

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

**IN THE HIGH COURT OF JUSTICE
(ADMIRALTY)**

CLAIM NO.: NEVHCV2018/0078

BETWEEN:

**KINGSLEY A. THOMAS
(a.k.a. "Kingsley Tyson")**

Claimant

and

BLUES AND BLUES LIMITED

Defendant

Appearances:

Mr. Patrice Nisbett with him Mr. Eustace Nisbett for the claimant
Ms. Kurlyn Merchant for the defendant

2019: September 30,
2020: January 27,
February 24,
June 15.

RULING

[1] **GILL, M. (Ag.):** This matter is at the stage of assessment of damages following judgment in default of acknowledgement of service. The Court is to determine the quantum of damages to be awarded to the claimant for damage caused to his fishing vessel as a result of a collision with a vessel owned by the defendant company. After a hard fought battle between Counsel for the parties on a

preliminary point involving the issue of contributory negligence, this is the Court's ruling on that issue.

Background

[2] The facts are revealed in the statement of claim filed on July 19, 2018. On May 16, 2016 at about 7:15 a.m. the claimant and his crew of 5 were net fishing in his fishing vessel Mishoun Fari at Monkey Shoals within the jurisdiction of St. Christopher and Nevis when the defendant's vessel MV Mutty's Pride collided with Mishoun Fari thereby causing damage to its nets and engine. The claim is for damages for loss and expense arising out of the collision caused by the negligence of the defendant. In the Particulars of Negligence, the claimant alleges that the defendant was negligent in that in all the circumstances it or its employees or agents:

- (a) Failed to man and/or monitor its vessel's control room; and
- (b) Failed to man and/or monitor its vessel's steering wheel; and
- (c) Failed to stop, slow down, or otherwise control the vessel away from colliding with the claimant; and
- (d) Failed to give any or sufficient warning of its approach; and
- (e) Failed to keep any or proper lookout; and
- (f) Failed to observe the claimant's warning that danger was ahead; and
- (g) Failed to bring its vessel to a complete stop within a reasonable time after it had collided with the claimant's vessel and net.

[3] The defendant failed to file an acknowledgement of service or defence and judgment in default of acknowledgement of service was entered on March 5, 2019 for an amount to be decided by the Court.

[4] On May 13, 2019 the Court gave directions for assessment. That order was served on the defendant on June 20, 2019 and by the filing of a witness statement, a witness summary and submissions on assessment of damages, the defendant has decided to participate in this stage of the proceedings.

[5] The witness summary of Randolph Park, the captain of MV Mutty's Pride, indicates that he does not know exactly at what point the nets were caught in the defendant's vessel as there were no markers or lines to signal a fishing operation on that day so there was no way of knowing what was taking place to exercise any precautions in this regard. Further, he avers that the claimant's vessel did not carry a radio and there was no way of the claimant communicating with the defendant or other mariners to alert of any operation by the claimant.

[6] Samuel Connor, the owner and sole shareholder of the defendant, in his witness statement, accepts that his vessel MV Mutty's Pride collided with the claimant's fishing net causing damage, but contends that the claimant is responsible for the said damage as the claimant and his crew:

- (i) Failed to place any markers or flag poles at intervals on the net in the water signifying their operation.
- (ii) Failed to communicate in any way or issue any warning to mariners operating in the area to prevent collision or contact with the fishing gear.
- (iii) Failed to take the necessary precaution to avoid collision with their nets.
- (iv) Were negligent in failing to place markers or warnings of their nets.

Mr. Connor states that the claimant ought to be held contributorily negligent for about 70% of the damage claimed.

[7] At the hearing of the assessment on September 30, 2019 it was hotly contested between Counsel whether the defendant can raise the issue of contributory negligence after judgment in default in this case. In the circumstances, the Court ordered submissions on this particular point. Written and oral submissions were made accordingly.

Issue

- [8] The single issue for the Court to determine at this stage is whether the defendant can raise the issue of contributory negligence after the claimant has obtained default judgment.

The Law

- [9] Lord Denning explained the concept of contributory negligence in **Jones v Livox Quarries Ltd.**¹ when he stated:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless.”

