

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

Claim No: ANUHCv 2019/0711

BETWEEN:

DOMINIQUE WARNER

Claimant

and

JUMBY BAY COMPANY LIMITED

Defendant

APPEARANCES:

Ms. Sherrie Ann Bradshaw for the Claimant

Mr. Kwame Simon for the Defendant

2022: November 2nd

2023: June 6th

JUDGEMENT

Introduction

- [1] **Drysdale, J.:** This is a claim in negligence. The Claimant contends that he became injured whilst performing certain tasks at the behest of his employer, the Defendant. The trial was bifurcated and as such only the issues regarding liability will be dealt with as part of this judgment.

The Pleadings

The Claim

- [2] The Claimant was employed with the Defendant from June 2013 initially as a ferry mate and then later from 2014 in the capacity as a heavy equipment marine and industrial mechanic. On or about the 13th day of May 2017, he was on a boat assisting

the Defendant in the transportation of seaweed. The seaweed was tied to the boat by a rope which secured it. The ropes used to secure the seaweed coiled around his feet whilst the boat was moving, resulting in the Claimant being thrown into the bottom of the boat which sped up after he accidentally pulled the throttle while falling. Although the Claimant was able to reach up and pull the throttle down, he injured his back because of the incident. The Claimant alleges that the injuries sustained were as a direct result of the negligence of the Defendant in failing to provide inter alia, a safe system of work and a safe place of work. As a result of the accident, the Claimant was unable to perform his duties at his place of employment and was on sick leave for a prolonged period, resulting in a mutually agreed separation from his employment on 28th June 2019.

The Defence

- [3] Save that the Defendant admits that at the material time the Claimant was employed by it as a heavy equipment marine and industrial mechanic it categorically denies that it is responsible for any alleged injuries sustained by the Claimant. The Defendant states that on 19th May 2017 it received a report from the Claimant advising that on 13th May 2017 at approximately 12:15 pm, he was injured while using the company boat to collect and transport seaweed.
- [4] The Defendant contends that it provided the Claimant with a safe place and system of work. Particularly it provided the Claimant with the proper training and information on how to collect and transport seaweed using the company boat. Consequently, the alleged injuries suffered by the Claimant were as a result of his own negligence.

The Evidence on Liability

The Claimant's Evidence

- [5] The Claimant's evidence is that he was at the material time employed as a heavy-duty equipment mechanic. His duties included the servicing of guest and staff ferries as well as heavy duty and other machinery. The Defendant owned a small boat called a skiff which in addition to being utilised to transport tools and staff was also used to

collect seaweed. Prior to the accident he had operated the skiff by himself during the ordinary course of his duties. He also had prior experience as a ferry mate and believed that he was somewhat competent using the skiff.

- [6] On the day in question, he was the only mechanic on duty to problem solve the day. A supervisor, from another department approached him asking him to fill in to pull seaweed from one part of the island to the dock where they took the seaweed out of the water. He declined and told the supervisor that was the only mechanic on duty and having regard to the amount of work he had to undertake that he would not be in a position to help him. Although the supervisor initially left, he returned shortly thereafter and told him there was no one else to do the task and asked again for him to do this task. He reiterated that he was not able to and then was told that there was no other option and that he had to perform this task. On that basis he agreed but indicated that he needed to first complete his scheduled checks on the staff and guest ferry at 9:00 a.m. Thereafter he went to assist the supervisor with the towing of the seaweed.
- [7] As this was the first time performing this task, he asked the supervisor for instructions. He was not given any previous training or information on how to transport and or dispose of the seaweed and the associated risks which could result from not handling it properly. Additionally, there was no supervision, assistance, or equipment given to him to properly perform this task.
- [8] On the first trip he realised that the skiff was difficult to steer because of the weight of the bags of seaweed which were tied to the side of it. He tried nonetheless to manoeuvre the skiff but was faced with the additional challenge of steering the skiff whilst the hotel ferry was also crossing his path.
- [9] The Claimant stated that after completing between 6-9 trips he asked the supervisor for a break to get some water. By that time, he had worked for several hours in the hot sun in dark blue overalls and he was thirsty. However, the supervisor instructed him

to do one more trip as it was now lunchtime. Therefore, he went back to tow the last bag of seaweed. When he got back to where the seaweed was bagged, he proceeded to pull the bag of seaweed out of the shallow water into the deep so the bag would not drag on the sea floor and get damaged. While pulling the bag he dropped the rope inside of the boat so it wouldn't get caught up in the propeller for the engine. After getting the bag into the deep he proceeded to accelerate the boat to start the journey back to the dock.

