

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2011/432

BETWEEN:

ALEXANDER LEWIS

Claimant

AND

**DENLEY JOSEPH
SIBLEY CHARLES**

Defendants

Appearances:

Mr. Septimus Rhudd and Mr. Jermaine Rhudd of Rhudd & Associates for the Claimant
Ms. Asheen Joseph of Lockhart, Mendes & Co for the First and Second Defendants

2016: September 22

JUDGMENT

- [1] **HENRY, J.:** On the 16th June 2010, the claimant (Mr. Lewis) was employed as part of the crew on the boat "Sibley" owned by the second defendant (Mr. Charles). Members of the crew were engaged in catching lobsters and fish off the coast of Barbuda. Mr. Lewis was injured while in the water when his left foot came in contact with the propeller of the boat, which was being operated by the first defendant (Mr. Joseph). In his Claim Form, Mr. Lewis seeks compensation for the injuries sustained.
- [2] Mr. Lewis avers that he was employed as a lobster diver and that it was a principal part of his job to enter the water and catch lobsters. While acting during the course of his employment, he entered the water to dive for lobsters. Mr. Joseph, without first ascertaining that it was safe to do so, negligently operated the boat in such a manner that the propeller came into contact with his left foot thereby causing injuries. Mr. Lewis also pleads that Mr. Joseph was at all material times acting as the servant and/or agent of Mr. Charles.

[3] Particulars of alleged Negligence by Mr. Joseph include:

- 1) Operating the boat at a time when it was manifestly unsafe to do so having regard to Mr. Lewis' presence in the water and in close proximity to the boat;
- 2) Failing to take any or any adequate precautions for the safety of Mr. Lewis while he was in close proximity to the boat;
- 3) Exposing Mr. Lewis to a risk of damage or injury of which he knew or ought to have know;
- 4) Failing, whether by means of sign, sound or otherwise, to warn Mr. Lewis that he Mr. Joseph was going to operate the said boat and start the propeller.

[4] Particulars of Negligence by Mr. Charles include:

- 1) Failing to satisfy himself that Mr. Joseph was competent to operate the boat while Mr. Lewis was working in close proximity as a diver;
- 2) Failing to take any or any adequate pre cautions for the safety of Mr. Lewis while he was in close proximity to the boat.

[5] In their Amended Defence, Mr. Joseph and Mr. Charles deny that Mr. Lewis was employed as a lobster diver. They aver that Mr. Lewis was employed as a trainee diver /or deckhand. According to them, he functioned as a deckhand but was also being trained as a diver. On the day in question he had been permitted to enter the water with the senior diver as a trainee and after a few minutes he was sent back on deck to await further instructions. Paragraph 4 of the Amended Defence aver that Mr. Lewis was on a frolic of his own and in reckless disregard of the established safety protocols, re-entered the water without authorization, knowledge or consent of Mr. Joseph and/or the on-duty diver watchman.

[6] Both Mr. Joseph and Mr. Charles deny any breach of duty as alleged by Mr. Lewis. According to the pleadings, Mr. Joseph has been the driver of "Sibley" for 2 years and was at all material times a skilled and experienced boat driver and navigator with upwards of 10. years experience. The Amended defence also aver that the matters complained of by Mr. Lewis were caused solely by the negligence of Mr. Lewis. They therefore assert that Mr. Lewis is not entitled to the relief claimed or any at all.

[7] In his reply, Mr. Lewis joins issue with the defendants on the Amended Defence. Specifically, Mr. Lewis maintains that at the time he sustained his injuries, he was not in the water as a trainee diver but rather as a full time employee of Mr. Charles. Mr. Lewis denies that he was sent back on deck by anyone to await further instructions as alleged. He further denies that he was on a frolic of his own or that he recklessly disregarded established safety protocols as alleged.

[8] The issues to be determined by the court are:

- 1) Was Mr. Joseph negligent on the day in question, if so, was Mr. Joseph's negligence the proximate cause of Mr. Lewis' injuries;

- 2) Was Mr. Charles also negligent and in addition is he vicariously liable for any injuries sustained by Mr. Lewis
- 3) Was Mr. Lewis in any way contributorily negligent?

