Maritime New Zealand comments on the rules system – September 2013

Introduction

For a number of years MNZ and other transport agencies have expressed concern about the ability of the rules regime to provide an appropriate regulatory framework that is robust yet sufficiently flexible to ensure delivery of regulatory outcomes.

Background

The rules regime was implemented in 1990 with the intent to establish a coherent set of technical rules enabling efficiency, flexibility and ease of implementation of international standards[1]. The system was initially reasonably flexible and efficient, but in the past 10-13 years it has increasingly attracted criticism from industry and regulators alike.

In the context of maritime regulation, the concerns were highlighted in the Value for Money Review report[2] which stated:

> The rules are complicated, and often difficult to understand and comply with. In places the rules are out of date and in others subject to constant change due to international technical requirements. There is the risk of:
>
> a. Increased economic burden (fiscal costs to government, compliance costs to business and dynamic costs to economic performance) of operating an out of date and unduly prescriptive regulatory framework
>
> b. Reduced confidence and international reputation as NZ continues to fall behind in implementing changes to requirements and standards under international conventions to which it is party.

These sentiments reflect the fact that the current "rules stock" in the maritime sector is severely hamstrung by high levels of prescription that are required to work in an environment of constant development and change. However the rules cannot be changed quickly and the system is significantly outdated which has adverse economic impacts on the industry and challenges the effective implementation of the published law. Over the past 10 years, the Ministry of Transport has attempted to address concerns regarding the rules processes, first by initiating the rules streamlining project (which resulted in amendments to some of the primary statutes enabling rules to be made by the Governor General by Order in Council)[3] and latterly by the rules redesign project, which has resulted in a transport wide framework for rule making.[4]

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[1] See Parliamentary Debates (Hansard) 24/07/1990, Hon. Jeffries (Minister) Second Reading Civil Aviation Law Reform Bill (second reading) and 11/08/1993, Hon Storey (Minister) Third Reading Maritime Transport Bill.

[2] "Building a sustainable Organisation – Value for Money Review at Maritime New Zealand" Ernst & Young, 8 December 2010.

[3] The Maritime Transport Act has not yet been amended to introduce this provision. It is included as part of the Marine Legislation Bill, currently before Parliament.

[4] This framework comprises the Transport Regulatory Policy Statement and the 101 page Regulatory Development and Rule Production Handbook.

Maritime New Zealand rules

The MNZ rules programme has not yet benefitted from either initiative and in the last financial year has continued to deal with rules under previously agreed processes. While MNZ anticipates some efficiency from the implementation of the redesigned rules process in 2013/14, there are residual concerns about the degree to which the process will produce tangible results that make a real difference to the maritime sector[5]. Significant process overlays that will continue to exist under the redesigned framework are unlikely to provide an avenue for wholesale revision of outdated rules nor is it expected to enable regular updates and maintenance of ever changing international and technical safety standards. It is important to reach a common understanding that these continuing changes will result in a continual and significant legislative programme. This programme needs to be funded by the Ministry of Transport across the three transport agencies resulting in trade-offs that impact negatively on all three safety regimes.

The current prescriptive framework is simply not able to respond quickly and robustly to international law changes, technological changes and changes in circumstances within the maritime industry. The system has proven itself to be a barrier to achieve effective outcomes that enable safe industry operations without undue economic impact. This is illustrated in a number of ways, but no more pertinently than by the fact that there is currently no fast and efficient way in which to remove outdated or incorrect maritime rules that have no significant policy component but still have a material operational impact.

In an attempt to try and address the concerns and work within the existing regime, MNZ embarked on an approach in the development of its Maritime Operator Safety Systems by attempting to develop outcomes based rules. However the existing prescriptive legislative framework under the Maritime Transport Act severely limits the ability to do so. This makes the development and maintenance of technical maritime standards that are prone to frequent changes, very difficult. It also emphasises the significant difference in approach to these matters between New Zealand and other national maritime regulators such as the Australian Maritime Safety Authority (AMSA).[6]

Proposal to review of the overarching Legislative framework

Despite the fact that the rules regime was considered to be innovative and efficient when it was first created, there is a need to revisit the overarching framework for maritime standard setting to determine whether it remains fit for purpose.

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[5] Recent experiences that contribute to these perceptions include: no scaleability of the process including limited options for fast introduction of international obligations, the time delays associated with Cabinet approval of the majority of rules, evidence of ongoing reworking of proposals and the limitations associated with prescription in the Maritime Transport Act.

[6] As the National Regulator, AMSA has the ability to make Marine Orders through legislative instruments that enable it to make, maintain and update national standards and codes of practice relating to marine safety, while meeting constitutional legal requirements for consultation and parliamentary oversight through disallowance.

The recent inquiry by the Independent Taskforce on Workplace Health and Safety highlighted the importance of three necessary conditions for an effective regulator: Clarity of role and function, the necessary legislative tools to carry out the functions and the capacity and capability (being people, resources and systems). While the Maritime Transport Act is very clear about the role and function of the regulator, the rules framework under the Act is a key legislative tool in ensuring that the functions can be carried out. The inflexibility and prescriptive nature of the empowering provisions relating to rule making means this tool is affecting the ability of the regulatory system to work as it was intended.

The vexed issue that generally arises in this context is attaining the right checks and balances to ensure that law making does not breach fundamental rights. Delegated legislative instruments are accepted as a necessary component to ensuring efficiency. The Legislation Advisory Committee Guidelines cite two leading authorities on the issue as follows:[7]

> There is little doubt that regulations are a necessary part of New Zealand's legal landscape. This has long been the case. It is a simple reflection of the complexity of living in a civilised society and the necessity for so much law containing high levels of technical detail. It would be impossible for Parliament to retain absolute responsibility for all of it.

While the maritime rule regime is delegated legislation that was anticipated to deliver efficient, flexible yet detailed law, the increasing inflexibility has undermined the original objective. Recent legislative developments in New Zealand suggest a change in approach to these matters is timely and sensible. The passing of the Legislation Act 2012[8] signals a clear legislative intent to define legislative instruments and provide clarity around the incorporation of material into subordinate legislation.[9] This provides a good opportunity for re-evaluating the approach to rules and associated regulatory instruments.

