NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 12 ▪ NUMBER 2 ▪ DECEMBER 2014

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2014

The mode of citation of this journal is: (2014) 12 NZJPIL (page)

The previous issue of this journal was volume 12 number 1, September 2014

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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COMPENSATION FOR POLLUTION FROM THE *RENA*

Simon Judd*

By 29 January 2013, the grounding of the container ship MV Rena on the Astrolabe Reef in October 2011 had cost the New Zealand Government $46,891,000. The expenditure was spread over 17 government departments and agencies, with $36,834,000 of the total incurred by Maritime New Zealand and $7,296,000 by the New Zealand Defence Force. This summary did not include the costs incurred by local government or the time spent by volunteers on the clean-up operation. Nor did it attempt to estimate the loss that had been suffered by private individuals and businesses and would be suffered in the future due to the long term environmental damage. This article considers who, as between the ship owners, the victims of the oil damage and the government, should bear these costs and losses.

I INTRODUCTION

By 29 January 2013, the grounding of the container ship *MV Rena* on the Astrolabe Reef in October 2011 had cost the New Zealand Government $46,891,000. Treasury advised that:[1]

> … the costs … cover both business as usual expenditure for time taken in response to the Rena grounding and other costs unique to the grounding, such as legal fees and the costs of vessels and expertise used in the cleanup process.

The expenditure was spread over 17 government departments and agencies, with $36,834,000 of the total incurred by Maritime New Zealand and $7,296,000 by the New Zealand Defence Force. This summary did not include the costs incurred by local government or the time spent by volunteers on the clean-up operation. Nor did it attempt to estimate the loss that had been suffered by private individuals and businesses and would be suffered in the future due to the long term environmental damage.

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1 New Zealand Treasury "Rena Grounding Costs" (press release, 24 April 2013).

An indication of the number of private businesses affected by pollution from the *Rena* can be gained from a letter that was sent on 8 October 2012 by one law firm[2] to the solicitors for the Rena's owners advising that it acted for "around 100 Bay of Plenty businesses" that had "all suffered economic loss and/or property damage resulting from the *MV Rena* grounding and the oil spill."[3]

In addition, the Treasury summary did not attempt to value the diminution of the natural resources in the Bay of Plenty area caused by the pollution or the on-going and future costs of attempting to restore the environment to the state that it was in before (if possible). The Ministry for the Environment has published a paper called *Rena Long-term Environmental Recovery Plan* that sets out long term goals and objectives and outlines actions that will be undertaken to address them.[4]

The salvage operation has not yet been completed and has been extremely difficult and expensive. On 30 May 2014 the owners applied for a resource consent to leave the remains of the wreck on the reef. 152 submissions were received by the Bay of Plenty Regional Council in response.[5] On 5 September 2014, the Council referred the application to the Environment Court.[6]

Costs to taxpayers have continued to be incurred beyond the nearly $47 million spent by January 2013, as have costs to local government and losses to private interests. This article considers who, as between the ship owners, the victims of the oil damage and the government, should bear these costs and losses. How reasonable is the present compensation regime under international law, as implemented in New Zealand, with its focus on limiting ship owners' liability and distinguishing between oil tankers and other ships? Should the international system – or the domestic implementation of it, or both – be changed to achieve a fairer outcome for the individual victims of oil spilled from cargo ships like the *Rena*?

II THE GROUNDING OF THE RENA[7]

On 5 October 2011, the 37,209 tonne *Rena* was sailing from Napier to Tauranga loaded with 1,368 containers and 1,733 tonnes of heavy fuel oil. It appears that the master "became obsessed

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2 North South Environmental Law.

3 See *Daina Shipping Company v Te Runanga o Ngati Awa (No 2)* [2013] NZHC 500, [2013] 2 NZLR 799 at [17], in relation to the application by the owners and insurers for an order of limitation of liability.

4 Nick Smith *Rena Long-term Environmental Recovery Plan* (Ministry for the Environment, December 2011).

5 "Submissions" (6 August 2014) Bay of Plenty Regional Council: MV Rena Resource Consent <www.renaresourceconsent.org.nz>.

6 "Rena application heads for environment court" (5 September 2014) Bay of Plenty Regional Council: MV Rena Resource Consent <www.renaresourceconsent.org.nz>.

7 "Response to the Rena Grounding: Rena Incident Overview" Maritime New Zealand <maritimenz.govt.nz>. See also the summary of facts in the criminal proceedings against the master and second officer at *Maritime New Zealand v Balomaga and Relon* DC Tauranga CRI-2011-070-7734, 25 May 2012 at [5].

with the need to arrive at the pilot station outside Tauranga Harbour by 0300 hours"[8] and consequently sanctioned various shortcuts that departed from the vessel's passage plan. The second officer also sanctioned a short cut, which put the vessel on a collision course with the Astrolabe Reef. The master failed to identify the problem and the *Rena* struck the reef, about 12 nautical miles off the coast of the Bay of Plenty, at 0214 hours. In the subsequent criminal proceedings, factors identified as leading to the casualty were the failure to plot the *Rena*'s position accurately or at all, the reliance on GPS and the failure to consult charts and other resources available on board that clearly and accurately showed the reef and its position.[9]

Subsequent to the grounding, an oil leak was detected on the night of 5 October and salvors were appointed the next day. Also on 6 October, the Director of Maritime New Zealand issued a "Notice to Hazardous Ship" pursuant to s 248(1)(a) of the Maritime Transport Act 1994 (the MTA) to the master, owner and agent of the *Rena* and to any person in charge of any salvage operation in respect of the *Rena*.[10] The notice advised that the Director was of the opinion that the ship *Rena* was a hazardous ship and that issuing instructions appeared to be necessary to avoid, reduce or remedy pollution or a significant risk of pollution. The notice required those in charge of the ship to comply with instructions issued by the National On-Scene Commander (NOSC) and to permit the NOSC to carry out such inspections as he considered appropriate. Failure to comply with the notice would have been an offence punishable by a term of imprisonment of up to two years or a fine not exceeding $200,000.[11]

On 9 October the salvors began the task of removing the fuel oil but:[12]

> … were hampered by bad weather, equipment breakdown and hazardous and changeable conditions. A storm overnight on 11 October resulted in the loss of an estimated 350 tonnes of oil from *Rena*, some of it washing up at various points along the Bay of Plenty coastline. Continuing bad weather the following night saw 86 containers lost overboard. A further 5–10 tonnes of oil was lost from the vessel overnight on 22–23 October.

Maritime New Zealand records that over 1,300 tonnes of oil were eventually recovered from the *Rena* with all accessible oil removed by 15 November 2011. Container removal then began with 341 containers removed by 26 December. On 8 January 2012 the ship broke in two and an estimated 200 to 300 of the remaining 830 containers were lost overboard. The stern section had sunk completely

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8 *Maritime New Zealand v Balomaga and Relon*, above n 7, at [5].

9 At [5]–[10]. The facts are also summarised in *Daina Shipping Company v Te Runanga o Ngati Awa (No 2)*, above n 3, at [11].

10 Notice released under the Official Information Act available on the Maritime New Zealand website.

11 Maritime Transport Act 1994, s 253.

12 "Response to the Rena Grounding: Rena Incident Overview", above n 7.

by early April 2012, with the front of the stern section in around 23 metres of water and the rear in about 65 metres. The Environment Court will now consider the owners' application for a resource consent to leave the remains of the wreck on the Reef.

The human effort that was applied in attempting to manage and clean up the pollution has also been recorded by Maritime New Zealand.[13] The Incident Command Centre included 200 to 300 personnel managing the response from a number of different organisations. Approximately 600 to 800 people were involved in the oil response team. There were about 150 people from the Air Force, Navy and Army, with another 150 on short notice to respond as needed. Around 150 Department of Conservation personnel were involved in field support for the wildlife response, conducting surveys, collecting live and dead oiled wildlife and providing logistical support. There were about 100 people working in the wildlife response team including National Oiled Wildlife Response Team personnel, veterinarians, ornithologists and other expert responders in the capture and treatment of oiled birds. In addition to these paid workers, some 8,000 volunteers contributed more than 19,000 hours in collecting more than 1,000 tonnes of oily waste from the coastline.

The true extent of harm to birds, fish and other wildlife is unknown but Maritime New Zealand has recorded that a total of 2,410 dead birds were collected of which 1,448 were oiled. A total of 409 birds were being cared for at the Te Maunga wildlife facility at the height of the response.[14]

Although oil damage has been the major cause of environmental harm, the containers from the *Rena* and their contents also pollute the sea and the coastline and can be navigational hazards. Of the 1,368 containers that were on board the ship, 1,007 have been received ashore, including those removed from the ship by the salvors and those collected from the water and washed ashore. That means that 361 have not been recovered.

