BEVAN JOHN MARTEN

RISKY ADVENTURES ON THE SOUTH SEAS: PERSONAL INJURY AND MARITIME LAW IN NEW ZEALAND

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ABSTRACT

This paper discusses personal injury litigation at maritime law. It aims to highlight the unique nature of personal injury proceedings in admiralty, compared to those at common law. The first part of the paper provides background on New Zealand's shipping industry in the twenty-first century, and the dangers inherent to maritime adventures. The number of seafarers appearing in the District Court on personal injury-related matters shows that ships remain dangerous places to travel and work upon.

The paper then discusses the scope of New Zealand's accident compensation scheme in relation to shipping. While the scheme is comprehensive in its coverage, especially for New Zealand residents, there is a gap in the scheme that leaves foreign nationals on international sea voyages without cover. This gives rise to the very real possibility of personal injury claims being taken in admiralty in New Zealand. This "admiralty gap" is demonstrated by recent cases, suggesting that the New Zealand legal system must be able to effectively deal with such claims.

The next section provides brief outlines on the procedural peculiarities of a claim in admiralty, especially claims *in rem* (against the ship itself). The right to arrest a ship, proceedings *in personam* and *in rem*, the personal injury jurisdiction of New Zealand's admiralty division and some conflict of laws issues are all highlighted. These all reinforce the uniqueness of such proceedings.

The limitation of liability regimes that have been in operation throughout the maritime world for many centuries are then detailed, with reference to the current New Zealand provisions within the Maritime Transport Act 1994, and how they apply to personal injury claimants. The Convention on the Limitation of Liability for Maritime Claims 1976 and the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 are discussed. Recommendations on the steps that New Zealand should be taking in this area are given, including considerations in relation to signing the Athens Convention, and bringing the global liability limits up to date.

Finally, following a general background to maritime liens, the maritime damage lien is discussed in relation to personal injury claims. It is argued that this lien should extend to cover more cases involving personal injury, and support is garnered from international examples. Following an examination of the policy goals behind the lien, and the tests set out in the New Zealand case of *The Margaret Z*, reform through the common law is proposed and three new tests suggested.

This paper, not including references, bibliography and abstract, is approximately 16,500 words.

Keywords: Maritime law / Personal injury / Limitation of liability / Maritime liens / ACC

I INTRODUCTION

What happens when a foreign ship limps into a New Zealand port, following an accident on the high seas? Would New Zealand's accident compensation regime provide comprehensive cover for all those injured aboard? Or would parties have to resort to proceedings in admiralty? This aim of this paper is to provide a New Zealand perspective on personal injury at maritime law. The topics addressed will ultimately demonstrate just how different an accident at sea can be compared to one that occurs on land, and highlight areas of New Zealand law that need to be updated or reformed to better accommodate the victims of maritime accidents. The inherently international nature of the subject, and the peculiarities of English admiralty law, ensures that there is no shortage of questions for lawyers to ponder.

After providing background on New Zealand's shipping industry, and the dangers inherent in maritime ventures, New Zealand's accident compensation (ACC) scheme is discussed with reference to shipping mishaps.[1] A gap in the scheme that allows for admiralty proceedings is revealed. The unique apects of such proceedings are then highlighted. This is followed by a discussion of the liability-limiting regime that exists for shipping operators internationally, and how this applies to New Zealand. Finally the law of maritime liens is examined, and reform of the maritime "damage" lien suggested in order to give personal injury claimants a fairer deal.

A New Zealand Shipping in the Twenty-First Century

One of the key features of New Zealand shipping in the twenty-first century is the absence of any civilian ships flying the New Zealand flag on regular international routes. This is in stark contrast to the nineteenth and twentieth centuries, when shipping formed the primary connection between New Zealand and

[1] Injury Prevention, Rehabilitation, and Compensation Act 2001.

the rest of the world. Sea passenger numbers peaked at 97,800 in 1967, but the days of the Kiwi "OE" beginning on the dock are now gone,[2] and by the late 1980s the New Zealand industry was in crisis.[3] Most New Zealand shipping is now limited to coastal freight and passenger services.[4] The Ministry of Transport records around 900 New Zealand-based seafaring jobs, compared to 1,800 or so 15 years earlier when New Zealand had a presence in foreign-going services.[5]

Nonetheless, "the role of shipping in our economic development and the way that the country goes about its business is pervasive."[6] Ships from many different nations carry fuel, cars, dry goods and other cargoes to New Zealand ports, before taking logs, agricultural products and other exports to their destinations throughout the world. The economics of transporting such loads results in 99 per cent of New Zealand's trade being conducted by sea.[7] Added to this are the 262,000 or more fishing vessels and pleasure craft that are a familiar part of New Zealand life.[8]

B A Legacy of Misfortune

Unfortunately, where ships go calamity is bound to follow.[9] Litigation for personal injury and loss of life has been a feature of maritime law for hundreds of years. The sea, and the ships that sail upon it, are intrinsically hazardous to those

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[2] "Sea Passengers and Vessels" in *Tourism and Migration 2000* (Analytical Report, Statistics New Zealand, Wellington, 2001) available at <http://www.stats.govt.nz> (last accessed 22 August 2005); for a literary illustration see Janet Frame *An Angel at my Table* (Hutchinson Publishing Group, Auckland, 1984) ch 27.

[3] *Report of the New Zealand Shipping Industry Reform Task Force to the New Zealand Shipping Industry* (Wellington, 1990).

[4] Ministry of Transport "New Zealand-Crewed Vessels" (Wellington, 2005). This document lists only 21 ships.

[5] Ministry of Transport "New Zealand-Manned Ships" (Wellington, 1990). The number of New Zealand seafarers employed offshore is unknown.

[6] Ministry of Transport *Review of the Shipping and Seamen Act 1952* (Discussion paper, Ministry of Transport, Wellington, 1992) foreword.

[7] Maritime Safety Authority *Ministerial Briefings 2002: Government Administration and Infrastructure* (Wellington, 2002) heading 2.1.

[8] *Ministerial Briefings 2002: Government Administration and Infrastructure*, above n 7, headings 2.3-2.5.

[9] 1,900 shipwrecks, not including the loss of pleasure craft and other minor incidents, are detailed in C W N Ingram *New Zealand Shipwrecks 1795-1970* (4 ed, A H & A W Reed, Wellington, 1972).

who work and travel on them. New Zealand's Maritime Insurance Act rather quaintly outlines the dangers of the sea:[10]

> "Maritime perils" means the perils consequent on or incidental to the navigation of the sea—that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils [of a like kind].

Maritime transport remains vital to the isolated islands of New Zealand, and the passing of time has not eliminated all these risks, as shown by two recent fatal accidents in the Marlborough Sounds.[11] Accident compensation cases regularly come before the District Court involving seafarers who have suffered injuries in relation to their work, through neck and shoulder strain,[12] back injuries from falls,[13] being pinned down by cargo in rough seas,[14] and a variety of other misfortunes.[15] Other incidents, involving both serious injuries and the loss of life do not come before the courts, but are long remembered in the communities they affect.[16]

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[10] Maritime Insurance Act 1908, s 4(3).

[11] Ann-Marie Johnson "Boatie dies in ferry collision" (3 May 2005) *The Dominion Post* Wellington A1; and "Harbour fall kills truckies" (20 August 2005) *The Dominion Post* Wellington A5; see also "Errors blamed for navy lifeboat fall" (11 May 2005) *The Dominion Post* Wellington A8; "Yachtie's rescue has sour aftermath" (30 April 2005) *The Dominion Post* Wellington A7.

[12] *Towers v Accident Compensation Corporation* (16 February 2004) DC AK AI 422-03.

[13] *McDonnell v Accident Rehabilitation and Compensation Insurance Corporation* (14 February 2000) DC WN DCA 283-98.

[14] *Morresey v Accident Compensation Corporation* (30 September 2003) DC CHCH AI 99-03.

[15] For further examples see *Tubb v Accident Compensation Corporation* (19 April 2004) DC CHCH AI 5-03 (Fisherman slips and injures knee while working on boat, strain complicated by years of standing on the job, and keeping balance in high seas); *Gallon v Accident Compensation Corporation* (19 April 2004) DC DUN AI 633-02 (Deck hand injures his back while working on fishing boat); *Blackie v Accident Compensation Corporation* (18 July 2003) DC DUN AI 260-02 (Injury to back while working on scallop boat); *Coffin v Accident Compensation Corporation* (3 September 2002) DC HUN AI 17-02 (seaman injures knee after fall on to deck of ship); *Harrigan v Accident Compensation Corporation* (22 August 2001) DC WN AI 38-01 (Seaman injures back during heavy lifting on interisland ferry); *McCabe v Accident Compensation Corporation* (7 August 2001) DC CHCH AI 116-99 (Chatham Islands harbourmaster injures back while tying up boat during a storm); *Harkess v Accident Rehabilitation and Compensation Insurance Corporation* (13 December 1999) DC CHCH DCA 248-97 (seaman strains back handling cargo); *Tranz Rail Ltd v Accident Rehabilitation and Compensation Insurance Corporation* (3 August 1998) DC AK DCA 383-97 (seaman trips and injures shoulder during berthing).

[16] See for example *Collision between the container vessel* Sydney Express *and the fishing trawler* Marian Luisa, *Wellington Heads, 29 December 1996* (Report 96-214, Transport Accident Investigation Commission, Wellington, 1996).

New Zealand's approach to personal injury legislation is now familiarly associated with the scheme of no-fault cover currently embodied in the Injury Prevention, Rehabilitation, and Compensation Act 2001. However, a number of provisions remain scattered throughout our maritime law statutes harking back to more traditional actions by seafarers and passengers seeking compensation for accidents suffered at sea.[17] These provisions point to the fact that, despite the wide reach of our compensation regime, personal injury litigation is not a dead letter in New Zealand. Admiralty litigation can take place in jurisdictions that have little or no connection with the vessel in question, save its physical presence at the time proceedings are brought.[18] New Zealand needs to ensure that its maritime law is up to date, takes into account international developments, and provides for safe and efficient shipping.[19]

II ACCIDENT COMPENSATION TO THE RESCUE?

If a foreign vessel, carrying both New Zealanders and foreign nationals, is journeying to, from or around New Zealand when an accident occurs on board, who will be covered by ACC? Who will have to turn to the admiralty courts to make a claim for compensation? This part of the paper examines both the theoretical and geographical scope of ACC, and the people to whom it applies within those boundaries. A gap in the scheme with regards to some admiralty proceedings is revealed.

A Comprehensive Cover

[17] See for examples Admiralty Act 1973, ss 4 and 6; Maritime Transport Act 1994, ss 86, 87, 95, 97.
[18] See for example *Fournier v The ship "Margaret Z"* [1999] 3 NZLR 111 (HC) (*The Margaret Z*).
[19] *Review of the Shipping and Seamen Act 1952*, above n 6, 7.

1 *Boundaries*

The second principle of the Woodhouse Report was that ACC cover should be comprehensive.[20] The concept was to extend cover to as many New Zealanders as possible, irrespective of where and how they were injured.[21] This was to extend to New Zealanders overseas,[22] although foreign visitors to New Zealand would have been obliged to take the country as they found it and arrange private insurance.[23] The ideal of comprehensive cover for New Zealanders was truly attained not with the first version of the ACC scheme,[24] but with the amendments made in 1973 which introduced supplementary cover for all non-earners injured in non-motor vehicle accidents.[25] A departure from the recommendations of the Woodhouse Report was also made to the extent that non-residents visiting New Zealand were given cover.[26] This was justified on the grounds that the insignificant costs (estimated at 10 or 20 cents per visitor at the time) made the arrangement the most practical solution to the question of coverage.[27]

This theoretical boundary – comprehensive cover with virtually no exceptions – was then checked by a geographical boundary: New Zealand. Initially the country was defined through reference to the continental shelf,[28] but this was soon changed to a more practical set of boundaries,[29] currently found in the 2001 Act.[30] The definition now includes the various islands that make up New Zealand

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[20] Owen Woodhouse and others *Compensation for Personal Injury in New Zealand* (Report of the Royal Commission of Inquiry, Government Printer, Wellington, 1967) paras 55 and 57 (Woodhouse Report).
[21] See Geoffrey Palmer *Compensation for Incapacity* (Oxford University Press, Wellington, 1974) 56.
[22] Woodhouse Report, above n 20, para 286.
[23] Woodhouse Report, above n 20, para 287.
[24] Accident Compensation Act 1972.
[25] Accident Compensation Amendment Act (No 2) 1973, s 37.
[26] This development was not without problems for foreign claimants, and has been subjected to strong criticism: see G Shapira "New Zealand Accident Compensation and the Foreign Plaintiff: Some Conflict of Laws Problems" (1980) 12 Ottawa L Rev 413, 417-420.
[27] Hon Hugh Watt MP, Minister of Labour (14 November 1973) 388 NZPD 5112; the relevant provision became section 102C of the Accident Compensation Act 1972.
[28] Accident Compensation Act 1972, s 2 "New Zealand".
[29] Hon Hugh Watt MP, Minister of Labour (14 November 1973) 388 NZPD 5113-5114.
[30] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 16.

(including offshore islands like the Kermadecs), the internal waters (the numerous bays and sounds), and "those parts of the territorial sea ... adjacent to the land territories and islets referred to".[31] But unlike the Admiralty Act 1973 which refers simply to "the territorial sea of New Zealand", the use of the term "those parts adjacent to" must be read as relating to a smaller expanse of water than the full 12 nautical mile limits. Parliamentary debates suggest three nautical miles as the intended scope.[32] Rather than creating a stumbling block for the recovery of compensation following maritime accidents, this point may only affect those overseas residents who are very strong and ambitious swimmers: able to take themselves beyond the defined boundary of New Zealand before being injured!

2 Journeys

Journeys around New Zealand using more conventional methods do not pose a problem, as both New Zealanders and overseas residents can travel between places in New Zealand, or on a round trip, and be deemed not to have left New Zealand.[33] Thus people may begin a sea voyage to the Chatham Islands, knowing that they may leave the boundaries of New Zealand as defined by the 2001 Act, but be deemed to have remained in the country and be covered by the compensation regime nonetheless. The same provision extends cover for tourists involved in travel such as scenic helicopter flights, and even long-range fishing expeditions.

