

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
CIVIL SIDE  
2001/CLE/GEN/660**

**BETWEEN:**

**ANTOINETTE HIGGS  
(Administratrix of the Estate of CHERRADO McCLEAN a.k.a  
CHERRADO HIGGS deceased)**

**Plaintiff**

**AND**

**COLINA FINANCIAL SERVICES**

**Defendant**

**Before: His Lordship The Honourable Mr. Justice Keith H. Thompson**

**Appearances:** Attorney: Bridgette Francis-Butler,  
Attorney Ashley Williams

**Trial Dates:** 21<sup>st</sup> January, 2019  
28<sup>th</sup> February, 2019

**FACTUAL MATRIX:**

[1] This matter was begun by way of a Specially Endorsed Writ of Summons, filed on May 29<sup>th</sup>, 2001. In 2003 the Writ of Summons was amended and filed on February 20<sup>th</sup>, 2003. An Interlocutory Judgment in Default was filed on June 20<sup>th</sup>, 2001. On June 26<sup>th</sup>, 2001, a Summons was filed to set aside the Interlocutory Judgment in Default on the ground that the Defendant named as a party was non-existent.

[2] In that said Summons, the Third Party named was "COLINA INSURANCE COMPANY LIMITED". On March 15<sup>th</sup>, 2002 a Summons was filed seeking to correct the name of the Defendant. On March 10<sup>th</sup>, 2004 a Consent Order was filed giving leave to the Defendant to serve its Defence within seven (7) days. The Defence was filed on March 10<sup>th</sup>, 2004.

[3] On August 11<sup>th</sup>, 2006 a Notice of Referral to Dispute Resolution Conference was filed. On July 12<sup>th</sup>, 2006 a Notice of Change of Attorney was filed replacing Arthur D. Hanna & Co. with Butler's Law Chambers. On June 21<sup>st</sup>, 2016 a Summons was filed supported by an Affidavit seeking to strike out the Amended Writ of Summons. A decision pursuant to the Summons seeking leave to Intervene, Set Aside the Judgment in Default of Appearance and to file a Defence, was written and is dated February 18<sup>th</sup>, 2003. It ordered inter alia;

1. That the default entered on June 20<sup>th</sup>, 2001 is set aside;
2. That leave is granted to the Plaintiff to amend the Writ filed May 20<sup>th</sup>, 2001, so as to correct the name of the defendant;
3. That service of the amended Writ be effected on the defendant within fourteen (14) days of the service of the date of this order;

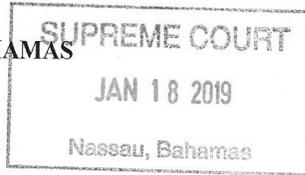
4. That an appearance if any, be entered within (seven (7) days of the service of the Writ on the defendant;
5. That a defence, if any, be filed within fourteen (14) days of entry of appearance;
6. That the Plaintiff bears the costs of the amendment; and
7. That the cost of “striking out the default judgment.”

The substantive trial commenced on February 18<sup>th</sup>, 2019.

**THE PLAINTIFF’S CASE:**

[4] The Plaintiff swore a witness statement on January 18<sup>th</sup>, 2019. There was an agreed statement of facts filed on January 15<sup>th</sup>, 2019. The witness statement is set out in full.

COMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Division  
BETWEEN



2001

CLE/gen/660

**ANTOINETTE HIGGS**  
(Administratrix of the Estate of **CHERRADO McCLEAN a.k.a. CHERADO HIGGS, deceased**)  
Plaintiff

AND

**COLINA INSURANCE COMPANY LIMITED**  
Defendant

WITNESS STATEMENT

I, **ANTOINETTE HIGGS** of Nassau Village in the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:-

1. That I am the Plaintiff herein and I make this Affidavit from my own Knowledge and in support of my claim against the Defendant herein for the Payment of the accidental death benefit under the policy of Insurance dated the 24<sup>th</sup> September, 1999.
2. That I am the natural mother of the deceased and the sole administratrix of the Estate of the deceased, **CHERRADO McCLEAN a.k.a. CHERADO HIGGS**, the insured.
3. The said **CHERRADO McCLEAN a.k.a. CHERADO HIGGS**, died intestate on or about the 18<sup>th</sup> April, 2000 allegedly, having jumped over board the Calypso I, a boat cruise sponsored by the Governor General Youth Award Program on the 14<sup>th</sup> April, 2000. His body was subsequently discovered in waters near Club Med, Paradise Island, The Bahamas.
4. That I had the daunting task to identify the body of my son at the Rand Lab/Morgue.
5. A Coroner's inquest had been conducted into the death of my son the said **CHERRADO McCLEAN a.k.a. CHERADO HIGGS**, where it was determined that his death was due to misadventure.
6. The insurer thereafter paid the Whole Life portion of the Insurance Policy in the sum of \$34, 116.31 representing principal together with interest thereon; however the Insurers seeks to avoid liability to pay to me the accidental and dismemberment Benefit portion of the said insurance by reason of death or dismemberment directly or indirectly occasioned or accelerated by suicide, attempted suicide or intentional self-injury while sane or while

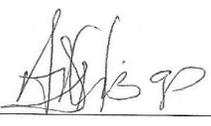
committing or attempting or preparing to commit an offence.

7. That it is my strong view that I am entitled to be paid the death benefit portion of the said insurance policy.
8. That I observed the trial at the Coroner's Court and I heard the Pathologist, Dr. G. Pradeep Kumar, give oral evidence at Court that he conducted an Autopsy on the body of my said son which revealed that my son had never smoked and that there was no evidence of smoking in his lungs. He also indicated that Cherrado's blood had been sent to Forensic Science Laboratory for chemical analysis with negative results.
9. That his friend Terrence also gave evidence at the trial that Cherrado was not smoking anything. He and another friend had barkwood in their presence, which is not illegal.
10. That there is no evidence that the deceased was attempting or committing any offence or that he "intentionally" caused injury to himself that accelerated his death.
11. That it is my belief that I am entitled to the death and dismemberment portion of the Life Insurance policy of the deceased.
12. That the content of this statement is true and correct to the best of my knowledge information and belief.

SWORN TO at Nassau, N.P. Bahamas )

This 18 day of January, A.D. 2019)

BEFORE ME,

  
  
NOTARY PUBLIC.



**“COMMONWEALTH OF THE BAHAMAS**

**2001**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**CLE/gen/660**

**BETWEEN**

**ANTOINETTE HIGGS**

**(Administratrix of the Estate of CHERRADO McCLEAN a.k.a. CHERADO HIGGS  
deceased)**

**Plaintiff**

**AND**

**COLINA INSURANCE COMPANY LIMITED**

**Defendant**

**WITNESS STATEMENT**

**I, ANTOINETTE HIGGS of Nassau Village in the Eastern District of the Island of  
New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath  
and say as follows:-**

- 1. That I am the Plaintiff herein and I make this Affidavit from my own  
Knowledge and in support of my claim against the Defendant herein for  
the Payment of the accidental death benefit under the policy of Insurance  
dated the 24<sup>th</sup> September, 1999.**
- 2. That I am the natural mother of the deceased and the sole administratrix  
of the Estate of the deceased, CHERRADO McCLEAN a.k.a. CHERADO  
HIGGS, the insured.**
- 3. The said CHERRADO McCLEAN a.k.a. SHERADO HIGGS, died intestate on or  
about the 18<sup>th</sup> April, 2000 allegedly, having jumped overboard the Calypso  
I, a boat cruise sponsored by the Governor General Youth Award Program  
on the 14<sup>th</sup> April, 2000. His body was subsequently discovered in waters  
near Club Med, Paradise Island. The Bahamas.**

4. That I had the daunting task to identify the body of my son at the Rand Lab/Morgue.
5. A Coroner's inquest had been conducted into the death of my son the said CHERRADO McCLEAN a.k.a. CHERADO HIGGS, where it was determined that his death was due to misadventure.
6. The insurer thereafter paid the Whole Life portion of the Insurance Policy in the sum of \$34,116.31 representing principle together with interest thereon, however, the Insurer seeks to avoid liability to pay to me the accidental and dismemberment Benefit portion of the said insurance by reason of death or dismemberment directly or indirectly occasioned or accelerated by suicide, attempted suicide or international self-injury while sane or while committing or attempting or preparing to commit an offence.
7. That it is my strong view that I am entitled to be paid the death benefit portion of the said insurance policy.
8. That I observed the trial at the Coroner's Court and I heard the Pathologist, Dr. G. Pradeep Kumar, give oral evidence of Court that he conducted an Autopsy on the body of my said son which revealed that my son had never smoked and that there was no evidence of smoking in his lungs. He also indicated that Cherrado's blood had been sent to Forensic Science Laboratory for chemical analysis with negative results.
9. That his friend Terrance also gave evidence at the trial that Cherrado was not smoking anything. He and Another friend had bark wood in their presence, which is not illegal.
10. That there is no evidence that the deceased was attempting or committing any offence or that he "intentionally" caused injury to himself that accelerated his death.

**11. That it is my belief that I am entitled to the death and dismemberment portion of the Life Insurance policy of the deceased.**

**12. That the content of this statement is true and correct to the best of my knowledge information and belief.**

**SWORN TO at Nassau, N.P. Bahamas )**

**This 18 day of January, A.D. 2019 ) \_\_\_\_\_**

**BEGORE ME,**

**NOTARY PUBLIC”**

[5] There were further questions put to the Plaintiff by her counsel with leave of the court.

[6] The Plaintiff identified the above witness statement by showing the signature to the court. She confirmed the contents as still being true and correct.

[7] The further questions which her counsel sought leave to put to her were as a result of just receiving the witness statement of Millicent Wong, the witness for the defendant.

[8] The Plaintiff testified that it was her view that the police painted a certain picture of her son. The picture they painted she says was one of criminal action. However, she says that her son lived with her and she would never come to a court and lie because she is a single mother of three boys and she grew them up in Nassau Village.

- [9] She admitted that in Nassau Village where she lived was a bad area on the left side. She lives on the right side. She further testified that her son was never a child that she had to talk to two or three times. He was a mannerly child. She never had to go to school for him. In fact, she says she never had problems with him and friends.
- [10] According to the Plaintiff, it was disturbing when she heard the police say that her son was smoking because he never smoked before, as she would never have allowed that in her house.
- [11] She further testified that she knew the officer who was involved and that some time ago her son had a confrontation with him at the pump where they used to live before. When asked by her counsel which officer, she responded by saying “the officer who they say beat my son on the boat.”
- [12] Counsel for the Defendant immediately objected saying that it was hearsay and speculation. Counsel for the Defendant acknowledged that the questions being put to the Plaintiff was as a result of just receiving the witness statement of Millicent Wong and withdrew his objection.
- [13] The Plaintiff was then handed over for cross-examination.

**CROSS-EXAMINATION:**

- [14] Counsel for the Defendant referred the witness to page 41 of the agreed bundle of documents. The document there is the conclusive police report.

[15] Prior to this the court pointed out to counsel for the Defendant that the Defendant appeared to be relying on a clause set out in the insurance policy. That clause states;

**“RISKS NOT INSURED”**

**“No amounts are payable under this attached Benefit for Death or dismemberment which are directly or indirectly occasioned or accelerated (a) by suicide, attempted suicide or intentional self-injury while sane or (b) by bodily or mental infirmity or illness or disease of any kind or (c) by reason of the life insured taking any narcotic or drugs or poison or (d) by inhalation of gas or fumes of any kind, produced or released by or as a result of an act of the life insured, whether intentional or otherwise or (e) as a result of entering, servicing, operating, travelling in or ascending or descending from an aircraft or aerial device except as a fare-paying passenger, on a licensed commercial airline flying on a regularly scheduled flight or (f) by war, invasion act of foreign enemy hostilities (whether was be declared or not) civil war, rebellion revolution, insurrection, military or usurped power, riot or civil commotion or (g) while committing or attempting or preparing to commit a criminal offence.”**

[16] On page 22 of the Agreed Bundle of Documents under the rubric “ACCIDENTIAL DEATH AND DISMEMBERMENT PROVISIONS WHEN PAYABLE” is the following;

**“ACCIDENTIAL DEATH AND DISMEMBERMENT PROVISIONS  
WHEN PAYABLE**

**The Company will pay the Sum set out in the following  
Schedule in respect of Accidental Death or Dismemberment**

**sustained by the Life Insured while this Attached Benefit is in force, as a direct result of bodily injury caused by violent, accidental, external and visible means, provided death or dismemberment occurred within three calendar months after such bodily injury was sustained.”**

[17] Counsel for the Defendant confirmed for the court that this was the clause being relied upon by his client based on the police report contained in the Agreed Bundle of Documents at page 41.

