

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0086

BETWEEN

VERONICA MAOUIHOUB

CLAIMANT

AND

FANTASEA TOURS LTD.

DEFENDANT

Appearances:

Mrs. Zhing Horne-Edwards for the Claimant

Mr. Grahame Bollers and Mr. Sten Sargeant for the Defendant

2022: March 29th
March 30th
May 11th

JUDGMENT

BYER, J.:

The Background Facts:

- [1] On 23 May 2017, the claimant, a citizen of the United Kingdom, was a passenger on board the Spirit of the Seas, a speed boat owned and operated by the defendant, having paid for a tour by boat to Mustique, with a bonus stop in Bequia.
- [2] When the claimant boarded the vessel, she and three other passengers sat at the very front of the bow, two on the port side and two on the starboard side. At the beginning of the trip, instructions were given on the location and use of life jackets, the sites that would be visited and the pros and cons of sitting in the bow and sitting in the stern. In particular, it was explained that one would experience a bumpier ride sitting in the bow than sitting in the stern, but that you would get wet sitting in the stern.

- [3] The claimant and the other three passengers moved further back to the seating on the port and starboard side just ahead of the centre console or wheelhouse. This is where the claimant remained during the excursion until she suffered her injury.
- [4] On the way to Mustique, while the claimant was seated just ahead of the centre console, the vessel went over a wave that was larger than the other waves they had encountered on the trip and the claimant was jolted from her seat into the air and landed hard back onto her seat, seriously injuring her back.
- [5] She was assisted by the mate, Ken Isaacs, who helped her to the seat immediately in front of the centre console where he sat with her and held her for support. The captain then continued the voyage to Mustique.
- [6] At the same time the injuries were sustained, the owner of the ship was the defendant and the captain and mate were the defendant's employees.
- [7] From the trial of the matter, the issues that were clear for the court's determination were mainly two, as follows:
1. Whether the Defendant's servants or agents were responsible for the injuries sustained by the Claimant relying on the particulars as itemised in the statement of claim, and
 2. Whether the Claimant was contributorily negligent for her own injuries and if so to what extent.
- [8] Before this court however embarks on the consideration of the issues as identified, the court must also deal with a preliminary point that was raised by the defendant during the course of the trial and upon which the defendant made submissions. That is, whether the claimant by having not specifically pleaded in response to certain allegations raised in the defence as filed, whether it meant that the claimant had admitted the same and that those matters were no longer in issue.
- [9] At paragraph 13 of the defence as filed¹ the defendant set out clearly their responses to the particulars of negligence as pleaded by the claimant:
- "13. The defendant denies that the accident was caused by the negligence of its servants and or agents as alleged in paragraph 12 of the Statement of Claim. Further and in the alternative, the accident was caused or contributed to by the negligence of the claimant.
- a. Paragraph 12 (a) of the Statement of Claim is denied. The defendant repeats paragraph 8 of this Defence that a health and safety briefing was given and a caution was given to the Claimant and other passenger sitting in the bow of the Vessel that it would be safe and more comfortable if they occupy seats in the stern of the Vessel.
 - b. Paragraphs 12 (b) and (c) of the Statement of Claim are denied. The Vessel was cruising at a reasonable rate of speed between 12 to 17 knots, sufficient in the circumstances so as to allow

