

## *Shipping Law*

PAUL MYBURGH\*

Justice Brad Giles was the shipping law editor of this Review for many years. His untimely death earlier this year robbed us of a deeply respected expert in shipping law and practice. As barrister, commentator and judge, Brad Giles' contribution to the development of New Zealand maritime law has been – and through his writings, his judgments and the new Admiralty Rules, will continue to be – profoundly significant.

In this review I consider some of the more significant legislative and case law developments in New Zealand shipping law during 1998 and 1999.

### **Legislative Developments**

#### A *Maritime Transport*

The Maritime Transport Act 1994 was amended three times in the period under review. The three amending statutes originated in the omnibus Maritime Transport Amendment Bill 1997, which was subsequently split into three Bills and enacted as the Maritime Transport Amendment Act 1998, the Maritime Transport Amendment Act (No 2) 1998, and the Maritime Transport Amendment Act 1999.

##### (a) The Maritime Transport Amendment Act 1998

This Act revises the marine pollution provisions of the principal Act to align them with the 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the Fund Convention), to both of which New Zealand has acceded. (For commentary on the Conventions and Protocols and information on their legal status, see the IMO's web site at <http://www.imo.org>.)

The Act redefines key concepts such as "CLC ship", which now extends to both laden and, with some qualifications, unladen oil tankers, and "pollution damage", which now includes the cost of reasonable clean-up operations and consequential loss of profits. The shipowner's limited liability regime has been strengthened by raising the monetary ceilings on liability, and by providing for

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\* Department of Commercial Law, The University of Auckland

unlimited liability where pollution results from the shipowner's personal intentional conduct. The Act also increases the maximum amount of pollution compensation payable from the Fund. Finally, the Act extends the coverage of both the CLC and Fund Conventions to New Zealand's exclusive economic zone.

Given that New Zealand has lagged behind Australia and most other maritime jurisdictions in implementing international marine pollution treaties, this updating of our marine pollution regime is welcome. However, the method of domestic implementation is unsatisfactory. The relevant treaties could, and arguably should, have been implemented by simply declaring that they have the force of law in New Zealand and publishing the unamended treaty texts as a schedule to the Act (compare, for example, the Protection of the Sea (Civil Liability) Act 1981 (Cth)). This method of domestic implementation is direct, straightforward and highly effective: it ensures that the treaty texts are readily available, that Parliament's intention in implementing the treaties is transparent, and that the treaty texts are correctly and consistently interpreted by the courts (see Myburgh, "The Harmonisation of New Zealand and Australian Maritime Laws" (1995) 6 Canterbury LR 69, 83; Berlingieri, "Uniformity in Maritime Law and Implementation of International Conventions" [1987] Jnl of Mar Law & Comm 317, 349).

The drafters of the principal and amending Acts have chosen instead to redraft and reorder the treaty provisions. The redrafting seems quite unnecessary, and likely to produce uncertainty and inconsistent interpretations. To cite but one example: while the definition of "oil" in the original text of the 1992 Protocols to the CLC Convention expressly extends to oil "carried on board a ship as cargo or in the bunkers of such a ship", there is no corresponding reference to bunker oil in the Act's definition. Does this omission merely indicate that the drafter considered the phrase in the original treaty text tautologous, or does it signal a deliberate departure from the treaty?

(b) The Maritime Transport Amendment Act (No 2) 1998

This Act provides for special enforcement powers to maintain on-water crowd control and safety during maritime events, such as the America's Cup regatta, which are held in New Zealand waters. Concerns were expressed in submissions to the Transport and Environment Select Committee that the proposed powers were too open-ended. As a result, the Bill was redrafted to make it clearer that these special powers are limited to the duration of the event and to "major maritime events or occasions". Enforcement officers, who may be police officers, Defence Force staff, harbourmasters or regional council appointees, may board, stop, detain, remove or ban ships, craft or seaplanes from the designated event area if they have reasonable cause to believe that it is necessary to maintain public

order or preserve safety. Infringement notices may be issued for obstruction or failure to comply with their instructions. The Auckland Regional Council asked for specific powers to deal with people who are drunk in charge of a vessel. The Select Committee concluded that this would be problematic, as enforcement officers other than police are not suitably trained to exercise these types of powers, and there is no existing regulatory and testing regime for drunk boaties. Instead, the Select Committee contented itself with a general plea for education in this area. The Auckland Regional Council was, however, successful in its bid to have a provision included which will allow recovery from event organisers of the reasonable costs of providing enforcement officers.

