UK and South African Case Law Related to the Oil Pollution from Ships' Bunker and Hazardous and Noxious Substances Carried as Cargo

Recent Occurrences

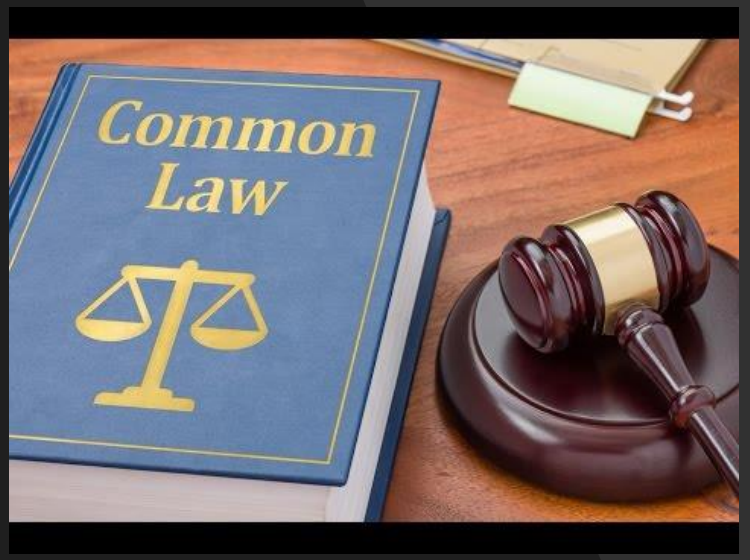
Torrey Canyon: Reshaped International Law

- Affected parties (British and French Governments) sought to make claims for compensation against those responsible, including Barracuda, the owners of Torrey Canyon).
- In the absence of an international compensation regime, they faced a myriad of legal hurdles.
- Jurisdictional issues.
- Common law claims.
- Limits to compensation.

Jurisdictional issues:

- The British Government issued a writ for damages on 4 May 1967 in the Admiralty Court in London that named Torrey Canyon's sister ships, Sansinena and Lake Palourde, which Barracuda also owned.
- The loss of the ship itself was an immediate problem – though it was suggested that the presence of a lifeboat in Penzance, recovered from the ship, might be enough to found it.
- Two sister-ships would be kept well away from the UK, and so there seemed to be an insoluble jurisdictional problem.
- But as luck would have it, one of the sister ships on her way to the Persian Gulf urgently needed recoiling. She was arrested in Singapore by British official.
- However, her insurers paid a bond for her release. France eventually established jurisdiction a year later by arresting Lake Palourde in Rotterdam
- British Government eventually agreed with owners that proceedings should be heard in London.

Common Law issues:



- Civil actions for oil pollution were limited to common law claims in tort against the vessel owner or other responsible parties, which required proof of fault.
- What would the claim be founded in? Nuisance, trespass, negligence
- Previous precedent illustrated difficulties.
- *Southport Corporation v Esso Petroleum Co Ltd:* HoL provided defence of necessity to discharge oil for the safety of the crew, neither trespass nor nuisance could succeed without some underlying negligence.

