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ROYAL COURT
(Samedi Division) 92

Hearing dates: 13th, 14th, 15th April, 1994.
Judgment reserved: 15th April, 1994
Reserved judgment delivered: 12th May, 1994

Before: The Bailiff,
Jurat J.H. Vint, and
Jurat M.J. Le Ruez

Between	**Neil McMurray**	**Plaintiff**
And	**John Roberts**	**Defendant**

Advocate M. St. J. O'Connell for the Plaintiff
Advocate A. D. Hoy for the Defendant

JUDGMENT

The Background

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The plaintiff is a fisherman. He started soon after he left school as a "nicker" or apprentice and progressed to a full crew member. There are two sorts of fishermen in Jersey: those who fish
10 around the island's coast, returning to port each night and those who go further afield. The plaintiff belongs to the latter category. In or around the month of July, 1991, he was taken on as a crew member by the captain or skipper of the fishing boat the "Kastel Paol". She is an approximately 57 ft. crabber and is used
15 to fish for crustaceans in pots. These are attached to a strop or string line which in turn is attached to a leaded lead line. Both lines and pots lie on the sea-bed. When the tide is right, the pots are lifted emptied, re-baited and relaid on to the sea-bed. The "Kastel Paol's" layout is similar to other fishing vessels of
20 the same type. There is a wheel-house, in front of which is an open deck with a deck light, sometimes in the middle of the deck, sometimes on the left (port) side. On the right (starboard) side is a rail of two horizontal bars and vertical stanchions which is called the shooting bar. It comes down to the gunwale or side of
25 the boat. Some distance in front of the shooting bar is a piece of metal called "the back-stop". It consists of a solid bar with a

flattened piece of metal which faces towards the stern of the vessel. The procedure for re-laying the pots is as follows. The pots are hauled out of the water on the right-hand gunwale by one crew member and are then passed to another crew member who empties them, places the catch, if any, in a *vivier*, and re-baits the pots if necessary. A third member of the crew then stacks the re-baited pots on the left (port) side of the boat and in front of the wheel-house. Whilst they are there, the skipper, if he is in the wheel-house, is prevented from leaving it on the port side. When all the pots have been hauled up, emptied and re-baited, they are then thrown over the rail (called "shooting"). One member of the crew, normally the one who stacked the pots, rolls each pot one at a time along the deck to the member of the crew who is to "shoot" them. The boat is moving forward at about five knots, usually across the tide and the pots are shot over the side by the shooting bar. The "back-stop" is there to help the member of the crew who is doing the shooting to brace himself against it, if necessary. The shooting bar is there not only to allow that member of the crew to steady himself, but to prevent the pots from going over the side out of control. During this time there is a large number of ropes from the pots lying on the deck. When each pot is rolled, the individual strop or stop line and part of the lead line roll around each pot. Sometimes, they become tangled and the member of the crew shooting the pot has to decide whether to try to untangle the rope, throw the pot overboard with the tangle intact or if he has not yet picked the pot up, to step back from the pot. Shooting the pots is recognized as the most dangerous of all the activities on a fishing vessel. There are ninety pots to a string.

The case for the plaintiff

On 29th October, the plaintiff was the crew member responsible for shooting the pots. The "Kastel Paol" was to the north-west of Alderney and began lifting the pots shortly after daylight, having left Alderney at about 4.30 a.m. When about three-quarters of the pots on the string being shot were in the water, the plaintiff saw that one of the pots being rolled towards him had a tangle of ropes around it. He picked it up and said that as it was his duty to place each pot on the gunwale, he did so, but before he could attempt to unravel the tangle, part of a rope - (from the size of it as shown to us it seemed to be part of the lead line), rode up his arm and then shortly after that slipped down to his wrist. By this time, there was some pressure being exerted on the rope by the pots which had previously been put over the side and were then stringing out astern of the "Kastel Paol". The plaintiff says that he cried out loudly for help, but that neither the skipper, who was Mr. C. R. Watson at the helm, nor either of the other two crew members on the deck, that is to say the one who had been rolling the pots to him and the other one who had been standing by the baiting position which is on the left-hand side or port of the vessel, did anything. The rope tightened

