IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 274 OF 2020

BETWEEN

(HESTON WAGNER	**CLAIMANT**
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(AND	
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(BELIZE AIRPORTS AUTHORITY	**FIRST DEFENDANT**
(TROPIC AIR BELIZE LIMITED	**SECOND DEFENDANT**

DECISION: 28th February, 2023

APPEARANCES:
Mrs. DeShawn Arzu Torres with Mr. Darryl Bradley for the Claimant
Mrs. Agnes Segura Gillett for the Second Defendant

JUDGMENT

1. Heston Wagner was the pilot of a Cessna Caravan plane which took off from the Placencia Airport on the 17th of November, 2017 at about 8:45am. That plane had no mechanical issues but during takeoff it collided with a motor vehicle that was traveling along the Placencia main road. This caused Mr. Wagner to lose control of the plane but he managed to make a controlled emergency landing in the Caribbean Sea off the eastern end of the Airstrip.

2. To understand how this could happen one must appreciate that the Placencia airstrip sits adjacent to the Placencia main road so in order to take off in the easterly direction (as this Cessna did) it was necessary to fly over that main road (as the Cessna did).

3. To prevent collision with vehicular traffic, stop and yield signs and boom barriers had been installed on the main road at the left and right sides of the airstrip. Maintenance of these barriers were the responsibility of the Belize Airports Authority. But their raising and lowering during take-offs and landings was done and controlled by a ramp agent employed by the airlines by the pressing of a button from a breaker box.

4. Mr. Wagner says he suffered post-traumatic stress disorder as a result of this incident and has been unable to work as a pilot since. He pleads that the second Defendant is liable in negligence as it failed to adhere to the safety standards and practices of the first Defendant, to keep any proper lookout for approaching vehicles, to institute safety measures and practices for the monitoring, lifting and placement of the boom barrier during takeoff and landing of flights, to ensure for proper signage at the Placencia Airstrip and causing a vehicle to pass in front of the departing aircraft. This duty of care to provide a safe system of work, safe plant and equipment was non delegable regardless of any action on the part of the Claimant.

5. He claims special and general damages for the injury he suffered and loss of earnings, interests and costs.

6. The Second Defendant denied any negligence insisting that it had no duty to ensure that the boom barriers were operable, functioning properly or pulled down for takeoff or landing. The responsibility for operating them resided always with the First Defendant. Furthermore, on the date of the incident the barrier on the left side was not working. Despite having been informed of this three days prior by the Second Defendant, the First Defendant only took steps to repair it after the incident.

7. Finally, they allege that the Claimant himself had been negligent. As the pilot he had a duty not to commence a flight until he was satisfied that both the plane and the facilities required for the safe operation of the flight were adequate. He should therefore have ensured that the barriers were down prior to takeoff and the runway and adjacent road were clear of traffic.

8. When he observed that a vehicle had crossed over the left barrier heading towards the Airstrip he should have aborted the takeoff. He also chose to take off at a dangerously low altitude considering the weight of the craft and the prevailing conditions. Had he not done this he would certainly have been able to avoid the collision. He also failed to follow the centerline of the runway or to take collision avoidance measures in a timely manner.

9. It was this negligence which caused the Second Defendant to lose an aircraft and to incur increased cost for insurance premiums and the compensation of the passengers who were on board. The Second Defendant counterclaimed for special damages in the amount of BZ $6,787,299.28.

10. In defence to the counterclaim, the Claimant denied any responsibility; whether for ensuring the boom was down, for failing to follow the centre line of the runway

or to take collision avoidance measures, or for violating any safety standards. Rather, he stated that if the plane was at a dangerously low altitude, it was because the plane was overloaded. In fact, it was impossible for him to see the barriers from his vantage point and once he commenced take off any attempt at aborting may have caused it to flip over.

11. The Claimant maintained that the collision occurred because of the Second Defendant's failure to properly operate the barriers prior to the departure of the flight, which is its non-delegable duty.

12. The Court takes this opportunity to thank Counsel on both sides for their helpful submissions and to apologise for the unacceptable and inexcusable delay in delivering this judgment. It hopes that justice has not been denied.

13. **The Issues** are perhaps obvious:

1. Whether the collision was caused by the negligence of the Second Defendant, including (i) who was responsible for the boom barriers, (ii) whether the Second Defendant attempted to lower the barrier, and (iii) whether the barriers were functioning at the time of the collision.
2. Whether the collision was caused or contributed to by the Claimant in any way, including (i) whether the Claimant acted in violation of safety standards and existing operational procedures, (ii) whether the Claimant flew the aircraft at a dangerously low altitude above the Placencia main road, (iii) whether the Claimant in any way negligently operated the aircraft, and (iv) whether the Claimant failed to take collision avoidance measures.
3. What remedies, if any, are either party entitled to?

