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 XTABI RESORT CLUB & COTTAGES) 1st DEFENDANT

AND XTABI 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 he 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.

She also was inconsistent in her accounts as to the weather conditions which prevailed on the day. In opening, the claimant's counsel had said that the claimant would say that the sea was a "little choppy". In her evidence however, she said that there were "waves", but she was not worried as she knew that her husband was a good swimmer. It is also unclear as to whether there were storm conditions apparent at the time when the deceased went into the sea. In the statement given to the police, she stated: "I told him not to go as the sea was rough and had a lot of big waves and he said: ' I am going to snorkel for just a few minutes' ". Her evidence in chief however does not support this account.

DAMAGES

45. With respect to the claimant's submissions on damages, the defendants' counsel submitted that if the court was not with it on the issue of liability, the claimant had not established her claim to the damages asked for. In so far as damages were concerned, the defendants' counsel said that the claimant had failed to provide the court with any credible evidence of income of the deceased. Indeed, it is to be noted that in his closing submissions, the claimant's counsel submits that there are two alternative sums which the court may order as damages under the Fatal Accidents Acts.

COURT'S RULING

46. It may be trite, but it is nonetheless necessary to state the principle that he who alleges must prove his case on a balance of probabilities. The claimant has brought these defendants to court on a claim that their negligence has caused loss and damage. The claimant must prove the assertion against either or both defendants. In that regard I believe that it is necessary to dispose of, as a preliminary matter, the submission of Mr. Samuda, the counsel for the defendants that there is no evidence led by the claimant which establishes that either of the defendants is the "owner, occupier or operator of the resort at which the deceased had checked in at the time of his death". In an application filed by the claimant and heard by my learned brother Sykes J, he held that the claimant was entitled to amend the name of the defendant to that contained in the above caption. He also held that notwithstanding the claimant's late application to change the name of the defendant, there could have been no doubt as to the person the claimant was suing. The defendant has led evidence that the registered title to the property on which the resort was situate, was in the name of Henry Bornstein who was the principal of both Brimhole Resort Development Company Limited and Xtabi Resort Limited. It was claimed that all returns and statutory deductions were made in the name of Brimhole Resort Development Company for the operation of the resort which, according to Mr. Samuda was "owned" by Mr. Bornstein.

47. It seems to me that notwithstanding the relationship between Mr. Bornstein and his companies, Xtabi Resort Limited is a proper defendant. Mr. Prebble had an opportunity to explain the role of Xtabi Resort limited and to deny that it operated the resort. In that regard, the fact of the existence of what seems at least to have been a "service company", Brimhole, which effectuates the making of returns statutory deductions on behalf of the operator of the resort, does not prevent the operator from being liable. I specifically hold that Mr. Bornstein was not the operator of the hotel as it would make a nonsense of setting up the other companies. I also hold that Mr. Prebble is also an agent or servant of the defendant Xtabi Resort Limited.

48. In this regard, my learned brother Sykes J. in the interlocutory application to amend the name of the defendant, which application was strongly resisted by the defendants, set out the reason for allowing the amendment sought. I agree completely and adopt the reasoning and analysis of the learned judge in refusing the submission that the claimant has failed to establish that the defendants are proper defendants. In particular, it must be remembered that this action seeks to impugn the behaviour of the defendants, jointly and severally, as "occupier". For the reasons set out by Sykes J. it cannot be denied that Xtabi Resort Limited was an "occupier". At paragraphs 37 to 39 he said:

37. I do not accept Mr. Samuda's submission that the application was in substance a change of party. This is not a case of a change of party as contemplated by rule 19.4(3). As I have endeavoured to show, to describe the result as having a "new defendant" is to misdescribe what happens under rule 20.6. What happens is that the real name of the defendant is now being put on the court record. Mr. Samuda's submissions are predicated on a very narrow definition of mistake under rule 20.6(2). Mr. Samuda's definition would confine mistake to misspellings alone. The authorities do not support such a narrow definition.