Even when they do leave the country, New Zealand residents can claim ACC cover in much the same way as if they were injured in their own back yard, provided

[31] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 16; water boundaries are defined by reference to the Territorial Sea and Exclusive Economic Zone Act 1977, ss 3 and 4.
[32] Hon Hugh Watt MP, Minister of Labour (14 November 1973) 388 NZPD 5114.
[33] Although round trips that stray over 300 nautical miles away lose cover: Injury Prevention, Rehabilitation, and Compensation Act 2001, s 16(3) and 17; the provision was originally introduced in the Accident Compensation Amendment Act (No 2) 1973, s 41.

they are not away for over six months.[34] A possible pitfall exists for those who leave New Zealand *intending* to be away for more than six months – they will be deemed to be no longer ordinarily resident in New Zealand from that moment.[35]

A person who is injured overseas may still have a right to sue in the country where they were injured. If this is the case, but they elect to rely on their ACC entitlements, the Accident Compensation Corporation may choose to enforce that person's right to sue.[36] This can be by way of the injured person taking the action, or by assigning to the Corporation their right to sue. This maintains the financial viability of the ACC scheme by enabling the Corporation to offset their costs in situations where a person has received both ACC entitlements and compensation from a foreign party (thus negating any double recovery), or where a foreign party remains potentially liable.[37]

B The Shipping Angle

Despite this wide theoretical and geographical cover, people arriving on ships do not come within the ACC scheme until they clear the gangplank when disembarking on arrival, and they lose cover as soon as they step on to the gangplank to depart.[38] The embarking/disembarking distinction probably has less to do with any inherent terrors of air bridges and gangplanks than with the need for a defined boundary that complemented the international air travel conventions.[39] The common law supports a similar approach, as in the case of *Moore v Metcalfe Motor*

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[34] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 22; see for example *Rive v Accident Rehabilitation and Compensation Insurance Corporation* (25 October 1996) DC WN DCA 129/96.

[35] Unless they leave on business: Injury Prevention, Rehabilitation, and Compensation Act 2001, s 17(2) and (4).

[36] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 321.

[37] *Schlaadt v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 2 NZLR 318, paras 19, 20 and 29 (HC) John Hansen J.

[38] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23(3); the original provision was introduced in 1973 as Accident Compensation Act 1972, s 102C.

[39] Hon Hugh Watt, Minister of Labour (14 November 1973) 388 NZPD 5112-5113; The International Convention for the Unification of Certain Rules relating to International Carriage by Air (12 October 1929) 137 LNTS 11 (Warsaw Convention); the Warsaw Convention and its protocols are currently found in schedule 4 of the Civil Aviation Act 1990.

Coaster Ltd, where a seaman who was injured on the gangplank of his ship was held to be "carried on the ship" as opposed to being on land.[40]

In the aviation context the provision relating to accidents that occur "in the course of any of the operations of embarking or disembarking"[41] has been litigated a number of times,[42] and occasionally given quite broad interpretations.[43] For example, a wheelchair accident on an airport terminal escalator was held to be within the coverage of the Warsaw Convention, as the boarding of passengers had begun and the passenger was being taken to the gate in response to the boarding announcement.[44] The ACC provision is much more specific: a person has embarked/disembarked as soon as they are on/have left "a gangway, air bridge or other thing attached to or laid against a ship, aircraft, or other conveyance and available for use in [embarking/disembarking]."[45] So in some situations passenger convention-based cover may kick in before a person leaves or enters the scope of ACC coverage.[46]

A further exemption from cover was created for those who travel in, and are accommodated in, their ship during a voyage around different parts of New Zealand.[47] This provision was apparently aimed at cruise ships.[48]

Before the boundaries of ACC were clarified, seafarers were specifically provided for in a long-winded provision designed to ensure that those on New

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[40] *Moore v Metcalfe Motor Coaster Ltd* [1958] 2 Lloyd's R 179 (QB).
[41] Warsaw Convention, above n 39, art 17; the passenger equivalent has the same wording: Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (13 December 1974) 1463 UNTS 20 (Athens Convention), art 1(8)(a).
[42] See for example *Burke v Aer Lingus Plc* [1997] 1 ILRM 148 (HC Ireland); *Kotsambasis v Singapore Airlines Ltd* (1997) 148 ALR 498 (NSWCA).
[43] This area is discussed in David McLean (ed) *Shawcross and Beaumont: Air Law* (Loose leaf, LexisNexis, London, International Carriage by Air) paras 721-724.1 (last updated March 2003).
[44] *Phillips v Air New Zealand* [2002] 1 All ER 801 (Comm).
[45] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23(3)(a) and (b).
[46] See Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317(5).
[47] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23(1) and (2)(c).
[48] Hon Hugh Watt MP, Minister of Labour (14 November 1973) 388 NZPD 5112.

Zealand and Commonwealth ships would be covered by the scheme while at sea.[49] This sort of "special treatment" for shipping is no longer in favour,[50] and did not survive once cover was extended to New Zealanders overseas generally.[51] But the number of amendments to the geographical boundaries of ACC in 1973 was, according to the government of the time, directly related to the interests of seafarers:[52]

> It might be said that I have spent a little longer on than would be expected on this clause, but it affects the lives and welfare of many people who are at sea for a considerable portion of their lives.

Despite being shuffled through the various Acts, these boundaries and travelling provisions have remained essentially untouched since that time.[53] During its time before the Select Committee, the Injury Prevention and Rehabilitation Bill 2001 generated very few submissions examining international aspects of the scheme,[54] and those that did were more concerned with issues such as the application of the compensation regime to staff while overseas,[55] the interaction between the ACC scheme and international conventions relating to air travel,[56] and the impact of the scheme on tourists.[57] Shipping was not mentioned, and the

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[49] Accident Compensation Act 1972, s 61(2) and (3).
[50] *Review of the Shipping and Seamen Act 1952*, above n 6, 104.
[51] Accident Rehabilitation and Compensation Insurance Act 1992, s 9. Before this time the various Acts required people to be working while overseas to receive cover, see for example Accident Compensation Act 1982, s 30.
[52] Hon Hugh Watt MP, Minister of Labour (14 November 1973) 388 NZPD 5114. The Minister was referring to what became the "travelling" provision currently embodied in section 16(3) of the Injury Prevention, Rehabilitation, and Compensation Act 2001.
[53] See Accident Compensation Amendment Act 1978, s 9; Accident Compensation Act 1982, s 2 "New Zealand", ss 33 and 34; Accident Rehabilitation and Compensation Insurance Act 1992, s 2 "New Zealand", ss 12 and 13; Accident Insurance Act 1998, ss 23 and 42.
[54] Injury Prevention and Rehabilitation Bill 2001, no 90-1.
[55] Air New Zealand Ltd "Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention and Rehabilitation Bill 2001" 7-8.
[56] Margaret McGregor-Vennell, Associate Professor, University of Auckland "Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention and Rehabilitation Bill 2001" 2-4.
[57] New Zealand Law Society "Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention and Rehabilitation Bill 2001" 18-19; International Compensation Consultants Ltd "Submission to the Transport and Industrial Relations Select Committee on the Injury Prevention and Rehabilitation Bill 2001" 18-19.

boundaries of ACC were not addressed. Further enquiries to the Department of Labour under the Official Information Act 1982 failed to yield any further departmental discussions on the matter during the 2001 reforms.[58]

C Illustrations

By applying the ACC boundary provisions to some hypothetical situations, both the comprehensiveness and inevitable shortfalls of the scheme become apparent.

Any New Zealand passengers and crew injured onboard a ship will come within the scope of ACC. Regardless of whether the ship was within the geographical definition of "New Zealand" at the time of the accident, or where the ship was registered, they are entitled to coverage throughout the world, for work or leisure.[59] Provided their injuries conform to the requirements of the 2001 Act, they will receive cover.[60]

The position of foreign nationals aboard a ship entering or leaving New Zealand exposes a gap in the ACC scheme. These people do not receive cover until they step off the gangplank and on to New Zealand soil, and they lose cover the moment they mount the gangplank to board their ship.[61] However, they remain subject to New Zealand's jurisdiction as long as they are within the territorial sea.[62] While the New Zealanders are barred from taking an action for damages following their personal injury by virtue of the ACC scheme's statute bar,[63] the English nationals may wish to explore this option.

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[58] Andrew Springett, Director, Legal Business, Department of Labour, to the author (8 August 2005) Letter.
[59] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 22.
[60] Injury Prevention, Rehabilitation, and Compensation Act 2001, ss 20 and 26.
[61] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23.
[62] Territorial Sea and Exclusive Economic Zone Act 1977, s 3.
[63] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317.

If a ship is moving from one point of New Zealand to another the "travelling" provisions extend ACC coverage to any New Zealanders' journeys, and to any foreign nationals who boarded the ship in New Zealand.[64] This would apply to passengers aboard the interisland ferry for example. However, any foreign nationals that have been accommodated within the same ship for their entire visit to New Zealand are excluded from cover.[65] This applies primarily to cruise ship passengers and the crew of vessels on international routes.

D Holes in the Net

The extension of cover to New Zealanders aboard ships wherever they may roam should come as no surprise: the ACC scheme is after all designed by New Zealanders to meet New Zealand needs.[66] The extension of cover to tourists while in the country also has its advantages, in that they are barred from suing New Zealanders and New Zealand organisations for personal injury.[67] Tourists also contribute to the scheme when they buy goods directly connected with ACC, such as petrol,[68] and other goods and services will have ACC levies factored into the price.[69] In this way they help pay for the scheme during their stay in the country.

Durie J once stated that it would be helpful "to avoid an anomaly, illustrated as follows, that persons injured on board a ship during a berthing accident, might be treated differently from those injured in the same accident but standing directly on shore."[70] This is a situation that could easily apply to foreign nationals aboard any ship visiting New Zealand, were they to meet with such a misfortune. However, the situation is unavoidable. Even if the geographical boundary were altered to extend

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[64] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 16.
[65] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23(2)(c).
[66] Shapira, above n 26, 420.
[67] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317.
[68] This carries an ACC excise tax: see <http://www.acc.co.nz> (last accessed 30 October 2005).
[69] See Part VI of the Injury Prevention, Rehabilitation, and Compensation Act 2001, which deals with the management of the ACC scheme including employers' and earners' levies.
[70] The judgment was referring to limitations provisions: *Wilson v Nightingale Trading Ltd* (4 August 1999) HC WN CP 88/99, 9 Durie J.

cover to every person as soon as they enter New Zealand's territorial waters, incidents could still occur on the high seas on vessels bound for New Zealand, with court proceedings being issued on arrival. An example is found in *Mitrofanova v The ship Kursa*, in which a seafarer was swept overboard on the high seas due to equipment malfunction and the ship was arrested in Picton.[71] Such claims cannot be denied a hearing: ACC will never extend to foreign nationals injured on the high seas, whereas our courts have jurisdiction over actions in admiralty, wherever such claims may arise.[72]

This leaves New Zealand with the unusual prospect of personal injury proceedings founded in admiralty. New Zealand lawyers may be aware of the "gaps" in ACC allowing nervous shock,[73] and exemplary damage actions,[74] but the admiralty gap eclipses them both in terms of its completeness and inescapable nature.

III MARITIME LAW AND PERSONAL INJURY PROCEEDINGS

Foreign nationals involved in shipping accidents occurring outside the scope of ACC coverage may wish to take an action for compensatory damages. New Zealand is not often seen as a desirable, or even viable, forum for such proceedings on account of the ACC bar on such actions.[75] However, this does not pose a problem for foreign nationals, as they do not come within the ACC scheme.[76] This part of the paper highlights some general issues in relation to admiralty claims, including their advantages.

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[71] *Mitrofanova v The ship Kursa* [1996] 3 NZLR 215 (HC); see also *The Margaret Z*, above n 18.
[72] Admiralty Act 1973, s 4(4)(b).
[73] *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA); see also Andrew Beck "Personal Injury Claims Resurface" [1998] NZLJ 429.
[74] *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA); *Bottrill v A* [2003] 2 NZLR 721 (PC).
[75] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317.
[76] *Queenstown Lakes District Council v Palmer*, above n 73, 553-554 Thomas J for the Court.

Proceedings in admiralty possess some unique qualities that set them apart from regular civil proceedings. Professor D C Jackson describes a "dual key" to common law admiralty jurisdiction, the first half being the availability of an action *in rem* (an action against the ship itself), the second half being the maritime lien (a security interest that attaches to the ship in some situations).[77] Both of these concepts are relevant to the personal injury litigant whose action lies in admiralty, but it is that dramatic stage of the action – the arrest of the ship – that determines the forum of the proceedings.

A The Right of Arrest

After issuing their claim *in rem*, plaintiffs relying on New Zealand's admiralty jurisdiction can seek warrants for the arrest of the vessel concerned.[78] This places the ship under the control of the court. The arrest of a ship in New Zealand is often a matter of exigency on the part of its crew or creditors, rather than convenience. Claimants can of course wait until a ship arrives in a more convenient jurisdiction before commencing their action. However, the arrest of the vessel at the earliest possible time provides security for their claims and prevents the ship's owners from attempting to move the vessel out of the jurisdiction – and thus escape having to answer the claims. In reality the arrest of a ship is often met by a guarantee by its insurers for any costs/damages that may arise from trial.[79] This prevents the serious financial loss that may amount from having such an important income-earning asset sitting idle during court proceedings.

B Proceedings In Rem

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[77] D C Jackson *Enforcement of Maritime Claims* (3 ed, Lloyd's of London Press Ltd, London, 2000) 11, footnote 8 [*Enforcement of Maritime Claims*].
[78] High Court Rules, r 776.
[79] High Court Rules, r 778(5); see for example *Mitrofanova v The ship "Kursa"* (18 December 1995) HC WN AD 313/95, 3-4 Doouge J.

Section 5 of the Admiralty Act 1973 confers upon the High Court the jurisdiction to hear actions *in rem*.[80] This refers to an action against a ship itself, although the accepted reality is that the ship's owner is the one answering the claim.[81] The action *in rem* allows jurisdiction to be founded wherever the ship is arrested, rather than where the owner(s) of the vessel are located. *In rem* actions may even be taken despite existing *in personam* or arbitral proceedings, or unsatisfied decisions.[82] One key advantage of an action *in rem* is that it:[83]

> [O]pens the way to obtaining adequate security in lieu and any peace of mind of knowing that if you do, eventually, obtain a judgment against the owner of the "res", you will, within and subject to the terms of the security, get ultimate satisfaction.

In rem actions also provide security that is much more accessible than comparable options in common law actions, such as mareva injunctions, which require a high evidential onus to be satisfied for a court to issue pre-trial.[84] Mareva injunctions can however be used to ensure that vessels may be sold to meet costs without the risk of funds disappearing out of the jurisdiction.[85]

Personal injury actions against a ship are common enough, especially in the earlier law reports. For example, in *The Athelvictor* a group of claimants sued the owners of a tanker that spilled oil into a harbour, subsequently ignited, and set off depth charges carried within trawlers nearby.[86] The claimants had to prove, unsuccessfully in that case, that the accident was caused by the negligent management of the ship in line with the words of relevant provisions of the United Kingdom's Merchant Shipping Act 1894.

