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BETWEEN **KIMBERLY BIRKENFELD**

Plaintiff

AND **ANTHONY BRUCE KENDALL** and others

Defendants

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**STATEMENT OF CLAIM**  
**Wednesday 22 December 2004**

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Solicitor acting: Roger Chapman  
PO Box 1213 DX SP20004  
Tel (04) 472 0940 Fax (04) 916 0141  
Wellington, New Zealand  
E-mail: roger@johnlaw.co.nz

**First cause of action: claim against first defendant: breach of duty of care** 92a

FOR A CAUSE OF ACTION AGAINST THE FIRST DEFENDANT the plaintiff says –

1. ON 8 August 2002 the plaintiff –
  - 1.1 Was navigating a sailing vessel, namely an IMCO Olympic-class windsurfing board (*the plaintiff's vessel*), which was stopped in the water in the Saronikos Gulf west of Glyfada, Greece, up to 1½ miles offshore and on the windward side of the starting line as set by the race committee for the Saronikos Gulf Regatta (*the regatta*), in which the plaintiff was to participate;
  - 1.2 Was taking part in or had completed a practice for the regatta.
2. AT the same time and place the first defendant was navigating a powered rigid inflatable boat (*the first defendant's vessel*) which was heading approximately east-south-east and approaching the plaintiff's vessel.
3. THE first defendant's vessel then collided with the plaintiff's vessel.
4. THE first defendant at all material times owed a duty of care to persons (including the plaintiff) who were or were likely to be in or on sailing vessels in the vicinity of the first defendant's vessel, which duty of care required him –
  - 4.1 Not to navigate the first defendant's vessel or permit it to be navigated at an excessive speed;
  - 4.2 To keep a reasonable lookout for other vessels;
  - 4.3 To observe all rules of navigation applicable to the first defendant's vessel;
  - 4.4 To take all reasonable steps to avoid colliding with or damaging other vessels or injuring persons travelling in them;
  - 4.5 To take reasonable care for the safety of other vessels and their occupants;

5. FURTHER or alternatively, the first defendant was at all material times under duties pursuant to the International Regulations for Preventing Collisions at Sea (*the Collision Regulations*) to persons (including the plaintiff) who were or were likely to be in or on sailing vessels in the vicinity of the first defendant's vessel, which duties required him –

5.1 Pursuant to Rule 2, to observe the precautions appropriate to the special circumstances of the case.

**Particulars of special circumstances**

5.1.1. There was a regatta or practice in progress, attracting many competing vessels, support boats, official boats, spectator craft, and other traffic;

5.1.2. The primary focus of competitors, which included many of the world's leading Olympic sailors, was (as the first defendant knew as a former competitor) on the race or practice in which they were participating or were to participate, giving rise to a special obligation on him to keep their safety in mind and to keep out of the way of their craft;

5.1.3. The first defendant was navigating his vessel prior to the start of and upwind of the starting line for a race involving specialised sailing vessels, namely windsurfing boards, which (as the first defendant knew as a leading exponent in sailing such vessels) were difficult to detect and unable to manoeuvre when stopped in the water.

5.2 Pursuant to Rule 5, to maintain a proper lookout so as make a full appraisal of the situation and the risk of collision;

5.3 Pursuant to Rule 6, to proceed at a safe speed so as to enable the first defendant's vessel to take proper and effective action to avoid collision;

5.4 Pursuant to Rule 7, to use all available means appropriate to the prevailing conditions and circumstances to determine if there was any risk of collision with the plaintiff's vessel;

