1987] B.C.J. No. 2500

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20 B.C.L.R. (2d) 318

British Columbia Supreme Court
Vancouver, British Columbia

Cumming J.

Heard: June 8 - 12, 15 - 19, 22 - 26, 29, September 14 - 18, 28, 29, October 1, 2, and December 17, 18, 1987
Judgment: December 21, 1987

Marine accident -- Ferry and pleasure boat on collision course -- Ferry overtaking pleasure boat and striking it -- Duty of overtaking vessel to avoid collision -- Failure of pleasure boat operator to keep proper lookout -- Ferry two-thirds at fault -- Fatal accident damages -- 43-year-old wife and mother earning $27,000 per year -- $190,000 loss of dependency -- $225,000 home care services -- $40,000 for psychological injury -- Canada Shipping Act, R.S.C. 1970, c. S-9, Collision Regulations, C.R.C. 1978, c. 1416, RR. 2, 5, 7 and 8.

This action arose out of a collision in Howe Sound between a British Columbia Ferry and the plaintiff's pleasure craft. The accident claimed the lives of the plaintiff's wife and two of his children. The ferry was 133 metres long and contained three decks for automobiles. The pleasure craft was 33 feet long and slept six. The ferry was making about 20 knots and overtaking the pleasure craft on her starboard side. The pleasure craft was making six knots and on a path converging with the ferry at an angle of 25 degrees. The vessels were within view of each other for 12 minutes before the collision.

The master of the ferry claimed that the vessels were travelling parallel and that the pleasure craft turned to port in front of the ferry two minutes before the collision at which time the master sounded his whistles. The operator of the pleasure craft claimed that the ferry was in his blind spot.

HELD: The action was allowed in part. The Court relied on the Convention of the International Regulations for Preventing Collisions at Sea, 1972 to find that the master of the ferry was two-thirds at fault and the operator of the pleasure craft was one-third at fault. The captain significantly misjudged the course of the pleasure craft relative to that of the ferry so much that he failed to appreciate that the vessels were on a collision course. The ferry, as the overtaking vessel, was under a duty to keep clear of the pleasure craft (R. 13) and was in breach of this duty. Other breaches included: Rule 5, failing to keep a proper lookout; Rule 7, failing to appreciate that the vessels were on a collision course; and, Rule 8, failing to take action to avoid collision. The plaintiff was also at fault. The plaintiff was aware of the ferry's lack of manoeuvrability as compared to that of a small vessel like his own. He was at fault for failing to maintain a proper lookout (R. 5) and for neglecting the precautions required by the ordinary practice of seamen (R. 2). The plaintiff's wife was 45 at the time of her death and earned $27,000 per year as an accountant. A 12-year-old and a two-year-old child also died. A 10-year-old son survived. The wife was the principal income earner and she was very frugal. The plaintiff's pre-retirement loss of dependency was $150,000 and the son's was $40,000. The plaintiff's interest in his late wife's post-retirement income was $35,000. For loss of home care services, the husband's loss was assessed at $195,000 and the son's loss was assessed at $30,000. The son's damages for loss of his mother's love, guidance and affection was assessed at $20,000 and for loss of his mother's inheritance his damages were assessed at $25,000. The family had been covered by the mother's dental plan and this loss was assessed at $6,950. On further evidence certain areas of the award were to be grossed-up to preserve them against the impact of income tax. The plaintiff suffered a mild soft tissue injury to the lower back which continued to bother him and which prevented him from returning to his previous occupation as an automobile mechanic. His prognosis was good. General damages were assessed at $9,000. The plaintiff was also assessed damages of $40,000 for a post-traumatic stress disorder. The Court noted that the plaintiff suffered a compensable psychological injury, which went beyond normal grief and other non-compensable factors. As a result of the accident the plaintiff was no longer an energetic, motivated and competent man. He was totally changed with no confidence and no interests. Past loss of earnings were assessed at $10,000 and future loss was $30,000. Special damages, including loss of the boat, were $102,271.

[Ed. Note: Corrigendum, released April 14, 1988 appended and correction made to judgment.]**.**

Counsel for the plaintiff George Kwok: J. **Laxton,** Q.C., N. Smith and M. Dong.
Counsel for the plaintiff Nelson Kwok: E.P. Good.
Counsel for the defendants: P.D. Lowry and M.A. Clemens.

CUMMING J.:-- This is an action for wrongful death and for personal injury arising out of a collision between a British Columbia Ferry, M.V. Queen of Cowichan (COWICHAN), and a small pleasure craft, M.V. Kimberley (KIMBERLEY). Particulars of these two vessels are set out in Appendices "A" and "B".

THE COLLISION

The collision occurred on August 12, 1985 in Howe Sound, between Bowen Island and the mainland of West Vancouver. On that morning, the plaintiff George Kwok, his wife Kim, and their three children were beginning a family vacation aboard their 33' pleasure craft KIMBERLEY. The family had spent the previous night aboard the vessel in the False Creek area of Vancouver in order to get an early start. They set out first thing the following morning.

After leaving False Creek, KIMBERLEY sailed through English Bay and into Howe Sound bound for her first destination at Gibson's Landing. As KIMBERLEY headed into Howe Sound, George Kwok was at the helm on the starboard side of the main cabin. The steering position on KIMBERLEY'S flying bridge was not then fully equipped or operating. Nelson, the Kwok's ten year old son, was below in the forward cabin of the vessel and Martin, age twelve, was on the settee on the starboard side of the main cabin. Kim, Mr. Kwok's wife, and their two-and-a-half year old son Michael, were seated towards the rear of the main cabin on the port side.

Shortly after 9:00 o'clock in the morning, KIMBERLEY entered Queen Charlotte Channel to pass between Passage Island and West Vancouver heading generally for Finisterre Island on the northeast corner of Bowen Island. Earlier that morning, it had been quite choppy through English Bay and Michael was getting seasick, but in the sheltered waters of Howe Sound, the sea was quite calm. The day was bright and sunny and with the exception of a tug, the Seaspan Rustler, and its barge tow, there was not a boat in sight in the Howe Sound area. Visibility was unlimited. KIMBERLEY was travelling at about six or perhaps seven knots.

About twenty minutes after KIMBERLEY entered the channel, COWICHAN, en route from Nanaimo to Horseshoe Bay, rounded Point Cowan on the southeast corner of Bowen Island and steadied on a course between Bowen and Passage Island which would take her past Lookout Point. COWICHAN was making about 20 knots.

By about 0918 hours, KIMBERLEY cleared the north end of Passage Island. COWICHAN, steering a course of 035 degrees, cleared the north end of Passage Island by 0925. They collided in the middle of the channel between West Vancouver and Bowen Island at a point between White Cliff Point and Kettle Point. KIMBERLEY was struck by the starboard side of COWICHAN as the ferry overtook her. Kim and Martin drowned and Michael died two days later. Only George Kwok and his son, Nelson, survived.

The central question is: how and why, on a clear day, did this collision occur?

THE ISSUES AS TO LIABILITY

Relevant to the determination of the issues in this case are the provisions of the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (the "Collision Rules") which are set out in Appendix "C" and to which in the course of these reasons I shall refer.

It is the plaintiff's case that COWICHAN, as the overtaking vessel, was under a duty to keep clear of KIMBERLEY (Rule 13); that KIMBERLEY, as the stand-on or privileged vessel, had the right and the duty to maintain her course and speed (Rule 17) (which he says she did) and that COWICHAN failed to appreciate that the vessels were on a collision course (Rule 7) and to take action to avoid a collision (Rule 8): COWICHAN simply ran her down.

It is the defendants' case, on the other hand, that COWICHAN was steering a course calculated to pass KIMBERLEY safely and that in doing so, she complied with Rules 7, 8 and 16, but

KIMBERLEY neglected the precautions required by the ordinary practice of seamen (Rule 2), failed to maintain a proper lookout (Rule 5) and to determine if a risk of collision existed (Rule 7) and, most importantly, failed to maintain her course (Rule 17): instead, when the vessels were about three cables apart, KIMBERLEY altered course substantially to port into the path of the overtaking COWICHAN, rendering the collision inevitable. But for that alteration of course by KIMBERLEY, the defendants say, the collision would not have occurred.

Thus, the issues are joined.

THE EVIDENCE

The evidence in this case evokes the comments of Lord Justice Hodgins in The Canadian Lake & Ocean Navigation Company Limited v. the Ship Dorothy, where he said:

> This case is an illustration of the experience which Admiralty Courts have had of the conflict of evidence in collision cases. As has been well said by Mr. Justice Davis of the Supreme Court of the United States, 'It always almost universally happens in cases of this description (collision that different accounts are given of the occurrence by those in the employment of the respective vessels; and that the court has difficulty in this conflict of evidence, of deciding to which side a preferable credence should be given. There are generally however, in every case, some undeniable facts which enable the court to determine where the blame lies The Great Republic 23 Wall. p. 29. And a similar experience has been given in the House of Lords by Lord Blackburn in the Khedive, 5 App. Cas. p. 880. 'The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth'. [(1906) 10 Ex. C.R. 163 at 164].

Nevertheless, certain salient facts emerge about which there is little or no dispute.

At 0921 hours COWICHAN, abeam Point Cowan at a distance of 5 to 7-1/2 cables, steadied on a course of 035 degrees and travelled a distance of 2.3 nautical miles(nm) in the following seven minutes, i.e. to 0928. At 0928, COWICHAN altered course 5 degrees to port to ensure, according to Mr. Chemko, the officer in command, that she would pass KIMBERLEY safely. Thirty seconds later, when KIMBERLEY was about three cables away, COWICHAN sounded a whistle signal of five blasts. At 0929, COWICHAN still making 20 knots, sounded a second series of five whistle blasts, to be followed by continuous whistles, and set her engines full astern. COWICHAN and KIMBERLEY collided at 0930. The point of impact is fixed, with a reasonable degree of certainty, at 49 degrees, 22'6" north latitude, 123 degrees, 18'24" longitude, 6.5 cables distant from White Cliff Point bearing 067 degrees.

The course and actions of KIMBERLEY within this time frame are somewhat less certain. She was travelling at about 6 knots (.10 nm/min.). From about 0918 to 0925, KIMBERLEY did not steer a straight course but, after passing Passage Island, made a number of alterations of course to starboard proceeding to calmer water and heading to pass between Finisterre and Bowyer Islands.

Although the two vessels were in sight of each other for as much as 12 minutes before the impact (from about 0918), Mr. Chemko, on the bridge of COWICHAN, first noted the presence of

KIMBERLEY at 0925. He did not take a bearing on her in relation to any fixed point on the ferry or by radar or otherwise, but visually estimated that she was bearing about 15 degrees or 16 degrees to starboard of COWICHAN and was approximately 1 nm or slightly more (say 1.15 nm) ahead. KIMBERLEY appeared to him then to be steering a parallel or near parallel course. He next noticed KIMBERLEY when the distance between them had closed to half a mile and he said that her bearing had not appreciably changed. I pause to observe that the significance of the absence of any change in the bearing of a vessel being overtaken is that it indicates that the courses of the vessels involved are not parallel but converging. He said that KIMBERLEY "jogged" somewhat to port and came back to starboard. This movement was not identified as a course alteration and may well have been caused by the action of the sea. At 0928, Chemko directed a course alteration to 035 degrees. Asked why, he said:

> A. Well, I thought we had a safe passing distance, but I just wanted to open it up a little bit, open up the passing distance, if not even make up for this little - I don't think he travelled too far to port anyway, but I just decided I am going to open up the passing distance a little more.

If Mr. Chemko's initial assessment of the relative course of KIMBERLEY had been accurate, namely: that it was such that COWICHAN would pass her safely, this course alteration to 035 degrees would not have been necessary to accommodate the smart boat's "jog" to port which, as noted, was immediately corrected. COWICHAN, coming up on Point Cowan had met the outbound ferry, the "QUEEN OF SURREY", which had rounded the Point wide and to which Chemko had given a wide berth. The more likely reason for the course alteration was, I think, and as suggested by Capt. Holmes, to bring COWICHAN a little wider around Lookout Point than her original course would have permitted. An examination of the courses plotted on the charts supports this conclusion.

At just about the time the order to alter course was given, Mr. Pinkerton, the quartermaster at the helm, glanced about and noticed KIMBERLEY. Although his opportunity to observe was somewhat limited, his prime attention being directed to his navigational instruments, he stated to the police investigators, immediately following the accident, that "she was closing with us".

When COWICHAN was off the south end of Passage Island, Capt. Holmes, her commanding officer, returned to the bridge. He glanced about and after being introduced to Mr. Vining, a friend of Mr. Chemko who was visiting the bridge and exchanging some small talk with him, he positioned himself forward of the chart table toward the starboard side of the bridge. From there he noticed a small pleasure vessel (KIMBERLEY) ahead at a range of 1 to 1.2 nm bearing a point to a point and a half (say 15 degrees) off COWICHAN's starboard bow and steering a parallel or near parallel course.

Capt. Holmes' attention was next directed to KIMBERLEY when he heard Mr. Chemko request an alteration of course from 035 degrees to 030 degrees at 0928. At that time, said Capt. Holmes:

> A. Well, when I looked around, he (KIMBERLEY) was virtually doing the same thing as I had seen him doing earlier. He was on an apparent parallel course, and proceeding in (sic) at the same speed as he was when I initially observed him.

What happened next, according to Capt. Holmes, is described by him as follows:

A. Shortly after Mr. Chemko ordered the course alteration, I observed the small vessel begin to alter to port.

Q. Go on?
A. And when I observed the alteration, I glanced at Mr. Chemko and had noticed that he was aware that this vessel was making an or coming around to port, and at that time he sounded five short blasts on the whistle and then proceeded over to the, maybe a step or so over to the console where the binoculars were and he picked up the glasses and observed the vessel to see if there was any response from this vessel as she was coming around and he didn't observe a response and I never certainly observed any response.
Q. Can I stop you there for a moment. Can you say how far the vessel appeared to be from you when the - when you first observed the alteration to port?
A. I estimate or estimated approximately two and a half cables, maybe just a shade over.
Q. What, if anything, was said at the time you observed the vessel alteration?
A. Well, I made after he had, after I had noticed that he was coming around, I believe I made a comment, something to the effect of 'what in the hell is this fellow doing.'
Q. 'What in the hell is this fellow doing.' All right. That was followed by the five blasts you told us and then you saw Mr. Chemko pick up the glasses. Can you carry on from there?
A. Yes. He momentarily observed the vessel and I believe there was no response, and I was in the process of going to tell him to put the engines into a crash stop and he at that time was also moving from the whistle position to the controls, and as he moved away from the whistle, I moved from where I was at the starboard side of the console over to the whistle and I began sounding the whistle.
Q. Just stopping you there, can you give us your best recollection of the time that elapsed between the first blasts, that is the beginning of the first five blasts and the second five blasts?
A. I estimate approximately in the vicinity of approximately 20 seconds, maybe 25.
Q. All right. From the time the engines were put astern, what did you thereafter observe of the small vessel?
A. Well, I observed once the alteration had started it appeared to me that he continued to come around; in other words, if you were to look at it above he would be what I would call scribing an arc as he was coming around.
Q. What happened:
A. Well, I continued to sound the whistle giving short blasts from the time that Mr. Chemko moved away up until the point where the vessel, small vessel disappeared from my sight.
Q. What was the last thing you saw of the small vessel before it disappeared from your sight?
A. Well, that something that has been embedded in my mind ever since the incident happened, and what I saw was the forward pilot house window, the majority of the port side and part of the starboard side window, and I could see the side windows of this vessel, and I found it very difficult to understand why this vessel is continuing to come around the way he is or he did, where all the side windows and I

can see the forward window and surely to goodness if I could see that, why is he not seeing me.

