

Personal Injury Accidents at Sea

PIBA
November 2008

GRAHAME ALDOUS QC
9 GOUGH SQUARE

1 AVOIDING LIMITATION NIGHTMARES

1.1 Limitation Periods

The fear that most frequently fills the hearts of practitioners who come across a shipping claim that they are unused to dealing with is that of missing a “special” limitation period. There are two circumstances under UK law in which there is a 2 year limitation period rather than the standard 3 year limitation period generally applicable to personal injury claims under the Limitation Act 1980.

1.1.1 Athens Convention: Passengers

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea is incorporated into UK law by, and can be found in, schedule 6 to the Merchant Shipping Act 1995. It relates to passengers under a contract of carriage. It does not cover crew members working on a ship under a contract of employment with the shipowner. Article 16 of the convention imposes a time limit for personal injury claims of 2 years from the date of disembarkation. The Convention itself applies to international carriage by sea, but its provisions are also applied to domestic carriage by sea, i.e. voyages to and from UK ports that do not visit another country in between, by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987.

The two year time limit under the Athens Convention can only be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen, but any such declaration or agreement must be in writing. The suspensive provisions of the Limitation Act, 1980, including the discretion to extend time under section 33, do not apply to the Athens Convention limit, see *Higham -v- Stena Sealink*.¹

1.1.2 2-Ship incidents: Collisions

The other two year time limit in shipping cases arises out of section 190 Merchant Shipping Act 1995. This applies a two year time limit to claims against the ship or her owners in respect of

¹ [1996] 1 WLR 1107

damage or loss caused by the fault of that ship, to another ship, its cargo or freight or any property on board it or for damages for loss of life or personal injury caused by the fault of that ship to any person on board another ship.

The common situation to which section 190 applies is injury resulting from collision between ships. A collision need not actually occur, however, so long as it is a "two ship" incident. Thus, if somebody on board one ship is injured when they are knocked over, or a rope parts, due to the wash of a passing ship that is travelling too fast, then a claim will be subject to the two year time limit under section 190. In the case of a person injured on one ship with a claim against the owners or operators of that same ship section 190 will not apply.

Where loss of life or suffering of injury is not coincidental with the causative maritime incident, time runs under section 190 from the time the injury is suffered. In *Sweet v RNLI*,² a lifeboat man started to have psychiatric symptoms a month after a collision and by 6 months after the collision they had developed into a recognised psychiatric condition. It was held that time started to run only once an injury had commenced and the date when that occurred was ordered to be tried with the medical issues.

Unlike the Athens Convention, under section 190 the UK Court has power to extend time for bringing proceedings to such extent and on such conditions as it thinks fit. The discretion will usually be exercised by the Admiralty Court, as generally the action will be one that is required to be brought in the Admiralty Court under CPR Part 61³ and accordingly the County Court may not be a Court having jurisdiction to extend time. Unlike section 33 of the Limitation Act 1980, the section 190 discretion is unhindered by lengthy criteria or specified matters to be taken into account and section 190 simply provides a wide discretion. An example of the discretion being exercised can be found in *Santos -v- The Baltic Carrier and the Flinterdam*.⁴

1.2 Foreign Limitation Periods

Where an accident happens abroad the limitation period applicable in the area in question may apply by reason of the Foreign Limitation Periods Act 1984.⁵ The basic rule is that when considering the appropriate law to apply in ascertaining the applicable limitation period, the applicable law is the law of the country in which the events constituting the tort occur and where elements of those events occur in different countries, the applicable law under the general rule in a personal injury claim is to be taken as being the country where the individual was when he was injured⁶.

That rule may be displaced in certain circumstances. If it appears in all the circumstances from a comparison of the significance of the factors which connect a tort with the country whose law would be applicable under the general rule and the factors which connect the tort with another country, that it is substantially more appropriate for the other country's law to apply then it will, displacing the general rule.

Thus even where an accident happens abroad the UK courts may nevertheless apply English law. In *Hornsby v Rumic* [2008] EWHC 1944 (QB) it was held that where the claimant in a personal injury action who was resident in Wales had sustained injury whilst performing his duties under a

² TLR 22/2/2002

³ See below.

⁴ [2001] 1 Lloyd's Rep. 689

⁵ For comprehensive guidance on international conflicts of law see, Dicey & Morris The Conflict of Laws

⁶ Section 11 Private International Law (Misc. Prov.) Act 1995.

temporary assignment within the coastal waters of the United Arab Emirates, the Private International Law (Miscellaneous Provisions) Act 1995 s.12 applied so as to displace the law of that country as the applicable law to his claim as it was substantially more appropriate in the circumstances for the law of England and Wales to apply.

