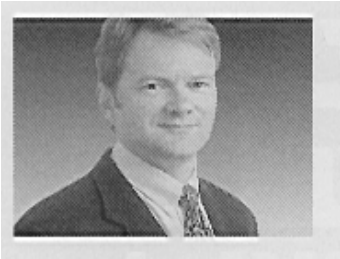

THE COURT OF APPEAL HAS ITS SAY ON SKIPPER FATIGUE ISSUES

Marty Logan LLB

The issue of the danger presented by crew and skipper fatigue on vessels is a very topical one and in November it came to be considered by a full five member bench of our Court of Appeal in Tell v MSA (CA 230/02,27/11/2002). The decision is of general importance to anyone in charge of a vessel and particularly those charged with safety offences under the Maritime Transport Act.

The facts were very simple. On the 6th March 2002 Mr Tell was the skipper of the fishing vessel *"Bounty"* when it was returning, at night, to the port of Auckland. His deckhand initially had taken the wheel and 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. Mr Tell then fell asleep at the wheel and the vessel went aground off Takapuna beach, under the leading light. The vessel was extensively damaged, but no-one was injured.

The skipper was charged with two offences under s65 of the Maritime Transport Act, with operating a vessel in a manner which caused unnecessary danger or risk to any person or property. He was also charged with failing to maintain a proper lookout at all times, contrary to Rule 22.39(2) of Schedule 1 to the Maritime (Offences) Regulations 1998.

Mr Tell vigorously defended the charges. The primary defence was that he had fallen asleep unexpectedly and because he had no control over this he did not intend to operate the vessel dangerously.

This raised a factual issue as to whether his falling asleep was really unexpected, but also raised a significant legal issue as to whether the prosecution needed to prove a mental element of the offence in the sense of having intended to operate the vessel dangerously or having knowledge of the dangerous operation. This mental element (sometimes referred to as the guilty mind) is referred to as *mens rea* in legal terms.

Mr Tell was convicted in the District Court and appealed to the High Court without success. It was decided on the facts that he knew he was feeling tired and therefore should have anticipated falling asleep.

He then appealed to the Court of Appeal. That Court accepted the factual findings made by the lower Courts and concentrated its judgment on *mens rea* issues. When considering what degree of *mens rea* is required for safety offences such as s5 the Court, broadly speaking, had three options available to it. The first category is offences involving "*mens rea*" where the prosecution has to prove the required *mens rea* element - generally intention, or recklessness, or relevant knowledge.

The second category is known as "strict liability offences", where the prosecution only has to prove the conduct constituting the offence (the *actus reus* in legal terms), but the Defendant is entitled to be acquitted if he/she is able to establish a lack of fault on the balance of probabilities.
The third category is "absolute offences", which are complete on proof of the prohibited conduct without any escape on account of lack of fault or otherwise.

The Defence argued that s65 offences required proof of a *mens rea* element, in that the prosecution had to prove that the Defendant consciously appreciated that the manner in which he was operating the vessel was causing unnecessary danger or risk. However the Court of Appeal had no hesitation in rejecting this submission and in finding that this was a strict liability offence. It noted that the provision was similar to other health and safety laws, particularly a similar provision relating to the operation of aircraft,

which had already been established as a strict liability offence.

Accordingly, once the prosecution showed that the manner of operation was objectively dangerous, then the Defendant could only escape liability if he/she could show a total absence of fault on their part. This is obviously a high test for the Defendant to meet. The Court noted that the principal purpose of s65 was 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 purpose of ensuring public safety is reinforced by potentially stern penalties for conduct which objectively falls within the statutory proscription. Accordingly, the appeal was lost.

So what does all this mean to skippers and operators? The stark reality is that you can be convicted for operating a vessel in a dangerous manner, even where you have no appreciation of the danger. The operation is viewed objectively and unless you can show that you were totally without fault you may find yourself facing prosecution, conviction, fines and possibly even imprisonment. The full bench of the Court of Appeal was adamant on the position and therefore the best advice can only be – *"Be careful out there"*.