The Act also gives shipowners, charterers, their agents, masters, freight consolidators and government officials the right to open, inspect and test packages or containers that are reasonably believed to contain dangerous goods and are not marked or packed according to maritime rules. These provisions usefully supplement the existing common law and statutory powers of carriers and government officials (see, for example, the Hague-Visby Rules (Maritime Transport Act 1994, Schedule 5, Art 3 r 5, Art 4 r 6), the Explosives Act 1957, the Dangerous Goods Act 1974 and the Hazardous Substances and New Organisms Act 1996).

(c) The Maritime Transport Amendment Act 1999

This Act contains several amendments to the principal Act in three key areas: (1) pilotage, wreck and salvage; (2) maritime rules, documents and investigations; and (3) marine pollution.

The Act clarifies the law relating to pilots' liability, and revises and updates the wreck regime. The Receiver of Wreck's functions will henceforth be performed by the rather more prosaically titled Director of Maritime Safety. Pilotage, safety standards for cargo and containers, safety equipment which must be carried on board, and navigational aids have been added to the list of topics which may be centrally regulated by the Minister of Transport through maritime rules. The potential ambit of maritime rules has been extended to "river rafts and other manually-powered water craft" and their operators, crew and passengers, in order to cover adventure tourism, and specifically white-water rafting. These changes will centralise the regulation of matters that have traditionally been dealt with by local government.

The Act prepares the way (for the second time) for New Zealand's belated domestic implementation of the 1989 Salvage Convention. The first attempt to do so was significantly flawed: see Myburgh, "1989 Salvage Convention: Casualty or Cure?" [1996] NZLJ 267, 270. Most of the concerns that I raised in that article have now been addressed. However, the Act is still unclear as to potential reservations to the Salvage Convention. Article 30 of the Convention enables parties to

exclude the Convention's operation from salvage in inland waters, where all parties concerned are New Zealand citizens, and "where the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea bed". There are no compelling reasons for New Zealand to exclude the Convention in the first two instances, but it is essential that the right of reservation is exercised in respect of the last instance, to avoid a conflict between the Convention salvage regime and existing cultural property protection regimes in the Antiquities Act 1975 and the Historic Places Act 1993, which would cover historic shipwrecks and other maritime cultural property. The Act should expressly state that the Convention salvage regime operates subject to these cultural property protection regimes (compare, for example, the Transport Legislation Amendment Act 1995 (Cth), s 43).

The Act also amends the procedures to be adopted by the Director of Maritime Safety when suspending, revoking or imposing conditions on maritime documents (ss 43-44 of the principal Act), and the Director's powers when investigating accidents (s 58). The last amendment is particularly important. Maritime Safety Authority accident investigations have attracted justifiable criticism for, amongst other things, denying the right of those under investigation to have counsel present at hearings (see Poole, "Procedural Failings at the Maritime Safety Authority" [1996] NZLJ 243). The repealed s 58 contained a general provision which stated that "subject to the provisions of [the Maritime Transport] Act, all of the provisions of [the Commissions of Inquiry Act 1908] ... shall apply accordingly". This general provision meant that parties required to appear at an investigation hearing had the same privileges and immunities as a person giving evidence under s 6 of the Commissions of Inquiry Act 1908 (in other words, the same privileges and immunities that they would have enjoyed in a court of law). More significantly, the effect of this general provision, properly construed, was that affected parties were entitled to be represented at hearings by their counsel or agent, as provided for in s 4A(3) of the Commissions of Inquiry Act (see Poole, 244).

In the context of these concerns about procedural fairness, the new s 58 makes for interesting reading. The Director's powers are now more carefully spelled out, and delegation of authority to investigate expressly sanctioned. The summons procedure follows s 5 of the Commissions of Inquiry Act, and affected parties are expressly accorded privileges and immunities equivalent to those under s 6 of the Commissions of Inquiry Act. However, the general provision in the repealed s 58 that incorporated the remaining provisions of the Commissions of Inquiry Act has vanished. Rather than constructing a more appropriate and detailed procedural framework for marine accident investigations, therefore, the new s 58 has removed what little scaffolding there was.

Finally, the Act implements – in an indirect and redrafted manner – the 1996 Protocol to the 1972 London Dumping Convention, which tightens up controls on dumping and incineration of waste at sea.