If a foreign limitation period applies then the UK court may disapply that time bar on grounds of undue hardship under section 2 of the Foreign Limitation Periods Act 1984. However, the mere fact that a foreign limitation period is shorter than the UK limitation period does not, without more, give rise to “undue hardship”, **Durham v T & N Noble plc** May 1 1996, unrep.

A useful guide to foreign limitation periods was published by Lloyd’s of London in 1993 under the auspices of the Comité Maritime International and edited by Professor Francesco Berlingieri.

Where a UK court has to apply foreign law, it is a question of fact for the court to find what the applicable foreign law is, and the court must then apply the relevant law as it finds it would be applied in the country in question⁷. In reaching its finding of fact as to the applicable foreign law the court may be assisted by expert evidence. The expert evidence can come from any suitable source and does not necessarily have to come from someone qualified to practice in the country in question.

1.3 Limitation on the amount of damages

1.3.1 Rationale

The UK has traditionally accepted a right for ship owners to limit the amount of damages that can be claimed against them and has implemented in UK law various international conventions setting the limits and the circumstances in which they can be relied on. The traditional justification for such limits was to ensure that ships had the freedom to travel internationally without being harassed by excessive claims so as to ensure freedom of trade, a matter dear to the heart of UK governments over the years as being in the interests of a maritime nation. The two conventions that are relevant to the claims considered in this work are the London and Athens Conventions. Both of these conventions accepted the need for a right to limit on the basis that ship owners must be able to insure their potential liabilities. This too is a matter close to the heart of a nation that is home to one of the world’s major insurance markets. There is little evidence, however, that ships which trade outside the protection of the conventions are unable to obtain insurance that would provide full compensation to victims of personal injury or fatal accidents on ships. Recent Protocols (considered below) are reducing the practical effect of these limitations in personal injury cases.

1.3.2 The London Convention

The Convention on Limitation of Liability for Maritime Claims 1976, known as the London Convention,⁸ incorporated into UK law by Schedule 7 of the Merchant Shipping Act, 1995, puts a

⁷ See S. 4 Civil Evidence Act 1972.

⁸ The convention was held in London at the Cunard International Hotel, Hammersmith between 1st and 19th November 1976 under the auspices of the Inter-Governmental Maritime Consultative Organization of the UN. The approved summary record of the convention is dated 4th April 1978 and is held at the IMO library in London.

financial cap on claims for loss occurring on board or in connection with the operation of a “ship”. The cap applies to any claims arising “on any distinct occasion”.⁹ If there is more than one claim and they exceed the cap then they will be paid out pro rata. In those circumstances a shipowner may pay the entire fund into court and leave the claimants to fight between themselves over their shares. This sort of action is called a Limitation Action, see below.

The convention specifies two categories of limit which, in a hangover from the wording of the 1957 Brussels Convention (which the 1976 London Convention replaced), are still commonly referred to as the “personal injury fund” and the “property fund”. If the property fund is not exhausted then the balance “spills over” to become available for personal injury claimants. Where there is only a personal injury claim then it will be limited to the specified amounts in the personal injury and property funds combined.¹⁰

Funds are valued in “units of account”. These used to be expressed in Gold Francs but since 1989 have been expressed in Special Drawing Rights, or SDR’s, which are the international units of account used by the International Monetary Fund. The value of an SDR varies and is reported in the Financial Times. Thus the value at the time of the claim will need to be checked, but it is about 1 US\$.

The size of the fund is calculated on a sliding scale depending on the tonnage of the vessel¹¹ and for that reason the right to limit is sometimes referred to as tonnage limitation. Generally the tonnage of a vessel will be ascertained from her tonnage certificate, but where the tonnage of a vessel is in dispute there may need to be expert evidence and a survey. In the UK the lowest limit is for vessels under 300 tons, which would include most yachts and small craft, for whom the combined funds limit was until May 2004 250,000 SDR’s, made up of 166,667 SDR’s for the injury fund and 83,333 SDR’s for the property fund. A Protocol to the London Convention agreed in 1996 increased the lowest limit to a total of 1,500,000 SDR’s with effect from May 2004, when it had received sufficient ratifications by members of the IMO to come into force. Thus most claims will have a value below the right to limit in any event and only in the most serious and therefore valuable claims will consideration need to be given to the right to limit.