- [10] While moving forward the rope which was attached to the bag of seaweed caught around his foot and pulled him to the floor. While falling his hand accidentally hit the accelerator for the boat and sent the boat in full throttle which resulted in him being slammed to the floor. This caused him to hit his head and wrench his back. He was able to pull the throttle into neutral, untangle his legs and stand up. At that time the only pains he felt was in his neck, the back of his head and his legs where the rope wrapped around them. He went back to the dock and informed the supervisor of what had occurred. He also told him that he would be going to the shop to relax. He remained there until the end of his shift as he was in pain.
- [11] On cross examination the witness stated that as it was the first time towing the bags of seaweed he asked for instructions. When confronted with a statement he gave Bryson's Insurance some 5 months after the accident stating that the job did not require any training, he stated that this was because the task involved hooking the seaweed to the boat and pulling it around.
- [12] The Claimant reiterates that at the time he was instructed to do one more trip, that it hot and he was dehydrated having worked in the sun the entire morning without any break. He admits that being fatigued contributed to his fall.
- [13] The Claimant stated that he is entitled to a 15-minute break and a 45-minute lunch break. However, he was unable to take the 15-minute break as upon finishing his early morning tasks he immediately commenced the task of towing the seaweed. He stated

that after the accident he ate his lunch and rested until the end of his shift at 3p.m. He then agreed that he had the opportunity to take all necessary breaks that he was entitled to.

- [14] As a result of the accident, he initially felt pains in his legs but no back pain. A few days later he felt excruciating pain to his back. Since that time, he has continued to suffer with back pain, and this has hampered his abilities to compete on the labour market. As a result of constantly being ill he and the Defendant agreed to a mutual separation.

The Defendant's Evidence

The Witness - Mike Flori

- [15] The witness deposed that he is the Manager of the Defendant. However, at the time of the incident he was the Deputy Manager of Island Services. That on Saturday 13th May 2017, he was stationed on the dock assisting with the removal of sargassum seaweed floating near the shoreline at Jumby Bay Island. The seaweed was being collected by a harvester and fed into net bags. A small boat known as a skiff was used to collect the net bags and tow them to the dock where they would be unloaded into a dumpster.
- [16] The Claimant used the skiff to tow the net bags to the dock for most of the morning. At one point he noticed that the Claimant was struggling with the tow because the drawstring of the bag was connected to one of the stern cleats of the skiff causing the skiff to be dragged off course and leading to the Claimant having to readjust his lines.
- [17] The witness admits to not seeing the Claimant fall but recalled him returning to the dock to explain that the rope on board the skiff had wrapped around his foot knocking him over. The witness stated that he inquired from the Claimant whether he was okay, and he answered yes. Nonetheless he suggested that the Claimant make a report of the incident but that the Claimant insisted that he was fine. That they then discussed

a better way of towing the net bags by making a bridle so that the skiff would not pull to one side.

[18] On cross examination the witness stated that he was overseeing the operations from the dock. This was done by inquiring from the Claimant whether there were any issues and making sure that there were no mechanical difficulties. The witness admits that the Claimant complained about having difficulty towing the bag of seaweed and that he suggested that the Claimant use a bridle which the Claimant did. Later when confronted with paragraph 4 of his witness statement he admitted that it stated that this conversation was held after the Claimant informed him of his fall.

[19] The witness admits that he did not see the Claimant fall. He further admitted that because of the distance of the boat from the shoreline and the location for the collection of the seaweed being around a corner, that it would not have been possible in any event to see the Claimant or his fall.

[20] The witness admits that the skiff could hold many persons but that the preferred method of collecting seaweed was for the Defendant to utilise one person. He admitted that the Claimant had not been given any information on how to collect the seaweed. He stated that he thought the Claimant had enough experience towing boats and that he had used the skiff previously. He admitted however that the Claimant had never used the skiff to tow seaweed. Finally, he denied that the Claimant ever asked him for a break during the course of the exercise.