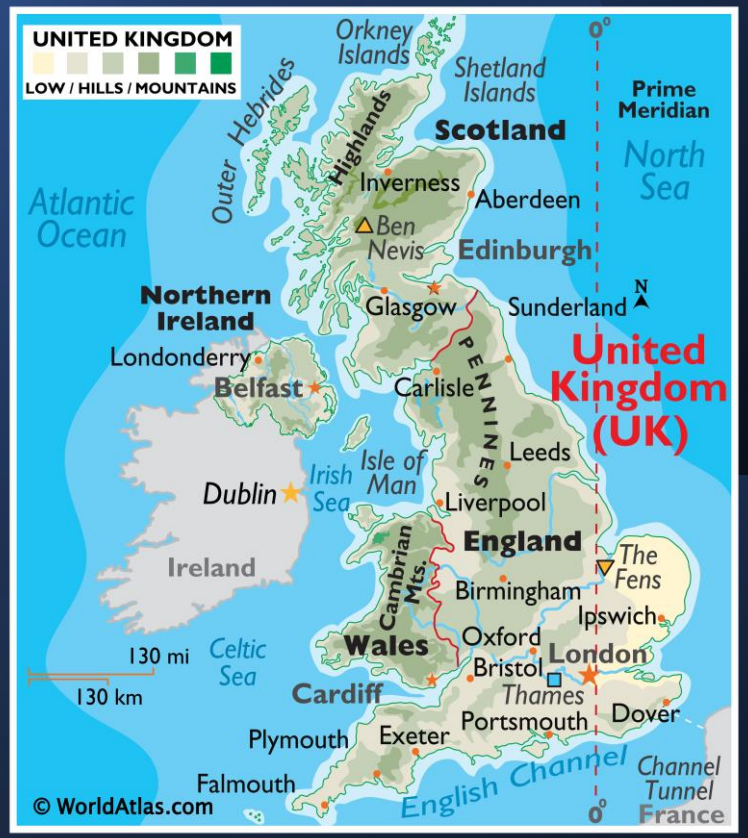
1969 International Convention on Civil Liability for Oil Pollution Damage (CLC Protocol)

- The British Government swiftly called for a new international regime immediately.
- It submitted a Note to the International Maritime Organisation (IMO), known at the time as the Inter-Governmental Maritime Consultative Organisation, appealing for it to consider, as a matter of urgency, changes in international maritime law and practice governing oil pollution.
- Both the IMO and Comité Maritime International presented draft conventions at the IMO International Conference on Marine Pollution Damage, held in November 1969 in Brussels, and from which emerged the CLC 1969.
- CLC 1969 : “uniform international rules and procedures for determining questions of liability and providing adequate compensation” to persons who suffered damage resulting from oil spills from ships.

UK: Compensation for Vessel Source Oil Pollution Damage

- First tier compensation: CLC Protocol imposes strict liability. Requires the owner of a ship registered in a contracting to maintain insurance or other means of financial security.
- Second tier compensation: CLC Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the Fund Convention).
- Third-tier compensation: for vessel-source persistent oil pollution is provided for by the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Supplementary Fund Protocol).
- The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
- Hazardous and noxious substances, compensation is dependant upon establishing a valid
- claim under UK common law. The amount of available compensation is limited by a separate convention, the Convention on Limitation of Liability of Maritime Claims 1976 as amended by its Protocol of1996 (LLMC 1996), dependent upon the size (gross tonnage) of the ship.

United Kingdom:



Torrey Canyon 1967: 80-119,000 tonnes

Sea Empress 1996: 72,000 tonnes

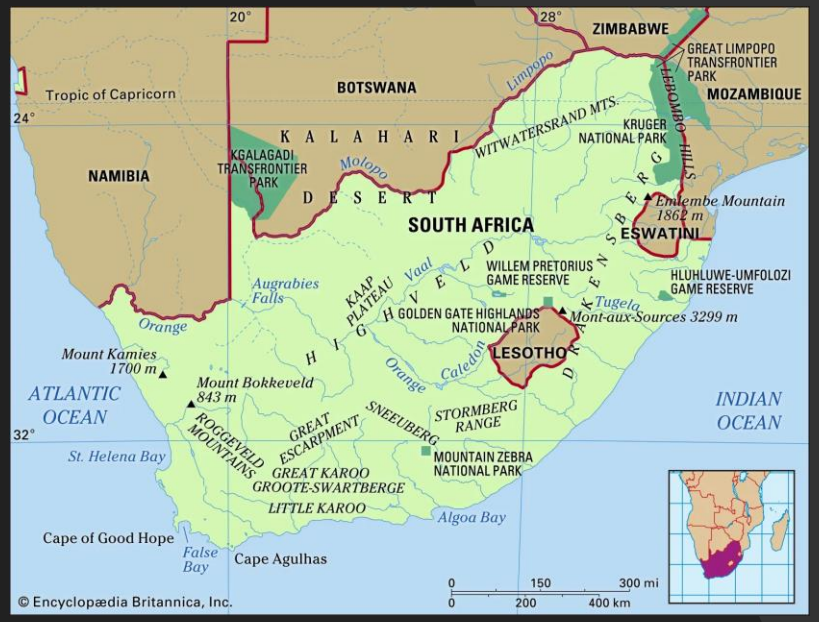
Gannet Alpha 2011: approx 200 tonnes / Clair 2016: approx 100 tonnes

