EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2009/0718

BETWEEN:

CARTER SMITH Jr.

Claimant

and

NICOLAAS BERSMA

Defendant

Appearances:
Lenworth Johnson for the Claimant
Kendrickson Kentish & Kathleen Bennett for the Defendant

April 13, 2011
April 29, 2011
January 12, 2012

JUDGMENT

Floyd, J.

1. This is a claim arising out of an incident that occurred on February 12, 2007 during the course of a fishing charter in the waters off the northern coast of Antigua. The claimant seeks compensation for injuries, loss and damages suffered during that charter based on a failure of the defendant, his servants or agents, to carry out the service of the fishing charter with reasonable care and skill. Alternatively, the claimant claims his loss was caused by the negligence of the defendant, his servants or agents.

2. The defendant disputes the claim and alleges any injuries, loss or damages suffered by the

claimant were caused by an act of God/act of nature.

3. The matter was initiated by way of Claim Form and Statement of Claim filed on December 2, 2009 wherein the claimant enumerated his injuries and his losses, claiming special damages, general damages, costs and interest.

4. By way of a Defence filed on April 12, 2010, the defendant denied the breach of any implied term and negligence, denied liability according to the principle of res ipsa loquitur and sought to limit his liability, if any, in accordance with the terms of the Antigua and Barbuda Merchant Shipping Act, 2006 of the Laws of Antigua and Barbuda 1992, as amended.

5. The trial of this matter took place on April 13, 2011 and April 29, 2011 with both sides calling evidence. A Bundle of Agreed Documents was filed on April 5, 2011. At the commencement of trial, the parties reached agreement as to the admission of two further bundles filed on April 5, 2011 being the Documents Not Agreed and the Additional Trial Documents.

THE EVIDENCE

6. The claimant, Carter Smith Jr., provided a witness statement and testified. He and his party were on a family vacation. They met at the defendant's boat at approximately 6:30 am on February 12, 2007 at Shell Beach for a fishing trip. The wind and waves were so strong it took 15 minutes to steady the boat in order to board. Wind gusts were 15 to 20 miles per hour. At sea, the waves were 6 to 8 feet high. Mr. Smith Jr. was seated in the front or bow of the boat. No safety instructions, no life jackets, and no advice to move to the rear or stern of the boat were given by the defendant and his crew.

7. At approximately 7 am, in open sea, a large wave hit the boat. Mr. Smith Jr. was thrown up into the air 3 to 4 feet, landing hard on his back. He was injured as a result. He was taken to hospital and transferred to a medical centre later that day. He was discharged on February 17, 2007. On February 20, 2007, he was transferred by air ambulance to the USA, his home.

8. Mr. Smith Jr. received a variety of medical care in different hospitals and underwent several surgeries. He received psychotherapy, physiotherapy, and counselling. He recovered reasonably well but still suffers from back pain and is unable to take part in many activities he previously enjoyed.

9. Employment for Mr. Smith Jr. was effected and he was forced to change occupations. His income was effected and although he had medical insurance he was put to a variety of expenses. A good deal of documentation was filed with the court, on consent of all parties and includes income tax returns and medical material.

10. Carter Smith Sr., father of the claimant, testified and provided a witness statement. He indicated that while on board the defendant's boat, no safety instructions, no life jackets and no advice to move to the rear of the boat were given. He was seated in the bow or front of the boat. Weather conditions were rough and windy and it took at least 2 passes to secure the boat for boarding. Wind gusts were approximately 20 miles per hour and waves were 5 to 8 feet high.

11. Approximately 15 minutes into the trip, a major wave hit the boat, throwing Mr. Smith Sr., the claimant and another witness, Hill Griffin, into the air. Mr. Smith Sr. and Mr. Griffin landed on cushioned seats while the claimant landed on fibreglass and was injured.

12. Mr. Griffin testified and provided a witness statement. He is the brother in law of the claimant. The wind and the waves made boarding the defendant's boat difficult. No life jackets and no safety instructions were given. Waves were 5 to 8 feet high. While in fairly open water, a very large wave hit the boat, throwing the 3 members of his party into the air. The claimant fell onto the floor of the boat on his back. Mr. Griffin described the water in the marina as fairly calm and conditions were safe, however, as the boat progressed, waves increased in size. The boat was then in consistent waves until the particularly large wave struck.

