REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

EXERCISING ITS ADMIRALTY JURISDICTION

Case no: AC 40/2009

Name of ship: **MV "SHARK TEAM"**

In the matter between:

SARAH TALLMAN Plaintiff

and

MV "SHARK TEAM" First Defendant (*in rem)*

GRANT TUCKETT Second Defendant *(in personam)*

WHITE SHARK PROJECTS CC Third Defendant (*in personam)*

Heard: Between 12 February 2004 and 29 July 2014

JUDGMENT DELIVERED ON TUESDAY 23 DECEMBER 2014

FREUND AJ:

Introduction

1. At about 07h30 on Sunday 13 April 2008 a shark-cage diving vessel, "Shark Team", set out from Kleinbaai (near Gansbaai), taking a party of ten tourists to sea on a shark viewing expedition. A little over 2 hours after departure, while the vessel was at anchor with a videographer in the shark cage attached to its side, it was struck by a large wave which caused it to capsize. Three of the tourists on board drowned. One of those tourists was the plaintiff's husband, Christopher Matthew Tallman ("Tallman").

2. The plaintiff instituted an action *in rem* against the vessel, and an action *in personam* against both the skipper of Shark Team that day, Mr Grant Tuckett ("Tuckett") and the owner of the vessel, White Shark Projects CC ("the owner" or "the CC").

3. The quantum of the plaintiff's claim, if she succeeds on the merits is, by agreement and in terms of an order previously made, to be held over for later determination. The issues to be determined at the trial were the following:

   a. Whether Tallman was married to the plaintiff;
   b. Whether Tallman's death was caused by negligence on the part of the defendants (or any of them);
   c. Whether an indemnity signed by Tallman absolves the defendants (or any of them) from liability; and
   d. Whether the first and third defendants are entitled to limit their liability on the basis of section 261 of the Merchant Shipping Act, No 57 1951

4. Well into the course of the trial the first question referred to above was admitted. No submissions were ultimately made on behalf of the defendants in respect of the possible defence raised by the third issue. It follows that the issues which require to be determined are the second and fourth issues listed above, as well as questions related to costs.

THE FACTUAL BACKGROUND

5. Shark Team is a catamaran 10.7m long with a beam of 3.7m. It was the first shark-cage diving vessel to depart from Kleinbaai on the morning of 13 April 2008. It was followed by several other shark-cage diving vessels namely, Barracuda at about 08h00, Swallow at about 08h20, Shark Fever at about 08h45, Megalodon 2 at about 08h55 and White Shark at about 09h05. These times are derived from harbour records, the approximate correctness of which is not in issue.

6. On leaving the harbour Shark Team had nineteen persons aboard: ten tourists, four crew (including the skipper, Tuckett), four “volunteers” (shark enthusiasts participating in a volunteer programme) and a videographer.

7. Shark Team proceeded about 4½ nautical miles (8½ kilometres) from Kleinbaai in a southerly direction to a position approximately 0,9 nautical miles (1.6 kilometres) west of Dyer Island. There it anchored and came to rest in an area known to the local boating fraternity as “the Geldsteen”, an extensive reef system. This area is described on the South African Navy (SAN) 120 chart as an area of “foul ground”. The other vessels mentioned above also all went to the Geldsteen.

8. The prevailing swell was a long period south westerly swell. Shark Team was anchored so that its bow faced into this swell. A relatively light wind from the south east was coming over the vessel's port side.

9. The crew succeeded in attracting sharks by chumming. This is explained as follows in a report into this matter prepared on behalf of the South African Maritime Safety Authority ("SAMSA") by Captain Coates ("Coates"):

> *"Sharks are attracted to the area using 'chum' which is a mulch of seafood products. This is shovelled into the water at various intervals and creates a 'chum line' which attracts sharks to the vessel. A bait line, consisting of approximately 15m of rope attached to a small tuna is also thrown into the water and rapidly recovered. This encourages the sharks to grab the tuna. A small bag containing shark liver oil is hung over the stern as an added attraction."*

10. Once at anchor tourists on board Shark Team entered the shark cage attached to the starboard side of the vessel to view sharks. As is explained in the SAMSA report:

> *"The cage consists of a rectangular steel enclosure, the gaps between the bars being of sufficient size to keep sharks out and allow good visibility. The cage was lowered into the water and then manhandled around to the starboard side of the vessel and made fast using ropes. The cage had several floats lashed to the side of it to ensure it was always buoyant. Approximately 30cm of the cage was clear of the water. The cage has a hinged lid to allow easy access for the divers. Diving is done using a mask and wetsuit with a maximum of 5 people in the cage at one time.*"

11. Shark Team was hit by a wave and capsized after it had been conducting shark-cage diving operations for about 2 hours. By this time all the

passengers had completed their dives but, at the time of the capsize, the vessel's videographer was in the cage obtaining video footage.

12. According to Tuckett, for the 10 minutes or so prior to the capsize he had been standing on the stern of the vessel, on the starboard outboard engine, throwing a bait line to attract sharks to the cage. The shark activity was good.

13. It appears from digital data retrieved from a camera that the capsize took place at or about 09h58.

14. The wave which hit Shark Team and caused it to capsize was, by all accounts, very large. It had narrowly missed Shark Fever, which was at rest nearby. The wave broke near or over Shark Team.

15. When Shark Team capsized all the persons on board were thrown into the sea. The survivors immediately started trying to climb onto the capsized hull. Several of them found themselves under the vessel. Some of them managed to escape from under the vessel by swimming out.

16. The videographer was trapped in the cage, which remained attached to the stern of the vessel, and partially buoyant. Tuckett and Mr Adrian Hewitt ("Hewitt"), a crew member, opened the lid of the diving cage and assisted the videographer out of the cage and removed his diving weights. Tuckett then swam around to the stern of the capsized hull. He saw that a woman passenger was struggling with a rope around her leg and assisted a volunteer, Megan Laird ("Laird"), in disentangling her.

17. By this stage White Shark, which had been at anchor several hundred metres away, had motored to Shark Team to assist with the rescue. It was at the capsized hull within 2 minutes. Those who clambered onto the capsized hull were assisted to climb onto White Shark.

18. During the rescue operation, Tuckett noticed a passenger who had appeared in the water some metres from the hull and was disorientated. He jumped back into the water, dragged him onto the hull and helped to get him onto White Shark. Tuckett is clearly to be commended for his brave conduct after the capsize.

19. People on the vessels that had come to assist saw a number of great white sharks around the upturned hull.

20. Altogether sixteen survivors made their way onto White Shark. Though this was not immediately understood by those on the scene, three passengers drowned. They were Tallman, his close friend and best man at his recent wedding, Mr Casey Lajeunesse ("Lajeunesse") and Mr Kenneth Rogne ("Rogne"), a Norwegian. No-one at the scene, including Tuckett and those in charge of the rescue vessel, White Shark, took the steps necessary to establish whether everyone on board Shark Team had been rescued.

21. White Shark left the scene approximately 8 minutes after the capsize. As it was leaving, or fairly shortly thereafter, it was realised that Rogne was missing. Once this was realised, the other shark cage vessels in the vicinity were alerted to search for him. It took an hour or more after this for anyone to realise that Tallman and Lajeunesse were missing.

22. Barracuda, which had left the area a little while before the capsize, returned and towed the capsized hull of Shark Team into deeper, and therefore safer, water. It was suggested that the hull was towed approximately 1.1 kilometres, but there is doubt as to this distance. Tallman and Lajeunesse would, unbeknown to anybody, have been under the hull as it was being towed.

23. Mr Mike Rutzen ("Rutzen"), a local shark diving expert and skipper, and Mr Koos de Kock ("de Kock"), a local SAMSA official, were at Kleinbaai at the time of the capsize and were requested to assist with the search for Rogne. They went out on the vessel Stan and arrived at the capsized hull where it had been towed into deeper water. They tried banging on the capsized hull but there was no response. Rutzen prepared to dive under the hull. De Kock manoeuvred Stan against the hull and at that moment a foot washed out between the engines of Shark Team. The foot belonged to Tallman, who was then pulled from beneath the hull and onto Stan. He had no pulse but two doctors who happened to be on Barracuda attempted to administer CPR to him on the way back to Kleinbaai, without success. At the time it was assumed that this individual was Rogne and that all persons on board Shark Team had been accounted for.

24. The absence of Tallman and Lajeunesse became apparent more than an hour after the capsize and only when a friend of theirs came looking for them at the harbour. Rutzen then launched a different vessel, Mako, to conduct another search (at 11h30, according to the harbour records).

25. The next body found was that of Rogne. He was found floating in the water, about 2 hours after the capsize. He was found by De Kock, about 100m southeast of the position at which the hull then was.

26. The body of Lajeunesse was found under the hull by Rutzen some time after 12h00. Rutzen found Lajeunesse with his arm entangled in rope inside the cabin, which was still intact but without air pockets. Rutzen had two encounters with sharks whilst extricating Lajeunesse's body and getting it onto the rescue vessel.

THE PARTIES' CORE CONTENTIONS

27. The plaintiff's case is that the defendants were negligent in numerous respects, not all of which were ultimately pursued. One aspect that was vigorously pursued was the contention that the sea conditions at the Geldsteen, if they were not sufficiently threatening when Shark Team arrived there, became noticeably threatening during the course of its stay. Accordingly, so it was argued, Shark Team should have left the Geldsteen area before the capsizing swell arrived.

28. The plaintiff also contends that the skipper ought to have realised that Shark Team was lying in the vicinity of a shallow part of the Geldsteen reef, and that this is an area known to be dangerous in large swells. Having regard to the preceding swell pattern and the nature of the foul ground in which Shark Team was anchored, the plaintiff contends that a breaking wave large enough to capsize the vessel was reasonably foreseeable.

29. The plaintiff also contends that the owner of Shark Team, knowing that the vessel from time to time visited the Geldsteen in large swell conditions, negligently failed to provide safety instructions to the skipper and crew; failed to assess the hazards faced by the vessel, specifically capsize; and generally failed to take steps to regulate the operations or navigation of the vessel, or to ensure that this was done safely.

30. The defendants dispute all this. In particular, they dispute that a person having the general diligence and level of skill of a reasonable shark-cage diving vessel skipper, in the position of Tuckett (at the location where Shark Team was situated, with her bow pointing into the oncoming swell and in the prevailing swell and wind conditions) ought to have foreseen the reasonable possibility of Shark Team capsizing.

31. The owner contends, in the alternative, that even if the skipper acted negligently, it is entitled to limit its liability in terms of section 261 of the Merchant Shipping Act. It accepts that, in this regard, the onus rests on it to prove on a balance of probability that the death of Tallman was caused without its actual fault or privity.

THE APPLICABLE LAW

32. A claim based on the loss of life at sea is a maritime claim; accordingly this is an admiralty action, which falls to be disposed of in accordance with the Admiralty Jurisdiction Regulation Act, 105 of 1983 (“the AJRA”).

