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LOST AT SEA

OR IS THAT LEFT AT SEA?

AGAIN AND AGAIN...

BY PETER MEYER

A Los Angeles attorney called recently to ask if I'd heard about the 'latest' diver to be left behind in open water by a charter boat crew. I hadn't and quickly started asking questions. Currently, we (Willis Canada, Inc., insuring dive industry businesses worldwide) are in the midst of a lawsuit with the 'previous' diver left behind, in California waters, and I was not pleased at the prospect of having yet another on my hands. These recurring incidents disturb me mainly because they are so avoidable. I felt compelled to air the subject.

The previously mentioned case involves a dive charter vessel that left behind 'Drifting Dan' (as he is now known), in California coastal waters in April 2004. Dan is suing multiple parties involved in his drifting adventure. The interesting thing is that Dan was recovered, presumably intact, later the same day he was left behind and absolutely nobody thought there was a lawsuit coming. While we know 'ambulance chasers' are watching for stuff like this, none of us were prepared for the magnitude of Dan's USD\$4 million demand for pain and suffering (and more), which I'll discuss later.

Before we go any farther with Dan's story, let me outline some of the standard issues we deal with during litigation of this type. An injured



party is entitled to recover 'damages' from the person(s) causing the injury through negligence. Basically, the damages are pecuniary, or economic, such as loss of employment income, resulting expenses etc., and non-pecuniary or non-economic, including emotional distress, loss of consortium (losing the affection of another, inability to engage in the sexual act, etc.).

In the insurance game, we generally calculate claims exposure or damages, in a cold, mathematical fashion. For instance, when someone sues one of my clients for bodily injury

or wrongful death (from a diving accident), first we determine if there was negligence. If none is apparent we proceed with a defense against the action. If there were obvious negligence, we'd strive to make an equitable settlement with all involved (no point denying the obvious).

Arriving at a settlement requires that an economist determine the financial 'loss' or damage accompanying physical loss (i.e. the injury or fatality). I told you it was cold and calculating. Generally, the plaintiff's economist puts up a high number and ours puts up a low number and the negotiations begin. Settlement agreement negotiations can cover a wide financial spectrum from a huge starting sum to something much less. Some years ago we had a triple diving fatality case where the plaintiffs' opening demand of USD\$9 million was settled (on the courthouse steps just like on TV) for around \$400,000. So, it's often no surprise when a huge demand is made for something we may consider relatively minor.

The final settlement is generally a valuation of the sum of economic and non-economic damage. Here's a sample calculation: a 40-year-old worker making \$50,000 a year would have basic economic damages of \$1,250,000 ($\$50,000 \times 25$ years). That's the 'reserve' we put on the



file. It's actually more complicated (pre-payment discounts etc.), but you get the idea. Non-economic damages make things more interesting; how do you calculate the loss of consortium (value) to the deceased or injured party's spouse, family, etc? What exactly is the lack of emotional and physical (read sex) consortium worth?

So back to Drifting Dan who was, indeed, left behind by the dive boat he chartered (with others) but who was recovered five hours later apparently in good condition after drifting aimlessly in a fog-shrouded sea. The primary motivation of his USD\$4 million suit, the document states, is to prevent such an incident ever happening to another (unfortunate) diver. Personally, I don't have a problem with Dan trying to improve diving safety; I just can't get my head around the need for \$4 million to make this right. The dead guy used in the example above wasn't worth nearly that.

Things are not always as they seem, however, and when you read the actual complaint documents, it turns out this case is really about: 1) negligence; 2) intentional infliction of emotional distress; 3) negligent infliction of emotional distress; 4) breach of fiduciary duty; 5) breach of contract; and; 6) fraud and deceit.