Negligence

- [9] Alderson, B in **Blyth v Birmingham Waterworks Co**¹ stated the now well established principles as follows:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Claimant's Case Against The First Defendant - Mr. Joseph

- [10] Mr. Lewis' case is that Mr. Joseph was negligent in operating the boat having regard to his presence in the water. His evidence is that there were six crew members on the boat on that day as they set off from River Dock in Barbuda. The others were Kenly Joseph, Keston Mason, Remy Charles, Kevin and one known to him as "Rasann". Denley Joseph was in charge of driving the boat. They left River Dock in Barbuda at about 7 am. They stayed in the waters east of Barbuda until about 2 in the afternoon. They then left for another area. At the second location, once the boat stopped, he along with Kevin and Rasann prepared to enter the water. Rasann was the watchman. Mr. Lewis and Kevin were the divers. According to him he stayed in the water about 25 minutes and caught 8 lobsters. There appeared to be no more lobsters or fish in the area so he came up from the water and got back into the boat. At the time Kevin and Rasann were still in the water. At some point he called out to Rasann and told him "OK me a come". At that time Rasann was about 3 yards from the boat. Mr. Lewis could not at that time see Kevin. Mr Lewis's evidence is that he also told Keston and Remy that he was jumping back into the water and that they should bring around the tank for him. He then put on his fins and his glass and jumped into the water. The boat was not moving at this time.
- [11] His evidence is that he started swimming towards Rasann. After swimming some distance he began to hear the loud muffling sound of the boat engine getting closer to him. He says he started shouting that he was behind the boat, and he began throwing water into the air so that the driver could see him and how close he was to the boat. According to him, the boat driver was supposed to either look behind when reversing or drive forward and around in a circle, since persons were in the water. From where he was in the water he says he was able to see that the driver was not looking back. Just as the boat reached him, he felt himself being pulled under the water. He then noticed that his left foot and fin were sliced. His left foot was injured by the propeller of the boat.

¹ (1856) 11 Ex. 781, 784

[12] Mr. Joseph rightfully accepts that Mr. Lewis' foot was injured by the propeller of the boat as the boat reversed. He admits that he had a duty of care toward Mr. Lewis, but denies that he breached that duty of care which resulted in Mr. Lewis' injuries.

[13] Mr. Joseph admits that he was the driver of the "Sibley" on the day in question. His evidence is that on that day they set out on a lobster/fish catching expedition. Kevin Joseph was the lead diver/Captain; Rashaan Roberts was the watchman, Shallum Charles was the deckhand, Ordinstan Mason was also a diver and Mr. Lewis was the trainee diver. Kevin had started training him some six (6) months before. Having arrived at the diving site, Kevin, Mr. Lewis and Rashaan went into the water. After a few minutes, Mr. Lewis was sent back on the boat by the lead diver. According to Mr. Joseph, he spoke to Mr. Lewis and was informed that they had not found much lobster. A few minutes later the other two emerged from the water and they decided to move to another location.

[14] At the new location, Kevin and Rashaan went back into the water. Lewis remained on the boat. He was lying on the gunnel on the starboard side of the boat. Shortly thereafter Rashaan called to him and asked him to reverse the boat a bit and have someone throw him the spear gun. Mr. Joseph's evidence is that he then put the boat in reverse as Rashaan had instructed. As he reversed, he heard a shout. He immediately stopped. He and Mason went to the side of the boat and saw Mr. Lewis in the water. He asked Mr. Lewis what was he doing in the water. Mr. Lewis shouted that he had gotten cut. They then pulled him out of the water.

[15] According to Mr. Joseph, once there is a diver in the water, it is the watchman who communicates with the driver when and where to move the boat. Furthermore, Lewis had not communicated to anyone – not the deckhand, not the watchman or the driver – that he was going back into the water. Mr. Joseph states that Lewis should not have been in the water unless he was called by the watchman on instruction of the lead diver. He gave this further evidence on re-examination:

"When we are working everybody communicates with the driver. If a diver is going to go into the water it is the watchman's duty to indicate that the diver is going to leave the boat, because the watchman is the person who knows the number of persons who should be in the water. So I was only following the directions of the watchman to reverse the boat."