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[80] While the use is not unconnected, the admiralty action *in rem* is a concept distinct from the action *in rem* in other areas of law, where it relates to an action enforceable against "all the world": Jackson, above n 77, 9.
[81] *Republic of India v India Steamship Company (No 2)* [1997] 3 WLR 818 (HL).
[82] *Raukura Moana Fisheries Ltd v The ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC).
[83] Christopher Hill *Maritime Law* (6 ed, Lloyd's of London Press Ltd, London, 2003) 100.
[84] *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451 (HC).
[85] See for example *Raukura Moana Fisheries Ltd v The ship "Irina Zharkikh"*, above n 82, paras 116-141 Young J.
[86] *The Athelvictor* [1946] P 42 (QB(Ad)).

Personal injury actions *in rem* give rise to issues such as maritime liens and applications for the limitation of liability. These are discussed below.

C Proceedings In Personam

Actions *in rem* are by no means the only option for admiralty proceedings: an action *in personam* at maritime law basically describes any action that is not *in rem*.[87] So an action *in personam* for personal injury as a result of negligence on the part of, for example, a ship's owner or master is not distinguishable from a similar claim in a non-maritime setting. For example, in *Hamilton v SS "Monterey"* there was a nautical theme to the case, which involved an assault on a passenger by a crewmember on the high seas, but it was ultimately a complaint against an individual.[88] The ship was not "the noxious instrument" that caused the damage, and there was no corresponding jurisdiction *in rem*.[89] Similarly, the case of *Union Steamship Company of New Zealand v Wenlock*, which involved an action in negligence by a ship's engineer for injuries sustained following a fall caused by oil spilled in the engine room.[90] Actions of this nature used to be relatively commonplace in New Zealand before ACC came into effect.[91]

These cases fall chiefly within the domain of negligence, the law as to which is essentially the same whether the case is brought in admiralty or at common law, and are not the focus of this paper. However, if a ship sinks, thus removing any question of arrest and *in rem* proceedings, defendants would have to have been pursued through regular *in personam* actions.

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[87] *Enforcement of Maritime Claims*, above n 77, 11; they are provided for in the Admiralty Act 1973, s 3.
[88] *Hamilton v SS "Monterey"* [1940] NZLR 31 (SC) (*The Monterey*).
[89] *The Monterey*, above n 88, 35-36 Myers CJ.
[90] *Union Steamship Company of New Zealand v Wenlock* [1959] NZLR 173 (SC and CA).
[91] See also *McCarthy v Union Steamship Company of New Zealand Ltd* [1916] NZLR 1154 (Court of Arbitration); *North v Union Steamship Company of New Zealand* [1973] 1 NZLR 675 (SC).

D New Zealand Admiralty Jurisdiction for Personal Injury

As discussed above, in some cases a person injured in a shipping accident may fall outside the scope of ACC cover and wish to take an action for compensatory damages. In these situations the New Zealand courts will have the jurisdiction to hear the case based on section 4(1)(f) of the Admiralty Act 1973:

> Any claim for loss of life or personal injury sustained in consequence of any defect in a ship on in her apparel or equipment, or the wrongful act, neglect, or default of the owners, charterers, or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects, or defaults the owners, charterers, or persons in possession or control of a ship are responsible, being an act, neglect, or default in the navigation or management of the ship, in the loading, carriage, or discharge of goods on, in, or from the ship or in the embarkation, carriage, or disembarkment of persons on, in, or from the ship.

This can be broken down into two categories of claim for personal injury or death. Firstly, claims arising from a defect in the ship itself. Secondly from the negligent or wrongful acts and omissions of people connected with the ship. If the claim arises in the second category it must relate to navigation, management, or dealings with the carriage of goods or people. This provides a claimant with a broad scope to bring a claim for personal injury when something goes awry shipside, but in some cases it may be advantageous to rely on section 4(1)(d) which provides for: "Any claim for damage done by a ship".[92] This is because such a claim might give rise to a maritime damage lien, which is discussed below.

Once jurisdiction is founded, admiralty claims proceed according to the respective common law tests for negligence.[93] Rather than discuss these, this paper is limited to the discussion of certain peripheral issues peculiar to maritime law.

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[92] See *The Margaret Z*, above n 18.
[93] See for example *The Port Victoria* [1902] P 25 (QB(Ad)).

E Maritime Claims and the Conflict of Laws

Conflict of laws issues often arise in shipping matters due to the international mobility of ships, and many leading conflict of laws cases have maritime themes.[94] Due to the comparatively small amount of money available under the ACC scheme, New Zealand is not a popular forum with personal injury litigants: "the law in New Zealand on damages for personal injury has rather stood still since the accident compensation scheme came into force."[95] Sometimes claims following accidents that occur in New Zealand, and could be litigated in New Zealand courts, are taken elsewhere – for example the claims following the sinking of the *Mikhail Lermontov* in the Marlborough Sounds were made in New South Wales.[96] Similarly, in *Union Shipping New Zealand Ltd v Morgan*, a New Zealander operating a New Zealand-flagged tug-and-barge outfit was injured onboard while unloading coal in New South Wales and took personal injury proceedings there.[97] Cases like these show a strong desire to avoid the ACC scheme where possible.

However, if a ship is arrested in New Zealand, then proceedings may take place in the New Zealand courts regardless of the lack of connecting factors between the ship and New Zealand.[98] In situations of this kind, the insurers of a ship will often extend a guarantee for costs provided that the case is transferred to the courts of another jurisdiction. This is potentially advantageous to all parties, especially when the ship is arrested in a jurisdiction with a poor judicial record.

If a case does end up in the New Zealand courts, some plaintiffs may elect to plead foreign law in the hope of a more advantageous outcome. Maritime cases

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[94] See for example *The Hollandia* [1983] 1 AC 565 (HL); *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 464 (HL).
[95] *Bryan v Phillips New Zealand Ltd* [1995] 1 NZLR 632, 640 (HC) Barker J.
[96] *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 (HCA); Parties may not try their luck in two jurisdictions: concurrent *in personam* proceedings in New Zealand between the same parties on the same matter are prevented by section 6(2) of the Admiralty Act 1973.
[97] *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 (NSWCA).
[98] See for example *The Margaret Z*, above n 18.

create some interesting questions of law in this regard.[99] If for example a ship has an "internal" accident that has nothing to do with the state whose waters it was travelling through, is there any point in applying the *lex loci delicti*?[100] It is arguably more sensible to apply the law with the closest connection to the ship in these situations. New Zealand's choice of law rules for tort are behind the times, but a situation such as this could support the "*lex loci delicti* with exception" approach as advocated by Schoeman,[101] rather than Australia's recent move towards a strict *lex loci delicti* rule.[102]

IV CIVIL LIABILITY

Even if personal injury plaintiffs' actions in admiralty are successful, they might still face the possibility of having the amount of compensation to which they are entitled limited. A series of international agreements are in force in a number of jurisdictions, limiting the liability of ship owners based on the tonnage of their ships.[103] Limitations of this kind are well established – there is even evidence of an eleventh century regime.[104] They first appeared in English law in 1734,[105] and were extended to personal injury claims in 1862.[106] However, agreements of this kind need to be periodically updated to raise the upper limits to account for inflation,

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[99] See generally C F Finlayson "Shipboard Torts and the Conflict of Laws" (1986) 16 VUWLR 119; Lawrence Collins (ed) *Dicey and Morris on the Conflict of Laws* (vol 2, 13 ed, Sweet & Maxwell, London, 2000) 1537 and following; greater attention is given to the common law in the eleventh edition of this work, at page 1409 and following.

[100] See *Dicey and Morris on the Conflict of Laws*, above n 99, 1541.

[101] Elsabie Schoeman "Tort Choice of Law in New Zealand: Recommendations for Reform" [2004] NZ Law Rev 537.

[102] See *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 (HCA); *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1 (HCA).

[103] An important work on the subject is Patrick Griggs and Richard Williams *Limitation of Liability for Maritime Claims* (3 ed, Lloyd's of London Press, London, 1998).

[104] Baris Soyer "1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?" [2000] JBL 153, 153 ["1996 Protocol to the 1976 Limitation Convention"]; for a general history see Patrick Griggs "Limitation of Liability for Maritime Claims: The Search for International Uniformity" [1997] LCMLQ 369.

[105] Responsibility of Shipowners Act 1734 (UK), 7 Geo 2, c 15.

[106] Merchant Shipping (Amendment) Act 1862 (UK) 25 & 26 Vict, c 63.

otherwise they can lead to unfairly low recovery for claimants:[107] New Zealand only updated its law on global limitation from provisions dating back to 1894 in 1987,[108] bringing the maximum liability for a cargo ship of 6700 gross tons from NZ$79,590 up to $6.6 million.[109]

The policy goal behind this limitation structure, which can prevent people from receiving compensation adequate to match their losses in some scenarios, is an attempt to create uniformity and certainty in the outcome of claims throughout the world's various maritime tribunals.[110] If such consistency is achieved, then those that invest in and operate shipping ventures throughout the world can do so in full knowledge of their rights and duties. This is conducive to international trade and investment in a similar sense to limited liability companies.

If the upper limit on liability is too high then shipping investment might decrease and the benefits that flow from this economic activity will not be as widely enjoyed. However, if liability is set too low, then there will be no one left to foot the bill when disaster strikes. For example, Transpower warned the drafters of the current maritime transport legislation that if the upper limit on liability is low, and the Cook Strait submarine cables were severed by a small ship (liability being calculated according to tonnage),[111] then the New Zealand taxpayer would be left with an enormous loss to bear.[112]

A Global Liability

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[107] "1996 Protocol to the 1976 Limitation Convention", above n 104,154-155.
[108] See Shipping and Seamen Amendment Act 1987.
[109] W P Jefferies MP (19 March 1992) 479 NZPD 7895.
[110] See generally Patrick S Griggs "Uniformity of Maritime Law: An International Perspective" (1999) 73 Tulane Law Rev 1551 ["Uniformity of Maritime Law: An International Perspective"]; Lord Mustill "Ships are Different – or are they?" [1993] LCMLQ 490, 492-493; *Review of the Shipping and Seamen Act 1952*, above n 6, 77.
[111] Maritime Transport Act 1994, s 87.
[112] Alastair Patrick, Coordinator of Maritime Policy, Ministry of Transport, to Hon R Storey MP, Chairman, Transport Select Committee (24 May 1994) Letter, 3.

1 Background to New Zealand limitations

New Zealand has signed the Convention for Limitation of Liability for Maritime Claims 1976 (the 1976 Convention),[113] and its articles were brought into effect by the Maritime Transport Act 1994.[114] Liability can be limited in relation to any ship that comes within New Zealand's admiralty jurisdiction.[115] A carrier that wishes to limit its liability following an incident involving its ship can make an application to do so, or raise limited liability as a defence in response to proceedings.[116] A wide range of defendants are entitled to rely on these provisions, including masters and ship owners, and do so independently of each other.[117] That is, their liabilities, once limited, do not merge into a single pool of funds.[118] When limitation of liability does attach to a claim, it is "virtually unbreakable",[119] a plaintiff must point to a "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."[120] For those looking for an illustration of the mathematics and other considerations involved, New Zealand's first case involving the 1976 Convention was recently decided in the High Court.[121]

Slightly different rules apply where two or more ships are involved in a claim. Section 95 of the Maritime Transport Act 1994 states that where, through the fault of two or more ships, someone on board a ship is injured, the ship owners are

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[113] Convention on Limitation of Liability for Maritime Claims (19 November 1976) 1456 UNTS 221 (1976 Convention). Forty states are currently parties to this convention: "Status of Conventions" (International Maritime Organisation, London, 2005).
[114] Maritime Transport Act 1994, Part VII.
[115] Maritime Transport Act 1994, s 83.
[116] High Court Rules, r 792.
[117] See Christopher Sprague "Damages for Personal Injury and Loss of Life: The English Approach (1997) 72 Tulane L Rev 975, 1012-1013.
[118] *Yachting New Zealand Inc v Birkenfeld (No 2)* (22 July 2005) HC AK CIV 2005-404-438, para 26 Keane J.
[119] Paul Myburgh "Shipping Law" [2005] NZ Law Rev 287, 296 [Myburgh 2005]; *The Leerort* [2001] 2 Lloyd's Rep 291, 294-295 (CA) Lord Phillips MR.
[120] Maritime Transport Act 1994, s 85(2).
[121] *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650 (HC).

jointly and severally liable.[122] This provision was added to the Transport Law Reform Bill late in the piece,[123] and according to the officials who advised on the Bill was "required in order to provide for cases involving people who do not have cover under the Accident Rehabilitation and Compensation Insurance Act".[124]

However, New Zealand's manner of adoption of the tonnage limitation regime has been subject to criticism: one commentator recently labelled Part VII of the Maritime Transport Act 1994 "an embarrassment" for the way in which it clumsily paraphrases the 1976 Convention, thus creating unnecessary ambiguity as to who may benefit from it.[125]

2 *Application to personal injury claims*

Personal injury claims fall within the scope of New Zealand's limitation provisions, provided the injury occurred "on board the ship or is directly connected with the operation of the ship or with salvage operations, or is consequential upon any such … injury".[126] The maximum rates of liability for personal injury claims are double those for other forms of damage,[127] suggesting a desire to give priority to these claims. However, limitation is rarely invoked for personal injury claims, especially compared with claims for lost/damaged cargo, which do not often come close to the upper limits of liability.[128]

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[122] Although a carrier who settles any claims in excess of its proportion of liability is entitled to recover a contribution from any other carriers involved: Maritime Transport Act 1994, s 96.
[123] Transport Law Reform Bill 1993, no 243-2, cl 117A.
[124] Ministry of Transport "Departmental Records and Recommendations on the Transport Law Reform Bill" (Report prepared for the Transport Select Committee, vol 1, Wellington, 1993) 169.
[125] Myburgh 2005, above n 119, 298; see also Andrew Tetley "Limitation of Liability – going Dutch?" [2004] NZLJ 158, 158; *Tasman Orient Line CV v Alliance Group Ltd*, above n 121, para 30 Williams J; Tom Broadmore "New Zealand" in Griggs and Williams, above n 103, 251.
[126] Maritime Transport Act 1994, s 86(1)(a).
[127] Maritime Transport Act 1994, s 87.
[128] *Review of the Shipping and Seamen Act 1952*, above n 6, 90; Grahame Aldous "Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings" [2001] LCMLQ 150, 154.