Whether the collision was caused by the negligence of the Second Defendant, including (i) who was responsible for the boom barriers, (ii) whether the Second Defendant attempted to lower the barrier, and (iii) whether the barriers were functioning at the time of the collision.

14. The Claimant says the Second Defendant owed him a primary, personal and non-delegable duty by virtue of the special position the employment relationship creates. As his employer the Second Defendant must provide him with a safe place of work, safe plant and equipment and a safe system of work.

15. The positioning of the airstrip to the main road presented a permanent risk and a hazard hence the reason for installing the boom barriers. They therefore required monitoring and supervision at all times during takeoff and landing by personnel to avoid any vehicles passing on the road during those times.

16. It is simply no defence for the Second Defendant to say that the responsibility rests with the Airports Authority which had insisted that the airlines operate the barriers on their behalf.

17. The Second Defendant accepts that it does owe a personal, non-delegable, duty of care to its employees to take reasonable care of the health and safety of its employees in all circumstances of the case so as not to expose them to unnecessary risk (see **Zoila Pereira v Saldivar Bakery & Anor Supreme Court of Belize, Action No. 356 of 1981**).

18. It maintains that it at all times discharged its common law duty to ensure the safety of its crew and passengers onboard that flight.

The Law:

19. The duty of care at all times remains with the Second Defendant, employer. In the Jamaican Court of Appeal case of **Courage Construction Limited vs. Royal Bank Trust Company (Jamaica) Limited et al Supreme Court Civil Appeal No.12/90 at page 8** Rowe P quoted with approval the following passage from Clerk and Lindsell on Tort:

> *The most important feature of this duty is its non-delegable nature. It is not enough that the master should take care himself: he has to see that care is taken by whomever he engages. What is personal is not the actual performance of the duty, but the responsibility for its bad performance…within its scope he remains answerable even though he properly delegates its performance to someone else.*

20. Rowe P then cited, with approval, the following passage from the English case of **McDermid vs. Nash Dredging and Reclamation Co. Ltd. [1987] 2 ALL 878**:

> *A statement of the relevant principle of law can be divided into three parts. First, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of worked provided for him is a safe one. Second, the provision of a safe system of work has two aspects: (a) the devising of such a system, and (b) the operation of it. Third, the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. The essential characteristic of the duty is that, if it is not performed, it is not defense for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation, the employer is responsible for the non-performance of the duty.*

21. **Cleston Maynard vs. Wayne Jeffries et al Claim No. NEVHCV2004/0131** outlines the duty involved in providing a safe system of work as follows:

[71] As indicated earlier in this judgment, quite apart from any issue of vicarious liability there is also the issue of whether the second defendant was, as a matter of primary liability, also liable to the claimant for failing to provide him with a safe system of work.

[72] On the issue of an employer's duty to provide a safe system of work, counsel for the claimant relied on the following passage from Clerk & Lindsell on Torts (18th ed.):

"A {sic.} employer does not warrant that the equipment or process is unattended by danger but he is under a duty to see that a safe system of work and adequate supervision are provided. A system of work is a term usually applied to work of a regular and more or less uniform kind. In this connection it means the organization of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the stage at which tey are to be taken, the number of men to be employed and the parts to whether a system should be prescribed, and in deciding this question regard must be had to the nature of the operation, whether it is one which requires proper organization and supervision in the interests of safety, or whether it is one which a reasonaly prudent employer would properly thnk could be safely be left to the man on the spot."

[73] On what constitutes a system of work, reliance was placed on the following dicta in the English Court of Appeal case of Speed v. Thomas & Company Limited [1943] K.B. 557:

"A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one element may be in the sequence in which a particular job ought to be carried out e.g., in a combined job of demolition and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to lie within the master's province and to be a matter of system. It is part of the lay-out of the job which it is the master's duty to decide, and, in doing so, he must pay proper regard to the conditions affecting the safety of his men ... (per Lord Greene at 563)

[74] Further reliance was placed on the following dicta of Lord Wilson in Wilson & Clyde Coal Company Limited [1938] A. C. 67 at 78:

"In Rudd's case the Court of Appeal, applying their general views which I have just stated, held that the employers could escape liabilty by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in the sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due case and skill. But it is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill. The obligation is threefold – "the provision of a competent staff of men, adequate material, and a proper system and effective supervision."

