IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship),* 2014 BCSC 1017

Date: 20140606
Docket: S087644
Registry: Vancouver

Admiralty Action *In Rem* against the Vessel "Gypsea Rose" and *In Personam*

Between:

Ashleigh Atkinson, an infant by her guardian ad litem, Kathe Atkinson and Kathe Atkinson

Plaintiffs

And:

The Owners and all others interested in the "Gypsea Rose", the "Gypsea Rose", Cory Skidmore, Maridee Patricia Skidmore, and Maridee Patricia Skidmore, Executor and Trustee under the Last Will and Testament of Lloyd Skidmore, Deceased

Defendants

Docket: S104438
Registry: Vancouver

Admiralty Action *In Rem* against the Vessel "Gypsea Rose" and the pleasure craft A 1994 20-foot Searay and *In Personam*

Between:

Dawn Boys and James Hugh Perry, each on their own behalf and as Guardians Ad Litem on behalf of the infants, Tatum Perry, Dawson Boys-Kerekes and Daxton Perry

Plaintiffs

And:

The Owners and all others interested in the "Gypsea Rose", the "Gypsea Rose", Maridee Patricia Skidmore and Maridee Patricia Skidmore, Executor and Trustee under the Last Will and Testament of Lloyd Skidmore, Cory Skidmore, The Owners and all others interested in the pleasure craft A 1994 20-foot Searay, the 1994 20-foot Searay, and Norman Atkinson

Defendants

Docket: S087642
Registry: Vancouver

Between:

Norman Atkinson

Plaintiff

And:

The Owners and all others interested in the "Gypsea Rose", the "Gypsea Rose", Cory Skidmore, Maridee Patricia Skidmore and Maridee Patricia Skidmore, Executor and Trustee under the Last Will and Testament of Lloyd Skidmore, Deceased

Defendants

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Plaintiffs Atkinsons:	J. Scott Stanley
Counsel for the Plaintiffs Dawn Boys and Perry:	Paul D. Mooney
Counsel for the Defendants “Gypsea Rose” and Skidmore:	Martin Johnson
Counsel for the Defendant Cory Skidmore:	Self-Represented
Counsel for the Plaintiff Norman Atkinson and Defendants “Searay” and Norman Atkinson:	Andrew Stainer
Place and Date of Trial/Hearing:	Vancouver, B.C. May 28-30, 2013 June 10, 2013
Place and Date of Judgment:	Vancouver, B.C. June 6, 2014

I. INTRODUCTION

[1] Two small pleasure boats collided on Lake Okanagan on the afternoon of June 30, 2008. Both were driven by experienced drivers. The 26.5 foot Campion vessel, Gypsea Rose, which was driven by Cory Skidmore and owned by his mother Maridee Skidmore, hit the starboard side of the bow of the 20 foot Searay vessel ("the Searay") which was owned and operated by Norman Atkinson.

[2] Mr. Atkinson's wife, Kathe, their three children, the three children of family friends and those children's grandmother, June Dawn Boys, were on the Atkinson vessel at the time of the collision.

[3] Three maritime law actions arise from this collision. In Action No. S087644, Kathe Atkinson and her daughter Ashleigh by her *guardian ad litem* are plaintiffs in the action *In Rem* against the vessel Gypsea Rose and *In Personam* against Cory Skidmore, Maridee Skidmore and Maridee Skidmore as executor of the estate of Lloyd Skidmore ("the Atkinson Action").

[4] Ms. Boys is a plaintiff in Action No. S104438 along with her son-in-law, James Perry as *guardian ad litem,* on behalf of her three grandchildren who were in the Atkinson vessel. The defendants include the defendants in the Atkinson Action as well as the Searay and Mr. Atkinson ("the Boys Action").

[5] The third action is commenced by Norman Atkinson for property loss against the owners and all others interested in the Gypsea Rose. This Action No. S087642, will be referred to as the "Norman Atkinson Action".

[6] Cory Skidmore, his mother, Maridee Skidmore, personally and as executor of the estate of Lloyd Skidmore, the owners and all others interested in the Gypsea Rose and the Gypsea Rose are defendants in all actions. Mr. Atkinson and his vessel the Searay are defendants in the Boys Action. Mr. Atkinson, in addition to being a defendant in the Boys Action, is the sole plaintiff in the Norman Atkinson Action.

[7] Cory Skidmore admitted negligence and liability during the trial. The actions were defended on behalf of Ms. Skidmore, the Gypsea Rose, Mr. Atkinson and the Searay.

[8] This trial was limited to the *In Personam* actions and only liability was in issue.

II. THE EVIDENCE

[9] Many of the facts are not in issue. In this section I will outline the evidence and then discuss it in more detail in the analysis portion of the judgement. I will also address the matter of credibility in the analysis section.

A. The Parties

1. The Defendant Gypsea Rose

[10] The Gypsea Rose was purchased in January 2004 by Lloyd Skidmore who was the father of Cory Skidmore and the husband of Maridee Skidmore.
Mr. Skidmore drowned in Lake Okanagan in August 2007 in a boating accident in which alcohol was a factor. At the time of the collision, Ms. Skidmore was the owner of the Gypsea Rose, either in her personal capacity or in her capacity as executor and trustee under the last will and testament of Lloyd Skidmore.

[11] The maximum speed for the Gypsea Rose at the time of the collision was 25 miles per hour.

[12] There were two particular problems with the Gypsea Rose. First, at certain speeds over 10 mph the propeller on the Gypsea Rose would not allow it to plane, which means that when operating the vessel, the bow would come up and the operator could not see what was in front of them. Second, the throttle would stick. These problems had not been fixed by the time of the collision.

[13] The reason for the problem with the propeller is that when Cory Skidmore earlier damaged the propeller, he did not replace it with the correct propeller for the boat because the correct propeller was too expensive.

2. The Defendant Cory Skidmore

[14] Cory Skidmore was 29 years old. At the time of the collision he was operating the Gypsea Rose on his way to the Peachland Marina. He was impaired and he was driving the boat at 15 mph, although he knew that it would not plane at that speed.

[15] Cory Skidmore had operated the Gypsea Rose at various times since its purchase in 2004. After the death of his father in August 2007, he continued to operate the Gypsea Rose along with his brother Nathan. Ms. Skidmore did not operate the Gypsea Rose.

[16] The maintenance and fueling of the Gypsea Rose became the responsibility of Cory Skidmore and his brother after the death of his father. Ms. Skidmore took no part in maintaining the vessel.

[17] Prior to the collision Cory Skidmore had not obtained any certificates and had not taken any courses pertaining to boating. He had not read nor heard of the *Collision Regulations*, C.R.C., c. 1416. However, he did have a lot of practical experience operating boats and it was his testimony that he had “been on the lake” all his life.

[18] Cory Skidmore was aware of the problems with the Gypsea Rose but continued to operate the vessel without repair of the problems.

[19] For approximately ten years, Cory Skidmore had been an alcoholic. He consumed significant amounts of alcohol on June 30 prior to the collision.

3. The Defendant Maridee Skidmore

[20] Ms. Skidmore resides on seven acres of waterfront property south of Peachland. The Gypsea Rose was moored at a dock on her property.