The status of claimants on board ship is relevant to whether the limitation on damages will apply. Employees under a “contract of service” with a shipowner are excluded from the cap and different amounts are specified for passengers,¹² who may also be subject to a cap under the Athens Convention, (considered below). The issue of what amounts to a “contract of service” was considered in relation to the London Convention limit in *Todd v Adams; The Margaretha Maria*¹³, see below.

1.3.3 Docks

Under section 191 of the Merchant Shipping Act 1995 the owners of docks have a right to limit liability, but that section has no application to personal injury or fatal accident claims.

⁹ Article 6

¹⁰ This is so even where there is no separate property claim, see Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings, Grahame Aldous [2001] LMCLQ, 150.

¹¹ Article 6

¹² Article 7

¹³ [2001] 2 Lloyd’s Rep. 443.

1.3.4 The Athens Convention

The Athens Convention applies to passengers under a contract of carriage, and so would apply to someone who was on a ship for the purposes of their employment but was nevertheless a passenger under a contract of carriage, such as the driver of a freight lorry on a ferry. As enacted the cap under the Athens Convention was 46,666 SDR's, some £39,000, but it has been increased gradually in respect of UK ships under the UK's powers under the convention. Where the shipowner is a carrier with a principal place of business in the United Kingdom the limit for an incident after 1st January 1999 is 300,000 SDR's.¹⁴

Carriers under the Athens Convention are required to give notice to passengers that the provisions of the Convention may apply¹⁵ and it is for that reason that passengers are issued with tickets containing small print about the Athens Convention. A failure to give such notice does not disentitle a carrier to rely on the provisions of the convention,¹⁶ though the carrier may be exposed to a criminal penalty.

A protocol to the Athens Convention agreed in 2002 but yet to come into effect will replace the fault based liability system with one of strict liability. The protocol will also raise the injury limit to 400,000 SDR's for a passenger where fault is established and to 250,000 SDR's in other cases. The status of the protocol can be checked on the IMO website.

1.4 Loss of the Right to Limit: “Breaking the Limit”

The right to cap claims under either the London¹⁷ or Athens¹⁸ Conventions can only be defeated, or “broken”, if it can be shown that the loss resulted from some personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. That is a deliberately difficult burden.

A number of cases under a similar provision in the Warsaw Convention, applicable to accidents on aircraft, provide some useful guidance. The knowledge that damage would probably result does not necessarily have to be knowledge of the precise damage which actually occurred, but it must be of the same kind: see *Goldman -v- Thai Airways International Ltd.*¹⁹ The requirement for knowledge is subjective. It requires an actual knowledge on the part of the relevant person at the moment at which the relevant act or omission occurs. It is not sufficient if the relevant person is aware that if a certain risk materialises, damage would probably result: see *Gurtner -v- Beaton.*²⁰ An appreciation or awareness at the time of the conduct in question that such conduct will probably result in the type of damage that is caused is required: see *Nugent -v- Michael Goss Aviation Limited.*²¹

In *Margolle -v- Delta Marine Co. Limited,*²² Mr. Justice Gross held that it was likely that only truly exceptional cases would give rise to any real prospect of defeating an owner's right to limit

¹⁴ By reason of the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order, 1998

¹⁵ The Carriage of Passengers and their Luggage by Sea (Notice) Order 1987

¹⁶ *The Lion* [1990] 2 Ll. Rep. 144

¹⁷ Article 4

¹⁸ Article 13

¹⁹ [1983] 1 WLR 1186.

²⁰ [1993] 2 Lloyd's Rep. 369.

²¹ [2000] 2 Lloyd's Rep. 222.

²² [2002] EWHC 2452 (Admty).

under the 1976 London Convention. That case involved a fishing boat that was in the habit of crossing the Channel separation zones in breach of the Collision Rules²³ whilst the skipper was asleep below. His Lordship thought that that might be a truly exceptional case and there was a real prospect of the right to limit being defeated. Accordingly he allowed the matter to go to trial. Such cases will, however, be rare. In *The Bowbelle*²⁴ Sheen J. described the right to limit as “almost indisputable”, and in *The Leerort*²⁵ Lord Phillips stated that “when a claim is made for damages resulting from a collision it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability”.

A shipowner seeking to exercise the right to limit merely has to establish that the claim falls within the wording of the applicable convention, and will incur the costs of establishing the necessary facts. Once they have established those facts then they are entitled to a decree limiting liability unless the claimant proves the facts required to “break” the limit. If the claimant chooses to contest the right to limit and fails in the attempt then they will be at risk as to the costs of doing so.