1967 **1993** **1996** **2007** **2011**

MV Braer 1993: approx 85,000 tonnes

Hamilton Trader 1969/ Rosebay 1990/ MSC Napoli 2007: all less than 1,000 tonnes

Major vessel-source pollution incidents in South Africa:



Major vessel-source oil pollution incidents	Year	Amount of oil spilled (tons)
Esso Wheeling	1948	Unknown
Sliedrecht	1953	1,000
Esso Essen	1968	15,000
Kazimah	1970	1,000
SS Wafra	1971	15,000
Oswego–Guardian–Texanita collision	1972	10,000
Oriental Pioneer	1974	200
A Venpet-Venoil collision	1977	30,500
Castillo de Bellver	1983	252,000
Kapodistrias	1985	Unknown
Pacificos	1989	10,000
Atlas Pride	1991	Unknown
Apollo Sea	1994	2,470
MV Treasure	2000	400
Jolly Rubino	2002	400
MV Seli 1	2009	Unknown
Kiani Satu	2013	Unknown
MV Chrysanthi S	2019	0. 4

Apollo Sea (1994):

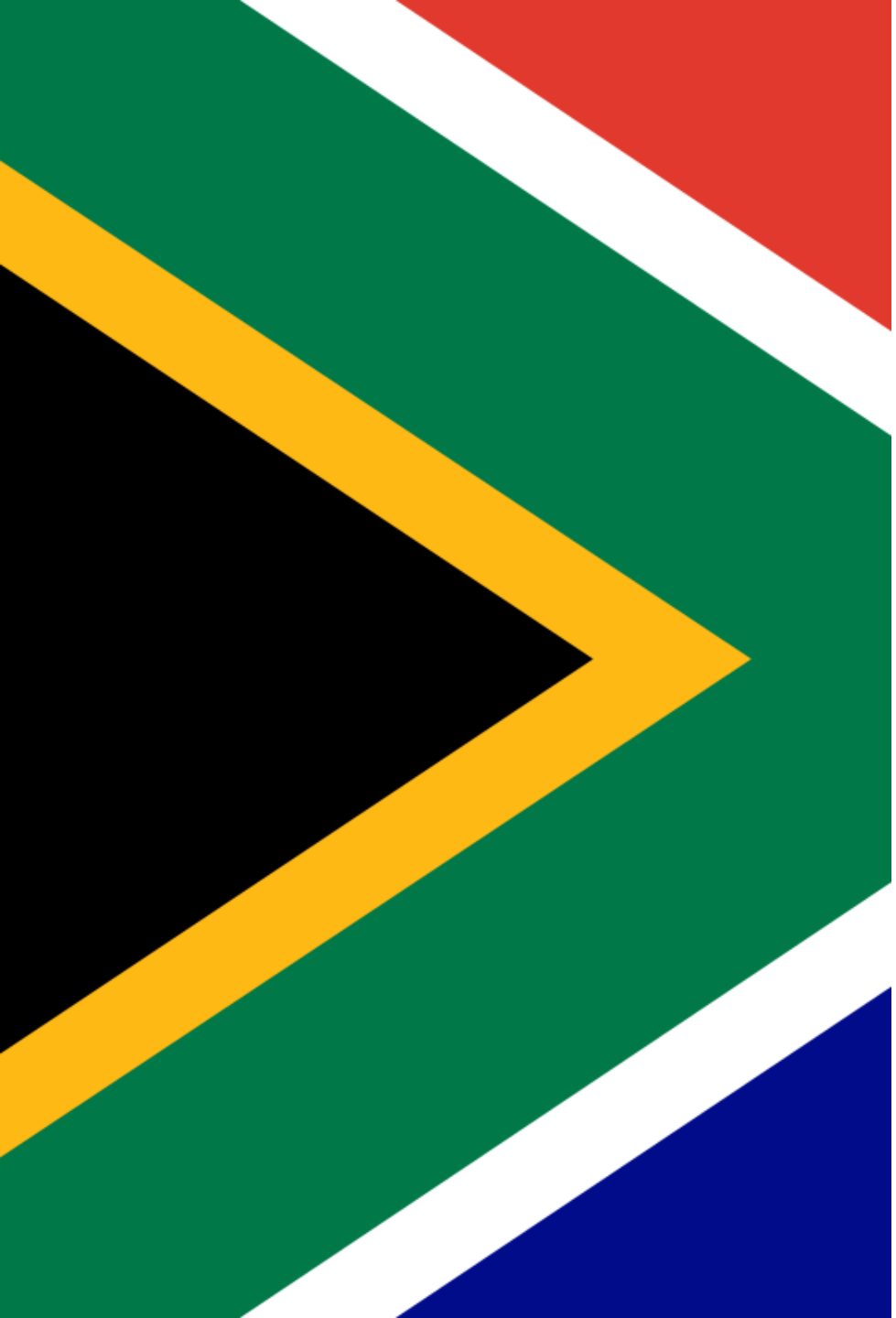
10,000 African penguins were oiled from the sinking of the Apollo Sea bulk ore carrier. Of those oiled penguins, over 4,700 were rehabilitated and released