Ian Steel

[21] The witness deposed that at the material time he was the 'Vice President of Operations & Infrastructure ("VP). In that capacity his responsibilities included the supervision of managers and employees in the various departments within the Operations & Infrastructure division. The witnesses deposed that the sargassum seaweed become a constant and annual problem for Defendant from 2011. For that reason, 'the collection and disposal of the seaweed became necessary in order to

continue operations on Jumby Bay as if the seaweed was left to decay it would cause extremely unpleasant effects across much of the island.' The witness also deposed that although initially a method of raking the seaweed and picking it up with a backhoe was used, this was not ideal as not all areas were accessible by the backhoe. Thus, a floating harvester was purchased to collect the seaweed.

[22] The witness stated that the seaweed is gathered less than a half-mile offshore and is fed into a harvester through a system of conveyor belts and then fed into net bags which were left floating behind the harvester. The bag of seaweed is then collected by someone manning the skiff and would be towed to the dock for unloading into a dumpster. He stated that the system required limited manpower.

[23] The witness deposed that collection process is considered safe for persons with marine experience as the equipment and procedure involves a low powered small boat less than 24 feet in length with an outboard motor. The witness stated that due to the simplicity of the task the skiff is operated with one person on board. He stated further that having two or more persons at or near the back of the skiff could lead to an unsafe condition as they would get in each other's way.

[24] The witness stated that because the seaweed floats there is no requirement to physically lift the net bag filled with seaweed. Further that there are no tides or ocean currents pulling on the net bag or the skiff since the water in which the skiff operates is sheltered and close to the shoreline. The witness further deposed that for safety this operation is only performed in daylight hours and that the skiff is never outside of the sight of other employees involved in the collection process.

[25] The witness states that employees who are authorized to operate the skiff are selected based on their previous marine experience which is gained during the course of their employment with the Defendant, or which experience they have obtained before joining the company. That he was aware that the Claimant was initially employed by the Defendant as a ferry mate in or round 2013. As a ferry mate, the Claimant's tasks included operating a 57-foot passenger ferry transporting guests and employees from

Jumby Bay to the mainland. In the Claimant's current position as mechanic, he was involved with maintaining marine equipment including the recovery of disabled equipment which involved the occasional towing of broken-down vessels using the skiff. That he was also aware that the Claimant worked at Vernon Crump's Boat Yard in Parham before joining the Defendant. Given the Claimant's marine experience acquired both on and off the job he was considered amongst the pool of employees capable of operating the skiff.

- [26] On cross-examination the witness stated the skiff was quite large and could easily accommodate more than one person but that an additional person would not have helped in the process, though it could not hurt. He stated further that persons selected to operate the skiff for the removal of seaweed were not given any training.
- [27] He stated that the skiff was never out of the eyesight of operation because of the short distance. However, if something happened to the operator of the skiff that the operator would himself have to alert someone at the dock. In the alternative if personnel at the dock saw the skiff as stationary, they would have to find out what had occurred. He agreed that he was not at work when the accident occurred and that he was unaware of whether the Claimant ever utilised the skiff to collect seaweed.
- [28] He stated that the bag of seaweed was very large and likened it to the size of a king-sized mattress. He agreed that it is attached to one side of the boat, the side selected being entirely up to the preference of the operator. He agreed that the seaweed attached to the skiff could cause difficulties in manoeuvring and that it requires intense concentration on the part of the operator.

The Issues

- [29] The issues to be resolved are as follows:
 - a. Whether the Defendant is liable in negligence for the Claimant's injury by failing to provide a safe place and system of work?
 - b. Whether the Claimant was wholly or partly responsible for the injury sustained?

Analysis and the Law

Issue: Whether Defendant is liable in negligence for the Claimant's injury by failing to provide a safe place and system of work

- [30] It is settled law that the three elements that a Claimant seeking damages for personal injuries for a claim grounded in negligence must prove to establish liability are whether there is a duty owed to the Claimant by the Defendant, whether there is a breach of that duty, and further, whether the Claimant's fall and injuries sustained is consequent of that breach¹.

Duty of Care

- [31] It is undisputed that the Claimant, was an employee of the Defendant. By virtue of this relationship, it is axiomatic that the Defendant owes the Claimant a duty of care to take reasonable care of his health and safety. This duty includes, but is not limited to, a duty to use reasonable care to provide a safe place and system of work, to take reasonable care for the safety of their workmen or women. As stated by Denning LJ in **Clifford v. Charles H. Challen & Son**²

'The question is whether the employer fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing routine tasks are often heedless of their own safety and may become slack about taking

¹ Gilbert Kodilyne Commonwealth Caribbean Text Law 5th edition page 68.

