



- [2] In this case the Claimant is Mr. Raymond Harvey who on the 7<sup>th</sup> day of October 2010 went spear fishing. Spear fishing (sometimes referred to as skin diving), is carried out, without air tanks and very often with the least of accoutrements. Judicial note can be taken that it has been practiced for decades by young men in and about the reefs which protect our island's shores. The fisher swims out to sea with his spear gun, a knife, goggles and perhaps a pair of fins.
- [3] The Claimant, whose witness statement, dated the 31<sup>st</sup> October 2014 stood as his evidence in chief, states that he had been doing spear fishing since 2007. When cross examined he stated that he normally went with a group of other spear fishers. This was the first time he was doing so alone. His girlfriend at the time, Shelly Ann Brown, waited ashore whilst he ventured forth. He set out to swim the 200 metres to the reef as he had done every Saturday or Sunday for the previous 3 years. He would then have crossed the reef and spear fished in the deeper waters beyond it.
- [4] In order to get to those deeper waters it is necessary to cross the channel between the reefs. That channel he admits is also used by pleasure boats to enter and exit safely the deeper waters beyond the reef.
- [5] The parties are in agreement that the unfortunate incident occurred in or near the channel. The parties admit that the boat operated by the Defendants came into contact with the Claimant causing him injury. The issues for my determination are whether the Defendant was negligent and/or whether the Claimant failed in a duty of care to himself thereby contributing to his own loss.
- [6] In the interest of time I will not review the entirety of the evidence in this matter. I will reference only so much of the evidence as is necessary to explain my findings and conclusions. I bear in mind that the burden of proof is on the Claimant and, he is obliged to satisfy me on a balance of probabilities. The action is a claim in negligence therefore the three elements of duty of care owed,

breach of that duty and damages in consequence, need to be established. The Defendants through their Counsel conceded that a duty of care is owed (see page 2 of Defendants' written submissions on liability).

- [7] The Claimant describes himself as a mechanical engineer now 35 years of age. It is fair to say I was not for reasons demonstrated below, impressed by the demeanor portrayed in the witness box. His "casual" approach to the giving of evidence might well be reflective of the lifestyle he enjoys. I do not therefore accept his evidence that he on this occasion was equipped with a spear which had a buoy attached.
- [8] In the first place, the Claimant admits that for most of the previous 3 years he had spear fished without the use of a buoy. A year before however the police had seized his equipment because he had no licence. He had only purchased this gun with buoy attached, 3 or 4 months prior to the incident. He stated he was unable to find the receipt. When challenged on that in cross examination he said he had been back to the store from which it was purchased, but they too were unable to locate it. We were not told when he went back, and of course if he only did so shortly before this trial, it may not be implausible that such a receipt could not be found.
- [9] The Claimant was, as he admitted well aware pleasure boats also used the channel which he had to cross. He admits the channel does not follow a straight line. He said the buoy while he swam extended about 2 feet behind him. He heard the noise of a boat, looked up and saw it approaching, at a distance pointed out, which both Counsel agreed, to be some 35 – 40 feet. He waved his arms and then attempted to dive below the boat. He however could not avoid a collision.
- [10] The Claimant said when permitted to amplify his witness statement, that he saw his spear gun and the buoy after the accident. It was he said beside him when

they took him out of the water. He had never seen it again. This detail was not included in his witness statement. There is in the evidence reference to a police investigation of the incident. Neither side called the investigating officer. The Claimant states that his efforts to recover his spear gun and buoy from the police were unsuccessful. It is not in the witness statement that the “whiteman” who rescued him threw the spear gun and buoy into the boat. I do not accept that there was a buoy attached to his spear as he alleged.

[11] Interestingly, when cross examined it was suggested to the Claimant that he had not waved his hands when he saw the boat. He responded,

“Yes, I did that is why I am alive today.”

When asked by the Court, what did he mean, having regard to his evidence that there was no spotter (look out person) on the bow of the boat, he said:

“Waving my hands, I was trying to get attention, because if they would have had a spotter.”

[12] Finally, I should say a few words about what I described as the Claimant’s casual lifestyle. This is reflected in his description of his employment. The part of his evidence is as follows:

“Q: You are a mechanical engineer where are you working

A: On and off with a friend

Q: Doing what

A: 4 days out of the week

Q: What do you work on

A: Machines. People want parts to fix for a car

Q: Where

A: Barnett Street, Montego Bay

Q: What is person’s name

A: Michael

Q: Surname

A: Don’t remember his surname

Q: Do you get paid

A: Cash to hand

The Claimant's Counsel then indicated that loss of earnings was not being pursued as part of the Claim.

