

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 OF 2003

BETWEEN:

LENNIE BOWENS

Appellant

and

**THE OWNERS AND PERSONS INTERESTED
IN THE MOTOR VESSEL "SPEEDY'S DELIGHT"**

and

EDWIN GEORGE

and

NORTH SOUND EXPRESS LIMITED

Respondents

Before:

The Hon. Mr. Albert Redhead

Justice of Appeal [Ag.]

The Hon. Mr. Adrian D. Saunders

Justice of Appeal

The Hon. Mr. Michael Gordon QC

Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington for the Appellant

Ms. Tana 'ania Small-Davis for the third Respondent

2004: January 15;
February 16.

JUDGMENT

[1] **SAUNDERS, J.A.:** This case concerns a claim for damages.

The parties and the cause of action

[2] The vessel "Speedy's Delight" is used to operate a ferry service between the southern part of Virgin Gorda and Road Town, Tortola. At the time of the incident giving rise to these proceedings, Mr. Edwin George, one of the respondents, was the captain of Speedy's Delight. North Sound Express ("NSX"), another

respondent, is a company that operates a ferry service from Bitter End, at the northern end of Virgin Gorda, to Beef Island. Mr. Lennie Bowens, the appellant, was employed by NSX as one of the captains of its ships.

- [3] On occasions, the owners of Speedy's Delight provided charter services to NSX. On January 16th, 2000 they did so, as the main ferries of NSX were not then in commission. Among the persons on board Speedy's Delight that day was Mr. Bowens. His employers, NSX, had chartered Speedy's Delight and had required him to accompany their passengers who were traveling on that ship. The weather was unfavourable and the seas choppy that morning. Unfortunately, during the course of the voyage, as the vessel negotiated the second of two swells that violently struck the ship, Mr. Bowens sustained injury to his back.
- [4] Mr. Bowens sued his employer (NSX), and the owners and also the captain (Mr. George) of Speedy's Delight. He claimed that the accident was caused by Mr. George's negligent management of the vessel. He also alleged that his employers were liable to him for having him travel on Speedy's Delight that morning in the prevailing weather conditions.
- [5] The trial came on before Matthew, J. (Ag.). The learned judge showed great sympathy for Mr. Bowens whose injuries are indeed severe. The judge however felt constrained to hold that no negligence could be attributed to Mr. George nor could liability be found against NSX. The judge dismissed the claims of Mr. Bowens but made no order as to costs. Mr. Bowens has appealed to this court.
- [6] Neither Mr. George nor the owners and persons interested in the vessel appeared at the hearing of the appeal. It was in the interest of NSX to submit though, and they did so quite forcefully, that the finding of no negligence against Speedy's Delight and its captain should be sustained.

[7] The appeal was largely centred on fact. However, to the extent that counsel for Mr. Bowens challenges, not so much the perception of the evidence by the trial judge, but rather the conclusions that were drawn by the judge upon the latter's evaluation of the primary evidence, it must be readily conceded that there is no basis for the usual reluctance of appellate courts to disturb a trial court's findings of fact¹. A different approach must however be taken to those areas of the evidence, and there were some, where different versions of the same event were given. In the latter case, deference must be paid to the findings of the trial judge who had the benefit of seeing and hearing the witnesses.

The accident

[8] There are three routes one can take to get from Bitter End to the airport on Beef Island. All three routes require passage over the sea. Two of them are entirely by sea. These two routes go via the Sound and then through the Sir Francis Drake Channel that leads to Beef Island. If one took either of these routes, then egress from the Sound would be via one of two channels, namely, either the channel between Prickly Pear and Colquhoun Reef (the "marked" channel), or through the channel between Mosquito Island and Anguilla Point (which channel is commonly referred to as "the Cut"). The third route that can be taken from Bitter End to Beef Island is to travel overland from Bitter End to Spanish Town and then to travel by sea from Spanish Town to Beef Island.

[9] On the morning in question, as previously stated, inclement weather prevailed. Mr. Bowens took the Bitter End ferry from Gun Creek to report for work around 6:00 a.m. He noticed that the seas were choppy. He estimated the wind to be 15-30 knots, rougher than normal. He sensed a cold front in the area. It was drizzling. Bowens got to work and prepared one of the smaller NSX ferries for use, to take passengers to Beef Island. There were several trips to be made. The first was scheduled for 6:45 a.m. but some of the passengers for this trip expressed

¹ See *Grenlec v. Peters* Grenada Civil Appeal No. 10 of 2002

concern about the weather. In light of the conditions, Mr. Bowens recommended to one of his Food and Beverage Managers that the NSX small boat should not be used. With NSX's larger boats out of commission, Mr. Bowens suggested that the passengers should take the overland route and that at Spanish Town, "Speedy's" could take them to Beef Island. The Resident Manager, Mr. Pugsley, also spoke to Mr. Bowens and asked him his views about the weather. Mr. Bowens repeated his suggestion. The manager, stating that it was Mr. Bowen's call, proposed that a helicopter should take the 6:45 a.m. passengers to the airport and that "Speedy's" should do the runs at 9:00 a.m.; 12:00 p.m.; and 2:45 p.m. Mr. Bowens agreed to this proposal.