[18] The police report is set out below:-

MEMORANDUM

ROYAL BAHAMAS POLICE FORCE

To: H.M. Coroner  
Parliament Street  
Nassau, Bahamas

Your reference

Our reference POI/CID/32

Date: 14<sup>th</sup> August, 2000

*No. 1000-2000*

Re: REQUEST FOR A CORONER'S INQUEST  
INTO THE DEATH OF CERRADO McCLAIN

At 10:30pm on 15<sup>th</sup> April 2000, Constable no. 625 Outrea reported to the police at Paradise Islands Station, that while on board the MV Calypso 1, a man trying to evade police custody jumped over-board and could not be located.

As a result of this report, officers from the Criminal Investigation Department were assigned to investigate.

Information received is that sometime around 9:00pm on Friday 14<sup>th</sup> April 2000, the subject was on board Calypso 1 on a cruise sponsored by the Governor General's Youth Award program along with several friends, when he was approached by a police officer. The subject was suspected of being in possession of substance believed to be marijuana. The officer identified himself and made an attempt to retrieve the substance when the subject threw the same overboard and also jumped into the water. Checks were made for the subject by personnel from the Calypso 1, Royal Bahamas Police and Defence Force Marines and B.A.S.R.A. with negative results.

On 18<sup>th</sup> April 2000, the body of the subject was found in waters of Club Med, Paradise Island, and it appeared to be lifeless. The body was taken to the Accident and Emergency Section of the Princess Margaret Hospital, where it was pronounced dead by a doctor.

An autopsy was later performed and the cause of death was:

1. Acute pulmonary oedema
2. Consistent with features of drowning
3. Head injury



1000-41

- [19] We take special note of some discrepancies in the police report. The report is dated 14<sup>th</sup> August, 2000.
- [20] Counsel for the Defendant took the witness to page 34 and asked her to start reading from paragraph four (4) which she did. After reading the fourth paragraph, counsel put several questions to the witness.
- [21] By agreement of both counsel, the court accepted the Police Report pursuant to Section 60 of the Evidence Act with the discrepancies. Section 60 of the Evidence Act states;

**Section 60:**

60. (1) **“Without prejudice to section 61, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied. (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement — (a) shall not be given in evidence by virtue of this section on behalf of that**

party without the leave of the court; and (b) without prejudice to paragraph (a) shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information. (3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.”

[22] The Court pointed out several discrepancies in the police report at page 41, of what was initially the non-agreed document. The first paragraph says;

“At 10:30 p.m. on 19<sup>th</sup> April, 2000, Constable No. 625 Outten reported to the police at Paradise Island Station that a man trying to evade police custody jumped overboard and could not be located.”

[23] The fourth paragraph says;

“On 18<sup>th</sup> April, 2000 the body of the subject was found in waters off Club Med Paradise Island.”

[24] Counsel for the Defendant took the witness to page 34 and asked her to start reading from paragraph four (4). After reading the fourth paragraph counsel put several questions to the witness.

“Q. Ms. Higgs, do you agree that the possession of marijuana is a crime?

A. I agree that it is a crime.

Q. Yes, thank you.

Q. Do you agree that resisting arrest is a crime?

A. I agree.

Q. You agree that resisting arrest is crime? Let me ask you this question.  
You were not present on the Calypso 1?

A. No.

Q. So there is no way for you to actually know what your son was going through?

A. No.

Q. There is no way for you to know what he thought when he leapt overboard?

A. No.

Q. No. Let me ask you this question. Could you your son swim?

A. Yes, sir.

Q. Was he a good swimmer?

A. Yes, sir, a good swimmer.

Q. Okay.

Mr. Williams: That is essentially all my questions for you, Ms. Higgs, and I will turn you over for re-examination.”

[25] The Plaintiff was then re-examined by her counsel.

**RE-EXAMINATION:**

Q. "Mrs. Higgs, at page 34 as you were referred to. At paragraph four it refers to as you have heard, the subject was suspected of being in possession of a substance –

A. Yes, ma'am.

Q. Believed to be marijuana.

A. --Yes, Ma'am.

Q. Was there any evidence before the court or any otherwise of any marijuana being found in respect to your son or anything?

A. No, Ma'am.

MS. BUTLER: .....that any substance whether it be marijuana was found by the police or otherwise in the possession of the insured.

THE WITNESS: No, Ma'am.

Q. Was any marijuana found or otherwise?

A. No, Ma'am.

MR. WILLIAMS: That didn't come up in cross-examination, my Lord. You can only ask questions that came up in cross-examination.

MS. BUTLER: He raised the question of marijuana.

MR. WILLIAMS: I didn't raise the question of marijuana being on the boat or anything.

THE COURT: I think you asked something about marijuana.

MR. WILLIAMS: No, I asked her if the possession of marijuana is a crime.

THE COURT: Yes.

MS. BUTLER:

Q. Ms. Higgs, do you know your son in any way to use marijuana?

A. No, Ma'am.

Q. Have you ever seen him in possession of marijuana?

MR. WILLIAMS: Objection. Again, my Lord, we didn't never impugn or seek to impugn Mr. Higgs. We didn't ask if Mr. Higgs was found with marijuana or was smoking marijuana. We asked the plaintiff a direct question. It is not what re-examination is for.

MRS. BUTLER:

Q. Mrs. Higgs, you were referred to whether or not you were aware of what your son would have done onboard of the boat.

Were you aware of what your son would have done onboard the boat?

MR. WILLIAMS: No such reference was made.

THE COURT: What was the question, Ms. Butler?

MS. BUTLER: Whether she was aware of what her son had did onboard.

MR. WILLIAMS: I didn't ask that question.

MS. BUTLER: What question did you ask?

MR. WILLIAMS: I asked if he could swim, if he was a good swimmer. She said that he was a good swimmer.

MS. BUTLER: Prior to that. If we could have the transcript read back.

(Record read back)

MRS. BUTLER: Alright. No, further questions.

THE COURT: Alright, you may step down, Ms. Higgs."

**THE DEFENDANT'S CASE:**

**EVIDENCE OF MILLICENT WONG:**

[26] Ms. Wong executed a witness statement which was filed February 13<sup>th</sup>, 2019. The witness statement was identified by her and proffered as her evidence in the matter. She identified it by pointing out her signature. She was then tendered for cross-examination.

COMMONWEALTH OF THE BAHAMAS

2001

IN THE SUPREME COURT

SUPREME COURT

CLE/gen/660

Common Law & Equity Division

FEB 13 2019

Nassau, Bahamas

BETWEEN

**ANTOINETTE HIGGS**

(Administratrix of the Estate of Cherrado McClean a.k.a. Cherrado Higgs. Deceased)  
Plaintiff

AND

**COLINA INSURANCE COMPANY LTD.**

Defendant

**WITNESS STATEMENT**

I, **MILLCENT WONG** of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:

1. That I am the Manager of Life and Disability Claims at Colina Insurance Limited (the Defendant).
2. The Defendant is a limited company registered in the Commonwealth of the Bahamas that carries on the business of insurance within the said Commonwealth. Such business is carried on at various locations in New Providence and other of the Family Islands in the said Commonwealth. I presently work at the Defendant's principal office at 308 East Bay Street, Nassau, New Providence, Bahamas.
3. Cherrado Salathiel Higgs, also known as Cherrado Salathiel McClain ('the Deceased') died because of a drowning that occurred on the 18<sup>th</sup> April 2000.<sup>1</sup> The official cause of death was noted by a Coroner's Inquest as (1)(a) acute pulmonary Oedema (b) Consistent with features of drowning and (2) Head Injury, due to Misadventure.<sup>2</sup>

<sup>1</sup> Page 32 of the Agreed Bundle of Documents

<sup>2</sup> Page 33 of the Agreed Bundle of Documents

4. At the time of his death, the Deceased was the life insured and owner of a Policy of Insurance namely: Policy No. 54924 ('the Policy') of which the Defendant was the Insurer.
5. The Policy was a policy issued to him by the Defendant Company. <sup>3</sup> The Policy, a Whole Life Policy was issued to the Deceased on the 28<sup>th</sup> November 1999. The face amount of this policy was \$30,000.00 and one of the additional benefits was Accidental Death and Dismemberment ('ADD') also in the amount of \$30,000.00. The Plaintiff was the named beneficiary of the Policy. This information is to be gleaned from the application form signed by the Deceased when he applied for the Life insurance<sup>4</sup>
6. The Defendant Company paid to the Plaintiff the face value of the Policy but refused to pay to the Plaintiff the ADD portion of the claim or a further \$30,000.00 as the Defendant Company took the view that the circumstances which lead to the unfortunate demise of the Deceased was not an 'accident' as defined in the Policy which reads:

*"The Company will pay the Sum set out in the following Schedule in respect of Accidental Death or Dismemberment by the Life Insured while his Attached Benefit is in force, as a result of bodily injury caused by violent, accidental, external and visible means, provided death or dismemberment occurred within three calendar months after such bodily was sustained."<sup>5</sup>*

7. Moreover, the Defendant Company was also of the view that the circumstances which lead to the death of the Deceased fell into the category of one of the exceptions listed in the Policy, namely:

*"No amounts are payable under this Attached Benefit for death or dismemberment which are directly or indirectly occasioned or accelerated (g) while committing or attempting or preparing to commit a criminal offence."<sup>6</sup>*

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<sup>3</sup> Page 20 of the Agreed Bundle of Documents

<sup>4</sup> Page 24 of the Agreed Bundle of Documents.

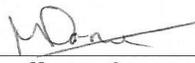
<sup>5</sup> Page 22 of the Agreed Bundle of Documents

<sup>6</sup> Page 22 of the Agreed Bundle of Documents

8. The Defendant Company relied on a Police Report dated the 11<sup>th</sup> May 2000, which indicated that the Deceased jumped overboard to resist arrest<sup>7</sup>. Due to the findings of the Police Report and the Coroner's Inquest<sup>8</sup> the Defendant Company took the view that the misadventure which led to the Deceased's death was not an accident as described in the Policy and/or fell into one of the listed exceptions contained therein. As such, the Defendant Company was obliged to not pay the ADD portion of the Policy in accordance with the Policy's contractual terms.

**CERTIFICATE OF TRUTH**

I, **MILLCENT WONG**, believe that the facts stated in this Witness Statement are true.

  
\_\_\_\_\_  
*Millicent Wong*

**DATED** the 12<sup>th</sup> day of **February 2019**

<sup>7</sup> Page 34 of the Agreed Bundle of Documents

<sup>8</sup> Page 33 of the Agreed Bundle of Documents

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
BETWEEN:**

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(Administratrix of the Estate of Cherrado McClean a.k.a.  
Cherrado Higgs. Deceased)  
Plaintiff

**AND**

**COLINA INSURANCE COMPANY LTD.**  
Defendant

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**WITNESS STATEMENT  
OF MILLICENT WONG**

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**2001**

**CLE/gen/660**

*Alexiou, Knowles & Co.*

**Alexiou, Knowles & Co.  
Chambers  
St. Andrew's Court  
Frederick Street Steps  
Nassau, Bahamas  
Attorneys for the Defendant**

*Matter No. 104453/ADW*

## CROSS-EXAMINATION:

[27] Ms. Wong confirmed that she was a representative of the Defendant. She also confirmed that there was a policy of Insurance in existence between her employer and the deceased prior to his demise.

