

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW**

SUIT NO. C.L OF 1997/F-013

**BETWEEN ELITA FLICKENGER PLAINTIFF
(Widow of the deceased Robert Flickinger)**

**AND DAVID PREBLE
(T/AS XATABI RESORT CLUB & COTTAGES) 1st DEFENDANT**

AND XATABI RESORT LIMITED 2nd DEFENDANT

Appearances: Mr. Ainsworth W. Campbell and Mr. Rudolph Francis instructed by Ainsworth W. Campbell; Mr. Christopher Samuda instructed by Samuda and Johnson.

Heard: November 26 and 28, 2002; 2002, 2005, January 16,17,18,19, 20, April 4, and May 15, June 15, 2006; 2007; 2008. April 27, 2009; November 10, 2010

Claim in negligence or breach of duty under Occupiers' Liability; Claimant's husband drowned while snorkeling off Negril Coast while guest at Xtabi Resort; whether proper defendants sued; whether deceased was warned of dangers; whether breach of duty on the part of defendants or either of them; Whether deceased accepted risk of swimming in rough seas; whether Act of God; whether witness credible in light of previous inconsistent statement; causation/foreseeability in Tort Law.

CORAM: ANDERSON J.

- 1) This is a long outstanding judgment in this case which has spanned some eight years before me. The last day of actual hearing was in 2008 but it would be over one year later that the

submissions from the counsel would be made available to the Court.

- 2) As will have been evident from the dates of hearing set out above this is a case which, having been filed in 1997 has spanned ten (10) years of hearing. There were several interlocutory hearings including applications for security for costs and amendments to the parties' pleadings in the proceedings. In July of 2007 when the court finished hearing the evidence, certain orders were made as to the time for providing written submissions. The first submissions should have been made by counsel for the Defendants, since the defence had called witnesses. The Claimant's counsel did present his submissions in a timely fashion having waited for a considerable period for the Defendant's submissions. Regrettably, the submissions for the Defendant were received just before the end of the Easter Term of last year.
- 3) Regrettably also, despite both counsel having presented written submissions, neither had served their submissions on the other. Thus on April 27, 2009, I made further orders for the exchange of submissions and time for the Defendant to reply to any authorities cited by the Claimant. It was therefore not until the Summer Term that I had access to all submissions and authorities cited by counsel for the parties.
- 4) These submissions have been finally exchanged and the judgment may now be given, some fourteen years after the incident giving rise to the action. The facts giving rise to this case are tragically simple.

- 5) Robert Flickinger, an American Tourist arrived in Jamaica to spend his holidays here on February 8, 1995. He landed at the Sir Donald Sangster International Airport in the Western city of Montego Bay in St. James. On the following day he went to the tourist village of Negril where he checked into a hotel, called Xtabi Resort and managed on a day to day basis by David Prebble, the first Defendant herein.
- 6) Shortly after arriving at the hotel and checking into cottage number 1, the cottage apparently nearest to the sea, Flickinger who was described by my brother Sykes J, in an interlocutory proceeding in this matter, as an "avid snorkeller", changed into his swimming gear and went into the sea to pursue his passion of snorkeling. The brief exchanges in conversations he had with his wife, the claimant herein, before he went into the water were, tragically, the last conversation he would have with anyone. Within a short time of his entering the sea, he was swept away and a few hours later his lifeless body was recovered from the sea.
- 7) Elita Flickinger is the widow of the deceased and some two years later, having retained counsel who represents her in these proceedings, suit was filed on her behalf. When the matter first came before me in 2002, the matter was adjourned as it did not appear that the widow had secured the required letters of administration or otherwise had authority to represent the estate of the deceased.
- 8) Be that as it may, the matter came back on the court's calendar in 2005. It has generated a considerable amount of paper, and

several interlocutory applications as referred to above. In the application before Sykes J, the defendant hotel's name was amended to the manner in which it now appears, Xtabi Resort Limited. Mrs. Flickinger has brought this action as widow of the deceased on her own behalf and on behalf of their son Ronald, a dependant of the deceased. The action is brought in negligence under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act.