[21] After the death of her husband, Ms. Skidmore did not operate the Gypsea Rose. Her older son Nathan and her younger son Cory were allowed to operate the Gypsea Rose with her permission. She had three rules for their operation of the

boat, one of which was that no-one was to drive or be on the boat if they had consumed any alcohol.

[22] Ms. Skidmore left all maintenance on the vessel to be done by her sons. She also left the task of fueling to her sons. Generally, the boat was refueled at the Peachland Marina.

[23] Earlier on June 30, 2008, Cory Skidmore had obtained Ms. Skidmore's express permission to use the Gypsea Rose for a trip across the lake to the cliff divers. On the second trip that day he was taking it to the Peachland Marina to get fuel and to "party".

[24] It was the evidence of Ms. Skidmore that she had often given permission for Cory Skidmore to take the boat to Peachland Marina to fill it up with fuel. She testified that if he had asked her to do this, she would have agreed with him taking the boat, but only if there was no alcohol involved.

[25] Ms. Skidmore was aware of the problems with the propeller and the throttle and was aware that these problems still existed on June 30, 2008. She was also aware that the problem with the propeller created a situation where the operator could not see over the bow at certain speeds and that this created the potential for a hazardous situation.

4. The Defendant Searay

[26] The defendant Searay was a 20-foot pleasure craft vessel owned by Mr. Atkinson. It was a vessel commonly described as a bowrider because there were seats in the bow for passengers.

[27] The Searay was operated by a starboard side helm with a dashboard for instruments and a horn, a throttle to the right hand side and a steering wheel. It had navigation lights, lifejackets, a fire extinguisher and a first aid kit. No flares were kept onboard.

[28] The Searay did not have to be under power for the dashboard horn to be operated. In addition to the dashboard horn, a separate signaling horn was onboard the Searay either on the dashboard or beside the driver's chair.

[29] When the engine was cold it took one to two minutes to start but when the engine was warm it took about 10 to 20 seconds to start the Searay.

5. The Defendant Norman Atkinson

[30] At the time of the collision, Mr. Atkinson who was 52 years old, held a Canadian Power and Sails Squadron Certificate and a Pleasure Craft Operator's card. The course for his certificate had taken two nights a week for three months. He learned a broad range of boating subjects including but not limited to basic navigation, tides and safety.

[31] After obtaining his Power Squadron Certificate, Mr. Atkinson did not attend any follow up courses. At the time of the collision, he had over fifteen years of experience operating boats.

[32] At the time of the collision, Mr. Atkinson was not aware of the *Collision Regulations*. However, he knew he had to keep a proper lookout while operating the Searay.

[33] Mr. Atkinson also knew that he had to continuously monitor the situation on the water around him and that he had to be on the lookout for and assess any risk of potential collision. As owner and operator of the Searay, Mr. Atkinson knew that if he could not keep a lookout, then somebody else would have to do it in his place.

B. <u>The Collision</u>

[34] There were nine people in the Atkinson vessel on June 30, 2008: Mr. and Mrs. Atkinson, their three children, Matthew (12), Christopher (10), Ashleigh (8), and Ms. Boys and her three grandchildren, Dawson (9), Daxton (4) and Tatum (3). Mr. and Mrs. Atkinson were long-time family friends of Ms. Boys' daughter and her son-in-law, James Perry.

[35] The Atkinson family had travelled to Westbank for the July 1st long weekend to visit with the Perry family, and to enjoy boating in Lake Okanagan. The families had been out on the lake in the Searay the day before, June 29.

[36] On June 30, the Atkinson family was planning to leave the Okanagan and drive home to the Lower Mainland. However, since it was a beautiful day they decided to stay longer and go out in the boat one more time. Ms. Boys went with her grandchildren in order to give her daughter a day off.

[37] They launched the Searay in Peachland at about 1:30 p.m. and spent some time on the water tubing with the children. It was a sunny and calm day with visibility described as “unlimited”. There was minimal boat traffic on the lake.

[38] At about 3:00 pm, they stopped, turned off the boat engine and came to a rest in the lake in order to eat their lunch and allow time for some swimming. Thirty minutes later they were preparing to get under way for more tubing.

[39] Ms. Boys testified that before the launch Mr. Atkinson did not speak to her about keeping a proper lookout. Mr. Atkinson confirmed that he did not talk to June Boys on either June 29, 2008 or June 30, 2008 about keeping a proper lookout. He had not requested his wife to assist in keeping a proper lookout while they were on the lake.

[40] The Searay was stationary in the water far from both shores and south of Antler’s Beach. It had been without power in the water with the engine off for approximately 20 to 30 minutes prior to the collision.

[41] At the time of the collision, all passengers were onboard the Searay except for Christopher Atkinson who was approximately 30 feet away floating in the Atkinsons’ three-man tube waiting to start tubing.

[42] Just prior to the collision, Mr. Atkinson was away from the helm. He was with his son Matthew at the back of the Searay on the swim grid. Mr. Atkinson was in the

process of hooking up the tube to get it ready for towing, and dealing with the tow rope which was tangled in the leg of the propeller.

[43] Kathe Atkinson was in the center part of the Searay, sitting on top of the driver's chair with her feet on the driver's seat. Mr. Atkinson testified that he was not aware that Kathe Atkinson had been sitting on top of the driver's chair just prior to the collision as he was pre-occupied on the swim grid.

[44] Ms. Boys, her three grandchildren, and Ashleigh Atkinson were in the bow of the boat.

[45] Everyone onboard the Searay was wearing lifejackets with the possible exception of Mr. Atkinson.

[46] Prior to moving to the swim grid, Mr. Atkinson had noticed that there was only one boat in the vicinity of the Searay. This boat was not the Gypsea Rose.

[47] While on the swim grid, Mr. Atkinson had his head down and was pre-occupied with untangling the tow line. As such, he was not able to see anything occurring around the Searay. He was kneeling for a portion of the time as he was attempting to pull the tow rope off the leg of the engine and the propeller.

[48] Kathe Atkinson was taking care of the children in the Searay. She was not watching the water for boat traffic or keeping a lookout. It was only after she finished dealing with the children that she looked up and saw the Gypsea Rose approaching off to the starboard or right side of the Searay. It was a large boat with a big burgundy hull straight up out of the water.

[49] Kathe Atkinson yelled to alert her husband and the others, and then jumped up on the seat, screamed frantically and waved her arms at the approaching boat. She was aware that there was a horn button on the dashboard but she did not use it. She did not attempt to start the engine because her son was in the tube behind the Searay and could have been hit if they moved.

[50] There is no evidence that anyone in the Searay saw the Gypsea Rose prior to the time that Kathe Atkinson raised the alarm by screaming.

[51] Mr. Atkinson testified that he was on the swim grid for about a minute to 90 seconds prior to hearing his wife yell that there was a boat approaching. After hearing his wife yell he looked up and saw the Gypsea Rose approaching from the starboard side at an approximate 90 degree angle. He estimated the Gypsea Rose was about 300 feet away at that time. Mr. Atkinson could not see the operator of the Gypsea Rose as the bow was raised.

[52] The first time that June Boys saw the Gypsea Rose was also after Mrs. Atkinson's screams. She also estimated its distance away at about 300 feet, or 100 yards. She grabbed the children and got down on the floor of the bow.