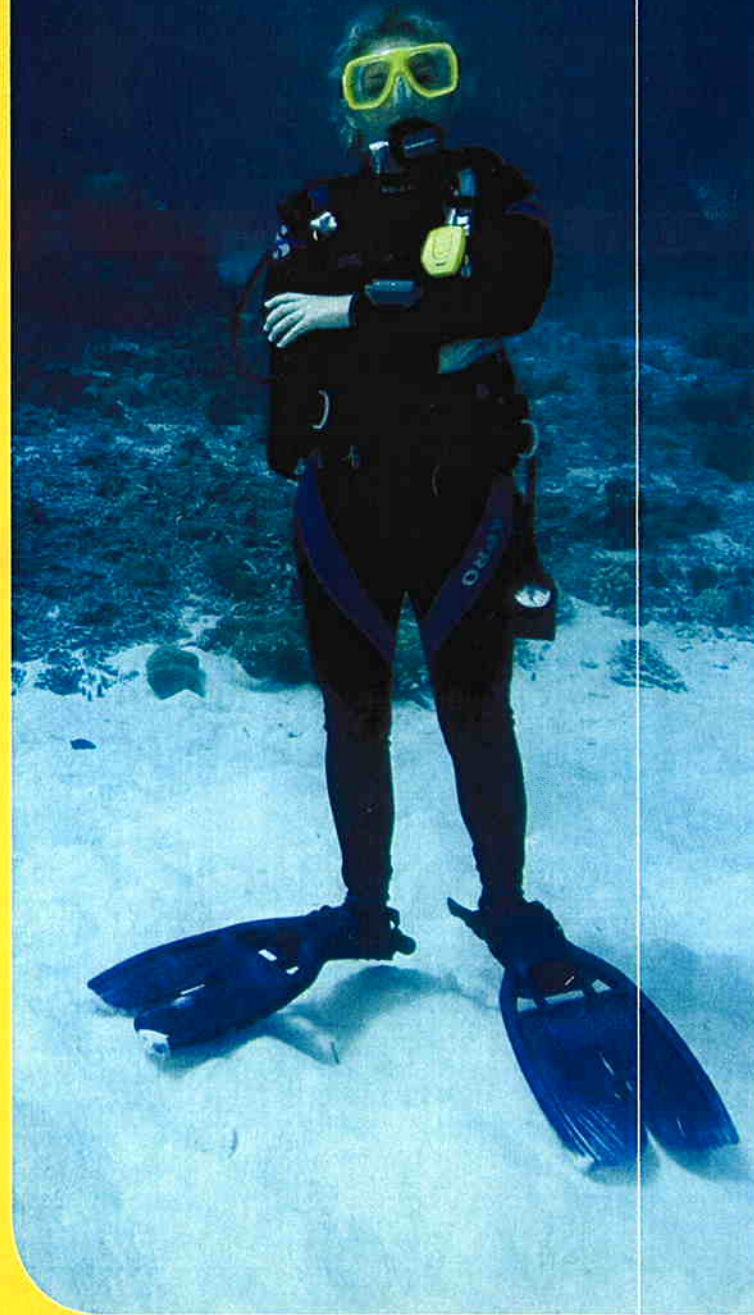
The negligence, breach of fiduciary duty and breach of contract issues are hard to argue against, unless you think leaving this guy behind was acceptable? The other issues seem a little more complicated. The intentional infliction of emotional distress and fraud and deceit allegations suggest pre-planning or collusion by the other adventurers on the vessel. Oh yes, lest I forget, Dan also claims to have developed skin cancer during his five-hour float and seeks compensation for that, as well. I'm not an expert in dermatology, but I figure if floating around (in the fog) for a few hours (in a wet suit) are all it takes, then most divers would be similarly afflicted by now. Also, my dermatologist tells me the skin cancer we suffer today was produced 10 to 15 years ago or more, so this claim bears scrutiny.

The fraud and deceit allegations emerge from Dan's belief that the boat crew intentionally lied about his location when reporting him missing to the Coast Guard. Public statements to date suggest the dive master signed Dan back on the boat after the first dive (when he was actually still diving), signed him into the water at the next dive site about 10 miles (16km) away and, finally, raised the alarm when he did not return after the second dive. The Coast Guard was then notified and a search commenced, in the wrong location.

As luck would have it Dan was spotted and rescued by a Boy Scout training vessel later in the day. Some confusion ensued when Dan's rescue was

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radioed to the Coast Guard who thought he (Dan) was a second lost diver. The misunderstanding took some time to figure out and was at once comical and scary, from a legal point of view, had Dan actually been injured or lost forever. Anyway, Dan is alleging that the dive master and crew knew he was back at the first site and lied about it. Why would they do that? I have absolutely no idea, but it makes for great reading.

Anyway, let's get back to the matter of damages. If Dan had died what would he be worth? Well, he is around 40 and is an engineer at an aircraft manufacturer, making pretty good money, so doing the normal math, let's say we could legitimately calculate real damages at around \$1.5 - \$2 million if he had died. I guess his attorney feels his non-economic damages must be worth another \$1.5 - \$2 million to get at the \$4 million total. Is it possible that this lawsuit may be both motivated by and exaggerated to generate an increased award? (Be still my cynical mind!)

Unfortunately for all of us in the dive industry (because costly settlements increase premiums for everyone), the likely scenario is that the various insurers representing the dive buddy, the dive vessel, the dive masters and the instructors involved, will vigorously defend against Dan's allegations while looking for the cheapest way out (i.e. avoiding the legal fees a two to three year court battle will cost each of them). So, you guessed it, in the end they'll likely offer money (a settlement) to avoid the expense of litigating such a convoluted case.

