

**IN THE CAYMAN ISLANDS COURT OF APPEAL**

**CRIMINAL APPEAL 19/16**

IND 78/15

C3094/2015

BETWEEN:

**HER MAJESTY THE QUEEN**

Respondent

- and

Simon Courtney

**Appellant**

**The Rt Hon Sir John Goldring, President  
The Hon Sir Richard Field, Justice of Appeal  
The Hon Dennis Morrison, Justice of Appeal**

Appearances: Laurence Aiolfi of McGrathTonner for the appellant. Patrick Moran Dpty DPP and Greg Walcolm for the Crown.

Hearing and Judgment reserved: 9 March 2017

Judgment delivered: 6 April 2017

**The President:**

*The facts*

1. This is an appeal against conviction and sentence. On 17<sup>th</sup> June 2016 Mr Courtney, an attorney in Cayman, was convicted by a jury of 2 counts of inflicting grievous bodily harm, contrary to section 204 of the Penal Code (2013 Revision), and one count of reckless driving, contrary to section 76 of the Traffic Law (2011 Revision). On 7<sup>th</sup> July 2016 the trial judge, the Honourable Justice Swift QC sentenced him to concurrent terms of imprisonment as follows: on Counts 1 and 2, three years, Count 3, eighteen months. The appellant was disqualified from driving for 5 years.
2. Although at the time of his conviction, Mr Courtney was of good character (and put forward as such), he was on bail for offences of speeding, driving under the influence of alcohol, dangerous driving and driving without a licence. He was subsequently convicted of these offences.

3. On 25<sup>th</sup> January 2015 Mr and Mrs Courtney went to a champagne brunch at the Ritz Carlton Hotel in Grand Cayman. They arrived at about 11.40 AM. The brunch began at 12.00PM. It finished at 5.00PM. Mr and Mrs Courtney dined with two friends. Mr Courtney was driving his left-hand drive Ford Shelby GT500 Mustang. It was described as a ‘super high performance’ vehicle, the second fastest car produced in the United States, and capable of reaching 60 miles per hour in 3.5 seconds. During the time Mr and Mrs Courtney were at the hotel, it rained heavily. At about 5:10 p.m. the Appellant, with his wife as passenger, drove out of the hotel. The court has seen the CCTV material depicting that. The vehicle proceeded along West Bay Road in a northerly direction. The speed limit was 40 mph. A short time after passing under the bridge over West Bay Road the vehicle suddenly and violently spun out of control. It turned through 360 degrees before mounting the pavement and striking and seriously injuring Kathy and Richard Shubert, the victims in counts 1 and 2 respectively. A rear wheel from the Mustang came off. There was a CCTV camera on the pedestrian bridge over the road. Its footage, which the court has seen, depicts the Mustang from the time it passed under the bridge to its collision with Mr and Mrs Shubert.
4. By the time the police arrived, Mr Courtney had left the scene. Mrs Courtney was sitting in the front passenger seat. The Mustang was on the northbound side of West Bay Road. The police noted that they detected alcohol on Mrs Courtney’s breath. They tried to locate Mr Courtney (including at his home). They failed. CCTV footage from the hotel after the collision depicts Mr Courtney rushing through the hotel, into the swimming pool area and leaving (via the beach) in the opposite direction to that in which his vehicle and wife were.
5. Mr Courtney next appeared at about 5.00PM the following day, when, with his wife and lawyer he went into George Town Police Station. He was arrested on suspicion of dangerous driving and leaving the scene of an accident. When cautioned he said, “Officer, I suffered a concussion in the accident and was disoriented. I am just coming from the hospital and the doctor released me into my wife’s care.” He was bailed to return to the police station. Mr Courtney later provided a written statement as his account of the incident, to which we shall come.

*The evidence of drink*

6. Although there was argument about its admissibility, the judge, in a ruling which Mr Aiolfi on behalf of the appellant explicitly did not criticise, admitted evidence going to Mr Courtney’s consumption of champagne at the brunch.

7. The waiter who served Mr and Mrs Courtney was Mr Nepal. He refreshed his memory from a witness statement he had made in February 2015. He said that at about 11:45 a.m. he saw Mr and Mrs Courtney at the entrance to the restaurant. In common with other guests, they were offered a glass of champagne while waiting to go in. CCTV footage showed Mr Courtney with a glass and sipping from it. There was also no dispute but that Mr Nepal served three bottles of champagne to the party of four. There was an issue as to whether the first glass Mr Nepal gave them was, or was not, part of the three bottles. Mr Nepal said he served all four people. He said in chief that, "he could not exactly say how much I served each person." When asked about Mr and Mrs Courtney, he said he would have served them "approximately four glasses." He would fill up the glass before it became empty (as the jury might have thought is commonly the case). He repeated his view that he served approximately "four glass per person." He agreed in cross-examination that he did not need to monitor each customer's drink, as it was not individually charged for. He also agreed that in a statement he had made on 18<sup>th</sup> May 2016, he told the police that, "Normally when we pour champagne we don't fill up the guest's glass. We would just pour like, half or three-quarters of the glass. I don't remember how many times I poured champagne into Mr Courtney's glass." As was adduced in re-examination however, at the time of Mr Nepal's May 2016 statement he did not have his February 2015 statement, made of course much nearer to the events in question.
8. As to the number of glasses a bottle of champagne holds, Mr Nepal suggested in his February statement, about five.

*The evidence of witnesses who saw or heard the collision*

9. A number of people saw and/or heard the collision.
10. At about 5.00PM Ms Kathryn May, was driving her car. She had just turned into West Bay Road. Her room-mate, Carolyn McGuire was in the front passenger seat. Ms May said that although it had been raining earlier, by then it was only cloudy. She said that having just turned onto West Bay Road in the direction of George Town, she saw the Mustang coming from the opposite direction. It passed under the pedestrian bridge by the Ritz Hotel heading towards West Bay. It was not out of control when she first saw it. She initially stated that "it appeared that the car ... it seemed like it was going faster than usual or needed for that specific area and the road conditions and the way it swerved like it was about to enter in my lane and then quickly it was almost like an overcorrection, it just darted right back into the lane that it should have been". She spoke of, "The Mustang was being driven faster than it needed to be driven, just knowing that as

many people across (sic) the street and the speed limit there. It appeared that it was going faster, also knowing that the roads were wet from the rain, taking that into account.” In cross examination she accepted that she had thought the speed limit was 25 (and not 40 mph) as at the time she saw the car spinning, as she described it, she thought it was going faster than the speed limit.

11. Ms May stopped to help. When she arrived she saw a man on the left and a woman on the right sitting in the front of the Mustang. She paid no further attention to them until later. She went to help Mr Shubert. After the emergency services had arrived, Ms May looked towards the Mustang. A woman was sitting in the right (passenger) side. Another woman was standing beside her at the right front passenger door. The man she had seen in the driver’s seat saw was not there. She had not seen where he went.
12. Under cross-examination Ms May agreed that generally “from her experience of driving up and down West Bay Road, when it rains from time to time, that there is standing water on the road occasionally.” She said, “...she was not certain whether at that precise moment [of the collision]... there was standing water which may have contributed to the spinning (of the Mustang).”
13. Carolyn McGuire, Ms May’s passenger, heard Ms May gasp. When she looked, she saw the Mustang coming into the middle lane heading towards them, before swerving quickly back towards the pavement. The collision then occurred. After Ms May had stopped, they both went to help Mr. Shubert. Ms McGuire looked at the stationary Mustang on the pavement. She saw two people in the car. The driver was a man. The passenger in the front seat was a woman. The driver left the vehicle. He was not injured. Ms McGuire then turned her attention to Mr. Shubert. She said it began to rain, although not heavily (light to medium).
14. She agreed in cross-examination that she told the police that when she saw the Mustang it was travelling at a normal speed coming into the middle lane. It then swerved back into the northbound lane at a faster speed.
15. Some people employed by the utility company CUC were working in the vicinity. Mr Ricardo Heron was standing by a truck on the southbound side of West Bay Road in the vicinity of the Ritz Carlton Hotel. He noted it had been raining hard earlier, but at the time he was standing with his colleagues, it was drizzling. The roadway was wet. He heard the sound of skidding tyres “like when it doesn’t get good traction.” This drew his attention to the Mustang coming “fast” up the

road. He said that it was heading over from the left hand side to the right hand side because it was swerving fast in their direction. He said he heard the loud sound of the vehicle, a very heavy sound, before he heard the tyres. He said he saw the Mustang before it swerved into the middle lane. It appeared to be travelling very fast. It collided with Mr and Mrs Shubert.

