



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 190/2015

In the matter between:

**MV 'SHARK TEAM'
GRANT TUCKETT
WHITE SHARK PROJECTS CC**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

And

SARAH TALLMAN

RESPONDENT

Neutral citation: *MV 'Shark Team' v Tallman* (190/2015) [2016] ZASCA 46
(31 March 2016)

Coram: Cachalia, Willis and Zondi JJA and Plasket and Kathree-

Setiloane AJJA

Heard: 22 February 2016

Delivered: 31 March 2016

Summary: Admiralty Jurisdiction Regulation Act 105 of 1983 – maritime claim involving loss of life at sea – boat capsized when struck by unusually large wave – whether skipper of boat negligent – no negligence established – appeal allowed and claim for damages dismissed.

ORDER

On appeal from Western Cape Division of the High Court, Cape Town
(Freund AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is set aside and replaced with the following order:

- '(a) The plaintiff's action is dismissed.
(b) The plaintiff shall pay the defendants' costs, including the costs of two counsel and the qualifying expenses of:
(i) Dr John Zietsman;
(ii) Mr Michael Fiontann Hartnett;
(iii) Professor Michel Tipton;
(iv) Dr Cleeve Robinson;
(v) Mr Robert Fine;
(vi) Mr Wilfred Chivell; and
(vii) Dr Linda Liebenberg.'

JUDGMENT

Plasket AJA (Cachalia, Willis and Zondi JJA and Kathree-Setiloane AJA concurring):

[1] The great white shark (*Carcharodon Carcharias*) has been described as 'one of the largest and most powerful predators on earth'.¹ Because of its size and strength, it was hunted by sports fishermen and, presumably because of the danger it was seen to pose to bathers and divers, by those

¹ Rudi van der Elst *A Guide to the Common Sea Fishes of Southern Africa* 2 ed (1993) at 54. It is described as a 'huge, spindle-shaped shark with small conspicuous black eyes, a blunt, conical snout and large triangular, saw-edged teeth' and grows to as much as 7.1 metres in length. (L J V Compagno, D A Ebert and M J Smale *The Sharks and Rays of Southern Africa* at 44).

who had 'taken it upon themselves to rid the oceans of these sharks'.² This, together with the slow growth rate of the great white shark, its low fecundity and its vulnerability to being caught in open-ocean gill-nets, rendered it a species vulnerable to over-exploitation. In 1991, it was declared a protected species in South Africa. As a result, the killing of great white sharks is unlawful.³ In the wake of this, a new industry developed: about 20 years ago, operators began to take paying clients to sea to view great white sharks from cages lowered into the water alongside ski-boats or similar craft.

[2] This appeal concerns the only tragedy in South Africa that has befallen such a craft, the 10.7 metre long catamaran-hull ski-boat MV '*Shark Team*'. At about 10h00 on Sunday 13 April 2008, while anchored and engaged in viewing great white sharks in an area called the Geldsteen to the west of Dyer Island and some eight and a half kilometres south of Kleinbaai on the southern Cape coast, a swell broke in front of or on *Shark Team* and capsized her. Most of those on board – paying tourists, crew and research volunteers – were thrown into the sea, among the great white sharks that had been attracted to the boat by chum – fish-bait thrown into the sea to lure the sharks to the boat – and 'teased' closer with a line to which a tuna head had been attached.⁴ Most of them managed to climb onto *Shark Team*'s up-turned hull and were taken off it and to the safety of Kleinbaai harbour by the crew of one of the vessels in the vicinity, *White Shark*.

[3] Unfortunately, three tourists drowned. Two were trapped under the hull while the third man, who had been sitting on the bow, was probably thrown clear of the boat. Ms Sarah Tallman, the widow of one of the deceased, Mr Christopher Tallman, instituted a maritime claim in the Western Cape Division of the High Court, Cape Town, in which she sought damages for, inter alia, loss of support *in rem* from *Shark Team*, and *in personam* from the skipper, Mr

² Van der Elst (note 1) at 54.

³ Phil and Elaine Hiemstra *Coastal Fishes of Southern Africa* at 70. The authors point out that similar protection is afforded this shark in Tasmania and New South Wales in Australia, in California and Florida in the United States of America, and in Namibia (at 70-71).

⁴ Ms Sara Dix, the videographer aboard *White Pointer*, whose skipper was considering taking the spot that *Shark Team* was about to leave when the capsizing occurred, testified that she saw five great white sharks in the vicinity of *Shark Team*'s up-turned hull.

Grant Tuckett, and the owner of *Shark Team*, White Shark Projects CC. I shall refer to Ms Tallman as the plaintiff and to *Shark Team*, the skipper and the owner as the defendants.

[4] The issues of liability and quantum having been separated, Freund AJ, after a trial that lasted 52 days and generated a record of 8 638 pages, found in favour of the plaintiff and declared that the defendants were liable for whatever damages the plaintiff could, in due course, prove. He did so on the basis that Tuckett had been negligent in failing to keep a proper look out in respect of the sea conditions and that, had he done so, he would have been aware of the risk posed by the swell, would have foreseen the reasonable possibility that a wave could have broken on or over *Shark Team*, and would have guarded against that possibility by weighing anchor and departing from his anchorage. He held that the liability of White Shark Projects CC was not limited by s 261(1)(a) of the Merchant Shipping Act 57 of 1951⁵ because it was unable to establish a lack of privity on its part in relation to the loss of life occasioned by the capsizing of *Shark Team*.

[5] The defendants appeal to this court against Freund AJ's order and do so with his leave.

The applicable law and the legal principles concerned

[6] Section 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983 defines a maritime claim as 'any claim for, arising out of or relating to', inter alia, 'loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship'.⁶ Section 6(1) of the Act creates a mechanism for the determination of the choice of law to be applied to a maritime claim. It provides:

⁵ Section 261(1)(a) of the Merchant Shipping Act provides:

'(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 of 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. . .'

⁶ Admiralty Jurisdiction Regulation Act, s 1, item (f) of the definition of 'maritime claim'.

'(1) 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 of 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 a matter at such commencement, in so far as that law can be applied;

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

[7] The effect of s 6(1) was considered by this court in *MT Argun: Sheriff of Cape Town v MT Argun, her owners and all persons interested in her & others; Sheriff of Cape Town & another v MT Argun, her owners and all persons interested in her & another*.⁷ Scott JA held that 'with regard to "any matter" in respect of which the High Court in England exercising its admiralty jurisdiction in 1890 would have had jurisdiction, the law to be applied is that which the High Court of Justice of the United Kingdom would have applied in the exercise of its admiralty jurisdiction on 1 November 1983, being the date upon which the Act commenced' and that the 'reference to what may for convenience simply be called the English admiralty law as at 1983 is to be construed as a reference to that law including the relevant principles of private international law'.⁸

[8] In terms of English private international law (as at 1 November 1983), the law applicable to this matter is South African law.⁹ This means that the common law rules of Aquilian liability are of application.

[9] The rules of evidence applicable to this matter differ from the usual. This being a maritime claim, s 6(3) of the Admiralty Jurisdiction Regulation Act

⁷*MT Argun: Sheriff of Cape Town v MT Argun, her owners and all persons interested in her & others; Sheriff of Cape Town & another v MT Argun, her owners and all persons interested in her & another* [2001] ZASCA 81; 2001 (3) SA 1230 (SCA).

⁸ Para 14.

⁹ JJ Fawcett and JM Carruthers *Cheshire, North & Fawcett: Private International Law* 14 ed (2008) at 766-768; Sir Lawrence Collins (General Editor) *Dicey, Morris and Collins: The Conflict of Laws* 14 ed (Vol 2) (2006) at 1893-1900.

permits a court in the exercise of its admiralty jurisdiction to 'receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit' but, in terms of s 6(4), the weight to be attached to that evidence 'shall be in the discretion of the court'.

[10] For Aquilian liability to arise, the harm caused by the defendant must have been both unjustified – wrongful, in other words – and culpable – either negligently or intentionally caused.¹⁰ The element of wrongfulness is not in issue in this matter: if the other elements of Aquilian liability are established, wrongfulness will follow as a matter of inevitability. There is also no suggestion that Tuckett acted intentionally when the harm occurred. Whether negligence was present and causally connected to the harm are the only issues involved in the first aspect of this matter.

[11] The starting point in a case such as this is, inevitably, this court's judgment in *Kruger v Coetzee*¹¹ in which the test for negligence was articulated as follows by Holmes JA:

'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.'

[12] The standard of diligence against which Tuckett will be judged will not, however, be the general standard of the *diligens paterfamilias* referred to by Holmes JA – the reasonable person.¹² In a case such as this, where specialized skill is involved, the general standard of the reasonable person is adjusted to that of the reasonable person in the field of endeavour involved. In

¹⁰*Perlman v Zoutendyk* 1934 CPD 151 at 155; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377D-E.

¹¹*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

¹² See *Cape Town Municipality v Paine* 1923 AD 207 at 216 in which Innes CJ equated the *diligens paterfamilias* of Roman Law with the reasonable man – what we now refer to as the reasonable person.

other words, while a person possessed of, or professing to be possessed of, specialized skills is not required to display the 'highest possible degree of professional skill', he or she will be held to 'the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs'.¹³ In other words, he or she will be held to a standard of reasonable skill and care within the area of his or her expertise or professed expertise.¹⁴ In this case, then, Tuckett will be judged against the standard of the reasonable shark boat skipper.

[13] That said, however, one must guard against the 'insidious subconscious influence of *ex post facto* knowledge', and bear in mind that '[n]egligence is not established by showing merely that the occurrence happened . . . or by showing after it happened how it could have been prevented': after all, the reasonable person does not have 'prophetic foresight'.¹⁵

[14] Generally speaking, Scott JA held in *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another*,¹⁶ that in order to establish negligence on the part of a defendant, it is not necessary that the precise manner of the harm's occurrence must be foreseeable: it is sufficient that its general manner of occurrence is reasonably foreseeable. But this general rule must bow to the peculiar facts of a case, which may call for a more subtle approach: flexibility with reference to the facts of each case is required.

[15] *Sea Harvest* illustrates the point particularly well. An unknown reveller had, shortly after midnight on 1 January 1993, fired a distress flare which landed on a fibre glass gutter of the respondent's cold store in Duncan Dock, Table Bay Harbour. It set the cold store ablaze. This was largely destroyed by

¹³*Van Wyk v Lewis* 1924 AD 438 at 444; *Charter Hi & others v Minister of Transport* [2011] ZASCA 89 para 32. See too P Q R Boberg *The Law of Delict* at 346-347; Jonathan Burchell *Principles of Delict* at 87-89.