[13] This "casual" approach to life is also demonstrated in the evidence about his place of residence:

“Q: Are you living in the US now

A: Yes

Q: where

A: in England

Q: permanently

A: not really

Q: now reside there

A: yes

Q: Since when

A: trying to get exact figures, maybe a couple of months now

J: you don't remember when you went to England

A: Maybe 6 – 7 months now.”

[14] In contrast to my view of the Claimant I was rather impressed by the demeanour and evidence of the 2<sup>nd</sup> Defendant Desmond Downer and his witness Albert Reddicks. These two experienced seamen were clearly very familiar with the water around the reef and the channel. They were forthcoming and frank in the delivery of the evidence.

[15] Mr. Downer's witness statement dated 15<sup>th</sup> April 2014 stood as his evidence in chief. In it he states clearly that the first indication he had that the Claimant was in the water was when he felt the boat impact something in the water. He was the boat's captain. The boat was 11.28 metres in length and equipped with 2 200 HP outboard engines. On board were diving instructor Kristian Black Louridien, two guests of the hotel (whose names were stated) and Albert

Reddicks a lifeguard. He did not see the Claimant in the water prior to the impact.

[16] When cross examined he admitted the weather was good and visibility good. The following exchange occurred,

“Q: You had a clear view  
A: Weather was pretty good  
Q: Clear view extended over what distance  
A: 100 and something metres  
Q: If person body above water could you see it  
A: yes ma’am”

And later,

“Q: The spotter what’s his function  
A: he helped me to scan and look for everything in the water  
Q: Standing or sitting  
A Standing shoulder to shoulder  
Q: Does he wear special head gear or only [use] his eyes  
A: We both use eyes. We can see very far  
Q: Beyond 100 metres  
A: yes, as far as my eyes can go  
Q: Spotter tells you to move  
A: We look for fish traps, guys shooting fish  
Q: He communicate with you  
A: yes  
Q: [you] need Spotter  
A: have to have Spotter”

In reexamination the following occurred

Q: you said you could see over 100 metres  
A: very far  
Q: if [the Claimant] was above water 40 feet away could you see him  
A: We could see him and buoy  
Q: Said Channel in like an ‘S’ explain  
A: have to steer like an “S”: shape boat have to go  
Q: why

A: Nature and way reef is built. If, go straight hit the reef.”

In answer to the court:

J: By way of explanation if had no buoy would you expect to see the person

A: yes

J: if visibility is as good as you say and distance and if even without buoy you expect to see him could you explain how accident occurred

A: I would not see going across. Maybe he was down there, heard the boat and came up.”

[17] The 2<sup>nd</sup> Defendant’s dilemma is therefore obvious. He had a clear range of vision. He also would have expected to see a swimmer with or without a buoy. He speculates that the swimmer may have been below the surface. The Claimant was however not wearing oxygen tanks. Judicial note can be taken that the human being cannot stay below the surface for very long. The Claimant will have had for some distance prior to the incident to have been on the surface of the water. Given the visibility available, it is more probable than not that it was the 2<sup>nd</sup> Defendant’s failure to keep a proper lookout which was the proximate cause of the accident. Even on his own evidence.

[18] To this visibility factor is added his evidence that the collision occurred near to the end of the channel and that therefore they were close to returning to shore. He also stated that his speed was “less than 5 knots”. When asked if that was considered fast he said “no, my normal speed, not fast.” It is my finding that the 2<sup>nd</sup> Defendant was less than careful as he approached the end of his journey. He may have been chatting with his guests, he may have been distracted by his spotter. It may be because, as he stated, swimmers were not supposed to be in that part of the channel, although he admitted that from time to time they were seen there and had to be redirected. I find as a fact that had they been keeping

a careful and proper lookout the Claimant who was swimming for a distance of 200 metres ought to have been seen by the 2<sup>nd</sup> Defendant or his spotter.