## B *Admiralty Practice*

The most significant procedural development was the repeal of the Admiralty Rules 1975, and the introduction of new Admiralty Rules as Part 14 of the High Court Rules (see the High Court Amendment Rules 1997, which came into force on 1 February 1998). Whilst admiralty lawyers might experience a slight twinge of regret at the loss of a venerable tradition and a certain distinctiveness, it must be conceded that the old Rules were desperately in need of updating, and that their integration into the High Court Rules brings to an end any demarcation questions which could potentially arise between the old Admiralty Rules and the general High Court Rules and practice (see the Admiralty Rules 1975, r 4; *Athens v The Ship "Bungo Rye"* (HC Auckland, AD 428, 8 September 1986, Barker J); *Koelmans v The Ship "Gulf Explorer"* (HC Rotorua, M 90/87, 27 March 1990, Fisher J); *Attorney-General v The Ship "Tosa Maru"* (1992) 5 PRNZ 661; *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"* [1998] 2 NZLR 108).

The new Rules abolish the old writ of summons and replace it with the standard notice of proceeding nomenclature. Provided that the endorsement on the notice of proceeding complies with the Rules, the admiralty action is deemed to have commenced when the notice of proceeding is filed (r 769). The timing of commencement of the action may be crucial in the event of the shipowner's insolvency, in the context of limitation periods, or in establishing whether the statutory requirements to proceed in rem have been met where there have been subsequent changes of vessel ownership. Service out of the jurisdiction in admiralty actions in personam is now governed by the general regime in rr 219-227 (r 770). The defendant no longer has to apply for leave to enter a conditional appearance (r 773). The Registrar now has the power to demand additional security from the arrestor to cover ongoing fees, expenses and harbour dues (r 776). This has proved necessary in recent years in situations like those involving the *Offi Gloria* and the *Cornelis Verolme*, where vessels lie under arrest for an extended period and the Registrar may incur considerable ongoing preservation costs. The arcane requirement to notify the relevant consulate when a foreign ship has been arrested on ownership or wages claims has sensibly been consigned to history, and the Registrar's communication methods finally updated from "telegraph" to "fax" (r 776). The rule on security in admiralty proceedings has been simplified and updated to reflect modern practice (r 781). Preliminary acts in collision cases have been retained, more, it would seem from the sub-committee's report on the new Rules, for the sake of

international uniformity than for practical usefulness (rr 785-786). Judgment by default in admiralty actions in personam is now governed by the general regime in rr 459-470 (r 787). The new Rules retain a special procedure for judgment by default in actions in rem (r 790).

The new Rules have also largely resolved the practical problems that used to occur when urgent arrest applications were brought after hours or over weekends. Under the new Rules the requirement to search the Central Registry (the Registry of the High Court in Wellington) for caveats before a warrant of arrest can issue, or before a vessel can be released from arrest, has been relaxed. In cases of “emergency or special circumstances”, the Registrar may now issue a warrant of arrest on the spot if convinced of the need to do so, and in receipt of a suitable indemnity (r 776(12)). The need for special rules and indemnities could, of course, be avoided altogether if the Department for Courts were to transfer the Central Registry admiralty records onto an electronic database that could be accessed at any time from other High Court Registries (or, for that matter, from practitioners’ offices).

A rather disappointing sequel to the introduction of the new Rules has been the subsequent amendment of r 135 to exclude the possibility of obtaining summary judgment in admiralty proceedings brought under Part 14 of the High Court Rules (see the High Court Amendment Rules (No 2) 1998, which came into force on 19 October 1998).

The availability of the summary judgment procedure in New Zealand admiralty proceedings was first considered in *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"* [1998] 2 NZLR 108, decided under the old Rules. Having considered the legal position in England (which expressly excludes summary judgment in respect of admiralty actions in rem: RSC, Ord 14(2)(c)), Singapore and Canada (where summary judgment is available in admiralty: *The August 8<sup>th</sup>* [1983] 1 Lloyd’s Rep 351 (PC); *Feoso Oil Ltd v Sarla (The)* [1995] 3 FC 68 (FC)), Potter J held that the summary judgment procedure was available in admiralty. Its application was not excluded by the High Court Rules, was not inconsistent with the admiralty jurisdiction, and gave access to a process “which for the parties and the Court, avoids the time and expense of litigation which is unnecessary to determine the merits of the situation, and at the same time ensures that all parties to the action are fairly treated” (pp 118-119).

In *Ports of Auckland v The Ship "Raumanga"* (1998) 12 PRNZ 84, which was decided under the new Rules but before the amendment of r 135 of the High Court Rules, Giles J noted in an obiter statement that, although *The Komtek II* “was decided under the Admiralty Rules 1975, which have now been repealed and incorporated as Part XIV of the High Court Rules, there is no material difference in context and that decision, with which I respectfully agree, applies” (p 87).