16. Mr Heron said he and his colleagues went to assist. When he passed the Mustang, the male driver was out of the vehicle on his cellphone. The driver came out of the car. He was looking in the direction of Mr and Mrs Shubert while on the phone. Mr Heron said he was unsure whether the driver was talking to anyone. In cross-examination he said no other person was around the car at the time. Mr Heron said a lady was in the passenger side.
17. Mr Goldbourne, another CUC employee, had his back to the road. He heard the sound of tyres screeching, like the engine of a vehicle was revving coming towards them. He turned around and saw the Mustang travelling sideways, like it was going out of control heading towards them. It swerved away from them. He did not see the collision as the CUC service truck obstructed his vision. He immediately went to see what was happening. He saw the aftermath of the collision. He said a man was standing to the left of the car with a cellphone in his hand.
18. Having searched in vain for a first aid kit, Mr Goldbourne went towards Mr and Mrs Shubert. As he crossed the road he said he saw the man with the cellphone toss it into the Mustang.
19. Mr Brandon Cadle, another CUC employee, saw the Mustang heading in the direction of West Bay. He heard the sound of a car accelerating, then the screeching sound of tyres. He heard, but did not see the collision. He said the Mustang travelled along West Bay Road at a fair speed, almost matching the speed limit. As he continued to observe it, he saw the driver of the car. He said he heard the acceleration of tyres. He heard the screeching and then the impact.
20. After the collision Mr Cadle went across the road. He said the driver of the Mustang was holding a black object in his hand. He was moving his fingers on it. He assumed it was a cellphone. He too said the driver then tossed the object into the Mustang.
21. There were other witnesses. Ms Kelli Travers-Peters was watching the CUC workmen across the road. She said it had been raining most of the day. She heard the sound of an engine revving, as though someone was trying to pick up speed. She described it as “gunning the engine”. She then heard tyres squealing followed by an impact. Mr. Shubert, as it was, flew into the air. She ran to assist. She saw Mrs Shubert lying injured without anyone tending to her. She helped Mrs Shubert until others took over. She said it had stopped raining by the time of the collision.

22. In cross-examination she said that when she was there, no-one approached Mrs. Shubert and offered her first aid. She did not tell anyone this was not necessary. However, while she was tending to Mrs. Shubert a man approached from the area of the Mustang. He had a pair of glasses in his hand. He squatted down, and tried to hand her the glasses. He said "here." She told the man she could not let go of Mrs Shubert's head. The man again tried to hand the glasses to her. She repeated what she had said. The man addressed Mrs Shubert. He said, "I'm sorry, I'm so sorry, I'm so, so sorry." He then placed the glasses on Mrs. Shubert's stomach and walked away to the right. It had begun to rain by the time she was helping Mrs Shubert.
23. Ms Travers-Peters described the man as Caucasian, in his fifties, nicely dressed, wearing a "plaid" pattern shirt with his shirt sleeves rolled back, darker brown hair with a receding hairline, like dirty blonde and brown combination. He did not have any injuries of his own. He did not try to assist Mrs Shubert.
24. Ms Travers-Peters said that after the emergency services took Mr and Mrs Shubert away, the female passenger of the Mustang, whom she had earlier seen, was still there. She left with two people in the direction of the Ritz Carlton.
25. Ms Lisa-Ebanks heard the collision. She saw Mr and Mrs Shubert fly in the air. She called 911. As she was heading out towards the scene, and on the phone, she passed a white male dressed in a plaid shirt with sleeves rolled up twice, blue jeans with a big buckle in the middle. She asked him twice whether she could help him. He did not answer. He went off in the direction of a laundry room which is adjacent to a wall at the boundary of the Ritz Carlton.

*The appellant's written account*

26. The Appellant was interviewed on 25.02.2015 at George Town Police Station in the presence of counsel. He provided a written statement as his account of the incident. He said concussion had affected his memory of events. He said that what he recalled was supplemented by details he had learnt since the accident. In that account, he said, among other things, that he monitored how much he drank because he was the designated driver. The Ritz stopped serving alcohol at 3.00PM. He had limited recollection of events from either 2.00PM or 3.00PM onwards. He had been informed that he left brunch at about 5 pm. He clearly remembered doing so. He went on to say:

"I was in first gear when I encountered the wet road surface. I had travelled about 100 feet on leaving the Ritz. I estimate that my speed was around 20 miles per hour (add or

subtract 5 miles per hour). On encountering wet roads the rear wheels started spinning. I depressed the clutch and put the car into a higher gear to stop wheel spin.

On releasing the clutch in second gear, the rear of the car kicked violently to the left. I lifted the accelerator and turned the steering wheel to the left to try and correct the slide. I was able to correct the first slide but I could feel the rear of the car sliding too fast to the right to be able to correct it. Nevertheless, I turned the wheel to the right as fast I could but there was nothing I could do...”

27. He said he hit the brakes when he felt the back of the car come around too far to be controllable. The car spun a complete 360 degrees and ended up crossing the kerb. The right rear wheel (passenger side) hit the kerb first. The car was going backwards at the time. After hitting the kerb the car slid around and came quickly to rest.
28. He said he assumed that he had hit his head during the accident but was not aware of any injury or pain at the time. He had not been aware of the pedestrians but could see a woman lying about 20 feet from the car. He had not seen any other injured person. He ran from his car to the injured woman, identified himself as a first responder, and asked if he could help. The injured woman was non-responsive. He took this as consent. Whilst he was treating her, he heard another woman’s voice telling him to leave her alone. He assumed that that was the voice of the injured woman’s friend and so he complied. He stood up and went to call 911. He did not have a mobile phone. He intended to go back to the Ritz but went into the wrong building (the Residences at the Ritz). He became confused and panicked about not finding the reception desk. He thought he had walked onto the beach and around to the restaurant where he had brunch. He did not remember anything else. He had a faint memory of waking up at the Grandview condominiums (where he lived some years ago). He remembered waking up in some bushes on the golf course at Britannia (the area where he lives). He then walked home, woke his wife and learned that a second person had been injured. He took a shower and then went to the George Town Police Station with Mr Goddard.

#### *The expert evidence*

29. The jury heard evidence from two expert witnesses; Mr Redden on behalf of the prosecution, Mr Nugent on behalf of the defence. The essential issues between them can shortly be summarised. In Mr Redden’s opinion progressive and harsh acceleration by this very powerful vehicle in the wet conditions caused wheel spin and a loss of control. In Mr Nugent’s opinion excessive (but

not necessarily much) water on the road, exacerbated by poorly performing tyres in the wet conditions, caused the vehicle to hydroplane (lose contact and traction with the surface of the road), resulting in a loss of control. Mr Nugent favoured the rear left tyre as the probable culprit. In Mr Nugent's opinion, the vehicle's traction control system would have prevented wheel spin and a loss of control as described by Mr Redden.

30. Two calculations of the Mustang's *average* (our emphasis) speed were carried out. The first calculation was done over a distance of 91 feet, the second from a different point, over a distance of 73 feet to another point nearer to the bridge. The first calculation produced an average speed of 37.59 miles per hour, the second of 39.38 miles per hour. The Mustang travelled the distance between the points in 1.66 and 1.27 seconds respectively. This of course was a vehicle capable of reaching 60 miles per hour in 3.5 seconds. There was an issue as to why the average speed of the vehicle over the longer distance to the further point was less. Mr Redden suggested there had been a change of gear. Mr Nugent suggested the vehicle was slowing down.

31. There was an agreed expert statement dated 6<sup>th</sup> June 2015. Among other things, it stated:

“...2. The [average] speeds of 37.59 and 39.38 [of the Mustang] calculated by Mr Redden are agreed upon.

3. Mr Redden believes the difference between the speeds is due to rolling resistance during gear change.

Mr Nugent does not concede this point.

4. There is no physical evidence of wheel spin prior the vehicle's loss of control.

5. There is no evidence of the vehicle braking, which is confirmed by a lack of brake lights on the CCTV video.

6. Mr Redden saw no standing water on the road in the area where the car first rotated clockwise, when he inspected [the] scene shortly after the crash...Mr Redden saw no evidence of standing water in the same area on the CCTV video.

