



**Court of Magistrates (Malta)  
As a Court of Criminal Judicature**

**Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)**

**The Police**

**(Inspector Johann J. Fenech)**

**-vs-**

**Paulina Kurowska, bearer of Polish Passport No. EF6574342**

***Criminal Inquiry No: 214/2017***

Today, the 1<sup>st</sup> November, 2018

The Court,

Having seen the charges brought against the accused **Paulina Kurowska** for having:

On the 10th April, 2016, at around noon in Wied iz-Zurrieq, limits of Qrendi, through imprudence, carelessness or unskilfulness in her art or profession, or through the non-observance of regulations, caused the death of Przemyslaw Jan Walkiewicz.

The Court was also requested to sentence the person convicted to the payment wholly or in part, to the registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee.

Having seen the Attorney General's consent so that this case be tried summarily and having heard the accused declare that she has no objection that the case be so tried.

Having heard the accused declare that she does not object to the case being tried summarily by this Court.

Having heard witnesses.

Having seen all the acts and documents exhibited;

Having heard the prosecution and defence counsel make their submissions;

Considers,

Whereas **Inspector Johann Fenech** explained how on the 10<sup>th</sup> April, 2016, information arrived at Zurrieq police station that several divers had to be airlifted after being rescued at sea with one diver having lost his life. Other divers had managed to swim ashore. A magisterial inquiry was launched and in the words of the inspector *"the people who were taking part in this expedition was testified on oath at Zurrieq and basically they all of them mentioned that the instructor was well certified in her job. She helped them when they found themselves in the rough seas. She helped them as well. When this polish guy surfaced unconscious, she also administered first aid and CPR. But all these attempts proved in vain. The accused also confirmed that all of them observed safety stops before they surfaced in the water and although the sea was rough on that day, she said that it was diveable and in fact they had attempted some dives some days earlier when the sea was far more rough than on that date."*<sup>1</sup> **PS 1434 Mario Mercieca** besides confirming the **Current Incident Report**<sup>2</sup> adds that *a tempo vergine* he spoke to Malcolm Portelli who stated that he was amongst a group of divers who were led by the accused as their instructor. They had descended to visit the wreck of the Um-El-Faroud but when surfacing after failing to locate the wreck, they had realised that they had drifted out to the open seas and found difficulty to swim ashore.<sup>3</sup>

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<sup>1</sup> Fol.300

<sup>2</sup> **Dok. MM** a fol. 307 et seq.

<sup>3</sup> Fol.303

It is indeed unfortunate, as these witnesses rightly point out, that the computerised dive watch pertaining to Przemyslaw Jan Walkiewicz was not found notwithstanding he had been seen wearing it as he was being airlifted; it was reportedly not found by hospital staff upon admittance.<sup>4</sup>

Whereas **Lt. Mark Cassar** states that when the helicopter he was piloting arrived on site he saw a group of four (4) divers with one giving mouth to mouth respiration to another diver. In his report he adds that when he arrived on scene the divers were approximately 700 metres away from shore.<sup>5</sup> Regarding the watch he is definitive *"To be honest, I gave a look but I saw no watch. The computer watch, not the regular watch.....No, for sure he didn't have. In fact I was looking."*<sup>6</sup> He continues describing the weather on that day *"The sea was rough,.... The wind was force six or seven, you can see the weather report. It was challenging [to operate the helicopter]"*.<sup>7</sup> The witness presented a weather report which shows that *"the greatest maximum wind speed and gusting value recorded during this timeframe was 31.3 Knots at 11:00UTC"*<sup>8</sup>, the time coinciding with the time when the dive was taking place. The report continues *"throughout the whole day the maximum wind speed varied between 11.3 knots and 31.2 Knots....The wind direction varied between 297° and 310° ....The wind direction continued to veer gradually to 297° at 09:00 UTC.... The sea state was forecasted as "Rough". The sea swell was also forecasted to be "Low Northwest"*.<sup>9</sup> This weather report is confirmed by **Jeffrey Custo** from the meteorological office who confirms that on the day in question the sea was very rough with north westerly winds of Force 5-6 locally 6-7 and a low swell from the North West.<sup>10</sup>

Whereas **Noel Micallef**, director of the diving school where the accused had been employed at the time of the incident as an instructor,<sup>11</sup> provided insight as to what occurred that day as well as confirming that customary practices adopted by divers were followed without exception.

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<sup>4</sup> Vide fol.305 u 310

<sup>5</sup> **Dok.MC** a fol.322

<sup>6</sup> Fol.315

<sup>7</sup> Fol.320

<sup>8</sup> **Dok. MC1** a fol.323

<sup>9</sup> Fol.323-324.

<sup>10</sup> Fol.326

<sup>11</sup> Fol.330

As such and in view of the conclusion reached by learned expert Mr. John Gera, namely that the accused was responsible for the death of Mr. Walkiewicz having failed to apprehend the treacherous sea conditions, Micallef's testimony merits in depth consideration; the same will be done with evidence of the other divers with **the evidence negating the said expert's findings.**

Infact the expert makes much of the fact that whilst Micallef opted to lead a dive in the valley, the accused took her group out of the valley and lead them to the wreckage which is 7 mins away from the valley's mouth.<sup>12</sup> He attaches great importance to this detail in attributing liability on the accused's part.<sup>13</sup> However **the reason for Micallef remaining inside the valley is altogether alien to the obtaining sea conditions but contingent entirely on the level of expertise of the divers he was leading:** *"She was a diving instructor. She was experienced enough to execute that sort of dive, I mean she was more experienced than me because I don't dive as much as my own instructors although I have big experience, she was more adaptable to do that dive than myself to be honest<sup>14</sup>. .... I was diving in the valley. I had three divers which were not experienced so I had to stay in the valley, while she had six divers which were experienced.... my divers were not experienced enough and I had to stay in the valley."*<sup>15</sup> **It is indeed unfortunate that the reason for Micallef remaining in the valley was not sought after by the expert as the ensuing reply would certainly have shown that this was not due to any over-confidence on the accused's part.**

Micallef continues that at the same time of the dive there were around 50 divers in the same area as the sea conditions were still favorable for diving<sup>16</sup> and adds *"Exactly like yesterday, exactly, with the difference that at the time there were fifty divers, yesterday there were three hundred divers. Exactly<sup>17</sup>.....North West West North West 4 to 5 which is very divable usually... the important thing in those conditions is the exit point and*

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<sup>12</sup> Vide **Dive Plan** a fol.198

<sup>13</sup> Vide Report marked **Dok JG** point 3 a fol.175

<sup>14</sup> Fol.330

<sup>15</sup> Fol.334

<sup>16</sup> Fol.331

<sup>17</sup> Fol.331

*the entry point. If the exit point and the entry point is safe then we dive, if it is not safe the exit and the entry we don't dive. Simple as that.....".<sup>18</sup>*

When reproduced Micallef mentions that he is a staff instructor with over 30 years experience and having 9000 dives under his belt.<sup>19</sup> The witness describes the protocol which divers are accustomed to follow before undertaking a dive but even more importantly lays out the qualifications of the divers which were being led by the accused. *"Yes as a matter of fact the precautions we took was I found two colleagues of mine,.... There was a certain guy Mario Azzopardi who is the Chairman of the Amateur Club Calypso I believe, if I am not mistaken, and he just had two divers he was dive marshal that day, so he was just with the book taking note, he wasn't diving himself he is an instructor, and two of his divers came up and we asked them what the conditions were in the Umal Farroud, otherwise we wouldn't have dived in the Umal Farroud, and they told us there was no current whatsoever. Then another friend of mine a certain Mr Role, Tano Role came up with his wife and I know him very well because I used to employ him as well, and I asked him and he said there was a slight current on the deck but he said there was no problem we came back safe and sound, I wouldn't consider it as a danger."*<sup>20</sup>

On another occasion when he testifies again he adds: *"We always do a risk assessment and we went down in the valley four people who just came out of the dive and we asked an amateur club and they told us there is no current, and also there was a friend of mine he was with his wife, they were diving, and he told me it is fine. There is no current whatsoever, so it should be all right if they are experienced obviously, and **they were all experienced divers as you can see from these forms,**"<sup>21</sup> they were all minimum advanced divers..... The wind was predicted 4 to 5 West which is a normal procedure there to dive, even 6 never mind 4 to 5, there was abit of a swell. The swell is not a problem, it is only a problem if you surface. **If you surface then it is a problem, but if you stay down, which unfortunately they couldn't stay** .....[since] One of the divers I believe a French lady started going up she was a bit low on air and everybody had to go up".<sup>22</sup>*

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<sup>18</sup> Fol.332

<sup>19</sup> Fol.340

<sup>20</sup> Fo.332

<sup>21</sup> Vide **Dok. NM** a fol 348 et seq.