¹ 10/1/2020

- the Captain to effectively reduce when it was necessary to do so, and for the Claimant to be able to take the ordinary care expected of person being at sea on a pleasure craft as opposed to being on dry land.
- c. Paragraph 12 (d) of the Statement of Claim is denied. There was no impediment to the Captain observing the nature of the water. Sea conditions were observed at the material time were normal for that time of year.
 - d. Paragraph 12 (e) of the Statement of Claim is denied. The Claimant was advised to move to the stern of the Vessel but chose to remain seated in the bow of the Vessel and never moved from where she first sat. Two of the other passengers moved to the aft of the Vessel. The Claimant was further cautioned by her Tour Operator Carol Boulton to move to the stern seating but she remained where she was.
 - e. Paragraph 12 (f) of the Statement of Claim is denied. Waves at sea are a natural occurrence that is inevitable. The Defendant avers that its Captain reduced speed as and when necessary in the then prevailing circumstances.
 - f. Paragraph 12 (g) of the Statement of Claim is denied. Upon arrival in Mustique Island the Claimant complained only of a sore back. The Claimant stayed on the tour and opted to obtain treatment on mainland St. Vincent. The Vessel stopped for its visit to Bequia before crossing the Bequia/St. Vincent channel back to Young Island. The Defendant assisted the Claimant is [sic] seeking an Orthopaedic Doctor who after X-Rays discovered the Claimant had exacerbated an injury to her back, she had sustained only months before. The Defendant further contends that at all material times it took adequate care for the Claimant's safety."

[10] In the reply filed by the claimant², which was filed after it had been brought to the claimant's attention at the pre trial review that they had in fact not filed that document, the claimant at paragraphs 5 to 8 responded to the said paragraph 13 as follows:

"5. The Claimant denies that she failed to take reasonable care for her own safety as alleged in paragraphs 11, 12 and 13 of the Defence and repeats paragraphs 8 and 9 of the Statement of Claim. Further, the Claimant repeats that there were no facilities to strap oneself to the boat but that she kept herself steady and seated in front of the wheelhouse as much as she could in the circumstances of the choppy waters.

6. The Claimant does not admit sub-paragraph (b) of paragraph 13 of the Defence, insofar as it relates to the speed at which the vessel was travelling. The Claimant does not have the experience or skill in sailing to be able to estimate the vessel's speed. The Claimant avers that the vessel was travelling at great speed, which was excessive in the circumstances.

7. As to sub-paragraph (d) of paragraph 13 of the Defence, the Claimant repeats paragraphs 3, 4 and 5 hereof.

² 28/7/2021

8. As to sub-paragraph (f) of paragraph 13 of the Defence, the Claimant admits that the vessel stopped in Bequia before returning to St. Vincent. The Claimant does not admit to any alleged discoveries regarding the Claimant's condition which the referenced Orthopaedic Doctor may have made from x-rays, as the intellection of the said doctor is not a matter that is capable of being within the knowledge of the Claimant. Save as aforesaid, sub-paragraph (f) of the Defence is denied. "

- [11] When the reply is therefore perused it is clear that the claimant did not respond to every single averment made in the defence denying the claimant's particulars of negligence. When the same was raised at trial by counsel for the defendant that having not taken issue, the claimant must have been taken to accept the averments, the claimant's response that the catch all phrase at the end of the reply was sufficient to do so. In the case at bar that phrase at paragraph 11 of the reply is stated thusly; "Save as hereinabove specifically admitted or not admitted, the *Ancillary claimant joins issue on the Ancillary defendant's defence.*" (My emphasis added)
- [12] It was therefore with some consternation that the court considered the relevance of this statement and whether it could be relied on by the claimant as having taken issue with the defence when first and foremost it made specific reference to parties that did not exist in the case at bar. There is no Ancillary claimant or Ancillary defendant. This court can only presume that this reply was produced from a precedent in which the requisite edits were not adequately undertaken. So be that as it may and beyond the fact that the statement at paragraph 11 cannot refer to the parties in the case at bar, this court must however consider whether any such statement is sufficient to "join issue" with the defendant on their defence.
- [13] In the case of **Sumitomo Mitsuiturst (UK) Ltd and ors v Spectrum Galaxy Fund Ltd**³ my brother Jack J undertook a useful overview of the history of the development of pleadings in which he recognized that pleadings became so "formulaic" that the slightest technical failure could result in the entire case being lost on a technicality. Thus, the learned Judge's conclusion was that this manner in which pleadings had evolved was now obviated by the advent of the CPR 2000. At paragraphs 7 and 8 of the judgment the learned Judge identified that Parts 8.7 and 10.5 clearly set out the regime for the production of the Statement of Claim and the defence and had this to say at paragraph 9: "*The general scheme is thus fairly clear. All matters of fact on which the claimant relies should be in the statement of claim (amended, if necessary, to meet points pleaded in the defence); all matters of fact on which the defendant relies should be in the defence (again amended if necessary to respond to amendments to the statement of claim).*"