and to save himself, he slipped over the side, but found that once he was in the sea, his right hand had been severed from his forearm. Eventually, the "Kastel Paol" was stopped and he was lifted on board. Later he was transferred to a French fishing boat and thence by helicopter to hospital in Cherbourg. No complaint is made by the plaintiff about his treatment by the captain and the crew of the "Kastel Paol" after the incident and after he had been picked up. Although he kept his hand, it was not possible to reunite it with the forearm. Accordingly, he now brings this action in negligence against the owner of the "Kastel Paol" as responsible for the negligence of his skipper. The defence has not persisted in its pleading that the defendant could not be vicariously liable for the negligence, if any, of Mr. Watson. There remains a denial of any negligence at all on the part of Mr. Watson or the crew and a plea of contributory negligence. There is also a plea of inevitable accident. Certain of the special damages have been agreed, if negligence is found.

We must now examine in some more detail the plaintiff's claim. Basically, he says that Mr. Watson and at least one other member of the crew, that is the one who was rolling the pots on that day, a Mr. D. J. Locke, were incompetent and that the third member, who had been baiting the pots, was affected by drink and/or drugs taken the previous evening. He was Mr. P. N. Bynam, known as Fagin. The same allegation was also made about Mr. Watson. At the time of the incident there was a further member of the crew, but he was in the galley and saw nothing.

The plaintiff says also that the layout of the deck was not satisfactory inasmuch as the gap between the shooting bar and the back-stop was insufficient to allow a crew member to move around with safety. Lastly, there should have been one or more knives at hand for use by the shooting crew member.

The Facts

We deal now with these allegations and the evidence we heard. We heard only two of the four persons who were on deck at the time: Mr. Watson and the plaintiff. Neither Mr. Bynam nor Mr. Locke were called by the defendant, but in any case, both live outside this jurisdiction and therefore were not compellable. It follows that where there was a conflict of evidence between Mr. Watson and the plaintiff, we had to decide which witness to prefer. We were unanimous in accepting the evidence of the plaintiff where it conflicted with that of Mr. Watson, both as regards the events of the previous evening and the incident itself. Mr. Watson, it was apparent to us, was reluctant to accept any responsibility whatsoever for the incident. The evidence of the plaintiff and a Mr. Scott Gourlay was that Mr. Watson was too anxious about other vessels in the vicinity when fishing and on occasions would order the ropes to be cut when other vessels were a considerable distance away. Inevitably, that required additional

work to be done and fewer lines were lifted and therefore, there was less catch to share between the owner, the skipper and the crew. Mr. Gourlay in fact described Mr. Watson as hopeless as a skipper. When it came to the question of priorities on board a
5 vessel, Mr. Watson put them in this order.

(a) Making the boat run smoothly.

(b) Making sure the crew was happy.

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(c) Making a good catch, so that everyone could earn a wage.

(d) Safety, which he said was a very high factor.

15 In assessing his evidence on the question of his competence, we think the order in which he has placed these factors is very significant.