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- 5.5 Pursuant to Rule 8 –
- 5.5.1 To take action in ample time to avoid collision with the plaintiff's vessel;
  - 5.5.2 To take action such as to result in passing the plaintiff's vessel at a safe distance;
  - 5.5.3 If necessary, to slacken speed or take all way off by stopping or reversing the first defendant's vessel's motor;
- 5.6 Pursuant to Rule 16, to take early and substantial action to keep well clear of the plaintiff's vessel;
- 5.7 Pursuant to Rule 18, to keep out of the way of the plaintiff's vessel.
6. IN breach of the duties referred to in paragraphs 4 and/or 5 the first defendant –
- 6.1 Navigated the first defendant's vessel at a speed, namely 9 knots or thereabouts, that was excessive in the circumstances;
  - 6.2 Failed to reduce speed or proceed at a safe speed;
  - 6.3 Failed to use any or any adequate or reasonable means to determine whether there was a risk of collision with the plaintiff's vessel;
  - 6.4 Failed to take any or any adequate or reasonable means to avoid colliding with the plaintiff's vessel;
  - 6.5 Failed to keep a proper lookout for other vessels and to observe the plaintiff's vessel;
  - 6.6 Failed to stop the first defendant's vessel, or steer clear of or otherwise avoid the plaintiff's vessel;
  - 6.7 Failed to take any or any adequate or reasonable steps to avoid damaging the plaintiff's vessel and/or injuring its occupant, the plaintiff;



- 6.8 Failed to take any or any adequate or reasonable steps to ensure that no action or inaction on his part harmed any other person (including the plaintiff);
- 6.9 Operated the first defendant's vessel or caused or permitted it to be operated in a manner which caused unnecessary danger to other persons (including the plaintiff).
7. IN acting and/or omitting to act in the manner set out in paragraph 6 the first defendant acted recklessly and in the knowledge that injury would probably result.

#### **Particulars**

- 7.1 In the special circumstances pleaded in paragraph 5.1, any deviation from the standard of conduct required of him under the Collision Regulations or otherwise by law was reckless;
- 7.2 In the special circumstances pleaded in paragraph 5.1, the first defendant knew or should have known that any deviation from the standard of conduct required of him under the Collision Regulations or otherwise by law would probably result in injury to some person or persons.
8. AS a result of the breaches referred to in paragraph 6 –
- 8.1 The collision referred to in paragraph 3 (*the collision*) occurred;
- 8.2 The plaintiff suffered injury and is now permanently partly disabled.

#### **Particulars**

- 8.2.1 The plaintiff suffered severe impact trauma to her cervical spine and the base of her skull;
- 8.2.2 She was rendered unconscious and thereafter was in a coma for approximately a month;
- 8.2.3 She was required to undergo emergency brain surgery on two occasions;

- 8.2.4 She has suffered and will continue in the future to suffer from motor dysfunction, sensory deficits and speech/language dysfunction;
- 8.2.5 She has been rendered an incomplete quadriplegic with loss of feeling and movement in both the upper and lower portions of her body, with impairment to the function of her arms and legs;
- 8.2.6 She has suffered and will continue in the future to suffer from physical impairment, cognitive impairment, emotional impairment, psycho-social impairment, behavioural impairment, and vocational impairment;
- 8.2.7 She suffers and will continue in the future to suffer from chronic fatigue;
- 8.2.8 She has a low threshold for stress;
- 8.2.9 She has speech and language dysfunctions that include poor articulation and speech patterns, and impairment of language comprehension, formulation and use;
- 8.2.10 She suffers and will continue in the future to suffer from low self-esteem, anxiety, depression, apathy, irritability, and low tolerance to frustration;
- 8.2.11 She suffers from post-traumatic stress disorder that includes physical symptoms of headache, panic disorder, hypertension, hyperventilation, and inability to speak when under stress.
9. AS a result of her injuries the plaintiff –
- 9.1 Has lost and will continue to lose income that she would otherwise have received.

