Claims Arising from the White Island Volcanic Eruption Disaster

An Interjurisdictional Conflict in Four Acts

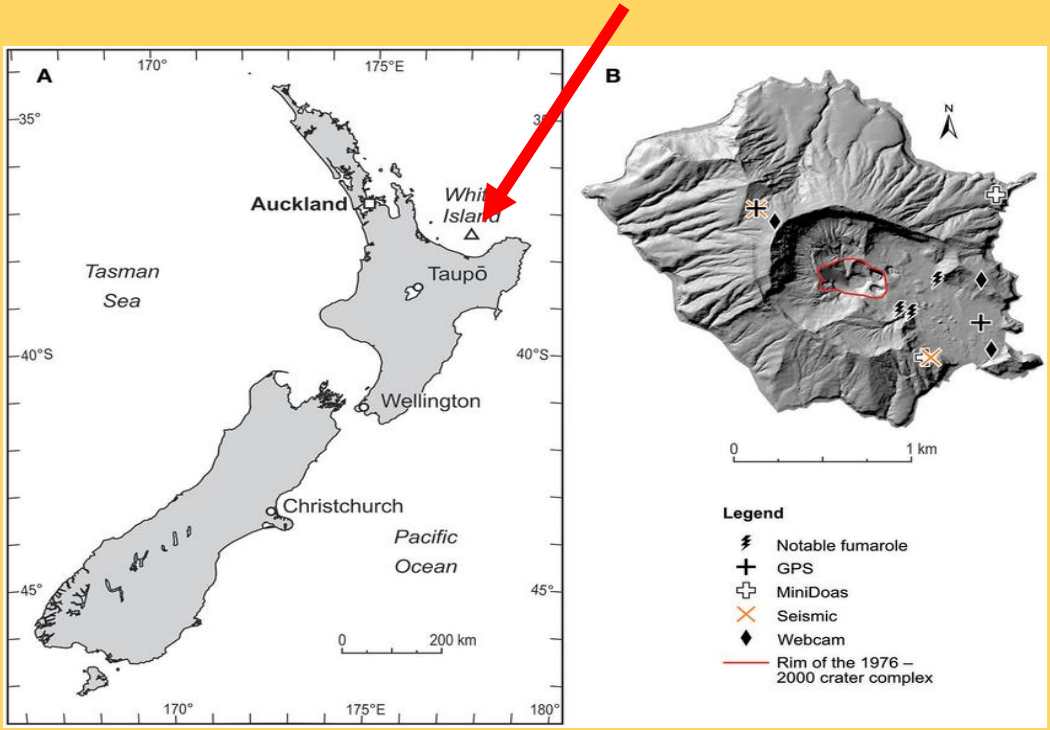
To the Browitts, the Hollanders, and all those who died or were harmed on White Island/Whakaari