¹⁴*Mitchell v Dixon* 1914 AD 519 at 525.

¹⁵*S v Bochris Investments (Pty) Ltd & another* 1988 (1) SA 861 (A) at 866J-867B.

¹⁶*Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* [1999] ZASCA 87; 2000 (1) SA 827 (SCA) para 22.

the fire as were fish and fish products belonging to the appellants that had been stored in the cold store. The flare had landed on the only part of the building that it could have ignited, and the fibre glass gutter could only have been ignited by a heat source of sufficient intensity and longevity. The distress flare met both of these criteria. Scott JA found that there was no doubt that a general possibility of a fire in the cold store was reasonably foreseeable but what would have been foreseen was a fire starting inside the cold store: indeed, that was precisely why fire-fighting equipment had been installed inside the premises.¹⁷ He then proceeded to hold:¹⁸

‘Having regard to the particular circumstances of the case, it seems to me therefore that the question of culpability must be determined not simply by asking the question whether fire, ie any fire, was foreseeable but whether a reasonable person in the position of Worthington-Smith or Visser would have foreseen the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter.’

[16] I turn now to the common cause facts followed by the issues that arise in this appeal. Thereafter I shall deal with the voluminous evidence adduced by the parties in relation to those issues. I shall then consider the court below’s approach to the evidence and the issues.

The common cause facts

[17] According to Ms Christina Rutzen, Kleinbaai harbour’s harbour master, on 13 April 2008 the wind was light and the swell was running at about two metres at the harbour. Conditions did not change until the afternoon. There were no signs to make her believe that putting to sea that day could be unsafe.

[18] *Shark Team* was the first of the shark boats to leave Kleinbaai harbour on the morning of 13 April 2008. It did so at about 07h30. *Shark Team* was followed by *Barracuda* at about 08h00, by *Swallow*, skippered by Mr Steve Smuts, at about 08h20, by *Shark Fever*, skippered by Mr Albert Scholtz, at about 08h45, by *Megalodon* at about 08h55 and by *White Shark*, skippered by

¹⁷ Para 23.

¹⁸ Para 24.

Mr Ronnie Lennox, at about 09h05. *White Pointer*, skippered by Mr Phillip Colyn, left Gansbaai harbour at about 09h00 and arrived where the other boats were at anchor shortly before the capsized.¹⁹

[19] All of these craft made for the Geldsteen, a favoured area for viewing great white sharks in the winter months and in the conditions prevailing that day. *Shark Team*, having launched first, arrived at the Geldsteen first, and after choosing a spot, Tuckett instructed the crew to commence chumming. He then anchored and lay some 200 metres from the point where he had anchored. Cage diving commenced.

[20] As they arrived, *Barracuda*, *Swallow*, *Megalodon* and *White Shark* anchored in a line roughly astern of *Shark Team*. *Shark Fever* took up a position ahead of and off *Shark Team*'s starboard bow. The line of boats was spread over about 350 metres from *Shark Fever* to *White Shark*.

[21] As a result of the bridle anchoring system used by the shark boats, their bows faced into the south-westerly swell. The wind, blowing from the south-east, blew into their port sides and the shark diving took place in the lee thus created on the starboard side of the boats.

[22] From about 07h50, when *Shark Team* anchored at the Geldsteen, until its capsized at about 10h00, it, *Barracuda*, *Swallow*, *Megalodon* and *Shark Fever* had their cages lowered and all of them engaged in shark viewing. Although *White Shark* lay at anchor, no shark viewing took place on this vessel. *White Pointer*, on arrival, had motored along the line of boats and was in the vicinity of *Shark Team* when the capsized occurred. Tuckett had contacted Colyn, the skipper of *White Pointer*, to offer him *Shark Team*'s spot, he having decided to go back to Kleinbaai. As they were talking to each other, disaster struck. *Barracuda* had left for the shore shortly before the capsized but returned to assist in the rescue.

¹⁹ I have named the skippers who gave evidence in the trial. One of them, Lennox, was not available to testify but two statements made by him were placed before the court.

[23] When the capsizing occurred, *Shark Team's* videographer was inside the cage. Tuckett and other crew assisted passengers to get onto the up-turned hull. He and Ms Megan Laird, the dive master that day, managed to free a woman trapped in the water next to the hull as a result of her leg being entangled in ropes. Tuckett and Mr Adrian Hewitt, a crew member, were able to extricate the videographer from the cage, thereby certainly saving his life. They also saved the life of a passenger who was floating off *Shark Team's* bow in great distress, unable to save himself and about to drown.

[24] *White Shark* was able to come alongside *Shark Team* and succeeded in taking all of the survivors aboard. In what was now a heavily over-loaded boat, its skipper, Lennox, headed for the safety of Kleinbaai harbour. It was then realised that people were missing. That information was conveyed to the other boats in the area. They commenced a search.

[25] *Barracuda* towed the up-turned hull of *Shark Team* into deeper water. In the meantime, the vessel *Stan*, with Mr Michael Rutzen on board, had launched from Kleinbaai harbour. When it arrived at *Shark Team*, its crew saw the feet of a man protruding from the hull. The body was recovered. It was Christopher Tallman. Although cardiopulmonary resuscitation (CPR) was attempted, it was to no avail. Rutzen, a diver and great white shark expert of immense experience, later dived under the hull and found the body of Tallman's friend, Mr Casey Lajeunesse, entangled in ropes. Despite the attentions of great white sharks, he was able to recover Lajeunesse's body.²⁰ A while later, a third body, that of Mr Kevin Rogne, was found floating near *Shark Team*.

[26] Before proceeding further, it is necessary to say something about the shark diving industry that developed after the great white shark was protected. Mr Wilfred Chivell, the owner of *Shark Fever*, is one of the pioneers in the industry and, it would appear, in the whale-watching industry as well. He testified that the industry started on a small scale in about 1996. At that stage only four or five boats operated in the area. That number has since increased.

²⁰ Rutzen said that great white sharks 'don't eat people' but react aggressively when angered.

In 2000, about 20 000 people were taken shark viewing. That figure has risen to about 70 000 people a year at present. Between 30 000 and 40 000 trips have been made over the years. The capsizing of *Shark Team* is the first and only incident of its kind in the industry.

The issues

[27] In her particulars of claim, the plaintiff alleged 32 different grounds of negligence. During the course of the trial some were not pursued while others were refuted. What remained were two issues. A third arose during the course of argument in this appeal. The first was that Tuckett was negligent because he failed to notice a deterioration in sea conditions when he could and should have done so. The second was that he had been negligent in failing to motor into the swell before anchoring in order to check the depth in front of where *Shark Team* was to lie. The third concerned the size of the wave and its origins, and whether Tuckett ought to have recognised signs that were indicative of an extraordinarily large swell developing and breaking. This issue is in truth part of the broader 'proper lookout' issue but will be considered separately.

[28] The trial centred on the first issue and Freund AJ found that this ground of negligence had indeed been established by the plaintiff. He rejected the defendants' defence that a reasonable skipper in Tuckett's position on the day in question, at the same spot, with *Shark Team's* bow pointing into the swell, and in the prevailing swell and wind conditions, would not have foreseen the reasonable possibility of the capsizing (and resultant harm). Because of the conclusion reached in respect of the first ground, Freund AJ did not consider it necessary to deal definitively with the second ground: although he found that Tuckett had been negligent, he suggested that the element of causation may not have been established. The third issue does not appear to have received discrete treatment.

[29] Evidence was led, on behalf of the plaintiff, to establish that while *Shark Team* was at the Geldsteen on the morning of 13 April 2008, the sea conditions deteriorated to the point that it had become dangerous to be there.

[30] The witnesses called by the defendants, on the other hand, testified that *Shark Team* was lying in deep enough water, that the swell was manageable and that no swells broke in the vicinity of *Shark Team* or looked like breaking (by either 'peaking' or 'feathering').²¹ The conditions were safe and there were no danger signs.

[31] As a result of a bathymetric survey conducted on the instructions of one of the defendants' expert witnesses, Dr John Zietsman, two pinnacles were found in the vicinity of the spot where *Shark Team* lay and on one of which the swell that caused the capsizing appears to have begun to break. It was argued that had Tuckett motored into the swell and used his fish-finder to determine the depth further on from where he wanted to lie, he would have seen the danger and would have avoided it by lying elsewhere. The defence to this attack was that the chances of Tuckett finding the pinnacles in this way were slim. Zietsman provided a possible explanation for the size of the wave, which was described, in one way or another, by everyone who saw it, as an extraordinarily large wave. The defendants' defence was that the possibility of such a swell developing and then breaking, in that area in the conditions prevailing at the time, was not reasonably foreseeable.

[32] This appeal turns largely on the facts. It is therefore necessary to traverse the voluminous evidence at some length before considering Freund AJ's factual findings and his conclusions.

The evidence

Proper lookout: the sea conditions in general

[33] As stated above, Christina Rutzen, the harbour master at Kleinbaai considered the wind to be light and the sea conditions to be moderate on the morning of 13 April 2008. She also testified that those conditions prevailed throughout the morning and only deteriorated during the afternoon. Her observations were supported by her brother-in-law, Michael Rutzen, who put

²¹A swell peaks when its face steepens. A swell feathers when white water develops on its crest. Both are signs that a swell is likely to break.

to sea shortly after the capsizing in order to help with the rescue effort. The conditions at the Geldsteen were, in his opinion, not dangerous on his arrival. He described conditions that day as not being too rough, stating that there was nothing unusual about the sea conditions. He experienced a light southeasterly wind and a swell of two and a half to three metres on his way to where *Shark Team* had been towed. He saw nothing to alarm him at the Geldsteen, the wind was dying and there was not a lot of swell. Mr Wilfred Chivell, the owner of *Shark Fever*, had not been concerned that day about the weather forecast and the maximum predicted swell height of 3,96 metres because the swell was long and could be worked in safely and comfortably. He thought that it would be a good day at sea. He saw no signs of deteriorating weather conditions by the afternoon. It must be borne in mind, however, that neither Christina Rutzen nor Chivell went to sea on the day in question and that Michael Rutzen only did so after the capsizing. That said, however, they are people with a great deal of maritime experience and local knowledge.