[53] Mr. Atkinson estimated that it was about ten seconds from the time he first saw the Gypsea Rose to the time of the collision. Kathe Atkinson also estimated the time to be about ten seconds while Ms. Boys described this time as a "under a minute" and stated that the collision happened quickly after she first saw the Gypsea Rose.

[54] In the time between noticing the Gypsea Rose and the collision, Mr. Atkinson did not move from the swim grid to the helm but rather focused on the passengers in the bow. He yelled at them to get out of the bow area. He described a "panic situation" onboard the Searay.

[55] It was the evidence of Mr. Atkinson that from the moment Kathe Atkinson first screamed until the time of the collision, no attempt was made by anyone onboard the Searay to sound the Searay's dashboard horn, sound the other signaling device kept onboard the Searay, move to the helm or start the Searay. He did not ask Kathe Atkinson or anyone to take any of those actions.

[56] On the morning of June 30, Cory Skidmore had taken his niece and her friend across the lake in the Gypsea Rose to watch the cliff divers. He had permission of

his mother to take the boat on this trip. Ms. Skidmore came to the dock to speak with him before he left to watch the cliff divers.

[57] Cory Skidmore returned to Ms. Skidmore's property at about 12:30 p.m. where his niece and her friend got off the boat. He tied the boat up, drank a quantity of alcohol and became intoxicated or in his words, drunk. He then departed in the boat with his girlfriend and his brother's brother-in-law for the Peachland Marina to refuel the boat.

[58] Cory Skidmore was driving the Gypsea Rose at about 15 mph. He did not see the Searay because his boat could not plane at that speed and he could not see over the front. He heard the screams when it was too late to turn to avert the collision or to cut the engine power.

[59] The Gypsea Rose hit the bow of the Searay at a 90° angle on the starboard side. It drove over the bow and windshield and stopped on the port or far side of the Searay. Significant damage was caused to the Searay. Injuries were sustained by Kathe and Ashleigh Atkinson, the three Perry children and Ms. Boys.

C. The Expert Evidence

1. Ian Hopkinson

[60] Counsel for the plaintiffs in the Boys Action sought to qualify and introduce the expert evidence and report of Captain Ian Hopkinson. Counsel for Maridee Skidmore provided notice that she sought to rely on his opinion.

[61] The qualifications of Captain Hopkinson are as follows. From 1954 to 1988, he worked in various capacities aboard ships in Wales, England, and British Columbia. He had a Master Mariner Certificate which allowed him to navigate any ship anywhere in the world. He has been a marine surveyor since 1988 to the present, and he is a member of the National Association of Marine Surveyors Inc. As a marine surveyor he examines boats and ships of all types, often for insurance purposes.

[62] As part of his Master Mariner training in navigation and seamanship, he was required to have knowledge of the *Collision Regulations,* which he referred to as the "rules of the road". His experience in operating pleasure craft is personal, as he purchased and operated a small boat on the coast for about 30 years.

[63] Counsel for Mr. Atkinson objected to Captain Hopkinson's qualifications permitting him to testify as an expert in these proceedings and to the necessity of his expertise in these proceedings. All of the vessels he has owned personally were sail boats and he has never owned a ski boat or vessel of the kind involved in the collision. His experience aboard those vessels has all been in coastal waters, and not on any lake or inland water similar to that in issue here. Captain Hopkinson's experience is in the deep sea. It was submitted that he has no relevant boating experience or training from the Power Squadron.

[64] After hearing argument on that issue, Captain Hopkinson was qualified to give expert opinion in the operation and navigation of marine vessels. The *Collision Regulations* are the same on the seas, where Captain Hopkinson has extensive experience, as on Lake Okanagan, the site of this collision. His experience as a marine surveyor provides him with knowledge of pleasure craft. The opinion provided was relevant and of assistance to the court.

[65] In his written opinion dated March 30, 2013, Captain Hopkinson addressed the issue of whether Mr. Atkinson was keeping a proper lookout prior to the collision on June 30, 2008. He stated as follows:

> In my opinion Mr. Atkinson did not meet the standard required of a prudent vessel operator since he was not keeping a proper lookout as required by Rule 5 of the International Regulations for preventing Collisions at Sea. A proper lookout in my opinion requires 100% concentration by sight and sound of the environment around my vessel which should provide me with advance warning of any dangers. Mr. Atkinson did not become aware of the approach of Gypsea Rose until it was only about 300 feet away, despite the fact that visibility was unlimited that day.
>
> He was absent from the helm and was therefore not in control of his vessel. He was instead occupied at the stern of the boat and engaged in the process of hooking up a tow line connected to a three man tube which was occupied by his son Christopher Atkinson and which was approximately 30 feet away.

[66] The written opinion also addresses the issue of whether the Atkinson vessel was a vessel "not under command". His opinion is in the affirmative, and states as follows:

> In my opinion the Searay owned by Mr. Atkinson was not under command at the time of the collision since there was no one at the helm and the engine was stopped. Since his vessel was less than 12 meters in length (Rule 27(g)) there was no requirement for him to exhibit the lights and shapes for not under command vessels described elsewhere in Rule 27.

[67] In cross-examination Captain Hopkinson testified that "lookout" meant both an activity and using one eyes and ears by looking around the vicinity to see if other craft or debris or anything that may affect safety was present. In response to a question as to whether or not the person keeping lookout can do other things, he responded in the affirmative saying that it was possible if it does not affect the ability to keep a lookout.

2. Jerald Powers

[68] Mr. Powers was called on behalf of Mr. Atkinson. He is a Life Member of Power Squadron, a Canadian organisation dedicated to safe boating and navigation. Mr. Powers testified that he has taken courses in boating, seamanship and navigation among other maritime subjects. He has also instructed other boaters on select topics.

[69] Mr. Powers is a knowledgeable and experienced pleasure boater. He has been a boater for over 40 years. He has owned a number of powered and sailing vessels and has operated them on inland lakes and rivers, as well as on coastal waters. He has also operated work boats used during his days as a surveyor on B.C. Hydro projects along the Columbia River system.

[70] Mr. Powers' provided the following written opinion:

> Firstly, with respect to question number 1 and the conduct of Mr. Atkinson, as owner and operator of the Searay, I am of the opinion that he did meet the standard expected or required of a prudent operator in similar circumstances. Okanagan Lake is a haven for recreational boaters during the summer months with water skiing and tubing being common boating activities, all

recognized as legitimate boating activities by the Office of Boating Safety/Transport Canada. It is also not uncommon to see boaters drifting on the lake with their engines shut off either fishing or just enjoying the solitude of being on the water. Other boaters intent on reaching a destination normally give them a wide berth and pass by quite safely. (ref. page 2 of Safe Boating Guide)

On 30 June 2008, Mr. Atkinson, as operator of the Searay, was preparing to tow his son behind the boat on a 3 person tube. He had prudently shut his engine off and moved to the back of the boat to rig the tow line. Prior to doing so, he had looked around and noticed that there was only one other boat in vicinity and it was not the Gypsea Rose, a 26.5 ft. Campion. Rule 5 of the International Regulations for Preventing Collisions at Sea states that "Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions as to make a full appraisal of the situation and of the risk of collision". I believe that Mr. Atkinson was in compliance in this regard even though he had left the helm for a position at the stern of the Searay which is essentially a runabout style boat with an open cockpit and no dodger, bimini or other overhead cover to obstruct the operator's or passengers' view. The swim grid on this vessel is an integral part of the boat, positioned well above the waterline and is easily accessed from the cockpit. The towing ring is positioned in the center of the transom and just slightly lower than the vessel's gunwale so anyone standing on the swim grid and attaching a line to the towing ring would still have excellent visibility of his surroundings.