33. Section 6(1) of the AJRA provides as follows:

"Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall –

(a) with regard to any matter in respect of which a court of admiralty in the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement, insofar as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic."

34. The AJRA came into force on 1 November 1983. The law to be applied is therefore the law which the High Court of Justice of the United Kingdom would have applied in the exercise of its admiralty jurisdiction on 1 November 1983. This requires the application of the rules of English private international law as they stood on 1 November 1983. *The "Argun"* 2001(3) SA 1230 (SCA) at 1239 I-J. It is common cause between the parties that, applying the rules of English private international law as they were on that date, South African law must be applied in the determination of the present action.

35. In Kruger v Coetzee 1966 (2) SA 428 (A) at 430E, the following test was laid down in respect of a delictual claim founded on negligence:

"For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

36. In Joffe & Co Limited v Hoskins and Another; Joffe & Co Limited v Bonamour, NO, and Another 1941 AD 431 at 450 the Court held as follows:

> *"In Cape Town Municipality v Paine (1923 A.D. at p.217) Innes, CJ, formulated the test as follows:-*
>
> > *'The question whether in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case on a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established, and it only remains to ascertain whether it has been discharged.'*
>
> *The word 'likelihood' which is used in the first sentence of the above quotation is, it seems to me, not used in the ordinary dictionary sense of 'probability' but in the sense of a possibility of harm to another against the happening of which a reasonable man would take precautions. That this is the sense in which that word is used appears clearly from the second sentence of the quotation.*"

37. In Herschel v Mrupe 1954 (3) SA 464 (A) at 477 A - C, the Court held as follows:

> *"No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened, the reasonable man would guard against it unless the chances of it happening were very slight. If, on the other*

hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons."

38. In Ngubane v South African Transport Services 1991 (1) SA 756 (A) at 776 G-I the Court endorsed the following formulation of the applicable principles by Prof. JC van der Walt (in Joubert (ed) "*The Law of South Africa"*, Vol 8 *sv "Delict*" para 43 at 78):

> *"Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others:*
> *(a) The degree or extent of the risk created by the actor's conduct;*
> *(b) The gravity of the possible consequences of the risk of harm materialises;*
> *(c) The utility of the actor's conduct; and*
> *(d) The burden of eliminating risk of harm*"

39. The precise or exact manner in which the harm occurs need not be foreseeable. It is the general manner of its occurrence which must be reasonably foreseeable. Sea Harvest Corporation v Duncan Dock Cold Storage 2000 (1) SA 827 (SCA) at para [22].

40. Our courts have adopted the *"relative*" approach to negligence as a broad guideline. This was confirmed by the Supreme Court of Appeal in Premier of the Western Cape Province and Another v Loots NO [2011] ZASCA 32 (25 March 2011) in which it held as follows (at para [13]):

> *"The relative approach does not require that the precise nature and extent of the actual harm which occurred was reasonably foreseeable. Nor does it require reasonable foreseeability of the exact manner in which the harm actually occurred. What it requires is that the general nature of the harm that occurred and the general manner in which it occurred was reasonably foreseeable. At some earlier stage there was a debate as to whether our courts should follow the relative approach as opposed to the so-called abstract or absolute approach to negligence. But it now appears to be widely accepted by academic writers, on good authority, that our courts have adopted the relative approach to negligence as a broad guideline, without applying that approach in all its ramifications.*"

THE FORESEEABLE CONSEQUENCES OF A BREAKING WAVE WHEN AT ANCHOR

41. Shark Team was at anchor when the wave struck it, causing it to capsize. A shark-cage diving vessel at anchor cannot take steps to avoid or to "*punch through*" an approaching breaking wave. This was the view of experts who testified for the plaintiff and was accepted by the defendants. Tuckett himself testified that "*…once you are on anchor, if there is a swell that could in any way possibly break on you, there's nothing you can do about it. You have to be off anchor to be able to get away from the swell."*

42. Asked to comment on the view expressed by Mr Johnson, an expert who testified for the plaintiff, that "*… when you're there at anchor with a cage over the side, you're a dead duck if a wave comes along*", Tuckett answered:

> *"That is correct, M'Lord, that's why when you pick your anchor spot, you have to be 100% sure, and as soon as anything happens, like you get a peaking swell anywhere near you, then you move, M'Lord, you don't sit and rev your engines, you pack up and you move.*"

43. Tuckett also accepted that a prudent skipper would endeavour to avoid any sort of breaking wave:

> "*So what you know when you're out there at sea is, you must avoid a broken wave – a breaking wave. ---Yes, ja, something that can cause damage and hurt somebody.*
>
> *Whether or not it's a capsize or whether its structural damage or whether its knocking somebody off their feet or knocking them overboard or whatever it is, you know when you're out there, avoid any wave, any swell that's going to break. --- That is correct.*"

44. Asked by the Court whether he accepted that a skipper should be alert to the risk of any breaking wave, he answered:

> *"Oh, most definitely. Ja, most definitely. You'll understand, M'Lord, that the idea of a capsize is such a huge event and it's so difficult to do. When we're talking about being nervous at sea, that's what we're nervous of. We're nervous of a wave breaking on us and knocking somebody over. That's what we're scared of. If we're scared of a wave coming that could capsize us, then we're never going to be there…"*

<u>WHAT SWELL SIZE WOULD HAVE INDICATED DANGER?</u>

45. A fundamental question in this matter is what swell size would be large enough to serve as a warning to a reasonably prudent skipper of a shark-cage vessel at anchor that he should weigh anchor and depart.

46. Tuckett testified that, whilst the vessel was at anchor, he would regard a 4m wave as dangerous and to be avoided. He said that:

> *"…if there was a chance of a 4m wave coming anywhere near me while I was on anchor, I would have moved away.*"

Shortly thereafter he continued as follows:

> *"…and if you've anchored and you're looking at a 2m wave, and it's a constant 2m wave and maybe to a 3m wave and then all of a sudden you see a 4m wave, then that would be a warning, M'Lord, and it would be a good reason for me to either move away or choose another spot, M'Lord.*"

47. At another stage he was asked:

> *"A swell of what height would have given you a cause for concern?"*

He answered:

> *"Anything from about 3.5m to 4m and above, M'Lord."*

48. Similar evidence was given by Hewitt, a senior crew member on White Shark that day, who has a class C skipper's licence. He was asked in cross-examination up to what size swell would cage diving on Shark Team be permissible. He said that he "*wouldn't really know*" because they did not go out in "*big swell conditions*". The cross-examination continued:

> *"What's big conditions? - - - I would say anything over 3m/4m, I mean its . . .*
> *Anything over 3m or 4m would be big conditions? - - - Over 4m, you're getting pretty big conditions.*
> *Well I don't know Mr Hewitt, I wasn't a crew member on Shark Team. I want to know how you operated. 3m, 4m, which is it? - - - We were very, very rarely out in 4m.*
> *What about 3m, anything over 3m, is that large? - - -It depends on the day, on the conditions.*"

49. Evidence was given by several witnesses of a conversation which took place on the viewing deck of Shark Team not very long before the capsize, between Tuckett and a volunteer on board, Ms Deborah Allbrook ("Allbrook"). There is

some controversy as to exactly what prompted this conversation. According to a witness for the plaintiff, Ms M Meyer, Allbrook's question was prompted by them all seeing a big swell that had broken some distance away. When Allbrook asked Tuckett what it would take to capsize Shark Team, he replied laughingly that that wave could capsize the vessel. This alarmed Ms Meyer.

50. On Tuckett's version, Allbrook's question was not prompted by them seeing a big wave. His version was that, when Allbrook asked him what size wave would be large enough to capsize the vessel:

> *"…I pointed to a reef system about 500m away, where you get larger swells breaking and I said it would something around that sort of size*".

He testified that he estimated that the wave he pointed out was "*maybe about a 4m wave*". This confirms that it was Tuckett's own view that there was an appreciable risk that a breaking wave of about 4m could capsize Shark Team.

51. Later in his evidence Tuckett started to downplay the risk posed by a 4m swell but the Court is satisfied that Tuckett's own evidence supports the view that a prudent skipper, at anchor with tourists at the Geldsteen, would regard passing waves of 4m or more as a clear warning that conditions were, or were becoming, unsafe and therefore a warning that he should depart.

52. This view is fortified by the evidence of certain other skippers of shark-viewing vessels who testified. Mr P Colyn, the skipper of White Pointer, who was called as a witness by the plaintiff, testified that, unlike prior to the capsize, "*if the swell is predicted for 4m, then we don't go out anymore*". Mr A. Scholtz, the skipper of Shark Fever, who testified for the defendants, said that, even

before the capsize, they had used 4m as a guideline as to the maximum acceptable swell size.

53. The Court is persuaded on all the evidence that, if sets of swells are coming through at 4m or more, a prudent skipper at anchor at the Geldsteen would be concerned and should depart. In part, this is because the Court accepts the plaintiff's contention that a prudent skipper should leave a margin of safety and not flirt with risk. This principle was accepted by Mr Fintan Hartnett ("Hartnett"), an expert who testified on behalf of the defendants:

> *"Would you agree that there should be a margin of safety of error? You see the conditions. You don't say well, I'm unsure. I'll just hang around for a while. You should be getting out long before things start getting risky or dangerous. - - - I think that's quite self-evident. A prudent skipper when he feels that things are getting dangerous moves his position, M'Lord.*"

54. A similar sentiment was expressed by Mr Johnson, who has been involved in maritime matters for 30 years and who testified for the plaintiff. He said that if they were at anchor:

> *"…for 10 minutes or half an hour, or whatever, and saw things are starting to get a bit bad, they should leave immediately.*"

55. In some circumstances a capsize of a vessel is not necessarily catastrophic. However, it is clear that a capsize of a vessel like Shark Team, when at anchor for shark viewing purposes, is extremely dangerous. First, great white sharks had been deliberately enticed to the immediate vicinity of the vessel. Secondly, it is clear on the evidence that there is an obviously foreseeable risk if this type of vessel capsizes that anyone in the cabin is likely to be trapped under the hull. The defendants repeatedly and insistently

emphasised that it would be too dangerous to expect anyone to attempt to rescue persons who might be trapped under the hull. The risks include not only danger from sharks, but also becoming entangled in ropes and the like. It follows that, on the defendants' own evidence, death by drowning is a clearly foreseeable risk if such a vessel capsizes.

56. Appreciating this, Tuckett testified that "*every skipper's nightmare is to get capsized*" and that "*obviously you avoid it at all opportunities*". He accepted that, if he had given a capsize any thought, he would have realised that, in the event of somebody getting trapped under the hull, they were inevitably going to die.