38. In this case, the claimant identified the defendants as the owner and occupier of the premises. This could only mean owner and occupier of the premises at the material time. The defendants initially accepted this description of themselves. The claimant and her husband were guests at the hotel at the time when the death occurred. The hotel was a going concern. It was in operation. As Lord Denning has reminded: when one speaks of occupier in this area of law it is simply shorthand for saying those who have sufficient degree of control over premises so that they have a duty of care to those who lawfully come unto the premises (see **Wheat v Lacon Co Ltd** [1966] AC 552, 577- 578). The details of the pleading and the particulars of negligence put the matter beyond doubt. The allegations in the statement of case could only be directed to the operator of the hotel.

39. The affidavit of Mr. Preble filed in support of the summons to dismiss the action speaks volumes. Paragraph three of his affidavit that I quoted earlier in this judgment makes it clear that he regarded the suit as being against the operators of the hotel at the material time. If this were not so, what other explanation can there be for him to say that one of

the defendants witnesses who was employed at the Resort at the time of the incident is no longer there? Mr. Preble spoke for both defendants. Why would the defendants need this witness if it were not to attempt to refute the specific allegations of negligence regarding how the hotel was operated at the material time? When he speaks in his affidavit of the suit becoming *"increasingly expensive for the Resort"*, could he really have been referring to persons other than the operators at the material time? When the amended defence refers to Mr. Preble as the manager of the Resort and denies that he was the owner and occupier, he must have been saying that he (as manager) was involved in the operation of the hotel. It is important to note that the address given by the claimant of the second defendant is West End Negril. Mr. Preble gives his address as care of Xtabi Resort Limited, West End, Negril P.O. It is common ground that the hotel at which the Flickingers were staying is located in West End, Negril. There is nothing to indicate that Mr. Preble and the second defendant understood the action in any other way, other than that the claimant was suing them as operators of the hotel at the material time. (Emphasis supplied)

49. Having said that however, I still have to consider whether the claimant has established her case against the defendants in a claim for negligence. She must accordingly establish that the defendants owed a duty of care to the deceased; that there has been a breach of that duty and damages arising from the breach. The claimant does not in specific terms accuse the defendants of breach of statutory duty under the Occupiers' Liability Act. In looking at the pleadings and the claimant's

submissions however, it seems clear that it is in relation to the duty as an occupier that the defendants are sued. Indeed, perhaps the first authority cited by the claimant is **Wheat v Lacon** [1966] AC 552. In that case, Lord Denning, MR in reference to the Occupiers' Liability Act, 1957, said:

> ".....the word 'occupier' is ... simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises. ... [W]herever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor'; and the 'occupier' is under a duty to his 'visitor' to use reasonable care. In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers.' and whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure....."

50. It would seem clear that given the degree of control which Prebble had over ingress and egress over the premises and his power to hire and fire, that he can be regarded as an occupier. But even assuming a duty as an occupier, the claimant must still show how the duty was breached. The claimant avers that there were no signs warning visitors that there were rough seas and that there were no lifeguards, and that swimming was done

at one's own risk. The claimant also avers in her particulars of negligence that the defendants failed to warn the deceased of storms that often develop in the area. There is no evidence that this was the case and therefore no basis has been made out for the need of any such warning. Indeed, the claimant sets out a list of "failures" by the defendants which she alleges amount to negligence, including "failure to warn of an *impending storm* and of the dangers posed thereby. But on the claimant's own evidence was that the "storm" arose suddenly and without warning after her husband had gone into the sea. Having seen the claimant as she testified and having noted the clear inconsistency between her statement to the police made a lot closer to the incident, I regret that I find her evidence quite unreliable and not credible. I accept that there were warning signs such as that tendered as an exhibit in this case.

51. With respect to the averments in the pleadings that the defendants failed to lock the ladder which was used by the deceased to climb down to the sea, I accept the undisputed evidence that the ladder had been pulled up and *it was the deceased who replaced it to use it to go down to the sea*. Further, the averments of a failure to do enough to rescue, or to assist "or assist sufficiently in the rescue of the deceased, are *conclusions* which are to determined by the court based upon the evidence from the claimant. Again, I regret that that evidence is not forthcoming for it does not say what the

defendants should reasonably have done which they did not do. Nor is it clear what the claimant means by not "locking the entrance to the sea" or having any "preparations for eventualities in the event that the sea became rough".