The previous evening, the "Kastel Paol" was in port in
20 Alderney. Mr. Watson says that he had his tea and turned in at about 8.00 p.m. and after being awakened by his alarm clock, called the rest of the crew at about 4.00 a.m. The plaintiff and Mr. Scott Gourlay say otherwise. The plaintiff said that when he went ashore at about 8.00 p.m. Mr. Watson, who was known to have
25 smoked cannabis before, had two "joints" in front of him. The plaintiff returned at about midnight, having spent the evening with friends, who testified that they had drunk one bottle of wine between the three of them. Mr. Scott Gourlay said that he was on a fishing vessel moored near the "Kastel Paol" and was invited on
30 board by Mr. Bynam. He arrived at about 7.30 p.m. where he said he saw Mr. Locke and Mr. Bynam "making joints". He made one and all smoked cannabis including Mr. Watson. Mr. Scott Gourlay left to go up to a pub at around 11.00 p.m. and all on the "Kastel Paol" were "skinning up", i.e. making cannabis cigarettes. Mr. Watson had a
35 fresh one in front of him. Mr. Scott Gourlay visited three pubs and got drunk. Mr. Bynam was there in one of them. He saw Mr. Bynam the next morning who was staggering around. According to the plaintiff, Mr. Bynam said to him "Christ, I'm snide" - that is to say that he was feeling terrible. It was Mr. Bynam who stacked the
40 pots and therefore the plaintiff asks us to infer that he did so incompetently so that the risk of the ropes becoming entangled was thereby increased. It was not Mr. Bynam, however, who rolled the pots to the plaintiff, but Mr. Locke. His competence was challenged both by the plaintiff and Mr. Scott Gourlay. Mr. Watson
45 denied that Mr. Locke had been sacked for incompetence, but agreed that they had parted company previously. He said that this was not due to incompetence on the apart of Mr. Locke, but due to Mr. Locke's feeling that he, Mr. Watson, was not making the most of the fishing possibilities. There is no direct evidence, other than
50 the evidence of the Plaintiff to suggest that any member of the crew was affected to the extent of being unable to carry out their duties by the previous night's activities. Moreover, P.C.Ogier of

the Guernsey Police arrived at Alderney some two hours after the incident, where the "Kastel Paol" was then moored and saw Mr. Watson and the crew. He could not find any signs of the influence of alcohol or drugs. Even if we prefer the evidence of the plaintiff and Mr. Scott Gourlay, who was, strange to say Mr. Watson's best man, on this particular aspect of the evidence, we heard no medical testimony about the affect of cannabis smoking combined with alcohol upon someone who had been addicted to cannabis, or at any rate was a confirmed cannabis smoker. Accordingly, we find that there is insufficient evidence under this head to found negligence upon the condition of Mr. Watson and his two crewmen who were on deck. The question of their competence of course and a safe system of work is quite another matter.

Reverting to the incident itself, the plaintiff said that the moment it became clear that his arm was trapped by the rope, he started to scream - "Cut the f-ing rope". He said that he would have been heard in Alderney. Neither of the two crewmen took any action nor did Mr. Watson in the wheel-house until the plaintiff had gone over the side. Mr. Watson says that he had been looking for part of the time at his radar, in case there were other vessels in the vicinity, but also, keeping a good look-out on the deck. It was vital, according to the evidence of a very experienced owner skipper from Devon, Mr. Kenneth Browse, that the skipper, during the operation of shooting the pots, should be totally alert. He should have had full vision of what was going on. He certainly should not be paying attention to the radar. So far as the safety question is concerned, which we have touched upon, and the priorities to be given in skippering a fishing vessel, in contrast to Mr. Watson's evidence, Mr. Browse said that the important matters to be borne in mind were the safety of the crew, the ship and the gear with the question of profit very much last.

Mr. Roberts, the defendant, very fairly said that a skipper should keep the boat on the intended track and watch the deck very carefully. He agreed that, if ropes got tangled during this operation, it was a very dangerous thing for the man shooting.

Mr. Watson said that as soon as he became aware that something was wrong, he put the "Kastel Paol" into hard astern. Mr.Taylor said that at the slightest hint of the rope not clearing he should immediately put the boat astern otherwise the main line might break. Mr. Taylor, a very experienced fisherman and Chairman of the Jersey Fishermen's Association, said that it would take about ten seconds for a boat the size of the "Kastel Paol" for the way to be taken off her. Mr. Watson said the whole thing was over in some three seconds and there was nothing further he could have done.

It is therefore clear that we have had to consider the question of timing, as this is very important in deciding as to where responsibility lies for the incident. Before doing so, we

think we can dispose of the question of the knives. Mr. Watson was reasonably sure that he probably told the crew to make certain that there was a knife near the crew man who was shooting the pots. Mr. Roberts said that normally there should be three or four quite small knives rather like the one which was produced by the defence for the Court to see, but they would normally be stronger and clean and they would be on deck. There would probably be two for cutting bait and might be wedged down a bait trap.

