

Outcome of the *Easy Rider* prosecution – Part 1: Maritime Law Charges

In this and the following edition of *The Legal Lounge* I summarise the outcome and reasoning of the District Court in finding various charges under the Maritime Transport Act 1994 and the Health and Safety in Employment Act 1982 to be proved against AZ1 Enterprises, and its sole director Ms Gloria Davis, following the tragic sinking of the *Easy Rider* in the Foveaux Strait on 15 March 2012.

AZ1 Enterprises Ltd, the owner and operator of the vessel the *Easy Rider*, and Ms Davis, the sole director of AZ1 Enterprises Ltd, were each prosecuted under the Maritime Transport Act 1994 for:

- Operating the ship knowing that a maritime document was required to be held and knowing it was not held (this related to the lack of a skipper's certificate being held by the skipper), s68(2)(a) MTA; and
- Causing or permitting the ship to be operated in a manner causing unnecessary danger or risk to the persons on board, s62(2)(a) MTA.

Sections 46(1)(a) and 44(2)(a) of the Civil Aviation Act 1990 have identical offence provisions to the above, and each carry a maximum fine of \$100,000 for a corporate entity; and a fine of up to \$10,000 or a term of imprisonment of up to 12 months for an individual. They are in the context of the Civil Aviation Act, and the equivalent regulatory sections of the Maritime Transport Act, at the more serious end of the offences scale.

The charges were found to have been proved against both AZ1 Enterprises and Ms Davis. This article focuses on the Judge's reasoning in finding the charge of 'knowingly operating a ship without the required document' to be proved against both parties, and discusses some potential issues for aviation participants to consider. Next month's article will focus on the second charge of unnecessary endangerment, and the charges laid under the Health and Safety in Employment Act.

Easy Rider accident – brief factual context

On 14 March 2012 the *Easy Rider*, a commercial fishing vessel, set sail at around 8pm. The intention was to drop off a boat load of passengers to the Titi Islands to go mutton birding, and then continue on to go fishing in the southern waters. In the early hours of 15 March 2012, the vessel carrying nine persons sank in the Foveaux Strait, resulting in the loss of eight lives, including the skipper, Ms Davis' partner William Karetai. The sole survivor, a crew member, was rescued after 18 hours in the water, clinging to the upturned hull and then later to an empty petrol container.

Maritime Transport Act charges

Operating without required maritime document

It was not in dispute that neither Mr Karetai nor any other crew member on board held a commercial skipper's certificate during the ill-fated voyage. However, a preliminary defence issue was raised as to whether in fact a skipper's certificate was required to be held. This was argued on the basis that the first part of the trip was a pleasure trip and not a commercial fishing trip, and hence no skipper's certificate was required for this part of the voyage.

Was a skippers' certificate required to be held?

The Safe Ship Management (SSM) certificate operating manual held by the company permitted pleasure trips to be carried out on the vessel provided no fare-paying passengers were carried, and MNZ was notified. Neither MNZ or its delegated SSM issuing company were notified. Further, the fitness for purpose certificate issued for the vessel restricted the number of passengers to be carried to 'nil', and the person who issued the fitness for purpose certificate gave evidence that the vessel would need to be re-surveyed before passengers could be carried on the vessel in any capacity. Although there was some debate around the necessity of these requirements and the apparent conflict between the manual and the fitness for purpose certificate regarding carriage of passengers, the Judge did not consider that these issues were of much relevance. This was because the Judge was satisfied that the purpose of the trip was a commercial fishing venture, and as such that a skippers certificate was required for the entire voyage.

The vessel had been loaded with commercial fishing gear, and the crew members had boarded the vessel at the commencement of the trip for the purposes of commercial fishing. The surviving crew member viewed himself as being "on duty" from the time the vessel left port, and Ms Davis, who had seen the vessel being loaded before it left port, had accepted under questioning that the purpose of the voyage was to fish. The fact that the skipper had elected to drop off some passengers along the way did not in the Judge's view render the voyage a private or pleasure trip, and he viewed the attempt to distinguish that part of the voyage as a pleasure trip as "artificial". This finding was important not only to the issue of whether a skippers' certificate was required, but generally as to whether the requirements of the Maritime Rules and the SSM certificate as they apply to commercial fishing operations applied to that part of the trip. He was satisfied that they did. The further ramifications of this to the unnecessary endangerment and health and safety charges will be discussed in the next edition of *The Legal Lounge*.

Did AZ1 and Gloria Davis know that a skippers' certificate was required to be held and was not held?

It should be noted that it is possible to be prosecuted for not holding an appropriate maritime (or aviation) document on a strict liability basis – that is, if it is proved that a legally required document was not held, unless a total absence of fault can be established by the defendant, the offence will be proved irrespective of the knowledge of the person at fault. However, the applicability of the strict liability offence appears to be limited to the person who is actually required to hold the relevant document – in this case, the skipper.