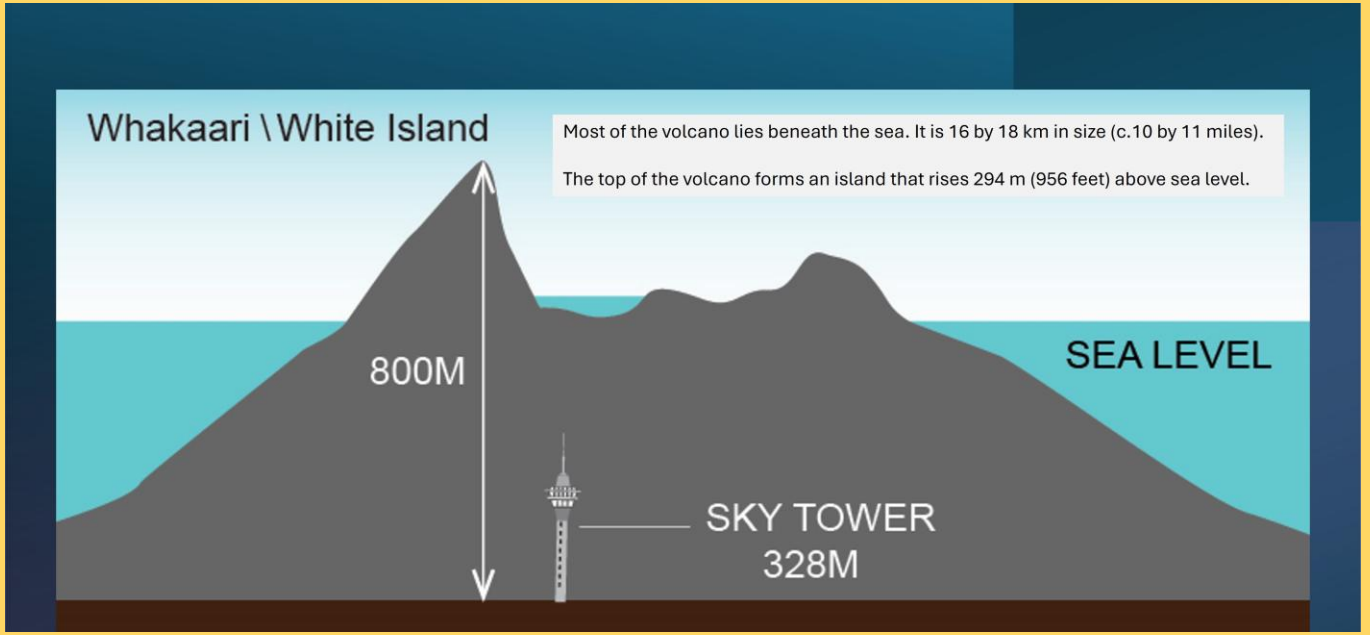
~December 9, 2019~

White Island/ Whakaari

Privately-owned volcanic island off the coast of New Zealand's North Island

After a 25-year eruption episode in 1975-2000—the longest in recorded history-- this stratovolcano
erupted in 2012, 2012 (twice), 2013 and 2016





On November 18, 2019, the Volcanic Alert Level on White Island was raised to Level 2

GeoNet Volcanic Alert Bulletin



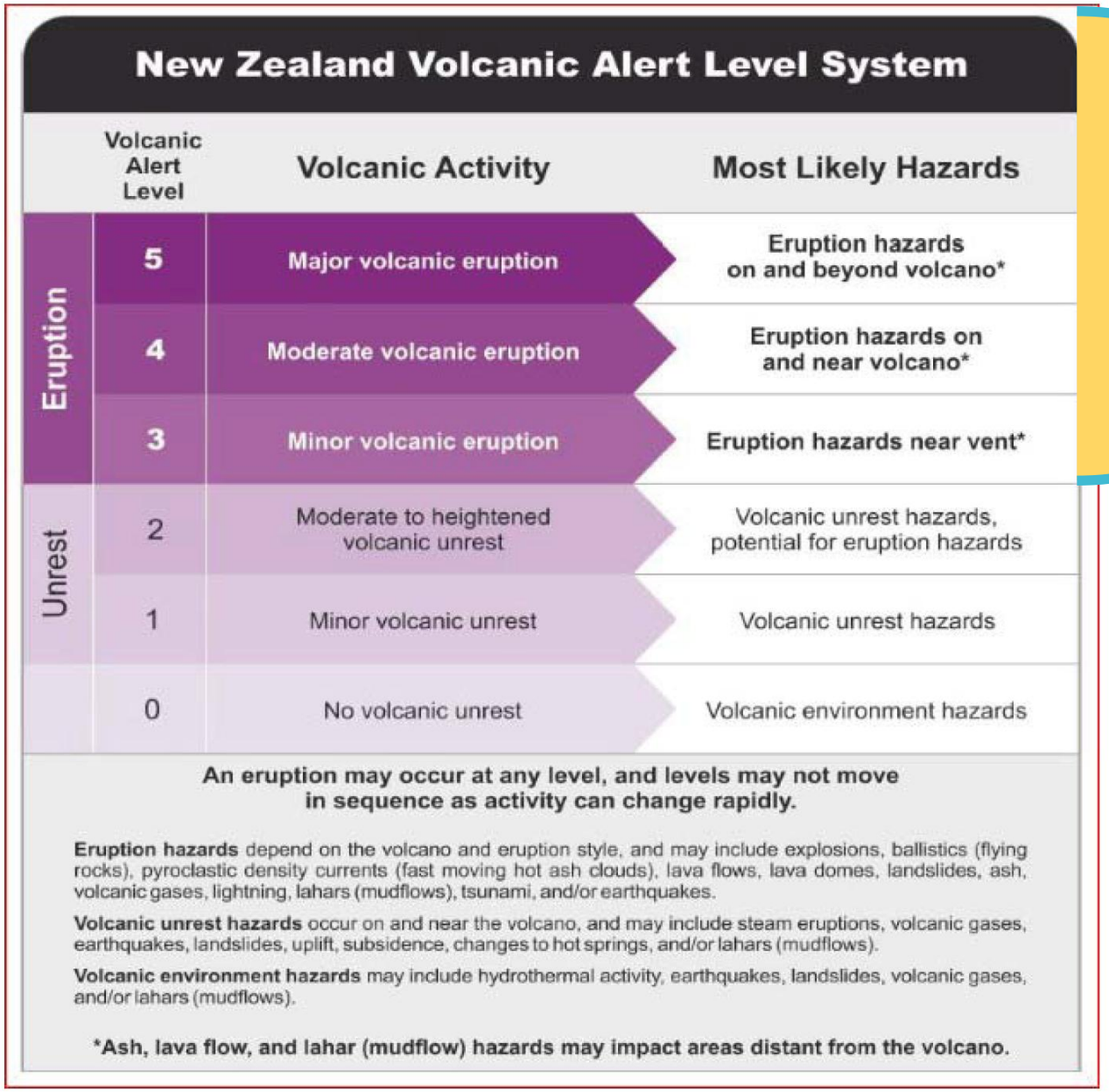
Whakaari/White Island: Background activity increases further

