

## **Outcome of the *Easy Rider* prosecution – Part 2: Endangerment and HSE charges**

On 14 March 2012 the *Easy Rider*, a commercial fishing vessel, sank in the Foveaux Strait resulting in the loss of eight lives. In last month's edition of *The Legal Lounge* I outlined the reasoning of the District Court Judge in finding the owner of the vessel, AZ1 Enterprises, and its sole director Ms Gloria Davis, guilty of operating the *Easy Rider* knowing that a commercial skipper's certificate was required to be held by the skipper, and knowing it was not held.

In this article I summarise the Judge's reasoning in finding further charges of unnecessary endangerment, and breaches of Health and Safety laws, to also be proved against both defendants. I conclude with some comments on the implications of this case for small commercial aviation operations, and legal liability issues that could arise for supposedly "silent" directors and officers.

### **Maritime Transport Act charges - Unnecessary endangerment**

AZ1 Enterprises and Ms Davis were respectively charged under s65(2)(a) of the Maritime Transport Act 1994 that they caused or permitted a ship to be operated in a manner causing unnecessary danger or risk to the persons on board.

It is important to note that this is a strict liability charge - that is, if the elements of the offence are proved, the onus is on the defendants to prove that they were not at fault, in that they took all reasonable and practicable steps in the circumstances to avoid the offending occurring.

*Was the Easy Rider operated in a manner causing unnecessary danger?*

Although the Judge was not satisfied beyond reasonable doubt that the boat was overloaded, it was clear that it was very heavily loaded, both with cargo and a large number of passengers. The passengers were carried in breach of the SSM certificate requirements, and the boat was not surveyed to carry passengers. The weather forecast was extremely poor, and there were insufficient life jackets for all persons on board.

The skipper did not hold the required maritime document (skippers' certificate). The Transport Accident Investigation Commission (TAIC) found, and the Court agreed, that the skipper had insufficient understanding of the concept of vessel stability, and that had he completed the required skippers' qualification, his understanding of issues with vessel stability and the potential implications of carrying such a large load would have been better. The skipper by his own admission also lacked experience in the Foveaux Strait area. Although other commercial skippers did decide to sail that night, others did not, and some expressed concern at the time at Mr Karetai's decision to go to sea in the conditions and with the load being carried.

The Judge held that the issue for determination was not whether a suitably qualified and experienced skipper should have opted to go to sea, but whether Mr Karetai, with his lack of experience in the area, and taking into account the other factors noted above, should have done so.

Although no one factor was alone determinative of an unacceptable level of risk, the Judge was satisfied that, those factors considered collectively, his decision to operate the ship in the circumstances caused unnecessary danger to all passengers and crew on board.

*Did Ms Davis and AZ1 Enterprises cause or permit the ship to be operated in this manner?*

As discussed in the previous article, the Judge rejected a defence argument that the vessel was operating as a pleasure vessel during the part of the voyage when the accident occurred. He was satisfied that it was operating as a commercial fishing vessel. As such, all of the legal requirements pertaining to the vessel's Safe Ship Management Operating Certificate applied, along with any other applicable Maritime Rules. As the nominated senior person for the organisation, Ms Davis also had obligations under the SSM certificate and SSM Manual.

In this context, Ms Davis knew of her husband's lack of a skipper certificate, and that this issue had been raised earlier in the day by a safety inspector, who was misled into believing he had a skippers' certificate. Ms Davis was also present when the vessel was loaded and knew that the extra passengers were being carried. The Judge held that she must have known that the vessel was operating outside its SSM certificate with the number of passengers being carried, and that her husband lacked the necessary experience to skipper such a voyage. The Judge found that Ms Davis either knew of all of these factors, or wilfully declined to acknowledge their presence, and thereby permitted the ship to be operated in a manner that placed the passengers at unacceptable risk.

