

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

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

CLAIM NUMBER: SVGHCV2012/0120

BETWEEN SHELENE MC. NEIL

CLAIMANT

-AND-

**CLIFFORD YOUNG
JERRY LEWIS**

DEFENDANTS

Appearances:

Mr. Roderick Jones of counsel for the claimant

Mr. Duane Daniel with Ms. Jenell Gibson of Counsel for the 1st defendant

Mr. Richard Williams with Ms. Dannielle France for the 2nd defendant

**2019: July 24
August 9**

JUDGMENT

[1] **MOISE, M.:** The claimant brought this action in negligence for special and general damages as a result of injuries sustained when sea vessels operated by the defendants collided en route to mainland Saint Vincent. The 1st defendant, on whose vessel the claimant was a passenger, although having initially filed a defence, has admitted liability. The main issue for consideration in this case was whether the 2nd defendant was also liable and, if so, to what degree did he contribute to this collision. The matter had gone through its normal case management procedures, with disclosure and witness statements having been filed. However, on 27th February, 2014 the parties agreed to refer this issue to a referee, with knowledge of the rules of the sea, for his consideration. After a protracted period, and numerous adjournments, the referee was finally able to conduct his hearing and submitted a report for the court's consideration on 2nd April, 2019.

[2] This report essentially found that both defendants contributed to the collision and, at the instance of the 2nd defendant, the referee was summoned to court on 24th July, 2019 for further questions to be

put to him for clarification. In these circumstances it is now left for the court to consider the report in accordance with the provisions of Rule 40.6 of the CPR. The Rule states as follows:

40.6 (1) Upon receipt of the report of the referee, the court office must fix a date, time and place for consideration of the report by the court.

(2) The court office must give 14 days' notice to the parties of such consideration.

(3) The court may –

(a) adopt the report in whole or in part;

(b) ask the referee to explain any part of the report;

(c) decide the question or issue on the evidence taken by the referee;

(d) direct that additional evidence be given to the court;

(e) remit any question or issue for further consideration; or

(f) vary the report.

THE FACTS

[3] The facts of this case are not particularly complicated. Essentially, on 12th April, 2009, the claimant was a passenger on the 1st defendant's vessel. The vessel was returning from Bequia to mainland Saint Vincent. The 1st defendant's vessel was travelling along the port side of the MV Jaden T, which was operated by captain Elvis Gooding, who himself is a licensed boat captain with 35 years of experience in that industry. The evidence suggests that there were a number of vessels in the area at the time. The 1st defendant, during the course of his journey, crossed the bow of the Jaden T from one side to the other. The 2nd defendant was operating his vessel along the starboard side of the Jaden T. He too was passing the bow of the Jaden T at the same time as the 1st defendant. They were all travelling in the same direction. It is during this maneuver that the vessels collided.

[4] The 2nd defendant insists, given that he was on the starboard side of the Jaden T, and essentially also that of the 1st defendant, that it was the 1st defendant's duty to give way. This is in keeping with Rule 15 of the International Regulations for Preventing Collisions at Sea, which is applicable in Saint Vincent and the Grenadines by virtue of the Shipping Act of 2004. The rule states that ***“when***

two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel."

[5] In light of this, among other considerations, the referee had little difficulty in concluding that the 1st defendant was the main cause of the collision. However, what appears to trouble the mind of counsel for the 2nd defendant was the finding that Mr. Lewis was also negligent. Under oath, the referee sought to explain his position as contained in his report. He states that rules 15 and 16 of the regulations are not the only factors to consider when determining liability for a collision at sea. He points, in his report and under oath, to section 6 of the regulations which requires vessels to be operated at a ***"safe speed and to take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."*** Section 6 also mandates that vessel operators consider the state of visibility, the traffic density and maneuverability of the vessel as factors which should determine the level of speed at which to proceed. Regulations 7 and 8 also address the issue of risks of collision and actions necessary to avoid a collision. In short, according to the referee, "right of way" does not absolve a vessel operator from the general duties of safety, including speed, the need for a proper lookout and the ability to avoid a collision if it is apparent that one may take place.

[6] The referee went on to make certain findings of fact, one of which was that the 2nd defendant was moving with too much speed in the prevailing circumstances. He found, based on the evidence of all witnesses before him, that the area was particularly busy on that day, with a number of vessels operating at the time. The Jaden T was itself operating on a tour and moving at a slow pace. Mr. Elvis Gooding, who was operating the Jaden T and who was a licensed boat captain of 35 years' experience, testified that none of the vessels involved in the collision took any evasive action in order to avoid the collision. In fact, in his view, the vessels were both operated at a speed which would have made it difficult to avoid this collision. I note that the referee accepted that there was some attempt by the 2nd defendant to avoid the collision, despite Mr. Gooding's assertion. However, what the referee did appear to accept, and underscored in court under oath, was that the 2nd defendant operated the vessel with too much speed in the prevailing circumstances.

