

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. No. 3229 of 1989**

**BETWEEN**

**PETER GRANGER**

**Plaintiff**

**AND**

**NEPTUNE INSPECTION AND DIVING SERVICES LTD.**

**AND**

**AMOCO TRINIDAD OIL CO.**

**Defendants**

**Before the Honourable Mr. Justice Ventour**

**Appearances:**

Mr. S. Marcus SC instructed by Ms. G. Edwards for the Plaintiff

Mr. F. Solomon SC and Mr. I. Benjamin instructed by Mr. W. D. Clarke for the second Defendant

The first Defendant took no part in the proceedings.

**JUDGMENT**

On 24<sup>th</sup> August, 1988 the Plaintiff suffered serious personal injuries. The medical doctor who gave evidence on behalf of the Plaintiff diagnosed the Plaintiff as suffering from the disease called bends.

**The disease bends**

Research has shown that commercial divers are highly susceptible to this type of disease. When divers descend into the water the external pressure increases

proportionally to the depth. The longer the diver stays down and the deeper the dive the more compress gas is absorbed by the body. When the diver ascends, time must be allowed for the additional gases (in particular, nitrogen) to be expelled slowly from the body or they will form bubbles in the body tissues. When the pressure decreases the excess nitrogen is released. If therefore the diver ascends too quickly not allowing enough time for the release of the additional gases from the body tissues the diver can suffer from bends. A slow ascent allows the gases time to diffuse from the tissues into the blood stream which then pass into the respiratory system and are exhaled from the body. After coming out of the water the diver is quickly placed into a decompression chamber to remove any additional gas from the body tissues.

**Is the second named Defendant liable?**

This Court is being asked to determine whether the Plaintiff's injuries are as a result of the negligence of the second named Defendant or whether the Plaintiff is solely responsible for his own misfortune or whether he contributed in anyway whatsoever. There is no dispute that the first named Defendant was engaged as an independent contractor by the second named Defendant to perform certain underwater operations on Platform C, Saaman field, Pt. Galeota. The Court must therefore find on the evidence that the second Defendant owed a duty of care to the Plaintiff, an employee of the first named Defendant, and that that duty was breached by the second named Defendant in order to establish any liability on the part of the second named Defendant for the injuries suffered by the Plaintiff.

### **The Pleadings:**

The Plaintiff by his Statement of Claim contends that on 25<sup>th</sup> August, 1988 he was performing his duties as a diver pursuant to his contract of employment with the first named Defendant. He alleges that on the same day, that is, the 25<sup>th</sup> August, 1988 the first Defendant was engaged in underwater operations and services on Platform C, Samaan Field, East Coast, Pt. Galeota, pursuant to a contract for the performance of such services and operations made between the first and second named Defendants, which said platform and field were premises of the second named Defendant.

The Plaintiff also contends that the said premises and the surrounding area were at all material times a factory within the meaning and definition of the Factories Ordinance, Chap. 13 No.2 of the Laws of Trinidad and Tobago (“the Ordinance”) and that on the said day, that is 25<sup>th</sup> August, 1988 while he was obeying the lawful instructions of the first named Defendant its servants and/or agents he completed a dive to a depth of about 175 feet below the water at the said premises of the second named Defendant and was about to return to the surface when the diving equipment failed and/or malfunctioned causing the Plaintiff personal injuries.

Particulars of personal injuries and negligence are detailed in paragraphs 6 and 7 of the Statement of Claim. Alternatively, the Plaintiff contends that his injuries resulted from a breach by the Defendants of their statutory duties owed to him pursuant to the provisions of the Ordinance and the Regulations made thereunder. Particulars of the breach of the statutory provisions were provided by paragraph 8 of the Statement of Claim.

Still further in the alternative, the Plaintiff is alleging that the injuries that he sustained were as a result of a breach by the first named Defendant of an implied term of the contract of employment and/or duty owed to him by the said Defendant to the effect that he would not be exposed to unnecessary risk and that this Defendant would take all reasonable care for his safety during the course of his employment and would provide a safe system or manner of work for him.

The first named Defendant filed no defence and in fact took no part in the proceedings before this Court. The second named Defendant on the other hand denies that the premises known as Samaan Field were the premises of the second named Defendant but admits that on 24<sup>th</sup> August, 1988 (not the 25<sup>th</sup> as alleged by the Plaintiff) the Plaintiff completed a dive at Platform C, Samaan Field to a depth of about 170 feet and that during the said dive the Plaintiff was receiving instructions from the servants and/or agents of the first named Defendant. The second named Defendant however, denies that the Plaintiff's diving equipment failed or malfunctioned or was incompetently handled as alleged or at all. This Defendant contended that because of the Plaintiff's own negligence his air hose was caught between the casing guides when he was about to return to the surface.

