

**IN THE SUPREME COURT OF BELIZE, A.D. 2010**

**CLAIM NO. 581 of 2006**

**ATTOLENE CRAWFORD LENNAN**

**CLAIMANT**

**AND**

**VANCE CABARAL doing business as  
ADVANCED DIVING  
MARK TUCKER**

**DEFENDANTS**

Hearings

2010

12<sup>th</sup> July

16<sup>th</sup> August

30<sup>th</sup> September

Mr. Fred Lumor SC for the Claimant.

Mrs. Ashanti Arthurs-Martin for the Defendants.

LEGALL J.

**JUDGMENT**

1. Dr. Abigail Drake Brinkman was born on 7<sup>th</sup> October, 1977 at Columbus Indiana, U.S.A. She loved scuba diving. She was unmarried and did not have children. At the tender age of 16 years, she obtained a certificate in scuba diving. She was also an

accomplished swimmer and a member of a swim team at elementary school and was able to swim a mile at age 11 or 12.

2. At the age of 20 years, as a pre-medical student, she visited Belize in 1997 with other students. She fell in love with Belize. On her return to the U.S.A., she continued her medical studies and completed a Master's Degree in Chemistry and Bio-Physics and received an award as the top student in Child and Adolescent Psychiatry. After successfully completing her medical studies at the university, she took the Indiana Medical Licensing Board Examination, so as to be certified as a medical doctor. Before obtaining the results of the examinations, she returned to the Belize she loved so much on 1<sup>st</sup> October, 2005 to do a paper on tropical medicine at the Hillside Health Care International Center at Punta Gorda, Toledo District, Belize.
3. Roger L. Brinkman was born on 7<sup>th</sup> April, 1946. His wife Janet F. Brinkman was born on 11<sup>th</sup> December, 1946. They are the parents of Dr. Brinkman and are both American citizens who live in the U.S.A. Roger is employed as a Psychiatric Emergency Coordinator in Indiana, U.S.A. and will retire when he attains the age of 66 years. His wife is a real estate broker in Indiana U.S. and she will retire at age 67.
4. Vance Cabral, the No. 1 defendant, is the owner and manager of a Dive Shop named "Advanced Diving" situate at Placencia Village in Belize, which rents to customers diving and snorkeling gears. He is

also the owner of a boat named “Advance 1” which is a boat that takes tourists for scuba diving and snorkeling. He holds a boat captain licence. The No. 1 defendant carries on a business of taking tourists at a fee for diving and snorkeling tours at locations in the Caribbean sea off the coast of Belize, one of which is a place named Silk Caye which is part of Belize. Mark Tucker, the second defendant is a freelance diver and trained dive master, was employed by the No. 1 defendant to assist on a dive and snorkeling tour with tourists, scheduled for 22<sup>nd</sup> October, 2005.

5. John Bain, an American citizen and an attorney-at-law, arrived by plane at the Phillip Goldson International Airport, Belize on 15<sup>th</sup> October 2005 on vacation. He was fifty years old. He travelled, as part of his vacation, to various parts of Belize; and eventually arrived on 21<sup>st</sup> October, 2005 at Placencia Village where the first defendant carried on his scuba diving and snorkeling business and Dive Shop. Bain also loved scuba diving. He enquired about a diving shop in the village for purposes of going on a diving tour. He found the No. 1 defendant’s Diving Shop at about 7:30 a.m. on the 22<sup>nd</sup> October, 2005. There he paid the required fees to the No. 1 defendant for going on the diving tour and rented diving gears or equipment, such as a buoyancy compensator and regulator from the first defendant. On the said date Dr. Brinkman had paid her fees to the said defendant to go on the said tour.
6. The diving tour was scheduled to leave at about 8:30 a.m. on the said 22<sup>nd</sup> October, 2005 from a dock at Placencia. Bain went to the dock

and met about ten other persons, including Dr. Brinkman with the same object of going on the diving tour. Some of the persons were interested in snorkeling, while others were interested in scuba diving. Among the persons interested in diving was Dr. Brinkman. She was one of the scuba divers. All the persons entered the No. 1 defendant's boat, Advance 11 including the No. 1 defendant and his assistant Mark Tucker, the No. 2 defendant. They left the dock and headed to the snorkeling and diving sites.

7. About ten minutes, or about 2 miles into the journey, the No. 1 defendant decided to return to the dock to get a larger boat because the boat Advance 11 was overcrowded. So the No. 1 defendant along with the passengers returned to the dock; and the passengers, as well as their equipment and other facilities, were transferred to a bigger boat, owned also by the No. 1 defendant named Advanced 1. After obtaining gasoline for the bigger boat from the gasoline station, they left once again to the snorkeling and scuba diving sites.
8. There were 14 persons on board – eight snorkelers, four scuba divers and the two defendants. The snorkelers were going to snorkel at a site called Silk Caye about twenty-two miles from the dock at Placencia, while the divers were to dive at a site called White Hole which was about 1 ½ miles from Silk Caye. About halfway on the journey to Silk Caye, the outboard Yamaha engine of the boat Advance 1 ceased to function, and developed problems. The No. 1 defendant then began to take measures to get the engine functioning again. While taking these measures, the boat began to drift in the rough waters of

the Caribbean sea. It drifted about three miles, when the No. 1 defendant was able to restart the engine. He had explained that water had gotten into the filter of the engine and caused the engine to cut off. With the engine now functioning again, the boat proceeded to Silk Caye.