[34] Ms Marili Meyer, a passenger on *Shark Team*, testified that the wind was strong and the sea was rough. She was extremely nervous and anxious as this was the first time she had ever gone to sea. Coming from the inland city of Bloemfontein, she was not particularly familiar with the sea. Her husband, Mr Hendrik Meyer, had been to sea once before. He therefore also had little experience to draw on as far as the nature and characteristics of the sea conditions and the wind were concerned. Ms Meyer testified about a wave that broke while she was on *Shark Team's* viewing deck. While she initially testified that it was 50 to 100 metres from *Shark Team*, she conceded that it could have been much further – in the region of 500 metres or more as Mr Tuckett later testified. Her evidence concerning this wave takes the matter no further, because the wave broke far away from *Shark Team* and posed no threat to it at all.

[35] Smuts, the skipper of *Swallow*, described the wind on 13 April 2008 as being 'very light'. On the way to the Geldsteen nothing caused him any concern. When he arrived at the Geldsteen, however, he said he experienced

a larger swell than he had anticipated. He took up a position about 30 to 50 metres astern of *Barracuda*, which was, in turn, about 100 metres astern of *Shark Team*. His crew lowered the cage and his clients proceeded to view sharks.

[36] He regarded the conditions as 'threatening' but not dangerous. The threat, he said, lay in the swell picking up because of the dropping tide. The swells began to peak and he estimated their size to have reached about 7 metres. His method of estimating the swell size, however, was based on what he believed to be the height from *Barracuda's* waterline to the top of her aerial. He believed this to be eight metres but accepted that it was, according to *Barracuda's* skipper, between three and a half and four metres. He also accepted that estimating swell height in the circumstances was, at best, a rough and ready exercise and unlikely to be accurate.

[37] He maintained that conditions deteriorated rapidly – in the five to ten minutes prior to the capsize – and spoke to Lennox, the skipper of *White Shark*, on his cellphone to discuss the conditions. He told Lennox that all of his clients had had their chance to view sharks and he intended returning to Kleinbaai. Lennox said that he was aborting his trip, having lain at anchor for about 30 minutes already. At that stage, however, Smuts had not seen any swells breaking in the area. He had just ended his conversation with Lennox when the capsize occurred.

[38] When Smuts was asked about the size of the wave that had capsized *Shark Team*, he said that one saw waves like that after and during north-west storms. On the day in question, a light south-easterly wind that normally flattens the sea was blowing but, he added, that 'definitely was not the case that day'.

[39] He conceded that conditions could vary from one spot to another, even over a fairly short distance. As a result, he said that all he could speak about were the conditions prevailing where *Swallow* lay.

[40] Mr Coenie Coetzee was the dive master aboard *White Shark* which had left Kleinbaai harbour at 09h05 on 13 April 2008. He described the trip to the Geldsteen as 'a nice ride' but on arriving and anchoring there he found a bigger swell than he had anticipated. He estimated the south-westerly swell to have been about four metres in height and said that a 'very, very slight' south-easterly wind blew. On arrival the crew began to chum and motored round for a while to see what the sea was doing. *White Shark* then anchored astern of *Megalodon*. A period of time after the vessel had anchored, however, four larger swells passed her. This alarmed Coetzee and Lennox. A decision was taken not to put the cage over the side and to abort the trip as well as the afternoon's trip. Shortly thereafter – 'a couple of minutes' later, according to Coetzee – *Shark Team* was struck by the wave and capsized.

[41] Despite the four swells coming through, *White Shark* remained at anchor until *Shark Team's* capsizing. Coetzee was explaining to his clients why the shark viewing had been cancelled when he saw the wave striking *Shark Team* some 300 metres away. Lennox was talking to Smuts, or had just finished doing so. It was put to Coetzee in cross-examination that the swell that was running at the Geldsteen had not caused concern for him 'until that set of swells came through' to which he answered: 'Correct.' Coetzee agreed that conditions could vary from boat to boat, depending on position, and that what was experienced on *Shark Team* could have been different to what was experienced on *White Shark*.

[42] Lennox did not testify but was interviewed by Captain K J Coates, who investigated the capsizing on behalf of the South African Maritime Safety Authority (SAMSA). Lennox also made a statement to the police, which is more or less consistent with the evidence of Coetzee.

[43] Colyn, the skipper of *White Pointer* testified that, after he had arrived at the Geldsteen, Tuckett called him by cellphone to offer him *Shark Team's* position. He stated that a swell of about four metres was running. He described this as 'quite a big swell'. His assessment of the conditions was that it was 'pretty safe' for shark viewing if one was in deeper water. He accepted

that if a boat was in a depth of ten to 12 metres, it would not be on a reef and would be safe. He described the position where *Shark Team* lay as being a prime spot for shark viewing and one that he had used. He testified that on 13 April 2008, the wind was a light south-easterly wind and it would have had no effect on the swell.

[44] On his arrival at the Geldsteen that day, he first motored to the northern-most end of the line of shark boats before turning and coming down the line to the vicinity of *Shark Team* and *Shark Fever*. The area looked safe to him. He accepted that if there was an absence of breaking swells and a boat lay in sufficient depth of water it could be accepted that it was in a safe position. He did not see any warning signs that a massive wave may be imminent but said that he had not been in the area long enough.

[45] As the skipper of *Shark Team*, Tuckett was the defendants' main witness. His version of events, and of the prevailing conditions, on the day in question was supported by various crew members of *Shark Team* and *Shark Fever*, as well as a passenger aboard *Shark Fever*.

[46] It is apparent that Tuckett is a well-qualified and experienced paramedic, diver and skipper. He began to work for White Shark Projects in late 2003 and so, by the time of the capsizing of *Shark Team*, he had close to four and a half years of experience in the shark diving industry. All of that experience was obtained in the area in which the capsizing occurred. The shark boats tended to operate in an area called Joubert's Dam, which is inshore of the Geldsteen and north of Dyer Island, and around Dyer Island, including the Geldsteen. The Joubert's Dam area is favoured in the summer months and the area around Dyer Island, including the Geldsteen, is the preferred area in the winter months.²²

[47] From Tuckett's experience, it can be accepted that he had local knowledge of the areas in which he operated, including the Geldsteen – and

²² The Geldsteen area was described differently by various witnesses. Nothing turns on this. It is common cause that the spot where the capsizing occurred is on the Geldsteen, howsoever it may have been defined.

the spot where the capsized occurred. Smuts, for instance, testified that Tuckett had extensive knowledge of shark-diving in the Geldsteen area. Mr Michael Hartnett, an expert witness called by the defendants, testified that Tuckett had local knowledge as he had 'thousands of hours working in the same area' and that, on this basis, he would have been in a position to 'discern certain conditions and what effect they will have on his vessel'. (He considered local knowledge to be perhaps the most important factor when a skipper has to decide on a safe place to lie at anchor.) Chivell, speaking more generally of all of the shark boat skippers, said that they had been going to sea in the Geldsteen area for 'many, many, many years over hundreds and hundreds of days and thousands of hours'. As a result of their experience, they 'got to know where [are] the safe areas; where can you do what in certain weather conditions'. For him too, the most important aspects of understanding the workings of the sea on the Geldsteen, and what is safe and what is not, are historic and local knowledge.

[48] Tuckett testified that he tended to be a cautious skipper and White Shark Projects was known among the local shark diving community as being the first to cancel or postpone trips on account of weather and sea conditions. This was confirmed by a number of the witnesses called by both the plaintiff and the defendants. The witnesses on both sides regarded Tuckett as a good skipper. Their assessment of his abilities as a skipper ranged from him being described as a 'fine skipper' by Smuts; a competent skipper according to a member of his crew, Ms Megan Laird; a responsible skipper, according to Christina Rutzen; and a competent and responsible skipper according to Colyn. The witnesses also agreed that Tuckett was a cautious skipper. Indeed, Chivell regarded him as being 'too careful' and a 'very cautious skipper'. This is confirmed by Zietsman who correlated swell heights and the instances of boats going to sea, both before and after the capsized: *Shark Team* only went to sea occasionally when the swell height was bigger than 3.75 metres, and less often than the other shark boats.

[49] On the day in question, Tuckett followed a routine that appeared to be standard among the shark boat skippers. He checked the forecast on the

program that White Shark Project used, Buoy Weather. That indicated, with a green flag, that conditions were suitable for most marine activities. When he arrived at the harbour, at about 06h00 or possibly earlier, he looked at the sea. There was nothing in the conditions that concerned him: a moderate south-east wind blew and it was overcast. The launch was uneventful, as was the trip to the Geldsteen. He saw no waves breaking over a rock called Black Sophie, which was an indicator of rough sea. He regarded it as 'an average trip on the Geldsteen', and the 'shark action was fantastic'. Everyone on board 'seemed to be quite happy with what they were seeing'. Neither the wind nor the sea conditions at the Geldsteen gave him cause for concern.

[50] When he arrived in the area that he had decided upon, he motored around for ten or 15 minutes and checked the swell direction, the current and the wind direction. He first went to a spot where *Barracuda* later lay. He decided that it was a bit rough there so he motored 100 to 150 metres to the south-west where conditions looked flatter. Both spots were entered as markers into his global positioning system (GPS) and had been since he started work in the industry. He had never seen the south-westerly swell break in that area and nothing in the sea state indicated to him that there may be shallower water to the west of *Shark Team*.

[51] Once he had decided on where he wished to lie, he motored, with the aid of his GPS and with his fish-finder functioning, into the wind for 200 metres – the length of his anchor line – and gave an order for the anchor to be deployed. The anchor was in nine metres of water. He then went astern back in the direction in which the wind was blowing and lay in the spot he had chosen, on the bridle anchoring system which kept the bow into the swell. He lay in 11.1 metres of water. He felt that this was safe: the shark boat skippers have a rule of thumb that one should, in order to be safe, lie in over nine metres of water.

[52] In dealing with where the boat lay, he denied the evidence given by Coetzee that *Shark Team* lay close to the kelp – and hence shallow water. Tuckett said that it lay over 200 metres from the kelp: the anchor, being in 9

metres of water, was probably 30 to 50 metres from the kelp and the boat was a further 200 metres from the anchor. He denied that *Shark Team* was on a reef and said that he was not aware of any reef nearby. The bow of *Shark Team* faced into the south-westerly swell at all times up to the capsize.

