Collecting Data and Investigating a Diving Accident: Focus on the European Law

Maître François Jaeck
Avocat à la Cour[1]
Executive Director of DAN Europe Legal Network
4 Place Guerry - BP 30217
41006 Blois Cedex, France

Recreational diving accident litigation and the tightening of case law has contributed to a major liability exposure change in Europe, resulting in the need for all parties to collect evidence and make genuine investigations into the causes of an accident if they want to be suitably compensated or not be held liable through lack of evidence. Force majeure and the admissibility criteria have also changed. Not only is irresistibility of an event a factor, but the demand that proof of unforeseeability must now also be brought. A review of the new European liability regime is discussed and its effect on dive professionals and package travel considerations. A complete reversal of the burden of proof is now the norm, since henceforth tourism professionals are ipso jure responsible for any injurious event occurring during a consumer's holiday.

"A complete reversal of the burden of proof is now the norm, since henceforth tourism professionals are ipso jure responsible for any injurious event occurring during a consumer's holiday."

Introduction

Recreational diving, as we understand it today — i.e., using self-contained underwater breathing apparatus (scuba) — while presented in Capt. Cousteau's works[2] in the most enchanting light, is still widely regarded in Europe as a risky activity to the extent that it has been decreed as such under certain states' legislation.[3]

This notion is supported by the legal regulations issued under the Civil Code, generally recognized in Europe, under the terms of which responsibility falls to dive accident victims (who are deemed to have accepted the risks of this activity) to establish the fault or negligence[4] of a third party to attempt to get compensation from said party.[5] Consequently, recreational diving activity organisers have also traditionally rarely been concerned with establishing the real cause of a death that occurred during diving activity, considering — rightly, under law — that it was up to the victim to establish any possible fault or negligence. These principles are still legally valid in the possible event of action on the part of the victim or victim's beneficiaries against the professionals supposedly responsible.

We have, however, seen a tightening of case law[6] with regard to the conditions of admission of cases of force majeure, or those in which fault or liability on the part of the victim are liable to exempt the professional. This compels the professional to engage in actual investigations if he or she justifiably foresees the possibility of one of these two causes of exoneration of their own responsibility being validly raised.

Moreover, since the 1990s, the situation in Europe has undergone a complete reversal because the victim has acquired this recreational diving provision as part of a "package travel" deal. In fact, the drive to protect consumers and make it easier for them to claim compensation led the Council of Europe to adopt Directive 90/314/EEC[7], which completely reverses the burden of proof in existing relationships between tourism professionals and European consumers. This about-face fundamentally changes the attitude that the organizer of deep-sea diving holidays must take when a recreational diving accident occurs.

Force Majeure: The Tightening of Admissibility Criteria

The traditional legal definition of force majeure was simple: an external, unforeseeable, irresistible event that exempts the (legally) liable party of all responsibility. This cause exempting responsibility is generally admitted under all legal systems, whether they be based on common law or civil law. However, in Europe we have seen, born of a concern to provide greater protection for the victim against the professional, a tightening of the conditions of admission under law of this responsibility-exempting circumstance.

In the past, it only required that an event be "irresistible" for force majeure[8] to be invoked. (In 2002, for example, the French Cour de Cassation[9] — final court of appeal — decided that the death of a renowned lecturer constituted a case of force majeure solely on the basis of the irresistibility of such an event.) Now, however, the courts demand that proof of unforeseeability must also be brought.[10] In such a case, a large wave caused a sudden movement of the dive boat, causing a diver to fall. The court of appeals[11] decided that despite the wave being irresistible, it was nevertheless not unforeseeable.

Similarly, although not directly connected with a dive accident, the Jolo hostage case is indicative of the European courts' concept of force majeure. During a diving holiday purchased from a travel agency in Sipadan, Malaysia, a group of tourists were attacked at their hotel on April 23, 2000, by a gang of armed men who took them at gunpoint to the island of Jolo in the Philippines. They were held with some 20 other hostages for several months by the rebel Islamist group Abu Sayyaf. Some of these tourists were French, who, once freed, took out legal action in France on the basis of the French law of July 13, 1992. (The EC Directive below describes the text that transposes into French law.[7]) The travel agency had argued, quite logically, for the existence of a case of force majeure. The French courts, both initially (2006) and on appeal (2009), found against them on the basis that a hostage-taking situation was not unforeseeable,[12] when, of course, there was no doubt as to the irresistible nature of the situation.

