IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

CLAIM NO. NEVHCV2007/0024

BETWEEN:

JAVIER ARTHURTON B.N.F.
SANDRA ARTHURTON ***Claimant***

and

WINSTON SKEETE ***First Defendant***

WESK LIMITED ***Second Defendant***

Appearances:

Mr Damien Kelsick with Miss Lynne Danglar *for the Claimant*
Mrs Miselle O'Brien-Morton *for the Defendants*

2008 : July 28;
2012 : May 30.

JUDGMENT

Introduction

[1] **LEIGERTWOOD-OCTAVE J:** Javier Arthurton [Javier], by his next friend and mother Sandra Arthurton [Mrs. Arthurton] has brought this Claim against Winston Skeete [Mr. Skeete] and Wesk Limited for damages as a result of injuries he suffered in accident which occurred on 24th January 2004 on the *MV Sea Hustler*, a vessel, operated by Wesk Limited and captained by Mr. Skeete.

[2] At about 7:30 p.m. on 24th January 2004, Javier, who was 12 years old at the time, was at the Nevis Pier with other persons, including his mother. The group was intending to travel to St. Kitts on the MV Sea Hustler, which is a passenger and cargo vessel.

[3] Javier's left foot was severely damaged when he stepped on to the ramp to board the boat.

[4] In his Claim, Javier alleged that the accident was caused by the Defendants' negligence. Both Mr. Skeete and Wesk Limited deny any liability and they allege that the accident was caused by the negligence of Javier or his mother.

Issue

[5] The pleadings raise one question for determination and that is was the accident caused or contributed to by the negligence of Mr. Skeete or Wesk Limited?

The Evidence

[6] Three witnesses and Javier himself gave evidence on behalf of the Claimant: Mrs. Arthurton; Javier's father Keith Arthurton; and his cousin Romancia Arthurton, who was part of the group travelling to St. Kitts. For the Defendants, Mr. Skeete testified along with Vernal Browne a deckhand on the MV Sea Hustler and James Greene, a senior maritime inspector.

[7] When the accident occurred, the Sea Hustler was under the control of Mr. Skeete and it was moored on the southern side of the pier. The sea, as described by witnesses on both sides, was "very rough" and "choppy". The Sea Hustler was rolling with the tide, with the high waves of the swells causing it to rock back and forth.

[8] There is no real dispute between the parties that the accident happened as described by Javier but where the evidence diverges sharply, relates to the circumstances leading up to it.

[9] In his witness statement Javier recalled that as he was attempting to board the Sea Hustler, the pier was dark but changed during cross-examination to say that there were lights on the pier and on the Sea Hustler. He could not decide whether or not there were two floodlights focused on the ramp, shifting between contradictory answers in cross-examination and re-examination.

[10] He maintained however that no crew member guided his group as they boarded and was supported by his mother who stated that there was no crew member on the ramp to help at all, which was unlike the normal boarding procedure that she was accustomed to. When he was asked whether he had heard a command to come on to the boat, he answered that it was his mother, who had told him to come but he had not heard any one on the Sea Hustler call him or any passengers to come on to the boat. It was raining and very noisy. The boat was making noise and passengers were running on to the boat shouting, when it started to rain. He and his mother had not moved with the crowd.

[11] He denied that Vernal Browne had told him and his mother to stop coming on board or that he had pushed him off the boat, causing his mother to get annoyed and to begin yelling at the crewman. She had not said anything about not moving from in front of the ramp neither had she quarreled with Vernal Browne telling him not to put his hand on her child.

[12] Javier's mother and his cousin basically supported his account of events. Romancia added there was no organized line but a crew member, who she knew as "*Lester*" had told the passengers to get on the boat as it was drizzling. She was the first one of the group to board the boat, carrying baby Aaliya in her arms While she was walking on the ramp, Romancia had to stop at one point as the ramp was moving up and down because the waves were rocking the boat. When she boarded Javier and his mother were still on the pier. Mrs. Arthurton had a confrontation with someone on the boat, whom she had told not to speak to her child "*like that*".

[13] Sandra waited until most of the passengers had boarded before she started walking up the ramp of the boat. Javier was on her right side boarding at the same time. Mrs. Arthurton told Javier to come. The tide rolled and the boat rolled in close to the pier. Sandra was thrown off balance and she reached for her son's hand.

[14] Javier stepped on to the ramp with his right foot and the ramp was moving at the time. He demonstrated in court, how he stepped on the ramp and stated that both his feet were on the pier when the ramp hit him. The sea suddenly *"jerked"* he stepped back. His right foot remained on the ramp and his left foot was on the pier. He tried but could not lift his left foot.

[15] He realized that the ramp was on top of his left foot and had dragged on it. He felt nothing at first because he was in shock but when the sea started to move the boat and the ramp from side to side, the ramp squashed his foot and he remembered being in a lot of pain. He had no memory of the ramp coming off the foot. Mrs. Arthurton shouted to a member of the crew who was not on the ramp but on the side of the boat. When Frankie lifted him up he realized that he could not move the big toe on his left foot and the nail was hanging off. He was in a lot of pain and he was later taken to the hospital.