III PAYING FOR THE DAMAGE AND CLEAN-UP COSTS

In November 2011, the Government announced a support package for businesses affected by the *Rena* casualty. This enabled eligible businesses to pay wages and meet other bills but will not provide compensation for loss of profit.[15]

New Zealand has a dedicated fund for dealing with oil spills called the New Zealand Oil Pollution Fund (NZOPF), constituted under s 330 of the MTA.[16] The NZOPF is comprised of levies paid by the owners of contributing ships and the owners of contributing oil and oil sites.[17] The

13 "Response to the Rena Grounding: Rena by the Numbers", above n 7.

14 "Response to the Rena Grounding: Wildlife", above n 7.

15 Robert Makgill and Jeremy Hayman "Rena Compensation" *NZ Lawyer Magazine* (New Zealand, 27 January 2012) at 13.

16 Maritime Transport Act 1994, s 330.

17 Section 333; and the Oil Pollution Levies Order 1998.

NZOPF may be applied for the purposes specified in s 331 of the MTA. Those purposes include, inter alia, the costs of:[18]

- investigating a suspected oil spill and controlling, dispersing, and cleaning up any marine oil spill;
- assisting any animal or plant life affected by any marine oil spill;
- any other expenditure for which the MTA contemplates that reimbursement may be made from the fund;
- such other expenditure, or classes of expenditure, related to marine oil spills, as may from time to time be approved by the Governor-General by Order in Council.

Pursuant to subs 2, these costs may only be recovered from the NZOPF if and to the extent that the claimant has not recovered them from the person who caused the spill and the claimant must make all reasonable efforts to recover the costs from that person.[19] It seems clear from the purposes listed in s 331 of the MTA that the NZOPF is intended to apply to clean-up and related costs only rather than damage to property or economic loss. The power granted by the section for the Governor-General to approve further classes of expenditure by Order in Council uses the word "expenditure" rather than damage or loss and so it is most likely that the NZOPF is limited to claims to reimburse for expenditure incurred to deal with a spill rather than loss or damage caused by the spill.[20] In any event, the debate is academic in the case of the *Rena* because there was only about $4 million in the NZOPF at the time of the casualty and all of that disappeared very quickly as less than 10 per cent of the government's own costs in dealing with the spill of close to $47 million to date.[21]

The NZOPF is meant to be available as a back-up to the extent that the costs cannot be recovered from the person who caused the spill. Even if the NZOPF was adequately funded, the first question would be whether and the extent to which recovery could be made from the owner. It has been reported that the *Rena* was insured for US$4.2 billion for a single event with a sub-limit of US$1 billion for a pollution event.[22] Therefore, there is no question of the owners being able to pay compensation. The key question is their legal liability to do so.

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18 Section 331(1).

19 Section 331(2).

20 Section 331(1)(h) and (i).

21 As a result of the *Rena* disaster, the Government has proposed raising the levy to increase the Fund's annual base revenue from $3 million to $4.5 million plus a further $3 million over three years to buy more response equipment and to make improvements: Jamie Morton "Greens Attack Oil-Spill Levy" *The New Zealand Herald* (online ed, Auckland, 13 February 2013).

22 "Govt ready to chase Rena's owners for extra cash" *The New Zealand Herald* (online ed, Auckland, 14 October 2011); and Bevan Marten "The *Rena* and Liability" [2011] NZLJ 341 at 342.

In relation to the clean-up costs incurred by central and local government, negotiations were reportedly concluded on 2 October 2012 with the owners agreeing to pay $27.6 million with a further $10.4 million to be paid if the owners decide to apply for and obtain a resource consent to leave the wreck on the reef.[23] The rationale for this extra payment is that it would cost the owners at least $10.4 million to remove the wreck. The press release from Maritime New Zealand stated that the agreement settled claims:[24]

> … of the Crown and public bodies including Maritime NZ, Bay of Plenty District Health Board, Environmental Protection Agency, the Minister of Local Government (signing as the territorial authority for Motiti Island), and the New Zealand Transport Agency.

Although this is substantially less than the $47 million incurred by central government to date, it is significantly more than $11 million, which is the limit of the owner's legal liability under current New Zealand law that the owners' insurers have paid into a fund.[25] Ordinarily, the liability limit applies in respect of all claims whether by public bodies or private interests and all claimants would share pro rata in that fund.[26] It is not clear what the legal basis of the agreed payment to the Government was and how that might relate to the amounts available to compensate private individuals and businesses, although media reports suggest that the agreement with the Government was a separate deal and so the full amount of the limitation fund will be available to compensate other claimants.[27]

IV LEGAL PROCEEDINGS SO FAR

A Criminal Proceedings

The master and second officer of the *Rena* were each charged with offences under the Crimes Act 1961 and the Maritime Transport Act 1994 (the MTA) relating to the operation and safety of the ship, and a strict liability offence under of the Resource Management Act 1991 (the RMA) relating to the discharge of contaminants into the sea. They pleaded guilty in the District Court at Tauranga on 25 May 2012 and were sentenced by Judge Wolff to seven months imprisonment.[28] In the course of sentencing, the Judge said:[29]

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23 Gerry Brownlee "Rena compensation agreed" (press release, 2 October 2012).

24 Maritime New Zealand "*Rena* settlement reached" (press release, 2 October 2012).

25 Maritime Transport Act 1994, pt 7.

26 The owners established the right to limit liability in both New Zealand and the United Kingdom.

27 Amy McGillivray "Rena compo offer 'a bribe'" *Bay of Plenty Times* (online ed, Tauranga, 3 October 2012).

28 *Maritime New Zealand v Balomaga and Relon*, above n 7.

29 At [34].

> This was gross negligence. The Crown does not contend that it was reckless but it is as close to that as it can come without being reckless.

The owner of the *Rena,* Daina Shipping Company,[30] was also charged with an offence under the RMA arising out of the spillage of oil. This is a strict liability offence and Daina Shipping Company pleaded guilty and was sentenced by Judge Wolff on 26 October 2012 to a fine of $300,000.[31] The maximum fine was $600,000 and there is also provision in the RMA for penalties for a continuing offence.

In his sentencing notes the Judge made clear that the causes of the collision with the reef were poor navigational skills by the master and the second mate and their rush to reach Tauranga, and that the owner was not at fault. The Judge stated that:[32]

> At no point during the course of the hearing … has there been any suggestion that the [owner] had put any pressure of time, or of operational requirements, on those actually responsible for the ship running aground … this is a single charge and … one of strict liability. That means that the owner cannot escape liability in such circumstances.

The Judge reduced the fine to $300,000 based on lack of fault, the fact that the owners had taken all reasonable steps to attempt to mitigate the oil leak and the early guilty plea. His Honour noted that the prosecution had not sought penalties for a continuing offence and that:[33]

> It is plain that the steps taken by the defendant in the present case meet all of the objectives that any such continuing fine would meet, and it is more important for co-operation and goodwill, that the difficulties associated with this are to be resolved in a satisfactory way.

B Civil Proceedings

The only civil case to have reached a judgment so far was the claim by the owners and managers of the *Rena* and their liability insurer seeking an order limiting liability under pt 7 of the MTA.[34] The insurer also sought an order authorising it to constitute a limitation fund from which claims would be paid.

Part 7 of the MTA is the legislation by which New Zealand acceded to the international convention that governs the right of shipowners and related parties to limit their liability for loss and

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30 The *Rena* was registered in Liberia. The owner is a Greek company, which is a subsidiary of Costamare Shipping Company SA: see *Daina Shipping Company v Te Runanga o Ngati Awa (No 2)* above n 3, at [13].

31 *Maritime New Zealand v Daina Shipping Company*, above n 7.

32 At [3].

33 At [17].

34 *Daina Shipping Company v Te Runanga O Ngati Awa* [2012] NZHC 3411; and *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3.

damage arising from a casualty in relation to the operation of a ship, being the 1976 Convention on the Limitation of Liability for Maritime Claims (the LLMC).[35] Under the LLMC the state parties also agreed a formula by which the amount of the limitation of liability is to be calculated by reference to the gross tonnage of the ship. The limits originally agreed were increased substantially by way of the 1996 Protocol to the LLMC, which came into force in 2004.

The New Zealand Government has now acceded to the 1996 Protocol[36] but had not done so when the *Rena* hit the Astrolabe Reef and so the limits under the MTA that apply to the *Rena* remain the original limits under the LLMC. Applying the 1976 formula to the gross tonnage of the *Rena* gives a limitation amount of $11,030,110.[37] If the 1996 Protocol had been in force then the amount would have been $27.6 million. On 19 April 2012 the International Maritime Organisation adopted further amendments to the 1996 Protocol that will substantially increase the limits again. These new limits will enter into force in June 2015.[38]

In making their limitation application to the High Court, the owners and insurer were required, under the High Court Rules[39] to name, as a defendant, at least one person with a claim against them. On 8 October 2012, the owners' solicitors had received a letter from a law firm acting for a Bay of Plenty Iwi,[40] Te Runanga O Ngati Awa, and its trust, Te Runanga Ngati Te Rangi Iwi Trust, and "around 100 Bay of Plenty businesses" alleged to have suffered loss and damage as a result of the *Rena*.[41] The plaintiffs named Te Runanga O Ngati Awa and Te Runanga Ngati Te Rangi Iwi Trust as the first two defendants.

