

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 679 of 2021

BETWEEN

LERON THOMAS	1ST CLAIMANT
KACEY-ANN REQUENA	2ND CLAIMANT
DEAN POLLARD	3RD CLAIMANT
AMIRTA CAWICH	4TH CLAIMANT

AND

COMMANDANT OF THE BELIZE NATIONAL COAST GUARD SERVICE	1ST DEFENDANT
COMMISSIONER OF POLICE	2ND DEFENDANT
ATTORNEY GENERAL	3RD DEFENDANT

DECISION OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE

APPEARANCES:

Mr. Darrell Bradley, Counsel for the Claimants

Ms. Alea Gomez and Mr. Jorge Matus, Counsel for the Defendants

DECISION AFTER TRIAL

Introduction

[1] The Claimants seek to recover damages for personal injury and property loss after the vessel they were travelling in sank. The Claimants were travelling to Turneffe Atoll to investigate reports of a deceased woman. The Claimants allege that the boat they were provided by the National Coast Guard Service (BCG) was in such ill-repair that it was not seaworthy. They claim damages for personal injury in negligence and breach of the duty of care employers owe to their employees. The Defendants assert that the vessel was in fit and proper condition and was safe and seaworthy. They claim that the vessel sank because of the 1st Claimant's negligence while in

command of the vessel. He did not account for the waves and improperly loaded the boat which caused the back of the boat to become swamped with water.

[2] I find that the Claimants have met their burden to prove that the Defendants' negligence resulted in their injuries and property loss. The Defendants have a non-delegable duty to provide a safe workplace and manner of work which includes keeping the equipment their employees use in safe and good repair.¹ The vessel was not seaworthy. Water entered through holes in the bottom, causing the vessel to sink.

Background

[3] The 1st Claimant is a Petty Officer Class 3 with the BCG. On November 26, 2020, PO Thomas and a colleague, Seaman Neal, were ordered to take the remaining Claimants to Turneffe Atoll using the vessel, *Imemsa*. PO Thomas testified that the two other Seamen assigned as crew were left onshore because the *Imemsa* could not accommodate that amount of people on board. Cpl. Requena, P.C. Pollard, and Ms. Cawich work for the Belize Police Department (BPD) and were travelling to Turneffe Atoll to investigate an alleged drowning.

[4] The resolution of this claim rests on the Court's finding regarding the *Imemsa*'s condition. That the Defendants have a non-delegable duty to provide a safe system of working and a safe place of work, which includes keeping equipment in safe and good repair, is not contested. The Parties also do not dispute that if I find that the *Imemsa* was unsafe and not seaworthy, the Defendants have breached that duty. The dispute arises out of their disagreement over the condition of the *Imemsa* and PO Thomas' culpability in its sinking.

[5] The Defendants rely on the Witness Statements of the engineer and technicians who repaired the *Imemsa* and judged it seaworthy to claim the *Imemsa* was in fit and proper condition. The Defendants also claim that PO Thomas improperly positioned the load in the boat, causing the stern to become swamped with water. The Claimants rely on their first-hand accounts of the events

¹ *Judson Mohammed v. AG (Trinidad and Tobago)* Claim No. CV 2015-00123.

leading up to and during the *Imemsa*'s sinking to argue that the *Imemsa* was in poor condition and solely responsible for the accident.

[6] The Defendants have not initiated a counterclaim against PO Thomas. If I find that the condition of the *Imemsa* caused its sinking, his culpability is largely irrelevant to this Claim. PO Thomas was acting in the course of his employment when the vessel sank. The Parties agree that the 1st Defendant is vicariously liable for the negligence of his employee.² Furthermore, the Parties agree that the 2nd Defendant's duty to its employees is non-delegable. They cannot escape liability by saying PO Thomas' negligence caused the *Imemsa* to sink. PO Thomas culpability is only relevant to what damages may be owing to him in the event he is found to have contributed to his injuries and losses.

[7] Witness statements were submitted as examination-in-chief, and the Claimants chose not to cross-examine any of the Defendants' witnesses. I, therefore, have treated the contents of those witness statements as uncontested by the Claimants. The Claimants' witnesses were cross-examined.

Issue:

After reviewing the evidence and submissions of the parties, I must decide one issue:

- **Did the Defendants breach their duty of care to ensure a safe workplace and system of work by failing to provide a seaworthy vessel?**

It is only if I find that the duty was breached, that I must turn my mind to a second question:

- **What damages do the Defendants owe to the Claimants for their breach?**

² *Cleston Maynard v. Wayne Jeffries et al.* Claim No. NEVHCV2004/031 at para 70.