MV Treasure (2000):

20,000 oiled penguins requiring rehabilitation
Pre-emptive capture program initiated on the islands and it was successful in relocating over 19,500

Great cost to South Africa:

- African Penguin
- Huge rehabilitation efforts
- Data available on cost of clean ups dating back to 1994.
- The Apollo Sea oil spill (1994): ZAR 27 million
- MV Treasure Spill (2000): ZAR 13 million
- Jolly Rubino incident (2002): >ZAR 18.4 million for salvage and clean-up operations
- MV Seli 1 (2009): > ZAR 40 million on salvage and clean-up operations (paid by SA taxpayers)
- Kiani Satu (2013) oil spill incident: > ZAR 38 million for salvage and clean-up operations.



South African Law:

South Africa acceded to the CLC in 1976 and enacted the Marine Pollution Control and Civil Liability Act No 6 of 1981 (MPCCLA).

South Africa became a party to the CLC Protocol in 2004.

First Tier:

- South Africa Merchant Shipping (Civil Liability Convention) Act No 25 of 2013 (Merchant Shipping CLC Act).

Second Tier:

- Merchant Shipping (International Oil Pollution Compensation Fund) Act No 24 of 2013 (IOPCFA)
- Shipping (International Oil Pollution Compensation Fund) Contributions Act No 36 of 2013 (Contributions Act); Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act No 35 of 2013

Because legislation was so late: SA had to pay contributions which had accumulated as shipping companies refused to pay outstanding ZAR 36 million.

Bunker Oil

- Has not ratified the The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
- The South African Marine Pollution (Control and Civil Liability) Act 6 of 1981 provides for bunker spills oil pollution damage limitation of liability.
- Has a limit ceiling of 14 (“fourteen million units of account”) SDRs which is lower than that provided by the 1992 CLC and the Bunker Convention.
- While article 7 of the Bunker Convention requires the “registered owner of a ship having a gross tonnage greater than 1000 registered in a state party to maintain insurance or other financial security”, the MPCCLA does not specify such a requirement.

Inadequate Compensation:

- The insurance claims for the seabird rescues during the Apollo Sea spill, in which the owner paid USD 589,000.
- MV Treasure spill, in which the owner paid USD 1,459,000.
- In both of these cases, the payments were relatively small sums for the companies.
- Delays in the payment of compensation to claimants in respect of vessel-source bunker oil pollution damage are common in South Africa and often lead to the disappointment and desolation of claimants who are paid inadequate compensation and who may experience several years of delays in receiving compensation.
- E.g. Compensation for pollution damage was paid to South Africa by the ship's insurer after claims were made; however, the insurer delayed the payments for several years before compensating the claimants.