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35 Convention on Limitation of Liability for Maritime Claims, 1976 1456 UNTS 221 (opened for signature 1 February 1977, entered into force 1 December 1986) as amended by Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims 35 ILM 1433 (opened for signature 1 October 1996, entered into force 13 May 2004).

36 Maritime Transport Act 1994, ss 84A and 347, which were introduced by the Maritime Transport Amendment Act 2013. The Maritime Transport Amendment Act 2013 brought into force the Protocol of 1996 to Amend the Convention on the Limitation of Liability for Maritime Claims, 1996, above n 35, and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 [2009] ATS 14 (opened for signature 1 October 2001, entered into force 21 November 2008). See also Marine Legislation Bill 2012 (58-2), cls 22–29.

37 "New Zealand compensation process underway for Rena losses" (July 2013) The Rena Project <www.renaproject.co.nz>.

38 Convention on Limitation of Liability for Maritime Claims, above n 35; and 2012 Amendments to Protocol of 1996 to Amend the Convention on the Limitation of Liability for Maritime Claims (adopted 19 April 2012, not yet in force).

39 High Court Rules, rr 25.25–25.28.

40 A Māori tribe.

41 *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [17].

The third defendant, Mr Lancaster, was joined as a defendant after he filed an appearance. He owned a business hiring kayaks and catamarans and claimed to have been unable to run his business for six weeks because of the oil and other pollution caused by the *Rena*. He claimed to have suffered loss of revenue of about $3,000.[42]

At the hearing of a limitation application, if it appears to the court that it is not disputed that the plaintiff has a right to limit the plaintiff's liability, then the court must make a decree limiting the plaintiff's liability and fix the amount to which the liability is to be limited.[43] If, however, it appears to the court that any defendant does not have sufficient information to enable the defendant to decide whether or not to dispute that the plaintiff has a right to limit the plaintiff's liability then the court must give such directions as appear appropriate for enabling the defendant to obtain such information and adjourn the hearing.[44]

Only the third defendant, Mr Lancaster, appeared at the hearing. He made an application for directions that the plaintiffs provide a number of documents to enable him to decide whether or not to dispute the limitation application. The documents that he requested were internal documents of the plaintiffs and records of investigations carried out by third parties relating to the immediate cause of the grounding, safety management of the ship and the wider operational and safety management responsibilities of the plaintiffs.[45]

Accordingly, the Court had to decide whether Mr Lancaster did not have sufficient information already to enable him to decide whether or not to dispute that the plaintiffs had a right to limitation of liability and whether the documents requested could provide a basis for Mr Lancaster to oppose the limitation application. In order to determine this, Woodhouse J needed to consider:[46]

> … the substantive law relating to, and the policy underlying, the entitlement of shipowners and others to limit liability, and to the test to be met by a party contending that there should be no limitation of liability.

The problem for Mr Lancaster was that the grounds for excluding limitation are very narrow. Section 85(2) of the MTA,[47] consistent with the LLMC,[48] provided that a person will only not be entitled to limitation of liability if loss or injury or damage results from:

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42 At [15]–[16].

43 High Court Rules, r 25.26(4).

44 Rule 25.26(5).

45 *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [14].

46 At [6].

47 This section has now been repealed by s 25 of the Maritime Transport Amendment Act 2013 and so art 4 of the LLMC now applies.

> … that person's personal act or omission where the act or omission was committed, or omitted, with intent to cause such loss or injury or damage, or recklessly and with knowledge that such loss or injury or damage would probably result.

Therefore, to succeed in his application for disclosure of documents, Mr Lancaster would have had to persuade the Court that he did not already have sufficient information to decide whether or not one or more of the plaintiffs could be guilty of a relevant act or omission with the requisite intent or knowledge to bring s 85(2) into play and that the disclosure of documents that he sought may provide evidence of the necessary conduct and knowledge. He already had the summaries of facts prepared by Maritime New Zealand in relation to the criminal prosecutions and Judge Wolff's sentencing notes and an interim report of the Transport Accident Investigation Commission released in February 2012.[49]

Justice Woodhouse discussed the history of limitation of liability for maritime claims and referred to a number of authorities that had considered how difficult it is to break the limitation.[50] He quoted the observation of Dr Jackson cited by Williams J in *The Tasman Pioneer* that "it seems accepted that limits will normally be unbreakable".[51] He noted that the owners of the *Rena* had obtained a limitation decree in London without opposition.

Justice Woodhouse explained why it is so difficult to break a limit by summarising the essential elements of s 85(2) as follows:[52]

- The disentitling act or omission must be that of an identified person.
- If the owner is a corporation the identified person must be an *alter ego* of the corporation.

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48 The wording of s 85(2) of the Maritime Transport Act 1994 was not identical to art 4 of the 1976 LLMC: see *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [27]. The decision of the drafters of the Maritime Transport Act 1994 to use their own language based on the 1976 LLMC rather than simply incorporating the text of the convention was criticised: Tom Broadmore "New Zealand" in Patrick Griggs, Richard Williams and Jeremy Farr (eds) *Limitation of Liability for Maritime Claims* (4th ed, Lloyd's of London Press, London, 2005) 327. The two New Zealand judges who have considered s 85(2) did not, however, make anything of the differences in wording and followed English authorities on the interpretation of art 4 of the 1976 LLMC as applying to s 85(2) of the Maritime Transport Act 1994: *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3; and *Tasman Orient Line CV v Alliance Group Limited* [2004] 1 NZLR 650 (HC) [*The Tasman Pioneer*] at [30].

49 *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [13].

50 At [25]–[30].

51 *The Tasman Pioneer*, above n 48, at [36] per Williams J as cited in *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [30]. Justice Williams was citing DC Jackson *Enforcement of Maritime Claims* (3rd ed, Lloyd's of London Press, London, 2000) at 590.

52 *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [32].

- The identified person must have one of the states of mind stipulated in s 85(2): either an intention to cause "such loss or injury or damage", or a combination of recklessness at the time of the conduct accompanied by knowledge that "such loss or injury or damage would probably result."
- The "loss or injury or damage" alleged to have been intended or known about must be the actual loss or injury or damage claimed by the claimant to have occurred.
- In the case of knowledge, where accompanying recklessness, there must be knowledge that such loss or injury or damage would probably result.

Mr Lancaster would have to establish that someone at senior management level in control of a plaintiff company committed an act or omission that caused the *Rena* to run aground and that he or she did so intending to cause loss to Mr Lancaster or recklessly with knowledge that loss to Mr Lancaster would probably result. That the owner would be vicariously liable for the actions of the master of the ship would not be enough to remove the limitation of liability, no matter how negligent or reckless the actions of the master were. Neither would negligence by senior management in relation to the management and general operation of the ship be sufficient to break the limitation.

Justice Woodhouse concluded that:[53]

> At the least, the senior management person, for each of the plaintiffs, would have to have known not only that it was probable that the *Rena* would collide with the Astrolabe Reef, but also that oil would be discharged, float ashore, and cause loss to business owners operating from the beaches … .
>
> For the purposes of this proceeding it is unnecessary to determine whether there must be knowledge of the identity of the claimant. I am satisfied that there must at the least be knowledge, when related to the facts of this case, of the probability of loss or injury or damage to business owners operating from the beaches and with this arising from oil pollution arising from grounding on the Astrolabe Reef.

The argument for Mr Lancaster was that the documents he sought might prove that directions from a person at senior management level of the company plaintiffs were in some way causative of the grounding of the *Rena*. Mr Lancaster's theory would have to be that senior management directives caused the captain and other senior officers to cut corners, "literally and figuratively."[54]

Justice Woodhouse did not consider that Mr Lancaster's disclosure application was justified. When the information sought by Mr Lancaster was compared to the extensive evidence as to the cause of the casualty already available, and especially the conclusions from the investigations that led to the prosecutions that there was no suggestion that the owner had done anything to amount to responsibility for what occurred on board, the pursuit of disclosure appeared to be "an expensive

53 At [41]–[43].

54 At [49]–[50].

expedition up a blind alley."[55] Furthermore, even if some evidence to support Mr Lancaster's theory might be disclosed, "this would take Mr Lancaster only a few steps towards, and leave him a long way from, what he would have to prove to break liability."[56] The assumed disclosure would be no more than evidence of causation. It would "come nowhere near to establishing the knowledge that would have to be established in terms of s 85(2)."[57]

The Judge also considered that the wide scope of the disclosure application was disproportionate to Mr Lancaster's claimed loss of an estimated $3000 in rental income.[58] Finally, the statement in Mr Lancaster's solicitors' letter that there were "strong grounds for opposing any application" for limitation supported a conclusion that Mr Lancaster did have sufficient information to decide whether or not to dispute the limitation application.[59]

The application for disclosure of documents was, accordingly, dismissed and directions made that Mr Lancaster was to file a memorandum within 15 working days stating whether or not he opposed the plaintiffs' application for limitation of liability. It does not appear that he did so and no appeal has been made against the decision.