Occasionally arguments are raised in favour of unlimited liability for personal injury and loss of life claims, especially when political pressure is put on governments following maritime catastrophes.[129] Limitation of liability is not universally popular.[130] However, if caps on liability were removed there is the risk that protection and indemnity (P&I) clubs would not insure ship owners for the full amount of their liability. Unless the ship owner could find extra insurance, there could well be unanswered claims in the event of a major disaster.[131]

There are also instances that raise questions about the fairness of an arbitrary limitation based on tonnage. The case of *Yachting New Zealand Inc v Birkenfeld* is one such case.[132] In 2002 a boat operated by Yachting New Zealand, and driven by New Zealander Bruce Kendall, collided with American windsurfer Kimberly Birkenfeld off the coast of Greece. Ms Birkenfeld suffered severe injuries, and is now a tetraplegic. She has been diagnosed with post traumatic stress disorder. She commenced a personal injury claim in admiralty in the High Court. Yachting New Zealand brought a separate action to limit their liability under the Maritime Transport Act 1994. The catch, from the plaintiff's perspective, is that their "ship" is a rigid-hulled inflatable. While a vessel of any size can do considerable damage to an unprotected human body, this boat had a gross tonnage well under 300 tons, and thus the lowest liability limits applied:[133] the limitation fund totalled less than NZ$400,000. In the words of Lord Mustill, "it is unacceptable that the financial future of injured persons should depend on chances as whimsical as these."[134]

Putting the actual proof of negligence and attribution of liability to one side, and negligence is fervently denied by the defendant Kendall, this sum is not a fair

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[129] "1996 Protocol to the 1976 Limitation Convention", above n 104, 157;
[130] See "Uniformity of Maritime Law: An International Perspective", above n 110, 1581; Lord Mustill, above n 110.
[131] Baris Soyer "Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974" (2002) 33 JMLC 519, 534 ["Sundry Considerations on the Draft Protocol to the Athens Convention"].
[132] *Yachting New Zealand Inc v Birkenfeld (No 2)*, above n 118.
[133] Maritime Transport Act 1994, s 87(1)(a).
[134] Lord Mustill, above n 110, 500 (speaking extrajudicially).

amount of compensation for the injuries that Ms Birkenfeld has suffered. She has gone from being an athlete, highly ranked in her field, to someone whose mobility is severely compromised. She can no longer compete as a windsurfer. Her ongoing medical expenses, especially in Florida where she lives, must be considerable. There are no arguments on the side of Yachting New Zealand in terms of encouraging shipping investment – the vessels were in the area for a board sailing regatta. The vessel operated by Mr Kendall was not a commercial vessel plying international trade. A fair amount of compensation would arguably total more than NZ$400,000.

Despite the policy arguments in favour of unlimited liability for personal injury claimants, they are unlikely to succeed in the near future. Limitation of liability has always been based on the understanding that those who fund maritime adventures place themselves at considerable risk. If they were threatened with the full burden of liability in the case of an accident, their "keen adventurous spirit" might be dampened, and their creditors would probably prefer the certainty of partial recovery to the risk of total loss.[135] Besides this, insurers may refuse to come to the table if liability is unlimited: when passenger limits were removed in Japan insurers retained the same limits on insurance cover.[136]

3 *New Zealand's priorities*

New Zealand's first priority should be to re-draft the provisions of the Maritime Transport Act 1994 in order to give the 1976 Convention its full effect.[137] The second priority should be to sign the 1996 Protocol to the 1976 Convention, which came into force in May 2004.[138] The key advantage of this would be a 250 per cent increase, on average, in the maximum limits.[139] This would address the

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[135] Hill, above n 83, 394.
[136] David Steel "Ships are Different: the Case for Limitation of Liability" [1995] LCMLQ 77, 82.
[137] Myburgh 2005, above n 119, 298.
[138] Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 (2 May 1996) LEG/CONF.10/8.
[139] "1996 Protocol to the 1976 Limitation Convention", above n 104, 158.

imbalance that is being aggravated by the worldwide inflation since the 1976 Convention was first drafted. The Protocol also puts in place a system for the speedier amendment of the liability limits to account for future inflation.[140] To prevent too much expense befalling the owners of smaller ships, New Zealand will probably wish to continue, as the United Kingdom has, in allowing lower limits for those vessels of less than 300 tons,[141] as the 1976 Convention allows.[142]

B Limitation of Liability and ACC

New Zealand's compensation scheme was given a fair amount of consideration during the drafting of the Maritime Transport Act 1994. For a start, the limitation of liability under Part VII of the Act does not affect anything in the Injury Prevention, Rehabilitation, and Compensation Act 2001.[143] Therefore a personal injury claimant cannot assert that their right to damages (albeit potentially limited damages) at maritime law overrides the accident compensation statutory bar.[144] The people who do eventually have their claims limited under the Maritime Transport Act will be those who did not fall under the compensation regime in the first place.

New Zealand's compensation scheme even goes towards the maritime transport policy goal of global certainty leading to confident international investment.[145] Because of the no-fault cover for personal injury, an investor involved in a maritime venture in New Zealand waters, or with New Zealand crew, has a very

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[140] See "1996 Protocol to the 1976 Limitation Convention", above n 104, 165-167.
[141] Merchant Shipping Act 1995 (UK), sch 7, part II, para 5.
[142] 1976 Convention, above n 113, art 15(2).
[143] Maritime Transport Act 1994, s 86(4).
[144] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317; An "avoidable" argument, raised in *McGrory v Ansett New Zealand Ltd*, suggested that the lack of a specific ACC bar in relation to this provision (among others) might create such an opportunity. It is noted for sake of completeness: *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328, 333 and 343 (CA) Keith J for the Court.
[145] *Review of the Shipping and Seamen Act 1952*, above n 6, 90.

high degree of certainty in relation to liability in this area. The result is that New Zealand carrier P&I costs are lower than in many other jurisdictions.[146]

The counter-argument is that the ACC scheme reduces the likelihood of quality performance, as people have less reason to avoid the contingency insured against, so the level of service might decrease when dealing with those covered by the scheme.[147] This view, which was noted in the Ministry of Transport's report,[148] has been generally dismissed by the majority of commentators who argue that tort law, and systems of liability like ACC,[149] have very little if any effect on behaviour in this way.[150]

One interesting issue that arises between limitation conventions and ACC is the different approaches to compensation in the case of injury. Recovery is low in terms of dollar amounts under ACC, but cover is widely available and claims are processed by a specialist government agency – not a court. The conventions on the other hand are applied when a person is unable to claim ACC, yet the sum that they can receive is reduced further by the regime. It is hard to determine whether the latter is compatible with the policy behind ACC, because New Zealand had not held a "full compensation" approach to personal injury cases for many years. The only certainty is that New Zealand is not a place where damages will be spiralling into the millions of dollars at any time in the near future.[151]

C The Athens Convention

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[146] Alistair Irving, P&I Services, to the author (10 August 2005) Letter: "P&I costs for New Zealand maritime employers are certainly lower than they would be if employees remained able to bring a common law action with respect to personal injury".

[147] Lewis Evans and Neil Quigley "Accident Compensation: The Role of Incentives, Consumer Choice and Competition" (2003) 34 VUWLR 423, 425.

[148] *Review of the Shipping and Seamen Act 1952*, above n 6, 90.

[149] Ian Campbell *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (Auckland University Press, Auckland, 1996) 183-187.

[150] See Don Dewes, David Duff and Michael Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, New York, 1996) 431-432.

[151] *Bryan v Phillips New Zealand Ltd*, above n 95, 640 Barker J.

1 *Background*

A foreign national injured aboard a ship upon which they were travelling as a passenger, may well look towards the International Convention for the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) when lodging their personal injury claim in New Zealand. This convention is specifically designed to cope with claims by seagoing passengers who are injured in shipboard accidents.[152] While the convention limits the liability of the carrier,[153] it also makes claims more straightforward by reversing the burden of proof in cases involving a ship-related accident.[154] This is set to change, however, if and when the 2002 Protocol to the Convention comes into force.[155] This will introduce strict liability for most cases, and compulsory insurance, with the aim of making compensation for passengers who suffer injury or loss easier to obtain.[156] There is also a focus on encouraging the prompt settlement of claims, and the discouragement of forum shopping: unlimited liability can lead to undisciplined claims.[157]

The reason that this convention might appeal to the unfortunate passenger mentioned above is found in section 317(5) of the Injury Prevention, Rehabilitation, and Compensation Act 2001. This provides an exception to the statutory bar on claims for compensatory damages for personal injury when actions are based on international agreements relating to the carriage of passengers. However, unlike the aviation equivalent, New Zealand has never signed the Athens Convention. This is not an uncommon position, as the upper limit of liability that the Athens Convention originally imposed for personal injury claims (about NZ$109,000)[158] was widely

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[152] See generally "Sundry Considerations on the Draft Protocol to the Athens Convention", above n 131.
[153] Athens Convention, above n 41, art 7.
[154] Athens Convention, above n 41, art 3.
[155] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (1 November 2002) LEG/CONF13/20.
[156] International Maritime Organization <http://www.imo.org> (last accessed 19 August 2005).
[157] Steel, above n 136, 81-83.
[158] Athens Convention, above n 41, art 7.

considered to be too low.[159] A protocol to the Convention in 1990 raised this to NZ$407,260 and introduced procedures for adjusting the limits,[160] but this is not yet in force – only five of a required ten sovereign states have signed. The 2002 Protocol will raise limits yet again to somewhere in the vicinity of NZ$580,000,[161] but only three of a required twelve states have signed.

2 *Should New Zealand sign?*

As the ACC legislation allows for it, and the Ministry of Transport has argued in favour of it over (over ten years ago),[162] the question arises as to whether New Zealand should now sign the Athens Convention and its protocols. Having made enquiries to the Minister of Foreign Affairs as to whether New Zealand had considered signing the Convention the following reply was received, stating that it was not a policy priority:[163]

> New Zealand has not flagged any passenger ships within the terms of the International Convention for the Safety of Life at Sea 1974 which trade internationally; the numbers of international passengers for which New Zealand is the departure or destination point are limited; and New Zealand has a very limited passenger and shipping industry which would be covered by the Convention. Taking these considerations into account, the government agencies with the primary policy interest in this treaty, the Ministry of Transport and Maritime New Zealand, have not to date accorded this treaty a priority in their policy development. Consequently we are not actively considering accession to this treaty. New Zealand may, however, consider becoming party to the Convention in the future.

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[159] *Review of the Shipping and Seamen Act 1952*, above n 6, 83.
[160] Protocol to Amend the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (29 March 1990) LEG/CONF8/10; for a full description see Hill, above n 83, 450-458.
[161] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974, above n 155, art 7.
[162] *Review of the Shipping and Seamen Act 1952*, above n 6, 85.
[163] Amy Laurenson, Legal Adviser, Ministry of Foreign Affairs and Trade, to the author (1 September 2005) Email.

Commentators suggest that the Athens Convention, especially when combined with an up-to-date ratification of the 1976 Convention and its protocols, can produce considerable benefits to the seagoing traveller.[164] However, these agreements have, with the exception of the 1976 Convention itself, proven unpopular on the global scene.[165] The reasons for this lack of interest are equally applicable to New Zealand, and are foreshadowed in the official response: these conventions are not a political priority, existing measures are deemed adequate, and the international legal process is too time consuming and expensive to provide efficient solutions in every situation.[166]

The main reason militating against New Zealand's accession to the Athens Convention is the lack of application it would receive on the water: the voyages affected by the Convention are where the ship's flag state is a party to the Convention, or where the contract of carriage is made in a state party to the Convention, or where the place of departure/destination is in a state party to the Convention.[167] The Convention affects only international carriage; domestic ferry services would not be affected.[168]

The New Zealand courts would probably not see many Athens Convention proceedings either. Foreign nationals injured on cruises while in New Zealand waters are excluded from ACC cover,[169] but immediate litigation upon arrival in a New Zealand port would not always be available. Only if the cruise operator was based in New Zealand, or the passenger had departed from (or was destined for) New Zealand, or if the passenger's contract of carriage was made in New Zealand and the defendant had a place of business there, would the New Zealand courts have

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[164] "1996 Protocol to the 1976 Limitation Convention", above n 104, 162-163.
[165] See generally Patrick J S Griggs "Obstacles to Uniformity of Maritime Law: The Nicholas J Healy Lecture" (2003) 34 JMLC 191 ["Obstacles to Uniformity of Maritime Law: The Nicholas J Healy Lecture"].
[166] Uniformity of Maritime Law: An International Perspective, above n 110, 1568-1569.
[167] Athens Convention, above n 41, art 2. The point of departure/destination goes by the contract of carriage, allowing for individual passengers' trips to differ from the totality of the ship's voyage.
[168] Athens Convention, above n 41, art 1 "international carriage".
[169] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23(1) and (2)(c).

jurisdiction over an Athens Convention claim.[170] This will generally exclude international passengers on stopover. These jurisdictional limitations are aimed at keeping litigation in forums convenient to the cruise operators, not the passengers.[171] Besides which, New Zealand is unlikely to be a very convenient forum for overseas passengers.[172]

However, this is not to say that there are no arguments in favour of signing. They relate chiefly to New Zealand's position as an increasingly popular cruise ship destination.

New Zealand's current place in the international passenger market is as a port of call for foreign cruise ships. The domination of passenger services by airlines looks unassailable, but the cruise ship niche is a valuable market. In the past five years an average of 13,100 people have arrived in New Zealand on cruise ships each year, mostly from the United States.[173] The government has expressed a desire to foster the cruise industry, and in 2001 estimated that the summer season alone would bring in NZ$600 million in economic benefits for New Zealand.[174] One industry participant is reporting a 26 per cent increase in business for 2006, with projected passenger spending in New Zealand ports stemming from their operations expected to reach NZ$16 million.[175] This data suggests that the cruise industry is of growing importance to New Zealand, and if the ratification of an international convention would help promote the growth of the industry, it might be given serious consideration by the government.

If New Zealand wished to become a point of departure for cruises, especially to Antarctica or the Pacific Islands, signing the Athens Convention would send a

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[170] Athens Convention, above n 41, art 17.
[171] The passengers have no one lobbying on their behalf when such conventions are drafted, see Lord Mustill, above n 110, 494.
[172] *Review of the Shipping and Seamen Act 1952*, above n 6, 84.
[173] Statistics supplied by the Ministry of Tourism, Wellington (25 August 2005).
[174] Hon Mark Burton, Minister of Tourism "Cruising to a Bright Future" (26 July 2001) Press release.
[175] Carnival New Zealand Ltd "Cruise Lines Expect Huge Growth in 2006" (9 August 2005) Press Release.

message to would-be operators that the country was serious: as with other limitation agreements, the policy behind the Athens Convention is increased predictability, and therefore efficiency, in the maritime transport sector. There is still a balance to be struck:[176]

> [B]etween accountability and incentives for performance on one hand, and, on the other, an upper limit to liability that does not deter investment in shipping and thus inhibit the wider benefits that flow from this key form of economic activity.