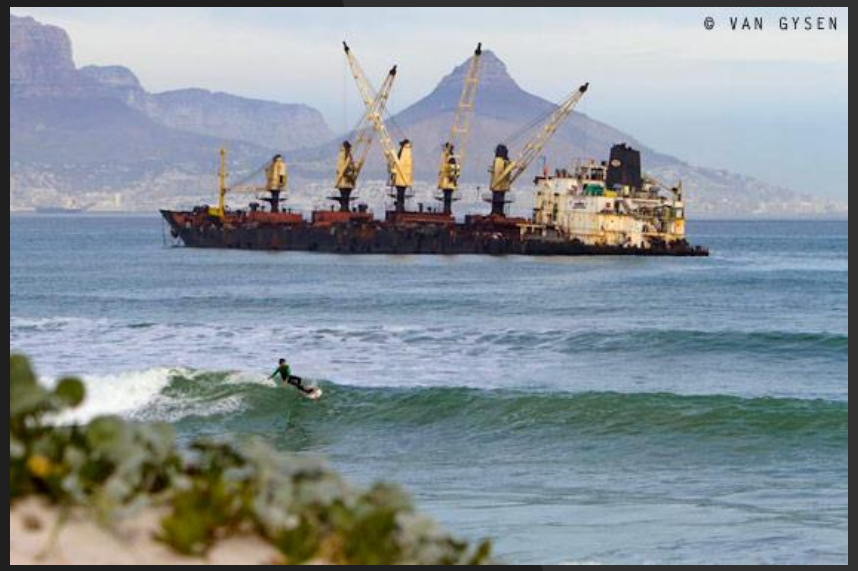
MV Chrysanthi S

- An incident of inadequate compensation occurred in 2019 with the MV Chrysanthi S spill, which resulted in 0.4 tons of oil (involving bunker fuel) being spilled in South African waters. The owner of the MV Chrysanthi S was found liable and was fined only ZAR 350,000 (USD 25,000) by the South African Maritime Safety.