The approach to these matters, as evidenced in other sectors may be a useful comparator. For example, under the Electricity Industry Act[10] the Independent Crown Entity known as the Electricity Authority is authorised to administer the Electricity Industry Participation Code, which includes amending it by notice in the Gazette.[11]

Under the Real Estate Agents Act[12] the Crown Agent known as the Real Estate Agents Authority is authorised to make practice rules for real estate agents by notice in the Gazette.[13]

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[7] George Tanner and Mai Chen "*Delegated Legislation*" NZLS Seminar, May 2002, 95.

[8] No 119/2012 (11 December 2012)

[9] It also introduces efficient mechanism for revoking spent instruments which may provide an avenue for dealing with outdated maritime rules.

[10] Electricity Industry Act 2010

[11] There are obligations on consultation and publishing a RIS, but these may be dispensed with in circumstances in which the amendment is technical or non-controversial or if there is widespread support for the amendment.

[12] Real Estate Agents Act 2008

[13] The rules can only be made with the approval from the Minister and must be consulted on before being made.

The Building Act 2004 was cited by the Independent Taskforce as an example in which the right balance may have been struck. The Act is a performance based regime that enables the Governor General to issue the Building Code by Order in Council while authorising the Chief Executive of the Department to issue documents confirming compliance with the code.

Under the present empowering provisions for rules in the Maritime Transport Act, such a framework is not achievable because the legislation requires the Minister to prescribe standards, criteria and technical standards in the rules.

Therefore the Act does not enable international best regulatory practice by providing a performance based regulatory framework. Redesigning the processes around such a framework, while laudable, will not make a significant difference and will continue to compromise the outcomes that the Act intends to achieve.

Recommendation

A fresh look at the regulatory framework under the Maritime Transport Act is required to address the issues that continue to arise in the rules development environment. It is important for all concerned to establish a framework that sets up a performance based system under the primary legislation in which high level outcomes are provided for by rules and the regulator is in turn authorised to provide for means of achieving those outcomes through technical standard setting.

This sort of approach is not only similar to the models that already exist under other legislation, but can also be achieved in a way that supports the principles that are set out for appropriate delegation of legislative power.[14]

A framework that enables the regulator to approve or set technical standards with appropriate constitutional safeguards,[15] is more likely to deliver a longer term solution to the concerns regarding the inflexibility and prescription of rules than any other approach.

MNZ believes this would also have numerous other benefits, including:

- It would retain one of the key elements of the rules redesign work – to undertake policy assessment prior to deciding that a rule was appropriate. This is now very much embedded in MNZ's approach for the future
- It would significantly reduce the incidence of transport rule amendments, resulting in reduced costs and a reduction in the regulatory work of the Ministry of Transport.
- It would enable sufficient flexibility to ensure that standards applying to the industry remain current, fit for purpose and suited to the operations in a way that should reduce the regulatory burden.

[14] See Legislation Advisory Committee Guidelines, pages 197-198.

[15] These include obligations to consult before setting standards, rights of appeal or review anddisallowance by Parliament. Additional checks that could conceivably be added include Ministerial oversight through Crown Entity monitoring.

- It would go a long way to addressing recommendations made in the recent PIF review that the focus of MoT should be in setting out a clear Regulatory Framework that enables MNZ to perform its regulatory role and function without involving both parties in the significant "retail" work on rules.[16]

- It should result in cost reductions for the Ministry of Transport and MNZ because it should reduce the significant burdens on both agencies in producing rules and advice to Ministers and Cabinet on technical rules.

Conclusion

In conclusion, MNZ acknowledges the efforts made by the Ministry of Transport to improve matters over the last decade. However MNZ believes real and tangible improvements in the maintenance of the maritime regulatory system cannot be achieved within the existing prescriptive regulatory framework under the Maritime Transport Act. A performance based regime that enables an appropriate balance between rule making by the Minister and technical standard setting by the regulator is urgently needed as the ultimate solution to longstanding concerns.

[16] Performance Implementation Framework – Review of the Ministry of Transport – pp 11, 25 and 25.

COASTAL REGULATION

The *Kotuku* Reports: An analysis

Stephanie Winson: Chief Legal Counsel - Maritime New Zealand

Introduction

The sinking of the fishing vessel *Kotuku* in Foveaux Strait on 13 May 2006 resulted in release of two accident reports. The Transport Accident Investigation Commission (TAIC) released its report on 18 April 2008 and Maritime New Zealand released its report in August 2008. Both reports reach largely similar conclusions about issues such as vessel stability, post construction modifications and the accumulation of water on deck associated with closed freeing ports. Both reports also highlighted issues such as the cradle constraints that prevented the liferaft from floating free and the dangers associated with drug and alcohol consumption.

Notably, both reports concluded that numerous factors contributed to the accident - some more proximate than others. The Maritime NZ report certainly draws attention to proximate events such as sea conditions, the decision making by the helmsman and loading of the vessel. As with many accidents there may often be an easily identified proximate event (or events) that may appear to have "caused" an accident, but international best practice suggests that investigations that focus on identifying proximate events as a way to explain what went wrong are inherently inadequate.

Contributors to accidents

Professor James Reason[1] has pointed to events such as MS *Herald of Free Enterprise*, Chernobyl and the space shuttle Columbia to conclude that accidents are invariably attributable to multiple contributing factors which, when aligned in time may give rise to catastrophic consequences. Prof. Reason suggests that the contributing factors to such catastrophic events may be placed into two categories – active errors and latent errors.

Active errors are those actions that are invariably the most proximate to the event and are generally associated with the front line operations such as the decision-making of a skipper or helmsman. Latent errors are normally those errors that are not contemporaneous to the event and arise during manufacture, system design, maintenance, or management decision-making.

It is this latter group of errors that may lie dormant for many years and not be identified as posing a risk to an operation until they are associated in time with other errors (active and latent) giving rise to often unforseen consequences.