² [1951] 1 KB 495 at 497

precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself.'

- [32] This duty to take reasonable care is a high standard but not absolute one. As Lord Porter in the case of **Winter v. Cardiff R.D.C**³ stated:

'The duty cast on the master is, of course, not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. As the law stands, that duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case.'

- [33] The instant case concerns the duty to provide a safe system of work and the duty to provide a safe place of work. They will be explored hereunder.

Safe System of Work

- [34] The Claimant argues that the Defendant by failing to provide him with training, assistance and or supervision breached its duty of care to provide a safe system of work. The Claimant submits that the Defendant imposed on him the task of the transportation and handling of seaweed, a task which he had never previously performed. Notwithstanding this the Defendant failed to give him any training and or assistance to execute this task properly and safely. Given his inexperience, the provision of appropriate training and or assistance would have prevented the injuries which have resulted in loss and damage.

³ [1950] 1 ALL ER 819 at 822

[35] The Defendant raised issue with whether the Claimant properly pleaded what was the proper system of work and in what relevant respects it was not observed. It relied on the authority of **Colfar v Coggins & Griffith (Liverpool) Ltd**⁴ to buttress this point. The Defendant also argued that the Claimant was an experienced boats man and that instructions or repetition of warnings would not have been warranted in the circumstances.

[36] A safe system of work has to do with the method of working which is designed to minimize the risk associated with the work. According to **Clerk and Linsell on Torts**⁵ it is:

‘an overarching obligation supporting and supplementing the other aspects of the personal duty. At its lowest, it requires appropriate instruction of the workforce as to the safe performance of the task. But with a task of any complexity, it requires the use of a safe system of work. This may involve the organisation of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety of precautions and the stage at which they are to be taken, the number of workers to be employed and the parts to be taken by them, and the provision of any necessary supervision...’

[37] In assessing whether the Defendant failed to provide a safe system of work it is necessary to resolve whether the pleadings and evidence demonstrate the elements to found a claim is present. As indicated the Defendant contends that the Claimant has not properly set out what the system of work was and what relevant aspects of it which was not observed. In the **Colfar v Coggins & Griffith (Liverpool) Ltd**⁶ case Viscount Simon LC found that a failure to do so was fatal to the claim. However, this statement of Viscount Simon LC in the **Colfar** case should not be viewed as an

⁴ [1945] A.C. 197 at 203

⁵ 20th Edition page 861

⁶ [1945] A.C. 197

absolute and instead must be viewed in the context of the circumstances of each case. In that case the plaintiff was a dock labourer working in the hold of a ship stowing bags of salt. The salt was lifted from a barge alongside by derricks working in tandem according to a system designed to achieve this objective. The plaintiff was injured when a worker failed to properly secure the bags of salt and the same fell on him. The plaintiff merely relied on the fact that a bag of salt fell on him to establish negligence in this regard. The pleadings did not particularise any allegation of any defects in the system of work or negligence which in these circumstances that caused the bag to fall and was thus found to be defective and insufficient to found a claim for breach of this duty. This is simply not the case here. Whilst the Claimant did not indicate in detail inter alia the process, the pleadings and evidence does set out the same and the failings to a sufficient degree to warrant future consideration of this matter. Further, a pivotal part of the Claimant's case is that he was not given any training and or assistance to enable him to perform the designated task properly and safely. These factors are necessary to ensure that an employee is not made the subject of unnecessary harm or danger and form part of the consideration of a safe system of work. The Claimant has also provided particulars to that effect. Thus, I find that the pleadings contain sufficient information to warrant a deeper dive into the evidence and the issue being whether there has been a breach of the Defendant's duty to provide a safe system of work.

[38] It is not disputed that the Claimant was not provided with any training or supervision to perform the designated task. The Defendant posits that this was because the Claimant was a trained and experienced boatman. Thus, the Defendant relies on mere instructions in these circumstances as sufficient to perform the task efficiently and safely without any incident.

[39] The evidence is that although there was a pool of staff which had been utilised to undertake the towing of the skiff in the removal of the seaweed, the Claimant had never formed part of that designated group. I am reminded of the evidence of the Defendant witness Ian Stell wherein he indicated that the seaweed phenomenon had

started affecting the island in 2011. That further the initial method of collection by a backhoe was inefficient and the Defendant purchased harvesters and employed this process in the collection. Further that the collection of seaweed was a nightmare and was being collected all the time and not just weekdays or weekends. Thus, from the evidence it is clear that this process had been utilised for some time prior to this incident. Given the fact that the Defendant now seeks to rely on the Claimant being an experienced boatmen and an all-rounder as not necessitating any training, assistance and or supervision, it waxes strange why in the passage of time his services had not previously been utilised to perform this task. Had the Defendant been confident in the Claimant's ability to perform this task in the manner contemplated to my mind he would have been part of the ad hoc designated members of staff who routinely and annually performed this task.