Then in relation to Part 10.9 which speaks to the filing of a Reply he has this to say⁴:

³ BVIHCV(COM)0172/2018

⁴ Ibid Paragraph 11

“There is, however, no indication that this provision is intended by a side wind to alter the general scheme of the CPR that everything in dispute should be in the statement of claim and the defence. Rather, it appears to be a practical measure. In many cases, instead of incurring the expense of amending the statement of claim, it will be simpler and cheaper to put in a short reply, if there is a limited point which needs to be made arising from the defence. There is nothing in the rule which indicates that the old RSC requirement for sequential responsive pleadings must be adopted. Such an interpretation would be contrary to CPR 8.7, 8.7A and 10.5. In deciding whether an allegation should go in a reply or in an amended statement, the Court should in my judgment be guided by case management principles and apply the overriding objective.”

- [14] However, in the case of **Edison James v Claudius “Cocom” Letang**⁵ Master Lanns (as she then was) having determined that the CPR 2000 being silent as to the requirement of a reply relied on the learning from Blackstone’s Civil Practice 2006 and at paragraph 46 of the judgment re-stated it thusly:

"CONTENTS OF A REPLY

Conventionally a reply may respond to any matter raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which requires a response once they have been raised in the defence. It has always been a cardinal principle of pleading (which has certainly not been altered by CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'. Once, however a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor should it be drafted as a defence to a defence. Where the defence takes issue with a fact set out in the particulars of the claim, and the claimant accepts that the fact is incorrect, the proper course should be for the claimant to seek to amend his statement of case accordingly ... and not to deal with the matter in the reply. Thus where for example, the particulars of claim contain an error as to the quantity of goods ordered, and the correct quantity is set out in the defence, the error should be corrected by way of amendment, rather than reply."

Indeed this court accepts that there may be an instance where allegations are contained in a Defence that require a response so that the issues can be defined as may require the filing of a Reply where there is reliance on a statute that would oust the case of the claimant as in the Limitation Act⁶. However, the question must be asked whether in every instance a reply is necessary. In this court’s mind, the wording of the rule in relation to the filling of a reply makes it clear that it is not a requirement to close the pleadings or that there is any sanction that can be

⁵ DOMHCV2008/0321

⁶ **Daphne Alves v The Attorney General of the Virgin Islands** BVIHCV2007/0306

taken (for instance judgment in default) and in this court's mind may only be necessary where the defendant has made fundamental averments of fact or law.

[15] In the case at bar, the defence at paragraph 13 did not raise any fundamental or new issues other than the defendant's denial of the manner in which the claimant pleaded the incident had occurred. In this court's mind, any reply to that would have simply been a restatement of the Statement of Claim and therefore even without a specific response to the same, the issues were clearly identified as to what this court had to consider and determine.

[16] I will now deal with those issues.

Issue #1 – Whether The Defendant's Servants Or Agents Were Responsible For The Injuries Sustained By The Claimant.

[17] The law in relation to negligence is well known and recognised by the Courts and in so clarifying the same, clearly state that not every act of carelessness or negligence is actionable under the tort of negligence.

[18] Lord Wright in the case of **Lochgelly Iron & Coal Co Ltd. V. McMullan**⁷ made it clear that 'negligence' means "more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing".(My emphasis added)

[19] Thus, there must be an existing duty of care as between the claimant and defendant that the defendant or their servants and or agents behaved in such a manner that was more than carelessness, that in turn caused the damage to the claimant and additionally that such damage was foreseeable⁸.