Given this judicial support for the availability of summary judgments, the amendment of r 135 to exclude admiralty proceedings is surprising. The rationale for the English exclusion of actions in

rem, which seems to be that the plaintiff in an action in rem might otherwise gain an unfair procedural advantage, is not compelling. As Lord Brandon of Oakbrook noted in *The August 8<sup>th</sup>* (pp 354-355):

There is ... no possibility in an Admiralty action in rem, any more than in other kinds of action, of a summary judgment on a claim being given without such claim having been first verified by affidavit evidence, and there is at least a considerable probability that the defendant, in an Admiralty action in rem as in other kinds of action, will seek to show that there are issues deserving to be tried, so that summary judgment should not be given but permission to defend, either unconditionally or conditionally, should be granted.

The argument is even less compelling in New Zealand, where the plaintiff bears the onus of satisfying the court that the defendant has no defence to the plaintiff's claim (r 136). The argument would also seem not to apply to admiralty actions in personam.

The amendment to r 135 to exclude summary judgment in all admiralty proceedings does not promote international uniformity: it goes further than the English rule and is at odds with the law in other common law maritime jurisdictions. This change does not appear to have been recommended or even discussed by the specialist sub-committee that was charged with drafting the new Admiralty Rules. One could argue that use of the summary judgment procedure is particularly apt in the admiralty context, given the jurisdiction's need to respond to "the itinerant nature of vessels and their cargo, the international coverage which is part of their regular activity and the rapidity with which they move from place to place and jurisdiction to jurisdiction" (*The Komtek II*, p 117).

## Case Law Developments

### A *Burden and Standard of Proof*

The vexed question of burden and standard of proof in the context of an application to set aside an arrest was considered in two High Court decisions in the period under review.

*Mobil Oil NZ Ltd v The Ship "Rangiora"* (HC Auckland, AD 877, 14 July 1998, Giles J), a matter arising from the liquidation of South Pacific Shipping Ltd (SPS), concerned a complex dispute over ownership and chartering structures. The case hinged on whether the relevant vessels were still on demise charter at the time admiralty proceedings were brought. The owners, on a conditional appearance, applied to have the plaintiff's action in rem and all caveats against release set aside, on the ground that the "relevant person" test in s 5(2)(b) of the Admiralty Act 1973 had not been satisfied. Section 5(2)(b) provides that, where "the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control

of, the ship”, the admiralty jurisdiction of the High Court may be invoked in an action in rem against that ship if “at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person” (s 5(2)(b)(i)), or against a sister ship which “at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid” (s 5(2)(b)(ii)). The owners argued that the arrest should be set aside on the grounds that the relevant person in respect of all of the claims was SPS, and that SPS was neither the beneficial owner nor the charterer by demise of the vessels at the time when proceedings were issued. At issue was whether the owners or the plaintiff bore the burden of proving these matters, and to what standard.

After summarising counsel’s arguments, Giles J surveyed the authorities in the area. The leading New Zealand authority is the Court of Appeal’s decision in *Baltic Shipping Co Ltd v Pegasus Lines SA (The Samarkand)* [1996] 3 NZLR 641. *The Samarkand* concerned a tort claim arising from the master’s negligent misrepresentation of the vessel’s carrying capacity, and was brought under s 4(1)(h) of the Admiralty Act. The owners sought to have the arrest set aside on the ground that the claim did not fall within s 4(1)(h), in that it did not arise “out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship”. In their joint judgment, McKay and Henry JJ referred to two earlier decisions, *Marine Expeditions Inc v The Ship Akademik Shokalskiy* [1995] 2 NZLR 743, in which Doogue J held that the owner seeking to set aside an arrest had the onus of establishing that the plaintiff had no arguable case, and *Reef Shipping Co Ltd v The Ship Fua Kavenga* [1987] 1 NZLR 550, in which the same test was applied. They noted that these two decisions had arisen in the context of the arrest of a sister ship, but went on to say (p 650):

We do not think the question of arguable case is relevant to the issue of jurisdiction, which is concerned with the nature of the claim, not the strength of the claim. If the claim is brought under s 4(1)(h) and s 5(2)(b) then the Court must look at the claim to determine whether it is within the jurisdiction, but must decide on the evidence before the Court whether the person alleged to be liable is the owner or charterer or in possession or control of the ship, and is the beneficial owner of all the shares therein.