57. The Court is not suggesting that it is always dangerous for a shark-cage vessel to go out to sea when there are occasional swells of 4m or more. This case is only concerned with whether the swell conditions at Geldsteen were sufficiently indicative of danger that a prudent skipper of a vessel on anchor would have departed. The Geldsteen is an area characterised by broken reef of varying depth. It is an area in which it is well known that waves break in heavy weather. This was not only the evidence of numerous witnesses who testified for the plaintiff; it was the evidence of Tuckett himself, who told Coates, when he enquired, that "*it breaks over the entire Geldsteen*". Scholtz, the skipper of Shark Fever called to testify for the defendants, agreed that, because of the reefs, it can get dangerous at the Geldsteen when there are large swells because swells sometimes break there.

58. The Geldsteen is marked on the map as an area of "foul ground". Mr Steve Smuts ("Smuts"), the skipper of Swallow, who testified for the plaintiff, said

that this indicated that the bottom was not all one depth; it had a jagged depth with pinnacles and was generally shallow. He testified that: "*Foul ground to me is an area where you can expect breaks*…". Mr Coenie Coetzee ("Coetzee"), the dive master on White Shark who also testified for the plaintiff, testified that Geldsteen is "*hazardous*" and a "*place where you can't put your back at the sea because there's a lot of swells picking up quickly*". He also told Coates "*that Geldsteen was a reef that everyone was aware of and would break with a large swell*". Colyn, the skipper of White Pointer who also testified for the plaintiff, said in respect of the Geldsteen that "(*w)hen there's a big swell running it is always possible for a wave to break…*" He described the swell at the Geldsteen when he got there that day as in the region of 4m or in excess of that, which he regarded as *"very big".*

59. The relatively shallow and uneven depths at the Geldsteen, coupled with the fact that swells are known to break there, make it necessary to adopt a relatively conservative stance as to what height of swells should be regarded as sufficiently dangerous that a prudent skipper would depart.

60. It must always be borne in mind that the business of the third defendant, the owner of the vessel, was to take tourists to sea to view sharks as a form of recreation. If the visible swell conditions are such that a prudent and experienced skipper should be aware that the risk of a wave breaking over his vessel is not insignificant, no purpose is served by continuing to expose tourists to this type of risk.

61. As referred to in the passage from the Joffe decision cited in paragraph 36 above, the question is what level of swell condition discloses "*a possibility of*

harm to another against the happening of which a reasonable man would take precautions". The passage from Herschel v Mrupe quoted in paragraph 37 above reveals that:

> *"If the harm would probably be serious if it happened, the reasonable man would guard against it unless the chances of it happening were very slight*".

62. Tuckett's own evidence shows that the foreseeable consequence of a wave breaking over a shark-cage vessel at anchor would probably be serious. His evidence also shows that he – like others – regarded a 4m wave coming near his vessel as indicative of danger.

63. The pleasures of shark cage diving (for those who like that sort of thing) and the disappointment that may follow from calling off a shark-cage diving trip do not, in the Court's view, justify failing to cancel or abandon a trip if there is any reasonably foreseeable possibility, not probability, of a breaking wave. Swells in excess of 4m in the nearby vicinity of a vessel at anchor at the Geldsteen would, in the Court's view, constitute a warning to the reasonably prudent skipper that he should pack up and leave.

64. Reference has been made above to the fact that the capsizing wave was a very large wave. The defendants asserted as the trial developed that it must have been at least 10m to 11m high. They referred to it as a "*freak*" wave and they argued that such a large wave could not reasonably have been foreseen.

65. The Court is not convinced that the wave was necessarily quite as large as the defendants asserted, but it does accept that it was both a very large wave, and that it was considerably larger than the largest swell observed in the

preceding or succeeding few hours. In the Court's view, however, little purpose would be served in exhaustively analysing the evidence as to the size of the breaking swell because, in its view, nothing turns on this. The question is not whether the defendants could reasonably have foreseen a wave as large as the wave which actually capsized Shark Team. The question is whether the conditions were such that the skipper could reasonably have been expected to foresee the risk of a wave breaking over Shark Team. If he could, the death of a passenger on board was reasonably foreseeable.

SWELL CONDITIONS BEFORE THE CAPSIZE

66. The primary focus of the trial concerned the prevailing swell conditions at Geldsteen in the period preceding the capsize. The plaintiff asserts that the swells were sufficiently large to make a swell breaking over the vessel reasonably foreseeable. The defendants dispute this. They contend that the swell conditions were moderate and that the skipper had no reason to foresee a breaking swell or a capsize.

67. The trial in respect of this matter ran for some 52 days. I do not propose to refer to all of the voluminous evidence regarding the swell conditions. I shall instead refer to the evidence which in my view is most pertinent.

(i) The evidence for the plaintiff

68. The first witness for the plaintiff was Ms M Meyer. She and her husband Hendrik (the second witness for the plaintiff) were passengers on Shark Team on the day of the capsize. By their own admission they both have minimal experience of going to sea.

69. Ms Meyer testified that, to her, the swells at Geldsteen "*looked big*". The conditions were "*not that bad*" when they got to Geldsteen but "*it got worse*". She was steadfast in contending that "*for me it deteriorated. I felt uncomfortable.*" She became particularly concerned after overhearing the conservation on the viewing deck between Tuckett and Allbrook, which has been referred to above.

70. Ms Meyer also testified that a man with a ponytail on the rescue vessel (White Shark) said to her, at the time of the rescue, that "*he can't believe it, we were not supposed to dive that day, it was not very good conditions, yes. He was upset.*" Coetzee, the dive master on White Shark, later made clear that he was the man with the ponytail.

71. Mr Meyer described the sea conditions at Geldsteen that day as "*quite rough*". He testified that you could see the nearby vessels "*going away, coming out, going away, coming out*". According to him the conditions in the beginning were not that bad but worsened while they were there. Pressed in cross-examination as to whether it was possible that he was mistaken that there was deterioration in the weather conditions, he said "*Not according to me, no… it got worse and bigger. Bigger and more often. The waves came more often, yes.*" Asked if it was possible that he just noticed one of the bigger sets coming through and that that gave him the impression that the conditions were deteriorating he said "*not possible. Not according to my opinion.*"

72. Mr Meyer also referred to comments made at the time of the rescue by a man on the rescuing vessel with grey hair, whom he believed to be the skipper of

White Shark. From other evidence, it is clear that this must have been the skipper of White Shark, Mr Ronnie Lennox. According to Mr Meyer, the man with grey hair was angry because, according to him, the conditions that day were not good and they should not have been diving that day. According to Mr Meyer the man said "*he can't believe anybody who was out on this, doing cage diving, because he's afraid. And he knew this was going to happen because the sea is too rough. And I remember he was very, very angry*."

73. The next witness for the plaintiff was Mr Steve Smuts, the skipper of Swallow, one of the shark-cage diving vessels at Geldsteen that morning. Whereas Shark Team had departed from Kleinbaai at approximately 07h30, Swallow had departed at approximately 08h20. It appears that the journey from Kleinbaai to Geldsteen ordinarily takes approximately 20 minutes or so. Swallow would therefore have been on the scene from approximately 08h40, that is, from a little over an hour before the time of the capsize.

74. There is a set of rocks near the departure point at Kleinbaai, known locally as "Black Sophie". According to Smuts, "*if Black Sophie breaks, it is a sign that there is a fair swell running*" and it was breaking at Black Sophie that morning. According to Smuts, there had been "*a bit of concern*" at the harbour prior to launching, but following the consensus of the skippers, he had put to sea.

75. He testified that, on arrival at Geldsteen, he found the swell to be "*far bigger*" than he had expected. Nonetheless, he put down his shark cage and his passengers participated in the usual shark viewing activities. However, because of the swell size that was coming through, he remained behind the wheel that day. Under normal conditions he would come out of the cabin,

assist people and chat to the tourists. That day, because of the swell size, he did not move out of the cabin. He stood at the wheel of his vessel to be able to start its motors and get some forward momentum if a swell started to cap. He testified that he had started Swallow's engines on two or three occasions that morning.

76. He testified that, although "*it wasn't dangerous when I got there, it was threatening*". He believed that, with the tide dropping, the chances of swells breaking in that area were large. He stated:

> *"As the tide started dropping, if my memory serves me correctly, the tide had just turned and it was then becoming really threatening.*"

The swells were now peaking (i.e. forming sharper points).

77. He estimated that Swallow was at rest approximately 150m away from Shark Team. She was 30m to 50m from Barracuda. Barracuda, including the top of her aerials, was from time to time disappearing behind swells. Based on his estimate of the height of Barracuda's aerials, he estimated the swell size to be in excess of 7m, taking the trough into consideration. He later made clear that this was only "*a very, very rough estimation*".

78. According to Smuts the conditions in the 5 or 10 minutes preceding the capsize of Shark Team deteriorated alarmingly. He testified that, shortly before the capsize, Ronnie Lennox, the skipper of White Shark, had telephoned him and told him that he was not dropping his shark cage into the water but aborting his trip because of the conditions. Smuts told Lennox that all his people were out of the cage, that he was busy packing up and that he

was getting "*the hell out of here*". It was "*a matter of seconds*" later that Shark Team capsized.

79. Smuts said that he regarded Geldsteen as a dangerous area when the swells were big because it breaks all over there.

80. It emerged during cross-examination that Smuts had had a sense of foreboding about this whole trip because of a dream that he'd had on the previous night. He also testified that after the capsize incident he could not go back to sea and had in fact become "*a hopeless drunk*". He has since recovered.

81. It was suggested to Smuts in cross-examination that he was really only concerned about a possible deterioration in conditions once the tide was falling and that this had not yet occurred. Smuts insisted that it had already "*been threatening*" and that in the period of about 5 to 10 minutes before the capsize of Shark Team, the conditions had become alarming.

82. The next witness for the plaintiff was Mr Coenie Coetzee, the dive master on White Shark. According to the slipway register, White Shark departed from Kleinbaai at approximately 09h05. Coetzee testified that they anchored at round about 09h30, though he conceded it might have been a little after that. It therefore appears that White Shark was an anchor at the Geldsteen by somewhere between 20 and 30 minutes before Shark Team capsized. Coetzee's estimate was that White Shark was at rest approximately 300m from Shark Team.

83. Like Smuts, Coetzee asserted that he had seen the water coming over "*Black Sophie*".

84. Coetzee testified that he had seen the weather forecast for that morning predicting 4.1m swells, which he regarded as big swells.

85. Coetzee testified that, on the trip out to Geldsteen, they had been expecting swells coming through and it was roughly as predicted. However after they had anchored, some big swells came through. The other shark-cage diving vessels were disappearing behind the swells. Coetzee and Lennox decided not to put down the diving cage and to cancel the second trip planned for later that day. Had they seen the swells they saw after anchoring, they would not have anchored. The swells were the reason for not putting their cage down and for deciding to abort their trip.

86. Some time after anchoring, a set of four "*big massive swells*" came through. It was this set of swells that led them to decide to abort the trip. Coetzee was in the process of explaining to their clients that they were abandoning their trip when he saw the wave capsizing Shark Team.

