

# WINDSURFER TILTS AT LEGAL WINDMILLS

BY MARTY LOGAN



I have been following with interest the sad litigation involving a claim by a Kimberley Birkenfeld against Yachting New Zealand Incorporated (YNZ) and Bruce Kendall.

Ultimately none of the legal conclusions reached by the courts are surprising, but the case is a cautionary tale for skippers who operate outside of New Zealand, even in a sporting capacity. The decisions have focused on the rather dry subject of limitation of liability in collisions, but behind the litigation is a tragic story involving a disabled former windsurfing champion American representing herself in pursuing a claim for damages through the New Zealand courts.

The claim has a Don Quixote aspect to it, as Ms Birkenfeld has repeatedly tilted at legal windmills with no apparent chance of success. The writer is aware from his own practice of the stress such claims can put on defendants, and in some ways this claim highlights the benefits of the Accident Compensation Corporation's system in New Zealand, which prevents such claims where the accident occurs within our jurisdiction.

The factual background is simple but apparently hotly contested. A collision took place off the coast of Greece in 2002 between a windsurfer, ridden by Ms Birkenfeld, and a rigid inflatable boat owned by YNZ and driven by Kendall. Ms Birkenfeld was severely injured and is now confined to a wheelchair.

## YNZ and Kendall have denied liability on the basis that they were not negligent

The cause of the collision is disputed, with Ms Birkenfeld claiming that the RIB collided with her while she was in the water, while the defendants claim the windsurfer collided at speed with the RIB. Ms Birkenfeld issued proceedings in New Zealand in 2004 against Kendall and YNZ, claiming \$15 million in damages. Both YNZ and Kendall have denied liability on the basis that they were not negligent.

YNZ has also sought to limit its exposure by relying on a limitation of liability provision in the Maritime Transport Act (section 85). For smaller vessels the ceiling for claims is, at the moment, approximately \$400,000. For larger vessels the maximum claim is calculated based on the tonnage of the vessel.

You cannot rely on the limitation if the loss was brought about by your deliberate or reckless actions. Ms Birkenfeld withdrew her allegation that the accident had come about because of any deliberate or reckless action on the part of the defendants and accepted that it was only a claim for negligence.

The High Court decision also reviewed the contractual arrangement between YNZ and Kendall (or the lack thereof), which may be of interest to professional sports people who work overseas. It would also be of interest to sporting bodies as to when they can be held accountable for independent contractors such as coaches or instructors. The court found that the limit applied.

Ms Birkenfeld was undeterred, and took the argument to the Court of Appeal and tried again with another ultimately unsuccessful argument. Virtually the only legal point the Court

of Appeal was called upon to determine was whether a RIB was a "ship" for the purposes of the Maritime Transport Act. She tried to argue that it could only apply to commercial vessels involved in the commercial shipping trade, and in particular only those over 24m, which had been measured in accordance with the tonnage convention. However, the court had no difficulty in deciding that a RIB was a ship.

She then attempted to take her argument to the Supreme Court, but in a recent judgement she has been refused leave to do so. Accordingly, Ms Birkenfeld will be left to contemplate whether she wishes to proceed with her negligence claim, given that the maximum result will be \$400,000, even if her version of the facts is accepted. As always with these types of claims, one of the main messages is to check your insurance if you are operating overseas. In New Zealand we are so used to living with the shield of the ACC legislation, which prevents personal damages claims, that it is easy to forget that out in the big wide world where many mariners operate, the exposure to personal liability claims can be horrendous.

*Marty Logan, of the marine law specialists Oceanlaw New Zealand, reports on aspects of maritime law that affect our readers.*



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14 New Street, PO Box 921 Nelson.

Phone 64 3 548 4136, Fax 64 3 548 4195, 0800 OCEANLAW

email [martylo@oceanlaw.co.nz](mailto:martylo@oceanlaw.co.nz) [www.oceanlaw.co.nz](http://www.oceanlaw.co.nz)

VIP 550