Published: Mon Nov 18 2019 12:00 PM

Volcanic Alert BulletinWI – 2019/09

Mon Nov 18 2019 12:00 PM; Whakaari/White Island Volcano

Volcanic unrest continues at Whakaari/White Island and some monitored parameters show further increases in activity. Hazards on the island are now greater than during the past few weeks, and the Volcanic Alert Level is raised to Level 2.



New Zealand Volcanic Alert Level System

	Volcanic Alert Level	Volcanic Activity	Most Likely Hazards
Eruption	5	Major volcanic eruption	Eruption hazards on and beyond volcano*
Eruption	4	Moderate volcanic eruption	Eruption hazards on and near volcano*
Eruption	3	Minor volcanic eruption	Eruption hazards near vent*
Unrest	2	Moderate to heightened volcanic unrest	Volcanic unrest hazards, potential for eruption hazards
Unrest	1	Minor volcanic unrest	Volcanic unrest hazards
	0	No volcanic unrest	Volcanic environment hazards

An eruption may occur at any level, and levels may not move in sequence as activity can change rapidly.

Eruption hazards depend on the volcano and eruption style, and may include explosions, ballistics (flying rocks), pyroclastic density currents (fast moving hot ash clouds), lava flows, lava domes, landslides, ash, volcanic gases, lightning, lahars (mudflows), tsunami, and/or earthquakes.

Volcanic unrest hazards occur on and near the volcano, and may include steam eruptions, volcanic gases, earthquakes, landslides, uplift, subsidence, changes to hot springs, and/or lahars (mudflows).

Volcanic environment hazards may include hydrothermal activity, earthquakes, landslides, volcanic gases, and/or lahars (mudflows).

***Ash, lava flow, and lahar (mudflow) hazards may impact areas distant from the volcano.**

Levels 3-5 are ERUPTIONS of varying levels of intensity

The Volcanic Alert Level at White Island/Whakaari was raised to Level 2 on November 18,2019

This information was never provided to Royal Caribbean shore excursion passengers

WHITE ISLAND/ WHAKAARI

DECEMBER 9, 2019

"if even a small phreatic (steam-driven) explosion were to happen when a group was in the crater, the consequences could be catastrophic."