#### **Particulars**

- 9.1.1 Before the collision the plaintiff owned and conducted a successful consulting business from which she derived income estimated at \$US100,000 a year:

9.1.2 At the time of the collision the plaintiff was 36<sup>87</sup> years of age, and could reasonably have expected to continue to conduct and expand her business until approximately the age of 70 years, and to earn from it sums totalling at least \$US10 million;

9.1.3 At the time of the collision the plaintiff was the top-ranked woman windsurfer in the United States and could reasonably have expected for at least a further ten years to receive income from product endorsements from manufacturers, and from print and broadcast media advertising and media employment in excess of \$US10 million a year.

9.2 Has endured and will in the future have to endure pain and suffering.

**Particulars**

9.2.1 The plaintiff suffers from persistent, painful and incapacitating headaches, for which she must take continual medication;

9.2.2 She is required and will in the future be required to undergo painful and exhausting physical therapy;

9.2.3 She suffers from loss of mobility and co-ordination of her limbs, eyes and mouth.

9.3 Has incurred and will continue to incur expense.

**Particulars**

The plaintiff will give particulars before this proceeding is set down for trial.

9.4 Has lost part of the amenities of life.

**Particulars**

9.4.1 The plaintiff is reliant on a wheelchair;

9.4.2 She is permanently unable to take part in sporting, social and recreational activities;

9.4.3 She is unlikely ever to marry or have children.



THE PLAINTIFF claims against the first defendant in respect of this cause of action –

- (a) Judgment for general damages in the sum of \$15,000,000;
- (b) Judgment for special damages in a sum to be quantified before this proceeding is set down for trial;
- (c) The costs of and incidental to this proceeding;
- (d) Such further or other relief as the Court thinks just.

**Second cause of action: claim against second defendant: vicarious liability**

FOR A FURTHER AND ALTERNATIVE CAUSE OF ACTION AGAINST THE SECOND DEFENDANT the plaintiff repeats the allegations set out in paragraphs 1 to 9 inclusive and says -

10. THE second defendant is and was at all material times -
  - 10.1 A society duly incorporated under the Incorporated Societies Act 1908 and having its registered office at Auckland;
  - 10.2 The governing body of competitive and recreational sailing (including windsurfing) in New Zealand;
  - 10.3 Responsible for the selection and training of participants and New Zealand representative teams participating in yachting events such as the regatta.
11. THE first defendant was at all material times -
  - 11.1 Acting on behalf of the second defendant or alternatively with its delegated authority as coach of a New Zealand representative windsurfing team which was to participate at the regatta; and
  - 11.2 In that capacity employed by, or alternatively acting as agent of, the second defendant.



12. THE second defendant is accordingly vicariously liable for any damage caused to the plaintiff by the first defendant's acts and omissions. 98a

THE PLAINTIFF claims against the second defendant in respect of this cause of action the same relief as in respect of her first cause of action.

**Third cause of action: claim against second defendant: breach of duty of care**

FOR A FURTHER AND ALTERNATIVE CAUSE OF ACTION AGAINST THE SECOND DEFENDANT the plaintiff repeats the allegations set out in paragraphs 1 to 10 inclusive and says -

13. THE first defendant was at all material times acting on behalf of the second defendant or alternatively with its delegated authority as coach of a New Zealand representative windsurfing team which was to participate at the regatta.

14. THE second defendant at all material times owed a duty of care to persons (including the plaintiff) who were or were likely to be in or on sailing vessels in the vicinity of the first defendant's vessel, which duty of care required it -

14.1 To establish, maintain and enforce adequate measures to -

14.1.1 Ensure the safety of competitors (including the plaintiff) taking part in regattas and practices for regattas in which New Zealand representatives (such as the first defendant) were also taking part;

14.1.2 Ensure that competitors (including the plaintiff) taking part in regattas and practices for regattas in which New Zealand representatives (such as the first defendant) were also taking part were not exposed to unnecessary hazards;