Such a concept could be easily applied to a recreational diving accident, which is not in principle in any way unforeseeable.

This strengthening of the conditions of admission of force majeure, however restrictive it may be for professionals, is only a small breach in their line of legal defense under the law, as they still remain, legally speaking, "on the defense," which therefore presupposes that the plaintiff has already demonstrated fault or negligence to attempt to establish their liability. However, in 1990 the European authorities decided purely and simply in certain conjectural instances to reverse the roles. Professionals become liable and remain so as long as they cannot demonstrate fault or negligence on the part of the victim or a genuine case of force majeure. Professionals are therefore in the firing line and are liable to get hit.

"Professionals become liable and remain so as long as they cannot demonstrate fault or negligence on the part of the victim or a genuine case of force majeure."

The New Liability Regime

On June 13, 1990, the Council of Europe adopted a directive that fundamentally altered the rule of law with regard to consumer action against tourism professionals, within the scope of the sale of "package travel." A directive is a legislative act passed by the institutions of the European Union that stipulates the rules that member states must transpose into (i.e., include in) domestic law.

A "package" means the prearranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation:

1. Transport

2. Accommodation

3. Other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package (in this case, deep-sea diving provision)[13]

The sale of such tourist package deals, particularly for recreational diving, is very common in Europe.

Thus, to date, more than 27 European countries have amended their domestic legislation to comply with this directive.[14] This new legal regime therefore affects more than 500 million consumers. However, throughout Europe tourism professionals very often remain unaware of this, continuing to believe that they are only held accountable for their own faults or negligence and believing that being able to demonstrate that an absence of fault or negligence on their part will be enough to protect them from possible prosecution.

Whereas, as per the Council Directive of June 13, 1990:[15]

1. *Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.*

2. *With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:*

   — *the failures which occur in the performance of the contract are attributable to the consumer,*

   — *such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,*

   — *such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.*

"In Europe we are now seeing a complete reversal of the burden of proof, since henceforth tourism professionals are now, ipso jure, *responsible for any injurious event occurring during a consumer's holiday."*

In other words, in Europe we are now seeing a complete reversal of the burden of proof, since henceforth tourism professionals are now, *ipso jure*, responsible for any injurious event occurring during a consumer's holiday. Clearly, a recreational diving accident could constitute such an injurious event.

This reversal of the burden of proof henceforth requires tourism professionals or their insurers to meticulously gather all available details in the event of a recreational diving accident and to seek to thereby establish the causes of it. In effect, the latter are no longer liable because they may have committed a fault or been negligent, but because the law says so.

Each state's law, as derived from this Council of Europe directive, allows for only three possible escape clauses under this directive:[16]

- Demonstrating that "the failures which occur in the performance of the contract are attributable to the consumer," in other words, that the cause is attributable to the victim
- Establishing that the cause of the accident constitutes a case of force majeure
- Establishing that the cause of the accident is a result of the intervention of a third party to the contract

Thus, while this Council directive was "simply" aimed at making it easier for consumers to take action against tourism professionals in the event of an injurious event during a holiday, one of the unexpected effects, in terms of recreational diving, is that the debate has been moved from the "comfort zone" of "fault" and "negligence," or the absence thereof, to that of the cause of a diving accident, which is much more tricky to determine.

All of which now means that it is incumbent upon tourism professionals (package travel organizers or vendors of such travel packages) to make a genuine commitment to gathering information relating to diving accidents and as far as is possible establish their causes.

For, by default and *ipso jure*, they will be held fully and automatically liable in accordance with the Community directive. A third-party act being an unlikely possible scenario in terms of recreational diving accidents, in practice for tourism professionals it comes down to "act of the victim" and "force majeure."