And that outcome, ladies and gentlemen, is the most obvious reason for the suit in the first place. It's hard to blame Dan (and his attorney) for trying to cash in on inexcusable negligence, whether or not he sustained injuries. This case will make interesting reading for some time and the industry will be well aware of the end result when it finally arrives, unless, of course, the dreaded 'confidential' settlement rears its head.

The legal ramifications of this case are noteworthy given the large financial claim. And, the record shows Dan is not alone when it comes to being left behind at sea. Run an Internet search on 'lost diver', 'missing diver' etc., and I think you'll find

Mens Journal Adventure

Stranded!
Think being left at sea by a dive boat happens only in the movies? Think again.

It didn't take long for Dan Carlock's dive to turn potentially fatal - but it took him a while to realize it. The 42-year-old Los Angeles man booked the Scuba boat Sundiver in Newport Beach, California, on the morning of Sunday, April 25, bound for an off-island water site. He planned to explore the platform's 700-foot legs with his dive buddies, but as he descended he couldn't equalize the pressure in his ears. Carlock surfaced to find himself alone, surrounded by fog with no boat in sight. He assumed the Sundiver crew came looking for him, but the dive master had booted the roll call and thinking all his clients were enroute moved on to another site without any realizing that Carlock was missing. As the hours passed, Carlock drifted, and last hope, he began snapping photos of himself to document what he was sure was his imminent death.

The possibility of being left in the open sea ranks among a diver's worst nightmares. The fear is bound to spread this summer, with the release of *Open Water*, a two-hour indie film that's being called the *Blair Witch Project* of the sea. As one character says in a journal after they've both been left adrift: "It happens more often than you'd think."

In fact, situations like Carlock's are far from uncommon. "In the last five years I've heard of only four or five cases," says Captain Michael Kari, chief of the U.S. Coast Guard's Office of Investigations & Analysis.

The real-life drama that inspired *Open Water* took place off the coast of Queensland, Australia. In January 1998, when Louisiana couple Thomas and Eileen Lonergan disappeared on the Great Barrier Reef after their boat crew bumped a reef wall, the alarm wasn't raised until two days later, after the captain discovered the Lonergans' belongings in a dive locker. Despite a massive search effort, they were never found. Ten days later some of their gear washed up 43 miles down the coast, and six months later a diver found a message in a drifting message. PLEASE HELP US OR WE WILL DIE. JANUARY 26, 8:00 AM

What can you do to make sure this doesn't happen to you? In the wake of the Carlock accident, the coast guard called upon the Professional Association of Diving Instructors (PADI) to institute procedures for dive masters, such as written checklists or numbered wristbands, to make sure all divers are aboard at the end of each dive. Meanwhile, the Divers Alert Network is prototyping a Diver ID System, in which a

■ In the wake of his drifting adventure, Dan was in the media spotlight. This report in *Mens Journal* was among many appearing in the media.

it happens on a fairly regular basis. Many of you will also be familiar with the recent movie *Open Water*, about two divers left at sea by a charter boat whose crew simply miscounted heads before leaving the dive site. Discovery of the missing divers' personal belongings aboard the dive boat more than a day later, raised the alarm, but the divers were never found. It's widely accepted that this movie is based on the loss of American divers Thomas and Eileen Lonergan, in Australian waters, a few years ago. Its release caused quite a stir, especially in the dive industry. I just had to buy the DVD version for my collection and was struck by the realistic portrayal of how simple it is to lose track of divers on a recreational outing. In the movie some 'into the water/out of the water' confusion involving a single diver and a couple who were buddies, results in an erroneous post dive count by the dive master. No formal conclusion was reached concerning fate of the couple. The movie suggests they became shark food. Obviously, the examples outlined here are the result of poor procedure checking divers in and out of the water and/or incompetence on the part of those running the operation. In Dan's case, the dive master conducting a verbal roll call swears someone either answered for Dan when his name was called or said that he was on board. A formal

sign out/sign in procedure of some kind (i.e. all divers have to personally sign off to confirm their presence on board) would have prevented this incident.

Where was Dan's buddy you ask? Well, he was on the boat at the time, but did not know Dan well and does not consider himself to be responsible for his buddy. Many California divers hold firmly to their right to dive solo and, even when placed in buddy pairs, pretty much abandon each other as soon as they get into the water.

The unfortunate part of the Drifting Dan saga is that this easily remedied - yet recurring - problem of leaving divers behind is going to be overshadowed by greed. The industry will (rightfully) downplay the incident because it is so outrageous. And, what about Dan? Isn't it obvious he's just a money grubbing opportunist whose concern for diving safety is anything but genuine? The real issue of divers being left at sea will itself be left behind as he makes his rounds of the talk show circuit; it's the all too familiar media circus.

