

FILED

JAN 22 2021

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**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 FINAL JUDGMENT FOR LIABILITY AND DAMAGES
----------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------

INTRODUCTION

On December 27, 2014, on or about 10:00 p.m., two small fishing boats were night fishing in the Wotje Atoll lagoon without lights. The boats collided, killing Diavon Edmond (“Edmond”). Edmond was a passenger on the boat owned by the Wotje Atoll Local Government (“WALGOV”).¹ The other boat was owned by the Marshall Islands Marine Resources Authority (“MIMRA”).²

The plaintiffs, as representatives of Edmond (his parents, wife, and children), filed a wrongful death lawsuit against the defendants, alleging his death was caused by the negligence of the boats’ pilots and owners.

¹Created under Article IX of the Constitution and the Local Government Act 1980, 4 MIRC Ch 1 (“LGA”)

²Created under the Marshall Islands Marine Resources Act 1997, 51 MIRC Ch. 1 (“MIMRA Act”).

In its August 17, 2020 Judgment of Liability (“Judgment of Liability”), the Court found that defendants MIMRA and WALGOV were liable to the plaintiffs for damages resulting from the death of Edmond. The amount of damages was left to be determined. The Court’s Judgment of Liability is by this reference incorporated.

DEFENSES TO DAMAGES

In an attempt to limit any damages award, defendants MIMRA and WALGOV, and the Republic of the Marshall Islands (“Republic”), argued in December 11, 2020 submissions, that MIMRA’s and WALGOV’s liability for damages is limited by the Government Liability Act 1980, 3 MIRC Chp. 10 (“GLA”). Section 1005(1) of the GLA, in relevant part, provides that “[t]he *Government* shall not be liable for more than (a) \$25,000 in any action for wrongful death; [or] (b) \$50,000 in any other tort action . . . (emphasis added).”

MIMRA, WALGOV, and the Republic argued that MIMRA and WALGOV fall within the meaning of “Government” for purposes of the GLA. In response, the plaintiffs argued that MIMRA and WALGOV do not. Further, the plaintiffs argued that if the defendants were covered by Section 1005(1) of the GLA, they waived the GLA defense by failing to timely raise it.

The Court will address the meaning of “Government” in the GLA and then the question of waiver.

The GLA Does Not Define the Term “Government”

The text of the GLA does not define the term “Government.” The text of the GLA does not expressly include within the term “Government” “public corporations and other statutory authorities,” such as MIMRA, or local governments, such as WALGOV.

In a 1986 amendment of the GLA, the Nitijela added Section 1024, which expressly extends to “any statutory authority or any entity in which the Government or any local government owns or

controls a majority of the beneficial interest” the protection from the seizure, attachment, or execution upon assets that is afforded the “Government” and any “local government” under Article I, Section 4(c) of the Constitution.³ That is, by Section 1024, the Nitijela extended to entities such as MIMRA and WALGOV the protections of Article I, Section 4(c) of the Constitution, *without* including MIMRA and WALGOV within the meaning of Government. The Nitijela could have, but it has not, similarly extended the GLA’s Section 1005 tort liability limitation to statutory corporations and local governments. One cannot infer from Section 1024 that MIMRA and WALGOV are covered by Section 1005's liability limitation. In fact, the language of Section 1024, implies that MIMRA and WALGOV are not covered by GLA Section 1005, without amendment of the GLA.

The Constitution Does Not Expressly Define the Government to Include Statutory Authorities and Local Government

As in the GLA, the text of the Constitution does not expressly define the term “Government.” Moreover, entities such as MIMRA, *i.e.*, public corporations or other statutory authorities constituted under the law of the Republic, are treated differently from departments and office of the executive, legislative, and judicial branches of the Government.