Both reports into the *Kotuku* accident highlight numerous latent conditions such as the regulatory system, the post construction modification of the vessel, survey decisions and vessel maintenance. Although the recommendations in both reports address latent conditions, the TAIC recommendations placed greater emphasis on the need to address these systemic aspects. This is probably not surprising in light of the purpose of the Commission under its statute to investigate

1 Professor James T. Reason *Managing the Risks of Organisational Accidents* 1997, Ashgate Publishing Ltd

to avoid similar events recurring and not to apportion blame. Prof. Reason would argue that active errors (particularly human errors) can never be fully eliminated and that the difference between a safe and an unsafe operation is the degree to which the latent errors have been mitigated.

Just Culture

There is increasing international acceptance that a punitive or disciplinary approach to accident investigation in safety critical industries does not generate reliable and truthful accounts of what went wrong – thereby compromising the opportunity to identify the underlying latent failures that may have contributed to the event. This in turn does not promote a safety culture, which enables actions to be taken to avoid a repeat of the events. In the transport sector this undermines one of the primary regulatory tools available to ensure the safety of system.

The "no-blame" accident investigation regime established under the Transport Accident Investigation Commission Act 1990 (TAIC Act) appears to be targeted at addressing those risks. However, there is increasing international acceptance that the "no-blame" concept doesn't provide the complete answer either. In 2004 Prof Reason drew attention to two difficulties with the "no blame" concept. He said:[2]

> First, it ignored –or, at least, failed to confront – those individuals who wilfully (and often repeatedly) engaged in dangerous behaviours that most observers would recognise as being likely to increase the risk of a bad outcome. Second, it did not properly address the crucial business of distinguishing between culpable and non-culpable unsafe acts.

Prof. Reason therefore supports the adoption of a safety culture approach that is known as "Just Culture". A just culture approach acknowledges that a distinction must be drawn between blameless unsafe acts and unacceptable behaviour such as false reporting or blatant law breaches. When errors occur that fall within the blameless category their full and honest reporting is protected from disciplinary and criminal sanction whereas unlawful or reckless behaviour is not.

Various industries such as the oil, nuclear, aerospace, medical and aviation industries have to a greater or lesser extent experimented and adopted a just culture approach to investigating events as a way to improve safety in those sectors.[3] The legal guidance to the provisions under the Convention on International Civil Aviation includes the following:[4]

> *National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice.*

Unfortunately the maritime industry appears to be lagging behind in this respect. The current debate in the legal committee of the International Maritime Organisation (IMO) about the "Fair Treatment of Seafarers in the Event of a Maritime Accident" highlights that the culture that still exists within this industry is considerably out of step with the other sectors mentioned.

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2 James Reason – Foreword in *A Roadmap to a Just Culture: Enhancing the Safety Environment* – Global Aviation Information Network (2004).

3 D. Marx - *Patient safety and the "Just Culture": A Primer for health care executives* – Report for Columbia University (2001); K Mearns, R Flin, M Fleming and R Gordon – *Human and Organisational Factors in Offshore Safety* (Offshore Technology Report OTH 543) London (1997); C Johnson *Failure in Safety-Critical Systems: A Handbook of Accident and Incident Reporting* University of Glasgow Press, Scotland (2003); P. M. Norbjerg – *The creation of an Aviation safety reporting culture in Danish Air Traffic Control* paper presented at the Open Reporting and Just Culture Workshop - Brussels (2004).

4 See: Attachment E paragraph 2.3 to Annex 13 to the Convention on International Civil Aviation - Chapter 5.

In 2008 the Maritime Safety Committee of IMO resolved to adopt a Code of International Standards and Recommended practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code).[5] This Code will take effect on 1 January 2010 and its purpose statement includes the following:

1.1 The objective of this Code is to provide a common approach for States to adopt in the conduct of marine safety investigations into marine casualties and marine incidents. Marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation, as defined in this Code, is an investigation conducted with the objective of preventing marine casualties and marine incidents in the future. The Code envisages that this aim will be achieved through States:

.1 applying consistent methodology and approach, to enable and encourage a broad ranging investigation, where necessary, in the interests of uncovering the causal factors and other safety risks; and

.2 providing reports to the Organisation to enable a wide dissemination of information to assist the international marine industry to address safety issues.

1.2 A marine safety investigation should be separate from, and independent of, any other form of investigation. However, it is not the purpose of this Code to preclude any other form of investigation, including investigations for action in civil, criminal and administrative proceedings. Further it is not the intent of the Code for a State or States conducting marine safety investigation to refrain from fully reporting on the causal factors of a marine casualty or marine incident because blame or liability, may be inferred from the findings.

This development is certainly encouraging, as it may bring the maritime sector into closer alignment with the other safety critical industries mentioned above. Unfortunately however, the "no blame" focus of the Code means that the maritime sector may miss the opportunity to adopt a wholesale just culture approach that is more likely to bring about lasting and beneficial results. It is also very likely that the adoption of a pure "no-blame" approach will prove challenging for many States including New Zealand because of the weaknesses related to that concept (as pointed out by Prof Reason).

Regulatory and other challenges

The obvious question that arises as a consequence of the adoption of the Casualty Investigation Code is how it will be implemented in domestic law. The most likely assumption will be that the TAIC Act is the domestic legal route for the implementation of the Code while the "other form(s) of investigation" fall on others such as the safety regulators. The challenge for a safety regulator such as Maritime New Zealand is that the current legislative arrangements relating to it do not preclude it from conducting accident investigations for safety purposes and in fact require all reports of accidents, incidents and mishaps to be made to it. Without clear protections for such reported information, the "no blame" concept is a rather hollow assurance. Maritime NZ and its Director have multiple and often seemingly competing statutory obligations. This is best illustrated by their overarching duty to promote maritime safety and regularly review the maritime system on the one hand and the duty to enforce the law and prosecute persons for law breaches on the other.

