

IN THE SUPREME COURT OF BELIZE A.D., 2006

Action No: 446 of 2006

BETWEEN

(AMELIA AVILA	CLAIMANTS
(HAROLD ZUNIGA (infant by	
(Next friend AMELIA AVILA	
(VANESSA AVILA	
(RICHARD AVILA	
(VINCENTE AVILA JR. Infants	
(	
( And	
(	
(FIDENCIO VELLO	1st DEFENDANT
(DISCOVERY EXPEDITIONS BELIZE LTD.	2nd DEFENDANT

BEFORE: Hafiz J.

Appearances:

Ms. Tricia Pitts for Claimants

Ms. Lisa Shoman and Kevin Arthurs for the Defendants

**J U D G M E N T**

Introduction

1. On July 9<sup>th</sup> 2006 on the New River, Orange Walk District, Belize, a tragic boating accident occurred claiming one life. The deceased

Vicente Avila, was a captain of one of the boats who was pronounced dead at the Orange Walk Hospital.

2. The Claimants are Dependents and Beneficiaries of the estate of Vicente Avila, the deceased. The Second named Defendant is a Company duly incorporated under the Companies Act, Chapter 250 of the Laws of Belize having its registered office at #5916 Manatee Drive, Belize City, Belize and providing Eco-Tours in Belize. The Second named Defendant is the employer of the First named Defendant, who is employed in his capacity as a Tour Guide.
3. The Claimants claim against the Defendants is that on July 9<sup>th</sup>, 2006, during the course of his employment the first Defendant drove a 38' – 400HP Motor Boat on the New River, Belize District which struck the motor boat driven by Deceased causing the Deceased' boat to capsize and as a result of this he suffered serious injuries from which he died on the said day in Orange Walk Town.
4. At the time of the accident, the deceased who was engaged as self-employed Tour Guide Operator by Serious Adventures Ltd, captained an ecological boat tour to the Lamanai Maya Ruin along the New River, Orange Walk District carrying 14 tourists, his step-son, Harold Zuniga, and two tour guides from Serious Adventures Ltd.
5. The Claim is that while traveling towards Lamanai Maya Ruin and upon reaching a curve in the river known locally as “Back Landing” or “The Narrows” the Deceased was collided into by the First Defendant who captained a boat belonging to the Second named Defendant which was traveling at excessive speed in the opposite direction towards Tower Hill, Orange Walk District, Belize. The Claimants say

that the said accident was caused wholly by the negligence of the First Defendant and that the Deceased would not have been struck and fatally injured if the First Defendant had maintained proper care and control of the motor boat driven by him.

6. The particulars of negligence claimed is that the First Defendant drove without due care and attention at an excessive speed, he failed to keep any proper lookout or to have any or sufficient regard for other users that was or might reasonably be expected to be on the water way, he failed to stop, slow down to swerve or in any other way to so manage or control his motor boat so as to avoid colliding with the boat driven by the Deceased.
7. The Deceased who was born on the 9<sup>th</sup> November, 1969 was 37 years old when he met his death. The Claimants claim is that he lost his normal expectation of life due to the accident. That the Deceased was survived by his wife Amelia Avila and an unborn child and that he was also the step-father of Harold Zuniga 13 years born to his wife on 17<sup>th</sup> April, 1994 who was solely dependent on the Deceased as a child of their family.
8. Further, the claim is that the Deceased also fathered three children with his previous wife namely, Vanessa Avila 14 years born on 22<sup>nd</sup> June, 1992, Richard Avila 12 years born on 24<sup>th</sup> March, 1994 and Vicente Avila Jr. 9 years born on 16<sup>th</sup> August 1996.
9. The claim is for Special Damages of \$3,680.52 and general damages.
10. The Defendants in their defence deny that the accident was caused by the 1<sup>st</sup> Defendant as alleged in paragraph 6 of the Statement of

Claim and say that the accident was in fact caused by the negligence of Vicente Avila, deceased. That the deceased drove the motor boat without due care and attention, drove at excessive speed, failed to keep any proper lookout or to have any or sufficient regard for other users that was or might reasonably be expected to be on the water, failed to stop, slow down, to swerve or in any other way to so manage or control his motor boat to avoid colliding with the boat driven by the 1<sup>st</sup> Defendant and failed to manage or effectively control the motor boat so as to avoid colliding with the 1<sup>st</sup> Defendant.

