Shark diving operators: test for negligence and limitation of liability

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Great white shark diving – a popular tourist activity in South Africa – recently came under the spotlight in the Western Cape Division of the High Court's decision in *Tallman v MV Shark Team*.

Facts

On April 13 2008 a shark-cage diving vessel, MV Shark Team, capsized after being struck by a large wave while on an excursion with a party of 10 tourists. The vessel was anchored at the time at the Geldsteen, an extensive reef system off the southwest coast of South Africa near Cape Town. Three of those on board drowned, including the claimant's husband, a US citizen. Sarah Tallman brought a claim for damages against the vessel *in rem* and for personal liability on the part of the skipper and the owner, respectively, for damages arising from the drowning.

The issues for determination at trial were whether:

- the drowning was caused by negligence on the part of the defendants; and
- the owner was entitled to limit its liability on the basis of the tonnage of the vessel in accordance with the Merchant Shipping Act 1951.

In a trial which ran for a staggering 52 days, the court was presented with an array of evidence from witnesses who were on board the vessel at the time and those aboard other shark diving vessels in the vicinity of the incident, as well as expert evidence from technical analysts and former master mariners.

The plaintiff's case was that the defendants were negligent in numerous respects. In particular, it alleged that the sea conditions became noticeably threatening at the diving site and that the vessel should have left the area before the capsizing swell arrived. Further, the skipper should have realised that the vessel was lying in the vicinity of a shallow part of the reef in an area known to be dangerous and to experience large swells. Moreover, the plaintiff alleged that a breaking wave large enough to capsize the vessel was reasonably foreseeable in light of the proceeding swell pattern and the nature and foul ground in which the vessel was anchored.

The defendants' main contention was that the vessel was struck by a "freak" wave of at least 10 to 11 metres (m) high which could not reasonably have been foreseen.

Decision

In the judgment the court examined a number of factual elements of the case, such as:

- the foreseeable consequences of a breaking wave when at anchor;
- what swell size would have indicated danger;
- the swell conditions before the capsize; and
- whether the skipper kept a proper lookout.

After considering the evidence, the court was satisfied that if sets of swells were coming through at 4m or more, a prudent skipper at anchor at the Geldsteen would be concerned and would depart the area.

One of the factors taken into account by the court was that a prudent skipper should leave a margin of safety and not flirt with risk. This was particularly the case when a vessel is at anchor for shark viewing purposes, which is extremely dangerous because:

- great white sharks have been deliberately enticed to the immediate vicinity of the vessel;
- there is an obviously foreseeable risk if this type of vessel capsizes, anyone in the cabin is likely to

be kept under the hull and it will be too dangerous to expect anyone to attempt to rescue persons trapped underneath;

- the risks include not only danger from sharks, but also becoming entangled in ropes and the like;
- on the defendants' own evidence, death by drowning is clearly a foreseeable risk if such vessel capsizes.

In applying the test for negligence under South African law – that of the 'reasonable man' who is obliged to take appropriate avoidance action once harm is foreseen – the court found that the question to be answered was whether the swell conditions at the Geldsteen were sufficiently indicative of danger that the prudent skipper of the vessel at anchor would have departed.

While the court cautioned that it was not suggesting that it is always dangerous for a shark-cage boat to go out to sea where there are occasional swells of 4m or more, the totality of the evidence led the court to conclude that swells in excess of 4m in the nearby vicinity of the vessel at anchor at the Geldsteen constituted a warning to the reasonably prudent skipper that he should "pack up and leave".

The court also concluded that nothing turned on exhaustively analysing evidence as to the size of the breaking swell. The question was not whether the defendants could reasonably have foreseen a wave as large as the wave which actually capsized the vessel, but rather whether the conditions were such that a skipper could reasonably have been expected to foresee the risk of a wave breaking over the vessel. If he could, then the death of a passenger was reasonably foreseeable.

The court was satisfied that the skipper had indeed been negligent and found the defendants liable for such damages as the claimant might prove in consequence of the death of Mr Tallman.

Turning to the issue of limitation of liability, the owner contended that even if the death was caused by the negligence of the skipper, it was permitted to limit its liability in accordance with Section 261(1)(a) of the Merchant Shipping Act. This provision gives owners a statutory right to limit liability on the basis of the tonnage of the vessel, provided that the loss or damage was caused without the owner's "actual fault or privity".

Only one member of the vessel-owning corporation gave evidence. She admitted that she knew that the skipper sometimes took tourists to the Geldsteen in swells of 4m or 5m. On this basis, the court was satisfied that the owner failed to prove that it lacked the required "privity".

Given the finding on the issue of privity, the court found it unnecessary to decide whether the owner lacked the necessary fault. It took the opportunity to add, nevertheless, that it did not accept the owner's argument that it was entitled to abdicate all responsibility in respect of navigation issues and to rely solely on the skipper's expertise and judgement. In this regard, the court cited the English judgment in *The Lady Gwendolen* and supported the finding that the absence of any effective managerial control over the way in which the defendant's ships were navigated by their masters was a serious failure in management.

Finally, the court found that no reliance could be placed on the indemnity form signed by the deceased before the excursion, which purported to release the owner from claims against it or its employees arising from, among other things, "wrongful death". This is because, as a matter of South African law, a dependant's action is not compromised by an indemnity or waiver given by the deceased.

The decision is under appeal.

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