- [10] At the date of the accident, Mr. Edwin George, the captain of Speedy's Delight, had been a licensed boat captain for some 30 years. He had captained ships in calm and rough waters. He was a very experienced captain although it must be said that the route from Bitter End to Beef Island was not his normal route. Nevertheless it was not a route that he had not himself negotiated in the past.
- [11] On the morning in question, Speedy's Delight, with Mr. George at the helm, left the Virgin Gorda Yacht Harbour and proceeded to Bitter End to pick up the NSX passengers. Mr. George came around the western coast of Virgin Gorda. He went northward off the western coast of Mosquito Island and entered Gorda Sound through the Marked Channel before heading for Bitter End. He said that the conditions that morning were "quite rough, quite stiff, whatever, all the way up, especially when [he] got outside Mosquito Island on the north side of Mosquito Island". He said he had a tough time getting into Gorda Sound through the Marked Channel. The swells there, he said, "were hitting you from different angles".
- [12] Mr. George would have had to pass west of The Cut on his journey into Gorda Sound to pick up the passengers. He was asked about any observations he made when doing so. He replied that the waves were high in the middle of The Cut but

that close to the land was “pretty good, very good”. At any rate, without mishap, he arrived at Bitter End to take the passengers to Beef Island.

- [13] At Bitter End, Mr. Bowens and the NSX passengers boarded the vessel and Speedy’s Delight then set out on its voyage to Beef Island. Mr. Bowens expected the ship to exit the Sound through the Marked Channel. The Director of Marine Services, Mr. Samuel, testified that the Marked Channel is the primary and recommended entrance to and exit from the Sound. It is marked (hence the name) with navigational buoys that are maintained by the Ports Authority. Mr. Samuel opined that this channel was so marked because it is deeper and has less navigational restrictions and hazards while The Cut is shallower and narrower.
- [14] After picking up the NSX passengers, Mr. George did not choose to return through the Marked Channel on his way to Beef Island. Instead he elected to exit the Sound through The Cut. Mr. Bowens could not have known beforehand that Mr. George was going to take that route. They had held no discussion on the matter. It was only some time into the journey that it became apparent to Bowens that Mr. George did not intend to take the Marked Channel.
- [15] When he appreciated what was happening, Mr. Bowens became concerned. The NSX passengers were entrusted to his care. After he had seen them settled away on the ship, and while the ship was headed towards The Cut, he proceeded to the pilot’s house to speak with Mr. George. It was his intention to ask Mr. George to make an about turn and instead proceed through The Marked Channel. Mr. Bowens said that the ship was doing about 22-23 knots at the time. As he got to the pilot’s house he heard Mr. George say, “Down there is rough”, and then a first swell struck the boat. Mr. Bowens decided to sit down. As he sat, another swell struck the boat. According to him, “the boat went up very high and when it dropped, I felt my back in pain”. It turned out that he had sustained very serious injury to his back. No one else suffered the slightest harm on the voyage. Bowens

was taken below and a doctor on board administered to him. Further trips that day were canceled.

The pleadings

- [16] Mr. Bowens alleged that Mr. George was negligent in that he: failed to use the passage demarcated for the use of vessels; failed to take proper heed of the weather conditions; and failed properly to manoeuvre the vessel. As against NSX, Mr. Bowens claimed that his employers negligently instructed him to accompany the passengers on the ship despite the adverse weather conditions. He also alleged that his employers were otherwise negligent in several other respects. Some of the particulars overlap so I shall not specify all of them. The following, I think, give a fair picture of the negligence alleged against the employers. It was alleged that NSX failed to instruct Mr. George to use the Marked Channel. That they failed to take adequate precautions for his (Mr. Bowens') safety. That they failed to provide Bowens with protective equipment. That they failed to adopt a proper system of work because if they had done so they would have caused Mr. Bowens and the passengers to proceed overland instead of via the Sound.

The case against Mr. George

- [17] I regret that, after careful consideration of the whole of the evidence given in this matter, I agree with the trial judge's conclusion that none of the allegations of negligence, whether against Speedy's or Mr. George, have been made out. It was suggested by counsel that the Marked Channel is the preferred route to egress the Sound. The evidence does not bear out however that in any and all circumstances this is necessarily the case. What the evidence shows is that, all things being equal, the Marked Channel is preferred because it is marked for navigational purposes and it has far greater depth. However, a captain cannot take a mechanical decision always to use that channel irrespective of the concrete situation. The captain has to make an informed decision based on the captain's own assessment of the actual weather and marine conditions at the time. The

Director of Marine Services, Mr. Samuel, was asked for example, "Can you say categorically that if weather conditions that are prevailing at the time that the areaof [the Marked Channel] will always be safer to navigate than [The Cut]?" His honest answer was, "I won't be able to say that". Indeed, he could not. As Mr. Bowens himself intimated when he testified, among the many variables that one must consider when making such a decision are the speed and direction of the winds and the flow of the current.

