IN THE HIGH COURT
of the
REPUBLIC OF THE MARSHALL ISLANDS

MAUJ EDMOND, *et al.*, Plaintiffs v. MARSHALL ISLANDS MARINE RESOURCES AUTHORITY, *et al.*, Defendants	CIVIL ACTION 2016-252 **JUDGMENT FOR LIABILITY**

This matter concerns a December 2014 nighttime collision of two small fishing boats in the Wotje Atoll lagoon that resulted in the death of Diavon Edmond ("Edmond"). Edmond was a passenger in one of the boats. A lawsuit alleging negligence was commenced in December 2016 by the personal representatives (parents, wife, and children) of Edmond against the pilots and owners of the two boats involved in the collision.

Upon consideration of the record herein including the June 2, 2020, Stipulation of Parties as to Facts and Exhibits[1] ("Stip.") and reasonable inferences to be drawn from the same, extensive briefing of the issues of liability and damages, and argument of counsel, this Court finds:

[1] The following exhibits were admitted into evidence by stipulation: *Exhibit 1* – March 18, 2011, Confirmation on Completion of the Project for Wotje Atoll Fisheries Technical Project with attached Transfer of Ownership with Attachments A-1, A-2, and B; *Exhibit 2* – May 11, 2011, Memorandum of Understanding Between the Marshall Islands Marine Resources Authority and Wotje Atoll Local Government; *Exhibit 3* – Appendix A of the Marshall Islands Domestic Water Craft Regulations; *Exhibit 4* – Police Report; *Exhibit 5* – Diavon Edmond's Certificate of Death No. Wotje 2014-2; and *Exhibit 6* – September 18, 2017, Statement of Michael Hax.

FINDINGS OF FACT

1. Defendant Marshall Islands Marine Resources Authority ("MIMRA") is a statutory corporation formed under Section 111 of the Marshall Islands Marine Resources Act 1997. *Stip., Par. 1.*

2. Defendant Wotje Atoll Local Government ("WALGov") is a statutory corporation formed under Section 108 of the Local Government Act 1980. *Stip., Par. 2.*

3. Defendants Bikoj Kiotak and Miten Jello are or were Marshallese citizens and residents. Miten Jello died after the date of the collision, but not because of the collision. *Stip., Par. 3, Par. 14.*

4. The Government of Japan, through the Overseas Fisheries Cooperation Foundation of Japan ("OFCF"), agreed with the Government of the Republic of the Marshall Islands ("RMI"), through MIMRA, to support the development of outer island fish bases. *Stip., Par. 4.*

5. In a May 7, 2010, "Memorandum of Understanding on the Project for Wotje Atoll Fisheries Technical Project in Republic of the Marshall Islands," OFCF transferred ownership of various equipment and materials, including two 19-ft. fishing boats, to MIMRA for use on Wotje Atoll. *Stip., Par. 5 & Exhibit No. 1.*

6. In a March 18, 2011, "Confirmation on Completion of the Project for Wotje Atoll Fisheries Technical Project" ("Confirmation") MIMRA committed itself to utilize the equipment and materials for the purpose of promoting and developing its fisheries. *Stip., Par. 5 & Exhibit No. 1.*

7. The transfer of ownership of equipment and materials was also confirmed by a March 18, 2011, "Transfer of Ownership" executed by OFCF and MIMRA and attached as "Attachment A" to the Confirmation. Also attached to the Confirmation was "Attachment A-2," which was a list of equipment to be used by WALGov that included the two 19-foot boats. *Stip., Par. 5 and the*

Confirmation with Attachment A (Transfer of Ownership) and Attachment A-2 (list of equipment), Exhibit No. 1.