- 9) The particulars of negligence were set out in the Claimant's Fourth Further Amended Statement of Claim filed on February 4, 2005:

Particulars of Negligence

- (a) Failure to warn the Deceased of the danger of the storms that often develop in and around the sea that is proximate to the Defendants' premises.
- (b) Failure to take note of an impending storm and/or to warn the Deceased of the danger posed thereby to the deceased.
- (c) Failure to lock a ladder that allowed access to the sea in circumstances and conditions when it was dangerous for persons including the Deceased to go snorkeling.
- (d) Failure to rescue the Deceased when he became imperiled.
- (e) Failure to lock and or close the entrance to the sea when in all the circumstances it should have been locked and or closed.
- (f) Failure to have any or any preparation for the eventualities of storms developing that endanger persons using the

facilities of the Defendants' premises including the Deceased.

(g) Failure to assist and or to assist sufficiently in a rescue operation of the Deceased.

10. The Claimant says that when her husband changed into his swimwear and went into the sea, after swimming for some minutes he gave her a "thumbs-up" sign which she took to be an indication that everything was fine. She said that suddenly the sea changed. "There was a wind, dark clouds and rain. None of these conditions existed before he went into the water. There was lightning. The sea was rough."

11. She said she heard him shout for help and she went to the office to ask someone to get help for her husband. She said that the receptionist in the office tried to get the "jet ski people" but that the office of those persons was already closed. There is, it should be noted, nothing in the Claimant's evidence which showed that she knew of the existence of "jet ski people" near to the premises and in this respect, her witness statement differs from the submissions of her counsel in his written submissions.

12. In her witness statement the Claimant also spoke of attempts by persons at the Resort, to rescue the deceased from the sea using a rope. She said she eventually saw persons on jet skis in the area where her husband had gotten into difficulties. She says she does not recall any signs on the property warning guests of the danger of swimming in the rough seas.

13. The evidence on behalf of the Defendants was given by the first defendant, David Prebble who gave a witness statement and a supplemental witness, and a witness statement by Justin Bell who was the gardener/handy man at the resort and who had taken the couple's luggage to their cottage when they checked in. There was also a witness statement by a police officer at the Negril Police Station, Lionel Colthurst, who testified that he took a statement from the Claimant on the day after the deceased drowned.
14. Prebble, the manager of the resort, confirmed that the Claimant and the deceased had checked in as guests at the resort on the early afternoon of February 9, 1995. He was in his office as the couple was checked in by the receptionist. He had heard a conversation between the deceased and the receptionist about snorkeling while they were in the process of checking in. He was also aware that they had signed a registration form in which the resort purported to exclude liability for any loss or damage.
15. It was his evidence that some time after the witness Justin Bell had taken the couple to their cottage, he saw Bell running towards him. When he enquired, he was told that the guest, (Flickinger) had gone into the water by the cottage they occupied. He had accompanied Bell back to the cottage where they made attempts to assist the deceased in his difficulties by throwing out a rope with a life ring at the end, but was unsuccessful.

16. Justin Bell, in testifying for the defendant, said he had assisted the couple with their checking in and taken their luggage to cottage number 1. He said that there were signs posted along the walk way to the cottage warning that swimming was done at the risk of the guest as there was no lifeguard on duty. He also stated that he was the one who had alerted the first Defendant that the deceased was in difficulties in the sea. He had also assisted with the attempts to rescue the deceased while they stood on the level below the balcony of cottage 1. They were he said, unable to go down to the lower level as the waves were crashing over that level and it was dangerous.
17. Although in cross examination his reading skills were shown to be limited he, none-the-less, insisted that the signs warning guests of danger and the absence of a lifeguard, were in fact posted on the property, and indeed, one was along the walkway to cottage number one to which he had taken the claimant and the deceased.
18. The other witness for the defendants was a police officer, Lionel Colthurst. He testified that he was the police officer who, the day after the demise of the deceased, took a statement from the Claimant which he read over to her and which she signed. That statement was admitted as an exhibit in these proceedings. I shall refer to this statement later in considering the evidence which the court accepts as proven facts.

19. In it, the Claimant is alleged to have told the officer of how she warned the deceased that the sea was too rough and that he should not go snorkeling. Notwithstanding her entreaties, he said he would go swimming for just a few minutes. Not surprisingly, the Claimant did not agree that she said anything of the kind.
20. The evidence of Mrs. Flickinger, Justin Bell and much of the evidence of the other defendant, David Prebble, provide the only direct eye-witness account of the deceased's demise. The remainder of the evidence of David Prebble, was primarily directed to establishing who was the proper party responsible for the managing and operation of the hotel.
21. Mr. Prebble acknowledged that he was the day to day manager of the facility. He also indicated that the person from whom he took instructions was a Mr. Bornstein who was apparently, the main "shareholder" in the company which owned the facility.