–Dr. Eric Klemetti , *Wired* (2012)



THE ERUPTION—VIEW FROM OFFSHORE



THE ERUPTION—
KRYSTAL BROWITT'S EYE VIEW



THE ERUPTION—STEPHANIE BROWITT'S EXPERIENCE





OF THE 47 PEOPLE ON THE ISLAND, 22 DIED, THE REMAINING WERE INJURED

OUR CLIENT STEPHANIE BROWITT SURVIVED BUT FATHER PAUL AND SISTER KRYSTAL BROWITT PERISHED
BARBARA, MARTIN, BEREND, AND MATTHEW HOLLANDER PERISHED

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MIAMI-DADE COUNTY, FLORIDA
CIVIL DIVISION

STEPHANIE BROWITT, Individually, and MARIE BROWITT, Individually and as Personal Representative for Decedents Paul Browitt and Krystal Browitt,	§	CASE NO. 2020-025966-CA-01
Plaintiffs	§	DIVISION _____
vs.	§	
ROYAL CARIBBEAN CRUISES, LTD.,	§	SUMMONS
Defendant.	§	

https://www2.miamidadeclerk.gov/ocs (Party Name Search Screen)

The Plaintiffs sued in Miami, Florida because:

ACT 1

Conflict over venue

Florida v. Australia

- At all material times **Royal Caribbean Cruises Ltd. ("RCCL") maintained its head office in Miami, Florida**.

- At all material times **RCCL's Global Tour Operations department was located at its head office in Miami**.

  That department was responsible for developing, operating and setting policy for RCCL's shore excursion program, and had approved the on-board promotion and sale of the White Island tour undertaken by Stephanie, Krystal, and Paul Browitt on 9 December 2019."

  [AGREED FACTS, *Royal Caribbean Cruises v. Marie and Stephanie Browitt*, Federal Court of Australia, June 7, 2021]

ROYAL SUES THE PLAINTIFFS IN AUSTRALIA

(Relying on the Passenger Ticket Contract's Forum-Selection Clause)

"Overview

…The parties to [the] contract are yourself and either Royal Caribbean Cruises Ltd or RCL Cruises Ltd, depending on which of those entities will be operating the cruise ship on which you sail (the 'Ship Operator')…'we', 'us', 'ourselves' and 'Royal Caribbean International®' means either Royal Caribbean Cruises Ltd or RCL Cruises Ltd.

These terms and conditions are to be construed under the laws of NSW [New South Wales] and you agree to submit to the exclusive jurisdiction of the court of that state in the event of dispute between you and Royal Caribbean International."

ROUND ONE TO ROYAL:

Forum issues were litigated in Australia

ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR ANTI-SUIT INJUNCTION

6. Like United Brands in the Diageo case, it appears at this time that the Plaintiffs have filed this suit in contravention of the forum selection clause which calls for suits to be exclusively filed in Australia. While the Plaintiffs raise several issues with the enforceability of the forum selection clause, this Court finds that those issues should be addressed in the forum set forth in the forum selection clause (Australia), not here in Miami.

7. In view of the foregoing, the Plaintiffs' motion is **DENIED**. The parties are hereby

Anticipating victory, Royal assures the Miami court that it will be able to enforce the Australian court's judgment....

before you. Because, essentially, once the Australian court makes a ruling, then the question is should the Florida court here abide by that ruling based upon issues of comity and international comity. And the answer to that is, yes, and the cases are legion on that standpoint, unless the judgment was procured by fraud or some other

unconscionable means which it won't be because this is Australia.

FEDERAL COURT OF AUSTRALIA

Royal Caribbean Cruises Ltd v Browitt [2021] FCA 653

File number:	NSD 1360 of 2020
Judgment of:	**STEWART J**
Date of judgment:	18 June 2021

Contractual language matters:

PLAINTIFFS PREVAIL IN AUSTRALIA

100 It follows that in my view the passenger's contractual counterparty is only the Ship Operator, whichever of the Royal Caribbean entities that happens to be in respect of the particular cruise, to the exclusion of the other. In this case it is common ground that it was RCL.

Given that there are no parallel proceedings on foot or contemplated in Australia, the Florida proceeding is where RCCL's head office is located and where various acts and omissions by RCCL which are relied on in the Florida proceeding as giving rise to the liability of RCCL are alleged to have occurred, and Mrs Browitt and Ms Browitt enjoy certain legitimate juridical advantages in Florida (i.e., higher damages, assessment of damages by a jury, and certain procedural advantages already identified), the pursuit of the Florida proceeding is entirely legitimate and in no sense unconscionable.