Q. The vessel then disappeared from your sight?
A. Yes, it did.
Q. And the ferry continued going astern?
A. Yes, it did.
Q. And ultimately stopped?
A. Yes.

And Mr. Chemko described KIMBERLEY'S turn to port in his evidence-in-chief as follows:

A. We had gone past the north end of Passage Island and the situation remained the same. I was directing my attention forward and I noticed this vessel, this pleasure craft making a jog to port and then go back to starboard.
Q. Carry on.
A. That concerned me a little but I wasn't alarmed about it. But, in any case, I ordered the quartermaster to alter course to port from 035 to 030. Just very shortly after he had steadied up on the 030 course I observed this pleasure craft to come to port. It was a very noticeable alteration to port and I became alarmed at it. If he continued what he was doing there was going to be a problem here. I went to the whistle and sounded five short blasts."

and on cross-examination:

A. ... I saw the vessel maintain a good course and, or a straight course and the speed appeared to remain the same. What more can I say?
Q. All right. And then, unexpectedly, it did this extraordinary thing of making a very quick turn to port towards the path of the ferry?
A. Yes.
Q. And, you say that it turned about 45 degrees quite quickly?
A. Well, it - the initial turn seemed to be quite quick and I believe it was describing an arc after that.
Q. Yes. So, it turned 45 degrees, you say?
A. It's an estimate,
Q. And then it continued to change its course right up to the point of collision, is that your evidence?
A. Yes.
Q. Yes. And, when you saw it make this rapid 45 degree change of course is when you sounded the first five blasts?
A. It didn't change 45 degrees immediately. It changed a -- I don't know how many degrees it changed but it was a large alteration and then it continued to describe that arc, but it didn't just simply turn 45 degrees.
Q. How much of an alteration did it make immediately?
A. Well, I, I immediately observed it, it would be an estimated, perhaps estimating 20 degrees.
Q. Let me refer you to your discovery evidence, page 68, question 402:

Q. Now, you said he came to port. Could you describe the change in his course that you observed at this point?
A. Well, the vessel came to port and I noticed it quite, that he seemed to come quite quickly and then it seemed to be describing an arc. Like it just didn't alter and stay on that course.
Q. Are you saying it was making a, it was continuing?
A. There was substantial, well, sort of a quick alteration and then a continual arc.
Q. So, there was a quick alteration, then a more gradual change which he continued to come to port; is that what you are describing?
A. Yes.
Q. And the quick alteration, can you estimate at all in terms of degrees of course change?
A. It would be just an estimate.
Q. Can you say how far in terms of degrees the course, the total change of course was from the time you first saw the vessel altering to port to the moment of the collision?
A. It was more than 45 degrees.
Q. More than 60 degrees?
A. Well, I'm not sure about that.
Q. All right.
A. It could even be 60 degrees. I just said more than 45 and I know it was 45 or more because the last seconds looking down on the vessel it could have been 60.
Q. Are you able to even approximately breakdown (sic) that total 45 degrees or 60 degrees in terms of - Did most of it take place as a result of the gradual arc or did a substantial portion of it result from the first rapid change?
A. It seemed to me from the first rapid change and then it was gradual and it was quite large right at the time of the, like the time of the actual collision.

It is to be noted that according to Capt. Holmes, KIMBERLEY, until she made and persistently maintained her turn to port as he described, was steering a course parallel or nearly parallel to that of COWICHAN. On the day following the accident, he gavea written statement to Cpl. Capadouca of the R.C.M.P., in which he said:

> We were approx. in a position off the south end of Passage Island, when I entered the No. 2 wheelhouse ... I casually spoke to B. Vining but prior to doing so, as policy when I come up, I looked forward and off to the sides quickly to determine what traffic was in the area in the form of vessels.
>
> I observed a small pleasure craft ahead of us going on a parallel course to us and I briefly observed out track and his track and, ah, ascertained that if both vessels continued on there (sic) course, we would pass this vessel with adequate searoom at a safe distance ...
>
> ... I heard him request an alteration to port of five degrees from 035 degrees to 030 degrees. I looked forward to see why he was doing this and I observed the pleasure

craft still going on a parallel course so I assumed that Mr. Chemko wanted to give more room to the pleasure craft or give lookout point a wider berth.

. . . . .

Right shortly thereafter, this pleasure craft that was on a parallel course began to alter to port ... So what we did is when Mr. Chemko observed that the vessel was coming to port he gave a series of five short blasts on the whistle because he felt if this fellow continued to do so, he would put his vessel into danger and our vessel into danger, plus there would be a possibility of a close quarter situation developing.

... it appeared to me that these signals were totally ignored by the vessel concerned.

When Mr. Chemko realized that, he gave another series of five short blasts, and almost immediately thereafter, he ascertained that the vessel was not going to take any action, he put the engines full astern. As his hand was reaching for the control, I said go full astern ... I rushed over to the whistle and I continued to blow the whistle repeatedly, a series of short blasts right up to the point where the vessel went out of sight. The next thing I saw were a few pieces of fiberglass thrown off to the side ...

c. . . . .

... when this vessel started to alter to port, I momentarily glanced at his wake and ascertained that up until the point that he altered his course to port, and the first set of whistles were given, that he was running a parallel course to us and his wake began to come around to port. And that assured me in my own mind, that up until his alteration to port, he was running a parallel course to ours.

. . . . .

Q. ... did you consider your vessel being an overtaking vessel?
A. Yes. It was an overtaking vessel and due to his speed compared to ours, I ascertained that we would pass him at a safe distance.
Q. And what would that distance be, captain?
A. That distance, if no one altered course would have been in the vicinity of, now I want to make this very clear, estimations of times, bearings, and distances, are done to the best of my knowledge. That distance, would have been 1/ 2 to 3/4 of a cable.
Q. When did you first consider you were on a collision course with the "KIMBERLEY"?
A. When we saw him coming up to port ...
Q. When you realized you were on the collision course, was there anything that you could take bearings or times.
A. No. There was not. The reaction time was Too short. If he had even been on a slight angle in course, we would have known what he was doing. But under the

circumstances, he was running parallel and then coming around to port like he did we had very little reaction time.

. . . . .

Q. Did you have sufficient room to alter course to port?
A. We couldn't as far as he was concerned without having him collide with us. As far as searoom, yes we could have altered to port. There is sufficient room to alter course in that channel. But under the circumstances, with him being where he was, we couldn't. (Emphasis added)

Not just once but at least six times Capt. Holmes asserted that KIMBERLEY wasrunning parallel to COWICHAN.

While the events which I have described were taking place on the bridge of COWICHAN, Mr. Partee, a passenger on board COWICHAN, watched matters unfold from a window seat on her starboard side about one third of the ship's length from the bow. Mr. Partee is himself an active pleasure boat operator involved in the affairs of the Canadian Power & Sail Squadron, a voluntary organization concerned with the teaching of boating safety. He described what he saw as follows:

I was sitting next to the window and I looked up just after we had passed Passage Island. I notice a pleasure vessel approaching from the starboard side. At the point that I noticed the boat it was approximately one mile off of the ferry's starboard bow.

MR. SMITH:

Q. If I can stop you there. You say one mile off the ferry's starboard bow. Are you able to say anything about the angle and whether it was ahead or behind?
A. The vessel, the pleasure vessel was ahead of and approximately - from where I was sitting - about 45 degrees to the left or starboard side of the vessel. The angle between the course of the ferry and the side of the KIMBERLEY was 45 degrees.
Q. You say it was to the left?
A. I'm sorry, to the right.
Q. Was there anything in particular that drew your attention to that vessel?
A. I was reading at the time and I noticed the vessel there. I read a few more paragraphs -- didn't take very long - and I looked again and the vessel was in the same relative position.
Q. What does that mean when you say 'the same relative position?'
A. Still at roughly a 45 degree angle off the starboard bow. My point of reference, in terms of the ferry, were dirty marks on the window. I had -- sat next to the window and I was aware of this and I could judge the position of the vessel by those marks and it had not changed from the original sighting.
Q. You say it had not changed from the original sighting. I take it you mean it was in the same position regards where you were sitting and the marks on the window?
A. That's right, same relative position.
Q. What did that indicate to you?

A. From my training within the Canadian Power Squadron I realized that indicated a collision course. I, at that time, became aware -- became concerned that there would be a collision and continued to watch the KIMBERLEY as she approached, at which time she did not appear to change course or speed at any time I had her in my view.
Q. How long did you have the KIMBERLEY in your view?
A. I first spotted her about five minutes before the collision and watched it until, perhaps, 15 or 20 seconds prior to the collision, where she began to disappear under the curvature of the ferry.
Q. In that period, approximately five minutes from your first sighting, how long did you have the KIMBERLEY in your view?
A. Almost continuously, except for the few minutes when I left my seat when I knew there was going to be a collision and ran forward to the passenger rail.
Q. During that time you had it continuously in your view did you observe any change in course?
A. No, I did not. I mentioned to my wife that it appears as if the KIMBERLEY was on automatic pilot.
Q. Why did you say that?
A. It was a very straight course. The wake was straight and the speed did not change.
Q. What happened after you first became concerned about a collision course?
A. When I realized it was on a collision course, perhaps three minutes later there was a sound of the ferry whistle, five short blasts, standard whistle for dangerous situations. There was no change, that I was aware of, in either vessel's direction or speed.

> Perhaps another minute went by and there was a second series of five blasts. Again, no change in the conditions. Perhaps another 30 seconds and the ferry's horn -- there was a solid, steady blast.

. . . . .

Q. If I can back up a minute. You said about three minutes after you first sighted the KIMBERLEY and became concerned about the collision course, you heard the COWICHAN sound the whistle?
A. That's right.
Q. Was there any change to the KIMBERLEY"s movement prior to the whistle?
A. No.
Q. Same course, same speed?
A. Same course, same speed.

Mr. Partee's evidence was substantially confirmed by that of Mr. Avison, who was standing on the forward observation deck of COWICHAN, below the bridge but somewhat closer to the bow. Asked what he saw from that vantage point, he said, in chief:

A. I saw a small pleasure craft off in the distance. I didn't think anything of it at the time. I was looking at it. It was the only other thing in the water and I just happened to be looking that way.

Q. Can you give us any estimate of how long this was before the collision occurred?
A. Approximately five minutes.
Q. Did you keep this pleasure craft under constant observation?
A. More or less, yes. I was looking out in that direction. I didn't actually stare at the craft, but I was looking in that direction the whole time.
Q. Where was its position in relation to that of the ferry?
A. It was slightly ahead and off to the right side.
Q. Can you say anything about the apparent direction of that pleasure craft?
A. It was headed approximately across about a 35 degree angle, coming towards the path of the ferry.
Q. When did you notice that it was coming in the direction of the ferry's path?
A. Maybe three minutes or so before the accident.
Q. What happened after that?
A. The small boat did not appear to alter course. It had a small wake behind it and appeared to be right straight behind the small boat the whole time. After it got maybe two minutes away I guess I started to wonder to myself, 'Is something going to happen here?' Somebody, I thought, should move.
Q. To that point had you heard any whistles from the ferry?
A. Not to this point.
Q. Did you subsequently hear whistles?
A. Yes, I heard one long blast maybe no more than two minutes before the accident.
Q. When you said a minute ago that you, prior to the whistles, you became very concerned about how close the vessels appeared to be coming, how far was the pleasure craft from you at that point?
A. In my terms I'd say about two to three city blocks. In feet, I don't know.

THE COURT:

When you first saw it you say it was two to three city blocks?

THE WITNESS:

That's when I became curious.

MR. SMITH:

Q. How long after that it was it when the whistle sounded?
A. I'd say the small boat was between one and two blocks away, city blocks.
Q. When the whistle sounded?
A. Yes.
Q. In that time, from the time you first noticed the small boat to the time the whistle sounded, did you notice any change in course by the small boat?
A. I didn't notice any.
Q. You were looking at it?

A. I was watching the boat, the wake. It looked straight behind it. There was no change.
Q. After the whislle sounded did you notice any change?
A. No, I did not.
Q. What happened after the whistle sounded?
A. I just stood there watching it and it got closer and closer. Neither the ferry nor the small boat appeared to change course. I stood there watching and about, I'd say, maybe ten seconds before the actual accident the ferry then started giving a series of short blasts on the horn, one after the other, and right up until the collision. I don't know when it stopped blowing. I didn't pay attention to when it stopped.
Q. Was the whistle sounding at the time of the collision?
A. I am pretty sure it was.
Q. Were you able to actually see the impact?
A. Yes, I did.
Q. What did you see?
A. The big rim around the bottom edge of the ferry, I was looking straight down as it was getting closer, and the big rim around the bottom edge appeared to hit the mid to rear section of the cabin on the small boat.
Q. On the left side of the boat?
A. On the left side of the small boat.

THE COURT:

Hit what? Hit the cabin?

THE WITNESS:

It appeared that the rim on the ferry hit the cabin area.

and on cross-examination:

Q. You are certain when you saw it, initially, at a mile distance it was steering a course that to you appeared to be intersecting about 35 degrees?
A. At that particular time I didn't think anything of it.
Q. It was some later time that you concluded that the course was intersecting at 35 degrees.
A. Approximately.
Q. Would it be fair to say you concluded that about the time you heard the whistle?
A. No, just before that.
Q. Just before that?
A. Maybe a minute before that. I concluded that before I heard anything.
Q. To your observation, which I think you said had not been consistent, but it had been more than once in that interval, you didn't see any change in the aspect of the vessel that caused you to think it had changed course?
A. No.
Q. Is that right?
A. That's right. I was watching the wake of the small vessel.

Mr. Islip, another passenger on the ferry who also had considerable experience operating power boats, was seated in the forward lounge of COWICHAN. He heard the first blast of five whistles and described what followed. He said:

A. ... I stood up and when I stood up I saw we were not there and that there was, in fact, a vessel off to the starboard side. I then realized that the whistle blast I heard were the blasts that they used to advise another vessel that they are in close proximity.
Q. How far away from the ferry was this other vessel when you first saw it?
A. My estimate of it are somewhere in the neighbourhood of a quarter to one-third of a mile.
Q. What can you say about its apparent course in relation to that of the ferry?
A. Well, it was ahead of us. It was envisioned it would cross the path of the ferry at some point further on.
Q. Can you say anything about the angle of the intersection?
A. Well, my best indication of it is if you take 90 degrees this vessel would be at this angle here. To my recollection about 45 degrees, at the most.
Q. What portion of this other vessel did you see?
A. Well, I viewed that vessel, originally, from inside the cabin and at that distance I could see the whole side of the vessel.

. . . . .