Evidence shows that the promotion of maritime safety is substantially dependent on reliable analysis of data drawn from maritime accidents, incidents and mishaps. However the integrity and

[5] See: MSC.255(84).

reliability of the information provided during the investigation of such events is inextricably linked to the consequences that may result for those involved in them. Put simply, if persons involved in accidents or incidents fear the consequence of disciplinary or prosecution action they are less inclined to provide a full and truthful account of any errors committed by them irrespective of the culpability associated with such errors.

The argument that the role of "no blame" investigation lies exclusively with the TAIC and that the investigative functions of Maritime NZ and its Director are aimed at regulatory and enforcement matters alone may therefore not bear scrutiny. In fact, in my view, there are three difficulties with this proposition:

1. **Statutory**: - Various provisions in the Maritime Transport Act 1994 (MTA) clearly indicate that Maritime NZ and its Director have a safety investigative and promotion role not merely an enforcement and regulatory role.[6] In addition the statutory obligation on Masters to report details of an accident, incident or mishap is provided for under the MTA and is afforded no legal protection from use in other proceedings.[7] The statutory ambit of investigation of the TAIC does not extend to all reportable incidents and certainly not to 'mishaps' as defined under the MTA.[8]
2. **Principle**: - As noted earlier a "no-blame" approach to investigation does not adequately address culpable, dishonest and unacceptable unsafe behaviour. The current legal protections under the TAIC Act would hinder the taking of appropriate sanctions in deserving disciplinary and criminal cases.
3. **Resourcing** – The TAIC does not appear to be sufficiently resourced to undertake investigations of the accidents and incidents that are currently notified to it.[9] As a consequence there is a risk that events deserving of more substantive analysis may not be investigated by the TAIC at all. Similar issues arise in respect to the investigation of aviation accidents and incidents. It is interesting to note that in relation to both sectors the TAIC has reported that it only conducts investigations into an average of less than 10% of the accidents that it has been notified of.[10]

In light of the above, both Maritime NZ and its sister transport agency the Civil Aviation Authority apply considerable resources annually to conduct investigations into accidents and incidents that are reported to them. Both agencies do this because they recognise the considerable safety benefits that are derived from a substantive analysis of underlying contributors to events that occur in their respective sectors. The difficulty with this dual investigative role of the regulators is that in the absence of a legislated just culture approach the primary safety objectives underpinning accident/incident investigation are often undermined when associated with incompatible regulatory obligations to take disciplinary or criminal action. This in turn is often at risk of exacerbation when disclosure of accident investigation information is called for in circumstances in which the regulator also intends to initiate criminal proceedings.

A further difficulty that arises when the regulator investigates is that it raises the spectre of self-examination. This is because the investigations they undertake will (if performed with a view to identifying latent factors) invariably turn attention to questions relating to the regulatory regime or the manner in which they as regulators have performed their functions.

If a genuine balance is to be achieved between protecting non-culpable errors and addressing those that are culpable, it is unlikely that the complete answer to this dilemma could simply be to supplement the resources of the TAIC under the current legislative regime. The problems

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6 See for example sections 57 – 59, 431(1) and 439(3)(d), which clearly indicate a substantive role for the safety regulator in investigating accidents, incidents and mishaps. This is similarly recognised under section 14 of the TAIC Act.

7 See section 31 of the Maritime Transport Act and the limits of protection under section 14B of the TAIC Act.

8 See section 13 of the Transport Accident Investigation Commission Act 1990.

9 In its Statement of Intent 2008-2011 (at page 7), TAIC drew attention to serious funding constraints and noted that "Investment in TAIC's capability and resources is required to fulfil its statutory purpose and function"

10 See page 3 TAIC Statement of Intent 2008-2011 reporting statistics for the financial years 2004/2005 through 2006/07.

highlighted by Prof Reason with the "no –blame" concept are real and raise pressing questions of principle about the legislative arrangements for accident investigation in New Zealand. The adoption of a just culture regime across all three statutes with greater clarity about primacy of roles and functions would undoubtedly better address the issue.

To this end, it is interesting to note that the civil aviation rules appear to have established such a regime by prohibiting (in certain circumstances) the use for prosecution purposes of information received under the mandatory reporting requirements[11]. Unfortunately the civil aviation rule appears to adopt a rather modified just culture regime, which relies on a rather unusual or indeterminate culpability test (ie. unnecessary danger). Industry criticism of the aviation regulator's ability to properly apply a just culture approach to investigation is therefore not entirely surprising and highlights how perceptions about these investigations inform debate and undoubtedly modify behaviour.

There is no equivalent legal mechanism available in the current maritime regulatory regime to protect information from being used in prosecutions in deserving circumstances. In the absence of a definitive study on the issue it is difficult to gauge the impact that these different legal arrangements may have, but the overwhelming advancements made in safety by some of the other industries (particularly the civil aviation sector) suggests that the maritime community should be taking another hard look at the issue. The adoption by IMO States of the Casualty Investigation Code is perhaps the prime opportunity for this to occur.

Kotuku as case study

The *Kotuku* accident is consequently a good case study to consider the points raised in this paper, particularly because the TAIC and Maritime NZ conducted accident investigations into the event.

The TAIC report

There can be no doubt that the primary emphasis of the conclusions in the TAIC report was on issues described earlier as latent conditions. In particular it focussed attention on the systemic issues arising from the regulatory regime that applies to Safe Ship Management (SSM) vessels under Part 21 of the maritime rules.

The TAIC report points out that the SSM regime (including the role of surveyors within it) had been independently reviewed three times since its inception.[12] It also noted that the response to questions arising from those reviews was that the philosophy of the SSM system was sound and that attention had to be given to the management and delivery of the system. Despite this, the conclusions reached in a number of accident reports published over that time and even after the sinking of the *Kotuku* suggested that things were still not working well.[13] The issues identified in the TAIC report extend to inconsistent legislation, deficiencies in the survey function and widespread non-compliance with maritime rules. In relation to the latter, the no-blame concept underpinning the TAIC Act means that those matters, which may fall within the category of

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11 See rule 12.63 of the Civil Aviation Rules which provides:
The Authority shall not use or make available for the purpose of prosecution investigation or for prosecution action any information submitted to it by a person under this Part unless—
(1) the information reveals an act or omission that caused unnecessary danger to any other person or to any property; or
(2) false information is submitted; or
(3) the Authority is obliged to release the information pursuant to a statutory requirement or by order of a Court.