Mr. Browse felt that it was not good enough to keep a knife on the bait table. There should always be a 12" bait knife behind the shooting bar, so that if a man were trapped, even if other crew members could not reach him, he could use it himself.

We are satisfied that there was no knife or knives available for use by the plaintiff when he was shooting the pots. It is also significant that the shooting bar and the back-stop have each been moved so that the area between them has now been doubled. Moreover, the hatch itself has now been moved, with the cover, to the port side. Thus, the deck has now been made clearer and larger and there is greater safety for the crew doing the shooting of the pots. These alterations were carried out some time after the incident, but it is not entirely clear exactly when this was.

We find that there should have been one or more knives available for the crew member shooting in order that, should an emergency arise, he would be able to use one of them. This leaves the question of competence of the two other crew members on deck, the clutter of gear on the deck and the competence of Mr. Watson.

It is helpful at this stage, we think, to consider the competence of the plaintiff as well. There is no evidence that he was other than a competent crewman. Even Mr. Roberts went so far as to say that he was not unhappy with the employment of the plaintiff. It was in fact Mr. Roberts who had the layout of the deck changed and increased the distance between the shooting bar and the back-stop. He regarded Mr. Watson as adequately competent, but he had had complaints from the crew because Mr. Watson was a bit edgy when working amongst other ships. It is impossible to say from the evidence we have heard whether the two other crew members on the deck, Mr. Bynam and Mr. Locke, were incompetent and therefore took no action because they did not know what to do, or because they did not know where to find a knife, or because the deck was too cluttered. It is obvious that there must be some clutter on a fishing vessel, with so many pots on board, but that alone would not, in our opinion, suffice to enable the plaintiff's claim to succeed on liability.

We are left, therefore, with the all important question of time. If, from the time it appeared something could happen to the time that the plaintiff's hand was severed and he was overboard, only three seconds elapsed, there might be a case for arguing that

the accident was, as is pleaded, inevitable. It is therefore important to pay strict attention to the question of time. Before we turn to some figures, we are satisfied that Mr. Watson was not concentrating as he should have been, on the deck. He was paying too much attention to the radar set, which was on the port side, and he had his head turned away from the starboard side, where the plaintiff was shooting the pots. Indeed the plaintiff said that when he screamed, Mr. Watson took no notice, or did not hear him, as his head was in fact turned towards the radar set. When eventually he attracted his attention, by which time he was over the side, Mr. Watson looked shocked. We shall come to the question of law in a moment, as to what the effect of our finding is, as regards Mr. Watson, because even if he was not paying attention, as we think he was not, if the accident happened so quickly, then even if he had been paying full attention, there would have been nothing, in his own words, that he could have done to avoid the accident. This was one of the main arguments of Mr. Hoy for the defendant. We thought it necessary to recall the plaintiff and the defendant on the question of the time it took to shoot the 90 pots. The plaintiff said that it took about twenty minutes, that is to say, between ten and fourteen seconds for each pot. The defendant, however, said that he thought it took between ten to fifteen minutes. Mr. Browse, when he was recalled, said that the figure of three seconds suggested by Mr. Watson was wrong, and that a more appropriate figure was ten to twelve seconds between each pot. Whilst the rope was going over, it would be fairly slack, and he felt an extra five to six seconds could be allowed for that and taking way off the boat, making a total of some fifteen seconds. In his opinion, the accident could have been avoided, firstly if the skipper had had his wits fully about him and or secondly, a knife or knives had been near the shooting bar. So far as dealing with a tangled rope was concerned, there were three choices, but the crew member had one or two seconds in which to make up his mind.

(1) He could leave it to get jammed on the shooting bar.

(2) He could pick it up and throw it over the side, in which case he risked getting the rope entangled on himself, which indeed happened.

(3) If he had time, he could try to clear it.