ACT 2:

Florida law v. U.S. maritime law

Royal Seeks to Apply Maritime Law

Plaintiffs opposed this because their injuries occurred on land, not on navigable waters.

They also opposed the application of maritime law because U.S. courts interpret it inconsistently with respect to the availability of damages—particularly "nonpecuniary damages" like pain & suffering, punitive, and loss of consortium.

THE TENSION BETWEEN THE U.S. SUPREME COURT AND THE 11TH CIRCUIT ON THE ISSUE OF GAP-FILLING AND NONPECUNIARY DAMAGES

- **The U.S. Supreme Court has held that courts may "fill gaps" in maritime law with State law remedies, which can include nonpecuniary damages.**

  --*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Miles v. Apex Marine*, 498 U.S. 19 (1990) ("*Moragne* involved gap filling in an area left open by statute…supplementation was…appropriate.").

- **It has also held that the "common-law tradition of punitive damages extends to maritime claims."**

  --*Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

- **Nevertheless, the 11th Circuit Court of Appeals (which includes Florida) will not "gap-fill" in the absence of "exceptional circumstances" [intentional conduct] and has refused to award either loss of consortium or punitive damages in maritime law cases.**

  --*In re Amtrak Sunset Ltd. Train Crash*, 121 F.3d 1421 (11th Cir. 1997); *Eslinger v. Celebrity Cruises, Inc.*, 772 Fed.Appx. 872 (11th Cir. 2019); *Petersen v. NCL (Bahamas) Ltd.*, 748 F. Appx 246 (11th Cir. 2018) ("[n]othing in [*Atlantic Sounding*] undermines our …olding in *In re Amtrak* …. that punitive or loss of consortium damages may be available under federal maritime law [only] 'in exceptional circumstances …")

Damages that may not have been recoverable under maritime law....



More damages that may not have been recoverable....



General Maritime Law Inapplicable; *Grubart* test not satisfied

--Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995): a party seeking to invoke maritime law "**must satisfy conditions both of location and of connection with maritime activity.**"

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AS AN IMPROPER PARTY AND FOR FAILURE TO STATE A CAUSE OF ACTION, AND DENYING AS MOOT PLAINTIFFS' MOTION TO STRIKE EVIDENCE

10. The Court finds that the location test has not been met under the circumstances of this case. First, the tort did not occur on navigable waters. In fact, the injury occurred on a natural island about 56 miles away from the port at which the *Ovation of the Seas* was docked. Amended

PRIMARY CAUSES OF ACTION

* Strict Liability for Abnormally Dangerous/Inherently Dangerous Activity
* Failure to Warn
* Negligence
* Joint Venture/Agency/Apparent Agency
* Intentional and Negligent Infliction of Emotional Distress

ACT 3:

Which damages law should apply:

Florida v. Australia

MOTION FOR APPLICATION OF AUSTRALIAN LAW ON DAMAGES

Defendant Royal Caribbean Cruises Ltd. ("RCCL") moves for the application of Australian law to all damages alleged in this action. In support of the motion, RCCL states as follows:

The Florida Supreme Court has "held that in tort actions involving more than one state, all substantive issues should be determined in accordance with the law of the state having the most significant relationship to the occurrence and the parties." *Bates v. Cook, Inc.*, 509 So. 2d 1112,

RCCL argued that because the Plaintiffs were Australians who purchased their cruise tickets and formed their relationship in Australia, sustained their injuries in New Zealand, not Florida, and arose from tortious conduct occurred in Australia and New Zealand, Florida did NOT have the most significant relationship to the case.

PLAINTIFFS' OPPOSITION TO RCCL'S MOTION TO APPLY AUSTRALIAN LAW

B. There is a "false conflict" between Florida law and Victoria's damages law

"[I]f the Browitt family's causes of action succeed against RCCL in the Florida Court, no interest or policy of the State of Victoria would be advanced or furthered by the Florida Court applying Victorian damages laws in the assessment of their damages entitlements. Nor would any interest of the State of Victoria be impaired if the Florida court applied the damages law of Florida (rather than of Victoria,) to the Browitts' claims if they are successful."