Q. What happened after you first sighted this vessel?
A. Well, I watched it for, like, I'd say a period of maybe fifteen to twenty seconds. I realized that this was going to be closer than the normal situation I have seen on the ferries of this nature. I just turned and walked back and through a set of doors that leads out on to the viewing area, which extends a long ways out of the front of the ferry beyond the bridge and over above the car decks, to get a better view.
Q. The area you went to was right at the front of the ferry?
A. Yes.
Q. And it was forward of the bridge?
A. Yes.
Q. What did you see when you got out there?
A. Well, you can get a better view of the pleasure craft. I watched it for a few minutes and I realized that that ferry -- that pleasure craft was not trying to outrun the ferry, because it was travelling in what I refer to as cruise attitude. It wasn't planing, it wasn't adding power, it was just in a straight line in a steady course, steady speed.

. . . . .

Q. From the time you first sighted this pleasure craft to the time of the collision, did it appear to you to have changed course?
A. No, none whatever.

Apart from Captain Holmes and Mr. Chemko, the only other witness who suggested that KIMBERLEY altered course to port when COWICHAN was close upon her was Mr. Bateson. Like Mr. Partee, Mr. Bateson is an experienced small boat operator with extensive experience in in-

structing student sailors with respect to sailing and boating and navigation. He was seated by a window about midship on the starboard side of COWICHAN. He described what he saw as follows:

A. I saw a small vessel that I estimated around 32 feet in size to be travelling on a relatively parallel course to the ferry, off about a quarter of a mile and possibly half a mile ahead. I gave no more real concern to it. It was something that happens every day and was nothing unusual about that particular boat.
Q. What do you recall seeing of the boat? First of all, what colour was it?
A. It was light-coloured.
Q. What perspective did you see?
A. Stern quarter.
Q. Can you say anything more - can you be more descriptive what you mean by stern quarter?
A. Part of the stern and also part of the sides looking at it from about a 45 degree angle to the actual bow -- to the stern.
Q. Did you make any assessment of what the vessel was doing?
A. My assessment there would be that the vessel(s) would not impede one another's passage in any way.
Q. Why did you -- why do you say that?
A. It's a professional interest that when a vessel is in relative close proximity, you automatically assess the movements and the intentions of that vessel.
Q. What then transpired?
A. About three minutes later I was again looking at the vessel. It appeared to move to port, course changed to port, and at this time it was -- if it had maintained that particular course, then I would have been very concerned for the vessel. Immediately at that time the ferry sounded the emergency signal, five blasts, at the same time as the announcement that we were landing in Horseshoe Bay in ten minutes. The boat appeared then at that time to correct its course to starboard and the ferry proceeded. Very shortly after that the other vessel, the vessel on the starboard bow we now know to be the KIMBERLEY again appeared to change course to port and go in towards the ferry. The ferry at that time gave five, again five blasts, and following the five blasts at that time I felt the vibration of the ferry increase.

THE COURT:

I am sorry?

A. Vibration increased on the ferry which I assumed to be an increase in the reverse pitch or I didn't know pitch at this time but going into reverse and then the horn was sounded a continuous basis of short blasts unto the actual collision. I did not see the collision as such. I saw the vessel go under the bow of the ferry. I then went around to the port side and saw the vessel on its side with a small boy on top of it and a person in the water down from the boat.
Q. How far away from your position on the port side of the ferry was the overturned boat?
A. I would say about two or 300 feet probably.

Mr. Bateson noted his observations in his diary. On cross-examination, he said:

Q. And now was that quarter mile away, did you mean by that that the KIMBERLEY was a quarter of a mile ahead of the COWICHAN?
A. No, I think the context of that it was a quarter mile running fairly parallel with the ferry.
Q. So was - it was the lateral distance of a quarter mile as best you could estimate?
A. Yes, yes.
Q. Than would you turn to page 467?
A. Uh-huh.
Q. Question 12,
Q. When was it that you next noticed the KIMBERLEY?
Q. Do you see that?
A. Yes, I do.
Q. A. I noticed the appeared - the small pleasure craft course at this time appeared to be a little erratic. It appeared to come in towards the ferry and it was at this stage that the five blasts were given by the ferry when this happened.
A. That's correct.
Q. Q. Now, when you noticed this erratic course, how long is that after you first noted that it was of no concern?
A. About three minutes, I would say.
Q. Had you watched it continuously from the time you first saw it until you noticed this erratic course?

A/ No, I hadn't.

So it is fair to say somewhere off Passage Island you observed the KIMBERLEY a quarter of a mile off and you gave it a glance and then you didn't look at it basically for another three minutes?

A. Approximately, yes, that's correct.
Q. And then you said you noticed that it did something a little erratic?
A. Uh-huh.
Q. And that at that moment or shortly thereafter I take it you heard the COWICHAN sound five whistle blasts?
A. That's correct, yes.
Q. And would it appear to you that the five whistle blasts had been caused perhaps by this erratic movement that you observed?
A. Yes. Apparent movement of the vessel, yes.
Q. I am sorry?
A. By an erratic movement of the vessel, yes, or a course change or whatever.
Q. That might have been what caused the ferry to sound the five blasts?
A. Yes and the vessel moved in towards it, yes.
Q. Now would you read on to on 467,

Q. I take it you don't know if it made some erratic movements from the time you had first seen it until the erratic motion?

A. During the three or four minutes or so, no, I hadn't.

Question on top of page 468:

Q. Now, what do you mean by erratic? What was it doing?
A. A slight course change to port, not erratic as such, it was one movement which could have been caused by the motion of the sea. Not going straight through the water.
Q. What is what you define as being erratic?
A. Yes.

Were you asked those questions? Did you give those answers, and are they true?

A. Yes.
Q. So this erratic movement that you saw was as you describe a slight course change?
A. Yes, that's correct.
Q. Would you agree with me that you did not see a dramatic course change of perhaps 45 degrees or more?
A. No.
Q. Are you absolutely certain you did not see such a dramatic course change at that time?
A. 45 degrees, no, I didn't. Not in one movement, no.
Q. What you saw was a slight course change?
A. Uh-huh.
Q. That could have been caused by the motion of the sea?
A. Yes, a boat very rarely goes in a direct straight line.

I shall refer again to Mr. Bateson's evidence.

Mr. Vining, who was on the bridge, described what he saw in the following terms:

A. Now can you tell us what transpired after that?
Q. well I believe after that brief conversation that I had with Captain Holmes, everyone was attending to their duty, they were all looking forward and I was, as I say, behind by the chart table, and after about ten minutes or so there appeared to be a pleasure craft to me right on the starboard side of the boat, came into view, and it was about the same time that I saw the boat that I heard a statement from Captain Holmes.
Q. What did he say?
A. I believe the statement was to the effect of 'What the hell is that idiot doing?' or words to that effect.
Q. What transpired from there?
A. Well from there it was pretty obvious to me, almost instantaneously, that the two vessels appeared to be on a collision course.
Q. Yes.
A. And I believe it was probably within 30 to 60 seconds that there was impact between the two.

Q. All right. What, if anything, transpired on the bridge either on the part of the Master or Mr. Chemko during the interval from the time that the Master remarked 'What is that fellow doing?' until the impact?
A. Well almost instantaneously Mr. Chemko began to sound the ship's horn. He pulled it a number of times. and during the interval as well, Captain Holmes eventually made his way over to where Mr. Chemko was as well and he began to pull it himself.

. . . . .

Q. The ferry did not change course prior to impact?
A. Yes, the ferry did not change course prior to the impact.
Q. And you said -- and you were very positive about this statement, you said:

> There was, in my estimation, no deviation whatsoever from the course of the KIMBERLEY, from the time I saw it until the moment of impact.

A. Yes. The ferry proceeded, seemingly travelled straight forward and KIMBERLEY was travelling on what appeared to me to be a 45-degree angle with neither party turning.
Q. And is that -- you have said that on -- you used that expression, 'there was, in my estimation, no deviation' in the course of the KIMBERLEY until the moment of impact, and that is true, isn't it.
A. Yes.

And Mr. Pinkerton said:

Q. So, it is fair to say that whilst you were not watching all the time when you were watching you never saw a change in the course of the KIMBERLEY?
A. No.
Q. Now, just so we understand from the position in which you were behind the helm is it fair to say that you had at all material times an excellent view of the KIMBERLEY, had you elected to look in its direction?
A. Yes.

. . . . .

Q. So, in effect what you're saying is that there was no change in the course or speed of the KIMBERLEY after the first set of five blasts?
A. I did not observe any, any change in the time that I was looking.
Q. And that is why you became concerned, is it not?
A. I became concerned because --
Q. There was no change in either the course or the speed of the pleasure craft after the first five blasts had been sounded?
A. Yes.
Q. Would you go now to please 669, starting at line two:

And I take it you never noticed any change in course in that period, that is, from the time you changed the course to 030 to the time when the first whistle sounded?

A. When I happened to be looking at it I didn't notice any change in course.
Q. And you understand the period that I am talking about. From the time you changed course to 030, to the time you first heard the blast, that is the period that we are talking about. You understand that?
A. At that time I was altering course of the vessel and I wasn't watching it at all.
Q. But after you altered the course to 030 and from that point, to the point of the first blast, is the time that I am asking about. Do you understand that?
A. That is a matter of a few seconds and I didn't notice any change of course then.
Q. I don't want to confuse you and I don't want to get confused myself. In the period from the time you changed course to 030 to the time of the first blast, you saw no change of course or speed in the KIMBERLEY? Have I got that straight?
A. That is correct.

Q. Is it true today?
A. Yes.
Q. So, is it fair to say then that although you didn't make a serious effort to determine whether the angle of the KIMBERLEY had changed in between hearing the sets of blasts the angle of the KIMBERLEY appeared to be the same?
A. Yes.

All the other witnesses who gave evidence and whose attention was drawn to the events that were taking place by the sounding of the first set of whistle blasts, testified that they saw no change in KIMBERLEY's course from the time they first observed her until the collision occurred. I shall cite some examples:

Mrs. Hersey, who was watching from her home on the waterfront near Kettle Point, said:

Q. And apart from the time you ran in to switch off the water on the tub did you keep your eyes on the two vessels?
A. Yes, I did.
Q. And right from the first time that you saw them to the time that they collided?
A. Yes.
Q. Were you actually watching them when they collided?
A. Yes, l was.
Q. And did you see either vessel in that period of time change course?
Q. None.

. . . . .

Q. Thank you. Now, Mrs. Hersey, it's been alleged in -- that after the whistles went the small boat, which we call the 'KIMBERLEY' made an arcing turn towards the ferry. Do you agree or disagree with that?

A. I disagree.
Q. Do you disagree a little bit or a lot with that?
A. A lot because I was -- my eyes were riveted.

And Mrs. Robertson, who was also watching from her waterfront home just above Bachelor Point, said:

Q. Is it fair to say your attention was directed to the two vessels contemporaneously with the first toot?
A. That's right.
Q. Now, from that moment to the point of collision did you take your eyes off the two vessels?
A. No.
Q. And did you see the course of these two vessels from the moment that you saw them to the point of collision?
A. Yes.
Q. Did you observe the wake behind the two vessels?
A. Well, I felt that the small one was either stopped or moving very slowly. My feeling was that it was someone maybe trailing a fishing line, just going at a slow speed and I don't remember any wake at that boat and the ferry I felt as though he was maybe attempting to stop because there was wash both seemed to be front and back of the ferry as though there was some attempt to slow down.
Q. Now, would you be able to recognize a course change?
A. I would think so, yes.
Q. Did you see either vessel change course at any time from the time when you first noticed them to the time of the collision?
A. No, I don't -- well, I don't think so. The one thing I had felt that the ferry was perhaps going a little to starboard and I don't know whether when he put - tried to go astern whether that would swing the ferry and, you know, away so that it would give that illusion. It may have just been an illusion that the ferry turned to star-board.
Q. All right. So there may have been a change in the course of the 'COWICHAN' for that reason. Did you see any change in the course of the 'KIMBERLEY', the small boat?
A. No I didn't.

Mr. Bauck, on the "Seaspan Rustler" said:

Q. >From that time you first had your attention drawn to the area, when you saw the KIMBERLEY four to five hundred feet ahead of the COWICHAN, to the time of the collision, did you have it under constant observation?
A. Yes, I did.
Q. During that period did the KIMBERLEY appear to you to be making any change in its course?
A. No.
Q. Did the COWICHAN appear to make any change in its course?
A. No.

And Mr. Cochrane, from his home located near September Morn Point on Bowen Island, said:

> Q. Now line 17 you were asked this question,
>
> > Q. Did you see any change in the speed of the small boat from the time you saw it until the time of collision?
> > A. No, I didn't appear to see any change in it, no.
> > Q. Did you see any course alteration by the small boat from the time that you saw it until the time of collision?
> > A. No.
>
> Did you give those answers and are they true?
>
> A Yes, to both questions.

Notwithstanding Mr. Bateson's carefulness, I do not consider that his evidence is really supportive of the defendant's allegation that KIMBERLEY made a significant course alteration which resulted in this accident. He does not describe her course over the last three cables of her voyage as did Mr. Chemko. His observation of KIMBERLEY was not as close or extended as that of either Mr. Partee or Mr. Avison. He did not observe her wake. I conclude that he made the same initial misjudgment of KIMBERLEY'S course, describing "relatively parallel" to that of COWICHAN, as did the ship's officers, and only realized, as they did, that she was on a collision course when it was too late to avoid the collision then imminent. I take him to have concluded that to be on the course he last observed, KIMBERLEY must have altered. In this, he made the same mistake the ship's officers did, for KIMBERLEY was, I find, on a converging course from at least 0925 hours.

Notwithstanding Captain Holmes' repeated assertions to the police, at the inquest, on discovery, and at trial that, when first observed at 0925, KIMBERLEY was steering a course parallel or nearly parallel to that of COWICHAN, the defendants introduced at the trial a vector diagram (Exhibit 60A) prepared by the Captain, which purported to show that KIMBERLEY was on a course converging with COWICHAN at an angle of 250. The purpose of Exhibit 60A was to show that had KIMBERLEY maintained that course and not, as Capt. Holmes and Mr. Chemko asserted, altered to port at the last minute, the collision would not have occurred, for COWICHAN would have passed her at a close but safe distance. On the basis of Exhibit 60A, the defendants contend that whatever her original course may have been, KIMBERLEY must be found to have altered to port as they allege she did.

This vector diagram, Exhibit 60A, is founded essentially on two bases. The first lies in the evidence of Dr. Upton who said that when he observed KIMBERLEY moments before the collision, she was headed "bow on" to his house above Manion Bay on Bowen Island. This, it is said, would put her on a course of 3380 which she could have only achieved if she made the sudden substantial turn.

The second essential leg of the theory demonstrated by the vector diagram is that from 0925 hours, COWICHAN was hidden from KIMBERLEY'S view because she was positioned in KIMBERLEY's arc of restricted visibility, a "blind spot" created by the after part of KIMBERLEY'S cabin super-structure. Mr. Kwok had stated in his evidence that the sole reason he had not seen COWICHAN earlier was that she was hidden by that blind spot. For reasons which I shall later explain this would not excuse his failure to have seen COWICHAN in a timely way, but the defendants seize upon this

evidence to assert that Exhibit 60A accurately reflects the relative positions and courses of the two vessels over the five minutes leading up to the collision.