9. On arrival at Silk Caye, the No. 1 defendant and the eight snorkelers got off the boat, leaving the No. 2 defendant and the scuba divers, namely, attorney John Bain, Nancy Masters, Yutaka Maeda and Dr. Abigail Brinkman. The boat then left Silk Caye at about 11:15 a.m. on the same day with the divers, and the second defendant for the diving site at “White Hole.”
10. About halfway to “White Hole,” the engine developed problems again, “went dead” according to the second defendant in his witness statement. The engine stopped functioning. With the captain of the boat left at Silk Caye with the snorkelers, it was left for the freelance diver, diver master and tour guide, the second defendant, to solve the engine problem and get it working again. In spite of his continued efforts, the engine failed to function and the boat continued to drift in the rough waters of the sea. The previous problem of water in the filter of the engine had re-occurred.
11. There is a dispute about some of the events that occurred after the boat began drifting the second time. I saw the witnesses who testified and who were present at the scene, namely, the defendants and John Bain. I observed their demeanour and I examined their evidence. I

- believe John Bain as to what occurred when the engine stopped working for the second time and the boat began to drift.
12. According to Bain, as the boat drifted, the No. 2 defendant and himself tried to get the engine started, and to send out some communication for help, but to no avail. Bain said that he tried to get the radio on the boat to work but it did not. He said in evidence that he strongly disagreed with the suggestion by learned counsel for the defendants that the radio on board was working. As the radio was not working no message for help could be sent. The boat continued to drift amidst the raging waters. Bain then suggested to the No. 2 defendant to drop the anchor. He dropped the anchor, but the boat continued to drift because the chain or rope attached to the anchor snapped or broke. The chain was rusty. The anchor became ineffective in stopping the boat from drifting. The drifting continued in the open sea.
  13. Dr. Brinkman and Nancy Masters then decided to swim to the nearest island, which was visible to them and which did not appear to them very far away. Bain and Yutaka also decided to swim. I believe Bain when he said that the No. 2 defendant then assisted all the divers to put on their diving and swimming apparel and assisted them to go to the edge of the boat and fall backwards into the water. They began swimming to the nearest island at about 11:30 a.m. on 22<sup>nd</sup> October 2005. The intention was to swim and to have the option to scuba dive to the nearest island.

14. I further believe Bain when he said that the No. 2 defendant did not tell them not to swim and they did not act contrary to his advice. All divers were now in the sea swimming to the nearest island. Bain said, and I again believe him, that he underestimated the depth and the current of the sea and the distance he was from the nearest island when the decision was made to swim to it. I believe the other swimmers also underestimated the distance to the nearest island.
  
15. The divers having left, on board the boat alone was the No. 2 defendant. He remained on the boat until about 4:00 p.m. the next day, 23<sup>rd</sup> October, after having tried unsuccessfully once again to get the engine started, and to get communication for help through the radio. He then, like the other divers, put on his swimming gear, abandoned the drifting boat and began swimming just after 4:00 p.m. on the said 23<sup>rd</sup> October to Glovers Reef, which destination he reached more than two hours later.
  
16. The divers who had left the boat at 11:30 a.m. on the 22<sup>nd</sup> October was still in the water when the No. 2 defendant reached Glovers Reef on the 23<sup>rd</sup> October. On the 24<sup>th</sup> October at 6:00 p.m., a catamaran boat came and rescued John Bain from the sea. He had been swimming for about two and half days. On the boat were Nancy Masters and Yutaka Maeda, two of the other divers. Dr. Abigail Brinkman was missing. Her body was found later that day about 6:00 p.m. floating face down in the water. The survivors were taken for medical attention. A post mortem examination was performed on the body of Dr. Brinkman and a medical certificate dated 26<sup>th</sup> October,

2005 gave the cause of death as “Immersion Asphyxia” and the place of death is listed as “Belizean Sea Waters.”

### **The Claimants**

17. Section 9 of the Torts Act, Chapter 172 of the Laws of Belize states that an action lies for causing death. It states:

“Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his injury thereby, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.”

Section 10 of the same Act states, inter alia:

“Every such action shall be for the benefit of the wife or husband, and every parent and child of the person whose death has been caused ....”

18. Section 11 of Torts Act Chapter 172 of the Laws of Belize states that “every such action shall be brought by and in the name of the executor or administrator of the person deceased.” The claimant is the administratrix in the estate of the deceased Dr. Abigail Brinkman by

virtue of the grant of Administration No. 262 of 2006 dated 10<sup>th</sup> January, 2007 by the Supreme Court Probate Division. The claimant therefore filed a statement of claim dated 20<sup>th</sup> October, 2006 against the defendant for:

- (1) Damages on behalf of the Estate and dependants of Abigail Brinkman, deceased, pursuant to the Torts Act, Chapter 172;
- (2) Special damages in the sum of US\$8,058.99 pursuant to Section 16(2) of the Torts Act, Chapter 179;
- (3) Interest on any damages found to be due to the Estate and dependants of the deceased pursuant to Section 161 of the Supreme Court of Judicature Act, Chapter 91.
- (4) And Costs.