The second named Defendant by its Defence denies that it or its servants or agents were negligent as alleged or that the Plaintiff injuries were the result of the second Defendant's negligence. The second Defendant also denies that it, its servants and/or agents were in breach of any statutory duty to the Plaintiff or that such breach caused the alleged or any injuries to the Plaintiff. Finally this Defendant contends that if the

Plaintiff suffered any injuries (which is not admitted) the same were caused solely or alternatively were contributed to by the Plaintiff's negligence.

The following are the particulars of the alleged negligence of the Plaintiff as pleaded by the second named Defendant:

- (a) **The Plaintiff approached the job from the wrong side and caused or permitted his air hose to become fouled in the manner set out in the pleadings.**
- (b) **Prematurely and unnecessarily took off his Kerby Morgan thus disconnecting himself from the supply of air from the platform and resorted to the emergency air unit.**
- © **The Plaintiff disobeyed the instruction of the Supervisor, the said John Lickford to remain at the stage and await the arrival of the standby diver who had been dispatched to assist him.**
- (d) **The Plaintiff ascended to the surface from a depth of approximately 170 feet too quickly and/or without going through proper decompression procedures and/or contrary to the instructions of the said Lickford.**
- (e) **Failed during the dive to observe all usual and proper safety and/or decompression procedures.**

In his Reply the Plaintiff denies being in any way negligent whether contributory or otherwise and contends that the cable connecting the stage was too short which prevented him from approaching the job from the wrong side as alleged by the second Defendant. He also denies disobeying his supervisor and contends that it was he who

requested the assistance of a standby diver and that while he was awaiting such assistance his air supply started to decrease which necessitated his action.

**The issues on the Pleadings:**

In the view of this Court the following issues arise for determination on the pleadings:

- (1) Are the provisions of the Ordinance applicable to the facts of the case and if so is a duty owed by the second named Defendant to the Plaintiff under the provisions of the Ordinance and has that duty been breached by the second named defendant;
- (2) Did the second named Defendant owe a duty of care to the Plaintiff to ensure that all necessary precautions are taken to prevent any danger to the Plaintiff.
- (3) If such a duty was owed was that duty of care breached by the second named Defendant resulting in personal injuries to the Plaintiff.

**Undisputed facts:**

There is absolutely no dispute that on 24<sup>th</sup> August, 1988 the Plaintiff was employed by the first named Defendant as a diver. There is also no dispute that at the material time the first Defendant was performing certain under water operations for the second named Defendant pursuant to a contract for such services entered into between the first and second named Defendants on the 2<sup>nd</sup> day of April, 1985 (the contract).

**The Plaintiff's evidence:**

The Plaintiff testified that on 24<sup>th</sup> August, 1988 sometime after 9:00 p.m. he was awakened by his supervisor John Lickford (who was the Manager and Supervisor for the first defendant) and told to prepare himself for the next dive. The Plaintiff was dressed

by the tenders (the diver's assistance) and had all his diving equipment checked by the tenders before executing the said dive. Part of his diving equipment was a large helmet called the Kerby Morgan to which was attached several cables/hoses, one for breathing, another for communication between the diver while executing the dive and the Supervisor who remains at the station on the platform. There was a third hose referred to as a nemo hose which was used to measure the depth of the water under the sea surface.

The work which the Plaintiff had to undertake was at a depth of approximately 175 feet. The stage which was used to take the Plaintiff down to perform his duties was operated by air pressure. The evidence of the Plaintiff is that the stage was supposed to have reached the sea bed but in the instant case the stage cable only extended to a distance of about 25 feet short of the sea bed so that the Plaintiff had to swim from the stage to the bottom of the sea to carry out his duties which included getting the well casing into the guide.

Having completed the job the Plaintiff then reported to his supervisor the fact that he had completed the job and was told by the supervisor to "come up right now". At that point the Plaintiff said that he realized his hose was stuck among the debris at the bottom of the sea. Visibility was zero so he had to feel his way around. At that stage the Plaintiff said that he asked his supervisor for a standby diver but the supervisor's response was not encouraging.

However, while moving around he discovered that it was the nemo-hose which had stuck and after freeing the hose he then informed the supervisor and indicated that he was returning to the stage. Once back in the stage the Plaintiff said he advised the supervisor that he was ready to be taken up but was then told that there was no air coming

from the compressor to operate the winch to pull the stage up and that he (the Supervisor) was going to look into the matter.

The Plaintiff testified further that the first defendant is supposed to have had two compressors – one for operating the stage and the other to provide air for the diver to breathe while making the dive and for the purpose of decompression. He said that the process of decompression begins while the diver is under water and when he reaches the surface he immediately enters the decompression chamber. He said that the air which was used to operate the stage winch came from the second named Defendant's platform.

While in the stage he said he felt no air coming through his air hose neither was there any communication link at the time. He heard a loud noise while in the stage and thought (and was able to confirm) that the well casing had been released from the guide. He removed the Kerby Morgan and sought to use the aqualung (a stand by breathing apparatus) but when he tried breathing with the use of the aqualung he realized that water was coming through the system. Fearing the worse he decided to swim to the surface.