[18] The evidence in the case was that Mr. George had experienced for himself the actual conditions that existed that morning. He had neglected to take The Cut on his way to Bitter End. He took the Marked Channel. But he had had a tough time coming in through the Marked Channel. He had observed that although there were high swells in the middle of The Cut, to the edge was not so bad. He had also experienced rough seas north of Mosquito Island. If Mr. George is to be believed, and there is every indication that the learned judge accepted that testimony, then he cannot be faulted for passing through The Cut on his way out from Bitter End. Given his many years of experience, his first hand observation of and experience in the actual weather conditions that existed at the time, his testimony that he considered the alternatives open to him before making a choice, and finally his evidence that save for the two swells (one of which caused the injury to Mr. Bowens) the easier passage that morning was through The Cut, I agree with the trial Judge that he cannot be faulted for taking the route that he took. The allegations of negligence in this regard have not been established as against Mr. George.

[19] It was suggested that contrary to his own evidence as to which part of The Cut was safest, Mr. George did not hug the coast as he passed through The Cut. This allegation was put to and vigorously denied by Mr. George. This was a dispute of primary fact. The judge saw and heard the witnesses and must obviously have

preferred the evidence of Mr. George. Only recently, in **Harracksingh v. The Attorney General of Trinidad and Tobago**², the Privy Council stated:

“ It is axiomatic that even where a case on paper would support a decision either way, the trial judge’s decision ought not to be disturbed unless it can be demonstrated that it is “affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong”: see **Watt or Thomas v Thomas** [1947] AC 484 per Lord Macmillan at page 491”.

In my respectful view, no such criticism of the trial judge could be substantiated here.

[20] Finally, as against Mr. George, there is the allegation that he adopted the wrong manoeuvre. The transcript of the evidence reveals this in his examination in chief:

Q. Okay. So what did you do after that?

A. Well the boat take the wave and when the boat was coming down off the wave, I brought the throttle back. When she came down off the wave, I heard Mr. Baynes scream.

Q. Now you spoke about bringing the throttle back.

Could you explain the maneuver you were doing and why you did it?

A. When the boat take the wave to go up, you pull the throttle back or the accelerator like a car to take the weight off the engine, off the boat, so she don’t drop heavily. So that is the reason I had taken the throttle off. When I say I take it off, I pull the throttle back and wait for it to level to the water and then I picked up with the next wave, with the throttle to climb the wave and I did the same thing coming back. The first wave was quite big and the second wave was much, much smaller.

[21] There was no cross-examination of this evidence-in-chief of Mr. George. Nor was there any other evidence that a wrong manoeuvre had been adopted. If indeed the accepted manoeuvre for negotiating swells is that one should decelerate as one ascends the wave, then in my estimation the above evidence is ambiguous as to whether that was what Mr. George had done. The burden of establishing negligence was on Mr. Bowens and in my view the judge was entitled to find that on such evidence as was given, no negligence could be attributed either to Mr. George or to the owners of Speedy’s Delight.

² *Privy Council Appeal No. 28 of 2002, (unreported) delivered 15th January, 2004*

The case against NSX

- [22] Mr. Bowens' case against NSX is terribly weakened by the finding that no negligence has been established against Speedy's. The learned trial judge went so far as to state that if Speedy's could not be found negligent then NSX also could not be held liable. Certainly, a fundamental basis for the employer's negligence in such cases as **McDermid v. Nash Dredging Limited**³ and **Smith v. Austin Lifts**⁴ was the undoubted negligence of the captain of the ship in the former and the occupier in the latter.
- [23] Mr. Bowens' case against NSX is coloured by the circumstance that Mr. Bowens was himself one of the sea captains of NSX. The NSX Manager had pointedly intimated to Mr. Bowens that, as to the manner in which the NSX passengers should be transported to Beef Island for the 9:00 a.m. run, it was Mr. Bowens' call. Mr. Bowens then himself agreed to the engagement of Speedy's. This was not a case where Mr. Bowens' employers declined to take the advice or recommendation of Mr. Bowens. There is little to suggest that, at the time, Mr. Bowens thought that engaging Speedy's for the 9:00 a.m. run was risky. If he, as an experienced sea captain, considered that engaging Speedy's for that run was a reasonable way of ferrying the passengers, then it ill behoves him now to suggest that his employers were negligent in doing so.
- [24] Counsel for Mr. Bowens also suggested that the fact that further trips on Speedy's were canceled that day should be regarded as evidence of negligence on the part of the employer. I disagree. This was simply a case of hindsight being better than foresight. But the defendants should be judged not on hindsight but on reasonable foreseeability.

³ (1987) 1 A.C. 906

⁴ (1959) 1 W.L.R. 100

[25] I fail to see how it can be said that the employers here maintained an unsafe system of work. They considered the situation. They agreed that it would be risky to use their small boat and so they neglected to use it. The Managing Director discussed the sea conditions with Mr. Bowens and, with the latter's concurrence, NSX hired a reputable and experienced ferry service to make the run. In my view, as long as the ferry service providers were not negligent, the employers had adequately discharged their obligations to Mr. Bowens. They ought not to be held responsible for what was a regrettable accident.

[26] In all the circumstances I would dismiss this appeal and, like the trial judge, I would make no order as to costs.

Adrian Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]