8. On May 11, 2011, MIMRA and WALGov agreed to a "Memorandum of Understanding Between the Marshall Islands Marine Resources Authority and Wotje Atoll Local Government" ("MOU") for the "management and administration of the Fisheries Support Station (Fish base) in Wotje Atoll." The MOU came into effect on May 11, 2011, was for an initial period of two years, and remained in effect "until revoked by the parties." *Stip., Par. 6 and Exhibit No. 2.*

9. The two 19-ft. long fishing boats owned by MIMRA were assigned to Wotje Atoll to be used for promoting and developing local fishing for the Fisheries Support Station in Wotje Atoll. *Stip., Par. 7.*

10. OFCF did not provide proper operational running lights or personal flotation devices with the boats that it transferred to MIMRA. *Stip., Par. 8.*

11. MIMRA did not provide proper operational running lights or personal floatation devices with the boats that it assigned to WALGov. *Stip., Par. 9.*

12. The MIMRA fishing boats and WALGov fishing boat were piloted at various times by various fisherman residents of Wotje Atoll. *Stip., Par. 10.*

13. The MIMRA and WALGov fishing boats were not covered by liability or other insurance. *Stip., Par. 11.*

14. In regard to the local use of the MIMRA boats, neither WALGov or MIMRA logged the dates of use, hours of use, or identity of pilots, and there was no agreement between MIMRA and WALGov regarding the use of the fishing boats other than that they were to be used for fishing. *Stip., Par. 12.*

15. On or about 10:00 p.m. on the night of December 27, 2014 (the "time of the collision"), Edmond, age 33, was a passenger in a 25-ft. long, 35 hp engine, boat owned by WALGov (the "WALGov boat"). *Stip., Par. 13 and Exhibit No. 4.*

16. The WALGov boat was being operated in the Wotje Atoll Lagoon (the "lagoon") by Miten Jello, who did not hold a small water craft license. *Stip., Par. 14.*

17. At the time of the collision, one of the two 19-ft. long fishing boats owned by MIMRA and assigned to Wotje (the "MIMRA boat") was being operated in the lagoon by Bikoj Kiotak ("Kiotak"), who also did not hold a small water craft license. *Stip., Par. 15.*

18. Kiotak was not an employee of MIMRA, but was a police officer employed by WALGov. Kiotak was not acting as an employee of WALGov the night of the accident when he was piloting the MIMRA boat. MIMRA had entrusted the boat key to the WALGov Mayor who had given it to Kiotak. *Stip., Par. 16; Par. 3 of Statement of Michael Hax, Exhibit No. 6.*

19. At the time of the collision, both of the boats were being operated without proper operational running lights and without personal flotation devices, which were required by the rules of navigation and Sections 3(1)(d) and 3(1)(f) of Appendix A of the Marshall Islands Domestic Watercraft Regulations ("Regulations") entitled "Safety and Equipment Standards for Domestic Watercraft." *Stip., Par. 17 and Exhibit No. 3.* Both the MIMRA and WALGov boats are classified as Group II vessels because they are greater than 16 feet, but less than 33 feet in length. *Regulation 2(3), Exhibit No. 3.* Thus, they are each required to have (i) one U.S. Coast Guard approved personal flotation device for each person aboard and one extra; (ii) a flashlight for signaling; (iii) proper operational running lights appropriate to the size of the vessel; (iv) a small handheld mirror for signaling; (v) a paddle; (vi) a compass; (vii) a properly charged and inspected fire extinguisher; (viii)

a U.S. Coast Guard Type IV throwable personal floatation device; and (ix) a first aid kit. *Regulation 3, Exhibit No. 3.*

20. At the time of the collision, the MIMRA boat was traveling at high speed and embedded its bow into the port side of the WALGov boat (the "collision"). *Stip., Par. 18.*

21. The resulting collision knocked Edmond into the lagoon, and his body was discovered in the lagoon the following next day. *Stip., Par. 19 and the Police Report, Exhibit No. 4.*

22. At the time of the collision, Edmond was not wearing a personal flotation device. *Stip., Par. 20.*

23. Edmond died as a result of the serious and disabling injuries to his head and neck and eventual drowning. *Stip., Par. 21 and Edmond's Certificate of Death, Exhibit No. 5.*

24. Edmond was an employee of Wotje High School at the time of his death and his income for his last two years of life (2013 and 2014) was $6,683.90 and $6,827.98, respectively. *Stip., Par. 22.*

25. Edmond provided the support for his family, which includes the following survivors: father Milton Edmond, mother Mauj Edmond, wife Lucia Edmond, and their children daughter Calorina Edmond (16), son Ramsen Edmond (15), daughter Miracle Edmond (12), son Bolten Edmond (6), and son Greg Edmond (2). [ages are at time of Edmond's death] *Stip., Par. 23.*

26. The MIMRA office in Majuro was not informed by its Wotje-based employees or anyone else that a MIMRA-owned boat was involved in the collision until June 2015. *Stip., Par. 24.*