[16] When the Defendants witnesses gave their account of what had transpired, Mr. Skeete who had been a sea captain for over 35 years explained that he was at the controls of the Sea Hustler for the entire period that it was at the Charlestown Pier on the evening of 24th January 2004. The boat had docked on the southern side of the pier because although the seas was rough they were calmer there than on the other side and this was an attempt to make the offloading and unloading of passengers and cargo safer for everyone. It was securely and properly tied up by strong ropes and he used reasonable care, caution and marine skill to control the Sea Hustler and to keep it as steady possible but the high waves made it rock and it was affected by the movement of the sea water underneath it. The boat was properly lit, with its two floodlights focused on the ramp.

[17] The Sea Hustler's ramp weighs 4 tons and is operated by a power lever. Once the boat is docked the ramp is lowered, as it was on that evening and it helped to keep the boat steady to the pier. The ramp remained lying on the pier, secured to the boat by chains. Vernal Browne, who had been trained by Mr. Skeete in nautical safety and proper boarding procedures, was responsible for managing the ramp and announcing to the passengers when boarding would begin.

[18] After the Sea Hustler had arrived in Nevis from St. Kitts, Vernal Browne and another deckhand Tyson began offloading cargo. In the process, rain began to fall. According to Vernal Browne, passengers who were waiting to board to travel St. Kitts rushed on to the boat before they told them to come. Javier and his mother were at the front of the crowd and he had tried to stop everyone who was trying to board before boarding time because it was not safe to do so. He yelled at the crowd to go back.

[19] When Mrs. Arthurton and Javier tried to board, the ramp was moving because of the high seas. He saw the danger and pushed Javier out of the way of the ramp but his mother became annoyed. She came forward with Javier, stood in front of the ramp, and starting shouting at him, telling him that he should not handle her child like that and that he should not put his hand on him.

[20] He told Mrs. Arthurton to move from the ramp because she and the little boy might get damaged added that if that was the case the workers on the Sea Hustler would not be held responsible. She was at the front of the ramp and she responded loudly that she was not moving. She was angry, arguing and scolding him but he did not

reply. While she was arguing, the ramp raised and squeezed Javier's foot. After he heard Javier screaming, he rushed to the lever to lift the ramp up but because of the rough seas the ramp lifted when the water raised the boat and Mrs. Arthurton then lifted Javier's foot from the path of the ramp.

The Authorities

[21] To succeed in a negligence claim, a claimant must prove that: the defendant owed him a duty of care; that defendant breached that duty; the breach of that duty caused damage and the damage was not too remote[1].

[22] Carriers of passengers are liable when negligence is proved and in their written submissions, the Claimant referred the court to authorities where the duty of care in relation to carriers of passengers and/or their servants was considered.

[23] In **Readhead v Midland Railway Co**[2], the court held that the duty of a railway company and its servants, in relation to their passengers, was to take all due and reasonable care, including the use of skill and foresight, to carry them safely. 'Due care' means that having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see whatever is required for the safe conveyance of their passengers is in fit and proper order[3].

[24] Although, the House of Lords in **Barkway v South Wales Transport Company**[4] placed the standard of care at "a very high degree", the obligation does not appear to be greater that the general duty at common law to take reasonable care in the circumstances to avoid acts or omissions which can reasonably be foreseen as likely to injure the person or property of another.

[25] The authorities that the Defendants have relied on are consistent with the finding in **Barkway's case**[5]. The Defendants' standard of care is that which might be expected from a person of ordinary prudence or a person of ordinary care and skill, engaged in the type of activity in which they were engaged[6]. A professional is required to meet the standard of the ordinary skilled man exercising and professing to have the special skilled in question[7]. It is sufficient that he exercises the ordinary skill of an ordinary competent man exercising that particular art[8].

[26] A carrier's duty to exercise reasonable care must depend on the circumstances of each case, as particular circumstances are likely to require particular precautions[9]. The Defendant railway company in **Schlarb v London & North Eastern Railway Co.**[10], was found to be negligent, in circumstances where the plaintiff had descended the staircase of a railway station and was proceeding cautiously forward on the

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[1] Donoghue v Stevenson [1932] AC 562
[2] [1869] LR 4 QB 379
[3] Ibiid at 393
[4] [1950] 1 All ER 392
[5] Ibid.
[6] Halsbury's Laws of England Fourth Edition Volume 33 at para. 621
[7] Ibid at para. 623
[8] Ibid.
[9] See Note 4
[10] [1936] 1 All ER 71

platform when she fell over the edge. It was proven that on that night, the lighting at the station was ineffective and because of ongoing construction, the plaintiff would have had not indication of which way the platform ran. The foot of the staircase was within three yards from the edge of the platform, which was marked by a white line painted along it.

[27] The court held that the company knew that passengers coming down the staircase would go on to the line. They also knew or ought to have known that the lighting was wholly inadequate on that night. No one including the person who sold her the ticket or the porter gave her any warning. There was no curved rail to help a passenger and the stairway was half-way across the platform. In those circumstances, there was a breach of duty on the part of the railway company and the plaintiff was entitled to succeed in her claim for damages.