14.1.3 Identify and eliminate any such hazards;

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- 14.1.4 Isolate any such hazards from competitors (including the plaintiff) taking part in regattas and practices for regattas, if such hazards could not be eliminated;
  - 14.1.5 Minimise the likelihood that any such hazards would cause harm to competitors (including the plaintiff) taking part in regattas and practices for regattas, if such hazards could not be isolated;
  - 14.1.6 Inform competitors (including the plaintiff) taking part in regattas and practices for regattas of the existence and nature of such hazards (if they could not be isolated);
  - 14.1.7 Train persons (such as the first defendant) likely to be in the vicinity of competitors (including the plaintiff) taking part in regattas and practices for regattas in methods of avoiding or minimising the risk of creating unnecessary hazards;
  - 14.1.8 Supervise persons (such as the first defendant) likely to be in the vicinity of competitors (including the plaintiff) taking part in regattas and practices for regattas so as to avoid or minimise the risk of creating unnecessary hazards;
  - 14.1.9 Avoid or minimise the risk of collisions during regattas and practices for regattas between sailing vessels and powered vessels;
  - 14.2 To take reasonable care in the selection and instruction of persons holding positions such as that of the first defendant;
  - 14.3 To take reasonable care to ensure that persons holding positions such as that of the first defendant were properly trained to navigate vessels such as the first defendant's vessel and to take reasonable care for the safety of other persons participating in the regatta and any practice for it (including the plaintiff);

- 14.4 To take reasonable care to ensure that members of the New Zealand team participating in the regatta and any practice for it (including the first defendant) at all times – 200a
- 14.4.1 Complied with the Collison Regulations;
- 14.4.2 Took reasonable care for the safety of other persons participating in the regatta and any practice for it (including the plaintiff);
- 14.4.3 Did not carry unauthorised passengers;
- 14.5 To avoid creating unnecessary hazards to persons (such as windsurfers and in particular the plaintiff) who might be exposed to danger of collision through the operation by the first defendant of powered vessels;
- 14.6 To establish, maintain and enforce standards of conduct for coaches and support craft so as to avoid the risk of creating unnecessary hazards.
15. IN breach of the duty referred to in paragraph 14 the second defendant –
- 15.1 Failed to establish, maintain or enforce –
- 15.1.1 The measures referred to in paragraph 14.1;
- 15.1.2 The standards referred to in paragraph 14.6;
- 15.2 Failed to take reasonable care (having regard to the matters set out in paragraph 14) in the selection and instruction of the first defendant;
- 15.3 Failed to take reasonable steps to provide the first defendant with adequate training and qualifications or ensure that he obtained adequate training and qualifications with respect to the matters referred to in paragraph 14;
- 15.4 Failed prior to the regatta and any practice for it to provide the first defendant with adequate instruction or briefing with respect to the matters referred to in paragraph 14.4;
- 15.5 Failed to take any or any reasonable or adequate steps to avoid creating unnecessary hazards of the kind referred to in paragraph 14.5;



15.6 Failed to exercise any or any reasonable or adequate supervision of the first defendant. 2019

16. AS a result of the breaches referred to in paragraph 15 –

16.1 The collision occurred;

16.2 The plaintiff suffered the injuries referred to in paragraph 8, and thereby the consequences referred to in paragraph 9.

THE PLAINTIFF claims against the second defendant in respect of this cause of action the same relief as in respect of her first cause of action.

**Fourth cause of action: claim against third defendant: breach of duty of care**

FOR A FURTHER AND ALTERNATIVE CAUSE OF ACTION AGAINST THE THIRD DEFENDANT the plaintiff repeats the allegations set out in paragraphs 1 to 6 inclusive, 8 and 9 inclusive and says -

17. THE third defendant is and was at all material times –

17.1 A company duly incorporated in the Isle of Man;

17.2 The controlling authority of the sport of sailing in all forms throughout the world;

17.3 Responsible for

17.3.1 The establishment and supervision of rules governing sailboat racing and the conduct of regattas and similar events;

17.3.2 The organisation and conduct of events such as the regatta;

17.3.3 The establishment, supervision and enforcement of measures for the safety of persons taking part in regattas and/or practices for regattas and similar events.