11. The Defendant also put the Claimant to strict proof as to the matter of the deceased dependants as stated in paragraphs 7,8, 9, 10 and 11 of the Statement of Claim.
12. The Defendants also counter-claimed that it was the deceased, Vicente Avila who came from the opposite direction at full speed resulting in the deceased boat colliding into their vessel and pushing their boat on the river bank. That as a result of the accident, the Defendants incurred medical expenses of \$390.00 and the cost of repairs to their vessel, Rio Reina, to the extent of \$5,939.05. The Defendants counterclaim is for damages in the sum of \$6,329.05.
13. In reply to the defence and counter-claim the Claimants deny that the accident was caused by the negligent driving of the deceased.
14. Issues:
  - 1) How did the collision occur?
  - 2) Who is to be blamed for the collision?
  - 3) The amount of damages to be awarded, if any.

### Evidence of the Claimants

15. The Claimants filed two witness statements, one from Harold Zuniga and one from Eduardo Garcia. The Defendants filed three witness statements. These are from Fidencio Velloso, Luis Ruiz and Sheffield Eck.
16. The evidence of Harold Zuniga is that he is a 13 year old student and reside with his family at No. 442 Riverside Street, Orange Walk Town, Belize. That Vicente Avila, the deceased was his father and a Tour Guide who lived at the same address.
17. Harold's evidence is that on the day of the accident he went with the deceased on a boat tour from Orange Walk to Lamanai Maya Ruin via the Belize New River. He testified that along with his father who was the captain of the boat and himself there were 14 tourists, another Tour Guide and a sideman aboard his father's boat.
18. His evidence is that his father was driving at a normal speed and that it took about 45 minutes to travel from Orange Walk to the Bend in the River locally known as the "narrows". That along the way their boat made about three stops so the Tourists could look at birds and crocodiles. That upon reaching the Bend in the River known as "the narrows" his father drove slowly around the Bend and that when they were in the middle of the curve he saw Chino's boat (Chino is the first Defendant) coming in the opposite direction at very fast speed. He said the boat was about 23 feet away.

19. Zuniga said in his witness statement that his father stopped his boat and then maneuvered the steering wheel into a little dead end creek which was to the right of the boat. Thereafter his father took him and threw him into the river. Further, he said that he was sitting a little behind of his father when his father pushed him into the water. (See paragraphs 8 and 9 of his witness statement).
  
20. Harold's evidence is that he saw Chino's boat collide into the left hand side of his father's boat before he went under water. That when he surfaced for air he saw that his father's boat was capsized. He said he shouted for him but he could not see him. Then he said he saw blood in the water and a white shirt that belonged to his father. Thereafter he saw his father sinking.
  
21. Harold said that he then swam towards his father and called for help. His father was still breathing and a man he believed to be a doctor bandaged his father's head to stop the bleeding.
  
22. Harold further stated that when Chino's boat collided into his father's boat, Chino's boat ran into a tree. Then everyone from his father's boat called to Chino's boat to come and help them. Chino then reversed his boat next to his father's boat and all the passengers including his father were transferred to Chino's boat. He said that Chino then drove towards Orange Walk Town. His father was taken to the hospital in a pickup which he believed belong to Chino.
  
23. Under cross-examination by Ms. Lisa Shoman for the Defendants, Harold said that he was at the back of the boat and his father was at the back of the boat, just in front the engine. He said there was a wheel to drive the boat and his dad, the deceased was standing. He said his dad saved his life by moving him. Further, he said when his

dad pushed him the boat was still moving and that his dad tried to get him out of the way.