[53] None of the passengers experienced any difficulties from the swell when moving around the boat. Indeed, he said that 'often when we're out there and it's a little choppy, people who are not used to being at sea, do need to hold on to handrails – we have to constantly tell them to hold on, don't move around too much, and there was nothing noticeable on that particular day'. None of the passengers indicated a concern with either the weather conditions or the state of the sea. Nobody experienced difficulties climbing into or out of the cage as a result of the swell.

[54] When everyone had had a chance to view sharks from the cage, Tuckett decided that it was time to leave. The videographer wanted more footage and Tuckett gave him a few minutes to do so. If he had been in any way concerned about the conditions, he would not have acceded to this request. He issued instructions to the crew to prepare for the return trip to Kleinbaai. By that stage, *Shark Team* had been at that spot for about two and a half hours. Tuckett had seen *White Pointer* approaching and was speaking to her skipper Colyn, to offer him *Shark Team's* spot, when the capsize occurred.

[55] After the capsize, the surviving passengers and crew of *Shark Team* were rescued by *White Shark* which had slipped its anchor on seeing the wave strike and was on the scene very quickly. The sea conditions at this stage were, according to Tuckett, flat. This is borne out, by and large, by the photographs depicting the rescue.

[56] Tuckett testified that conditions vary from place to place on the Geldsteen, even over fairly short distances. He described the spot where *Shark Team* lay as being sheltered.

[57] When testifying about the conditions, he pointed to various features of the *Shark Team* video that had been handed in as an exhibit. It showed a fairly flat sea, with a small swell, people getting into and out of the cage with ease and the cage itself being stable rather than 'swinging and slapping around' when in the water. It also depicted a crew member standing easily on an engine while he worked the bait line. This was possible in good sea conditions but if the sea is 'very up and down or choppy then we actually have to stand down on the deck behind the cage'. He described the swell as 'a slow rolling swell'. These conditions, he said, remained constant throughout the trip.

[58] While he made it clear that it was difficult to estimate the swell size with accuracy, especially from photographs or videos, and his estimates came with no guarantee of accuracy, he guessed that the swell size was between two and two and a half metres. In some of the photographs that he was taken to, he estimated swells of three metres.

[59] When a video taken from *Barracuda* came to light towards the end of Tuckett's examination in chief, he was taken through it. It showed, much like the *Shark Team* video, passengers who seemed to be comfortable in the conditions, and who stood with ease, and with no support, on the deck. The cage looked stable and divers were entering and leaving it easily. The sea, he said, looked calm where *Barracuda* was lying. He identified one swell that he described as 'a moderate swell' that was not peaking which looked to him like an 'average, moderate, slow, lazy swell'. He estimated that other swells going past *Barracuda* were in the region of two and a half metres but said that he was making 'educated guesses'. One had some white water on it, created, he believed, by the wind.

[60] Tuckett was subjected to a long, arduous cross-examination that traversed both the relevant and the irrelevant. It lasted five days.

[61] In cross-examination, he stated that: his employer had not placed pressure on him to go to sea on 13 April 2008; he was satisfied that his crew

was competent; he was alert, as he always was, when he was at sea that day; *Shark Team* was never in danger; there were no warning signs of possible breaking waves; there was no deterioration in the conditions; and there were no breaking waves anywhere near *Shark Team*. He said that there was nothing that he could have done to have prevented the capsize and that the wave was one he 'could never have expected or never have avoided'. He made it clear that, being the first to arrive on the Geldsteen, he was able to choose the calmest spot, that the swells were not very big where *Shark Team* lay and that he saw no peaking or feathering swells: all he saw were slow, lazy swells. He did notice, however, that the boats astern of him were 'riding in higher swells than where I was'.

[62] Tuckett had testified in chief that he had been to the spot where the capsize occurred many times in the past. It was one of his waypoints in his GPS and a favourite spot of his. He was taken to task on this evidence on the basis that the logs for *Shark Team's* trips from 7 March 2008 to the date of the capsize showed that he had been to spots all over the Geldsteen but not to that exact one. These spots varied from 40 to 770 metres away.

[63] I turn now to the evidence of Scholtz, the skipper of *Shark Fever*, which had taken up a position about 40 metres ahead of *Shark Team* and about 20 metres across (off *Shark Team's* starboard bow). His evidence is important because of *Shark Fever's* proximity to *Shark Team*.

[64] He testified that, on the morning of 13 April 2008, *Shark Fever* launched without incident and 'had a very pleasant ride' to the Geldsteen. There was, he said, some swell but it was not uncomfortable or anything to worry about. On arrival, he saw that *Shark Team* was lying almost exactly on a way point of his – a spot he described as one of the 'safe spots' – so he moved to another way point in front of *Shark Team*. He lay in 12 or 12.5 metres of water. He described the conditions as calmer than where *Barracuda* and *Swallow* lay at The Point. He said:

'Where myself and *Shark Team* were lying, the water was calmer there than where *Barracuda* and *Swallow* was lying, because I could see their boats' noses go up and

down and up and down, and we were almost stationary at times. And yes we also went a little up and down at times but give and take 80% of the time we were lying, we were almost lying still.'

He estimated the swell size to be about two and a half metres on average.

[65] He said that he knew the area where he lay and that it was a 'safe area for me'. He had been there in conditions similar to those prevailing on 13 April 2008, and worse. He had never seen feathering swells in that area: while swells break close to the island and on the kelp, they do not break in the area where he lay. Later, he said that over a period of five years prior to the capsizing, he had not seen a swell break in that area, so he assumed it to be a safe area.

[66] On the day in question, he never saw any swells 'standing up' near his boat and nothing in the conditions caused him any concern. The swell posed no danger. He knew he was safe from experience and because *Shark Team*, being so close to him, had been there for longer than him. He could not recall conditions deteriorating in any way and he did not notice any increase in the swell height. He stated, however, that the swell was not consistent in that while the average was about two and a half metres, some swells as big as about four metres came through at times. He stressed that '[w]hile we were lying there I felt very safe and comfortable being there at the time, no matter if the swell was 1 metre or 4 or 5 metres'. Conditions remained constant from before the capsizing to afterwards. From an hour and a half before the capsizing to a half hour after it, *Shark Fever* lay in that area and, 'there was nothing for me to really feel worried about, to really move out of the area to get to the harbour, to land'.

[67] It was put to him that when he saw the swell that capsized *Shark Team* getting bigger, it must have reached a shallower area. He said that he had difficulty responding to this as 'I was lying there the whole day' and '[n]othing out of the ordinary happened'. It was also put to him that *Shark Team* should never have been where she was. His answer was that there was no doubt in his mind that the vessel was 'not in danger at all' and that the swell that

capsized *Shark Team* 'was according to me an unexpected swell or as it was referred to as well, as a freak swell'.

[68] The evidence of both Tuckett and Scholtz concerning the wind and sea conditions as well as a lack of deterioration in them was supported by: Ms Megan Laird, who was on *Shark Team* as a volunteer and dive master; Mr Adrian Hewitt, who was a crew member aboard *Shark Team*; Ms Alison Towner, the dive master aboard *Shark Fever*; and Ms Sara Dix, the videographer aboard *White Pointer*. Laird, Hewitt and Towner were marine biologists engaged in research into great white sharks and all three had sea-going and diving qualifications and experience. Their research and their duties entailed recording data concerning their boat's position, water depth, swell size and wind direction. They also had to keep a lookout for these types of factors and conditions. While Dix may not have had the research involvement of the others, she too had extensive sea-going experience. A passenger aboard *Shark Fever*, Ms Bridget Willcox, who had some sea-going experience, gave evidence that was consistent with that of the crew of both vessels.

[69] Their evidence, taken together, was to this effect: the wind was light to moderate; there were no concerns about the swell on the *Geldsteen*; it was estimated to be two metres, two to three metres; two and a half to three metres by Laird, Hewitt and Towner respectively and described as moderate by Dix and Willcox; the swells were long, lazy swells; all felt comfortable on their boats; none of them noticed any deterioration in the conditions or any increase in wind speed; nobody on the respective boats were seen to experience condition-related difficulties; no breaking, peaking or feathering swells were observed; and none of them recalled any larger swells coming past their boats.

[70] Laird said that if the swell had deteriorated she would have noticed because she was working as the dive master and this would have had an impact on people who were trying to get in and out of the cage, and on those inside the cage. Hewitt recorded details of the conditions for his research. He

was interested in correlating shark sightings and prevailing conditions. One of Towner's duties was to fill in data sheets that recorded conditions, including the depth of water, the nature of the swell and its direction, wind direction, current direction and underwater visibility. She said that after the capsizing, the sea returned to the state it had been in before the event. Dix said that the sea returned to normal, and said of the wave that '[i]t really was just like something that came out of nowhere and then went again'.

[71] Michael Rutzen's evidence concerning conditions on 13 April 2008 has been alluded to above. He also gave evidence concerning the Geldsteen, based on more than 20 years of experience. In his experience, the swells break only on the kelp lines and the south-east wind tends to flatten the south-westerly swell. He had only experienced an extraordinarily large wave once on the Geldsteen and that was in 1998 when it broke and 'washed white water' towards the moving boat he was in. Swells of between three and four metres are normal in the area where the capsizing occurred.

[72] Chivell is also a mariner with a great deal of experience of the Geldsteen. He said that he was familiar with the spots where *Shark Team* and *Shark Fever* lay and, in his opinion, they are safe spots. He had never seen breaking swells there or heard of a shark diving or whale watching boat experiencing problems with breaking swells in that area.

[73] Concerning the deterioration of conditions, he made two points: first, that deteriorating conditions per se are not a problem but it is only when a 'massive change in swell conditions' occurs that it becomes problematic; secondly, he saw no signs of deteriorating conditions by the afternoon of 13 April 2008, no deterioration of significance was forecast and only a slight increase of wind speed, which would have been irrelevant to boats lying in the lee of Dyer Island, was predicted. He also saw no evidence of dangerous conditions in the photographs taken immediately after the capsizing.

[74] He was of the opinion that three metre swells could not be said to be big and four metre and bigger swells could be said to be big but there was no

reason why skippers could not go to the Geldsteen in four metre swells: it all depended on a range of factors whether it was safe or not. Large swells on their own are not a problem. They only become a problem when they break.

[75] He found it strange that Smuts and Lennox could have thought that conditions were dangerous but yet had anchored. This, he said, would have led him to institute a disciplinary process if one of his skippers had done that. He made the point, however, that both Smuts and Lennox were new to the industry, that they had only a few months experience in the area and that *White Shark* was smaller than the other shark diving boats, as well as lower in the water, and thus susceptible to 'feeling' the conditions more than the others. *Swallow* was also a smaller boat, according to Smuts.