12 See page 69 of the *Kotuku* accident report.

13 See: TAIC report 04-202 *Queenstown Princess* – 14 February 2004; TAIC report 05-212 *Milford Sovereign* - 31 October 2006; TAIC report 06-208 – *Santa Maria II* - 10 December 2006; TAIC report 07-206 Tug *Nautulus III* and barge *Kimihia* -14 April 2007.

culpable acts, cannot be addressed in proceedings if reliance on the TAIC information is required to do so.

The Maritime NZ report

In order to assess the need for regulatory intervention arising from this event, a separate investigation by the safety regulator was necessary under existing law. As noted earlier the Maritime NZ report placed a fair degree of emphasis on proximate events (or active failures) such as rule breaches and decision-making. Although the latent factors highlighted in the TAIC report of the regulatory regime did not receive the same emphasis in this report, it was clearly acknowledged that there is a problem with the SSM system. In the section headed "Action taken by Maritime New Zealand" the Maritime NZ report notes that a "first principles look of the requirements of Maritime Rule Part 21 and the associated service delivery model was required"[14] and its recommendations include a proposal to review the procedure whereby survey data is transferred from SSM Companies to Maritime NZ. Interestingly the purpose of the investigation was recorded as being to:[15]

- *Determine the causes and contributing factors that resulted in the vessels capsize and foundering*
- *Identify learning points arising from the accident with a view to preventing a recurrence*
- *Determine the reason for the failure of the vessel's liferaft to deploy*
- *Determine if there were breaches of the Maritime Transport Act and other relevant legislation*
- *Determine if there were any safety lessons that could be learned or dangers that the maritime community should be made aware of.*

The emphasis on learning from the event demonstrates the priority that Maritime NZ gives to its statutory obligation to promote maritime safety and educate the maritime community. Despite the wider legal mandate, no disciplinary or law enforcement action was recommended in respect of the rule breaches that were identified. The specific reasons for this are not identified but this is not unusual as such action would ordinarily not be reflected in a report of this nature. Whether such an approach would undermine the trust and confidence that the maritime industry has in providing a reliable and truthful account of accident events is unknown, but quite likely.

Issues analysis

The fact that both the SSM regime and the system of survey are now being actively reviewed by Maritime NZ is something that could be described as a direct consequence of these investigations. In that respect one might argue that the current system has delivered a positive outcome. The same can be said for the fact that both reports clearly identified numerous likely contributors to the accident, which can be actively remedied on an ongoing basis to avoid similar events in the future.

However other matters may not necessarily lead to similarly clear conclusions. In the first instance the very limited jurisdiction and resources of the TAIC raises serious questions about the commitment New Zealand is able to make to its international obligations as set out in the Casualty Investigation Code. If a substantive TAIC investigation such as this one places significant constraints on the Commissions ability to conduct subsequent or more investigations there is no guarantee that the overarching safety outcomes of the maritime community are achievable or sustainable. While exact costs are not known the expenses incurred in conducting the two

[14] See page 69 of the Maritime NZ report.

[15] See page 8 of the Maritime NZ report.

investigations into the *Kotuku* have been significant.[16] One might ask whether it is in New Zealand's best interest for money to be spent by two agencies conducting a virtually similar safety investigation into the same event. Even if one were to suggest that the pragmatic approach may be for the safety regulators to simply decline to initiate a safety investigation when notified that the TAIC is doing so - the current "no-blame" legislative regime under the TAIC Act necessarily obliges the regulators in almost every case to conduct a parallel investigation to obtain evidence for regulatory or enforcement purposes. This certainly is not the most efficient and sensible approach to achieving the crucial balance between safety promotion and accountability. This single-minded focus on regulatory and enforcement functions would also mean that a substantial part of Maritime NZ's statutory functions are not being performed.

Secondly if the safety regulators are statutorily enjoined to conduct safety investigations with no legislative clarity about the protections offered for non-culpable safety errors the reliability of data provided will be questionable. This undermines the integrity that a truly just safety investigation model offers. In addition this may invariably result in the safety regulator adopting a default disciplinary or enforcement approach, which destroys any genuine attempt to develop an industry culture focussed on truthful reporting and disclosure of non-culpable unsafe acts.

An additional complication is that a dual role for the maritime safety regulator is in direct conflict with the investigative independence envisaged by the Casualty Investigation Code. This is exacerbated in circumstances in which a true analysis of latent conditions arising from an accident necessarily draw attention to the regulatory model or its application. Self-examination is inevitable when the regulator is an active participant in the events being examined and even the most objective, careful and accountable examiner cannot avoid the perception of conflict in such circumstances. The risks associated with such perceptions are real and quantifiable when one compares the advancements made in those industries in which a more principled approach to investigation has been taken.

Conclusion

Maritime safety cannot be improved by simply identifying proximate events or active failures arising from accidents or incidents. The proactive identification and rectification of latent failures is fundamental to improving safety. However, this is undermined if there is no structure within which these and non-culpable unsafe acts can be appropriately recorded and protected from disciplinary or criminal proceedings. A shift in attitude and law is required that gives due recognition to the value of striking the appropriate balance between safety outcomes and justice outcomes.

For New Zealand this means a green fields approach to domestic law with a view to giving effect to the overarching intent of the Casualty Code yet ensuring that culpable unsafe acts do not go unpunished. A fresh look at these issues may also result in first principles debate about the proper role and function of the safety regulator and the independent accident investigator in light of international obligations and the lessons learned in other sectors.

Lasting and tangible advancements in safety are unlikely to occur in maritime sector if the current legislative arrangements are not revisited.

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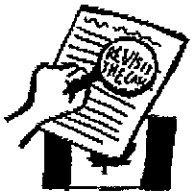
16 In relation to the costs incurred by the TAIC it is noted in the 2008 TAIC Annual Report at page 20 that the costs associated with the Kotuku investigation were significant.