In his opinion, the moment there became the slightest hint of the pot's not being clear, or any ropes' being tangled, the skipper should be alert at once, because if he does not go astern right away, there is a risk that the main line could break. It was not uncommon that pots got entangled, but there was no difficulty in his experience, because competent skippers would not be at a loss as to what to do. If a crewman did not take action along the lines suggested by him, he would either have to go over the side or lose his limb. He would have between two to three seconds to

make up his mind. In our opinion, the crucial point for the skipper to know what was happening was when he saw, or should have seen, that the pot was entangled. That was the time when avoiding action, if we may put it like that, should have been taken. He did not do so and as we already said, having preferred the evidence of the plaintiff to that of the skipper, we accept the version of the incident as given to us by the plaintiff.

The Law

We now turn to the question of the law.

The tort of negligence is well understood in Jersey and the courts have applied the general English principles. [Louis v. Troy (1970) JJ 1371]. In that case the court referred to certain passsages from 3 Halsbury. In 4 Halsbury 34 are set out the relevant duties of master and servant in the context of negligence. These differ very little from the law as accepted by the court but it is as well to cite them.

"Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property." (para.1.).

"The test of reasonable foreseeability of risk must be based not only upon existing facts known to the defendant but also upon those which he had a reasonable opportunity to learn."

"In every case it is a question of fact whether conduct which disregards such knowledge or opportunity of knowledge amounts to negligence." (para 2)

"When confronted with a category of case where harm to the plaintiff is forseeable but which has not been the subject of a previous decision as to whether there is a duty of care the courts decide more frequently to bring the new case within the categories of cases where a duty of care is owed." (para 5.)

On the question of the duty of care at common law of an employer or master, to use the old term, in 4 Halsbury 34 at 1 paragraph 30 it states:

"At common law an employer is under a duty of care to take reasonable care for the safety of his employees in all the circumstances of the case so as not to expose them to an unnecessary risk. ... An employer's duty to take reasonable care ... is a single and continuing duty. ...The employer's obligation has long been recognised as threefold in character, that is to say, to provide: (1) A competent staff

of employees. (2) Adequate material and, (3) a proper system and supervision."

In McDermid v. Nash Dredging Ltd. (1987) 1 A.C. Lord Brandon, in referring to the duty of an employer, put it thus (at page 919):

"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 work provided for him is a safe one. Secondly, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. Thirdly, 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 no defence 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 liable for the non performance of the duty."

Thus the negligence of the captain of the Kastel Poal, if found to be such, is deemed to be that of the defendant. Applying these principles to the facts of this case we find that the captain, and thus the defendant, failed to provide a competent crew, or a safe system of work and, accordingly, was in breach of his common law duty to the plaintiff. We have to deal with two other matters. First, the defence of contributory negligence. That matter was before the court in the Louis case. At page 1402 the court said this:

"The authorities cited to us clearly show that the fact that the plaintiff has to take a risk does not amount to contributory negligence on his part if the risk is one created by the negligence of the defendant and is one which a reasonably prudent man in the plaintiff's position would take."

Moreover, the fact that a practice has been long established, (given the patent nature of the risk and the ease with which precautions could have been taken), does not exonerate an employer. See also Morris v. West Hartlepool Steam Navigation Co. Ltd. (1956). A.C.552.

In Macrae v. Jersey Golf Hotels (1973) J.J. at page 2331 the Royal Court said this:-

" In coming to our decision we place particular reliance on the principle of common practice as the standard of care. Charlesworth states at para. 71;

> ***"Common practice by persons habitually engaged in a particular operation is strong evidence of what is reasonable care in the performance of that operation ... But although compliance with common practice is evidence that reasonable care has been used, it is not conclusive, and it is open to the court to hold that common practice does not make proper provision for a known risk."***

The edition of Charlesworth is not mentioned.