[76] Chivell was sceptical about the ability of lay people to gauge that conditions were deteriorating. First, he expected that experienced skippers and crew would become aware of deteriorating conditions before a lay person. Secondly, he said that if 'you've never been at sea . . . and you're sitting on the boat and you've done your dive and you're starting to feel seasick, then everything becomes a problem'.

[77] When asked to comment on one of the swells in the *Barracuda* video, he conceded that '[f]rom the angle of the video it looks like a big swell' but he insisted that conditions could be different where other boats were lying and that if the swell 'is not breaking, if it's not feathering, if it doesn't give you any indication of breaking, I wouldn't mind these swells'. He added, however, that while the bigger swells that showed signs of feathering posed no threat to *Barracuda*, the boats astern of her should have been 'very much alert'.

[78] Hartnett was an expert by virtue of his long and varied experience as a mariner. He was not at sea on the Geldsteen on the day of the capsize but was required to give his expert opinion on a number of aspects relating in one way or another to the reasonableness of Tuckett's conduct that day.

[79] He believed that there were no indications in the weather forecast of possible danger. He considered that the size of the swell, on its own, is a meaningless measure of whether conditions are dangerous. What would indicate danger are such features as feathering swells or the shortening of swells, and of course, breaking waves. Big swells pose no threat on their own. As other witnesses had testified, he also pointed to the fact that conditions at sea may vary from spot to spot: while swells may be breaking in one spot, they may not be doing so elsewhere.

[80] He regarded a boat lying in 11 metres of water to be safe. He was of the view that in choosing a spot, Tuckett ought to have been guided by his local knowledge. The fact that he had found his chosen spot to be safe in the past, and had never experienced breaking swells there before, were important indicators that he acted reasonably.

[81] Hartnett made the point that inexperienced people, being in a foreign environment, are not well placed to judge whether conditions are deteriorating. Skippers and crew, being more attuned to the marine environment, are far better placed to do so.

[82] He did not consider it inappropriate for a skipper to be checking on the cage diving. He considered this to be one of a skipper's duties. He also saw no problem in a skipper working a bait line. This did not create a conflict with his duty to keep a proper lookout: indeed, by virtue of the nature of the task, it could make the skipper more alert to 'strange waves or big swells' because these would affect his balance while he throws, works and retrieves the bait line.

Proper lookout: the pinnacles and motoring into the swell

[83] After Zietsman, a civil and ocean engineer, had been engaged as an expert witness by the defendants, he commissioned a bathymetric survey of the area in which the capsizing occurred. This brought to light the existence of slightly shallower water to the north-west of *Shark Fever* and to the west of *Shark Team*. More importantly, it brought to light the existence of two

pinnacles, each about five square metres in area, and approximately 6,8 and 7,2 metres under the water. Neither Tuckett nor any of the other skippers who testified, including Chivell, knew of these pinnacles. They all had used this area for shark viewing over a number of years, and considered it a perfectly safe place to lie. The remainder of the shallower area was over eight metres deep.

[84] Tuckett was asked whether he had ever seen, with the aid of his fish-finder, shallower areas in the vicinity of the capsized. He said he had not and the sea state to the west of *Shark Team* had not indicated the presence of shallower water either. He saw nothing, he said, that 'gave me any indication that there [were] any shallow reefs there'. This evidence was supported – perhaps indirectly – by Scholtz when it was put to him that the swell that caused the capsized must have reached a shallower area when he saw it getting bigger. As previously noted, he answered that he had difficulty responding because 'I was lying there the whole day' and '[n]othing out of the ordinary happened'. He had not seen a wave breaking in that area for the previous five years during which he had used that spot.

[85] It was put to Chivell, in the context of the assertion that Tuckett should have spotted the shallower water off his starboard bow, that a skipper of a boat will see shallower water because the swell would 'rise up' over a reef. Chivell, with reference to a recent trip he made to the Geldsteen (in conditions similar to those prevailing on 13 April 2008) to try to locate the pinnacles identified by the bathymetric survey, said that one would have expected this to be the case but he found on his trip that it was not necessarily so. He then stated, with obvious reference to *Shark Team*, that if a boat has been lying in a place for two or two and a half hours and no swells had looked like they were going to break, there would be no danger signs to induce a skipper to move away. When it was put to him that a swell is going to break sooner or later over a shallow reef, his answer was that he had not seen that happen in the Geldsteen area.

[86] Hartnett was of the view that given the depth, size and spire-like shape of the pinnacles off *Shark Team's* starboard bow, and on one of which the swell had begun to break, it was not to be expected that a person would be aware of their presence by reading the water: there would have been no discernible disturbances of the surface when swells passed over them in the conditions prevailing on 13 April 2008. It could well have been different in a very big sea, but nobody would be there to observe.

[87] It was suggested to Tuckett that he had been remiss in failing to proceed from the spot he had chosen into the swell to ensure that no shallow water lay ahead. He stressed that he had not been aware at the time of any shallow areas in the vicinity of *Shark Team* 'so I was one hundred percent confident with the area where I came to lay'. The court then asked him whether he should have 'scouted around, to use lay language' and whether, if he had done so, his knowledge would have been different. To this he said:

'Yes, M'Lord, but I had been riding around that area in years previously and I've never picked up anything like that, so the thought never entered my mind that there was anything there that I needed to worry about. And because I'd anchored previously on that marker in those conditions with that wind, with those swell conditions, I was quite happy to go straight to that point and I felt quite safe there, M'Lord. And we did motor around. We motored around off The Point. We did motor coming over. We did go a little bit further out to start our chum line coming into that point. So we did look for a good 15 minutes before actually dropping our anchor in the 9 metres of water, M'Lord.'

[88] He made the point that 'as soon as I came anywhere near to the Geldsteen and started . . . choosing my anchor point and checking the wind, then the depth-finder would go on'. When asked by the court what his fish-finder had shown him on the day in question, he said that he had definitely not seen 'any shallow pinnacles or anything'.

[89] He was asked whether, with the benefit of hindsight and the bathymetric survey, he thought it would have been prudent to proceed into the swell for a while. He said:

'Yes, M'Lord, but you've got to also bear in mind, M'Lord, that I was one hundred percent convinced in my mind that the only swell that was going to break anywhere near me that day would have been behind me and on my portside. And I never saw anything peaking or swirling or any indication of anything south or west of my position to give me any concern. And I would have been looking in that direction as I came in to pick my spot to lay anchor as well, M'Lord.'

[90] In re-examination, he was taken to this issue again. He made two points. First, he said, when he chose his spot, he motored around it for anything from five to 15 minutes focusing on the area in front of where the vessel was to lie. Secondly, he said that going into the swell to check depth would not have led to the discovery of the shallower area and the pinnacles because they lay to the west – in other words, off *Shark Team's* starboard bow.

[91] As far as spotting the pinnacles was concerned, Chivell was of the opinion that it would have taken sheer luck for anyone to have done so: one would have to sail directly over one of them with the fish-finder on and be watching it at the precise moment. This is so because the fish-finder uses a single beam trained directly downwards. That was why it was more important to read the sea.

[92] According to Zietsman, one pinnacle was about 37 metres from *Shark Fever* and the other was about 48 metres from *Shark Team*. One does not know how accurate these figures are but they will suffice as a rough guide. He explained that while the fish-finders on the shark boats use a single beam, the bathymetric survey was done with a high resolution multi-beam system that gives a swathe of the sea bed.

The wave and the capsizes

[93] In his judgment, Freund AJ expressed the view that the size of the wave that struck *Shark Team* was not relevant but he accepted 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'.²³

[94] It is, in my view, necessary to canvass the evidence concerning the size of the wave and its effect on *Shark Team*. It is noteworthy that, as I shall show, every person who saw and testified about the wave described it as extraordinarily large.

[95] Coetzee described the wave as unique and said that the unique thing about it was 'the size, the height and the white water that was going continuously non-stop for a long period of time'. Smuts said that he had seen waves of that size and bigger during north-westerly storms but on that day a light south-easterly wind, which usually flattens the sea, was blowing. Colyn said that the wave that capsized *Shark Team* was 'massive'. It had been put to him that in a consultation with the defendants' legal team, he had said that the wave was the biggest he had seen in the area. He conceded that he may have said so.

[96] Dix, the videographer on board *White Pointer*, testified that she was in the wheelhouse with Colyn when the wave struck *Shark Team* and that Colyn described it as a 'freak wave'. This made sense to her because 'there was nothing else after it really . . . it was just out of the blue'. She described it as a 'massive wave'. When asked what drew her attention to the swell, she said: 'Well, it was massive. It was massive. I'd never seen anything so big.'

[97] It was put to Coates, who investigated the capsize on behalf of SAMSA, that Tuckett had experienced nothing untoward at sea and then saw a 'wall of water' coming towards *Shark Team*, and he was then asked how *Shark Team* could have escaped in these circumstances. He answered: 'With a lot of luck, Sir.'

[98] Tuckett said that he had never seen a wave of that size in his life, before or since the capsize of *Shark Team*. He continued shark viewing in that

²³ Judgment of the court below, para 65.

very area after the capsize and has never seen a breaking swell of that nature there.

[99] Laird was on the bow of *Shark Team* when the wave struck. She estimated that it was about 10 metres high. (In an interview with 'You' magazine, she had apparently said the wave was about eight metres high but, in my view, little turns on this. On the basis of this discrepancy, the court below called her credibility into question. In my view, the discrepancy was immaterial.)

[100] Hewitt described the wave as 'this huge wave heading straight towards us' and said that 'you could hear it roaring'. He described it as being 'incredibly large'. He estimated its height to be the height of the White Shark Projects lodge – which was about 10 metres high. He also estimated the height of the wave to be about the same as the length of *Shark Team* – about ten to 11 metres. He had never seen a wave like that at the Geldsteen and had only seen something similar once before – 20 nautical miles off Cape Point in 'very, very rough conditions'.

[101] Scholtz referred to the wave as 'the freak swell'. He was on the viewing deck when he saw the swell which was 'out of the ordinary compared to the other swells'. It was catching up to a swell in front of it. Then, when the swell was 15 to 20 metres from *Shark Fever* it 'just suddenly became very big, just like rose up'. He told his passengers after the capsize that they had witnessed something that he as a skipper had never witnessed, either in that area or elsewhere. Finally, he described the swell as a 'freak swell' and as being 'out of the ordinary for me'.