Mr Nugent believes standing water in the northbound lane contributed to this crash. Mr Nugent believes the CCTV video is of insufficient quality to determine if standing water is present.

7. Mr Redden believes no hydroplane event occurred, which is consistent with his statement of finding no standing water at the scene.

Mr Nugent believes the CCTV video is of insufficient quality to determine if standing water is present.

8. Mr Redden believes the vehicle's progressive acceleration continued until the torque overcame the contact patch between the tire [sic] and the road.

Mr Nugent disagrees that the vehicle was in an acceleration at the time of the loss of control.

9. There is a visible difference in the tread pattern between the Goodyear tires [on the Mustang] and Michelin tires. The Michelin tire has larger tread grooves.

10. There are too many factors to conclude if a different tire on the vehicle would change its wet performance...

...14. The [critical] comments regarding the Goodyear tire taken from the internet site [tirerack.com](http://tirerack.com) are the personal opinions of their respective authors [sic]...

16. The pedestrians were struck by the vehicle's rear."

32. We have reminded ourselves of the evidence of both Mr Redden and Mr Nugent. We shall only refer to some of it.
33. Mr Redden arrived at the scene at about 6:55PM, by which time it was dark. He looked for, but did not find, any tyre marks. He described tyre marks in terms of short-lived evidence. The road surface was wet. It had rained all day before the collision and had rained after it. He said the reason he saw no short-lived evidence on the road surface was because it would have been washed away. If he had inspected the road a few moments after the collision, he would possibly have seen marks. We shall return to this topic.
34. Mr Redden described the road surface as in average condition. Water had settled on the shoulder heading towards West Bay between the double yellow lines. That was at the edge of the travel lane where there were two drains. The next day Mr Redden went to the scene some 30 minutes

after it had stopped raining. He noted that water had settled in the area before the bridge in the driveway of the North Tower of the Ritz Carlton Hotel.

35. Initial examination of the Mustang revealed that its right rear wheel had been detached as a result of the collision. The tyres were in average condition and were roadworthy. They had been specifically manufactured for the Mustang. Further examination found no mechanical defects.
36. As to the 37.59 average speed calculation, Mr Redden expressed the opinion that he would have expected the Mustang to have entered the area at less than 37.59 mph and left the area at more than that. He had no measurement of the speed at which it entered the area. He could not make any calculation.
37. In cross-examination Mr Redden accepted that on the basis of the CCTV footage, the Mustang did not accelerate from rest but from an estimated speed of approximately 10-15 mph.
38. Based on his review of the CCTV footage and his calculations, Mr Redden concluded that the collision was due to the appellant's harsh acceleration of the Mustang on a wet road. That caused both rear tyres to spin and slip and traction to be lost. He further concluded that the collision could have easily been avoided if the appellant had applied the throttle in a much gentler manner, taking into account the wet road conditions.
39. Mr Redden added that the Mustang was equipped with an 'Advance Trac system'. It switched on when the ignition key was switched on. This system is designed to limit and manage wheel slip and sideways movement. Based on his observations of the Mustang on the CCTV footage he opined that it was a possibility that either the system was switched off, or some of its systems were defeated. It was impossible to say.
40. Mr Redden said he saw no standing water on the road in the area where the car first rotated. There was no evidence of water in that area on the CCTV footage. He did accept however, that the CCTV footage was of insufficient quality to determine whether there was any standing water in the road in the noted area. He stated that based on his extensive knowledge of the road, and primarily, his observations of it when he initially attended post collision, and again the following day 30 minutes after a similar degree of rainfall, that there would be no standing water on that specific area of roadway. There could be no possibility of a hydroplane event.
41. As the agreed statement makes plain, in Mr Redden's opinion the Mustang's progressive acceleration continued until the torque overcame the contact patch between the tyre and the road.

He said that because of the harsh acceleration and consequent increase in torque on the wet road, traction between the rear wheels and the road would decrease. Consequently the tyres would spin out resulting in a squealing sound.

42. Mr Redden said that the Mustang's clockwise rotation was caused by the appellant shifting gears during the wheel spin and loss of traction. He explained the motion of the Mustang depicted in the CCTV footage in the following way. When the tyres squealed the appellant changed gears. That resulted in a further loss of traction. It caused the Mustang to rotate clockwise, at which point Mr Courtney overcorrected the clockwise motion. That caused it to make a counter-clockwise motion. It resulted in a loss of control.
43. Mr Redden expressed the opinion that there are too many factors to say if a different tyre on the vehicle would have changed its wet performance. He said that a survey on Tyrerack.com (paragraph 14 of the agreed statement) did not help in relation to any determination of performance of the tyres on the appellant's car.
44. In Mr Redden's opinion, his analysis was bolstered by the evidence of the witnesses, such as Mr Cadle and Ms Travis-Peters.
45. In Mr Nugent's opinion the collision was caused by the hydroplaning of the left rear tyre. Once that happened, the appellant would have no control over the vehicle. He said his opinion was based on the evidence he had heard and the weather conditions on the day of the incident. Water would have overwhelmed the drainage system and pooled. Although the pooled water may have been visible to the naked eye of the driver, it is not unusual for it not to be. He said no other explanation made sense. The appellant was able to steer the car back to the left after it had hydroplaned because the front tyres returned to contact with the road. They ceased to hydroplane. The rear wheels then whipped around. The appellant lost total control again. Hydroplaning could defeat the Trac System. In the Tyrerack.com survey the tyres mounted on the appellant's car ranked worst in hydroplane resistance and wet traction. In cross-examination Mr Nugent accepted that there was no indication of standing/pooled water on the road surface from the CCTV footage or from any witness. His only indication of there being standing water present on the road surface came from the appellant. He accepted that he could not explain why only the left, and not the right, front tyre hydroplaned, although it was likely the right front tyre would have travelled through more standing water than the left rear tyre on the basis that the Mustang was travelling (in a straight line) prior to swerving to the right in a clockwise motion. Mr Nugent accepted that the evidence of squealing tyres would support Mr. Redden's

conclusion. He did not think that was likely to have occurred. He said he regarded the evidence of eyewitnesses as the most unreliable evidence. He preferred the physical evidence.

46. In answer to a question posed by the jury, Mr Nugent said that although a layman would think that the car would initially swerve to the left, rather than the right, where there is loss of traction on the left rear wheel due to hydroplaning, with the right wheel continuing to have contact with the road surface and traction, the contrary was the case.
47. The appellant gave evidence. He stood by his prepared statement. He said he did not know how much he drank because the drink was being topped up. He indicated he had drunk no more than a small flute per hour. He was drinking slowly because he knew he had to drive. He ceased drinking at about 3.00PM. He was unaffected by what he had drunk. Mrs Courtney said she was sure the appellant drank carefully and in the main coffee and water. The receipt showed coffee and water were consumed.
48. Mrs Courtney described the appellant being distraught and disheveled when he arrived home. For two weeks he struggled to think straight. He saw several doctors.
49. No medical evidence was called.

*The written directions*

50. There were agreed written directions. They were in the following terms and recounted during the summing-up:

“Jury Directions – The Indictment

Separate Consideration

There are some common elements in the offences but it is very important that you consider each count separately and decide on your verdict on each count separately.

Counts 1 and 2 – Inflicting Grievous Bodily Harm

It must be proved that Mrs Shubert (Count 1) and Mr Shubert (when you turn to consider Count 2) suffered grievous bodily harm. All that means is really serious bodily harm. You will probably have no difficulty deciding that the dreadful injuries they each sustained are properly described as really serious bodily harm.

Next it must be proved that the Defendant inflicted that harm on each of the Shuberts. There is no doubt that the car he was driving hit them both so you will doubtless decide that the Defendant inflicted the harm.

Next it must be proved that the harm was inflicted unlawfully. The word 'unlawfully' in the case of an offence of inflicting grievous bodily harm simply means that the harm was not inflicted (i) in self-defence, or (ii) in defence of other persons or property, or (iii) for the purpose of the prevention of crime. Obviously none of those defences applies here and you can be sure the harm was inflicted unlawfully.

Finally, and this is the issue for you to decide, it must be proved that the harm was inflicted 'maliciously'...Maliciously has a special meaning here...For your purposes it means recklessly.