Justice Woodhouse then went on to give his reasons for an order he had made in December 2012[60] allowing the insurer to establish a limitation fund.[61] The purpose of such a fund is to enable the shipowner to pay into court or provide security for the maximum amount of the owner's liability pending determination of claims. The fund will be available to pay claimants and so claims need not be made against the ship or other property of the owner.

The result of the application for limitation of liability is that the liability of the owners and insurer of the *Rena* is limited to the amount of just over NZ$11 million, which has been paid into a fund by the insurer. Those who claim to have suffered loss will be able to claim against that fund and eligible claimants will receive a compensation payment based on their pro rata share. The owners were directed to place advertisements in 11 newspapers (both in New Zealand and overseas)

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55 At [48] per Woodhouse J borrowing the phrase of Lord Phillips of Worth Matravers MR in *Schiffahrtsgesellschaft MS Merkur Sky mbH & Co KG v MS Leerort Nth Schiffahrts GmbH & Co KG* (*The Leerort)* [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep 291 at [29].

56 At [49].

57 At [50]. The result would have been the same now that s 85 of the Maritime Transport Act 1994 has been repealed, applying art 4 of the LLMC directly.

58 At [53].

59 At [54].

60 *Daina Shipping Company v Te Runanga O Ngati Awa* [2012], above n 34.

61 His Honour declined to follow *The Tasman Pioneer,* above n 48, in which the Court held that there was no jurisdiction under the Maritime Transport Act 1994 to order a limitation fund.

specifying a period of not less than 12 weeks within which any notice of appearance and claims should be filed. As a result, 74 claims were made falling into the categories of loss or damage to cargo and of business interruption losses caused by oil pollution.[62]

If the New Zealand Government had acceded to the 1996 Protocol to the LLMC then the limit and fund would have been about NZ$28.4 million. It may be, however, that in that case the negotiations for an ex gratia payment to the Crown may have led to a different outcome than the NZ$27.6 million received. The strict legal position is that the limitation amount applies to all claims whether relating to public expenditure or private damage.

If the *Rena* had been an oil tanker rather than a container ship then the victims of the casualty would have been in a significantly better position because the incident would have been governed by the international conventions that only apply to ships that carry oil, being the 1969 Convention on Civil Liability for Oil Pollution Damage (the CLC)[63] and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and its 1992 Protocol.[64] These conventions are incorporated into New Zealand law by pts 25 and 26 of the MTA and only apply to ships that carry oil in bulk as cargo (CLC Ships).

The liability of a CLC Ship is subject to limitation under s 347 of the MTA that may be fixed from time to time by way of Order in Council. The present liability limits were fixed by an Order in Council made in 2003 reflecting an increase in the international liability limits agreed by the International Maritime Organisation in October 2000, to take effect from 1 November 2003.[65] If the *Rena* had been a CLC Ship then the liability limit would have been about NZ$49 million.

In addition to the liability of the owner of a CLC Ship, victims of pollution damage caused by such a ship are able to claim compensation from the International Oil Pollution Funds (the IOPC Funds). The procedure for such a claim is set out in pt 26 of the MTA. A claim may be made against

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62 See directions judgment as at 18 December 2013: *Daina Shipping Company v MV Rena Claimants* [2013] NZHC 3450.

63 International Convention on Civil Liability for Oil Pollution Damage 973 UNTS 3 (opened for signature 29 November 1969, entered into force 19 June 1975) as amended by the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969 1956 UNTS 255 (opened for signature 15 January 1993, entered into force 30 May 1996) and the 2000 Amendments of the Limitation Amounts (adopted 18 October 2000, entered into force 1 November 2003).

64 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 UNTS 57 (opened for signature 18 December 1971, entered into force 16 October 1978) as amended by Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1953 UNTS 330 (opened for signature 13 January 1993, entered into force 30 May 1996), Protocol of 2000 of Amendments of the Limits on Compensation in the Protocol of 1992 (adopted 27 September 2000, entered into force 27 January 2001) and Supplementary Fund Protocol of 2003 (adopted 16 May 2003, entered into force 3 March 2005).

65 Maritime Transport (Maximum Amounts of Liability for Pollution Damage) Order 2003.

the IOPC Funds if the owner is not liable for the pollution damage, or if the claimant is not able to recover damages from the owner or its insurer or if the damage exceeds the amount of the owner's limitation of liability under s 347 of the MTA. The maximum liability of the IOPC Funds is specified in s 373 of the MTA and, like the owner's limitation, is able to be fixed from time to time by Order in Council. The present liability limits for the IOPC Funds were fixed in 2003 in the same Order in Council that fixed the limitation of the shipowner's liability.[66] The limit of a claim against the IOPC Funds that would have applied to the *Rena* if she had been an oil tanker would have been NZ$402 million. A supplementary IOPC fund was established in 2003 under the Supplementary Fund Protocol of 2003[67] that would provide up to $1.392 billion of compensation from marine oil damage from oil tankers for any one incident. New Zealand has not acceded to this Protocol, which would require New Zealand to contribute to the fund and such contributions would be collected through a levy paid by oil importers. The Ministry of Transport produced a consultation document in May 2014 proposing that New Zealand should accede and received submissions between May and June 2014. The Ministry of Transport will report to Cabinet by the end of 2014.[68]

In summary, if the *Rena* had been an oil tanker then the owner and its insurer would have been strictly liable to compensate victims up to a cap of NZ$49 million, and, to the extent that the damage exceeded that amount, the victims could have claimed against the IOPC Fund for additional amounts up to NZ$402 million. If New Zealand had acceded to the 2003 Protocol then $1.392 billion would have been available. Of course, if the *Rena* had been carrying oil then the pollution damage may have been far greater than it was. Nevertheless, those who have suffered damage caused by the bunker oil that spilled from the *Rena* may well struggle to understand why their position is worse than that of a victim of oil that has spilled from an oil tanker.

An argument can be made against extending the IOPC Funds to the victims of pollution from container ships on the grounds that the contributions to the Funds come from the oil companies,[69] who are the cargo interests that benefit from oil tankers rather than container ships. The counter argument is that the oil industry benefits from all shipping because oil is used to fuel all ships and the most significant damage caused by a container ship casualty such as the *Rena* is oil damage. Also, making the Funds available for oil damage caused by container ship casualties would assist the individual victims but would be unlikely to put an excessive drain on the Fund given that the extent of the damage likely to be caused by a container ship casualty is relatively small compared to the potential damage that an oil tanker casualty may cause. The international community

66 Maritime Transport (Maximum Amounts of Liability for Pollution Damage) Order 2003.

67 Supplementary Fund Protocol of 2003, above n 64.

68 "Supplementary Fund Protocol, 2003" (8 October 2014) Ministry of Transport <www.transport.govt.nz>.

69 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, above n 64.

acknowledged the fact that pollution damage from fuel or bunker oil causes damage in the same way as oil carried as cargo by adopting the Bunker Spills Convention.[70]

V BREAKING THE LIMIT?

A discussed above, the High Court granted the application by the owners and insurers of the *Rena* for an order limiting their liability to $11 million and to constitute a fund of that amount. By rejecting Mr Lancaster's application for disclosure of documents to enable him to decide whether to oppose the limitation application, the Court effectively determined that there was no basis for breaking the limitation under art 4 of the LLMC. Given that the loss and damage caused by the grounding of the *Rena* exceeds NZ$11 million, the question must be asked whether there is any route under New Zealand law for recovering a greater amount.

Section 86(3)(d) of the MTA provides that the limitation of liability "applies, subject to subsection (4) of this section, whether the liability arises at common law or under any other enactment, and notwithstanding anything in any other enactment." Subsection 4 provides that:[71]

> This Part and Articles 2, 3, and 9 of the LLMC Convention do not limit or affect—
>
> (a) section 33J, 33K, or 110 of this Act; or
>
> (b) anything in the Accident Compensation Act 2001 or Parts 18 to 26A of this Act or the Carriage of Goods Act 1979.

Sections 33J, 33K and 110 of the MTA give powers to the Director of Maritime New Zealand and to regional councils, inter alia, to remove or require the removal of a ship that is wrecked if the ship is considered to be a hazard to navigation. The effect of s 86(4) of the MTA would seem to be that the limitation of liability does not apply to costs that could be recovered from the owner of the *Rena* in the event that what remains of the *Rena* on the Astrolabe Reef is a navigation hazard that needs to be removed.