13. The defendant, Nicolaas Bersma, testified and gave a witness statement. He indicated that he was retained by the claimant and his party to provide a boat for a fishing charter. The claimant and his party boarded the defendant's boat at approximately 6:50 am on February 12, 2007. There was a

crew of 3 including the captain/pilot, the first mate and Mr. Bersma. Mr. Bersma stated that he always indicates where life vests are located during fishing charters. The defendant stated that it is his standard procedure once everyone is settled in the boat to conduct an orientation and he did so on this occasion. He would explain the operation of the toilet and show where life vests are. Three inch decals also indicate life vest locations. He explains there are 2 life rafts on board. Nothing is said about wearing life vests because it is not comfortable to wear them while fishing.

14. Once the vessel reaches the open sea, the defendant examines the conditions and makes a judgement call as to how to proceed. He then explains to passengers that he may have to relocate them if the sea gets rough. However, in this case, the boat never made it to open sea before the wave struck. Therefore, no such indication was ever given. A passenger unfamiliar with seafaring ways might consider the location to have been open sea, however, the defendant stated it was not. The defendant testified that the boat was just about to enter the open sea, however, his witness statement at Paragraph 6 stated that the vessel "was exiting the calm waters in the channel between Bird Island and Long Island entering the open sea (when) a swell approximately 3 feet struck the vessel".

15. The defendant indicated there was no difficulty boarding the boat. There was quite a bit of wind but the water was calm. The wind was nowhere near 15 to 20 miles per hour. The configuration of the marina made it difficult to manoeuvre the boat to the dock. As the boat moved along, the waves were approximately 1 to 2 feet high leading up to the channel. Near the mouth of the channel, there were waves of 3 to 4 feet maximum height. That is when the incident occurred which threw the claimant into the air. The claimant was dislodged from his seat but he was not precipitated 3 to 4 feet into the air. That would not have been possible due to the speed the boat was proceeding at. The boat was travelling at 15 to 18 miles per hour. At that speed, the claimant would have landed in the back of the boat if he had risen 3 to 4 feet. The defendant denied wind gusts of 20 miles per hour. The defendant was beside the console and the 2 man crew was behind the console. The boat, a Boston Whaler, was approximately 6 months old at the time of the incident. The captain was Wayne Adams, however, in the channel the pilot, Bernard Savory, took over. Fifteen minutes into the trip, Mr. Savory assumed control of the boat.

16. Although the defendant acknowledged that the boat hit something and people were dislodged from their seats, he did not see the wave that caused the incident. Although the defendant estimated the waves to be 3 to 4 feet in height at the time, he testified that he did not see the wave that struck the boat. His witness statement referred to a swell of approximately 3 feet striking the boat but he did not actually see the wave. The defendant agreed that the wave may have been higher than 3 feet or the angle of the wave may have caused a significant "jolt" to the boat. He stated the Boston Whaler is a boat designed to withstand 3 foot waves. He agreed that it is possible a wave of 5 to 7 feet could cause an impact throwing people into the air. Although he estimated the waves to be 3 to 4 feet, he agreed it was possible that the waves were 5 to 6 feet. The defendant stated that he did not deem it necessary to make a judgement call and move people to the back of the boat. He has done that from time to time but did not do so in this case as he did not see the wave that struck the boat.

17. The defendant indicated he usually checks the weather forecast every day before charters, however, he could not recall if he checked it before this trip. He finds the "met office" forecasts "fairly" accurate. The forecast from the Meteorological Services Office for this date is found at Pages 22-23 of the agreed documents bundle. It indicates moderate seas with swells of 5 to 6 feet. Small craft were advised to exercise caution against breaking swells.

18. Bernard Savory testified and gave a witness statement. He is a marine engineer who has operated boats for 30 years. He acted as the pilot that day steering the boat through the channel. He described the sea as calm inside the reef. Wind gusts of no more than 10 miles per hour. Conditions were normal. If sea conditions had been rough, persons in the front of the boat would have been soaked and they would have been told to move to the rear of the boat.