The Court's consideration:

22. The Court begins its consideration with the pleaded case, the particulars of negligence being:

i) Failing to adhere to the safety standards and practices of the First Defendant.

ii) Failing to keep any or any sufficient or proper look out for approaching vehicles.

iii) Failing to institute safety measures and practices for the monitoring, lifting and placement of the boom barrier during take-off and landing of flights.

iv) Failing to have proper signage at the Placencia airstrip and or causing a vehicle to pass in front of a departing aircraft.

23. The submissions from the Claimant focused on a failure to provide a safe place of work and any system, including personnel and clear documented procedures to monitor the boom barriers in the event of a malfunction (paragraph 21 of the Claimant's submissions). This falls perhaps under allegation iii only. The Court is minded to believe that the other allegations have all been abandoned.

24. In any event there was no evidence to support allegation 1. As stated by the Second Defendant the only safety practice that was put in place by the First Defendant was the lowering of the barriers during take offs and landings and the Claimant did see the Second Defendant's employee Luis Cucul press the control to lower the barrier before he took off.

25. Luis Cucul testified to this as well. He said he pressed for the right barrier, and it lowered. But when he pressed for the left barrier (about three times) it did not come down. Clearly the Court must find that the left barrier was not functioning.

26. Mr. Cucul then noticed the vehicle on the roadway and realised the danger. He shouted and tried to run towards the vehicle to stop it but was unsuccessful and the vehicle clipped the right wheel of the plane.

27. As it relates to the second allegation, again this Court agrees with the Second Defendant that there was no duty to keep any lookout for approaching vehicles. The process which was in place was for the barrier to stop any approaching vehicles. This allegation has not been made out either.

28. Allegation iv is also without merit. The parties have agreed that the First Defendant is the owner and entity responsible for the Placencia Airstrip. The onus for placing signage on that airstrip could not possibly fall on the Second Defendant in these circumstances.

29. Nor could the Second Defendant be responsible for signage on the main road (see Public Roads Act Cap 232). In fact, even the evidence provided revealed that there was signage placed at the airstrip by the First Defendant to warn motorists. But as they did not prove to be effective speed bumps and safety barriers were also installed.

30. The Court understands the *"causing a vehicle to pass in front of a departing aircraft"* to be part of the failure to have proper signage so that too must fail.

31. Now to allegation iii, the meat of the matter. The circumstances as the Court finds them are that the barriers were not manned by any personnel. They were controlled, by personnel employed by the Second Defendant, from a control box located at the Placencia Airstrip.

32. The Second Defendant was aware that the left barrier had been malfunctioning prior to the incident (perhaps about 3 days prior) and had reported this to the First Defendant. There was no evidence provided that the Second Defendant had even been notified by the First Defendant that the barrier had been fixed.

33. It would seem to me to be reasonable that in the absence of such information a test ought to have been done before the actual time of takeoff to ensure that it was now functional. And where it proved not to be, then their contingency measure, of

having the ramp agent physically stop the traffic, could have been activated. Or, if the barriers could have been manually positioned, then that too would have been acceptable.

34. All this should have been placed in some proper instruction or guidance to the barrier operator who should have been under proper supervision to follow through. This was not the type of situation that should have been left up to chance, or a panicked attendant running down the airstrip hoping to avert the danger.

35. This to my mind was an accident waiting to happen because nothing had been put in place to avoid it. The Second Defendant having accepted the task of operating the barriers on behalf of the First Defendant cannot now say it was not my responsibility. I have provided a safe system of work by pressing a button to activate the barrier. Or that the Claimant ought to have seen that the left barrier had not gone down and there was a motor vehicle on the roadway.

36. This cannot be left solely on the shoulders of the First Defendant who must bear its own burden. Nor can it be foisted upon the Claimant's shoulders as it should not be left up to an employee to identify and take precaution against dangers in the workplace (**General Cleaning Contractors v Christmas[1954] AC 180**).

37. The Second Defendant must have reasonably foreseen the harm which could be suffered by this breach of his non-delegable duty to provide a safe place of work as well as a safe system of work. Even where the First Defendant may also have a duty the Second Defendant's remains at all times.

38. The Court finds that the Second Defendant as the Claimant's employer breached its duty of care and is liable for the injuries the Claimant has suffered. This takes us now to the second issue.