Exhibit 60A, however, while superficially persuasive, is flawed by two factors. Firstly, the evidence of Dr. Upton, whose effort to be fair and accurate cannot be gainsaid, does not support a finding that KIMBERLEY was steering the course the defendants assert and further say could only have been achieved if she had turned as they allege. Dr. Upton said on cross-examination:

> Q. And did you tell Mr. Smith at the time that you thought that the angle of the KIMBERLEY from your vantage point was consistent with the boat being aimed at Finisterre Island?
> A. Yes. You mean the bow of the boat pointing at Finisterre?
> Q. Yes. Was it consistent with the boat being directed towards Finisterre Island also?
> A. It - it could have been, but it was enough pointed towards me, which was just a little bit towards Finisterre, that I could not have sworn to any change in course of the boat at all.
>
> . . . . .
>
> Q. Well, if you would just go back to the chart for a minute, the one behind you, I don't know if you're a sailing man, but could you estimate how many degrees difference that KIMBERLEY would have to be, whether it's pointing to you or pointing to Finisterre Island?
> A. No, I couldn't do that. I don't know my degrees that well.
> Q. Well, is it, as I understand your evidence, and doctor, please tell me if I'm wrong, that it appeared, the KIMBERLEY appeared, to be pointing in your general direction, but you couldn't swear now that it wasn't perhaps also pointed towards the Finisterre Island as well?
> A. The amount of variation it -- it could have been quite easily -- at a slow speed it could be varying that much, and that's all. It would have to vary.
> Q. Yes, so you can't obviously swear today whether it was actually pointed directly at you the whole time you saw it, or whether it was pointed at Finisterre Island?
> A. It was roughly bow on to me, but to me that's the same as Finisterre at the angle from which I was looking a mile and a half from the boat.

Secondly, if I do not accept Mr. Kwok's assertion that COWICHAN was at all times in KIMBERLEY'S blind spot and find instead that she was wider on KIMBERLEY'S port beam than such an assertion would allow, the two vessels had to be on a course converging at an angle greater than that shown by Exhibit 60A. I cannot and do not accept Mr. Kwok's assertion in this regard; there were other reasons which I will allude to later as to why he failed to see COWICHAN. His claim that COWICHAN was in his blind spot does not put her there. Furthermore, other independent witnesses, with minor but understandable variations, estimate the degree of convergence at greater than the 25 degrees shown on Exhibit 60A. This must be so, for otherwise, if KIMBERLEY did not alter to port, which I find she did not, the vessels would not have collided.

Mr. Lowry contended that Exhibit 60A is independent of the evidence of Captain Holmes but I cannot accept this contention. The Captain said, speaking of it:

Q. Can you tell His Lordship now, how this diagram compares with what you saw?
A. My Lord, that diagram is stated to represent exactly what I recall happened, as far as the courses, times and distances that are concerned.

In view of the contradictions between this evidence, exemplified by Exhibit 60A, and his previous, often-repeated assertions that their courses were parallel or near-parallel, I cannot place any confidence or credence in the evidence of Capt. Holmes or that of Mr. Chemko where it is to the same effect.

Captain Trimmer, a master mariner called to give evidence on behalf of the defendants said, in cross-examination:

Q. Is there a difference noticeable to an experienced mariner against another vessel heading on a parallel course and a vessel that is 25 degrees off parallel, in terms of its own course?
A. Yes, I would say 25 degrees is substantial.
Q. You consider 25 degrees a substantial variation from a parallel course?
A. Yes.
Q. Well, how would you notice the difference between a vessel on a parallel course and a vessel 25 degrees off the parallel?
A. You would see more of the side of the vessel than the stern.
Q. And would the difference be obvious to an experienced mariner, in your opinion?
A. Yes, it would.

Capt. Holmes and Mr. Chemko were both experienced mariners. In misjudging so significantly the course of KIMBERLEY relative to that of COWICHAN on their first and second sightings they failed to appreciate that the vessels were on a collision course. Thereafter, they failed to take action to avoid a collision and, as the overtaking vessel, to keep clear of her. They were in breach of Rules 5, 7, 8, 13 and 16, and wereguilty of negligence substantially contributing to the collision which occurred.

CONTRIBUTORY NEGLIGENCE OF KIMBERLEY

It is clear, and indeed conceded, that Mr. Kwok did not see COWICHAN until she was almost on top of KIMBERLEY. The question is: was his fault in this regard a "cause" or merely a "condition" of the collision? [See In Re Landi's Petition: 194 F. Supp. 353 (1960)]

For many years, Mr. Kwok had been sailing the waters of Howe Sound. He knew he was entering a channel which was frequently navigated by large ferries. He knew that he would be crossing the usual ferry traffic lanes marked on the chart he had on board. He said he was looking for a ferry to show his sons and expressed surprise that he did not see one. He knew that ferries travelled much faster than his vessel and that their maneouverability was much more limited than KIMBERLEY'S. He knew that any inbound ferry would be overtaking him as he proceeded northerly through the channel. He had ample time (at least ten minutes) to look for traffic around his vessel after he cleared the north end of Passage Island. Had he seen the ferry at any time until just before he did, he could easily have navigated to stay clear of her. In this regard he said:

Q. And were you aware of all those ferries?
A. Yes, sir.
Q. Have you always endeavoured to keep clear of the ferries in Howe Sound?

A. Will you say that again?
Q. Have you always attempted to keep clear of the ferries in Howe Sound?
A. Of course. If I don't keep clear, they're going to run me over. Of course I will do it.
Q. When you have seen ferries you have always navigated to stay away from them?
A. Yes. No matter how I'm going to get out of the way.
Q. No matter what, you've done that?
A. That's right.
Q. You consider that a common sense thing to do?
A. Matter of survival, sir.
Q. Why is that, Mr. Kwok?
A. Well, it's -- the ferry going so fast and I cannot out-manoeuvre them and I just have to run for my life. If I can may say that, because they just, as far as I know they just don't let anybody stand in the way. You know, so I saw lot of pleasure craft almost got run over in Horseshoe Bay and you just have to get out of the way when the ferry come.
Q. You know, Mr. Kwok, that that is the safe thing to do, isn't it?
A. Yes, yes, yes, I agree with you, sir.
Q. Very often you've seen the ferry on the Bowen Island shore?
A. Yes.
Q. And you know that the ferries cannot stop quickly?
A. Yes.
Q. Yes, you know that?
A. Yes, I know.

. . . . .

Q. And if you had seen it, what then?
A. Of course I will get out of the way if I am in the way. That is a normal reaction for everybody.

. Q If you saw the ferry coming around Cowaris Point and heading up for Horseshoe Bay, you would give it a broad berth, would you not?

A. Exactly.

Rule 5 of the Steering and Sailing Rules (Appendix "C") prescribes the duty to maintain a proper lookout. What constitutes a proper lookout will depend in large measure on the particular circumstances of each case. In Stevens v. United States Lines Co. et at (1951) 187 F. 2d 670, Woodbury, J. said at 674 to 675:

(7) The lookout rule embodied in Article 29 of the Inland Rules quoted in the margin is broad and general in its terms. It does not spell out what constitutes a 'proper lookout' or even under what circumstances one must be kept. It leaves these matters at large to be determined by reference to the 'ordinary practice of seamen' or to the 'special circumstances of the case.' That is to say, the statute establishes a standard of conduct by which to measure the behaviour of mariners with respect to maintaining a lookout under the various circumstances which they may encounter,

> not a specific rule, or series of rules, for particular specified situations. In keeping with the statutory scheme we shall not attempt to put a gloss upon the statute by laying down a rigid legal rule of general application with respect to what constitutes a 'proper lookout' in a particular situation, or as to the specific circumstances under which some sort of lookout must be kept.
>
> Instead of tailoring hard and fast legal rules to fit specific states of fact as they arise in their infinite variety in these cases, we think it preferable to state as a general proposition that the article in question requires a lookout in every direction from which danger may reasonably be expected to arise, and that the quality and diligence of the lookout required depends upon the degree, and imminence of the danger reasonably to be anticipated.

Mr. Laxton agreed that this is a fair statement of what Rule 5 requires.

Mr. Kwok says that the sole reason he did not see COWICHAN in a timely way was that she was obscured by KIMBERLEY'S blind spot. Despite his years of boating experience he had never read the Collision Rules, and he revealed a wholly erroneous appreciation of his duty to look out properly. He said:

> Q. Well, I suggest to you that to keep a good look-out by sight you have to have a good look around your vessel so you would be aware of all traffic in your vicinity at all times? What do you say?

You said:

> A. I understand.
> Q. Do you agree with that?
> A. I understand it, but that circumstances -- I don't agree with you all around because the place I was in there, I cannot look all around it because there are certain blind spots and my vision cannot turn corners to look at them, sir.
> Q. Do you consider then that this rule requires you keep a look-out everywhere except where there are blind spots?
> A. Yes, I understand.
> Q. Do you? I don't mean to be unfair to you. Do you understand that by this rule you are not required to keep a look-out where there are blind spots?
> A. I understand that. Yes.
> Q. You understand that?
> A. Yes.
> Q. That is what you think the rule means?
> A. Well, proper look-out - I consider it -- I did look out fairly well on that day of collision. I did pretty well on the lookout part.
> Q. That may be, Mr. Kwok, and we will come to that in just a minute, but I am just asking you now about what you understand you are required to do under this rule and I want to give you an opportunity to explain fully what you understand it requires. Do you understand that you are required to keep a look-out everywhere except where there may be blind spots?
> A. Yes.

Q. That is your understanding?
A. Yes.
Q. So you are not required, in your view, to keep a look-out where there are blind spots?
A. Okay. I understand.
Q. Do you agree with that?
A. I agree.
Q. That is your understanding of the rule?
A. Yes.

This may be contrasted with the evidence of Captain Hopkinson, a master mariner called on behalf of the plaintiffs, who said:

Q. What would a proper lookout have constituted in your opinion on the part of KIMBERLEY in this instance?
A. KIMBERLEY would have proper lookout, would have been a lookout around all points to the horizon and above the vessel also, your honour.

THE COURT:

You mean from the bridge of it?

THE WITNESS:

Looking up in the air, your honour.

THE COURT:

Oh, I see.

MR. LOWRY:

Q. You say that a proper lookout would have required an observation through 360 degrees?
A. Yes.
Q. Would you agree that it should have been an observation sufficient that the operator of KIMBERLEY would have been aware of any vessel that might interfere with his navigation or any vessel which, the navigation of which he might interfere with?
A. Yes.
Q. That's what a proper lookout is; isn't it?
A. I agree.
Q. You have no hesitation in saying that that is something that it is obvious as a failure on the part of KIMBERLEY in this instance?
A. No, I do not.
Q. Now you mention up above that there was a blind spot. You say that 'All the evidence indicates that the owner/ operator of KIMBERLEY, Mr. George Kwok, was unaware of the presence of QUEEN OF COWICHAN until seconds before the collision. We note that the arrangement of KIMBERLEY, which has the inside helm located at the starboard forward corner of the wheelhouse, provides a blind

sector of view when a lookout is being kept from the inside helm station.' First of all, did you - we spent a great deal of time over the last two days with Captain Horne's determination what that sector was. Did you make calculations of that sector before you gave this opinion?

A. No, I didn't.
Q. You assumed that there was some blind sector there?
A. Yes.
Q. It came as no surprise to you that there was?
A. No.
Q. Can I suggest, tell us what do you think, what do you consider the significance of a blind sector to be in relation to one's obligation to keep a proper lookout?
A. It obscures your vision around the horizon of full 360 degrees and so that if you wish to keep a proper lookout, you either have to move yourself from your steering position so you can see around the blind spot or the arc or alternatively, you could alter the course so you could superimpose the blind area on another portion of the horizon.
Q. Yes. First of all, a blind sector is something to be accommodated in a lookout; is it not?
A. Yes. I think it's maybe worthwhile mentioning that on ships blind spots can occur on radar displays.
Q. Yes. I put to you that a blind spot is something to be accommodated in keeping a proper lookout?
A. Yes.
Q. In other words, do you as a seaman consider that if there is a blind spot you don't have to look around it? You can just ignore the blind spots?
A. No.
Q. You consider that you must move your location in your vessel if it means taking a step to one side and looking in such a way that you eliminate the blind spot temporarily for the purpose of seeing what is coming?
A. Yes.

To the same effect is the evidence of Mr. Schrodt, an experienced boater, a longtime member of the Canadian Power Squadron and now the National Director of its Boating Course, who stated in his report:

> 9. I consider that Mr. Kwok should have been particularly sensitive to the extent to which his vision was obstructed by the cabin structure of his vessel. Good seamanship required that his lookout accommodate any and all obstructions and that if necessary he ask for periodic assistance in this regard. Obstructions are common and in some vessels are greater than in others. The obligation on the operator of a vessel is in no way relieved by virtue of any obstruction to his vision.

The evidence of Mr. Lindsay, an engineer who took measurements of the interior of a vessel indentical to KIMBERLEY as she was at the time of the accident, makes it clear that Mr. Kwok could, by leaning to his left while in his seat or standing beside it without letting go the helm, have looked around the blind spot and seen the oncoming COWICHAN even she had been in KIMBERLEY'S arc of restricted visibility. I have already found that she was not, and could have been seen without his

doing either of these two things. Why, then, did Mr. Kwok not see her? His attention in the few short minutes before the collision, may well have been distracted by the behaviour of his son Martin, who, against instructions, had twice gone out of the cabin to KIMBERLEY'S open rear cockpit, or by his concern over Michael's seasickness and his attempts to assist his wife in dealing with it by passing an ice cream bucket to her as she was seated in the rear of the cabin. The fact that he did not hear the whistle signals as described by other witnesses suggests that his attention was distracted from his navigation. At all events, he did not see COWICHAN: either he did not look out, or his look out was inefficient. It is axiomatic that "an inefficient lookout is equivalent to none". [See Interstate Towing Co. v. Stissi 717 F. 2d 752 (1983)].

When Mr. Kwok was alerted by the whistle sounds he heard he was, he said, initially confused as he did not know where they were coming from. He put his boat in neutral and looked about; he saw the hull of the ferry almost upon him and shifted into reverse in an attempt to back away but before this could take effect, the collision occurred. This is not, however, a case where his ineffective attempt to avoid the collision is to be explained as an error in judgment committed in the agony of the moment: his failure to maintain a proper lookout throughout the course of his voyage right up to the point where a collision was inevitable made it impossible for him to take appropriate action in a timely way.

Mr. Laxton contended that Mr. Kwok's breach of Rule 5 was not an effective cause of the collision, and that KIMBERLEY was bound, by the provisions of Rule 17, to keep her course and speed (Rule 17(a)(i)) permitted to take action to avoid collision only when it became apparent that the give way vessel was not taking appropriate action (Rule 17(a)(ii) and only required to take action when the vessels were so close that colllsion could not be avoided by action of the give way vessel alone (Rule 17(b)). Rule 13, he says, governs and overrides the fault of Mr. Kwok, eliminating it as a cause of this collision.