[102] Towner was on the viewing deck of *Shark Fever* when she saw the swell that capsized *Shark Team*. She said that she saw 'a very, very large what can only be described as "a wall of water" coming towards us'. When asked about its size, she said she was on the viewing deck and 'I had to look up and actually strained my neck to look up at this thing'. In cross-examination, it was established that the viewing deck was about four metres

above the waterline and she was 1,6 metres tall – and she still strained her neck looking up at ‘this thing’. She described it as ‘significantly higher’ than the viewing deck and as a ‘very, very large wave, abnormally large’. She resisted estimating its height until she was pushed to do so by the court. She accepted that a swell of eight metres would be ‘extraordinarily large’ and said that this swell was ‘larger than 8 metres’: it was ‘certainly not something normal out there’.

[103] Wilcox was a passenger on *Shark Fever*. She described the swell as ‘massive’ and huge in comparison to anything they had seen earlier.

[104] Michael Rutzen did not see the wave. He was asked, however, if he had ever seen abnormally large waves in the Geldsteen area. He said that he had, on one occasion in 1998 when he ‘heard a big thunder’, a wave broke and ‘washed white water towards us’. He said that three to four metre swells are normal in the area where the capsizing occurred but the wave that capsized *Shark Team* was not normal.

[105] Chivell, the owner of *Shark Fever*, was not at sea when the capsizing occurred. In his view, it would have taken a wave of a height more or less equal to the length of *Shark Team* to cause her to capsize. He had never seen a wave of that size at the Geldsteen.

[106] Although Tuckett said that the wave had struck *Shark Team* head-on, other witnesses spoke of it striking the starboard bow. Tuckett appears to have been incorrect. Given that it is now known that the swell began to break on a pinnacle which was west of *Shark Team* and that it passed under *Shark Fever* which was off *Shark Team*’s starboard bow, it is probable that it struck *Shark Team*’s starboard bow – as Hewitt put it, ‘somewhere directly off the bow to slightly off the starboard bow’.

[107] Smuts described the wave as having pitch-poled *Shark Team*. By this he meant that it went over along its length. Coetzee said the same: that the wave flipped *Shark Team* over, bow over stern and that ‘the bow ended up in

the stern's direction upside down'. This is consistent with the evidence of Laird, who was on the bow of *Shark Team* when the wave struck. She said that it 'hit Shark Team on the bow and flipped it over, capsized the vessel'.

[108] It is clear from the evidence given by those who saw the wave that capsized *Shark Team* that it was extraordinarily large and was the only wave of its kind to be seen that day. Indeed, most of the witnesses testified that they had either never seen a wave of that magnitude or had only seen one once. Clearly, it was not the product of the prevailing swell: not a single swell, even those that were bigger than the norm, broke that day in the vicinity of *Shark Team*. Only one, or perhaps two, showed signs of feathering, but those were some distance beyond *Shark Team*, and astern of *Barracuda* – and posed no threat to *Shark Team*.

[109] Zietsman proffered an explanation for the large wave, what its probable size was and how it broke. His explanation is summarised in his report at the conclusion of an analysis of the swells and the wind conditions on 13 April 2008 and reads as follows:

'The most important findings of these analyses is that the crossing of the South West swell and the South East wind sea, at right angles, would create a wedging effect. Observers on the boat would have felt the relatively short period wind generated waves from the SE at a period of about 8 seconds and a wave height of 1.5 m. The much longer wave swell from the SW at about 14 seconds and a significant wave height of 3.5 m would have been less evident to someone on the boat, at least until the two coincided and created a superposition of the components.

The wedging effect would have resulted from the merging of the incoming swell from the South West with the wind sea from the South East. The combination of wind and wave swells is an infrequent occurrence and is only likely to occur at less than 2% of the time.

The confluence of these effects, together with the reflection of other waves from the NE (i.e. from the Gansbaai/Danger Point Peninsula) as modelled by ZAA, would have increased the most probable maximum wave height to give a swell of $H_s=3.5\text{m}$ (and most probable maximum height 7m) and when this is further combined with their localised superimposition at a point where the water depth is reduced, it would cause wave break.

The result of the combination of all these factors at the same time and same point most probably resulted in the wave breaking over the reef, which as noted in Section 2.2.1 above is a rocky outcrop to the north west of Shark Fever and to the west of Shark Team, where the water depth is about 5.3m LAT or about 6.5m at the time of the incident. We believe that it is this outcrop that caused the combined wind and wave swells coming from directions at right angles to each other to break. Shark Fever was able to avoid a potentially similar scenario because the wave had not yet broken as it was positioned to seaward of Shark Team and in deeper water.

In summary, if the wind sea had not been present from the South East and superimposed on the wave swell from the South West, with both occurring simultaneously and at a location where the water was shallow enough to cause wave break, then the possibility of the wave breaking when and where it did and the consequences for Shark Team would have been much reduced.'

[110] When Zietsman testified, he said that what made the wedging occur, and explains why this was a relatively rare phenomenon, was the confluence of the south-westerly swell of a particular height – over about three and a half metres – and a south-easterly wind of a sufficient velocity – capable of generating a wind swell. In other words, it is not a phenomenon associated with every south-westerly swell and south-easterly wind.

[111] Zietsman was not surprised to be told that neither Tuckett nor Laird aboard *Shark Team* were aware of any short period wind-generated swells, despite the fact that, he said, one could see in the video the effect of the wind swell in the rocking of the boats. People on the boats probably only noticed and experienced the larger swell and would not have been aware of the wind swell cutting across the sea swell.

[112] During the course of his cross-examination, Zietsman was asked whether, with the full knowledge at his disposal and with the benefit of hindsight which, it was conceded, Tuckett 'couldn't possibly have known', he would have thought it dangerous to lie where *Shark Team* had on the day of the capsizing. His answer was that on the basis of what he knew 'with hindsight, having done all this work, that under these conditions I wouldn't moor there'.

[113] The cross-examination proceeded thus:

'Now, I understand that and I understand, of course, that even you if you'd been out there as a skipper wouldn't have known all those things. --- Exactly.

And far less would Mr Tuckett have known all of those things. I understand that. --- Yes, I understand, M'Lord. Yes.

But you do accept that if hypothetically – and it would be a very strange scenario – if hypothetically one had all of that knowledge. --- Yes.

It would be apparent it's risky. --- Yes, you wouldn't moor in that location.'

[114] He was asked about how easy it was to identify the interaction of the sea swell and the wind swell. He said that although it was correct that the hump effect, where the two meet, was 'quite dramatic', nobody but he noticed it and nobody wanted to accept it. He said that 'nobody could see it' and it was only when he pointed it out that people noticed it. The cross-examination proceeded as follows:

'But what happens is, it is quite a dramatic effect if you're looking for it, as you said. --- Well, if you know what you're looking for.'

[115] That the phenomenon was not generally known about was clear from the evidence of Chivell. He testified that he had never experienced a cross sea on the Geldsteen but, if it occurred, that would be when the sea is very big as a result of a 'massive cold front'.

[116] Zietsman explained that the swell began to break on the deeper of the two pinnacles, which was closest to *Shark Fever*. In order for it to start to break, the swell had to be at least 8,41 metres high. (He departed from the rule of thumb that the break height of a swell is determined by the depth of water divided by 1,3 because other factors were present, such as the slope of the sea bed, which increased the break height.) He calculated the break height where *Shark Team* lay to be 10,81 metres. What stood out for him, however, was that the break continued even as the swell moved into deeper water. This attested to the size of the swell because, if it had been smaller, it would have reformed into a swell and passed under *Shark Team*. The fact that it continued to break confirmed for him that it was bigger than ten metres. He

believed that it would have taken a wave of that size to have capsized a boat of the size of *Shark Team*.

[117] It is perhaps not surprising that, on being asked what conclusions he drew from his evidence about the size of the swell and how it broke, he answered that it suggested to him that 'it was an unusual event'. He also was of the view that given the size of the swell, it 'would have broken whether or not that pinnacle of 7,2 existed'.

The court below's judgment

[118] In his judgment, Freund AJ's starting point was what he described as 'a fundamental question' as to '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'.²⁴ His key finding in this respect was that the reasonable skipper, with tourists on his boat and at anchor on 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'.²⁵

[119] On the basis of the evidence of the Meyers, the up-country passengers aboard *Shark Team*, as well as that of Smuts on *Swallow*, which lay astern and to the port of *Barracuda*, Coetzee on *White Shark*, the vessel at the northern end of the line of shark boats, and the hearsay evidence of Lennox, the skipper of *White Shark*, Freund AJ found that, on the probabilities, 'swells in excess of 4m must have passed *Shark Team* in the period preceding the capsize reasonably frequently' and 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'.²⁶

[120] He was 'in little doubt' that Coetzee and Lennox on *White Shark* 'regarded the conditions where they were in the period preceding the capsize

²⁴ Judgment of the court below, para 45.

²⁵ Judgment of the court below, para 51.

²⁶ Judgment of the court below, para 186.

of Shark Team as dangerous'²⁷ and that, on the basis of the evidence of Coetzee and Smuts, 'conditions where they were deteriorated alarmingly in the few minutes immediately preceding the capsize'.²⁸ He was prepared to accept that conditions may have been different where *Shark Team* and *Shark Fever* lay but regarded it as 'improbable that they were very different'.²⁹

[121] He found that, having regard to 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'.³⁰

[122] On this basis, Freund AJ found that there was force in the contention advanced on behalf of the plaintiff that Tuckett and his crew were not keeping a proper lookout in respect of the swell conditions as a result of complacency; that the swell conditions were large and threatening enough to serve as a warning to a prudent skipper and, that being the case, Tuckett should have 'foreseen that a wave breaking over Shark Team was a reasonable possibility'.³¹

[123] The crux of Freund AJ judgment appears in the following passage:

'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

²⁷ Judgment of the court below, para 152.

²⁸ Judgment of the court below, para 160.

²⁹ Judgment of the court below, para 162.

³⁰ Judgment of the court below, para 151.

³¹ Judgment of the court below, paras 187-188.

anchor and been at the wheel, and therefore, on the probabilities, in a position to avoid or “*punch through*” an approaching wave.