On my reading, this passage in McKay and Henry JJ’s judgment clearly amounts to a rejection of the approach in *The Akademik Shokalskiy* and *The Fua Kavenga*. Their judgment also seems to support, albeit somewhat obliquely, the approach adopted by the High Court of Australia in *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404. In *The Shin Kobe Maru* the High Court of Australia drew a distinction between jurisdiction which is based on a claim having a certain legal character (so-called “subject matter jurisdiction”), and jurisdiction which depends on the existence of particular facts or a particular state of affairs or on a question of mixed fact and law (“factual preconditions”). In respect of the former, the High Court held that no question of onus arises. In

respect of the latter, there is an onus on the plaintiff to establish, on a balance of probabilities, the existence of the facts on which it bases its claim. The *Shin Kobe Maru* approach was considered in more detail and endorsed by McGechan J in his separate judgment in *The Samarkand*. To the extent that jurisdiction does not depend on any factual precondition (p 655):

the approach adopted in *The Ship "Shin Kobe Maru"* ... is unanswerable. Where there is no factual issue, question of onus and standard simply do not arise. All the challenged in rem plaintiff need do is to take the pleadings in one hand, and the statute in the other, and show by comparison that the pleading as worded fits within the statute. It is, as it was put, a "subject matter" question.

In respect of jurisdiction premised on questions of fact, or mixed fact and law, however (p 656):

questions of onus and standard can arise ... [I]n light of the approach adopted in *The Ship "Shin Kobe Maru"* ... it would be wise for in rem plaintiffs to be ready themselves to prove any "factual preconditions" ... and on the balance of probabilities.

The same issue subsequently arose in *Sovrybflot v The Ship Efim Gorbenko* [1996] 2 NZLR 727, a sister ship case. Doogue J distinguished *The Samarkand* on the ground that the Court of Appeal decision did not pertain to sister ship jurisdiction, and reaffirmed his earlier ruling in *The Akademik Shokalskiy* that the owner carries the burden of proving that the plaintiff has no arguable case.

Having considered these authorities, Giles J confessed that he found the decision in *The Samarkand* troublesome, as it afforded owners little opportunity to challenge the merits of a claim at an early stage. In addition, the strict New Zealand approach to wrongful arrest meant that "a plaintiff arresting a ship has little real vulnerability for the economic consequences visited upon an owner" (p 27). His Honour concluded that *The Samarkand* was nonetheless (p 28):

a binding authority and it is not for this Court to depart from it. As to that case I prefer the approach articulated by McGechan J on the subject of jurisdictional fact and I prefer to interpret the comments of McKay and Henry JJ as being generally supportive of His Honour's approach. But I agree with Doogue J that the burden of proof rests upon the applicant [owners] and is at a high level. The owners must establish the jurisdictional fact issues upon which they rely at a level which satisfies this Court that the plaintiffs have no arguable case. Alternatively, if I be wrong in so finding and the position is that the plaintiffs carry the onus, then it is, in my view, enough for the plaintiffs to demonstrate that they have an arguable case, thereby entitling them to their ultimate day in Court.

Giles J's approach to burden and standard of proof in *The Rangiora* was subsequently adopted in *Vostok Shipping Co Ltd v The Ship "Kapitan Lomaev"* (HC Auckland, AD 907, 10 September 1998, Laurenson J), where the issue was whether the relevant person was the beneficial owner of the vessel at the time the

action was brought, as required by s 5(2)(b)(i) of the Admiralty Act. Laurenson J agreed with Giles J and Doogue J that, in relation to issues of jurisdictional fact, the burden of proof ought to rest upon the applicant owner (p 9):

It seems to me, as a matter of practice and principle, that in the case of admiralty claims which are often commenced at short notice and with considerable sums at stake, real caution should be exercised before a plaintiff is prevented from continuing an action in rem on the basis of an interlocutory application which may have to be dealt with at short notice in order to recognise the exigencies presented by a vessel held under arrest.