### **Negligence and Neglect**

19. When the boat developed engine problems the first time, and the No. 1 defendant saw there was water in the filter, he should have foreseen that this may happen again and may result in the engine not being able to function. He gave evidence that gasoline sometimes contain water which he described as bad gas from Mexico. He said that bad gas cause the motor to smoke and stagger. On seeing the engine not functioning; and bearing in mind that the boat drifted for about three miles on the first occasion before he got the engine working again, it seems to me, that the prudent and proper thing for the No. 1

defendant to have done on that first occasion was to return to or head towards the dock at Placencia to have a proper mechanical check of the engine, rather than proceeding farther out to sea to Silk Caye.

20. Even though it may have happened before with other operators, and even though he said that water in the filter was neither dangerous nor unusual, that is no excuse for not doing the prudent and proper thing, by returning back to Placencia and have the engine checked, for he himself admitted that “it is a dangerous sport.” Moreover, he should have considered that water entering the filter may have occurred because of the filter or engine not properly sealed; and therefore should have reasonably foreseen that the same problem may occur again and cause the boat to drift in the open sea.
  
21. In addition, after the second break down of the engine and the boat was adrift, the anchor on the boat was not in suitable condition and when thrown overboard to prevent the drifting, the rusty chain or rope holding the anchor snapped making the anchor ineffective. I am sure that if there was a proper, well maintained and suitable anchor, it would have prevented the drifting of the boat, and the divers may not have attempted to swim to the nearest island. That anchor was not properly maintained and therefore was not suitable for the purpose for which it was made. It was the duty of the defendants, before taking the passengers out to sea in a boat, to ensure that the boat was fully equipped and had a proper and suitable anchor among other things. The No. 1 defendant said, and supported by the No. 2 defendant, that everything in the boat was working properly, and in good order and

shape; but I do not believe that the anchor, the engine and the radio were in good order and working as they should. The radio was not working and could not be used for making communication for help. Perhaps if the radio, anchor and engine were working properly, or anyone of them, this tragedy may have been avoided.

22. A small craft warning was issued for the coast of Belize because of the Hurricane Wilma which was in the Atlantic Ocean. The No. 1 defendant said that he was not aware of the warning as he did not listen to the weather that day. He was a sea captain taking persons out to sea and it would be reasonable to expect that he would check the weather pattern for that day. But he did not.
23. But the No. 1 defendant swore that he on 19<sup>th</sup> October, 2005 thoroughly inspected and serviced the engine of the boat and he said the engine was in “good, efficient working condition.” The said defendant also said that the boat was not, after the inspection, used for any trips or tours until the date of the tragedy – 22<sup>nd</sup> October, 2005. All requisite safety equipment, namely, 1 VHF Radio, life jackets, fire extinguisher, compass, binoculars, first aid kit, tool box, flashlight, tour ropes and anchor with chain and ropes were checked on October 19<sup>th</sup>, 2005 and were found in good and proper working condition, according to the No. 1 defendant.
24. The defendants say that while going to the dive site the engine experienced difficulties, but these difficulties were not caused by any default, omission or negligence on their part or by any defect that was

obvious to them. The engine, anchor, and radio were thoroughly inspected and were found to be in good working and proper condition, say the defendants; and therefore they were not negligent or breached any statutory duty. They did not cause the death of the deceased.

25. I saw the defendants gave evidence in the witness box. I observed their demeanour and saw how they answered questions. I do not believe that they made all those checks and found everything in proper working condition. It was the No. 1 defendant who swore in his witness statement that he asked the passengers who were then in Advance 11, whether they wanted to travel in a larger boat, not because it was overcrowded but because he wanted his passengers very comfortable. But in his sworn testimony in court he said he changed the boat because the smaller boat – Advance 11 – was overcrowded. And he said this is different from what he said in his witness statement.

26. After the boat engine malfunctioned or stalled the first time during the trip, the defendant said that from his experience he knew that the stalling of the engine occurs because of water getting into the engine. He said when he checked the engine of the boat he “noticed the gas filter had water inside.” He continued: “So I poured out the water, put on back the filter and pump some more gas into the filer. As is expected the motor started up fine .....

When the engine malfunctioned the second time, the No. 2 defendant said he noticed water inside the fuel filter and he did what the No. 1 defendant did previously, but the engine would not start. And it never started for the

- next day and a half, when the No. 2 defendant decided to abandon the boat, not ship, and decided to swim to Glovers Reef.
27. The problem probably was not only water in the filter, but there perhaps was some other problem of a more serious nature with the engine. I therefore do not believe the No. 1 defendant when he said that he checked the engine on the day of the tour and it was in good working and proper condition. From the facts of this case, I believe the defendants carried the passengers in the boat Advance 1 when the engine, anchor and VHF radio were not in good and proper working condition.
28. Considering the evidence in this case, were the defendants negligent, neglectful or acted in default under section 9 of the Torts Act above? Was there a duty on the part of the defendants to exercise reasonable care to prevent injury to other persons using the boat? The evidence in this case shows clearly that the defendants had a duty to exercise reasonable care. 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: see *Glasgow Corporation v. Muir 1943 A.C. 448, at p 457*; *Donoghue v. Stevenson 1932 A.C. 562 at p 580*; and *Fardon v. Harcourt Livington 1932 A.E.R. 81*.
29. But before deciding the issue of negligence or neglect, the court must bear in mind, the well known and often articulated views of Lord

Pearson with respect to the burden of proof in the celebrated *Henderson v. Harry E. Jenkins* 1969 3 A.E.R. 756 at p766.

“In the action for negligence, the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails.”