As well, Mr. Atkinson's wife and other passengers, even though not instructed to do so, had a commanding view of the lake around them and were capable of sounding an alarm in the event of a dangerous situation developing. This, Mr. Atkinson's wife did when she noticed the Gypsea Rose about 300 feet distant and headed in their direction. Accordingly, with only about 10 seconds from his first sighting the Gypsea Rose and the collision, Mr. Atkinson and his passengers chose to wave their arms in order to get the attention of the operator of the Gypsea Rose. As with certain distress situations, waving is an accepted and effective means of attracting attention. Also, within that estimated 10 second time span, he prudently chose to focus on the safety of the passengers in the bow area as it was likely deemed most vulnerable in a contact situation. Not mentioned in the statement of facts outlined in the Bernard & Partners letter dated 28 March 2008 is anything describing the track of the Gypsea Rose, whether it was a straight track, an arching track or whether or not it had suddenly changed direction.

The foregoing not withstanding, according to Rule 3(f) of the International Regulations for Preventing Collisions at Sea, Mr. Atkinson's vessel was "not under command"; its engine was not running and it was burdened by a tow line attached to a 3 man tube with his son aboard, and according to Rule 18(a)(i), "A power driven vessel underway shall keep out of the way of a vessel not under command".

You have also asked me to comment on Captain F.I. Hopkinson's opinion(s) offered with respect to the two questions. Captain Hopkinson felt that Mr. Atkinson did not meet the standard required of a prudent vessel operator

> by virtue of not being in compliance with Rule 5 of the International Regulations for Preventing Collisions at Sea. Had this incident occurred anywhere on the West Coast with its busy shipping lanes and heavy marine traffic, I would be more inclined to agree with him. Okanagan Lake on a warm, sunny afternoon with its myriad assortment of small boaters indulging in various activities such as water skiing, tubing, fishing or just drifting presents a substantially different scenario.
>
> I do agree fully with Captain Hopkinson's assessment of Mr. Atkinson's vessel being a "vessel not under command" since there was no one at the helm, the engine was stopped and the vessel was burdened by the tow line attached to the 3 man tube, hence the applicability of Rule 18(a)(i) of the International Regulations for Preventing Collisions at Sea. Captain Hopkinson also agreed that since Mr. Atkinson's vessel was less than 12 metres in length, there was no requirement to comply with Rule 27(g) of the International Regulations for Preventing Collisions at Sea (ie, displaying certain lights and/or shapes).

[71] Mr. Powers provided his opinion regarding what constitutes a proper lookout. He testified that it was possible to maintain a lookout from somewhere other than the helm of the vessel, and in this case, from the swim grid of the Atkinson vessel. He also testified that one may direct their attention away from the water for a period of time and still maintain a proper lookout.

[72] As discussed above, it was the opinion of Captain Hopkinson that Mr. Atkinson was not keeping a proper lookout as required by Rule 5 at the time of the collision. Captain Hopkinson was a former Master Mariner with an extensive background in marine navigation and vessel operation. Mr. Powers on cross-examination admitted that a Master Mariner's credentials were superior to his.

[73] Mr. Powers provided the following evidence on cross-examination:

(a) Nothing in the Rule 3(f) definition of "vessel not under command" nor Rule 18(a)(i) precluded a vessel operator from keeping a proper lookout;

(b) A vessel operator needs to keep a proper lookout while operating his or her vessel;

(c) A vessel operator needs to keep a constantly monitor the situation on the water around him or her so that they are able to make a full appraisal of the situation and risk of collision;

(d) Part of keeping a proper lookout was being able to notice if there was a situation occurring and to have enough time to

> make that appraisal and then to react accordingly, in a positive manner and in ample time in order to avoid a collision pursuant to the requirements under Rule 8.

[74] Despite Mr. Powers' opinion in his written report that Mr. Atkinson had been keeping a proper lookout, as the Searay itself had no physical objects to obscure anyone's view, on cross-examination he admitted that the fact that a view was physically unobstructed did not mean that a proper lookout was being kept. He also agreed that in coming to his opinion he was not aware of Mr. Atkinson's testimony that:

(a) while he was on the swim grid he was trying to detach the tow rope from the engine leg and propeller;

(b) while he was engaged in this task of detaching the tow rope, he not able to see anything that was developing around his vessel; and

(c) while he was on the swim grid he had his head down in the water and the first indication that he had that there was a boat coming was when he heard Kathe Atkinson screaming.

[75] Mr. Powers was then presented with this evidence from the witnesses testimony:

(a) visibility was described by all as "clear" and in some cases "unlimited";

(b) Mr. Atkinson was on the swim grid for 60 to 90 seconds immediately prior to hearing his wife yell. That was the first time that day he saw the Gypsea Rose;

(c) when he first looked up he saw the Gypsea Rose about 300 feet away; and

(d) by the time Mr. Atkinson looked up it was too late to do anything.

[76] Mr. Powers also agreed on cross-examination that:

(a) someone in the Searay should have been paying attention and the person in charge wasn't nor were the passengers;

(b) the collision was preventable;

(c) it was foolish to have someone in the tube without the ability to start up the Searay and this created a “dangerous situation” with the Searay not being able to maneouver;

(d) it was implicit in Rule 5 that a proper lookout meant the ability to see and take evasive action; and

(e) that a proper step in taking evasive action was the sounding of the vessel’s horn or “sound signaling device”.

[77] Based on this evidence, Mr. Powers agreed with Captain Hopkinson that Mr. Atkinson was not keeping a proper lookout pursuant to the requirements of Rule 5. As such, it is his oral opinion and not his written opinion on this issue which is accepted.

III. THE ISSUES

[78] In addition to the negligence of Cory Skidmore, which is admitted, were Mr. Atkinson and/or Ms. Skidmore negligent?

[79] Was Mr. Atkinson negligent because he did not keep a proper lookout and as a result did not see the Gypsea Rose approaching the Searay?

[80] Was Ms. Skidmore negligent for permitting Cory Skidmore to drive the Gypsea Rose when he was impaired?

[81] Was Ms. Skidmore negligent for permitting the Gypsea Rose to be operated in an unseaworthy condition which she knew prevented the operator from keeping a proper lookout?

[82] Was the negligence of either or both of Mr. Atkinson and Ms. Skidmore a cause of the collision?

[83] If the negligence of Mr. Atkinson and /or Ms. Skidmore contributed to the accident how should liability be apportioned?

IV. THE LAW

[84] In Maritime Law, the manner in which a vessel is operated is governed by both the common law and statute law. Liability for damages caused by a vessel will depend on the failure of the owner or operator to meet the standards set by the common law, or upon the violation of statute law in regards to the equipping or operation of a vessel: *Halsbury's Laws of Canada*, 1st ed., Maritime; Municipal (Markham, ON: LexisNexis, 2012) at 302, HMT-97.

