

LIMITATION OF LIABILITY FOR PERSONAL INJURY IN NEW ZEALAND: ACC MEETS THE SEA

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Introduction

New Zealand's approach to personal injury law is now familiarly associated with the scheme of no-fault cover currently embodied in the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) (the 'ACC' scheme). 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.¹ 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,² and where an accident occurs on a foreign ship before disembarkation in New Zealand, the statutory compensation regime will not apply.³

As a result of this 'admiralty gap' in the statutory compensation scheme, New Zealand needs to ensure that its maritime law in the area of personal injury is up to date, takes into account international developments, and provides for safe and efficient shipping.⁴ This article, which arose from a wider study of the interaction between maritime law and personal injury in New Zealand, concerns the limitations on liability for personal injury actions following shipping accidents in that jurisdiction. It examines both the *Convention for Limitation of Liability for Maritime Claims 1976* (the 1976 Convention)⁵ and the *International Convention for the Carriage of Passengers and their Luggage by Sea 1974* (the Athens Convention)⁶, and how they interrelate with New Zealand's ACC legislation.

Limitation of Liability Generally

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.⁷ Limitations of this kind are well established – there is even evidence of an eleventh century regime.⁸ They first appeared in English law in 1734,⁹ and were extended to personal injury claims in 1862.¹⁰ However, agreements of this kind need to be periodically updated to raise the upper limits to

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¹ See for examples *Admiralty Act 1973* (NZ) ss 4 and 6; *Maritime Transport Act 1994* (NZ) ss 86, 87, 95, 97.

² See for examples *Fournier v The Ship "Margaret Z"* [1999] 3 NZLR 111; *Mitrofanova v The Ship Kursk* [1996] 3 NZLR 215.

³ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 23.

⁴ Ministry of Transport, *Review of the Shipping and Seamen Act 1952* (Discussion paper, Ministry of Transport, Wellington, 1992) 7. While this report is almost 15 years old at the time of writing, it represents one of the only discussions available on the topic of limitation of liability in New Zealand at an official level. It also provides an insight into the current *Maritime Transport Act 1994* (NZ), which remains the New Zealand's key piece of shipping legislation.

⁵ *Convention on Limitation of Liability for Maritime Claims* (opened for signature 19 November 1976) 1456 UNTS 221 (1976 Convention) (entered into force 1 December 1986). Forty states are currently parties to this convention: *Status of Conventions* (2005) International Maritime Organisation.

⁶ See generally Soyer, B, 'Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974' (2002) 33 *Journal of Maritime Law and Commerce* 519.

⁷ An important work on the subject is Griggs, P, and Williams, R, (eds), *Limitation of Liability for Maritime Claims* (3rd ed, 1998).

⁸ Soyer, B, '1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?' [2000] *Journal of Business Law* 153, 153; for a general history see Griggs, P, 'Limitation of Liability for Maritime Claims: The Search for International Uniformity' [1997] *Lloyds Commercial and Maritime Law Quarterly* 369.

⁹ *Responsibility of Shipowners Act 1734*, 7 Geo 2, c 15.

¹⁰ *Merchant Shipping (Amendment) Act 1862*, 25 & 26 Vict, c 63.

account for inflation, otherwise they can lead to unfairly low recovery for claimants:¹¹ New Zealand only updated its law on global limitation from provisions dating back to 1894 in 1987,¹² bringing the maximum liability for a cargo ship of 6700 gross tons from NZ\$79,590 up to NZ\$6.6 million.¹³

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.¹⁴ 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, New Zealand's electricity grid operators, 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),¹⁵ then the New Zealand taxpayer would be left with an enormous loss to bear.¹⁶ There is essentially a trade-off in operation between the costs of undertaking a risky maritime adventure, notably insurance costs, and the amount of compensation available if something goes wrong.