19. Mr. Savory was steering the boat. He took over the controls 1 ½ to 2 minutes before the incident. The claimant was in front of him and Mr. Savory did not see the claimant thrown 3 to 4 feet in the air. What happened to the claimant was not within his line of vision. He cannot say anything about the claimant and others being thrown into the air. Waves from Shell Beach, the point of embarkation, to the reef were no higher than 1 foot. Cruising speed was lower than 15 to 20 miles

per hour. Mr. Savory was also engaged in teaching Mr. Adams the landmarks in the area of the channel and how to navigate through that area.

20. There was no difficulty getting the boat docked. The problem was getting the boat off the lift at low tide.

21. Mr. Savory said he was familiar with the weather forecast. He listens to weather forecasts every evening which are good for 24 hours. In the morning, he looks for cloud types and wind speeds before venturing out. Mr. Savory stated that he was not familiar with the weather report found at Pages 22-23 of the Agreed Documents Bundle. Had he known, however, he would not have taken extra precautions because it was a normal day.

22. When the wave struck, there was a "significant bump". The wave was 3 to 3 ½ feet to a maximum of 4 feet. The wave was steep and not rolling. It was unexpected and not smooth. It was a small wave.

23. When asked whether safety instructions were given to the passengers, Mr. Savory replied that he has yet to be on board a small charter boat where any safety instructions are given to the passengers.

SUBMISSIONS

24. Learned counsel for the claimant, Mr. Johnson, submits that the defendant and his crew did not consult the published weather forecast for the date in question. If they had, they would have been aware of conditions including seas with moderate swells of 5 to 6 feet. Armed with this foreknowledge, the defendant could have taken precautions to seat his passengers, including the claimant, further back in the boat. The wave was not a "freak" wave or an act of God, since waves of that height were forecast on that date.

25. Learned counsel further submits that the evidence of the claimant and his witnesses and that of the witness for the defendant, Mr. Savory, should be accepted. The court should find that no safety

instructions were given by the defendant at the commencement of the voyage.

26. Mr. Johnson submits that there is contradiction in the evidence as to the reason why there was difficulty boarding the boat. The claimant and his witnesses refer to poor weather conditions, the defendant refers to poor marina design and Mr. Savory refers to low tide. Learned counsel submits that the boat operator at the time of boarding, Wayne Adams, who did not testify, was incompetent to handle the boat. At the time of the incident, however, it was Mr. Savory who was operating the boat. Therefore, this court need make no findings in regard to the competency of Mr. Adams' boating skills.

27. Furthermore, learned counsel points to the discrepancies in the evidence as to how high the claimant was thrown into the air during this incident. Since there is no real issue as to the cause of the injuries to the claimant, that being this incident, this court need make no finding as to how high the claimant was thrown by the impact of the wave.

28. Mr. Johnson further submits that the defendant's boat crew was conducting a training exercise at the time of the incident. Mr. Savory was teaching Mr. Adams the navigation of the channel area. This interfered with the general administration of the boat and the ability of its operators to deal with hazards, such as the impact of the wave.

29. Mr. Johnson submits that the defendant is liable through negligence by omission. He and his crew failed to check the published weather forecast prior to setting out on this charter. Had the contents of the weather forecast been known to the defendant, positive steps could have been taken to avoid the incident which injured the claimant. The claimant and his party could have been seated further back in the boat and in a cushioned seating area.

30. The negligence is aggravated, submits Mr. Johnson, by the defendant's failure to provide safety instructions and life jackets to the claimant and his party and by allowing a training exercise to occur during the fishing charter.