The Evidence

22. According to the witness statement of the claimant, after they had checked into the resort and had been taken to their cottage, she and her husband changed into swimwear. She decided that she would sit on the balcony to get a sun tan while her husband decided to go swimming. She said that as he swam he gave her a "thumbs-up". Then, about fifteen minutes after he had gone into the sea, the conditions changed. She said suddenly, there was a storm. "There was wind, dark

clouds and rain. None of these conditions existed before he went into the water..... There was lightning, the sea was rough". It was her evidence that the rain did not last for very long, only about two to three minutes. She said when she saw what was happening, she went to the office to ask the receptionist to call the jet-ski people. However, they were closed and there was no one there.

23. She also gave evidence of the recovery of her husband's body from the sea some time later; the performing of a post mortem examination thereon and the expenses involved in getting the body prepared and sent to the United States for burial. In so far as the claim under the fatal Accidents Acts was concerned, she gave evidence of the kind of life she enjoyed with her husband and was supported in this by her son Ronald, who came to Jamaica the day after his father had died.

24. The evidence for the Defendant is already summarised above and is contained in the witness statements of David Prebble, Justin Bell and Lionel Colthurst.

25. While none of the witnesses for either party, with the possible exception of the claimant and Bell, could speak to the facts of what had happened when Mr. Flickinger drowned, Mr. Prebble testified that he had been made aware of the deceased getting into difficulties from Bell, who told him. He had then himself gone to the cottage and had tried to assist in the rescue but without success. Mr. Prebble also said that while he had never been a director, shareholder or officer of Xtabi Resort Limited,

he had worked as General Manager of the resort from 1986. He said he had been employed by a Mr. Henry Bornstein who was the owner and registered proprietor of the land on which the resort stood. It was his evidence that at the material time, Mr. Bornstein was the owner of the resort and principal of Xtabi Resort Limited. His evidence does not elucidate how Xtabi Resort Limited was related to operations of the resort. However, he also stated that "Brimhole Resort Development Company Limited operated the resort at the time of the incident". Again, there is no evidence of the relationship if any, between Xtabi Resort Limited and Brimhole Resort Development Company Limited.

26. The claimant in the course of cross examination of the defendant Prebble, sought to establish that he, Prebble, was an "occupier" for the purpose of allowing the claimant to establish a claim under the Occupier's Liability Act. In cross examination, Prebble had acknowledged that he had the power to hire or fire employees on a day to day basis' that is he was in charge of what took place on a daily basis.

27. As noted above in the evidence of Justin Bell, it was the case for the defendants that there were signs saying "Swim at your own risk: No Lifeguard on duty". As pointed out by Mr. Campbell in his written submissions, Bell was shown in cross examination to be barely literate. However, I accept as a fact that there were signs posted on the property to this effect and indeed one such sign purportedly taken from the way to the

cottage taken by the deceased and the claimant, was tendered into evidence as an exhibit.

28. Mr. Prebble in his evidence also stated that the registration card which was signed by the deceased also had an exclusion clause which exonerated the resort from any loss or damage and as such the resort could not be liable for the demise of the deceased or any damages flowing therefrom. I need to make the observation here that a "warning" is to be distinguished from a "notice" purporting to exclude liability.
29. In so far as the evidence of the drowning of the deceased is concerned, the counsel for the claimant asked the question why the defendants had not called the then receptionist at the resort to testify as to the conversation she had had with the deceased at the time of checking in. He also asked why when, according to Prebble, Justin Bell had advised him that Mr. Flickinger was in difficulties, he had not enquired whether Mr. Flickinger had not seen the signs about swimming.
30. I should note that in the statement purportedly given by the claimant to the police and which Lionel Colthurst said she read over and signed as correct, she said that after arriving at cottage number 1, her husband had gone to the shops and bought some items including snorkeling equipment. She said it was after he returned that they changed into swimming gear and decided to go snorkeling. In that statement she also said she had tried to dissuade him from going as the sea was rough but he insisted and went down the lower level. She also said

she saw him pick up a ladder which was not in the sea and placed it into holes in which it hooked so as to allow for one to descend into the sea.