Defendant's Submissions

- [10] As it is the defendant who seeks to introduce the issue of contributory negligence, it is prudent to spell out the defendant's position first. The defendant relies on the witness summary of Randolph Park, the witness statement of Samuel Connor and the report of the Nevis Air and Seaport Authority (NASPA) attached to claimant's witness statement to establish that the claimant was in breach of The Fisheries Act, Cap. 14.07 by not having the required markers while fishing. The following regulations contained in the Schedule to the Act are relevant.

33. Any fish aggregating device placed in the Fishery waters of Saint Christopher and Nevis shall

- (a) be clearly marked with the name of the owner and of the vessel from which the device was placed;*
- (b) bear a radar reflector and such other equipment or markings as the Chief Fisheries Officer may from time to time require.*

¹ [1952] 2 QB 608 at page 615

36. No person shall

....

(f) set or place any fish pot or trap without an identification mark issued or approved by the Chief Fisheries Officer.

- [11] The NASPA report states that in the interview with the captain of the MV Mutty's Pride he raised certain concerns. The relevant part of the report reads as follows:

"The Captain accepted the responsibility for the damages to the fishing gear however he has raised the following concerns which are deemed important and serious attention should be paid to these issues:

- Why is it, that fishing boats involved in such operations do not have pole flags at intervals on the net in the water signifying their operation.*
- They have no means of communications to alert mariners operating in the area to prevent collision or contact with the fishing gears."*

The captain suggests that these issues should be brought to the attention of the port to encourage the authority to enforce such recommendations/concerns thus preventing future collision and potential lives being lost at sea. In addition the authority should consult the IMO regulation pertaining to fishing activities."

- [12] Learned Counsel for the defendant, Ms. Merchant, submitted that none of the witness statements of the claimant or the NASPA report contradict the defendant's contention that there were no pole flags, markers or any form of communication to alert mariners that there were nets in the area. Therefore, on the face of the record, it is conclusive that the claimant was in breach of the statutory requirement to display markers. That being the case, the claimant was contributorily negligent. Ms. Merchant made it clear that the defendant is not disputing that the captain and crew of MV Mutty's Pride owed a duty of care to all mariners, including the claimant, and that there was some breach of that duty when the vessel collided with the net and engine of Mishoun Fari. However, she argued strenuously that at the stage of assessment of damages, the defendant is not barred from raising the issue of contributory negligence in the determination of the quantum of damages to be awarded to the claimant. Counsel cited a line of authorities on the point.

[13] In **Pugh v Cantor Fitzgerald International**,² Ward L.J. engaged in a useful discourse at paragraphs 26 to 29 of the judgment as follows:

“26. The first question is what issues may be raised on assessment of damages which is undertaken after there has been a judgment on liability. The answer is given by the unreported judgment in this court in *Lunnun v Singh & Ors.* dated 1st July 1999.... Jonathan Parker J., as he then was, stated the “underlying principle” in these terms namely:-

‘That on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment.’

27. Clarke L.J. held that on the assessment of damages the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim but subject thereto, the claimant could take any point relevant to the assessment of damages including failure to take steps to mitigate. Peter Gibson L.J. was of the view that:-

“the true principle is that on an assessment of damages any point which goes to the quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment.”

28. In my judgment that view of the true principle survives the introduction of the new Common Procedure Rules.

29. Thus the second question is what issues are determined by a judgment entered in default of defence. I accept the principle as it was expressed by Viscount Radcliffe in the Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993, 1012:-

... default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham L.C. (in *New Brunswick Railway Co. v British & French Trust Corporation Ltd.* [1939] A.C. 1, 21), they can estop only for what must “necessarily and with complete precision have been thereby determined.” ”

² [2001] EWCA Civ 307

- [14] The reasoning in **Lunnun v Singh** and **Kok Hoong v Leong Cheong Kweng Mines Ltd.** was applied by Blenman J.A. in **Keith Claudius Mitchell and The Attorney General of Grenada**³ when she stated:

“Turning to the default judgment, I agree that it is incumbent on the judicial officer at the assessment hearing based on a default judgment to scrutinise the pleadings in order to determine what the default judgment represents. I have no doubt that as a general rule the default judgment does not represent a decision that all of the loss or damage alleged by the claimant was indeed suffered by him or attributable to the defendant;...”