- [40] The Claimant suggests that the reason he was directed to perform the removal of seaweed task was due to some disagreement with the workers and the Defendant concerning the payment of overtime wages. That the Defendant refusing to pay was left with a situation of none of these workers attended for duty on the weekend and he was forced to perform this task. I believe that this was the reasoning which caused the Defendant to select the Claimant to perform this task and not as the Defendant suggests because the Claimant aptly suited for the task. The fact of the matter is that the Claimant was the only worker on duty capable of operating the skiff. This and the Claimant's repeated attempts to deny performing this task have not been disputed. Having examined the evidence, I am of the considered opinion that the Defendant being faced with a desperate situation which required immediate attention failing which it would have adverse consequences for its business, took measures in the form of directing the Claimant to perform this task. The Defendant having no other choice in the selection of personnel, I believe was hopeful that given what it perceived intellectually to be a simple task, that the Claimant would have been able to undertake it without any training. I also take cognisance of the evidence of the Defendant's witness Mike Flori that the Claimant was not given any instructions and so find. The lack of proper training and instructions was an error in judgment as in all practicality

this task entailed the stabilising and manoeuvring of the skiff resulting in the Claimant having to frequently to readjust his lines whilst maintain focus and awareness of his surroundings whilst traversing a route which intersected with other staff ferries. This was not a simple task. In any event even where a task may not be unduly complex, given that there is an inherent risk to health and safety in its performance, I find that some level of training is required. This is particularly so when a party has no experience and is performing the task for the first time.

[41] In any event, the Defendant appears to have conflated the issue of providing training as a ferry mate with the issue of how to properly secure and transport the seaweed. It is my considered opinion that by doing so the Defendant has compared apples to oranges. The ability to manoeuvre a boat with persons and or equipment inside does not equate with using the skiff to tow items particularly where the uncontroverted evidence is that the Claimant had never utilised the skiff in such a manner. Although the Defendant's witness Ian Steel suggested that the Claimant had used the skiff to tow broken down vessels if he is to be believed in any event this was not a typical occurrence, the witness himself describing this activity as occasional. Furthermore, from the context of the Mr. Steel's witness statement this occasional towing seemed to have performed by the Claimant under the supervision of the most senior mechanic. I am strengthened in my belief also having regard to his evidence on cross examination in which he admitted that when the skiff was used to tow vessels it was done by two persons. Thus, the bald statement that the Claimant had occasionally towed broken-down vessels without any further detail is insufficient to determine whether this is an apt comparison to the towing of seaweed. The sheer size and weight of the seaweed would have necessitated not only training as to how to safely perform this task but, how to secure the seaweed and any appendages used in this process.

[42] The Claimant's evidence is that he pulled the rope into the boat to prevent it from interfering with the propeller. There is no indication that there was any provision to properly store the rope and no suggestion by the Defendant that there was an alternative safer manner than that employed by the Claimant to perform the task which

he failed to adhere to. In the absence of proper and adequate training at the very least supervision to ensure that the Claimant was not only performing it correctly but that he was not creating an unsafe situation should have been provided. Although witness Ian Steel suggests that 'having two or more persons at or near the back of the skiff could lead to an unsafe condition as they would get in each other's way' the Defendant admits that the skiff was a large boat that could hold many persons. The Defendant witness Mike Flori concurs that the skiff could easily hold many persons. I note that a document produced by the Defendant from the safety department, the safety chief recommends that:

'when going out on a boat you should have someone other than the driver present, in case a life-threatening situation arises. One should also be aware of their surroundings and keep checking; ensuring that all ropes or lines on the boat are securely in place and out of harm's way to the persons occupying the vessel. Remember to maintain a reasonable speed when on the waterways and keep an eye out for swimmers and other crafts.'