The Accident Compensation Act 2001 and the Carriage of Goods Act 1979 are not relevant to claims for pollution damage in relation to the *Rena*.

Parts 18 to 26A of the MTA are New Zealand's statutory provisions that deal expressly with marine pollution. Pursuant to pts 19 and 22, the Director of Maritime New Zealand is given significant powers to direct the owner and/or master of a ship and others to take steps to prevent or

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70 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, above n 36.

71 The wording of this subsection was changed from 1 October 2013 by amendments made in the Maritime Transport Amendment Act 2013 but the effect is the same.

reduce the escape of hazardous substances from a ship[72] and to take such measures as the Director considers appropriate in relation to a hazardous ship or the cargo on that ship.[73]

As soon as it had run aground on the Astrolabe Reef, the *Rena* became a hazardous ship for the purposes of the MTA and the bunker oil that escaped from the ship was a hazardous substance. Therefore, the owner of the *Rena* was required to follow the instructions of the Director in relation to dealing with the ship and attempting to prevent the escape of oil. The Director appointed a National On-Scene Commander (NOSC) and instructed those in charge of the *Rena* to follow the directions of the NOSC.[74] Any failure or refusal to follow the instructions of the Director would have been an offence.[75]

The owner cannot set off its own costs involved in attempting to prevent the escape of oil, or in attempting to secure or salvage the ship against the amount available to compensate victims of the pollution.

Sections 344 to 349 of the MTA provide for the liability of shipowners for pollution damage. Section 344 provides that a shipowner of a non-CLC ship is strictly liable to the Crown or relevant marine agency for the reasonable costs of dealing with a harmful substance that has escaped from a ship but subject to the liability limitation contained in pt 7. Section 345 provides that a shipowner is strictly liable in damages for all pollution damage caused by the escape of the harmful substance but also subject to the liability limitation in pt 7. The higher liability limits for a CLC ship are set out in s 347.

Section 348 sets out that a shipowner shall not be liable if it can prove that the escape was caused by specified acts or events that are totally outside the shipowner's control. Pursuant to s 349, the court has the power to reduce a shipowner's liability to a particular claimant if there has been contributory negligence on the part of that clamant.

Section 352 provides that the only claim for damages that may be made in New Zealand for pollution damage caused by the escape of a harmful substance are claims under ss 344, 345 and 346[76] and that the claim must be made against the owner only and not against any employees or agents or others involved[77] unless it can be proven that the damage was caused by a particular

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72 Maritime Transport Act 1994, ss 234 and 248.

73 Section 248.

74 *Maritime New Zealand v Balomaga and Relon*, above n 7.

75 Section 253.

76 Maritime Transport Act, s 346 provides that where pollution damage has been caused by more than one ship and the damage cannot reasonably be separated the owners of the ships will be jointly and severally liable.

77 Section 352(b) and (c).

person's "personal act or omission, committed with intent to cause pollution damage or recklessly as to whether pollution damage would probably occur."[78]

It is likely that a claim under s 345, being based on the international regime, would be limited to property damage and economic loss to businesses with direct reliance on the sea or coastline such as fishing businesses. Businesses that suffer indirect economic loss such as those offering accommodation or hospitality services who suffer due to a drop in tourist numbers may not be able to claim. Claims for damage to the environment are likely to be limited to costs of reasonable reinstatement actually undertaken or to be undertaken. Claims for pure economic loss and for long term damage to the environment may be seen as too remote, open ended and difficult to quantify under historical tort law and the international regime.[79] Claims against the IOPC Funds do allow some claims for pure economic loss, such as in the tourism sector,[80] but only victims of oil pollution damage from oil tankers may claim against these funds.

On the face of it, therefore, the limitation of liability of NZ$11 million that applies under pt 7 of the MTA and ordered by the High Court applies to all claims of any nature that could be made in respect of loss or damage arising from the *Rena* except for costs that might be incurred in removing the wreck if it is a navigational hazard. Such claims must be made under s 345.

VI AVOIDING THE LIMIT?

There have been attempts in other states to recover compensation in excess of the relevant limitations by using the criminal law or alternative causes of action that are alleged not to be covered by the limitation of liability. A famous example is that of the *MT Erika*, which sank off the coast of Brittany in 1999.[81] The *Erika* was an oil tanker and so was subject to the CLC and Fund conventions to which France had acceded. The ship broke up and 20,000 tons of oil was spilled into the sea killing thousands of sea birds and polluting 400 kilometres of the French coast.

The first possibility for recovering compensation separate from the CLC and Fund Convention regime was under the criminal law, because French criminal law allows the victims of crime to recover damages. Criminal charges were brought against a number of individuals and companies associated with the *Erika* including the ship's master, the management company, the classification society that had inspected the vessel and the owner of the cargo, the French oil company Total SA.

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78 Section 352(c).

79 See Thomas Schoenbaum "The Deepwater Horizon Spill in the Context of the Public International Law Regimes for the Protection of the Marine Environment: A Comparative Study" (paper presented to the Pacific Admiralty Seminar, San Francisco, 4 October 2012) at 19–20.

80 "Compensation and Claims Management" International Oil Pollution Compensation Funds <www.iopcfunds.ord>.

81 Schoenbaum, above n 79, at 12.

Convictions were entered against four parties and three of them were found liable to pay civil damages. Total, as cargo owner, was found exempt from civil liability but convicted of criminal negligence and fined €375,000.

A second proceeding to recover compensation in excess of the CLC and Fund limits was brought by the French commune of Mesquer against Total SA on the grounds that the oil spill was "waste" within French and European law and that Total had a duty to bear the full costs of cleaning up the waste and compensation for damage caused by the waste because it was the owner of the waste. After hearings in French courts, the case was referred to the European Court of Justice (ECJ) for a ruling on the applicability and correct interpretation of EU law. In 2008, the ECJ decided that hydrocarbons spilled into the sea did constitute "waste" under EU law and that the "polluter pays principle" applied to the waste. The Court ruled that if Total's conduct had contributed to the risk that the pollution would occur then Total, as the generator of the waste, would be fully liable.[82]

New Zealand law would not appear to allow the kind of claims that were brought in France in respect of the *Erika.* There is no general principle in New Zealand that victims of crime can receive civil damages. The criminal charges that were brought in respect of the *Rena* did allow for penalties for on-going offending but, as discussed by Judge Wolff, such penalties would only be imposed if the owner was not acting properly and responsibly in attempting to mitigate the damage.[83]

There is no equivalent under New Zealand law to the EU notion of "waste" or any separate cause of action based on the "polluter pays principle". Any claims under the RMA would be a "liability arising under any enactment" under s 86 of the MTA and so would be subject to the limitation.

In summary, therefore, the limitation of liability ordered by the High Court in favour of the owners and insurers of the *Rena* is a clear and unbreakable limit in respect of civil claims that could be made in respect of pollution damage caused by the grounding on the Astrolabe Reef. The owners remain responsible for dealing with the wreck and the oil and cargo that remains on the Reef, and can be directed by the Director of Maritime New Zealand to take further steps in relation to the wreck. They have already been the subject of criminal proceedings and a fine. Otherwise, the owner's liability, although strict, is capped at the limitation amount.

VII AN ALTERNATIVE TO THE INTERNATIONAL REGIME

The major jurisdiction that has not acceded to the international conventions governing liability for pollution damage caused by oil spills and other marine accidents is the United States of

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82 Case C-188/07 *Commune de Mesquer v Total France SA* [2008] ECR i-4501, [2008] 3 CMLR 16. See also Nicolas de Sadeleer "Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims" (2009) 21 JEL 299; and Schoenbaum, above n 79.

83 *Maritime New Zealand v Daina Shipping Company,* above n 7, at [17].

America.[84] Instead of incorporating the LLMC and the CLC and Fund conventions into domestic law, the United States has passed two statutes that govern liability for "virtually all cases of maritime pollution":[85] the Oil Pollution Act of 1990 (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

These statutes do not distinguish between oil tankers and other ships and apply equally to onshore and offshore facilities, pipelines and deep-water ports. Accordingly, victims of an oil spill have the same rights and follow the same procedure to seek redress regardless of the source of the oil.

OPA and CERCLA provide for strict liability up to limits. Those limits are easy to avoid, however, because OPA provides that the limit does not apply in the event of "gross negligence" or "willful misconduct" or by "violation of an applicable … regulation"[86] and CERCLA provides that the limit will not apply to "wilful negligence or wilful misconduct."[87] These are much lower thresholds for breaking the limits than the requirements under the LLMC and CLC conventions – which, it will be remembered, require a personal act or omission by the owner or alter ego of the owner that was reckless with knowledge that harm would result.