For example, with respect to the Public Service, Article VII, Section 1(3), of the Constitution provides as follow: “For the purposes of this Article, a public corporation or other statutory authority constituted under the law of the Republic [*e.g.*, MIMRA] shall be deemed to be an office of government, and a member or employee of any such public corporation or other statutory authority

³Article I, Section 4(c) of the Constitution reads as follows: “the Government of the Republic and any local government shall not be immune from suit in respect of their own actions or those of their agents; but no property or other assets of the Government of the Republic or of any local government shall be seized or attached to satisfy any judgment.”

shall be deemed to receive his compensation from public money; but, without prejudice to the status for any other purpose of any such public corporation or statutory authority, or of any member or employee or funds thereof, or of any other money from which the compensation of any such member or employee may be paid, the application of this Article in a particular case may be excluded by Act.” Const., Art. VII, Sec. 1(3).

Pursuant to Article VII, Section 1(3), of the Constitution, the MIMRA Act takes MIMRA out of the Public Service. Section 111(3) of the MIMRA Act provides “Article VII of the Constitution shall not apply to or in relation to the Authority.” That is, for purposes of Article VII, MIMRA is not “an office of the government” and its employees shall not be deemed to receive compensation from public money.

Second, for purposes of auditing public funds, Article VIII, Section 15, of the Constitution refers to public corporations or other statutory authorities created under the law separately from the departments and offices of the executive, legislative, and judicial branches of Government. Article VIII, Section 15, of the Constitution provides that “the Auditor-General shall audit the public funds and accounts of the Republic of the Marshall Islands including those [1] of all Department or offices of the legislative, executive and judicial branches of government and [2] of any other public corporation or other statutory authority constituted under the law of the Republic [*e.g.*, MIMRA], unless provision is made by Act for audit by any other person. Again, public corporations and other statutory authorities are not referred to as departments or offices of the Government, *i.e.*, a department or office of the legislative, executive, or judicial branches of the Government. Consistent with Article VIII, Section 15, of the Constitution, the MIMRA Act at Section 127 provides that “[t]he accounts and records of the Fund shall be audited annually by such auditor as

the Authority shall appoint.” For purposes of Article VIII, Section 15, MIMRA is not designated a department or office of the government.

Third, the Constitution does not treat local governments (e.g., WALGOV) as departments or offices of the national government. They are separate entities subject to the laws of the Republic. Under Article IX of the Constitution, “[t]he people of every populated atoll or island that is not part of an atoll shall have the right to a system of local government which shall operate in accordance with any applicable law.” Const., Art. IX, Sec. 1(1). Moreover, subject to any Act, a local government can make ordinances for its area of jurisdiction. Const., Art. IX, Sec. 2.

MIMRA’s and WALGOV’s Responses

MIMRA and WALGOV argued that notwithstanding the above textual analysis, the Court should treat MIMRA and WALGOV as part of the Government (*i.e.*, central government) for purposes of GLA for the following reasons.

MIMRA argued that MIMRA should be covered by the GLA’s limitation of liability as part of the Government because, among other things,⁴ (i) the Cabinet appoints the MIMRA Board,⁵ a portion of MIMRA’s revenue is paid into the Government’s General Fund,⁶ and MIMRA manages the Marshall Islands’ marine resources on behalf of the Government, as do other *agencies* of the Government.⁷

⁴MIMRA’s Opposition to Plaintiff’s (sic) Brief Regarding Damages . . . , filed December 11, 2020; and the Republic’s Written Submissions filed December 11, 2020.

⁵Section 113(1) of the MIMRA Act, 51 MIRC 113(1).

⁶Section 124(2) of the MIMRA Act, 51 MIRC 124(4).

⁷Section 119(1) of the MIMRA Act, 51 MIRC 119(1).

WALGOV argues that notwithstanding the failure of the GLA to expressly include WALGOV in the term “Government,” WALGOV is “apart of” the Government and subject to the laws of the Government.⁸

However, MIMRA’s and WALGOV’s arguments are undermined by the Nitijela’s express extension of the GLA’s Section 1005 limitation of liability to other corporate entities created by Act, including the College of the Marshall Islands,⁹ the RMI Ports Authority,¹⁰ and the Kwajalein Atoll Development Authority.¹¹ Similarly, their arguments are undermined by the Nitijela’s failure to extend the GLA’s limitation on liability to other Government created entities, including the Jaluit Atoll Economic Development Authority¹² and to the Wotje Atoll Economic Development Authority.¹³ This distinction shows that the Nitijela can, when requested, extend the GLA’s Section 1005 liability limitation to public corporations. Without Nitijela action, public corporations are not covered by Section 1005.