'Recklessly' (for the purposes of Counts 1 and 2)

To prove that really serious harm was inflicted recklessly the Crown has to prove 4 things:

1) that there was a risk that **some bodily harm (not necessarily really serious harm) might result to some person(s)** from the Defendant driving that car in the circumstances existing at the time.

Those circumstances include...

(a) the general manner of his driving, the speed at which he drove, whether he accelerated harshly, the tyres fitted to the car,

(b) the nature, condition and use of the road at the time including the wet surface, the possibility of encountering standing water, the warnings of the existence of CUC works adjacent to the road,

(c) the number of pedestrians in the area, the amount of traffic on the road, his knowledge of (d) the capabilities and characteristics of the car, and the amount of alcohol he had consumed.

You must decide whether such a risk existed. If you are sure such a risk existed, then you go on to consider whether it is proved:

2) that the Defendant was aware of the risk, and

3) that, in the circumstances known to the Defendant at the time, he was aware that it was unreasonable to take the risk, and

4) that the Defendant went on to take the risk.

If you are not sure of any one of those 4 elements you will find the Defendant not guilty. If you are sure all 4 elements are proved, you will find him guilty.

#### Alcohol

You are entitled to consider alcohol in deciding the question of recklessness in the following way

- first when you consider whether the amount of alcohol consumed is a factor in your assessment of whether there was a risk of **some bodily harm** resulting from the act of driving (1<sup>st</sup> element) and second, when you consider whether the Defendant would have been aware of the risk (2<sup>nd</sup> element) and would have been aware that it was unreasonable to take the risk (3<sup>rd</sup> element) and would not have taken the risk (4<sup>th</sup> element) if he had been sober.

If you think alcohol consumption may have been insufficient to have played any part at all in that occurred or no sufficiently substantial part (and that is a matter for you to decide) then you must ignore it and put it out of your minds.

If however you are sure that alcohol did contribute to the risk and you are sure that, because of self-induced intoxication, the Defendant was unaware (i) of the risk his driving was likely to pose and (ii) that it was unreasonable to take the risk of driving, but that he would have been aware of the risk and would not have taken it if had he been sober, you will treat him as if he was aware of the risk and aware that it was unreasonable to take it. If you are sure of those matters, his intoxication does not provide him with a defence.

#### Post-crash behaviour

When you are deciding the issue of recklessness, you are entitled to take into account, if you consider it appropriate to do so, the post-crash behaviour of the Defendant. But you can only do so if you are satisfied that his departure from the scene was because he was aware that he had driven recklessly.

If, on the other hand, you think that he may not have been motivated by such awareness and instead think that there is a reasonable possibility that he

(a) may have gone to find help or to call 911, or

(b) may have had no concerns about his manner of driving but fled the scene out of fear of being breath-tested by the Police or arrested or losing his licence, or

(c) may have left for some other reason unconnected to any reckless driving,

then his post-crash behaviour is of no relevance to the issue of recklessness and you should ignore it. Whatever you think of such behaviour, it would not be a factor in your assessment of recklessness.

Therefore if you are sure that the Defendant unlawfully and recklessly inflicted really serious injury to the Shuberts, you will find him guilty on both charges. If you are not sure that the Defendant unlawfully and recklessly inflicted really serious injury to the Shuberts, then you will find him not guilty on both charges.

Counts 3 and 4

Counts 3 and 4 are alternative offences. You cannot convict the Defendant on both Count 3 and Count 4. If you decide that he is guilty of one of those counts, you should return a not guilty verdict on the alternative count.

Count 3 – Dangerous Driving

The fact that the Defendant drove the Mustang at the time it hit the Shuberts is not disputed.

The sole question for your consideration is whether it is proved that the manner of this Defendant's driving was dangerous to the public. I emphasise that this decision is yours to make because it is your assessment of the driving that is required.

You take into account all the circumstances including factors a) to k) to be considered for the purposes of Counts 1 and 2.

For the purposes of this offence there is no requirement to prove that the Defendant intended to drive dangerously – intention is not an element of the offence.

You are entitled to consider alcohol but here you are considering whether it is proved that a sufficient quantity of alcohol was consumed as to have played a part in the manner of the driving. On this charge it has no other relevance because, when deciding dangerousness, you are not considering the state of mind of the Defendant or whether he was reckless.

The Defendant's post-crash behaviour is not relevant to your consideration of whether his driving was dangerous and you should ignore it when considering this particular charge.

You examine all the evidence and you decide if the driving was dangerous. You are not looking inside his mind. You simply decide, looking at the matter objectively, whether you are sure that his driving was dangerous.

If you are sure the driving was dangerous, the verdict is guilty. If you are not sure the driving was dangerous, the verdict is not guilty.

#### Count 4 – Reckless driving

There is no dispute that the Defendant was driving.

You must consider the same 4 elements of recklessness in the infliction of harm in Counts 1 and 2 but directing your mind this time, instead of to the risk of some harm resulting from his driving, to the risk of **an accident resulting**.

To prove that the Defendant drove recklessly the Crown has to prove 4 things:

1) that there was a risk of **an accident resulting** from the Defendant driving that car in the circumstances existing at the time. Those circumstances include factors a) to k) to be considered for the purposes of Counts 1 and 2.

You must decide whether you are sure that such a risk existed. If you are sure such a risk existed, then you go on to consider whether it is proved

2) that the Defendant was aware of the risk, and

3) that, in the circumstances known to the Defendant at the time, he was aware that it was unreasonable to take the risk, and

4) that the Defendant went on to take the risk.

If you are not sure of any one of those 4 elements you will find the Defendant not guilty. If you are sure all 4 elements are proved, you will find him guilty.

## Alcohol

You are entitled to consider alcohol in deciding the question of recklessness for the purposes of Count 4 when considering whether there was a risk **of an accident resulting** but only in accordance with my directions in relation to Counts 1 and 2.

## Post-crash behaviour

When you are deciding the issue of recklessness, you are entitled to take into account, if you consider it appropriate to do so, the post-crash behaviour of the Defendant but only in accordance with my directions on this topic in relation to Counts 1 and 2.

Therefore if it is proved so that you are sure that the Defendant drove recklessly, you will find him guilty. If you are not sure he drove recklessly, then you will find him not guilty.

## **The agreed route to verdict**

You must apply the detailed directions I have given you when you go through the following questions and decide on your answers.

## Counts 1 and 2

Deal with Counts 1 and 2 separately as follows answering the following questions in relation to each count:

### Question 1

Did the victim sustain Grievous Bodily Harm (ie: really serious bodily harm)?

If you are sure that he/she did, go to Question 2. If you are not sure, the verdict is Not Guilty.

### Question 2

Did the Defendant inflict that harm on the victim (ie: by colliding with him/her)?

If you are sure that he did, go to Question 3. If you are not sure, the verdict is Not Guilty

### Question 3

Did the Defendant inflict that harm on the victim unlawfully (ie: not in self defence, in defence of

others, in defence of property, or for the purpose of prevention of crime)? If you are sure that he did, go to Question 4. If you are not sure, the verdict is Not Guilty.

Question 4

Did the Defendant inflict that harm on the victim recklessly (as defined)?

If you are sure that he did, the verdict is Guilty If you are not sure, the verdict is Not Guilty.

Count 3

Question 1

Did the Defendant drive his motor vehicle on a road?

If you are sure that he did, go to Question 2. If you are not sure, the verdict is Not Guilty

Question 2

Did the Defendant drive dangerously?

If you are sure that he did, the verdict is Guilty If you are not sure, the verdict is Not Guilty.

If you find the Defendant not guilty on Count 3, proceed to Count 4

Count 4

Question 1

Did the Defendant drive his motor vehicle on a road?

If you are sure that he did, go to Question 2. If you are not sure, the verdict is Not Guilty.

Question 2

Did the Defendant drive recklessly?

If you are sure that he did, the verdict is Guilty If you are not sure, the verdict is Not Guilty.

## **The appeal against conviction**

51. We should start with a general observation. Mr Aiolfi, who represents the appellant before us, was junior counsel to Mr Burke QC in the court below. As will become apparent when we go through the grounds, Mr Aiolfi is now critical of the judge in a number of different ways. He submits the directions he and Mr Burke had previously agreed were wrong or inadequate. The judge failed to give directions or rule in ways which he and Mr Burke never asked him to do and inadequately or misleadingly summed up evidence in ways which were never raised at the time. Whatever we may think about the appropriateness of Mr Aiolfi now raising these matters, we shall of course consider them on their merits.