<sup>22</sup> Fol.342-343

The following description of events, coupled to the weather conditions witnessed by Micallef, are determining considerations in establishing *culpa* on the part of the accused, the legal implications of which will be examined further on when the Court considers the doctrine of culpability: *"first of all it was choppy not very rough, it was swelly. Secondly we went down the valley to meet some divers as we all do in those circumstances, because when it is force 4 to 5 in North West, it is one of the few places to give a good quality dive and Paolina's group was very experienced and we needed to go to a safe place which was good for the less experienced, which was my group and a good quality dive for her group, .... I did not go outside the valley because they were only open water divers and hers were minimum advanced, some of them were rescue dive masters,"*<sup>23</sup>

It is relevant to point out that Micallef confirms that after ascertaining from divers exiting the sea that conditions were such as to permit the dive of experienced divers under the accused's lead, it was he who conveyed the all-clear for the dive to proceed:

*Avukat: Okay. On the day did you advise Ms Kurowska if there was any reason not to dive?*

*Xhud: As I said last time to the Inspector we always do a risk assessment and we went down in the valley four people who just came out of the dive and we asked an amateur club and they told us there is no current, and also there was a friend of mine he was with his wife, they were diving, and he told me it is fine. There is no current whatsoever, so it should be all right if they are experienced obviously, and they were all experienced divers as you can see from these forms, they were all minimum advanced divers.*

.....

*Qorti: What checks are actually carried out? I mean surely you don't rely on you meeting a friend who was diving and asking him about the current. As a diving school is there any check that is carried out before one dives?*

*Xhud: Listen if there is no one to tell you that there is no current than what you do is you go down, say we were the only diving school that day which it wasn't, but let's say as an argument, then we go down..*

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<sup>23</sup> Fol.387

*Avukat: How many diving schools were there?*

*Khud: There was about ten. You go down, you get out of the valley say in five meters, as soon as you turn on the right because that is where the wreck is, the Umal Farroud, if there is a current you just say listen, on the brief you say Plan B if there is current we will go onto the reef, and like that it is easy because there are references to come in and out etc, so that is how we sort it out if there is nobody to ask.*

*Avukat: So it is on this basis that you gave the go ahead for Ms Kurowska to take down her students.*

*Khud: Yes of course she had a group of six."*<sup>24</sup>

Whereas **Mario Azzopardi** confirms that before Micallef began a dive he enquired about sea conditions. *"Although sea was rough, **the exit point was quite safe.** From information I got from other divers that had already exited the waters, and had been diving on the wreck Um El Faroud they **did not encounter any current.** This information I passed on to Noel Micallef."*<sup>25</sup>

Whereas **Avertano Role** too confirms that on the day in question he had just emerged from a dive with two other divers and confirmed, as is customary between divers,<sup>26</sup> to Noel Micallef that they had encountered no adverse conditions and in fact the sea conditions had remained unchanged; so much so that there were many divers at the same time the accused's group were on the dive.<sup>27</sup> In a statement he confirms on oath he states that *"the current on the deck of the Faroud was slight and perfectly manageable such that we had no problem making it back to shore...We also met two other divers on the wreck who did not seem adversely affected by the current on the Faroud."*<sup>28</sup>

Whereas the pathologists **Profs. Marie Therese Camilleri and Dr. Ali Safraz** confirm that Mr.Walkiewicz died as a consequence of barotrauma due to change in pressure caused by very rapid decompression which

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<sup>24</sup> Fol.341 -343

<sup>25</sup> Fol.405; Vide **Dok. MA** fol.409

<sup>26</sup> Fol.416

<sup>27</sup> Fol.417-418

<sup>28</sup> **Dok. MS** a fol.413

causes a person to lose orientation and is conducive to death.<sup>29</sup> If the subject inhales water foaming in the mouth can occur. Faced by the fact that the deceased had performed a safety stop the experts, in particular Dr. Ali Safraz holds firm to the view that this notwithstanding he must still have ascended rapidly or precautions were not taken *"Obviously something did not work right. Some precautions were not taken . . . . Something must have happened . . . . Must have. He must have ascended very quickly. Must have."*<sup>30</sup>. **Dr Mario Scerri** goes on to explain that *"Probably because I cannot document this because the computer was not found, probably there was a rapid ascend more than it is recommended, because normally you ascend gradually to give nitrogen not to form the bubbles to be expelled from the body, if the patient goes up suddenly, there is no time for nitrogen to expell, it forms bubbles and it cause symptoms which are rapidly fatal.....If he ascends cautiously according to the protocol, because they have a protocol, he should not develop barotrauma, but usually sometimes, something happens, either they see something and they get frightened and they get suddenly up or else he feels something and he gets suddenly up. They don't follow the described protocol"*.<sup>31</sup>

**These pathological findings clearly exonerate the accused from any wrong doing given that she saw to it that a safety stop was scrupulously observed.** So much so that, as the **Dive Report** drawn up by Malcolm Portelli attests, **when everyone surfaced none of the divers showed any sign of distress.** This report offers a step by step eye-witness account for the dive until the moment when the group surfaced:

*"Only when we surfaced we realised we were almost 300 m away from the shore and the current had already started drifting us SE. We could not even see the entry/exit points and landed looked far away. The instructor asked each one of us if we were OK and told us we had to make a surface swim back to the exit point<sup>32</sup>....I was surprised and I could not and still cannot understand what happened to him. We surfaced all together and all of us were fine. The last thing I know is that when we surfaced, no one was in a state of panic or in difficulty at any time. Every one surfaced slowly, he was looking carefully to his dive computer on his left wrist and his buoyancy was good too. We all went slightly up and down due to the current but **no one went above the safety stop limit especially the polish who was slightly below my level.** I really cannot*

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<sup>29</sup> Fol.379

<sup>30</sup> Fol.380-381

<sup>31</sup> Fol.384

<sup>32</sup> Fol.203



*understand how he surfaced properly and what may have happened to him. It's a big mystery for me especially when he was surrounded with another six divers...Also, the fact that three of us made it safely without any rescue assistance, it goes to show that it was manageable to swim all the way back even wearing all the heavy equipment."*<sup>33</sup>. These words are not the words of a novel diver but of a PADI Master Scuba diver who was specialised inter alia in deep sea dives, wreck dives and rescue dives.<sup>34</sup>

When tendering evidence before the legal expert Malcolm Portelli offers countless statements which **negate that there was any negligence on the accused's part** as concluded by the technical expert. His evidence, admittedly a lengthy one, carries such detail that the Court can picture the events as they unfolded, when **after ascending to the sea surface all divers were seen in good health and without issue:**

*Wasalna z-Zurrieq f'xi l-ghaxra w kwart ta' filghodu u inzilna hdejn il-bahar u Paulina tatna dive site orientation. Il-bahar kien imcaqlaq pero mhux li ma tghodosx.* Nahseb lir-rih kien gej minn north-west fid-direzzjoni lejn is-south east. Din kienet it-tielet darba li ddivojajt hdejn l-Un El Faroud. Qatt ma sibt kurrenti fid-dives ta' qabel fiz-Zurrieq. Paulina tatna d-dive plan u spjegatilna l-procedura u cioe li mill-entry-point nghumu sol-ponta tan-naha l-ohra u dan isir biex ma nahlux arja. Mill-ponta nghoddsu lejn l-Un El Faroud b'240 degrees biex tasal hdejn il-propellor tar-wreck. Bejn wiehed w iehor minghajr kurrenti ghandek sebgha minuti biex tghodos mill-ponta sal-Un El Faroud<sup>35</sup>.....