52. Indeed, it is not clear how the defendant can overcome the difficulty showing that the area where the deceased drowned was in fact contiguous with the premises in respect of which the defendants were the occupiers. This after all, was in the sea where the deceased had been swimming for some time before the rough seas developed. There were no measurements included proffered in the claimant's case. There was mention of the length of the rope to which a life vest was attached, but no evidence as to whether this was in all the circumstances, adequate, and so it has not been established as to precisely where in the Caribbean Sea the deceased died. Indeed, the claimant has not, in the evidence or the pleadings, advanced definitively the proposition that it was the rough seas which was the cause of the death of the deceased, as opposed to any other factor. Indeed, the death of the deceased could have been caused by other factors including his own lack of competence to negotiate rough seas, as well as the fact of his voluntary assumption of any risk, as submitted by the defendants. The importance of this fact is exemplified by the citation of dicta from Lord Hoffmann from **Tomlinson v Congleton Borough Council** case at paragraph 61, below. The existence of other

probable causes leads me to consider the next issue herein, that of causation.

53. It must be borne in mind that an essential element of negligence must be for the claimant to show causation. In other words, the claimant must show that the alleged breach was the *cause of the loss and damage*. Lord Hoffmann, writing in the **Law Quarterly Review** ([2005] LQR 592 at 596-597) stated the following:

> "First, it is usually a condition of liability that not only should one have done, or been responsible for, some act which the law regards as wrongful, *but that there should be a prescribed causal connection between that act and damage or injury for which one is held liable*. There may be other conditions as well, such as that the harm should have been foreseeable. But some prescribed causal connection is usually required. Secondly, the question of what should count as a sufficient causal connection is a question of law..." (Emphasis Mine)

The claimant must, as a matter of law, establish a causal connection (commonly known as the "but for" test) between the injury suffered and the conduct of the defendant.

54. In a recent Canadian Supreme Court decision, **Resurface Corp v Hanke** 2007 SCC 7 at para 11, the court had occasion to consider again the issue of causation. The Supreme Court, in that case, reasserted the traditional preference for the 'but

for' test in causation, even where an injury has multiple causes. **Resurfice Corp** involved a product liability action against the manufacturer of an ice resurfacing machine (Resurfice Corp) and the distributor of that product (Leclair Equipment Ltd). The plaintiff, Hanke, was an arena attendant at an ice rink. In 1995 he was badly injured after a hot water hose was mistakenly inserted into the ice machine's gas tank, causing an explosion when vapourized gasoline ignited from an overhead heater. Hanke suffered serious burns to his face, lost most of his fingers and spent two years in hospital. In his action, Hanke claimed that design defects in the machine were the cause of the accident. In particular, Hanke claimed that the water and gasoline tanks were similar in appearance and had been placed too close together, making it easy to confuse the two. In addition, Hanke alleged that the defendants had failed to provide appropriate warnings about the dangers associated with the use of the ice machine.

55. The trial judge dismissed Hanke's action on two grounds. First, with respect to foreseeability, the trial judge found that it was not reasonably foreseeable that an operator of the machine would confuse the two tanks. Hanke's own evidence at trial was that he knew the difference between the two tanks and knew not to put water into the gasoline tank. In addition, the trial judge found that the gas tank was clearly marked "gasoline only". Second, with respect to the issue of causation, the trial judge found that there was nothing wrong with the design of the

machine and that the plaintiff himself had caused the accident by turning on the water when he knew, or should have known, that the hose was in the gasoline tank. Therefore, having concluded that the plaintiff had failed to establish foreseeability or causation, the trial judge dismissed the action.