However, the number of people who depart New Zealand for cruises having not arrived here by the same means is not significant. Some people do fly into the country before departing on a cruise, or cruise in then fly out, but they are few by comparison to those that come and go on the same ship.[177] It is these international visitors, upon whom the increasingly important tourism industry depends, who would stand to receive the most benefit from New Zealand's ratification of the Athens Convention, depending on how that regime interacted with the ACC scheme.

3 *Potential interaction with ACC*

Currently, a New Zealand resident who is injured while cruising in New Zealand waters would be covered by ACC.[178] However, if the Athens Convention applied to that passenger's voyage they might prefer to rely on it and take an action for damages, either in New Zealand,[179] or any other available jurisdiction.[180] An overseas resident in the same position would not be entitled to ACC due to the "travelling" provisions,[181] but would have the same rights as regards actions in admiralty.

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[176] *Review of the Shipping and Seamen Act 1952*, above n 6, 84.
[177] "Sea Passengers and Vessels", above n 2.
[178] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 22.
[179] Relying on section 317(5) of the Injury Prevention, Rehabilitation, and Compensation Act 2001.
[180] Athens Convention, above n 41, art 17.
[181] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 23.

The Ministry of Transport has argued that ACC should take priority in situations where a person had both ACC entitlements and Athens Convention-type rights even where the incident occurred overseas.[182] This would be in keeping with ACC's well established statutory bar on common law actions, and could be achieved in two ways. Firstly by amending section 317(5) of the Injury Prevention, Rehabilitation, and Compensation Act 2001 to prevent any New Zealand residents who were entitled to ACC cover from taking a Convention-based action. Secondly by making use of the opt-out clause in the Athens Convention that would allow New Zealand to not apply the Convention in instances where both passenger and carrier are "subjects or nationals" of New Zealand.[183]

This latter option would result in ACC being the default law applied in such situations, with the exception in section 317(5) obviously being denied its full effect. Careful drafting would be needed to ensure that the New Zealand "subjects and nationals" matched up with those "ordinarily resident in New Zealand" under ACC,[184] otherwise odd situations could arise. For example, a New Zealand citizen receiving ACC cover, while a person on a resident's visa is given the option of ACC or an Athens Convention action.[185]

Affording priority to ACC brings into question New Zealand's commitment to the exception in section 317(5) of the Injury Prevention, Rehabilitation, and Compensation Act 2001 relating to actions based on passenger conventions. Why do we allow airline passengers to take actions under the Warsaw Convention regardless of whether they have ACC cover?[186] This has been discussed by one commentator, whose arguments are equally applicable to the Athens Convention, and suggest that such international arrangements should be given precedence over the domestic ACC

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[182] *Review of the Shipping and Seamen Act 1952*, above n 6, 84.
[183] Athens Convention, above n 41, art 22.
[184] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 17.
[185] Relying on the current wording of section 317(5) of the Injury Prevention, Rehabilitation, and Compensation Act 2001.
[186] See *Aviation Law* (Brookers, Wellington, CV Part 9A) para Intro.13 (last updated 27 November 2003).

scheme.[187] New Zealand, by signing an agreement like the Athens Convention, becomes a potential forum for litigation under that convention. Therefore it takes on international obligations, and implements part of an international framework. Coverage by the Warsaw/Athens Convention is determined by a passenger's contract of carriage, not territoriality. ACC is only a domestic scheme, partly defined by the state's territory, and applying mainly to New Zealand residents. Therefore it is important that New Zealand maintain the exception to the statute bar in order to meet its international obligations – even where its own citizens are involved as they, too may rely on those obligations.[188] In other words, giving priority to ACC could frustrate the intentions of these international conventions.

If New Zealand residents are barred from taking actions in New Zealand they will probably look elsewhere for an alternative Athens Convention forum, as the hope of receiving more compensation will outweigh the usual "home advantage". The obvious place would be the principal place of business of the carrier, which is not likely to be in New Zealand.[189]

If New Zealand residents were to be limited to ACC claims following an accident where a New Zealand carrier was liable, there could be some media pressure on government when foreign nationals are reported claiming large sums in compensation while New Zealanders effectively excused the carrier of all liability.[190] Alternatively, the onerous exclusion of liability clauses often found in passenger tickets could cause injustice to those who are injured and have no alternative but to pursue contractual action.[191] On balance it would be more appropriate for New Zealand, upon signing the Athens Convention, to give priority to that agreement over ACC. After all, no one will lose any rights to ACC cover, and they will still be able to rely on that system rather than the convention if they desire.

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[187] See Margaret Vennell "Order or Chaos: Air Carriers' Liability in the South Pacific" [1998] NZ Law Rev 345.
[188] Vennell, above n 187, 358-365.
[189] Athens Convention, above n 41, art 17(1)(a).
[190] A similar argument relating to air versus land claims is raised in "Sundry Considerations on the Draft Protocol to the Athens Convention", above n 131, 522.
[191] See for example *Alder v Dickson* [1954] 2 Lloyd's Rep 267 (CA); Hill, above n 83, 446-448.

If so, the "subrogation" provision would allow the Accident Compensation Corporation to redress any financial imbalance.[192]

4 Long road to Athens

While the details of the agreement have not been examined in detail here the Athens Convention, like many politically charged international treaties, is not a perfect instrument and has been subject to criticism.[193] The Athens Convention can be beneficial for seagoing passengers who suffer misfortune, and signing the agreement would bring New Zealand further in line with international standards. It may even promote the country's growing cruise ship hosting industry. However, until the Convention can have wider application to New Zealand-based shipping, if not New Zealanders themselves, the government is unlikely to make it a policy priority. If the Convention is eventually signed, it should be given priority over ACC where dual entitlements exist. Before any steps are taken, however, it would be advisable for New Zealand to ratify the 1996 Protocol to the 1976 Convention which removes the current cap on recovery for passenger claims, thus allowing much fuller recovery than would currently be possible, and would generally bring the two liability regimes into a much more harmonious state.[194] Changes could be within the existing Maritime Transport Act 1994 or, following the example of Canada, a single statute ratifying all these agreements in one place.[195]

VII A NEW LEVEL OF SECURITY FOR PERSONAL INJURY CLAIMS

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[192] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 321.
[193] See for example ["Obstacles to Uniformity of Maritime Law: The Nicholas J Healy Lecture", above n 165, 201-204.
[194] "1996 Protocol to the 1976 Limitation Convention", above n 104, 162-164, 167.
[195] Marine Liability Act RS C 2001 c 6; see William Tetley "Canadian Maritime Legislation and Decisions 1999-2001" [2001] LMCLQ 551, 552-553.

Once claims have been founded *in rem* against the value of a ship, and the defendant has moved to limit their liability, there will not always be enough funds available to satisfy each and every party with a claim against the ship. Personal injury claimants may have to battle against mortgagees, salvors, and the court's expenses in arresting and maintaining the vessel. If adequate compensation is to be realised a person's claim must rank highly compared to the other interests in the ship. This part of the paper discusses the maritime "damage" lien, and the role it may play in personal injury litigation. It then discusses some options for reforming this area of the law. Initially, it is necessary to provide background to the concept of the maritime lien.[196]

A Introduction to Maritime Liens

The maritime lien is a powerful security interest, "one of the first principles of the law of the sea",[197] which attaches to a restricted number of admiralty claims.[198] Not all actions *in rem* result in such an interest. The maritime lien is a relatively recent creation of the common law,[199] and over the years courts have determined which matters give rise to them, and where they rank in relation to other claims. Maritime liens arise at the same time as the cause of action, but must be carried into effect by an action *in rem*.[200] They require no formal registration and remain attached to a ship through changes of ownership, even where there is a bona fide purchaser for value.[201]

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[196] Three important works on the subject are Griffith Price *The Law of Maritime Liens* (Sweet & Maxwell, London, 1940); D R Thomas *Maritime Liens* (vol 14, British Shipping Laws, Stevens & Sons, London, 1980); William Tetley *Maritime Liens and Claims* (Business Law Communications Ltd, London, 1985).

[197] *The Tolten* [1946] P 135, 146 (CA) Scott LJ.

[198] An interesting historical discussion can be found in *The Ripon City* [1897] P 226 (QB(Ad)).

[199] The damage lien was given its contemporary form in *The Bold Buccleugh* (1851) 7 Moo PC 267; 13 ER 884 (PC).

[200] *The Halcyon Isle* [1981] AC 221 (PC).

[201] *The Father Thames* [1979] 2 Lloyd's Rep 364, 368 (QB(Ad)) Sheen J.

One of the key advantages of the maritime lien is that it outranks a mortgage in order of priority.[202] This has long caused fierce debate between those who represent the interests of mortgagees, and those who represent the interests of seafarers and the shipping service industry.[203] Maritime liens also outrank ordinary statutory claims *in rem*, including an action for personal injury based on section 4(1)(f) of the Admiralty Act 1973. The nature and ranking of the various liens are matters of public policy.[204]

The question of maritime liens only arises when the sale of the vessel raises insufficient funds to satisfy all claimants. After a case has been taken, and liability limited, there still remains the question of who gets what share of the available money. Personal injury plaintiffs will want to ensure that their claims result in adequate compensation being paid. They do not want to sit behind mortgagees and other potential claimants in priority. The best means of ensuring priority is to make sure that an action results in a maritime lien over the ship. This is only available at present by virtue of the damage lien, which is discussed in detail below. First, however, an outline of the other maritime liens currently available under New Zealand law and the policy grounds justifying them is required to place this lien in context.

B New Zealand Maritime Liens: Current Ranking

The nature and ranking of the various claims that give rise to a maritime lien in New Zealand, as set out by Perkins,[205] has been adopted by the New Zealand

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[202] *Currie v M'Knight* [1897] AC 97, 105 (HL) Lord Watson.

[203] Jose Maria Alcantara "A Short Primer on the International Convention on Maritime Liens and Mortgages 1993" (1996) 27 JMLC 219, 219.

[204] Thomas, above n 196, para 5 and ch 9; *The Tolten*, above n 197, 149 Scott LJ.

[205] See M E Perkins "The Ranking and Priority of *In Rem* Claims in New Zealand" (1986) 16 VUWLR 105; compare for example the ranking of claims during a company liquidation under the Companies Act 1993, sch 7.

courts.[206] This adheres very closely to the English position.[207] The concept of ranking liens "consists of the idea that some liens have an inherent merit or comparative righteousness which entitles them to a preference".[208] The ranking of one maritime lien against another is not discussed in detail in this paper, although this can be crucial when multiple lien-holders are in competition.[209] Instead, the key focus is on having a personal injury claim achieve maritime lien status in the first place, thus outranking mortgagees and other statutory lien holders. It should also be noted that the courts retain a residual discretion when it comes to the priority of claims, enabling them to give a particularly deserving claimant a higher priority than their rank might usually entail.[210] The liens below are presented in order of the priority given to them by the New Zealand courts.

1 Administrative costs

The highest priority is accorded to the costs of the registrar and any other government agency involved, such as a harbour authority, that may have incurred expenses during the arrest and upkeep of the vessel during trial.[211] The producer of the fund in court, generally the arresting party, also has their costs ranked highly.[212] The policy behind this is simply that the justice system needs to provide for its own administration costs, and after all has the final say on the matter.[213] This is comparable to a company liquidation, where the liquidator's fees are the first to be paid.[214]

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[206] *ABC Shipbrokers v The ship "Offi Gloria"* [1993] 3 NZLR 576, 582 (HC) Holland J (*The Offi Gloria*); *The Margaret Z*, above n 18, 116-117 (HC) Fisher J.
[207] *The Offi Gloria*, above n 206, 582 Holland J.
[208] Roger G Connor "Maritime Lien Priorities: Cross-Currents of Theory" (1956) 54 Mich L Rev 777, 791.
[209] An interesting discussion of the topic can be found in William Waung "Maritime Law of Priorities: Equity, Justice & Certainty: The Dethridge Memorial Address 2004" (2005) 19 MLAANZ Jnl 9; see also Thomas, above n 196, ch 9.
[210] *The Offi Gloria*, above n 206.
[211] *The Countess* [1923] AC 345 (HL).
[212] *The Eva* [1921] P 454 (QB(Ad)); *McGechan on Procedure* (Loose leaf, Brookers, Wellington, High Court Rules) para HR792.02 (last updated 20 April 2004).
[213] Thomas, above n 196, para 414.
[214] Companies Act 1993, sch 7, cl 1(a).

2 *Maritime liens*

The next highest priority is given to maritime liens, as distinguished from statutory liens. Maritime liens can sometimes be lumped together,[215] but tighter contests may require them to be ranked individually.[216] Perkins, whose order is followed here, extends the highest priority to liens over wages, both seamen's and masters', and any disbursements of the master.[217] Tradition states that wages will adhere to the last remaining plank of the ship.[218] The original policy behind the lien was that wages must be ranked highly because otherwise people will not sign on to sail in ships, due to the risks involved. But even in the 1950s this was criticised as no longer relevant to the unionised, wage-based and regulated shipping industry of the twentieth century.[219] However, the fact remains that seafarers are not in a good position to assess a ship's solvency, and protecting their wages in this way prevents the injustice that could arise from the deceptions of dishonest ship owners.[220]

In New Zealand the damage lien, which falls within the maritime lien category, ranks above salvage claims, although this is not the case in every jurisdiction.[221] Thomas, discussing English law, ranks them above all others.[222] As these liens are the only type with a potential bearing on personal injury claims, they are discussed in detail below.

Salvage liens are also high-ranking maritime liens, justified on the basis that salvage (essentially rescuing people or property from the sea) is a magnanimous

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[215] *McGechan on Procedure*, above n 212, para HR792.02.
[216] Perkins, above n 205, 116.
[217] The rights of a master were not available at common law, but were introduced to New Zealand by section 100 of the Shipping and Seamen Act 1952: B H Giles and G J Mercer "Shipping Law" [1993] NZ Recent L R 323, 324 and 326.
[218] *The Madonna D'Ira* (1811) 1 Dods 37; 165 ER 1224 (HC(Ad)).
[219] Connor, above n 208, 791-792.
[220] M E J Black "Admiralty Jurisdiction and the Protection of Seafarers: The F S Dethridge Memorial Address 1999" (2000) 15 MLAANZ Jnl 1.
[221] See Tetley, above n 196, 159 and following.
[222] Thomas, above n 196, para 439.

deed and should be encouraged by allowing the salvor to claim their expenses.[223] It also preserves the *res* for other claimants. Such encouragement was clearly needed, as in days gone by stranded seafarers were occasionally left to die by ships in a position to rescue them, on account of the trouble it could cause the rescuer.[224] However, some would argue that a good deed is its own reward – evidenced by the way one New Zealand fisherman has been treated for his attempt to claim compensation after salvaging a stranded American yachtsman – one commentator describes this as "blatant greed".[225]

3 *Possessory liens*

Next in priority are possessory liens, which must be distinguished from maritime liens.[226] These pertain to persons such as shipbuilders and repairers who, unlike their counterparts in the United States, do not gain a maritime lien over vessels they work on.[227] These people have the right to hold the ship in their possession until their fees are paid, but the possessory lien enables them surrender the ship itself for sale, while retaining security for their fees.[228]

4 *Mortgages and In Rem Claims*

Following these liens come mortgages, and finally statutory liens. The latter arise from claims under section 4(1) of the Admiralty Act 1973. That section includes claims for personal injury, so personal injury litigants do not face very good prospects for recovery when several parties are competing for limited funds, unless they can point to some higher-ranking security interest.