*L-Un El Faroud ma rajnihx. Wara sebgha minuti konna ghadna ma rajnihx l-Un El Faroud. Jien kelli Suento D9 TX f'idi x-xellugija filwaqt li f'idi l-leminjia, kelli l-kumpass Suento wkoll. Ghamilna xi sebgha minuti ohra nduru biex insibu l-Un El Faroud izda ghalxejn. Paulina ghamlitolna sinjal biex jien naghmel il-kumpass halli nduru lura. Qabel ma tlaqna lura, Paulina saqsiet lil kulhadd kemm kellna bars tal-arja.* Jien kelli mija u sittin bar dak l-hin u tlaqt ghad-dive b'mitejn w ghaxar bars. Il-kumpass dawwartu mija u tmenin degree jigifieri gie jaqra sittin degree. Paulina wkoll kellha kumpass. Jien inzilt sa disgha w ghoxrin metru. Jien kont fuq wara nett tal-grupp. Sakemm isserfisajjna d-dive taghna damet disgha w ghoxrin minuta skond il-computer

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<sup>33</sup> Fol.296

<sup>34</sup> Fol.104

<sup>35</sup> Fol.105-106

tieghi. *Sakemm isserfisjajna ma kellniex problemi.*<sup>36</sup>...Il-pollakk li miet kien il-buddy tieghi u ma tantx tkellem anke qabel ma għodsejna.F'ebda hin il-pollakk li miet ma deher f'xi problema waqt id-dive kollha....Billi ma rajniex il-Un El Faroud, jista jkun li konna off-course. Il-kumpass kien u hadem sew. Morna off-course minhabba l-kurrenti probabbilment. Ma kienx hemm raguni ohra għalxiex morna off-course. Spiccajna xi tlett mitt metru mill-art meta sserfisjajna.....Qabel isserfisjajna għamilna safety-stop ta' tlett minuti meta konna f'fond ta' hames metri. Qabel dan, jien w il-pollakk li miet, għamilna minuta zejda deep stop biex apparti t-tlett minuti li għamel kulhadd u dan biex wiehed ikun safe. Paulina ddecidiet li nisserfisjaw meta ma sibniex ir-reef u b'hekk bdejna l-procedura ta' surfacing. Il-pollakk li miet kellu arlogg simili għal tieghi pero bic-tinga tat-titanium u li kien f'idu x-xellugija.Kien il-hin kollu jħares lejha u l-bouyancy tieghu kienet tajba. Sakemm isserfisjajna, il-pollakk li miet, kien ok. X'gara, ma garax taht l-ilma. Meta sserfisjajna kulhadd kien tajjeb. Paulina saqsietna jekk hssejnix l-kurrenti u jien għidtilha li le. Kont sorpriz kif spiccajna hemm barra. Il-bahar kien choppy u kien hemm xi metru jew metru w nofs mewg. Ir-rih kien force 5 jew force 6. Paulina gabritna f'cirku u hadd ma għamel xi sinjal li ken hemm xi problema.<sup>37</sup>Paulina għamlitilna sinjal biex nġumu lura u bdejt nġum lura.

Whereas **Felix Amos Cohen** offers a detail hitherto unknown but indicative of a cautious approach adopted by the accused namely that a dive was scheduled for the 8<sup>th</sup>, two days before, but was cancelled due to bad weather:<sup>38</sup>

*I did not feel any currents.*<sup>39</sup>....We went down to some twelve meters and after some time, Paulina checked her compass together with Malcolm and we continued diving at around twenty meters. The French lady indicated that she had one hundred bars and so we got together after a signal by Paulina in order to ascend. We did a safety stop at around five meters and it could be that we did two safety stops. Paulina made a sign for a three minute safety-stop. The polish guy who died was ok and he made a signal to stay for another minute safety-stop and we all did another minute. After this minute passed, we started ascending.<sup>40</sup> As we surfaced, the polish guy was

<sup>36</sup> Fol. 107

<sup>37</sup> Fol.110

<sup>38</sup> Fol.113

<sup>39</sup> Ibid.

<sup>40</sup> Fol.114

coughing but seemed that he was swimming normally. We had drifted from where we had expected to come up and Paulina indicated the direction to swim back. There was a swell. All of a sudden, I heard Paulina shouting and she was near the polish guy, some fifteen meters from me. At that point I swam back to Paulina and when I saw that there was a problem, I started to do the international distress sign. I saw people waving back to me from the shore. The polish guy had foam on his mouth and his eyes were closed. Paulina was giving him rescue breaths<sup>41</sup>..... Paulina asked me to hold the polish guy's head. I think the polish guy opened his eyes once and he was also vomiting. Paulina told me to put the polish guy's legs on my shoulders and swim backwards. Paulina told Rob to do the distress sign and to hold his head whilst I had his legs on my shoulders. Paulina continued giving the polish guy rescue breaths. The helicopter took a long time to come.<sup>42</sup>

Whereas **Rob Von Spruwell** also provides the Court with an eye-witness's account of the dive in question:

*I noticed that we could not find the wreck and Paulina and Malcolm were looking at their compasses. We could not find the wreck and no diver had a problem whilst diving..... Paulina did a sign that we were going to surface and **we did a safety-stop**. When surfaced, the sea was choppy. **Everyone looked ok**<sup>43</sup>..... At one point I heard Paulina shout for help. I asked Felix if she was calling for help. I saw Paulina with the polish guy and noticed she was asking for help. I swam with Felix back towards Paulina who was giving mouth to mouth breathing to the polish guy. Paulina inflated the orange float. Paulina told me to hold the head of the polish guy. His hand was like dead. He was unconscious. At no point did the polish guy speak. **Nothing was wrong during the dive. I think the polish guy had a heart attack.** Foam was coming out of the polish guy's mouth. Paulina was trying to put the regulator in the polish guy's mouth. Felix was holding the polish guy's legs on his shoulders..... I think that forty five minutes passed from when I noticed there was a problem till when the helicopter arrived. The polish guy was getting blue and we continued trying to help Paulina. **Paulina was excellent and did extraordinary things in trying to help. ....Paulina wanted to remain last to be rescued by the helicopter.**" <sup>44</sup>*

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<sup>41</sup> Fol.115

<sup>42</sup> Fol.116

<sup>43</sup> Fol.118

<sup>44</sup> Fol.1119-121

Whereas two days after the incident, Kurowska gave a statement rife with details of the dive to the legal expert; these details are corroborated by Portelli's version of events: *"We started on our way towards the Un El Faroud wreck. Malcolm was using the compass and he set the compass on 60 degrees. I showed the helmet to the other divers. This is a monument under the sea and it is a scuba divers hardhat made of concrete at some twenty eight meters deep but we only saw it from around twelve meters deep where we were. The visibility was some ten to twelve meters when usually it is fifteen to twenty meters. After some three minutes, I could not see the wreck of Un El Faroud as there were particles in the sea. The sea was murky. I turned back and indicated the compass to Malcolm to double-check the direction and he signalled that we were on the right track. I asked the divers how much air they had and at this time, we were at a depth of twenty meters. Deborah and Xavier signalled that they had left one hundred twenty bars of air which was, in my opinion, too little to go to near Un El Faroud. I decided to turn right towards the reef and not continue towards Un El Faroud. **I have more than one thousand dives to my credit as an instructor.** We did not reach the reef and **three people had just one hundred bars of air when I asked. This was half the bars that the cylinders had when we started our dive. I decided to abort the dive** and this was some twenty-five to twenty-six minutes after the start of the dive. I gathered the divers together and signalled that we are finishing the dive. This was at a twenty seven meters depth. I asked then to go up and went to a depth of twelve to fifteen meters and I shot the Distress Signal Buoy which is a marker buoy....**I did a safety stop at five meters and we were in a circle whilst I was in the middle. I signalled to the divers that we were going to do a three minute safety stop at a depth of five meters. As I did not feel any currents at that time and there were no indications or references of this, I signalled first that we had three minutes, then two minutes and then one minute and after this, the end of the safety stop. At this moment, Przemyslaw indicated that his computer was still showing a minute safety stop left, so I signalled to all the group to wait for a further one minute. When Przemyslaw signalled that the safety time had elapsed, we started to surface.** When I surfaced I came up far away from the entry-exit point, so I knew that the current must have pushed me away from the entry-point during the safety stop. Everyone surfaced. I showed them the direction to swim towards the shore. I noticed at this moment that Przemyslaw had his mask off his face so I shouted to him, I think in polish, to put it on again and to keep the regulator in his mouth. All the others had the mask on. We started to swim and I looked around and noticed that at a distance of some twenty meters from me, Przemyslaw was not swimming but was drifting. I went towards him.*