- [15] In **Froom v Butcher**,⁴ Lord Denning M.R. discussed a barrage of cases involving claimants for damages for personal injuries to illustrate the law relating to contributory negligence where the claimants were not wearing seat belts in motor vehicular accidents caused by the negligence of the defendant drivers. In that case, Mr. Froom suffered a broken rib, bruises to his chest and abrasions on his head as a result of a collision with a car, the driver of which was convicted of careless driving. Mr. Froom, as a personal preference, contrary to the law, was not wearing a seat belt when the accident occurred. He was awarded £450 in general damages by the judge at first instance. On appeal, Lord Denning reasoned the matter this way:

“Everyone knows, or ought to know, that when he goes in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens – and the injuries would have been prevented or lessened if he had worn it – then his damages should be reduced.”

The appeal was allowed and the damages reduced by £100.

- [16] Lord Denning gave guidance on the approach to be taken in apportioning damages in such cases when he declared:

“Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was the prime cause of the whole of the damage. But insofar as the damage might have been avoided or lessened by wearing a

³ GDAHCVAP2015/0034, delivered September 22, 2017, at paragraph 36 of the judgment

⁴ [1976] 1 QB 286

seat belt, the injured person must bear some share. But how much should this be... In most of these cases, the liability of the driver is admitted: the failure to wear a seat belt is admitted: the only question is: What damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.”

- [17] The point in issue was addressed in the St. Lucia case of **Bonny Alexander v Stanislaus Smith and James Enterprises Limited**.⁵ Mr. Alexander, a front seat passenger who was not wearing a seat belt, was thrown from the vehicle in which he was travelling and became entrapped in a tree as a result of a collision with a vehicle driven by the first defendant and owned by the second defendant. The defendants admitted liability in the acknowledgement of service and did not file a defence. Mr. Alexander obtained judgment in default of defence. At the assessment of damages, Counsel for the defendants submitted that the failure of Mr. Alexander to wear a seat belt raised the issue of contributory negligence as being relevant to the quantum of damages to be awarded to the claimant. Counsel for the claimant contended that the admission of liability by the defendants and the entry of judgment in default against them amounted to an estoppel on the issue of liability.

- [18] The learned Master at paragraph 27 of the judgment had this to say:

“A default judgment is conclusive on the issue of liability of the defendants as pleaded in the statement of claim but not necessarily conclusive on the issue of damages. It is open to the defendant at the assessment of damages to advance a causation objection, failure to mitigate loss or contributory negligence.”

The Court noted that it was uncontested that the claimant was not wearing a seat belt at the time of the accident and was of the view that his injuries would have been less severe had he been wearing a seat belt. The global sum awarded to him was reduced by 15%. (This decision has been reversed on appeal and is discussed at paragraphs 31 to 33 below.)

⁵ SLUHCV2017/0208

[19] In the case at bar, Ms. Merchant also cited the case of **Buzzmaker LLC v Lindsay Fitz-Patrick Grant**⁶ in which a ruling on summary judgment established the defendant's liability to pay interest. Glasgow M., as he then was, in discussing what matters may be set forth on assessment, ruled:

“He [the defendant] is however entitled to contend that while Buzzmaker may be entitled to interest, it has not shown the basis for claiming the amount it avers to be due....It therefore remains for this court to determine on evidence how much Buzzmaker may be awarded as interest. This exercise would necessarily involve an assessment of the evidence and arguments that the sums due as late payment fee may or may not be awarded as interest.”⁷

[20] In summary, the defence submitted that the defendant is not barred from raising the issue of contributory negligence at the assessment stage.

Claimant's Submissions

[21] The claimant is adamant that in the circumstances of this case, the defendant ought not to be allowed to rely on the defence of contributory negligence at this stage of the proceedings.

[22] Learned Counsel for the claimant, Mr. Patrice Nisbett, submitted that contributory negligence must be specifically pleaded if it is being relied on as a defence.⁸ He contended that at the assessment stage, the defendant cannot challenge the issue of liability. For this proposition, Counsel relied on the dictum of Lord Millett in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** when he stated:

⁶ SKBHCV2015/0280

⁷ Ibid at paragraph 18 of the judgment

⁸See Donald Findlay v Wendell Walters, SVGHCV2012/0151, per Henry J. at paragraph 28 of the judgment

“...once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing:...If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata*....the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined.”⁹