With respect, the approach adopted in *The Rangiora* and *The Kapitan Lomaev* is problematic. In both cases, the ratio of *The Samarkand* (or at least of McKay and Henry JJ's judgment) seems to have been interpreted narrowly as relating to subject matter jurisdiction, with the Court's statements about factual preconditions characterised as obiter dicta. This would seem to be an overly technical reading, given the Court of Appeal's apparently unqualified endorsement of *The Shin Kobe Maru*. It is also difficult to see how one can simultaneously characterise *The Samarkand* as binding and apply elements of the *Shokalskiy/Gorbenko* approach. The two approaches cannot, in my view, be reconciled: even on the narrowest reading of *The Samarkand*, the Court of Appeal's decision is at odds with the *Shokalskiy/Gorbenko* approach. Further, the grounds on which the two lines of authority have been distinguished do not bear close scrutiny – why should a different approach to burden and standard of proof apply to sister ship arrest as opposed to arrest of the offending vessel, or to s 4 as opposed to s 5(2) issues? On the *Shin Kobe Maru* approach, the only relevant question is whether factual preconditions are at issue. Finally, given the concerns expressed by Giles J about the potential for injustice to shipowning and chartering interests, it is perhaps surprising that the *Shokalskiy/Gorbenko* approach was preferred over *The Samarkand*, which places the burden of proof on the plaintiff. As David has pointed out (“Admiralty – An Ancient Jurisdiction with Continuing Relevance” in ADLS Seminar, *Admiralty Arrest: Jurisdiction, Procedure and Practical Issues* (1998) 13), the effect of the decisions in *The Rangiora* and *The Kapitan Lomaev* is that:

an owner may have the worst of it on two counts – the burden (if it can be so called) on a plaintiff to show a claim under section 4 is light and does not permit any examination of the merits of the claim *and* if there are relevant jurisdictional fact issues the owner will carry the onus of establishing the matters it relies on to say there is no jurisdiction.

That said, I do not think that the *Shin Kobe Maru* approach adopted in *The Samarkand* is free of difficulty. A neat distinction cannot always be drawn between subject matter jurisdiction and categories of claims that are premised on factual preconditions. This is demonstrated by the High Court of

Australia's own categorisation in *The Shin Kobe Maru* of claims under s 4(2)(a) and (b) of the Admiralty Act 1988 (Cth). The Court considered (p 426) that jurisdiction based on s 4(2)(a) (a claim "relating to ... ownership of ... a ship") is not premised on any factual preconditions, but rather relies on the claim having the legal nature required by that head of jurisdiction. By contrast, a s 4(2)(b) claim (a claim "between two co-owners of a ship relating to ... the ownership ... of the ship") was characterised as potentially raising factual issues as to proof of co-ownership. While the somewhat circuitous drafting of s 4(2)(b) might encourage a characterisation that the claim is based on a factual precondition, the claim, properly described, relates to the co-ownership status of the vessel. On that reading, s 4(2)(b) could be said to raise legal issues only. The distinction unravels further in cases where, say, the dispute is whether the parties' relationship comes within the legal definition of "co-ownership". Conversely, a s 4(2)(a) claim relating to ownership of a ship could be read as implicitly but necessarily raising factual issues about the events or agreements on which the assertion of ownership is based. In my view most, if not all, of the list of claims and other jurisdictional requirements in the Admiralty Act are capable of being read as raising underlying issues of fact or mixed issues of fact and law. This is a necessary consequence of the common law tradition of defining the admiralty jurisdiction by way of a list of fact-based heads of claim. Whether an assertion of admiralty jurisdiction raises factual issues seems to me to have rather more to do with the way in which the pleadings are framed than with the intrinsic nature of the claim itself. To that extent, the distinction is unhelpful. It would be more logical to adopt a uniform approach to burden and standard of proof for all categories of admiralty claims.

The challenge for the courts in this area is to achieve an equitable balance between the rights of plaintiffs and owners. In my view, we have not yet achieved that balance (see also David, p 13). When this issue comes before the Court of Appeal again, the Court will hopefully take the opportunity to re-examine the whole issue from first principles. Parliament could assist in this process by enacting a wrongful arrest provision along the lines of s 34 of the Admiralty Act 1988 (Cth), which would provide "a legislative rebalancing of [the] odds which disproportionately favour plaintiffs in this jurisdiction" (see Giles J's recommendations in *The Rangiora* pp 27-28, and Nossal, "Damages for the wrongful arrest of a vessel" [1996] LMCLQ 368).

## B *Freedom of the High Seas*

In *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (noted by Bracegirdle, "Public International Law" [1999] NZLJ 114) the Court of Appeal allowed Sellers' appeal against conviction in the District Court for a breach of s 21(1) of the Maritime Transport Act 1994, which requires pleasure craft to comply with minimum safety requirements set out in maritime rules before they leave New Zealand. New

Zealand is responsible for providing search and rescue facilities for a vast area of the Pacific Ocean. The purpose of s 21 is to assist the Maritime Safety Authority in fulfilling its international sea and rescue obligations. Sellers objected, as a matter of principle, to being required to have a radio and emergency locator beacon on board (p 46):

My maritime art is based on the mystery of the sea. It is religious to me, being alone, simple and strong *with* the sea – not with radios – the radio has stuffed everything ... but the mystery of the ancient sea will outlast man. I am protesting on religious grounds to attempts to restrict free and private movement on the open sea.