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[223] Connor, above n 208, 792.
[224] See H W Simpson *Cannibalism and the Common Law* (Penguin Books Ltd, Harmondsworth, 1986) 103.
[225] See Rocky Bottom "Rearview" *Seafood New Zealand* Wellington (July 2005) 64.
[226] Hill, above n 83, 121.
[227] *The Offi Gloria*, above n 206, 585 Holland J.
[228] *The Russland* [1924] P 55 (QB(Ad)).

C *The Damage Lien*

1 *Potential for confusion*

The damage lien is a confusing aspect of the law. This is chiefly due to the way in which the lien itself (a policy-based security interest) and the head of jurisdiction "damage done by a ship" (a ground upon which a plaintiff may base a claim *in rem*)[229] are often discussed together.[230] The former has developed solely through the courts, whereas the latter has long been a statutory provision.[231] It is of critical importance to note that while the majority of successful claims founded as "damage done by a ship" result in a damage lien, this is not true of all such claims.[232] Damage liens do not attach to government ships for example,[233] or in cases where the owner of the vessel is not lawfully responsible for the person who caused the damage.[234] The concepts are distinct.[235]

The use of the term "damage" for both jurisdiction and lien further muddies the waters, as a result of the legal baggage carried by that term. Does it refer to the physical damage that gives rise to the claim (splintered timbers and broken limbs) or the action for "damages" that follows? English law clearly favours the former,[236] the United States courts the latter.[237] Furthermore, the lien is sometimes called a "collision damage lien".[238] This is not an accurate title in the Anglo-common law

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[229] Admiralty Act 1973, s 4(1)(d).
[230] See for example *The Tolten*, above n 197.
[231] It first arose in section 7 of the Admiralty Court Act 1861 (UK). There is also a head of jurisdiction for "damage received by a ship", but this does not create confusion in relation to personal injury: Admiralty Act 1973, s 4(1)(e); Admiralty Court Act 1840 (UK), s 6.
[232] See *The Veritas* [1901] P 304, 308-309 (QB(Ad)) Gorell Barnes J; *The Minerva* [1933] P 224, 233 (QB(Ad)) Bateson J.
[233] *The Tervaete* [1922] P 259 (CA); Hill gives the further example of claims involving the carriage of nuclear matter under the Nuclear Installations Act 1965 (UK): Hill, above n 83, 93.
[234] *The Parlement Belge* (1880) 5 PD 197, 218 (CA) Brett LJ.
[235] *The Margaret Z*, above n 18, 120 Fisher J.
[236] See *The Veritas*, above n 232, 311 Gorell Barnes J.
[237] See *The John G Stevens* (1898) 170 US 113, 120 Gray J.
[238] See Tetley, above n 196, ch 9.

context, as although the damage lien formerly arose only from collisions,[239] this has long since ceased to be the case.[240]

2 *Underlying policy*

The original policy behind the maritime "damage" lien was set out in the House of Lords decision in *Currie v M'Knight*. Lord Watson stated that the lien:[241]

> [Rests] upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam-power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.

The concept of a lien promoting "careful and prudent" navigation in this way has lead to the damage lien being "jealously guarded" as a "prominent weapon" in achieving such policies.[242] The second point raised in the passage above is the ability of the lien to give the innocent victim a fair chance at recovering adequate compensation. These policy goals have been accepted more or less unchallenged for over one hundred years.

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[239] *The Robert Pow* (1863) Br & L 99; 168 ER 313 (HC(Ad)).
[240] *The Zeta* [1893] AC 468 (HL).
[241] *Currie v M'Knight*, above n 202, 106 Lord Watson.
[242] Thomas, above n 196, para 426.

3 *Extension to personal injury*

Given the number of cases skirting the topic, it seems astounding that there was considerable doubt until very recently as to whether the damage lien could extend to personal injury. The debate arose due to the uncertain position of personal injury actions in the early admiralty jurisdiction, and is now of limited relevance to New Zealand.[243] There had long been precedents to support admiralty *jurisdiction* being founded on actions for personal injury based on damage done by a ship,[244] but nothing to support damage *liens* arising from such a case. So when Fisher J in *The Margaret Z* held that the damage maritime lien extended to both property loss and personal injury,[245] it was originally seen as controversial.[246]

It is now commonly accepted that such an extension is an accurate statement of the law,[247] neatly illustrated by Jackson's change of tack between editions of his text on the *Enforcement of Maritime Claims*.[248] Indeed, no commentator came forward with any objection in principle to the treatment of personal injury and property injury in the same way,[249] and such a distinction could have subjected the law to ridicule by holding a person's property in higher regard than their person.[250] Scott LJ laid the groundwork, *obiter*, in *The Tolten*,[251] and Fisher J was justified in putting the point to rest.[252]

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[243] See *Enforcement of Maritime Claims*, above n 77, 34; a New Zealand perspective is given in *The Queen Eleanor* (1899) 18 NZLR 78, 81 (SC) Stout CJ.
[244] *The Sylph* (1867) LR 2 A & E 24; see also *The Zeta*, above n 240, 478 Lord Herschell LC.
[245] *The Margaret Z*, above n 18, 121-122 Fisher J.
[246] See Paul Myburgh "Shipping Law" [1999] NZ L Rev 387, 400 [Myburgh 1999].
[247] Myburgh now believes that the point is settled: Paul Myburgh, to the author (20 July 2005) Email.
[248] This is despite a lack of reference to *The Margaret Z* or a comparable English case: compare D C Jackson *Enforcement of Maritime Claims* (Lloyd's of London Press Ltd, London, 1985) 22-23; *Enforcement of Maritime Claims*, above n 77, 34-35.
[249] See for example Tetley, above n 196, 170.
[250] John Mansfield "Maritime Lien" (1888) 4 LQR 379, 388.
[251] *The Tolten*, above n 197, 146-147 Scott LJ.
[252] *The Margaret Z*, above n 18, 122 Fisher J.

4 *Extension to those aboard ship*

Another extension to the damage lien that was made in *The Margaret Z* was the possibility for a person to gain a damage lien having been injured by the ship, but without being external to it. That is, the ship can damage crewmembers and passengers on board; their location is not an issue.[253] This was also controversial at the time, though mainly due to its potential ramifications for cargo claims.[254] Were this paper discussing damage liens from an English perspective, this topic would require more detailed discussion, as damage liens there still require the damaged material to be external to the ship.[255] However, the extension made in New Zealand is a sound one, and is supported by strong Australian authority.[256] Location should not be an issue. The tests for the damage lien are already difficult, and people can suffer from another party's negligent navigation of a ship while on board it in the same way as those external to it. This extension does not open any floodgates either, as it will often be harder to show in such cases that, while the injury occurred there, the ship itself caused the damage.[257] The ship will often simply be a danger of a passive kind to those moving about it.[258]

5 *The damage jurisdiction*

In the absence of a specialised lien for personal injury, a person who has been injured in a shipping accident and takes an action under New Zealand's admiralty jurisdiction is better advised to frame the proceedings as "any claim for damage done by a ship".[259] A successful claim based on this head of jurisdiction

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[253] *The Margaret Z*, above n 18, 123 Fisher J.
[254] Myburgh 1999, above n 246, 400.
[255] *The Rama* [1996] 2 Lloyd's Rep 281, 293 (QB(Ad)) Clarke J.
[256] *Union Steamship Co of New Zealand v Ferguson* (1969) 119 CLR 191 (HCA); *Nagrint v The Regis* (1939) 61 CLR 688 (HCA).
[257] *Nagrint v The Regis*, above n 256, 698 Dixon J.
[258] *Nagrint v The Regis*, above n 256, 700 Dixon J.
[259] Admiralty Act 1973, s 4(1)(d); a recent New Zealand discussion can be found in *Ultimate Lady Ltd v The ship "Northern Challenger"* (17 September 2001) HC AK Ad7-SW2000, paras 160-175 Williams J.

may give rise to a damage lien, meaning the plaintiff who proves that they have been damaged by a ship stands a better chance of recovering damages than one who follows a more conventional path.[260]

It is not the intention of this paper to criticise the damage jurisdiction in general, although it is impossible to avoid the cases concerned with it when discussing the damage lien. Instead this paper focuses on reforming the damage lien to better suit personal injury claimants.

E The Four Requirements

The New Zealand tests for a damage lien were established in *The Margaret Z*, drawing on a variety of common law precedents. Interestingly, a recent English summary of the law was not adopted.[261] Fisher J noted that, to modern eyes, the concept of damage being done by a ship "has all the analytical appeal of the criminal trial of animals in medieval France."[262] This refers to the way ships have been personified over the years in maritime law as objects that can act of their own accord in a sense, and can thus be held accountable for their actions as "wrongdoers".[263] His honour then set out the four requirements:[264]

(a) First some physical part of the ship or its gear must play an essential part in the chain of events which leads to the damage.

(b) Secondly, the part played by the ship or its gear must be a significant and active one.

(c) Thirdly, human conduct must also play an essential part.

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[260] That is, founding an action on section 4(1)(f) of the Admiralty Act 1973.
[261] *The Rama*, above n 255, 293 Clarke J; *The Margaret Z*, above n 18, 122-123 Fisher J.
[262] *The Margaret Z*, above n 18, 123 Fisher J.
[263] See *Republic of India v India Steamship Company (No 2)*, above n 81, 825 Lord Steyn.
[264] *The Margaret Z*, above n 18, 124-125 Fisher J; a recent English formulation sets out similar tests, but also requires the damage to be external to the ship: *The Rama*, above n 255, 293 Clarke J.

(d) Fourthly, it seems that the only form of human conduct which qualifies is the crew's active operation of the ship or its gear.

The effect of these tests is to place personal injury plaintiffs in an unduly difficult situation that is hard to justify, given that the lien now extends to claims of their kind. This is illustrated by the case of *The Margaret Z.*

F Illustration: *The Margaret Z*

The *Margaret Z* was a United States registered tuna fishing vessel that arrived at the port of Whangarei for repairs in January 1996, where it was arrested. The ship had no real connection with New Zealand – an example of how arbitrary the forum of maritime trials can be. Alongside a registered mortgage by a finance company, and a claim by an unpaid oil supplier, were three crewmembers with personal injury claims arising from events that occurred on the high seas. Their situation illustrates the importance of claims for damage done by a ship, as opposed to regular claims for personal injury. If their injuries could be classed as damage done by a ship, and they were entitled to a maritime damage lien, they would have ranked above the mortgagee. But if their claim was merely an ordinary statutory personal injury claim *in rem* based on section 4(1)(f) of the Admiralty Act 1973, they would not recover anything of the US$1.3 million that remained to be distributed from the sale of the vessel.[265]

1 Application of tests to personal injury plaintiffs

Meeting the four requirements of the damage lien in a personal injury case is difficult. None of the three personal injury plaintiffs in *The Margaret Z* met the criteria. Unfortunately their claims were not helped by the lack of details available at the hearing. Overall their cases suffered from a lack of connection between the crew,

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[265] *The Margaret Z*, above n 18, 116-117 Fisher J.

the ship and the damage done, but only a "bald account of the facts" was available, and despite a request for better particulars from the plaintiffs none were forthcoming.[266]

(a) Plaintiff Malone

Mr Malone was a marine engineer on the ship. He slipped on a painted section of the deck and fell while lifting a hatch cover, sustaining injuries to his leg and knee. The Court held that this injury related to a static part of the ship, and that he was not operating any of the ship's gear at the time. There was no damage lien.[267]

(b) Plaintiff Ivankov

Mr Ivankov was a crewmember on the ship. A six-kilogram metal ring was not secured properly and fell on his head and right shoulder. He sustained serious injuries to his face, teeth, shoulders and neck. The Court held that this metal ring was clearly in an unsafe (but static) condition, but that there were not enough facts provided in relation to it. There was no damage lien.[268]

(c) Plaintiff Burrich

Mr Burrich was the chief engineer on the ship. He had to repair a pump, which was heavy and needed to be hoisted into the air. During the hoist the vessel rolled, pinning another crewmember against the side of the ship. Mr Burrich rushed to assist him, and injured his shoulder while pulling the pump away. This claim appears to be closer to meeting the requirements, but the Court held that as the pump

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[266] *The Margaret Z*, above n 18, 126 Fisher J.
[267] *The Margaret Z*, above n 18, 127-128 Fisher J.
[268] *The Margaret Z*, above n 18, 126 Fisher J.

was not in operation while it was being repaired – it was just a dead weight – there was no damage lien.[269]

2 *Why this is unjust*

While the application of the facts to the tests established was accurate, the outcome of *The Margaret Z* was not a fair one. The three plaintiffs all suffered personal injuries connected with the dangers of their employment, yet none of them recovered any compensation. From reading the facts presented at the trial it becomes apparent that the vessel and its affairs were not in perfect running order. For example, Mr Burrich described himself as the "paper chief engineer", suggesting crewing inadequacies.[270] Meanwhile the ship's owners were filing for bankruptcy,[271] suggesting a poorly run operation. It is possible to draw an inference that the plaintiffs had suffered a raw deal during their employment, and were injured partly as a result of the negligence of their employer.

The plaintiffs' cases show that the tests for the maritime damage lien do not work well for personal injury claimants. This is not surprising, given that personal injury was only recognised as a legitimate form of "damage" very recently. Still, it is illogical that Mr Burrich may have obtained a damage lien had the pump he was repairing been operating at the time. Or Mr Ivankov if the ring that fell on him had fallen from a crane he was operating at the time. These people are deserving of more security when taking claims, especially when limitation conventions reduce the overall liability of the ship owners, and there may be a host of competing mortgagees and other high-ranking claims. The law should be extended to cover situations of their kind more comfortably.

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[269] *The Margaret Z*, above n 18, 126-127 Fisher J.
[270] *The Margaret Z*, above n 18, 126 Fisher J.
[271] *The Margaret Z*, above n 18, 114 Fisher J.