24. In further cross-examination, Harold said that his father was at the middle of the curve and on the right hand side and that he was going at a normal speed. Again, he said that his father took him and threw him into the river. He also said that he could see how fast the other boat was going.
25. The other witness for the Claimant is Eduardo Garcia. In his witness statement he said that on or about July 9th, 2006 at about 10:45 a.m. he was at Lamanai, Orange Walk District where he saw Fidencio Velloso, also known as Captain Chino. He was ready to take off from the dock in Lamanai towards Orange Walk. His evidence is that he told Chino that he should be very careful because there were two to three boats coming from the direction of Orange Walk Town.
26. He said that after he told Chino that boats were approaching, he saw him take off heading in the direction of Tower Hill, Orange Walk District, Belize. Chino was driving a 38' white boat with green lining with two 200 horsepower outboard motors. He said that he traveled the New River on a daily basis. That he knows the area where the accident took place which is known locally as "Back Landing" or "the narrows".
27. Mr. Garcia said that on or about 2:00 – 2:30 p.m. when he was returning to Orange Walk he passed near the area of the accident. He saw Vicente's boat capsized in a little creek. The creek is at a dead end off the right hand side of the curve in the narrows.
28. Under cross-examination he admitted that he was not at the scene of the accident when the two boats collided.

29. I must say that the evidence of Garcia for the Claimant does not assist the court in the cause of the accident. Another observation I must make is that the Claimants closed their case without leading any evidence as to damages. There was no evidence as to special damages nor was there any evidence as to the age of the deceased and his earning capacity. Also, no evidence was led as to his dependents who are his widow, Amelia Avila who was pregnant at the time and his three children with another wife as shown in paragraphs 10 and 11 of the Statement of Claim. This evidence is relevant for the purposes of damages in the event the Claimants prove their case.

#### Evidence of the Defendants

30. Mr. Fidencio Vellos testified that he is the 1st Defendant in the claim. That he is employed by Discovery Expeditions Belize Ltd. as a boat captain since 1993. He said that he worked on the New River for over 20 years and since he was 14 years old. That on the 9th July 2006, he was driving the "Rio Reina", a 34 foot, 3.5 ton fiberglass passenger vessel belonging to Discovery Expeditions Belize Limited, his employer, as its captain and his sideman that day was Luis Ruiz.

31. He said that the steering wheel for the "Rio Reina" is located on the front right hand side of the vessel near the bow of the boat. See exhibit "FV 1" which is a photograph of the said steering wheel of the Rio Reina.

32. Mr. Vellos said that he left the dock of Lamanai Landing which is the Tower Hill base of operations for Discovery Expeditions Belize Limited, for his tour on the New River, on route to the archeological site of

Lamanai at about 8:00 a.m. that day with about 36 Italian passengers. He departed Lamanai at about 11:00 a.m. and about 10 minutes after departing from there, on approaching the third curve in an area known as “the Back Landing Narrows”, he saw the bow of an oncoming boat coming at full speed. That the boat was a 23 foot, Mexican fiberglass skiff, known locally as a “lanchon”.

33. Mr. Vellos evidence is that at the time when he saw the approaching boat, he was on the right hand side of the river and the oncoming boat was on his right-hand side, which he said is the other boat left side and was coming directly towards his boat. He said that immediately upon seeing the oncoming boat, he pulled the throttles back and put his boat engines in neutral and was able to quickly turn his steering wheel twice to the right and in the direction of the nearby right river bank. Mr. Vellos said that he took that action in an attempt to avoid a head on collision. See paragraphs 7 – 11 of his witness statement.
34. Mr. Vellos evidence is that before the other boat collided into the Rio Reina, his boat was already only about three feet from the edge of the right river bank and that despite the evasive action that he took the other boat collided into his boat impacting on the outer left hand side of the Rio Reina near the first row of passengers seated in the boat. See exhibits “FV2, FV 3 and FV4” for the photographs showing the point of impact on the Rio Reina.
35. He further testified that upon the collision, his boat pushed up on to the right river bank and forced into a tree causing damage to the outer right hand side of the boat near to where the steering wheel and controls are located. See exhibits “FV5, FV6 and FV7” for photographs showing the damage caused by the tree to the Rio Reina.