Global Liability

Background to New Zealand Limitations

New Zealand has signed the 1976 Convention,¹⁷ and its articles were brought into effect by the *Maritime Transport Act 1994* (NZ).¹⁸ Liability can be limited in relation to any ship that comes within New Zealand's admiralty jurisdiction.¹⁹ 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.²⁰ A wide range of defendants are entitled to rely on these provisions, including masters and ship owners, and do so independently of each other.²¹ That is, their liabilities, once limited, do not merge into a single pool of funds.²² When limitation of liability does attach to a claim, it is 'virtually unbreakable',²³ 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.'²⁴ 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.²⁵

¹¹ Soyer, above n 8, 154-155.

¹² See *Shipping and Seamen Amendment Act 1987* (NZ).

¹³ New Zealand, *Parliamentary Debates*, 19 March 1992, volume 479, page 7895 (W P Jefferies MP).

¹⁴ See generally Griggs, P, 'Uniformity of Maritime Law: An International Perspective' (1999) 73 *Tulane Law Review* 1551; Lord Mustill, 'Ships are Different – or are they?' [1993] *Lloyds Commercial and Maritime Law Quarterly* 490, 492-493; Ministry of Transport, above n 4, 77.

¹⁵ *Maritime Transport Act 1994* (NZ) s 87.

¹⁶ Letter from Alastair Patrick, Coordinator of Maritime Policy, Ministry of Transport, to Hon R Storey MP, Chairman, Transport Select Committee, 24 May 1994, 3.

¹⁷ *Convention on Limitation of Liability for Maritime Claims* (opened for signature 19 November 1976) 1456 UNTS 221 (1976 Convention) (entered into force 1 December 1986). Forty states are currently parties to this convention: *Status of Conventions* (2005) International Maritime Organisation.

¹⁸ *Maritime Transport Act 1994* (NZ) Part VII.

¹⁹ *Maritime Transport Act 1994* (NZ) s 83.

²⁰ High Court Rules (NZ) r 792.

²¹ See Sprague, C, 'Damages for Personal Injury and Loss of Life: The English Approach' (1997) 72 *Tulane Law Review* 975, 1012-1013.

²² *Yachting New Zealand Inc v Birkenfeld* [2005] NZAR 727, para 26.

²³ Myburgh, P, 'Shipping Law' [2005] *New Zealand Law Review* 287, 296; *The Leerort* [2001] 2 *Lloyd's Rep* 291, 294-295, Lord Phillips MR.

²⁴ *Maritime Transport Act 1994* (NZ) s 85(2).

²⁵ *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650.

Slightly different rules apply where two or more ships are involved in a claim. Section 95 of the *Maritime Transport Act 1994* (NZ) states that where, through the fault of two or more ships, someone on board a ship is injured, the ship owners are jointly and severally liable.²⁶ This provision was added to the Transport Law Reform Bill late in the piece.²⁷ According to the officials who advised on the Bill, it was ‘required in order to provide for cases involving people who do not have cover under the Accident Rehabilitation and Compensation Insurance Act’.²⁸

However, New Zealand’s manner of adoption of the tonnage limitation regime has been subject to harsh criticism: one commentator labelled Part VII of the *Maritime Transport Act 1994* (NZ) ‘an embarrassment’ for the way in which it clumsily paraphrases the 1976 Convention, thus creating unnecessary ambiguity as to who may benefit from it.²⁹

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’.³⁰ The maximum rates of liability for personal injury claims are double those for other forms of damage,³¹ 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, as they do not often come close to the upper limits of liability.³²

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.³³ There is a human reaction to human suffering that lends itself to the argument that personal injury should be treated differently from damage to goods or structures. Even limitation of liability in general is not universally popular.³⁴ 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.³⁵

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.³⁶ 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 of New Zealand. Yachting New Zealand brought a separate action to limit their liability under the *Maritime Transport Act 1994* (NZ). 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:³⁷ the

²⁶ 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* (NZ) s 96.

²⁷ Transport Law Reform Bill 1993 (NZ) cl 117A.

²⁸ 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.

²⁹ Myburgh, above n 23, 298; see also Tetley, A, ‘Limitation of Liability – going Dutch?’ [2004] *New Zealand Law Journal* 158, 158; *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650, para 30; Broadmore, T, ‘New Zealand’ in Griggs and Williams, above n 7, 251.

³⁰ *Maritime Transport Act 1994* (NZ), s 86(1)(a).