*The sea was choppy at this point and we were in the open sea. I arrived near him and I noticed he had foam [white/yellowish] coming out of his mouth. As I saw the foam, I started to shout for help as the foam indicated that he had water in his lungs.”.*<sup>45</sup>

Whereas the accused, **Paulina Kurowska**, chose to testify in these proceedings she highlights the precautionary measures undertaken. She explains that she is a Master Scuba Diver Trainer, having well over 1000 dives under her belt<sup>46</sup> and had an instructor 3 years before.<sup>47</sup> More importantly she confirms that the decision where her group was to dive was one taken with the director of the diving school, Noel Micallef: *“first of all still at home I checked the weather predictions, I checked them on the wind finder, then I went to the dive centre and I talked to Noel and we discussed the weather predictions and we had eight people at the dive centre. Two of them they did not have much experience and six of them they had much experience so that we knew that there must be two groups and I was assigned with the group of the more experienced people because the weather predictions was wind force 4 to 5 north west so we needed to find out the place where to dive so both our groups are satisfied with the diving and Noel decided<sup>48</sup> that it would be Wied iz-Zurrieq, it will be good for the experienced divers, there is the wreck and it will also be good for the less experienced divers, they will do the shallower dive in the valley..... Then we checked the equipment, we went to Wied iz-Zurrieq, we checked if the weather predictions are accurate, how the sea condition is, then Noel approached his friends divers, one couple just got out of the water from the dive and he discussed with them how where the water conditions. He asked not only about the conditions in the valley but also on the wreck so it was also for me to know. As I do not speak Maltese he translated what they said to me..... He told me that conditions are diver bow and we have seen the sea conditions*

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<sup>45</sup> Fol.95-99

<sup>46</sup> Fol.399

<sup>47</sup> Fol.89

<sup>48</sup> Court: But who actually decided where to take this group? Did you receive instructions?

Witness: Look it is like we are discussing

Court: Yes, yes but

Witness: **It is Noel's decision**

Court: It is Noel's decision, you were employed by him?

Witness: Yes

Court: He dictates, dictates in the sense, he decides, given the experience, the experience level of the group, given the obtaining whether conditions on a particular day, the dive should take place here, correct?

Witness: **Exactly** – Fol.402

and transcend exit points and they were fine, they were ok and then the divers told him that there is very negligible, very small current on the wreck itself, but it was still fine to dive with my experienced group. Later on I did the briefing, I did give them the dive information, what we are going to do during the dive, I assigned them into the groups buddies. We prepared the equipment and went for the dive.... I had a group of six divers, all of them were advanced or over advanced. They had qualifications so they were experienced divers, they were highly qualified divers. As I said with four of them I had already dived before so I knew what to expect under the water but with two I didn't, that's why I had a little chat with Noel still in the dive centre, so he told me that they are good, they are well trained, they are experienced so they were fit to dive..... When we got to Wied iz-Zurrieq we checked ourselves with our own eyes what are the sea conditions in reality. Then we made sure that Noel who was talking on behalf of the school so also for my credit how are the sea conditions, then I did the briefing, I told them what we are going to do, where we are going to enter, where we are going to exit, how are we going to dive, what will be our maximum depth, what will be the maximum time of the dive and I assigned them into pairs of buddies and then I did the log of the dive and we prepared the equipment, they prepared the equipment, I just checked if it was correct and we went diving".<sup>49</sup>

Regarding the deceased she describes him as a qualified driver well equipped to undertake the dive in question: *"I dived with him four times before, it was our fifth dive, he was a rescue diver which is quite high, a rescue diver qualification which is quite high and he had four other specialities so he was highly trained. He had deep diver speciality, he had the wreck diving speciality, enriched air speciality and underwater it was felt, he felt very confident, he felt very comfortable, under the water he was a very good diver. He was maybe a little bit independent, but it was still ok knowing his experience and his training. He was always looking at his watch at his computer, he was checking the depth, the timing, everything. He was communicative, he was always answering so there was never a problem with him.... it was our fifth dive."*<sup>50</sup>

She goes on to describe that when the group surfaced everyone appeared fine also mentioning a detail Portelli had previously spoke of himself and cited in his report: *"and I looked around to see if actually everybody has surfaced, I checked if everybody was there, I asked if they are*

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<sup>49</sup> Fol.393.395

<sup>50</sup> Fol.396

*ok, everybody showed me they are ok and I showed them that we are swimming towards the shore, I showed them the direction and then I looked around to the whole group if we are all swimming and they are following me and he at this point was not swimming, he was just drifting and then I realised that something must have been wrong so I swam to him immediately. I took out his mask, I checked if he is breathing, he was not breathing, so I started to shout for help and I started to do the rescue breath".*<sup>51</sup> She explained that the method of communication indicating the group was all right was by signalling with the OK sign. She saw, as Portelli confirms, that he was communicative and gave the ok sign too! Hence up until this point, barotrauma or whatever other ailment may have afflicted the deceased, had not yet taken hold. In fact, it was only when she started to swim ashore and after around a minute that she turned to check on the group and saw his body drifting. **The accused's actions underwater were all measures precisely intended to avoid barotrauma.**

Again her version tallies perfectly with that of Portelli: *"We were doing the safety stop. I showed to my team that we were doing the safety stop. We were in the circle with me in the middle so if I turned around I could see everybody and then I showed them that we have safety stop. It is three minutes at five metres and I started to count down to show them that this is three minutes and I turned this is two minutes, and I turned this is one minute, and I turned and I showed them this is the end of the dive and we are all going up and at this moment he showed me that he had one minute left on his computer so I told everybody stop .....we have one minute and when he showed me his safety stop has finished, I showed everybody alright this is the end of the type.....Then I showed them to go up, we started to go up and I was still turning everyone was going up and then on the surface I made sure that everybody is there, alright, did nothing happen, so I just turned around, I looked at the people they were fine, but just in case I asked if they were fine, it is the sign when it is a bit of distance like we are on the surface.... Then I just looked for the group, for the people, if everybody has surfaced, so as already said I looked around, everybody was up, we signed that we are alright and I showed them to go to the shore and then I needed to be sure that everybody is going so I just looked around again and then I noticed that he was not swimming but he is drifting....He showed me on the watch that he has one minute so we waited for him as a whole group, we just ascended and then everything was fine when I asked if he was fine on the surface already he showed me that he is fine.... We ascended as a whole group and we were close to each*

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<sup>51</sup> Fol.397

*other and then I just asked if everybody is ok, everybody was ok, everybody showed me that they are ok ....And we swam to the shore and then I looked around just to check if everybody is swimming because we are swimming on the back and there were some people closer to the shore behind me and still some people like one person like him who was in front of me so I just needed to turn to check everything is fine and in this moment I noticed that he is just floating, he was not swimming."*<sup>52</sup>

Under cross-examination she speaks of the qualifications of the divers she led. Whilst the victim was an advanced open water diver (AOWD), having performed 61 dives and having dived to a maximum depth of 29.4 m<sup>53</sup>, the maximum depth she was taking them to was that of 30m but being a deep diver he could dive to a depth of 40m.<sup>54</sup> Not to be forgotten that the deceased's dive buddy was Malcolm Portelli a master scuba diver himself who could also reach a depth of 40m.<sup>55</sup> **Contrary to what the court expert states, the accused was familiar with the dive site having done between 10-20 dives in the same location.**<sup>56</sup>

She insists – as was corroborated by other witnesses - that it was safe to proceed with the dive since what mattered were the entry and exit points which were in the valley where there wasn't much of a swell. Underwater they felt no swell no current but upon surfacing she realised that the swell had increased; a current took them away from the shore. Kurowska still finds difficulty explaining what happened to Walkiewicz: *"Frankly speaking I don't know as he showed me on the surface that he is all right, all right so we started to swim and then he was drifting but then what I learnt is that cause is barotrauma, and barotrauma means that probably at one point he must have started to ascend too fast.... This is the thing that I do not understand frankly....I didn't see him ascend too fast because we were all together...I waited for him one minute with the whole group but then we started to ascend together."*<sup>57</sup>

A last point made by the accused in her testimony which certainly deserves highlighting is that **each diver had his own computer and thus**

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<sup>52</sup> Fol.398-400

<sup>53</sup> Fol. 351

<sup>54</sup> Fol.400

<sup>55</sup> Fol.400; vide also Fol.361

<sup>56</sup> Vide also fol.90

<sup>57</sup> Fol.402



**each individual was responsible in dictating measures designed for his own safety including the imperative safety stop.** The accused, as Portelli<sup>58</sup> and Felix Amos Cohen<sup>59</sup> confirmed, **abided by Walkiewicz's request to make an additional 1 minute stop bringing the total safety stop to that of 4 minutes.** Divers *"should use his own computer, because they are showing the exact profile of this particular diver, so what might happened, there are two reasoning if I might say, one is that we started going up from this 27 metres and we where going up, he might go up too fast, his computer showed him one minute more it was just a precaution to prevent the decompression sickness, but it might also happen that the computers are showing the depth with the ten centimetres of the precision and they calculate the safety stop on the depth from three to six metres. If we were altogether in the group, I was on around 5.5 metres depth, if he was at 6.1 which is even from 3 metres [distance form her] I really would not see it because it is too small. His computer would not calculate this time"*.