Whether the collision was caused or contributed to by the Claimant in any way, including (i) whether the Claimant acted in violation of safety standards and existing operational procedures, (ii) whether the Claimant flew the aircraft at a dangerously low altitude above the Placencia mainroad, (iii) whether the Claimant in any way negligently operated the aircraft, and (iv) whether the Claimant failed to take collision avoidance measures.

39. Before addressing the issue above, the Claimant raised in his *'Addendum to his Closing Submissions'* whether an employer can maintain an action in negligence against an employee. As recognised by the Second Defendant this was never pleaded. Had it been it may have been good grounds to launch a strike out attack. Proper use of the arsenal is always encouraged. It was also not agreed as an issue between the parties prior. Nonetheless both parties have addressed the Court on it and so the Court will oblige.

40. So, it is the Claimant's contention that the Court should depart from the legal principles (established by a bare majority) in **Lister v Rockford Ice & Cold Storage [1957] AC 555**. In that case a father and son were working with a cold storage company driving a waste disposal truck. The son who was driving backed over the father, injuring him. The father successfully sued the Company and its insurers paid. The Company sued the son for indemnification.

41. The House of Lords held that as an employee the driver was responsible to carry out his work with reasonable skill and care. Where the employer is held vicariously liable for his employee's actions, the employer may recover from that employee any damages awarded against it.

42. This decision was strongly criticized by Lord Denning in **Morris v Ford Motor Co. [1973] 1 QB 792** as he felt it would imperil good industrial relations. Persons employed as drivers would be left feeling aggrieved by having to pay what ordinarily they would expect the employer's insurance to pay for any mistake which they may have made while performing their duty.

43. Counsel for the Claimant then took the Court through a number of Canadian cases which overruled **Lister (ibid)** finding that an employer had no cause of action against an employee in negligence. These cases each cite a number of public policy considerations. Not only the existence and purpose of the employer's insurance but the imbalance inherent in the employer employee relationship and the disparity in an employee's wages in comparison to the loss which an accident or employee error might cause.

44. The general perception was that finding an alternative way to encourage employee responsibility and dedication to duty while using a deterrence other than imposing some impossible financial responsibility seemed to better support good industrial relations - **London Drugs Ltd v Kuehne & Nagel International Ltd [1992] 3 SCR299, Douglas v Kinger [2008] ONCA 452**.

45. To this, the Second Defendant responded that the Canadian cases were all based on an erroneous application of the two stage ***Anns*** test (**Anns v Merton London**

Borough Council [1978] AC 728) which had been overruled by the House of Lords in **Caparo Industries PLC v Dickman & Anor. [1990] 2 AC 605**. So that they could not be considered good law.

46. Counsel added that the Canadian cases are based on Canadian public policy and as stated in **BCB Holding Limited & Belize Bank Limited v The Attorney General of Belize [2013] CCJ 5** there was no international public policy which was to be used as a yardstick since public policy is to be assessed firstly by reference to Belize.

The Court's Consideration:

47. The genesis of the employee's implied obligation to work with reasonable skill and care is found in **Harmer v Cornelius (1858) 5 CB (NS) 236** which established the employee's implied warranty of the skill required for the job for which he is hired. Willes J explained:

"When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. Thus, if an apothecary, a watch-maker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts... An express promise or express representation is not necessary."

48. Then **Lister (ibid)** recognised that embedded in such a warranty was the promise to exercise that skill to a generally accepted standard. Viscount Simmons approved the test as formulated by Willes J but extended that promise to embrace an exercise of care as *"necessary to the proper performance of duty"*. It was a breach of this implied contractual duty which grounded the finding in **Lister (ibid)** and prompted Viscount Simmons to state:

"The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is

that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions may be, dismissal perhaps loss of character and difficulty in getting fresh employment, but an action for damages, whether for tort or for breach of contract, has even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer L.J. It cannot be disregarded."

49. However, Lord Radcliffe in dissenting surmised that *"the law does impute to an employee a duty to exercise reasonable care in his handling of an employer's property. It is the fact of such employment that places the property within his control; ..., he owes a general duty to all concerned not to be negligent in the exercise of that control."*

50. The **Lister** (ibid) decision has met with much controversy. In his riveting article A Theory of Vicarious Liability (2005) Alberta Law Review, J W Neyers outlined at page 306 a number of reasons why he believed the doctrine was incorrect. First was the numerous sources of criticism and he quoted a few - Atiyah, Vicarious Liability in the Law of Torts (London Butterwoorths, 1967) at page 426: *"It is obvious that the whole foundation of vicarious liability as it operates today would be seriously affected if employers made a regular practice of suing their servants for indemnities"*; Markesinis, Markesinis and Deakin Torts Law (New York Oxford Press, 2003) at 597 *"one must hope that the House of Lords will... remedy this defect. De legeferenda, therefore, it would be best to limit such a right to an indemnity to cases where the employee intentionally inflicted loss on the victim"*; Rogers, Winfield and Jolowitz on Torts, 16th ed, 2002 at 728 *"the ... principle is unjustifiable in modern conditions"*.