In Froom v. Butcher (1976) Q.B. 286 at page 291, Lord Denning referred to the question of contributory negligence as follows:

> ***" ...Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable man he might hurt himself."***

That case is cited in Buckley: The Modern Law of Negligence where, on page 67, is this passage:

> ***"They will for example be reluctant to hold contributorily negligent a plaintiff who is criticised merely for his actions in the heat of the moment following an emergency created soley by the defendant's carelessness."***

The only suggestion by Mr. Hoy is that the plaintiff ought to have carried a personal knife. We find that there is no evidence to suggest that that was common practice but if it was something that was essential for the safety of the employees, then it was the duty of Mr. Watson as the skipper to see that the practice was enforced. We find that the plaintiff's conduct did not contribute causally to the accident. As regards the defence of inevitable accident, there is a passage in the 13th edition of Winfield and Jolowicz on Tort which suggests that the defence is out of date. Having found that the plaintiff has discharged the burden of proving negligence it follows that the defendant, through Mr. Watson, did not exercise the reasonable care required of him and the defence of inevitable accident fails.

Damages

Heads of Claim

The plaintiff seeks damages under the following heads:-

1. **General Damages**

(a) For pain and suffering and loss of amenities (not less than) 45,000.00

(b) For future loss of earnings 486,000.00

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2. Special damages

(a) For past loss of earnings from the date of the accident to the date of the trial (approximately) 40,000.00

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(b) Other special damages for the cost of purchasing a new double bed, items of clothing and specialist footwear 722.00

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3. Interest on the damages claimed above

The medical report has been agreed by the parties. It is signed by someone on behalf of S. Ravindran MCh. Orthopaedic Registrar. The summary of the report is as follows:

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"This 25 year old, Mr. McMurray, sustained a traumatic amputation of his right hand at the level of the distal row of carpal bones on 29th October 1991 in a fishing boat accident. Initial emergency management was carried out in Cherbourg Hospital in France. He developed a skin necrosis and wound infection of the stump. Shortening and closure of the stump was carried out at the level of the wrist joint by excising the two rows of carpal bones.

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At present the wound infection has settled and he has a through the wrist amputation stump on the right forearm with good pronation and suppination of the forearm bone. He has been fitted with an artificial limb which has got a cosmetic hand and a hook. He is a right handed person. At presnt(sic) he is not very happy with his artificial limb and he has been referred back to Portsmouth Artificial Limb Centre for discussion and appropriate modification of his existing prosthesis. The loss of the dominant right hand at the level of the wrist joint gives him a 60% disability. Reference: Accident Benefit Injury and Disablement Benefits by Social Security, States of Jersey Social Security Department, June 1991."

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The plaintiff said that he might have to have the arm shortened in order to fit an artificial hand so that it was the same length as his left hand and arm. It was clear that the prospect was not something he was looking forward to.

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1(a) Damages for pain and suffering and loss of amenities

In regard to a sum for pain and suffering, and loss of amenities, we were referred to three cases: Clarke v. Glacier Metal Co. (Kemp and Kemp Vol. 3 at page 58502); Beadle v. Letraset (op.cit.p. 58503) and Warren -v- Butterworth (op.cit.p. 58502). These cases were decided over twenty years ago and a proper allowance must be made for inflation. We award under this head, taking into account that the plaintiff may have to undergo further surgery to fit an artificial hand, the sum of £45,000.

1(b) Damages for future loss of earnings

In Livingstone v. Rawyards Coal Co. Ltd. (1880) 5 App. Cas. 24.39. Lord Blackburn defined the measure of damages as:

> ***"that sum of money which will put the party who has been injured, or who has suffered, in the same position he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."***

That principle is followed in the Royal Court see Rebours v. Jersey Elecricity Ltd. (1984) J.L.R. 67. Accordingly we have to look at the past and into the future. Without proof of loss there cannot be any recovery. Unfortunately we have had little evidence about the plaintiff's earnings on an annual basis as he, in common with other fishermen, took time off during the rough weather in the winter. His average earnings appeared to be in the region of £10,000 p.a. At the time of the accident the plaintiff was aged 24. Mr. Browse who had had 43 years in the fishing industry told us that a crew member might expect to work up to about 42, Mr. Taylor puts it lower at 30 as the life is hard. A skipper, according to Mr. Browse could expect to fish up to about 50.