APPLICABLE LAW

For plaintiffs to maintain an action for negligence against the defendants, they must establish the common law elements of negligence, namely that the defendants had a duty to perform, that they breached the duty, and that as a direct result of the breach, plaintiffs were harmed. *See Kelley v.*

United States, 185 F.Supp.3d 967 (E.D. Ky. 2016). The elements of a negligence claim are (i) duty; (ii) breach of that duty; (iii) that the breach of duty be the proximate cause of plaintiffs injury; and (iv) that plaintiff did in fact suffer injury. *See RMI v. American Tobacco, et al.*, 2 MILR 181, at 190 (2002). Negligence is the omission to do something an ordinarily prudent person would have done or the doing of something that an ordinarily prudent person would not have done under such circumstances. The Restatement of Law (Rest. 2nd Torts § 282) defines the term as follows: "Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." *See Anitok v Binejal*, 2 MILR 114, at 116 (1998).

ANALYSIS

The Court finds in this particular case that plaintiffs have proved cognizable theories of negligence against the defendants for the reasons that follow.

The Parties' Claims and Defenses

Plaintiffs claim they are entitled to recover damages against the defendants because of various forms of negligence including ordinary negligence, negligence *per se*, negligent entrustment, negligent maintenance, negligent hiring, and *respondeat superior*.

WALGov filed an Answer to Plaintiffs' Complaint on March 28, 2017, in which it candidly admitted liability, and since that date has consistently admitted in its briefing and oral arguments that the plaintiffs allegations were true; that WALGov and MIMRA, which partnered to develop the fish base on Wotje Atoll, were both negligent for operating their respective boats at nighttime without proper operational running lights or personal flotation devices; and that such actions were the cause of Edmond's death. Therefore, since WALGov has admitted liability, the following conclusions of law will mostly discuss MIMRA's involvement.

In sum, MIMRA seeks to avoid liability in this matter through (i) its claim that the operator of the MIMRA-owned boat was not an employee of MIMRA; and (ii) its affirmative defense of assumption of the risk.

As stated above, Japan, through its OFCF, agreed with the RMI, through MIMRA, to support the development of outer island fish bases. In a May 2010 memorandum of understanding, the OFCF of Japan transferred ownership of various equipment and materials, including two 19-ft. fishing boats to MIMRA for use on Wotje Atoll. This ownership transfer from OFCF to MIMRA was confirmed via a March 2011 Transfer of Ownership, and in a March 2011 Confirmation, MIMRA committed itself to utilize the equipment and materials for promoting and developing its fisheries. In a May 2011 MOU, MIMRA and WALGov agreed to the management and administration of the Wotje fish base.

In the MOU, MIMRA confirmed that it desired to assist WALGov in its operation of the fish base, and that it would provide technical assistance and financial assistance for the first two years. The MOU further provided that it would be reviewed every two years and would remain in effect until it was revoked by both parties. In accordance with the stated goals of the outer island fishing development, two 19-ft. long fishing boats owned by MIMRA (one of which was involved in the accident herein) were assigned to Wotje Atoll to be used to promote and develop local fishing for the fish base.

No evidence was adduced which indicated that MIMRA and WALGov had revoked the MOU, or that MIMRA intended to, or did, divest itself of participation in and oversight of the fishing development activities in Wotje. In regard to the local use of the MIMRA boats, they were piloted at various times by various fisherman residents of Wotje Atoll, and there was no agreement between MIMRA and WALGov as to use of the boats other than that the MIMRA boats were to be used for

fishing. MIMRA had entrusted the MIMRA boat key to the WALGov Mayor who gave it to Kiotak on the night of the accident. Neither WALGov nor MIMRA logged the dates of use of the boats, hours of use of the boats, or the identity of the pilots of the boats.

Ordinary Negligence and Negligence *per se*

Under *Kelley* and *American Tobacco, supra,* in this case, boat owners MIMRA and WALGov had a duty (to provide passengers, including Edmond, with safe navigation in their small water crafts), breached that duty (by piloting the boats after dark without proper operational running lights or personal flotation devices), and as a direct result of the breach (the collision of the two boats would not have occurred but for the boats not having proper operational running lights, and Edmond might have been rescued if the boats had personal flotation devices which could have been either worn by or thrown to Edmond), and the plaintiffs were harmed (by their family member and supporter Edmond suffering head and neck injuries and dying).