Given that it is each diver's computer watch which dictates when the particular's diver's ascent can proceed, how could this have been made known to the lead diver unless that information is communicated by the respective diver himself? This procedure was meticulously followed when the stop extended from 3 to 4 minutes. Should Walkiewicz needed more time or whether he should have ascended at a slower pace, will unfortunatly remain unknown given his computerised dive watch with the dive's data was never retrieved. Given that barotrauma was determined as being the cause of death, there is no doubt that Walkiewicz – deposite the 4 minute safety stop – still ascended too rapidly for some unknown reason. Yet surely **the speed of that ascent was in no way accelerated by the accused, to the contray.**

In the light of these accounts and in particular those of the many witnesses who testified both in these proceedings as well as in the course of the magisterial inquiry, the Court finds it difficult to reconcile how the learned technical expert could in any way find fault on the accused's actions going as far as to declare that she was negligent when she allowed the dive to proceed.<sup>60</sup>

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<sup>58</sup> Fol.109

<sup>59</sup> Fol.114

<sup>60</sup> Fol.176

This conclusion cannot be one shared by the Court in that the sea conditions were at no point so adverse as to dissuade others from embarking on the dive. Micallef, Azzopardi and Role all stated that many divers were on location at the same time of the fateful dive and no other incidents were recorded.

Nor should the learned expert have arrived at this conclusion by drawing on his personal experience, albeit impressive, as a diver familiar with that area. With due respect this is a legally unsound consideration from which no conclusions can be drawn, even if in part.

Criminal liability can only be attributed by assessing the actions of the accused within a framework of circumstances which she personally perceived at the time in question. In his Notes on Criminal Law, **Professor Anthony J. Mamo**, states:

“In these definitions the essence of negligence is made to consist in the “possibility of foreseeing” the event which has not been foreseen. The agent who caused the event complained of, did not intend or desire it, but could have foreseen it as a consequence of his act if he only had minded: so his negligence lies in his failure to foresee that which is foreseeable”.<sup>61</sup>

Hence this begs the question: was what happened to Walkiewicz a consequence of Kurowska’s act had she minded?

The Court makes reference to the Court of Appeal’s judgment in the names **Il-Pulizija vs Perit Louis Portelli, B.E &A., A&CE**.<sup>62</sup>

“Hu mehtieg ghall-kostituzzjoni tar-reat involontarju, skond l-artikolu 239 tal-Kodici Penali, illi tirrikorri kondotta volontarja negligenti – konsistenti generikament f’nuqqas ta’ hsieb (“imprudenza”), traskuragini (“negligenza”), jew ta’ hila (“imperizja”) fl-arti jew professjoni jew konsistenti specifikatament f’nuqqas ta’ tharis tar-regolamenti – li tkun segwita, b’ness ta’ kawzalita`, minn event dannus involontarju.....

.....Huwa obligu specifiku ta’ kulhadd illi juza fl-agir tieghu dik id-diligenza li s-sitwazzjoni tissuggerixxi ghall-prevenzjoni ta’ pregudizzju ghal-terzi. Hija kultant il-ligi stess li permezz ta’ preskrizzjonijiet u divjeti tiddixxiplina l-attivitajiet individwali f’kamp determinat; u f’dal kaz ikun negligenza, bhala element tal-kolpa, in-nuqqas ta’ tharis tal-precett tal-ligi. Fejn dan il-ligi ma tghamlux, tkun tikkostitwixxi negligenza dik il-kondotta li l-generalita` tal-ohrajn tajba tal-istess kategorija ma kienitx tadopera fic-cirkostanzi. Dan il-kriterju jindika l-limiti tar-responsabbilita` kolpuza, u fl-istess hin jiddetermina d-diligenza indispensabbli biex jigu evitati sanzjonijiet legali; u waqt li jiddixxiplina l-kondotta individwali, ihalli lok ghall-apprezzament ta’ diffikultajiet u probabilitajiet tas-sitwazzjoni konkreta. Meta wiehed, quddiem kaz Prattiku, iqies ic-cirkostanzi jadopera ruhu kif generalment kien jaghmel “vir bonus” tal-

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<sup>61</sup> Prof. Sir A. J. Mamo, Lectures in Criminal Law, p. 67

<sup>62</sup> 4.02.1961 per Onor. Imhalled Dr. J. Flores. Kollez. Deciz Vol.XLV.iv. 870, 903

istess kategorija, u jiffirma konvinciment; jekk mbaghad jirrizulta li l-kondotta tieghu ma kienitx obbiettivament adatta ghall-kaz konkrett, huwa ma jirrispondix ghar-rizultat. F'dan il-kaz il-konvinzjoni ragunata, jew dik li komunemenet tissejjah ic-“certezza morali”, kif distinta mic-“certezza obbiettiva”, tkun sufficjenti biex teskludi l-imputabbilita`. Din il-konvinzjoni trid tkun bazata mhux fuq innuqqas ta' impenji ghall-iskoperta` tar-realta`, imma fuq il-verosimilianza soda li, a bazi ta' elementi esterni, is-sitwazzjoni tkun tipprezenta.

Dan l-istess kuncett iservi mbaghad ta' gwida biex jigi stabbilit fil-kaz partikulari n-ness ta' kawzalita`bejn ir-rizultat u l-kondotta tal-agent. Presuppost ta' dan in-ness kawzali huwa komportament guridikament negligenti; fejn dan ma jezistx ma jkunx hemm quddiem il-ligi dak in-ness, u allura l-event dannuz johrog mill-limiti tal-imputabbilita` u jkun jirraprezenta l-fortuwitu.

L-element fortuwitu spiss jiddetermina sitwazzjoni. Dan partikolarment jissuccedi fl-ezercizzju ta' attivitajiet professjonali, fejn f'ram aktar minn iehor, il-professionista` huwa kontinwament konfrontat minn esigenze, diffikultatjiet u relativitajiet ta' metodi, u espost ghall-azzjoni ta' elementi injoti.”

Chirani, cited in the judgement **Ciantar v Gatt**, holds:<sup>63</sup> :

*"L'efficacia del caso fortuito e della forza maggiore, o dello stato di necessita', quali mezzi liberatori delle responsabilita, cessano quando questi avvenimenti siano preceduti da dolo o colpa dell'agente... Il fatto illecito si conobbe allora al comportamento giuridicamente anormale, ne sara' valevole l'eccezione liberatoria perche' inutilizza dal dolo o dalle colpe precedente...."*

Reference is also being made to the judgement in the names **Il-Pulizija vs Ludwig Micallef**:<sup>64</sup>

“Jispetta ghalhekk lill-Prosekuzzjoni tipprova b'mod konklussiv illi l-incident li fih miet Clifford Micallef sehh unikament jew almenu in parti, tort ta' negligenza, traskuragni w nuqqas t'osservanza tar-regolamenti tat-traffiku da parti tal-imputat li tajjarha.