36. Mr. Vellos evidence is that the steering wheel console for the other boat, which is a small boat, and held about 18 people, is at the rear or stern of that boat. He said that after the collision he got up from where he had fallen, stopped or shut down his engines, and then counted and checked his passengers and found that 2 of them had fainted and along with his assistant, Luis Ruiz, he attended to them.
37. He said that he could see that the other boat was about 60- 70 feet away on the opposite river bank and behind his boat and had capsized. That the passengers of the other vessel were all in the water.
38. Mr. Vellos said that he then proceeded to load the passengers from the other boat onto his boat along with the driver, Vicente Avila from the other boat who was bleeding from a head injury and was placed on the floor of his boat and held by a passenger from his boat. He then proceeded to take them to the Lamanai Landing dock in Tower Hill and thereafter to the Orange Walk Hospital.
39. Under cross-examination by Ms. Pitts he denied that they were in a hurry so that they can go and view the World Cup Match. He denied he was driving fast and he denied that he knocked the boat on the left side. He disagreed with Ms. Pitts that he could not take any evasive action. He said on the curve he saw the bow of the other boat and he had the opportunity to turn and he turned to his right.
40. In further examination he said that when his boat was hit it went three to four feet into a tree. He also disagreed with Ms. Pitts that in turning the curve the boat will go diagonally.

41. Under re-examination of Mr. Velloso by Ms. Shoman he said that only if a boat is going fast then it will go diagonally. He said that before the impact of the boats, he put both engines in neutral and turn twice. Further, that if Mr. Avila, the deceased had taken the curve appropriately on his right then he would have avoided his boat. Additionally, he said that if he had not taken the action he did, the impact would have been right dead centre, bow to bow. He said that he took the necessary actions because he had the privilege to see first.
42. The second witness, Luis Ruiz, testified that he is the assistant to the 1st Defendant and an employee of the 2nd Defendant. That on 9th July 2006, his boat traveled from Lamanai to Tower Hill with 27 passengers in total, including the captain and himself. That after about 10-15 minutes of traveling another motor vessel, came into view approaching at high speed, traveling from north to south or from Tower Hill dock heading toward Lamanai destination. His evidence is that their vessel had just come around the 4th curve taking a right turn and the other motor vessel was coming around the 5th curve making a left turn.
43. Mr. Ruiz at paragraph 6 of his witness statement said that he then saw the captain of the approaching vessel took his left arm and brought a child from behind him, who was sitting on the engine close to him.
44. His evidence is that his captain brought the gear of the boat to neutral, slowing down the motor vessel, and violently turned the steering wheel to the right to avoid a bow to bow collision. That the captain of the other vessel could not control his vessel and caused it to slap their boat resulting in them being pushed to the right onto the river bank.

45. Mr. Ruis evidence is that he was sitting on the 1st step of the bow and the slap of the boats caused him to fall backward overboard into the water. He said that he held onto the rope, and as he was falling, he saw the other motor vessel lean less than 45 degrees on its left and when he came up from under the water, the other motor vessel was floating upside down.

46. In cross-examination by Ms. Pitts, Mr. Ruis said that the Rio Reina was on the right side of the river coming from Lamani to Tower Hill and that they were on the third curve. When it was suggested to him that his captain was in the middle of the river he denied this was so. He also denied that the Rio Reina went diagonally across the river when it took the curve. I must mention that there is no evidence from any witness that the Rio Reina went diagonally across the river. Mr. Ruis further said that he was sitting on the first step from the bow and he could see the speedometer. He also said that he felt the speed the boat was going and that it was at 4,000 rpm. In further cross-examination he said that when he first saw the Christina, which is the other boat it was about 10 feet away from the Rio Reina.