In the circumstances of this case, I consider this submission an excessively literal application of Rule 17. Rules 17(a)(ii) and 17(b) can only come into play when the stand on vessel becomes aware of the conditions which they postulate: here KIMBERLEY was not so aware because of Mr. Kwok's breach of Rule 5. In this regard I refer to the case of Egmont Towing & Sorting Ltd. v. The Ship "Telendos" (1982) 43 N.R. 147, which arose out of a collision between the tug "Stormcrest" as she was being overtaken by the ship "Telendos" in the vicinity of the First Narrows in Vancouver Harbour. Both vessels had been aware of the presence of the other but the pilot of the "Telendos" had lost sight of the "Stormcrest at some point and believed she had gone in to the docks east of the Vancouver Wharves and was not continuing westward out of the harbour. He therefore navigated in the northern portion of the channel as if the "Stormcrest" was not there. When it was finally discovered that the "Stormcrest" was still there it was too late to take any effective action to avoid collision. Had the pilot realized that the "Stormcrest" was to starboard and still proceeding westward out of the harbour he would have navigated further to port and closer to the centre of the channel. The crew of the "Stormcrest" did not themselves keep an eye on the overtaking "Telendos", their attention being diverted elsewhere, but the trial judge held that their failureto look astern was not the causa causans of the collision and held that "Telendos" was solely to blame. In allowing the appeal Thurlow, C.J., giving the judgment of the Court, said at pages 151 to 152:

> The question that is critical to the appeal is whether the finding of the learned trial judge that the failure of the "Stormcrest" to keep a lookout as to what the "Telendos" was doing was not a causa causans of the collision should stand. He

> appears to have considered that, because it was the duty of the "Telendos", under Rule 13(a) of the Collision Regulations, to keep out of the way of the "Stormcrest" and because there was no warning from the "Telendos" there was no obligation on the "Stormcrest" to pay attention to what the "Telendos" was doing. In my opinion neither the duty of the "Telendos" to keep out of the "Stormcrest's" way nor the lack of a warning of some sort from the "Telendos" could serve to relieve the "Stormcrest" of her duty to keep a proper lookout. That obligation is imposed by Rule 5. It is a fundamental obligation one that was recognized long before the rule was enacted in its present day form. Moreover, under Rule 17(b) when an overtaken vessel which is keeping her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, it is the duty of the overtaken vessel to take such action as will best aid to avoid collision. A vessel cannot discharge this duty when the moment to discharge it arrives if it does not know of the emergency and, as it will not known unless a proper lookout is being kept, it seems to me that if a lookout that is at least sufficient to apprise the overtaken vessel in time of the need for such action is not kept, the failure of the overtaken vessel to keep it will disable her from taking the action required of her will be a cause of the collision that follows. She cannot, in my opinion, absolve herself of her responsibility to take, at the appropriate moment, such action as will best aid to avoid collision by simply relying on the duty of the overtaking vessel to keep out of her way while neglecting to keep a lookout to ensure that the overtaking vessel is actually keeping out of her way.

At the time the decision in Telendos was given, Rule 13(a) of the Collision Rules was cast in the following terms:

> (a) Notwithstanding anything in the Rules of this Section any vessel overtaking any other shall keep out of the way of the vessel being overtaken.

In 1983, Rule 13(a) was amended by SOR/DORS/83-202 to read:

> (a) Notwithstanding anything contained in the Rules of Part B, Sections I and II, any vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken.

Rule 5 was then, as it is now, found in Section I of Part B of the Collision Rules, while Rule 13 is in Section II. Mr. Laxton contended that the effect of this amendment was to increase the burden on an overtaking vessel imposed by Rule 13(a) beyond that which had previously prevailed, although I did not understand him to go so far as to suggest that the obligation on the stand-on vessel imposed by Rule 5 was abrogated. Indeed, he could not, for as Thurlow, C.J. points out, "It is a fundamental obligation, one that was recognized long before the rule was enacted in its present day form". That language, in my view, still applies. Furthermore, in my opinion, the rules found in Sections 1 and 2 of Part B of the Collision Rules must give way to the General Rule 2 found in Part A which is not excluded by the non obstante clause of Rule 13. For emphasis, I repeat here Rule 2, which, under the heading of "Responsibility", provides:

> Rule 2
> Responsibliity

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

The ordinary practice of seamen who operate small boats in ferry-travelled waters was attested to by several qualified witnesses. Mr. Partee said in cross-examination:

Q. You are, then, familiar with the volume of ferry traffic?
A. That's right.
Q. In Departure Bay?
A. That's right.
Q. Is that something which is of continuing concern to you when you navigate across that bay?
A. Yes.
Q. How do you govern the navigation of your vessel in relation to ferries going into and out of Departure Bay?
A. My philosophy is to keep well clear.
Q. Why is that?
A. They are bigger than I am.
Q. How do you ensure that you keep well clear? What do you do?
A. I am constantly aware of not only the ferry traffic, but other traffic around my vessel. In my vessel the visibility is very good in all directions and I am constantly aware of what other vessels are doing. I do some fishing and it requires constant vigilence.

. . . . .

Q. In order to be able to govern your navigation, as you have told us, with respect to ferries, I take it, it is fair to say that you endeavour to keep a continuous lookout all around you, do you?
A. That's right.
Q. Particdarly when you are navigating in the vicinity where they are known to be?
A. That's right.
Q. Do you do that by looking ahead and aside and looking behind you?
A. That's right.

Captain Hopkinson in cross-examination said:

Q. Now tell me, captain, would you be prepared to sit on the high side in the situation that I have described to you and proceed across Howe Sound or Queen Charlotte Channel with the wind blowing, as I have suggested without ever looking on the other side of the sats for an inbound ferry?

A. No.
Q. Would you consider it reckless to do that, that is to proceed without looking.
A. I would prefer to use the word neglectful.
Q. Fine. It's something you would not do?
A. No.
Q. Under any circumstances; would you?
A. I don't believe so.
Q. Now why wouldn't you? You have told us you have the right-of-way.
A. I would be aware that I was in a ferry lane. I would believe myself to be sufficiently experienced with the sea to know that I would have to keep a lookout, and I certainly wouldn't wish to argue the collision rules with the ferry given the size of my vessel.

Captain Trimmer stated in his report:

11. I consider that it was incumbent upon Mr. Kwok to keep a lookout sufficient to ensure that he would have seen the approaching ferry well before the collision. All of the advice I have tried to give to the operators of pleasure craft in writing my book has been predicated on their being aware of the traffic around them. Common sense dictates that smaller pleasure craft stay clear of large, higher speed, less maneouverable commercial traffic. Mr. Kwok's recognition of his obligation in this regard was in the circumstances of no value because it was not coupled with the sufficiency of lookout the circumstances demanded.
12. Once Mr. Kwok embarked on the navigation of a channel where there were designated and established ferry routes, it became imperative that he make himself aware of the ferry traffic in the passage so that he could navigate his vessel accordingly.

And Mr. Schrodt in his report stated:

11. My own practice in operating vessels both sail and power wherever ferry traffic can be expected has been to keep a regular watch for ferries which I may meet or by which I may be overtaken. I consider that I am obligated to be aware of the approach of a ferry in sufficient time to permit me to navigate my vessel clear of its path. I have never 'stood on' against a ferry by which I was being overtaken. Certainly to my observation the interaction of ferry and pleasure boat traffic in Queen Charlotte Channel is such that ferries which travel about 20 knots navigate regularly past slower pleasure traffic, passing at about a cable distant as was planned in this instances, because common sense in the exercise of good seamanship prevails.
12. In the Power Squadron we teach the Regulations for Preventing Collisions at Sea - the 'first' of which is the maintenance of a proper lookout by sight and hearing. Unless the surrounding traffic is known to the operator of a vessel he cannot apply the rules for Preventing Collisions. We teach the determination of the 'stand on' vessel and the 'burdened' vessel in the application of the Rules but we emphasize that good seamanship requires the Rules to be applied with common sense. We instruct students to look for ferries and to take early action to stay clear of them.

The opinions of these witnesses and the provisions of Rule 2 are not in any way a declaration that "might is right": they are, rather, expressions of common sense. It is common ground that the Collision Rules apply to all vessels, large and small alike, but they are to be applied in a practical way having regard to what is required by the ordinary practice of seamen and as well to any special circumstances, including the limitations of the vessels involved.

A ferry's lack of maneouverability as compared to that of a small vessel like KIMBERLEY is a special circumstance. The passages I have quoted from Mr. Kwok's own evidence indicate that he was aware of this and aware generally of the ordinary practice of seamen which he said he would follow. I conclude, therefore, that his breach of Rules 2 and 5 was an effective contributing cause of this collision.

CONCLUSION AS TO LIABILITY

Liability for this accident must be apportioned, but not equally. COWICHAN bears the greater burden. I assess the responsibility of COWICHAN at two thirds and that of KIMBERLEY at one third.

DAMAGES

I turn now to the question of damages.

I FAMILY COMPENSATION ACT

The death of Kim Kwok as a result of this tragic accident has resulted in what is unquestionably a significant financial loss to the surviving members of her family, her husband George and their son Nelson. The difficult task I face is that of assessing in a fair and reasonable way the financial measure of that loss. I have before me the evidence and reports of several actuarial and accounting experts but by reason of the different assumptions used by each and of the wide divergence in the theoretical bases employed in their respective analyses that task is, if anything, made even more difficult. In this regard I have in mind the comment of Dickson J. (as he then was) in Lewis v. Todd (1980) 115 D.L.R. (3d) 257 where he said:

> "... the award of damages is not simply an exercise in mathematics which a Judge indulges in, leading to a 'correct' global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award." (At pp. 267-8)

(a) Loss of Dependency

(i) Pre-retirement Income

At the time of her death, Mrs. Kwok was and had been for some time employed as an accountant for a general insurance agency. She was highly regarded by her employer and it was common ground that at the date of trial her gross income would have been of the order of $27,000 per year. There was some suggestion that in 1994, when her immediate supervisor is due to retire, she could expect to succeed her as comptroller and that, if she did, her income would approximately double. To do so, however, Mrs. Kwok would be required to take and complete the courses necessary to qualify as a certified general accountant. While I do not discount her capacity to accomplish this objective, I am of the opinion that the prospect of her actually being able to do so, having regard to her other heavy commitments to her family, is no more than a possibility, albeit one real enough in the sense that the terms "possibility" and "probability" are used in the judgment of Robertson J.A. in Kovats et al v. Ogilvie et al [1971] 1 W.W.R. 561, to be taken into account in assessing her prospects of future income and the benefit her family might reasonably have expected to derive therefrom.

The Kwok family was not an average Canadian family (if there be such a thing) and does not fit readily into the statistical patterns which have been alluded to by the experts. As this family operated, Mrs. Kwok's income was not simply an addition or increment to a theoretical family pool. Her steady and secure income was relied on in large measure to provide for the family's basic needs with the result that Mr. Kwok's income could be used for capital accumulation which, in the case of the Kwok family, was substantial given the relatively modest level of income the family enjoyed, and with the further result that Mr. Kwok was free to forego the necessity of earning a steady income and to follow his own pursuits even when the prospect of immediate financial return was remote or uncertain.

This pattern of reliance upon Mrs. Kwok for the family's basic needs began in the early period of their marriage when Mrs. Kwok worked full-time while her husband took vocational training and worked for about three years as an apprentice mechanic. She provided the down payment for the purchase of the family home in 1971 and when Mr. Kwok went into the garage business, she worked with him in that venture while continuing her own full-time employment. The profits from the business went largely into savings, including the purchase of investment property.

After the garage business was closed as a result of its inability to compete with a self-service gas station which had opened nearby, Mr. Kwok worked at a number of jobs many of which he left because of conflicts with his employer. He was clearly a man who held strong opinions as to how things should be done and who preferred to be his own boss.

It was perhaps inevitable that until he could return to a self-employed situation, Mr. Kwok's income would be somewhat erratic and indeed it was. His employment income in 1981 was $11,000; it rose to $26,000 in 1982 but fell in 1983 to $19,000 and fell again in 1984 to only $4,500. For a period of about a year prior to November 1984, Mr. Kwok was unemployed and was engaged in the building of the KIMBERLEY. During this time Mrs. Kwok's income not only permitted Mr. Kwok to withstand a period of unemployment without his family's suffering unduly, but also to spend that time and most of his accumulated savings in pursuit of his boat building project.

At the time of the accident it was Mr. Kwok's intention to leave his employment at Unitow Services Ltd. where he had worked for some months and to devote himself to building more boats and operating a marine charter and commercial fishing business. Although it is far from certain as to just how successful this venture would prove to be, the fact remains that it was Mr. Kwok's intention, at that time, to embark upon it. The venture would have required further depletion of the family's capital and would not, at least in its early stages, have been likely to produce a high income and probably would have required the reinvestment of such income as it did produce. It was the existence of Mrs. Kwok's

secure and stable income which would free Mr. Kwok to pursue his plans without having to worry about providing for his family in the short and medium term. That freedom of choice has, as a result of his wife's death, been denied him.

Unlike some families with two income earners, the Kwoks did not formally pool their resources and live on a pooled fund. Most of the household expenses were paid from an account into which Mrs. Kwok's salary was automatically deposited and from which she handled the payment of the household accounts. There was a second account maintained for which Mr. Kwok was primarily responsible which was used principally for expenses related to the boat and other investments. Nonetheless, there was some mixing in the use of the funds in these accounts, both of which were in their joint names and from each of which mortgage payments on the family residence and the investment property respectively were made.

A good deal of argument at the trial was addressed to the question as to whether the loss of dependency should be calculated solely on the basis of Mrs. Kwok's income alone, as was contended by counsel for Mr. Kwok and the expert called on his behalf, or on the basis of their joint income, as contended by counsel for the defendants and for the plaintiff Nelson Kwok and the experts called on their behalf. The authorities cited to me, of which Moore v. Musketeer (1986) S.C.B.C. No. C836833 Vancouver Registry, March 18, 1986 (unreported) is an example, favour the former approach. It has the advantage in this case of being free of the speculative element used by the experts' as to what Mr. Kwok's income would or might be and of then including it for the purpose of making certain of their calculations and then removing it to arrive at net figures.

It is also necessary, in arriving at an estimate of the financial benefit which the surviving members of the family might reasonably have expected to receive from the earnings of Mrs. Kwok had she survived, to deduct a sum which represents a fair estimate of her own consumption. It is apparent from the evidence that Mrs. Kwok was a frugal soul. She begrudged herself new clothes, spent little on food in that she took her lunch to work, and she managed the family finances with care and with an eye to maximizing their savings. Expenditures for such things as travel, furniture and entertainment were kept to a minimum. To arrive at an estimate of Mrs. Kwok's personal consumption Mr. Kidd, called on behalf of the plaintiff, adopted a statistical approach which, although sanctioned by certain of the decided cases, yields in this case an amount which is unreasonably low. Mr. Schultz, on behalf of the defendants, applied different statistical tables to an assumed joint income which resulted in a calculated estimate of her personal consumption which I consider unreasonably high.

Having in mind the comments of Dickson J. in Lewis and Todd (quoted supra) and the possibility of improvement in Mrs. Kwok's income, I think that a fair assessment of the present value of the loss of dependency on Mrs. Kwok's pre-retirement income is the sum of $190,000.00.

The Claim of Nelson Kwok

It is clear from the judgment of the Court of Appeal in Grant v. Jackson (1985) 68 B.C.L.R. 212, that the claim of an infant plaintiff for the loss resulting from the death of a parent is a claim which the infant has in his or her own right and that to direct that the amount determined to be the value of the lost dependency or the portion thereof determined to be compensatory of the claim of the child alone be paid to the surviving parent in the confidence that he or she will use that portion for the benefit of the child (as was done in the case of Sharp-Barker and Barker v. Fehr (1982) 39 B.C.L.R. 19) is not appropriate. Neither is it appropriate, in my view, to assess the amount of the infant's portion on the

narrow basis of the statistically determined incremental cost of one additional person residing in the family home.