30. Mrs. Arthurs-Martin for the defendants relied on the latent defect defence, and argued that water entering the filter was a latent defect and relied on the case *Readhead v. Midland Railway Co. (1868-69)L.R. 4 Q.B. 379*. In that case, the plaintiff who was a passenger on the defendants railway suffered an injury because of the breaking of the tyre of one of the wheels of the carriage in which he was travelling. It was found by the court that the breaking of the tyre was because of “a latent defect in the tyre which was not attributable to any fault of the manufacturer, and could not be detected previously to the breaking.” The court gave judgment for the defendant on its finding that there was a latent defect in the tyre. The question is what is a latent defect? A latent defect would seem to include defects which no skill could detect and the effects of which no care or foresight could avert: see *Readhead v. Midland RY above at p. 385*.

31. In this case before me, I do not find evidence of latent defect. In relation to the anchor and radio I see no such evidence. As far as the engine is concerned there was water in the filter and the water must have got into the filter either by water in the gasoline itself or by a leak somewhere in the engine or filter and neither of these could qualify on a latent defect as defined. As *Readhead* clearly shows, carriers of passengers have a duty to exercise due care and foresight; and due care means a high degree of care and casts on the carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers, is in fit and proper order: *Readhead at page 393*.
32. Neither the anchor, radio nor engine was in fit and proper order. On the facts of this case and for the above reasons, it is my view that the latent defect defence fails.

**New intervening cause or act**

33. The defendants submit further that the deceased's decision to leave the boat and swim to the nearest island, Silk Caye, was a new intervening act by the deceased which caused her death. Her death, according to the submission, was not caused by any negligence or breach of duty by the defendants: it was solely caused by her own independent act of trying to swim to Silk Caye when she knew or ought to have known that it was dangerous and unreasonable to do so. Learned counsel for the defendants, Mrs. Arthurs-Martin, in support of this submission, relies on *The Melanie v. The San Onofre 1922 P*

*243; Quinn v. Burch Brothers (Builders) Ltd. 1966 2 Q.B. 370; and Darly v. The National Trust 2001 EWCA CIV 189.*

34. In *The Melanie*, two vessels, Melanie and San Onofre, collided in the Bristol Channel in dense fog. The Melanie was blamed for the collision. Both vessels suffered damage, but the damage to The Melanie was more severe, and its crew went on-board the other vessel, San Onofre, which was not so badly damaged and was operative. The master of the San Onofre, with the assistance of a third vessel, tried to bring The Melanie towards the dock, but by reason of the fog, the vessels by accident grounded some distance from the dock, and the San Onofre suffered damage. San Onofre argued that the damage was as a result of the previous collision, so that expenses resulting from the damage could be recovered as damages arising from the previous collision.
  
35. The San Onofre argued that the damage to it resulting from it rendering assistance to The Melanie, was the natural and probable result of the previous collision; and was sufficiently connected with the said collision to render the damages claimed recoverable. The court disagreed. The court held that the master of the San Onofre was a pure volunteer, and the negligence which caused the previous collision could not be said to be the “direct cause of the subsequent accident.” In other words, the subsequent accident causing damage to the San Onofre was not the natural and reasonable consequence of the previous collision. The San Onofre failed to prove that the subsequent

accident was a direct consequence of the previous collision, and the court refused its claim.

36. In this case before me, the act of swimming by the deceased to the Silk Caye was a direct consequence of the failure of the engine to work, an ineffective anchor and the failure of the VHF radio to function. It seems to me that if, for instance, the engine was working, as it should have been, there would have been no need for anyone to leave the boat and swim to Silk Caye; and the tragedy would most likely have been avoided. The attempt to swim to Silk Caye was, on the facts of this case, the natural and reasonable consequence of the defendants negligence and failure of the above facilities to work.
  
37. In *Quinn v. Burch Bros (Builders) Ltd.*, the defendants were the main contractor for certain works and they made a contract with the plaintiff as an independent sub-contractor to do plastering work. The plaintiff, in carrying out his plastering work, looked around the work site for a step-ladder, which the defendant had said was on site. He came across, not a ladder, but a trestle, put it up against a wall, but failed to secure the foot of the trestle. He mounted the trestle in order to perform his work, and a few moments later, the trestle collapsed and he suffered a “nasty injury to the oscaisis of one of his heels.”
  
38. The court held that this was not a case based on Tort, but a case of breach of contract. It was a case of an independent contractor and a main contractor whose contractual obligation was to provide a ladder and no ladder was supplied. The plaintiff, instead of making enquiries

about a ladder, chose to do his work with a trestle without using the trestle properly. Sellers LJ held that this was not an accident caused by the defendant breach of contract because “It was in no way something flowing probably and naturally from the breach of contract”: see *Quinn* above p 390. Lord Salmon pointed out that the only question in the case was whether the defendant’s breach of contract caused the injuries which the plaintiff suffered. He held that it was “quite impossible to say that in reality the plaintiff’s injury was caused by the breach of contract.” In this case before me, the deceased decision to swim to Silk Caye was something that flowed naturally from the defendants above negligence and was a cause of the injury to the deceased.