The issue is narrowed still further given that case law in certain states considers that professionals may not be exempted from their obligations except by proving that the fault of the victim can be largely categorized as force majeure.[17] And so it comes full circle. Professionals are held liable — by law — regardless of whether they have committed a fault or been negligent, except where they can demonstrate that a death is attributable to force majeure, which presupposes genuine investigations.

Although in the past diving accidents were defined as those that occurred during recreational diving activity, and although divers were held to have accepted the risks of such activity, European law is now far more severe. At the same time as research has progressed and there is better understanding of how to reduce the risks of decompression-related accidents, the law has become more nuanced. A diving accident is not a decompression accident. A decompression accident is not necessarily accidental.

"Although in the past diving accidents were defined as those that occurred during deep-sea diving activity, and although divers were held to have accepted the risks of such activity, European law is now far more severe."

In a recent ruling on July 3, 2008, France's highest appeal court, the Cour de Cassation, made it clear that an "accident" was defined as the sole and sudden act of an external cause.[18] Since the inquiry had allowed it to be established that no alarming event had occurred during the dive itself or the return to the surface, that the technical and safety regulations had been complied with, that the death could not have resulted from faulty decompression, it was not possible to maintain the use of the term "accident." This effectively deprived the victim's spouse of an insurance payout, as she was only entitled to it in the event of an "accidental" death. This time, the victim's beneficiaries have been "penalized" for not having actually tried to determine the causes of an accident.

Conclusion

It is clear that the courts will assess the cause of a diving accident that will allow liabilities incurred to be defined and the victims' right to compensation to be

determined rather than make a straightforward search for fault or negligence. The courts now require a genuine search for the cause of a diving accident before determining a victim's right to compensation, to declare a professional liable, or to *ipso jure* exempt them of all liability.

Whether they be professional organizers of travel that includes recreational diving, whether they be diving instructors or organizers, whether they simply be divers or their beneficiaries, all parties now need to collect evidence and to make genuine investigations into the causes of an accident if they want to be suitably compensated or not be held liable through lack of evidence.

"All parties now need to collect evidence and to make genuine investigations into the causes of an accident if they want to be suitably compensated or not be held liable through lack of evidence."

Endnotes

1. French term. The American equivalent would be "attorney-at-law."

2. http://fr.cousteau.org/technology/scaphandre — © Cousteau Society

3. i.e. France, Code du Sport, Articles L.231-2 et A.231-1/6°

4. In the original text "Faute," which covers both intentional action and negligence.

5. i.e. France, Cour de Cassation, 1st Civil Division, 09 March 1983, unpublished

6. Under Article 5 of the Civil Code, judges in France may not give "arrêts de règlement" (judgments that set a binding precedent). This means that courts cannot be bound by previous rulings. A court can rule on the basis of prior holdings, however, where there is a strong link between the principle and the resolution of the case.

7. Council Directive 30/314/EEC of 13 June 1990 on package travel, package holidays and package tours

8. France, Cour de Cassation, 1st Civil Division, 06 November 2002, Appeal 99-21203

9. Cour de Cassation — The French Cour de Cassation is France's highest appeal court, responsible for ensuring the law is properly applied. As such it does not rehear cases, but it has the power to quash decisions made by the lower courts on points of law. It is split into six divisions: three civil, one criminal, one social and one commercial.

10. France, Cour d'Appel Angers, 07 March 2006, unpublished.

11. Court of appeal (British English) / Court of appeals (American English)

12. France, Tribunal de Grande Instance, Paris, 07 June 2006

13. Council Directive 30/314/EEC of 13 June 1990 on package travel, package holidays and package tour, Art. 2

14. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:71990L0314:EN:NOT#FIELD_FR

15. Council Directive 30/314/EEC of 13 June 1990 on package travel, package holidays and package tour, Art. 5

16. Council Directive 30/314/EEC of 13 June 1990 on package travel, package holidays and package tour, Art. 5.

17. France, Cour d'Appel Angers, Formal Sitting, 07 March 2006, www.legifrance.gouv.fr

18. France, Cour de Cassation, 2nd Civil Division, 03 July 2008, Appeal 07-17150