### **Ground 1**

52. The submission is that the judge erred in law in directing the jury on the issue of the appellant's consumption of alcohol. Put shortly, Mr Aiolfi submits that given the evidence of alcohol consumption was entirely inconclusive, the issue should not have been left to the jury, there was insufficient evidence to give the direction on self-induced intoxication, the judge should have reminded the jury that self-induced intoxication was not part of the defence, the judge should have cautioned the jury that the consumption of alcohol did not by itself amount to creating a risk, and the judge did not accurately summarise the evidence going to the topic of alcohol consumption.
53. At the outset of the trial, the defence submitted that the judge should exclude all evidence of alcohol consumption as irrelevant and/or insufficiently probative and prejudicial. The judge's attention was drawn to the well known authority of *McBride* [1961] 45 Cr App R 262 in which Ashworth J, when giving the judgment of the Court of Appeal, said (pages 266-7):

“In the opinion of this court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle, two further points should be noticed. In the first place, the mere fact that a driver had had drink is not of itself relevant: in order to render evidence as to drink...admissible such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the court an overriding discretion to exclude such evidence if, in the

opinion of the court, its prejudicial outweighs its probative value. It is impossible to lay down any general rule as to the way in which this discretion should be exercised as each case must be considered in the light of its own particular facts, but in the opinion of this court, if such evidence is to be introduced, it should at least appear of substantial weight.”

54. The judge, in a ruling necessarily based on the papers, admitted the evidence of the consumption of alcohol. In doing so, he referred in particular to the evidence of Mr Nepal. Mr Aiolfi does not criticise the judge’s ruling.
55. Mr Aiolfi submits the evidence in the event fell short of what was anticipated. He submits that the contents of Mr Nepal’s February 2015 statement fell away when his attention was drawn to his 18<sup>th</sup> May 2016 statement. That became his ultimate evidence. There was no further evidence suggesting how much Mr Courtney had had to drink. Following the decision of the Court of Appeal in *Woodward* [1995] 2 Cr App R 388 (where the evidence fell considerably short of that anticipated at the outset), the issue of drink should have been withdrawn from the jury at the close of evidence, submits Mr Aiolfi, albeit no submission to that effect was made to the judge.
56. We do not agree. The jury was entitled to rely on Mr Nepal’s evidence as recounted in the statement he made shortly after the events in question. The written directions made it clear that the jury should ignore the topic of alcohol if they thought it may have been insufficient to have played any part in all that occurred. This was essentially a matter for the jury.
57. Aiolfi next submits that because of the insufficiency of the evidence self-induced intoxication should not have been part of the (agreed) direction to the jury. Moreover, he submits, the judge should have reminded the jury that the appellant did not assert he was unfit through drink, that was not part of his case.
58. In our view, the judge was entitled to give the direction he did. He was saying no more than that if they thought the appellant’s appreciation of the relevant risk for counts 1 and 2 and count 4 may have been affected by the drink he had consumed, that was no answer to any lack of appreciation of the risk. That, as it seems to us, was correct. In any event, if the jury did not think alcohol affected the appellant’s appreciation of risk, they were to ignore it. As to the complaint that the judge should have reminded the jury that intoxication was not part of the defence, that must have been patently obvious to the jury from beginning to end.
59. The next complaint Mr Aiolfi makes about the direction he had previously agreed, was that the judge should have warned the jury that consumption of alcohol could not of itself have amounted

to the relevant risk. We cannot accept that submission. The possible relationship between alcohol and risk was quite clear from the direction.

60. Finally, Mr Aiolfi submits that the judge's summary of the evidence regarding alcohol was imbalanced and partial. He did not, it is said, remind the jury of what Mr Nepal said in cross-examination. He should have referred to the CCTV evidence indicating Mr Courtney was unaffected by drink when leaving the scene. He is critical of a comment by the judge to the effect that the glass of champagne consumed by Mr Courtney before going to his table was additional to anything later consumed, whereas it was part of one of the three bottles the group consumed.

61. We have reminded ourselves of Mr Nepal's evidence. We have carefully read those parts of the summing-up drawn to our attention by Mr Aiolfi. The judge said (transcript page 24/16 and following):

“...there is no actual footage of the table, so we have the evidence of Mr Nepal...[he] says that during the [period between 12.00 noon and 4.00PM]...he served the table with three bottles of Moët champagne, each bottle containing either five or six flute glasses. So that's 15 to 18 glasses in all...that depends on whether you think Mr Nepal is right when he says it was about five glasses to the bottle or whether Mr...Pintal [another witness] is correct when he says it was about six to a bottle...

Mr Pintal also said...Mrs Courtney stopped drinking by three o'clock in the afternoon. Mr Courtney, according to Mr Nepal was served approximately four glasses of champagne, and that is what [he]...told the police when he made his statement in February 2015, although, understandably perhaps, he couldn't recall the details when seen again in May 2016.”

62. The judge referred to the 'additional' glass of champagne on entry. He then set out Mr and Mrs Courtney's accounts.

63. In our view, Mr Aiolfi's criticisms are without substance. The judge's summary of Mr Nepal's evidence was not imbalanced and impartial. Any comment was well within appropriate bounds. If the observation about the additional glass was wrong, it does not begin to amount to a material irregularity. The jury was capable itself of assessing this (as any) aspect of the evidence.

64. In the result, there is in our view no substance in the first ground of appeal.

## Ground 2

65. In the second ground of appeal Mr Aiolfi submits the judge misdirected the jury on the issue of recklessness. Mr Aiolfi makes a number of different points. He submits that it was not sufficient for the judge merely to have referred to the checklist of issues going to risk for the different allegations. It was an abrogation of his duty to fail to summarise the evidence in respect of each point set out in the checklist. He should have given guidance on what a reasonable risk was.
66. We cannot agree. Indeed, had Mr Burke or Mr Aiolfi thought that further explanation was needed, we have no doubt they would not have been slow to say so. The list was clear and understandable. It was unnecessary to add to it. The judge summed up the evidence as a whole. Adding to the list would have run the risk of further complication.
67. Mr Aiolfi further complains that guidance should have been given on whether it was unreasonable to take the risk. He submits that following the well known case of *R v G* [2001] 1 Cr App R 21, the judge should have directed the jury that a person acts recklessly with respect to a circumstance, when he is aware that the risk exists or will exist and, with respect to a result, when he is aware of a risk, that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk. As Mr Aiolfi rightly submits, this imposes an objective standard within the subjective test on the issue of whether it was unreasonable to take the risk. Whether it is reasonable for a defendant to run the risk depends on all the facts (see for example the guidance Judicial College's Crown Court Bench Book). In addition to drawing our attention to the Bench Book, Mr Aiolfi draws our attention to the current comment in Blackstone in which (at paragraph A2.9) it states:

“Driving a car carries a risk of damaging other vehicles but the degree of risk involved in driving with due care and attention is reasonable in the light of the overall balance perceived in the current social consensus...*[I]n the context in which many prosecutions are brought, there will be little if any arguable justification for taking a risk (or for taking the degree of risk which was in fact taken) and the question will simply be whether the accused was aware of that risk.*” [our emphasis]

68. Mr Aiolfi submits that the jury's attention was never directed to the objective element of the risk, merely the subjective. The jury too should have been directed to the objective standard of the ordinary prudent driver in assessing that risk. It is said, that the failure so to direct the jury's attention amounted to a fundamental misdirection and prejudiced the appellant.