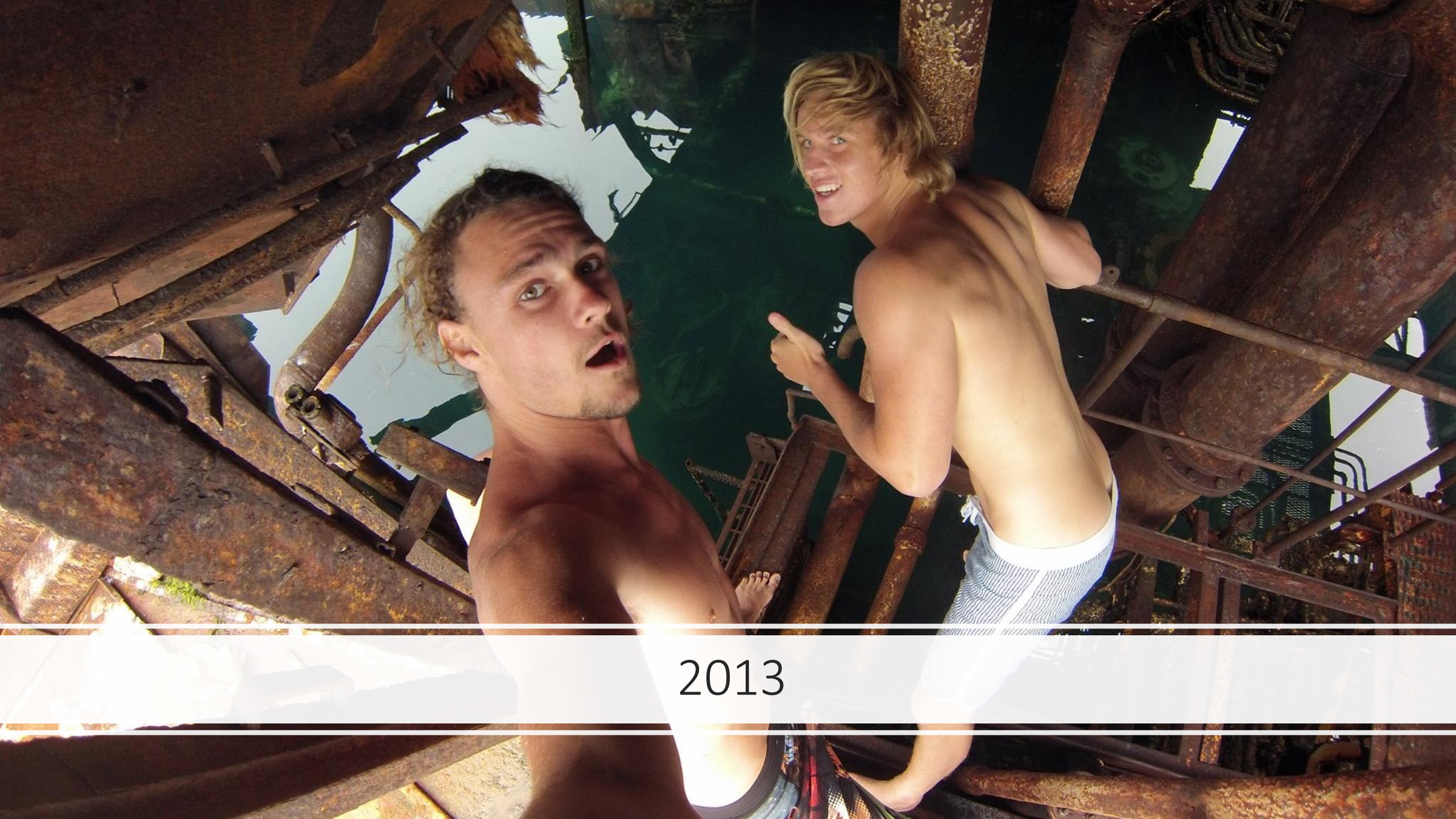
South African Law

- Not a party to the Bunker Convention
- Despite submitting the need for one a joint submission to the IMO's legal committee on the importance of one
- No third-tier compensation: not party to the Supplementary Fund Protocol
- Enactment of the various amendments of the CLC Protocol in general, and in particular the amendments of the limits of liability in the CLC Protocol, as provided by section 2(2) of the Merchant Shipping CLC Act is not automatic. Lengthy time periods to update limits.
- High Court deals with oil pollution cases. Decides on limits and owner must constitute a fund with the court and pay compensation to the court (subrogation)

