



S-162938
No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between

Christian Barchfeld and Dirk Barchfeld

Plaintiffs

and

Jamie's Whaling Station Ltd., Jamie Bray and Wayne Dolby

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiffs,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

Overview

1. This action concerns the personal, physical and psychological injuries and deaths suffered by the Plaintiffs and other passengers who were aboard the whale-watching vessel, the Leviathan II, on October 25, 2015, when it capsized and sank off Tofino, British Columbia.
2. The Plaintiffs allege that the Defendants, or one of them, were negligent in the operation of the Leviathan II on October 25, 2015 which negligence resulted in the claimed injuries and loss of life.

The Parties

3. The Plaintiffs, Christian Barchfeld (“Christian”) and Dirk Barchfeld (“Dirk”) are brothers who reside in Germany and, at all material times, while on vacation in British Columbia, were passengers on the Leviathan II.
4. The Plaintiffs bring this action on their own behalf, and on behalf of a proposed class consisting of all passengers aboard the Leviathan II when it capsized and sank on October 25, 2015, including those resident in British Columbia and elsewhere in Canada and the world.

5. The Defendant, Jamie's Whaling Station Ltd. ("Jamie's Whaling Station") is a corporation incorporated pursuant to the laws of British Columbia with its head office located at 200-1808 Bowen Road, Nanaimo, British Columbia, V9S 5W4. Jamie's Whaling Station carries on business as a nature tour operator and operates Jamie's Whaling Station and Adventure Centres with locations in Tofino and Ucluelet, British Columbia. The touring services offered include whale-watching aboard the Leviathan II.
6. The Defendant, Jamie Bray ("Bray"), is a resident of British Columbia and is the president of Jamie's Whaling Station and the owner and operator of Jamie's Whaling Station & Adventure Centres and was, at all material times, responsible for the safety of passengers on board the Leviathan II, including ensuring the competence of its captain and crew to ensure passenger safety on board the vessel.
7. The Defendant, Wayne Dolby ("Dolby"), was the captain of the Leviathan II on October 25, 2015 and was also responsible, at all material times, for ensuring the safety of the Plaintiffs and other passengers on board the Leviathan II.

The Sinking of the Leviathan II on October 25, 2015

8. On October 25, 2015, the Plaintiffs attended at Jamie's Whaling Station & Adventure Centres in Tofino, British Columbia at approximately 11:00 a.m. and booked a whale-watching tour, scheduled to depart at 1:30 p.m. that day.
9. The tour took place on the whale-watching vessel, the Leviathan II, with the Defendant, Dolby, as the captain. There were two other young crew members on board the vessel and they advised the Plaintiffs and other passengers where the life-jackets were located

and how to put them on; however, passengers were not required to wear the life-jackets and no information was provided as to when they might be required.

10. After leaving the Tofino Harbour, for the first 15 minutes of the tour as they exited the bay, the sea was calm however; as the vessel navigated into open water, it became rough, with high waves. At this point, the Plaintiffs were sitting at the front of the first row on the top deck of the boat, and the strong rocking of the boat made them feel ill.
11. The Leviathan II was then navigated into the calmer waters of another bay where the Plaintiffs were able to observe whales for approximately 45 minutes. The defendant, Dolby, then announced that he would steer the vessel towards an area where sea lions could be observed.
12. Once the Leviathan II was turned back towards open sea, the waves were again very high, exceeding two meters, and the vessel was rocked by the waves. At no point were the Plaintiffs or other passengers on the open deck advised by the defendant Dolby or other crew members to either put on life jackets or to keep them easily accessible.
13. The plaintiff, Christian, again feeling unwell due to the severe waves and movement of the boat, descended to the lower, indoor deck of the vessel, where he watched the high waves crashing against the window and felt very uncomfortable and afraid. The plaintiff, Dirk, was on the middle deck at this point, noting that the crew did not demonstrate any concern about the sea conditions.
14. Once the ship arrived at the location for observing the sea lions, which consisted of many rocks submerged by waves, the ship drew near, with the rocks on the starboard side. At

the end of the grouping of rocks, the ship turned and passed the rocks again, with the rocks on the port side. The waves were approximately one to two meters high at this point. The ship turned again and slowed down, reducing to approximately one-third speed.