47. The other witness is Sheffield Eck who said that he is the Accountant for the second Defendant Company. He said that on or about July 26, 2006, the Defendant Company received from Seabus Enterprises Limited, Invoice No. 100 for the sum of \$5,939.05 for the estimated cost of repairs to the vessel Rio Reina. See Exhibit "SE 1".

48. Mr. Eck said that on or about July 11, 2006, the Defendant Company received from B.E.R.T. an invoice in the sum of \$390.00 for transportation to the Orange Walk Hospital. See exhibit "SE 2".

49. That the Defendant Company paid the sum of \$390.00 to Messrs. B.E.R.T and was issued with a receipt dated November 27, 2006. See Exhibit "S.E. 3". He said that all three of these bills were paid in full.

### **Determination as to liability**

50. The Court does not have the benefit of any independent witnesses of this accident which occurred on the river as only the two boats with their occupants that were involved in the accident were on the river at that time. Also, in this case there is no evidence by the Police who normally investigates accidents and would draw sketch plans of the scene of the accident as is done in road traffic accidents. So, there is no sketch showing point of impact or skid marks or any concentration of debris as in road traffic accidents
51. Nevertheless, the Court found some assistance in arriving at a determination having visited the *locus en quo* ("the narrows") the day before the trial and thereafter listened carefully to the witnesses who testified as to how the accident occurred.
52. In my view the same principles should be applied in this case as in the case of road traffic accidents. It is a two way traffic for boats to and from Lamani. Each boat must be on its right hand side and duty of care must be taken, such as driving within a normal speed limit and to be cautious and slow down around curves. Because of the dangerous curves even if one is driving slowly it is necessary to stay on the right side to give way for other boats in the opposite direction as the river is narrow. By the evidence before the Court the name of the

place where the accident occurred speaks for itself. The river is called “the narrows”.

53. On a balance of probabilities, I find that it was established that the accident occurred on the Defendant’s side (or by the Rio Reina side) of the river. That the accident was caused as a result of Mr. Vicente Avila, deceased driving fast and in the middle of the river as testified by Velloso and Ruis.
  
54. There were only two witnesses for the Claimant and as said above the evidence of Garcia for the Claimant does not assist the court in the cause of the accident. Under cross-examination he admitted that he was not at the scene of the accident when the two boats collided. The evidence from the other witness, Harold Zuniga, 13 years old, is the step-son of the deceased. He was very emotional when he was testifying and he touched everyone’s heart in the courtroom that day. This is understandable as he lost his father as a result of that accident and I sympathize with him and his family.
  
55. I found it very difficult to accept Harold Zuniga’s testimony as to how the accident occurred for several reasons. In his witness statement he said that when his father reached the Bend in the River known as “the narrows” his father drove slowly around the bend. Then, at that time he said that he, Zuniga saw Chino’s boat in the opposite direction. His evidence is that his father then stopped his boat and maneuvered it into a little dead end creek which was to the right of their boat. He said that his father then took him and threw him into the river and then he saw Chino’s boat collide into the left side of his father’s boat before he went under water. This evidence of his father stopping the boat and then throwing him into the water is

contradicted by his evidence in cross-examination where he said that when his dad pushed him the boat was still moving.

56. Harold's version of the accident is not convincing for other reasons also. If he was thrown into the water before the impact he would have gone under water before the impact. He could not see the point of impact as this accident had to occur within seconds as the boat the deceased was driving came around the curve. Further, I do not believe that the deceased had any time to stop and maneuver into the dead end creek. This evidence is unbelievable.

57. Having visited the place where the accident occurred and seeing the curves in the river and the dead end creek this version of the story given by Zuniga does not seem probable to me. The evidence shows that the accident occurred between two curves. The dead end creek is opposite to where the accident occurred and on the right hand side of "the Christina". Had the deceased gone into the dead end creek there would not have been an accident. When this accident occurred the Rio Reina ended up in a tree which is opposite to the dead end creek. From the evidence, I find that "the Christina" ended up in the creek after it slapped the Rio Reina at the side.