³¹ *Maritime Transport Act 1994* (NZ), s 87.

³² Ministry of Transport, above n 4, 90; Aldous, G, ‘Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings’ [2001] *Lloyds Commercial and Maritime Law Quarterly* 150, 154.

³³ Soyer, B, above n 8, 157.

³⁴ See Griggs, above n 14, 1581; Lord Mustill, above n 14, 490.

³⁵ Soyer, above n 6, 534.

³⁶ *Yachting New Zealand Inc v Birkenfeld* [2005] NZAR 727. Ms Birkenfeld’s case was heard in the New Zealand Court of Appeal on 28 June 2006. The Court’s decision was reserved.

³⁷ *Maritime Transport Act 1994* (NZ) s 87(1)(a).

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.'³⁸

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 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.

Criticisms of the mechanism for calculating compensation, such as those raised above, and even the notion that injury to humans should be given special treatment are unlikely to topple the established regime of limited liability for personal injury in the near future. Other policy considerations currently hold sway. 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.³⁹ 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.⁴⁰

New Zealand's priorities

New Zealand's first priority should be to re-draft the provisions of the *Maritime Transport Act 1994* (NZ) in order to give the 1976 Convention its full effect.⁴¹ The second priority should be to sign the 1996 Protocol to the 1976 Convention, which came into force in May 2004.⁴² The key advantage of this would be a 250 per cent increase, on average, in the maximum limits.⁴³ This would address the 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.⁴⁴ 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,⁴⁵ as the 1976 Convention permits.⁴⁶

Limitation of Liability and the Accident Compensation Scheme

New Zealand's compensation scheme was given a fair amount of consideration during the drafting of the *Maritime Transport Act 1994* (NZ). 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* (NZ).⁴⁷ 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.⁴⁸ 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.

³⁸ Lord Mustill, above n 14, 500 (speaking extrajudicially).

³⁹ Hill, C, *Maritime Law* (6 ed, 2003) 394.

⁴⁰ Steel, D, 'Ships are Different: the Case for Limitation of Liability' [1995] *Lloyds Commercial and Maritime Law Quarterly* 77, 82.

⁴¹ Myburgh, above n 23, 298.

⁴² *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976* (2 May 1996) LEG/CONF.10/8.

⁴³ Soyer, above n 8, 158.

⁴⁴ See Soyer, above n 8, 165-167.

⁴⁵ *Merchant Shipping Act 1995* (UK) sch 7, pt II, para 5.

⁴⁶ *Convention on Limitation of Liability for Maritime Claims* (opened for signature 19 November 1976) 1456 UNTS 221 (1976 Convention) (entered into force 1 December 1986), art 15(2).

⁴⁷ *Maritime Transport Act 1994* (NZ) s 86(4).

⁴⁸ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) 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: [1999] 2 NZLR 328, 333 and 343.

New Zealand's compensation scheme even goes towards the maritime transport policy goal of global certainty leading to confident international investment.⁴⁹ 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 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.⁵⁰

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.⁵¹ This view has been generally dismissed by the majority of commentators who argue that tort law, and systems of liability like ACC,⁵² have very little if any effect on behaviour in this way.⁵³ A better example might be New Zealand's occupational health and safety legislation which, in a country where employers are not held directly liable for employee injuries, establishes a system to ensure that workplaces meet safety requirements – complete with penalties to provide 'teeth'.⁵⁴

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 has 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.⁵⁵

The Athens Convention

Background

A foreign national injured aboard a ship upon which they were travelling as a passenger, may well look towards 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.⁵⁶ While the convention limits the liability of the carrier,⁵⁷ it also makes claims more straightforward by reversing the burden of proof in cases involving a ship-related accident.⁵⁸ This is set to change, however, if and when the 2002 Protocol to the Convention comes into force.⁵⁹ 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.⁶⁰ There is also a focus on encouraging the prompt

⁴⁹ Ministry of Transport, above n 4, 90.

⁵⁰ Letter from Alistair Irving, P&I Services, Wellington, to the author, 10 August 2005: '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'.