Sabiex tipprova dan il-Prosekuzzjoni ma tistax tistrie fuq dak li l-Qorti tista' tahseb li gara, ghaliex il-gudikant irid necessarjament jiddeciedi *iuxta allegata et probate*. Id-dover tal-Prosekuzzjoni hu allura li jipprezenta quddiem il-Qorti, kaz konvincenti u pprovat li adegwatament jistabilixxi l-htija tal-imputat ghall-akkadut, li tipprova kondotta volontarja, negligenti, konsistenti generikament f'nuqqas ta' hsieb 'imprudenza', 'negligenza' jew 'traskuragni' jew ta' hila, ta' 'imperizja' fl-arti jew professjoni jew konsistenti specifikament fin-nuqqas ta' osservanza tal-Ligijiet, regolamenti, ordnijiet u simili li tkun segwita b'ness ta' kawzalita` minn akkadut dannuz u involontarju.

Dan ifisser li fil-materja tal-kolpuz hemm necessarjament l-element t'attivita` diretta ghal xi fini partikolari, li minhabba nuqqas ta' certu prekawzjoni jistghu jigu lezi jew danneggjati jew impregudikati l-interessi ta' terzi. Il-konnotat karettistiku tal-kulpa huwa l-prevedibilita` tal-event dannuz, li kondotta llegali ta' xi

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<sup>63</sup> Qorti tal-Appell Civili; 15.05.1926, per Onor. Imhallet Luigi Camilleri

<sup>64</sup> Deciza mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali fis-17 ta' Awwissu, 2010, Nru 753/2006 per Onor. Magistrat Dr. Consuelo-Pilar Scerri Herrera. Il-konsiderazzjonijiet legali maghmula minn din il-Qorti gew abbracciati fis-sentenzi tal-istess Qorti, diversament preseduta fil-kawzi fl-ismijiet **Il-Pulizija vs Edward Bonnici** (27.010.2016), u **Il-Pulizija vs Rudolph Gatt** (03.02.2016), it-tnejn per Onor. Magistrat Dr. Josette Demicoli.

hadd tista' ggib. Din hija l-kulpa normali jew l-hekk imsejha 'colpa incosciente' a differenza minn dik imsejha 'colpa cosciente', li hija l-kulpa bl-element fiha tal-previst tal-akkadut.

Hemm diversi forum ta' kodotta kolpuza derivanti minn att ta' negligenza, imprudenza, imperizja u non ossevanza tal-ligijiet, regolamenti, ordnijiet u simili.

L-imprudenza tigi mill-agir ta' xi hadd minghajr ma jiehu l-opportuni kawteli.

In-negligenza tigi mid-disattenzjoni u disakkuratezza tal-agent fil-kondotta tieghu.

.....

Il-Qorti hi ghalhekk sejra tezamina bir-reqqa x'inhuma l-ingredjenti tar-reat principali in ezami, u cioe' ta' dak kontemplat fl-**Artikolu 225 tal-Kap. 9**, u cioe' tar-reat li bih gie akkuzat l-imputat, u cioe' omicidju involontarju. L-**artikolu 225 tal-Kap 9** jiddisponi s-segwenti:

"Kull minn b'nuqqas ta' hsieb, bi traskuragni jew b'nuqqas ta' hila fl-arti jew professjoni tieghu, jew b'nuqqas ta' tharis tar-regolamenti, jikkaguna l-mewt ta' xi hadd ..."

Issa ghalhekk, wiehed irid jifli l-elementi li jikkostitwixxu dan r-reat, li huma bazikament tlieta u cioe:-

1. b'nuqqas ta' hsieb, bi traskuragni, jew b'nuqqas ta' hila fl-arti jew professjoni tieghu jew b'nuqqas ta' tharis tar-regolamenti ;
2. kkaguna l-mewt ;
3. fuq persuna.

Fis-sentenza moghtija mill-Qorti tal-Appelli Kriminali nhar il-21 ta' Marzu 1996 fl-ismijiet **il-Pulizija vs Richard Grech** dik il-Qorti sostniet is-segwenti:-

"Huwa mehtieg ghal kostituzzjoni tar-reat involontarju skond l-artikolu 225 tal-Kodici Penali, li tirrikorri kondotta volontarja, negligenti – konsistenti generikament f'nuqqas ta' hsieb, imprudenza fl-arti jew fil-professjoni, jew konsistenti specifikament f'nuqqas ta' tharis ta' regolamenti, li tkun segwita b'ness ta' kawzalita' minn event dannuz involontarju. Ghandu jigi premess li ghal accertament tal-htija minhabba f'kondotta effettivament adegwata ma' dik ta' persuna li s-sapienza umana identifikat mal- bonus pater familias, dik il-kondotta cioe' fil-kaz konfet, kienet tigi uzata minn persuna ta' intelligenza, diligenza u sensibilita normali, kriterju dan li filwaqt li jservi ta' gwida objettiva ghal gudikant, jhallieh fl-istess hin, liberu li jivvaluta d-diligenza tal-kaz konkret."

L-awtur Taljan **Giorgi** fil-ktieb tieghu **Teoria delle Obbligazione** – 1127 pagna 46 ighid:-

"La diligenza del buon padre di famiglia costituisce in criterio abbastanza indeterminate per lasciare al giudice Liberta' di valutazione".

Fil-kawza fl-ismijiet **II-Pulizija v Leonard Grech** deciza mill-Qorti tal-Appell Kriminali nhar il-hamsa ta' Settembru, 1990, il-Qorti dahlet fid-dettal dwar in-natura tal-kolpa f'dawn il-kawzi. In succint fuq skorta ta' awturi u gurisprudenza, t-treppod tal-kolpa gie definit bhala:

1. la volontarieta dell'atto;
- 2 la mancata previsione dell'effetto nocivo;
- u
- 3 la possibilita di prevedere.

Bhala konkluzzjoni tad-definizzjoni li din il-Qorti trid taghti lit-terminologija culpa, ghalhekk jibqa' dejjem li l-element taghha huwa volontarieta' tal-att, in-nuqqas ta' previzjoni tal-effetti dannuzi ta' dak l-att u l-possibilita' ta' previzjoni ta' dawk l-effetti dannuzi. Jekk l-effetti dannuzi ma kienux prevedibbli, hlief b'diligenza straordinaria li l-ligi ma tesigix u li semmai tista' ggib culpa levissima li ma hiex inkriminabbli, ma hemmx htija. (vide **Il-Pulizija vs John Vella** deciza nhar il-15 ta' Dicembru 1958 mill-Qorti ta' l-Appelli Kriminali). [sottolinejar tal-Qorti]

.....

Irid jigi determinat allura jekk l-imputat kienx hati ta' xi nuqqas ta' hsieb jew traskuragni jew ta' nuqqas ta' tharis tar-regolamenti....”

### In **Il-Pulizija vs Aaron Camilleri et**, the Court held:<sup>65</sup>

“Kif inghad fis-sentenza **Il-Pulizija vs Saverina sive Rini Borg et**, deciza mill-Qorti tal-Appell Kriminali fil-31 ta' Lulju 1998, “Skond l-Artikolu 225 tal-Kodici Kriminali, sabiex jirrizulta d-delitt ta' omicidju involontarju, hemm bzonn li tirrikorri kondotta volontarja negligenti, konsistenti generikament f'nuqqas ta' hsieb (imprudenza), negligenza jew traskuragni, jew ta' hila (imperizja) fl-arti jew professjoni, jew konsistenti specifikatament fin-nuqqas ta' osservanza talligijiet, regolamenti, ordnijiet u simili, li tkun segwita b'ness ta' kawzalita', minn akkadut dannuz involontarju”.

Il-gurist **Francesco Carrara** jghid hekk dwar il-culpa, “... il tripode sul quale si asiede la colpa sara' sempre questo - 1° volontarieta' dell'atto - 2° mancata previsione dell'effetto nocivo - 3° possibilita' di prevedere.”<sup>66</sup>

Bl-istess mod, il-**Professur Anthony J. Mamo**, fin-noti tieghu, jghid hekk:

“In these definitions the essence of negligence is made to consist in the “possibility of foreseeing” the event which has not been foreseen. The agent who caused the event complained of, did not intend or desire it, but could have foreseen it as a consequence of his act if he only had minded: so his negligence lies in his failure to foresee that which is foreseeable.”<sup>67</sup> [sottolinejar tal-Qorti]

U fis-sentenza fuq citata, gie ritenut hekk dwar il-kondotta kolpuza:

“... kondotta kolpuza hija definita bhala kondotta volontarja li tikkaguna event dannuz, mhux volut, izda prevedibbli, li seta' jigi evitat bl-uzu ta' attenzjoni jew prudenza fi grad ta' persuna normali”.