SUBMISSIONS BY THE CLAIMANT

31. The submissions of the claimant are based upon a theory of liability in negligence on the basis that the defendants were occupiers of the premises, including the sea proximate to the resort, and that they had breached the duty of care owed to the deceased as a visitor to their premises.
32. In the pleadings the claimant states that “the sea around the premises of the defendants was dangerous for swimmers and snorkellers. Tropical storms often made the sea around the defendant’s premises even more exceedingly dangerous to snorkellers”. In the Fourth Further Amended Statement of Case the claimant averred that the deceased died because of the negligence of the defendants. The submissions claim damages for negligence and damages under the Fatal Accidents Acts. The particulars of negligence pleaded are set out above. However, the pleadings do not indicate against which of the defendants the particulars are applicable. The submissions do not assist the court in determining the evidence which has been led which relates to the particulars pleaded.
33. On the other hand, the claimant’s attorney’s submissions cite a number of authorities which have to do with liability under the Occupiers Liability Act. It should be noted that there is no pleading that defendants are liable pursuant to occupiers’

liability. The submissions of the claimant detail the damages claimed. These are special damages relating to funeral expenses as well as transport costs of returning the body of the deceased to the United States of America. The figure claimed is US\$11,941.45. There is also a claim under the Fatal Accidents Act for a sum of US\$252,592.45.

34. Notwithstanding sums claimed in the pleadings, the claimant's attorney in his written closing submissions claims as general damages two alternative sums in excess of US\$1.7 million dollars.

SUBMISSIONS BY THE DEFENDANT

35. Defendants' counsel, Mr. Samuda, in his written closing submissions asked the Court to find that the defendants ought not to be held liable in respect of the claim made by the claimant, Elita Flickinger. It was submitted that the court had to be satisfied that the averments in the pleadings had been substantiated by the evidence which had been adduced. In particular it was submitted that the claimant must establish the following facts:-

- a) On or about the 9th day of February 1995, whilst the deceased was snorkeling in the sea around and in close proximity to the defendants' premises, the sea became turbulent, suddenly and without warning;
- b) Storms often developed in and around the sea that is proximate to the defendants' premises.

Counsel pointed out that the claimant had sued both defendants as the “owners and occupiers and operators of the resort hotel”.

36. It was submitted that this must be taken to mean that at the material time, both defendants, that is, “David Prebble, trading as Xtabi Resort Club and Cottages and Xtabi Resort Limited were the owners, occupiers and operators of the subject resort”. However, no evidence had been led by the claimant, (on whom the burden of proof lay), which established, on a balance of probabilities, that this proposition was valid. Nor had it been pleaded that either of the defendants was the “owner, occupier or operator” of the resort. The claimant therefore had to establish its case that both the defendants were jointly the owners, occupiers or operators” of the resort. Indeed, counsel submits that the evidence of the first defendant is clear that he was the salaried manager of the resort employed by Henry Bornstein. It was also submitted that while David Prebble was in day-to day charge of the hotel, he was in constant contact with Henry Bornstein who was the owner of the land on which the resort was situated and, in fact, the owner of the resort. There is no evidence of any business or organization named “Xtabi Resort Club and Cottages”. In addition, all returns and taxes in respect of the resort are filed by Brimhole Resort Development Company Limited, the company which was also

responsible for the taxes and statutory deductions for the employees and all other bills of the resort.

37. It was the further submission of the counsel for the defendants that there had been no evidence presented that either of the defendants was the legal owner of the property. Certainly, there was no evidence which suggested that Xtabi Resort Limited, a separate legal entity, was the owner, occupier or operator of the resort. In any event, such an averment would be contrary to the pleadings which have the two defendants as “owners, occupiers and operators” of the resort. In the premises, the claimant had failed to show that either defendant is a proper defendant. Accordingly, neither owes a duty of care to the claimant and on that ground alone, the claimant ought to fail. Counsel cited the cases of **Royster v Cavey**, [1947] 1 K.B. 2004 and **Adams et al v Naylor** [1946] A.C. 543. These were cited as authority for the proposition that in order to succeed, a claimant must show that the defendants owed a duty of care to the victim of the tort. If the claimant fails to show that the defendant owes such a duty, then the claim must fail.

38. It was further submitted by counsel that, in any event, the claimant has failed to establish that the defendants breached any duty owed to the deceased. It was the defendants’ view that the deceased did not look to the defendants in relation to any duty owed to him on his deciding to go for a swim. Indeed, it was the defendants’ case that the deceased knowingly ignored

the warning signs which cautioned that rough seas are dangerous and that there were no lifeguards and so one swam at one's own risk. Notwithstanding that, however, the duty if it exists, is to take reasonable care not to cause injury. It was submitted that the defendants had taken reasonable care by placing the signs on the property in full view of prospective residents and it may be added, by removing the ladder from the position it would have been in if guests were being invited to go swimming. It should be noted here that there is no dispute as the claimant avers in her testimony that she saw the deceased take up the ladder from where it had been placed and put it into the grooves in order to descend into the water. The defendant relies for support on the authorities **Mersey Docks and Harbour Board v Proctor**, [1923] A.C. 253 and **Drink Walter v Morand**, [1929] 4 D.L.R. 421.