[85] With regard to the application of the common law, in *Dixon v. Leggat*, 64 O.R. (3d) 347(C.A.), Goudge J.A. stated at para. 45:

> [45] However, it is also clear that liability can be imposed on an owner of a vessel on the basis of the ordinary principles of tort law. As MacIntyre J. said in *Ito-International Terminal Operators Ltd. v. Miida Electronics Inc*., 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752 at para. 28:
>
> > It is my view, as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment.

[86] In *The "Dundee"* (1823), 166 E.R. 39 at 43, Lord Stowell of the High Court of Admiralty set out the essential elements of actionable negligence:

> …a want of that attention and vigilance which is due to the security of other vessels that are navigating on the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages.

[87] The test of negligence under maritime law is determined by the actions of the ordinary seaman, rather than the ordinary man. As stated in *Thomas Powell and Cuba (The)* (1866) 14 L.T. 603 at 603: "We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."

[88] In *Boleslaw Chrobry (The)*, [1974] 2 Lloyd's L.R. 308 at 316, the test was restated as: "The standard of skill and care to be applied by the Court is that of the ordinary mariner and not the extraordinary one, and seamen under criticism should

be judged by reference to the situation as it reasonably appeared to them at the time, and not by hindsight."

[89] Liability for a marine collision is based on a finding of fault for an act that has caused or contributed to the damage. The defences of inevitable accident and "agony of the moment" apply in maritime as well as in the common law. The defence of inevitable accident is available if it can be shown that the proximate cause of the accident was some external event beyond the ship's control that could not be avoided by ordinary care, caution and maritime skill (*A/S Ornen v. Duteous (The)*, [1986] F.C.J. No. 282 (T.D.) at para. 21). With regard to the agony of the moment, errors made in emergencies may be excused.

[90] The common law rules regarding collisions have for the most part been superseded by statutory rules which have been enacted in similar form in many countries. In Canada, they first came into effect in 1914 in the form of the *Collision Avoidance Rules*. The present *Collision Regulations,* which incorporate at Schedule 1 the *International Regulations for Preventing Collisions at Sea, 1972*, are enacted pursuant to the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 (the "*Act*").

[91] *The Act* is the principal legislation governing safety in marine transportation and recreational boating as well as protection of the marine environment. The *Act* applies to lakes and inland waterways as well as to the territorial sea. "Vessel" is the term used for general application in the *Act*. As the definition of vessel includes a boat, those nouns will be used interchangeably in these Reasons.

[92] One of the issues addressed in in the *Collision Regulations* is the fact that historically many collisions occurred because of the lack of a proper lookout. At common law, as stated regarding British shipping laws in Simon Gault, ed., *Marsden on Collisions at Sea*, 12th ed (London, UK: Sweet & Maxwell, 1998) at para. 6-48:

> If a ship is proved to have been negligent in not keeping a proper look-out she will be held answerable for all the reasonable consequences of her negligence;

[93] Rule 5 of the *Collision Regulations* requires that all operators maintain a proper lookout. It states:

> 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..

[94] A proper lookout has been interpreted to include: visual lookout; aural lookout; and the intelligent interpretation of data received from electronic navigational aids such as radar. The number of persons required to constitute a proper lookout will depend on factors such as the size of the vessel, visibility, and the density of traffic. In most cases one person may be sufficient. It is also important to ensure that the lookout is posted in a place on the vessel where there is an unobstructed view: Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Toronto: Irwin Law, 2003) at 501-502.

[95] An allegation of negligence because of a violation of the *Collision Regulations* must be considered in light of the principle that a mere breach of a statute, standard or rule is not equivalent to a finding of liability. Standards and rules help to inform the Court of the standard of care and what accords with those standards: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29.

[96] The liability of an owner or master for a collision between an anchored, stationary vessel and a vessel travelling at an excessive speed without keeping a proper lookout was considered by the Nova Scotia Court of Appeal in *Conrad v. Snair* (1995), 131 D.L.R. (4th) 129, [1995] N.S.J. No. 519 (C.A.) [*Conrad*]. After reviewing the case authorities, Mr. Justice Freeman stated that a boat owner's responsibilities could be divided into three principal categories, at para. 115:

1. The ship must be seaworthy in the sense of being fit for the intended voyage, in good repair and properly equipped, and safe for those on board.
2. The ship must be provided with proper navigational aids including current charts, rules and information.
3. The ship must be properly and competently staffed.

[97] This list of categories was adopted by the British Columbia Court of Appeal In *Vukorep v. Bartulin,* 2005 BCCA 142 at para. 19. In *Vukorep*, Rowles J.A. went on to state:

> [20] The case authorities establish that owners must show they were themselves in no way in fault that was causative of what occurred: *Stein v. Kathy K.*, [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, and *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*, [1924] A.C. 100, at 113. In *Meeker Log and Timber Ltd. v. Sea Imp VIII (The)* (1994), 1 B.C.L.R. (3d) 320, [1994] B.C.J. No. 3006, (B.C.S.C.), aff'd (1996), 21 B.C.L.R. (3d) 101, [1996] B.C.J. No. 1411 (B.C.C.A.) [cited to B.C.L.R.], Lowry J., as he then was, said that an owner:
>
> > ...must discharge what is a heavy burden of proving that the person or persons who represented its managing or directing mind were not at fault in any way that was at all causative of the loss: there must have been no failure to do what ought to have been done. The standard of care is not one of perfection; it is rather one of what would be done by a reasonable owner (at para. 18).
>
> [21] In summary, an owner will not be permitted to limit his liability under the *Act* if:
>
> > (a) the accident in question occurred with the owner's actual fault or privity in that it occurred as a result of the owner's failure to ensure that the ship was (i) seaworthy (ii) provided with proper navigational aids or (iii) properly and competently staffed; and
> >
> > (b) the relevant fault caused or contributed to the accident.

[98] However, in order for the owner to be at fault, there must be consent, express or implied, for the person in control of the vessel at the time of the accident to have that vessel. Without the requirement of consent, an owner with no intention of allowing an unfit ship to operate may have that ship stolen and be held liable for any accidents that result. This principle is stated by the Supreme Court of Canada in *Goodwin Johnson Ltd. v. AT & B No. 28 (The),* [1954] S.C.R. 513 at 533:

> His absolute authority on board ship derives from that conception. <u>So long as there is the voluntary entrustment of interests to the administrator or person in complete control of the vessel</u>, what that vessel does through its fault to damage another is chargeable against those interests, and only when there is a breach in authority from the owner can they claim exemption.
>
> [Underlining added]

Also see *Cox v. Brown*, 4 C.P.C. (4th) 110 (B.C.S.C.)

[99] If more than one individual is found liable, apportionment of responsibility is governed by s. 17 of the *Marine Liability Act,* S.C. 2001, c. 6 which states:

> Apportionment based on degree of fault
>
> **17.**(1) Where loss is caused by the fault or neglect of two or more persons or ships, their liability is proportionate to the degree to which they are respectively at fault or negligent and, if it is not possible to determine different degrees of fault or neglect, their liability is equal.
>
> Joint and several liability
>
> (2) Subject to subsection (3), the persons or ships that are at fault or negligent are jointly and severally liable to the persons or ships suffering the loss but, as between themselves, they are liable to make contribution to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.
>
> Exception — loss of ships and property
>
> (3) Where, by the fault or neglect of two or more ships, loss is caused to one or more of those ships, their cargo or other property on board, or loss of earnings results to one or more of those ships, their liability to make good such loss is not joint and several.
>
> Persons responsible
>
> (4) In this section, a reference to liability of a ship that is at fault or negligent includes liability of any person responsible for the navigation and management of the ship or any other person responsible for the fault or neglect of the ship.