Hemm diversi forom ta' kondotta kolpuza derivanti minn att ta' negligenza, imprudenza, imperizja u non ossevanza tal-ligijiet, regolamenti, ordnijiet u simili.

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<sup>65</sup> Qorti tal-Magistrati (Malta) Bhala Qorti ta' Gudikatura Kriminali, Onor. Magistrat Dr Natasha Galea Sciberras, 25.04.2014, Kump. Nru 609/1993

<sup>66</sup> Carrara F., “Programma Del Corso Di Diritto Criminale”, Vol. I (Parte Generale), p. 88.

<sup>67</sup> Prof. Sir A. J. Mamo, Lectures in Criminal Law, p. 67

L-imprudenza tekwiwili ghal “un atto inconsiderato e rischioso” maghmul b’ “leggerezza” jew “sconsideratezza”<sup>68</sup> u kif jghid **Antolisei**, “L’imprudenza e’ propriamente l’avventatezza, l’insufficiente ponderazione ed implica sempre una scarsa considerazione per gli interessi altrui”.<sup>69</sup> U kif insibu fin-**Novissimo Digesto Italiano**, “Si comporta con imprudenza che tiene una condotta positive dalla quale occorre astenersi perche’ capace di cagionare un determinato evento di danno o di pericolo, o che e’ stata compiuta in modo non adatto, cosi’ da essere, pericolosa per l’altrui diritto penalmente tutelato. E’, quindi, una forma di avventatezza, un agire senza cautela.”<sup>70</sup> Bl-istess mod, fissentenza fl-ismijiet **Il-Pulizija vs Saverina sive Rini Borg et**, fuq citata inghad illi “L-imprudenza tigi mill-agir ta’ xi hadd minghajr ma jiehu l-opportuni kawteli”.

In-negligenza tigi mid-disattenzjoni u disakkuratezza tal-agent fil-kondotta tieghu, fil-waqt illi “l-imperizja hija l-forma specifika tal-kulpa professjonali cioe’, kif jghid il-**Manzini**: inettitudine e insufficienza professionale, generale e specifica, nota all’agente, di cui egli vuole non tener conto”.<sup>71</sup>

Skond l-imsemmija sentenza, “**Il-kulpa tista’ tkun dovuta wkoll ghal nonosservanza tal-ligijiet, regolamenti, ordnijiet u simili, bhal ma huma l-assjem ta’ regoli predisposti mill-awtorita’ pubblika dwar xi attivita’ determinata u specifika bl-iskop li jigi evitat il-possibilita’ ta’ hsara u dannu lil terzi, cjoe’, dawk li jkollhom l-element tal-prevenzjoni.**” Il-kulpa tista’ tkun dovuta wkoll ghalhekk ghal non ossevanza tal-ligijiet u regolamenti bhal ma huma l-assjem ta’ regoli predisposti mill-Ordinanza tat-Traffiku (Kap. 65 tal-Ligijiet ta’ Malta) u l-High Way Code – Motor Vegicle Regulations, fost regoli ohrajn.[enfazi tal-Qorti]

Dwar id-diligenza rikjesta fil-kamp kriminali, il-**Professur Anthony Mamo** jghid illi “The amount of prudence or care which the law actually demands is that which is reasonable in the circumstances of the particular case. This obligation to use reasonable care is very commonly expressed by reference to the conduct of a ‘reasonable man’ or of an ‘ordinarily prudent man’, meaning thereby a reasonable prudent man: “negligence”, it has been said, “is the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do” ... What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the person (**Carrara**, Programma, § 87n.) whose conduct is the subject of enquiry. Whether in those circumstances, as so known to him, he used due care – whether he acted as a reasonably prudent man – is in general a mere question of fact as to which no legal rules can be laid down.”<sup>72</sup>

Another judgement, **Il-Pulizija vs Mustafa Gohar**<sup>73</sup> decided as follows:

"Kif spjega l-gurista taljan **Francesco Antolisei**, biex wiehed jifhem l-essenza vera tal-kolpa, wiehed irid jzomm f’mohhu li fil-hajja socjali spiss jinholqu sitwazzjonijiet li fihom attivita diretta ghal xi fini partikolari tista taghti lok ghal konsegwenzi dannuzi lil terzi. L-esperjenza komuni jew l-esperjenza

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<sup>68</sup> Dizionario Zingarelli, (2002) “Vocabolario della Lingua Italiana”, Nicola Zingarelli (Edizzjoni 12, Gunju 2001).

<sup>69</sup> Antolisei F., “Manuale di Diritto Penale: Parte Generale”, Edizzjoni 15 (Giuffre’, 2000), p. 366.

<sup>70</sup> Novissimo Digesto Italiano, Vol. III, p. 548.

<sup>71</sup> **Il-Pulizija vs Saverina sive Rine Borg**, fuq citata

<sup>72</sup> Lectures in Criminal Law (First Year), p. 71.

<sup>73</sup> Qorti tal-Magistrati (Malta) Bhala Qorti ta’ Gudikatura Kriminali, Nru. 107/2004, 20.11.2004, per Onor. Magistrat Dr. Consuelo-Pilar Scerri Herrera, 20.11.2004.

teknika - cioe l-esperjenza komuni għall-bnedmin kollha jew dik l-esperjenza ta' kategorija ta' nies li jesplikaw attivita partikolari - tghalliem li f'dawn il-kazijiet wiehed għandu juza certi prekawzjonijiet bil-ghan li jevita li l-interessi ta' l-ohrajn jigu pregudikati.

"Sorgono per tal modo, jkompli dan l-awtur, delle regole di condotta. Spesso si tratta di semplici usi sociali come, per es., quello per cui il possessore di un'arma da fuoco e' tenuto a scaricarla, quando la depone in un luogo frequentato. Non poche volte interviene lo Stato od altra autorita', pubblica o privata, a fissare queste regole, disciplinando determinate attivita', piu o meno pericolose, in modo da prevenire, per quanto e' possibile, conseguenze nocive per i terzi... Il reato colposo nasce sempre e soltanto dall'innosservanza di talune delle norme indicate. L'infrazione giustifica nei confronti dell'agente un rimprovero di leggerezza. Il giudice dice all'imputato: tu non sei stato cauto e diligente come avresti dovuto. Il rimprovero, cosi formulato, e' la conseguenza caratteristica del reato colposo, perche nel reato doloso il giudice rimprovera al reo di aver voluto il fatto proibito, mentre nel fatto incolpevole (il c.d. caso fortuito) nessun biasino puo muoversi all'agente. Riteniamo, pertanto, che l'essenza della colpa debba ravvisarsi nella inosservanza di norme sancite dagli usi o espressamente prescritte dalle autorita' allo scopo di prevenire eventi dannosi" [Antolisei, F., Manuale Di Diritto Penale, Parte Generale, Giuffre' (Milano), 1989, pp.322-323]

"Din il-Qorti taqbel perfettament ma din l-esposizzjoni. In fatti, l-artikolu 225 tal-Kodici Kriminali taghna jirreferi għar-regoli ta' kondotta derivati mill-esperjenza komuni jew teknika bil-kliem 'nuqqas ta' hsieb', 'traskuragni', u 'nuqqas ta' hila fl-arti jew professjoni', filwaqt li daww r-regoli ta' kondotta statutorjament stabbiliti huma indikati bil-kliem 'nuqqas ta' tharis ta' regolamenti'. Hu appena necessarju jinghad li b'nuqqas ta' tharis ta' regolamenti l-legislatur mhux qed jirreferi biss għall-legislazzjoni sussidjarja (li tigi fis-sehh permezz ta' avvizi legali, notifikazzjonijiet tal-Gvern, ordnijiet etc.) izda għal kull forma ta' kondotta statutorjament stabbilita, u għalhekk qed jirreferi wkoll għal daww r-regolamenti promulgati minn enti privati (perez. r-regolamenti imfassla minn sid ta' fabbrika biex jipprevjeni hsara għal kull min jahdem jew jidhol f'dik l-fabbrika).