Nelson Kwok was born June 5, 1975. The Kwoks were keenly interested in their children's education and would have continued to assist and support them in the pursuit of further education after their graduation from high school. I think it fair to assume that Nelson would have continued to be dependent upon his parents past that time and until he reached the age of 22 when his dependency on them could be expected to terminate. Until that time, he is entitled to about one third of the value of the loss of dependency.

Accordingly, I apportion the claim for the loss of dependency as follows:

George Kwok	$150,000.00
Nelson Kwok	$ 40,000.00

Almost two years have elapsed between the date of the accident and the date of trial. As a result, in the case of George Kwok, $18,000 may be regarded as past loss and the balance as future loss, and in the case of Nelson Kwok $9,000 is past loss and the balance is future loss.

(ii) Post-retirement Income

At the time of her death on August 12, 1985, Mrs. Kwok was aged 45 years, 8 months. Assuming that she would have continued her employment until the age of 65 she would then become entitled to pension income from three sources: from the Canada Pension Plan, under the Old Age Security Act, and from the group R.R.S.P. sponsored by her employer and funded through the North American Life Assurance Company. Under this latter arrangement the employee contributes 5% of salary each year which contribution is matched by the employer and the total accumulation of funds standing to the credit of the employee at the time of retirement is applied to the purchase of an annuity.

On one point at least, the experts are in accord: the determination of post retirement income is difficult. The best estimate of the present value, on a joint life basis, of Kim Kwok's net pension incomes after tax is found in Exhibit 93, the report of Mr. Jeremy Collisbird, which is based upon assumptions which I think are not inconsistent with those I have made with regard to Mrs. Kwok's future income prospects as they stood at the time of her death. From his resultant figure of $49,600, there should be deducted an estimate of the amount of Mrs. Kwok's personal consumption which I think should, at that stage in their joint lives, be assumed to be one third. In the result I would fix the present value of Mr. Kwok's interest in his late wife's post-retirement income at the rounded sum of $35,000.

(b) Home Care Services

Mrs. Kwok as a wife and mother was a truly remarkable person. She handled the family and business bookkeeping and accounting and assisted her husband in his garage business and his boat building venture. In addition to working at a full-time job, caring for the three children and assisting her husband, she was a busy and active homemaker performing many of the gardening chores, indoor and outdoor painting, cooking, baking, washing, ironing and laundry, as well as shopping, without any outside the household assistance. She also had the care of her elderly mother-in-law who lived with the family. Mrs. Kwok did sewing and mending for the family, preserved fish which her husband caught and fruits and vegetables which she raised in her garden or bought in season. It was her re-

sponsibility to clean and maintain both houses, the family home and the rental property, and to do the necessary redecorating of the latter when the tenants changed. She prepared lunches for the children and her husband, made their breakfasts and cleaned up before they set off for school and work each day before leaving for work herself. Her mother-in-law looked after the children briefly when they came home from daycare or school until she returned from work and then she would help Nelson with his homework. She was active in the chilgtsren's schools and learned sign language to assist Martin, the retarded son, to speak. She also cut her family's hair. Prior to the accident, her health was good -- it had to be. All her spare time apart from work, in the evenings and on the weekends, was devoted to the care of her home and family. Her standards and performance in this regard were high indeed.

Since the accident the situation in the home has changed markedly. Mr. Kwok's standards of housekeeping are not those of his wife -- he said himself that the house is a "mess". He has not replaced his wife as a mentor for Nelson in his schoolwork and cannot perform in anything like the way she did the multitude of household chores which she had carried out.

The plaintiffs are entitled to damages to compensate for the value of the loss of these many services which Mrs. Kwok rendered and which she no longer provides.

The report of Suzanne Lancaster, a rehabilitation consultant, contains a detailed estimate of the value of these many home and family care services which sets out, as a separate item, the cost of homemaking services (in the narrow sense of that term) and puts separate values (several of which are, I think, considerably overstated) on a number of the other functions such as painting and maintenance of the rental property, gardening services, extra drycleaning and repair of clothes, accounting and bookkeeping and tax preparation which Mrs. Kwok performed. Ms. Lancaster arrives at a total estimated annual cost of $23,342.

While these detailed figures are of assistance in arriving at an appreciation of the extent of the loss the family sustained as a result of Mrs. Kwok's death I do not think that any useful purpose is served by the award of specific sums under each heading. I think it more realistic to view the matter broadly and I conclude that a fair estimate of the annual value of what I describe compendiously as home care services, embracing all these activities, is $15,000.

Again, following the case of Grant v. Jackson, (supra), the plaintiff Nelson Kwok has an independent claim in his own right to a portion of the value of the lost home care services. It is noted in the report of Mr. Taunton that the specific items in the Lancaster report under the headings of painting and maintenance of rental property, gardening services to the rental property, accounting and bookkeeping, and tax preparation are not of direct benefit to Nelson. His claim is to a portion of something less than the whole. This problem can be resolved by fixing his share of the award for lost home care services during the period of his dependency i.e. until age 22, at 25%.

I assess the claim for the loss of home care services in the sum of $225,000 apportioned as follows:

George Kwok	$195,00000
Nelson Kwok	$ 30,000.00

In the case of George Kwok the sum of $22,500 may be regarded as past loss and the balance as future loss, and in the case of Nelson Kwok $7,500 is past loss and the balance future loss.

(c) Child Care

Ms. Lancaster in her report recommends that provision be made for the cost of babysitting for Nelson in order that Mr. Kwok should be free to go out in the evenings and also for child care services to look after him when he returns from school. She puts a time limit on these requirements, suggesting that they would be necessary only until Nelson reaches the age of 14. While I agree that an award under these heads is appropriate, I think the claim advanced is overstated both as to duration and amount, and that the sum of $5,000 would be fair. Of this amount, $3,000 should be regarded as past loss and $2,000 as future loss.

Mr. Smith contended that it is Mr. Kwok who is entitled to the award under these heads for, he says, they are designed to free him of responsibility in these areas. I do not agree. It is Nelson who will be the recipient of the services to be rendered and accordingly the award should be made in his favour.

Ms. Lancaster also recommended in her report that provision be made for psychological counselling for Nelson Kwok which she recommended in the sum of $2,160 per year over a ten year period, a total of $21,600. Although it appears that Nelson is a changed person since his mother's death, which has understandably upset him very much, and has been doing rather poorly at school, there is no sufficient evidence before me upon which I can assess the need for psychological counselling or, if needed at all, how much would be required. This aspect of the plaintiff's claim is altogether too speculative. Accordingly, I make no award in respect of it.

(d) Loss of Love, Guidance and Affection

Counsel have agreed that Nelson Kwok is entitled to recover for the loss of love, guidance and affection resulting from his mother's death the sum of $20,000, together with interest from August 12, 1985 at the rates applied by the Registrar and I so award.

(e) Schooling and Tutoring

A further claim is made for the provision of tutoring and schooling for Nelson. While the evidence is somewhat unclear it does appear that Mr. Kwok has incurred some outlay in this regard as a result of engaging tutoring assistance for Nelson and I think he is entitled to the sum of $500.00 under this head. With respect to the future, however, the evidence is simply too speculative and uncertain to make any award beyond that which might be properly regarded as being covered by the award under Item (d).

(f) Value of Lost Inheritance

Through the report of Mr. Taunton a claim is advanced on behalf of Nelson Kwok for the loss of future inheritance. He presents a number of scenarios based upon a wide variety of assumptions in respect of each of which there is a good deal of uncertainty. His conclusions range from a high estimate of over $106,000 to a low of just over $21,000. Mr. Smith on the other hand, takes the position that Nelson Kwok has suffered no loss and has no such claim at all. He points out that the beneficiary of Mrs. Kwok's will was not Nelson Kwok in the first instance, but her husband George Kwok. She might change her will. Even if Mr. Kwok predeceased his wife when she changed her will such events would be unlikely to benefit Nelson. It is likely that the special needs of Martin would have weighed heavily in any testamentary changes she might as the years progressed have made. Further, he says that upon Mrs. Kwok's retirement she and her husband would be under no obligation to preserve the fund of family investmentsfor Nelson's inheritance. They might well have chosen to spend it for their

own support during their retirement years and had every right to do so, although I think it unlikely that the Kwoks, unless absolute need dictated it, would exhaust their funds in this way.

A claim of this nature is beset with uncertainty and any award must necessarily be largely arbitrary. Conscious that this is so, I think that an appropriate award to make in favour of Nelson Kwok is the sum of $25,000 as the value of lost inheritance.

(g) Medical and Dental Coverage

While she was working, Mrs. Kwok had the benefit of an employer sponsored medical/dental plan which provided coverage for herself, her husband and her children. That coverage has ceased and Mr. Kwok has replaced it with medical coverage under the British Columbia Medical Services Plan at an annual cost of $444 for himself and Nelson. In addition, he incurs annual dental costs for semi-annual check-ups for Nelson of $108.00. Nelson is entitled to award of the present value of medical and dental coverage during his dependency at the rate of $330 per year and Mr. Kwok is entitled to similar coverage for the period until Mrs. Kwok would have retired.

Accordingly, I assess the claims for the loss of medical and dental coverage as follows:

George Kwok	$4,200.00
Nelson Kwok	$2,750.00

In the case of each the sum of $660 may be regarded as past loss and the balance as future loss.

(h) Payment into Court

The sums awarded to Nelson Kwok, together with Court Order Interest where applicable thereon, wlll be paid into Court to be dealt with pursuant to s. 12 of the Infants' Act.

(i) Management Fees

I do not consider that the decision of the Court of Appeal in Mandzuk v. Vieira (1986) 2 B.C.L.R. (2d) 344 requires that in every case where substantial damages are recovered an additional amount for investment counselling and management fees must, regardless of the plaintiff's education and ability, also be awarded. In this case, Mr. Kwok, who is university-trained, has demonstrated clearly his ability effectively to manage his financial affairs. He has run his own business and was planning to embark on another and over the years he has accumulated, as a result of prudence and good management, substantial savings and investments. He is, in my view, quite capable of managing the awards he will recover as a result of this judgment and has no need of the services of an investment counsdlor or manager.

With respect to the sums to be recovered by Nelson Kwok, as they are to be paid into Court to be dealt with in accordance with s. 12 of the Infants' Act, there is no need for such services either. Indeed, no claim for them was made on his behalf.

Accordingly, l make no award for investment counselling or management fees.

(j) Contingencies

I have not overlooked the matter of contingencies but the imposition of a contingency deduction is not mandatory in every case. (See Blackstock and Vincent v. Patterson et al (1982) 35 B.C.L.R. 231).

They have, by their very nature, offsetting effects and have been adequately taken into account by the actuarial and economic experts in the preparation of their reports. Accordingly, I do not propose to make any adjustment one way or the other for contingencies.

(k) Accelerated Inheritance

Mr. Clemens suggested that a deduction should be made from the award in favour of Mr. Kwok by reason of his accelerated inheritance of his wife's estate. In my view, this is not a case which calls for such a deduction.

In Killeen v. Kline (1982) 33 B.C.L.R. 225 Lambert J.A. in dealing with the submission that the trial judge erred in refusing to make a specific deduction for acceleration of inheritance said at, page 240:

> The proper deduction for acceleration of receipt of the estate is not obtained simply by applying to the full monetary value of the estate a percentage equal to the actuarial possibility that Mrs. Killeen would not have survived her husband and then deducting the result from all the other heads of damages, including future pecuniary loss. That is not what was done by Seaton J. (as he then was) in Sexton v. Boak, [1971] 4 W.W.R. 176, 27 D.L.R. (3d) 181 (B.C.).
>
> Instead, the proper deduction, in my opinion involves an assessment, not a calculation, by the trial judge of both the advantage of accelerated receipt of the capital of the estate (which is not an amount equal to the capital of the estate nor even an amount equal to the capital of the estate reduced by the percentage possibility that Mr. Killeen would survive Mrs. Killeen) and the advantage of accelerated receipt of the income of the estate (which is likely to be a different proportion of the income than the proportion that is appropriate for accelerated receipt of capital).
>
> In this case the early receipt of capital conferred no significant advantage on Mrs. Killeen as she already had all the advantages of access to the capital when Mr. Killeen was alive.

(Emphasis mine).

In this case too, the early receipt of capital conferred no significant advantage on Mr. Kwok as he, like Mrs. Killeen already had all the advantages of access to the capital when Mrs. Kwok was alive. Accordingly, I make no such deduction.

(l) Gross-up for Income Tax

Certain of the elements of this award require additional provision by way of gross up to preserve them against the impact of income tax. I am unable, on the materials before me, to make the necessary calculations and instead propose to accept the offer of counsel of the assistance of their experts to do those calculations.

In computing the appropriate amount to be provided for gross-up for income tax, I think it fair to proceed on the assumption that the amounts recovered by Mr. Kwok will not be invested in their entirety in interest-bearing securities but in a mixed fund apportioned equally between bonds and equities.

In the case of Jung v. Krimmer (1986) 15 B.C.L.R. (2d) 90, Spencer J., in making an award for gross-up for income tax, did so on the basis that it should be calculated in a manner which takes into account the surviving widow's income from other sources. He said, at page 101:

> The law in England appears to be that a tax gross-up should be allowed for as if the income to be earned on a damage award is the plaintiffs only income. See Taylor v. O'Connor, [1971] A.C. 115 at 129, [1970] 2 W.L.R. 472, [1970] 1 All E.R. 365 (H.L.). That was a case where damages were awarded to provide a fund to compensate for loss of dependency. Lord Reid said:
>
> > I have no means of knowing or event of estimating with any degree of accuracy by how much the damages in this case must be increased by reason of this factor. I do not even know at what rate the respondent will have to pay tax if she has no other income than that which comes from the 10,000 pounds to which I have already referred and the damages which she will now receive. She may even have to pay some surtax. In dealing with this matter of income tax we must, I think, proceed on the assumption that the widow has no private income of her own. If one took her private income into account that might increase the damages substantially. But, in my view, it would not be proper to do that.
>
> I note a distinction between this case and Taylor v. O'Connor. It is that I have been supplied with calculations to show the different impact of taxation upon the income from any award for loss of inheritance depending upon which tax bracket the plaintiff is pushed into as a result of earnings she already makes.

and continued, at pp. 102 to 103:

> In the present case I have the benefit of the actuarial calculation already referred to. That supplies Lord Guest's missing factor. I question why, as a matter of principle, a greater sum should not be awarded to compensate a rich widow than a poor one where the amount of her loss is shown to be greater. In this case the effect of progressive tax rates as they exist today shows that their impact wlll be to tax away more of the income from a present award upon which the widow must rely to replace the estate her husband would have accumulated than would be the case if she had no other income. I note that in a recent case, Nielsen v. Kaufmann (1986), 54 O.R. (2d) 188, 36 C.C.L.T. 1, 26 D.L.R. (4th) 21, 13 O.A.C. 32 (C.A.), the court embarked upon a detailed consideration of the various factors which influence the rate of tax to be paid on an award where there is sufficient evidence before it to enable that to be done.

> I am therefore of the opinion that the evidence before me permits me to take into account in a reasonable way the impact of taxation on the sum to be awarded for lost inheritance and that I should it into account.