His legal submissions were based on the somewhat less metaphysical proposition of the freedom of the high seas. An essential feature of this freedom is the nationality principle: that the flag state of a vessel has exclusive jurisdiction over the ship while it is on the high seas. Keith J, delivering the judgment of the Court, noted that the nationality principle is set out in art 92 of the 1982 United Nations Convention of the Law of the Sea (UNCLOS), to which New Zealand is a party and which in this respect is considered to be declaratory of customary international law. The Court, having conducted an exhaustive survey of UNCLOS and other relevant treaties, and having considered the established exceptions to the nationality principle and the growing role of port state control in enforcing safety, employment and environmental standards, concluded that under international law a port state nonetheless (p 57):

has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas. Any requirements cannot go beyond those generally accepted, especially in the maritime conventions and regulations; we were referred to no generally accepted requirements relating to the equipment particularly in issue in this case so far as pleasure craft were concerned. In addition, any such port state powers relate only to those foreign ships which are in a hazardous state.

The Court emphasised that s 21 of the Maritime Transport Act has to be understood and interpreted in the context of the restrictions placed upon port state powers at international law, particularly as the Act is peppered with direct and indirect references to compliance with and implementation of international maritime conventions. Three possible interpretations were identified as removing the conflict between the Director's powers in s 21 and relevant international law rules: foreign pleasure craft might be excluded from the ambit of the section, the territorial scope of the section might be read narrowly as not extending to the high seas, or the Director's powers "might be read as subject to the relevant rules of international law" (p 59). The Court held that the first two interpretations were not viable, given the general wording of s 21. Instead, the Court adopted the third

alternative, in terms of which the Director's powers were interpreted as subject to relevant standards of international law and restrictions on port state powers. All that the Director was entitled to do under s 21 was to "ensure compliance with accepted international standards and rules, to the extent that they allow that judgment to be made by a coastal state ... [T]hat extent will be widened when and to the extent that international law allows" (p 62). The Court considered that its proposed "gloss ... is consistent with the wording of s 21(1)(b) and (c) when that provision is read, as it must be, in its wider context" (p 62). The Director's requirements were therefore in breach of s 21 as interpreted by the Court, and Sellers' conviction and sentence were quashed.

With respect, the international law "gloss" which the Court places in the margin of s 21 is reminiscent of the Post-Glossators' treatment of Roman law in the thirteenth and fourteenth centuries, in terms of which the "glosses" become commentaries, while the original text is relegated to a marginal note, and finally disappears altogether: see *Sohm's Institutes of Roman Law* (3rd ed, 1907) 140-150. The net effect of the Court's gloss – as international law currently stands and as far as foreign-flagged yachts are concerned – is to erase s 21 from the statute book. The Director of Maritime Safety cannot require foreign yachts to carry even basic safety equipment while they are within New Zealand's search and rescue area. This result cannot be reconciled with the plain wording of s 21, which, although of general scope, does not seem to be particularly ambiguous or unclear. Rather than adopting a literal interpretation of s 21, however, the Court clearly preferred what it saw as a schematic or teleological interpretation of the whole Maritime Transport Act, construing its provisions in accordance with the broader purpose of the international conventions which the Act was intended to implement, and relevant general principles of customary international law as divined by the Court (for other examples of this broader approach, see *Stag Line Ltd v Foscolo Mango & Co* [1932] AC 328, 350; *James Buchanan & Co Ltd v Babco Forwarding & Shipping Co (UK) Ltd* [1978] AC 141; *Fothergill v Monarch Airlines Ltd* [1981] AC 251; and Keith, "Roles of the Courts in New Zealand in Giving Effect to International Human Rights – With Some History" (1999) 29 VUWLR 27, 37-40).

### C *Ambit of the Damage Lien*

Whether the maritime lien for damage done by a ship extends to personal injuries sustained by crew members aboard a vessel was considered in *Fournier v The Ship "Margaret Z"* (HC Auckland, AD 59, 1 April 1999, Fisher J). Fisher J had to determine the priorities of competing claims against the residue of the fund resulting from the *Margaret Z's* sale. If the crew members could establish that their personal injury claims attracted maritime lien status, they would enjoy priority over the mortgagee's claim. If not,

their claims, as ordinary statutory rights of actions in rem, would rank below the mortgagee's claim, which would exhaust the fund.