[23] Mr. Nisbett argued that where default judgment is obtained, the defendant is only permitted to raise the issue if it is not inconsistent with the statement of claim. He averred that contributory negligence is not a live issue in the claimant’s statement of claim (including the attached maritime report), and is a liability issue which could only be introduced had the defendant obtained an order to set aside the default judgment. He quoted Aikens J. in **Carbopego-Abastecimento De Combustivies SA v AMCI Export Corporation** that “...where a judgment in default has been granted on the question of liability, that judgment is conclusive on the issue of liability of the Defendant to the Claimant as pleaded in the Particulars of Claim.”¹⁰

[24] Mr. Nesbitt posited that it is pellucid from the authorities that the defendant is barred from challenging the issue of liability but may challenge the heads of damage or the extent of the damage caused. He recalled the learning of Edwards J.A. in the leading authority of **Michael Laudat and The Attorney General of Dominica v Danny Ambo** when she expounded:

“Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgment of service and/or a defence is taken to admit liability as pleaded. At the assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant’s liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and

⁹ [2005] UKPC 33 (Jamaica) at paragraph 16 of the judgment

¹⁰ [2006] Lloyd’s Rep. Plus 28 at paragraph 14 of the judgment

general damages. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.”¹¹

[25] Counsel pointed out that the defendant had ample opportunity to file a defence. Having failed to do so, the defendant cannot come now and ask the Court to pull back the curtain and re-open the issue of liability. He referred the Court to the judgment in **Timothy Symes v St. George’s Healthcare NHS Trust**¹² which cited **New Century Media Ltd v Makhlay**.¹³ In **Makhlay**, the claimant obtained judgment in default of acknowledgement of service in relation to the breach of a services contract entered into between the parties. At the assessment of damages hearing the Court refused to allow the defendant to argue that the claimant was in repudiatory breach or that the defendant was entitled to terminate the contract on notice. It was held that these issues went to the question of liability which had been determined by the default judgment. Carr J. was quoted extensively in the following paragraphs:

“30. A default judgment on liability under CPR Part 12 is a final judgment that is conclusive on liability. The Particulars of Claim are, in effect, a proxy for the judgment, setting out the basis of liability. Once judgment is entered, it is not open to a defendant to go behind it. Damages of course still have to be proved. And a defendant can raise any issue which is not inconsistent with the judgment – see the White Book 2013 notes to CPR 12.4.4...

36. Mr. Makhlay had a full opportunity to defend the claim on liability. If he disagreed with an aspect of liability that was relevant to quantum, it was for him to challenge the claim at the liability stage. He chose not to do so. He has not sought to set the judgment aside. He cannot now “roam freely” across issues of liability as he wishes to do....

40. Mr. Makhlay’s approach is tantamount to an abuse of process by way of a back-door attempt to challenge the findings in the judgment. It offends not only a natural sense of justice, but also against the general rule that a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction....

¹¹ HCVAP2010/016, at paragraph 30 of the judgment

¹² [2014] EWHC 2505 (QB)

¹³ [2013] EWHC 3556 (QB)

41. The consequences of Mr. Makhlay's position being correct would be startling: a defendant would benefit from failing to lodge a defence on liability and by simply submitting to a judgment in default, holding his powder dry until the quantum stage. He would then be able to mount essentially unfettered, all and any arguments on liability at the quantum stage that he wished probably, as has happened here, without any proper pleading or identification of the issues."

[26] In **Symes**, a case of clinical negligence, the claimant alleged that a consultant employed by the defendant failed to advise him that a lump on his face was "suspicious of malignancy", causing a delay in treatment and resulting in the tumour spreading to his lungs. He was left with inoperable lung cancer and a short time to live. In correspondence between solicitors for the parties, the defendant's solicitors admitted that the report on the sample was incorrect and that there was a delay in performing a necessary operation. However, the letter denied that the delay had any impact on the nature or extent of the surgery and the postoperative treatment the claimant underwent, the subsequent development of his condition or his life expectancy. In the Particulars of Claim, the claimant relied on the admission and subsequently obtained default judgment for an amount to be decided. The defendant served a medical report in support of arguments denying causation. The Master ruled that the matters pleaded in the Particulars of Claim were conclusive on the issues of breach of duty and causation. On appeal of the Master's order which included the striking out of paragraphs of the defendant's counter-schedule as being inconsistent with the Particulars of Claim, the Court, in allowing the appeal, held that the default judgment precluded the defendant from contesting liability but not causation.