[20] I do not think it can be disputed by the defendant that as the owner of the boat, the ***MV Spirit of the Seas*** and as the employer of the Captain Bertram Dabreo and the First mate Ken Isaacs who were on the boat that day, that the defendant owed a duty of care to the claimant as a passenger on the boat. The claimant in this Court's opinion meets the definition of 'neighbour' as set out in the seminal case of **Donoghue v Stevenson**⁹ and I therefore find that there was a duty of care owed to her by the defendant company.

⁷ 1934 AC 1 pg 25

⁸ Clerk and Lindsell on Tort 18th Ed. Page 219

⁹ 1932 AC562 pg 579

[21] Therefore, the more fundamental questions for this Court are whether there was such a breach of that duty owed, that the alleged breach caused the damage and that such damage was foreseeable.

[22] By the Statement of Claim filed on 23 May 2019, the claimant set out the particulars of negligence she sought to rely on¹⁰:

“PARTICULARS OF NEGLIGENCE

- a) *failing to issue safety instructions at the beginning of the sea excursion or at all when it was reasonable in the circumstances to do so;*
- b) *driving his vessel at a speed that was excessive in the circumstances and that caused the claimant to be violently jolted from her seat and suffer harm;*
- c) *failing to reduce his speed when it was reasonable for him to do so;*
- d) *failing to observe the choppy nature of the water and the height of the waves;*
- e) *failing to advise the claimant to move from her seat in front of the wheelhouse when it was unsafe for her to remain in that position;*
- f) *failing to steer or control the vessel adequately or at all so as to avoid hitting the waves at speed;*
- g) *failing to seek any or any adequate medical attention for the claimant as soon as practicable after the claimant suffered injury or at all; and*
- h) *failing in all the circumstances to take any or any adequate care for the claimant’s safety.”*

[23] The particulars can therefore be dealt with under the broad headings of speed¹¹, failure to adhere to the surroundings¹² and failure to care for the safety of the claimant (which by implication includes the seating arrangements)¹³.

Speed

[24] The evidence of the claimant in her Witness Statement¹⁴ said the following:

“13. I am not a sailor and so I cannot say exactly how fast the boat was travelling but I do know that it felt as if it was travelling at a great speed, particularly as the sea was becoming more and more choppy and the ride more and more bouncy very quickly.”

18. As I lay on the seat at the back of the boat, I was in extreme pain and discomfort. Sea water was splashing over into the boat and I became wet and cold. I think I was in shock. I was unable to stand or even maintain an upright position but, despite my obvious distress, at no point did the boat stop or slow down.”

¹⁰ Paragraph 12

¹¹ Subparagraphs (b) and (c)

¹² Subparagraphs (d) and (f)

¹³ Subparagraphs (a), (e), (g) and (h)

¹⁴ Filed 2/6/2020

- [25] Under the rigorous cross-examination by Counsel Mr. Bollers, the claimant however admitted the following:
- a) that she had never been on a boat before on any of the holidays that she had gone on previously;
 - b) that she knew nothing about boating and that she did not know anything about how fast that boat has to go;
 - c) that it was a mere feeling that it was travelling fast because she “felt the wind in her hair”;
 - d) that she did not know how what speed was required to traverse the seas at the height they were that day; and
 - e) that she did not know how fast the boat was going or that it was moving at an excessive speed but it just “felt” that way.
- [26] In support of this evidence the claimant relied on her fellow passenger Ms. Kathleen Playford. Ms. Playford was also a fellow tourer with the claimant having met the claimant for the first time on the Caribbean trip, which took in three islands, Tobago, Grenada and St. Vincent.
- [27] In the witness statement of Ms. Playford¹⁵ the sole statement in relation to speed was at paragraph 11:
- “I also recall that the boat was travelling very fast on the way to Mustique. To me it seemed as if the boat was gaining speed as we went further out to sea.”*
- [28] On cross-examination, she clearly and succinctly stated that she had no knowledge of whether the boat was operated at excessive speed, as she knew nothing about operating a speedboat.
- [29] That was the sum total of the claimant’s evidence in support of her claim in relation to the issue of speed. Indeed on the cross examination of the witnesses for the defendant, namely the captain and his mate Mr. Isaacs, the claimant attempted, but in this court’s mind unsuccessfully so, to infer that the captain was travelling at an excessive speed.
- [30] What however the captain Mr. Dabreo did state on cross-examination was that he was travelling at cruising speed and that he would have reduced the speed depending on the oncoming wave action. In fact, he said that the speed at which he travelled from St. Vincent to Bequia was not the same speed that he travelled from Petit Nevis (the whaling station off of Bequia) to Mustique as the waters were choppy. He explained in his evidence as well under amplification that a speedboat has to travel at a certain speed to “plane” the boat, that is, to have the bow level with the water so that there is less tendency for seasickness or an uncomfortable ride.