⁵¹ Evans, L, and Quigley, N, 'Accident Compensation: The Role of Incentives, Consumer Choice and Competition' (2003) 34 *Victoria University of Wellington Law Review* 423, 425.

⁵² Campbell, I, *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (1996) 183-187.

⁵³ See Dewes, D, Duff, D, and Trebilcock, M, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) 431-432.

⁵⁴ See *Health and Safety in Employment Act 1992* (NZ). Formerly the *Maritime Transport Act 1994* (NZ) contained its own specific health and safety provisions, but ships are now covered by the main legislation: *Health and Safety in Employment Act 1992* (NZ), s 3B.

⁵⁵ *Bryan v Phillips New Zealand Ltd* [1995] 1 NZLR 632, 640.

⁵⁶ See generally Soyer, above n 6, 519.

⁵⁷ *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea* (opened for signature 13 December 1974) 1463 UNTS 20 (Athens Convention), art 7 (entered into force 30 April 1989), ('Athens Convention')

⁵⁸ *Ibid.* art 3

⁵⁹ *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974* (opened for signature 1 November 2002) LEG/CONF13/20.

⁶⁰ International Maritime Organization <www.imo.org> at 23 April 2006.

settlement of claims, and the discouragement of forum shopping: unlimited liability can lead to undisciplined claims.⁶¹

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* (NZ). 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)⁶² was widely considered to be too low.⁶³ A protocol to the Convention in 1990 raised this to NZ\$407,260 and introduced procedures for adjusting the limits,⁶⁴ 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\$580,000,⁶⁵ but only three of a required twelve states have signed.

Should New Zealand sign?

As the ACC legislation allows for it, and the Ministry of Transport has argued in favour of it (over ten years ago),⁶⁶ 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.⁶⁷

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.

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.⁶⁸ However, these agreements have, with the exception of the 1976 Convention itself, proven unpopular on the global scene.⁶⁹ 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.⁷⁰

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

⁶¹ Steel, above n 40, 81-83.

⁶² *Athens Convention*, above n 57, art 7.

⁶³ Ministry of Transport, above n 4, 83.

⁶⁴ *Protocol to Amend the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea* (opened for signature 29 March 1990) LEG/CONF8/10; for a full description see Hill, above n 39, 450-458.

⁶⁵ *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974* (opened for signature 1 November 2002) LEG/CONF13/20, art 7.

⁶⁶ Ministry of Transport, above n 4, 85.

⁶⁷ Email from Amy Laurenson, Legal Adviser, Ministry of Foreign Affairs and Trade, to the author, 1 September 2005.

⁶⁸ Soyer, above n 6, 162-163.

⁶⁹ See generally Griggs, P, 'Obstacles to Uniformity of Maritime Law: The Nicholas J Healy Lecture' (2003) 34 *Journal of Maritime Law and Commerce* 191.

⁷⁰ Griggs, above n 14, 1568-1569.

Convention, or where the place of departure/destination is in a state party to the Convention.⁷¹ The Convention affects only international carriage; domestic ferry services would not be affected.⁷²

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,⁷³ 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 jurisdiction over an Athens Convention claim.⁷⁴ 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.⁷⁵ Besides which, New Zealand is unlikely to be a very convenient forum for overseas passengers.⁷⁶

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.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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 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 struck⁸⁰

[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.⁸¹ 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.

⁷¹ *Athens Convention* above n 57, 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.

⁷² *Athens Convention* above n 57, art 1 'international carriage'.

⁷³ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 23(1) and (2)(c).

⁷⁴ *Athens Convention*, above n 57, art 17.

⁷⁵ The passengers have no one lobbying on their behalf when such conventions are drafted, see Lord Mustill, above n 14, 494.

⁷⁶ Ministry of Transport, above n 4, 84.

⁷⁷ Statistics supplied by the Ministry of Tourism, Wellington (25 August 2005).

⁷⁸ Hon Mark Burton, Minister of Tourism, 'Cruising to a Bright Future' (Press Release, 26 July 2001).

⁷⁹ Carnival New Zealand Ltd, 'Cruise Lines Expect Huge Growth in 2006' (Press Release, 9 August 2005).

⁸⁰ Ministry of Transport, above n 4, 84.