Under *Anitok, supra,* (i) negligence is the omission to do something an ordinarily prudent person would have done (an ordinarily prudent WALGov and MIMRA would not have omitted properly equipping their boats); or (ii) the doing of something which an ordinarily prudent person would not have done under such circumstances (an ordinarily prudent WALGov and MIMRA would not have allowed an improperly equipped boat to be piloted after dark). This conduct by WALGov and MIMRA is negligent in that it falls below the standard established by law for the protection of others (such as passengers like Edmond) against unreasonable risk of harm (piloting in lagoon waters after dark without proper operational running lights or personal flotation devices). *See The Restatement of Law, supra.*

MIMRA accepted the transfer of the OFCF boats without all of the necessary equipment required by the Regulations, and MIMRA, in turn, did not provide all of the necessary and required equipment for the boats that it assigned to be used at Wotje Atoll.

A party may be liable under a theory of negligence *per se* if its actions violated a law or regulation relevant to the incident. If a party's actions violated a statute or regulation, the party's actions are considered negligent without determining whether a reasonable person would have done the same thing. *See Byrd v. McGill*, 478 So. 2d 302, 304-05 (Supreme Court of Mississippi. 1985) ("[o]ne who violates the provisions of a statute is *per se* negligent, without need for showing that the putative tortfeasor maintained an actual lack of reasonable care"). In *Byrd*, the owner of the boat failed to provide the operator of a boat and his passengers with the required "Coast Guard approved life preserver for each person aboard, a paddle, and during the hours of darkness, a light sufficient to make the vessel's presence and location known within a reasonable distance." The court concluded that the plaintiff was within the class of persons sought to be protected by the statute (passengers in a boat on waters in the State of Mississippi) and the resulting harm, drowning, is the type of harm sought to be prevented by the statute. *Id.* at 305. Therefore, the court held that the defendant could have been liable under a theory of negligence *per se* and the lower court erred by refusing such an instruction. *Id.*

In this instance, neither MIMRA's nor WALGov's boat had proper operational running lights or personal flotation devices which were required under Sections 3(1)(d) and 3(1)(f) of Appendix A of the Regulations entitled "Safety and Equipment Standards for Domestic Water craft." Since both the MIMRA and WALGov boats are between 16 and 33 feet in length, they are classified as Group II vessels. *See Regulation 2(3) of Exhibit 3.* As such, the boats were each required to have (i) one U.S. Coast Guard approved personal flotation device for each person aboard and one extra; (ii) a flashlight

for signaling; (iii) proper operational running lights appropriate to the size of the vessel; (iv) a small handheld mirror for signaling; (v) a paddle; (vi) a compass; (vii) a properly charged and inspected fire extinguisher; (viii) a U.S. Coast Guard Type IV throwable personal flotation device; and (ix) a first aid kit. *See Regulation 3 of Exhibit 3.*

The Regulation requirements of a flashlight for signaling, a small handheld mirror for signaling, a paddle, a compass, a properly charged and inspected fire extinguisher, and a first aid kit are in no way related to the collision of the boats or the death of Edmond. However, the boats' failure to have proper operational running lights and personal flotation devices are clear violations of the Regulations and, therefore, a clear breach of a duty owed by MIMRA and WALGov to passengers such as Edmond. The accident herein was the result of the lack of proper operational running lights as neither boat could see the other. Additionally, if either boat had the required personal flotation devices, such devices could have been used to prevent Edmond from drowning when or after he was injured.

Clearly the Regulations requiring proper operational running lights and personal flotation devices were designed to prevent the very type of harm that occurred in this case – injury to a boat passenger resulting from a boat collision, and his subsequent injury and drowning. Thus, as in *Byrd*, MIMRA and WALGov's failure to ensure that the boats contained the proper operational running lights and personal flotation devices constitutes negligence *per se* because it violated the applicable Regulations.

Even if the failure to provide proper operational running lights was not found to constitute negligence *per se* the Pennsylvania rule applied in maritime cases is applicable in this case. Under the Pennsylvania rule, if a boat violates a safety standard designed to prevent collisions, the burden shifts and the violator has the burden of proving that the violation could not have caused the accident.