The reasoning of Spencer J. is compelling but in this case I have no evidence which would enable me, or those upon whom I must rely to perform the calculations, to know with the degree of certainty available to Spencer J. what Mr. Kwok's other income is now or wlll be in the future. The absence of such evidence calls for a more conservative approach. (See Vestner v. Wallace, S.C.B.C. June 6, 1986, Proudfoot J. (unreported). Accordingly, the amount to be awarded for gross-up should be calculated on the assumption that the income earned on the award is the plaintiff's only income.

If agreement cannot be reached in this respect, the matter may be spoken to at a time convenient to counsel.

II PERSONAL INJURIES

Nelson Kwok

No claim is advanced on behalf of Nelson Kwok for personal injuries.

George Kwok

(a) Non-pecuniary Damage

Mr. Kwok's claims for personal injury are set out in paragraph 12 of the amended statement of claim as follows:

> Further, as a result of the collision and the negligence of the defendants, the plaintiff has suffered personal injury, particulars of which are as follows:
>
> (a) injury to the back;
> (b) general shock and upset;
> (c) depression.

(i) Injury to the Back

Mr. Kwok continues to complain of pain in his lower back, the result of having fallen against the seatback when his vessel was struck. Mr. Kwok did not contact his family physician with regard to this complaint until approximately two months following the accident after which he embarked on a course of physiotherapy treatment which resulted in some improvement. It is of little significance that neither Dr. Yue, his family physician, nor Dr. Yu, the orthopaedic surgeon to whom he was referred for consultation, were called to give evidence at the trial for it is common ground that he has some ongoing complaint which is genuine.

None of the medical witnesses who have treated him dispute that he suffers low back pain which prevents him from returning to his previous occupation as an automobile mechanic. Although the orthopaedic surgeons were unable to find a precise cause for this pain, they do not question that it exists and that it is understandable. Whether its source be organic or psychological, it is real.

Dr. Robert Tate, an orthopaedic surgeon who examined Mr. Kwok on March 25, 1987 stated his opinion as follows:

> The paucity of worrisome positive physical findings here would not support this man's complaint of daily pain in the lower back without radiation to the extent that it would prevent him from gainful employment. He does impress me as a sincere, albeit rather intense individual and one always hesitates to deny any patient the complaint or complaints they express. One does have to try and support them on the basis of positive clinical and/or radiological findings however and support for his professed degree of disability is not present on either basis. He cooperated very well with this interview and examination and I can only conclude he does have some symptoms in his lower back, probably on a musculo-ligamentous basis perhaps aggravated by a degree of introspection or tension in that he has had every right to suffer from a degree of tension in the past when one considers the magnitude of his personal family loss.

Mr. Kwok has suffered a mild, soft tissue injury to the lower back region which has continued to bother him but for which the prognosis is good. I assess his damages under this head in the sum of $9,000.

(ii) General Shock, Upset and Depression

Prior to the accident, Mr. Kwok was an energetic, motivated and competent man. Within his small, closely-knit social circle, he was comfortable and confident. He was a "doer" with dreams and plans which he researched and worked hard to achieve. He was a person used to being busy and to enjoying it; he was no stranger to long hours of work.

On August 12, 1985, he was involved in a sudden and terrifying collision in which he very nearly lost his own life. Almost immediately after he was pulled from the water, he learned that his wife and one of his children were dead. He also learned that another child was in critical condition, and while still in shock from the initial tragedy, he had to spend two days in a terrible vigil which culminated in his having to make the wrenching decision to discontinue life support and permit his youngest son to die. For a period he was suicidal. He has had to relive these events at the inquest, through the discovery process, and at this trial.

Now, over two years after the accident, Mr. Kwok is a totally changed person. He has no real interest in any of his past activities and has completely lost his confidence. He seems to live in another world and generally refuses his friends' repeated attempts to interest him in activities and social gatherings in order to build a new life. He was particularly dependent on his wife, and her death has left a great void - he has become isolated, the victim of severe emotional and psychological problems.

The law relating to damages for psychological injury or nervous shock, as it is sometimes called, was summarized in McLoughlin v. O'Brian and others (1982) 2 All E.R. 298 where Lord Wilberforce stated at pages 301 to 302:

> "Although we continue to use the hallowed expression 'nervous shock', English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the

mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts in situations where claims for negligence are made. Although in the only case which has reached this House (Hay (or Bourhill) v. Young, [1942] 2 All E.R. 396 [1943] A.C. 92) a claim for damages in respect of 'nervous shock' was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character. As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached:

1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for 'nervous shock' caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in Dulieu v. White & Sons, [1901] 2 K.B. 669, [1900-3] All E.R. Rep. 353, though taken up by Sargant LJ in Hambrook v. Stokes Bros., [1925] 1 K.B. 141, [1924] All E.R. Rep. 110, has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in Dillon v. Legg (1968) 29 A.L.R. 3d 1316.
2. A plaintiff may recover damages for 'nervous shock' brought on by injury caused not to him or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff (Hambrook v. Stokes Bros., [1925] 1 K.B. 141, [1924] All E.R. Rep. 110, Boardman v. Sanderson, [1964] 1 W.L.R. 1317, Hinz v. Berry, [1970] 1 All E.R. 1074, [1970] 2 Q.B. 40, including foster children (where liability was assumed), and see King v. Phillips, [1953] 1 All E.R. 617, [1953] 1 Q.B. 429).
3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In Hambrook v. Stokes Bros. an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.
4. An exception from, or I would prefer to call it an extension of, the latter case has been made where the plaintiff does not see or hear the incident but comes on its immediate aftermath. In Boardman v. Sanderson the father was within earshot of the accident to his child and likely to come on the scene; he did so and suffered damage from what he then saw. In Marshall v. Lionel Enterprises (1971), 25 D.L.R. (3d) 141 the wife came immediately on the badly injured body of her husband. And in Benson v. Lee [1972] V.R. 879 a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there

> suffered shock. Your Lordships have to decide whether or not to validate these extensions.

(See also Marshall v. Lionel Enterprises (1971), 25 D.L.R. (3d) 141, Fenn v. Corporation of the City of Peterborough et al. (1976), 1 C.C.L.T. 90, Cameron v. Marcaccini (1978), 87 D.L.R. (3d) 442; and Montgomery v. Murphy (1982), 136 D.L.R. (3d) 525).

In Hinz v. Berry, [1972] Q.B. 40, the distinction between those elements of shock and upset and consequential depression which are compensatable and those which are not, were carefully drawn. Lord Denning M.R. said, at p. 42:

> In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.

At p. 44 Lord Pearson had this to say:

> The circumstances of the accident as witnessed by the plaintiff were of an exceptionally horrifying and tragic character, and it is easy to believe that she suffered an extremely severe shock from witnessing it. She has been since the accident, for a period of not far short of six years, in a sad and depressed state. Mr. Carman has given us a list of five causes of the depressed state, and he says, I think rightly, that these five causes have all been operating from the date of the accident until now. The first factor was her own inevitable grief and sorrow at losing her husband, a good husband who was also a good father to her family. That would have caused much sorrow and mourning in any event. Secondly, there was her anxiety about the welfare of her children who were injured in the accident. Thirdly, there was the financial stress resulting from the removal of this very hardworking breadwinner who took extra work in addition to his normal work. She may well have been in considerable financial difficulty. The fourth factor was the need for adjusting herself to a new life, which may well have been quite unusually severe in this case. Now, all those four factors are not compensatable, that is to say they are not proper subjects to be taken into account in assessing damages according to English law. And then we come to the fifth of the five substantial factors, and that is the shock of witnessing the accident. That is the only factor which is compensatable in the sense that I have explained. It is not disputed that this factor is a proper subject for compensation. The only problem is one of assessment.

He added, at p. 45:

> It [the amount to be awarded] should not be for the whole of the mental anguish and suffering which she has been enduring during the last five or six years. It should be only for that additional element which has been contributed by the shock of witnessing the accident, and which would not have occurred if she had not

> suffered that shock. It is a difficult distinction to draw, but I think the judge has laid a proper foundation and has found a right ground of decision, namely, that where there is an extra element which has been added by the shock of witnessing the accident, that is a proper subject of compensation.

This subject has been discussed by the Court of Appeal in British Columbia in Griffiths v. C.P.R. (1978) 6 B.C.L.R. 115 where Taggart J.A. said at p.121:

> It was argued that the trial judge erred in failing to award compensation for the emotional and psychological damage sustained by Mr. Griffiths as a result of the death of his wife. In support of this argument we were referred to Schneider v. Eisovitch, [1960] 2 Q.B. 430, [1960] 1 All E.R. 169. There Paull J. awarded compensation for the shock sustained by the plaintiff on being told that her husband had been killed in the accident in which she was injured. Authorities such as Vana v. Tosta, [1968] S.C.R. 71, 66 D.L.R. (2d) 97, support the proposition that in appropriate circumstances damages can be awarded for the shock sustained by a claimant who sees his child or spouse injured at the scene of an accident. See also Abramzik v. Brenner (1967), 62 W.W.R. 332, 65 D.L.R. (2d) 651 (Sask. C.A.). These authorities, however, have no application in the present case because, as the trial judge found, the evidence indicates that the husband's emotional condition is not a result of his physical injuries nor is it a result of seeing his wife injured and dying before his eyes. The cause of his emotional problem is his grief over his wife's death and his inability to manage in the situation in which he now finds himself. I am therefore of the opinion that the trial judge was correct in refusing to make an award of damages for the emotional and psychological injuries sustained by the appellant.

Hinz v. Berry (supra) and Griffiths v. C.P.R. (supra) were considered and applied in the decisions of Legg J. in Beaulieu v. Sutherland [1986] B.C.J. No. 2325 (January 31, 1986) and of Davies J. in Beecham v. Hughes [1986] B.C.J. No. 2902 (June 26, 1986) [appeal dismissed [1988] B.C.J. No. 825 (B.C.C.A.)].

It was contended by Mr. Smith that the differing labels attached to maladies of this sort have less significance than they had previously. In Morrison v. Novelli, [1986] B.C.J. No. 172 (B.C.C.A. No. 002148, Vancouver Registry, February 27, 1986), Esson J.A. said at pages 5 to 6:

> The appellant's submission is that nothing should have been allowed for the depression that can all be explained as normal grief, which is not compensable. That does not appear to have been the position taken at trial; it was not the basis upon which the case was left with the jury. They were properly advised that they should make no award for ordinary grief, but to the extent they found a more serious mental condition caused by the accident it was proper to make an award. It is clear that that was the only proper basis on which to leave the case with the jury. There was a substantial body of evidence indicating a relatively severe and continuing condition. Whether it is called depression or nervous shock or prolonged grief reaction, it was a consequence of the accident. It was a distressing condition which caused substantial problems to Mrs. Morrison in her life and at the time of

> trial was not resolved. It was, therefore, open to the jury to regard that as a matter for substantial compensation.

Morrison v. Novelli was an appeal by the defendant against the award of non-pecuniary damages made by a jury. The main thrust of the appellant's argument was that the award was inordinately high. Griffiths v. C.P.R., supra, was not referred to by Esson J.A. or the others of the three member panel of the Court who heard the appeal. I do not think that it can be taken from what Esson J.A. said in the passage I have quoted that the authority of Griffiths v. C.P.R. is in any way affected. Even if his language were susceptible of such an interpretation, which I think it is not, the case of Bell v. Cessna Aircraft Co. (1983) 46 B.C.L.R. 145 strongly suggests that it should not be so construed.

With these principles in mind, I turn to consider the medical evidence.

Mr. Kwok was referred to Dr. J. Cheng, a psychiatrist by his family physician. In his report dated October 30, 1985, Dr. Cheng stated:

> His main problem seems to be his grief reaction towards the deaths of his wife and his sons in a boating accident on August 12, 1985.

On page two of his report, Dr. Cheng's diagnostic impression is as follows:

> "He is showing signs and symptoms of a depressive reaction. I feel he is not only grieving for the loss of his wife and sons but also the loss of his boat which has been his only interest after work.

On examination, Dr. Cheng found that his speech was coherent, that there is no evidence of delusion or hallucination and that he was oriented with no evidence of confusion. He fouind Mr. Kwok's lack of socialization outside of his immediate family to be a compounding factor in the grief reaction.

Mr. Kwok did not return to Dr. Cheng nor was he referred to another psychiatrist by his family doctor. He was, however, referred to Dr. Termansen by his solicitors.

Dr. Termansen, a psychiatrist called on behalf of the plaintiff, stated in his report:

> "It is my conclusion that Mr. Kwok suffers from a Post-Traumatic Stress Disorder -- Chronic, characterized by chronic depression and anxiety. He shows the characteristic symptoms of post traumatic stress disorder. He has re-experienced the traumatic collision at sea many times since it actually occurred. He has shown a marked reduction in his involvement with the external world and his usual social and occupational activities. He has a variety of physical complaints and suffers from a significant ongoing depression. He has manifested significant irritability since the accident, and he has shown a marked change in lifestyle, as well as change of residence. He has complained of failing memory, difficulty in concentration, emotional lability, and recurrent headaches. His trauma was not only the sudden and fatal collision at sea, but the tragic loss of his wife and two children. His present symptomatology is in no way related to any possible financial compensation, in my view. Post-traumatic stress reaction is related to the sudden nature of the accident and its fatal consequences.

. . . . .

> It is my opinion that Mr. Kwok's condition will improve somewhat, but, basically, he will remain psychologically scarred and disabled. He is unlikely to return to his former occupation and he is not likely to return to his former active existence and strong emotional involvement with family relationships. He also appears to have lost his strong emotional attachment to ships and the ocean. Mr. Kwok is likely to continue to lead a much more socially isolated and impoverished existence and to continue to suffer from recurrent anxiety, depression and psychosomatic disturbance.

Dr. Vallance put a different label on it. In his report, he states:

> There is no doubt that he has suffered from an intense grief reaction. Such a reaction would be understandable in any terms but I believe was felt all the more keenly by him given that he has always been a loner, has not related well to women save for his wife and was consequently all the more emotionally dependent upon her. In similar fashion his boat of which he was particularly proud appears to have been a central feature in his family life leisure pursuits and possibly to some extent in his business plans.
>
> Apart from the grief reaction he sustained a considerable fright in the accident, together with a sense of helplessness at not being able to rescue his family, and I believe a sense of guilt in that he survived and the others did not. He developed some features of a post-traumatic stress disorder insofar as he had some frightening dreams and intrusive thoughts of the accident, together with some phobic features such as being in water or on boats. These were not marked features of his condition however and I would consider such a post-traumatic stress disorder to have been mild and certainly by comparison with the grief reaction.
>
> His emotional state gradually improved but as so frequently happens, worsened again as the litigation process increased in activity.

In conclusion, Dr. Vallance stated:

> He had already improved considerably save for the more recent exacerbation and once the litigation process is concluded, which hopefully it will be as rapidly as possible, he will again improve and come all the more rapidly to an adjustment over the loss of his wife and sons.

On cross-examination, Dr. Vallance agreed that Mr. Kwok exhibited all the symptoms of a post-traumatic stress disorder but considered they were mild and of relatively short duration except when they were reactivated by circumstances, as indeed they have been.

In my view, the opinion of Dr. Vallance is to be preferred over that of Dr. Termansen. Dr. Vallance had before him a more complete history of Mr. Kwok's personal and family background than did Dr. Termansen and Dr. Termansen was unaware of many of Mr. Kwok's activities since the accident until they were brought to his attention during cross-examination. Dr. Termansen during that cross-examination appeared to me to be somewhat argumentative and overly defensive of his position.