In fatti kemm fil-**Codice Zanardelli** kif wkoll fil-**Codice Rocco**, l-espressjoni uzata hi "inosservanza di leggi, regolamenti, ordini o discipline." Il-Qorti tikkonkludi fuq dan il-punt billi tissottolinea li anke f'kaz ta' nuqqas ta' tharis ta' regolamenti l-essenza tal-kolpa hi l-istess bhal fil-kaz ta' nuqqas ta' hsieb, traskuragni jew imperizja. In-nuqqas ta' osservanza ta' regoli stabbiliti minn xi awtorita għat-tharis ta' terzi tammonta għal negligenza jew imprudenza, il-ghaliex huwa certament impuridenti jew negligenti mhux biss minn jittraskura li jiehu daww l-prekawzjonijiet indikati mill-esperjenza ordinarju tal-hajja, izda wkoll minn jittraskura li josserva daww ilprekawzjonijiet specifikatament preskritti minn xi awtorita." [enfazi ta-Qorti]

U dik l-Qorti f'dik il-kawza kompliet hekk:

"Kif jispjega l-gurista **Francesco Carfora** (*Digesto Italiano, Vol 7, Parte 2, v. Colpa (materia penale), Diritto Vigente, p. 775*) jekk il-prudenza tikkonsisti filli persuna taghmel dak li hu ragonevolment mistenni minnha sabiex tipprevjeni l-konsegwenzi dannuzi ta' ghemilha, l-imprudenza, li hija n-negazzjoni ta' din il-virtu', tikkonsisti filli wiehed jaghmel avventatament daww l-affarijiet li hu messu ppreveda li setghu jikkagunaw hsara. It-traskuragni, mill-banda l-ohra, timplika cert non-kuranza, certu abbandun, kemm intellettiv kif wkoll materjali. Fiz-zewg kazijiet, pero l-hsara tkun prevedibbli ghalkemm mhux prevista; kieku kienet wkoll prevista, wiehed ikun qieghed fil-kamp doluz b'applikazzjoni tad-dottrina tal-intenzjoni possittiva ndiretta.

.....Id-definizzjoni tal-**Crivellari** fil-**Codice Penale - Vol III** hi bazata fuq l-istess postulati u hi din :  
"la colpa e la volontarieta mancanza di previsione delle conseguenze prevedibili del proprio atto."  
(pagina 228, para. 32.).

Meta si tratta ta' colpa huwa mportanti li jigu ppruvat in-nexus li ghandu jezisti bejn l-att w r-risultat sabiex l-att jista jitlej kriminalment imputabbli. Huwa biss jekk jirrizulta *chain of causation* bejn l-att li holoq id-danni u d-danni rizultanti li jista jirrizulta culpa. Kif gie **deciz nhar ssbatax ta' Mejju, 1948** fis-sentenza **Il-Pulizija v Salvatore Camilleri per Imhallef Harding** li "*Such need for the existence of a chain of causation between the negligent act and the ensuing harm is a requisite for responsibility to exist.*"

Fil-fatt jkompli jghid :

*"The principle that for culpa to exist there must be the causa nexus between act and event, applies not only with regard to negligence, imprudence, carelessness and unskillfulness, in an art or profession but it is equally requisite in case of non-observance of the regulations."*

Fil-fatt **Maino** fil-ktieb tieghu **Commentario al Codice Penale Italiano (Vol III, 1622, pg. 286)** jghid:

*"E concorda la giurisprudenza, sancendo che l'inosservanza dei regolamenti non basta a costruire delitto colposo quando fra le inosservanze dei regolamenti e' l'evento funesto non siavi il nesso di causalita'."*

**Consequently if the accused is to be found guilty for the involuntary homicide of Mr. Walkiewicz, there must exist a chain of causation between a negligent act on her part having failed to foresee that which was foreseeable had she minded, and the ensuing death.**

There is not a shred of evidence that the accused was wrong in her assessment of the situation. Nor can it be forgotten that it was her employer who having assured himself that there were no currents on the wreck's site, in turn informed her that the dive can proceed. Such a decision largely hinged on the fact, as corroborated by the very same divers when testifying in the course of the inquiry,<sup>74</sup> that the group was made up of no amateur divers. The diving experience of the deceased himself deserves underlining since here there was no beginner but a man having done 61 dives with the deepest dive being that of 29 metres whilst the dive being led by the accused was going to be to a depth of 25 metres.<sup>75</sup>

From evidence gathered it clearly emerges that a procedure is, as stated by Micallef, followed before each dive where divers are briefed and given a dive plan. Portelli<sup>76</sup>, Amos Cohen<sup>77</sup> and Von Spruwell<sup>78</sup> all confirmed that before commencing the dive they received a dive plan

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<sup>74</sup> Fol.105- Portelli; Fol.112-Cohen; fol.117-Von Spruwell

<sup>75</sup> Fol.346

<sup>76</sup> Fol.105

<sup>77</sup> Fol.113

<sup>78</sup> Fol.117



and were given a briefing by the accused. This goes to show a clear observance of regulations, if not legal, technical ones followed by diving schools. The fact that as Cohen admits a dive was cancelled due to bad weather 48 hours earlier<sup>79</sup> clearly shows that the accused was not one to take risks or to take safety of her divers lightly.

The accounts by both Cohen and Von Spruwell bear witness to the strenuous efforts embarked upon by the accused after realizing that Mr. Walkiewicz was unconscious; her actions were not ones of a frantic person having no clue as what to do in such a sudden and distressing situation but, with a sense of immediacy such incidents entail, she was quick to embark on a series of knowledgeable and calculated actions undertaken in a bid to ensure his safety. Her professionalism emerges from the fact that she was still instructing two of the divers as to the measures to be taken not only to bring Mr. Walkiewicz safely to shore but also to summon help, remaining the last person to be brought to safety.

Another detail which seems to have not been picked upon by the defence, and even more by the learned court expert who hastily attributes blame on the accused by concluding she was unfamiliar with the currents which hit the area,<sup>80</sup> relates to the fact that surfacing was only meant to take place once the exit point was reached “... *the important thing in those conditions is the exit point and the entry point. If the exit point and the entry point is safe then we dive, if it is not safe the exit and the entry we don't dive. Simple as that*<sup>81</sup>..... The wind was predicted 4 to 5 West which is a normal procedure there to dive, even 6 never mind 4 to 5, there was abit of a swell. The swell is not a problem, it is only a problem if you surface. *If you surface then it is a problem, but if you stay down, which unfortunately they couldn't stay* .....[since] One of the divers I believe a French lady started going up she was abit low on air and everybody had to go up”.<sup>82</sup>

Thus, the question to be asked is: Could the accused have foreseen that they would end up off course due to a necessary surface warranted after a French diver realised she had insufficient air? Could she have foreseen

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<sup>79</sup> Fol.113

<sup>80</sup> Point 16 a fol. 172 of his report **Dok. JG**

<sup>81</sup> Fol.332

<sup>82</sup> Fol.342-343 per Noel Micallef

that they would have had to surface prematurely and thrown off-course due to currents which came into play only when they surfaced due to the unexpected turn of events? Throughout the dive she was confirming the course with Malcolm, thus at no point did she take actions unilaterally or at whim.

In fact had the group not been constrained to surface they would have continued their course under water to the exit point which was in a comparatively sheltered location – the valley. It has already been established by Azzopardi, Portelli and Role that they encountered no difficulties with the sea currents on the dive site.<sup>83</sup> As Portelli states it appears that during the stop, which became necessary precisely to avoid barotrauma, the current must have swept the group further out to sea. The evidence brought forward shows that **the accused was overly cautious when taking measures to avoid the risk of barotrauma occurring**. The fact that following a safety stop of three minutes, when requested by the deceased to wait for a further minute, another minute was added before leading her group to ascent, clearly militates against any negligence on the accused's part which in turn heralded and brought about barotrauma which led to the sad demise of Jan Walkiewicz.

Having carefully examined the evidence compiled throughout these proceedings, the Court finds an absolute lack of the *causa nexus* between act and event required for criminal culpability to attach to the accused.

Therefore, and in the light of these judgements, the Court cannot but find that no evidence was presented that the barotrauma which caused the death of Przemyslaw Jan Walkiewicz was caused by the imprudence, carelessness, unskillfulness in one's art or profession, or due to the non-observance of regulations by the accused Paulina Kurowska.

Consequently, in view of the above-made considerations the Court cannot but acquit the accused of all the charges brought against her.

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<sup>83</sup> Vide Avetano Role's confirmation at **Dok.MS** a fol.413; Mario Azzopardi a fol.409 and Malcolm Portelli a fol.105

**Dr Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law).  
Magistrate**