About 20 feet before he reached the surface he passed the standby diver who, apparently, was on his way down. He handed his aqualung to the standby diver and held on to the jacket leg of the platform from where he waited the resurfacing of the stage, a process which he said took approximately five minutes. He then jumped on to the stage which took him up to the 15-plus deck. Thereafter he climbed some stairs to the production level which was some 30 feet away. At that point he said he "freaked out" and was assisted by some other workers and taken to the decompression chamber. It was while he was in the chamber he felt as if needles were in his feet.

After his first session in the chamber he came outside and stood up against the compressor holding on to its handle when he felt his body swaying from side to side. He was immediately sent back to the chamber for further decompression but at the end of the second session he said he was unable to come out of the chamber because he felt a paralysis from his feet right up to his waist and then to his chest. He could not move. He was given a third session but there was no change in his condition. The supervisor summoned Doctor Spicer who met and spoke to the Plaintiff at the AMOCO offshore dispensary.

The Plaintiff said that Doctor Spicer ordered that he return to the chamber at 12 midnight but that his employers took him to a hotel instead where he spent the night and was taken to the Cocorite Seventh Day Adventist Hospital the following morning. He remained in the hospital for approximately 28 days during which time he was taken down to Chagaramas for decompression treatment but there was no change nor was there any improvement in his condition. He was later transferred to the Port of Spain General Hospital where he spent a further 2 or 3 weeks.

When asked by his Counsel whether he knew who owned the platform he answered in the affirmative and went on to say:

**“If the supervisor says that we are going to work on AMOCO platform then I believe it is AMOCO platform”.**

Further in his testimony he said he had seen the sign on the platform mark AMOCO. He also said that on the day of the incident one of the two compressors used by the first named Defendant had broken down, that is, the compressor which provided the air to operate the stage winches.

At the Cocorite Hospital where he spent some 28 days he said although they tried to get him to eat he could not. He was fed mainly with gello and that he could consume no solid foods. He said he even suffered a heart failure. He was later transferred to the Port of Spain General Hospital where he was warded for about 3 weeks. He was seen by two psychiatrists. He continued to drink juices only. He could not eat. He was put on drips. He continued to experience no feelings from his chest right down to his feet. He was next sent to the St. James Infirmary where he spent about 6 months. At the Infirmary he was given 3 pints of blood and was trained to sit in a wheel chair. Still unable to eat he was put on a programme of physical exercise like “push ups” but he said that he was only able to do about 2 or 3. After a while he was able to sit pretty well in a wheel chair. He was allowed to visit his home rather frequently but after “the going and coming” he decided to stay at home rather than at the infirmary.

He is unable to use the toilet on his own. He wears pampers and has to be assisted from his bed to the wheel chair. Prior to the incident on 24<sup>th</sup> August, 1988 the Plaintiff says that he was engaged in weight lifting. He played some tennis; he did a little dancing and he also played the guitar. On some mornings he would run and he enjoyed sea bathing. He could no longer participate in those activities because of his condition.

Since the accident he has married and even though he is unable to indulge in sex he enjoys the relationship with his wife. As a professional diver he had earned \$400.00 per day. On any one year he would work for a period of 6 months. He admitted that during the six months he would not work every day but when called out to work he spent 24 hours out on the platform but works for 12 of those 24 hours.

During cross-examination by Senior Counsel Mr. Frank Solomon the Plaintiff admitted that it was his duty to satisfy himself that all the diving equipment had been checked to ensure that they were in good working condition and that no one could compel him to execute a dive without the equipment being first checked. When asked whether he knew who had provided the compressor to operate the stage on the previous occasions when he dived he said that the second Defendant did. The witness said that if the second Defendant provided the air to operate the stage then it would have had to own the compressor that provided the air. He was certain that the first named Defendant was being supplied with air for the winch that operated the stage from the second named Defendant. When pressed further however the Plaintiff said that he did not know who owned the compressor which provided the air for the stage.

The Plaintiff explains under further cross-examination that from the depth that he had dived he would have had to make three water stops on his way to the surface and that after he had reached the surface he had about 5 minutes to get into the decompression chamber. He said that the first stop would normally be about 65 feet and that he would be kept there for about 45 minutes. The next stop would be at a level of about 30 feet and there he would spend 20 minutes; finally the third stop is at a level of 15 feet at which stage he spends about 10 minutes and then finally he gets to the surface and must enter the chamber within 5 minutes.

The Plaintiff admitted not having made any of the required stops while swimming to the surface. He said that while he was using the aqualung he was taking in water with air and in an effort to save his life he could not have made any stops on his way up. He assumed that the water was entering through the regulator because something may have

gotten into the diaphragm of the aqualung. He said he never expected the aqualung bottle to leak and that necessitated his quick ascent to the surface. He admitted however that if the equipment did not malfunction he would have ascended more slowly.