Whatever Happened to ... R. v. Sault Ste. Marie: the Due Diligence Defence

> *There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent.*
>
> – *R. v. Sault Ste. Marie*, per Dickson J. at page 1313



Introduction

In 1985, shortly after he became Chief Justice of Canada, Brian Dickson was speaking to a large group of law students at the University of Alberta. The last question he was asked was "what was your favourite judicial decision that you were involved in?"

The Chief Justice paused. The audience sat quietly, enthralled about what case, if any, he would pick from his already prolific 12-year career on Canada's top court. Most assumed he would name one of the seminal interpretive *Charter of Rights* cases and principles to which he made major contributions. "My favourite case was *Sault Ste. Marie*," he replied confidently. "That case is a good example of creating doctrine to serve important legal purposes. This article describes the decision in the case of *R. v. Sault Ste. Marie* [1978] 2 SCR 1299 and its impact on Canadian law.

Proof of Criminal or Regulatory Guilt

To obtain conviction on a crime, the Crown must, by its own evidence, prove full mental intention (*mens rea*) beyond a reasonable doubt. That is a high standard of proof, one that is justified by the serious consequences that flow from criminal conviction.

Prior to 1978 in Canada, persons accused of public welfare regulatory offences such as liquor law offences, pollution, misleading advertising, traffic infractions and securities offences, were convicted if the Crown prosecutor could merely prove the accused did the offence. No intention at all needed to be proven for these many less serious municipal, provincial or federal regulatory offences. This *absolute liability* rendered it almost impossible for someone to defend against such charges. If the offence had occurred, one was judged guilty, even though one did not intend to do it or had acted reasonably to prevent the offence from occurring.

Mr. Justice Dickson, writing for a unanimous Supreme Court of Canada in *R. v. Sault Ste. Marie* pointed out that treating all these public welfare offences with the same absolute liability served to punish the innocent and add nothing to deterrence. He wrote at para 1311:

There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?

He went on to judicially adopt a middle ("half way") category of intent for some of the more business-related regulatory offences such as pollution. This category is known as the *strict liability* offence, and it gives rise to the *due diligence* defence.

Persons charged with many such regulatory offences are not now automatically guilty under absolute liability principles. They can take the stand at trial to convince the judge of their innocence on the basis of what they did to prevent the offence from taking place. This new middle category of strict liability allows the courts to protect the public from harm without the harsh punishment of absolute liability on one hand and without burdening the Crown to prove guilt beyond a reasonable doubt that accused intended to commit the offence.

Facts of the Sault Ste. Marie Case

The Ontario city of Sault Ste. Marie hired Cherokee Disposal as a contractor to dispose of the city's waste. Cherokee Disposal's disposal site bordered Cannon Creek, which ran into Root River. This site had fresh water springs that flowed into the creek. Cherokee Disposal submerged the springs and disposed the municipal waste. Some of this waste seeped through the artificial barrier into the groundwater, polluting the creek and eventually the Root River. The Root River also flows into the St. Mary's River which in turn empties into the eastern end of Lake Superior. Surface water intake in Lake Superior supplies about half of the municipal water to the 75,000 residents of Sault Ste. Marie.

The pollution of Cannon Creek and Root River led to charges against both the City and Cherokee Disposal, under s. 32(1) the *Ontario Water Resources Commissions Act*:

> *… every municipality or person that discharges, or deposits, or causes, or permits the discharge of deposits of any material of any kind into any water course, or any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence…*

The trial judge found that the City had nothing to do with the actual operations. Cherokee Disposal was an independent contractor and its employees were not city employees.

Supreme Court of Canada Decision and Impact

Justice Dickson (as he then was) defined and inserted the category of strict liability as a halfway point between full *mens rea* and absolute liability. He recognized different standards of proof according to three categories of offences (pp 1325-26):

There are compelling grounds for the recognition of three categories of offences rather than the tradition two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care, this involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonable believed in a mistaken set of facts which, if true, would render the act or

omission innocent, or if he took all the reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
4. Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea.* An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Public welfare regulatory offences are strict liability offences. After proof that the offence occurred, the burden shifts to the accused to show that reasonable care was taken to prevent the wrongful act. In a prosecution for an environmental offence, for example, the Crown would demonstrate that the accused discharged a harmful substance into the river. The accused may then show that this was a mistake or that many precautions were in place to prevent this from happening. The accused faces a negligence-type standard of proving reasonable and prudent actions in the circumstances, even though the offence still occurred. This "due diligence" defence is today written in to most regulatory offence legislation.

The corporate manager may show what reasonable steps were taken to prevent the offence. What is reasonable will depend upon the circumstances of the case, including that manager's role in the corporation and in the offence.

This middle category strikes a fair compromise to both the accused and the Crown on behalf of society. The Crown does not have to prove fault and mental intention beyond a reasonable doubt. The accused can explain what happened and escape liability where one's actions were reasonable.

The Requirement of *Mens Rea* According to Type of Offence		
Full *Mens Rea*	Strict Liability	Absolute Liability
proof of a guilty act committed with full intention beyond a reasonable doubt	- *prima facie* proof of commission of the offence - due diligence defence	- commission of offence proved - *mens rea* assumed; no defence on basis of lack of intention
CRIMINAL CODE CRIMES	WIDE RANGE OF REGULATORY OFFENCES	

The City of Sault Ste. Marie 35 Years Later

Water pollution concerns in St. Mary's River were not identified until 1985, seven years after the Supreme Court decision. Sault Ste. Marie is a border town – with cities of the same name in Michigan and Ontario. The pollution had originated from various industrial sources. Environment Canada and the Ontario Ministry of the Environment, the U.S. Environmental Protection Agency and the Michigan Department of Environmental Quality all signed a Letter of Commitment toward ecological restoration of this area. A three-stage remediation plan was created on the Canadian side. The city has committed to

keep its water clean through continuous surveillance and maintenance, something that started with this pollution prosecution 35 years ago.