15. Suddenly and without warning from the defendant Dolby, or from any other crew member, the vessel tipped violently to the left and capsized. Within seconds, Dirk was under water. After approximately 10 seconds, he was able to get to the surface. He noted that the capsized ship was to his left, essentially upside down, with the propellers still rotating.
16. Dirk found a life ring floating beside him and was able to pull it over himself. He saw a man, who he believes was the defendant Dolby, standing on the ship yelling at people to get off the rocks. Dirk did not see this man again thereafter, nor did he see nor receive any assistance from any other crew member.
17. Dirk and several other passengers crowded together, trying to hold on to the single life-ring, while being submerged by two-meter waves. The group of passengers attempted to get back to the ship, but it was floating away from them too quickly. Approximately 25 minutes after the capsized, Dirk and the other passengers saw a male body floating face-down in the water, but they were unable to reach him.
18. Eventually the sea became calmer as Dirk and the group of passengers drifted behind the rocks in water that was covered with oil and diesel from the ship, along with kelp. The ship had drifted two or three-hundred meters away from the group and there was a large life raft floating nearby the ship. Dirk and the other passengers tried to swim toward the

life raft by getting everyone to kick together, but after making some progress, they were hit by large waves, pushing them further back.

19. Approximately 45 minutes after the ship capsized, one member of the group of passengers saw a flare go up from the life raft, which gave the group some hope. Ten or fifteen minutes later they saw a fishing boat approach the capsized ship and the group called out to gain the attention of the fishermen. Eventually, another fishing boat reached Dirk and the group of passengers and pulled them out of the sea and into their boat.
20. Meanwhile, Christian, who was still trapped on the lower, indoor deck of the capsized vessel, was thrown about the cabin as though he were in a washing machine. When he recovered, there was water inside the cabin, up to his chest and slowly rising.
21. Christian attempted to locate the stairway that led to the middle deck, but this was completely under water and blocked by debris. He then attempted to find ways out by diving, without success, because all passages were blocked. He also attempted to break the windows of the cabin, using his feet, his hands and then his shoulders, but this did not succeed either and he could not find any heavy object to assist in breaking the windows.
22. Suddenly, the vessel tilted slightly backwards such that the bow was sticking a little more out of the water. A life jacket floated by and Christian gave it to two women who were trapped in the cabin with him. Christian was able to open a door, however this only led to the engine room and there was no exit allowing for escape.
23. Eventually, Christian was able to locate another door that he was able to open and he and the two women were able to exit the vessel, the women clinging to the life jacket and

Christian clinging to some cleats and the rail on the outside of the vessel. Christian continued to be slammed by waves while desperately trying to keep hold of the side of the vessel.

24. At the same time, he realized that his legs were entangled in ropes and cables and he could do nothing to untangle them. He was losing strength in the cold water and from the exertion of clinging to the vessel and almost gave up hope of surviving his ordeal.
25. Fortunately, a fishing boat arrived and rescued him and the two women who were still clinging to the life jacket Christian had given to them. The rescuers cut the ropes from Christian's legs and got Christian aboard their boat, where he lost consciousness for approximately 35 minutes while being transported back to land.
26. Eventually, Christian and Dirk were both transported by ambulance to Tofino where Christian was hospitalized and treated for cuts, bruises, hypothermia and severe shock. Dirk also suffered leg scratches and a shin wound. Both brothers suffered tremendous anxiety and anguish during the several hours it took before they received news that they had both survived the tragedy, which ultimately claimed six lives.
27. Both Dirk and Christian were interviewed by members of the RCMP and the Transportation Safety Board and, after spending the remaining five days of their scheduled vacation in Vancouver rather than compounding their stress by returning home early, they flew home from Vancouver on October 31.
28. The capsizing of the Leviathan II occurred in an area known as Plover Reefs, an area known to be potentially treacherous, where large tidal swells can pull boats onto the

rocks. It is also subject to the effects of the Aleutian Low, which is a persistent low-pressure system which lashes the coast with cyclonic winds and high waves, beginning in October. This area of the North Pacific is also known by mariners as the Graveyard of the Pacific, with more ship wrecks per kilometer than anywhere else in the world.