56. The decision at first instance was overturned by the Alberta court of appeal and the defendant appealed to the Supreme Court which reversed decision of the court of appeal. In the relevant part of its unanimous decision, the Supreme Court held that the "but for" test remained the proper test for the establishment of causation. The Supreme Court stated:

> "*The court of appeal erred in suggesting that, where there is more than one potential cause of an injury, the 'material contribution' test must be used. To accept this conclusion is to do away with the 'but for' test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the court of appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the 'material contribution' test. This is inconsistent with this court's judgments in* ***Snell v Farrell****, [1990] 2 SCR 311,* ***Athey v Leonati*** *at para 14,* ***Walker Estate v York Finch General Hospital****, [2001] SCC 23 at paras 87-88, and* ***Blackwater v Plint****, [2005] 3 SCR 3, 2005 SCC 58, at para 78.*"

The Supreme Court went on to conclude that the basic test for determining causation remains the 'but for' test, even in cases involving multi-cause injuries. The Supreme Court confirmed that this "fundamental rule has never been displaced and

remains the primary test for causation in negligence actions". McLachlin C.J. stated that:

> "*The 'but for' test recognizes that compensation for negligent conduct should only be made 'where a substantial connection between the injury and defendant's conduct' is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they 'may very well be due to factors unconnected to the defendant and not the fault of anyone' -* ***Snell v Farrell****, at p 327, per Sopinka J.*"

Canadian insurance lawyers, Susan Wortzman and Christine Snow of the legal firm Lerners LLP, in commenting on the **Resurfice** decision suggested, and I adopt their view, that:

> "The 'material contribution' test, on the other hand, is to be only applied in 'special circumstances' where two requirements are met. These are: (i) where it is impossible (due to factors outside the plaintiff's control) for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test; and (ii) where it is clear that the defendant breached a duty of care owed to the plaintiff, *exposing the plaintiff to an unreasonable risk of injury*, and the plaintiff suffered an injury. (My emphasis)

It will be appreciated that the "but for" test articulates the principle that *causation only exists if the harm suffered by a party would not have happened in the absence of the defendant's conduct. The test ensures a defendant will not be held liable for a claimant's injuries where they may very well be due to factors unconnected to the defendant and not the fault of anyone.*

57. In light of the reasoning above, I am of the view that even if the defendants had failed to provide the warning signs, (I have found as a fact that they did provide signs), and even if the other particulars of negligence alleged had been established, and I hold that they have not, the claimant would still have to fail as they have failed to establish the principle of causation.

58. In the event that I am wrong on this issue, I would go on to consider whether there is any liability which arises under the Occupiers' Liability Act. The Act provides in section 3 as follows:

1) An occupier of premises owes the same duty (in this Act referred to as the common duty of care") to all his visitors except in so far as he is free to and does extend, restrict modify or exclude his duty to any visitor by agreement or otherwise.
2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
3) The circumstances relevant for the present purposes include the degree of care and of want of care which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing:-
   (a) An occupier must be prepared for children to be less careful than adults;
   (b) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so;
4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.
6) Where.....
7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor. (The question as to whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another)

59. It is apparent, by its terms, that the duty of care owed to a visitor under the Act is no higher than the duty at Common Law. The terms of section 3 of the statute make it clear that in considering whether the duty has been observed, all the circumstances of the case must be looked at. Thus the statute recognizes that children are likely to be less careful than others. Adults, on the other hand, must be taken to appreciate the dangers posed by rough seas. Further, in the instant case, the evidence suggested that the deceased was an "avid snorkeller". I would infer from that that he had some ability as a swimmer and respect for the inherent risks associated with the sea.

60. Subsection (5) of section 3 specifically seems to absolve the visitor from liability for loss or injury where the danger is one in respect of which the visitor had been warned. Mere warning is not in and of itself enough to absolve the occupier, but all the circumstances must be looked at. In the instant case, as I have

found, the deceased had been warned that "rough seas are dangerous" and that there was no lifeguard on duty.

61. I found the case of **Tomlinson v Congleton Borough Council and Others**, [2003 UKHL 47, to be very instructive. There, the claimant, a young man was a visitor on the property of the defendant. On that property was a fourteen (14) acre man made lake, created by flooding an old sand quarry, in which the claimant went for a swim. He waded into the water until it was just above his knees and then dived in and struck his head on sand, broke his neck at the fifth vertebra and as a result, he was made a tetraplegic. Lord Hoffmann, delivering judgment in that case said:

> ".....in these proceedings (the claimant) seeks financial compensation: for the loss of his earning capacity, for the expense of the care he will need, for the loss of the ability to lead an ordinary life. But the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault. In order to succeed in his claim, that is what Mr. Tomlinson has to prove. His claim failed on the basis that he was unable to prove that the defendants were at fault".