18. AT all material times the third defendant knew or should have known –

18.1 Of the danger of injury to persons such as windsurfers during regattas and practices for regattas by the navigation of powered vessels in areas in which windsurfers and windsurfing boards were present;

18.2 That prior to the regatta there had been a history of collisions during sailing events between powered vessels and sailing vessels, resulting in serious injury to the occupants of sailing vessels;

18.3 Of the requirements of the Collision Regulations.

19. THE third defendant at all material times owed a duty of care to persons (including the plaintiff) who were or were likely to be in or on windsurfing boards during the regatta or practices for the regatta, which duty of care required it –

19.1 To introduce, and take all practicable steps to enforce, adequate measures to -

19.1.1 Ensure the safety of competitors (including the plaintiff) taking part in regattas and practices for regattas;

19.1.2 Ensure that competitors (including the plaintiff) taking part in regattas and practices for regattas were not exposed to unnecessary hazards;

19.1.3 Identify and eliminate any such hazards;

19.1.4 Isolate any such hazards from competitors (including the plaintiff) taking part in regattas and practices for regattas, if such hazards could not be eliminated;

19.1.5 Minimise the likelihood that any such hazards would cause harm to competitors (including the plaintiff) taking part in regattas and practices for regattas, if such hazards could not be isolated;

19.1.6 Inform competitors (including the plaintiff) taking part in regattas and practices for regattas of the existence and nature of such hazards (if they could not be isolated);

- 19.1.7 Train persons (such as the first defendant) likely to be in the vicinity of competitors taking part in regattas and practices for regattas (including the plaintiff) in methods of avoiding or minimising the risk of creating unnecessary hazards;
- 19.1.8 Supervise persons (such as the first defendant) likely to be in the vicinity of competitors (including the plaintiff) taking part in regattas and practices for regattas so as to avoid or minimise the risk of creating unnecessary hazards;
- 19.1.9 Avoid or minimise the risk of collisions during regattas and practices for regattas between sailing vessels and powered vessels;
- 19.2 Develop, maintain and enforce protocols for operation of powered coach boats (such as the first defendant's vessel) with special reference to collision dangers;
- 19.3 Develop, maintain and enforce protocols for pre-race and pre-regatta briefing of team officials, coaches and competitors with special reference to collision dangers;
- 19.4 Provide or ensure that regatta organisers provided sufficient officials with responsibility for ensuring the safety of competitors and the enforcement of safety rules;
- 19.5 Ensure that national sailing associations and regatta organisers developed, maintained and enforced adequate measures to carry out and achieve the requirements set out in paragraphs 19.1 to 19.4 inclusive.
- 19.6 IN breach of the duty referred to in paragraph 19 the third defendant failed to take any of the steps referred to in paragraph 19 in relation to the regatta and/or practices for the regatta.
20. AS a result of the breaches referred to in paragraph 19 –
- 20.1 The collision occurred:
- 20.2 The plaintiff suffered the injuries referred to in paragraph 8, and thereby the consequences referred to in paragraph 9.



THE PLAINTIFF claims against the third defendant in respect of this cause of action the same relief as in respect of her first cause of action.

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THIS DOCUMENT is filed by **ROGER CHAPMAN**, Solicitor for the plaintiff, whose address for service is at the offices of Johnston Lawrence, Solicitors, Level 6, Wool House, 10 Brandon Street, Wellington. Documents for service on the plaintiff may be left at that address or may be -

- (a) Posted to the solicitor at P O Box 1213, Wellington; or
- (b) Left for the solicitor at a document exchange for direction to DX SP20004, Wellington; or
- (c) Transmitted to the solicitor by facsimile to (04) 916 0141.

Correspondence may be sent by email to the solicitor at roger@johnlaw.co.nz but service of documents by email will not be accepted.