¹⁵ Filed 2/6/2020

- [31] The other employee of the defendant the mate Mr. Isaacs, although he said that he knew about “speed to a certain extent” did say that the speed was decreased when they made the trip over to Mustique from Bequia as opposed to the speed that they travelled to Bequia from St Vincent.
- [32] Counsel for the claimant’s submission on this issue was grounded mostly on the fact that the passengers aboard the boat that day were over the age of 50. That was an essential fact that needed to be taken into consideration as to how fast the captain should have driven the boat. That is what a “reasonable and prudent”¹⁶ captain would have done to lessen the impact of the waves on his older clientele. Having failed to do so the claimant submits that the speed of the boat was excessive and lent itself to an injury in his elderly passengers, which did in fact occur.
- [33] Counsel for the defendant has however contended that there was no evidence before the court, which supports any contention as made by the claimant that the captain was driving at excessive speed. As has been identified by the court in its own reproduction of the evidence of the witnesses on this point, the defendant has made it clear that neither the claimant nor her witness could establish that either the boat was being driven too fast or what had in fact transpired, they just did not know.
- [34] Having assessed the evidence by the claimant and her witness and the defendant’s witnesses what is clear is that the claimant and her witness were not “seasoned sailors, familiar with the sea and boating”¹⁷ and as such this court must look at their evidence in relation to speed in that perspective. I do not accept that the mere fact that the passengers on board were of a certain age group meant that regardless of skill or sea conditions that the boat had to be driven at a “slow” rate. There was neither scientific evidence nor evidence of any nature that could substantiate such an action. Therefore, on a balance of probabilities I do not accept that in all the circumstances of the case that the defendant’s employee the captain of the boat was driving the boat at an excessive speed and I find therefore that the claimant has not established this particular of negligence.

Failure to Consider the Surrounding/Prevailing Conditions

- [35] Under this pleading, this court will consider the prevailing sea conditions.
- [36] The claimant in her evidence consistently spoke of the “choppy” waters and that the trip was very bouncy. Her description of what transpired that led to her injury¹⁸ was that a large wave hit the boat and caused it to drop from a height and that she was in fact airborne for a moment. However, this statement of the “large wave” was categorically contradicted in cross-examination when she was

¹⁶ Paragraph 43 Submissions of the Claimant filed 8/4/2022

¹⁷ **Carter Smith Jr v Nicolaas Bersma** ANUHCV 2009/0718 at paragraph 46

¹⁸ Paragraph 14 of WS filed 2/6/2020

questioned as to how the accident occurred and she said, “I do not know where the wave came from. I do not know how it happened – I only know I was bounced in the air”.