31. Learned counsel for the claimant cites the classic authorities in cases of negligence. In the case of

Blyth v. Birmingham Waterworks Co. (1856) 11 EX. R. 781 at 784, the court held that "negligence is the omission to do something which a reasonable man……would do, or doing something which a prudent and reasonable man would not do." Further, in the case of Donoghue v. Stevenson (1932) ALL ER 1 at 11 the court held "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

32. Mr. Johnson also referred this court to the Supply of Goods and Services (Implied Terms) Act CAP 421A of the Laws of Antigua and Barbuda where Section 11 provides that in a contract for the supply of a service, there is an implied term that the supplier will carry out the service with reasonable care and skill. Such care and skill was lacking in this case as is evidenced by the defendant not checking the published weather forecast and conducting a training exercise during a charter.

33. Reference was also made to the case of Stoven v. Wise (Norfolk County Council, third party) (1996) 3 ALL ER 801 at 807 wherein the court held "common law obligations to take positive action arise mainly in contract and fiduciary relationships. They may also arise in tort….Their unifying thread is some circumstance or combination of circumstances, which makes it fair and reasonable that one person should be required to take reasonable steps for another's protection or benefit." The boat charter in this case being a service provided for fee establishing a contractual relationship and therefore a duty of care.

34. Learned counsel for the claimant submits that the wave that struck the boat was not an act of God, it was a predicted occurrence in the meteorological service weather forecast. Reference was made to Halsbury's Laws of England, 4th Edition, VOL. 9 (1), P. 665, Para. 907 defining act of God as "an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against…..an accident due to natural causes…..which could not by any amount of human care and skill have been resisted….it is extraordinary and as such could not reasonably have been anticipated…..something overwhelming."

35. The issue of anticipation and foresight of the event and the damage caused thereby was referred to in the cases of Tennant v. Earl of Glasgow (1864) 2M (HL) 22 and Nugent v. Smith (1876)

L.R. 1 CPD 423. In the case at bar, it is submitted that the wave that struck the boat could have been anticipated and preventive measures taken to avoid injury.

36. Learned counsel for the defendant submits that the sea conditions were not rough. In fact, the sea was relatively calm and conditions favourable as the witnesses Savory and Griffin testified to. Counsel goes further and submits that the weather forecast for the day in question called for sea swells of 5 to 6 feet, however, the incident occurred while exiting the channel and not in open sea. The actual weather conditions for that date as found at page 22 of the Agreed Documents Bundle were mostly fair. Conditions were therefore relatively normal on that day.

37. Learned counsel submits that the incident was caused by an act of God, an act of nature and in this case a freak wave. References were made to the case of Seneka v. LeDuc (1985) CAN LII (AB.Q.B.) at Para 14 which described act of God as being "due to natural causes exclusively: of an extraordinary nature – and; such that it cannot be anticipated or provided against." In the case at bar, the wave was sudden, steep and unexpected. Nothing could therefore have been done to warn or alert the claimant.

38. Learned counsel for the defendant submits that the doctrine of res ipsa loquitur does not apply in this case. References were made to Clerk and Lindsell on Torts 13th Edition, Para. 967 and 972 and to Halsbury's Laws of England 4th Edition, Vol. 34, P. 50, Para. 61. These texts indicate that the doctrine applies when the event that inflicted the damage was under the control of the defendant, the occurrence would not have happened without negligence and there must be no evidence as to why or how the occurrence took place. If the defendant shows how the accident happened and it is consistent with an absence of negligence, the maxim is displaced. In the case at bar, the cause of the incident is known, that being a large wave or a freak wave striking the boat. Therefore, the doctrine of res ipsa loquitur does not apply. Learned counsel goes further and submits that the incident was not caused by any negligence or lack of reasonable care and skill on the part of the defendant and his crew. The wave could not have been avoided and was not seen by anyone.

ISSUES

39. Did the defendant, his servants or agents carry out the fishing charter service with reasonable care and skill?

40. Was the defendant, his servants or agents negligent in carrying out the fishing charter service?

41. Does the doctrine of res ipsa loquitur apply?

42. Were the injuries suffered by the claimant a result of an act of God?

43. If successful, what measure of damages is the claimant entitled to?

ANALYSIS

44. On the morning of February 12, 2007, the defendant and his crew were engaged in providing a fishing charter service to the claimant and his party. It is not entirely clear just what the weather conditions were like in the marina. The parties appear to agree that there were problems boarding the boat but the cause is not clear, even among the witnesses for the defendant. Mr. Griffin, witness for the claimant, agreed that the water was "fairly calm" in the marina, and conditions were safe. However, he testified that as the boat progressed, it was in "consistent waves" which got bigger and bigger. I found Mr. Griffin to be a credible witness, fairly stating his evidence in a measured and consistent fashion.