Dr. Spicer who was called to give evidence by the Plaintiff said he attended to the Plaintiff at the Cocorite Community Hospital. He did a physical examination of the patient each day and applied decompression treatment once a day from August 26<sup>th</sup> to September 4<sup>th</sup> 1988 in an attempt to revitalize the spinal cord. He had hoped for some improvement to the patient's condition if in fact the initial injury was not already permanent.

Dr. Spicer testified further that on 5<sup>th</sup> September, 1988 the patient developed pulmonary embolism (that is a clot in the lung) which condition was attended to by a cardiac specialist. While being treated for this condition the doctor said that the patient suffered a kidney failure. A kidney specialist was summoned and he had to apply a treatment known within the medical circle as peritoneal dialysis which is a procedure used to flush out the impurities of the stomach. The medical doctor further testified that the patient's cardiac and kidney condition improved considerably but that his neurological condition did not. In fact the patient was discharged from the Community Hospital on 22<sup>nd</sup> September, 1988 and was admitted on the same day as a patient of the Kidney Unit at the Port of Spain General Hospital. Doctor Spicer had by then formed the view that the patient had suffered a permanent paraplegia of his legs and permanent disability of his bladder and bowels. Part of his prognosis was that the patient would become impotent. The doctor further testified that he last examined the patient on 16<sup>th</sup> January, 1998 and found that he was still paralysed in both legs and that the patient said

to him then that he was impotent which condition is consistent with the doctor's earlier findings.

**The second named Defendant's evidence:**

Mr. Albert Johnson was the only witness called to give evidence on behalf of the second named Defendant. Like the Plaintiff he too was employed by the first named Defendant and on 24<sup>th</sup> August, 1988 he was the standby diver for the Plaintiff. He had 22 to 25 years experience as a professional diver. To a large extent Mr. Johnson's testimony corroborated that of the Plaintiff in so far as the procedure applied in preparing the diver for the dive and the nature of the equipment used by the diver. The witness explained that the standby diver was necessary in the event that the diver gets into any difficulty or if he needs any assistance in completing the job he had been sent to do. Mr. Johnson said that there are air tanks around in the event the compressor malfunctions. In fact, he said that if the diver complains about the air the supervisor simply turns a valve and the diver receives air from any of the standby air tanks.

Mr. Johnson further said that at the time of the accident it was not compulsory for divers to dive with the bail out bottle on their backs and instead they would have placed the bail out bottle in the stage. He says that it is now compulsory for the diver to carry the bail out bottle on his back because it is a safer course to adopt. The witness also said that he was present when the Plaintiff's equipment was checked by the tenders. He confirmed that the decompression chamber was located on the drilling deck which is above the production level (see exhibit "Y") and that the decompression chamber was brought onto the platform as part of the first Defendant's equipment. He said that the

main air supply comes through the J valve from upstairs and that the bail out bottle supply air to the diver in the event that the main air supply is interrupted.

Mr. Johnson testified that after he had jumped into the sea and descended for about 20 or 25 feet he felt something bounce his feet and realized it was the Plaintiff. He returned to the surface and showed the Plaintiff where the ladder was to climb to the 15 plus level. He had taken the bail out bottle (aqualung) from the Plaintiff. He said that the Plaintiff climbed the ladder and that he (Mr. Johnson) climbed up behind him. This witness said he then asked his standby diver to follow the Plaintiff.

Mr. Johnson also explained that after the Plaintiff got up to the 15 plus he then walked around to the southern side to get up to the production deck which is about 30 feet away and then he had to climb the staircase to get to the platform on the drilling level which is another 30 feet away where the decompression chamber is located.

Mr. Johnson explained further that as long as the regulator of the aqualung hangs loose at the bottom of the sea water will get in and that if the diver puts on the regulator for the bail out bottle without activating the purge valve he will take in water. He said that the water in the mouth piece will only be released if the purge valve is activated and the diver will get air without any water.

Under cross-examination by Counsel for the Plaintiff the witness agreed that if the compressor breaks down there will be a loss of air to the diver or if there is any event which causes the diver to panic he will not measure time when it is a matter of life and death. The diver he says will seek to get to the surface as quickly as possible if faced with a panic situation. The witness also admits that the platform belonged to AMOCO and that among the several employees of the first Defendant there was a representative

from the second named Defendant whom they referred to as the AMOCO inspector. He said that the inspector whose name was Peter Britton communicated with Mr. Lickford the supervisor and manager of the first named Defendant throughout the operations. Most of the time they occupied the room where the diving gear was located. Mr. Johnson said that Mr. Britton usually enquired of the divers how the job was going and whether they were getting through with the job. He said that it was the second named Defendant who hired the various drilling crew to carry out certain works on the platform. This witness further testified that the AMOCO inspector whom he had known for about three to four years before the operation on the Samaan C platform was present for the entire operation. The witness confirmed that on 24<sup>th</sup> August, 1988 the first Defendant's air compressor had broken down during the operation and that Mr. Lickford had to make a request from Skinner Drilling Co. for air for the diver. Mr. Johnson found that it was reasonable for a diver in the case of an emergency to seek to come up to the surface in the shortest possible time.