- [37] On cross-examination, when she was pressed, she admitted that she had never expected the water to be entirely flat, as they had been informed by the information furnished by the tour operators that the trip between Bequia and St. Vincent was usually rough on the ferry and that they were advised that the passengers should take seasickness medication. The claimant went on to state that she was totally unaware as to the condition of the seas in May and that she did expect the boat to rise and fall with the waves. In fact, she accepted that the sea conditions made the ride bumpy but that it was no more than she had anticipated from a speedboat ride and as a matter of fact she was never concerned about the condition of the water and the bouncing that she experienced during the trip.
- [38] On this issue the claimant’s witness Ms. Playford was of very little assistance in that she admitted that she believed that the sea would be rough not “very” rough although she was aware that the tour operator had informed them that the crossing to Bequia would have been rough enough to require sea sickness medication. Somehow, having decided not to go to Bequia, this witness had no clue that in getting to Mustique that she would have had to pass Bequia and that in fact they were scheduled points of interest in Bequia which were part of the “Mustique” tour.
- [39] The defendant’s case on the other hand, was in the evidence of Captain Mr. Dabreo. His recollection was that the sea conditions on that day were far from unusual. In his words, they were normal and in such normal conditions, he drove the boat at a usual speed that would give the most comfortable ride and he remained at the console at mid ship from beginning to end. His clear evidence which was un touched on cross examination was that there was no “freak” wave or large wave that hit the boat that he did not see or adjust for as he traversed the waters.
- [40] Additionally, the witness for the defendant, Ken Isaacs also made mention of the fact that even if the waters could be considered choppy, as far as he was concerned, the sea conditions were normal. In fact, he said that on that trip he did not recall any large wave or any wave having any greater impact than another but he felt the usual bounces on the water and there seemed to be nothing out of the ordinary. In his evidence in chief, he said at paragraph 9¹⁹ that the waves going over to Mustique from Bequia were slightly larger, which could only have been in comparison to the waves encountered between St. Vincent and Bequia as he made it clear that while at Moonhole Bequia and Petit Nevis there was no wave action at all as the boat was “under land”.
- [41] On a balance of probabilities, the claimant has not satisfied me that the captain failed to keep a proper look out at the prevailing conditions which were normal by all accord save by the claimant and her travelling companion whose evidence this court can place little stock given the nature of

¹⁹ WS filed 4/6/2020

their lack of experience in boating. I accept that the Captain of the boat, of some 19 to 20 years experience would be well aware of what the prevailing circumstances would have been and his consideration of the same. That having accepted those circumstances there is no evidence that has been led that identifies any failure on his part in this regard.

- [42] I therefore, do not accept that the claimant has made out this claim as to the failure of the captain to consider prevailing conditions in all the circumstances.

Failing to Take Any Or Adequate Care For Safety Of The Claimant

- [43] Under this particular of negligence, it is the contention of the claimant that there was a failure to issue a safety briefing at the beginning of the sea excursion, that she was never instructed to move from the bow of the boat, and that there was a failure to obtain medical care for the claimant as soon as possible after the injury occurred.

- [44] The claimant's evidence was that upon entering the vessel, at the Young Island dock, she "went straight to the front to get the best possible view." Indeed the claimant then went on, to state at paragraph 10²⁰ that:

"At the time of boarding, the captain of the boat informed us that it would be a "bouncy" ride, so we were advised that we should move further back. At the same time, though, he also warned us that we would get wet at the back of the boat. Nothing else was said to us about any dangers. As soon as we were asked to move, we did so. The more elderly members of the travelling party took seats toward the rear of the boat. We, meaning the four of us who had first boarded the boat and were initially sitting at the front of the wheelhouse and that is where we remained as the boat started out on the trip. My recollection is that the seats had thin plastic-coated foam cushion on them."

At paragraph 12²¹, the claimant continued by stating that indeed there was no health and safety briefing of any kind, not mention of life jackets but that there was some kind of briefing which she does refer to tangentially but that it gave no information as to how she should have conducted herself with regard to the boat seating. It was however of note that even though the claimant says no health and safety briefing was given, and that all was said that the bow of the boat would be bouncy while the back would be more comfortable but there was a chance of getting wet, the claimant referred to the fact that the "more elderly members of the travelling party" immediately took seats to the rear of the boat.