See Vinson v. Cobb, 501 F. Supp. 2d 1125 (E.D. Tenn. May 16, 2007). Here, the failure to have proper operational running lights on the MIMRA and WALGov boats is a clear violation of a safety standard imposed by regulation, as described above. Applying the Pennsylvania rule, the burden shifted to MIMRA to show that the failure to have proper operational running lights on its boat did not cause the accident and Edmond's death. It was unable to do so.

Therefore, even if the proper operational running lights were not required on MIMRA's boat, which they clearly were, the failure to have proper operational running lights on its boat provides conclusive evidence that MIMRA breached the standard of care of a reasonable boat owner or operator. Defendants Kiotak and Jello also acted negligently by operating these boats at night, in complete darkness, without proper training, proper operational running lights, or personal flotation devices. As such, MIMRA and the other defendants are liable to plaintiffs for damages for the torts of ordinary negligence and negligence *per se* which resulted in Edmond's wrongful death.

Negligent Entrustment

MIMRA claims it did not entrust its boat to Kiotak to use for fishing because Kiotak was a WALGov employee and hence, could not be an agent of MIMRA without its authorization. The Marshall Islands Marine Resources Act 1997 defines "master" in Section 102(45) as "...in relation to any fishing vessel, means the person in charge or apparently in charge of that vessel...." Section 102(35) states that "fishing vessel" means any vessel, boat, ship or other craft which is used for, equipped to be used for or of a type that is normally used for fishing." Clearly, Kiotak was acting as the master of MIMRA's boat on the night of the collision.

MIMRA attempts to avoid liability under the theory of negligent entrustment and states:

> MIMRA entrusted the Mayor (the Wotje Mayor) with spare keys to the vessel with the belief that he would be a competent and trustworthy caretaker who

> would only allow the vessel to be used lawfully with consent of proper persons for proper uses.[2]

Owners of a boat may be liable if they negligently entrusted the boat to an incompetent operator. *Dunaway v. King*, 510 So. 2d 543, 545 (Ala. 1987) (a cause of action for negligent entrustment is not restricted to automobiles, but may include the entrustment of vehicles, *boats*, firearms, or explosives). Negligent entrustment requires the following elements: (1) the owner entrusted the boat to the operator; (2) the operator was incompetent, unlicensed, or reckless; (3) the owner knew or should have known that the operator was incompetent or reckless; and (4) the negligence resulted in damages. *Dunaway*, 510 So. 2d at 545; Restatement (Second) of Torts § 390 (1965) ("One who supplies directly *or through a third person* a chattel for the use of another whom the supplier knows *or has reason to know to be likely* because of his youth, inexperience, or otherwise, *to use it in a manner involving unreasonable risk of physical harm to himself and others* whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them").

In *Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570 (8th Cir. 1977), a 15-year old summertime dockhand was given access to the keys of a marina to perform numerous jobs. As a fringe benefit of their job, dockhands were allowed to take out rental boats so long as they received permission from the marina owner and boat owner. In this case the dockhand used his key to the dockhouse to access the key to one of the 175 boats at the marina. He took out a motorboat at night and was involved in a serious collision. Even though the motorboat was taken by the dockhand without the knowledge or consent of the marina owner or boat owner, the court found that the marina owner was liable because

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[2] See page 6 of MIMRA' November 15, 2019, Opposition to Plaintiff's (sic) Brief Regarding Liability and Damages.

there was an effective negligent entrustment as the dockhand had complete access to the keys to the boats at all times and had not been specifically prohibited from using the boats at night.

> Obviously, Kimberling's (marina owner) policy was not an adequate safeguard against use of the dockhouse key to gain access to the rental motorboats. Moreover, permission has a negative, as well as an affirmative, connotation. "The absence of a prohibition against an expected or foreseeable or natural use may be strongly indicative that such use is permissible."

See also Pierce v. Standow, 163 Cal.App.2d 286, 329 P.2d 44 (1958) [mother who had specifically forbidden her 17-year old son to drive, but gave him the car keys daily while he waited for her in the car after school, was liable because by entrusting the key to her son, she put it in his power to drive the car at will, which supports the inference that she impliedly consented to his doing so].