What then could the plaintiff have been expected to achieve in the future? He was by all accounts an enthusiastic competent fisherman before the accident. Mr. Hoy accepted that he had a future in fishing. But because of the plaintiff's erratic life style instead of earning around £18,000 to £20,000 p.a. he had only managed to earn around £10,000 p.a. Mr. Browse said that Jersey skippers were extremely ambitious as the plaintiff seemed to us to be. He added that very few crew members became skippers and that it was very difficult to raise money to buy a boat. It is clear to us that even if the plaintiff were to be employed by Mr. Browse for the immediate future with someone to help him, that sort of employment could not be guaranteed. Mr. O'Connell submitted that we should find that as a talented dedicated ambitious fisherman the plaintiff could, in due course, have been expected at least to become a skipper and eventually an owner. After all, Mr.Roberts had achieved that position at the age of 29. He invited us to apply a multiplicand of £27,000 and a multiplier of 18. Mr. Hoy submitted that it was speculative whether the plaintiff could have found employment as a skipper let alone as an

employer skipper. It seems to us that all in all a measure of speculation is inevitable. As Prosser Q.C. sitting as a deputy judge of the High Court said in an unreported case of Simon Rupert Morton v. Handley in 1989:

> ***"... I said during argument, I repeat now, in dealing with this period and in dealing with the future beyond 1989 I had to do a great deal of speculation. Sometimes in making assessments of the kind that I have been dealing with judges have to speculate. In general terms judges in English law are advised not to speculate about anything but to act upon evidence and in civil matters only award when proof has been made on a balance of probabilities. I have to look to the evidence, assess it and then make as intelligent a speculation as I can as to what would have happened during that period between 1984 and 1988 and I have to then do the same exercise for the future ..."***

Mr. Hoy submitted that the proper approach was to award the plaintiff a sufficient sum to allow him to acquire a boat with some discount because of the inherently dangerous trade of fishing. It seems to us that this method is to be preferred.

In either method we have to stand back and look at the matter globally and award a lump sum.

Mr Williams told us about the value of second hand boats. It is obviously unlikely that the plaintiff could have afforded a new one in due course. A 40 to 60 ft. boat would cost around £80,000 to £100,000 depending on the condition of the gear and probably could be found in one to two weeks. A boat the size of the Kastel Poal (herself for sale) would cost between £160,000 and £180,000. We do not think it would be right to consider the top size. A boat like the Kastel Poal could be found in about a month. If, as we think, obtaining finance is difficult (Mr. Roberts acquired his boat with help from the vendor) then it cannot be right either to put the plaintiff into a better position by allowing him the full cost of a boat now. Even if he progressed, as we think he would have done, he would have been expected to provide some of the cost from his own resources. Given his ability we think that he would have been able, eventually, to buy a boat similar to the Kastel Poal. We think, also, that it would be fair to make a further allowance for the cost of providing a helper when the plaintiff goes to sea to show to his putative skipper where the best fishing grounds may be found. Accordingly, we award by way of general damages under this head the sum of £150,000. We do not consider it appropriate to make a separate award under the principle of Smith v. Manchester Corporation.

2(a) Past loss of earnings

So far as the plaintiff's loss of earnings is concerned from the date of the accident to the date of trial, we can only take the assessments of the income tax figures that were mentioned. This reduces the amount under this head by half. We award the sum of £20,880 which takes into account payments from the Social Security Fund claimed, and also £7,000. being the amount he earned when employed by Mr. Browse.

2(b) Other special damages

We award the sum of £722 in respect of the items claimed under this head.

Our total award, therefore, is as follows:-

1.	General damages (excluding pain & suffering)	£150,000
2.	Pain and suffering	£45,000
3.	Special damages	£21,602

There will be interest on the above sums as follows:

1. On the amount awarded for pain and suffering at the rate of 2% per annum from the date of the original Order of Justice (17th August, 1992) until the date of judgment.

2. On the special damages at the rate of one half of the U.K. selected retail banks short term money rates (base rate) from time to time from the date of the accident (29th October, 1991) to the closing date of the hearing (15th April, 1994) and calculated on a daily basis.

Authorities

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