2 MEANING OF “SHIP”AND “CREW”

A common thread through the statutory provisions applicable to accidents at sea is the meaning of “Ship” and “Crew”. There is no single straightforward definition of either of these terms and for that reason the guidance that is available from the UK case law is considered below.

2.1 What is a Ship?

Which regime has application to an accident may well depend on whether a vessel is a ship, and whether the injured person is a member of the crew or not. If the vessel is a ship then this may have important consequences for the purposes of the applicable limitation period, as well as for the purposes of conventions limiting the amount of damages that may be recovered.

The general definition in section 313 of the Merchant Shipping Act 1995, simply says that “ship” includes every description of vessel used in navigation. There are variations on this in other statutory provisions and so cases on the definition of ship need to be treated with some caution. The Athens Convention relating to the carriage of passengers and their luggage by sea (incorporated into UK law by schedule 6 to the Merchant Shipping Act 1995) is limited to seagoing ships,²⁶ and the International Convention on Salvage 1989 (incorporated in Schedule 11 of the Merchant Shipping Act 1995) defines “vessel” as any ship or craft, or any structure capable of navigation. None of these definitions really answers the question of what is a ship.

The earlier definition in the Merchant Shipping Act 1894 (which itself came from the 1854 Act) was “*Ship includes every description of vessel used in navigation not propelled by oars*”. The omission of the words “not propelled by oars” in the 1995 Act presumably means that the Quinquereme of Nineveh, the oared galley of ancient times, would now be a ship, whereas previously it was not, although she might have qualified as a ship pre-1995 by reason of the fact that she had a sail as well as four rows of oars on each side.

²³ International Regulations for Preventing Collisions at Sea 1972.

²⁴ [1990] 3 All ER 476.

²⁵ [2001] 2 Ll. Rep. 291, 295.

²⁶ Seagoing ships in international carriage under the Convention itself, and in domestic carriage by The Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987.

The issue of what is a ship has come before the Courts on many occasions, but they have not provided a definitive definition: indeed, they have refused to do so. Further, the Courts' decisions have not always been consistent, nor have they always taken into account all the other decisions that have previously been made. The problem of definition is not so much with the notion of a vessel, which appears to mean simply something that can float, as with the concept of navigation. To be used in navigation a vessel must be on navigable waters, either at sea or on inland navigable waters. There is a division of opinion, however, as to whether navigation can mean simply moving about on water or involves the concept of going purposefully from A to B.

The following **have** been held to be ships:-

- (a) Jack up rigs²⁷ with no rudder or mode of power that are towed or carried into position - see *Clark -v- Perks*.²⁸
- (b) A dredging hopper barge with a double bottom and no means of propulsion - see *The Mac*²⁹ and *The Mudlark*.³⁰
- (c) A "flotel"; a floating platform carrying accommodation for hundreds of workers offshore with offices, workshops and storage areas, equipped with cranes, helicopter landing pad and power source - see *Addison -v- Denholm Ship Management (UK) Limited*.³¹
- (d) A backhoe dredger; a floating platform comprising ten individual pontoons bolted together and held in position when in use by three hydraulic legs but with no bow, no stern, no anchors, no rudder or any means of steering or self-propulsion, and no keel or skeg - see *The Von Rocks*.³²
- (e) A motor boat used for carrying more than 12 passengers from Exeter along the River Exe for half a mile and for a further mile along a canal to the first lock before returning to Exeter - see *Weeks -v- Ross*.³³

The following have been held **not** to be ships:-

- (a) A gas float moored in tidal waters as a lightship - see *Wells -v- The Owners of the Gas Float "Whitton No. 2"*.³⁴
- (b) A pontoon crane; a pontoon on which a crane was permanently fixed and was capable of being moved but only for short distances in favourable weather - see *Merchants Marine Insurance Co. Ltd. -v- North of England P & I Association*.³⁵ It is of note that this was not regarded as a clear-cut case by any means

²⁸ [2001] 2 Lloyd's Rep. 431

²⁹ [1882] 7 PD 126

³⁰ [1911] PD 116

³¹ [1977] ICR 770

³² [1998] 2 Lloyd's Rep. 198

³³ [1913] 2 KB 229

³⁴ [1897] AC 337

³⁵ [1926] 25 Lloyd's Law Rep. 446 and [1926] 26 Lloyd's Law Rep. 201

- (c) A flying boat that only travelled on the surface of the water when taking off or landing - see *Polpen Shipping Co. Ltd. -v- Commercial Union Assurance* ³⁶