²⁰ WS filed 2/6/2020

²¹ WS filed 2/6/2020

- [45] In this regard, the claimant's witness, Ms. Playford also spoke to the indication of the relative disadvantages of the seating on the boat, the front as compared to the back and that there was also an indication about life jackets.
- [46] Both the claimant and her witness remained steadfast in their evidence, that upon receiving the directive that the front of the boat would be bumpy, they relocated themselves closer to the centre console where they had to sit sideways on the seats. It is the contention of the claimant that upon taking this seat they were never told that they still were exposed to the risk of injury or advised to move further back.
- [47] On cross-examination, however the tapestry of the picture painted by the claimant in examination in chief as to having no warning, that she was not advised to move or that she was unaware that she should move slowly unraveled to a large extent.
- [48] Under lengthy cross-examination, the claimant admitted the following:
- i) that it did not cross her mind that she was taking a risk to go on a smaller boat than the planned ferry;
 - ii) that she expected seatbelts on the boat as if she were on a plane but she never asked for seatbelts as the grab rails had been pointed out to her;
 - iii) that she made a conscious decision to stay in the bow section of the boat as she wanted to enjoy the view;
 - iv) that she chose the view as opposed to getting wet in the back;
 - v) that having shifted on the bench seating in the bow still meant that she was in bow of the boat;
 - vi) that she was being bounced up and down and back and forth but she did not move to the stern when they stopped at Moonhole;
 - vii) that she did not want to move to the back;
 - viii) admitted getting a warning from the tour operator Ms. Boulton and that she reiterated what had been said about sitting in the bow of the boat;
 - ix) that she had received warnings from the captain as to the nature of the ride in the bow of the boat; and
 - x) that she did decide to return to St. Vincent for medical treatment.
- [49] The witness Ms. Playford in cross-examination admitted that when she boarded the boat she was given a briefing, her recollection was that it was only about moving from the front of the boat to the back and that there were life jackets on board. Although she stuck to her story that there was no other warning after the boat left Petit Nevis, she did admit that she realized at that point that they were heading back into open water and without being told, she paid attention to the waves and when she saw one she held onto the grab rail. In fact, she was facing the direction of the waves and it was the claimant whose back was to the oncoming waves.

- [50] The two employees of the defendant who were on board that day, clearly stated and remained unshakeable on cross-examination that the mate Ken Isaacs had told the passengers on boarding clearly what the pros and cons were of sitting at the front of the boat and the back of the boat. In fact, the said witness Isaacs said on cross examination that when he did the briefing he did not see the need to tell them that they needed to move. The claimant was given a choice. This sentiment was also reiterated by the captain, in his evidence on cross-examination, he told the court that the mate had told the passengers the kind of ride that would be experienced at the front of the boat, he did not see the need to say anything further. Indeed, the tour operator Ms. Boulton, a witness for the defendant was also adamant that she had reiterated the cons of sitting at the front of the boat, an indication she reported was met with mirth and derision by the claimant.
- [51] Perhaps even more telling was the evidence that was elicited from one of the directors of the defendant, Mrs. Kim Halbach. Mrs. Halbach accepted that the age of the participants of the tour was perhaps an area of concern but she clearly stated that the company has a protocol, that they can only advise and that they would never physically move passengers who failed to take the advice proffered.
- [52] The contention of the claimant is therefore that even if they accept that there may have been warnings issued by the employees of the defendant, at the very most the warning was simply about moving from the “front” of the boat. The extent of this warning for the claimant was therefore wholly inadequate given the age of the passengers, who were additionally all unfamiliar with boating in this region and who had boarded a speedboat for the first time. In the contention of the claimant, these circumstances warranted the defendant’s employees being more explicit in their advice with specific reference being made to the great possibility of the passengers being injured if they failed to adhere to the advice. This failure fell below the standard of care that would be required in the circumstances and as such the defendant must be held liable for this failure.
- [53] The defendant on the other hand contends that contrary to the pleading of the claimant that no health and safety briefing was given at the beginning of the trip, both the claimant and her witness admitted that there was a briefing. The extent of the briefing as identified by the witness for the defendant remained largely unimpeached and for the defendant it was therefore clear that a briefing had been made. Further, despite the claimant not having made a specific averment that the age of the claimant was not taken into consideration in what was told to the passengers and how they were dealt with by the crew, the defendant submitted that in fact that it was clear that the age of the passengers had been taken into account.
- [54] The defendant contended that it was clear that the defendant company, who had been offering these tours to the tour company for over 20 years, were well aware that any tour offered took the age of the passenger taken into account, by the very nature and type of tours that were offered. In fact, the tour’s representative Ms. Boulton made it clear that all tours were rated and specifics given as to their nature. The defendant therefore submitted that not only had the age of the passenger