In that case Lord Hoffmann also delivered himself of the following dicta, which I respectfully adopt for the purposes of these proceedings:

> I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. *Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so*. (Emphasis Mine)

62. In the same case, Lord Hutton who agreed with the principles enunciated by Lord Hoffmann also expressed similar views on the question of swimming in the context of the United Kingdom Occupiers' Liability Act of 1957 and 1984. (The Jamaican Act is in similar terms to the UK 1957 Act). At paragraph 60 of the judgment, he opined:

"In **Cotton v Derbyshire Dales District Council** (20 June, 1994, unreported) the Court of Appeal upheld the decision of the trial judge dismissing the plaintiff's claim for damages for serious injuries sustained from falling off a cliff. Applying the judgment of Lord Shaw in *Glasgow Corporation v Taylor* the Court of Appeal held that the occupiers were under no duty to provide protection against dangers which are themselves obvious".

He then went on to say in paragraph 63:

"In **Darby v National Trust** [2001] PIQR 372 the claimant's husband was drowned whilst swimming in a pond on National Trust property. The Court of Appeal allowed an appeal by the National Trust against the trial judge's finding of liability and May LJ stated at p 378:

> "It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs. In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond."

63. Lord Hobhouse of Woodborough shared similar thoughts in the same case. He said:

> "In this case the trial judge after having heard all the evidence made findings of fact which are now accepted by the claimant: *There was nothing about the mere which made it any more dangerous than any other stretch of open water in England. Swimming and diving held their own risks. So if the mere was to be described as a danger, it was only because it attracted swimming and diving, which activities carry a risk. Despite having seen*

signs stating "Dangerous Water: No Swimming", the claimant ignored them. (Emphasis mine)

64. I respectfully adopt the views of the learned law lords. In the instant case there is no evidence that the waters in the vicinity of the Xtabi Resort were any more or less treacherous than anywhere else in Jamaica. There was certainly no evidence of the existence of rip tides or particularly dangerous currents. But I am strengthened in my view that the claimant must fail because I believe she was being truthful in that part of her statement given to the police, in which she said the sea was "rough" and she warned her husband not to go swimming. That evidence in the statement is corroborated by the evidence of the 2nd defendant.

65. Even if the claimant's account of the events of that fateful February day in 1995 is as she recounted it in her witness statement, it seems to me that it would raise, on its face, the defence of "Act of God" which the defendants' attorney has raised. The term is taken to refer to events outside of human control such as sudden floods or natural disasters for which no one is held responsible. If there was this "sudden unexplained storm, which came up without warning and rain lasted only two or three minutes" as stated by the claimant it would certainly raise the question whether this represented an intervening event which avoided the liability of the defendants.

66. If, on the other hand, the seas were rough with "big waves" as the claimant said in her statement to the police, and which I

accept as the factual position on a balance of probabilities to have been the case, it is certainly not reasonably foreseeable that a person who was an "avid snorkeller" would have placed himself at risk in the rough seas by going in for a brief swim, when he was booked to stay at the resort for several more days.

67. In summary, the claimant has failed to establish to the requisite standard, on a balance of probabilities, that the defendants or either of them, had breached a duty of care owed to the deceased so as to allow her to succeed in this claim. Nor has it been established that if there was a breach of duty, such breach was the cause of the death. As tragic as the loss of a husband and father is, and as much as the claimant is entitled to sympathy, the court cannot provide relief on the basis of sympathy and find liability where none exists.

68. In light of the decision at which I have arrived, it is not necessary for me to consider the substantial submissions on the issue of damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act.

69. In the circumstances, the court makes the following order: "Judgment for the defendants with costs to be taxed, if not agreed".

ROY K. ANDERSON
PUISNE JUDGE
NOVEMBER 10, 2010