[16] The evidence of the watchman Rashaan corroborates the evidence of Joseph in a number of respects. Firstly, that Lewis was a trainee diver at the time of the incident. Secondly, that at the first site Lewis was sent back on the boat by the lead diver because Mr. Lewis' tank was empty. Thirdly, that at the second location, he and Kevin went into the water and left Lewis on board. According to Rashaan, it is his job to know where the divers are at all times. As far as he knew, Lewis was on deck and Kevin was diving in the back of the boat, so he signalled to Mr. Joseph to reverse a little. As Joseph reversed, he heard a scream, and then he heard Lewis say he got cut. He concludes by stating: "I do not know why Lassie (Mr. Lewis) went behind the boat, he knew that he should not go behind the boat by the propeller. As I stated before Lassie used to be a watchman, he trained me,

he knows the driver cannot see behind the boat and that if a diver wants to go into the water he must alert the watchman and say "man overboard".

- [17] The evidence of the lead diver, Kevin, is that he, Kevin, was the lead diver and Lewis was with him as a trainee diver. Rashaan was the watchman. He states that after a few minutes he did send Lewis back up on deck. He was pressed on cross-examination but was resolute that after about 20 minutes Mr. Lewis had signalled that his tank was empty and was signalled to go up. He confirms that at the second location, only he and Rashaan went into the water. His evidence is that he did not call Lewis into the water. A few minutes after he started diving, the watchman signalled for him to come up. When he did, he saw Lewis holding his foot and he was bleeding.

Findings & Conclusions

- [18] The court finds that on the day in question Mr. Lewis was a trainee diver. I do not accept Mr. Lewis' contention that he was free to go into the water and dive at any time and that he needed no permission. It makes no sense that there would be a lead diver but anyone else was free to dive when and where they pleased. I accept that there was a watchman who needed to know, for safety reasons, the location of the divers and consequently the evidence that before going into the water Mr. Lewis was required to notify someone is accepted. Notwithstanding that evidence, the court finds that the driver, Mr. Joseph had a duty to those in the water to operate the boat in such a manner so as not to cause harm to anyone, by doing in the circumstances what a reasonable prudent driver would do. In the court's view, a reasonable prudent driver would have taken some measure to ensure that no one was in the path of the boat before he reversed, even a short distance. Mr. Joseph on cross examination stated:

"Having received the request from Rashaan to reverse a bit, that's what I did. No, I did not look around before I reversed because I didn't expect anyone to be in the water."

- [19] Well the unexpected often happens. People are known to move. I accept that the "Sibley" is some 46 ft long and even if he had looked back, because of the position of the wheelhouse in back, he may not have seen Lewis. However, in looking about, he would have noticed that Mr. Lewis was no longer lying on the gunnel where he had last seen him. It was put to Mr. Joseph that even though Rashaan said to move the boat a bit, he as the driver, still had a responsibility to check. His response was, "It depends".

- [20] I find that the driver, Mr. Denley Joseph breached his duty to Mr. Lewis on the day in question in that he failed, whether by means of sign, sound or otherwise to warn persons in the water, including the claimant, that he was going to reverse the said boat and start the propeller. I find further that the breach was the proximate cause of the injuries sustained by Mr. Joseph.

The case against the Second Defendant – Mr. Charles

- [21] The second defendant, Sibley Charles, is the owner of the boat. He was not aboard the boat at the time of the incident. The pleaded case against him is that at the time of the incident, Mr. Joseph was

acting as the servant and/or agent of Sibley Charles. Further particulars of negligence pleaded are that he failed to satisfy himself that the driver was competent to operate the boat while the claimant was working in close proximity as a diver. And secondly, that he failed to take any or any adequate precautions for the safety of the claimant while he was in close proximity to the boat.

[22] The Privy Council recently stated the general principles respecting vicarious liability as follows:

“Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement. This consideration underlines the need to keep the doctrine within clear limits.”²

[23] Lord Styn further addressed the policy behind the principles. He cited the case of **Bazley v Curry**³ where it was stated:

“The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.”

[24] Here, the uncontested evidence is that at the material time, Mr. Lewis was an employee of Mr. Charles. His duties involved entering the water and catching Lobster/ fish. It is irrelevant for these purposes whether he was in the water as a trainee diver or as a fully trained diver. The injuries were sustained during the course of his employment. I do not accept that he was on a frolic of his own. Whether during the course of performance of his duties he observed all the protocols would go to whether he was contributorily negligent. There clearly is a nexus between Mr. Joseph’s employment with Mr. Charles and the wrong that justifies imposition of vicarious liability on the employer, Sibley Charles.