39. In *Darby v. The National Trust* above the husband of the claimant died by drowning in a pond under the ownership and control of the defendant. The claimant brought a claim on behalf of her husband’s estate against the defendant claiming a breach of the common duty of care under section 2 of the Occupiers Liability Act 1957 (UK). The claimant’s case rested mainly on the proposition that the defendant should have had “no swimming” notices around the pond itself. The court held that there was no duty on the part of the defendant to warn against swimming in the pond, because the risk to competent swimmers of swimming in the pond “were perfectly obvious,” and notice saying “Danger No Swimming would have told Mr. Darby no more than he already knew”: per May LJ in *Darby at p 25 and 26*.

40. This case before me is distinguishable in that the defendant here negligently created a situation where Dr. Brinkman had to make a choice whether to stay in the drifting boat or try to swim to the nearest island. In *Darly* the defendant did not negligently create a situation whereby *Darly* had to make a choice.
41. It seems to me that if the defendants, as in this case, are under a duty to prevent the claimant from having to swim to Silk Caye, they cannot complain that injury or death that resulted from the claimant having to swim, relieves them of liability for their original negligence. The claimant's decision to swim, when the engine broke down and the anchor failed and the boat was drifting, was an expected response by the claimant who was an accomplished swimmer. The claimant's act did not eclipse the initial wrong doing of the defendants. The claimant act was not "ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable, or extraneous or extrinsic": see *The Oropesa 1943 p 32 at p 39*.

### **Contributory Negligence**

42. Learned counsel for the defendants further submitted that, on the facts of this case, Dr. Brinkman did not, in her own interest, take reasonable care of herself; and contributed, by her want of care, to her own death. Dr. Brinkman, says learned counsel for the defendants, should "have waited on board the boat for assistance instead of opting to swim back to the island. And she should have appreciated the risk involved and therefore "contributed substantially to her death." Mrs.

Arthurs-Martin relies, in support of her submission on contributory negligence on *Nance v. British Columbia Electric Railway Co. Ltd. 1951 AC 601, at page 613* where Viscount Simon said that “the plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety ..... and a want of care by the plaintiff for his own safety.” In *James v. Livox Quarries Ltd. 1952 2 Q.B. 608*, another case relied on by Mrs. Arthurs-Martin, Denning LJ said that “A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself and in his reckonings he must take into account the possibility of being careless.” His Lordship continued:

“Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences.”

43. The question the court must ask for the purpose of deciding whether or not contributory negligence is established is whether the facts, which were known by the claimant, would have caused a reasonable person in the position of the claimant, to realize the danger. In order to establish contributory negligence of the claimant, it is essential for the respondent to establish that the injury to the claimant was partly caused by her omission to take that degree of care which the circumstances of the case required. In *Caswell v. Powell Duffryn Associates Collieries*

*Ltd 1940 AC 152*, Lord Wright said that it was a question of degree of care which the circumstances required the claimant to take; and the court would have to draw a line “where mere thoughtlessness, or inadvertence or forgetfulness ceased and where negligence began.”

44. All that is necessary to establish contributory negligence is to prove to the satisfaction of the court that the injured party did not, in his own interest, take reasonable care of himself; and contributed, by his lack of care, to his own injury. Where a person is part author of his own injury, he cannot call on the other party to compensate him in full: see *Nance v. British Columbia Electric RY Co. Ltd. 1951 AC 601, at p 611* and *Associated Industry Ltd. v. Kumar Ragnauth 1982 W.I.R. 249 at p 251*.
  
45. I think there is much merit in the submission that Dr. Brinkman was careless for her own safety and was part author of her own injury and contributed to her death. One could understand that being in a boat where the engine and anchor were not working and the boat drifting in the open sea, and with the knowledge that the boat had drifted about three miles when the engine first broke down, that a good swimmer and scuba diver would have the urge to swim towards the shore. But the rough waters of the sea and the possibility of underestimating the distance of the shore from the boat, should have been considered by Dr. Brinkman for her own safety before making the decision to swim. I therefore accept the submission that Dr. Brinkman was guilty of contributory negligence and contributed to her death. Had it not been

for the defendants initial negligence as shown above, Dr. Brinkman most certainly would not have decided to swim to Silk Caye. It must be remembered that the other defendant also abandoned the boat subsequently and decided to swim. Doing the best I can on the evidence before me, I hold that she contributed 20% to her death.

### **Waiver**

46. The defendants further submit that they are not liable because of a waiver signed by Dr. Brinkman. The No. 1 defendant, as we saw above, carries on a business at his Dive Shop where he rents diving equipment for a fee to persons desirous in going on diving tours. The persons are requested to fill up a document named "Diving Application," the top of which the person states his name, address, email address, hotel, emergency contact number, any medication taken and any allergic condition. The middle part of the document lists the diving equipment rented and the price paid for the equipment.
  
47. At the bottom of the document, appears the alleged waiver with the signature of the person concerned, the date and a witness to the signature. There is no signature of the defendants on the document. The waiver is in these words:

I am aware of the inherent hazards of water sports, including Scuba Diving & Snorkeling. I will abide by all the laws of Belize. The lessee agrees that the above equipment was received in good condition and assumes full responsibility for replacement or

repairs of any lost or damaged equipment. By this instrument I release Advanced Diving Dive Shop and related persons from all liability whatsoever for personal injury, property damage or loss, or wrongful death. I am fully aware of this document and release; therefore I sign it being conscious of its importance.