39. It is also the defendants' position that the claimant has failed to establish the facts upon which her case is pleaded. The case is that there was a sudden and violent storm which lasted about fifteen minutes. The rain lasted about two to three minutes. It had been clear before and the storm suddenly arose. Counsel submits that the defendants' version of the facts, that the sea was rough should be preferred to the version of the claimant. He suggested that there was no evidence provided to the court to support the existence of a storm, as that term is understood, as a violent disturbance in the atmosphere with

strong winds and usually accompanied by significant thunder and rain. On the claimant's evidence, there was rain for "about two minutes".

40. Moreover, it was the claimant's case that such storms occurred often in the vicinity of the defendants' premises. Counsel rightly points out that there is not a scintilla of evidence which bears out the assertion that there are frequent storms in the area. In the absence of proving these averments in the pleadings by evidence and on a balance of probabilities, the factual substratum of a claim for negligence disappears and the court ought to find for the defendants. In any event, counsel for the defendant argues, if there was an occurrence as described by the claimant, it would provide the basis for the defence of the "unforeseen hand", an Act of God".

41. Counsel for the defendants also submits that even if there were a duty and breach of that duty, the deceased had voluntarily assumed the risk with full knowledge of that risk. In that regard, counsel points to the statement of the claimant given to Lionel Colthurst and signed by her that she had warned the deceased not to go into the sea because it was rough. He also adverts to the warning signs which I find as a fact, were posted on the premises. The defendant submitted that a defendant occupier will not be held liable where a visitor voluntarily assumes the risk and dies as a result of doing so. {See **Cotton v Derbyshire Dales District Council** 1994 EWCA

Civ 17 (June 10, 1994); **Darby v National Trust** (2001) EWCA Civ. 189; **Simms v Leigh Rugby Football Club Ltd.** (1969) 2 All E.R. 923;

42. The defendants' counsel also submitted that the following principles may be drawn from the authorities:

- a) An occupier is only under a duty to warn visitors where they would be unaware of the nature of the risk without such a warning and that if the danger is obvious, no warning is necessary;
- b) The absence of warning signs regarding a possible danger is not a causative breach of the duty and the failure by a defendant to provide signs warning against the danger does not, *ipso facto*, ground liability

43. Even if the warning signs were not adequate and the danger not patently apparent, as the defendant contends, the defendant has in any event excluded liability by virtue of the exclusion clause printed on the registration card signed by the deceased. That clause was in the following terms:

“PROPERTY IS PRIVATELY OWNED AND MANAGEMENT RESERVES THE RIGHT TO REFUSE SERVICE TO ANYONE. WE WILL NOT BE RESPONSIBLE FOR ACCIDENTS OR INJURIES TO GUESTS OR FOR LOSS OF MONEY, JEWELRY OR VALUE OF ANY KIND”.

Insofar as this exclusion clause is concerned, it is trite that these clauses are strictly construed against the person who

seeks to rely on the clause. The clause does not, by its terms, exclude liability for death, and I would hold that it would not, by itself, protect the defendants if that were all that was being relied upon.

44. Defendants' counsel also submitted that the evidence of the claimant was not credible. In particular, he pointed to what he termed as the previous inconsistent statement given by the claimant herself on the occasion of her attendance at the Negril police station. In that statement, she had clearly stated that the sea was rough and she had warned her husband against going into the sea. In her *viva voce* evidence she sought to deny this. When pressed, she admits that she may have said so saying she did not read over the statement and she was not stable when she gave the account of "what happened". It is however, not unreasonable to conclude that her recollection of the events would have been clearer closer to the time of the incident. I accept as a fact that the sea was rough and that the claimant had implored him not to go in.

The defendants' counsel also points out the fact that the claimant's account of what transpired on arrival at the cottage at the resort. In the statement to the police, she indicated that her husband had left the cottage and went to shop for a few items before returning to the cottage. On the other hand, in her evidence in chief, she stated that upon arrival at the cottage, both parties immediately changed into swimwear.