45. The fact that there were waves was confirmed by the defendant who testified that while the water was calm in the marina, conditions were windy. As the boat left the marina it encountered "moderate chop" of 1 to 2 foot waves. The defendant confirmed waves of 3 to 4 feet in the area of the mouth of the channel. He agreed, however, that it was possible that waves may have reached 5 to 6 feet. Mr. Savory testified as to waves of 3 to 4 feet, normal conditions, not rough. There were

no 5 foot waves. The wave in question was 4 feet maximum. Five foot swells were possible but not in the channel. The wave that hit the boat was steep and not rolling. It was unexpected. Steep waves are rare.

46. It is clear to me when I review the testimony both verbal and written, that the claimant and his party were not seasoned sailors, familiar with the sea and boating. Conditions that were rough to them were not considered so by the defendant and the pilot, Mr. Savory, who were used to vessels and boating. Nonetheless, I am satisfied that although conditions at the time of boarding were relatively calm, they rapidly deteriorated as the boat travelled towards the channel and the open sea. Waves began to increase in height.

47. All of the witnesses for the claimant and even the witness for the defendant, Mr. Savory, denied any sort of safety briefing given by the boat owner, the defendant. Mr. Savory, a marine engineer, with 30 years' experience has never been on a small charter boat where safety instructions were given to the passengers. One concludes, therefore, that this particular charter was no different. This contradicts the evidence of the defendant. I accept the evidence of the claimant, Mr. Smith Sr., Mr. Griffin and Mr. Savory and I find that no safety instructions were given on this charter. I find therefore that no explanation was given to the claimant and his party as to what to do in the event of rough seas. This would have been important information for neophyte mariners, as I have already found that the claimant and his party were. Without even a minimum of safety instructions, the claimant and his party were placed at risk by the defendant. They were given no life vests because, as the defendant stated, it is not comfortable to wear a life vest while fishing. Of course, it is clear from the evidence that the charter had not yet reached a point where actual fishing began. It would therefore have been quite possible for the claimant and his party to don life vests for the journey out to the fishing location.

48. No evidence was led as to what benefit, if any, a life jacket would have been for the claimant. Would the padding of a life vest have protected the claimant in his fall? There is no evidence as to that. What is clear is that no life jackets were given by the defendant to the claimant and his party and no safety instructions whatsoever were given by the defendant to the claimant and his party, and I so find.

49. The placement of the claimant and his party was forward in the boat. The evidence indicates that in heavy or rough seas, passengers would be moved further back in the boat. That did not happen in this case. The defendant stated that once the boat "heads out to open sea", guests may be relocated. However, in this case, he made a "judgement call" deeming it unnecessary to move people to the back of the boat. The defendant further testified that he has done that from time to time but he did not do so in this case as he did not see the wave. However, he did agree there were waves of 3 to 4 feet and that it was possible the waves were as high as 5 to 6 feet. That being the case, it would have been prudent for the defendant to have provided safety instructions, preparing the claimant and his party for the possibility of rough seas and waves. It would also have been prudent to relocate the claimant and his party to the back of the boat. For even if the boat had not yet entered open water and the defendant did not see the wave which did the damage, he was aware of the waves rising in height and magnitude and he consciously decided not to relocate his passengers, including the claimant. He therefore assumed the risk.

50. The evidence of the defendant that he was aware of the boat being in waves of 3 to 4 feet in height and possibly as high as 5 to 6 feet contradicts the proposition that it was a rogue wave or a freak wave which struck the boat. Seasoned mariners, as the defendant and his pilot were, should have anticipated the potential for larger waves in the area of the channel and the mouth to the open sea. In that area, the crew should have been particularly vigilant as the terrain and conditions changed. The wave may not have been avoidable but its effects and appearance could have been and should have been anticipated and planned for.