[28] The evidence of Ms. Wong is that the effective date of the policy was November 28<sup>th</sup>, 1999. She explained that the attached benefits were to be found in an attached rider, which would have included a waiver of premium, the accidental death and dismemberment and a living benefit. The questioning was as following;

Q. "And in part of the claim that refers to the attached benefit, can you explain what are the attached benefits under this policy of insurance?"

A. The attached benefits would be the supplemental rider which would have included a waiver of premium, the accidental death and dismemberment and a living benefit rider.

Q. And in respect of the policy it also refers to special conditions and exclusions. Can you say to the court what are the special conditions based on this?

A. The special conditions?

Q. And exclusions under the policy. That is listed here under the policy.

A. Benefits? The basic plan as well as the attached plan.

Q. As based on the recommendation here under the summary of the policy it refers to a section after beneficiaries where there are special conditions and exclusions.

A. Okay, there are special conditions within the policy contract upon which a claim would not be for the – the claim would not be paid.

Q. So under this as noted here what is deemed special conditions?

A. The special conditions would be the terms of the contract on which the policy was paid.

Q. And what does this say here with respect to what are special conditions and exclusions.

A. It says none.

Q. Okay.

THE COURT: While we are on that, special conditions and exclusions the policy says none. It says N-O-N-E.

MR. WILLIAMS: I will deal with that point in re-examination, my Lord.

THE COURT: Okay.

MS. BUTLER: As I indicated, can you look at page 22 of that policy under the accidental death and dismemberment provisions. And can you read into the record basically what the company says it will pay in this sum as to the first paragraph?

A. "The company will pay the sum set out in the following schedule in respect of accidental death or dismemberment sustained by the life insured while this attached benefit is in force as a direct result of bodily injury caused by violence, accidental, external and visible means, provided death or dismemberment occurred within three calendar months after such bodily injury was sustained."

Q. And in that occasion it refers to there being an accidental death benefit or accidental as a reason why it would pay?

A. Yes.

Q. So that being the case, does it suggest to you as to your understanding of the clause that the insurers would pay in the event that there is death by accident?

A. Yes, depending on if the circumstances reveal that it was accidental, that the death was accidental.

Q. And can I refer you further down to the portion that refers to the risk that is not insured.

In this section it also refers to the issue that no amount will be paid. And can you say the circumstances the under A, under which it would not be paid?

A. By suicide, attempted suicide or intentional self-injury while sane.

Q. Can I also refer you to clause C of that provision?

A. By reason of the life insured taking any narcotics or drugs or poison.

Q. At paragraph – at G?

A. While committing or attempting or preparing to commit a criminal offence.

Q. Ms. Wong, can you state to the court whether in respect to suicide or intentional self-injury that it falls within an accident?

A. If I can state – can you repeat, please?

Q. Whether you based on your knowledge in insurance, whether something that is where one commits a suicide or attempts to commit suicide or if there is an intentional self-injury that that is what is categorized as an accident?

A. Well, that falls under the risk not insured. Suicide would not be considered an accident.

Q. What do you interpret the issue of self-injury, intentional self-injury?

A. If a person harms themselves intentionally or unintentionally by self-injury.

Q. Okay. In respect to someone that is jumping into a water, is that referred to in your understanding as an intentional injury?

A. Well, I can't really say. It depends on the circumstances.

Q. Okay. But based on the clause that you rely upon, does it refer that or suggest that there must be an intention on the part of the insured to commit suicide or to impose self-injury upon himself?

A. I am not sure I understand the question.

Q. Would you say that to commit an offence of suicide that there must be an intention to commit suicide, that that person must intend to commit suicide?

A. I would assume so.

Q. Okay. And you refer to an intentional self-injury. Does that suggest that that person intended to commit self-injury to themselves, to commit self – injury?

A. It would be hard to determine the intent.

Q. Based on the clause that you rely upon, does it suggest that the insured, that I refer to you under clause 1 as you read earlier, under the circumstances where the insurance will be payable, does it suggest that their issue of negligence would be covered by the policy?

A. Negligence on whose behalf the insured?

Q. The insured?

A. I am not sure I understand what you are saying.

THE COURT: What clause are you referring to Ms. Butler?

MS. BUTLER: The clause where it refers to when payable. What I am asking her when the accident, death and dismemberment when payable.

THE COURT: When payable?

MS. BUTLER: To the top.

THE COURT: Uh-huh. You are asking her if pursuant to that clause the company will pay the sum set out, etc., if it is her opinion that negligence fits into any of those categories; is that what you are asking?

MS. BUTLER:

Q. Mrs. Wong, in your witness statement you refer to due to the findings –

THE COURT: Which paragraph?

MS. BUTLER: Paragraph 8 of the witness statement.

THE COURT: Yes.

MS. BUTLER:

Q. At paragraph 8 of the witness statement you refer to the fact that the police report and Coroner's inquest, the defendant company was of the view that the misadventure which led to the defendant's death was not an accident. Can you explain to the court how did you come to that view?

A. Okay the company would have taken the view that based on the circumstance of the untimely demise of the insured it would not have been considered accidental based on the policy exclusions.

THE COURT: Say that again?

Ms. Butler asked you how did you arrive at that position. The police report indicated that to you and you interpreted it as not being an accident?

WITNESS: Yes.

THE COURT: She asked you how did you arrive at that conclusion.

THE WITNESS: The police report indicates that the insured was avoiding arrest and the police contract stipulates that the deceased fell into the category of one of the exceptions listed in the policy.

MS. BUTLER:

Q. Can I ask you what exception you relied on then? What exception you relied

on?

A. The exception would have been while committing or attempting or preparing to commit a criminal offence.

MS. BUTLER:

Q. All right. Mrs. Wong, as I was asking, how is it that you came to the conclusion that it was not an accident? And based on what you are saying is that based on the policy contract which we refer to here can again and the various exceptions of which you rely upon one being you have pointed out the avoidance of arrest, and what else is it that you are saying that made you determine that it is not an accident?

A. As defined in the policy which reads:

“The company will pay the sum set out in the following schedule in respect of the accidental death and dismemberment of the life insured.”

MS. BUTLER:

Q. Well, again as I have indicated, what do you have to say that he was committing an offence other than a police report that says he is suspected?

Do you have any evidence in your possession which made the company to decide that the insured was in fact committing an offence?

A. There is also a Coroner's Inquest.

THE COURT: The Coroner's Inquest Report what does it say was the cause of death? It says drowning.

MR. WILLIAMS: It says drowning.

MS. BUTLER:

Q. Mrs. Wong, you referred to the Coroner's Inquest, and as the Court has indicated in terms of the basis on which the Coroner's Inquest the ruling came out, it also refers to there being – that would be referred to drowning and it referred to head injuries and they have indicated it as due to a misadventure. And so you indicate that you rely upon the police report and you rely upon the Coroner's Inquest, the ruling as it was. I am just wanting you to indicate to us, the court, as to how does that define that it falls within the categories that you rely upon?

As indicated based on the Coroner's decision of misadventure, can you explain based on that ruling, because prior you have said based on the police report and the Coroner's Inquest and its decision that is how you arrived at your decision that this matter does not fall within that category?

MS. BUTLER:

Q. That it falls into the exceptions. I just want you to explain how did you come to that conclusion?

A. What I think the company's view would have been was that the insured was evading the police's arrest and having jumped overboard he met his demise. Had he not resisted arrest he may have still been alive so it would not have been considered accidental.

Q. And you refer to the issue of evading the police. Does that fall within the category that you rely upon?

THE COURT: It would be G, "while committing or attempting or preparing to commit a criminal offence." Isn't that what you are asking her about?

MS. BUTLER: I am asking her about that. But the phrase which she used was evading the police. Evading the police does that say I am

committing or attempting to commit an offence or that I am preparing to commit an offence?

MR. WILLIAMS: Once again that is a question of interpretation.

THE WITNESS: The police report stated that he was resisting arrest.

THE COURT: Is that what the police report states? Let's look at the police report. It was page 40 was it?

MS. BUTLER. Page 34.

THE COURT: It says on the 14<sup>th</sup> of April Constable 625 Outten reported to the police at Paradise Island Police Station that while onboard the M.V. Calypso a man trying to evade police custody jumped overboard and could not be located.

The question Ms. Butler is putting is even if it says a man trying to evade police custody was he committing an offence or preparing to commit an offence? Isn't that your question, Ms. Butler?

MS. BUTLER: Yes, it is.

THE COURT: Mrs. Wong.

MS. BUTLER: I don't know that she answered.

THE COURT: No, I am waiting for the answer.

THE WITNESS: Your questions was the fact of whether he was evading police?

MS. BUTLER:

Q. Whether the fact of him evading the police was synonymous of him committing a crime or preparing to commit a crime.

MS. BUTLER:

Q. At line 29 on page 56, can I just ask you – are you able to find line 29 on page 56?

A. Yes.

Q. It refers to while onboard the boat the officer is saying, “my attention was drawn by a scent which was known to me as marijuana.” I proceeded.

Further down it refers to paragraph 4 on page 57. He says I asked a young man what it was they were smoking. Two of them turned to me and what appeared to be Backwood cigars and one of them quickly walked away.

You see it?

Prior to that –

MS. BUTLER: Sorry, my Lord, I think I had it marked.

MS. BUTLER:

Q. At page 96 of the evidence of Officer Outten in cross-examination?

THE COURT: 96?

MS. BUTLER: Page 69, sorry.

THE COURT: Oh, Yes, this is still Mr. Outten. Which paragraph?

MS. BUTLER: I want to take her down to line 22.

THE COURT: Yes.

MS. BUTLER:

Q. This would be 23. “Did you ever say anything to anybody that you were on that boat and that you should make a statement saying that the Mr. McClain had been resisting arrest?”

Mrs. Wong, in respect to that was there any evidence that you would have to show that, or supporting evidence that Mr. Higgs had in fact been resisting arrest?

A. You mean based on what is in this transcript?

Q. Based on the transcript, based on your knowledge as to why you have denied?

MR. WILLIAMS: Objection. Asked and answered. Ms. Wong had explained why they denied the policy. They didn't deny the claim they denied the D1 benefit.

Q. Mrs. Wong, we refer to the fact that the evidence that was produced in respect to Mr. Outten, that parties involved indicated that they had Backwood cigarettes. To your knowledge is backwood cigarettes an illegal substance?

A. No.

MS. BUTLER:

Q. Mrs. Wong, can I refer you at page 72 at paragraph 19. The question that was asked of the officer is that were you in any way angry with Mr. McClain because he had failed your opportunity to possibly discover an illegal substance in his presence? So I am going to put it to you that there was no illegal substance that was found?

THE COURT: I don't know. You can put it to her but she is not in a position to answer yeah or nay.

MS. BUTLER: Based on the transcript.

THE COURT: Based on the transcript.

Go ahead.

MS. BUTLER: Based on the transcript of the hearing.

THE COURT: You would have to put it in that fashion, based on the transcript that no illegal substance was found.

MS. BUTLER:

Q. Ms. Wong, based on paragraph 19, as we referred to just now, it would appear that there would not have been at that point any illegal substance found by the officer on the person of Mr. McClain. Do you agree with that?

THE COURT: If you go to page 74 starting at say at line 15. And the question is "And you found cigars, cigarettes or alcohol on anybody that night? The answer was, "cigarettes." "Regular or any kind of? Yes, sir. Like a packet of Rothman's or anything? Yes, sir.

MS. BUTLER: It is those paragraphs first in the transcript that I am trying to bring her to.