As discussed above, the courts have described the international limits as virtually unbreakable.[88] By contrast, the limit under OPA will be broken in almost every case because, at a minimum, regulations for protection of the environment will almost always have been broken and in most cases of an oil spill it will not be difficult to establish gross negligence by the master of the ship or employee of the responsible party. A further critical difference between the United States and international regimes is that the vicarious liability of the owner for the conduct of its employees or agents is sufficient to avoid the limitation.

In addition, it appears that OPA may supplement the ordinary maritime law and the law of individual states of the United States rather than displacing the other laws. Congress included savings provisions in the legislation to allow for the continued application of state law liability in

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84 The United States has not ratified the United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), the International Convention on Civil Liability for Oil Pollution Damage, above n 63, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, above n 64, or the Convention on Limitation of Liability for Maritime Claims, 1976, above n 35.

85 Schoenbaum, above n 79, at 10.

86 Oil Pollution Act of 1990 33 USC § 2704 (2006).

87 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 USC § 9607.

88 See *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [28]–[30] and the cases cited therein.

respect of pollution by oil within a state[89] and a general savings clause that "[e]xcept as otherwise provided", OPA "does not affect admiralty and maritime law."[90]

There is some uncertainty about whether or the extent to which OPA claims may prevent state claims and general maritime law claims in light of decisions delivered in 2011[91] in the litigation against BP and others arising from the Deepwater Horizon oil spill.[92] At a minimum, however, there would seem to be more potential avenues available to victims to seek redress, including punitive damages, under the United States' legislative scheme than under the international regime as incorporated into New Zealand law. As discussed above, the MTA expressly excludes all civil claims, whether at common law or under statute, except for those set out in ss 344, 345 and 346 of the MTA.

If the United States legislation had applied in New Zealand in relation to the *Rena* then it is most likely that the owners would have been exposed to unlimited liability for the damage caused. The decisions of the master and crew to take short cuts on their voyage from Napier to Tauranga and the failure to follow basic requirements in the navigation of the ship amounted to gross negligence. This would have been a violation of regulations and so the limitation of liability would not apply.

Damages under OPA are probably more extensive than those that could be recovered under the international conventions, and, therefore, the MTA, because OPA expressly states that a responsible party is liable for, inter alia, damage to natural resources – damages for which are recoverable by a trustee – and also loss of profits and earning capacity recoverable by any claimant.[93] As discussed above, such losses would probably be too remote to be recoverable under the Common Law and the international conventions.

VIII POLICY AND POLITICS

Limiting the liability of ship owners and others responsible for the operation of a ship is a statutory invention. But for the decisions of past politicians to pass legislation giving the shipping industry this protection and the concurrence of present politicians in continuing it, those responsible for ships and maritime casualties would face unlimited liability just like those who commit torts or other legal wrongs on land.[94]

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89 Oil Pollution Act of 1990 33 USC § 2718 (2006).

90 Section 2751.

91 *In re OIL Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010* 808 F Supp 2d 943 (ED La 2011) at 960

92 See the discussion in Schoenbaum, above n 79.

93 Oil Pollution Act of 1990 33 USC § 2702 (2006).

94 See the discussion in Lord Mustill "Ships are Different – Or Are They?" [1993] LMCLQ 490 and the response by David Steel "Ships are Different: The Case For Limitation of Liability" [1995] LMCLQ 77.

It appears that laws limiting the liability of shipowners developed in continental Europe in the 17th century,[95] although some believe that limitation has its origins as early as Roman law.[96] The laws that developed in Holland, Sweden, France, Spain, Greece and elsewhere limited the liability to the value of the vessel and equipment. The concept was one of "limitation by abandonment" by which the shipowner would issue a "notice of abandonment" abandoning the ship to creditors. In Germany the limitation could be relied on at the enforcement stage of a claim rather than when establishing liability. The defendant would be liable for the total amount of damage but at the point that the claimant sought to recover the judgment from the defendant's assets, the claimant was limited to recovering the value of the ship plus freight.[97]

In England, the first statute limiting the liability of ship owners was the Ship Owner Liability Act of 1734,[98] which followed the lobbying of Parliament by shipping interests in response to the case of *Boucher v Lawson*.[99] In that case the shipowner was found personally liable to a cargo owner for a valuable cargo of gold and silver that was stolen by the master of the ship. Although the decision was an uncontroversial application of the common law of carriers' liability, it highlighted to the shipping industry the risk that the owner took when entrusting a ship and cargo to a master and crew on what would often be a lengthy voyage. The shippers were able to persuade Parliament that unless liability was limited, people with capital would not be willing to risk their fortunes on investing in shipping and the British shipping industry would suffer. This was particularly so when competitors from Continental Europe did have the benefit of being able to limit their liability.[100] In the petition presented to Parliament by the shipowners in response to *Boucher v Lawson*, they said:[101]

> Greatly alarmed to find … that Owners of Ships are answerable for all Goods for which they are intitled to freight, although the goods may be made away with by the Master or Mariners without the Privity of the Owners: That the Petitioners, when they became Owners of Ships, did not apprehend themselves

95 James J Donovan "The Origins and Development of Limitation of Shipowners Liability" (1979) 53 Tul L Rev 999.

96 Dennis J Stone "The Limitation of Liability Act: Time to Abandon Ship?" (2001) 32 J Mar L & Com 317 at 318; and Norman A Martinez Gutierrez *Limitation of Liability in International Maritime Conventions* (Routledge, Oxford, 2011) at 5–7.

97 Nigel Meeson and John A Kimbell *Admiralty Jurisdiction and Practice* (4th ed, Informa Law, 2011) at [8.4]; Thomas J Schoenbaum *Admiralty and Maritime Law* (4th ed, Thomson West, 2003) at 804; Gutierrez, above n 96, at 5–15; and Donovan, above n 95.

98 Ship Owners Liability Act 1734 (GB) 7 Geo II, c 15.

99 *Boucher v Lawson* (1734) Cas t Hard 85.

100 JC Sweeney "Limitation of Shipowner Liability: Its American Roots and Some Problems Particular to Collision" (2001) 32 J Mar L & Com 241 at 243.

101 As cited by Lord Mustill, above n 94, at 496.

> exposed to such Hazard or liable as Owners to any greater Loss than that of the ships and Freight … and representing to the House that unless some Provision be made for their relief Trade and navigation will be greatly discouraged since Owners of Ships find themselves, without any fault on their part, exposed to ruin, from which their greatest Circumspection cannot secure them, through their Malversation of the Masters, or Mariners, who they are obliged to employ.

Given the importance of the shipping industry to Britain and the desire to expand it at that time in history, it is easy to understand how Parliament was persuaded.

The Act of 1734 was, however, narrowly focussed on the particular concern highlighted by *Boucher v Lawson*, namely owners' liability for theft of masters and crew and also loss by fire.[102] The Act described as "[a]n Act to settle how far Owners of Ships shall be answerable for the Acts of the Masters or Mariners" provided that:

> Be it enacted by the King's most Excellent Majesty … That no person or Persons who is… Owner or Owners of any Ship or Vessel shall be subject or liable to … any Loss or Damage by … Imbezzlement, secreting or making away with … Gold, Silver, Diamonds, Jewels, precious Stone or other Goods or Merchandize … without Privity and Knowledge or … Owner or Owners, further than the Value of the Ship or Vessel, with all her Appurtenances, and the full Amount of the Freight due or to grow due for and during the Voyage.

Over the following 167 years the limitation was gradually extended by Acts in 1786,[103] 1813,[104] 1854,[105] 1862,[106] 1894,[107] 1898,[108] until by 1900,[109] the limitation applied to virtually all types of claim where damage or loss was caused whether on the land or the water as a result of the operation of a ship. The limitation also applied for the benefit of shipowners of all nationalities. Over that time the way of calculating the amount of the limitation changed from using the value of the ship and freight to a formula based on the gross tonnage of the ship.[110]

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102 Responsibility of Owners of Ships for Acts of Masters and Mariners Act 1734 (GB) 7 Geo II, c 15.

103 Owners of Ships Responsibility for Acts of Seamen Act 1786 (GB) 26 Geo III, c 86.

104 Ships Condemned as Slave Ships Registered as British Built Act 1813 (UK) 53 Geo III, c 59.

105 Merchant Shipping Act 1854 (UK) 17 & 18 Vict, c 104.

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

107 Merchant Shipping Act 1894 (UK) 57 & 58 Vict, c 60.

108 Merchant Shipping (Liability of Ship Owners Act) 1898 (UK) 61 & 62 Vict, c 14.

109 Merchant Shipping (Liability of Ship Owners and Others) Act 1900 (UK) 63 & 64 Vict, c 32.

110 Sweeney, above n 100, at 244–245.

In the United States, the Federal Limitation of Liability Act was passed in 1851.[111] The state of Massachusetts had already passed its own version of the English statute in 1819 and Maine followed suit in 1821.[112]

The Limitation of Liability Act of 1851 followed the famous case of *The Lexicon*[113] which reached the United States Supreme Court in 1847. The shipowner was found liable for the value of a chest containing gold and silver coins that was lost when a vessel sank following a fire. In 1849 a fire on another ship, the *Henry Clay*, led to the shipowner being held liable to the cargo owners even though there was no proof of fault or negligence.[114]

The shipping industry lobbied Congress to put them on the same footing as their British and European counterparts and emphasised the risk that men of substance would not be willing to invest in shipping.[115] During the congressional debates it was argued that:[116]

> … men of pecuniary ability who are able to respond to damages will be driven out of it, and another class of irresponsible men will take their places.