87. It is convenient at this stage to refer to certain hearsay evidence from the skipper of White Shark, Mr Ronnie Lennox ("Lennox"). Lennox was undergoing rehabilitation for alcoholism at the time of the trial and it was therefore not possible for him to testify. However the Court was furnished with a note of an interview with Lennox on 17 April 2008, made by Captain Coates in the course of his investigation for SAMSA. (Section 6(3) of the ARJA permits this Court to receive as evidence statements which would otherwise

be inadmissible as being in the nature of hearsay evidence. In Cargo Laden and Lately Laden on board MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 842 G to H the Supreme Court of Appeal held that the Court should, speaking generally, incline to letting hearsay statements go in and to assess the weight to be attached to them when considering the case in its totality. The Court accordingly ruled as admissible a considerable volume of hearsay evidence.)

88. The note of Coates' interview with Lennox records that Lennox estimated the swell when he left the slipway at 2m. It records that, when he arrived at Geldsteen, the swell was not as he expected and he knew that, with the tide dropping, it was not going to be good to lie around any of the reefs. On low tide the swell would pick up. Due to the swell, he decided not to put the cage down and that they could not stay long. He told his dive master to tell the passengers that it was going to get dangerous and that they could not stay for long. Four large swells appeared and he started the motors, warned his dive master and had to drive up one of the swells. This was two to three minutes before the big wave (which capsized Shark Team).

89. Several witnesses credibly denied that they had made comments attributed to them by Coates and, leaving aside its hearsay nature, the Court is in considerable doubt as to whether the note accurately recorded what Lennox said to Coates. Little weight is therefore attached to it.

90. The Court was also furnished with an affidavit given by Lennox to the South African Police, apparently dated 8 April 1998. In this affidavit he says that, once at anchor, he had discussed the conditions with Coetzee and that:

> *"Ons het saam besluit dat ons nie baie lank gaan lê nie, want die water was baie sterk en die toestande nie veilig om lank op die spesifieke plek te lê en haaie kyk nie.*"

91. He also refers in this affidavit to a set of four waves that came through about 15 minutes after they had thrown anchor:

> *"Die branders was kort op mekaar en die water was baie sterk gewees. Ek het toe dadelik die dive master gesê dat hy moet klaar maak, want ek gaan anker optrek. Volgens my was dit nie meer veilig om daar te lê en haaie kyk nie. Ek het toe die kantoor gekontak en meegedeel dat hulle die tweede 'trip' moet kanseleer, want die water is te rof. Ek het toe ook die skipper van Swallow, Steve, ook geskakel en gesê dat ons nou huistoe gaan.*"

92. The next witness for the plaintiff was Mr P Colyn, the skipper of White Pointer. He arrived at Geldsteen shortly before Shark Team capsized. He testified that when he arrived at Geldsteen "*there was a very big swell*" which he assessed to be approximately 4m.

93. Colyn stated during cross-examination that he had seen waves breaking at the Geldsteen two to three times per season on days when the swell was 4m and higher. In the resultant cross-examination, counsel for the defendant appeared to accept that swells of that size could be described as "*very big*" or at least "*large*".

94. It was put to Colyn in cross-examination on behalf of the defendants that, according to Tuckett, he *seldom, if ever, took Shark Team out in swell conditions where they were in the region of 4m or in excess of that region*". Colyn's answer was that:

"Prior to the accident we all went out in those conditions."

Counsel for the defendants responded that Tuckett's evidence would be to the contrary.

95. Colyn also testified that "*if the swell is predicted for 4m, then we don't go out anymore*".

96. The plaintiff also led expert evidence by Mr J-P Arabonis ("Arabonis") , whose primary expertise appears to lie in the field of weather forecasting. In his initial written report regarding swell conditions, Arabonis made certain basic errors, which he freely conceded when called to testify. I do not propose to dwell on his evidence in any detail. I think it appropriate, however, to refer in passing to opinions that he expressed regarding swell conditions revealed by a video made on Shark Team on the morning of the incident. He identified one swell (at 2:49) that, according to him, had "*quite a sharp, quite a peak to it*". He referred to another two swells (at 2:54 – 2:55) as swells that "*are starting to get quite close to an unstable wave that would be close to breaking*". He referred to a further swell (at 3:23) that was "*moving towards an unstable wave*"; to another swell (at 4:06 – 4:07) "*seeming to be quite a steepening and moving towards an unstable wave*"; to another swell (at 4:28 – 4:29) as being "*getting quite sharp*", and so forth. Mention should also be made of the fact that Arabonis expressed the opinion that certain photographs taken on the day showed swells of 3.5m to 4m not infrequently.

97. In addition to the witnesses referred to above, the plaintiff also led evidence from several other experts on their opinions regarding swell conditions as

revealed by material made available to them. For example, Coates expressed the opinion that the photographs before the Court "*show large swells, very very clearly*". Mr Johnson expressed the opinion that the photos and the Shark Team video showed that "*there was a significant swell running there*" and that "*there was a big swell on that day*".

(ii) The evidence for the defendants

98. The evidence led by the defendants regarding the swell conditions presented a generally – but not entirely – more benign picture.

99. Asked about the weather conditions, Tuckett said he "*regarded it as an average trip on the Geldsteen… we were quite happy…*" The thrust of his evidence was that there was an average day swell of about 2.5m, which was of no concern to him.

100. This is not entirely clear, but it seems reasonable to assume that Tuckett was the primary source of the version presented by the defendants in a press statement issued on the day in question. There it was asserted that there was an approximately 2m swell which made it *"a perfect sea going day*".

101. Tuckett testified that he saw nothing break over Black Sophie. He accepted, however, that Black Sophie was "*quite a reliable guide".*

102. He was referred to swells seen on the Shark Team video and he assessed the swell size as a 2m or 2.5m swell. Shown a photograph taken that morning (photograph D9) he said that "*just guessing, it looks about a 2.5m, 3m swell at maximum".*

103. He was then referred to a video taken from the vessel Barracuda which was only made available to the parties on the morning of 11 March 2014 (by which stage Tuckett had already commenced his evidence). He was referred to a portion of the video (at 9:30) which shows a swell passing on the starboard side of Swallow. In his evidence in chief, Tuckett described this as a moderate swell of about 2m or a maximum of 2.5m, which did not look like it was going to break. In cross-examination he initially described this swell as a comfortable swell and reiterated that he would have been quite happy to be at anchor with the swell like that. Later in cross-examination, however, he changed his stance, describing the swell as "*peaking*" and saying that, if he had seen such a swell, he would have moved to somewhere calmer.

104. I pause to observe that Dr John Zietsman ("Zietsman"), an expert who testified on behalf of the defendants, later testified in respect of the same swell at (9:30 on the Barracuda video):

> *"…it could be 4m or so, I guess. It's feathering at the top."*

In Laird's testimony on behalf of the defendants, her comment in respect of the same swell was that she didn't think it would be very comfortable in the cage after going over a swell like that. Scholtz, the skipper of Shark Fever, testified that the swell "*looks a bit on the shaky side*", but said that he had worked in conditions like that. Asked whether it was correct that he doesn't do that anymore, he said that this was correct.

105. In his evidence in chief, Tuckett was also referred to a swell seen from 9:45 to 9:55 on the Barracuda video. He described this as "*pretty much the same*" as

the previous swell. He said that the videographer had zoomed in on Megalodon and filmed about a 2.5m to 3m swell with white water and wind spray on the top, passing to the port side of Megalodon. Tuckett did not give the impression that he would have been particularly concerned by this swell.

106. Zietsman testified in respect of this swell that it was "*feathering a bit more than the previous one*". He was of the view that "*…we're probably looking at about 6m on the front*". The Court's assessment is that Zietsman's estimate of about 6m is more accurate than Tuckett's estimate of 2.5m to 3m.

107. Laird expressed the opinion in respect of the same swell that it looked quite close to breaking. She agreed that it was "*quite a sizeable swell*" and said that "*I wouldn't be happy with that, and I'd pull up anchor and I'd move. I wouldn't want to be anchored in that area.*"

108. When Scholtz testified in respect of the same swell he accepted that it was feathering, not only at the top, but also along its back. He agreed that it was becoming quite a sharp swell and was peaking noticeably. He said that, from the angle of the video shot, it looked as though it wouldn't take very much more and it could break. In his view the conditions revealed by this swell were not appropriate for shark cage diving. In those conditions, Megalodon should not have been where it was. He also testified that White Shark (seen at 9:53 on the video) ought not to have been out there in those conditions.

109. Ms C Beukes ("Beukes"), one of the members of the CC, was also asked in cross-examination about the conditions shown on the Barracuda video. She

stated, quite candidly, that "*if my boat was anchored where that boat was anchored I would have been worried…*".

110. I revert to the evidence given by Tuckett. The conditions shown on the Barracuda video were taken up with him in cross-examination. He testified that he had been seeing the kind of swells depicted in the video throughout the morning:

> *"So what we saw there in that video you were seeing consistently while you were out there at the Geldsteen on 13 April? - - - Where those boats were lying. That's correct.*
> *They were consistently bobbing up and down as we saw. - - - That is correct, M'Lord.*"

111. Asked in cross-examination about vessels disappearing behind swells, Tuckett said that this happened often and was not concerning. He said he was only concerned if he saw swells nearby that started to break or were peaking – those were the warning signs. He also testified that the swell conditions shown on the Barracuda video were like the conditions that he had been consistently seeing that morning.

112. In the course of his evidence in chief, Tuckett stated that he had picked Shark Team's resting spot in preference to the spot where Barracuda later came to rest because the spot at which Barracuda came to rest was "*a bit more up and down*" and the spot he selected "*just did look a bit flatter*". He repeated in his evidence in chief that the Barracuda position "*was a little bit more up and down there*". In cross-examination he again repeated that his selected position "*just looked a little bit calmer*" and that the swell where Barracuda came to rest was "*a little bit more up and down than where I was*". However,

later in his cross-examination – when the implications of the larger swells seen on the Barracuda video were more obvious to him – he changed his stance and asserted that the swell where Shark Team was was "*much less where we were lying compared to the other vessels*" (emphasis added). This change in stance is an aspect to which the Court will revert below.

113. An aspect that bears mention is that Tuckett was not familiar with concepts such as "*significant wave height*" and the associated probable maximum wave height, as referred to in the expert literature and testimony. Tuckett accepted that if he experienced a 1m wave he could anticipate the possibility of a 2m wave. However, he did not seem to accept that if he was in a 2m wave area, he could anticipate the possibility of a 4m wave coming through. Pressed on this issue, he declined to answer, stating that he was "*not an expert on waves*".

114. Rutzen was the next witness called to testify by the defendants. His evidence was that, when he went out on his rescue mission after the capsize, they were running a 2.5m to 3m swell. Referred to the larger swells shown on the Barracuda video, he said that these were not the kind of swells that he encountered when coming out from Kleinbaai later. The upturned hull had been towed into deeper water before Rutzen arrived on the scene. It is not clear how far it had been towed. This makes it difficult to assess whether the bathymetry at the place where he found the hull was significantly different from where the capsize took place, and therefore whether the swell conditions may have been different.