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

[124] Freund AJ held that because the Geldsteen is described in charts as being foul ground, ‘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’.³² A prudent skipper would therefore, he said, have ‘taken care to establish the depth in the direction from which the swell is proceeding’.³³ As Tuckett had not looked at the depth south and west of his chosen spot, he could not have known whether there was shallow ground in those directions, and so was negligent.³⁴

[125] The court then held that what was ‘considerably less clear’ was whether that negligence was causally connected to the capsizing³⁵ and whether, with the equipment available to him, Tuckett would have found the pinnacles had he explored to the west of his spot.³⁶ Freund AJ held that it was not necessary to make findings on these issues as he had already concluded that Tuckett had been negligent in another respect and that his negligence was causally linked to the harm. He suggested, however, that he inclined towards a finding of liability on this ground too.³⁷

Analysis

Factual findings

[126] Freund AJ accepted as more probable the evidence of the plaintiff’s witnesses and rejected as improbable the evidence of the defendants’ witnesses as to the sea conditions and whether they deteriorated. In particular, he rejected the evidence of Tuckett in its entirety. He also appears to have rejected the evidence of every witness whose evidence supported

³² Judgment of the court below, para 193.

³³ Judgment of the court below, para 194.

³⁴ Judgment of the court below, para 195.

³⁵ Judgment of the court below, para 196.

³⁶ Judgment of the court below, para 197.

³⁷ Judgment of the court below, para 198.

Tuckett's version. He accepted, and relied heavily on, aspects of the evidence of Zietsman as to swell heights.

[127] The factual findings of trial courts are presumed on appeal to be correct and will only be interfered with if they are the product of misdirection. In *Santam Bpk v Biddulph*³⁸ Zulman JA held:

'Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "becomes illusory" (*Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623H-624A). It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

[128] In my view, there are a number of criticisms that may be levelled against the judgment of the court below in respect of its assessment of the evidence and consequent factual findings. They amount to misdirections.

[129] The first is that the court below did not evaluate and assess the evidence of the witnesses properly. Freund AJ simply accepted the evidence of the plaintiff's witnesses and rejected the evidence of the defendants' witnesses without giving reasons of any substance as to why he preferred the one over the other: he referred to the probabilities as favouring one side and being against the other without justifying his conclusion.

[130] For instance, he stated that, having regard to the probabilities, the 'swell conditions prior to the capsizing had become noticeably dangerous and . . . the evidence of Tuckett, and those who supported him to the effect that the conditions were benign, cannot be accepted'.³⁹ He did not say on what basis he had decided that the probabilities favoured this conclusion,

³⁸ *Santam Bpk v Biddulph* [2004] ZASCA 11; 2004 (5) SA 586 (SCA), para 5.

³⁹ Judgment of the court below, para 151.

especially when it was accepted by all of the witnesses with sea-going experience that conditions differ from spot to spot, that Smuts and Coetzee could only speak about conditions where their vessels lay and that Tuckett had testified that he had chosen his spot precisely because it was calmer.

[131] In accepting the evidence of Smuts, Coetzee and Lennox that the sea condition was deteriorating Freund AJ overlooked the incorrect premise on which they based their opinion – the dropping tide. The evidence was that the capsizing occurred shortly after high tide. The tide could not have dropped significantly by then and certainly was not dropping when they claim the deterioration of conditions caused them concern. This undermines Smuts' evidence that 'with the tide dropping, the chances of swells breaking in that area were large'⁴⁰ and Lennox's hearsay evidence (to which, admittedly, little weight was attached) that 'with the tide dropping, it was not going to be good to lie around any of the reefs' and that '[o]n low tide the swell would pick up'.⁴¹ Low tide was still almost six hours away.

[132] All of this is gainsaid by the fact that the evidence of those aboard *Shark Team* and *Shark Fever*, the closest boat to *Shark Team*, was that they experienced no breaking swells over the entire period that they were on the Geldsteen – over two hours in the case of *Shark Team* prior to the capsizing, and more or less the same time, but both before and after the capsizing, in the case of *Shark Fever*. They also saw no peaking or feathering swells where they lay.

[133] The grounds upon which Freund AJ rejected Tuckett's evidence are flawed. They were that Tuckett had testified in chief that he had, on the request of his employer, filled in training logs after he had given crew members training and not contemporaneously, had not had the appropriate skipper's licence for a period while he skippered *Shark Team* and had been shown to be incorrect in his evidence that he had gone to the precise spot of the capsizing numerous times before in the weeks preceding the incident. He

⁴⁰ Judgment of the court below, para 76.

⁴¹ Judgment of the court below, para 88.

had filled in the training logs some time after the capsizing and the problem with his skipper's licence had occurred, and been rectified, about two years before the capsizing.

[134] These grounds accord no basis whatsoever for rejecting his evidence as a whole. Whether Tuckett filled in the training logs after the event, and not contemporaneously with the training being given, and whether he was properly certified as a skipper at some stage prior to the capsizing had no material bearing on his credibility and were irrelevant to the issues before the court. In the second place, there was no suggestion that Tuckett was untruthful. Ironically, his forthrightness in disclosing these facts seems to have been held against him and was used as the basis for a finding that he was 'not unwilling to mislead'.⁴²

[135] As for Tuckett's evidence about going previously to the precise spot of the capsizing, it must be borne in mind that he was testifying about six years after the capsizing occurred. When he was confronted with his boat's logs, they showed that in the five weeks or so preceding the capsizing he had been to numerous spots all over the Geldsteun including spots close to his position on 13 April 2008. He had an explanation for that too. He said that one could not always go to a spot because it could already be taken by another boat or the wind or the swell prevented one from lying there. He also said that in the previous winter months he had used that spot many times. It was not suggested to him in cross-examination that he had tried to mislead the court deliberately, as opposed to making a sincere mistake.

[136] Even if it were to be accepted that he had been untruthful about lying on the precise spot of the capsizing during the preceding five weeks, that does not mean that everything else that he said must be rejected: evidence can be 'good in parts'.⁴³ The ultimate question that must be answered 'is not whether a witness is wholly truthful in all that he says, but whether the court can be

⁴² Judgment of the court below, para 165.

⁴³ H C Nicholas 'Credibility of Witnesses' (1985) 102 SALJ 32 at 35.

satisfied . . . on a balance of probabilities in a civil matter, that the story which the witness tells is a true one in its essential features'.⁴⁴

[137] It is obviously so that Tuckett had an interest in the outcome of the case. That is not unusual at all. The matter concerns his personal liability and also affects his professional reputation. This does not mean that his evidence must be treated with suspicion, much less disregarded or discounted. It must still be dealt with on its merits, bearing in mind his interest.⁴⁵

[138] He was also criticised for downplaying the size of the swell on the Geldsteen on the day in question. His evidence in this respect is, however, consistent with the evidence of everyone else who was aboard either *Shark Team* or *Shark Fever* and who testified. There is no suggestion – much less evidence of – a conspiracy between all of these witnesses.

[139] Evidence of the swell size must also be viewed in its proper context. Throughout Tuckett's evidence he was at pains to say, when asked to estimate the size of a swell, that he found it difficult to do this, that he was taking an educated guess and that his estimates came with no guarantee of accuracy. All of the witnesses with sea-going experience confirmed that it is extremely difficult to estimate swell sizes, particularly from photographs and videos, and that the result may not be accurate. Not surprisingly, in the circumstances, the estimates of the size of the swell varied considerably from witness to witness: at one stage, Smuts, whose evidence was accepted and relied upon, spoke of an eight metre swell but his estimate was shown to be based on an erroneous assumption.

[140] I have read the evidence of Tuckett – and re-read parts of it more than once – and I can see no proper basis for its rejection. To say, as Freund AJ did, that he has a propensity to mislead is, with respect, neither borne out by the evidence as a whole and nor is it fair. He may be subject to criticism in certain respects, but his evidence was supported in all material respects, and

⁴⁴ Nicholas (note 43) at 35.

⁴⁵ Nicholas (note 43) at 37-38.

not only regarding swell size, by a number of witnesses who were aboard *Shark Team* and *Shark Fever*. I do not understand why that evidence apparently counted for naught and was rejected.

[141] If a reason for the rejection of the evidence of those who supported Tuckett's version is discernible, it appears to have been their supposed interest in a favourable outcome for the defendants, or sympathy for or loyalty towards Tuckett. This is especially so in respect of Towner, Tuckett's partner. I could find nothing in the record that established any hint of these forms of bias on the part of Laird, Hewitt, Scholtz, Towner, Dix and Willcox. In addition, Laird and Dix had had nothing to do with Tuckett for a number of years and Willcox did not even know him. Even if criticism could be levelled against some of the witnesses in some respects, their evidence taken as a whole constitutes an impressive, consistent and weighty edifice.

[142] Freund AJ accorded far too much weight to the evidence of the Meyers, and far too little weight to its deficiencies and their fairly made concessions. They spoke of windy conditions whereas every other witness spoke of a slight wind blowing. Their lack of sea-going experience made their evidence of deteriorating conditions worth little, even though I do not doubt their honesty. Their evidence of the conditions was vague. They conceded, fairly, that the crew would have had a better understanding of the conditions than them. Interestingly, Ms Meyer first thought that she had noticed conditions deteriorating when she was on the viewing deck where, because of its height above the deck she had been on, the movement of the boat is likely to have been exaggerated. Every other person aboard *Shark Team* did not experience any marked deterioration, and testified about a long, lazy swell, no breaking swells and no indications of peaking or feathering swells.

[143] This evidence is largely consistent with the weather forecast for the area for 13 April 2008 and with the observations of Christina Rutzen and Chivell from the shore. Every witness who went from Kleinbaai to the Geldsteen that day spoke of it being a pleasant and easy trip. The evidence accords too with the conditions that Michael Rutzen encountered shortly after

the capsize and that Dix spoke of at the precise spot of the capsize for about half an hour after the event. Zietsman's research reveals that if there was any deterioration in conditions it was marginal and would not have been discernible to the skippers at the time. The photographs taken after the capsize, particularly those depicting the rescue, show a calm sea.

[144] What precisely was the evidence of Smuts and Coetzee? Smuts was at anchor for sufficient time to complete shark viewing. He was probably about 150 metres away from *Shark Team*. *Swallow* lay astern of and north-east of *Barracuda* which lay in a spot which Tuckett had felt was too rough. Smuts testified that the swell was bigger than he had anticipated but said that conditions were 'threatening' but not dangerous. The threat was the dropping tide, which as I have discussed above was factually incorrect. He saw no swells breaking, although he spoke of some swells peaking. It would appear from his evidence that he believed there to have been a deterioration in the conditions in the five to ten minutes before the capsize. The threatening conditions could not have been a serious concern for him or else he would not have anchored and allowed shark viewing for nearly an hour and a half. *Swallow* was still at anchor when the capsize occurred.