—The Honourable Steve Bracks, AC, former Premier of Victoria[3]

Plaintiffs argued that not only did Florida have the most significant relationship to the case because the tortious conduct occurred at RCCL's headquarters there, but that there was no actual conflict between Florida and Victoria law, submitting letters from the former Premier of Victoria, the former Attorney General of Victoria, and a former judge of the Supreme Court of Victoria in support. In the absence of a conflict, Florida law should apply.

Evidence from the Honorable David Ashley AM KC (Former Judge of the Victorian Supreme Court and Court of Appeal)

It would not be in the interest of Victoria that one or more of its residents, injured by tortious conduct committed in Florida, should be held to Victorian damages which would have disadvantageous consequences such as those which I mention…below.

~~~

[I]n my opinion a Victorian judge applying the *lex loci* doctrine would decide—had the plaintiffs brought their proceeding in Victoria—that all issues of substantive law should be decided according to the law of Florida, and that no such issue should be decided according to the law of Victoria….the amendments to the *Wrongs Act* 1958 which capped damages were only intended to apply to torts occurring in Victoria.

~~~

Florida has the greater interest—arguably the only interest—in having the whole of its law (including its damages law) applied to the hypothetical case [in which the Browitts had sued in Victoria]. It is really inconceivable, having determined that Victoria would have no interest in applying Victorian substantive law, that the Victorian judge would nonetheless conclude that Florida's interest should lead to a contrary conclusion

Evidence from RCCL expert, Professor Mark Lunney

Q You've now read the act and you've read the second reading speech and you've read IPs, right?

A That's correct.

Q Okay. Where in any of those materials is it reflected that the -- that Victoria has an interest in limiting its citizens' recovery against foreign defendants in foreign jurisdictions?

MR. ODELL: Objection. Form.

THE WITNESS: I think there's nothing in the statements which would indicate that matter would ever cross the minds of the parties that were dealing with the issue.

MR. KAESKE: Okay. Thank you.

Have a wonderful day.

Lunney and Ashley agree:
the Browitts would not have been entitled to *any pain and suffering* damages
if Victoria law applied because they lacked an Australian "significant injury certification"

Ashley:

Neither Stephanie nor Marie Browitt have had their injuries assessed under Part VBA of the *Wrongs Act*. They have had no occasion to do so. The consequence may be, if the defendant's motion succeeds, in a proceeding regularly brought in Florida to which Florida law applies in determining liability, that the Florida jury will be precluded from awarding either of the plaintiffs damages for non-economic loss.

Lunney:

55. In Victoria, there is a threshold that must be overcome before a claim for damages for non-economic loss in relation to an injury may be brought. A person is not entitled to recover damages for non-economic loss in any proceeding in a court in respect of an injury to a person caused by the fault of another person unless the person has suffered a significant injury.[70] The detail is complicated but in general a significant injury is one that has been assessed by a medical practitioner or a Medical Panel as satisfying the threshold level.[71]

8. This Court cannot just gloss over what the Defendant is alleged to have done here in Florida. This is not a case in which the defendant is merely a Florida-based company, as in many of the cases that the Defendant cites and relies on in its motion. To the contrary, replete throughout the Second Amended Complaint are allegations of tortious conduct alleged to have been committed by Defendant RCCL here in Miami, Florida—conduct resulting in injuries to the Plaintiffs in either New Zealand or Victoria, Australia.

9. Florida's interests cannot be ignored. Florida has an interest in regulating and deterring tortious conduct committed in the state of Florida by an in-state defendant like RCCL. Similarly, Florida has an interest in making sure that damage awards do not impose excessive and unfair burdens on domiciliary defendants like RCCL.