115. Rutzen made the point that Gansbaai "*is in the middle of the highest wave energy area in Africa*" and that the area was characterised by a lot of waves. He said that a 3m or 4m swell was quite normal.

116. Asked whether vessels disappearing in the swells showed that the swells were really large, he said "*I suppose so*". He accepted that vessels disappearing like this would be a cause for concern, especially if the swell is fast.

117. The next witness for the defendants was Laird, who was on board Shark Team on the morning in question as a volunteer. At the time she had a fair amount of sea going experience. She testified that she estimated the swell height on arrival at Geldsteen to be approximately 2m. She regarded the conditions as quite comfortable. She testified that she did not notice the swell condition to deteriorate at all. She did not recall any large swells coming past Shark Team. She did not see other vessels in the vicinity disappearing. (Her assessment of the larger swells on the Barracuda video has been briefly summarised above.)

118. Hewitt, a crew member on Shark Team on the day in question, testified next for the defendants. He said that the conditions were no worse than usual, estimating the size of the swell whilst out at Geldsteen at between 2m and 3m. He did not recall any change to the sea conditions whilst they were at Geldsteen.

119. Mr Albert Scholtz was, as referred to above, the skipper of Shark Fever. The evidence shows that Shark Fever was the closest vessel to Shark Team at

rest probably no more than 40m to 50m from Shark Team. Scholtz testified in chief for the defendants that the average swell size at Geldsteen that day was about 2.5m or so. He said that he had not experienced any feathering waves there that morning. He did not see any swells standing up near Shark Fever and there was nothing about the conditions that day that gave him any concern.

120. Under cross-examination he testified that the prediction in the weather forecast that he used that day was for a 4m swell. Even before the capsize they had used 4m as a guideline as to the maximum acceptable swell size. He said that his evidence in chief about the swell that morning being 2.5m or 3m was a reference to the "*background*" or "*usual*" swell. He admitted that large swells had come through from time to time, which could have been 4m or 5m.

121. He also testified that at times some of the vessels at Geldsteen that morning disappeared behind the swells. He estimated that the height from the viewing deck of these vessels to the waterline was between 3.5m and 4m. He accepted that, if boats of that size were disappearing from view, this would indicate more than 2m or 3m swells. Though he could not remember, he said that it "*could be*" that Shark Team had disappeared from view. He accepted that swells of 4m or 5m in height would be significant in relation to where his vessel had come to rest. Asked whether the position might have become unsafe in 4m or 5m swells, he said "*it could be*", depending on the wind. But he added that he felt safe and comfortable. Reference has been made above to Scholtz's comments on the larger swells shown in the Barracuda video.

Finally, Scholtz accepted that on the day in question "*large swells were coming through periodically*", which he would understand to be sufficient to frighten people "*to an extent*". Nonetheless he did not feel in danger.

122. This is a convenient stage to refer to certain hearsay evidence from a passenger on Shark Fever. During the course of the trial the plaintiff's attorney sent an email to tourists who had been on the vessels in the vicinity of the capsize asking for photographs which they may have taken. One Ms Rachel Mallon replied, furnishing photographs. In her covering email she stated the following:

> *"As a closing thought, what I will say is that my husband and I were becoming increasingly nervous before the fateful wave occurred. The swells were becoming increasingly large, and my husband observed that they were starting to break uncomfortably close to us. The reasons for our nervousness were that these waves seemed very large, and large enough to dwarf the boats. However, the crew seemed relatively calm, so perhaps they had experienced swells like this before with no incident.*"

123. The next witness for the defendants was Ms Alison Towner ("Towner"). On the day in question she was a crew member on Shark Fever. She has been involved in a committed personal relationship with Tuckett for some years.

124. Towner described the sea conditions on the day in question as "*normal*". The swell after anchoring was about 2.5m to 3m. She did not see any swells in the vicinity of Shark Fever that were either peaking or feathering. The swell conditions did not change.

125. She testified that they "*…do often see boats disappearing behind swells. It doesn't mean anything*."

126. Asked in cross-examination about the larger swells seen on the Barracuda video, she described those conditions as moderate and no different from the conditions in which they normally go out in winter. Asked if she would be quite happy to carry on with shark diving activities on a boat encountering the sorts of condition shown on the Barracuda video, she stated that this was correct.

127. She testified that she recalled that on the day in question boats were disappearing from view (in the swell). Asked whether that included Shark Team, Barracuda and the others, she said "*yes*". She later qualified this saying that she did not remember whether Shark Team had been one of the boats disappearing from Shark Fever. When it was put to her that if boats close by were disappearing, that would suggest that one was dealing with a larger swell, she disagreed.

128. Asked about the 4m to 5m swells that Scholtz had testified about, she said that she was "*not disputing*" what Scholtz had said but that she "*didn't notice*" such swells. Later she said that, if she had seen a 5m swell coming, this would have been "*an indicator*" to the skipper and a "*noticeable swell*", but she repeated that she did not see such swells. Asked if a 5m swell was something to be concerned about she answered:

> *"I'm not saying it's something to be concerned about, it's just some – it's a good practice to be vigilant out there.*"

Pressed further, she conceded that, when you get a 5m swell, you have to consider getting out of the area.

129. Later in her cross-examination she testified that they do go out in "*fairly large swells*" of 4m or 5m from time to time.

130. The next witness for the defendants was Sara Dix, a videographer who was working as a crew member on White Pointer on the day in question. She described the swell that was running that day as moderate, and not too bad. Asked about this in cross-examination, she answered:

> *"…well it's the Cape of Storms, it's not the Mediterranean, you know, we're used – we're used to rough seas when we go to sea.*"

131. Dix emphasised in cross-examination that she is not technically able to make a proper assessment of swell conditions. When she said that the sea was moderate, she could not say whether it was 2m, 3m, 4m or 5m; she did not know.

132. She also testified that if vessels are disappearing, she regarded this as indicative of a moderate swell. This was something which they sometimes experienced.

133. Asked about the larger swells shown on the Barracuda video, she said that she would not find conditions as shown on that video to be unusual. She added:

> *"…that video is nothing…this stuff that we see at sea I always used to say it's the Cape of Storms, it's not the Mediterranean.*"

134. The next witness for the defendants was Hendrik Henn, the NSRI Station Commander at Hermanus. He was called out to Geldsteen in response to the

capsize of Shark Team. He got to the overturned vessel at about 11h50, i.e. approximately 2 hours after the capsize. It appears that the site where he found the vessel could have been a considerable distance away from where the capsize occurred, though this is a matter in dispute.

135. He testified that when he got to the scene, "*it wasn't exactly a very calm day*". "*There was a reasonable size swell, I would imagine 1m to 2m coming through there…"*

136. In cross-examination he was asked about the larger swell sets he had encountered on the way out to Geldsteen and he says that these were "*not more than 4, 4.5m at max I would imagine*".

137. The next witness for the defendants was Brigitte Wilcox, who had been a passenger on Shark Fever on the day in question. She had been contacted just a week prior to testifying, some eight years after the incident. She testified that she was only able to describe the swell conditions as "*moderate swells*".

138. In cross-examination it was put to her that she had been quoted in "You" magazine shortly after the incident as saying:

> *"Just after we'd dropped anchor, there was a biggish swell but after that things went well for more than an hour.*"

She denied any recollection of having used the word "*biggish*" when speaking to the author of the article.

139. She said there had been no change in the swell at all the entire morning. She testified that she did not remember "*growing swells*", as referred to in Rachel Mallon's email.

140. Wilcox said on several occasions that she could only describe the swell as "*moderate*" because she was unable to estimate the height of the swells in metres. In cross-examination she was requested to point out heights in the court room that would correspond with her views as to a "*moderate*", "*biggish*", "*large*" and "*huge or massive*" waves. It turned out that what she described as "*moderate*" was measured as 1.46m; what she described as "*biggish*" was measured at 2.19m; what she described as "*large*" was measured at 2.91m and what she described as "*huge or massive*" was measured at 3.6m.

141. Like the plaintiff, the defendants introduced quite a bit of hearsay evidence. Of relevance for present purposes is a set of affidavits from persons who had been in the vicinity on the morning in question admitted as evidence at a very late stage in the trial. Mr Anthony Guest was a British tourist on board Shark Team. His evidence was to the effect that there had been a lazy swell running, which he estimated to have been about 3m. He thought that the conditions were quite rough but not unsafe. During the time that "*Shark Team*" was an anchor, he was not aware of any change in the sea or weather conditions. He did not observe any swells or waves of the magnitude seen towards the end of the Barracuda video.

142. Ms Lacotta Cleaver, a volunteer on Shark Team on the relevant day, said in an affidavit that nothing about the sea or wind conditions gave her any reason

for concern. She did not see the conditions worsen while they were at anchor. There was a bit of a swell.

143. Ms Karin Wilson was employed as the videographer aboard Shark Fever on the morning in question. She stated in her affidavit that she remembers that there was a swell running and that the water was slightly choppy in some places between Kleinbaai and the Geldsteen area but she did not have any discomfort about proceeding to sea that day. There was nothing about the weather or the sea conditions that struck her as unusual or which gave rise to any apprehension on her part.

144. Mr Johan Burger was the videographer who had been on board Barracuda and had taken the Barracuda video. He described the weather conditions on the day in question as fine, with a 2m to 2.5m swell running. There was nothing about the conditions that alarmed him. He expressed the opinion that the video made the swells at 9:30 and 9:45 appear more dramatic than was realistic.

145. Ms Deborah Allbrook, an American volunteer on board Shark Team, said in her affidavit that she did not recall anything about the sea or weather that caused her concern on the morning in question. The swell was not overly large and she did not notice that the conditions changed or deteriorated.

146. I turn now to refer to aspects of the expert evidence given by Zietsman on behalf of the defendants regarding swell conditions at Geldsteen on the day in question. Zietsman gave complex and lengthy evidence, some of which was

vigorously disputed by the plaintiff. It is not necessary for present purposes to resolve the disputed aspects.

147. Zietsman gave detailed evidence regarding the "*significant wave height*" at what he took to be the location of Shark Team and an estimate of the most probable maximum wave height at that location. "*Significant wave height*" is a term used to describe the average of the highest one third of waves in a sea state during a given period. As Zietsman explained in his initial report to the Court:

> *"It is an important parameter that is used to describe sea conditions. The most probable maximum wave height in the period will be very approximately twice the significant wave height.*"

148. Using what he regarded to be a reputable computer programme and what he considered to be the best available weather data, Zietsman carried out various exercises. In his initial report (at figure 5.4.4) he assessed the significant wave height in the vicinity of Shark Team as 3.5m. He subsequently carried out various other exercises. The defendants submitted that the relevant analysis was his fifth analysis (exhibits V14 and V15). That analysis concludes that, in the area where Shark Team and Shark Fever were lying at the time of the incident, the significant wave height was between 3.3m and 3.45m and that the most probable maximum wave height was between 6.5m and 7m. It will also be recalled that Zietsman estimated one of the swells seen on the Barracuda video as about 6m.