[19] This conclusion is supported by the evidence of the Defendant's witness Mr. Albert Reddicks. His witness statement dated the 15<sup>th</sup> April 2014 was also allowed to stand as his evidence in chief. He has been a licensed life guard for over 30 years. He also felt the impact but had seen nothing of the Claimant prior to that. He admitted when cross examined that he was the designated spotter on the day in question and it was his duty to look out to see if anybody was in the water and to alert the captain. He said on the day in question he was wearing sunshades and could see clearly. There was he said nothing to obscure visibility. The following interesting discussion about the speed of the boat ensued:

Q: suggest the boat was travelling fast

A: (witness laughs) we were in channel coming very slow.

Q: What knots

A: Hard to say can't give estimation

Q: what is fast

A: 30 – 25 knots

Q: What is regular speed

A: High and low. Depends on the Captain. The captain drive boat, how he can drive it.

Q; What is slow

A: 5 – 10 knots is slow, like k.p.h that is slow

Q: suggest speeding

A: No

Q: if Mr. Harvey at any point was above water swimming in sea you would have seen him.

A: sure

Q: even if body slightly submerged under water had you been keeping proper lookout you would see him moving

A: yes, if on top of water I would see him swimming. if under water I can't see him."

In answer to the Court:

Q: Can you explain how is it you did not see Claimant

A: don't know, I did not see anybody in vision coming in."

[20] The Defendants' witness therefore has fortified my finding, on a balance of probabilities that less than reasonable care was taken by the 2<sup>nd</sup> Defendant and his spotter on the day in question. Had a careful look out been kept the Claimant ought to have been seen as he swam towards and across the channel as I find he was doing. Even if he was swimming in the channel, as the Defendants alleged he was, he ought to have been seen. This is because he had to have been on the surface at some point and within the range of vision described. The witnesses' inconsistency on the question of what was normal speed, is also cause for concern. Mr. Reddicks describes 5- 10 knots as slow. His captain says less than 5 knots is slow, and was normal for going through the channel.

[21] It leads me to a finding that the vessel was not going as slow as the captain would have us believe. It probably was travelling fast as the Claimant describes. These were experienced seamen doing a trip or route they had taken several times. It was a clear day. They were heading back to shore and almost there. The boat on their evidence was lightly loaded. They did not expect anyone in the channel as they said spear fishermen normally used another route out to sea. All these factors support a finding that their normal careful lookout was at that point relaxed. I find as a fact that the 2<sup>nd</sup> Defendant failed to keep a proper lookout and so did the Spotter employed by the 1<sup>st</sup> Defendant for that purpose.

[22] The Claimant as I have found, did not have a buoy attached so as to mark his presence. It was submitted that his failure to do so constituted contributory negligence. No evidence has been lead as to the practice in Jamaica in the

spear fishing industry, nor is there evidence as to the international norms and standards in that regard. Nevertheless I find that the presence of a marker buoy would have improved the likelihood of the Claimant being spotted by even a less than attentive boat crew. The Claimant has contributed to the extent of 20% to his own injury and loss. His evidence that the police had one year before cautioned him about the need for such an appliance supports this conclusion even in the absence of any legal duties or evidence of duties resulting from established norms.

[23] I therefore find the Defendants liable to the extent of 80% for the Claimants injury loss and damage.

[24] On the question of damages the parties helpfully agreed the quantum of Special damages as-

1. US\$75.00 and J\$208,684.42
2. Taxi fare paid was agreed @ J\$18,500.00

Total therefore US\$75.00 and J\$227,186.42

[25] In his submission on general damages Mr. McBean for the Claimant said \$1.5 to \$2 million was appropriate. He relied on ***Andre Clarke v. Atkinson Suit CL 2005/HCV 5108*** unreported Judgment of McDonald J delivered 25 April 2006; ***Cecil Martin v. Uncle Sonny's Transport Co. Ltd. Suit CL 1995 M135 Khan 5<sup>th</sup> page 68***, and ***Cowan v. New Era Homes Ja. Ltd. Khan 6 d page 72***.

[26] Miss Hudson for the Claimant in written submissions asked for \$3.5 million. She also relied upon the ***Andre Clarke*** case as well as ***Jason Edwards v. Phoebe Buchanan Harrison's Assessment of Damages page 326*** and ***John Shirley v Jamaica Premix Harrison's Assessment of Damages page 214***.