been considered but that in any event the passengers would have been given sufficient information before boarding and at the time of boarding boat which they were open to follow or not.

[55] When this court makes the assessment as to the extent of the obligation when passengers are being carried, it is clear that that obligation is the carry “with due care”²². In this court’s mind to do so would mean that all that was necessary to be done to ensure such due care was in fact done and adhered to. Therefore when this court considers the evidence with regard to the briefing that was carried out, I accept on a balance of probabilities that the briefing was in fact a perfunctory one carried out by a crew that knew the recitation by rote however, I do not accept that there was any need to include the caution that if a passenger sat anywhere forward of the captain’s console the possibility of injury was greater but I do accept that a stronger indication may have been helpful, a position that was in fact accepted by the director of the defendant Mrs. Halbich in her oral evidence. As one always knows, hindsight is 20/20 but this court accepts that the employees of the defendant were right to accept and believe that they were dealing with adults. Mature adults who said that they had never travelled on a speedboat in recent memory or at all, who had looked for seatbelts when boarding and who had been directed to the grab rails that surrounded the bow of the boat. The claimant never asked a question, never made any move to move to the back of the boat and I accept on a balance of probabilities that when she was advised about the nature of the ride in the bow of the boat that with her personality of “liking to laugh and fun loving”²³ she made the decision to stay where she was as she “liked the bounces”.

[56] I do not accept that there was any obligation on the defendant to advise any more than they did and in the manner that they did, supported by the words of the tour representative. I accept therefore that the actions of the defendant did not fall below that which was required of a prudent boat tour operator. I accept on the balance of probabilities that this particular of negligence was also not made out. I do not accept that the defendant was negligent in this regard. The claimant chose her seat, sat and made no attempt to draw the captain or the mate’s attention to any discomfort or concern as to the motion of the boat or the seat she occupied. Lord Salmon in the case of **Hilda Wragg v Douglas Grout and the London Transport Board**²⁴ say it best:
“Naturally one has the greatest sympathy with the plaintiff who has suffered this most unfortunate accident and serious injury. But in law she cannot recover damages unless she can show that this injury was caused by some negligence on the part of the Transport Board or its servant. To my mind the evidence does not support any such finding. I think that this is just one of those unfortunate accidents to which we are all prone and which cannot really be attributed to the fault of anyone. It may be that if the plaintiff had been holding on more tightly or more intently the accident would have been avoided. But there was no negligence on the part of the defendants and her injury was not caused by any fault of theirs.”

²²**Luddit and ors v Ginger Coote Airways Ltd** [1947] AC 233 at 241

²³Characterisation of the claimant by the Witness for the Claimant Kathleen Playford on cross-examination

²⁴ [1966] EWCA Civ J042-1

[57] I therefore do not find that the defendant has breached their duty of care to the claimant. At the most, the defendant by its employees may have been blasé or even careless, but I am of the opinion that this did not amount to negligence.

[58] There having been no finding of negligence on the part of the defendant, there is now no need to for this court to undertake an academic exercise as to the possibility of there being contributory negligence on the part of the claimant.

It is hereby ordered as follows:

ORDER

[1] The Claim is dismissed in its entirety with prescribed costs to the defendant on the basis of an unvalued claim pursuant to Part 65.5 CPR 2000.

Nicola Byer

HIGH COURT JUDGE

By the Court

Registrar