149. Based on evidence given during the trial and certain photographs, Zietsman also attempted to determine where the various vessels referred to above had

been at rest in the period leading up to the capsize. He then calculated the significant wave height and most probable maximum wave height at those locations. His final conclusions are tabulated in exhibit "QQ41". He concluded, for example, that the significant wave height in the vicinity of Megalodon was exactly the same (3.15m – 3.3m) as in the vicinity of Shark Team and that the maximum wave height in the vicinity of Megalodon was slightly lower than near Shark Team (6m to 6.5m, rather than 6.5m). He concluded that the significant wave height in the vicinity of Swallow was marginally higher than in the vicinity of Shark Team (3.3m – 3.45m, rather than 3.15m – 3.3m) and that the probable maximum wave height in the vicinity of Swallow was also marginally higher (6.5m – 7m, rather than 6.5m). He concluded that the significant wave height in the vicinity of White Shark (3.45m) was a bit higher than in the vicinity of Shark Team, but also concluded that the probable maximum wave height was noticeably lower there than in the vicinity of Shark Team (5.5m – 6m, rather than 6.5m).

150. Another aspect of Zietsman's evidence that bears mention is an exercise which he did which, in the Court's view, showed that the swell conditions on the day in question were at or about the upper limit of the conditions in which Shark Team ordinarily went to sea. Zietsman had regard to certain available "*hindcast*" weather data in respect of the nearest available offshore position over a long period. The significant wave height at that offshore position between 06h00 and 09h00 GMT on the day in question was agreed by the parties as being between 3.5m and 3.7m. Zietsman's exercise examined the occasions over the period on which Shark Team did and did not go to sea, and compared this with the "*hindcast*" data. He concluded that Shark Team

only very occasionally put to sea where the relevant offshore significant wave height exceeded 3.75m.

(iii) Evaluation

151. Having regard to its assessment of the evidence as a whole, the Court has concluded that, on the probabilities, the swell conditions prior to the capsize had become noticeably dangerous and that the evidence of Tuckett, and those who supported him to the effect that the conditions were benign, cannot be accepted.

152. The combined effect of Coetzee's direct evidence, Lennox's hearsay evidence, Smut's evidence as to his conversation with Lennox, and the evidence of Mr and Mrs Meyer as to what Coetzee and Lennox said on the scene at the time of the rescue, leaves the Court in little doubt that both Coetzee and Lennox regarded the conditions where they were in the period preceding the capsize of Shark Team as dangerous.

153. Coetzee impressed the Court as a credible and sincere witness and as a witness with the requisite experience to enable him to form a reliable opinion regarding the dangerousness or otherwise of the prevailing sea conditions. Due to its hearsay nature, Lennox's evidence must be given less weight, but it tends to confirm Coetzee's evidence in this regard.

154. Coetzee's evidence as to the prevailing conditions in the period preceding the capsize is also broadly supported by the evidence of Smuts. Smut's admitted drinking problem and his admission that he had been nervous because of a dream the previous night must clearly be taken into account when assessing

the reliability of his evidence. Nonetheless the Court formed the impression that he was a truthful witness who tried, to the best of his ability, to describe the conditions as he perceived them. It was argued for the defendants that his evidence was not credible, because on his own version he had allowed tourists to get into the cage. The Court does not accept this argument. The impression formed by the Court was that Smuts had been concerned all day about the conditions but, needing the work, he was reluctant to call the expedition off, when other skippers around him were prepared to go to, and remain at, sea.

155. It is clear that, prior to the capsize of Shark Team, Lennox and Coetzee had already decided to abort their trip and to cancel their trip scheduled for later that day. The Court accepts Smut's evidence that he told Lennox, before the capsize, that he was getting "*the hell out of here*".

156. Smut's evidence about the conditions where he was is, in the view of the Court, supported by the larger swells seen on the Barracuda video. It will be recalled that in respect of one of those swells, Zietsman testified that it was probably *"about 6m on the front, and feathering*".

157. It is not insignificant that Beukes, one of the members of the CC, candidly conceded that if her boat had been anchored where the boats seen on the Barracuda were anchored, she *"would have been worried*". Scholtz a skipper called to testify for the defendants, similarly expressed the view that the conditions revealed by this swell were not appropriate for shark-cage diving.

158. These concessions stand in stark contrast to the evidence of Tuckett who testified that the conditions seen on the Barracuda video were compatible with what he had consistently been seeing in the vicinity shown on the video and who essentially sought to create the impression that such conditions were of little concern. The Court prefers the view expressed by Beukes and is not persuaded by Tuckett's attempts to downplay the conditions shown on the Barracuda video.

159. The Court notes, but is unpersuaded by, the defendants' submissions that the Barracuda video so distorts the swell sizes that it does not serve as meaningful evidence showing dangerous conditions. Making due allowance for the angle of the video shots and the extent of zooming in and out, the Court is of the view that the bigger swells seen on the Barracuda video support the general conclusion formed by the Court of threatening sea conditions.

160. There are indications in the evidence of Smuts and Coetzee that conditions where they were deteriorated alarmingly in the few minutes immediately preceding the capsize. It was suggested by the defendants that, if that should be the finding of the Court, and if the Court should also find that similar conditions must have been experienced by Shark Team, Tuckett would not have had enough time to take evasive measures before the capsizing wave arrived. For present purposes it suffices to say that I am not persuaded that the swell conditions in the vicinity of White Shark, Megalodon and Swallow deteriorated only immediately before the capsize. The swells were large enough when White Shark anchored that it did not put down its shark cage.

The Barracuda video shows that large swells had been coming through for quite some time before Shark Team capsized. Counsel for the defendants estimated that the larger swells seen on the Barracuda video may have been half an hour or so before Shark Team capsized. I agree.

161. The Court is satisfied that the conditions where Swallow, White Shark and Megalodon were at rest were risky. Appreciating that the Court might well reach this conclusion, the defendants argued that the swell conditions where those vessels were may well have been quite different from those in the vicinity of Shark Team and Shark Fever.

162. The Court accepts that the swell conditions there may have been a little different but regards it as improbable that they were very different. First, the defendants' contention is not supported by the evidence of Zietsman. Zietsman went to considerable effort to try to determine the exact locations of Shark Team, Shark Fever, Barracuda, Swallow, Megalodon and White Shark. Assuming, as the defendants claim, that he positioned the vessels correctly, his calculations as to the significant wave heights and maximum probable wave heights at the various relevant locations do not reveal substantial differences. Where Zietsman's calculations indicate more adverse conditions in the vicinity of other vessels, this is only by a small margin. It is also noteworthy that the probable maximum wave height calculated by Zietsman for White Shark was lower than for Shark Team.

163. Secondly, it is striking that, having recently arrived with a party of expectant tourists, the skipper and dive master of White Shark cancelled their trip (and the afternoon's trip); they did not motor over to somewhere near Shark Team

and Shark Fever. If the conditions were strikingly different, that would be the logical thing for them to do. On the probabilities, they did not do this because the conditions were not strikingly different.

164. Thirdly, the Court attaches no weight to Tuckett's eventual version that the swell where Shark Team was was "*much less where we were lying compared to the other vessels*". As referred to above, his earlier, repeated version was merely that his selected position was "*a little bit calmer*" and that Barracuda's position as "*a little bit more up and down*". The Court can accept that that might well have been his perception but does not accept his later version to the effect that the swell was "*much less*" where Shark Team was at rest.

165. The Court did not find Tuckett to be a reliable witness. In the Court's view, he tended to downplay the swell conditions in the location of Shark Team, for obvious reasons. He was also shown to be a witness who was not unwilling to mislead. A few examples will suffice.

166. First, by his own admission, he signed a series of documents purporting to certify that training had been given to crew members on particular occasions, when this was not the truth. He must have realised that the purpose of the documents was to represent to persons in authority the correctness of the information which he purported to certify.

167. Secondly, he was caught out giving misleading evidence to the Court regarding the regularity with which he had previously brought Shark Team to rest at the same sight that he utilised on the day in question. He testified in chief that "*that spot*" and one a little to the north east "*would have been my*

first two places that I would have gone to every single time". He said that he had done "*a good couple of hundred* trips" to this particular location. He gave evidence to similar effect during cross-examination. He was asked by the Court how close he would have been in the past to the same spot and he said within 1m or 2m. He was asked by the Court whether it was possible in the preceding five weeks or so that he had not been there and he answered "*No, I would have been there at some stage, M'Lord, definitely*". He was thereafter confronted by counsel for the plaintiff with the co-ordinates extracted from a series of Shark Team field data sheets over a considerable period before the date of the capsize, and he conceded that there did not seem to be any particular place to which he went back to with any degree of regularity over the period concerned. He later said that he could not remember whether the place where he anchored on the day in question was in an area where he had anchored that year; and he accepted that it was quite possible that he had not anchored in that area in that year. These concessions, which contradicted evidence repeatedly given earlier, did not do much to give the Court confidence in the reliability of his evidence or indeed in his credibility.

168. Thirdly, Tuckett had little compunction in skippering Shark Team for a substantial period without the required certificate of competence. For some three and a half years (from the end of 2003 to May 2007) he had only a "*sport and recreation*" certificate of competency for a ski boat of less than 9m, whereas Shark Team was 10.7m and was being used for commercial purposes. As Captain Dernier made clear, the certificate was therefore deficient on two counts. Tuckett did take steps to qualify and to obtain the required certificate prior to the accident, but he kept this from Ms Beukes, the

only member of the CC who testified, and who learnt of Tuckett's non-certification only during the trial. The Court finds it's disturbing that Tuckett continued to operate as skipper, knowing that he lacked the required certificate of competence. The Court also finds, on the probabilities, that Tuckett concealed his lack of the required certificate from Beukes. This too is disturbing.

169. The Court takes note of the evidence of the various witnesses who supported Tuckett's contention that the swell conditions were essentially benign but has ultimately not been persuaded that this evidence outweighs the evidence relied upon by the Plaintiff.

170. Zietsman's evidence shows that Tuckett and some of the other witnesses for the defendants understated the prevailing swell conditions. His conclusion of a significant wave height of between 3.3m and 3.45m in the area where Shark Team and Shark Fever were lying at the time of the incident shows that Tuckett's estimate (and the estimate of witnesses who supported him) that the swell was about 2.5m or lower cannot be accepted. (It bears mentioning that, on the plaintiff's case, Zietsman's figures underestimated the swell conditions, because they were based on understated weather data. It is not necessary to decide whether this is correct. The Court assumes, without deciding, that Zietsman's figures are approximately correct.)