[27] Interestingly, Learned Counsel for the defendant, Ms. Merchant, used **Symes** to argue the position of the defence that the defendant is not contesting liability, but should be allowed to dispute quantum on the basis of contributory negligence as was determined on the issue of causation in **Symes**. Mr. Nisbett accepted that the law provides for the defendant to raise issues of causation to the extent of

determining whether the damages sought are damages that flow from the established liability and whether the amounts claimed are akin to the liability.

[28] Mr. Nisbett forcefully advanced that the case at bar is distinguishable from “the seat belt cases” cited by the defendant. In those cases, the claimant either admitted, or it was uncontested, that the claimants were not wearing seat belts at the time of the accidents involved. Here, Counsel maintained, there has been no admission or some form of acceptance by the claimant that he was not displaying the required markers when the collision occurred. Nowhere in the NASPA report attached to the statement of claim is there any admission or mention of any such admission made by the claimant, or that the claimant was negligent in any way. Mr. Nisbett went on further to submit that, in fact, the report suggests that there were markers on the claimant’s net .The report states that the net “is made of twisted mono filament twine, three strain rope, lead and cork floats”.

[29] Counsel begged the question: How would the evidence be adduced to establish that fact? He reasoned that the Court is being asked to engage in an inquiry in these circumstances, a situation clearly prohibited by the case law.

[30] Mr. Nisbett contended that this attempt by the defendant is a clear example of an inconsistency with the liability established in the statement of claim, the very nature of which the authorities have sought to avoid. Therefore, to permit the defendant to raise the issue of contributory negligence at this time is tantamount to an assault on the law.

Bonny Alexander Appealed

[31] While preparing this ruling, I became aware that the seat belt case of **Bonny Alexander**¹⁴ cited by Ms. Merchant was listed for hearing by the Court of Appeal

¹⁴ Supra at note 5

in March 2020.¹⁵ Mr. Alexander (“the appellant”) challenged the decision of the learned Master in finding that he was contributorily negligent. Learned Counsel for the appellant argued that it was not open to the learned Master to have made a determination that not wearing a seat belt contributed to the loss suffered by the appellant in the absence of any evidence of the seat belt or the not wearing of a seat belt as exacerbating any damage or injury.

[32] The Court had to consider:

- (1) Whether the learned Master erred in assessment of damages in finding that the appellant was contributorily negligent;
- (2) Whether there was evidence before the learned Master indicating that failure to wear a seat belt contributed to injuries; and
- (3) Whether or not the learned Master erred in considering oral submissions on contributory negligence in the absence of such pleadings and evidence.

[33] In an oral judgment, the Court of Appeal ruled that there must be some evidence from an expert to say that some additional injury would have been sustained by the failure to wear a seat belt. Whereas the judgment of Lord Denning in **Froom v Butcher**¹⁶ made it clear that as much as one may take the view that if you do not wear a seat belt, then any injury may be exacerbated by that fact, but that is not a basis upon which a Court can make a finding of contributory negligence. Since there was no evidence from an expert or otherwise upon which the learned Master could have made a finding of contributory negligence, the Court found that the order reducing the damages awarded to the appellant by 15% on the basis that he was contributorily negligent by not wearing a seat belt could not stand. The awards made by the learned Master were reinstated without the reduction of 15% for contributory negligence.

¹⁵ SLUHCVP2018/0016

¹⁶ Supra at note 4

Analysis

- [34] The Court accepts that where a claimant obtains default judgment, the issue of contributory negligence can be raised at the assessment of damages as it relates to the quantum of damages to be awarded as long as it is not inconsistent with the liability determined by the judgment. Counsel on both sides submitted authorities to this effect and Ms. Merchant was at pains to emphasise that the defendant is not disputing liability.
- [35] The Court has no qualms in stating that if it is established that the claimant was in breach of the law by not displaying the required markers while engaging in a fishing operation, then the claimant would be contributorily negligent in the May 30 incident. Distinguishable from **Bonny Alexander**, no expert evidence would be required to show the extent of damage that might have been avoided had the claimant displayed the required markers. The Court would be entitled to find that the damage caused to the claimant's fishing net and engine may have been avoided or lessened by the claimant exhibiting equipment which may have alerted the captain and crew of MV Muttu's Pride of the fishing expedition being carried out by the claimant. The claimant would have to bear a share of responsibility for the damage caused to his property. Consequently, the quantum of damages to be awarded against the defendant would be reduced by an appropriate percentage.
- [36] The question then becomes: How is the Court to establish that the claimant did not display the required markers? According to Ms. Merchant, this is done by:
- (i) the witness summary of Randolph Park, the captain of MV Muttu's Pride stating that there were no markers to alert him and his crew of the claimant's fishing operation; and
 - (ii) the statement in the NASPA report exhibited to the claimant's witness statement that the said Randolph Park raised concerns about fishing boats not having flag poles or markers at intervals signifying their operation.