**Counsel submissions:**

On that evidence Counsel for the second named Defendant has submitted that the drilling platform and its environs do not, as a matter of construction, constitute a factory as alleged by the Plaintiff and that as a consequence the statutory duties prescribed by the Ordinance do not apply. Counsel also submitted that there is no evidence tendered by the Plaintiff to support the allegation of negligence against the second named Defendant and as a consequence the claim made by the Plaintiff against the second named Defendant ought to be dismissed.

On the other hand Counsel for the Plaintiff contends that the Platform C, Samaan Field, East Coast, Pt. Galeota were premises of the second named Defendant and were on 24<sup>th</sup> August, 1988 a factory within the provisions of the Ordinance. He also argued that as a consequence of the negligence of the second named Defendant (while the Plaintiff was performing the diving operation) the diving equipment including the diving gears and apparatus failed and/or malfunctioned, resulting in injury to the Plaintiff.

Counsel for the Plaintiff submits that the second named Defendant is liable to the Plaintiff for:

- (i) Breach of the duty of care, which the second named Defendant owed to the Plaintiff; and
- (ii) Breach of the statutory duty owed by the second named Defendant to the Plaintiff pursuant to the provisions of the Ordinance.

The Plaintiff alleges that the second named Defendant was negligent when it:

- (a) failed to provide a sufficient supply of air particularly for the need of the Plaintiff during the diving operation;
- (b) provided an emergency standby air unit with a leaking regulator causing the Plaintiff to ingest water;
- (c) failed to supply properly working and efficient equipment and apparatus for use by the Plaintiff;
- (d) failed to provide cable/hose of a sufficient length for use by the Plaintiff in the said diving operation;
- (e) was in breach of regulation 20 under the Factories Ordinance when it failed to provide an air pressure container and fittings of good construction.

### **Was the Platform a “factory” within the meaning of the Ordinance?**

I shall first examine the Plaintiff’s contention that the said platform field and surrounding environs where the Plaintiff was contracted to carry out the diving operations on 24<sup>th</sup> August, 1988 were a factory within the meaning of the Ordinance and that the second named Defendant was in breach of the statutory duty owed to the Plaintiff under the provisions of the said Ordinance.

It is to be noted that in section 2(1) of the Ordinance the expression “Factory” means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the purposes referred to in paragraphs a, b and c of the said sub-section and further the sub-section goes on to identify a number of premises in which persons are employed in manual labour and which by their nature would be included in the definition of the expression “Factory” for the purposes of the Ordinance. See sub-paragraphs (i) to (xv) of sub-section 2(1) of the Ordinance. I have carefully analysed each of these sub paragraphs and have found nothing to remotely suggest that the Samaan C platform as constructed and having regard to the purpose of which it was being used on 24<sup>th</sup> August, 1988 was or is a factory within the Ordinance.

Still on the provisions of the Ordinance Counsel for the Plaintiff has argued that whether or not the platform of AMOCO qualified as a factory within the definition of the Ordinance the regulation and/or the provisions of the Ordinance in respect of (i) Hoists or Lifts, (ii) Steam Boilers, (iii) Air Pressure Containers, must be observed whether or not the hoist or lift, steam boiler or air pressure container is situated in the premises to which the Ordinance applies.

Counsel submits that the evidence establishes that AMOCO has been in breach of Regulation 20 and is accordingly liable thereunder.

The Rules and Regulations governing the operations of Factories in Trinidad and Tobago are to be found in Volume IX of the 1950 Laws of Trinidad and Tobago. At page 287 of Volume IX there is the **Factories (Prescribed Forms) Order** and under Form 2 of that Order there are expressed certain safety requirements for the use of every hoist or lift, steam boilers and air pressure containers. The Order states in part that all such apparatus and/or machinery must be of sound construction and/or properly maintained. See regulations 18, 19 and 20 of Form 2 on pages 292-293 thereof.