The United States Limitation Act was passed in 1851. It provided, inter alia, that:

(1) A shipowner is not to be liable for fire not caused by the owner's design or neglect;[117]

(2) A shipowner is exonerated from liability for certain valuable cargo, which are shipped without declaration of what they are;[118]

(3) In any case, except for crew wages, a shipowner's liability is not to exceed the value of his interest in the vessel, plus pending freight, unless a loss is occasioned with his "privity or knowledge."[119]

In 1884 Congress added a provision apportioning limitation among multiple owners and in 1935 and 1936 amendments were made to provide extra protection for claims for death or personal

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111 Limitation of Liability Act of 1851 46 USC.

112 Shortly after it was created as a state separate from Massachusetts in 1820: Sweeney, above n 100, at 245.

113 *New Jersey Steam Navigation Co v The Merchants Bank of Boston (The Lexington)* 47 US (6 How) 344 (1848)

114 Facts recounted in *Wright v Norwich & NY Transp Co (The City of Norwich)* 30 F Cas 685 (CCD Conn 1870).

115 Sweeney, above n 100, at 253–260.

116 Sen Hamlin (Chair of the Committee on Commerce) *Congressional Globe*, 31st Con 2nd Sess 332 (1851).

117 Limitation of Liability Act of 1851 46 USC § 30504.

118 Section 30503.

119 Section 30505.

injury.[120] In particular, the shipowner was required to establish a fund for paying these claims based on a formula per gross ton of the vessel rather than based on the value of the vessel plus pending freight. Apart from claims for death or personal injury, the United States Statute still limits liability to the value of the ship and freight rather than adopting the English change to a formula based on gross tonnage.

If the policy behind the original limitation statutes was the political desire to protect and promote investment in a shipping industry that was an extremely risky enterprise, the question must be asked whether those concerns remain relevant today. When these statutes were passed there were no radios, telephones or internet and sailors did not have satellite-based weather and global positioning systems. Owners could not monitor their ships once they left dock and had to trust in the integrity and competence of the master and crew. With ships powered by sail, the duration of any voyage was unpredictable and the ship was always at the mercy of the weather. Given today's technology, the original reasons for limitation do not apply.

Equally, at the time of the original limitation statutes, the notion of substantial damage to the environment and the idea of pollution from a ship causing significant damage to people on the shore could not have been imagined. The focus of the drafters of the original legislation was on sharing of risk between the owners of ships and others who wanted to use those ships to transport cargo and to travel. Cargo owners and travellers are able to choose whether or not to use a ship and so choose to accept the risk. People living or running businesses on the shore do not choose to take the risk of pollution from a ship damaging them.

Limitation provisions have, of course, continued to be in force throughout the 20th century and into the 21st, notwithstanding the continual improvements in technology and corresponding weakening in the traditional arguments for limitation. Under the 1924[121] and 1957[122] Conventions, the international regime adopted the English approach of limitation based on tonnage. Article 1 of the 1957 Convention provided that the owner had the right to limit except where "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". The Convention also expressly granted the right to limit to "the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager and operator acting in the course of their employment".[123]

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120 Limitation of Liability Amendment Act of Aug 29, 1935, Ch 804-1, 49 Stat 960; and Limitation of Liability Amendment Act of June 5 1936, Ch 521-1.

121 International Convention for the Unification of Certain Rules Relating to Limitation of Liability of Owners of Seagoing Ships 120 LNTS 123 (signed 25 August 1924, entered into force 2 June 1931).

122 International Convention Relating to Limitation of the Liability of Owners of Seagoing Ships (opened for signature 10 October 1957, entered into force 1968).

123 Article 6(2).

The present LLMC substantially increased the limit from that which applied under the earlier conventions but in return made it more difficult to avoid the limits. Instead of "actual fault of privity of the owner" a person seeking to avoid the limit now has to prove:[124]

> That the loss resulted from [a person's] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

That this tightening of the limitation in exchange for increased limits was deliberate is clear from the *travaux preparatoire*.[125] The limits were increased under the 1996 Protocol[126] and will be increased again in 2015 as a result of the 2012 amendments to the 1996 Protocol.[127]

The liability regime for pollution damage from oil tankers has, of course, been separate from that applying to other ships since the 1969 CLC came into force in 1975. The CLC, not the LLMC, applies to CLC Ships, which are ships that carry oil as cargo in bulk. The CLC limits were increased by the 1992 Protocol and increased again by the 2000 amendments to that Protocol, which entered into force in November 2003.[128]

The main differences between the CLC and the LLMC are that:

(1) The CLC provides for strict liability for pollution damage caused by CLC Ships whereas the LLMC does not establish liability.
(2) The limitation amount is substantially higher for CLC Ships than for non-CLC ships.
(3) Victims of pollution damage from CLC Ships can claim against the IOPC Funds whereas victims of pollution damage from non-CLC ships cannot.

In the United States, OPA and CERCLA apply to oil pollution damage and so shipowners are not protected by the 1851 Limitation Act for claims brought under OPA or CERCLA, which effectively result in unlimited liability for pollution damage.

The arguments in favour of limitation today rely on economic considerations and, in particular, the availability and cost of insurance. As one commentator put it:[129]

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124 Convention on Limitation of Liability for Maritime Claims, above n 35, art 4.

125 *Daina Shipping Company v Te Runanga O Ngati Awa (No 2)*, above n 3, at [30].

126 Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, above n 35.

127 2012 Amendments to Protocol of 1996 to Amend the Convention on the Limitation of Liability for Maritime Claims, above n 38.

128 2000 Amendments of the Limitation Amounts, above n 63.

129 Guitierrez, above n 96, at 33.

> … the justification for the concept of limitation of liability seems to have shifted from the encouragement of trade and navigation to capping potential insurance pay-outs thereby stabilizing the cost of insurance**.**

The moral question is why should a shipowner be able to limit liability to the level of its insurance leaving victims of pollution damage without full compensation? Why should the business of the shipowner be safeguarded from ruin when those who suffer the effects of pollution face ruin? As Lord Mustill discussed extra-judicially in 1993, there are other groups in society who face unlimited liability for torts – such as auditors, doctors and drivers of motor vehicles – and there does not seem to be any moral justification for treating shipowners differently.[130] Perhaps there are arguments for sharing risks and limiting liability but the arguments should apply equally to all.

It is difficult to see why stabilizing the cost of insurance would be a good reason to limit liability. Insurance is a relevant consideration, of course, because if shipowners could not get adequate insurance then they would not be in business. As Professor Schoenbaum said:[131]

> Limitation of liability laws should be drawn to take advantage of efficiencies and economies of scale … . Where it is easier and cheaper for one party rather than another to insure against potential risks, the law should provide the appropriate incentives to do so. The enhancement of economic efficiency and the utilization of the best system of spreading risk should be the new guiding purpose of limitation law.

Others argue that the question of insurance should not be relevant because it is not relevant in any other area of tortious liability. If a tortfeasor on land does not have insurance or has inadequate insurance to cover the damages then the tortfeasor must pay from his or her personal resources and may face bankruptcy if unable to do so. Now that the historical reasons for maritime limitation are no longer present, shipowners and those involved in the operation of ships should face unlimited liability like everyone else.[132] Furthermore, that unlimited liability should be strict liability because of the dangerous nature of the activity being carried on.[133]

That a limitation of liability is not moral or just has been the subject of judicial comment in a number of cases. It has been described as "tyrannical"[134] and "manifestly inequitable"[135] by English judges. In *The Bramley Moore*, Lord Denning said that the shipowner's right to limit liability "[i]s

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130 Lord Mustill, above n 94.

131 Schoenbaum, above n 79, at 806.

132 Inho Kim "Who Bears the Lion's Share of a Black Pie of Oil Pollution Costs?" (2010) 41 Ocean Development and International Law 55 at 62.

133 One could argue that shipping oil and other dangerous substances is the equivalent of carrying on a dangerous activity on land to which the rule in *Rylands v Fletcher* would apply.

134 *Prenn v Bailey* (1881) 40 LT 399 at 401.

135 *The Ettrick* (1881) 6 PD 127 (CA) at 131.

not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience."[136]

In the United States, the judicial dislike for the 1851 Limitation Act was characterised by the ease with which the limit was able to be avoided, especially during the middle of the 20th century.[137] In 1954 in *Maryland Casualty Co v Cushing*, Justice Black said:[138]

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions of the shipping industry which induced the 1851 Congress to pass the act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury, rather than subsidies paid by injured persons.

