



LIABILITY OF OWNERS FOR OPERATING VESSELS (CONTINUED)

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The legal saga arising from the sinking of the fishing vessel *Mi Jay* in 2005 ended with a decision of the High Court in December last year (1). The sinking achieved national notoriety because of the distressing fact that two crew members were able to make it into a life-raft following the sinking, but after spending a considerable amount of time in the life-raft they died before searchers were able to find them.

The factual background raises the difficult issue of what responsibility lies with what could be termed “investor” owners (as opposed to owner/operators) for the safe operation of the vessels. Such owners can have little or no maritime knowledge or experience and rely on the expertise of others, such as surveyors or masters, to ensure the safe equipping and operation of their vessels. This raises the issue of when it is reasonable for such owners to rely on the expertise of others, or when this amounts to the shirking of responsibilities placed on them as the owner of a commercial vessel.

The *Mi Jay* was owned by a one-man company and the proprietor of the company, Warwick Loader, had little maritime experience. Accordingly, the owner entered into a joint venture arrangement with experienced fishermen to operate the vessel. In November 2005 the vessel left port with a very basic fishing plan.

Loader simultaneously left to pursue his main occupation, checking on possums in an area outside of cellphone contact. It appears that the vessel was lost between November 23 and 28, 2005. By December 6 Loader had returned from the bush, become concerned about the vessel and had raised the alarm with the search coordination centre. The bodies of two crewmen were found in the life-raft on December 19. The skipper was never found.

Given the lack of communication from the vessel, her course was essentially unknown, which made the job of those organising the aerial search very difficult. As a result the search covered about 90,000sq km. There was some evidence that the search had covered the correct area at any early stage but had not been able to see the life-raft.

The company owner was charged under section 65 (1) (a) of the Maritime Transport Act on the basis that it had operated the vessel in a manner causing unnecessary danger or risks to other persons. Loader was charged personally under section 410 (3) of the same act.

This provision makes directors or managers liable (following the conviction of a company) if the offence took place with their authority, permission or consent, and they could reasonably have been expected to know that the offence was being committed but failed to take all reasonable steps to prevent it.

Section 65 creates an offence of strict liability, which means that there is no need for the prosecution to prove that the defendant intended to commit the offence. Instead they only have to prove that the conduct constituting the offence occurred, and then it is up to the defendant to establish a lack of fault on their part.

It was alleged that the vessel had been operating in an unsafe manner because there had been no regular position reports to shore. The court was satisfied that the owner had not made any arrangements with the master for a radio or telephone reporting schedule. The ves-

sel's safe ship management manual required regular reporting and the court decided it was open to the owner to require compliance with this by giving firm and clear instructions to the master. Failure to give the direction permitted the vessel to be used in a manner that caused unnecessary risk to the crew, because the consequence of not giving regular position reports was that the position of the *Mi Jay* was unknown after she departed port. There was also an issue with regard to the qualification held by the master and whether this also contributed to the unsafe operation of the vessel.

The main defence put forward by the owner and Loader was that they had not operated the vessel and instead it had been operated by the master.

Both the owning company and Loader were convicted in the District Court. They appealed to the High Court, which reversed the District Court's interpretation of section 65 (1) (a) and found that they could not be said to be operating the vessel when they had no involvement in its physical operation.

However, the court had no hesitation in amending the charge to an allegation that they defendants had, “caused or permitted” the ship to be operated in a manner which caused unnecessary danger or risk to any person (This is an offence under subsection 65 (2) (a) of the Maritime Transport Act). As the consequences of a conviction under either subsection of section 65 are the same, the appeal effectively failed. Loader was sentenced to 350 hours of community work. No penalty was imposed on the company as it was insolvent.

In the judgment there is little discussion about the competing or overlapping obligations between the actual operator, in the form of the master, and the shore-based owner. Instead, the court appears to have taken a very simple approach and found that the owner could have taken an additional step (given a direction to the master), and the failure to take that step was sufficient to impose criminal liability.

The decision can in some regards be contrasted with *R v Mather*. In that case the owner was a house builder by trade who retained the services of an experienced skipper to operate his fishing vessel. The vessel was properly equipped but the master made a number of unfortunate decisions while mooring the vessel offshore.

One of those decisions was to select the wrong anchor out of those available to the vessel. After the vessel foundered and all on board drowned, the Maritime Safety Authority (as it was then known) prosecuted Mather, alleging that he had allowed the unsafe operation of the vessel. The court ultimately rejected this assertion.

Accordingly, the situation is not entirely clear and does depend on its own facts. However, “investor” owners should be on notice from the *Crusader Fisheries Limited* decision that courts are prepared on occasions to take a very straightforward approach to such prosecutions, and if they are satisfied that there was an additional step that the owner should have taken then liability will be imposed. That liability can be imposed on individuals even where the vessel is owned by a company.

(1) *Crusader Fisheries and Another v Eno*, CRI 2007-442-000005, High Court Nelson, Wild J, December 11, 2007

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