69. This is another of Mr Aiolfi's submissions which fails to grasp the common sense reality of the position in the context of the present case. It seems to us inconceivable that, having regard to the risks relied upon by the prosecution, anyone could seek reasonably to run them. There could, in the words of Blackstone, have been "...very little if any arguable justification for taking the risk (...or degree of risk...)." We doubt the defence put forward such a proposition. We apprehend that was why the defence agreed the direction in the form placed before the jury.
70. Mr Aiolfi takes another point, equally without merit. He submits that section 76 of the Cayman Traffic Law (2011 Revision) requires for a conviction of reckless driving, driving of a standard far below that of a reasonable and competent driver: in other words, driving of a standard worse than careless driving. That section provides:
- "A person who drives a vehicle...on a road dangerously or recklessly, or at a speed or in a manner...which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road...and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road...commits an offence."
71. As the Respondent points out, there is nothing within that provision which provides that to convict of reckless driving, the tribunal has to be sure that the driving was of a standard far below that of a reasonable and competent driver. However, it seems to us Mr Aiolfi is correct in that regard. It cannot have been the intention of the legislature that merely to drive carelessly is sufficient to found a conviction for reckless driving. It must have been the intention that the standard of driving for both dangerous and reckless driving is the same: in other words, a standard of driving far below that sufficient to convict of careless driving. Mr Aiolfi submits that in directing the jury in respect of Count 4, the judge should have referred to that standard of driving. His failure to do so amounted to a misdirection.
72. In support of his submission, Mr Aiolfi relies on the appellant's acquittal of dangerous driving on count 3. He submits it follows that the jury were not sure that the appellant did drive at a standard far below that of the reasonable and competent driver. Had they been, they would have convicted on count 3, which, following the written directions on route to verdict, they would have considered before count 4.
73. In our judgment, this ignores the reality of this case. In a nutshell, the prosecution's allegation was that the appellant, in a built up area with pedestrians around, accelerated harshly in his very

powerful car in wet conditions, resulting in a complete loss of control of his vehicle, when (in respect of counts 1 and 2) he appreciated (or absent drink, would have appreciated) that he was running the risk of injuring people. That is what the jury was in the event sure of. It seems to us inconceivable that in such circumstances the jury could have concluded other than that the driving was of a standard far below that of the reasonable and competent driver.

74. Moreover, counts 3 and 4 were alternative counts. Given, as it seems to us, count 4 is the more serious of the two, and to a substantial degree reflected counts 1 and 2, counts 3 and 4 might more happily have been in reverse order. That said, it seems to us the jury would have been bound to consider them together. By then they would have decided that the appellant's conduct had been reckless in the terms of counts 1 and 2. It was then but a small step to convict on count 4. What we cannot accept was that the verdict on count 3 may mean that the jury concluded the appellant's driving was no more than careless. That seems to us a wholly unrealistic suggestion in the circumstances.
75. Finally on Ground Two, Mr Aiolfi criticises the direction of the judge regarding his client leaving the scene, only to reappear at about 5.00PM the following day. We have set out the direction above. In short, the judge said that that conduct should only be held against him if the jury was satisfied he left the scene because he was aware he had driven recklessly. Mr Aiolfi submits there were many reasons why the appellant might have left (an obvious one being he feared he had drunk too much). The judge should have canvassed them. To leave the issue in that way inexorably linked leaving scene with driving recklessly, which was prejudicial to the appellant.
76. The direction given by the judge (and agreed by all) limited the circumstances in which the prejudicial effect of the appellant leaving the scene could be held against him. It gave to the jury the option of considering 'innocent' reasons as to why he might have left which they would have to ignore. It would not be surprising if the defence thought the direction rather favourable to the appellant. It was not in our judgment necessary for the judge to spell out in more detail the 'innocent' reasons.
77. We reject the submissions on Ground 2.

### **Ground 3**

78. In what we are bound to say we find a surprising submission, Mr Aiolfi submits the judge erred by not withdrawing the case from the jury. No submission that he should do was ever made to him.
79. Mr Aiolfi, in detailed, jury-like submissions, seeks to analyse the evidence. We shall try shortly encapsulate his submissions. We make it clear that we have carefully considered them in their detail. He submits that Mr Redden fundamentally misunderstood the eyewitness evidence. His reliance on it was misconceived. For the most part, what the eyewitnesses saw or heard related to events after the loss of control. Their evidence was consistent with hydroplaning and did not support Mr Redden's hypothesis. The prosecution did not calculate the rate of acceleration performed or explain when it becomes harsh. The two speed calculations suggested the vehicle was slowing down. Mr Redden speculated that there had been a gear change to explain it. There was no physical evidence to support Mr Redden's hypothesis of wheel spin (although we observe that in his prepared statement the appellant stated that "the rear wheels started spinning" when he was driving at what he put at no more than 25 miles per hour). The vehicle's safety systems would have prevented a loss of control. There was nothing to suggest they had been switched off. Only hydroplaning could explain what happened. There was no evidence of the vehicle 'fishtailing' such as would happen under fast acceleration. Mr Redden's consideration of the Mustang's performance potential was irrelevant. He was mistaken regarding a whole series of facts, some of which are set out above. He was wrong regarding his evidence of a lack of standing water (a necessary component of the hydroplaning hypothesis). He failed to take into account a series of facts or considerations. In particular, he failed to give any or sufficient weight to the CCTV footage which did not support his conclusion. It suggested the vehicle travelled in a straight line within the speed limit giving no cause for concern. The lay witnesses did not suggest a loss of control. Mr Redden failed to give sufficient weight to the criticisms of the Mustang's tyres.
80. We cannot accept Mr Aiolfi's submissions. There was plainly no submission at the close of the prosecution (or at any other time) because such a submission was bound to fail. The Mustang reached an *average* speed just below the speed limit in a short time. The eyewitness evidence when taken as a whole tended to support Mr Redden's hypothesis: tyres squealing followed by loss of control. The impression gained by the witnesses of speed in all the circumstances just

prior to the loss of control was admissible and relevant. The power of the vehicle was plainly relevant in the circumstances. Mr Redden's evidence about the absence of standing water at the relevant place on the day, on the next day following rain and as someone familiar with the area was relevant. We were shown (as was the jury) a defence photograph taken more recently and after rain. It showed standing water. However, as became apparent, it was of limited value. It did not depict the relevant area.

#### **Ground 4**

81. Mr Aiolfi submits as his fourth ground that the judge failed to sum up essential parts of the defence expert evidence. As will become apparent, for good reason this was not a matter drawn to the judge's attention at the time.
82. Again, we shall seek to summarise Mr Aiolfi's submissions.
83. It is said the judge failed to mention to the jury that the only way control could have been lost was by hydroplaning. This seems to us a point wholly without merit. The two different hypotheses of loss of control are set out in paragraph 7 of the expert's agreed statement. Mr Nugent's hypothesis is referred to in the summing up at page 37/19. Mr Aiolfi tells us this point was the focus of the defence speech. It seems to us the two competing hypotheses of the loss of control underlay the whole of the summing-up.
84. It is said the judge dealt inadequately with a fundamental part of the defence case, namely the defective tyre design for wet driving conditions. We do not agree. At page 37/4 and following of the summing-up the judge referred to the website [tirerack.com](http://tirerack.com) (see paragraph 13 of the agreed experts' report). He referred to the fact the tyres were recommended by Ford and said to be optimised for driving in the wet.
85. In our judgment the summing-up cannot be criticised in this regard. The issue between prosecution and defence on the tyres and hydroplaning was absolutely clear to the jury. The judge dealt with it in a way which cannot be impeached. We reject Mr Aiolfi's submission.
86. Finally in respect of this ground, Mr Aiolfi submits that the defence having raised it, it was for the prosecution to disprove the defect in the tyres. As we understand it, he is submitting that that in terms should have been mentioned by the judge (albeit no-one so suggested at the time).

87. This again seems to us a submission without merit. To convict, the jury had to be sure that hydroplaning did not occur. In deciding that issue, they had to consider the tyre issue. On the basis of the directions they received on the burden and degree of proof, it must have been plain to them that if they thought the tyres may have been defective and caused hydroplaning, they were bound to acquit.
88. In short, there is nothing in Ground 4.

### **Ground 5**

89. Ground 5 suggests that the judge did not sum up the expert evidence in a balanced way. Again, we shall simply summarise Mr Aiolfi's lengthy and detailed submissions. To some extent they repeat submissions previously made.
90. The judge said this about Mr Nugent's evidence (page 39/2):
- “Mr Nugent could find no evidence of harsh acceleration. He thought the car was decelerating, and thought the eyewitnesses who spoke of seeing and hearing the car accelerate may have been mistaken in some way. Eyewitnesses, he said, are most unreliable. They may have heard what happened after traction was lost. He thought the speed calculations themselves showed a small drop in speed which could be accounted for by a loss in traction.”
91. Mr Aiolfi is critical of what the judge said. He should have reminded the jury of the agreed average speed and the indication of the vehicle slowing and not spoken in terms of Mr Nugent's belief. In our judgment, there is nothing in this point, not least because the jury had in the experts' agreed statement the agreed measured average speeds.
92. At page 35/1 of the summing-up, having referred to the average speeds, the judge said:
- “I must emphasise that these are average speeds. We do not know what the speed was at the point which the measurement began or at the point where it ended. It could have been travelling at a steady 37 or 39 miles per hour. We simply do not know if the speed was steady or not.”