Here, MIMRA entrusted its boat to Wotje's Mayor and Wotje fishermen so long as it was used for fishing. There was no agreement as to who could use the boat or when it could be used, other than that it was to be used for fishing. MIMRA knew, or should have known, since it assigned the boats to Wotje without prohibition, that the operators of its boat was likely to pilot the boats after dark and without personal flotation devices and were unqualified or inexperienced operators in that they did not know the Regulations – or at the very least, MIMRA did not make any attempt to determine whether these operators were only going to use the boats during daylight hours, only with personal flotation devices, and only if qualified and experienced.

MIMRA might have escaped liability in this matter in several ways – (i) by selling the MIMRA boat to WALGov for $1.00 through a bill of sale; (ii) by prohibiting WALGov from allowing the MIMRA boat to be used after dark; or (iii) by providing the MIMRA boat with proper operational lights and personal flotation devices. MIMRA took none of these preventative actions. This reckless disregard for the safety of those using the boat is as serious a breach of reasonable conduct as actual knowledge – perhaps even more serious. Under either scenario MIMRA is liable

for negligently entrusting an unequipped boat to an unqualified and inexperienced operator – who likely did not know that proper operational running lights and personal flotation devices were required – which resulted in Edmond's death.

In *Complaint of Interstate Towing Co.*, 717 F.2d 752, 754 (2d Cir. 1983) a small pleasure craft owned by Furey was piloted by Stassi and ran across the tow line of a barge being towed by a tug which had all the proper lights indicating a tow was underway. The court found that boat owner Furey's liability was both personal and vicarious because he allowed Stassi to operate the boat without knowing whether Stissi was familiar with the rules of navigation and maritime lighting. *See Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570 (8th Cir. 1977) (owner liable where he had knowledge of boat operator's "very young age, poor school record, little training in safe operation of the motorboats and no training whatsoever in their operation at night, and 'very limited' experience"). In the present case, given MIMRA's failure to even inquire as to the various eventual operators' knowledge of the Regulations, MIMRA had a duty to inform the Wotje Mayor and the eventual operator of the MIMRA boat of the Regulations requiring proper operational running lights and personal flotation devices and the inherent danger of piloting the boat without them. MIMRA breached the standard of care of a reasonable boat owner by failing to insure that the operators to whom it entrusted the MIMRA boat were both familiar with and complied with the rules of navigation and the Regulations to insure that the boat was operated only during daylight, only with personal flotation devices, and only by persons using reasonable care. As such, MIMRA is liable to plaintiffs for damages for the tort of negligent entrustment which resulted in Edmond's wrongful death.

Negligent Maintenance

It is axiomatic that an owner of a vehicle has a clear duty to properly maintain the condition of his vehicle for the safety of its occupants and pedestrians. Maritime law recognizes this duty and

permits claims for personal injury to a non-seaman aboard a vessel, due to negligence. *See, e.g., Mala v. Marine Serv. Mgmt.*, Civ. No. 2006–120, 2009 WL 2170071 (D.V.I. Jul. 20, 2009); *see also, Kermarec v. Comagnie Generale Transatlantique*, 358 U.S. 625 (1959) ("It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew."); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001) (finding that general maritime law recognizes the tort of negligence, and breaches of a maritime duty are actionable when they cause injury)

At the time of the collision, the defendants' boats were operating late at night without proper operational running lights making them virtually invisible to others in the lagoon. The failure to equip their boats with proper operational running lights is the result of the defendants' neglect, indifference, and negligent conduct, and these defendants are be held responsible for Edmond's death. *See Mala v. Marine Serv. Mgmt., supra,* Civ. No. 2006–120, 2009 WL 2170071 (D.V.I. Jul. 20, 2009) (negligent maintenance of gas pump by defendant marina). This argument is further reinforced by the regulatory requirements and the Pennsylvania rule stated above. Given that the use of proper operational running lights is required by applicable Regulations, defendants' failure to ensure proper and working safety equipment on their boats is a clear violation of the applicable standard of care. MIMRA's negligent maintenance arises because at any time between the Wotje Atoll arrival of the MIMRA boat without the required proper equipment and Edmond's death three years later, MIMRA could and should have either (i) properly equipped the boat with the required proper operational running lights and personal flotation devices; (ii) prohibited the boat from being operated after dark without the required equipment; or (iii) properly instructed its employees at the fish base on Wotje and the Wotje Mayor, who had the key, not to allow the boat out after dark. MIMRA did none of these things.