51. The author continued *"Second, numerous common law jurisdictions have either statutorily overturned the doctrine or sought to ameliorate its hardships through "gentleman's agreements"*

between employers and insurers ensuring that it will not be enforced. Third, when squarely faced with arguments as to the validity of Lister v. Romford, various Commonwealth courts have sought to limit its scope or argue for its abolition. Fourth, most civil law jurisdictions do not have a similar rule (though they share with the common law a doctrine of vicarious liability). When all this is taken into account, there is a strong case to be made that Lister v. Romford is wrongly decided on the issue of indemnity. This consensus was probably best summarized by Williams, who argued:

On the whole it is submitted that it would be fair and right, and in accordance with the modern rationale of vicarious liability, that a statute should be passed to disallow an action by the master for indemnity against the servant, where the servant has been guilty only of inadvertent negligence It may be expected that many persons would approve this proposal, while jibbing at the logical corollary — that the servant who is sued should be given right of indemnity against the master.'"

52. The decisions of the Canadian courts which overruled **Lister (ibid)** have been rejected by Counsel for the Second Defendant firstly because the **Anns** Test was used for determining the duty of care. The **Anns** test begins with proof of proximity or the neighborhood principle and is followed by a consideration of the policy factors which could reduce the duty. The **Caparo** Test perhaps narrows the **Anns** Test by seeking first foreseeability of harm, then proximity. If those two are met then finally a duty to be fair and reasonable is required. The policy considerations are practically entirely removed.

53. This Court appreciates the use of the **Anns** Test for its simplicity, flexibility and recognition of the important role played by policy considerations in determining proximity. But it has been criticized and was eventually replaced by the very Court that originated it. Even the **Caparo** test is not without its own criticism and has been said to cause chaos and confusion.

54. Counsel for the Claimant also highlighted that Canadian public policy may not be Belize's. It begs the question, is England's public policy more Belize's than Canada's. Undoubtedly, the weighing of reasons for and against imposing liability involves some consideration of policy. More importantly here though a consideration of those same Canadian policies briefly outlined above reveal that there are none which would be so vastly different so as to be inapplicable to Belize.

55. There is no doubt that more often than not an employer stands in a greater position of power than an employee. The terms of employment are set by the employer and the employee must accept them prior to engagement. He rarely has a say. The wages of an employee such as a driver or even the Claimant, a pilot, is incomparable to what the Company says it has paid out whether on its own or through its insurer (it is definitely insured).

56. Employers are required to be insured for this specific purpose. If the law would now require the employee to be insured to cover any indemnity claims levied by the employer this would make very little financial sense. In fact, rather than foster good relations between an employer and his employee there may now be a general reluctance to accept certain positions where an error or an accident might invite a claim of this nature. This was precisely the thrust of the argument made by Lord Somervell of Harrow in **Lister (ibid)**.

57. While in 1957 it may have been considered an appropriate response to demand that *"the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained"* - (**Lister at page 580**). Such an approach becomes increasingly more concerning when one considers the price of certain

equipment in this technological era. The possibility of causing hardship if not bankruptcy on employees is evident.

58. Further, there are other deterrents or sanctions which may be more appropriate. Dismissal, disciplinary action, barred promotion, demotions have been generally quite effective deterrents. It is also quite difficult to reconcile such a claim with the issue of vicarious liability.

59. How is the employer held liable on the one hand for the employee's conduct but then on the other able to be indemnified by the employee for the sums he has had to pay out. Is the employee not then being required to take on a risk of loss when he has no corresponding possibility of profit as his employer does.

60. This Court greatly respects the decisions of the House of Lords but can see no good reason whatsoever to slavishly follow **Lister**. There was such merit in the dissenting decisions and as time and tide has changed I do not believe this to be good law for Belize.

61. Perhaps to soften its blow it should properly be confined to cases of gross negligence, exceptional circumstances of misconduct or suspected fraud but certainly not negligence simpliciter. This is so either for a claim by the employer against the employee for an indemnity or directly for damages for negligence.