In 1970 the United States Court of Appeals for the Fifth Circuit said: "[i]n the vast majority of cases, limitation is denied for one reason or another."[139] A moral case for limitation is weakest in relation to pollution damage because the victims cannot be regarded as having accepted or consented to the limitation and consequent risk that their loss may be uncompensated. If someone chooses to send their goods on a ship as cargo they are accepting the risk that in the event of a casualty the owner will be able to limit liability and so cargo owners may not be fully compensated. The cargo owner can choose whether or not to ship cargo on that basis and, if so, can take out appropriate insurance.

Likewise the shipowner accepts the risk that in the event of a collision with another ship limitation of liability will apply. The risk that loss may be uncompensated in the event of a collision, even if the other vessel is at fault, is a known risk that every shipowner chooses to take. The cargo owner and the shipowner are knowing participants in risky activities in which there are limitations of liability and can be regarded as having agreed to or at least accepted the limitation regime, and so it is morally sound to enforce the limits.[140]

The person living or working on the sea shore, by contrast, does not choose to be involved in activities with the ship and cannot be regarded as having agreed to or accepted any limitations of liability. The person has not agreed to run the risk.[141] Therefore the moral case for a limit against that person is very weak.

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136 *The Bramley Moore* [1963] 2 Lloyd's Rep 429 (CA) at 437.

137 D Greenman "Limitation of Liability Unlimited" (2001) 32 J Mar L & Com 279 at 285–287.

138 *Maryland Casualty Co v Cushing* 347 US 409 (1954) at 437.

139 *Olympic Towing Corp v Nebel Towing Co* 419 F 2d 230 (5th Cir 1970) at 235.

140 Lord Mustill, above n 94, at 493. Lord Mustill calls these "closed situations" where a limited number of people voluntarily assume their share of the risk.

141 At 493. Lord Mustill calls these "open situations".

There is another side to this argument. Although shipowners benefit from the international shipping industry, so do those who use ships to transport their cargo and so also do most of the people of the world. Indeed, it is probably correct to describe international shipping as an essential service without which modern society could not continue as it does.

The CLC and Fund Conventions recognise the principle that those who profit from an activity should bear the risks generated by the activity by sharing the risk between the shipowners and the cargo owners.[142] The third group that benefits from the activity is society as a whole and so it would be reasonable for society as a whole, through the society's government, to pay the uncompensated loss to the victims above that compensated by the shipowner and the cargo owner. One commentator describes the theory as follows:[143]

> Given that strict liability is based on the profit-risk theory, the liable party who makes such a profit shoulders a risk proportional to the profit gained; given also that society as a whole profits from the carriage of oil by sea, it is natural that the risk in excess of the profit of the liable party should be borne by society as a whole.

This theory is reflected in the Canadian approach whereby the Canadian Government has set up a domestic fund that is available to compensate for losses caused by pollution damage that are uncompensated under the CLC and Fund regime. Canada's Ship Oil Pollution Fund (SOPF) is available to pay compensation for spills of any kind of oil from ships of all classes. A claimant can either claim directly against the SOPF for its whole loss and the SOPF will then take over the rights of the claimant to recover under the CLC and Fund regimes (subrogation) or the claimant can claim directly against the ship owner and IOPC Funds and then claim against the SOPF to the extent that the loss is uncompensated (last resort).[144] The SOPF was created from the previous Maritime Pollution Claims Fund, which was made up of levies imposed on contributing oil in the 1970s, and the responsible Minister has the power to levy contributions for the SOPF.[145]

The argument is that it is in fact better for society as a whole to adopt this approach than to impose unlimited liability on shipowners because that will discourage substantial and ethical organisations from operating in the shipping industry. Indeed, it has been argued that the effect of OPA is that major oil companies and shipowners are avoiding the United States' waters and, rather, more and more single ship companies with very limited financial capacity are being used to trade with the United States.[146] It would be better to have reasonable limits and a sharing of risk between

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142 See Wu Chao *Pollution from the Carriage of Oil By Sea: Liability and Compensation* (Kluwer Law International, London, 1996) at 4.

143 At 396.

144 Ship Source Oil Pollution Fund governed by the Marine Liability Act SC 2001 c 6, pt 7.

145 Sections 112–125.

146 Chao, above n 142, at 5.

responsible shipowners, responsible cargo owners and the public than to attempt to impose unlimited liability on the industry and run the risk that the industry responds by using other means to restrict their liability.

IX CONCLUSION

The historical reasons for limiting shipowners' liability do not provide a valid justification for limitation of liability for pollution damage in the 21st century. There may, however, be valid reasons for continuing a limitation regime based on the fact that society as a whole benefits from international shipping, which may justify sharing the risks associated with shipping between the shipowners, the cargo owners and the wider community. The reality for a small nation like New Zealand is that we need to join with the international consensus and that consensus favours limitation of liability and sharing of risk.

It is appropriate that, in exchange for limitation of liability, the liability of shipowners for pollution damage should be strict and should not require the victims to prove fault. The transportation of oil on ships, both as cargo and as fuel, is a dangerous activity analogous to engaging in a dangerous activity on land. Just as the rule in *Rylands v Fletcher*[147] imposes strict liability on an owner or occupier of land for damage caused by the escape of "anything likely to do mischief" that is kept on that land, so it is reasonable that the owner of a ship is strictly liable for damage caused by the escape of oil or other dangerous substances from the ship. This is the position in New Zealand pursuant to s 345 of the MTA and in the international regime under both the CLC and Bunkers Spills Conventions and so the existing law is adequate in this regard.

There should be no distinction between ships that carry oil as cargo and other commercial shipping that sails the oceans. Although all ships are now subject to strict liability, the substantial difference in the extent of potential liability caused by the different limitation regimes cannot be justified. All ships carry oil whether as fuel and cargo or only as fuel and the nature of the damage caused by an oil spill is the same whether the spill comes from cargo tanks or fuel tanks or both. The extent of the damage is likely to be greater from an oil tanker because there is more oil that can escape but it makes no difference to the individual victim whether the damage is caused by cargo oil or fuel oil. Therefore the provisions of the CLC Convention and its subsequent Protocols should be extended to cover all ships rather than only oil tankers. If all ships were covered by the CLC Convention then the Bunker Spills Convention would not be needed.

The Fund Convention and subsequent protocols should also be extended to cover pollution damage from all ships rather than only oil tankers. The oil companies that contribute to the IOPC Funds benefit from the fuel oil carried by container ships because that oil is purchased from the oil companies. It is reasonable that those who suffer damage from bunker oil spilled from a container

147 *Rylands v Fletcher* (1868) LR 3 HL 330 (HL).

ship, such as the victims of the *Rena* casualty, should be able to obtain compensation from the IOPC Funds in the same way as victims of oil spilled from an oil tanker. This should not significantly increase the burden on the IOPC Funds because the extent of pollution damage likely to be caused by a bunker oil spill from a container ship, although devastating for the victims, is minor compared to the extent of devastation likely to be caused by a spill from an oil tanker.

Given that international shipping is for the benefit of society as a whole and is a necessary activity for the functioning of the global economy and that this is the only proper justification for limiting the liability of those involved in the shipping industry, it follows that the community, through its government, should bear the risk of pollution damage that exceeds the compensation available from the ship owner and the IOPC Funds. New Zealand should adopt the Canadian approach of establishing a fund that is available either to compensate claimants in the first instance and then recover from the liable parties up to the applicable limits or provide compensation of last resort for losses that exceed the limits. If such a fund were in place, claims against it should be permitted to extend to natural resources damage and pure economic loss of all claimants. The arguments that these heads of damage are too open-ended have less weight when the compensation is paid from a state fund.

Individual victims of pollution damage and local communities impacted by an oil spill should not be left uncompensated for damage that exceeds the amounts available under whatever version of the international regime has been enacted into national law at the time. The victims are effectively subsidising the shipping and oil industries and the rest of society that needs shipping to continue. If it is appropriate for the shipping industry's liability to be limited then the state should accept responsibility for compensating victims for damage that exceeds the amounts available from the shipowners and the IOPC Funds.

Mr Lancaster and the other businesses and individuals harmed by the pollution from the *Rena* did not choose to take the risk of suffering such damage. They did not each agree that the owner of the *Rena* should be entitled to limit its liability for the loss they suffered. Therefore they should not be required to subsidise the owner and its insurer. The New Zealand Parliament enacted legislation on behalf of New Zealand society as a whole to permit the owners and insurers of the *Rena* to limit liability. Accordingly, it would be fair and reasonable for society as a whole, through the New Zealand Government, to compensate the victims of the *Rena* to the extent that their losses exceed the amount of the Court ordered limitation fund.