In particular, regulation 20 (upon which Counsel alleges that AMOCO is in breach) states:

**“Air pressure container – every air pressure container and its fittings must be of sound construction and properly maintained. Detailed requirements are laid down as to the fittings.**

**Air pressure containers must be thoroughly cleaned, examined and hydraulically tested every twelve months by a competent person and a report entered or attached to the general register. New or second hand air pressure containers must be examined, hydraulically tested and certified before being taken into use.”**

In my respectful view Counsel has advanced no reason whatsoever to support his contention that Regulation 20 applies to the second named Defendant whether or not the Samaan Platform constitutes a factory within the provisions of the Ordinance. In fact, I don't think that the argument was advanced with any great force. It would seem to me

that what is intended by the Ordinance and by extension the Factories (Prescribed Forms) Order is that once the premises are caught by the Ordinance then it matters not whether the hoist or lift, steam boiler or air pressure container is situated at the premises to which the Ordinance relates. In such a situation the regulations would nevertheless apply. The owner or operator of the factory will be statutorily obliged to maintain any such apparatus. Having found that the Samaan Platform was not a factory on or about 24<sup>th</sup> August, 1988 within the provisions of the Ordinance I cannot see how the Regulations made pursuant to the Ordinance could apply to the second named Defendant in those circumstances. Moreover, no evidence was put before this Court by the Plaintiff to suggest that AMOCO was operating a factory (other than the submission that the Samaan Platform was a factory) in any other part of the country.

**Did the second named Defendant owe a duty of care to the Plaintiff?**

The Plaintiff also alleges that the second named Defendant was in breach of a duty of care which it owed to the Plaintiff in that the second Defendant:

- (a) failed to provide a sufficient supply of air, particularly for the needs of the Plaintiff in the diving operation;
- (b) provided an emergency standby air unit with a leaking regulator, causing the Plaintiff to ingest water;
- (c) failed to supply properly working and efficient diving equipment and apparatus for use by the Plaintiff;
- (d) failed to provide a cable/hose of a sufficient length for the use by the Plaintiff in the said diving operations.

The second named Defendant has contended that it entered into a contract with the first Defendant to provide it (the second Defendant) with diving services and that in pursuant of the contract the Plaintiff was employed by the first Defendant and thereby became the servant and/or agent of the first named Defendant. In the circumstances the second Defendant owed no duty of care to the Plaintiff.

On the evidence therefore this Court must decide whether there was a duty of care owed to the Plaintiff by the second named Defendant and if there was whether the second named Defendant was in breach of that duty.

The undisputed facts arising from the pleadings are that the Plaintiff was at the material time employed by the first named Defendant as a diver and was performing underwater operations pursuant to a contract made between the first and second Defendants for the provision of such services by the first Defendant to the second Defendant (see contract dated 2<sup>nd</sup> April, 1985 put in by consent). There is no dispute therefore that the first defendant was employed by the second Defendant as an independent contractor.

It is a well established principle in law that generally an employer is not vicariously liable for the negligence of an independent contractor or his servants in the execution of his contract. **“Unquestionably”**, says Williams J. in the case of **Pickard – vs- Smith (1861) 10CB 470**, **“no one can be made liable for an act or breach of duty unless it be traceable to himself or his servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.”**

There are instances, however, where the employer would not be able to shelter behind an independent contractor whom he has employed and who has been negligent in the performance of his contract. One such instance is when the employer employs a contractor to do work which by its very nature through the eyes of the law involves a special danger to another. **See paragraph 123 of the Sixth Edn. of Charlesworth on Negligence.**

In the instant case the evidence is that the first defendant was engaged in putting in a new well at the Samaan C Platform, Pt. Galeota and the Plaintiff had to dive at a depth of approximately 175 feet to the sea bed to install a well casing into the guide as part of the operations being conducted by the first Defendant pursuant to the contract made between the first and second Defendants. I do not think it could be argued that such an exercise is not inherently dangerous. See the comments of Ramlogan, J. on page 13 of the unreported case in **H.C.A. 996 of 1990 Raymond Roopnarine –vs- Moze East Coast Ltd.**

In the case of **Honeywill & Stein Ltd. –vs- Larkin Bros. Ltd. (1934) 1 KB 191** it was held by the Court of Appeal that where a person employs an independent contractor to do work which involves special danger to another's premises, he (the employer) must take reasonable precautions to see that the work does not cause damage to the premises. If the employer fails to take such precautions he will be held liable.

Given the nature of the operation to be performed by the first Defendant (the independent contractor) and the risk of the divers involve it would seem that the second Defendant was bound to stipulate in the contract with the first Defendant not only that reasonable precautions be taken to avoid any danger to the workers of the first named

Defendant but was under a duty to ensure that those precautions are strictly observed failing which the second Defendant would be held responsible for the consequences.

**Holliday –vs- National Telephone Co. (1899) 2 QB 392.** In the instant case and having regard to the dangerous nature of the job it clearly could not have been sufficient for the second named Defendant to have simply accepted a warranty from the first named Defendant as it did in Article 3 of the Contract, that all equipment, materials and supplies furnished by it (the first Defendant) were free from defects in materials and workmanship.