29. On the day of the tragedy, Parks Canada, which manages the Pacific Rim National Park Reserve near Tofino, had issued a wave hazard rating of “high”, meaning waves of 1-3 meters high.
30. Indeed, prior to the plaintiffs’ booking their excursion aboard the Leviathan II, a Canadian government data buoy at La Perouse Bank, which is 34 kilometers off of Ucluelet, had recorded wave heights increasing throughout the morning from 1.8 m. (at 7:38 a.m.) to 2.01 meters (at 10:38 a.m.) and wind gusts increasing from 12.6 m/s at 7:38 a.m. to 15.5 m/s by 10:30 a.m., which translates to approximately 24.5-30 knots.
31. Following their booking and up to the time of their departure, the waves continued growing, reaching a height of 2.56 meters by 12:38 p.m. and 2.60 meters shortly after their scheduled departure time of 1:30 p.m.
32. Further, many of the rescuers and other witnesses cited in media reports described poor sea conditions at the time of the tragedy, noting that the tide was running, the sea was up and there was a big groundswell and large rollers hitting boats hard.
33. Also of note were reports of unusually rough seas and strange wave patterns that day. The day of the tragedy was the day after hurricane Patricia spun off the coast of Mexico

in the eastern Pacific, reaching speeds of 185 knots, such that the tail end of that storm may have been impacting the ocean where the Leviathan II went down.

34. In addition to the known hazards of the area and the specific risks posed by the weather conditions on the day of the tragedy, immediately prior to the capsizing the majority of the passengers aboard the Leviathan II were crowded onto the port side of the upper viewing deck. The vessel was positioned parallel to the swells, rather than facing them head-on, when the large swell hit the starboard side. This combination of factors had the effect of raising the centre of gravity and affecting the vessel's stability.
35. The defendant, Dolby, with 20 years' experience at sea, knew or should have known that the waters he steered into were hazardous, that the vessel's stability would be affected by having the majority of passengers on one side of the top deck and that, in those circumstances, a large swell from the opposite side taken broad-side could capsize the vessel.
36. In those circumstances, the defendant Dolby, and the remaining defendants by virtue of the doctrine of vicarious liability, were negligent in their operation of the Leviathan II and were directly responsible for the pain, suffering and loss of life which resulted from this tragedy.
37. At no time were Dirk and Christian's survival and/or rescue aided by any effort or act of the defendant Dolby, nor any of the other crew members of the Leviathan II.

38. The acts and omissions of the Defendants which led to the capsizing of the Leviathan II caused the Plaintiffs and other class members to sustain personal, physical and psychological injuries, losses of personal property as well as the deaths of 6 passengers.

The Representative Plaintiffs

39. Dirk and Christian both experienced significant physical and psychological trauma as a result of this ordeal. Upon returning home, Christian visited his family physician who referred him to a specialist, regarding the bruises and contusions on his arms and legs as well as ongoing pain in his hip and knee joints.
40. Christian continues to suffer from poor sleep, which is frequently interrupted by nightmares. He has difficulty concentrating during the day while at work as a dental technician and suffers from frequent headaches.
41. Christian has also been seen by a psychiatrist whose initial assessment included a diagnosis of post-traumatic stress disorder, characterized by insomnia, depressive exhaustion, flashbacks, particularly while driving in the dark, as well as anxiety and nightmares, for which he is undergoing therapy.
42. Dirk has also received, at his own expense, psychiatric treatment for reactive depression, secondary to post-traumatic stress disorder related to his experience of this tragedy.
43. Dirk and Christian also lost and/or had various personal items destroyed in the capsizing, including expensive corrective eyewear, clothing, camera, cellphone and binoculars, collectively valued at well in excess of \$5,000.