V. THE ANALYSIS

A. Overview

[100] Three individuals are alleged to have been negligent and to have caused the collision on Lake Okanagan on June 30, 2008. Cory Skidmore's negligence is admitted. It is clear on the evidence that he failed to keep a proper lookout and that his failure to do so was a cause of the collision. I will discuss the evidence and law relevant to the contested claims against Ms. Skidmore and Mr. Atkinson.

[101] In discussing the facts relevant to the Skidmore defendants, I am mindful that there are issues of credibility and reliability. As I make findings of fact I will set out the evidentiary basis for those findings.

B. Maridee Skidmore

[102] Ms. Skidmore was the owner of the Gypsea Rose, either in her personal capacity or as executrix and trustee of the estate of her late husband, Lloyd Skidmore. Mr. Skidmore had purchased the boat in 2004.

[103] Mr. Skidmore died from drowning in Lake Okanagan in 2007. Alcohol was a factor in the drowning. Ms. Skidmore was still mourning his death, and was grieving on the date of the collision. As had been her custom, she spent much of the day in her bedroom.

[104] After her husband's death, only her sons, Cory and Nathan, operated the Gypsea Rose. Her sons were left to do the maintenance and to refuel the boat. She permitted them to use the boat if they obeyed her rules about operating the boat. There were three rules: the boys had to ask her permission; they had to be responsible and careful; and at no time was alcohol or anyone who had drunk alcohol allowed on the boat. Ms. Skidmore knew that Cory was an alcoholic and could not be trusted to use good judgment on his own.

[105] Ms. Skidmore testified that there was no specific discussion regarding speed because this boat did not go fast. Ms. Skidmore described it as a fishing or cruising boat. She testified that she spoke to the boys about not going fast with the bad propeller, and that was one part of the condition to be responsible.

[106] The Gypsea Rose was not well maintained or in good operating condition in two particular respects. Although Ms. Skidmore's testimony was inconsistent regarding her knowledge of the throttle and of the propeller and the planing problem, I find that the facts that the improper replacement propeller caused the boat not to plane at higher speeds, and that the throttle would stick were known to Ms. Skidmore and to Cory Skidmore.

[107] The rules which Ms. Skidmore had imposed on her sons' use of the boat addressed the poor condition of the boat as well as her knowledge of Cory's alcoholism. Cory knew of the rules. The only evidence that he breached these rules

prior to the second trip on June 30 is that he was driving fast on the trip back from the cliff divers earlier on June 30.

[108] The three responsibilities of a boat owner are set out in *Conrad*. It is the first and third categories, namely whether the ship was seaworthy and whether it was competently staffed, that are relevant in determining the liability of Ms. Skidmore in this case.

[109] First I will deal with the responsibility set out as the third category in the case: The ship must be properly and competently staffed. The application to these facts is that Ms. Skidmore must have been satisfied that Cory was competent to operate the boat at the time of the collision. This is turn raises the question as to whether Cory had Ms. Skidmore's consent to take the boat to the Peachland Marina.

[110] On the morning of June 30, Ms. Skidmore gave permission to Cory to take his niece and her friend on the boat across the lake to watch the cliff divers and only to the cliff divers and back. I find that Ms. Skidmore observed Cory at the dock before he left on this trip across the lake about 11:00 a.m. She confirmed with him that he was sober.

[111] When Cory returned from the cliff divers at about 12:30 p.m., he drank a quantity of alcohol. He then departed in the boat with his girlfriend and his brother's brother-in-law for the Peachland Marina to refuel the boat. It was on this journey that the collision with the Searay occurred. Ms. Skidmore testified that she would not have allowed him to take the boat if he had been drinking, even one beer.

[112] There is no evidence that Ms. Skidmore gave her express consent for the second trip. It was not one continuous voyage but two separate trips. The issue which arises is whether Cory had his mother's consent to use the Gypsea Rose for the second trip to the Peachland Marina to refuel the boat.

[113] The evidence of Ms. Skidmore and Cory Skidmore is entirely unclear regarding the events between the two boat trips. Ms. Skidmore has testified to three

versions, and at trial, had difficulty determining which of two versions of events were accurate.

[114] I do find that Cory tied up the boat when he returned from watching the cliff divers. He had returned quickly from the first trip so that he could begin drinking alcohol that day. He had a conversation with his mother, and her making him a sandwich was discussed. He told her to go and take a nap. His goal was to take the boat keys and "go party". Where and how he obtained the keys is not clear. I find that Ms. Skidmore did not see Cory after he started drinking and before the second trip; Cory did not want her to see him drinking or drunk.

[115] Cory drank five to six beers and some vodka and smoked a joint. He admitted that he was drunk before he went out on the boat the second time that day. He fairly stated that he was an idiot for driving the boat when he was drunk.

[116] Whether Ms. Skidmore gave her implied consent is to be determined by a test both objective and subjective. The test was stated in *Morrison (Committee of) v. Cormier Vegetation Control Ltd*. [1996] B.C.J No. 612 at para. 62:

> [62] While the implied consent test is sometimes described by the Courts as an objective test, it necessarily imports a subjective element into that determination. Put another way, would this particular owner, in all of the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? If the answer to that question is "yes", then the driver has proven that he or she drove the vehicle with the owner's implied consent.

Although *Morrison* was reversed on appeal, it was reversed on the basis of express not implied consent. The above statement of the test for implied consent was affirmed by the Court of Appeal in *Godsman v. Peck*, [1997] B.C.J. No. 377 (C.A.) at paras. 31 and 39.

[117] I find that the facts here do not support a finding of implied consent for Cory to drive the boat to the Peachland Marina for refueling. Although that is a trip for which he had often previously had consent, in these circumstances the crucial fact is that he had been drinking alcohol. Ms. Skidmore had a rule that no-one was to drive or

be on the boat when they had been drinking. Permission would have been granted if there was no liquor: no permission would have been granted if there was liquor.

[118] Counsel in the Boys Action made submissions that the evidence of Ms. Skidmore was internally inconsistent and inconsistent with her Examination for Discovery. That is true in many respects. However, with regard to the issue of implied consent for the trip to the marina, many of the inconsistencies are a result of an elongated cross-examination which clearly had the effect of confusing the witness. It is always a danger in such processes that the trier of fact could get a false impression of the evidence, which is why the full context and all the evidence must be considered: see *Smith v. B.C.T.V. Broadcasting Ltd.* (1988), 32 B.C.L.R. (2d) 18 (C.A.).

[119] The evidence of Ms. Skidmore must be considered in its entirety. Her evidence was clear and uncontroverted that there was a “no alcohol” rule and a rule to drive responsibly for the operation of the boat. The reason for the no-alcohol rule was compelling: her husband had drowned in a boating accident when he had been drinking. She did not want to lose her sons to the lake too.