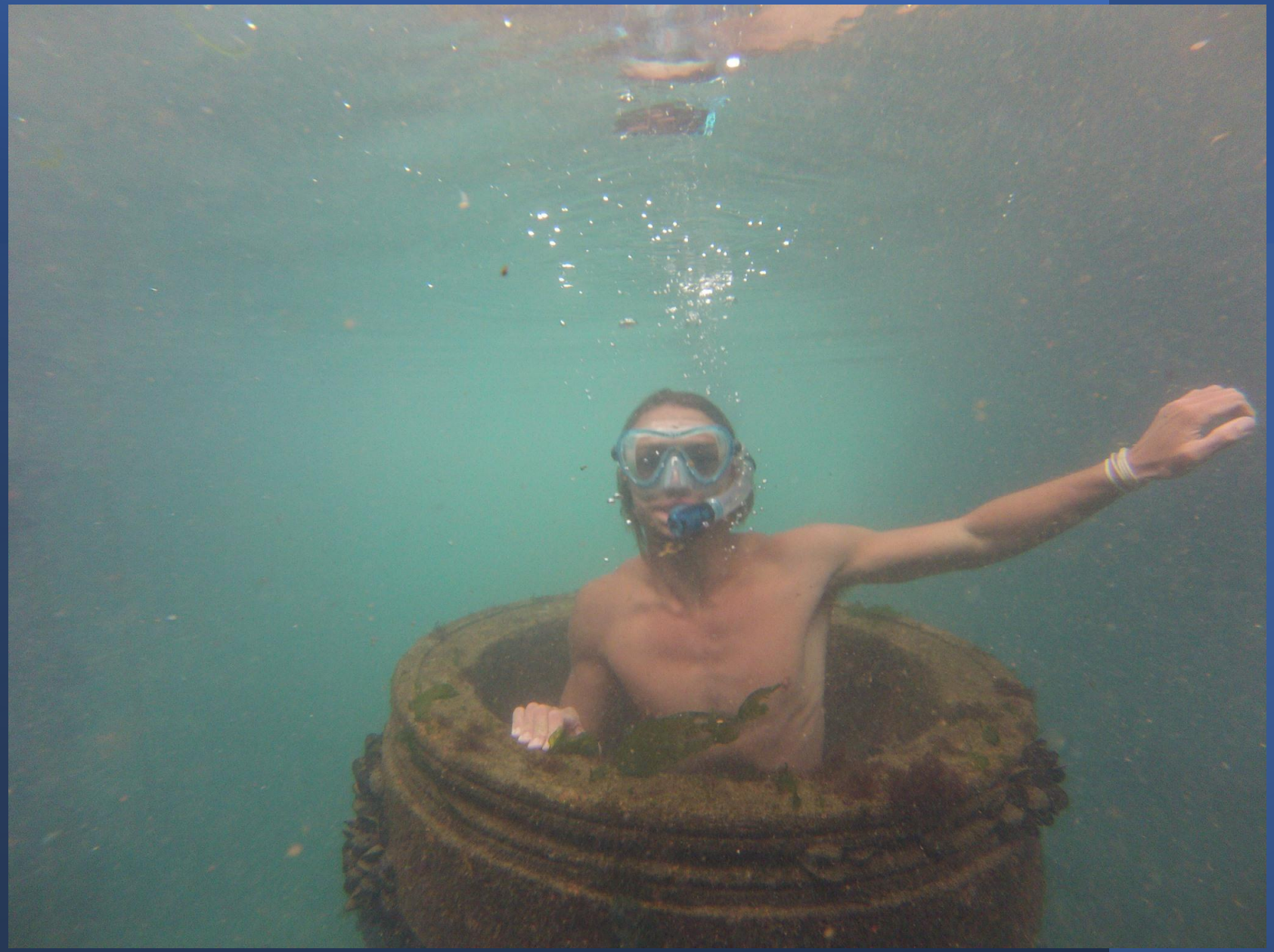
Seli I (2009)