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Tell v Maritime Safety Authority - [2008] NZAR 306

Court of Appeal Wellington
CA 230/02

11, 27 November 2002
Keith, Blanchard, Tipping, McGrath and Anderson JJ

Criminal law -- Whether offence one of strict liability -- Purpose of offence to ensure public safety -- Irrelevant that penalty for offence same as offences requiring mens rea -- Legislative history demonstrated principal purpose of section -- Maritime Transport Act 1994, ss 61, 62, 63, 64, 65, 66, 67 and 81 -- Civil Aviation Act 1964, s 24(1)

Mr Tell fell asleep at the wheel of his fishing boat, causing it to run aground and suffer extensive damage in Auckland harbour. He was charged under s 65(1) of the Maritime Transport Act 1994 with continuing to operate the vessel with knowledge that he was liable to fall asleep. He was not charged on the basis that he operated the vessel while he was asleep. He argued unsuccessfully in the District and High Courts that the offence was not one of strict liability. He further appealed.

Held (dismissing the appeal)

1 Mens rea is a necessary ingredient of all offences unless Parliament has made it clear, expressly or by necessary implication, that proof of mens rea is unnecessary. The absence of any reference to knowledge or recklessness in the offence is not of itself decisive. The principal purpose of s 65 of the Maritime Transport Act was to provide a sanction where the safety of persons or property was unnecessarily put in danger or risk. The dominant legislative purpose was to ensure public safety and to achieve that the manner of operation of the vessel which caused unnecessary risk was to be judged from an objective standpoint. It followed that it was unnecessary for the defendant to have consciously appreciated the risk he was taking.*Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) applied. *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) applied.

Cases referred to in judgment

Civil Aviation Department v MacKenzie [1983] NZLR 78 (CA)

Millar v Ministry of Transport [1986] 1 NZLR 660 (CA)

Appeal

This was an appeal from a decision of the High Court affirming a decision of the District Court.

P W David and *K A Harmes* for the appellant.

T J Broadmore and *R K P Stewart* for the respondent

Tipping J.

[1] The appellant, Mr Tell, fell asleep at the wheel of his fishing boat. He was charged with two offences under s 65(1) of the Maritime Transport Act 1994 (the Act). They were charges of operating a vessel in a manner which caused unnecessary danger or risk to persons (first charge) and to property (second charge). The issue on this appeal is whether those offences required proof of mens rea or were offences of strict liability. Both Judge Thorburn in the District Court and Morris J in the High Court held that the offences were of strict liability and that Mr Tell had not proved he was without fault. He was therefore convicted and fined a total of $2500 and the conviction was upheld on appeal. By consent Mr Tell was granted leave to bring a further appeal to this court on the classification issue.

[2] On 6 March 2000 Mr Tell was the skipper of the fishing vessel *Bounty*. He was returning at night to the Port of Auckland. His deckhand had initially taken the wheel. Mr Tell took over while the deckhand got some sleep. As the vessel was coming into the Rangitoto Channel, following the leading light at Takapuna, Mr Tell was feeling tired and thought of getting the deckhand up from his rest to do the last hour's sailing. It was suggested in the courts below that Mr Tell fell asleep suddenly. Neither judge accepted that proposition. Morris J expressly rejected it, finding that Mr Tell had not established a reasonable possibility he became unconscious involuntarily. In fact the evidence was reasonably plain that he fell asleep when he ought not to have and in circumstances entirely within his control. That is why the judge found Mr Tell could not be said to have behaved without fault.

[3] As a result of its skipper falling asleep at the wheel, the fishing vessel went aground off Takapuna Beach under the leading light. It was extensively damaged but no one was injured. As well as the offences under s 65, Mr Tell was also convicted of failing to maintain a proper lookout at all times, contrary to r 22.39(2) set out in Schedule I to the Maritime (Offences) Regulations 1998. It is accepted that if the primary offences involve strict liability, this offence cannot be materially different. In the circumstances it is unnecessary to give it separate attention.

[4] Section 65 of the Act is in Part VI, the primary heading of which is "Offences in Relation to Maritime Activity". The first subheading in Part VI which relates to ss 61, 62 and 63 is "Offences Against Health and Safety on Ships". Sections 64 - 67 have a subheading saying simply "Safety Offences". It is thus clear that Parliament saw s 65 as being in a category of offence dealing with safety generally in respect of maritime activity. The section is in these terms:

> **65. Dangerous activity involving ships or maritime products** -- (1) Every person commits an offence who --
> (a) Operates, maintains, or services; or
> (b) Does any other act in respect of --
>
> any ship or maritime product in a manner which causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs.
>
> *[2008] NZ AR 306 page 308*
>
> (2) Every person commits an offence who --
> (a) Causes or permits any ship or maritime product to be operated, maintained, or serviced; or
> (b) Causes or permits any other act to be done in respect of any ship or maritime product, --
>
> in a manner which causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs.
>
> (3) Every person who commits an offence against subsection (1) or subsection (2) of this section is liable, --
> (a) In the case of an individual, to imprisonment for a term not exceeding 12 months or a fine not exceeding $10,000:
> (b) In the case of a body corporate, to a fine not exceeding $100,000:
> (c) In any case, to an additional penalty under section 409 of this Act.

[5] Clearly the operation of which s 65(1)(a) speaks must be a voluntary and conscious operation of the ship concerned. Mr Tell was not charged on the basis that he operated the vessel while he was asleep. He was charged and convicted on the basis that he continued to operate the vessel with knowledge that he was liable to fall asleep. That was held to be operation in a manner which caused unnecessary danger or risk.

[6] Mr David did not submit that there had to be an intention on Mr Tell's part to cause such danger or risk. Rather he submitted that it was necessary for Mr Tell consciously to have appreciated the risk he was taking. The issue is therefore whether mens rea, in the sense contended for, is a necessary ingredient of an offence under s 65(1)(a) in relation to proof of the proscribed manner of operation. Given that the ship must have been consciously operated, does the prosecutor have to prove that the operator consciously appreciated that the manner of operation was causing unnecessary danger or risk?