Restatement (2d) Conflict of Laws, for the reasons stated above and below. The Court finds that under the Restatement's "most significant relationship" test, Florida has the most significant relationship to this case. The place of injury does not favor either side in the instant

10. Interestingly, Defendant RCCL has agreed to the application of Florida law in both its contract with affiliate, RCL, and in its contract with the tour operator for the White Island shore excursion, ID Tours. While these contracts do not directly include or relate to the Plaintiffs in this case, they do demonstrate the Defendant's expectation that Florida law would apply to events centering around the cruise and the shore excursions.

insurer being sued. As Defendant RCCL's expert, Mark Lunney, testified in his deposition [Exhibit 18 to Plaintiffs' Opposition], there was "nothing" in the legislative history materials of the Victorian damages caps legislation which would indicate that Victoria has an interest in limiting its citizens' recovery against foreign defendants in foreign jurisdictions, or that this "would ever cross the minds of the parties that were dealing with the issue."

12. Given the foregoing, the Court finds that there is a false conflict in this case. "A

ACT 4:

New Zealand v. Florida

The impact of separate New Zealand legal proceedings



NEW ZEALAND WORKSAFE CHARGED 13 ENTITIES/PERSONS WITH VIOLATIONS OF THE NEW ZEALAND HEALTH AND SAFETY AT WORK ACT

White Island Tours, Ltd.—operator of the tour that took passengers to White Island by boat

Tauranga Tourism Ltd. and ID Tours Ltd.—intermediary brokers/destination management companies between Royal Caribbean and White Island Tours

Andrew Buttle, Peter Buttle, James Buttle and Whakaari Management Ltd.—members of the family that owns White Island and the entity they created to license tour operators

Institute of Geological and Nuclear Sciences Ltd. (GNS)—sets Volcanic Alert Levels and publishes Volcanic Alert Bulletins

National Emergency Management Agency (NEMA)—lead agency for emergency management

Volcanic Air Safaries, Ltd., Kahu NZ Ltd., Aerius Limited, Inflite Charters Ltd.—helicopter tour companies

Worksafe concluded it had no jurisdiction over Royal Caribbean Cruises

White Island Tours and the helicopter companies entered guilty pleas

Whakaari Management Ltd. was convicted, but that conviction was reversed on appeal

Charges against NEMA, GNS*, ID Tours, Tauranga Tourism LTD and the individual Buttles were dismissed

* GNS plead guilty to one set of charges relating only to conduct pre-dating the eruption and impacting only its employees

RCCL names 8 of the charged entities/persons + *Worksafe* as "Fabre" defendants

--Under *Fabre v. Marin*, 623 So.2d 1182, 1186 (Fla. 1993), "Liability is to be determined on the basis of the percentage of fault of each participant to the accident and not on the basis of solvency or amenability to suit of other potential defendants."

RCCL then sought to rely upon New Zealand evidence and findings as proof of liability in Florida, though Plaintiffs were not represented and RCCL was an empty chair

PLAINTIFFS' MOTION TO STRIKE RCCL'S SUMMARY JUDGMENT EVIDENCE

[redacted] RCCL seeks to introduce the contents of the New Zealand court rulings, its sentencing orders, and "Summaries of Fact" of unspecified authorship to prove the facts necessary for its *Fabre* defenses. These documents are all inadmissible hearsay, some are not authenticated, and all fall outside Florida's "public records" exception to the hearsay rule [Fl. St. §90.803(8)]. The same is true of a 2021 report of a New Zealand lawyer that was critical of *Fabre* defendant, WorkSafe—it is rank hearsay to which no exception applies.

The Court declines to take judicial notice of the sentencing orders and holds that judicial notice would not cure the hearsay problem:

THE COURT: -- but whatever the number is, does not -- taking judicial notice of the three sentencing orders does not alleviate the hearsay issues contained within these foreign sentencing orders.

8/27/24 Tr., 59:23-5

The court holds that the New Zealand court findings are hearsay not admissible under the public record exception:

3. The Court does not find that these documents constitute public records under 90.803 subsection (8). While the court in New Zealand can be

8/27/24 Tr., 60:3-9

6. The Court finds that the charging document is HEARSAY and that NO EXCEPTION APPLIES.

8/27/24 Tr., 61:10-11

2. Put, "The Court GRANTS The Motion to Strike the SOF's." The Court finds that no hearsay exception applies to these documents. The documents are

8/27/24 Tr., 185:19-21

2. As to the Laurenson Report, the Plaintiff -- the Defendant, argues that it is admissible as a public record under 90.803 subsection (8). The Court disagrees for several reasons. First, the document relies on many outside sources, including WIT, WML. There was a list, a laundry list that I think -- that I think Mr. Kaeske pointed out.