51. The evidence of Mr. Savory is that the wave was not inordinately tall, being 3 to 5 feet, probably 4 feet, in height. It was, however, a "steep" wave, according to Mr. Savory. What made it unexpected was the fact that it was steep and not rolling. Mr. Savory went on to say that while it was rare to encounter a steep wave of 3 to 5 feet, it is not unknown. This created the " significant bump" which precipitated the claimant to the deck.

52. I am satisfied that the wave which struck the boat was not a freak wave. It was within the height of other waves encountered by the boat during the charter, however, its incline was different to other

waves that day. While this was rare, it was not a unique situation never before encountered. As such, it was not and should not have been totally unexpected. It was a condition that the defendant should have but did not prepare for by issuing life vests, giving safety instructions and moving passengers, including the claimant, to the back of the boat as soon as wave height increased, regardless of whether the boat was fully in open water or not. The failure on the part of the defendant to do any of that on this occasion was negligent and fell short of the reasonable skill and care a fishing charter should have exhibited.

53. This negligence is accentuated when one considers the weather forecast available for the day in question. Mr. Savory was not familiar with the weather forecast found at Pages 22 and 23 of the Agreed Bundle of Documents and the defendant could not recall receiving this forecast. Even though the "actuals" listed at Page 22 show "mostly fair" conditions on February 12, 2007, the forecast available that day warned of "moderate swells 1.5 to 1.8 metres or 5 to 6 feet. Small craft and sea bathers should continue to exercise caution against breaking swells mainly near coastal areas." It was exactly such a swell or perhaps slightly smaller, that broke upon the defendant's boat causing the injury to the claimant.

54. I find that for a boat charter to not check the government weather advisory prior to taking paying customers on a fishing trip out to sea, compounds the negligence and lack of appropriate care and skill that a prudent boat charter ought to display.

55. As I have already indicated, the wave that struck the boat, although rare, was not unexpected or unforeseen. The wave height was common that day, although the angle of incline was rare. It was not, therefore, a freak wave nor was it so extraordinary nor unforeseen that it could not have been anticipated and guarded against. Indeed, despite the situation with wave height, the defendant made a conscious decision, deeming it unnecessary to relocate the passengers to the back of the boat.

56. I find that the wave was not so unique as to be deemed an act of God. Although unusual, in the face of the actual conditions and the available forecast, the appearance of the wave could have and should have been anticipated by the defendant. His failure to do so and to take appropriate

safety precautions for his passengers was negligent and outside the care and skill of a prudent fishing charter.

57. Having found that the defendant breached his duty of care towards the claimant through negligence and a failure to display the requisite care and skill, it is unnecessary for me to engage the doctrine of res ipsa loquitur. Applying the definitions referred to in Clerk and Lindsell on Torts and Halsbury's Laws of England the doctrine is not applicable in this case. The thing that inflicted the damage was the wave striking the boat. While the boat was under the control of the defendant, the wave was not. Although the incident and the injuries would not likely have happened without the negligence of the defendant, there is clear evidence as to how the occurrence took place. The doctrine would not apply in these circumstances. However, that does not negate my finding of negligence on the part of the defendant.

58. The wave was not an act of God or a freak of nature. The evidence of the boat pilot, Mr. Savory, describes the wave as rare, unexpected and steep. Contrary to the submissions of learned counsel for the defendant, the wave was seen by a witness, Mr. Savory. The pilot described the wave, as I have already noted, and also described his actions of steering the boat straight into the wave in order to lessen its impact. He must have seen the wave in order to describe it and attempt to take evasive action.

59. I have already found that had appropriate safety precautions been taken, such as wearing life jackets and moving to the rear of the boat, the incident and the injuries caused could have been avoided. Thus, while the application of the doctrine of res ipsa loquitur is not fully made out, I am nonetheless satisfied that negligence and a lack of care and skill on the part of the defendant and his agents and servants, has been established.