In the Canadian case of **Municipality of County of Cape Breton –vs- Cahppell’s Ltd [1963] 36 DLR (2d)** the Nova Scotia Supreme Court applying the principle in the **Honeywill case** in a majority decision held the employer liable for the negligence of the independent contractor. Very briefly the facts of the case are that the Defendants employed an independent contractor to carry out some repair work in the copper eavestrough of the Plaintiff’s brick building. Using a blowtorch to carry out the work a piece of wood facing board caught fire and the entire building was destroyed. The Appeal Court reversing the decision of the trial Judge held that the independent contractor was liable and in the circumstances the employer was liable for the tort of the independent contractor. The Court found that, “although generally a person is not responsible for the negligence of an independent contractor employed by him such is not the case where **the work involved is an extra-hazardous and inherently dangerous operation creating special risks of harm.** In such situations the person who orders the work to be done cannot relieve himself from liability by employing someone else to do it

and he is just as responsible for the negligence of an independent contractor as if he had done the work himself.” (emphasis added).

In support of his submission that the second named Defendant was liable to the Plaintiff in the circumstances of the instant case Counsel for the Plaintiff relies heavily on the authority of **Mc Ardle –vs- Andmac & Mac Roofing Co. (1967) 1 AER 583** in which it was held that when an employer engages an independent contractor and assumes the duty of coordinating the work through an agent or servant the employer is under a duty to see that reasonable safety precautions were taken for the sub-contractor’s employees.

The evidence from the second Defendant’s only witness is that AMOCO had a representative throughout the operations on the platform. The witness Albert Johnson said that the AMOCO representative Mr. Peter. Britton was referred to as the AMOCO Inspector and that he had known Mr. Britton doing that job for AMOCO years before 24<sup>th</sup> August, 1988. His evidence is that the AMOCO Inspector was in the habit of communicating with Mr. Lickford, the Manager of the first Defendant and also with the divers engaged by the first Defendant for the performance of the contract and that on the day in question the AMOCO Inspector said to him “how is the job going.... all yuh getting through?”

Whatever the duties of the AMOCO inspector were, it seems clear to this Court that his presence on the platform throughout the operations must have been to ensure that the first named Defendant was getting on with the job. In fact it would appear that under the terms of the Contract the second named Defendant’s representative (the AMOCO inspector) had full authority (see article 4.4 of the contract) to resolve day to day

operational matters which may have arisen between the first and second Defendants. Having regard to all the circumstances I am satisfied from the evidence that the second named Defendant did owe a duty of care to the Plaintiff.

**Was there a breach of that duty**

The Plaintiff's testimony is that on the evening of 24<sup>th</sup> August, 1988 the tenders (Assistant Divers) prepared him for the dive. His job was to get the well casing into the guide at a depth of approximately 175 feet below the sea surface. The stage cable failed to extend the full distance and the Plaintiff had to swim a distance of approximately 25 feet from the stage to get to the bottom of the sea to perform his duties.

Immediately after completing the job the Plaintiff reported to his Supervisor (John Lickford) that the job was completed and he (the Plaintiff) was told by Mr. Lickford "to come up right now". The Plaintiff protested and reminded his Supervisor that he (the Plaintiff) ought to be allowed the usual five minutes to organize his hose, which at the time was spread along the sea bed before getting back into the stage to begin decompression in preparation for his ascent.

While feeling his way around (visibility was at zero) he discovered that the hose was stuck among the debris at the bottom of the ocean. He communicated to the Supervisor that he needed a standby diver but he said that the Supervisor's response was not encouraging. He said that he continued "fishing" around and realized that it was his nemo hose which had stuck. He reported to the Supervisor that it was his nemo hose and that he needed some slack in order to free the hose. As soon as the hose was free he swam to the stage and asked the Supervisor to "pick him up" but to his surprise the

Supervisor said that there was no air to operate the winch to pull the stage to the surface and that he (the Supervisor) was going to investigate.

The Plaintiff's evidence is that while in the stage he realized that he was not getting any air to breathe. He had heard a loud noise and discovered that his communication line had also been disrupted. He immediately removed the Kerby Morgan from his head and put on the aqualung so that he could breathe once again but while breathing he realized that he was taking in water and air. Appreciating the danger that confronted him he decided to swim to the surface as quickly as he could. At about 20 feet from the surface he passed the standby diver who was now on his way down.

The Plaintiff having resurfaced from a depth of 175 feet without making the required stops it was necessary to have him placed in the decompression chamber as quickly as possible to begin the process of decompression. However, after reaching the surface the Plaintiff said he had to wait for more than five minutes before the stage was able to pull him up to the 15 plus level from where he had to climb several stairs to get to the drilling platform where the decompression chamber was located.

From the evidence of the Plaintiff there clearly was no sense of urgency by those responsible for the operations to get the Plaintiff into the Chamber having regard to the circumstances. It appears to be business as usual by those responsible. The Plaintiff had just resurfaced from a depth of approximately 175 feet below the surface of the sea without being put through the required stages of decompression and there was no mechanism in place to deal with what could easily be described as an emergency. The Plaintiff explained, that in normal circumstances at a depth of approximately 175 feet, the ascent would be interrupted by three (3) water stops to facilitate the decompression

process and that on reaching the surface the diver ought to be placed in the decompression chamber within 5 minutes. He insisted during cross-examination that it was the second named Defendant who provided the air for operating the winch which took the stage down to the sea bed and brought it back to the surface.