[145] Coetzee's evidence of deteriorating conditions is similarly sparse. Boiled down to its essentials, it is confined to four large swells that came past *White Shark* shortly before the capsize and persuaded him and Lennox to abort their trip. Before that the vessel lay at anchor for about half an hour and was still at anchor when the wave struck *Shark Team*.

[146] It is not necessary, in my view, for the evidence of Smuts, Coetzee and Lennox to be rejected in order to accept the evidence of Tuckett and the witnesses who supported him. I say this because the evidence of Smuts, Coetzee and Lennox concerned conditions where *Swallow* and *White Shark* lay, some distance away from *Shark Team* and *Shark Fever*; and everyone accepted that conditions in the two locations could be different. By the same token, the evidence about the conditions they experienced cannot be taken to be evidence of the conditions that Tuckett, Scholtz and their crew and

passengers experienced. In my view, Freund AJ erred when he held that despite the evidence, the probabilities pointed to conditions being much the same in the two different spots.

[147] The only evidence adduced by the plaintiff of conditions where *Shark Team* and *Shark Fever* lay was that of Colyn who believed conditions to have been safe, even though he estimated the swell to have been about four metres in height. He never saw any breaking swells. He remained in the area of the capsized for about half an hour. He intended to put his cage down and to view sharks. The only reason why this did not happen, according to both Colyn and Dix, was that no one felt like viewing shark after the tragedy that befell *Shark Team*, not because it would have been dangerous to do so.

[148] In my view, for the reasons that I have set out, the evidence of Tuckett and those who supported his version should not have been rejected by the court below. The rejection of this body of evidence constituted a misdirection. Once that evidence is accepted, as it should have been, it establishes that there were no signs, in the position where *Shark Team* lay, that would have alerted a reasonable skipper to the possibility of danger.

Swell size and foul ground

[149] In my view, Freund AJ's starting point was an incorrect formulation of the test to be applied as to the foreseeability of harm when he stated that '[t]he swell conditions were sufficiently large and threatening that Tuckett should have foreseen that a wave breaking over Shark Team was a reasonable possibility'.⁴⁶ Earlier in his judgment he had said that the question was not 'whether the defendants could reasonably have foreseen a wave as large as the wave which actually capsized Shark Team' but whether 'the conditions were such that the skipper could reasonably have been expected to foresee the risk of a wave breaking over Shark Team'.⁴⁷

⁴⁶ Judgment of the court below, para 188.

⁴⁷ Judgment of the court below, para 65.

[150] In the light of the facts of this case, and in line with the flexible approach advocated by this court in *Sea Harvest*,⁴⁸ a more precise formulation of the harm that should have been foreseen by Tuckett is required. He should, in order to be held culpable, have foreseen the possibility of a wave breaking that was sufficiently large to capsize a boat of the size of *Shark Team*. That, according to Zietsman, could not have been achieved by a south-westerly swell on its own: in the prevailing conditions such a swell could not achieve the required size.

[151] The incorrect formulation led Freund AJ to focus on the swell size as the determinant of foreseeable harm. All of the evidence of those with sea-going experience was that swell size on its own is not the problem: shark boats could work in big swells as long as they were long swells, as was the case on 13 April 2008. The danger lies in the swells breaking. The signs that this may happen — and that the potential for danger is present — are either swells starting to feather or to peak.

[152] The focus on swell size led Freund AJ to take a swell size of four metres as some sort of safety cut-off. He then proceeded, on the basis of Zietsman's conclusions as to the significant wave height⁴⁹ to find that the four metre cut-off was exceeded, not on the basis of the significant wave height (which he had calculated to be in the region of three metres) but the assumed maximum wave height of twice the significant wave height. By doing this, he reduced what is really a matter of judgment by experienced skippers with local knowledge who take into account a range of factors, into a simplistic, formulaic process — when the swell is four metres, it is time to leave. What is worse, he calculated the cut-off according to the maximum wave height, rather than the significant wave height. In other words, on this approach, shark boats should return home if the significant wave height is two metres because the maximum wave height will be about double that. This is entirely unrealistic: if this were the standard that skippers had to adhere to, the shark boats would never put to sea. It is also unconnected to the foreseeability of

⁴⁸ Note 16, paras 22-24.

⁴⁹ Significant wave height is a concept used to describe the sea state. It is the average of the one-third highest swells over a period.

any harm eventuating: some of the witnesses testified that one can have a dangerous sea with a small swell and a perfectly safe sea with a much larger swell. It will often depend on the period of the swell (and other factors like wind).

[153] In fixing on the size of the swell as the determinant of imminent danger, he appeared to ignore the obvious safety measure of skippers making sure that their boats lie in sufficiently deep water. The rule of thumb of the shark boat skippers was that anything deeper than nine metres was good enough and considered safe. He also ignored the evidence that at the spot where the capsizing occurred, no swells had broken that day or looked like breaking, and generally did not break, except in very big seas, when nobody would be at sea anyway.

[154] He attributed a great deal of importance to the *Barracuda* video in particular. It showed a limited number of big swells astern of *Barracuda* and a bit of feathering on one of them. This video has limited value because *Barracuda* was probably about 120 metres astern of *Shark Team*: the fact that the vessels astern of her may have seen danger signs, does not mean that Tuckett should and could have, being some distance ahead of *Barracuda*.

[155] On the other hand, Freund AJ made no mention of the fact that on both the *Barracuda* and *Shark Team* videos one sees passengers and crew moving around with ease and comfort, and a stable deck. Despite referring to the affidavit of the videographer who made the *Barracuda* video stating that the two big swells visible in the video appear more dramatic than they were,⁵⁰ he simply discounted this evidence⁵¹ and relied on the video as a primary piece of evidence of deteriorating conditions. My colleagues and I have also viewed the video and do not share Freund AJ's observations.

[156] Freund AJ made much of the assertion that the Geldsteen is inherently dangerous because it is foul ground. In this he read too much into the concept

⁵⁰ Judgment of the court below, para 144.

⁵¹ Judgment of the court below, para 159.

of foul ground. As a number of witnesses testified, it signifies an uneven sea floor that creates difficulties for anchoring but if a skipper places his or her boat in a sufficient depth of water and is careful to anchor properly, it poses no dangers. He also read too much into the evidence that breaking waves are experienced all over the Geldsteen in bad conditions. In the type of circumstances when the waves break all over the Geldsteen, no one puts to sea.

Conclusion

[157] The evidence establishes that at the spot where the capsizing occurred, there were no danger signs that would have alerted a reasonable skipper to the need to depart in order to avoid the harm of a sufficiently large wave breaking, capsizing the boat and causing the death of a person. To this must be added the evidence of Zietsman that the south-westerly swell on its own could not have produced the type of wave that could have capsized *Shark Team*. Negligence on the part of Tuckett has thus not been established in this respect.

[158] Even if the evidence of Smuts and Coetzee as to warning signs of danger is accepted, then another issue arises. According to both witnesses, the deterioration occurred over a short period – what Chivell and Zietsman would regard as impossibly short periods. Both Smuts and Lennox had decided, in the light of the warning signs they had just seen, to leave. They had not had time even to weigh anchor when the capsizing occurred. If they are taken as the epitome of the reasonable skipper, then the warning signs came too late for Tuckett. Even if he had the same knowledge as them, the wave would have struck *Shark Team* before he could have weighed anchor. He could not have avoided the catastrophe. So, on these facts, which are favourable to the plaintiff, causation would not have been established.

[159] The evidence establishes that no one knew of the pinnacles, that it would have taken sheer chance for anyone to find them with a single-beam fish finder, that all of the skippers believed from past experience that where *Shark Team* lay was safe and that no signs of danger were seen there at the

time or before. On this basis, a reasonable skipper would have believed that he or she was lying in a safe spot: the depth where *Shark Team* lay was 11 metres and there were no indications of shallower water, and nor would there have been as a result of the depth, size and shape of the pinnacles. It would have made no difference if Tuckett had motored into the swell – in a south-westerly direction. The pinnacles lay to his west and as the swell was not coming from that direction, no danger could reasonably have been foreseen from that quarter.

[160] The evidence establishes, thus, that a reasonable skipper in Tuckett's position would not have known of the pinnacles, would have had no way of knowing about them and would have believed himself or herself to be safe in the position where *Shark Team* lay. He or she would have done no more than Tuckett had done in motoring around his or her chosen spot with the fish-finder on, and would have had no reason to explore further to the west where the pinnacles were. Consequently, negligence on the part of Tuckett has not been established in this respect either.

[161] Furthermore, the evidence of Zietsman was that the wave that capsized *Shark Team* was so big that it would have broken in the deeper water whether the pinnacle was there or not. That establishes an absence of causation, even if negligence had been established.

[162] The wave was extraordinarily large. Its origin, it would appear, was not the south-westerly swell but the confluence of that swell, when it had attained a critical height, and the south-easterly wind, when it had attained a critical velocity, resulting in a wedging effect – a relatively rare occurrence and one that was unknown to even the most experienced of the skippers who testified. From the evidence of Zietsman, a civil and ocean engineer of immense experience, who identified the phenomenon with some difficulty, it may be concluded that a reasonable skipper in the position of Tuckett could not have been expected to know of this phenomenon, would not have known when the sea swell and wind had reached a critical height and velocity respectively, and would not have been able to recognise the signs of the phenomenon, let

alone guard against the risk it posed. On that account, negligence on the part of Tuckett has not been established in relation to this issue either.

[163] As a result of my conclusions on the negligence issue, it is not necessary to deal with the second issue, whether or not White Shark Projects' liability was limited in terms of s 261(1)(a) of the Merchant Shipping Act.

[164] The appeal must, accordingly, succeed.

The order

[165] I make the following order:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court below is set aside and replaced with the following order:
 - '(a) The plaintiff's action is dismissed.
 - (b) The plaintiff shall pay the defendants' costs, including the costs of two counsel and the qualifying expenses of:
 - (i) Dr John Zietsman;
 - (ii) Mr Michael Fiontann Hartnett;
 - (iii) Professor Michael Tipton;
 - (iv) Dr Cleeve Robinson;
 - (v) Mr Robert Fine;
 - (vi) Mr Wilfred Chivell; and
 - (vii) Dr Linda Liebenberg.'

C M Plasket
Acting Judge of Appeal

APPEARANCES:

For Appellants:

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