Uneasy lessons to learn

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The *Easy Rider* tragedy left the country and the industry reeling with the loss of so many lives in one incident – the greatest number in one maritime incident since the *Wahine* disaster in 1968. The recent decision of Judge Strettel in the District Court in Invercargill has rightly left the industry with significant concerns, wondering just what the decision means for small operations of a similar nature around the country.

Charges were laid by Maritime New Zealand against Gloria Davis, and the company which owned *Easy Rider,* AZ1 Enterprises Limited, under the Maritime Transport Act 1994 and the Health and Safety in Employment Act 1992.

BACKGROUND FACTORS

The combination of circumstances that led to this tragedy are relatively complex, and only covered briefly for the present purposes. Rewai Karetai (Davis' husband) and seven others on board lost their lives when the *Easy Rider* foundered in Foveaux Strait, in heavy weather in March 2012. There was one survivor.

Karetai was acting as the skipper of the vessel, without the required Inshore Launch Master qualification. In addition, at the time of sailing, the vessel was part way through a safety audit required by the Safe Ship Management certificate. Consequently, the vessel was at sea without valid certification.

The vessel was regarded as overloaded with additional passengers onboard, together with substantial amounts of fishing gear and other equipment. That overloading was found to have a significant impact on the stability of the vessel, a fact that Karetai may not have appreciated the seriousness of, not having obtained an ILM qualification.

CHARGES

Davis and AZ1 were each charged with offences under the MTA and HSE Acts. Additional charges were laid but subsequently withdrawn. The charges considered by the Court were that Davis and AZ1:

i. Under s 68(2)(a) of the Maritime Transport Act, that they operated the *Easy Rider* knowing that a maritime document (a skipper holding an appropriate ticket) was required before the vessel could be lawfully operated and knowing that such a ticket was not held;
ii. Under s 65(2)(a) of the MTA, that they caused or permitted the *Easy Rider* to be operated in a manner which caused unnecessary danger or risk to those onboard; and
iii. Under s 18(1)(b), 50(1)(a) and 56(1) of the HSE, that they acquiesced or participated in the failure to take all practicable steps to ensure that no contractor was harmed while doing work on the *Easy Rider* that he was engaged to do.

Both parties were found guilty of all three charges.

MTA CHARGES

In considering the statutory responsibility for the vessel's activities, the Court looked at various aspects of the vessel operations, and how duties were divided between Davis and Karetai. This included a consideration of *Easy Rider's* SSM policy and operations manual, noting that Davis was the person responsible for many aspects of the operations covered by that manual. Davis was also the "Fit and Proper Person" for the purposes of the MTA (and associated Maritime Rules) and had taken responsibility for all paperwork that was associated with the operation.

In the context of this background, the Court found that Davis had responsibilities for the operation of the vessel that went far beyond that of a desk-bound office holder. She was found to have a responsibility for the safety of passengers onboard the vessel and for land-based aspects of management, including safety training, operational procedures and compliance with an SSM Manual. Because Davis had assumed such responsibility for the operation of *Easy Rider,* she was not able to hide behind a role of an "administrator" when things went so drastically wrong. Knowing that there was a safety audit being conducted, she should have asked what the outcome of that audit was, and how the issue of Karetai's lack of suitable qualification was resolved.

On this basis, Davis was held to be an "operator" for the purposes of the Act and the charge under s 68(2)(a) of the MTA was proved. The Court also found that Davis must have known that Karetai did not have the required ticket and, despite that, he was acting as the vessel's skipper on this (and other) trips.

HSE CHARGES

Davis was also found to be responsible for the combination of circumstances which collectively caused those onboard the vessel to be placed in what the court termed "an unacceptable risk situation" for the purposes of the HSE Act. She had failed to take all reasonable steps to prevent or stop the vessel going to sea under such circumstances. The Court found Davis knew:

(a) Karetai's inexperience as a skipper.
(b) The vessel had passengers onboard (over and above the two crew on the vessel), originally to be two, but increased to six.
(c) The vessel was fully laden and appeared to observers to be low in the water as it left Bluff.
(d) No-one onboard the vessel had the appropriate ticket or experience.
(e) The vessel had not passed its safety audit.

In respect of the HSE charges, Davis was held responsible for there being too few lifejackets onboard and because she was held out by the company as the person responsible both for safety on the vessel and compliance with the HSE Act, she was equally responsible for the shortcomings of the company's practices. Despite the fact it was Karetai rather than Davis who

made decisions regarding the practical operation of the vessel, particularly while at sea, her responsibilities were not abdicated and she was liable for the consequences of failing to take all reasonable steps which resulted in the harmful situation occurring.

Karetai was intending to drop passengers off for a mutton birding expedition on the way to his intended fishing grounds, so the Court also considered whether the first part of the trip, when the sinking occurred, was for commercial purposes, as the commercial activity was only to be commenced after the passengers had disembarked. The Court found the entire trip was of a commercial nature and therefore the obligations associated with a commercial activity were relevant for the entirety of the trip.

For the industry this means that a vessel which is in SSM and has set out for a trip which has some commercial purpose is viewed as a commercial operation for the entirety of the voyage.

IMPLICATIONS

The question industry should be asking is "what does this mean for me?" because this decision is significant. There are many small operations in New Zealand involving a commercial vessel which have a spouse or family member as a director of a company, a person responsible for safety obligations, or both, while the person with the relevant experience and qualifications is the one out at sea, "doing the business", if you like. The buck doesn't stop with those out at sea – those based ashore can be held to be responsible for fundamental aspects of an operation, despite not being physically present on the vessel.

While there are reasons why operations have been structured in a way that places a spouse or family member in a position of responsibility, the *Easy Rider* decision sends a strong indication of the expectations placed upon the shore-based party, and their liability for shortcomings in the operation. Gloria Davis was found to be an "operator" despite the fact that she never physically assisted in the loading or sailing of the vessel. By virtue of her position of authority, and the tasks she routinely undertook in a personal capacity and as an agent of AZ1, she was, for the purposes of the MTA, operating the vessel.

MNZ has signalled that a hard line will be taken against operators, and directors, who are not meeting the standards required by law. It seems to be commonplace in the industry to assume that some of these roles are protected by corporate structures or are roles which are only administrative in nature. The post-*Easy Rider* reality is that where someone routinely assumes responsibility for an operation, they shall be held liable should those responsibilities not be discharged properly and in accordance with the law. A passive director will be held liable for the effects of their failure to properly discharge the obligations of the office.

The sinking of the *Easy Rider* is an absolute tragedy, the effects of which will be felt in the small southland community for many years. It is important that the lessons from this matter are heeded by the industry. Periodic reviews of corporate structures and constant adherence to safety requirements are fundamentals of any well run operation. This incident should not be viewed as one of "those things that happen". It is important for those who are out on the water to remember that the ramifications of their decisions can be far-reaching and have significant consequences for loved ones based ashore. It is also vitally important that those who hold responsibilities within an operation satisfy themselves that the relevant standards are met, and the operation remains lawful. The results of not doing so can be utterly disastrous.