Nonetheless there is, as is conceded by Mr. Clemens, an element of compensatable psychological injury in Mr. Kwok's overall present condition, that extra element which is beyond normal grief and the other non-compensatable factors referred to in Hinz v. Berry, and I think it is substantial. I assess his non-pecuniary damages under this head in the sum of $40,000.

(b) Past Loss of Earnings

The evidence as to what Mr. Kwok lost in earnings as a mechanic following the accident is less than clear. He intended to leave his job at Unitow at some time to work on the second boat and estimated that he would take about four and a half months to complee it. In order to finance it, however, he would rely in part on his earnings from Unitow. I think it reasonable to conclude that he would have worked over the winter months until the season opened the following year when he was expecting to be in a position to spend his full time on his boat charter business. My best estimate of the amount he would have earned had it not been for the accident, is $10,000.00.

(c) Loss of Future Earnings

Prior to the accident, Mr. Kwok was intending to leave his employment as an automobile mechanic and devote himself to the development of a commercial fishing and charter boat business using the KIMBERLEY as a start in expanding the operation to a fleet of five boats. He had taken a number of steps to that end, including arranging for appropriate advertising and in fact, in the two week period prior to the accident, had already taken out three charter tours. A second boat had been ordered and plans were being made for a third. It is clear that he cannot now pursue these plans. He has an understandable fear of the sea and his interest in the project has gone.

Because the planned boat charter business was only in its very early stages, there is no record by which to judge how much it would earn or indeed whether it would succeed at all. Nonetheless, in assessing whether or not Mr. Kwok would have a realistic prospect of succeeding in this venture, regard may properly be had to his actual work history varied as it has been. Throughout his life he had been a hard worker -- industrious, frugal and imaginative. He was able, with his wife's help, to accumulate substantial capital, to purchase two houses and two other properties, and to build a boat worth about $100,000. He has in his life shown himself capable of learning new skills and willing to work to succeed. His research and planning for his new venture appear to have been carefully thought out and his determination to succeed is without question.

Although he must now find some other way to support himself, there is some reasonable basis for optimism that he will do so as Dr. Vallance concluded in his report in the comment quoted above.

It is impossible to calculate with any degree of precision just what Mr. Kwok would likely have earned had it not been for the accident. What is certain is that he had lost what may well have been a good opportunity to do well, a loss which is compensible (see Conklin v. Smith et al. (1978), 88 D.L.R. (3d) 317, Clark v. Kereiff (1983), 43 B.C.L.R. 156, Herndon v. Rondeau (1984), 54 B.C.L.R.

145 and Freitag v. Davis, [1984] 6 W.W.R. 188). It is also evident that he is unlikely to return to his former occupation.

Since the accident, Mr. Kwok's earning capacity has been reduced and he no longer has before him what was a reasonable opportunity to succeed in his planned new line of endeavour. I must, however, discount the award I would otherwise make under this head by the extent to which the loss I have described is attributable to factors which are elements defined in Hinz v. Berry as being non-compensatable. I assess his damages under this head in the sum of $30,000.

(d) SPECIAL DAMAGES

The following items of special damage have been agreed upon:

(a) Value of KIMBERLEY	$ 90,670.81
(b) Personal items lost in accident	1,767.22
(c) Funeral expenses	9,833.00

TOTAL	$102,271.03

and are accordingly awarded together with Court Order Interest thereon calculated, in respect of Items (a) and (b) from August 12, 1985 and with respect to the expenses making up Item (e) from the date of their payment.

Exhibit 39 is a handwritten list prepared by Mr. Kwok headed "Stuffs Deemed Useless After the Accident". It is a list of items of fishing equipment and boat building material totalling over $12,000 which Mr. Kwok claims as special damages. He agreed on cross-examination that they were not lost on board the vessel on the day of the accident, that he still has them in storage and that he has made no effort to sell them. The values are, in large measure, unsubstantiated; many of the items were claimed by him as business deductions in his tax return and, of course, it is apparent that no attempt to mitigate his loss in this regard has been made at all. This claim has not been proven and must be rejected.

LAROCQUE ORDER

In order to meet the requirements of the decision of the Court of Appeal in Larocque v. Lutz et al (1981) 29 B.C.L.R. 300, the awards for future damages will bear interest from the date of the trial (June 8, 1987) to the date of payment at a rate representing the difference between the current rate of interest applicable under the Court Order Interest Act and 5%.

COURT ORDER INTEREST

The portions of the awards for past loss under Items I(a)(i), (b), (c), (e) and (g) and II(b) will bear interest under the Court Order Interest Act from August 12, 1985 to the date of trial at one half the rates applied by the Registrar.

COSTS

The plaintiff Nelson Kwok is entitled to his costs and the plaintiff George Kwok is entitled to his costs as provided by s. 3 of the Negligence Act.

In the event the Public Trustee has incurred costs which exceed those to be recovered by this direction he is entitled, pursuant to Section 9 of the Infants Act, to have them taxed and paid out of the estate of the infant.

CUMMING J.

APPENDIX "A

PARTICULARS OF COWICHAN

Name "QUEEN OF COWICHAN"
Official Number 370065
Lloyds' Register Number 7411143
Port of Registry Victoria, B.C.
Call Sign CZ 4990
Type Double-ended steel RoRo vehicle/passenger ferry, bow and stern doors.
Propulsion 2 MAK Maschinenbau, 12 Cylinder diesels, type 4 SCSA, Model 12 M55lak, 11, 860 BHP, driving one Ka-Me-Wa controllable pitch propeller at each end, bridge controlled.
Steering Gear Wagner Electric Hydraulic sterring gear at each end with 2 power units to each unit.
Length - registered 133.50 m
Beam - moulded 27.13 m
Depth - moulded 7.92 m
Gross Tonnage 6,551.18
Net Tonnage 4,208.76
Built Yarrows Shipyard, Victoria, B.C. - 1976
Crew 32
Passengers (at the time
of the casualty) 305
Number of Motor Vehicles 134 (at the time of the casualty)
Vehicle Capacity --
Automobiles
Main Deck 140
Gallery Deck 64
Upper Car Deck 158
Draught -- (No. 1 End) Fwd. 5.0 m
(No. 2 End) Aft 5.2 m
Owners (1) Canada Trust Co., Mortgage Company, Box 5545, Terminal "A", London, Ontario
Operators (bareboat (2) Montreal Trust Company Charterers) B.C. Ferry Corporation 818 Broughton Street Victoria, B.C.

The "QUEEN OF COWICHAN" is a double ended RoRo vehicle/ passenger Ferry with a rudder and single controllable pitch propeller at each end. She has three car decks, an engine room located amidships and a navigation bridge at each end. The vessel has a semi-circular deckline in plain view below which the identical bow and stern sections have considerable flare fairing the hull into a normal

shape at the load waterline. There is a steel rubbing strake around the vessel's main deck which protrudes approximately 2.7 m at each end and approximately 0.5 m at the sides.

The vessel's No. 1 navigation bridge is at the forward end and the No. 2 bridge is at the after end. Both bridges have open wings, the outsides of which are set inboard, approximately 4.6 in from the ship's side and the distance from bridge to bow is 24.4 m at each end.

The "QUEEN OF COWICHAN" is operated from the No. I navigation bridge westbound and the No. 2 navigation bridge eastbound. For manoeuvering purposes the forward end is considered to be that end from which the vessel is being navigated.

Each bridge is equipped with direct pneumatic propulsion controls supported by an electric telegraph for emergency use and to relay "standby" and "finished with engines". The main engines and shafts are uni-directional and ahead and astern thrusts are obtained by blade-pitch adjustments. The bridge controls give direct control over the speed of propeller rotation and amount of positive and negative pitch applied to the propeller blades.

The console on each navigation bridge is equipped, amongst other things, with the following:

(1) Tachometers for forward and after propeller shafts;
(2) Control air pressure gauge;
(3) "T" handle controller for after propeller; "L" handle controller for forward propeller;

NOTE:

The pitch direction, amount of pitch and shaft revolutions are all controlled and coordinated by the speed and direction control levers. The levers are graduated from 0 to 10 with approximate speeds coinciding with settings as follows:

SETTING	SPEED
5	16.75 knots
6	19.00 knots
7	20.20 knots
8	21.10 knots
9	21.50 knots
10	22.00 knots

(4) Forward and after propeller pitch indicators;
(5) Propeller mode selector lever;

Mode 1 - For normal navigation between ports. All power is transmitted to the aft propeller and control is by the "T" handle controller.

Mode 2 - For manoeuvering, control of the forward propeller is achieved by the "L" handle controller and separate control of the aft propeller is accomplished, by using the "T" handle controller.

There is a delay of approximately 65 seconds when changing from Mode 1 to Mode 2 to allow for the forward propeller to complete its pitch cycling and the clutch to engage.

(6) Steering pump controls;
(7) Jog steering controller for each rudder.

NOTE:

The steering wheel is used for normal navigation between ports and, during manoeuvering in Mode 2, steering can be accomplished by using the dual jog controllers.

These controllers are spring-loaded levers mounted horizontally on the console which need only to be pushed to left or right to obtain port or starboard wheel respectively.

The "QUEEN OF COWICHAN" was certificated for both Home Trade Class III and Home Trade Class IV voyages operating with two SIC 16 Certificates issued on February 7, 1985 and due to expire on October 10, 1985. The Certificates are to cover the vessel for her regular run from Departure Bay, Nanaimo, to Horseshoe Bay, West Vancouver and for her occasional run between Horseshoe Bay and Langdale. This, and other B.C. Ferries have made thousands of such voyages, providing regularly scheduled services between the B.C. mainland and Vancouver Island over the years.

Navigating Equipment

Radars	(4) - (2) Decca Radar Co. Ltd. True motion X Band model 1226, one at each end. - (2) Decca Radar Co. Ltd. Relative motion X Band model 916, one at each end.
Echo Sounders	(2) - (1) Simrad E.N. at each end
Gyro Compass	(2) - (1) Sperry, model S.R. 120 at each end
Auto Pilot	(2) - (1) Wagner, at each end
VHF Radiotelephone	(6) - (1) Sailor R/T model 142/29 and (2) Horizon 78 series, at each end
Standard Magnetic Compass	(2) Henry Brown & Son, Sestrel with projectors to wheelhouse, one at each end
Whistles	The vessel has three whistles at each end. They are switched to provide a blast using all three whistles simultaneously for normal operation, and had

	the facility to use only one of the three to provide a lower tone. The whistle system was in the former mode at the time of the casualty. The whistle is audible to a distance of at least 2 miles.
Lifesaving Equipment	
Liferafts	(60) Beaufort, 25 person inflatables, Model 'A' pack
Lifeboats	(2) Boston whaler, 5 person, fibreglass construction, model
(Emergency Shepherding)	Outrage 19, equipped with a Detroit diesel 3 cylinder engine with a Hamilton marine water jet.

APPENDIX "B"

PARTICULARS OF KIMBERLEY

Name MOT Licence Number	"KIMBERLEY" 13K93793 28319 Fibreglass Power
CFV Licence Number Type of Vessel	Cruiser, intended for commercial fishing and pleasure use
Propulsion	Volvo Penta diesel, 6 cylinder turbo charged, model TAMD40B 165 BHP, single fixed-pitch propeller pro-peller
Steering Length - overall Beam	Wagner hydraulic 10.21 m (33'06") 3.20 m (10'06")
Depth Displacement Built	0.91 m (3'00") 5.443 Kg (12,000 lbs.) approx. Per-maglass Plastics Ltd., Richmond, B.C. 1984
Draught	0.91 m (3'00") Fwd. (approx.) 0.91 m (3'00") Aft (approx.)
Sleeping capacity Persons on-board at time of collision	6 5 George Kwok, Vancouver, B.C.
Owner	

The pleasure craft "KIMBERLEY" was a single screw cabin cruiser with a semi-displacement hull. The vessel was designed in 1973 by a naval architect in Richmond, B.C. and the mould was bought by Permaglass Plastics in 1981. She was the twelfth vessel to be built from the mould by Permaglass with only minor alterations to the original design and specifications.

The builder constructed the hull, deck and house and glassed them together along with bulkheads, flying bridge, motor stringer, floors and tanks. He also installed the engine, drive shaft, rudder and hydraulic steering amongst other things and the owner/operator completed the final fitting out of the vessel himself.

The vessel was launched at Ladner, B.C. on August 8th, 1984.

The "KIMBERLEY" had a top speed of 12 knots at 3400 rpm and a cruising speed of 9 knots at 2900 rpm. The turbo-charger engaged at 3,000 rpm.

The "KIMBERLEY" had three conning stations: the forward starboard side of the main cabin; the starboard side of the cockpit and the flying bridge. The flying bridge was equipped with a throttle and gear shift only. Hydraulic lines had been led to the flying bridge for a steering position but a wheel had not been fitted.

The windows and patio doors to the main cabin were fitted with tinted safety glass.

The vessel was not equipped with an automatic pilot.

Being a licensed fishing vessel under 15 tons gross, and being operated as a pleasure craft at the time, the "KIMBERLEY" was exempt from inspection by the Ship Safety Branch of the Coast Guard. She was apparently fully equipped and complied with the Small Fishing Vessel Inspection Regulations.

The "KIMBERLEY" was inspected by a Department of Fisheries and Oceans representative on July 26, 1984 and the vessel was issued a CFV number. The owner/operator possessed a 'C' class Fishing Licence renewed May 30, 1985. Although not required to carry a VHF radio, the vessel did have one fitted but no licence had been issued for the radio, nor did the operator possess a Restricted Radiotelephone Operator's Certificate.

Navigation Equipment

Magnetic Compas	Saturn
VHF Radio	Horizon, equipped with the proper channels
Echo Sounders	(2) (1) Eagle, MACH 1 computer graph (1) Eagle, without graph
Safety Equipment	
Rubber Dinghy	(1) TAYLOR, suitable for 4 adults, complete with 1 set of oars.
Life Jackets	(10) Vest type, MUSTANG (various sizes for adults and children)
Radar Reflector	None

APPENDIX "C"

PART A - GENERAL

Rule 2
Responsibility

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the

limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

PART B - STEERING AND SAILING RULES

SECTION 1 - CONDUCT OF VESSELS IN ANY CONDITION OF VISIBILITY

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 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 exits. If there is any doubt such risk shall be deemed to exist.

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

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

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

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

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

Rule 8
Action to avoid Collision

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

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

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

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

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

Rule 13
Overtaking

(a) Notwithstanding anything contained in the Rules of Part B, Sections I and II, any vessel overtaking any other vessel 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 sternlight 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.

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
Acton by Stand-on Vessel

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

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

(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.

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

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

Rule 34

Manoeuvring and Warning Signals

(d) When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. Such signal may be supplemented by a light signal of at least five short and rapid flashes.

* * * * *

Corrigendum

Released: April 14, 1988

CUMMING J.:-- It has been drwan to my attention that the second paragraph on page 3 of the reasons for judgment in this case may be somewhat misleading. The words "east of" in line 15 should be deleted and the words "between Bowen and" substituted, so that the paragraph will read:

> About twenty minutes after Kimberly entered the channel, Cowichan, en route from Nanimo to Horseshoe Bay, rounded Point Cowan on the southeast corner of Bowen Island and steadied on a course between Bowen and Passage Island which would take her past Lookout Point.
> Cowichan was making about 20 knots.

CUMMING J.