[27] The Claimant's injuries in the case at bar are detailed in medical reports agreed as **Exhibits 1 and 2**. In the former Dr. Francis Lindo a Consultant Orthopaedic

Surgeon described the patient as having suffered a wound to the back of the right hip. I pause to observe that the area of the wound is consistent with the Claimant's account of how the accident happened. Had he come up under the boat as the second Defendant would have us believe, one might have expected an injury to the head. The doctor on examination found a wound to the back of right hip joint and short extremely rotated right leg. X-rays showed a fracture to the right neck of femur. The wound on right buttock was debrided and closed with sutures. On the 1<sup>st</sup> November 2010 surgery was effected to his right hip where open reduction and internal fixation and a bone graft to fracture of the right neck of the femur was done. He was discharged on crutches on the 4<sup>th</sup> November 2010. There was a painful unstable right knee. MRI to the knee revealed:

- a) Ruptured right anterior cruciate ligament (ACL)
- b) Torn right medial meniscus of knee
- c) Torn right lateral meniscus of knee

The patient was offered surgery to the right knee but had up to the date of the report (11<sup>th</sup> May 2011) not decided on it.

[28] The medical report of Dr. Dundas Consultant Orthopaedic Surgeon, is dated 25<sup>th</sup> September 2012. He examined the Claimant on the 24<sup>th</sup> September 2012. Dr. Dundas' examination revealed a fit young man with pink moist mucosae. He had a superficial well healed laceration spanning the middle third of the thigh. There was no deep muscle injury. At the back of the right thigh was a 28 cm serpentine scar extending from the posterior of the greater trochanter of the right femur to just below the middle of the thigh. On the lateral anterior aspect of the thigh there was a comma shaped 27.5 cm scar extending from the anterior superior iliac spine to the mid lateral region of the right thigh. His right lower limb was 1 cm shorter than the left. Measurements were taken and described in detail in the report. The doctor said examination suggested cruciate ligament instability but the range of motion of right knee was equivalent to the range of motion of the left at 137°. Dr. Dundas' diagnosis was:

- a) Status open reduction and internal fixation fracture neck right femur
- b) Anterior cruciate ligament insufficiency

Dr. Dundas concluded that surgery was necessary to address the problem in the right knee by reconstruction of the anterior cruciate ligament. He rated the impairment consequent on the cruciate ligament at 4% of the whole person or 16% of the lower extremity. He did not venture an opinion for the impairment consequent on the meniscus injury.

- [29] Mr. Harvey stated that having seen Dr. Dundas he had decided to do the surgery. He said up to the time of seeing Dr. Dundas he had pain in his right knee on a continuous basis. He could not sleep on his right side due to the pain in his hip. He still feels pain in his foot when he walks. I observed that he walks with a marked limp and this is consistent with the leg length discrepancy noted by Dr. Dundas. Mr. Harvey says he can no longer play football, go to parties or dance as he used to. He walks with a cane. He says he feels like an old man and he is just 33 years old. He still feels pain in his knee every day.
- [30] I agree with the submission that the **André Clarke** case cited above is the most helpful in this assessment of damages. The award there was \$1.3 million which when updated approximates to \$3 million. Andre Clarke's disabilities are more serious, than Mr. Harvey's; on the other hand the circumstances of Mr. Harvey's injuries (being gashed by a boat's propeller) were certainly more traumatic. When all is considered \$2.6 million is appropriate compensation for Mr. Harvey's pain, suffering and loss of amenities.
- [31] Curiously Claimants Counsel made no submission with respect to the cost of Future Medical care. Exhibits 2 (a) (b) and (c) support such a claim. The Claimant said he wished to do the surgery. The total is \$666,100.00. This forms part of the General Damages.

[32] Damages must be reduced by 20% having regard to my finding of contributory negligence.

[33] There is therefore judgment for the Claimant against the First and Second Defendants as follows:

General damages

- |     |                                       |                 |
|-----|---------------------------------------|-----------------|
| i.  | Pain Suffering and Loss of Amenities: | J\$2,080,000.00 |
| ii. | Future Medical Care                   | \$532,880.00    |

Special Damages:

- |     |  |               |
|-----|--|---------------|
| i.  |  | US\$60.00     |
| ii. |  | J\$181,749.14 |

Interest on Special Damages at 3% from the 7<sup>th</sup> October 2010 to the date of this judgment.

Interest on General Damages @3% from the 24<sup>th</sup> April 2012 to the date of this judgment

Costs to the Claimant to be taxed if not agreed.

**David Batts**  
**Puisne Judge**