93. Mr Aiolfi submits the judge should have balanced this with a reference to Mr Nugent's evidence that it would not have been possible for the Mustang to have exceeded 39 miles per hour and then slowed to 37 without braking. No brake lights were visible on the CCTV.
94. There is further criticism of the passage at page 39/3-6 (paragraph 90 above) regarding the eye-witness evidence. It is said the only witness who heard acceleration was Mr Cadle. Moreover, Mr Nugent said what Mr Cadle heard was consistent with hydroplaning. There was we observe too the evidence of Ms Travis-Peters of a sound as though someone was "gunning the engine to pick up speed."
95. Mr Aiolfi submits the judge failed fairly to deal with the question of the absence of tyre marks on the when Mr Redden first came to inspect. The judge said (page 35/15):
- "If there was harsh acceleration, which Mr Redden favours as the cause of the loss of control due to wheel spin, there would be no marks to be seen on the road due to rain unless you were able to inspect immediately. He says you...hear tyres squeal, which may be of some significance when you come to the eyewitness evidence."
96. Mr Aiolfi submits that there was other relevant evidence on this topic. Mr Redden said short-lived marks might disappear when the road had dried up. Marks left when the vehicle lost control were still visible. The judge should have mentioned these matters. The Respondents observe that Mr Redden later said that he understood it had rained again after the collision and before his arrival, which would have washed any marks away.
97. Mr Aiolfi is also critical of the judge's remarks about the lay witnesses' evidence. He should, submits Mr Aiolfi, have referred to Mr Nugent's evidence to the effect that their evidence is consistent with hydroplaning. However, as set out in paragraph 90 above, the judge, in referring to the eye witness evidence, did say (page 39/8):
- "...[the eyewitnesses] may have heard what happened after traction was lost."
98. Mr Aiolfi is critical of what he submits was the judge's failure to highlight a conflict in Mr Redden's evidence as to whether there was wheelspin. He is further critical of the judge not in terms reminding the jury that Mr Redden agreed that hydroplaning can cause the braking and traction system to be defeated.
99. Finally in respect of Ground 5, Mr Aiolfi submits the way the evidence regarding the presence of water on the road was dealt with was unfair. At page 33/23 and following the judge said:

“...Mr Redden said that although standing water can accumulate at the side of West Bay Road where the yellow lines are, it does not, due to the camber of the road, gather on the carriage way where this car was being driven. He could see no evidence of pooling water on the carriageway.”

100. Mr Aiolfi submits that Mr Redden said that water never pooled in the part of the road where the vehicle was driven. The vehicle was being driven in the left-hand lane. Mr Redden he submits, did agree that sometimes rainwater did back up through the drains. However, as it seems to us and as the Respondents submit, the crucial issue was the presence of standing water in the area where the control of the vehicle was lost. Mr Redden’s evidence was adequately summarised by the judge. It was based, in the round, partly on local knowledge and experience, partly on the limited help provided by the CCTV and what he found the following day.
101. We have already indicated our view regarding some of the criticisms made by Mr Aiolfi. It seems to us that taken in the round, there is a lack of reality about Ground 5, involving as it does a minute analysis of the summing-up. The issues in this case were clear. When viewed in the round, they were adequately and fairly summarised by the judge. It was not incumbent on him to deal with each aspect of the evidence. There is in our judgment no substance in Ground 5.

### **Ground 6**

102. In this ground, Mr Aiolfi submits that the judge failed to sum up key evidence in a fair and balanced way. There is some repetition of previous submissions. We again will try and summarise the points raised in this ground as shortly as we can.
103. When referring to what Mr Courtney said in evidence, the judge said (summing-up, page 30/15):

“...As he went under the bridge, he experienced some wheel slippage, but he changed up a gear and that dealt with it. He later described that as slight loss of grip with a slight loss of acceleration, but only the driver would have noticed. And there’s no suggestion of water pooling at this point in the road and the car is under the bridge, so at most the road here would be merely wet. And this is some distance before the loss of control you see on the CCTV camera.

It’s a matter for you, but it appears that the defendant ignored this earlier loss of traction and dismissed it as unimportant. Was it an early indication that the road surface was slippery or that he was not driving sufficiently carefully? These are matters for you.”

104. Mr Aiolfi submits that those comments were prejudicial to the appellant. Either he was aware of the risk or he was not driving carefully. He further submits the judge should have balanced that comment by reminding the jury the defendant had said he had successfully dealt with that issue. Also, that he failed to provide any balance by pointing out the time to react was momentary.

105. There is also criticism of the judge's summary of Mrs Courtney's evidence. The judge said (page 31/18):

“Mrs Courtney in cross-examination, was referred to her statement...in which she had said that the car started skidding all over the road as soon as they left the Ritz. She said she didn't mean to say it happened as soon as that. It's a matter for you whether that account echoes what the defendant said about that earlier loss of traction, or whether she was in fact referring to final loss of traction in which the accident occurred.”

106. Mr Aiolfi submits there was no evidence of such loss of traction. The CCTV evidence does not suggest it, nor does any eye-witness. The comment should not have been made.

107. Finally in respect of this ground, Mr Aiolfi is critical of what the judge said about standing water.

108. The judge said (page 32/4):

“The defendant said he saw no standing water on the road ahead of him, but the road was wet...the photos taken...this week [show]...standing water by the trees...by the kerb next to the northern-most entrance of the Ritz, but none of the standing water on the area behind those trees...”

Now it's a matter for you whether on the CCTV there is any evidence of standing water on the area beside those trees. If not, it may suggest to you- it's a matter entirely for you- but it may suggest there would not have been any around the drain at that point...”

109. The judge further said (page 33/12):

“You may have to decide whether standing water played any part in this accident and, if it did not, it appears its presence in the road is merely speculative because no-one appears actually to have seen it.”

110. Mr Aiolfi submits these were extremely prejudicial comments. Both experts said Mr Redden arrived too late to see any standing water which might have been there. Kathryn May said that

while standing water does gather in that part of the road, she could not remember if there was any. Both experts said the CCTV was not of sufficient quality to determine whether or not there was any standing water.

111. As it seems to us, these were all comments the judge was entitled to make. The jury could assess the evidence of Mr and Mrs Courtney. They had Mr Courtney's account in his written statement. They could not but have been acutely aware of the issue of standing water and the evidence with respect to it. In the final analysis, there was no evidence of standing water in the area where traction was seemingly lost, as the judge was entitled to point out.
112. We reject the submissions on Ground 6.

### **Ground 7**

113. In Ground 7 Mr Aiolfi submits that the judge should not have reminded the jury of the evidence of speed which had been given by the witnesses. There were agreed average speed calculations. On the facts of this case, that is all that should have been said on the topic. In fact, having said that the jury was entitled to prefer one expert over another or reject both, he summarised the eye witness evidence going to speed (page 41/8 and following). He failed too at that point to remind the jury of the agreed evidence.
114. We do not agree with Mr Aiolfi. The judge was entitled to remind the jury of the evidence they heard. It would have been surprising had he not. The jury was entitled to have in mind the impressions the witnesses gained. They were perfectly capable of putting that evidence into the broader, agreed evidence. What he said did not amount to inviting the jury to disregard the agreed evidence (which in any event was of an average speed only). As to reminding the jury of the agreed evidence on the topic, the judge had previously summarised it. They had it before them in the agreed expert statement.
115. We further reject a submission that the judge failed accurately to summarise the witnesses' evidence.
116. In the result Ground 7 fails.

### **Ground 8**

117. In his final ground, Mr Aiolfi submits that the judge erred in directing the jury on identification. This submission revolves around the allegation that the person by the car apparently making a

call on his cellphone was the appellant. The witnesses spoke in terms of the user of the phone being the driver. Mr Aiolfi submits that the jury should have been warned of the dangers of such an identification (albeit no-one made such a suggestion to the judge at the time).