Regardless of how Dan fairs in this matter, all dive operators (and insurers) around the world need to pay attention to the outcome. It will be precedent setting. There are too many cases of divers being left at sea and, unlike Dan, never being found. A wake-up call is needed. Charging people money to take them diving carries a serious responsibility. Failsafe procedures should be in place to ensure such incidents cannot occur. Of course there are responsible operators out there whose tried and true methods guarantee divers are accounted for, but how can we tell who they are in advance? The last thing I want is to surface on an empty sea far from land.

I can relate a first hand experience of divers being left behind that occurred some years ago here in British Columbia, in Active Pass. We had just come down from Porlier Pass in my own charter boat, *Sea Venturer*, to dive Enterprise Reef. On arrival I noticed bubbles in the planned dive area so I simply backed off until the divers already below surfaced. When they did they quickly swam over to our swim grid only to discover that we were not their charter boat, which a couple of radio calls revealed was already en route to Vancouver. Likely, these two divers were in no



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serious danger even if we hadn't come along since boating traffic in the area is heavy and they would have been rescued in short order (but that's not the point). That situation is not like many (perhaps most) other dive destinations where the open ocean beckons.

It's been almost 20 years since that incident took place but trust me divers are still being left behind regularly in many parts of the world. A recent Internet search I conducted (while researching another of our current cases, this one concerning two lost divers in Costa Rica), I came across these sobering articles: "Left Behind to Drift at Sea." "Every Diver's Nightmare." "Lost Diver Kept Her Wits and Survived." "Divers Drift 45 Miles and 14 Hours in the Red Sea." "Sixteen Divers Surface to Find Boat Missing." "25 Hours Left at Sea." The list goes on. Try a couple of searches yourself and you'll have reason enough to be nervous about entrusting your safety to some operator who may even be connected to those mentioned in these media reports.

What's just as disturbing is the attitude of (dive industry) officials toward this situation. Here's the comment of a spokesperson for a group of Australian marine park tourism operators, when asked what impact the film *Open Water* might have on their businesses: "It's a work of fiction and I don't think we need to read too much into it." Excuse me but wasn't the movie based on a 'real' incident in your own back yard? Another comment: "It's not indicative of our industry. These kinds of events are rare." In my opinion there are too many cases of divers being left behind for them to be considered "rare."

Before *Open Water* hit the cinemas DEMA Executive Director Tom Ingram said "we rarely have the opportunity to respond to events portrayed in a movie in advance of its release and support the industry by dispelling myths created by cinematic fiction. In reality, diving is a safe and enjoyable sport. While this movie is a heart-pounding thriller, it is a fictionalized account of what could have happened in the most extreme confluence of unlikely events."

So, according to DEMA, it was the "most extreme confluence of unlikely events" that gave us Drifting Dan, the loss of the Lonergans, the movie *Open Water*, the 'Aqua Nuts' settlement in Florida where two divers were adrift for 25 hours, the five divers missing off Sri Lanka in 2002, the two British divers left behind in the Red Sea while their vessel headed for port, my own Active Pass experience and numerous others?

I'm sure there will be people who've looked at the movie and said, "I don't think I should go diving." And, well, maybe they shouldn't. Maybe they should stick to knitting because, after all, if they choose to dive they must accept the risk of being left behind by an incompetent operator?

The last thing this industry should do is to ignore these events. Call me old fashioned, but I don't think being left behind by a dive charter boat should be considered an inherent risk of the sport. The next time you head out for a boat-based diving adventure, remember the saga of Drifting Dan and be prepared to check out the operator carefully and completely. You might also want to beef up your own personal survival gear to include some modern signaling equipment (safety sausages, EPIRBs etc.) and make sure you make enough of an impression on board so that your absence will be conspicuous!

My sympathies go out to Dan for the harrowing experience he endured. Still, it's too bad he had to be so excessive in his demands, because it may actually prevent the dive industry from paying attention to the real problem. While Dan's ultimate motivation may be for some easy money, he could argue (others in his defense might also) that he is suing for a shitload because it is the most dramatic, media-appealing way of 'drawing attention' to this problem and, thereby, effecting necessary change in operational procedure that may even come in the form of local/national legislation.

I personally feel it won't affect the dive industry at all, but I am sure it will add a few zeros to his bank account somewhere down the road. Real change in operational procedures will only be forced if the rest of us insist on them every time we go diving. ❖

Peter Meyer is the Senior Vice President of Willis Canada, Inc., providing insurance to a broad spectrum of dive industry constituents that include retail dive facilities; dive vessel operators and diver resorts worldwide; scuba instructors, dive leaders and the general diving population. Since 1988 he has been a leading consultant for the dive industry and currently manages the professional liability programs for several dive training agencies and hundreds of retailers, resorts and vessel operators. He has been involved in recreational boating and scuba diving his entire life, having owned and operated two retail dive facilities, two live aboard dive charter vessels, and having taught recreational diving at all levels for many years.



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