171. Zietsman's initial report stated that the "*most probable maximum wave height*" in a period will be very approximately twice the significant wave height. He implied that the most probable maximum wave height in the vicinity of Shark Team was 7m.

172. He later qualified this. Table 2.2.1 of his November 2013 report asserted that 1:100 waves would be 1.52 times the significant wave height; 1:1000 waves would be 1.86 times the significant wave height; and 1:10,000 waves would be 2.15 times the significant wave height. The "*most probable maximum wave height*" is usually a reference to 1:1000 waves. The table therefore implies that the most probable maximum wave height is 1.86 times the significant wave height. If the significant wave height in the area where Shark Team and Shark Fever were lying is assumed to have been between 3.3m and 3.45m, the implication is that the most probable maximum wave height was between 6.1m and 6.4m.

173. The plaintiff submitted that, for a typical wave period of about ten seconds, the 1:100 wave will occur about every fifteen minutes, while the 1:1000 wave will occur about every 3 hours. It should be noted, however, that Zietsman and Arabonis agreed that the spectral peak period at the relevant time was thirteen to fourteen seconds. This would imply that the 1:100 wave and the 1:1000 wave would occur over slightly longer periods than those asserted by the plaintiff. Zietsman testified that "*in theory*" one would have to wait between 2 and 3 hours for a wave 1.86 times the significant wave height and for about 11 or 12 hours for a wave twice the size of the significant wave height. Of course, to treat the ratios in this way is potentially very misleading. Zietsman correctly accepted that the "*one in eleven hours or twelve hours*" wave might well be experienced at the commencement of that period or at any time during that period.

174. If the significant wave height at the location of Shark Team was 3.3m, swells 1.52 times this size, i.e. swells slightly over 5m, should be expected within every 100th swell. A swell of 6.5m was also eminently possible, on Zietsman's calculations, within a 3 hour period.

175. It will be recalled that Scholtz conceded that swells of 4m or 5m could have been coming through from time to time. This seems very likely, having regard to Zietsman's evidence. It is all the more likely that Shark Team experienced quite a few swells of well over 4m if one has regard to both the Barracuda video and to the evidence of Coetzee, Smuts and Lennox, taken together.

176. In addition, some of the witnesses who testified for the defendant were not found to be entirely satisfactory and reliable. In the Court's view, there was force on the criticism by the plaintiff of some of the evidence of Laird and Hewitt. The Court does not accept Laird's evidence that the swell was consistently approximately 2m, with no large swells coming past and with no other vessels in the vicinity disappearing. It is clear from the conspectus of the evidence, including some of the witnesses who testified for the defendants, that on the day in question vessels quite frequently disappeared behind the swells. The Court was also not impressed by Laird's claim that it had always been her view that the capsizing wave was at least 10m high. She was confronted with a magazine article quoting her as saying shortly after the incident that the wave "*looked as high as 8m*". She stated that she might have given an estimate to the journalist that the wave was between 8m and 10m. In every other respect Laird accepted that the magazine article had correctly quoted her. It is improbable, in the view of the Court, that it would

have misquoted her on this particular aspect. If she had said to the journalist that the wave looked as high as 10m or was between 8m and 10m, it is improbable – given the magazine's tendency to highlight the dramatic – that she would have been quoted as saying that the wave "*looked as high as 8m*".

177. Hewitt's evidence became more unimpressive the longer he was cross-examined. He started out as clear and definite but became more and more vague, particularly when confronted with evidence that – together with Tuckett – he had signed documents confirming training that had in fact not been given. Hewitt's assessment of the swell as between 2m and 3m also seems improbable having regard to the various factors discussed above.

178. The Court is not suggesting that Laird and Hewitt deliberately sought to mislead it regarding the swell conditions. The point is simply that they were not found to be reliable witnesses whose evidence tipped the balance and cast real doubt on the evidence by the plaintiff's witnesses.

179. Scholtz was a more satisfactory witness. He made several concessions adverse to the defendants' case and potentially indicative that he may himself have been somewhat negligent (though he did not concede such negligence). Scholtz was, however, not an entirely satisfactory witness. He admitted furnishing a written statement to his employer on the day in question in which he described conditions as a "*nice, calm, almost flat day*". That cannot be reconciled with his testimony of "*usual swell*" that day of 2.5m or 3m, with bigger swells coming through that "*could be*" 4m or 5m.

180. Rutzen's evidence was of limited assistance. It is noteworthy that, whereas Tuckett testified that the conditions seen in the Barracuda video were compatible with what he had been seeing all morning, Rutzen said that he had not encountered swells like the larger swells on the Barracuda video when he came out after Shark Team had capsized. It is not clear whether this may have been because Shark Team had been towed to deeper water before Rutzen arrived on the scene.

181. Towner's evidence must naturally be assessed in the light of her close personal relationship with Tuckett. The Court formed the impression that, like several others who testified, Towner had become used to going out with tourists in conditions that, in the Court's view, were far from ideal. She – like some of the other witnesses for the defendants – did not think it was a matter of any concern that boats were disappearing from view in the swell. The Court has difficulty in accepting this view. If vessels of about 3.5m above the water line disappear behind swells, the swells are clearly quite substantial.

182. As referred to above, asked about the 4m to 5m swells to which Scholtz had referred, Towner's evidence was that she was "*not disputing*" what Scholtz had said but that she "*didn't notice*" such swells. It is quite possible that she did not. That does not mean that such swells were not in fact being experienced. The probable explanation, in the Court's view, is that Towner was not paying careful attention to the swell conditions.

183. The evidence of Dix did little to assist the defendants, given her attitude to it being "*the Cape of Storms"* and *"not the Mediterranean*". The fact that the prevailing conditions off the Southern Cape coast are generally stronger than

some other places is a cause for concern, not a basis for complacency. It will also be recalled that she was, on her own version, not able to say whether the swell was 2m, 3m, 4m or 5m. Her evidence was therefore not very helpful.

184. The Court accepts that Wilcox was an independent witness and accepts that she sought to describe the conditions to the Court to the best of her ability. The Court accepts therefore that she did not perceive the conditions to be dangerous. That falls to be contrasted with the contrary perceptions of Mr and Mrs Meyer (who testified) and Ms Mallon (who did not), other passengers with a similar lack of experience at sea. On the probabilities, and having regard to what has been stated above, the Court is inclined to prefer the assessment made by Mr and Mrs Meyer to the assessment by Wilcox.

185. The Court's initial impression on reading Ms Mallon's email was that it was persuasive and in itself indicative of reasonably dangerous conditions. That view had to be reassessed in the light of the affidavits produced by the defendant at a late stage from Cleaver, Wilson, Burger and Allbrook, all of whom tended to support Tuckett's description of the swell conditions. The Court ultimately concluded that little weight should be given either to Ms Mallon's email or to the defendants' affidavits, precisely because of their hearsay nature. The cross-examination of Scholtz (whose initial statement referred to it being "*a nice, calm, almost flat day*" but whose evidence when cross-examined painted a different picture) illustrated the danger of attaching too much weight to hearsay evidence.

186. The Court found, earlier in this judgment, that, if swells were coming through at 4m or more, a prudent skipper at anchor at the Geldsteen would be

concerned and should depart. The Court finds, on the probabilities, that swells in excess of 4m must have passed Shark Team in the period preceding the capsize reasonably frequently. The Court finds that these swells were sufficiently threatening that a prudent skipper would, prior to the time of the capsize, have taken steps to depart from the scene.

NOT KEEPING A PROPER LOOKOUT

187. A significant part of the plaintiff's case was the contention that the skipper and crew of Shark Team were not keeping a proper lookout in respect of the swell conditions. The Court finds that there is force in this contention. In the Court's view the skipper and crew had become used to operating in quite large swells, and they therefore paid little attention to the swells on the day in question. They (and other skippers and crew of similar vessels who regularly visited the Geldsteen) had in the Court's view become complacent. It was just bad luck on the part of Shark Team and good luck on the part of the other vessels that the only vessel struck by the wave which broke was Shark Team.

188. The defendants pointed out that shark-cage diving vessels had been going to Geldsteen for years without experiencing a capsize. That is no doubt correct. It is, however, not in itself an answer to the charge of negligence in the present case. It is clear that waves do break all over the Geldsteen in large swell conditions. The swell conditions on the day in issue may not have been as large as they sometimes get, but they were large enough to serve as a warning of danger to a prudent skipper. The point has been made above that a prudent skipper leaves a margin of safety and does not flirt with risk. The swell conditions were sufficiently large and threatening that Tuckett should

have foreseen that a wave breaking over Shark Team was a reasonable possibility.

FAILURE TO DEPART

189. If Tuckett had been keeping a proper lookout, he would have been aware of the risk posed by the swell conditions. He would have foreseen the reasonable possibility that, if Shark Team stayed where it was, a wave might break over his vessel. He should have taken reasonable steps to guard against this risk. The reasonable steps which should have been taken were to weigh anchor and to depart from Geldsteen as soon as possible.

190. It is common cause that Tuckett took no steps to depart. Though his passengers had completed their dives, he was content to allow the videographer to continue filming in the cage.

191. A reasonable skipper would, by the time of the arrival of the capsizing wave, have departed. At the very least, a reasonable skipper would already have weighed anchor and been at the wheel, and therefore, on the probabilities, in a position to avoid or to "*punch through*" an approaching wave.

192. Tuckett was, therefore, negligent. His negligence was causally connected to the capsize which resulted in the plaintiff's husband's death.

FAILURE TO CHECK THE DEPTH IN FRONT OF THE VESSEL

193. The Geldsteen is an extensive reef system, and an area described on the applicable chart as "foul ground". This does not mean, in and of itself, that it is

unsafe, in suitable weather conditions, to anchor in the vicinity and to engage in shark cage diving. It does mean, however, that care must be taken to establish the depth of the position where the vessel comes to rest and the depth in the direction from which the swell is proceeding. The shallower the depth, the greater the risk that a swell will break.

194. A prudent skipper concerned about risk of a wave breaking over his vessel would therefore have taken care to establish the depth in the direction from which the swell is proceeding. In this case the swell was coming from the South West.

195. By his own admission, Tuckett did not look at the depth southwards and westwards of his location. He therefore could not have known whether there were any shallow reefs nearby with the potential to cause a swell to break. In the view of the Court, this too was negligent.

196. What is considerably less clear is whether this negligence contributed causally to the capsize. With the benefit of hindsight, it is now known that there were two shallow pinnacles in the vicinity. It seems clear that these shallow pinnacles contributed to the fact that the wave which capsized Shark Team broke where it broke. It is less clear how far Shark Team was at rest from these two pinnacles. On the defendants' version, it was some distance away. On the plaintiff's version, it was much closer to the pinnacles. The closer it was, the more plausible the plaintiff's argument becomes that a prudent skipper should have known where the pinnacles were and that Tuckett's negligence was causally connected to the capsize. The further it was, the more plausible the defendants' argument that the pinnacles are irrelevant

because, having regard to the depth where Shark Team was at rest, a wave would not have continued to break all the way to where Shark Team was.