118. This is a misconceived submission. This was not identification evidence in the terms of *Turnbull* [1977] QC 224. It did not amount to an identification of the appellant individually. It was evidence of the driver being the person having a cellphone which he ultimately threw into the Mustang. Whether that was right or not was for the jury on the basis of the evidence they heard. They were entitled to conclude it was the appellant.
119. A further point without merit is made regarding the so-called identification evidence. The appellant was not offered an identification parade. The judge, submits Mr Aiolfi, should have warned the jury that he had been deprived of an important procedural safeguard. In our view there was no obligation to offer an identification parade in the circumstances. Not offering one did not deprive the appellant of an important procedural safeguard. No warning was necessary.
120. Mr Aiolfi is also critical of the judge's comments regarding the cellphone. The judge said (page 3/1):

“...the reference that has been made in the speeches to telephone evidence. You don't know what is in that evidence. You would be speculating if you do so, so ignore it is my advice.”
121. Mrs Courtney's phone made no calls at the relevant time. That was in the admissions. The appellant said he made no calls. He said that his relevant cellphone records had been disclosed to prosecution. Some had been provided by the appellant's secretary during the trial. There was an issue about whether they were from the relevant service provider.
122. As the Respondents submit, the evidence in respect of the cellphones came to this. Three eye-witnesses said the driver of the Mustang had a cellphone or a device resembling one. No-one could say a call was made. The Appellant said he had made no calls and cited his evidence in support. It is not necessary to set out what exactly the judge said regarding this straightforward issue. We do not accept a submission from Mr Aiolfi that the judge's summary of the witnesses' evidence regarding the alleged cellphone was inadequate or that the matter was inappropriately dealt with in the circumstances.
123. In our view there is nothing in Ground 8.

124. **The appeal against sentence**

*The judge's sentencing remarks*

125. As he was entitled to as the trial judge, the judge set out his conclusions in robust terms. In short, he said the conviction was on the “clearest possible evidence,” that it was clear the appellant “fled” the scene leaving the victims lying there, that his first thought was for himself, that he had a cellphone which he did not use to call for assistance, that he lied when he claimed he was the “first responder,” that his expressions of remorse were “disingenuous,” that he spent 12 hours hiding from the police after the accident until the effects of the alcohol he had consumed had left his system, that his claim of concussion was false, that he was when driving “the worse for drink,” that his driving was impaired by drink, that he drove too fast for the conditions, that the conduct of his defence did him no credit and that he “tried to evade [his]...responsibility at every turn.” The judge referred to the victim impact statements which disclosed life affecting injuries. He accepted that by his actions the appellant had destroyed his life and career. He referred to the fact that the appellant was on bail for driving offences at the time.
126. The judge set out the basis for the sentences he imposed.
127. By section 76(b) of the Traffic Law (2011 Revision) the maximum sentence for reckless driving is imprisonment for two years. By section 104 of the Penal Code (2013 Revision) the maximum sentence for inflicting grievous bodily harm is imprisonment for seven years (compared with five years in England and Wales). The judge said he was obliged to take that into account. As the judge said, there is as yet no sentencing guideline for the offence of causing serious injury by dangerous driving. The Court of Appeal has indicated that the court may have regard to the Sentencing Council's Definitive Guideline in respect of dangerous driving, provided account is taken of the fact there has been no death (see *R v Dewdney* [2015] 1 Cr App R (S) and *R v Hussain* [2015] 2 Cr App R (S) 52).
128. The judge (as have we) was referred to the Sentencing Council's Definitive Guideline dealing with inflicting grievous bodily harm. Not surprisingly he said that he did not derive a great deal of benefit from it because, in particular (sentencing remarks paragraph 12):

“...the factors determining culpability...do not sit comfortably with the reckless infliction of harm by driving, but I do find that the present case would sit within level 2 of that Guideline on the basis that it is a case of greater harm, based on the injuries suffered, and lower culpability, based on the lack of premeditation. In fact, taking into account the higher maximum sentence here in the Cayman Islands, the starting point [of 1 year six months custody] and range of sentence [between 1 and 3 years] applicable to a level [or category] 2 offence do not differ greatly from those I intend to apply in the present case after analysis of the relevant case law dealing with causing serious injury by dangerous driving and the...[Definitive] Guideline dealing with causing death by dangerous driving. Whilst the latter gives some guidance as to the sentencing principles involved, I must keep in mind, first, that the maximum sentence for that offence in...[England and Wales] is 14 years, whereas...in Cayman it is only 10 years, and, second, that in the present case no fatalities occurred and, third, that the maximum sentence for inflicting grievous bodily harm is higher here than in...[England and Wales].”

129. The judge went on consider a series of individual cases in which the Court of Appeal had considered sentence appeals in cases of serious injury caused by dangerous driving. Each was plainly decided on its own facts. In some cases there were pleas of guilty. The range was between 16 months (for a 71 year old man of good character in respect of a momentary but significant error of judgement (category 3) when no drink was involved and following a plea of guilty (*Regina v Smart* [2015] EWCA Crim. 1756)) to 4.5 years (for a man with a bad driving record who pleaded guilty having seriously injured two passengers when driving dangerously, at speed and having consumed drink and drugs (*Regina v Dewdney* [2015] 1 Cr. App. R. (S) 5)).
130. As relevant for present purposes, the judge also referred to the *Chief Justice's Statement on Tariffs and Guidelines (2002)* in which the tariff for causing death by dangerous driving involving alcohol or other aggravating factors was set at 5 years. We observe that it may be thought that a tariff of 5 years no longer reflects the current thinking regarding what is rightly regarded serious offending.
131. In assessing the seriousness of the case, the judge had regard to the factors set out in the Guideline for causing death by dangerous driving. He determined it was a category 2 offence, characterised, as he found it was, by impairment of the ability to drive due to alcohol consumption causing a substantial risk of danger. The starting point in England and Wales, had

death resulted for one victim would have been 5 years, with a range of between 4 and 7 years. The judge said he paid heed to the guideline subject to the comments he had previously made which reduced the sentence.

132. In the result, and due to the alcohol consumed, he placed counts 1 and 2 into category 2, with a starting point of 2 years and a bracket of between 18 months and 3.5 years. He referred to some aggravating features: serious injury to more than one person, leaving the scene and the fact the appellant was on bail for motoring offences. He rejected a submission that the acquittal of count 3 was a mitigating feature. As he put it:

“The jury was directed to acquit on that count if they decided that the driving was reckless because the offences were alternatives. Their verdict does not mean that your driving was not also dangerous.”

133. The judge referred to the appellant’s previous excellent character and references and lack of convictions. He rejected the submission that the appellant had suffered concussion and its after-effects in the accident. He finally on sentence said (paragraph 25 of the sentencing remarks):

“Taking the starting point as 2 years imprisonment, I increase the sentence based on the aggravating factors I have found to be present, to a sentence of 3 years’ imprisonment on counts 1 and 2 and impose 18 months concurrent on Count 4...You will be disqualified for 5 years.”

134. Mr Aiolfi’s fundamental underlying submission is that the acquittal of dangerous driving did not connote such a serious degree of bad driving sufficient to warrant a finding of dangerous driving. To sentence on the basis of dangerousness as the judge did was therefore wrong. The most appropriate sentencing guidance to follow was that related to careless driving. The mitigating features of no previous convictions, a single blow or act, (as it is submitted) remorse, good character and exemplary conduct and the personal mitigation should have reduced counts 1 and 2 below Category 2 and into Category 3 of the Assault Guideline. That would have meant a starting point of a high community order with a range of a low community order to 51 weeks.

135. Moreover, the judge was wrong placing the offending within Category 2 of the causing death by dangerous driving. The point regarding the implication of the not guilty verdict on Count 3 is relied upon. It would have been more appropriate to have regard to offences of causing death by careless driving with a bracket of a community order and 2 years’ custody.

136. We reject Mr Aiolfi's submissions. We do not accept that the acquittal on Count 3 reduced the degree of seriousness of the driving from dangerous to careless, as we have set out above (see paragraph 70 and following above). We agree with the judge in that regard. Such guidance as the judge obtained from the Guideline regarding the offence of causing death by dangerous driving was appropriate and appropriately applied. The bracket within which the judge placed counts 1 and 2 was entirely justified. The judge was (contrary to another submission of Mr Aiolfi) entitled to take into account the higher maximum sentence in Cayman. In short, it seems to us this sentence was not even arguably manifestly excessive. The appeal against sentence is dismissed.