Sgd: Abigail Brinkman 22/10/05

Sgd: Witness

48. When that alleged waiver or exclusion clause is carefully scrutinized, we find it refers to lessee which is not defined and presumably there is, correspondingly, a lessor. Perhaps lessee and lessor refer to the persons who rented the diving equipment and the renter of the equipment respectively. The clause goes further and seeks to exempt the Advance Diving Shop and “related persons.” Does the term “related persons” include the defendants? Perhaps it does, but the term is not clear or free from ambiguity. Apart from that, the clause seems to purport to exempt the Dive Shop and related persons from all liability whatsoever for injury or death that came about because of, to use the opening phrase of the waiver, “inherent hazards of water sports, including scuba diving and snorkeling,” and the rented equipment. What is the purpose of the opening phrase if it was not to connect it to the injury or death. The clause does not seem therefore to purport to provide a waiver in a case where the injury or death came about from a defective boat engine and anchor. The clause is far

from being precise and clear and is immensely ambiguous. These exemption or waiver clauses if they are to be effective must be so worded as to limit or exclude liability in clear terms. Lord Greene in *Alderslade v. Hendon Laundry 1944 KB 189 at page 192*, speaking in relation to negligence, said that “if a contracting party wishes to limit his liability in respect of negligence he must do so in clear terms, in the absence of which, the clause is construed as relating to a liability not based on negligence.” I hold, for the above reasons, that the clause or waiver did not limit or exclude the defendants from liability for the death of Dr. Brinkman.

49. I therefore find that both defendants were neglectful and negligent which resulted in the death of the deceased. Moreover, I find that the No. 1 defendant was vicariously liable for the neglect and negligence of his employee, the No. 2 defendant who was acting in the course of his duties and as servant or employee of the No. 1 defendant.

### **DAMAGES**

50. Section 12 of the Torts Act states how damages are to be assessed in a case such as this. The section states:

“12. In every action such damages proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought may be awarded, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the parties for whose

benefit the action is brought in such shares as the court or a jury may direct.”

51. On the question of damages, the court has the task of (i) estimating how long, or the period, the dependants, in this case the father and mother of the deceased, would have continued to benefit from the dependency, had the deceased not been killed; and (ii) what the amount of the dependency would have been in each year of that period. The former is usually referred to as the multiplier or the “period of dependency” and the latter, as the multipland or the “amount of dependency” to use the words of Shanks J in the Belizean case of *Castenada et al v. Sutherland v. Cisco Construction Ltd. dated 11<sup>th</sup> February 2000.*

#### **The Period of Dependency**

52. The starting point is to estimate the period of dependency or the multiplier. The court in its duty to make that estimate is really undertaking the onerous task of determining what will happen in the future. To determine the estimate of the number of years that a dependency would last, the court has to consider the number of years between the date of the deceased death, and the date at which she would have reached the normal age of retirement. The court is to make a decision on future events; and it has not been surprisingly said, that in most cases the exercise is “a matter of speculation and may be conjecture.” see *Kassam v. Kampala Aerated Water Co. Ltd. 1965 1 W.L.R. 668 at page 672.*

53. It falls within the ambit of speculation because, not only is there the possibility that the deceased might not have lived to retirement age, but also because injury or illness may have prevented her from engaging in gainful employment. Moreover, there is no certainty that the dependants themselves would live throughout whatever period of dependency is estimated by the court. The dependants may die, not long from now, or may live throughout the period. The court has to consider all the possibilities that may occur in the future before deciding on the period of dependency.
54. The deceased had no children and was unmarried. Her parents, the dependants, are both 63 years old. Her father was born on 7<sup>th</sup> April, 1946 and will retire from his job in 2012 and her mother was born on 11<sup>th</sup> December, 1946 and will retire in 2013. I have to estimate the life expectancy of the parents of the deceased. In this exercise, I am not fortunate to have access to life expectation tables prepared by actuaries as may be available to other courts.
55. It would be helpful to consider, for comparative purposes, the periods of dependency ordered by the courts in Belize in fatal accident cases. In *Canul v. Alfaro et al No. 552 of 2000 (unreported)* the deceased was 28 years when he died. His dependants were two young daughters, three years and two years old, and his widow was 26 years old. A multiplier of 16 was used as the period of dependency. In *Morales De Habet v. Adolpho et al Belize Law Reports Vol. v p 173* the deceased was 29 years old when he died. His dependants were two children, who were four years and two years old. His widow was

- 29 years old at the time of his death. The court used a multiplier of 16 being the period of dependency.
56. In *Perriera v. The Attorney General No. 217 of 1992* the deceased husband was 35 years at the time of his death, and his widow was 38 years old. His three children were aged 10, 7 and 3 years at the time of his death. The multiplier used was 13 years. In *Sanchez v. Gianchandani 385 of 1999* the deceased father was 45 years old when he died. He had six children, aged, 2, 7, 11, 12, 15; and 16. The multiplier used was 6.
57. In *Casteneda v. Cisco Construction Limited Vol. 2 B.L.R. 92* a multiplier of 12 was used, where the dependants were a widow and four children. The age of the deceased and the dependants were not stated in the report, but the court considered a total dependency of all the dependents to be 57 and used an average dependency of 14.25. The court took into consideration contingencies and a lump sum payment and reduced that average to 12 which was used as the multiplier. In *Kandammy Murilidaran v. Tropical Air Services Ltd. No. 96 of 1992* the deceased was 25 years old at the date of his death. His widow was also 25. A multiplier of 12 was used.
58. In this case before me, considering the age of the deceased at death, the age of the parents of the deceased and the possible length of their lives and that the dependants would be paid a lump sum, I arrive at a multiplier of seven.