[120] Cory Skidmore testified that it was his practice not to ask his mother’s permission to drive the boat if he had been drinking as he knew the answer would be no. He had asked his mother twice in June 2008 for permission when he had been drinking and both times she had refused. I find that he was intent on taking the boat to the Peachland Marina without his mother’s knowledge. If she had seen him, she would have known he had been drinking and refused permission.

[121] I find that Cory Skidmore did not have the consent of Ms. Skidmore, express or implied, to drive the boat to the Peachland Marina to refuel on June 30, 2008. I therefore do not find that she was in breach of her responsibility to ensure that the boat was competently staffed.

[122] The owner also has a responsibility under the first category of *Conrad* that the ship must be seaworthy in the sense of being fit for the intended voyage, in good repair and properly equipped, and safe for those on board.

[123] The three components of this category must all be present. The ship must not only be fit for the voyage, but also in good repair and safe in order to be seaworthy. In two respects the Gypsea Rose was not in good repair and was not safe. First, the throttle stuck at times and had not been repaired. It could cause the boat to maintain its speed and be out of control. I note that the throttle did not malfunction that day and is not a cause of the collision.

[124] The second and relevant defect is that the Gypsea Rose had a propeller that was wrong for the boat. This propeller prevented the boat from planing as it should at certain speeds over 10 mph. Ms. Skidmore knew of the effect of this propeller as did Cory. The failure to plane significantly and negatively affected the ability of the driver to keep a proper lookout. Indeed, Cory could not see what was in front of the boat as it was moving unless he put his head out the side window. The lack of vision of the driver of the boat was similar to that of the driver of an automobile who cannot see out the front windshield.

[125] The Gypsea Rose was not seaworthy: it was not in good repair and safe for those on board. The incorrect propeller which prevented the boat from planing made the Gypsea Rose unsafe for those on board. Although the propeller was known by the owner to be defective, it had not been replaced with a proper propeller for the boat. Ms. Skidmore is therefore in breach of her responsibility as an owner under the first category of *Conrad.*

[126] However, in cases of a ship being unseaworthy, as with all cases of negligence, it must be shown that the breach of the standard of care caused the damage in question before liability can attach: See *Ferguson v. Artic Transportation Ltd.*, [1998] F.C.J. 634 (T.D.) at para. 10. As with the owner's responsibility to properly staff the ship, the owner cannot be liable for the unseaworthiness of the ship if they did not give consent for the ship to be operated in that condition. There

was no "intended voyage" in the words of *Conrad*. Otherwise, a prudent owner, knowing their ship to be unfit for operation and taking steps to have it repaired at dock, would be liable if that ship was stolen and involved in an accident.

[127] As discussed above, in this case Ms. Skidmore did not give Cory her consent to use the boat on his second trip to the Peachland Marina. I therefore find that the breach of her duty to keep the ship seaworthy did not cause the collision, and she is therefore not liable.

[128] I recognize that Ms. Skidmore had previously consented to the use of the Gypsea Rose knowing it to be unseaworthy. Those trips however did not result in an accident. In this case Ms. Skidmore did not give Cory her consent to use the boat on his second trip to the Peachland Marina. The collision occurred at a time when Cory neither had consent nor would he have been granted it if asked, due to his drinking. Ms. Skidmore did not voluntarily give control of the boat to Cory and is not liable for the collision.

[129] I find that the breach of her duty to keep the ship seaworthy did not cause the collision, and the actions against Ms. Skidmore must be dismissed.

C. Mr. Norman Atkinson

[130] Mr. Atkinson was at all material times in command of the Searay. He was the operator of the vessel. He has a Power Squadron Certificate and 15 years' experience boating.

[131] When he was on Lake Okanagan with his family and guests on the day of the collision, he made many good decisions. Stopping on the lake for lunch and swimming enhanced the enjoyment of the day. He was watching the lake and noticed only one other boat in the vicinity.

[132] The engine was appropriately turned off during the stop. This was a prudent decision given the presence of swimmers around the boat and a tuber attached to the boat by a rope. Mr. Atkinson was aware that starting the engine safely is a time

consuming process, which he was about to undertake to resume the days' tubing activity.

[133] Before getting under way, it was necessary to untangle the tubing rope from the leg of the propeller. The best place to do that task was the swim grid at the back of the boat. Mr. Atkinson went to the swim grid for that purpose. There was nothing wrong with his decision to leave the helm.

[134] However, before doing so, or before leaving the dock for the boating trip, he did not instruct either of the other adults in the boat, Ms. Boys or Kathe Atkinson, to keep a lookout. The evidence is clear that neither was keeping the required lookout. Both were understandably involved with the children.

[135] While on the swim grid for a minute to 90 seconds, his attention was focussed on the rope, not on the lake. Mr. Atkinson had his head down. While on the swim grid he could not see the surrounding lake. He was kneeling until his wife screamed.

[136] A proper lookout includes an aural lookout. Mr. Atkinson testified that he could not have heard the Gypsea Rose as he had his head down on the swim grid near the water. However, Kathe Atkinson also testified that the Gypsea Rose was eerily quiet as the engine noise was travelling out the back of that boat. The quiet made a visual lookout more important. It also made it easier for the Gypsea Rose to hear the occupants of the Searay.

[137] Mr. Atkinson did not see the Gypsea Rose until after he heard his wife scream. The Gypsea Rose was a large burgundy boat vertically high up out of the water. It was there to be seen. The evidence of the expert witnesses was that Mr. Atkinson was not keeping a proper lookout in these circumstances. I agree.

[138] After Kathe Atkinson screamed when she saw the Gypsea Rose approach, she stood on the driver's seat and waved her arms in an attempt to make herself as big as possible so that the other boat would see them. Cory heard the screams. It was too late for him to change course. The collision occurred.

[139] Mr. Atkinson submits that the Searay meets the *Collision Regulations* definition of a "vessel not under command" at the time of the collision. The *Collision Regulations* state:

> 3. For the purpose of the Rules, except where the context otherwise requires:
>
> …
>
> (f) term "vessel not under command" means a vessel which through some exceptional circumstance is unable to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel.

The application of this definition is found in Rule 18 which provides that a power-driven vessel shall keep out of the way of a vessel not under command.

[140] Mr. Powers testified that the facts that the vessel was turned off, there was a child floating in a tube attached to the vessel, and the rope for that tube was entangled in the leg of the vessel constituted exceptional circumstances under this Rule.

[141] It was, however, also the evidence of Mr. Powers that, and on a plain reading of Rule 5 regarding Look-out, a proper lookout is required to be maintained in all instances, even for those vessels deemed "not under command". Additionally, as stated in Rule 2(a) of Schedule 1 of the *Collision Regulations*:

> 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.

[142] *The Donald Helene (The) v. Gloucester No. 26 (The)*, [1965] 1 Ex. C.R. 586 (Exchequer Court of Canada – New Brunswick Admiralty District), concerned a case where the Donald Helene was drifting with its engine stopped when it was rammed by the Gloucester No. 26. The Court found that there was a lack of proper lookout on the part of both vessels and, despite the fact that the Donald Helene was not under power at the time of the collision, attributed fault at 50% for each vessel.

[143] While I agree that the Searay was a vessel not under command, that finding does not relieve Mr. Atkinson of the duty and rule requiring him to keep a proper lookout.