MS. BUTLER:

Q. So based on the paragraph on page 72, paragraph 19 and as the court has just read page 74 and starting at line 15, the question as the court indicated, had you found cigarettes or cigars or alcohol or anything that night? The answerer was "yes". The answer was cigarettes. "Regular or of any kind?"

At line 20, "like a packet of Rothman's or anything? Yes. Okay, anyone with Backwood was the question. Yes. Anyone with alcohol on them? No, sir. And did you confiscate any cigarettes or cigars from any of the persons you searched?"

So based on what we have the question as could that information lead you to believe that there was any illegal substance found on the insured?

A. No.

Q. Can I just take you further to the witness statement of Ms. Armbrister?

THE COURT: Where is that?

MS. BUTLER: Starting at 43, Tranell Armbrister.

THE COURT: That is page 43? It is not a witness statement. It is a transcript.

MS. BUTLER: At page 45 of this transcript.

THE COURT: Page 45.

MS. BUTLER: It is page 45. The number is 45.

Transcript page is 26.

THE COURT: Yes. At line?

MS. BUTLER: At line one it refers to –“I saw two men. They appeared to be struggling and one of them was telling the other to shut up. And the other was telling the one to shut up that was wearing a yellow and the other one had on a blue and tan striped shirt. He was trying to get over the railing and other one was trying to pull him back by his shirt and they were just continuing to struggle.

The one in the yellow shirt had got away and went into the water.”

MS. BUTLER: Does anything that is said in that suggests that one was evading the police or it suggest that there was struggle between parties?

A. It seemed to be a struggle.

THE COURT: Sorry, you are saying that suggests a struggle between two people?

THE WITNESS: Yes.

MS. BUTLER:

Q. Can I take you further down also on page 45 at line 20?

“The man in the tan shirt he was just trying to calm the man in the yellow shirt down and trying to get him to relax or something. And he took out a pair of handcuffs to sort of prevent him from going over the railing.”

So does anything is that suggest that there was a likelihood that there was an arrest for an offence.

A. He had the handcuffs which appears to suggest that there may have been an arrest.

Q. The witness says that he took out a pair of handcuffs to sort of prevent him going over the railing.

MS. BUTLER:

Q. At page 46 at paragraph 31 it says that, “I understand he was a police officer when he took out the handcuffs.”

So it appears that prior to that one would not have known that the person in question or the police officer would have been a police officer.

MR. WILLIAMS: Objection relevance.

THE COURT: Well, someone who pulls out a set of handcuffs doesn't necessarily mean that they are a police officer. It could be a security guard, could be a normal citizen.

MR. WILLIAMS: I understand that. My Lord, my learned friend is being disingenuous because if you were you were to read the entirety of these transcripts it would say that he had a warrant card and he identified himself.

THE COURT: Yes, it says he identified upfront. I read that. He along with two other police officers.

MR. WILLIAMS: And defence force officers.

THE COURT: I saw one defence force officer.

MS. BUTLER: That doesn't necessarily mean, my Lord, if I may, that the insured or those in the vicinity were aware that he was a police officer and that he had identified himself as a police officer up to that point.

THE COURT: Well, Mr. Williams is saying you have to read the transcript in its totality which I am going to have to go back and do myself. But I did read somewhere in there where at some point the officer says that he identified himself as such. Now whether it was to the deceased is the question.

MS. BUTLER:

Q. The witness at page 47 at paragraph 24, "did you at any time hear the gentleman say or identify himself as a police officer?" The answer was "no, the ONLY words that were heard was shut up."

RE-EXAMINATION:

MR. WILLIAMS:

Q. And I would refer to pages 22 to 30. I think all of that is the policy contract. Mrs. Wong, the policy at page 20 it contains the terms that govern the policy?

A. Yes.

Q. So the items on page 22, page 23 even like the application for insurance, they all form part of the insurance contract?

A. Yes, they do.

Q. If we look at page 20 where it says special conditions and exclusions. Does that refer to the items that are contained in the insurance police terms?

A. Yes. You mean the special conditions and conditions?

Q. Yes. Where it says special conditions and exclusions it says none. Does that refer to the terms that are in the policy already or does this refer to some other thing that the insured can get?

A. That the insured can get?

Q. That the insured can get. For instance, you could not get accidental death and dismemberment. You could choose not to have that, right?

A. Yes.

Q. When it talks about special conditions and exclusion and it says none, is it saying none in relation to the terms that are referred here on page 22 or is it saying none to some other or riders that the insured could possibly get?

A. Other riders that I assume the insured could get?

THE COURT: Pardon?

THE WITNESS: I would think it would be the other riders that the insured would get.

MR. WILLIAMS:

Q. So what you are saying to me and to the court is that the terms in this policy are the terms that govern the policy and where it says none it's referring to the fact that there is no additional items outside of these riders that the insured has?

A. Yes.

Q. Mrs. Wong, this may be strange for you and I to understand, but maybe are you familiar with Backwood cigars?

A. No, sir.

Q. I mean you know what they are?

A. I mean I know about cigars.

Q. So you don't understand what people use Backwood for? Some older people maybe.

A. No.

Q. So are you familiar with marijuana culture at all?

MS. BUTLER: My Lord, are we generalizing it?

MR. WILLIAMS: No, I am not generalizing but these things did come up with the cross-examination.

THE COURT: Well, I am young but I don't use Backwood.

MR. WILLIAMS:

Q. Mrs. Wong, I will take you to page 65 of this bundle.

We are at page 65 and I will start at line 2. **“He didn't reply. He look at his friend and his friends told him to drop it. This is when I leaned over and grabbed at his hands that I held overboard. (Special note of Outten holding the deceased's hand overboard.)** So I am just sticking a pin and asking you to follow me and then I am going to take you to page 52, right, and I will take you to ---.

THE COURT: 52?

MR. WILLIAMS: Yes, my Lord. I will take you to line 26.

This Tranell Armbrister giving this evidence. And the court asked Ms. Armbrister did you notice anything on the person of the yellow shirt. And the witness responds, **“he had something in his hand but it was small. I wasn't sure what it was.”**

THE COURT: “But you saw something?” The answer, “Yes.”

MR. WILLIAMS:

Q. And so I will take you back to your witness statement where you said the reasons because there were a lot of questions as to why the insurer would

have denied this policy or the accidental death and dismemberment portion of the policy.

In your witness statement you indicated at paragraph 8 that the defendant company relied on the police report dated the 11<sup>th</sup> of May, 2000 and the Coroner's Inquest.

So the 11<sup>th</sup> May, 2000 is at page 34, page 34 of the bundle. And at line or at paragraph 4 it reads:

**“The subject was suspected of being in possession of a substance believed to be marijuana. The officer identified himself and made an attempt to retrieve the substance and the subject threw the same over board and also jumped into the water.”**

Mrs. Wong, in a situation like that based on this police report, and you had a claim come before you for accidental death and dismemberment, would that be sufficient this portion in the police report for the company to question whether or not it would pay that portion of the policy?

A. No.

Q. It wouldn't be sufficient? What would take it into the realm of making it sufficient?

A. There would have to be a conclusive police report.

Q. This is in relation to the marijuana?

THE COURT: You are saying that it had to be a conclusive police report?

THE WITNESS: Yes.

THE COURT: Mr. Williams.

MR. WILLIAMS: Yes, my Lord.

THE COURT: Are you aware of what you just asked your witness?

MR. WILLIAMS: I understand what the response is and I don't thing ---

THE COURT: That is coming from the manager of the company. Do you have a conclusive police report as suggested by Mrs. Wong?

MR. WILLIAMS: I think when she says a conclusive police report ----

THE COURT: She says a conclusive police report.

MR. WILLIAMS: That sounds almost like a charge.

THE COURT: Which says that what we have done here today has been high-jacked for want of a better word. In other words she is saying that you didn't have sufficient evidence to deny payment.

MR. WILLIAMS: I don't know if that's what she is saying.

THE WITNESS: Basically we will take this into consideration.

MR. WILLIAMS: So it is one of a piece.

THE WITNESS: Right. And also where it says he was evading police I would also take that into consideration.

THE COURT: That does not fix what has therefore already been said in terms of a conclusive police report.

MR. WILLIAMS: I don't understand what is a conclusive police report.

THE COURT: Your question was very clear. "Would that be sufficient for you to arrive at the conclusion to deny or not pay." She said no, she would need a more conclusive police report.

MR. WILLIAMS: And so, right, and I understand because this police report is dated the 11<sup>th</sup> May, 2000.

MR. WILLIAMS:

Q. Could it be said then that the police report at page 41, it is actually a bit different because they say definitively at the top a man trying to evade police custody jumped over board and could not be located. Would this be sufficient? Is this the conclusive police report?

A. Yes.

Q. And one final question. Mrs. Butler, asked you if you were to see one swimming to shore and you asked you what would you assume and you responded that the person probably was swimming to safety.

Knowing what you know now, based on what we have read out of the transcripts, are there any other assumptions as to what could be made as to what he was doing in the water?

A. The assumption would be that he was trying to get away.

Q. Get away from who?

A. Get away from the police officer.

MR. WILLIAMS: Thank you, Mrs. Wong. That is all in re-examination.

[29] This case is a case where the deceased was insured with the Defendant under police No. 54924. The effective date of the said policy was November, 28<sup>th</sup>, 1999. The policy contained a basic plan of "Whole Life" in the amount of Thirty Thousand (\$30,000.00) and attached benefits of;

- |    |           |   |   |   |             |
|----|-----------|---|---|---|-------------|
| a. | WOP 2140  | - | Waiver of Premium –Wlp                  | - | \$30,000.00 |
| b. | BASF 3120 | - | Accidental Death &<br>Dismemberment Wlp | - | \$30,000.00 |
| c. | BASE 4102 | - | Living Benefit Rider                    | - | \$15,000.00 |

[30] In the box which says "SPECIAL CONDITIONS AND EXCLUSIONS" it says "NONE". The parties agree that the policy was in existence at the time of the deceased's demise. The face value of \$30,000.00 was paid to the beneficiary. However, the beneficiary has commenced this action for payment of one of the attached benefits, that being the \$30,000.00 for the accidental death and

dismemberment, which the Defendant has refused to pay taking the position that the insured fell squarely under (A) the rubric "RISKS NOT INSURED". That section reads;

**"No amounts are payable under this Attached Benefit for death and dismemberment which are directly or indirectly occasioned and accelerated (a) by suicide, attempted suicide or intentional self-injury while sane or (b) by bodily or mental infirmity or illness or disease of any kind or (c) by reason of the Life Insured taking any narcotic or drug or poison or (d) by inhalation of gas or fumes of any kind, produced or released by or as a result of an act of the Life Insured, whether intentional or otherwise or (e) as a result of entering, servicing, operating, travelling in or ascending or descending from any aircraft or aerial device except as a fare-paying passenger on a licensed commercial airline flying on a regularly scheduled flight or (f) by war, invasion act of foreign enemy hostilities (whether war be declared or not) civil war, rebellion, revolution, insurrection, military or usurped power, riot or civil commotion or (g) while committing or attempting or preparing to commit a criminal offence."**

[31] Both parties also agree that it is the letter (g) above that this action centers around.

[32] Reference was also made to the transcripts of the Coroner's Inquest. In particular the evidence of Tranell Keva Armbrister and Officer Outten.

[33] Officer Julian Outten, the Officer at the center of the incident also gave evidence at the Coroner's Inquest. The relevant parts of his evidence are as follows.

A. My name is Julian Outten, Constable of the Royal Bahamas Police Force, presently attached to -----

THE COURT: Sorry, Police Constable.

THE WITNESS: Outten.

THE COURT: Number?

THE WITNESS: 625.

THE COURT: Yes.