Analysis:

Issue One: *Did the Defendants breach their duty of care to ensure a safe workplace and system of work by failing to provide a seaworthy vessel?*

[8] The *Imemsa* is a 25', high bow, Mexican built, fibreglass skiff. The bow sits approximately 7" higher out of the water than the transom. The vessel has an outboard motor and an external fuel tank. The *Imemsa*, like other boats of this kind, did not have a bilge pump. The *Imemsa* was brought into service after it was confiscated for involvement in illegal activities. The BCG used the vessel on previous missions. On a previous mission, the engine failed and the *Imemsa* was towed to shore. The trip to Turneffe Atoll was the first time it was put back into service after its engine was replaced. The Defendants have established that the engine had been deemed in sufficient working order to resume operations before it was sent on this mission.

[9] Evidence provided in the Witness Statement of Mr. James McFoy, Petty Office Class I of the BCG, establishes that the *Imemsa* required repairs before it was brought into service. PO McFoy has been responsible for the overall maintenance of the hulls of vessels in the BCG's fleet for over 12 years and oversaw the *Imemsa*'s repair. Three cracks on the bottom of the vessel were patched with fibreglass. Each crack was approximately 3" long and 1/8" wide. The day after the hull repairs were completed, the *Imemsa* was subjected to a load test where it was 3/4 filled with water. The fibreglass repairs held and no further leaks were observed. PO McFoy deemed the *Imemsa* seaworthy on November 20, 2020, and the vessel was immediately put into service.

[10] Concerns about the reliability of its engine were raised after it was put into service and the engine was replaced with a newer model. Thereafter, Mr. Allen Logan, Lieutenant Junior Grade Officer of the BCG, received a complaint on November 25, 2020, that the engine was "hard to start." The next morning, the Officer on duty, PO Clifford Martinez, who was readying the vessel to take the Claimants to Turneffe Atoll, called him because the *Imemsa*'s engine was having issues. LT(jg) Logan proceeded to the dock and worked on the engine for 2 hours. He determined that the engine was hard to start because of a defective battery and battery cables. He replaced these parts and SN Neal tested the engine. SN Neal verified that the engine was no longer having engine performance issues.

[11] While the engine was being repaired, several people raised concerns about the *Imemsa*'s condition, including PO Thomas. PO Thomas testified that he complained no less than 3 times to his supervisors but was not in a position to refuse his orders to proceed with the mission. He was, however, so concerned about the *Imemsa*'s condition that he took photographs of the hull before embarking. These photographs, submitted into evidence, show extensive fibreglass patches consistent with the repairs described by PO McFoy. I am unable to see holes in the hull including where the transom joins the bottom of the boat.

[12] Cpl. Requena called her supervisor to ask that he request another vessel as she was reluctant to travel in the *Imemsa*. Her supervisor reported that her concerns related to the *Imemsa*'s engine, although Cpl. Requena testified that she was also concerned by the hull's condition because of its dilapidated state. She stated she could see water through holes in the bottom while she was waiting for the engine to be repaired. P.C. Pollard confirmed that he heard Cpl. Requena's call to request a new vessel and expressed that he also had concerns about the *Imemsa*'s condition.

[13] P.C. Thomas, Cpl. Requena, and P.C. Pollard confirmed that, Scenes of Crimes Technician, Jason Reneau was replaced by Ms. Cawich when he refused to travel on the *Imemsa* because of its condition. Mr. Reneau's concerns prompted his supervisor to contact the BCG and informed that Scenes of Crimes personnel would not travel on the *Imemsa*'s because it was not in good condition to go to sea.

[14] The *Imemsa* sank approximately 30 minutes after its departure from the BCG base in Belize City after the engine began to involuntarily slow. All persons on the vessel who testified stated that the water entered initially through holes in the bottom and not over the sides. The vessel filled from the stern to the bow because of cracks near the transom. They also testified that efforts by PO Thomas and SN Neal to remove the water were unsuccessful and the *Imemsa* sank without capsizing within 3 to 4 minutes.

[15] The Defendants put forward an alternate theory of why the *Imemsa* sank for the Court to consider. They propose that PO Thomas caused the accident when he shifted barrels of fuel causing

the stern of the *Imemsa* to sit lower in the water. Waves crashed over the transom and flooded the vessel. They ask this Court to consider the reports that verified the *Imemsa's* seaworthiness as supporting a finding that PO Thomas' error is the cause of the accident.