The evidence of the Plaintiff as to what transpired while he was at the bottom of the ocean has not been contradicted by the second named Defendant. I therefore find as a fact that the following acts did occur and collectively they raise a presumption of negligence:

- (a) The inability of the Supervisor to operate the stage and to begin the process of decompression of the Plaintiff when the Plaintiff reported to him that he was ready to be taken up after he had completed the job;
- (b) The aqualung, the alternative breathing apparatus began to leak through the regulator and the Plaintiff was compelled to ingest both water and air in his desperate attempt to save his life;
- © There was no chamber nearby after the Plaintiff had swam to the surface from a depth of approximately 175 feet to facilitate, the process of decompression. Neither was there any attempt to get the Plaintiff to the nearest chamber as quickly as possible having regard to all the circumstances. In other words the Defendants failed to appreciate the danger to which the Plaintiff had been exposed and on the evidence they did little or nothing to eliminate that danger.

The evidence adduced by the second named Defendant failed on a balance of probability to discharge the burden placed on it by the presumption of negligence.

Considering all the evidence there is little doubt in my mind that the Defendants were negligent in their conduct of the operations on the 24<sup>th</sup> August, 1988 and their breach of duty owed to the Plaintiff gave rise to the Plaintiff's injuries for which they are liable. Does the fact that the first named Defendant was an independent contractor relieve AMOCO, the second named Defendant, from liability; I do not think so. In fact on the authorities to which the Court has referred it is clear that having regard to the inherently dangerous exercise to be undertaken by the first Defendant, AMOCO was under a duty to see that reasonable safety precautions were put in place for the protection of the workers of the first named Defendant. AMOCO failed to carry out that duty and therefore, in the circumstances, are liable to the Plaintiff.

**Was the Plaintiff Contributory Negligent?**

The second named Defendant however has pleaded in the alternative that the Plaintiff's injuries (which the second named Defendant has not admitted) were caused solely or alternatively contributed to by the negligence of the Plaintiff. This Defendant gave the following particulars of the alleged negligence of the Plaintiff:

- (a) **The Plaintiff approached the job from the wrong side and caused or permitted his air hose to become fouled in the manner set out in the pleadings.**

No evidence was led by the second Defendant to support this allegation. In any event I have accepted Counsel's argument that the allegation is without merit because the Plaintiff had to swim from the stage to the bottom of the sea to perform the job.

- (b) **Prematurely and unnecessarily took off his Kerby Morgan thus disconnecting himself from the supply of air from the platform and resorted to the emergency air unit.**

The evidence from the Plaintiff which has not been contradicted is that immediately after he was told by his Supervisor that there was no air to pull up the stage he (the Plaintiff) heard a noise and realized that not only was he not getting air through the air hose attached to the Kerby Morgan but that his line of communication had also been interrupted. In short, the removal of the Kerby Morgan was as a result of not getting a supply of air for breathing purposes.

- (c) **The Plaintiff disobeyed the instruction of the Supervisor, the said John Lickford to remain at the stage and await the arrival of the standby diver who had been dispatched to assist him.**

The Plaintiff's uncontradicted testimony is that when he requested a standby diver from the Supervisor the latter actually queried the reason for such a request. In view of his failure to receive a supply of air through the air hose attached to the Kerby Morgan and the fact that the aqualung was leaking through the regulator and not being able to communicate his obvious plight to the Supervisor because of what may have been a temporary break down in communication it could hardly be argued that the Plaintiff disobeyed the instructions of the Supervisor. In fact the Plaintiff denied in his evidence that his Supervisor ever made any request of him to remain in the stage until the standby diver arrived.

**(d) The Plaintiff ascended to the surface from a depth of approximately 170 feet too quickly and/or without going through proper decompression procedures and/or contrary to the instructions of the said Lickford.**

I have accepted the evidence of the Plaintiff as to what transpired approximately 175 feet at the bottom of the sea. This Court appreciates that it was a question of life and death for the Plaintiff and faced with the situation which the Plaintiff described and which the Court accepted did exist, this Court finds that the Plaintiff acted reasonable in all the circumstances. I do not therefore hold that the Plaintiff failed during the dive to observe all usual and proper safety and/or decompression procedures as alleged by the second named Defendant.

In view of the above I do not find that the Plaintiff was guilty of any contributory negligence and I hold the second named Defendant liable in negligence to the Plaintiff. Damages will be assessed by a Judge in Chambers. The second named Defendant will also pay the Plaintiff's costs certified fit for Senior Counsel.

**Dated this 31<sup>st</sup> day of May, 2001**

**Sebastian Ventour  
Judge**