Negligent hiring and *Respondeat Superior*

Because the Court finds that MIMRA and WALGov are liable for the death of Edmond under ordinary negligence, negligence *per se*, negligent entrustment, and negligent maintenance, it need not consider the plaintiffs claims of negligent hiring and *respondeat superior*.

Assumption of the Risk

On February 7, 2017, MIMRA filed an Answer to the Complaint claiming an affirmative defense of assumption of the risk. MIMRA stated that Edmond "had boarded the boat voluntarily that evening and therefore voluntarily assumed the risk."

MIMRA's attempt to assert the defense of assumption of the risk against Edmond in this matter is misplaced because Edmond did not board the MIMRA boat piloted by Kiotak. If a passenger in the MIMRA boat had been injured or killed as a result of the collision, MIMRA could have attempted to assert the defense of assumption of the risk. In this case, since Edmond boarded the WALGov boat, which also did not have the required proper operational running lights and personal flotation devices, WALGov could have attempted to assert the defense of assumption of the risk, but it elected not to do so.

Even if MIMRA could properly assert assumption of the risk as a defense, it would not be a complete bar to recovery for several reasons.

Most pertinent here - assumption of the risk does not absolve a defendant of reckless conduct. A defendant is liable for plaintiff's injuries under assumption of risk in instances where the defendant "engages in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport or activity or increases the inherent risk involved in the activity." *Kalter v. Grand Circle Travel*, 631 F. Supp.2d 1253 (C.D. Cal. 2009) (internal citation omitted.) It is reckless behavior to pilot any boat after dark in the lagoon without required proper operational running lights and personal

flotation devices. Moreover, it is indisputable that a regulatory framework existed in the Marshall Islands to provide for the safety and protection of fishing boats. The framework makes no distinction between protections that apply only by "day" or only by "night." MIMRA cannot and has not shown that its responsibility ceased for the boats which it owned and assigned to Wotje. This responsibility endured whether the boat's required equipment was utilized in broad daylight or, as here, under the cover of darkness.

MIMRA states that assumption of the risk typically involves one of the following situations (1) plaintiff has given his consent in advance to relieve defendant of an obligation of conduct toward him, and to take his chances of injury from known risk arising from what defendant is to do or leave undone; (2) plaintiff voluntarily enters into relations with defendant with knowledge that the defendant will not protect him against the risk; or (3) plaintiff is aware of a risk already created by the defendant's negligence, but proceeds to encounter it by voluntarily taking part even after the danger is known to him. However, it is clear that (1) Edmond did not give consent to *MIMRA* in advance to relieve *MIMRA* of its conduct; (2) Edmond did not voluntarily enter into any kind of relationship with *MIMRA*; and (3) Edmond was not aware of a risk already created by *MIMRA's negligence*.

Finally, the nearly universal rule is that neither contributory negligence nor assumption of risk bars recovery for breach of a duty imposed by . . . regulation if the purpose of the . . . regulation would be defeated by application of either defense. *See* W. Prosser, Law of Torts 425-26, 453-54 (4th Ed.1971). *See* Restatement (Second) of Torts, Sec. 483 (If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery from bodily harm caused by the violation of such statute).

Many courts have held that assumption of risk and contributory negligence are not valid defenses in cases involving negligence per se. For example, *Osborne v. Salvation Army,* 107 F.2d 929 (2nd Cir., 1939) stated, in relevant part:

> The better reasoned decisions have held that assumption of risk and contributory negligence . . . are not valid defenses in cases where the violation of a statute enacted for the benefit of a class of which the plaintiff is a member is involved. If the plaintiff's injuries arose from the violation, defendant's liability was absolute irrespective of any proof of negligence. . . (*citations omitted*) . . . It is the general rule that a plaintiff may not waive a statute enacted for his protection and that he cannot do so because of assumption of risk is clear. To bar recovery in an action brought under the statute because the plaintiff's acts contributed to his injuries would seem to render its enforcement entirely ineffective. There is no practical difference in such cases between the defense of assumption of risk and that of contributory negligence. . .