- [43] Having regard to the evidence I find that an additional worker to assist the Claimant in the execution of this task and to ensure that all safety and other protocols are being observed would not create a hazardous situation as suggested by the Defendant. In fact, I find that an additional person would have given rise to a safe working environment and system of work. Also, by failing to give the Claimant any or any adequate instructions, and training the Defendant essentially left the Claimant up to his own devices to determine how to safely perform this task. The Claimant had never performed this task a fact which the Defendant was at all material times aware of. It was therefore incumbent upon the Defendant to ensure that not only could the Claimant adequately manoeuvre the skiff whilst towing the seaweed but that he was seized with all the necessary information and protocols to ensure that any necessary item of safety is used properly.

[44] The Defendant also failed to consider that workmen are often careless as to their own safety and essentially left the Claimant up to his own devices to perform this task. This does not align with the creation of a safe system of work. Further the fact that the Claimant made a statement that training was not required does not negative the positive duty on the Defendant as his employer to ensure that all steps necessary to safely perform the designated task existed. The case of **General Cleaning Contractors Ltd. v. Christmas**⁷ is instructive in this regard. In that case Lord Oaksey stated:

'In my opinion, it is my duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their work people are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition. The risk that sashes may unexpectedly close, as the sashes in this case appear to have done, may not happen very often, but when it does, if the workman is steadying himself by a handhold, his fall is almost certain. If

⁷ 1953 AC 180 pages 189-190

the possibility is faced the risk is obvious. If both sashes are closed there is no longer the handhold by which the workman steadies himself. If either sash is kept open the handhold is available and, on the evidence in this case, is, in my opinion, reasonably safe. But the problem is one for the employer to solve and should not, in my opinion, be left to the workman.'

[45] I find also that the Defendant failed in its duty to provide any adequate supervision of the Claimant. The evidence is that the supervisor remained on the dock which was $\frac{1}{4}$ mile away. Further that because of the distance and the area of collection being around a corner it was not possible for him to have sight of the skiff. Moreover, there was no way of communicating with the Claimant should the need arise. Thus, it was only after the Claimant returned to the dock that the witness was made aware that the Claimant had fallen whilst transporting the seaweed. The factual matrix thus clearly reveals that not only was there was no supervision but that no emergency protocols had been put in place to address an issue such as this which was entirely foreseeable given the nature of the task.

[46] The Claimant alleges that the Defendant caused or required him to work when it was unsafe to do so. The evidence is that the Claimant was directed to assist in the removal of seaweed as he was the only person capable of operating the skiff that day. This was not in the Claimant's usual course of duties; he being employed as a mechanic. That immediately after performing his early morning checks commenced the job of towing the seaweed and as such did not have an opportunity to take his 15-minute break, which by company policy he is entitled to before he started this task. Having started his shift at 6.30 he had already been working for several hours. Moreover, he continued to work in the blazing sun for several hours before asking for a break only to be directed to perform a further trip before being afforded the opportunity to take lunch.

[47] Additionally, it is noted also that the supervisor who had been monitoring the movement of the Claimant had earlier noticed that the Claimant was having difficulty in manoeuvring the skiff, yet no measures were taken to assist him. Whilst the witness Mike Flori on cross examination stated that in response, he had suggested that the Claimant use a bridle, when confronted with his evidence it chief it was eventually agreed that this conversation took place after the Claimant informed him of the fall. Whilst the Claimant appeared to have notwithstanding undertaken several trips, this difficulty in manoeuvring the skiff, coupled with the evidence of Ian Steel that performing this task requires intense concentration, the Claimant being denied the ability to be refreshed and was accordingly weak and dehydrated these events created an unnecessary risk and danger for injury which was entirely foreseeable. It is the duty of an employer not only to design protocols for a safe work environment but also to ensure that it is being followed. This is especially so when a worker is undertaking a labour-intensive task and due to the weather and fatigue would be prevented from effectively or safely performing the same.

[48] When looked at in the round I find that denying the Claimant an opportunity to take a break after having worked for almost 6 hours in the heat of the day is unreasonable and posed a high risk to his health and safety. Given the nature of the job being performed this denial created an unsafe system of work. Had the Defendant adhered to its protocols and afforded the Claimant an opportunity to rest and be rehydrated it is likely that this would have obviated the fall and injuries sustained by the Claimant.

[49] Thus the Defendant by failing to give any training and or adequate instruction and supervision to the Claimant, concerning not only the proper and safe method of doing the job of work but also the likely dangers to be met, should he depart from that prescribed method; by failing to provide any assistance in the performance of this duty; by refusing the Claimant's request for a break and by extension failing to adhere to its protocols for health and safety fell far short of its duty of care owed to the Claimant and breached the duty to provide a safe system of work.