⁸WALGOV’s Response to Plaintiffs’ Post Damage Brief, filed December 11, 2020; and the Republic’s Written Submissions filed December 11, 2020.

⁹Section 226 of the College of the Marshall Islands Act 1992, 14 MIRC Ch. 2 (“In as much as the College is chartered as a non-profit corporation by the Nitijela, it is hereby provided that the limits of liability applicable to the Republic shall apply to any suit brought against the College in the courts of the Republic.”).

¹⁰Section 109(1) of the RMI Port Authority Act 2003, 22 MIRC Ch. 1 (“The Authority is covered under the Government Liability Act (3 MIRC Chapter 10).”).

¹¹Section 710 of the Kwajalein Atoll Development Authority Act 2016, 10 MIRC Ch. 7 (“The Authority, its members, and employees shall be deemed to be employees of the Government for purposes of the Government Liability Act 1980, Title 3 MIRC, Chapter 10.”).

¹²Jaluit Atoll Economic Development Authority Act 2000, 10 MIRC Ch. 15.

¹³Wotje Atoll Development Authority Act 2002, 10 MIRC Ch. 16.

Finally, MIMRA's designation from a State Owned Enterprise under the State Owned Enterprises ("SOE") Act of 2015¹⁴ is of no avail. For purposes of Section 1005 of the GLA, the Court finds SOE status is a distinction without a difference.

MIMRA's and WALGOV's Waiver of Defenses

Even if the GLA limitation of tort liability extends to defendants MIMRA and WALGOV, as entities within the definition of "Government," MIMRA and WALGOV waived the defense by inaction. The GLA limitation on tort liability is an affirmative defense. Marshall Islands Rule of the Civil Procedure 8(c), in relevant part, reads as follows: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. . . ." Defendants, however, failed to raise the GLA limitation in their pleadings. The failure to plead an affirmative defense as required by Rule 8(c) results in the waiver of that defense and its exclusion from the case. § 1278 Effect of Failure to Plead an Affirmative Defense, 5 Fed. Prac. & Proc. Civ. § 1278 (3d ed.).

On November 15, 2019, defendant WALGOV did, in an answering brief on damages, claim that the GLA limit on wrongful death recoveries to \$25,000 applied to WALGOV but should not apply to MIMRA, which had much greater revenues. In its November 15, 2019, opposition brief regarding damages, MIMRA made no claim of either a maritime or government limitation on liability. It was only on July 15, 2020, did MIMRA in its proposed "Judgment" assert a limitation of damages under the Limitation of Liability for Maritime Claims Act ("LLMCA")¹⁵ and the GLA.

¹⁴52 MIRC Ch. 6.

¹⁵As calculated by the plaintiffs, the LLMCA limitation would be \$1,650,040. This calculation is not contested by MIMRA. However, it is far more than the Court has awarded the plaintiffs. Hence, it is not relevant.

The defendants, however, did not in their answers or by a pre-trial motion raise the GLA limitation on tort liability as a defense or limitation. Nor did the defendants request leave to amend their answers to plead the GLA limitation. The Court waited for the defendants to move to amend their answers to assert the GLA defense, but the motions never came. Accordingly, the Court concludes that the defendants waived the GLA defense by failing to assert it by motion or pleading. Moreover, under the GLA, the defendants should have objected to this case being filed before the plaintiffs presented their claims to the Attorney-General, as requested in Section 1007 of the GLA. The Court does not recall seeing evidence that this occurred.

In summary, the Court concludes that the GLA Section 1005 limitation on Government liability does not apply to MIMRA, a public corporation or other statutory authority, or to WALGOV, a local government. Next, the Court shall turn to the calculation of damages.