58. I believe the accident happened the way described by Fidencio Vellos and Luis Ruiz. Mr. Vellos evidence is that he was on his right hand side of the river and the deceased boat was also on Mr. Vellos side of the river heading directly to his boat. What Vellos did was to take evasive action as he immediately pulled his throttles back and put his boat engine in neutral and quickly turn his steering wheel twice to the right nearby the river bank. When the boat collided he was three feet from the river bank and upon the collision the boat pushed up onto the river bank and was forced into a tree. Luis evidence confirmed that of

Vellos. Luis said that Vellos brought the gear of the boat to neutral, slowing down the motor vessel and turning the steering wheel to the right to avoid a bow to bow collision.

59. Another important piece of evidence by Luis is that when he saw the Christina which was being driven by the deceased, the deceased took his left arm and brought a child from behind him, who was sitting on the engine. That child is Harold Zuniga, the step son of the deceased whose evidence is also that he was sitting a little behind his father. But, Harold Zuniga's evidence differs from that of Luis as to what happened when his father reached for him. Harold's evidence is that his father took him and threw him into the river. Luis evidence is that the deceased reached for Harold and brought him close to himself. I believe Luis evidence that the deceased reached for his son and brought him close to himself. In my view, the deceased who unfortunately is not here to tell his story wanted to protect his son from any harm that may be caused in the event of an accident. The deceased had no time to do anything to avoid the accident as his first reaction was to protect his son.

60. The photographic evidence is also helpful in this case. The photographs confirm the evidence of Vellos and Luis that the impact was on the outer left hand side of the Rio Reina. See Exhibits "FV 2", "F.V. 3" and "F.V. 4".

61. I find from the evidence that Vellos who worked on the New River for over 20 years did swerve to avoid the accident. Had he not done so there would have been a bow to bow collision and many lives would have been lost that day as there were in total 54 persons in the two boats. I agree with Ms. Shoman in her closing address that Vellos quick actions stopped the entire event from being disastrous. Many

tourists could have lost their lives that day. It was most unfortunate that Vicente Avila died. But, the fact that he died does not absolve him of any responsibility for the collision that occurred on the river that day.

62. Therefore, having considered all the evidence in this case, I find that the accident was caused wholly by the negligence of the deceased, Vicente Avila. In the circumstances, for reasons given, I reject the case for the Claimants. I therefore, give judgment for the Defendants.

63. I find on a balance of probabilities that the Defendants have proven their counter-claim that the accident was caused by the negligence of Vicente Avila, deceased who was driving in the middle of the river and therefore on the Rio Reina side of the river when it slapped against the said vessel. They are therefore, entitled to damages.

### **Damages**

64. The Claimants claim fails and so they are not entitled to any damages.

65. The Defendant's counterclaim for special damages was for \$6,329.05. The evidence of Vellos shows damage caused to the boat as a result of the impact and also damage caused to the boat when it went up to the bank and into a tree. See Exhibits "F.V. 2" to "F.V. 7". Sheffield Eck, the Accountant for the 2<sup>nd</sup> Named Defendant Company tendered an invoice for the sum of \$5,939.05 showing estimated cost of repairs to the vessel, Rio Reina. See Exhibit "S.E. 1". He also tendered a receipt for the sum of \$390.00 from B.E.R.T. See Exhibit "S.E. 2". This evidence was not challenged by the Claimants. I accept this evidence by the Defendants. Accordingly, I award the sum of \$6,329.05 to Defendants as special damages.

66. **Conclusion**

Claim for the Claimants fail.

Damages in the sum of \$6,329.05 awarded to the Defendants

I award interest at 6% on the sum of \$6,329.05 from the date of the accident, 9<sup>th</sup> July, 2006 to the date of trial of this action.

I award cost in the sum of \$3,000. to the Defendants.

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Minnet Hafiz  
Supreme Court Judge

Dated this 16th day of October, 2008.