3. Secondly, it is not based on firsthand observation of the events as required by Florida law.

4. Third, the report constitutes an investigation, factual findings, opinions, and recommendations by Mr. Laurenson which are not allowed under Florida law under the Public Records exception.

still meet a different exception. As a result, this Court's ruling on the Laurenson Report is without prejudice to the Defendant arguing that statements would -- that certain statements within that report are admissible under a separate hearsay exception, such as a statement against interest under 90.804(2)(c), or as a party admission under 90.803(18). And you're going to

The Court excludes the commissioned "Laurenson Report" on hearsay grounds

In summary, the Florida court excluded all of the New Zealand court documents on hearsay grounds:

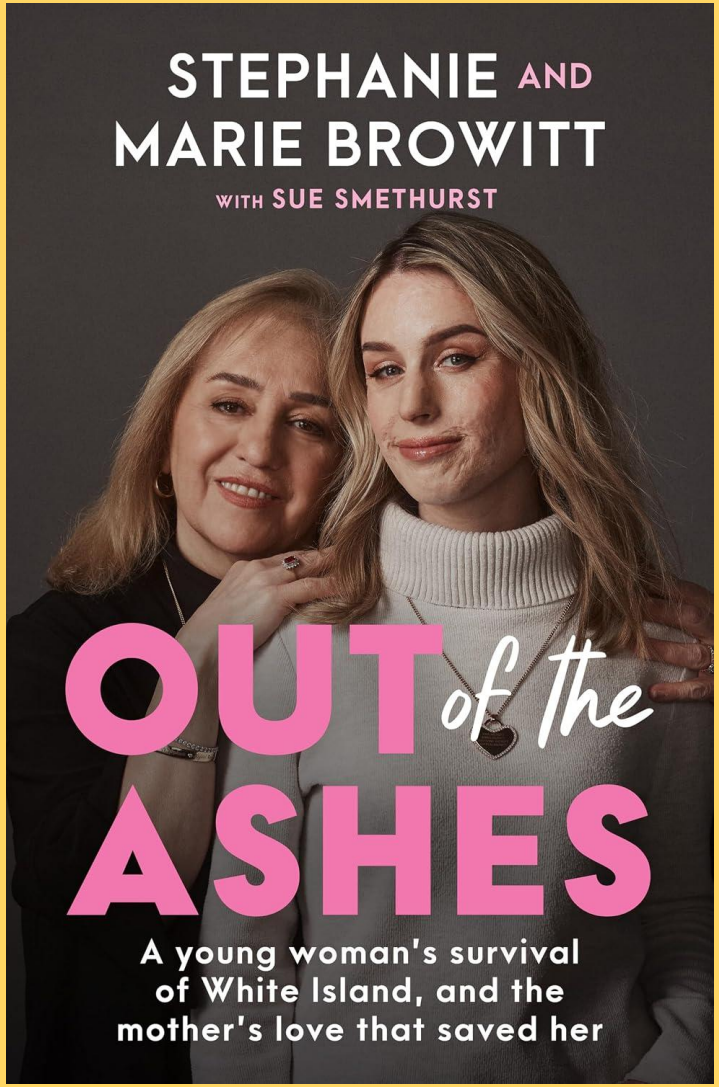
- The Summaries of Fact
- The judgments and sentencing orders
- The Laurenson Report (presenting "findings" on WorkSafe's conduct)

These holdings were critical, leading to the grant of Plaintiffs' summary judgment motions as to Worksafe and the Buttle-related *Fabre* "defendants" and to the significant limitation of expert testimony aimed at establishing Worksafe's liability

THE BROWITT CASE SETTLED TWO DAYS INTO JURY SELECTION



AFTERMATH


STEPHANIE AND
MARIE BROWITT
WITH SUE SMETHURST
OUT of the ASHES
A young woman's survival
of White Island, and the
mother's love that saved her


60
MINUTES


60
MINUTES