### **The Multipland**

59. Having arrived at a multiplier, I must now make a decision on the multipland or the amount of the dependency. The starting point on any estimate of the amount of the dependency is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of her death. The problem in this case is that there is no evidence of the deceased earnings, if any, prior to her death or evidence of earnings she would have obtained in the future.
  
60. As Mrs. Arthurs-Martin puts it in her submission, there is no evidence of the potential income the deceased would have earned. Moreover, there is no evidence that the deceased provided, prior to her death, material benefits for her parents from which an estimate of any dependency could have been made. I have no evidence of the income of the parents of the deceased. I have no evidence as to whether the deceased, prior to her death, had made any financial contribution to her parents for their maintenance, though Mr. Brinkman says that it was expected that their daughter would have provided valuable medical services and financial assistance when needed, the possible cost or extent of which was not given in evidence. I have no evidence of the financial expenditures the deceased incurred in her maintenance and needs. Evidence of these matters is relevant for purposes of arriving at a multipland.
  
61. The claimant relies on basic salaries for doctors at K.H.M.H. Hospital in Belize as published in the Reporter newspaper of August 8, 2010; the basic salaries as published of most junior hospital trainees in the

National Health Service in the United Kingdom; and the salaries of doctors published in the United States, as showing the salaries which were available to Dr. Brinkman as potential earnings. But these publications were not tendered in evidence, nor were they part of any disclosure order made by the court nor were they disclosed. These publications were mentioned as part of the written submissions on behalf of the claimants. These publications on salaries are not evidence in this case. The court cannot properly act on them.

62. But the claimant relies on the case of *Taff Vale Railway v. Jenkins 1913 A.C. page 1* where Viscount Haldane said he knew of no foundation in principle for the proposition that the deceased must be “shown to have been earning something before any damages can be assessed.” But certainly there must be evidence of potential earnings, which is absent in this case. In *Taff Vale*, the appellants were a railway company who were responsible for an accident by which a girl of sixteen years, who was the daughter of the respondents, was killed. The appellant, admitted that the death was caused by the negligence of their servants; but denied that the respondents, the parents of the girl had suffered any damage. On a trial by jury, the judge refused to withdraw the case from the jury on the submission that there was no evidence of damage. The jury awarded compensation to the respondents.
63. On an appeal, the appeal was dismissed. On appeal to the House of Lords, Viscount Simon says that there was evidence before the jury from which the jury may reasonably have taken the view that the

amount of assistance which she would have given at home to her parents would have been considerable ...’ His Lordship then said as follows:

“My Lords, in this case the jury had, as it seems to me, sufficient material before it upon which to find a verdict affirming the proposition that there was prospective pecuniary advantage to the parents of which they were deprived by the daughter death ..... These cases go to a jury because the jury is supposed to be cognizant of the condition and standards of life among the persons concerned in a way no judge can be .....”

64. His Lordship came to the above conclusion because there was evidence before the court that the deceased girl was a dressmaker’s apprentice in the employment of a firm of drapers, and at the date of her death, her apprenticeship had two months to run. There was evidence that if she had remained in the employment of the firm, at the conclusion of her apprenticeship, she would have earned three or four shillings a week, ultimately rising to 21 shillings a week, and would have earned more by pursuing her business at her home as she intended to. There was evidence also that she had rendered some assistance in her parents shop, and made some earnings by dressmaking work in her spare time. Though there was no evidence that at the date of her death she was earning money and contributed to the support of her parents, the court held on the above evidence that the jury had enough evidence before it upon which to find that there

- was prospective pecuniary advantage to the parents of which they were deprived of by her death.
65. In this case before me there is no evidence of any prospective earnings of Dr. Brinkman. There is no evidence of any financial receipts from employment and no evidence whether she was of any assistance to her parents. As a doctor, she would have been employed and earned a salary; but what would that salary be? How much of that salary she would spend on herself? How much would she have spent on her parents? Evidence concerning these matters are relevant for purpose of determining the multipland.
66. The claimant relies also on *Dolbey v. Goodwin 1955 1 W.L.R. 553*; and *Watten v. Vernon 1970 R.T.R. 471*. In *Dolbey*, there was evidence before the court that the deceased was in employment before he died and that he contributed £5 a week to his mother who on his death brought a claim under the Fatal Accidents Acts. She received an award from the court based on evidence before the court. So too in the case of *Watten* there was foundation evidence to the effect that the deceased who was 16 years when he was killed while walking on the road by a car was employed at a wage of £6 out of which he gave his parents a part. There was also evidence of the amount of salary he would have received if he had lived to the age of 25. In these cases there was foundation evidence from which the court used to award damages for loss of prospective earnings. The problem of the case before me is that there is no such evidence; or evidence of the earnings of her parents, whether they suffer from any ailment for

- which they might have needed assistance from their daughter in future, or whether she made any financial contribution to them in the past.
67. The claimant also relied on *Kandalla v. British European Airways Corporation 1981 Q.B. 158* for the accepted proposition that even if there is no firm evidence as to the income of the deceased at the date of her death, damages could still be awarded to the claimants on what the deceased might have expected to make had she not died. In *Kendalla* extensive evidence was given of the work, physical condition and financial situation of the claimant and the financial contribution he made to his two deceased daughters who were employed as doctors in England for several years before they were killed in an airline accident. There was also evidence of what doctors earn in the Natural Health Service (UK).
68. The court also by agreement was provided with figures showing the national average earnings of general practitioners in England from 1972 – the year the claimant daughters died – to the year of the decision 1981. The figures showed the net earnings after tax, for an unmarried doctor in 1979-1980. Using these figures the court was able to arrive at the net available income of the two deceased daughters and to award a quarter of that income as the multiplier or the amount of the dependency. The court was then able to arrive at an amount as damages using of multiplier of five. So although in *Kendalla* there was no firm evidence as to the income of the two daughters earning at the date of their death, there was much other foundation evidence from which the court used to arrive at a figure of

what they could have earned if they had not died. And there was also foundation evidence which enabled the court to decide how much of the daughters income would have been needed for the support of their parents.