62. An employer is to treat his employees fairly and there is no fairness whatsoever in imposing this doctrine otherwise. No reasonable employer would consider it necessary to sue an employer if the negligence is of such a nature that it may occur from time to time. Employees are simply not held liable for ordinary negligence or

carelessness in the performance of their duties. Employers accept this risk in business and imposing it on the employee is simply unfair.

63. In any event this Court has already found serious fault on the part of the employer and for this reason alone **Lister** would not apply in relation to an indemnity (Clerk & Lindsey on Torts 20th ed 4-36). If my consideration above proves to be wrong the Court will now consider the Counterclaim.

64. The Second Defendant pleaded five particulars of negligence:

(i) The Claimant, in violation of safety standards and Belize Civil Aviation Regulations (Operational Procedures), flew the caravan aircraft at a dangerously low altitude (5.3 ft.) above the Placencia main road when given the weight of the aircraft and prevailing conditions, he should have been at a minimum of 28 ft. when he flew over the Placencia main road. But for the Claimant's negligence, the aircraft would have cleared the height of the motor vehicle and no collision would have occurred.

(ii) The Claimant failed to abort take-off despite having observed that a motor vehicle had crossed over the left barrier and was headed towards the direction of the Placencia Airstrip.

(iii) The Claimant, instead of following the direct path of the centerline of the runway, made a turn to the right, thereby causing its right-side landing gear to come into contact with the approaching motor vehicle.

(iv) The Claimant failed to take collision avoidance measures in a timely manner to avoid coming in contact with the approaching motor vehicle.

(v) The Claimant as pilot in command of the caravan aircraft, initiated the flight without ensuring that the barriers were both placed down and that

the runway and adjacent road was clear of oncoming traffic and the facilities required for the flight were being safely operated.

65. The Second Defendant then submitted that the accident was caused not by the presence of the vehicle on the roadway but by the Claimant's failure to utilize appropriate operational procedures. Further, he flew dangerously low, negligently and failed to take collision avoidance measures.

66. The Airstrip, this Court accepted, is "short" as both experts said this. The Second Defendant's expert explained that a runway which is less than 2,500 feet in length (as Placencia's is) is considered short. He maintained that a short field take-off was the appropriate procedure and would have ensured that the Claimant was more than the admitted 5 feet he was above the ground. He should have been at least 50 feet in the air by the end of the runway and would, therefore, not have collided with the oncoming vehicle.

67. Mr. Montalvo, another pilot for the Second Defendant also confirmed this position. The Claimant's own expert witness testified that it was not considered safe to make a normal take-off on a short field. But he maintained that there was nothing wrong in using the entire length of the field as this would allow the plane to build more power. The Claimant admitted to having done a normal take off.

68. The Court finds that the Claimant must have known what the proper take-off was. He determined not to use it although his plane was well equipped with the APE STOL (Short Take-Off or Land) System and he was trained and quite capable of performing a short take-off.

69. By using this normal takeoff he said he had to lift off prematurely when he noticed the vehicle traveling across the main road. Having done this he was unable to reach his desired take off altitude.

70. Clause 8.1.1.8.2 of the Tropic Air Limited Operations Manual mandated that *"Tropic Air shall ensure that the net take-off flight path clears all obstacles by a vertical distance of at least 35 feet or by a horizontal distance of at least 300 feet…."* The Department of Civil Aviation Regulations by which pilots operating in Belize are bound states at Regulation 1.495 that the operator is to ensure "that the net takeoff path clears all obstacles by a vertical distance of at least 35 feet or a horizontal distance of at least 300ft."

71. The Claimant submitted that this reference to obstacle is to a fixed structure like a tree or a building not a moving vehicle. Furthermore, it does not provide for a minimum height requirement at the end of the airstrip.

72. This interpretation of the manual and the regulations leaves much to be desired. It is clear that the Manual sought to echo the particular Regulation. So where it says Tropic Air shall ensure it really translates to those employed by Tropic Air to fly their planes shall ensure that their net takeoff flight path clears the obstacles by a vertical distance of at least 35 feet. Any other interpretation is simply absurd.

73. Then the 'fixed obstacle'- if we wish to be pedantic we could consider the fence at the end of the runway and the lamp pole shown quite clearly in the photographs provided by the Claimant as fixed obstacles. That would mean that the craft should be at least 35 feet above those once it has taken off.

74. However, where the Court has difficulty in finding that the 35 feet is mandatory is that Ravi Nunez explained that the lay of the two airstrips in Placencia did not allow for the 35 feet when taking off from both. This would mean that the 35 feet was not mandatory and it is born out by the use of the ‘or’ which follows it with a referrence to the specifications for horizontal distance.