This paper does not argue in favour of a lien for every person who can prove negligence, and thus claim compensation for their personal injury, simply because they were injured on or near a ship. It does suggest a broadening of the criteria for the damage lien, so that more personal injury claims – while still founded on the damage jurisdiction – will give rise to a damage lien. For example, if a ship is in poor condition and a crewmember is injured they should have more chance of having a damage lien recognised.[272]

This argument is based on a belief that seafarers who are injured because of the negligence of their employer, who may have provided them with unsafe working conditions, should be given a priority claim over the vessel. Personal injuries should be given a higher priority because they directly affect people's health and wellbeing, not just their financial state. These claims, when supported by a damage lien, will outrank any mortgages or statutory claims over that vessel. This will lead to more just results in situations like that in *The Margaret Z*.

G Other Calls for Review and Change

This is not the first call for a closer look at maritime liens. However, any such review in the Anglo-common law tradition immediately encounters a stumbling block. New Zealand and England have taken very conservative approaches to this aspect of the law, unlike jurisdictions such as the United States.[273] Lord Diplock once noted, extra-judicially, that "the attitude of the United Kingdom towards maritime liens is on the whole one of dislike of them."[274] Indeed some authorities regard them as practically set in stone: "Although [the maritime lien] rules may not

[272] It should be noted that many seafarers have employment contracts that provide for personal injury benefits. This might allow a contract-based wages lien to apply. Alternatively, the benefits might affect the equity of any damage lien recognised when priority is determined. For those that do not have such contracts, or for those not employed on the ship, the damage lien may prove a more useful tool.

[273] *The Offi Gloria*, above n 206, 582 Holland J; Giles and Mercer, above n 217, 323.

[274] Lord Diplock (Minutes of the XXVII[th] Conference of Comité Maritime International, New York, September 1965) 101.

be immutable they should not be varied or not applied unless the circumstances are exceptional and equity demands such a course to be taken."[275] Almost one hundred years earlier Lord Herschell declared that: "the doctrine of maritime lien in cases of collision is … too well established to be now questioned."[276]

Other commentators have been more open-minded. Jackson suggested a "fundamental rethinking" of maritime liens in England following the advent of the most recent maritime lien convention,[277] and in the wake of the High Court's decision on maritime liens in *The Margaret Z* Myburgh noted that: "Restraint is obviously advisable, as is a thorough consideration of the public policy principles on which existing liens are grounded."[278] Thomas argues that the relative priority of liens is open to readjustment, although his approach could be equally applied to liens in general:[279]

> [S]uch "rules of ranking" are no more than visible manifestations of an underlying equity, policy or other consideration being displaced. Upon the underlying equity, policy or other considerations being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy, so also the "rule" becomes inoperative or inapplicable.

I elect to take up their challenge with regards to the damage lien.

VIII REFORMING THE DAMAGE LIEN

New Zealand has, in the form of the ACC scheme, made a strong commitment to those who suffer personal injury. There is a focus on fair

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[275] *The Offi Gloria*, above n 206, 582 Holland J.
[276] *Currie v M'Knight*, above n 202, 108 Lord Herschell.
[277] D C Jackson "International Convention on Maritime Liens and Mortgages 1993" [1994] LMCLQ 12, 15.
[278] Myburgh 1999, above n 246, 399.
[279] Thomas, above n 196, para 418.

compensation for as many people as possible. Despite the praiseworthy extensions to the damage lien recognised in that case, New Zealand law let the *Margaret Z* claimants down. While their accident occurred on the high seas, and could not be covered by ACC, there should be more scope for maritime personal injury claims to be protected by a lien here.

A Re-Examining the Policy of 1896

1 Careful and prudent navigation

A re-examination of the policy behind the damage lien is overdue. The primary policy, as quoted earlier from the judgment in *Currie v M'Knight*, is essentially that the lien will provide an incentive for "careful and prudent" navigation.[280] Despite the centrality of policy to maritime liens, this statement has been repeated without further analysis since the time of that judgment, and may no longer reflect twenty-first century priorities.

This is not to suggest that Lord Watson's concerns in *Currie v M'Knight* were ill founded at the time. In the late nineteenth century, there was a huge increase in the number of steam-powered ships. These were at great risk of colliding with the more cumbersome and ill lit sailing vessels that were not yet completely phased out.[281] Safety measures for seagoing ships were not seriously considered in England until 1836, and progress was slow. In 1882, just eleven years before the accident that gave rise to the proceedings in *Currie v M'Knight*, over 3360 people had perished in more than 1120 British shipping accidents.[282]

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[280] *Currie v M'Knight*, above n 202, 106 Lord Watson.

[281] See for example the facts of *The Beta* (1869) LR 2 PC 447 (PC).

[282] "History of Safety at Sea" in the United Nations Atlas of the Oceans <http://www.oceansatlas.com> (last accessed 31 September 2005).

Even modern navigation is not free from the perils of collision.[283] However, the focus on careful and prudent navigation has shifted. Innovations such as radar, sonar, global positioning systems, radio and the host of other devices that are now routinely installed in ships make them a lot safer. Conventions on the Safety of Life at Sea,[284] collision regulations,[285] and similar agreements provide the backdrop for a safer international shipping scene. Effective training of masters and crew also goes a long way to ensuring that sea-lanes are safer places.[286] The advantage of these measures are that they are preventive. The responsible ship owner can take advantage of these options and make their maritime venture safer before anyone loses sight of land.

The damage lien is a reactive measure. It works after the collision or accident has occurred; all the lien can do is to ensure that unfortunate victims recover when confronted by competing claims. The people who are actually in control of the ship (responsible for the careful navigation) are not affected by it, and their motivation to avoid collisions and other dangers is much more likely to relate to self-preservation, professional pride and humanitarian concerns.[287] If safe shipping is the priority, the maritime lien seems a weak tool to go about it with.

In favour of the lien is the fact that it provides an effective claim against a ship that has been navigated in a dangerous way and has caused loss. The possibility of the lien reminds the ship's owner that the price of such conduct is a strong claim against their ship – a claim that could result in the sale of the vessel if insurance does not come to the party. It adds to the totality of incentives to conduct safe shipping ventures.

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[283] A well-established volume of the British Shipping Laws series is devoted to the subject: Simon Gault (ed) *Marsden on Collisions at Sea* (12 ed, Sweet & Maxwell, London, 1998); the facts of some modern cases reflect the need for this: *The Ruta* [2000] 1 Lloyd's Rep 359 (QB(Ad)).
[284] International Convention for the Safety of Life at Sea (1 November 1974) 1184 UNTS 2.
[285] Convention on the International Regulations for Preventing Collisions at Sea (20 October 1972) 536 UNTS 28.
[286] International Convention on Certificates of Training, Certification and Watchkeeping for Seafarers (7 July 1978) 1361 UNTS 2.
[287] Connor, above n 208, 792-793.

2 *A chance of recovery*

The second aspect of policy, that a person who suffers damage done by a ship should be able to recover against the ship, provides a much stronger justification for the lien. Even though recovery against the ship is a factor common to all liens,[288] the damage lien carries extra weight in this regard because it arises from tortious conduct. For this reason they were given precedence in *The Veritas*:[289]

> [The contracting party] has chosen to enter into a relationship with the vessel for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first; otherwise the injured party might be unable to satisfy his claim out of the res without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risk of subsequent events affecting their claims.

When one ship collides with another on the high seas there is no contractual relationship to fall back on that points to one ship agreeing to that risk. Unlike a cargo claimant, who is able to negotiate the terms of their dealing with the ship's owner, the tort claimant enjoys no comparable opportunity.[290] Mansfield discussed this lack of preparedness suffered by the damage lien holder by highlighting an element of "emergency", common to both damage and salvage liens, whereby liability relates to the unforeseeable perils of the sea.[291] The relative powerless of personal injury plaintiffs in these situations strengthens their claim to a high-ranking damage lien.

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[288] *The Parlement Belge*, above n 234, 218 Brett LJ.
[289] *The Veritas*, above n 232, 313 Gorell Barnes J.
[290] The 1967 Convention reflected such concerns, by ensuring that claims for lost or damaged property would only attract a lien when founded on tort: Francesco Berlingieri "The 1993 Convention on Maritime Liens and Mortgages" [1993] LMCLQ 57, 65; International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (27 May 1967) reproduced in Tetley, above n 196, 634, art 4(1)(iv).
[291] Mansfield, above n 250, 390.

Potential problems arise however in relation to passengers and crew who are on board the vessel under contract. They have elected to be there and may not be as deserving of a lien. The issue does not arise under English law, where the damage lien only applies to damage done externally to the ship.[292] Neither New Zealand nor Australia have yet considered this angle of the extension of the lien to those on board the ship being held liable. It is submitted that injuries sustained to people in this position should not be treated differently when having their lien recognised, but that their contract may affect the equity of their claim when priorities are determined.[293]

3 *Careful and prudent shipping – a new direction*

The damage lien can still play an important role in ensuring compensation for deserving tort claimants, but the previous justification of promoting careful and prudent navigation no longer carries the weight it once did.[294] The lien should continue moving forwards, departing slightly from its traditional roots, as it did in *The Margaret Z*.[295] A principled extension of the lien to cover more instances of personal injury could provide more legitimacy to, and strengthen, the original safety focus. This extension would take place through a redefinition of the current damage lien tests, undertaken below, which would reflect the modified underlying policy of the lien.

Greater availability of the lien in situations giving rise to personal injury claims would be based on the message that safety at sea is a priority, not just in navigation, but in the overall management and operation of seagoing vessels. The

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[292] *The Rama*, above n 255.
[293] See above n 272.
[294] The concept might now be considered somewhat quaint: *The Ruta*, above n 283, 364 Steel J.
[295] Fisher J might disagree: "Given the luxury of starting afresh it might have been tempting to return to the lien's original rationale by confining it to damage caused by negligent navigation in the traditional sense": *The Margaret Z*, above n 18, 124.

damage lien would continue to react when disaster strikes, but it would also become a more preventive measure: unsafe ships would soon have high-ranking claims against them, so there would be greater incentives for the owner to maintain a safe ship in the first place rather than for the crew to navigate a poorly-maintained ship carefully. This move would also give the sanctity of life a high value, and provide the opportunity for adequate compensation to be paid to those who are injured in maritime accidents. People whom, like the crew of the *Margaret Z*, sometimes receive nothing despite "the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation."[296]

4 *Who will drive this process?*

The most basic option for reform of the damage lien would be a re-framing of the current tests for the damage lien, supported by the adjusted policy goals discussed above. The obvious avenue for this is through the common law, where the lien originally arose and has been developed to date. Within his judgment in *The Margaret Z*, Fisher J expressed some consternation at this development. He thought that the rationale currently given in support of damage liens was questionable, but that any change should be left to Parliament, hopefully taking guidance from international conventions.[297] However, Parliament did not attempt to define or even list the available maritime liens in the Shipping and Seamen Act 1952, the Admiralty Act 1973, or the Maritime Transport Act 1994, and has shown no signs of interest since. If it were to turn its attention to maritime liens in future this would certainly allow for a more satisfactory and authoritative remodelling of the law. However, in reality, waiting for Parliament to act here would be a futile task.

Current judicial authority regards maritime liens as a procedural and remedial aspect of the law, rather than a substantive one,[298] an area perhaps more

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[296] *Harden v Gordon* (1823) 11 Fed Cas 480, 483 (CCD Maine) Story J.
[297] *The Margaret Z*, above n 18, 118-119 Fisher J.
[298] *The Halcyon Isle*, above n 200; but see Hill, above n 83, 120.

open to common law development. Myburgh's take on Fisher J's judgment should be supported, that a "blanket self-imposed abdication of these inherent [admiralty jurisdiction] powers seems undesirable."[299] The courts are better equipped and more likely to guide the course of the law in this situation.

B Drawing Support from International Law

If reform of the damage lien is to take place, allowing it to cover more situations involving personal injury, the courts or legislature will inevitably look to international law to gauge the direction in which other parts of the world are moving. They will not need to look far. As the following two examples will demonstrate, personal injury claimants have been treated much more favourably on the international scene and in the United States than in Anglo-common law jurisdictions relying on the damage lien.

1 Convention on Maritime Liens and Mortgages 1993

To find an example of personal injury being accorded a special place in the list of maritime liens, one need not look further than the Convention on Maritime Liens and Mortgages 1993.[300] This is a strong indication of the support for personal injury claimants on the global political scene.[301]

However, international consensus on the topic of maritime liens and ship's mortgages has been difficult to achieve. After a 1926 convention that achieved

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[299] Myburgh 1999, above n 246, 399.

[300] International Convention on Maritime Liens and Mortgages 1993 (6 May 1993) 33 ILM 353. An introduction to the Convention, and the text itself, can be found in: Alcantara, above n 203; see also Berlingieri, above n 290.

[301] Personal injury liens were also provided for in the 1993 Convention's two predecessors: 1926: art 2(4); 1967: art 4(1)(iv); the majority of delegations considered the personal injury lien important for political and social reasons during the drafting of the 1967 Convention: "International Uniformity of Maritime Liens and Mortgages: The 1965 New York Conference of the Comite Maritime International" (1966) 41 NYU L Rev 939, 945.

limited success came a 1967 convention that failed,[302] largely due to differences between the common and civil law approaches to the subject.[303] In 1985 a United Nations committee was charged with developing a new convention on maritime liens, taking into consideration the impact of maritime liens on both the financing of shipping ventures, and safety and efficiency of shipping operations.[304] Yet again, the agreement that was produced eight years later has failed to gain sufficient international support to enter into force, and is now unlikely to do so.[305] A prescient comment from the 1950s has been vindicated: "maritime liens appear to be too influenced by national characteristics to lend themselves to regulation by international convention."[306]

Fortunately for personal injury claimants in the few jurisdictions that have ratified the Convention, it contains the following in its list of recognised maritime liens: "Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel." [307] The Convention sets out the various liens in order of rank, and the personal injury lien fares well here:[308]

> Relative to the 1926 Convention, these claims rise in priority by taking precedence over salvage awards. They also take priority relative to the 1967 Convention by surpassing claims for port, canal and other waterway dues and pilotage dues.

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[302] International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926) 120 LNTS 187; International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, above n 290.
[303] Berlingieri, above n 290, 57.
[304] Berlingieri, above n 290, 62.
[305] William Tetley "Maritime Liens and Conflict of Laws" (Scandinavian Institute of Maritime Law, Oslo, 16 September 2004).
[306] "The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages" (1955) 64 Yale LJ 878, 905.
[307] Convention on Maritime Liens and Mortgages 1993, above n 300, art 4(1)(b); the wording is the same as the 1967 Convention, and also appears in the 1976 Convention, above n 113, art 2(1).
[308] Alcantara, above n 203, 223.

This lien, which originates from the agreements themselves,[309] provides an ideal form of security for the personal injury claimant, being designed specifically for that purpose. However, like the common law lien currently available in New Zealand it does not cover any form of personal injury, but only those with a connection to the operation of the vessel.[310] The lack of a requirement that part of the ship or its gear be involved allows a broader interpretation, with the possibility of, for example, an accident on a wharf while unloading that does not directly involve a physical part of the ship, but does implicate its crew in the sense that the unloading operation was performed negligently.