See, also, Mayes v. Byers, 214 Minn. 54, 7 N.W.2d 403, 144 A.L.R. 821 (Minn. 1943) (holding that the defendant was barred from using the defenses of contributory negligence and assumption of the risk against an intoxicated patron who fell because the stairway where she fell was maintained in violation of the city ordinance); *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686 (D.C. Cir., 1987) (where a particular statutory or regulatory standard is enacted to protect persons in plaintiff's position or to prevent the type of accident that occurred, and the plaintiff can establish his relationship to the statute, unexplained violation of that standard renders the defendant negligent *per se* and the plaintiff's alleged negligence was of no import); *Martin v. George Hyman Const. Co.*, 395 A.2d 63 (D.C., 1978) (the "nearly universal rule" that the defense of contributory negligence may not defeat the purpose of a statute or regulation. . . . where a statutory scheme was intended to mitigate a risk that may flow from foreseeable carelessness, allowing the defense of contributory negligence would frustrate legislative purpose); and *Wren v. Sullivan Elec., Inc.*, 797 F.2d 323 (6th Cir., 1986) (plaintiff fell into an open elevator shaft due to sub-standard lighting and court concluded that he was within

the class protected by safety regulations and, therefore, within Tennessee's negligence *per se* doctrine in which the doctrines of contributory negligence and assumption of the risk do not apply).

MIMRA attempted to find support for its assumption of the risk claim through a 1986 case from the Federated States of Micronesia ("FSM"), *Koike v Ponape Rock Products, Inc.*, 3 FSM R. 57, 66 (Pon. S. Ct. Tr. 1986). However, this case is of no import due to the FSM court adopting the doctrine of comparative negligence a mere three years after *Koike*.

Even if MIMRA could properly assert the affirmative defense of assumption of the risk, most, if not all, jurisdictions, including the FSM, have now eliminated assumption of the risk and contributory negligence in favor of the doctrine of comparative negligence. *See Suka v. Truk*, 4 FSM R. 123, 127 (Truk S. Ct. Tr. 1989) [doctrine of contributory negligence should not be adopted in Truk State in the absence of a statute because it is not in conformity with traditional Trukese concepts of responsibility]; *Epiti v. Chuuk*, 5 FSM R. 162, 167 (Chk. S. Ct. Tr. 1991) [absolute defenses of Assumption of the Risk and Contributory Negligence are contrary to the traditional Chuukese concepts of responsibility and shall not be available in Chuuk State]; *Amayo v. MJ Co.*, 10 FSM R. 244, 250 (Pon. 2001) [comparative negligence, not assumption of risk, is the rule in Pohnpei]; *Primo v. Semes*, 11 FSM R. 324, 330 (Pon. 2003) [comparative fault is a preferable doctrine to that of contributory negligence, and should be considered the law in Pohnpei until and unless the Pohnpei Supreme Court rules otherwise]; and *Kileto v. Chuuk*, 15 FSM R. 16, 17-18 (Chk. S. Ct. App. 2007) [the assumption of the risk defense is contrary to the traditional Chuukese concepts of responsibility and is generally not available in Chuuk].

Admiralty and maritime law have also abandoned contributory negligence and assumption of the risk in favor of the comparative negligence doctrine. *See Pope Talbot v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, 1954 A.M.C. 1 (1953) [The harsh rule of the common law under which

contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice . . . admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires]; *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877, 1987 AMC 2268 (11th Cir., 1986) [The assumption of the risk defense is not a bar to recovery in admiralty].

As determined above, MIMRA's affirmative defense of assumption of the risk does not apply in this case because (i) Edmond did not board MIMRA's boat; and (ii) assumption of the risk does not apply to negligence *per se*. Should the proper opportunity arise in the future, this court could, if asked, determine that comparative fault is a preferable doctrine to that of contributory negligence and assumption of the risk and apportion damages based on the percentage of fault of each of the parties.

Damages

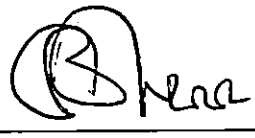
Prior to awarding damages, the Court wishes to hear argument from the parties.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT defendants WALGov and MIMRA are liable to the plaintiffs for damages resulting from the death of Edmond in an amount to be determined after argument.

Accordingly, the Court sets this matter for a hearing on damages at 9:00 a.m. on August 26, 2020.

So Ordered and Entered. Signed: August 17, 2020.



Carl B. Ingram
Chief Justice, High Court