

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0043

BETWEEN:

SOLANA GOODING

CLAIMANT

and

ASHLEY OLLIVIERRE

DEFENDANT

Appearances:

Mrs. Zhing Horne-Edwards for the Claimant

Mr. Richard Williams with Danielle France for the Defendant

2018: February 20

May 8

ORAL DECISION

BYER, J:

The Undisputed Facts:

- [1] On the 14th day of April, 2013, the Claimant was a passenger on board the ***MV Petti Cash***; a speedboat owned and operated by the Defendant, having been invited by the Defendant's son, Josh, to a weekend excursion from Bequia to Isle à Quatre to celebrate his birthday. The weekend

trip extended from Saturday April 13 to Sunday April 14, 2013 but the Claimant joined the party on Sunday April 14, 2013 only. The Claimant had been on trips on the **MV Petti Cash** on a number of occasions in the past.

- [2] Prior to embarking on the excursion, the Defendant did not check the weather and marine forecast issued by the St. Vincent and the Grenadines Meteorological Services for Sunday April 14, 2013.¹
- [3] On the return voyage from Isle à Quatre to Bequia, the Claimant was seated on the padded rear-facing bow seat. She was facing the captain and the captain was facing her. The captain observed the Claimant, his daughter Amanda and their friend Kristi bouncing up and down in their seats as the boat went over the waves on its way back to Bequia. The Claimant, Amanda, Kristi and other passengers were laughing and joking during the trip. The Defendant did not reduce his speed at this time nor did he tell the Claimant to change seats or to hold on.
- [4] At no time, whether before, or during the course of, the voyage did the Defendant give the Claimant or the other passengers any instructions in safety measures or precautions to be taken in any given situation.
- [5] At some point during the trip, Amanda told the Claimant that she should move from where she was sitting. While the Claimant was still seated on the bow seat, the boat went over another wave and the Claimant was jolted from her seat into the air and landed back onto her seat, seriously injuring her back.
- [6] The Defendant then stopped the boat and after the Claimant was placed on the floor of the boat, continued the voyage to Bequia, this time at a very slow speed.
- [7] From the pretrial review held between the parties on the 8th day of December 2017, the issues for trial could be distilled as follows:
 - 1. whether the Defendant was 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 contributory negligent for her own injuries and if so to what extent.

¹ Second Supplemental List of Documents of the Claimant filed on February 15, 2018

Issue #1 – Whether the Defendant was responsible for the injuries sustained by the Claimant.

- [8] The law in relation to negligence is well known and recognised by the Courts to clearly state that not every act of carelessness or negligence is actionable under the tort of negligence.
- [9] Lord Wright in the case of Lochgelly Iron & Coal Co Ltd. V. McMullan² 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”.
- [10] Thus, it is that there must be an existing duty of care as between the Claimant and Defendant that the Defendant behaved in such a manner that was more than carelessness that caused the damage to the Claimant and additionally that such damage was foreseeable.³
- [11] I do not think it can be disputed by the Defendant that as the Captain of the boat, the **MV Petti Cash** that day, he owed a duty of care to the Claimant as a passenger on the boat. The Claimant in this Court's opinion met the definition of ‘neighbour’ as set out in the seminal case of Donoghue v Stevenson⁴ and I therefore find that there was a duty of care owed to her by the Defendant.
- [12] 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.
- [13] By the Amended Statement of Claim filed on the 23rd day of September 2016, the Claimant set out the particulars of negligence sought to rely on:
1. *“Driving the boat at an excessive speed in circumstances where it was unsafe to do so;*
 2. *Driving the boat at such a speed and in such a manner so as to cause the Claimant to be violently jolted from her seat and suffer injury;*
 3. *Failing adequately or at all to observe or heed the choppy nature of the water and the height of the waves;*
 4. *Failing to reduce the speed at which the boat was travelling when it was reasonable in the circumstances to do so;*
 5. *Failing to steer or control the boat adequately or at all so as to avoid hitting the waves at speed;*
 6. *Failing to take any or any adequate care for the Claimant's safety. “*

² 1934 AC 1 Page25

³ Clerk and Lindsell on Tort 18th Ed. Page219

⁴ 1932 AC562 Page579

- [14] Additionally at trial, Counsel for the Claimant made an application pursuant to Part 29.9 CPR 2000 to amplify the witness statement of the Claimant and introduced for the first time the failure of the Defendant to give safety instructions before they set sail.
- [15] In this regard, the Claimant has sought to rely on the case of Eastern Caribbean Flour Mills Ltd. v. Ormiston Ken Boyea⁵ in which the Court of Appeal by way of Barrow JA as he then was, stated clearly that although pleadings set the “parameters of the case that is being advanced by each party so as not to take the other side by surprise, Judges are also obliged to look to other documents, for example witness statements, to see what the issues are between the parties”.
- [16] It is this statement of the law upon which counsel for the Claimant submitted that the introduction of the failure to give safety instructions as a particular of negligence when no such indication had been given in pleadings, but instead via a witness statement was permissible. Counsel submitted that the Court must therefore consider it as part of the Claimant’s case as well as the recent allegation of failing to adhere to the Government issued weather forecasts.
- [17] Indeed, there was no issue taken by Counsel for the Defendant on the introduction of the weather forecasts but submitted to the Court that little weight can be placed on them in any event as the same were not relevant to the conditions at sea or the area in which the accident occurred.
- [18] I in fact, accept that the issue of this forecast to which I shall come back later can and does form part and parcel of the already pleaded particulars of negligence.
- [19] The more troubling addition however, was the failure to give safety instructions.
- [20] In the case of Lindsay Fitz-Patrick Grant v. Glen Fitzroy Phillip et al⁶ Hariprashad-Charles J, had this to say about the principle of pleadings, “pleadings...have to be precise, specific and unambiguous so that a Respondent knows what case he has to meet. In fact, this is true of all matters generally as the function of pleadings is to give fair notice of the case which has to be met and define the issues on which the court will adjudicate in order to define the matters in the dispute between parties. A party must so state his case that his opponent is not taken by surprise”.
- [21] I therefore, accept the submission that this is not a particular of negligence which this Court can or should address and I refuse to do so.