CALCULATION OF DAMAGES

As noted in Plaintiffs' Brief Regarding Damages . . . , filed November 27, 2020 ("Pltfs' Damages Br."), and not contradicted by the defendants, in a personal injury tort case such as this, the usually damages at issue are (i) punitive damages, (ii) general damages, and (iii) special damages. Both general damages and special damages are compensatory damages.

Punitive Damages

"Punitive damages have been defined as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious, or oppressive character of the acts complained of." 22 Am. Jur. 2d Damages § 556. However, in this case, the plaintiffs do not seek punitive damages, so the Court need not consider them and can proceed to general damages.

General Damages

“In a tort case, ‘general damages’ are compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved. They can be recovered without proof of their amount. General damages in a personal-injury case include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms and are incurred in addition to quantifiable damages, such as lost wages and medical expenses.” 22 Am. Jur. 2d Damages § 46.

In the present case, the plaintiffs, as Edmond’s surviving dependant wife, five children, and parents, claim they are entitled to general damages resulting from his wrongful death. Consistent with the above definition, the plaintiffs describe their general damages as including “emotional distress, pain, suffering, and loss of consortium or companionship.” Pltfs’ Damages Br., pp 2-3. Although the defendants did not challenged the plaintiffs’ definition and scope of general damages, defendant MIMRA challenged the eligibility of Edmond’s parents to sue for his wrongful death, because they were not dependant on Edmond at the time of his death. However, at the Court’s December 31, 2020 hearing, the plaintiffs provided uncontested evidence that, although not very old, Edmond’s parents were dependant upon him. Edmond’s father, 57 years old at the time of Edmond’s death, and now is only 62 years old, appeared at the hearing to suffer from a number age-related disabilities. He could barely walk with the aid of a crutch. He could not hear or see well, and he appeared to need the assistance of others for simple tasks. Accordingly, the Court concludes that the plaintiffs, including his parents, were dependant upon him at the time of his death and are entitled to recover general damages against the defendants for wrongful death.

As to the amount of general damages to be awarded, the Marshall Islands Supreme Court has held that courts ordinarily do not receive evidence on the “value” of pain and suffering, physical or mental, but allow the trial judge to make such an award as in his or her sound judgment will substitute monetary reparation when the damage actually done by the wrongdoer is essentially irreparable. *Antolok v. The Estate of Lakbel*, 2 MILR 160, 162 (2000). In the present case, the plaintiffs suggest that, absent a controlling statute, the amount of general damages can vary one and five times economic damages. Pltfs’ Damages Br., p 2. The Court’s review of general damages awarded by the States of the United States, does not provide much guidance. Hence, in awarding general damages, this Court will follow the Supreme Court guidance in *Antolok*.

After considering all the facts and arguments, the Court concludes that in a wrongful death case, where the special damages for the loss of future wages will cover several years, general damages of one-half of the special damages is appropriate.

Special Damages

Unlike general damages, “special damages are usually synonymous with pecuniary loss. Medical and hospital expenses, as well as loss of earnings and diminished capacity to work, are regarded as special damages in personal-injury cases.” 22 Am. Jur. 2d Damages § 46. Similarly, the plaintiffs define special damages as “economic damages which can be objectively determined for categories such as (i) loss of future earnings, (ii) medical expenses, (iii) property damage, and (iv) other measurable economic harm caused by the defendants' actions.” Pltfs’ Damages Br., p 4. However, as the plaintiffs concede, “there were no medical bills, damage to Diavon's property, or other objectively measurable harm. Therefore, the special damages awarded to Diavon's family are limited to his loss of future earnings.” *Id.*

The plaintiffs calculated the loss of Edmond's future earnings based upon his earning as a security guard at the Northern Marshall Islands High School ("NMIHS") in Wotje Atoll from the 3rd quarter of 2011 until his death at the end of the 4th quarter of 2014. Over the 18 quarters, Edmond earned an average of \$1,793.57 per quarter. According to the plaintiffs, before 2011, Edmond worked on Wotje Atoll making copra and fishing. They have no dollar amount for his earnings for the 112 quarters between his turning 18 years old and starting his work at NMIHS in 2011.