69. Returning back to the case before me, I have no doubt that the deceased was bright and would have obtained a job as a doctor in the U.S.A. or elsewhere had she lived. At what possible future salary I do not have any evidence. How much she would have spent on herself, I have no evidence. She is unmarried, but I have no doubt, based on the evidence that she most likely would have married and have children, and being married would have had less of her income available for her parents support, because of her own future family needs.
70. Even in cases where there is foundation evidence as in *Kendalla* and the other cases cited above, there is a certain amount of conjecture on the part of the court in arriving at the yearly future earnings of a deceased person and the amount that would have been needed to support the dependants.
71. I have no doubt that the deceased if she had lived would have obtained as mentioned above a job as a doctor in the U.S.A. at a salary in U.S. dollars, and would have made a financial contribution from her salary to her parents; especially during their retirement years. The problem in this case, due to a lack of evidence, is to estimate the extent of her annual salary and the amount of it she would have annually contributed to her parents. Perhaps, based on the lack of

evidence, I should decline to award an amount of dependency; or perhaps I should re-open the case and give the claimant the opportunity to lead the required evidence, if it is available. The parents of the deceased, one of whom gave evidence in this case, and who may be able to give any required evidence do not live or reside in Belize, but in the U.S.A. Had they been living in Belize, re-opening the case may not have been a problem. Other questions that would arise are whether it would be fair to the defendants to re-open the claimant's case at this stage of the proceedings; whether the defendants should be heard on the issue of re-opening the case before a decision is made in that regard; and since the case has been pending in court since 2006 whether it would be fair to give the claimant a second chance to prove this aspect of the case? Moreover, could the court, in fairness to both sides, re-open the claimant's case without any application from the claimant to do so?

72. I think, on the facts of this case, the better thing to do, bearing in mind that had she not died she would have earned future earnings, would be to award a nominal sum as the multipland or the amount of the dependency. It is well known that nominal damages are awarded for the infraction of a legal right, where the extent of the loss is not shown, and is, in that case, a judicial declaration that the claimant's right has been violated. On the basis of the above I think awarding a nominal sum representing the multipland is the better thing to do. Moreover, as is often the case, in assessing the multipland, as the authorities above show, there is often, even where there is foundation evidence, some element of conjecture on the part of the court in

arriving at the multipland. I therefore award as the multipland the sum of US\$6000 per year which amounts to US\$250.00 per month for each dependant.

73. The multiplier of seven must be divided between the date of death of the deceased and the date of judgment, that is 4 years and 11 months, and the future years would therefore be 2 years and 1 month. The dependants are entitled to damages using a multiplier of seven and a multipland of US6,000 per annum as follows:

\$6,000 x 4 years, 11 months	=	US\$29,500.00
Plus interest of 6% per annum	=	\$1,770.00
\$6,000 x 2 years 1 month	=	<u>US\$12,500.00</u>
Total		<u>US\$43,770.00</u>

Since I have found the deceased contributed 20% to her death - \$8,754.00  
 Total US\$35,016.00  
 or  
 BZ\$70,032.00

In accordance with section 12 of the Torts Act, the damages are to be divided between the dependants in the following shares:

Roger Brinkman (father of the deceased) 50% =	US \$17,508.00 or BZ \$35,016.00
Janet F. Brinkman (mother of the deceased) 50% =	US \$17,508.00 or BZ \$35,016.00

74. An amount for loss of expectation of life, would, it seems to me, depend on the facts and circumstances of the particular case. However, the claimant in this case claims the conventional sum of BZ\$3500 for loss of expectation of life. I see no reason to vary from this sum. The claimant also claims US\$8,058.99 (or BZ\$16,117.98) as special damages. Roger Brinkman in his witness statement enumerated the various items that make the total claimed as special damages. I accept the evidence of special damages as claimed in his witness statement.

### **Conclusion**

75. I therefore make the following orders:

- (1) The defendants shall pay to the claimant for and on behalf of the dependants the sum of US\$35,016.00 or BZ\$70,032.00 as damages for causing the death of the deceased by negligence and neglect.
- (2) The said damages are to be divided amongst the said dependants in the following shares:
  - (a) Roger M. Brinkman (father) 50% or US\$17,508.00 or BZ\$35,016.00
  - (b) Janet F. Brinkman (mother) 50% or US\$17,508.00 or BZ\$35,016.00

- (3) The defendants shall pay to the claimant on behalf of the dependants the sum of BZ\$19,617.98 for loss of expectation of life and special damages.
  
- (4) The defendants shall pay costs to the claimant, to be agreed or taxed.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
30<sup>th</sup> September, 2010