This appears to be the ideal maritime lien for personal injury. However, its location within an unsuccessful international convention reduces its influence. New Zealand is unlikely to ratify this convention, having taken no part in the framing of the international conventions on maritime liens to date, let alone signed them. This lien is unlikely to arise in New Zealand law in the near future.

2 *Maritime liens in the United States*

A further example of international support for personal injury claimants can be found in the United States,[311] where maritime liens are used extensively to secure a wide variety of claims.[312] Liens for damage by a ship in that jurisdiction are merely one facet of the lien recognised for tort claims generally, including personal injury. This is not the only option open in the United States, where actions may be taken *in personam* under the Jones Act,[313] which specifically provides for seafarers' personal injury actions, or an action *in rem* based on unseaworthiness.[314]

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[309] Tetley, above n 196, 176-177.
[310] Berlingieri, above n 290, 64.
[311] Maritime law in the United States is a matter for the federal courts.
[312] See generally Grant Gilmore and Charles L Black *The Law of Admiralty* (2 ed, The Foundation Press Inc, New York, 1975) ch 9.
[313] Merchant Marine Act 1920 (Jones Act) 46 USC 688.
[314] *The Osceola* (1903) 189 US 158.

The maritime law of the United States is a potential goldmine for those seeking to further the lot of the personal injury claimant, notwithstanding the excesses commonly associated with such actions in that jurisdiction. Seafarers have long been afforded very protective and far-reaching provisions for the recovery of their "maintenance and cure".[315] The concepts are not too alien from those in Anglo-common law: seaworthiness is a familiar enough concept in the marine insurance field, and the doctrine of maritime liens is considered "a simple, practical, straightforward, problem-solving device".[316] If the law on maritime liens were to be reworked in order to secure personal injury claimants a fairer deal, legislators would be wise to pay attention to the American approach.

C Tweaking the Tests

The following discussion sets out some options for changing the tests of the damage lien in order to accommodate a wider range of personal injury situations, without losing sight of its fundamental characteristics: that it is the *ship* which is implicated through the fault of those responsible for it. It should be noted that as it is the tests for the lien that are being altered, not those for the damage jurisdiction, some (but not all) claims founded on the personal injury jurisdiction would potentially give rise to a lien. The "defects in the ship or in her apparel or equipment" may be covered, for example, but not the entirety of the second part of the jurisdiction, relating to the acts of persons involved with the ship.[317]

1 Where does the trouble start?

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[315] Gilmore and Black, above n 312, 281.
[316] David R Owen "US Maritime Liens and the New Arrest and Attachment Rules" [1985] LCMLQ 424, 424.
[317] See Admiralty Act 1973, s 4(1)(f).

Based on the current New Zealand tests for a maritime lien: If you fall down a ship's hatch you are not covered (the clumsy/unfortunate scenario).[318] If someone maliciously pushes you down the hatch you are not covered (the citizen-to-citizen dispute).[319] If a person operating a crane knocks you down the hatch you are covered.[320]

Do these distinctions make sense? The first fails because the ship plays no active role in the injury – the person just fell as they might do anywhere. The second fails because the ship has no connection with a simple assault. The third succeeds because it involves both the ship (or in that case its gear) and the negligent operation thereof. But what if the hatch cover is improperly constructed or maintained, or the hatchway is negligently covered with a tarpaulin only? In these cases the part of the ship, kept in a poor condition or badly managed, is the cause of the injury but people who are injured as a result do not have their claims backed up by a lien.

There is no problem in excluding people whose injury could not be connected in any way to the negligent operation or management of the ship – those who simply fall over through clumsiness for instance. These people would be covered by ACC in New Zealand, but may struggle to lay a successful claim in admiralty. It would not be fair to give them a lien over the ship where no fault can be attributed to the ship's owner. Similarly where the injury occurs as a result of an assault or some other citizen-to-citizen interaction that, while it occurs on board a ship, has no other connection with that ship. Cases of this kind can be dealt with by the criminal law, or by regular civil proceedings between the disputing parties. They do not enter the realm of maritime law.

2 Keeping the fundamentals

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[318] *The Theta* [1894] P 280 (QB(Ad)).
[319] *The Monterey*, above n 88.
[320] *Union Steamship Co of New Zealand v Ferguson*, above n 256.

From the tests and distinctions raised above it becomes apparent that the first two requirements, that some physical part of the ship or its gear must play a significant and active role in the chain of events that leads to the damage, form the heart of the damage lien. The requirement that human conduct must also play an essential part is also clearly justified. However, this concept should not be confused with human conduct in the sense of "activity" or "work". This has the potential to restrict the damage lien to instances where a crewmember is directly involved in an accident via positive action, thus leaving out situations where a defect is latent like the negligently covered hatch. The human element is the negligent activity that leads to the accident, as the Privy Council noted in *The Utopia*:[321]

> [T]he foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed.

The requirement that an element of negligence be shown again prevents situations such as the clumsy/unfortunate, or citizen-to-citizen dispute from being inflicted on the ship owner who has done nothing blameworthy.

3 *Extending the scope*

The first two requirements are Fisher J's interpretation of what is commonly discussed in terms of the ship being the instrument of the damage.[322] These requirements remove cases that do not concern the ship itself from the ambit of the damage lien, but do not preclude liens in cases where the ship does not make physical contact with the thing it damages. For example, it might negligently cause a wash that damages property on shore.[323]

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[321] *The Utopia* [1893] AC 493, 499 (PC) Sir Francis Jeune.
[322] See Tetley, above n 196, 167.
[323] *The Eschersheim* [1976] 2 Lloyd's Rep 1, 8 (HL) Lord Diplock.

The requirement that the ship's role be "significant" would prevent someone who tripped and fell on the hatch cover from maintaining a lien based on the ship's role in their accident. For example, the plaintiff Malone in *The Margaret Z* argued that he only slipped and fell because a non-slip coating was not placed on the section of the deck where he had to stand to lift a hatch. If this factor were not added his claim would have been one of mere clumsiness or misfortune. With the suggestion of a shortcut in the ship's safety equipment there is more chance of an arguable role for the ship's gear in his injury. However, the requirement that the ship play an "active" role must be carefully curtailed, lest it shut out a range of situations where a dangerous part of the ship is the cause of the damage (such as a broken hatch cover) but did not have to be moved or operated in order for the accident to occur. Significant but passive should suffice.

The fourth requirement in *The Margaret Z* is that only the crew's active operation of the ship or its gear "for its designed operational purpose" suffices.[324] This is highly restrictive in cases of personal injury. An interpretation that is more consistent with the wording of the personal injury jurisdiction in the Admiralty Act 1973 is preferable.[325] This would extend the scope of the damage lien to include defects in the ship's equipment, and the negligent management of the ship, when they result in physical injury. The relevant conduct should be the negligent activity that leads to the damage, including allowing a ship to become a passively dangerous place, provided it is connected with the operation of the ship.

If the scope for activity that can be attributed to the ship is too tightly defined, then in many cases it will be found that those in charge of the ship were acting and not the ship. This is an artificial distinction, given that crews will perform most of their lawful duties in order to operate or navigate the ship in one way or another.[326] For example, in *Currie v M'Knight* the *Easdale* was damaged after the crew of the *Dunlossit* cut its mooring ropes and cast it adrift so that they could make

[324] *The Margaret Z*, above n 18, 125 Fisher J.
[325] Admiralty Act 1973, s 4(1)(f).
[326] Tetley, above n 196, 173.

for sea. This was held to be an act solely of the *Dunlossit*'s crew, thus not of the ship.[327] This interpretation of navigation has been described as "excessively narrow".[328] Later English authority refers to navigation or management of the ship "in the physical sense",[329] which appears to be a very vague distinction. The approach in *Currie v M'Knight* was approved in *The Eschersheim*, where a salvage tug purposefully beached a damaged ship only to have the pounding of the elements turn it into a total loss. The House of Lords held that the chain of causation was unbroken, that the salvage tug was the instrument by which the damage was done.[330]

While the facts are not identical, and *The Eschersheim* was considered a borderline case, it suggests that the term "damage done by a ship" is not as settled as Lord Diplock believed.[331] Relying on only two authorities, one of which was *Currie v M'Knight*, his Lordship's interpretation of the test seems comparatively expansive,[332] and it could be argued that a wider range of shipboard activities can now be attributed to the ship.[333] By widening the scope of activities that can be attributed to the ship, a more realistic examination can take place as to whether those responsible have operated the ship in such a way as to breach a duty and cause damage to someone or something.

4 Illustrations

Extending the situations that give rise to a damage lien would have resulted in some cases that were decided against would-be personal injury lien holders being decided differently. Two such cases concern falls that were arguably caused by poor

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[327] *Currie v M'Knight*, above n 202, 107 Lord Watson.
[328] Tetley, above n 196, 167.
[329] *The Rama*, above n 255, 293 Clarke J.
[330] *The Eschersheim*, above n 323, 8 (HL) Lord Diplock.
[331] *The Eschersheim*, above n 323, 8 (HL) Lord Diplock.
[332] The other was *The Vera Cruz (No 2)*, a damage jurisdiction case, in which "damage done by a ship" was defined as entailing that "a ship was the active cause, the damage being physically caused by the ship": *The Vera Cruz (No 2)* (1884) 9 PD 96, 99 (CA) Brett MR.
[333] Tetley argues that the case virtually reverses the approach in *Currie v M'Knight*: Tetley, above n 196, 167-168.

management or upkeep of the vessels involved. They were damage jurisdiction cases in which the plaintiffs' cases were struck out, rather than damage lien cases, but the issues raised and tests applied are comparable.

In the first case a seafarer was required to cross the deck of the *Theta* in order to reach his own ship.[334] It was night and there was no lighting on the *Theta*. He fell down into the hold due to a hatch being covered only by a tarpaulin, and was injured. In the second the plaintiff was unloading a ship.[335] While standing on one part of a hatchway, another part gave way due to faulty construction. He too fell into the hold and was injured. While neither of these plaintiffs succeeded, the plaintiff in *Union Steamship Co of New Zealand v Ferguson* did.[336] That plaintiff fell from a hatchway into the hold when the winch that operated the hatch covers started up without warning. The High Court of Australia confirmed that "a ship is to be regarded as the active agent of damage when injury is caused by the working of a ship's gear independently of the navigation of the ship."[337] In both the former two cases the plaintiffs received no compensation, despite having been injured due to the negligence of the respective ships' crew/owners. If the tests for the damage lien were read more broadly, to take account of more instances of negligent ship owning leading to personal injuries, then the results may have been more just.

Over one hundred years ago, New Zealand's Stout CJ was raising similar concerns at the narrow interpretation of the requirement that the ship be the active cause of the damage: "Had there been no cases decided on the meaning of this phrase in the Admiralty Act, I should have come to the conclusion that the words of the section were wide enough to cover it."[338] He came to his conclusion that the plaintiff was not within the damage jurisdiction "not without some doubt, and with regret", but felt bound by the English precedents.[339] Bruce J also described the facts

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[334] *The Theta*, above n 318.
[335] *The Queen Eleanor*, above n 243.
[336] *Union Steamship Co of New Zealand v Ferguson*, above n 256.
[337] *Union Steamship Co of New Zealand v Ferguson*, above n 256, 210 Menzies J.
[338] *The Queen Eleanor*, above n 243, 82 Stout CJ.
[339] *The Queen Eleanor*, above n 243, 84 Stout CJ.

in *The Theta* in terms sympathetic to the plaintiff: "to put it at the highest, those in charge of the ship so placed a tarpaulin over the hatchway as to make a trap into which the plaintiff fell, whilst lawfully crossing the deck of the ship to reach his own vessel."[340]

5 *Three suggested requirements*

These personal injury cases could be covered more easily if the requirements of the damage lien were presented in the following way:[341]

(a) First some physical part of the ship or its gear must be the direct or indirect instrument of the damage;

(b) Secondly, the part played by the ship or its gear must be a significant one;

(c) Thirdly, liability must stem from a breach of duty by those who own or are legally in charge of the ship, in relation to the operation of the ship.

The third of these modified requirements gives a greater focus to the breach of duty, as opposed to mere human activity, consistent with *The Utopia*. It also broadens the test from acts of the crew alone, while keeping the language in line with relevant international conventions.[342] The second is designed to remove any chance of a "clumsy/unfortunate" or "citizen-to-citizen" situation giving rise to a damage lien. The first is designed to cover a wide range of physical defects, including defect such as the dangerous tarpaulin-only covering in *The Theta*, and the poorly constructed hatch cover in *The Queen Eleanor*. These reformulated tests do not represent a completely new approach to the damage lien as established in *The Margaret Z*. Rather they are suggestions as to how the basic premise can be tweaked, in order to cover a wider range of situations.

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[340] *The Theta*, above n 318, 284 Bruce J.

[341] These were drafted with guidance from the general approach put forward by Tetley: see above n 196, 159.

[342] Convention on Limitation of Liability for Maritime Claims 1976, above n 113, art 2(1)(a); Convention on Maritime Liens and Mortgages 1993, above n 300, art 4(1)(b).

IX CONCLUSION

Personal injury cases that fall within the ambit of admiralty law are unique. They involve issues that would never arise in New Zealand were the accident to occur on land, due to the ACC scheme and its extensive no-fault cover. Maritime personal injury cases do take place within New Zealand due to the inevitable gap in ACC's coverage that allows events occurring on the high seas, or affecting seagoing non-residents, to be litigated under admiralty jurisdiction. This allows the arrest of the ship involved, and an action *in rem* using the ship itself as security. The defendant will have the opportunity to limit their liability using the provisions of the Maritime Transport Act 1994 that incorporate the 1976 Convention. New Zealand needs to update these provisions, and may also wish to sign the Athens Convention. This latter convention will only become a live issue if New Zealand's cruise ship industry develops further, but the agreement certainly provides tangible benefits for seagoing passengers who need to bring a personal injury claim.

If liability is limited and there are restricted funds to be shared amongst several claimants, the personal injury claimant does not rank highly under current law unless they can base their claim on "damage done by a ship" and meet the tests to satisfy the maritime damage lien. The tests for this high-ranking security interest are currently too restrictive to be satisfied in some meritorious situations, and is arguably based on outdated policy assumptions. New Zealand should consider broadening these tests, in accordance with the suggestions outlined above, and recognise a shift in policy for the lien towards a broader safety focus. This will extend the benefit of the lien to more personal injury claimants, and is supported by international examples. Maritime adventures are intrinsically dangerous, and the law should not leave those who are injured in the course of them without some form of redress.

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