Counsel argued that these statements are uncontested as in **Bonny Alexander**¹⁷ and the defendant ought not to be barred from relying on the issue of contributory negligence.

Uncontested Statements

[37] On May 13, 2019 the sitting Master gave directions for assessment of damages including:

- I. That the Claimant shall file and serve on the Defendant witness statements and written submissions which the Claimant intends to rely on or before 4th June 2019;
- II. The Defendant shall file a Notice in Form 31 within 7 days of the service of the Claimant's witness statements and submissions;
- III. The Defendant shall be at liberty to file and serve witness statements and written submissions on which the Defendant intends to rely on by 26th June 2019;
- IV. The assessment of damages is fixed for hearing for 8th July 2019.

[38] Pursuant to the order of the Court, the defendant joined the proceedings and filed a Notice of Intention to be Heard on Assessment requesting to cross-examine the claimant and his witnesses, make submissions to the Court and call evidence to be set out in the witness statements of Samuel Connor and Randolph Park.

[39] There was no direction given to allow the claimant an opportunity to reply to the witness statements and written submissions of the defendant to dispute any contention or allegation made by the defendant. In fact, the claimant's witness statement includes the same description of his fishing net as in the attached NASPA report that at the material time, the net was made of twisted mono filament twine, three strain rope, lead and cork floats. Is this evidence that he displayed the required markers?

¹⁷ Supra at note 5

[40] Interestingly, the specific requirements for the claimant's compliance were not provided to the Court. As stated earlier, regulation 33 of the Fisheries Regulations stipulates that any fishing aggregate device shall bear a radar reflector and such other equipment or markings as the Chief Fisheries Officer may from time to time require.¹⁸ There is nothing before the Court indicating what, if any, equipment or markings the Chief Fisheries Officer has required.

[41] Therefore, it appears to me that in order to make a determination as to whether or not the claimant's fishing vessel bore any required markings, the Court must engage in an inquiry into the evidence of the parties. The only avenue for this to be done at this stage of the proceedings is at the assessment hearing which allows for cross-examination of the witnesses. There has been no admission by the claimant of any act or omission which would amount to negligence on his part. On the state of the evidence before the Court at this time, I cannot conclude that the contention of the defence that the claimant did not have the required markers while fishing is uncontested. This will necessitate a hearing of the witnesses and an assessment of the evidence. In the circumstances of this case, in light of the default judgment, is it permissible for the Court to conduct a hearing to determine whether or not the claimant ought to be held contributorily negligent?

[42] In the circumstances of this case, I think not. The defendant is asking the Court to find the claimant 70% contributorily negligent, that is, that the claimant must bear the brunt of liability for the collision of the vessels. To my mind, the Court being requested to re-open the issue of liability by embarking upon a fact finding mission as to whether or not the claimant was displaying the necessary markers at the time of the collision. No issue of contributory negligence arises from the statement of claim. From the submissions of Counsel, an inquiry into the circumstances surrounding the presence or absence of markers will be contentious. Ms.

¹⁸ At paragraph 10 above

Merchant contends that it is uncontested that the claimant displayed the markers. Mr. Nesbitt counters that the NASPA report suggests that he did. There is no evidence before this Court as to what constitutes the required markers. The Court would be required to make a determination of the degree of blameworthiness in the sort of inquiry frowned upon by Lord Denning in **Froom v Butcher**.

- [43] The defendant had the opportunity to have this issue ventilated at trial with the filing of a defence. The defendant chose not to do so. The Court will not now embark upon what will be, in effect, a mini trial as to whether or not the defendant is contributorily negligent in this case.

Order:

- [44] For the foregoing reasons, it is ordered and directed as follows;
- 1) The defendant is precluded from raising the issue of contributory negligence at the assessment of damages.
 - 2) The Court will proceed to assess damages under the remaining heads identified by the claimant.
 - 3) In relation to this ruling, there is no order as to costs.

**Tamara Gill
Master (Ag.)**

By the Court

Registrar