197. Another factor which would fall to be considered is whether, if Tuckett had sought to determine the depth southwards and westwards of his location, he would have been able to determine, with the equipment available to him, the location and depth of the pinnacles. That too is a matter in dispute.

198. Inasmuch as the Court has already found that Tuckett acted negligently and that this negligence was causally connected to the capsize, it is unnecessary to consider these difficult questions any further. It suffices to say that the Court's *prima facie* impression is that Shark Team may well have been located closer to the pinnacles than Zietsman (and the defendants generally) conceded; and that Zietsman's own evidence suggests that a diligent skipper ought to have been able to detect the presence of the pinnacles. It is however unnecessary for the Court to reach any conclusion on these issues and it expressly refrains from doing so.

FAILURE TO COUNT THE RESCUED PASSENGERS

199. The crew and passengers of the capsized vessel did their best to climb onto the upturned hull and to await rescue. Within a couple of minutes the rescue vessel, White Shark, was on the scene. Within 8 minutes or so everybody had been transferred onto the rescue vessel and it departed.

200. Neither Tuckett, nor any member of the Shark Team crew, nor anyone from the rescuing vessel took proper steps to determine whether all the passengers and crew who had been on board Shark Team had been rescued. It was only

shortly after departing that it was realised that one passenger was missing. It was much later that it was realised that a further two passengers, including Tallman, were missing.

201. Tuckett sought to cast the blame for this on Coetzee or Lennox. The Court is not persuaded. In the Court's view Tuckett acted negligently in not taking reasonable steps to determine whether all the passengers had been rescued. It is not necessary to determine whether anyone else acted negligently.

202. However, the plaintiff has not shown that this negligence contributed causally to Tallman's death. I did not understand this to be disputed by the plaintiff, by the end of the trial.

LIABILITY OF THE THIRD DEFENDANT

203. The third defendant ("the CC") is the employer of Tuckett. On the ordinarily applicable principles of the South African law of delict, it would be vicariously liable for his negligence.

204. The CC is, however, also the owner of the vessel. It contends that, even if Tallman's death was caused by negligence on the part of Tuckett, his death was caused without "*actual fault or privity*" on its part. It relies on section 261(1)(a) of the Merchant Shipping Act, No 57 of 1951 ("the MSA") in this regard, which provides as follows:

> *"(1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity –*

> *(a) if no claim for damages in respect of loss or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage*." (emphasis added)

205. Since the vessel's gross registered tonnage is 4, the CC's liability, if this defence is sound, is limited to 826,68 special drawing rights. One special drawing right is currently valued at US $1. Accordingly, the value of 826,68 special drawing rights is US $826.68. If the CC is right, this is the limit of the plaintiff's claim against it.

206. Section 261 is similar to section 503 of the English Merchant Shipping Act of 1894 and may be construed in accordance with the English authorities on the subject. Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GMBH of Bremen 1986 (4) SA 865 (C) at 875 H-J.

207. In Asiatic Petroleum Company, Ltd v Lennard's Carrying Co Ltd [1914] 1 KB 419 Lord Justice Buckley held as follows (at 432):

> *"The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. But the words 'actual fault' are not confined to affirmative or positive acts by way of fault. If the owner be guilty of an act or omission to do something which he ought to have done, he is no less guilty of an 'actual fault' than if the act had been one of commission. To avail himself of the statutory defence, he must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to show knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission to do so may be a fault, and if so, it is an actual fault and he cannot claim the protection of the section.*"

208. Much of the evidence and argument was addressed to the question of "*actual fault*". In the Court's view "*privity*" is equally important in this case. The meaning of "*privity*" in this context was considered by the Court of Appeal in Compania Maritima San Basilio SA v The Onceanus Mutual Underwriting Association (Bermuda) Ltd (The "Eurysthenes") [1976] 2 Lloyd's Rep 171 (CA). In that case Denning MR held that, for a ship owner to have the required privity, it is sufficient if it "*knew, or ought to have known*" of the facts in question. He continued (at 179):

> *"…To my mind…when the old common lawyers spoke of a man being 'privy' to something being done, or of an act being done 'with his privity', they meant that he knew of it beforehand and concurred in it being done…And when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from enquiry – so that he should know it for certain – then he is to be regarded as knowing the truth.*"

In the same case, Lord Roskill said that privity is directed "*to acts or matters which were done with his knowledge or concurrence*" and Lord Lane said:

> *"'Privity' means 'with knowledge and consent'. It has, so far as I can discover, no connotation of fault."*

209. The only member of the CC who testified was Beukes. She admitted that she knew that Shark Team went out in swells "*of more than 4m*".

210. Asked later in cross-examination what would show her that it was not a "*sea day*" she answered:

> *"Oh, because I would know if it's, like a north west wind or if it's a wave height of more than 4, [or] 5m and depending on the area where we work in.*"

211. Asked where they did not go if there were swells of 4m or 5m, she said that she was not quite sure but she thought that they wouldn't go to Joubert's Dam (a different site from the Geldsteen).

212. This issue was taken up later with Tuckett. The following cross-examination is revealing:

> "*Ms Beukes testified that she knew that you were going out in swells of 4 and 5m or 4 to 5m. You nod your head. - - - That is correct, M'Lord. And they would know that all three of those could combine at the Geldsteen; that you sometimes were in the Geldsteen in the foul ground in swells of 4 to 5m. - - - That is correct. It depends on the wind speeds and wind directions and stuff like that as well.*"

213. On Tuckett's own evidence it would be unsafe to remain at anchor at the Geldsteen "*if there was a chance of a 4m wave coming anywhere near me*". Beukes knew that the skippers sometimes took tourists to the Geldsteen in swells of 4m or 5m. This is a sufficient basis on which to conclude that the CC failed to prove (the onus being on it) that it lacked the required "*privity*".

214. The whole thrust of Beukes' evidence, and the case presented on behalf of the CC, was that it was perfectly in order for the CC and its management to leave all navigational issues to the skippers, including the question of the sea conditions in which they should take tourists out. If there was anything that Beukes didn't know about the conditions in which Tuckett would go to sea and remain at anchor at the Geldsteen, it was only what she (and the owner

generally) chose not to ask. This too precludes reliance by the CC on a lack of "*privity*".

215. It is therefore unnecessary to consider whether the CC proved the absence of any fault, in the form of negligence, on its part which was causally related to the capsize. A few *obiter* comments suffice. The Court does not accept the CC's argument that it was entitled to abdicate all responsibility in respect of "*navigation*" issues and to rely solely on the skippers' expertise and judgment in relation to such issues. This is all the more so where it appears that the CC was not even aware that, for several years, Tuckett did not have the legally required certificate of competence. In any event, the Court accepts the plaintiff's argument that ship owners are not entitled to adopt a supine attitude and to leave all "*navigational*" issues to the sole discretion of skippers. That this is so is apparent from the various judgments in The "*Lady Gwendolen*" [1965] 1 Lloyds' Rep 335 (CA). Willmer LJ found that the absence of any effective managerial control over the way in which the plaintiff's ships were navigated by their masters to be a serious failure in management which contributed to the collision. Similarly Winn LJ was highly critical of the fact that the board did not "*concern itself at all with any problem or question relating to safe navigation*" and that "*it took no action whatever with the object of improving safety in navigation*". He therefore found that the owners had failed to satisfy him that they were free from actual fault which contributed or may have contributed to the cause of the collision.

216. The plaintiff argued that the CC should have put protocols in place which governed the maximum swell conditions in which skippers could operate.

Robertson, an expert who testified for the defendants, conceded that such protocols "*would be reasonable*". The Court agrees.

217. Tuckett was asked the following:

> *"You're told on the morning don't go out there in large swells. You are sitting out there on your boat in the Geldsteen in foul ground and a swell comes through and it's 4m big. You're going to – as an obedient employee – you're going to up the anchor and you're going to get out of there if that was the protocol. - - - If it had been made clear to me that the 4m is my cut-off and I read it as a 4m swell, then I'm going to have to do as I'm told."*

218. A reasonable owner, cognisant that any capsize could result in fatalities and cognisant that swells do break from time to time in the vicinity of the Geldsteen, would in the Court's view lay down a protocol specifying swell conditions in which the vessels should either not go to sea or should not remain at anchor. The defendants have not shown that, if they had laid down a protocol of this type, the capsize would nonetheless have occurred. They have, therefore, not discharged the onus on them to prove an absence of negligence causally related to the fatality.

219. In the light of the conclusions reached above, no purpose would be served by considering further grounds of negligence on the part of the owners advanced by the plaintiff.

THE DEFENCE BASED ON WAIVER

220. It is common cause that Tallman signed an indemnity form and thereby concluded a contract between the CC and himself. In the indemnity form he

stated that he was "*releasing any claims*" he had against the CC or its employees arising *inter alia* from "*wrongful death*".

221. The defendants pleaded reliance on this indemnity. However they conceded in argument that, as a matter of South African law (which they conceded to be the applicable law) a dependant's action is not compromised by an indemnity or waiver given by the deceased, citing Jameson's Minors v CSAR 1908 TS 575 and JCC v Stott 2004 (5) SA 511 (SCA) at para [6]. In the light of this concession, nothing more need be said about this defence.

222. The defendants faintly suggested that a defence of *volenti non fit injuria* could be raised against the plaintiff, but they conceded that the weight of authority was against such a defence succeeding, citing *inter alia* Santam Insurance Co Ltd v Vorster 1973 (4) SA 764 (A) at 777 E-H. Again nothing more need be said about this defence.

CONCLUSION AND COSTS

223. The Court has found for the plaintiff on all issues. Costs must follow the cause.

224. I am satisfied that there was good cause for the plaintiff to lead the evidence of all her expert witnesses. I am also satisfied that the plaintiff herself was a necessary witness, inasmuch as the validity of her marriage remained in dispute until she testified.

225. The plaintiff submitted that the defendants should be punished by an adverse costs order on the attorney and client scale. The Court is not persuaded that any grounds exist for such an order.

The Court therefore makes the following order:

1. It is declared that the first, second and third defendants are jointly and severally liable for such damages as the plaintiff might prove in consequence of the death of Tallman on 13 April 2008, the one paying the others to be absolved.

2. The first, second and third defendants are to pay the plaintiff's costs of suit occasioned by this hearing, jointly and severally, the one paying the other to be absolved, including the qualifying expenses of:

    - Mr Jan-Pierre Arabonis;
    - Captain William Dernier;
    - Captain Kevin Coates;
    - Mr David Johnson.

3. The plaintiff is declared to have been a necessary witness.

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AJ FREUND
ACTING JUDGE OF
THE HIGH COURT

For the Plaintiff	:	Adv D Melunsky
For the Defendants	:	Adv M Wragge SC and Adv DJ Cooke