[7] Bearing in mind the statutory setting of s 65, as well as its own terms, we have no hesitation in upholding the view taken by both judges below that in the relevant respect the offence involved is one of strict liability. The prosecutor does not have to prove the conscious appreciation for which Mr David contended. We accept Mr Broadmore's submissions for the respondent in this respect.

Section 65

[8] We agree with Mr David's submission that mens rea should be regarded as a necessary ingredient of all offences unless Parliament has made it clear, expressly or by necessary implication, that proof of mens rea is not necessary. As we have already noted, the operation of the ship must be intentional. The question concerning mens rea relates to the manner of operation. Essentially it is whether the operator must know, or be reckless whether, his manner of operation is causing unnecessary danger or risk. We consider that there is a clear and necessary implication from the terms of s 65 that such knowledge or recklessness is not a necessary ingredient of the offence. While the absence of any reference to knowledge or recklessness is not of itself decisive, the statutory method of expression, both in subss (1) and (2), leads us to the conclusion that the subjectivity of the offence is confined to the "operates" element, and that

the question whether the manner of operation caused unnecessary risk has to be judged from an objective standpoint.

The statutory setting

[9] The conclusion we have reached on the basis of the text of s 65 is reinforced when consideration is given to the provisions surrounding it. The offences created by subss (1) and (2) of s 61 require knowledge of reasonably likely harm. This requirement is in clear contradistinction to the absence of such a requirement in s 65. Furthermore s 66 provides that in prosecutions for breaches of ss 64 and 65, but not in respect of breaches of s 61, proof of the breach of a relevant maritime rule shall, in the absence of proof to the contrary, be presumed to have caused unnecessary danger or risk, irrespective of whether injury or damage occurred. A presumption of this kind, couched in that way, is a clear pointer to offences against ss 64 and 65 being offences of strict liability. Section 67 is concerned with communicating false information affecting safety. Its significance lies in its express reference to "knowing the information to be false or in a manner reckless as to whether it is false". Parliament has thereby clearly signalled the need for knowledge or recklessness when that is intended, and in a section in close proximity to s 65 which contains no such words.

[10] Mr David drew attention to s 81, which is headed "Strict Liability and Defences". He suggested that this was the full extent of the reach of strict liability under the Act. It is, however, important to note that s 81 is directed specifically and solely to s 62, which concerns failure to comply with any provision of Part II. We do not consider it follows that offences created by Part VI are therefore incapable of having elements of strict liability. Part II offences are concerned with non-fulfilment of duties relating to safety and health on ships and in relation to seafarers. They mirror in that context general health and safety legislation. The fact that strict liability has been provided for in their respect does not, in our view, mean that Parliament viewed all other offences as necessarily involving mens rea, irrespective of their terms, their statutory context and their purpose.

[11] Mr David also pointed out that the penalties in s 65 were at the same level as those in s 61. That is certainly a matter to be borne in mind, but we do not regard it as outweighing the strength of the contrary indicators which favour strict liability in respect of s 65. We also bear in mind, as Mr David urged, s 25(c) of the New Zealand Bill of Rights Act 1990, which affirms the presumption of innocence "until proved guilty according to law". As the law was correctly applied in the courts below Mr Tell was proved guilty in accordance with it.

Legislative history/authorities

[12] The leading cases in this field are *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA). The judgments are well known and need not be discussed in any detail. The seven-fold classification in *Millar* can for ordinary purposes be reduced to three: (1) offences involving mens rea, (2) offences of strict liability, and (3) absolute offences.

[13] Those in the first category involve proof by the prosecutor of mens rea, generally intention or recklessness or relevant knowledge. Offences in the second category require proof only of the actus reus (the conduct constituting the offence) but the defendant is entitled to be acquitted if able to establish lack of fault on the balance of probabilities.

Absolute offences are complete on proof of the prohibited conduct without any escape on account of lack of fault or otherwise. Such offences are rarely created and the contest is generally between categories 1 and 2.

[14] *Millar's* case is also important for the statement at p 668 in the joint judgment of Cooke P and Richardson P concerning the correct approach to issues such as the present:

> But as a general approach to statutory offences when the words give no clear indication of legislative intent and there is no overriding judicial history, it will be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability.

We have adopted that approach, the essence of which is captured in the first sentence of para [8] above.

[15] *MacKenzie* was a case under s 24(1) of the Civil Aviation Act 1964 which relevantly provided:

> (1) Where an aircraft is operated in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft, and also the owner thereof unless he proves to the satisfaction of the Court that the aircraft was so operated without his actual fault or privity, shall be liable on summary conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding twelve months, or to both . . .

[16] Section 24 became s 44 of the Civil Aviation Act 1990, which is in materially the same terms as regards aircraft as s 65 of the Maritime Transport Act 1994 with which we are at present concerned. We do not regard the changes made to the section which was in issue in *MacKenzie* as detracting from the force of the submission made by Mr Broadmore that as s 24(1) of the Civil Aviation Act 1964 was held to create an offence of strict liability, so too should s 65(1) of the Maritime Transport Act. The change from "where an aircraft is operated" in s 24(1) to "every person who operates an aircraft [ship]" in ss 44 and 65 cannot be regarded as affecting the present issue. Nor can the dropping of the reference to "actual fault or privity" as regards owners. The new sections address that issue within the concepts of causing or permitting in their respective subs (2).

[17] Our consideration of the legislative history and the relevant authorities supports the conclusion that s 65(1) of the Act creates an offence of strict liability. That conclusion is also supported by what we consider to be the principal purpose of s 65. This is not so much to punish knowingly reprehensible conduct but rather to provide a sanction in a case where the safety of persons or property is unnecessarily put in danger or at risk. The legislative purpose of ensuring public safety is reinforced by

potentially stern penalties for conduct which objectively falls within the statutory proscription.

Conclusion

[18] For these reasons we agree with the respondent's submission that the courts below correctly classified the two offences of which Mr Tell was convicted. Neither the District Court nor the High Court erred in law. The appeal is accordingly dismissed with costs to the respondent of $2500 plus disbursements to be fixed if necessary by the Registrar.

Reported by: Gerard McCoy QC, *Barrister*