

# THE OBLIGATIONS TO RECOVER FISH LOST AT SEA

BY MARTY LOGAN



A recent fisheries prosecution raises important practical issues for commercial fishing vessel operators, and may well have implications for recreational fishers.

The decision in the Rotorua High Court dealt with the unfortunate issue of commercial fish species that a commercial fisherman accidentally lost at sea.

There are occasional reports in the media of trails of dead fish being found on the surface, and these reports often elicit emotional responses from fishers and members of the public who are upset at the apparent waste of a valuable resource. The decision was an appeal from a conviction in the District Court.

Given that we acted for the defendant in this matter, and for commercial fishers on a regular basis, it may be said that our views are somewhat coloured. However, with respect to the court, we believe this judgment raises a number of practical problems for commercial fishers, and puts them in the position of having to make difficult legal decisions while at sea.

Firstly, let's deal with what occurred. There was some dispute in the District Court as to the facts, but for the purposes of legal analysis it was accepted that events unfolded as follows.

A trawler was trawling near the western side of Whale Island in the Bay of Plenty when she snagged a log in her trawl. The trawl was torn by the log and as the net was hauled in, some of the catch, mainly snapper, was expelled from the net.

By this stage some or all of the snapper had sustained mortal injuries as a result of their time within the trawl, and after they escaped from the net they remained on the surface.

The skipper was aware of fish behind him but did not take any steps to retrieve the dead fish. A charterboat was operating in the area and an honorary fishery officer was at the helm. The charterboat collected about 20 of the snapper.

The commercial vessel asked for the fish back, but the charterboat operator refused and reported the incident to the Ministry of Fisheries. The fishing permit holder did not report the lost snapper on its catch landing return.

Following this incident, two charges were laid, one under the "anti-dumping" provisions of section 72 of the Fisheries Act, and the other under the Reporting Regulations.

The permit holder had failed to comply with regulation 6(2)(a) of the Fisheries (Reporting) Regulations 2001 because the snapper should have been included in the catch landing return by entering the destination code A, for fish returned to, abandoned in, or accidentally lost at sea.

The defendant pleaded guilty to the reporting charge but defended the abandonment charge, on the basis that the fish had been accidentally lost through no fault of the fisher and that there was no requirement to try and retrieve fish that had been accidentally lost.

Section 72 provides that no commercial fisher shall return to, or abandon in the sea, any legally sized quota species. This prohibition is subject to a number of exceptions that are not relevant here. The fish had not been deliberately returned to the sea. The only issue is what is meant by abandoning fish at sea.

The defendant argued that the fish had not been taken because they had not been brought on board the vessel. It was argued by extension that if the trawler had not taken them then they could not have been abandoned.

It was held that technical taking was not necessarily required. Instead, the elements were that if the fish had been killed by trawling, had then been lost at sea and the vessel operator had not taken reasonable steps to retrieve the lost fish, then this amounted to abandoning them.

Alternatively, the court found that the taking was complete once the fish were in the trawl net. This was on the basis that the net either removed them from the natural environment, or prevented them from moving unrestrained within that environment.

On the first point, the need now to take reasonable steps to retrieve any fish lost at sea will raise all sorts of difficult practical issues for operators.

Trawlers are not purse seiners and are not set up to recover fish from the surface. What will amount to reasonable efforts and what is "reasonable" to be measures against?

For example, would the commercial value of the lost fish be relevant to the scale of effort required, and what equipment should be reasonably carried for this purpose? The skipper at sea will be forced to make on-the-spot decisions in often difficult conditions that can expose him to prosecution.

With regard to the second point relating to when fish are taken, this also could have wide-ranging ramifications. Essentially, the fish are taken as soon as they swim into the net. By analogy, the High Court decision is now clear authority for the proposition that as soon as a fish has a hook in its lip it is taken, and there is no need for the fish to actually be brought on board a vessel and secured before it can be said to be taken.

This raises issues in the recreational context as to when you have taken your bag limit, particularly on a day when a number of "big ones" have got away during the fight to the surface. We believe this is a matter that will have to be clarified further in the future, possibly by changes to legislation.

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