[7] The referee also considered the requirement under section 5 of the Rules of the Sea for each vessel to maintain a proper look out by sight and hearing and any appropriate means in the prevailing circumstances. When pressed by counsel for the 2nd defendant, the referee accepted that this does not mean that the captain cannot operate as the “look-out” himself and that there is no requirement for a 2nd person to be appointed for that purpose. He however underscored that what must be considered is the prevailing circumstances at the time. He remained adamant that the area was very busy on that day with a number of vessels at sea. When coupled with the speed at which the vessels were operating, he formed the view that neither defendant had complied with rule 5. In light of this I refer directly to the findings of the referee at paragraph 16 of his report where he states as follows:

“Mr. Lewis made a good and prudent decision in attempting to mitigate the collision impact, in the absence of tangible evidence, he put his two motors in reverse. The fact remains by his own admissions that there was a lot of other vessels that were in the area of which he was unable to give a number of and which the rule 6 states, every vessel shall at all times proceed in a safe speed so that she can take proper and effective action to avoid a collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In determining a safe speed the following factors shall be among those taken into account: the traffic density including concentrations of fishing vessels or any other vessel given the circumstances to include visibility. Rule 5 requires consideration of the prevailing circumstances and conditions. Danger can approach from any directions for unforeseen reasons. The risk of collision is always present.”

[8] These are the issues which were considered by the referee in coming to his conclusion, and for my part, I see no reason to trouble that decision. He accepted that the 1st defendant violated the rules of the sea by failing to give way, but was also of the view that the 2nd defendant could not be absolved of responsibility in his own failures. Given his findings he referenced sections 136 and section 350 of the Shipping Act of Saint Vincent and the Grenadines which provides that liability for damage caused as a result of a collision should be apportioned according to the degree of fault of each ship involved in the collision. Where it is impossible to ascertain the degree of fault of each vessel the liability must be apportioned equally. Based on the findings in the report, the court was

of the initial view that a recommendation was being made to apportion liability equally. However, on examination the referee indicated that he had not taken that decision and left it for someone else to decide. I presume that someone else was the court. However, when posed with the question as to his own views the referee recommended a 70%-30% apportionment of liability with the first defendant bearing the greater burden.

[9] In accordance with Rule 40.6 of the CPR the court, in assessing the report of the referee, may either adopt it in whole or may vary parts of it. After the enquiry I am satisfied that the referee has been clear in his findings and there was ample evidence upon which his findings were made. The only issue is that he failed to apportion the liability between the two defendants. I am satisfied, given the nature of the report, that the 1st defendant should bear the greater burden and would exercise my discretion under the rules to vary the report so as to adopt the apportionment recommended by the referee during the court's own enquiry. I would therefore enter judgment for the claimant against both defendants with damages to be assessed. I am mindful that this accident occurred over ten years ago now and the case has been lodged in the system for in excess of seven years. Whilst I would not seek to place blame on anyone, I would only mention that the issue of delay continues to be a most vexing issue for the system we seek to administer. It continues to undermine public confidence in the justice system and we must all do our part to correct this issue. An individual who has suffered an injury of this nature, in a case which is not particularly complex, should not have to wait for such a long period of time to have matters brought to an end. There must be finality to litigation within reasonable time. I will therefore proceed to give directions for the assessment of damages with the hope that matters could be concluded within the time frame outlined in the orders below.

[10] I make the following orders and declarations:

(a) Judgment is entered in favour of the claimant against both defendants;

(b) The 1st defendant shall be responsible for 70% of all damages and costs awarded to the claimant;

- (c) The 2nd defendant shall be responsible for 30% of all damages and costs awarded to the claimant;
- (d) The claimant shall file witness statements in support of her assessment on or before, 20th September, 2019;
- (e) The defendants are at liberty to file evidence in reply on or before 27th September, 2019;
- (f) The parties are to file an exchange written submissions by 11th October, 2019;
- (g) The matter will be listed for assessment on 24th October, 2019 before the master;
- (h) The claimant is also entitled to prescribed costs on the assessment and the costs of the assessment hearing are to be assessed by the master at the hearing on 24th October, 2019.

**ErminMoise
Master**

By the Court

Registrar