MS. WILLIAMS:

Q. Where are you presently attached?

A. To the Paradise Island Police Station, Central Division.

Q. And in April 2000, where were you attached?

A. Pardon?

Q. April 2000, where were you attached?

A. Paradise Island.

Q. Now, do you recall, in particular, Friday, the 14<sup>th</sup> of April, 2000, around 9:00 p.m.?

A. Yes, Ma'am.

Q. Tell us, where exactly were you?

A. On board the Calypso 1.

Q. And while on the Calypso 1, tell us what, if anything, happened. Take your time and tell us what, if anything, happened.

A. Well, while I was on board the boat, my attention was drawn by a scent which was known to me as marijuana. It was coming from the front section of the boat. I then proceeded to the front section of

the boat where the scent was coming from. I met three y there. I introduced myself by presenting my warrant card to them and stated that I was a police officer. At this point I asked the young men what it was that they were smoking. Two of them turn and showed me what appeared to be Backwood Cigars, and one of them quickly walked away.

I asked one of the men what it was that he had in his hand. He fist also was clinched, hanging over the railing of the body. His friend told him to drop it. I became suspicious and grab one of the suspect's hands that was hanging over the boat. He pushed me back. I turned and placed him against the partition in an attempt to restrain him. I saw his friend advancing toward me. This was when my attention was taken off him. He got away, proceeded over the railing.

He took a few paces up on the platform. I shouted for him to stop. He turn, jumped off and in the water, and started swimming toward the wharf. I pushed my way to the back of the boat. One of the crew members was trying to get a floatation device off the boat.

The boat was turned around and I began searching for the individual.

Q. And what if anything happened next?

A. About an hour or so afterwards the boat docked at Paradise Island. I went to the station and informed personnel there about what had happened so that they can notify the proper authorities.

Q. Yes, and as a result, or did he give a statement regarding this particular matter?

A. Yes, ma'am. I wrote a report.

Q. Now, do you recall – you said that the boat turned around, do you recall if a search was made for the person who jumped over board?

A. Yes, ma'am.

Q. Can you give us details of that search?

A. Well, the boat circled in the area several times looking for him, along with a small Defence Force vessel, circled several times looking for him.

Q. Was the search fruitful?

A. Not at that time.

Q. Now, you said you were on board that boat, the Calypso 1, could you tell us why you were on board that boat?

A. Well, I'd just gotten off, and it was common practice when boats are leaving from the back of Paradise Island, that we go on board and ensure that nothing ever happen. There was an estimated arrival, me and triple six Hanna, we were walking in the back and met Corporal Rolle, and he asked who would be accompanying him, and both of us said neither of us. Constable Hanna said, I would go, and I agreed and I went on board.

Q. Could you tell us what was your purpose on the boat that night?

A. Namely for security purpose.

Q. And when you say "security purpose" could you particularize what exactly you mean, what type of security?

A. To ensure that nothing out of the ordinary happen with regards to their behavior, towards that effect.

THE COURT: Very well, Mr. Hanna.

CROSS-EXAMINATION BY MR. HANNA:

Q. Good morning, Mr. Outten.

A. Good Morning.

Q. Can you describe to me what a Backwood Cigar looks like?

A. It is four inches --- some of them are four inches in length, brown tobacco leaves. It is dark-coloured or this light.

Q. Different colorations. Do you associate these Backwood cigars with any particular conduct or activity?

A. They are used for rolling marijuana joints.

Q. Okay. Did you see these cigars before or after you smelt what you described as something known to you as marijuana?

A. Did I see them before or after? This was after I smelt it.

Q. How did you come to know the smell of Marijuana?

A. It comes from growing up. I smelt it a lot. My cousins and brother, they smoked it a lot; and joining the Police Force, I smelt it on several other situations.

Q. How many other situations?

A. Quite a few.

Q. More than five?

A. As the officer involved in a case, it would be no more than five.

Q. How tall are you?

A. Five eleven and a half.

Q. Describe the three gentlemen you said you approached on the boat.

A. The one I saw briefly, to my estimation, was about five, six, five, seven. He had on white and white. Dark colour, dark completion. The other was a bit taller than I was, slim built.

Q. And the other one?

A. The other one, I only saw him briefly.

Q. Did you recall what these people were wearing, any of the other two people you described?

A. One was wearing white and white. The other one had on a darkish-coloured jacket, what appear to be a blue jeans pants.

Q. The one you saw briefly was involved in the incident you described to the Court?

A. After he showed me what he had in his hands he walked away.

THE COURT:

Q. What did you suspect he had in his hand?

THE WITNESS: I saw it was a Backwood Cigar.

MR. HANNA:

Q. What did he do with it?

A. He walked away. He still had it in his hand. I examined it and he walked away.

THE COURT: It didn't have marijuana?

THE WITNESS: No, sir.

MR. HANNA: Thank you, your Worship.

MR. HANNA:

Q. On the boat, on the level where you were, were you the only four people on that level.

A. No, sir.

Q. How many people were there on that level?

A. Quite a few.

Q. And you are certain that this smell was coming from these three people?

A. The only three persons that were smoking at the time.

Q. Is it correct to say they were the only people smoking at the time?

A. The only people, to my knowledge.

Q. I asked if these were the only people you saw smoking at this time?

A. Yes. Sir.

Q. Describe to me how his hands was clenched that night?

A. Like this (indicating) over the railing of the boat.

Q. That means his hands were over the water?

A. Really over on the deck.

Q. Where were you in relation to the boat?

A. I don't understand the question?

Q. Were you in the middle of the said boat?

A. In the middle.

Q. When he turned away and walked from you where was Mr. McClain?

THE COURT: It hasn't been established which was McClain.

MR. HANNA:

Q. Do you know the identity of the person who you said had jumped into the water?

A. Yes, sir.

Q. Do you recognize that person to be one of the three persons you were arresting at the time?

A. Yes.

Q. What happened to the one, McClain? In your statement you said that he turned away.

A. I didn't say he turned away from me.

Q. Well, he walked away from you?

A. No, sir.

Q. Did you make a statement?

A. After the incident.

Q. When was it? A day or a week after?

A. The same night.

Q. Your recollection would be more accurate on the night. Did you make a statement that one of the two turn and run away quickly?

A. No, sir.

Q. If it is written down in here, it means this is inaccurate, which you wrote on the night of the incident?

A. No, sir. I don't recall writing it.

MR. HANNA:

Q. Okay. Your Worship, can he be shown his own statement?

THE COURT: Yes.

Is this your handwriting?

THE WITNESS: Yes, sir.

THE COURT: Signature?

WITNESS: Yes, sir.

THE COURT: Good.

MR. HANNA: Thank you Your Worship.

MR. HANNA:

Q. About 11 lines down you said, one of these two turned and walked away quickly? Is that the one you said turn around and he was not smoking something illegal? Statement, line 11, you remember these two walk away?

A. Yes. That would have been an error.

Q. It goes on a few lines to that ---

A. I asked if the remaining two --

A. I haven't asked you the question. I'll get to that in a minute. Do you always use your warrant card when you are addressing people suspected of committing an offence?

A. Yes.

Q. Can you show me what it looks like if you are in possession of it now?

A. (Indicating)

- Q. Do you always keep it in your wallet?
- A. At the time.
- Q. Were you on duty on the night of the incident?
- A. I had just gotten off at 7:00.
- Q. Were you carrying your wallet at the time?
- A. No, sir.
- Q. Were you keeping the warrant card?
- A. In my top left pocket
- Q. Why were you keeping it there if you were off duty?
- A. I had made an arrest at Solomon's Mines.
- Q. You had no money on you at the time?
- A. I had money in my pocket.
- Q. Did you speak in a calm voice? Do you remember the language you used?
- A. No, sir.
- Q. Is it possible that you could have said something to the effect, "Who is smoking weed?"
- A. No, sir.
- Q. What would you have asked?
- A. I simply asked what they are smoking.
- Q. You didn't accuse anybody of smoking marijuana?
- A. No, sir.
- Q. Were you told that nobody was smoking anything illegal?

- A. Yes, sir.
- Q. Who told you that?
- A. The individual in the white and white, shorter guy.
- Q. He was one of the two who were remaining?
- A. Yes, sir.
- Q. Did you then turn and asked the remaining individual what he was smoking?
- A. Yes, sir.
- Q. Why did you assume he was smoking something?
- A. Because the scent was emanating from where he stood.
- Q. The scent, what you described as marijuana?
- A. Yes, sir.
- Q. And you are the only person, so far, saying there is a smell of marijuana?
- A. I don't know, sir, that is just my –
- Q. Where was the person you questioned as having the clenched fist? Was that Mr. Sharrado McClain?
- A. Yes, sir.
- Q. Where was he when you were asking him this question?
- A. He is standing to the right of me.
- Q. That was in the middle of the boat?
- A. Yes, sir.
- Q. What did he say when --- what happened after you asked?

- A. He didn't reply. He looked at his friends and his friends told him to drop it. That is when I lean over and grab at his hand that I held overboard.
- Q. Was it dropped?
- A. In the water.
- Q. How long did it take for you to identify yourself as a police officers that until you saw the hand clenched over the railing?
- A. A few seconds.
- Q. In that time was there a moment for McClain to dispose of the object in his hands?
- A. A few seconds in between.
- Q. Describe to me how you try to restrain Mr. McClain.
- A. he violently shrugged me off with his inner hand. I took my force arm against his chest and felt in my pocket for the handcuffs. I noticed, over my shoulder, the shorter one advancing toward me. I placed the left hand over here (indicating). That is when he escaped from me and jumped over the railing.
- Q. How hard did you hold him?
- A. Not hard.
- Q. Did you grab him?
- A. No, sir.
- Q. Did you see anything happen on that night which might establish that he acquired a contusion that is six inches by two inches on top of his head?
- A. No, sir.

Q. You don't think you would have been responsible for that?

A. No, sir.

Q. Did you slap McClain?

A. No, sir.

Q. Did you threaten Mr. Trevor Woods with arrest?

A. No, sir.

THE COURT:

Q. Who is Trevor Woods?

THE WITNESS:

A. The shorter guy.

BY MR. HANNA:

Q. What did you say to Mr. Woods, that other one of the two remaining, when you saw him approaching you?

A. I told him to stay back.

Q. Did you try to hit Mr. Trevor Woods at any point and time?

A. No, Sir.

Q. Did you slap McClain against the wall?

A. No, sir.

Q. Did you throw him into that railing, the boat railing?

A. No, sir.

Q. Are you aware of the fact that you may have damaged Mr. McClain's jewelry?

A. No, sir.

Q. If Mr. McClain's chain was popped as a result of your restraining him - - let me put it this way: It has been established that his jewelry was damaged, as a result his chain popped. Did your hand come any higher above his chest towards his throat that might have caused that kind of damage?

A. Not to my knowledge, sir.

Q. Not to your knowledge?

A. No, sir.

Q. Mr. Outten, could you describe to me what you describe as a violent shrugged?

A. It was across my chest area. When he raised it up, him hitting me. I stumbled back.

Q. It has been - - evidence has been given that you did not identify yourself as a policeman. The motion when you took your warrant card out, were you on duty? You were not on duty at the time?

A. No, sir.

Q. You were acting in your own capacity as a policeman?

A. Yes, sir.

Q. How long were you trying to restrain Mr. McClain?

A. About a few seconds.

Q. Less than five?

A. I don't know. It happened sort of quick.

- Q. How tall was Mr. McClain?
- A. He was taller than I was.
- Q. He was taller than you were?
- A. That is how it appeared.
- Q. The evidence that has been submitted in the form of - - I am looking at the death certificate, it says that he is five, eight inches in length. That is three feet shorter than you are?
- A. Yes.
- Q. You remember him being tall?
- A. Yes, sir.
- Q. Do you know whether he was heavy, thin?
- A. He was a slim person.
- Q. Was he muscular?
- A. It didn't look so. I guess.
- Q. Did you find him an intimidating person?
- A. No, sir.
- Q. Do you recall whether or not there was a young girl who was in the vicinity of this incident?
- A. There were several other people there.
- Q. How many other people gathered around?
- A. I am not aware, sir.
- Q. How many? Several, three or four? More than one I take it?
- A. Yes, sir.