As the prosecution was attempting to attribute fault to the company AZ1 Enterprises and Ms Davis, it laid the charges on the basis that both defendants knew that a skippers' certificate was required to be held by someone on board the vessel, and knew that no such person held that qualification during the voyage.

The Judge found that Ms Davis knew that a skippers' certificate was required to be held, and was not in fact held. Ms Davis was the sole director of AZ1 Enterprises, the company set up with her partner to acquire the vessel. Ms Davis held a number of designated responsibilities under the SSM manual and was nominated as the "fit and proper person" responsible for the SSM certificate. As such, she had responsibilities under the SSM certificate and Maritime Rules to ensure that an appropriately qualified skipper was in command on any commercial fishing operations.

During the SSM certification process, Mr Karetai had nominated another person as the responsible person who would hold the skippers certificate, on the basis that he did not yet have the relevant qualification, or sufficient depth of knowledge of the operating conditions on the Foveaux Strait, to hold the position of skipper. The SSM certificate was granted on the basis that the named person would be engaged until such time as Mr Karetai qualified as a skipper. This discussion took place in Ms Davis' presence and she was fully aware of the basis on which the SSM certificate was granted. That arrangement did not however eventuate, and Ms Davis knew that Mr Karetai was operating the vessel as skipper without holding the relevant document.

Earlier in the day of the ill-fated voyage, a Maritime NZ inspector had attempted to conduct an audit of the vessel and operation, but had agreed with Mr Karetai to visit later in the week to do the inspection. He was not aware at this time that Mr Karetai had intended to set sail and would not be in port at the agreed time. During the course of his visit the inspector had in fact questioned Mr Karetai about his skippers' certificate and why it was not displayed on the vessel. In his presence, Mr Karetai had contacted Ms Davis and had a discussion about the whereabouts of his skippers' certificate and had indicated his intention to retrieve it from their home for later inspection. Ms Davis had therefore actively participated in a conversation designed to deceive the inspector into believing her partner held the relevant skippers certificate. In those circumstances, the Judge held that Ms Davis must have been aware that the absence of a skippers' certificate was a matter of concern. Ms Davis was present when the vessel had been loaded, and there was no suggestion that she believed that any of the other crew members had a skippers certificate.

On the facts, the Judge held that it was clear that Ms Davis knew a skippers certificate was required to be held and was not in fact held by any person on board the voyage.

The Judge further held that as a matter of common law, the company was deemed as principal, to have the knowledge of both Mr Karetai and Ms Davis as its agents, and accordingly it also had the requisite knowledge that the required maritime document was not held by any person on board.

Did AZ1 and Ms Davis "operate" the vessel

The defence attempted to argue that Mr Karetai alone operated the vessel as skipper, and not AZ1 or Ms Davis. As will be apparent in my next article, this argument was also relevant to the second charge of endangerment, but did not hold any sway with the Judge. It is clear under both maritime and aviation law, that more than one person can be the "operator".

The SSM certificate was held by AZ1 Enterprises, and the vessel was registered under that SSM certificate. Based on the Judge's finding that the voyage was a commercial fishing operation, the Judge was satisfied that it was being operated under the SSM certificate and as such, both AZ1 and Mr Karetai were "operators" of the vessel as a matter of law. The legal definition of "operate" under the Maritime Rules also extends to persons who "operate or permit the operation of" the vessel. On the facts, the Judge held that it was clear that Ms Davis as an agent and director of AZ1 enterprises, and its nominated senior person, knew about and had permitted the operation of the vessel, despite knowing the appropriate aviation document was not held.

The Judge was therefore satisfied that this offence was proved against both AZ1 Enterprises and Gloria Davis.

Comments

It would be fair to say that the evidence of Ms Davis' knowledge of her partners' lack of a skippers' certificate, and the need for one to be held to conduct commercial fishing operations, was overwhelming. However, the Judge's reasoning regarding the nature of the particular voyage is of some potential importance in the aviation context. It suggests that aviation operators conducting commercial activities under an aviation document, ought to be extremely cautious before assuming that part of a trip can be "carved out" and treated as a private operation and thus not subject to the legal requirements that might otherwise apply to the "commercial part" of an operation. This will become even more apparent from my discussion of the Judge's comments in relation to the unnecessary endangerment charge.

This judgement suggests that attempts to split up flights on such a basis may be viewed as contrived and artificial by the Courts. How this would translate in the aviation context would be a fact specific assessment, and would need to be assessed in the light of the relevant civil aviation rules and approved operating procedures or limitations applicable to the type of operation and aircraft. At the least, it is an issue that commercial operators ought to be aware of when there is "mixed purposes" associated with any flight operation. As a general rule of thumb, if there is any doubt, I would suggest that it would be prudent and wise to assume that the entire operation is required to be conducted under the auspices of and in compliance with the relevant operating certificate and civil aviation rule requirements applicable to any commercial operation; or that consideration be given to conducting entirely separate flights for separate purposes.

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