DAMAGES

60. As to special damages, I agree with the submissions of learned counsel for the defendant that they must be specifically pleaded and proved. I also agree that the evidence of the claimant at trial was that the medical expenses he incurred while in Antigua and Barbuda, including his air transport

back to the USA, were paid by the insurance company of the defendant and as such, he is not entitled to compensation for that.

61. The medical documentation shows that the claimant suffered a lumbar fracture at L1 and either L4 or L5, venous thrombosis and pulmonary embolus. Although he recovered, he has had residual pain and psychological problems, including depressive and post-traumatic stress disorders. He underwent surgery and received a variety of treatment. His special damages claim has included a number of different items.

62. I agree with learned counsel for the defendant that the claimant is not entitled to recover the sums referred to in invoices at pages 11 and 12 of the Bundle of Documents Not Agreed. The invoices are in the name of the claimant's father and are for non-medical and in-home care in South Carolina, where the father resides. Similarly, monies spent on dog walkers, as referred to in invoices at pages 23 and 24 and tips paid for massages at pages 32, 36, and 37 are not recoverable as they were unforeseeable. As for chiropractic treatment, I am satisfied and agree with submissions of learned counsel for the defendant that this is not medical care nor is there evidence of referral of the claimant to a chiropractor by a medical doctor. As such, I make no award for any of these items. For transportation, parking, cell phone, photocopying and courier expenses, I am not satisfied that the claimant has substantiated his claim with the material filed. There is insufficient reliable evidence provided to award anything other than a nominal amount of $500.00 USD for such associated costs. As for vacation and car rental disruption expenses, I am prepared to award $2,466.66 USD. The material filed in support of this claim indicates the family vacation included 6 persons. Clearly, the claimant's portion of the amount claimed should be awarded to him as his holiday was effectively ended by this incident.

63. As to the balance of the specific damages claimed, based upon the receipts and documents filed and submissions from learned counsel, I am prepared to award the following:

For spine, back and physical therapy and massages - $13,220.78 USD

For psychologist and psychiatrist care - $45,225.00 USD

For prescriptions and supplies - $3,550.73 USD

For back surgery - $7,538.01 USD

For transportation, parking, cell phone, photocopying and courier expenses - $500.00 USD

For vacation and car rental disruption expenses - $2,466.66 USD

For family travel and accommodation during claimant's hospitalization - $9,386.98 USD

64. As for salary (disablement/loss of earnings), I am satisfied that the injuries suffered by the claimant affected his ability to work and his employment earnings. Although there was a general economic downturn in the USA in 2007-08, "closer to 2008" as the claimant testified, the television/film industry, where the claimant was employed, was less affected. Learned counsel for the parties are in agreement that the report of psychologist J. M. Liebowitz dated May 11, 2008 indicating a "reasonably good" prognosis with an expectation of return to work for the claimant of 6 months or November 11, 2008, should be accepted. Based on the claimant's income tax statements for 2004 to 2006, his average income was $124,103.00 USD. The date of incident was February 12, 2007 and his expected date of return to work was November 11, 2008. That leaves a total of 21 months where the claimant's ability to work was affected by this injury or $217,180.00 USD. His income tax return for 2007 showed an income of $76,848.00 USD and he later received a further $16,000.00 USD which learned counsel for the claimant submits should be deducted. Those amounts shall be deducted. The amount for lost earnings is therefore $124,332.00 USD. All of the claims made on behalf of the claimant were expressed in $USD. The awards are, therefore, similarly expressed in $USD at this point. However, the final awards in the Order will be expressed in $ECD, (the rate of currency in this region.)

65. As for general damages, learned counsel for both parties directed me to the combined case of Wadadli Cats v. Frances Chapman ECSC, Civil Appeal No. 16 of 2004 and Keithley George and Francis Trading Agency Limited v. Gerald Khoury ECSC, Civil Appeal No. 19 of 2004. I am

directed to paragraph 18 wherein the court held "there was a duty on the part of the respondent to claim losses for loss of future earnings and to assert the basis on which such a claim was being made." I agree, therefore, with the submission of learned counsel for the defendant that no award for future loss of earnings should be made as none was pleaded. I note, however, that a claim for the "cost of future care" was made. The claim in that area is advanced on the basis of care by chiropractor, Benjamin Shield. However, as previously noted, I do not accept the claim for chiropractic care as this is not medical care and there is no evidence of referral by a medical doctor to the chiropractor. I further agree with the submissions of learned counsel for the defendant that there is no evidence from a medical doctor as to the prognosis of the claimant's injuries. I do not accept the assessment of Chiropractor Shield as to the claimant's residual physical disability, as a chiropractor is not a medical doctor.