Q. Do you remember specifically a young lady who was very near to you at that point in time?

A. No, sir.

Q. It has been given in evidence here that Mr. McClain had an appearance of looking afraid. Is it possible that he was afraid that because he was trying to - -.

THE COURT: He won't know that. He can't answer that.

MS. WILLIAMS: Just a matter of procedure, is it correct to put to a witness in these proceedings what another witness would have said?

THE COURT: No. Mr. Hanna, be guided.

MS. WILLIAMS: I will be guided by that, your Worship.

THE COURT: Thank you. Thank you so much.

BY MR. HANNA:

Q. Did you at any point grab on to the clothing of Mr. McClain?

A. Pardon?

Q. During this incident did you at any point grab onto Mr. McClain's clothing?

A. When he attempted to cross over to the railing.

Q. Where?

A. The jacket.

Q. Where on the jacket?

A. The back of the jacket.

Q. Was he facing you or away from you at the time?

A. Away from me.

Q Did you make a statement after Mr. McClain was in the boat, after he jumped off the boat, "He locked up"?

A. No, sir.

THE COURT: Locked up.

MS. WILLIAMS: A phrase. One take it to mean that he is going to be arrested.

THE COURT: Oh, yes.

BY MR. HANNA: If Mr. McClain dropped whatever you suspected to be marijuana over the side of the boat, why were you attempting to restrain him?

A. To conduct a further search of him, sir.

Q. Did you ever say to anybody who was on that boat that they should make a statement saying that Mr. McClain had been resisting arrest.

A. Not to that effect. I asked that persons who saw what happened to you come forward.

Q. Did you ask a gentleman?

A. When I turned around, the persons who were there I asked.

Q. Would you describe any of these people?

A. One of the defence force officers he was in the immediate area. I can't remember his name offhand.

Q. Did he make a statement to that effect?

A. Not in my presence.

Q. This was pointed out to me, and a young lady and another?

A. Yes, sir.

Q. Were there also persons who saw what happened and they were willing to come forward?

A. Did they make a statement that they saw Mr. McClain resisting arrest, as far as you were aware?

THE COURT: No, sir.

BY MR. HANNA: Can you describe for me a bit more detail what effort was made to -  
- what happened when he jumped off the boat?

A. The captain turn the boat around and again circled the area, and a defence force vessel began circling the area.

Q. Were any lights brought out?

A. I can't recall.

Q. You can't recall?

A. A big spotlight on the boat was shining.

Q. Shining. You said you saw Mr. McClain swimming towards the wharf?

A. I said he started swimming south of - -.

Q. The statement you made was that you saw him swimming towards the wharf. So, he is swimming south?

A. Yes, sir.

Q. How long did you watch him in the water?

A. Immediately after I saw him swimming I run to the back of the boat to get some assistance.

Q. What made you concern about Mr. McClain's safety?

[33] The Coroner's Court's decision was that;

“The deceased Charrado McClain died in waters off Club Med in Nassau Harbour, New Providence on 18<sup>th</sup>, April, 2000 of:

- (1), (a) Acute pulmonary Oedema
- (b) Consistent with features of drowning and
- (2) Head injuries due to Misadventure.

[34] In the United Kingdom, death by misadventure as recorded by coroners on death certificates and associated documents, is one that is primarily “ATTRIBUTED” (our emphasis) to an accident that occurred due to a risk that was taken voluntarily. (Wikipedia The Free Encyclopedia.)

#### **CLOSING SUBMISSIONS OF THE PLAINTIFF:**

[35] The Plaintiff's submissions obviously centered around the position taken by the Defendant in that the Defendant says that the deceased's death was not an accident as defined by the policy. The Plaintiff's position is that the deceased met his death by reason of an unfortunate accident. The Plaintiff cites the case of **INVESTORS COMPENSATION SCHEME LTD. VS. WEST BROMWICK BUILDING SOCIETH [1995] 1 All ER 98**, where Lord Hartman said;

**“Where the operative words are precise, clear and unambiguous they will prevail over the recitals”.**

[36] The Plaintiff also cites the contra proferentum rule whereby the words of the deed are to be interpreted most strongly against the party who puts the words forward.

[37] One of the express terms of the policy was;

**“The Company will pay the sum set out in the following schedule in respect of Accidental Death or Dismemberment by the life insured while his Attached Benefit is in force, as a result of bodily injury caused by violent, accidental, external and visible means, provided death or dismemberment occurred within three calendar months after such bodily injury was sustained.”**

[38] The further position put by the Plaintiff is that at the Coroner’s Inquest one of the witnesses Tranell Armbrister testified that she saw the deceased swimming towards the dock, which the Plaintiff says infers an intention to swim to safety. This the Plaintiff says should be looked at as an accident, thereby allowing the policy to pay to the beneficiary or the deceased’s estate the A.D.D. portion of the policy.

[39] The Plaintiff’s further argument is that the clause under “RISK NOT INSURED” in particular (g) should not apply, due to the fact that the insured’s death fell within one of the exceptions under the policy.

[40] The Plaintiff’s position is that the unfortunate event which took place was an accident. In support of this position, counsel relies on **HALSBURY LAWS OF ENGLAND 4<sup>TH</sup> EDITION VOLUME 25 page 569** wherein it states;

**“In an accident insurance, the insurer contracts to pay a certain sum of money to the insured on the happening of a specified event that the insured sustains “accidental injury” ..... Accident covers any “UNLOOKED FOR MISHAP (our emphasis) or an UNTOWARD EVENT” (our emphasis), which is not expected or designed or any unexpected personal injury resulting from any unlooked for mishap or occurrence.”**

[41] In looking again at the clause, it speaks to the commission, attempting to commit or preparing to commit a crime.

[42] The Defendant’s case is primarily hinged on the commission of a crime. That crime being the crime of resisting arrest, pursuant to Sections 247 and 443 of the Penal Code which state;

**“247. Whoever assaults, molests, obstructs or resists, aids or incites any other person to assault, molest, obstruct or resist any public or peace officer, or any person employed by a public or peace officer, acting or proceeding to act in the execution of any public office or duty or in the execution of any warrant or legal process, shall be liable to imprisonment for six months**

**443. Whoever endeavours to resist or prevent the execution of the law — (1) by resisting the lawful arrest of himself or of any other person for any cause other than crime; (2) by rescuing any other person from lawful custody for any cause other than crime; or (3) by rescuing any goods or things from any public officer or peace officer or other person having the possession, custody or care thereof under or by virtue of any lawful warrant or process, is guilty of a misdemeanour.”**

[43] The Defendant also relies heavily on the police report which they put as “attempting to evade police.” They also say in paragraph 14 of their closing submissions that; **“the deceased died by misadventure (attempting to evade the police.)**

[44] We proffered a definition of death by misadventure earlier at paragraph 33.

#### **THE LAW:**

[45] We hasten to point out that the police report dated 11<sup>th</sup> May, 2000 speaks to the deceased **“TRYING TO EVADE POLICE CUSTODY”**. The request for a coroner’s inquest also says that the deceased was trying to **“EVADE POLICE CUSTODY”**.

[46] We therefore opine that evading police custody in the circumstances is distinct from **“EVADING ARREST”**. Nowhere in Officer Outten’s report or evidence at the coroner’s inquest does he say that the deceased was evading arrest. In fact, there was no evidence that the deceased was ever told by Officer Outten that he was being placed under arrest. The evidence of Officer Outten on page 81 of the transcript of the evidence in the Coroner’s Court, line 28 – 32 states;

**“Q. Did you tell him to stop, that he was under arrest? I don’t know what the procedure is. What do you do?”**

**A. At that point, I did not tell him he was under arrest, Sir. After he pushed me off him, I try to .....**”

[47] Officer Outten admits that he did not tell the deceased that he was under arrest.

[48] There is also the fact that nowhere in the evidence was there any confirmation of any drugs, in particular marijuana in the system of the deceased, or on the body when found. When we analyze Section 247 of the Penal Code we would be hard pressed to conclude that the deceased either committed, attempted to commit or prepared to commit a criminal offence.

[49] The question which lies to be answered is; “whether the deceased either directly or indirectly met his untimely death by willfully exposing himself to needless peril. In the case of **MORLEY and MORLEY V. UNITED FRIENDLY INSURANCE PLC [1993] 3 All ER 47**, the facts of which were;

**“The deceased was insured with the defendant insurance company under a personal accident insurance policy which provided, inter alia, that no benefit was payable under the policy if death or injury resulted directly or indirectly from willful ‘exposure to needless peril.’ The deceased had got out of a car in which he was a passenger in order to relieve himself. When he returned to the car the driver, in order to hurry him, slowly began to drive away. The deceased then jumped or stepped onto the rear bumper of the car, which was barely moving at the time. The driver accelerated slightly and drove off in a zig-zag fashion at 15 to 20 mph causing the deceased to be thrown off and suffered injuries from which he later died. The plaintiffs, who were the administrators of the deceased’s estate, claimed under the insurance policy but the defendants, relying on the exclusion clause, refused to pay. The plaintiffs brought an action against the defendants but the judge dismissed their claim on the ground that by stepping onto the moving car the deceased had willfully and deliberately exposed himself to a**

**substantial risk of injury within the exclusion clause. The plaintiffs appealed.**

**Held – In determining whether the deceased had willfully exposed himself to needless peril so that the exclusion clause in the policy applied to exclude payment under the policy, it was necessary for the defendants to show that the exposure to risk had been willful and not merely negligent. That required (per Neill LJ) the court to consider the circumstances, including the likelihood of the insured injury being incurred if the risk was taken and the opportunity for reflection before the risk if taken or (per Beldam LJ) that at the time of his actions the deceased was mindful of a real risk of the kind of injury for which benefit was provided by the policy and that he either intended to run that risk or exposed himself to it not caring whether he sustained such injury or not. On the facts, the deceased had not ‘willfully’ exposed himself to unnecessary peril but had merely engaged in a momentary act of stupidity and accordingly the plaintiffs were entitled to recover under the policy. The appeal would therefore be allowed (see p. 52 c g j to p 53 a, p 55 f to p 56 a, post).”**

[50] In our view therefore, no crime was committed pursuant to sections 247 and 443 of the Penal Code. Officer Outten never told the deceased he was being arrested or under arrest. It was Officer Outten’s further evidence at the Coroner’s Inquest that he did not even use words to imply that he was about to arrest the deceased or that the deceased was “LOCKED UP” as put to him at the Inquest.

[51] In light of the findings therefore, and the fact that litigation, once commenced ought to be completed. We must necessarily go further and deal with the position of the insurance policy “ACCIDENTAL DEATH & DISMEMBERMENT

etc.” which is inter-connected with the clause relied on by the Defendant (i.e. “The commission of a crime”).

- [52] In the authoritative book; **“GENERAL PRINCIPLES OF INSURANCE LAW”**, by **E.R. Hardy Ivamy, LLB., Ph.D., LL.D.** under the rubric of “Wilful Acts” he says at page 285;

**“In the absence of privity or consent, the assured, if not guilty himself of misconduct, is not precluded from recovering. (see MIDLAND INSURANCE CO. V SMITH (1881), 6 Q.B.D. s.61).**

**If the act amounts to a crime, the insurers must, if they resist claim on this ground, satisfy the jury that the alleged crime was committed. The evidence brought forward must be sufficient to justify a conviction on the criminal charge. In the absence of clear proof that the act was criminal, the (PRESUMPTION AGAINST CRIME MUST PREVAIL), (our emphasis) and the assured will be entitled to recover. To preclude the assured from recovering; it must be shown that the crime, was committed by him or with his privity or consent.”**

- [53] The Coroner’s Court’s conclusion was that, **the deceased died in waters off Club Med** in Nassau Harbour, New Providence on 18<sup>th</sup> April, 2000 of: (1), (a) Acute Pulmonary Oedema, (b) Consistent with features of drowning and (2) Head injury, due to Misadventure.