[25] With regard to the particulars of negligence alleged against Mr. Charles, the court finds them to be unproven.

Contributory Negligence

[26] The defendants have raised the issue of contributory negligence by the claimant, Mr. Lewis. Particulars of his alleged negligence include:

- 1) Failing to observe or heed the established protocols before entering the water;
- 2) Failing to wait for due authorization from Mr. Joseph and or the diver watchman on duty before entering the water;
- 3) Surreptitiously and without warning entering the water and staying in close proximity to the boat out of sight and hearing of Mr. Joseph or the diver watchman;

² Bernard v Attorney General of Jamaica [2004] UKPC 47

³ (1999) 174 DLR (4th)

- 4) Failing to give any or any proper warning that he had entered the water;
- 5) Failing to keep any or any proper lookout though he was or should have been aware that Mr. Joseph was likely to set the boat in motion at any given time.

[27] As was stated by Lord Denning in **Jones v Livox Quarries Ltd**⁴:

“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.”

[28] Mr. Lewis admits that, in addition to being the lead diver, Kevin was the Captain on the day in question. Further, that everyone took orders from Kevin and that he himself also had to take orders from Kevin. I find there was a chain of command and established protocols applicable to the “Sibly” in the sense that there was a system of rules governing diving operations. These included:

- 1) It was the lead diver who decided who would dive at a particular site
- 2) Permission was required of the lead diver to enter the water
- 3) It was the watchman who kept track of the location of each diver in the water and who communicated with the driver of the boat.

[29] The protocols and procedures may not have been reduced to a written manual. The forms were more prescribed by custom and authority but I find that they existed nonetheless. I find further that the crew members were aware of them and observed them. Specifically, they were aware of the role of the captain, lead diver and watchman and their relationship to each of them. In keeping with the protocol, the evidence shows that as Captain and lead diver, it was Kevin who had decided that he Mr. Lewis would dive with him that day and as a result he entered the water with him on the first dive site. The court also accepts the evidence that it was the watchman who communicated with the driver. It is the watchman’s job to alert the driver as to the diver’s activities and position.

[30] Further, the court does not accept that the driver had full knowledge that Lewis was in the water at the time Lewis re-entered the water. The court rejects Mr. Lewis’ evidence that he spoke to Rashaan while Rashaan was in the water watching Kevin. His version of what took place is not supported by any other evidence. Further, both Keston and Remy deny that he, Mr. Lewis, spoke to them and told them that he was jumping in the water and requested that they bring around his tank. I accept the evidence of Mr. Joseph that Keston was in the cabin with him at the relevant time, so that Mr. Lewis could not have spoken to him. There is no evidence that a tank was brought to Mr. Lewis. Mr Lewis’ evidence is that he did not wait for a tank. He started swimming towards Rashaan towards the back of the boat. Rashaan, he says, was not looking in his direction. His head was down.

[31] Neither Roshaan nor Kevin had instructed Lewis to enter the water and from the evidence I find that neither one of them was aware that he had jumped back into the water. I find from the evidence that

⁴ [1952] 2 QB 608

he failed to follow the established protocols. He re-entered the water without instructions from the Captain/lead diver. Further, he failed to communicate with the watchman or the Captain/lead diver that he intended to re-enter the water. He also failed to notify the other persons on deck that he was re-entering the water. A reasonable prudent man would have done so. Having been a watchman himself, he knew the role of the watchman was to keep track of the location of the divers in the water and to communicate with the driver. He knew or ought reasonably to have known that these were part of the safety procedures in place on the "Sibly". He ought reasonably to have foreseen that his failure to observe those procedures might lead to injury to himself. I therefore find that Lewis was also contributorily negligent.

- [32] I further find that his negligence contributed to the injuries he sustained. I would apportion the responsibility for Lewis injuries as 60% to the defendants and 40% to the claimant himself.
- [33] Accordingly, on the issue of liability, judgment is granted in favour of the claimant on his claim and also for the defendants on the issue of contributory negligence, to be apportioned 60% to the defendants and 40% to the claimant. Damages to be assessed.
- [34] Prescribed costs to be apportioned accordingly.


CLARE HENRY
High Court Judge
Antigua & Barbuda