[16] When I consider the totality of the evidence presented, I find that the *Imemsa* was not seaworthy, safe, or fit for purpose. All persons present when the *Imemsa* sank testified that water came through holes in the bottom of the vessel. I have not been given reason to question their credibility or version of events. The Defendants have presented no evidence to contradict what occurred as the *Imemsa* sank. Consequently, the Defendants have breached their duty to provide the Claimants with a safe system of working and a safe place of work.

[17] A finding that water came through holes in the bottom of a vessel is not precluded by another finding that when the *Imemsa* was examined and deemed seaworthy a few days prior, those holes were not present. The Court heard evidence that the *Imemsa* had been towed when its engine failed on an earlier mission and the engine was changed. Any of these actions could have stressed an already weak hull causing it to crack and new holes to appear. Likewise, the areas with new fibreglass may not have held or new cracks may have appeared when *Imemsa* came down on waves while moving through the water. Even though the water only began to enter when the fuel containers were moved, this fact does not necessarily lead to the conclusion that the movement caused the water to enter. One would also expect water to only begin to enter through the bottom of vessel as it slowed and lost the forward momentum that had been pushing water down, around, and behind the vessel.

Issue Two: What damages do the Defendants owe to the Claimants for their breach?

[18] The Defendants have asked that I find PO Thomas contributed to the loss and ought to bear some responsibility for the losses and injuries caused. I find no basis on which to conclude that human error caused the *Imemsa* to sink. He provided clear explanations for how he distributed weight in the vessel to ensure that it was balanced and for why SN Neal was piloting when he was the coxswain and senior officer on the *Imemsa*. The Defendants, having failed to provide a safe and seaworthy vessel, are solely responsible for the Claimants' injuries and losses.

[19] After reviewing the authorities presented by the Parties, I make the following awards of general damages:

- PO Thomas is awarded \$25,000 to compensate for injuries suffered, specifically second-degree burns to 20% of his body from exposure to fuel in the water that has left permanent scarring. This amount also reflects the trauma of experiencing the vessel sinking and waiting four hours for rescue.
- Cpl. Requena is awarded \$20,000 to compensate for injuries suffered, specifically second-degree burns to her torso, arms, and vaginal area from exposure to fuel in the water. This amount also reflects the trauma of experiencing the vessel sinking and waiting four hours for rescue.
- PC Pollard is awarded \$12,000 to compensate for psychological injury, including PTSD, arising from the vessel sinking and waiting four hours for rescue. That he has delayed treatment for these conditions does not negate the injury.
- Ms. Cawich is awarded \$12,000 to compensate for psychological injury, including PTSD, arising from the vessel sinking and waiting four hours for rescue.

[20] The amounts of general damages for physical injury are in line with the St. Lucian High Court's decision in *Rhea Fletcher v Nicholina James*,³ which was cited by both Parties. The claimant in that case received EC\$35,000 (BZ\$25, 711) in 2020 for first- and second-degree burns and trauma associated when hot water was thrown on her.

[21] The amounts of general damages for psychological injury, including Post-Traumatic Stress Disorder (PTSD) are consistent with the Jamaican Supreme Court's decision in *McLean v. Pepsi Cola Bottling Co. Ltd & Anor*⁴ where the claimant suffered with PTSD and major depression after she was injured in a car accident. She was awarded BZ \$14,955.11. The Belizean authority cited⁵ to me involved a young woman who lost her ability to have children after her ovaries and womb were negligently removed. I do not find those circumstances a useful comparison in the present case.

[22] The Claimants have each made requests for special damages for items lost or destroyed when the *Imemsa* sank and amounts to cover medical expenses and travel. No receipts have been

³ Claim No. SLUHC2018/0558 (2020).

⁴ [2014] JMSC Civ. 55.

⁵ *Bonilla v. Landero et al.* Claim No. 721 of 2016.

provided for this Court to verify the amounts claimed. I have also been provided no other evidence beyond the Claimants' assertions that these items were lost or expenses undertaken that would justify an award of special damages.

Disposition:

1. Judgment is entered for the Claimants against the Defendants;
2. The Defendants pay the 1st Claimant \$25,000 in general damages;
3. The Defendants pay the 2nd Claimant \$20,000 in general damages;
4. The Defendants pay the 3rd and 4th Claimants \$12,000 each in general damages;
5. The Defendants shall pay interest on the sum, including the amount owed for exemplary damages, at the rate of 6% pursuant to Section 176 of the *Senior Courts Act, 2022*.
6. The Defendants shall pay prescribed costs.

Dated February 9, 2023

Patricia Farnese
Justice of the Supreme Court of Belize