The above cases, involving essentially commercial vessels, indicate that "navigation" does not necessarily connote anything more than movement across water and the function of conveying persons or cargo from place to place is not an essential characteristic. As against that, however, the following have also been held not to be ships:

- (a) A jet-ski, described by the manufacturers as a "personal water craft" and whose purpose was to "mess about" rather than undertake journeys - see *Steedman -v- Scofield*,³⁷ a decision that was followed in *R v Goodwin*,³⁸ under s. 58 Merchant Shipping Act 1995.
- (b) A dinghy on a reservoir being used for pleasure purposes rather than going from one fixed point to another - see *Curtis -v- Wild*,³⁹ and,
- (c) A three-ton electric launch carrying 30-40 passengers on a half mile long artificial lake built on Southport foreshore - see *Southport Corporation -v- Morris*.⁴⁰

Thus, there appears to be little consistency in what amounts to navigation. It appears that, if you have a proper commercial purpose whilst floating around going nowhere in particular, you may be a ship, but if you are simply messing about for fun, then you may not be.

2.2 Who are Crew?

The ways in which people come to be on board ships vary infinitely. Relatively easy to classify are the passengers on board a liner or a ferry under a ticket for carriage, who are not crew, or employees of the ship-owner who are on board to work the ship, having signed the ship's articles, who are. There are many categories of people, however, who are more difficult to classify, such as the hairdresser or croupier on board a cruise ship, the Sea Scouts crewing a training yacht, the paying crew of a sea school yacht, the participants in a rally or race who have paid the owner for their berth on a yacht, and their companions who have not paid but who are crewing as a favour or are crewing because they are being provided with expenses, food and clothing and/or because they want to get to their destination.

In *Todd v Adams; The Margaretha Maria*,⁴¹ the Court had to consider whether share fishermen were employees on a contract of service or whether they were on board as self employed contractors. Mr. Justice Aikens at first instance concluded that the share fishermen were employees. Applying the control test, he found that ultimate control and direction of the crew lay with the shipowners who provided the bulk of the equipment, the investment and the management of the business of fishing. His judgment was overturned in the Court of Appeal, who placed greater emphasis on the financial arrangements between the crew. They emphasised that the proceeds of any trip were divided and paid out by the auction firm who sold the catch rather than by the shipowners; the apportionment between crew members was decided by one of their number, not by the shipowners and the crewmen were taxed on the basis of being self employed (although that on its own cannot be determinative). As the crewmen were not employees the

³⁶ [1943] 1 KB 161

³⁷ Times Law Report, 15th April, 1992

³⁸ [2005] EWCA Crim 3184

³⁹ [1991] 4 All E.R. 172

⁴⁰ [1893] 1 QB 359

⁴¹ [2001] 2 Lloyd's Rep. 443

shipowner had a right to cap damages⁴². The matter was settled before it could be considered by the House of Lords.

In *The Biche*,⁴³ the Divisional Court held that a group of young people taken on board a yacht to crew the yacht for sail training purposes were not "employed or engaged in any capacity on board the ship on the business of the ship" and accordingly they were passengers under the Merchant Shipping (Safety Conventions) Act 1949.

3 UK HEALTH AND SAFETY STATUTES AND REGULATIONS

3.1 UK Health and Safety

In the UK, health and safety at work are largely governed by a set of regulations having their origin in EU directives, collectively they are referred to as the "Six Pack". There are two common mistakes that are made in relation to workers on ships and the Six Pack regulations. The first is to forget that the Six Pack regulations exclude the crew of ships. The second is to remember that crew are excluded, but forget that there are alternative merchant shipping, and fishing, requirements that can afford similar protection to crew members and masters of ships. The exclusions and alternative provisions are considered in detail below.

Each of the Six Pack Regulations contains exclusions for the Master and crew of ships, though they are not entirely consistent in their wording. The most common exclusions are expressly limited to sea-going ships and to normal ship-board activities of a ship's crew under the direction of the Master. The exclusions reflect special pleading on the part of the maritime industries at the time of the implementation of the original EU directives in the UK through the Six Pack.

A similar exclusion is to be found in the Docks Regulations 1988, which expressly (by regulation 4 (4)) impose no duty on the Master or crew of a ship or their employers in relation to plant which remains on board the ship and any dock operations carried out on the ship solely by the Master or crew of the ship.