Part 2: RELIEF SOUGHT

44. The Plaintiffs claim, on their own behalf and on behalf of a class of similarly situated persons resident in British Columbia and elsewhere in Canada and the world, as follows:

- (a) general damages;
- (b) special damages including, but not limited to, out of pocket expenses related to lost and/or damaged personal belongings, additional travel costs, the costs of medical treatment and care and/or income losses arising from physical and/or psychological harm;
- (c) punitive damages;
- (d) pre-judgment interest; and
- (e) such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

45. The Plaintiffs plead that the capsizing of the Leviathan II and the subsequent injuries and the damages they and other Class Members sustained resulted from the negligence and/or other wrongful acts or omissions on the part of the Defendants, the particulars of which include, but are not limited to the following:

- (a) the Defendants permitted the Leviathan II to be operated when they knew or ought to have known that it was unsafe to do so in the sea conditions then existing;
- (b) the Defendants permitted the Leviathan II to be operated when they knew or ought to have known that the vessel was not safe for the purposes intended;

- (c) the Defendants allowed the Leviathan II to be operated by a crew who they knew or ought to have known lacked the proper skills, training and experience to properly operate the vessel;
- (d) the Defendants failed to hire properly trained personnel to operate and crew the vessel;
- (e) the Defendants failed to have procedures in place and/or failed to follow such procedures to ensure the safe evacuation of passengers in the event of a capsizing of the vessel;
- (f) the Defendants permitted the Leviathan II to be operated in adverse sea conditions without ensuring that the Plaintiffs and other Class Members were properly instructed in the use of life jackets and/or failed to ensure that the Plaintiffs and other Class Members were wearing properly fitted life jackets at the time of the vessel's capsizing;
- (g) the Defendants failed to have procedures in place and/or failed to follow such procedures to ensure that the available life rafts would be properly deployed and available to the Plaintiffs and other Class Members in the event of the vessel's capsizing;
- (h) the Defendants failed to have procedures in place and/or failed to follow such procedures to ensure that appropriate emergency notification would be transmitted in the event of the vessel's capsizing to ensure prompt emergency response; and

(i) such further and other particulars which are known only to the Defendants.

46. In addition or in the alternative, the Plaintiffs plead that, at all material times, the Defendants, Jamie's Whaling Station and Bray, had entered into contracts with the Plaintiffs and other Class Members, which contracts were breached.

Plaintiffs' address for service:

ROCHON GENOVA LLP
Barristers • Avocats
121 Richmond Street West
Suite 900
Toronto, ON M5H 2K1

Tel: 416-363-1867
Fax: 416-363-0263

VINCENT GENOVA
LSUC# #29490T

JOEL P. ROCHON
LSUC#: 28222Q

Local Agents for Service:

BENNETT MOUNTEER LLP
1400 - 128 West Pender Street
Vancouver, BC V6B 1R8

Tel: (604) 639-3667
Fax: (604) 639-3681

Mark Munteer
Email: mm@hbmlaw.com


Place of trial:

Vancouver, British Columbia

The address of the registry is:

The Law Courts
800 Smithe Street
Vancouver, BC V6Z2E1

Date: 29 March, 2016



Signature of Vincent Genova,
Lawyer for the Plaintiffs

Rule 7.1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This claim concerns the injuries and loss of life suffered by passengers aboard the Leviathan II on October 25, 2015. The Plaintiffs allege that the Defendants, Jamie's Whaling Station Ltd., Jamie Bray and Wayne Dolby breached the standard of care expected in the circumstances and, in so doing, caused the losses alleged by the Plaintiffs on their own behalf and on behalf of the Class Members.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Class Proceedings Act, R.S.B.C. 1996, c. 50.