⁵ SVG Civil Appeal 2006/0012

⁶ SKBHCV2010/0026 Par19

- [22] The other particulars can be dealt with under the broad headings of speed, failure to adhere to the surroundings, failure to care for the safety of the Claimant (which by implication includes the seating arrangements).

Speed

- [23] The evidence of the Claimant in her witness statement said the following:

Paragraph 9 “Ashley pulled out of Isle A Quatre in a hurry sometime after 4:00pm ... He continued to drive the boat at speed out of Isle A Quatre.”

Paragraph 10 “... the bouncing motion of the boat intensified and the captain did not reduce his speed”.

In cross examination, “the Defendant was driving at speed but not at cruising but not a super speed”.

- [24] Under the rigorous cross examination, the Claimant however admitted that on the boat at the time there were at least five (5) other individuals who captained boats, who she also admitted did not speak to speed.

- [25] Counsel for the Claimant has essentially asked this Court to by and large disregard the evidence of these witnesses for the Defendant– generally on the basis of partiality. I am not swayed by this argument and find that rather unlike the Claimant in the Carter Smith Jr. v. Nicolaas Bersma case⁷, this Claimant was not a “neophyte” to either the vessel or to sailing. I do not accept that the Defendant was driving the vessel at an excessive speed and this Court accepts the evidence given on behalf of the Defendant that in fact most of the passengers had been standing, yet no one else suffered injury when this vessel hit the wave.

I therefore, find that the particulars pleaded regarding speed are not made out.

Failure to Consider the Surrounding/Prevailing Conditions

- [26] Under this particular, I will consider the weather and sea conditions.

- [27] The Claimant by her witness statement at paragraph 5 stated “the sea was choppy and the waves were pushing the boat towards the dock where we were waiting to get on the boat”.

Paragraph 10 “in the channel between Isle A Quatre and Paget Farm, it started to get really bumpy on the boat as the sea was choppy”.

On cross examination, she further stated, “the sea was very choppy and windy between Isle A Quatre and Bequia. Choppy and rough”.

⁷ ANCHCV2009/0178

- [28] The Defendant's case on the other hand, was in the evidence of the Defendant himself. The Defendant told this Court in fact there was no difficulty docking at Paget Farm. He explained that the jetty sits against the wind and so it was more difficult to get in there than other ports like Port Elizabeth. He also stated that it was normal seas. He told the Court that he judged what the sea conditions would have been like from looking at them. He categorically stated, "I am a seaman". He said when he looked at the meteorological forecast put into evidence his response was that it was only applicable to the open seas and not the sheltered area where the accident took place. He said there was no need for high swells for persons to be bouncing up and down in a speed boat, even swells of one (1) foot can cause bouncing and in any event the swells were never more than 3" in the sheltered passage.
- [29] Additionally, the witnesses for the Defendant, all of whom were experienced seamen spoke of the conditions being of moderate seas.
- [30] On a balance of probabilities, I believe the picture painted by the witnesses for the Defendant. That at the time of the accident, there was not exceptionally rough seas and even with the meteorological forecast, I accept the observations of a seaman, who had admittedly thirty-four (34) years of experience. A forecast can only be a forecast, and there was no evidence of this being the actual conditions present on the day in question.
- [31] I therefore, do not accept that the Claimant has made out this claim either.

Failing to Take Any or Adequate Care for Safety of the Claimant

- [32] Under this particular of negligence, I consider the point made by the Claimant that at no time did the Defendant instruct her to move from the bow seat she occupied.
- [33] The Claimant's evidence was that upon entering the vessel, the only seats available were the ones in the bow. She occupied the same and held on. She submitted that the Defendant, seeing her bouncing up and down, never told her she was in danger or should move. She consistently spoke to him holding on and that despite her tight grip to hold on to the sides of the vessel, she was injured.
- [34] However, it was of interest to the Court that every single witness for the Defendant including the Defendant, all commented on the fact that the Claimant was not holding on.
- [35] This Court accepts that it is not outside the realm of possibility for a version of events to have been, that in the midst of the continuing revelry, that the Claimant was oblivious to the possible risks of not holding on and did not do so.

- [36] 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 Defendant's attention to discomfort or distress she says she was feeling. Caught up in the revelry of the moment, I accept that the Claimant was the victim of a most unfortunate accident.
- [37] I therefore do not find that the Defendant breached his duty of care to the Claimant. At the most, he may have been nonchalant but I am of the opinion that this did not amount to negligence.
- [38] There is therefore no need to address my mind to Issue #2 with regard to contributory negligence.

IT IS HEREBY ORDERED AS FOLLOWS:

ORDER

- [1] Claim is dismissed on a prescribed costs to the Defendant on the basis of an unvalued claim.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar