

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2014/CLE/gen/939

BETWEEN

BLUEWAVE BOAT RENTALS LTD

Plaintiff

AND

MORRIS DAVIES

Defendant

Before Honourable Mr Justice Ian Winder

Appearances: Sean Moree with Vanessa Lee for the Plaintiff
Stephen Turnquest with Syneisha Bodie for the Defendant

Hearing dates: 13 May 2016 and 22 June 2016

JUDGMENT

WINDER J

This is a claim for breach of contract and alternatively negligence arising from the rental of a 21-foot vessel on 10 September 2013.

1. The agreed statement of facts dated 27 August 2014 provides as follows:

- (1.) The Plaintiff is a company incorporated pursuant to the laws of the Commonwealth of The Bahamas and operates a boat rental business in Marsh Harbour, Abaco.
- (2.) The Defendant is a citizen of the United Kingdom.
- (3.) On the 10th September, 2013, Mr. Morris Davies entered into a contract with the Plaintiff for the rental of a 21' Dusky vessel ("the Vessel"). The Vessel was to be returned on the 15th September, 2013. ...
- (4.) The particulars of the Agreement were *inter alia*, as follows:
 - i. To operate the boat in DAYLIGHT hours only within the Abaco Sound between Green Turtle Cay to the north and Little Harbour to the south.
 - ii. To dock, anchor or secure the boat and equipment to prevent damage to the boat, motor or equipment and/or dock, boats and persons as a result of existing or changing weather conditions.
 - iii. To pay the appropriate service charge for any service required as a result of any carelessness or neglect of the Defendants in respect of the boat including towage or other charges if they are found to have taken the boat outside of the Abaco Sound.
 - iv. To be responsible for any legal costs or expenses connected with the collection of any debts incurred by reason of any damage to the boat or expenses incurred thereof during the rental period.
 - v. That the Defendant is familiar with the geographical boundaries of the Abaco Sound area.
 - vi. That the Defendant has the necessary experience to safely operate the Vessel that the Defendant has rented and that the Defendant will forfeit the Vessel if the Plaintiff is not satisfied with the Defendant's operation/knowledge of the boat rented.
- (5.) On the 15th September, 2013, at approximately 6:00 a.m., the Defendant collided the Vessel into rocks situated South East of Sandy Cay (hereinafter referred to as "the Collision").
- (6.) Subsequently, the Defendant placed an emergency mayday call to Bahamas Air Sea Rescue Association Abaco for assistance (hereinafter referred to as "BASRA").
- (7.) At approximately 6:50 a.m., a rescue team from BASRA arrived on the accident scene where they discovered the Defendant and his wife

injured but conscious. Shortly thereafter, further assistance arrived from BASRA equipped with medical supplies.

- (8.) At 7:31 a.m., BASRA left the scene with the Defendant and his wife and headed to Marsh Harbour where they were met by an EMS Ambulance and transported to Dr. McIntosh's office in Marsh Harbour, Abaco.
- (9.) The Collision occurred at approximately 6:00 a.m., at which time it was dark. The sun rose at 6:54 a.m. on the day of the Collision.

2. The action was commenced by the Plaintiff by specially endorsed Writ of Summons dated 7 August 2014. The Statement of Claim (as amended) provides, at paragraphs 7 -9 and the Prayer, as follows:

- 7. At 7:31 a.m., BASRA left the scene with the Defendants and headed to Marsh Harbour where he was met by an EMS Ambulance and transported to Dr. McIntosh's office in Marsh Harbour, Abaco.

PARTICULARS OF BREACH OF CONTRACT

- (a) The Defendants operated the Vessel while it was still dark. The collision occurred at approximately 6:00 a.m. and the sun rose at 6:54 a.m. on the day in question.
 - (b) The Defendants agreed to be responsible for any legal costs or expenses connected with the collection of any debts incurred by reason of any damages to the Vessel or expenses incurred thereof during the time it is rented.
- 8. Further, the Defendants was negligent in that he was in breach of his duty of care to the Plaintiff.

PARTICULARS OF NEGLIGENCE

- (a) The Defendants did not use reasonable skill and care whilst operating the Vessel. The Defendants agreed that he had the necessary experience to safely operate the Vessel. Based on the collision and his decision to operate the Vessel in darkness the Defendants showed that he did not have the requisite skill and knowledge to operate the Vessel.
- 9. By reason of the Defendant's breach of contractual duty and negligence the Vessel belonging to the Plaintiff was severely damaged and the cost to repair it exceeded the value of the Vessel. Accordingly, the Plaintiff suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- i. The sum of \$30,000.00 representing the value of the Vessel prior to its collision.
- ii. The sum of \$18,995.00 representing the loss of revenue over a twenty nine week period.
- iii. The sum of \$600.00 representing the cost of the removal of the Vessel from the rocks.
- iv. The sum of \$2,380.00 representing time lost rescuing the Defendants and transporting the Vessel to storage.
- v. The sum of \$252.00 representing the cost of the Vessel survey.

AND THE PLAINTIFF CLAIMS AS AGAINST THE DEFENDANT:-

1. Loss and/or damage suffered by the Plaintiff in the amount of \$52,227.00 as a result of the Defendant's breach of the terms stipulated in the Agreement and/or negligence;
2. Costs; and
3. Further or other relief as the Court deems just.

3. The Defence dated 20 September 2014 sets out the Defendant's case at paragraphs 8-11 as follows:

8. As regards subparagraph (a) under the "Particulars of Breach of Contract" pleaded by the Plaintiff, the First-named Defendant admits to operating the vessel in the dark but denies that in doing so he thereby breached the contract. The Defendants contend that while the form of contract did contain the term referred to at paragraph 3(i) of the Statement of Claim that provision was waived by virtue of the fact that prior to taking possession of the vessel the First-named Defendant advised the booking agent with whom he was dealing that he had asked a taxi to collect himself and the Second-named Defendant from the Blue Wave Water Rental dock at 6:10 a.m. and that said Defendant asked that the agent ensure that the taxi driver could access Blue Wave Water's dock at that hour, which the booking agent agreed to do. The Defendants further state that at the time that the First-named Defendant signed the contract the return time was stated to be 7:00 a.m., not 8:00 a.m. as appears in later copies of the contract.
9. As regards sub-paragraph (b) under "Particulars of Breach", the Defendants admit that the agreement contained a provision to the effect stated but the Defendants admit no liability to the Plaintiff in consequence thereof. The Defendants state that the vessel was rented by the First-named Defendant on the explicit understanding that once the vessel was operated within the Abaco Sound in compliance with the contract any damage to the vessel would be covered and paid by insurers.
10. The Defendants deny that they breached any duty of care to the Plaintiff as alleged at paragraph 8 of the Statement of Claim. The Defendants state that after taking possession of the vessel they discovered that the vessel's compass light did not work and when the First-named Defendant checked under the console he discovered that the wires which were supposed to connect the compass light to the battery were disconnected. Consequently, the First-named Defendant, who was piloting the vessel, was able to make course adjustments in reliance on the compass only by shining a torchlight on the compass housing. However, the Defendants further state that when the torchlight was used to illuminate the compass the light therefrom would reflect off the white console and make it impossible for the First-named Defendant to see for several minutes afterwards, as a result of which the First-named Defendant endeavoured to steer without the compass.
11. The Defendants state while en-route to the Blue Wave Water Rental dock to return the vessel on the morning of September 15, 2013 the lights of Marsh Harbour and the light at the entrance to Man O'War Cay came into view at approximately 6:00 a.m. whereupon the First-named Defendant began a turn to port in order to head toward the entrance to Marsh Harbour. The Defendants state that it was then that the vessel hit a rock.

4. The Plaintiff joined issue with the Defence in a Reply dated 14 October 2014.
5. At the trial the Plaintiff called Troy Cornea, Phylis Cornea and David Bassion as witnesses in its case. The Defendant gave evidence and called Elizabeth Davies.
6. The evidence of Troy Cornea was that:
 - (a) He is the owner of the Plaintiff Company which he established in 1998. At approximately 6:00 am on 15 September 2013 he learnt that one of the company's boats was involved in a collision off Sandy Cay between Hopetown and Marsh Harbour.
 - (b) On arrival at the scene he saw the Defendant and his wife who were conscious but clearly injured. They were attended to by a trained paramedic David Bassion. The sun was coming up as he arrived at the scene. The 21-foot Dusky which had been rented to the Defendant was sitting on top of rocks off Sandy Cay. The Defendant was taken to Marsh Harbour for medical attention.
 - (c) A taxi driver by the name of Swain had been waiting at the Marina to transport the Defendant to the Airport. The Plaintiff nor any of its employees had arranged the cab for the Defendant.
 - (d) The vessel was severely damaged, and had to be retrieved from the rocks off Sandy Cay. The entire hull had to be replaced.
7. The evidence of Phylis Cornea was that:
 - (a) She was the office assistant at the Plaintiff's business. At the date of trial she had been employed for approximately 9 years.
 - (b) On 10 September 2013 she rented the 21-foot boat to the Defendant for four and a half days and he executed a standard Boat Rental Contract and Agreement. The vessel was to be returned at approximately 8 am. The office does not open until 9 am but accommodations are often made for renters who are leaving on an early flight. Davis explained to her that he was leaving

early and would return the vessel at 8 am. She amended the 9 am to an 8 am return time.

(c) She denied waiving any of the terms of the Plaintiff's standard contract.

8. The evidence of David Bassion was that on 15 September 2013 he received a call from Troy Cornea advising of an incident with one of his boats. Cornea asked Bassion to accompany him to the scene. They arrived at the scene at approximately 7:10 as the sun was rising. He observed the Defendant and his wife with serious injuries and attended to them. He later handed them over to the local medical personal when they arrived at Marsh Harbour.

9. The evidence of Morris Davies was that:

(a) He, along with his wife Elizabeth, rented the boat from the Plaintiff on 10 September 2013. At the time of his renting the boat he made it absolutely clear that he wished to return the boat early Sunday Morning, 15 September in order to catch the 7:20 am flight from Marsh Harbour to Nassau. He told Phylis Cornea, who handled the booking, that he required early access to the Marina for a taxi, which he had rented.

(b) He was a trained boater with 60 years experience. He trained as a naval cadet on the training ship HMS Conway and sailed with the Royal Mail Liners in numerous ports around the world including the Caribbean. He has owned a yacht for over 45 years from 31 feet in length to his present 61 feet yacht. He has travelled the Gulf Stream between Florida and The Bahamas on more than 30 occasions on ships piloted under his sole command.

(c) On Sunday September 15, 2013 he left Elbow Cay and headed to Marsh Harbour at about 5:45am. The compass light was inoperative and as a result it was only possible to make adjustments by shining a torch at the compass housing which reflected off the white console but which unfortunately made it impossible for him to see for several minutes afterwards, so he tried to steer without the compass.

- (d) At about 6:00 am he could see the lights at Marsh Harbour open up and the light at the entrance to Man O War Cay. He began to turn to port in order to head towards the entrance of Marsh Harbour when he hit the rock. He does not recall the impact but he was thrown from the boat. He climbed into the boat and called BASRA for assistance.
- (e) The Plaintiff altered the Rental agreement after the accident by changing the time of the return from 7am to 8am.

10. The evidence of Elizabeth Davies was that:

- (a) She is the wife of the Defendant. On 15 September 2013 she along with her husband left Sea Spray Marina on Elbow Cay at 5:45 am in the 21-foot boat. At 6 am the light marking the entrance to Man O War Cay was clearly visible and her husband altered course towards Marsh Harbour. Almost immediately there was a loud crash as the boat hit an obstacle. She fell against the console and/or the metal support frame and received severe injuries.
- (b) The rental agreement was altered by the Plaintiff in several respects including the changing of the time from the 7:00 am, which was originally provided.
- (c) At the time of the rental it was agreed with Phylis Cornea that they could return the boat at approximately 6:15 on 15 September 2015 as the Plaintiff had been made aware of the reservations, which they had for a 7:15 departure from Nassau to Marsh Harbour. They did not conceal the fact that the boat would be operated in the hours of darkness.

11. There was no dispute as to the loss occasioned to the Plaintiff arising from the accident and that the only issue for the court was the question of liability and whether the Defendant was responsible. This loss was agreed to have been \$52,227.

Issues

12. The issues for determination in this action are the following:

- (a) Whether the Defendant breached the terms of the Agreement, specifically the Daylight Clause; and/or
- (b) Whether the Defendant acted negligently in operating the Vessel resulting in the Collision.

Breach of Contract

13. The Plaintiff claims that:

[T]he Defendant admits to operating the Vessel in the dark, but contends that the Plaintiff waived the Daylight Clause. The Defendant alleges that he advised the booking agent that a taxi would be collecting him and his wife at the dock at 6:10 a.m. on the day of the Collision and the Daylight Clause was waived to accommodate his travel plans. Despite this contention, the Defendant accepts that neither he nor Mrs. Phyllis Cornea indicated on the Agreement that the Daylight Clause was waived. Conversely, Mrs. Cornea who checked out the Vessel to the Defendant on the 10th September, 2013 denied waiving any terms of the Agreement and stated that the Defendant was to return the Vessel at 8:00 a.m. on the day of the Collision. Mrs. Cornea accepted that the return time on the Agreement was amended from 9:00 a.m. to 8:00 a.m. Furthermore, Mrs. Cornea stated that only Mr. Troy Cornea, the owner and operator of the Plaintiff, could authorize the use of a rental boat before sunrise and he had never given such permission to the Defendant, or anyone else for that matter.

14. The Defendant accepts that the standard term of the contract provided for the operation of the boat only between the hours of sunrise and sunset. He says however that the Plaintiff waived this requirement in relation to his rental. The Defendant cites the following evidence in support of the contention:

- a) Oral evidence that Phylis Cornea was made aware of their flight from Abaco at 7:20/7:15 that morning and permitted them to return the boat at 6:15 am and in any event before 7:00am.
- b) Arrangements were made to permit their cab driver to access the Marina prior to the usual opening hour of the Plaintiff's business.
- c) Philis Cornea was aware of their residence at Elbow Cay and that they would be commuting from that location to return the boat.

15. Resolution of this issues undoubtedly boils down to whose version of the event of 10 September 2013 I accept. It is not disputed on the evidence that there was a discussion as regards the use of the vessel outside of the normal operational hours of Blue Wave. The evidence of Phylis Cornea supports this but she says this extended only to 8:00 am and not to 7:00 am as asserted by the Defendant. Having seen the witness and observed their demeanor as they gave their evidence I accept the Defendant's evidence that Phylis Cornea was aware of the early 7:20 flight and had agreed that the vessel could be returned before 7:00 am.

16. Whilst there was no formal waiver of the 'daylight' clause, having regard to: (1) the Defendant's known address at Sea Spray on Elbow Cay and (2) the need to check-in for the flight; it is reasonable to infer that the Plaintiff agreed that the Defendant would operate the vessel outside of the daylight hours.

17. In the circumstances therefore I am not satisfied, on balance, that there was a breach of contract prohibiting the use of the vessel, as alleged by the Plaintiff.

Negligence

18. The Plaintiff says at paragraphs 37 and 38 of its submissions:

37. A duty of care arises based on a general concept of reasonable foresight. In Donoghue v. Stevenson [1932] A.C. 532, at page 580 Lord Atkin described the principle as:

“The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee would be likely to injure your neighbor. Who, then in law is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

There is little doubt that as the owner of the Vessel, the Plaintiff, would be directly affected by the Defendant’s actions while piloting the Vessel.

38. Subsequently, the House of Lords in Caparo Industries Plc v. Dickman [1990] 2 AC 605, established a three-fold test to determine whether or not a duty exists at page 617:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

It is reasonably foreseeable that as a result of the Defendant operating the Vessel in the dark, a Collision may occur and the parties are in a relationship of proximity as the Plaintiff is the owner of the Vessel. In the circumstances it would be fair, just and reasonable to impose liability on the Defendant for actions done by him negatively affecting the Plaintiff.

19. The Defendant says at paragraph 9, 22 - 25 of its Submission:

9. The Defendant gave his credentials as a boater which, if accepted, indicate that the Defendant is a competent mariner with the training and experience necessary to have safely operated this particular vessel. As the Defendant’s evidence in this respect went unchallenged at trial no basis exists on which to conclude that the Defendant lacked the requisite skill and knowledge to operate the boat. On that premise, we submit that neither the fact that the Defendant commenced the trip in the dark nor the fact that the collision occurred by themselves, whether taken individually or whether taken collectively, necessarily indicate negligence on the Defendant’s part.

...

22. ... [W]as reasonable for the Defendant to continue with the journey upon discovering that the compass light did not work. We submit that in the circumstances which must be taken to have informed the Defendant's judgment it was not unreasonable, reckless or careless of the Defendant to have done so.

23. The first circumstances which informed the Defendant's thinking was the fact that he and Mrs. Davies had an early morning plane to catch and that if they turned back they would undoubtedly miss their flight out of Marsh Harbour and with it, doubtless, any connections ultimately to the U.K. on which a timely Abaco departure was dependent: the decision to proceed can hardly be characterized as whimsical or impulsive.

24. The second factor which informed the Defendant's judgment was that he had in his possession a flash light which, upon discovering the compass light malfunction, at first enabled him to see the compass heading, the difficulty being that as time wore on the Defendant found that he was being temporarily blinded by the reflection of the flashlight off the compass console and as a consequence, he eventually tried to steer without the compass, relying on illumination by flashlight only intermittently in order to check direction of travel.

25. While admitting that circumstances were not ideal the Defendant said nevertheless that "you do the best with what you have". That is important, as the standard for the exercise of a duty of care must depend on the circumstances with which the Defendant is faced.

20. Counsel for the Defendant says paragraph 28.

28. It would seem that the proper inference from the Defendant's evidence is that he would have proceeded some distance away from the final buoy (it is unclear how far) after discovering that the compass light was not working before deciding to cease attempts at continuous compass illumination in favour of intermittent illumination, his choice being between suffering temporary blindness on one hand and being navigationally hampered by the protocol of intermittent illumination on the other.

21. Whilst the question of whether the Defendant acted reasonably depends on the circumstances of the particular case it is not a subjective evaluation. The court must determine whether a reasonable person in the given circumstances would have acted as the Defendant did.

22. The evidence, which I accept, is that at the time of the collision there was absolutely no light. Firstly, it seems unreasonable that the Defendant waited until he reached the end of the channel to learn that the compass was not functioning. This is a matter which a reasonable person ought to have considered prior to leaving port notwithstanding the presence of lighted buoys. Secondly, for the Defendant to have continued towards Marsh Harbour, after clearing the channel and the lighted buoys, without a functioning compass and not being able to see in front of him was not the actions of a reasonably prudent boater in these circumstances. His own evidence was that "it was only possible to make adjustments by shining a torch at the compass housing which reflected off the white console but which unfortunately made it impossible for him to see for several minutes afterwards". I reject the Defendant's contention that the continuation of the journey whilst alternating between temporary physical blindness on the one hand and navigational blindness on the other was reasonable and not reckless.

23. It appears beyond dispute, in my view, that the reasonable prudent boater, whether as experienced as the Defendant or simply the ordinary boat renter with the minimum requisite knowledge of the Sea of Abaco, would not have acted as the Defendant did. At the moment he became aware he was unable to navigate and steer the boat at the same time he ought to have abandoned the journey and returned to the marina for assistance or working equipment.

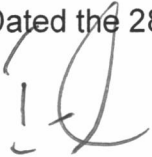
24. The fact that they had a plane to catch could not justify the risks, which as the facts unfolded, turned out to be real and substantial.

Conclusion

25. In all the circumstances I will dismiss the claim in breach of contract but nonetheless find that the Defendant was negligent in the operation of the 21' boat rented from the Plaintiff. I give judgment to the Plaintiff in the sum of \$52,227. Interest will be paid at a rate of 3% per annum from the date of filing of the Writ of Summons until judgment and will accrue thereafter at the statutory rate.

26. As the Plaintiff has not succeeded on all of the claim advanced I award it 65% of its reasonable costs to be taxed if not agreed.

Dated the 28th day of July AD 2016

A handwritten signature in dark ink, appearing to be 'I Winder', written over the date line.

Ian Winder

Justice