[28] On the authorities, the Claimant have invited the court to conclude that as alleged in the Statement of Claim, the Defendants were negligent as they had not satisfied the duty of care to him having failed to certain things, including to:

a) Devise, institute or operate or ensure the operation of a system whereby the boat's ramp would be secured prior to boarding;

b) Provide a competent attendant to assist the Claimant in ascending the boat's ramp;

c) Warn the Claimant of the state of the boat's ramp when the sea was rough or otherwise prevent him from getting his foot caught under the ramp;

d) Prohibit the Claimant from ascending the ramp when it was unsafe to do so;

e) Take any or any adequate care for the his safety while boarding the boat;

f) Provide adequate lighting for the passengers boarding the boat; and

g) Exposed the Claimant to a foreseeable risk of injury.

[29] The other side has however argued that the incident was not caused by any acted or omission of the Defendants and that their employees had acted with reasonable care. The acts of Javier and his mother coupled with the rain and the rough seas provided the scene for an accident of such a nature to take place, it was inevitable.

[30] Inevitable accident was mentioned in the closing paragraph of the submissions but not defined. Where a Defendant relies on the defence of inevitable accident, he must prove that for some reason beyond his personal control, and even with his skill and care, the accident, or skidding could not have been avoided and that he was not negligent[11].

Findings

[31] I agree with Mr. Kelsick that the two sides in this case have given two different stories of what transpired on that evening at the Charlestown pier, the problem is that both he and Mrs. Morton equally invite me to conclude that it is the witnesses on their respective side that have given the true account. Particularly, the evidence

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[11] Hunter v Wright [1938] 2 All E.R. 621

from Mrs. Arthurton and Vernal Browne are at such extremes on critical issues, such as the presence of a deckhand on the ramp, that I must decide as a matter of credibility, which side's evidence I prefer.

[32] Having seen and heard the witnesses, I have concluded that I prefer the evidence given by the witnesses for the Defendants for reasons that I will now state.

[33] It is common ground that the seas were very rough on the evening of January 24th 2004, at the Sea Hustler was at the mercy of the high waves as it was docked at the Charlestown Pier. It rolled from side to side, it rocked up and down and it jerked. I accept that there was proper lighting on the ramp coming from the two floodlights, even though Javier was reluctant to admit it.

[32] Whether or not there were members of the Sea Hustler crew on the ramp at the material times, it is Mrs. Arthurton who made the decision to proceed to board with Javier. He was clear that she told him "to come" and she made that decision fully aware of the condition of the sea and the movement of the ramp. Both she and Javier denied that any crew member was present on the ramp at the time. Romancia placed one "Lester" who she knew to be a crew member on the ramp and there was someone who Mrs. Arthurton was having confrontation with, who she heard her tell "*not to speak to [her] child like that*". Yet, Mrs. Arthurton denies that she had an argument with anyone.

[33] There is no evidence that there was a confrontation with anyone after Javier was injured, there was a desperate and urgent cry for help but not a confrontation. A confrontation before he was injured is consistent with Vernal Browne's evidence, that he was on the ramp and establishes his credibility. I believe him therefore when he stated that he had not given anyone including Javier and his mother the signal to come aboard and that he had in fact stopped her when she came forward and he had warned her that Javier might be injured.

[34] Mr Skeete had docked the Sea Hustler at the southern side of the Charlestown pier because the seas were calmer on that side. He was concerned for the safetly of the passengers as they embarked and disembarked from the boat. There is no allegation that on that evening the seas were in such a condition that the boat should not travelling. The boat was secured to the dock with heavy ropes and he remained at the controls for the entire time. Similarly, there is no evidence that he did not property control or secure the Sea Hustler.

[35] What happend on the evening of 24th January 2004, was an unfortunate and on the part of Javier and his family, I would imagine a tragic incident. However, I believe that the circumstances leading up to it were as described by the Defendants and particularly, through their witness Vernal Browne. I am not able to say what prompted Mrs Arthurton to decide to board the boat at the time she did. Other passengers seemed to have done so because it had started to rain. That might have been her reason but I cannot say so definitively but what I am sure of is that in so doing she opened her son to a risk that materialized in a tragic way.

[36] Having considered, the authorities and reviewed the evidence and the submissions from both sides, it is my judgment that neither the Defendants nor their servants

were negligent, in that they had exercised the duty of care at the standard of care required in relation to the Claimant.

[37] In light of the reasons that I have stated, I made the following order:

Claim No. NEVHCV2007/0024 is dismissed with no order as to costs.

[38] I should add that the Defendants, as the successful parties would generally entitled to their costs[12], but I have chosen to exercise my discretion not to award costs[13], because of all the circumstances of this case.

IANTHEA LEIGERTWOOD-OCTAVE
High Court Judge [Ag]

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[12] Rule 64.6[1] of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000
[13] Rule 64.6[2]

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