66. In his witness statement, the claimant indicates that he is "better now, but (has) back pain." He cannot sit for long periods (although he was able to take airline flights of 3 hours and 4 ½ hours respectively to attend this trial) and he is unable to pursue some of his former recreational activities. He has found employment in the same or similar field as before the accident. He underwent surgery and received physical and psychological therapy. The medical evidence and documentation filed ends in 2008. The psychologist, Dr. Liebowitz, as previously noted, gave a prognosis of a return to work in November 2008. It appears the only treatment thereafter was provided to the claimant by way of chiropractic procedures.

67. I was referred to the Wadadli Cats case and also the case of Johnson v. Williams et al, VC 2004 CA 1 for general damage amounts. In the former case, the plaintiff was hurt in a boating accident, suffering shock, severe bruising to the head, severe neck and arm pain, bruising to the inner ear and post-concussion syndrome, paraesthesia - pins and needles in her right arm, numbness over the right thumb and forefinger and cervical spondylitis and a mild degree of carpal tunnel syndrome. She suffered permanent and chronic pain as well as lack of sensation in her fingers. In the companion case of Khoury, the claimant was hit by a van and suffered shock and severe pain, multiple bruises and swelling of the left ankle and leg, severely comminuted and crushed intra-articular fracture of the lower ends of the tibia and fibula, bruising and operation scars to the left ankle. In both cases, the court awarded $120,000.00 for pain and suffering and loss of amenities.

68. In the Johnson case, the claimant was hit by a vehicle, driving over his hip and lower abdomen. He was hospitalized for 49 days with injuries to his lower back and pelvic area, painful bruising to his forearm, knees and leg. He had residual scarring to his leg, has constant pain, uses a stick to walk, increased frequency in urination and conjugal relations suffered. Mr. Johnson received $30,000.00 for pain, suffering and loss of amenities.

69. Bearing in mind the facts of the case at bar and the case law referred to, I award $80,000.00 for pain, suffering and loss of amenities.

70. The defendant seeks to limit his liability by invoking the terms of the Antigua and Barbuda Merchant Shipping Act, 2006 Laws of Antigua and Barbuda No. 1 of 2006, especially sections 236 and 237. Section 236 allows an owner of a ship to limit his liability for any claim, including personal injury, unless the occurrence results from the actual fault or privity of the owner. Learned counsel for the claimant refers this court to the case of Asiatic Petroleum Company Limited v. Lennard's Carrying Company Limited (1914) 1 KB 419. The court held at p. 433 as follows:

> The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words "actual fault" are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act of omission to do something which he ought to have done, he is no less guilty of an "actual fault" than if the act had been one of commission. To avail himself of the statutory defence, he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to show knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section.

71. I am satisfied that this definition of "actual fault or privity" is reasonable and is applicable to the legislation and the facts of this case. As previously noted, the negligence of the defendant in failing to avail himself of the published weather forecast from the government meteorological office and

the negligence of failing to provide either safety instructions or safety devices such as life jackets, was an actual fault of the ship owner, the defendant, who was physically present on board the vessel prior to and when the incident occurred. As such, the defendant is not entitled to the relief from liability provided by sections 236 and 237 of the Act.

Order

Judgment is entered for the claimant against the defendant as follows:

1. Special damages are awarded in the sum of $556,794.44 ECD.
2. General damages are awarded in the sum of $80,000.00 ECD.
3. Interest is awarded at the rate of 6% from the date of filing, December 2, 2009, until payment.
4. Costs are awarded pursuant to the prescribed costs regime of the Civil Procedure Rules (CPR) 2000.

Richard G. Floyd
High Court Judge