The Judge pointed out that there were a number of steps that could have been taken to alleviate the unacceptable risks that existed, including appointing a suitably qualified skipper; and by delaying the departure of the voyage until other matters, including the required safety inspection, had been satisfactorily resolved. The Judge held that in that regard, both Mr Karetai and Ms Davis independently had an obligation to contact the safety inspector before permitting that voyage to proceed. Moreover, in her capacity as the company's agent responsible for safety and compliance with the SSM Manual, Ms Davis had an obligation to ensure compliance of the boat and its operations with the SSM Manual, in particular with respect to carriage of passengers. The Judge held that she failed in her obligations to do so. On that basis, the Judge held that she did not take all reasonably practicable steps to avoid the offending occurring, and the charge was proved. As Ms Davis and Mr Karetai were acting as agents of the company, the charge against the company was also proved.

#### **Health and Safety charges - failing to ensure the safety of contractors working on the ship**

AZ1 Enterprises was charged with failing to take all practicable steps to ensure that no contractor or sub-contractor was harmed while doing work on board the ship. In deciding this charge, the Judge once again dismissed the defence argument that the ship was at that time operating as a pleasure vessel, and not a place of work. The Judge was satisfied that the vessel was operating as a commercial fishing vessel; the contractors were solely on board for the purpose of working; and they began carrying out their duties from the time when the ship left port at Bluff. In light of the factual findings made against the company in relation to unnecessary endangerment, it is no surprise that this charge was also considered to be proved against the company.

Ms Davis was also charged that she, as a director of the company, *acquiesced or participated in* the failure of the company to ensure no contractor or sub-contractor was harmed while doing work on the ship.

The Judge acknowledged that a person is only required to take all practicable steps in respect of circumstances that *the person knows or ought reasonably to know about*, and that this was of particular relevance to the charge against Ms Davis. However, the Judge was satisfied based on his earlier findings that she knew that Mr Karetai was skippering the boat without the required qualification, and that he had acknowledged his own inexperience in the area. In addition, she was aware that a safety audit had commenced, and at the very least, the Judge held that she had a duty to enquire further into her husband's assurances that the ship had passed the safety audit, and as to who was skippering the boat. She was also aware that he was taking six passengers on the voyage and knew, or ought reasonably to have known, that this was not permitted by the fit for purpose certificate. The Judge held that Ms Davis could and should have taken steps to address these issues, and as she did not do so, she failed to take all practicable steps to ensure no harm occurred to the contractors working on the ship, and acquiesced or participated in the failure of the company to do so. Thus she was also found guilty of this charge.

### **Comment on the prosecution of Ms Davis as a director, and implications for aviation businesses**

The Court acknowledged that it had some sympathy for the position Ms Davis found herself in, and that this would be taken into account at sentencing. However, Ms Davis was the sole director of the company, and for maritime law purposes she carried many of the legal responsibilities for compliance with the safety requirements of the SSM certificate and was the nominated fit and proper person for the organisation. Thus, the Judge stated, Ms Davis was ***"held out by the company as the person responsible for both the safety on the boat and compliance with the [law]"***. The Judge went on to acknowledge:

***"In practice, she did not fulfil those roles. They were left to Mr Karetai, he skippered the boat and he made the relevant decision in regard to the operation of the boat. Regrettably, that is not an excuse. A person with such responsibilities... cannot abdicate those responsibilities and suggest, as here, that she fulfilled only clerical duties"***.

Although the level of involvement and knowledge of Ms Davis in this case might be greater than in other cases, the above comments could equally apply to a number of small aviation businesses, particularly husband and wife owned businesses, who view one business partner as merely office holders "on paper". The law does not make such a distinction. Workplace health and safety laws are also about to be strengthened, and more stringent duties will attach to directors and senior officers of companies than that which Ms Davis has been prosecuted under. Visit my website at [www.amclegal.co.nz/articles](http://www.amclegal.co.nz/articles), workplace health and safety issues, to read more about this.

I cannot stress enough that small aviation businesses in a similar position should review the legal structure, and in particular the designated legal responsibilities of officers of the business, to avoid unintended consequences arising for a non-active partner, in the event that something goes wrong.

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