The Provision and Use of Work Equipment Regulations 1998 do not impose any obligation in relation to a ship's work equipment (whether that equipment is used on or off the ship),⁴⁴ but where merchant shipping requirements are applicable to a ship's equipment shore employers of personnel other than the Master and crew are only relieved of responsibility if they can show that they have taken all reasonable steps to satisfy themselves that the merchant shipping requirements were being complied with in respect of the equipment in question.⁴⁵

The exclusions do not, however, leave the crew of ships entirely without protection as a separate body of regulation, referred to as "merchant shipping requirements" has implemented the EU directives in a way that has been particular to merchant shipping. This has enabled the merchant shipping and fishing industries to have their own period for adjustment and implementation, and has enabled regulation to reflect the particular needs of life on board ship. Gradually, however, the network of regulation has come to offer a very similar level of protection to crews as would be provided by the Six Pack, albeit expressed in a particular form.

⁴³ [1994] 1 WLR 243

⁴⁴ The Provision and Use of Work Equipment Regulations 1998, Regulation 3 (6)

⁴⁵ The Provision and Use of Work Equipment Regulations 1998, Regulation 3 (7)

The main merchant shipping regulations that apply where the Six Pack provisions are excluded are set out below. The Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006, and The Merchant Shipping and Fishing Vessels (Lifting Operations and Lifting Equipment) Regulations 2006 came into force on 24th November 2006. Working hours at sea are controlled by The Merchant Shipping (Hours of Work) Regulations 2002.

There is a plethora of other merchant shipping regulations that may need to be considered in the case of an accident on a ship, but caution should be exercised before assuming that they give rise to a direct civil remedy rather than simply being evidence of negligence. In *Todd v Adams; The Margaretha Maria*,⁴⁶ for example, the Court of Appeal held that breaches of the Fishing Vessel (Safety Provisions) Rules 1975 (SI 1975/330) made under s.121(1) Merchant Shipping Act 1995 gave rise to criminal liability but did not give rise to civil liability. The court held that the relevant factors were:

- i) the provision of criminal penalties in s.121(5) of the Act;
- ii) the obligation in s.121(1) was not expressed as lying on any specific person;
- iii) s.121(2) gave the Secretary of State a power to exempt vessels from the ambit of any rules;
- iv) the certification provisions in ss.122 to 125 of the Merchant Shipping Act lay uneasily with the notion that a breach of the rules could lead to civil liability; and
- v) the legislature must have envisaged, when enacting s.121(1) of the Act, that the Secretary of State would promulgate rules of a fairly detailed and comprehensive nature, particularly in light of the fact that the Rules had already been in existence for 20 years.

The merchant shipping regulations do not limit or exclude other remedies (unlike Article 14 of the Athens Convention in the case of passengers under a contract of carriage, for example). A ship falls within the definition of premises for the purposes of the Occupiers Liability Act 1957 by virtue of section 1 (3) of that Act, and a ship can also be equipment under the Employers Liability (Defective Equipment) Act 1969 (see *Coltman v Bibby Tankers Ltd (The Derbyshire)*,⁴⁷ a case where the entire ship sank due to a presumed defect with the loss of all on board).

3.2 UK and Non-UK ships

The merchant shipping regulations apply directly to UK ships, that is to say ships registered in the United Kingdom under the Merchant Shipping Act 1995, which is the enabling Act for the merchant shipping regulations. Various of the regulations are additionally applied to non-UK ships while they are in a port in the UK by the Merchant Shipping (Safety at Work Regulations) (Non-UK Ships) Regulations 1988. None of the regulations apply to non-UK ships at sea or abroad.

⁴⁶ [2001] 2 Lloyd's Rep. 443

⁴⁷ [1987] 3 All ER 1068, HL

3.3 Merchant Shipping provisions

The main Merchant Shipping health and safety regulations are:

- *Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997*
- *Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999*
- *Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006*
- *Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998*
- *Merchant Shipping (Means of Access) Regulations 1988*
- *Merchant Shipping and Fishing Vessels (Lifting Operations and Lifting Equipment) Regulations 2006*
- *Merchant Shipping (Safe Movement on Board) Regulations 1988*

3.4 Offshore Installations and Diving

The main Offshore Installations and Diving regulations are:

- *Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995⁴⁸*
- *Offshore Installations and Wells (Design and Construction etc) Regulations 1996⁴⁹*
- *Offshore Installations (Prevention of Fire and Explosion, and Emergency Response) Regulations 1995⁵⁰*
- *Lifting Operations and Lifting Equipment Regulations 1998⁵¹*
- *Offshore Installations (Safety Case) Regulations 2005⁵²*
- *The Diving at Work Regulations 1997.*
- *Merchant Shipping (Diving Safety) Regulations 2002*