Wikipedia defines “Misadventure” as being a form of unnatural death, a category that also includes accident, suicide and homicide.” Black’s Law Dictionary, under “ACCIDENTAL KILLING” defines it as “homicide resulting from a lawful act performed in a lawful manner under a reasonable belief that no harm could occur – Also termed death by misadventure.”

[54] In the case of GLENLIGHT SHIPPING LTD., (PURSUERS) V. EXCESS INSURANCE CO. LTD. (1982), s. 642, the facts of which are;

**“A shore engineer died by drowning after driving his car off a ferry during its passage from Kyle of Lochalsh to Kyleakin. When the ferry was almost across the channel he drew out from a row of parked cars on the car deck and drove at a relatively fast speed along the deck, up the ramp (which was in the raised position) and over the top into the sea. A post-mortem revealed that his blood contained 307 milligrams of alcohol per 100 milliliters of blood.**

**A policy of insurance between his employers and the insurance company provided that, in the event of the insured persons under the policy (which included the deceased) sustaining “bodily injury by violent accidental, external and visible means which injury shall solely and independently of any other cause result in” death, the defenders would pay the sum specified under the policy. Further, there was an exclusion clause in the policy to the following effect:- “The Company shall not be liable for any claim the consequence of ....The insured willfully exposing himself to needless peril (except in an attempt to save human life) committing or attempting to commit suicide or causing intentional self-injury.”**

**It was contended for the insurers that the death of the deceased was not accidental or was the result of the deceased exposing himself to needless peril.**

**Held (1) that the phrase “violent accidental, external and visible means” meant no more than “accidental”.**

**(2) That if the deceased acted through a mistake his death could be regarded as the result of accidental means since it was the result of the mistake rather than the result of the deliberate act.**

*Dicta of Coltman J. in Borradaile v. Hunter (1843) 5 Man. & G. 639, 663 and Judge Fay Q.C. in Marcel Beller Ltd. v. Hayden [1878] Q.B. 694, 705 followed.*

(3) That, once a prima facie cause of accident was established, the burden of proof shifted to the party seeking to show that it was a cause expected by the policy which primarily caused the loss.

(4) That there was no evidence that the deceased committed suicide; it was more probable that he drove up the ramp and off the ferry under the mistaken belief that the ferry had berthed. A man who was befuddled with drink and not in full possession of his faculties might well have mistakenly concluded that the ferry was at the slipway and that it was time to disembark.

(5) That an exclusion clause such as that in clause 6 should not be construed literally; and that the word “willfully” imported a subjective test and meant in this context “intentionally.” It implied that the deceased recognized the danger but nevertheless willfully and consciously assumed the risk.

*Dicta of Lord Stormonth-Darling in Sangster’s Trustees v. General Accident Assurance Corporation Ltd. (1896) 24 R. 56, 57 followed.*

*Dicta of Judge Fay Q.C. in Marcel Beller Ltd. v. Hayden [1978] 1 Q.B. 694, 705 applied.*

(6) That the insurers had not established that the deceased willfully exposed himself to peril by driving off the ferry when the ramp was up because (a) as the deceased was so incapacitated through drink that he acted by mistake there could not have been willful misconduct on his part; and (b) it could not be concluded that when the deceased consumed the alcohol he did so with the intention of running any risk. A person cannot be held to have willfully exposed

himself to needless peril unless it is established that he considered the risk and then deliberately and consciously exposed himself to it.

Observed that there was a presumption against suicide in Scots law. *Macdonald v. Refuge Assurance Co. Ltd. (1890) 17 R. 955* referred to.

[55] Lord Ross at page 269 and 270 states;

“The policy provides *inter alia* as follows – “Now this policy witnesses that in consideration of the Insured having paid or agreed to pay to the Company the First Premium the Company agrees subject to the terms, exclusions, definitions and conditions contained herein or endorsed hereon that if during the Period of Insurance or during any subsequent period for which the Insured shall pay and the Company shall agree to accept the premium for the renewal of this policy the Insured shall sustain bodily caused by violent accidental, external and visible means which injury shall solely and independently of any other cause result in his death or disablement the Company will pay to the Insured or in the event of death to his legal personal representatives the sum or sums of money specified in the Table of Benefits.”

The said table of benefits in the policy provided *inter alia* that the benefit payable under this policy in respect of the death of an insured person's should be an amount equal to five times the insured person's basic annual salary at the time of the incident. In the joint minute (No. 51 of Process) it is agreed *inter alia* that as at 12<sup>th</sup> May 1977 the basic annual salary of the deceased was £3,774.46. This differs somewhat from the figure averred on record, and counsel for the pursuers in his closing submissions, restricted his

claim to £18,872.30 being five times the agreed basic annual salary of the deceased.

The critical question which thus arises in this case is whether the deceased sustained bodily injury caused by violent accidental, external and visible means which injury solely and independently of any other cause resulted in his death. The phrase "violent accidental, external and visible means" is a somewhat clumsy one, but it has been commonly employed in personal accident policies since the last century. The use of a phrase in these terms was criticized by Lord Cozens Hardy M.R. in *In re United London & Scottish Insurance Company Limited- Brown's Claim [1915] 2 Ch. 167* at page 170 where he stated;

"It seems to me seriously open to doubt whether that does not exempt the company on every occasion which is likely to occur." In my opinion, however, the better view of these words is that which is expressed by Professor Ivamy in *Personal Accident, Life and Other Insurances (Second Edition)*, page 28, where he states in relation to this phrase "So far as the effect of the policy is concerned, these words probably add nothing to the idea conveyed by the word 'accident,' since they merely give expression to the essential features of an accident. At the same time they serve a useful purpose in making clear the distinction between accidental and natural causes, and thus help to define with greater precision the scope of the insurance."

[56] Further on page 272 Lord Ross states;

"In the circumstances, the question arises as to whether the deceased's death was the result of accidental means. Mr. Macfadyen contended with considerable force that the deceased's act in driving

his car along the deck and over the ramp was a deliberate act, and that his death could not therefore be said to have been caused by accidental means. He maintained that the means were deliberate even if the result was not the result which the deceased intended; whatever result he had in mind, Mr. Macfadyen contended that it was beyond doubt that the deceased's driving along the deck and up the ramp was a deliberate act on his part, and the probable and natural consequence of that act must be that he would drown. In these circumstances he maintained that the proper conclusion to be drawn from the evidence was that the death was not the result of accidental means.

I quite accept that on the evidence the deceased's act in driving his car along the deck and up the ramp was a deliberate act on his part. In my opinion, however, it is necessary to consider what the deceased's intention was at the material time. There are really only two possible explanations. Either he intended to take his life or he drove along the deck and over the ramp by mistake.

If the deceased drove along the deck and up the ramp, with the intention of committing suicide, then clearly his death could not be the result of accidental means. But what if he drove along the deck and up the ramp in error, having mistakenly concluded that the vessel had arrived at Kyleakin and that it was time to disembark? If that were established I am of opinion that death would be due to accidental means. Even though he acted deliberately in driving along the deck and up the ramp, his drowning would not be the intended or expected or expected consequence of his deliberate act; to the contrary, on this hypothesis, his intention was to drive up the slipway and into Kyleakin. I appreciate that normally a man is taken to intend the ordinary or probable consequences of his acts, but, in my opinion, mistake or error (if such there was) would involve the

introduction of a fortuitous cause. It is well established that if an insured has acted negligently, his subsequent death may be regarded as the result of accidental means even though he has acted deliberately; and this is because the death is the result of the negligence rather than the deliberate act (Ivamy, *supra*, page 25). In the same way, if the deceased acted through mistake, I am of opinion that his subsequent death could properly be regarded as the result of accidental means, since it was the result of the mistake rather than the result of the deliberate act.

I find some support for this view in the decision of Judge Fay Q.C. (sitting as a Judge of the High Court) in *Marcel Beller Ltd. v. Hayden* [1978] Q.B. 694. At page 705, he states "It seems to me that a clear distinction can be drawn between cases where the predisposing cause is the deliberate taking of an appreciated risk and the cases such as the present where the predisposing cause although it leads to the taking of risks involves risk which was neither deliberately run nor actually appreciated." Accordingly if there was no question of suicide and no question of the deceased having willfully exposed himself to needless peril, I am of opinion that his death would be the result of accidental means if the risk involved was the result of error and was not a risk deliberately run nor actually appreciated by him. I also find support in *Borradaile v. Hunter* (1843) 5 man & G. 639 where Coltman J. expressed the view that a suicide exception would not cover the case of a man who had taken poison by mistake. In my opinion, if the deceased mistakenly thought that the ferry had arrived at Kyleakin, his death from drowning would still be accidental even although his driving along the deck was deliberate.

Accordingly what has to be determined is the deceased's intention and state of mind when he drove off the ferry. In order to determine

that, it is necessary to consider all the evidence which throws a light upon his state of mind at the relevant time.

[His Lordship considered the evidence and continued] -- On the whole evidence, however, I am satisfied that suicide can be excluded. Although I accept that the deceased deliberately set his car in motion and drove along the deck and over the ramp, I am clearly of opinion that suicide can be discounted. There was a substantial body of evidence to the effect that the deceased was a cheerful individual with no known worries. Part of this evidence came from relatives, the widow, the son and brother-in-law. I believed their evidence.”

“In my opinion, a man who was to some extent befuddled with drink and was not in full possession of his faculties, being confronted with the scene depicted on No. 38 of Process, might well have mistakenly concluded that the vessel was at the slipway and that it was time to disembark. I think that such a man might well have failed to appreciate that the vessel was still moving and that the ramp was in its up position, but might have thought that the ramp was part of the slipway.

The witness M'Rae stated that while one is on the ferry approaching Kyleakin one can see the lights on the jetty, and one is presented with the appearances of a continuous stretch of roadway from the car deck rather than the appearance of a deck, a ramp and a jetty. For what it is worth, this evidence lends some support to the view which I have formed as to what in all probability occurred.

Of course, I appreciate that even if the deceased had concluded mistakenly that the ferry had arrived at Kyleakin, the normal course would have been for him to have waited until the vehicle in front of him had moved off. The normal practice was for vehicles to leave the car deck in the same order as they had arrived. The deceased in

fact swung out and overtook four other vehicles ahead of him in the line. One will never know for sure why he did so, but it may be that in his fuddled state he concluded mistakenly that the vehicle ahead of him had stalled or had broken down and that he required to overtake it; alternatively he may have been in a hurry and decided to jump the queue. Whatever the explanation, I am of opinion that because of his fuddled state, it is impossible to apply standards of reason to his behavior. All that one can say is that he was probably suffering from mistake due to his being under the influence of drink. I am quite satisfied that that is the most likely explanation of what he did. Was his death then due to accidental means?

In my opinion, since the deceased probably drove off the ferry under the mistaken belief that she had berthed and that it was time to disembark, his death can properly be described as due to accidental means. I refer to the earlier passages in this opinion where I have explained why I regard his death as being due to accidental means in such circumstances.

Whether or not death was due to accidental means, the defenders would not be liable if the claim is covered by exception 6 of the Policy on which the defenders rely. The defenders have averred that the deceased committed suicide or alternatively willfully exposed himself to needless peril.”

[57] In the case of **MORLEY and another v UNITED FRIENDLY INSURANCE PLC** (supra) Lord Justice Neill stated at paragraph 54.