75. Be that as it may, flying over the main road at a height of five feet must be dangerously low. Had there been a pedestrian passing by, they would have been part of this unfortunate saga. This Court could find it no other way but to say that the Claimant had indeed been flying dangerously low and this contributed to the collision. I cannot find that it caused the collision because if that vehicle was not there, there would have been no collision whatsoever.

76. Issues of the weight or true weight of the aircraft are of no moment as the Court accepts the weight which the Claimant signed to on the manifest. The Court also accepts that as the pilot he ought to have borne that in mind while he prepared for takeoff.

77. The Second Defendant then asks the Court to find that the Claimant was negligent in heading down the runway prior to ensuring that the barriers had been properly positioned. The Claimant admitted that there was nothing which prevented him from doing so. But by the time the plane was in a high pitch altitude he could not see beyond the nose of the craft to see the barriers or that the vehicle was below him.

78. This Court finds it incredible even to suggest that the pilot ought to ensure that things that are to be done on the ground to ensure a safe take off but which have

absolutely nothing to do with the craft he is obligated to control, are in fact done. I cannot hold this to be so. There must be some things which he has to trust are being done because he is guaranteed a safe place of work. The proper functioning and placement of the barriers are one of those things.

79. It is certainly unbelievable that the Second Defendant, who vigorously fought allegations of negligence in relation to the very barriers they agreed to operate, could somehow in the same breath shout negligence at the pilot for not waiting to ensure those barriers had been positioned.

80. The Second Defendant also pointed to the Claimant's statement that he veered slightly to the right at the eastern end of the runway. They questioned why he would have done this when trying to avoid the vehicle which was traveling from left to right. The Claimant's explanation was that there were trees to the left of the runway so he could not veer in that direction. The trees were clearly quite some distance away and the Court accepts that that could not have prevented him from veering left.

81. The Second Defendant continued that if the Claimant had intended to avoid the vehicle he would have and could have veered to the left. Again this Court rejects this argument. This all happened in a matter of seconds. The craft impacted an object which ought not to have been there and could not have been reasonably anticipated. The pilot reacted and cannot be said to be negligent for veering slightly one way rather than another.

82. The Second Defendant then raised the issue of whether the stall horn sounded or not. That Mr. Montalvo, also a passenger on the flight, did not hear the stall horn did not mean it did not sound. In the panic of the moment and with the passing of time

it might well be difficult to say exactly what had transpired. The Court accepts Mr. Wagner's testimony that the horn sounded and he was forced to react by lowering the nose of the aircraft as it was on the verge of falling out of the sky. He then made an emergency landing in the sea.

83. The Second Defendant's final attack was an allegation that the Claimant had failed to take collision avoidance measures. This argument seems to be that even after having collided with the vehicle the Claimant ought to have been able to safely land the craft on the ground. The Claimant's expert spoke to pitching the aircraft up to climb at a steeper angle or using its emergency/transient power to ensure that it climbed safely.

84. The same expert also informed that in cases of emergency the pilot could take decisions and deviate from the rules etc. in the interest of safety. The Claimant explained that he tried to lift off earlier once he saw the vehicle on the road. He anticipated that by doing this he would have had a safe takeoff and avoided the vehicle. He, therefore, never thought there was a need to use transient power. The Court cannot overlook either that both parties agreed that the Claimant made a controlled landing at sea.

85. I do not believe it wise in these circumstances to find the Claimant negligent because he reacted in a way which in hindsight may not have been the perfect or even the best way to react. Again the Court reminds that this collision and the aftermath occurred in a matter of seconds and was totally unexpected and unusual.

86. This Court could find nothing that demonstrated that it was the Claimant's negligence, gross or otherwise which caused the collision. For this reason, the Counterclaim is dismissed.

87. The Court having found the Claimant to be contributorily negligent, assesses the contribution to be 10%.

What remedies, if any, are either party entitled to?

88. The Claimant sought special damages in the sum of $967,490.23. The major part of that sum was stated to be loss of earnings for a period of 11 years from December 2017. The Claim was brought in 2020 and so clearly part of that period had to be loss of future earnings which can form no part of special damages but resound in a claim for general damages.

89. The Second Defendant has correctly drawn the Court's attention to the fact that the income tax statement provided by the Claimant for 2017 shows that he had received a salary for 52 weeks (12 months). He cannot again claim for December of 2017. The Court will begin its assessment from January, 2018.

90. The Claimant has asked for some unspecified reason that a mean of his yearly salary for the last five years up to and including 2017. The Court could see no reason to take an average when the trend demonstrated was that his salary seemed to fall each year. The reason for this is unknown. Further, there were only statements from 2015 to 2017 (not a five year period). The Court will instead use only the 2017 salary.

91. The Second Defendant asked that there be a deduction of 25% for income tax and places reliance on an Eastern Caribbean Supreme Court case **Francis Gill v Devon Dale Jones; Marvin Willie St. Clair Augustin v Cherry Olivier & Others - St. Lucia SLUHCV 2016/062 at paragraph 21**.

92. This Court sees no reason to deduct 25% when the Claimant's income tax statement for 2017 is before the Court and shows quite clearly how much tax has been withheld. The St Lucian court deducted 25% because this information was not before it. So for our purposes the annual sum of $60,090.40 will be used.

93. The Second Defendant maintained that the Claimant has not been out of work because he is incapacitated. He chose to resign on 11th February, 2019 and has done nothing to mitigate his losses. I agree with this submission. There is absolutely nothing before the Court which indicates that the Claimant could not work in another position. In fact, Dr. Annel Martinez, his own expect revealed that he could work gainfully otherwise. The Claimant admitted that he does have some interest in two companies. It remains unclear whether he makes an income through them.

94. The Claimant at the time of the incident was just a few months shy of his 50th birthday. By the date of delivery of this decision he would be fifty-five. His retirement age would be sixty. Although he claims it to be 65 he has not proven this to be so. The Claimant had claimed 11 years but in his submissions he asked for a period of five years to be used. The Second Defendant thought a period of four years at most. She added that since there was nothing impeding other forms of employment or demonstrating the permanence of his alleged incapacity that figure could be lowered to two years.

95. This Court, having considered all of the circumstances outlined above including the claimant's age. The court therefore finds an overall period of three years to be adequate. $60,090.40 x 3 = $180,271.20.

96. The remaining $9,600.00 was a claim for medical expenses but no receipts were produced. It bears reminding perhaps that one cannot simply throw oneself at the head of the Court and say these are my losses. Those losses must be proved. Undoubtedly, the Claimant must have incurred medical expenses. The evidence is there that he had doctor visits, therapy sessions and he was prescribed medication. He provided some receipts for travel but never pleaded any of that. At best the Court can award a nominal sum of $2,000.00.

97. Special damages are therefore awarded in the sum of $182,271.20.

98. As far as general damages go this Court finds that the Claimant has proven that he suffers from Post-traumatic stress disorder (PTSD) as diagnosed by Dr. Annel Martinez. Counsel for the Second Defendant submitted that the good doctor ought to have done a more thorough evaluation of the Claimant. I cannot say she is in a position to make such an assertion without some proper basis. I am no medical expert myself so without more I am unable to yield to this.

99. Counsel also made much about how many times the Claimant had travelled by plane after the incident and that he had not been truthful with the doctor about his avoidance. This, she said, also brought the diagnosis into question. Again I am unable to make any such finding. The doctor was clear that all persons are different so there was no rule about how someone with PTSD would react.

100. Dr Martinez found that the Claimant had severe symptoms of PTSD. The Claimant urged a figure of $81,460.00 which represented the middle range of severe PTSD - **Jenny Adelina Bonilla v Dr Gilbert Landero and Attorney General of Belize Claim No 721 of 2016**. The Second Defendant pressed for a figure reflective of less severe symptoms. Again the basis for this was unknown and this submission had to be rejected. The Court accepts $81,500.00 less 25% factored in to reflect the difference in economies being $73,530.00.

101. The Claimant sought $20,000.00 for his loss of earning capacity and the Court finds this fair in the circumstances. Not only has he lost his much loved profession but retraining for another profession at this stage of his life may be difficult as he has difficulty focusing and concentrating.

102. General damages are awarded in the sum of $93,530.00.

103. Damages will be discounted by 10% to reflect the Claimant's contributory negligence.

Disposition:

1. Judgment for the Claimant on the Claim.
2. Special damages are awarded in the sum of $$180,271.20 and general damages are awarded in the sum of $93,530.00.
3. Damages are to be discounted by 10% to reflect the Claimant's own contributory negligence.
4. Interest is awarded on the damages at the rate of 6% from the date of the filing of the Claim until payment in full.
5. The Counterclaim is dismissed.

6. Costs to the Claimant to be assessed if not agreed and discounted by 10% to reflect the Claimant's contributory negligence.

SONYA YOUNG
JUSTICE OF THE HIGH COURT