⁴⁸ SI 1995/738

⁴⁹ SI 1996/913

⁵⁰ SI 1995/743

⁵¹ SI 1998/2307

⁵² SI 2005/3117

4 ADMIRALTY CLAIMS; THE ADMIRALTY COURT AND THE CPR

Admiralty Claims are governed by CPR Part 61 and its Practice Direction. In the White book they are not to be found in Volume 1 with the main body of the CPR, but in Volume 2 in the Specialist proceedings section, along with relevant sections of the Supreme Court Act 1981, the Hovercraft Act 1968 and the Merchant Shipping Act 1995.

4.1 Exclusive jurisdiction of the Admiralty Court

Part 61.2 of the CPR provides that a claim must be brought in the Admiralty Court if it is a claim for loss of life or personal injury specified in section 20(2)(f) of the Supreme Court Act 1981, namely:

- (f) *any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of –*
- (i) *the owners, charterers or persons in possession or control of a ship; or*
 - (ii) *the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of a ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation of persons on, in or from the ship.*

Thus most personal injury accidents on ships technically fall within the exclusive jurisdiction of the Admiralty Court and should not be commenced in the ordinary way in the County Court, regardless of value. In many cases, however, a County Court will be the appropriate place for a claim to be dealt with. If an objection is taken that a case issued outside the Admiralty Court is technically within the Admiralty Court's exclusive jurisdiction, the County Court's powers of case management will be wide enough to transfer the case to the Admiralty Court. If the Admiralty Court considers that the case belongs in the County Court it will simply transfer it back to a suitable county court again. Accordingly if a case belongs, by reason of value, simplicity or otherwise, in the County Court any objection is pointless if the parties can agree on a suitable County Court.

Under Part 61 actions in rem, limitation actions and collision claims are specifically within the exclusive jurisdiction of the Admiralty Court.

4.1.1 Actions "in rem" & Arrest

Most personal injury actions are brought against parties, either individuals or corporate bodies. Such actions are referred to as actions in personam. In the case of accidents involving ships an

action can be commenced against the ship itself. Such actions are referred to as actions in rem, a phrase that has survived the Woolf reforms and still persists in CPR Part 61.

An action in rem is an action against “the thing” rather than against an individual. Accordingly service can take place on the vessel if it is within the jurisdiction. An action in rem also permits the arrest of the vessel, or of one of its sister ships, if they are within the jurisdiction. If a vessel is arrested maliciously, however, then damages may be payable, and if a vessel is arrested unreasonably then the costs of the arrest may be denied even if the arresting party is successful in the underlying claim.

Shipowners will often forestall a threatened arrest by providing security for the claim. This can be by payment of monies into court, but is usually by the provision of a letter of undertaking by a bank or P&I Club to pay any judgment for damages, interest and costs up to a specified amount. The amount must be enough to meet any sum that might realistically be recovered. A shipowner can protect their ships from arrest by entering a caution against arrest⁵³ in the Register maintained by the Registrar of the Admiralty Court.

4.1.2 Limitation Actions

Where a shipowner is entitled to limit his liability to a maximum sum and there may be a number of claims against the limitation fund (see page 52 above) then he may pay that fund into court and commence an action for a declaration of his entitlement to limit his damages and for an assessment of the claims against the fund. This form of action is referred to as a Limitation Claim, to which special rules apply under CPR Part 61.11.

4.1.3 Collision Actions

The Admiralty Court has an unusual procedure for collision claims⁵⁴ that requires parties to plead “blind”. Following service of a claim form each party files a collision statement of case, which is in the form of a questionnaire about the circumstances of the collision. These documents used to be referred to as Preliminary Acts, but the name was changed as part of the CPR reforms. The object of this procedure is to obtain from the parties binding statements of the facts when they are still fresh in the minds of those involved.⁵⁵

Section 188 of the Merchant Shipping Act 1995 specifically provides that where loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and of any other ship or ships, the liability of the owners of the ships shall be joint and several. The innocent victim of a collision therefore, does not need to get involved in the division of responsibility between two ships who are to blame and can leave that matter to be resolved between the shipowners under their right to contribution under section 189 Merchant Shipping Act 1995.