“An exclusion clause in a policy of insurance has to be construed in a manner consistent with and not repugnant to the purpose of the policy. To construe the words ‘wilful exposure to needless peril’ so

as to deprive the insured of benefit under the policy whenever it could be shown that his intentional acts had exposed him to a substantial risk would severely restrict the scope of the indemnity against accidental bodily injury. To avoid liability insurers must show that the exposure to needless peril was willful, not merely that intentional acts done by the insured resulted in his being exposed to such peril. The word 'wilful' used in similar contexts has been the subject of judicial interpretation for over 100 years. In conjunction with the word 'misconduct' it was construed in contracts of carriage by rail where, for example, the company had excluded liability except for willful misconduct of its servants."

[58] Paragraph 6 and 7 of the Defendants defence reads as follows;

- "6 It was a condition of the accidental death and dismemberment provision that no amounts would be payable thereunder for death or dismemberment directly or indirectly occasioned or accelerated (a) by suicide attempted suicide or intentional self-injury while sane or (g) while committing or attempting or preparing to commit an offence.**
- 7. On the 14<sup>th</sup> April, 2000 the said Cherrado Salathiel Higgs while on board the M/V Calypso I and during the commission of a crime in an attempt to evade police custody jumped over board and drowned."**

[59] The Defence puts forward two (2) grounds on which it sought to resist the claim as set out in the statement of claim, those being (a) and (g) of the "accidental death and dismemberment provision of the policy."

[60] At page 7 of **CANDLER VS. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA (1963) 2 OR 547** Justice Grant quotes from the authoritative writing of **“WELFORD’S ACCIDENT INSURANCE 2<sup>nd</sup> ed. pages 274 – 5** that an accident is;

**“(4) An injury which is the unforeseen and unexpected consequence of an act deliberately done is caused by accident, provided that the act is not one calculated in the ordinary course of things to produce the consequences which it, in fact, produces. Thus, if the assured is drowned whilst bathing or crossing a stream, or stumbles in walking and sprains his ankle, or strains the internal cartilage of his knee-joint in the stooping to pick up a marble, or ruptures himself whilst playing golf, his death or injury is caused by accident. The death or injury though, in a sense, the consequence of an intentional act on his part, seeing that, if he had not put himself in a certain position, there would have been no death or injury, is not a consequence which could reasonably be expected to follow in the ordinary course from the act, and is, therefore, an accidental and not a natural consequence.”**

[61] The evidence in this matter speaks for itself and we have set out the same above. There was no definitive evidence at trial or at the Coroner’s Inquest that the deceased was in possession of an illegal substance. There was no evidence that the deceased was being placed under arrest by Officer Outten. In fact the evidence is quite the opposite in that Officer Outten himself confirmed that he never told the deceased that he was either going to be arrested or that he was in fact under arrest. Thus the conclusion that there was no commission of criminal offence pursuant to Sections 247 and 443 of the Penal Code.

[62] In light of such finding, we addressed paragraph 6 of the filed Defence wherein the Defendant placed reliance on two conditions of the accidental death and dismemberment provision of the policy namely (a) and (g).

[63] The GLENLIGHT case (supra) in our opinion was more than instructive. It highlights a clause and the interpretation thereof which is virtually identical to that on which the Defendant in the instant action is relying. It is in the following terms;

***“Now this policy witnesses that in consideration of the Insured having paid or agreed to pay to the Company the First Premium the Company agrees subject to the terms, exclusions, definitions and conditions contained herein or endorsed hereon that if during the period of Insurance or during any subsequent period for which the Insured shall pay and the Company shall agree to accept the premium for the renewal of this Policy the Insured shall sustain bodily injury caused by violent accidental, external and visible means which injury shall solely and independently of any other cause result in his death or disablement the Company will pay to the insured or in the event of death to his legal personal representatives the sum or sums of money specified in the Table of Benefits.”***

[64] The wording in the policy, the subject of the instant action is as follows;

***“The Company will pay the sum set out in the following schedule in respect of Accidental Death or Dismemberment sustained by the Life Insured while this Attached Benefit is in force, as a direct result of bodily injury caused by violent, accidental, external and visible means, provided death or dismemberment occurred within three calendar months after such bodily injury was sustained.”***

[65] The substantive and operative words are but a part of the remaining words which themselves are substantive in their own right.

[66] It follows therefore that the obvious critical question is whether by jumping over board the Calypso I, the deceased can fit into the accidental and bodily injury clause. So far as committing or attempting to commit a criminal offence, I have already concluded that no attempt was made to commit a criminal offence nor was a criminal offence committed.

[67] It is trite law that once the Plaintiff has established a prima facie case of accident, the burden shifts to the defendant if they wish to show that it was in fact a cause excepted by the policy which primarily caused the loss.

[68] I am of the strong view that on a balance of probabilities the death of the deceased was due to accidental means. It is also trite law that such an exclusion clause is not to be read in a sense inconsistent with the main purpose of the policy, which is to insure against accident. In the GLENLIGHT case (supra) LORD ROSS said;

**“If this clause were read literally, it would exclude the great majority of accidents.”**

[69] He went on to state that;

**“All such clauses are to be read, in case of doubt, MOST STRONGLY (our emphasis) against the party who puts them forward, VIZ; the company. I do not say that they are not to receive a fair interpretation, but the interpretation must be such as the company might reasonably expect the assured to put upon them when he accepts the policy.”**

[70] Further, on in the GLENLIGHT case LORD ROSS said;

**“So far as the first of these grounds is concerned, I do not consider that the deceased can be said to have willfully exposed himself to peril by driving off the ferry when he did. No doubt the deceased was negligent in driving as he did, but negligence is not enough. I have concluded that the most probable explanation of the accident was that the deceased drove off the ferry in error due to his being fuddled with drink. I do not consider that the danger to which the deceased exposed himself was appreciated by him at all; to the contrary he thought that it was safe to drive off as he did since he mistakenly thought that the time for disembarkation had arrived. I respectfully agree with what Judge Fay Q.C. (SITTING AS A Judge of the High Court) said in *Marcel Beller Ltd. v. Hayden* [1978] Q.B.694 at page 705. The word “willfully” like the word “deliberately “in that case imports the subject test. In my opinion the word “willfully” in the expression implies that the deceased recognized the danger but nevertheless willfully and consciously assumed the risk. If the deceased was so incapacitated that he acted by mistake, I do not consider that there could be willful misconduct on his part. “Wilfully” in this context must mean “intentionally.” Mr. Macfadyen contended that the exclusion was established if the deceased had performed a willful act (i.e. driving) the objective consequence of which was needless peril, but I do not think that that is the correct way to look at it. I do not think that it is enough to say that the danger ought to have been obvious to the deceased if he had been paying heed to what he was doing. For the act of the deceased to have been a willful act in this context, I am of opinion that the act must have been the act of a person who was capable of realizing the probable consequences of what he was doing. I am not satisfied that the deceased fell within that category.**

**So far as the second ground is concerned I am not satisfied that the deceased willfully exposed himself to needless peril by consuming**

such an excessive quantity of alcohol at a time when he was about to drive and to embark with his vehicle on the ferry. I observe firstly that it is not alleged that the deceased willfully exposed himself to needless peril by driving his car at a time when his ability to do so was impaired by drink. If that had been alleged, I would have been disposed to agree with Judge Fay in *Marcel Beller Ltd. v. Hayden*, supra, at page 705, to the effect that driving in a drunken state was negligent but not deliberate or willful.

Mr. Macfadyen for the defenders contended that (1) the deceased had consumed an excessive quantity of alcohol, (2) that it was a reasonable inference that when he did so he intended to drive, and (3) that accordingly he willfully exposed himself to needless peril.”

[71] Lord Ross goes on to state on page 277;

“(3) The really difficult question is whether, in consuming the alcohol in the circumstances, the deceased willfully exposed himself to needless peril. In my opinion, he did not. I see no justification for concluding that when he consumed the alcohol, the deceased did so with an intention of running any risk at all. It is more likely that he began drinking without any intention of exposing himself to danger and that the progressive drinking made him careless of his own safety. In consuming the alcohol, the deceased may well have acted carelessly or even recklessly, but there is nothing to suggest that he had any intention of exposing himself to danger. There is nothing to suggest that he gave the matter any thought at all, far less that, having given the matter thought, he deliberately and consciously decided to run a risk. In acting as he did, the deceased may well have exposed himself to needless peril, but I do not think that it is

established that he did so willfully. In my opinion, an individual cannot be held to have willfully exposed himself to needless peril, unless it is established that the individual considered the risk and then deliberately and consciously exposed himself to it.

It follows that the defenders have failed to establish that the claim is covered by any of the exclusions of the policy, and that the pursuers have succeeded in establishing that the death of the deceased was due to accidental means within the meaning of the policy. That being so, the defenders are bound to make payment to the pursuers of the benefits under the terms of the policy of insurance. It was made clear by counsel that any payment received by the pursuers under this policy would in fact benefit the deceased's widow, but that of course is a matter between the pursuers and the widow. So far as the defenders are concerned any payment requires to be made to the pursuers.

In all the circumstances I shall sustain the first plea-in-law for the pursuers, I shall repel the pleas-in-law for the defenders and I shall pronounce decree in favour of the pursuers for the sum of £18,872.30, being the amount to which the pursuers restricted their claim with interest as concluded for."

[72] In the instant case, we are of the same view as Lord Ross. On a balance of probabilities, the deceased never thought there was any risk in what he did and never willfully exposed himself to a risk. **(LORD ROSS said at page 276;)** "I respectfully agree with what Judge Fay Q.C. (sitting as a Judge of the High Court) said in *Marcel Beller Ltd. v. Hayden* [1978] Q.B. 694 at page 705. "The word "WILFULLY" like the word "deliberately" in that case imports the subjective test. In my opinion the word "willfully" in the expression implies that the deceased recognized the danger but nevertheless willfully and consciously assumed the risk. In my view the probabilities are that the

deceased never thought there was any risk in what he was doing and never willfully exposed himself to risk. If the deceased was so incapacitated that he acted by mistake, I do not consider that there could be willful misconduct on his part. “Willfully” in this context must mean “intentionally”. Mt. Macfadyen ....., but I do not think that that is the correct ..... it. I do not think that it is enough to say that it is enough to say that the danger ought to have been obvious to the deceased if he had been paying heed to what he was doing.’

[73] Further on page 277 **LORD ROSS** states;

“The really difficult question is whether, in consuming the alcohol in the circumstances, the deceased willfully exposed himself to needless peril. In my opinion, he did not ..... safety.

In consuming the alcohol the deceased may well have acted carelessly or even recklessly, but there is nothing to suggest that he had any intention of exposing himself to danger. There is nothing to suggest that he gave the matter any thought at all for less that having given the matter thought, he deliberately and consciously decided to run the risk. In acting as he did, the deceased may well have exposed himself to needless peril, but I do not think that it is established that he did so willfully. In my opinion, an individual cannot be held to have willfully exposed himself to needless peril, unless it is established that the individual considered the risk and then deliberately and consciously exposed himself to it.”

[74] The evidence in the instant matter is somewhat similar to the facts and evidence in the **GLENLIGHT** case (supra). We are of the opinion as **LORD ROSS** was

that the deceased in the instant matter cannot be held to have willfully exposed himself to needless peril, which the insurers are alleging caused his death.

[75] The defendant has failed to establish that the Plaintiff's claim is covered by any exclusion clause in the subject policy of insurance. I therefore must necessarily conclude that the Defendant has not provided a defence to sufficiently show that the actions of the deceased fell within any exclusion clause in the policy of insurance. In light of this therefore the Plaintiff has succeeded in establishing that the death of the deceased was due to accidental means within the meaning of the policy of insurance.

[76] Therefore in consideration of all the evidence, the authorities and in all the circumstances, the Defendant is bound to make payment to the Plaintiff of all the benefits under the terms of the policy of insurance.

[77] I therefore order that payment is made to the Plaintiff as prayed in the statement of claim along with interests and costs to be taxed if not agreed.

Dated the            day of            A.D., 2019.

Keith H. Thompson  
Justice