⁸¹ 'Sea Passengers and Vessels' in *Tourism and Migration 2000* (Analytical Report, Statistics New Zealand, Wellington, 2001) available at <www.stats.govt.nz> at 23 April 2006).

Potential interaction with ACC

Currently, a New Zealand resident who is injured while cruising in New Zealand waters would be covered by ACC.⁸² 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,⁸³ or any other available jurisdiction.⁸⁴ An overseas resident in the same position would not be entitled to ACC due to the 'travelling' provisions,⁸⁵ but would have the same rights as regards actions in admiralty.

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.⁸⁶ This would be in keeping with ACC's well established statutory bar on common law actions, and could be achieved in two steps. Firstly by amending section 317(5) of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) 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.⁸⁷ If the first step were to be taken without the second, the New Zealand legislation would probably be read down to make it consistent with the international law of the sea, as was the case in *Sellers v Maritime Safety Inspector*.⁸⁸

This would result in ACC being the default law applied in such situations. 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,⁸⁹ 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.⁹⁰

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* (NZ) 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?⁹¹ 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 scheme.⁹² 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.⁹³ 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.⁹⁴

⁸² *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 22.

⁸³ Relying on section 317(5) of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ).

⁸⁴ *Athens Convention*, above n 57, art 17.

⁸⁵ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 23.

⁸⁶ Ministry of Transport, above n 4, 84.

⁸⁷ *Athens Convention*, above n 57, art 22.

⁸⁸ [1999] 2 NZLR 44 (CA).

⁸⁹ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 17.

⁹⁰ Relying on the current wording of section 317(5) of the *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ).

⁹¹ See Brookers, *Aviation Law*, CV Part 9A (at 27 November 2003) para Intro.13.

⁹² See Vennell, M, 'Order or Chaos: Air Carriers' Liability in the South Pacific' [1998] *New Zealand Law Review* 345.

⁹³ *Ibid*, 358-365.

⁹⁴ *Athens Convention*, above n 57, art 17(1)(a).

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.⁹⁵ 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.⁹⁶ 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. If so, the 'subrogation' provision would allow the Accident Compensation Corporation to redress any financial imbalance.⁹⁷

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.⁹⁸ 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. The current policy document defining New Zealand's transport goals to 2010 is particularly vague in relation to shipping reform, and does even not mention international conventions of the type discussed in this article, let alone prioritise them.⁹⁹ 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.¹⁰⁰ Changes could be within the existing *Maritime Transport Act 1994* (NZ) or, following the example of Canada, a single statute ratifying all these agreements in one place.¹⁰¹

Conclusion

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 the rest of the world. Nonetheless, shipping remains vital to New Zealand's economy: 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.¹⁰² Added to this are the 262,000 or more fishing vessels and pleasure craft that are a familiar part of New Zealand life.¹⁰³

New Zealand's reliance on the sea means that our maritime laws should be kept up-to-date with international developments. New Zealand's approach to personal injury law may give the impression that the ACC scheme covers all possibilities but this is not the case when it comes to shipping accidents. This article has suggested that New Zealand still has some way to go in meshing together a comprehensive and fair approach to personal injury, taking into account both international and domestic law.

⁹⁵ A similar argument relating to air versus land claims is raised in Soyer, above n 6, 522.

⁹⁶ See for example *Alder v Dickson* [1954] 2 Lloyd's Rep 267; Hill, above n 39, 446-448.

⁹⁷ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 321.

⁹⁸ See for example Griggs, above n 69, 201-204.

⁹⁹ *New Zealand Transport Strategy* (New Zealand Government, Wellington, 2002).

¹⁰⁰ Soyer, above n 8, 167.

¹⁰¹ Marine Liability Act RS C 2001 c 6; see Tetley, W, 'Canadian Maritime Legislation and Decisions 1999-2001' [2001] *Lloyds Commercial and Maritime Law Quarterly* 551, 552-553.

¹⁰² Maritime Safety Authority, *Ministerial Briefings 2002: Government Administration and Infrastructure* (Wellington, 2002) heading 2.1.

¹⁰³ *Ibid*, headings 2.3-2.5.