4.2 Admiralty Court Case Management

⁵³ CPR Part 61.7

⁵⁴ CPR Part 61.4

⁵⁵ *The Frankland*, (1872) L.R. 3 A.&E. 511, per Sir Robert Phillimore.

Issues of liability are generally dealt with in the Admiralty Court by the judges of the Admiralty Court. They will also deal with case management directions and interim applications. The Admiralty court lists trials during term time from Monday to Thursday and normally has Friday as an applications day. This pattern of listing is important to note for diaries when listing trials. A five day case will not normally be finished in one week, unless the listing so provides, as it might if a Deputy Judge of the Admiralty Court is appointed to hear the case. It is important, therefore, to establish what the listing for trial is and to inform parties and experts accordingly. Matters of quantum are generally referred to the Registrar of the Admiralty Court, the name given to the Master of the Queen's Bench Division who deals with Admiralty matters, the last Admiralty Registrar was Master Miller who has now retired and the post remains unfilled with all the Masters taking turns to undertake the work. A new appointment is expected in 2009.

Case management and trial preparation in the Admiralty Court follow the guidance set out in the Admiralty and Commercial Courts Guide, which can be found in Volume 2 of the White Book. It is expected that the provisions of the Guide will be followed. As Admiralty actions do not need to be allocated to a track there is no allocation questionnaire, but there is a Case Management Information sheet, which can be found at Appendix 6 of the Guide. Parties are expected to fill in the sheet as fully as possible and on time. The same applies to the Progress Monitoring Information Sheet and the Pre-trial Checklist. Appendix 8 of the Guide sets out a standard pre-trial timetable which should be followed unless there is good reason to depart from its terms. Particular attention should be paid by those preparing for hearings in the Admiralty Court to the provisions in Appendices 9 and 10 of the Guide concerning skeleton arguments and preparation of bundles.

4.3 Jurisdiction in England and Wales

Jurisdiction in the Courts of England and Wales is founded on the ability to serve. Someone within the jurisdiction may be served personally or by one of the methods approved in CPR Part 6. If a defendant is not within the jurisdiction they may still be served; either if they can be served outside the jurisdiction without permission under CPR Part 6.19, or if permission is granted in an ex parte application under CPR Part 6.20. Permission may be granted on a number of grounds, including in particular:

- Where an action is being brought by someone within the jurisdiction and another party outside the jurisdiction is a necessary or proper party to the action,⁵⁶ either as a Defendant or a Third Party,
- Where a claim in contract, for example for breach of an express or implied term to provide a safe place and system of work, is based on a contract made or broken within the jurisdiction, or is governed by English law,⁵⁷ and
- Where there is claim in tort for damage sustained within the jurisdiction or resulting from an act committed within the jurisdiction⁵⁸. Damage sustained

⁵⁶ Part 20 (3)

⁵⁷ CPR Part 20 (5)

⁵⁸ CPR Part 20 (8)

within the jurisdiction would include the loss sustained by a widow of a seaman killed abroad.⁵⁹

Even where an accident happens abroad the UK courts may nevertheless apply English law. In *Hornsby v Rumic* [2008] EWHC 1944 (QB) it was held that where the claimant in a personal injury action who was resident in Wales had sustained injury whilst performing his duties under a temporary assignment within the coastal waters of the United Arab Emirates, the Private International Law (Miscellaneous Provisions) Act 1995 s.12 applied so as to displace the law of that country as the applicable law to his claim as it was substantially more appropriate in the circumstances for the law of England and Wales to apply.

If a party wishes to dispute the jurisdiction of the court to hear a claim then it must do so immediately after service under CPR Part 11.⁶⁰ The court may decline jurisdiction either because service should not have been effected, or because a contractual term providing for another jurisdiction to hear the dispute should be respected, or because some other jurisdiction is the more convenient forum for the dispute and the UK is a “*forum non conveniens*”.

Bibliography

- Work Accidents at Sea, Grahame Aldous QC and Linda Nelson, 9 Gough Square Publishing.
- Collisions at Sea, Marsden
- Merchant Shipping Legislation, Fogerty
- Admiralty Jurisdiction and Practice, Meeson
- Limitation of Liability for Maritime Claims, Griggs, Williams and Farr.
- Arrest of Ships, Berlingieri

⁵⁹ *Booth v Phillips and others*, Admiralty Court [2004] 1 WLR 3292, [2004] 2 Ll Rep 457, and *Cooley v Ramsey* [2008] EWHC 129.

⁶⁰ An application must be made within 14 days of acknowledgment of service and be supported by evidence, CPR Part 11 (4).