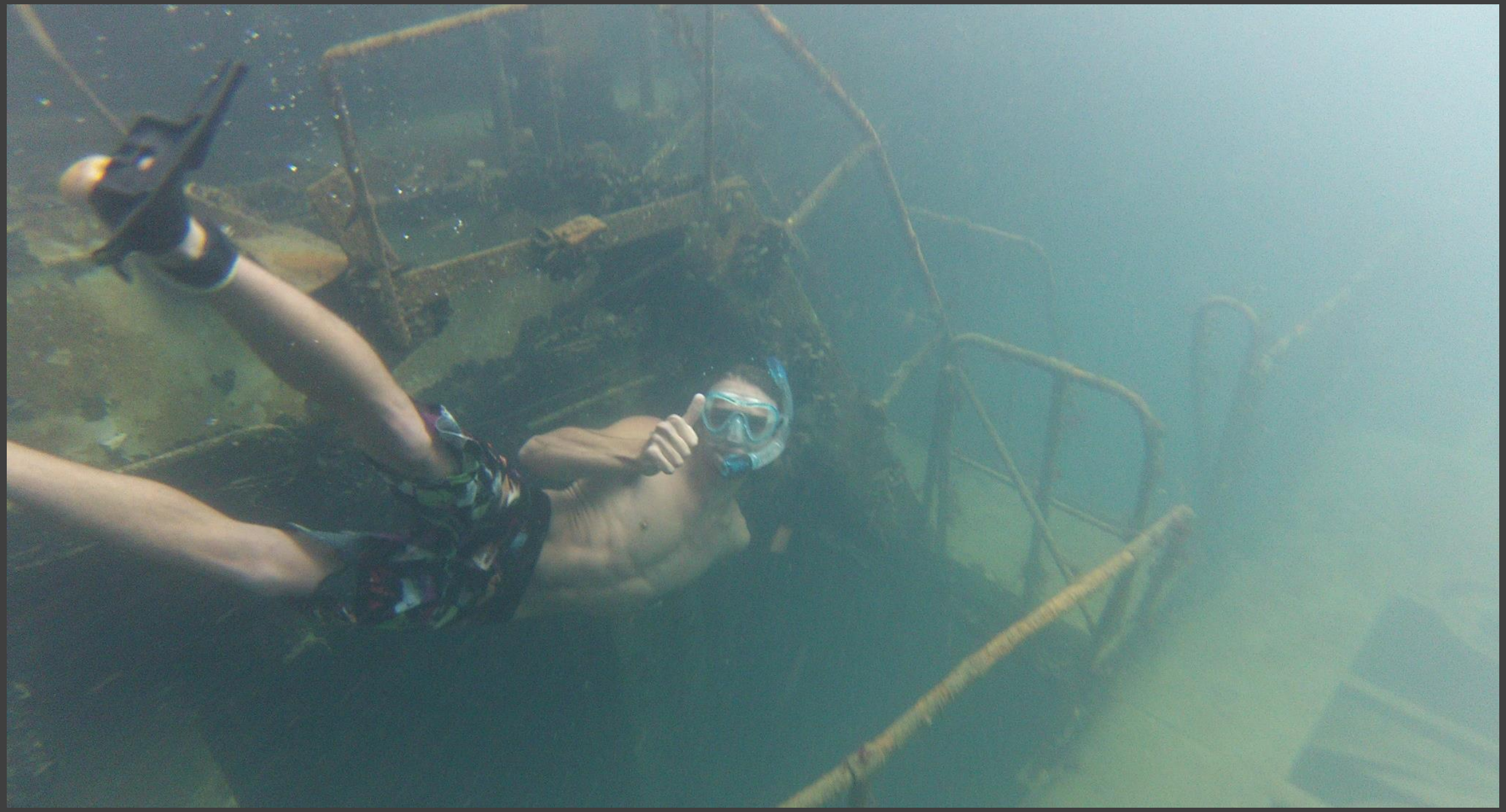


- South Africa's Maritime Safety Agency
- 30,529 dwt bulk carrier Seli 1 grounded on Blouberg coastline.
- The Turkish-owned handysize bulker was insured for hull risks by JSC Rosgosstrakh of Moscow and for P&I by Hamburg based Zeller Associates Management Services on behalf of the Russian P&I Pool.
- "sought to withdraw insurance cover" - owner defaulted on an express condition of the policy.
- Salvors (Smit) received an order from Lloyd's Open Form arbitrator in London and directed the owners or their insurers to put up $2.8mn in security for Smit's special compensation claim.
- Smit was instructed by SAMSA to remove all oils and contaminants on board.
- Owner unable to pay, so SA had to pick up the mitigation and cleanup costs.
- Prior to Nairobi International Convention on Removal of Wrecks (18 May, 2007; Entry into force: 14 April 2015)



2013





Conclusions:

- Lack of case law emerging from SA regarding compensation is largely because legal disputes prior to 1994 are not within the public realm.
- Post 1994: government incredibly slow to enact enabling legislation.
- Taxpayers pick up the bill.
- The UK, by contrast, was instrumental in establishing a legal compensation regime at the IMO.
- Acted quickly to enact necessary legislation, therefore has had time to deal with disputes surrounding technicalities and defintions.