[144] Rule 5 requires consideration of the "prevailing circumstances and conditions". On a lake there are no lanes of travel. Danger can approach from any direction for unforeseen reasons. The "risk of collision" is always present. The safety Mr. Atkinson felt in the middle of Lake Okanagan was an illusion.

[145] Mr. Atkinson submits that the accident was inevitable. He says that there was not enough time to do anything to prevent it even had he been keeping a proper lookout. I agree with his submissions that it would have taken too long to start the Searay and move out of the way of the Gypsea Rose. However, that is not all that could have been done to prevent the collision.

[146] Cory heard Mrs. Atkinson's screams. His uncontroverted and logical evidence was that he could hear a horn over the sound of the engine. He said that "horns are made to be loud". If he had heard a horn he would taken off the throttle all the way because a horn means that "something is wrong". I believe Cory's evidence in this regard as it is consistent with his hearing the screams and consistent with his growing up on the lake and being attuned to sounds of distress.

[147] Further, although there is no evidence as to the audibility of the two horns on the Searay, the *Collision Regulations* required that a boat of the size of the Searay must be fitted with a horn that was audible at a distance of 0.5 miles, or 2640 feet.

[148] At 15 mph, the Gypsea Rose would have travelled 220 feet in the 10 seconds from the time Kathe Atkinson screamed until the collision. If a proper lookout had been maintained the occupants of the Searay would have observed the Gypsea Rose sooner. With Mr. Atkinson's evidence that he was on the swim grid for 60 to 90 seconds, 50 to 80 seconds more could have been available. The immediate use of the horn would have given the approaching boat sufficient time to take evasive action to avoid the collision.

[149] I am satisfied on the evidence, including the evidence of times and distances, that the collision could have been avoided if the Searay had seen the Gypsea Rose earlier. Although Cory Skidmore was impaired at the time, he was experienced in driving the Gypsea Rose on Lake Okanagan. I accept his evidence that if had heard the horn one minute before the collision then he would not have hit the Searay. With 30 seconds warning he might have been able to take evasive measures. He did not hear a horn or any signalling device before the collision.

[150] If Mr. Atkinson had been keeping a proper lookout, there would have been time for him to assess the situation and instruct Kathe Atkinson, who was sitting with her feet on the driver's seat and close to the horn, to signal or to sound the horn. Cory would have heard earlier screams or the horns and the collision would have been averted. The failure to keep a lookout resulted in insufficient time to take those appropriate measures to warn the oncoming vessel and thereby to avoid the collision. The absence of proper lookout was a cause of the collision.

[151] It is submitted by Mr. Atkinson that in the agony of the moment, he cannot be faulted for the decision which he made which was to stay where he was and instruct those in the bow to get on the floor rather than him trying to start the boat. It is reasonable with the short time available to take the actions he did. However, this submission misses the point. The reason that there was such a short time available to take any actions is the failure to keep a proper lookout.

[152] I find that Mr. Atkinson failed to keep a lookout in breach of Rule 5 of the *Collision Regulations*, and that this breach was negligent and a cause of the collision.

D. Apportionment of Liability

[153] There was very little in the way of submissions regarding the apportionment of liability. Counsel in the Boys Action stated that s. 17 of the *Marine Liability Act* operates in the same manner as the *Negligence Act*, R.S.B.C. 1996, c. 333. However, as there had been no submissions by the defendants with regard to contributory negligence on the part of Ms. Boys or her grandchildren, the ultimate

apportionment of liability does not affect them. They thus took no position on the appropriate apportionment.

[154] Counsel acting on behalf of Norman Atkinson also made no submissions regarding the specific apportionment of liability in this matter except to say that Ms. Skidmore bears considerable responsibility. The implication, in my view, is that Ms. Skidmore should be apportioned a greater amount of liability than Norman Atkinson, should he be found to liable at all. However, as I have not found Ms. Skidmore liable this submission is not helpful.

[155] In *FFS HK Ltd. v. P.T. 25 (The)*, 2010 BCSC 1675 at paras. 166-184, Madam Justice Wedge discussed the operation of s. 17 of the *Marine Liability Act*. She found that the section operated in the same way as the *Negligence Act*. In *Hynna v. Peck*, 2009 BCSC 1057, 99 B.C.L.R. (4th) 357, Ballance J., at paras. 88-93, concisely summarized the law:

> [88] In assessing apportionment, the Court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Stated another way, the Court does not assess degrees of causation, it assesses degrees of fault: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212; *Aberdeen v. Langley (Township)*, 2007 BCSC 993 [*Aberdeen*]; reversed in part, *Aberdeen v. Zanatta,* 2008 BCCA 420.
>
> [89] In *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505, 80 B.C.L.R. (3d) 153, Finch, J.A. (now the Chief Justice), for the majority of the Court of Appeal, explained this important principle at paras. 45-47:
>
> > In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, *supra*, and the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.
> >
> > Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor apse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.
>
> [90] In *Aberdeen*, Groves J. provided insight into the difficulty that the Court faces in quantifying the concept of blameworthiness under the

Negligence Act. At para. 62 he endorsed the factors in assessing relative degrees of fault set out by the Alberta Court of Appeal in *Heller v. Martens*, [2002] A.J. No. 638, as follows:

> 1. The nature of the duty owed by the tortfeasor to the injured person ...
> 2. The number of acts of fault or negligence committed by a person at fault ...
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault ...
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy ... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis ...
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy ...
>
> [Authorities omitted.]

[91] To the foregoing factors, Groves J. added the following at para. 67:

> 6. the gravity of the risk created;
> 7. the extent of the opportunity to avoid or prevent the accident or the damage;
> 8. whether the conduct in question was deliberate, or unusual or unexpected; and
> 9. the knowledge one person had or should have had of the conduct of another person at fault.

[92] After surveying the authorities, Groves J. summarized at para. 67 the approach to be taken in assessing the relative degree of blameworthiness of the parties:

> Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[93] On appeal, the decision in *Aberdeen* in relation to the issue of contributory negligence was remitted for retrial. However, the Court of Appeal did not criticize Groves J.'s careful summation of the governing legal principles on apportionment.

[156] Cory Skidmore admitted liability. I have found Mr. Atkinson to also be liable for the collision, but Ms. Skidmore to not be liable.

[157] In these circumstances, the actions of Cory Skidmore are far more blameworthy. He drunkenly set out in an unseaworthy vessel across a lake which has frequent pleasure craft with reckless indifference and disregard for the safety of other persons who might be using the lake. While I have found Mr. Atkinson to be negligent, his was a momentary or minor lapse of care in conduct which, nevertheless, carried with it the risk of foreseeable harm.

[158] In the Boys Action I apportion liability 80% to Cory Skidmore and 20% to Mr. Atkinson. The claim against Ms. Skidmore is dismissed.

[159] Cory Skidmore is found liable in the Atkinson Action, and the claim against Ms. Skidmore is dismissed.

[160] In the Norman Atkinson Action, the claim against Ms. Skidmore is dismissed. Cory Skidmore is 80% liable with Mr. Atkinson found to bear 20% contributory negligence.

[161] With regard to costs, if counsel are not able to reach an agreement, arrangements should be made to appear before me at a further hearing on that issue.

"The Honourable Madam Justice Watchuk"