The first issue was which law governed recognition and priority of claims. Fisher J had no hesitation in applying the majority approach in *The Halcyon Isle (Bankers Trust International Ltd v Todd Shipyard Corp* [1981] AC 221 (PC)) to the effect that both issues fall to be determined by the lex fori, and declined to accept the claimants' argument that that approach did not apply because the lex causae of all of the claims was the same (United States law).

Fisher J then considered the ambit of the damage lien. He accepted the mortgagee's arguments that the court should not extend maritime liens beyond existing precedents, because they "cut across the community interest in protecting more broadly based proprietary principles and in the financing of commerce through registered mortgages" (p 9). Any extensions to maritime liens should therefore be left to Parliament, guided by considerations of international uniformity. These views, which mirror the conservatism of the English admiralty courts on this issue, have been expressed by our courts on previous occasions (see *ABC Shipbrokers v The Ship "Offi Gloria"* [1993] 3 NZLR 576, 580-581, which also suggests that the list of maritime liens is closed). Extending existing maritime liens or creating new liens could have a significant impact on international trade. Restraint is obviously advisable, as is a thorough consideration of the public policy principles on which existing liens are grounded. The fact remains, however, that most of the current maritime liens were created and developed, not by Parliament, but by courts exercising their inherent admiralty jurisdiction. A blanket self-imposed abdication of these inherent powers to Parliament seems undesirable.

Fisher J summarised his conclusions on the damage lien as follows (pp 18-19):

- (a) A maritime damage lien will normally be available where damage is caused by the crew's active operation of the ship or its gear in a manner giving rise to substantive liability.
- (b) The ship or its gear must play a significant role in the chain of causation leading to the damage. It is insufficient to show that the damage could not have occurred but for the existence of the ship or its gear.
- (b)[sic] The damage in question can be injury to the person.
- (c) The damage can be suffered in or on the ship.
- (d) Members of the ship's crew qualify as eligible claimants.
- (e) The activity is not confined to the navigation of the ship in the usual sense but must involve the active use of the ship or its gear for one of the purposes for which they were designed or installed.

- (f) Because the damage must be caused by the active operation of the ship or its gear, injury suffered due to the plaintiff's encounter with a static condition does not qualify.
- (g) For the same reason, damage caused by the action of one or more individuals on the ship does not qualify unless it was effected through the active operation of the ship or gear.

The findings that “damage” extends to personal injury, and that the injured person or damaged object need not be “external to the ship” are controversial.

As to the personal injury issue, Fisher J concluded that there is “no reason in policy, logic, or authority for distinguishing between personal injury and property loss as the foundation for a damage maritime lien” (p 14). While this conclusion is attractive, it is difficult to reconcile with his Honour's stated approach of not expanding the lien beyond existing precedents. Although the precedents relied on by the court unquestionably establish that in rem *jurisdiction* for “damage done by a ship” has historically been extended to personal injuries, their support for the proposition that a damage *maritime lien* similarly extends is considerably less clear. Two of the more recent cases do suggest, without much elaboration, that the demarcation of the in rem head of jurisdiction is co-determinative of the ambit of the maritime lien, but this would seem to conflate two distinct issues (see *Berliner Bank AG v C Czarnikow Sugar Ltd (The Rama)* [1996] 2 Lloyd's Rep 281, 291 per Clarke J: “It is common ground between the parties that a person has a damage lien if, but only if, his claim is a claim for ‘damage done by a ship’ within the meaning of s. 20(2)(e) of the Supreme Court Act, 1981”; and *The Atlantic Faith* [1978] SLR LEXIS 288; [1978-1979] SLR 357 (not cited by Fisher J)).

Fisher J also held (on similarly slender and divided authority) that the injured person or damaged object does not have to be “external to the ship” to attract a maritime lien. While acknowledging the mortgagee's warnings of the “floodgates risk of bringing shipboard accidents into the scope of the damage maritime lien”, his Honour thought that the “precedents seem too far advanced to put the clock back” (p 15).

As Fisher J himself acknowledged (p 15), it necessarily follows from his conclusions that ordinary cargo claims for damage sustained on board the vessel during the course of carriage might, in certain circumstances, attract a maritime damage lien. Ironically, given his stated conservative approach, Fisher J seems to have opened up the possibility of an entirely new category of maritime lien, which could turn established expectations, interests and priorities on their heads. Cargo claims have traditionally occupied a humble place in the rank and file of statutory rights of actions in rem. If they were to meet Fisher J's criteria and attract damage lien status, they would enjoy a very high priority, displacing all statutory rights of action in rem, ship mortgages and prior maritime liens.