Safe Place of Work

[50] The legal obligation on an employer to provide of a safe place of work concerns the employer's duty to take care to not merely to warn against unusual dangers known to them but to ensure that the premises where its employees are required to work are maintained in as reasonably safe a condition that a prudent employer exercising reasonable skill and care would permit. In the text **Clerk & Lindsell on Torts**⁸ the authors in describing an employer's duty to provide a safe place of work stated:

'Safe place of work and access to it. There is a duty to see that a reasonably safe place of work is provided and maintained. The place of employment should be as safe as the exercise of reasonable care and skill permits; it is not enough for the employer to show that the danger on the premises was known and fully understood by the employee. On the other hand, there will be no liability if there is no real risk to employees acting with sufficient care. In considering whether the place of work is safe or not, regard must be paid to its nature. If it is a roof, scaffold or tunnel, the standard of safety to be applied is that of a reasonably prudent employer who provides a roof, scaffold or tunnel at which his men are to work. The failure to provide crawling boards for a risky operation on a roof and reliance solely on the experience of the workman was held to constitute negligence. A place which is safe in construction may become unsafe through some obstruction being placed on it or through the presence of something on the floor which makes it slippery. In such cases the test to be applied is whether a reasonable employer, in the circumstances of the case, would have caused or permitted the existence of the state of affairs complained of.'

⁸ 22nd edition page 919

[51] The place of work in this instance is a small boat moving on the open water to which a heavy load has been attached. The place of work is also somewhat remote being on the open water with no other vessels or employees that could provide supervision and or assistance should the need arise. Thus, there is a greater obligation on the Defendant to ensure as far as reasonable that there existed a safe place of work.

[52] Whilst there is no evidence that the vessel in and of itself was not seaworthy given that there is an inherent risk of danger in the task performed at the place of work, it is the use of the skiff in the manner so done which comes into focus to determine whether the place of work was rendered unsafe. When examined, the facts as pleaded and proved point to a failure of the Defendant to provide a safe place of work. The weight of the seaweed clearly presented a challenge in properly manoeuvring the skiff. Although the Defendant observed this no assistance or guidance was provided to the Claimant. The Defendant also did not warn the Claimant of any associated risks with this task. Coupled with the already established unsafe system of work all these factors made for unsafe a situation that no prudent employer would allow to exist. Thus the Defendant failed in its duty to provide a safe place of work.

Issue 2: whether the Claimant was contributory negligent in the accident which caused injury

[53] The Defendant contends that the Claimant showed complete disregard for his own safety by allowing the rope holding the bag of seaweed to fall to the ground by the steering wheel of the boat, an area where all the controls for navigating the boat are located and where he would be required to stand in order to drive the boat. The Defendant therefore submits that at the very least that the Claimant was contributory negligent in the accident and thus should be held wholly or partially responsible for the same.

[54] Having found that the Defendant failed in its duty to provide a safe system and place of work, it would be contradictory to now foist the blame in whole or part on the Claimant. I am further strengthened in my view having considered the authority of **Mayers v**

Williams⁹ et al. In that case Blenman J (as she then was) found that in cases which concern an unsafe place or system of work that it would be rare to find a worker in such circumstances guilty of contributory negligence. Having examined the evidence and given the factual matrix I disagree with the submission that the Claimant was at fault to any extent in this matter. The Defendant failed in its duty of care to the Claimant and but for its actions the Claimant would not have suffered the injuries he now sues for compensation.

Order

[55] Based on the foregoing, the court finds the following:

1. The Defendant breached its duty to provide a safe system and safe place of work and is liable in negligence to the Claimant for the injuries sustained.
2. Judgment is entered for the Claimant with damages to be assessed.
3. The Claimant shall file and serve all witness statements and written submissions on which the Claimant intend to rely on or before 7th July 2023.
4. The Defendant shall file and serve a Notice in Form 31 within 7 days of the service of the Claimant's witness statements and submissions.
5. The Defendant shall be at liberty to file and serve witness statements and written submissions on which the Defendant intends to rely on or before 7th August 2023.
6. The assessment of damages is fixed for hearing for 11th November 2023
7. The Defendant shall pay the Claimant prescribed costs.
8. Interest

⁹ BVIHCV2002/0029

Jan Drysdale

High Court Judge

By The Court

Registrar