In calculating lost earnings, the plaintiffs assume that Edmond would have worked until he turned 65 in July 2046, earning on average \$1,793.57 per quarter, for a total of \$226,588. The plaintiffs also suggest that Edmond's salary would grow by 2% per year and that present value calculations using 0.09 or 0.0025% per year would be appropriate. Pltfs' Damages Br., pp 4-11. The defendants did not challenge the bases of plaintiffs' calculations. However, the Court has concerns.

First, to assume Edmond would work until age 65 is optimistic. The poor health of Edmond's father at age 62 does not support the assumption that Edmond would have lived to age 65, let alone work until age 65. The published data on the life expectancy of Marshallese is too incomplete and variable to be of much help on this question.¹⁶

Second, Edmond's downward trending average quarterly earnings of \$2,233.73 in 2011, \$1,782.65 in 2012, \$1,607.09 in 2013, and \$1,707.00 in 2014,¹⁷ do not support the assumption that Edmond's annual salary would increase by 2% per year.

¹⁶See World Bank chart:
<https://data.worldbank.org/indicator/SP.DYN.LE00.IN?end=2000&locations=MH&start=1987&view=chart>

¹⁷Declaration of Bryan Edejer Re Wages of Decedent, filed November 5, 2020/

Third, the plaintiffs have not subtracted from their estimate the taxes Edmond would have paid on his salary, including the following:

- (i) 8% on the first \$10,400 earned each year for the wages and salary tax under Section 103(a) of the Income Tax Act 1989, 48 MIRC Ch.1, equaling approximately \$18,127;
- (ii) 7% on up to \$5,000 of earnings per quarter through to March 6, 2017, and 8% on up to \$10,000 of earnings per quarter there after, for the worker's contribution under the Section 129 of the Social Security Act of 1990, 49 MIRC Ch. 1, equaling approximately \$17,971; and
- (iii) 3.5% on up to \$5,000 of earnings per quarter for the worker's contribution under Section 116 of the Marshall Islands Health Fund Act of 2002, 7 MIRC Ch. 2, equaling approximately \$7,930.

Fourth, not all of Edmond's earnings would have gone to support his dependants. It is reasonable that at least 20% of his earning would go to costs other than supporting his dependants (*e.g.*, for his own needs and other expenses).

Fifth, the plaintiffs receive Social Security survivor benefits in the amount of \$12,641.35 to cover, in part, the loss of Edmond's wages.

Sixth, historically low bank interest rates do not support using present value calculations at 0.09 or 0.0025% per year.

Given the facts and arguments in this case, to determine special damages the Court adopts the "Total Offset" Rule set forth in *Pltfs' Damages Br.*, pp 8-11, citing *Beaulieu v. Elliott*, 434 P.2d 655 (Alaska 1967) and others. This method eliminates the guess work in trying to determine the present value of inflation adjusted value of future earnings. Applying the "Total Offset" Rule to the plaintiffs' estimate of Edmond's future earnings at \$226,588, less wage and salary taxes of \$18,127, less social security taxes of \$17,971, less the Health Fund taxes of \$7,931, less social security

payments to plaintiffs of approximately \$12,641 and subject to an 80% cap to reflect Edmond's non-dependent expenses, the Court calculates the plaintiffs' special damages at \$135,934.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT defendants WALGOV and MIMRA are jointly and severally liable to the plaintiffs for damages resulting from the death of Edmond as follows:

1. In special damages for loss of future earnings, \$135,934;
2. In general damages for emotional distress, pain, suffering, and loss of consortium or companionship, \$67,967;
3. Filing fees of \$100.00;
4. Service process fees; and
5. Plus post-judgment interest on the above at a rate of 9% per annum from the date of this judgment until the judgment is paid in full.

So Ordered and Entered.



Carl B. Ingram
Chief Justice, High Court
Date: January 22, 2021