

Paper by N.Z. Delegation. - An outline of recent
legislative changes in Admiralty/Maritime law in
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It was an extremely difficult task knowing how to
deal with the topic of Admiralty Law in the context
in which it is to be discussed this afternoon.

We have already had a paper on the criminal aspects
of that branch of the law and, as a consequence,

I took the liberty of assuming that any discussion
here would relate more to the procedural than to the
substantive aspects of Admiralty Law. This, therefore,
will be my approach this afternoon.

Let me say at the outset, with great respect, although
I nevertheless appreciate it may well sound offensive,
that maritime law in Australia, to the outsider,
appears to be at best a wilderness of woe where the
Merchant Shipping Act of 1894 reigns supreme, and

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you are presumably hamstrung by the Colonial Courts of Admiralty Act of the Imperial Parliament of 1890. As far as the States are concerned, I take it that the Colonial Laws Validity Act of 1865 still limits their individual legislative capacity. For many years New Zealand has adopted a strongly independent approach to this type of situation and has enacted its own legislation as far as this was possible. In this respect, the Statute of Westminster was the great liberator in more ways than one.

I am well aware, of course, of the problems which face a Commonwealth such as Australia where there are conflicting views being expressed by the different States and the Commonwealth Government itself.

This must be particularly frustrating to people such as yourselves because the interests involved are far from parochial and political. They affect substantive law and commercial affairs. Some years ago my friend Michael Astley from Adelaide commended to my untutored attention a textbook by Wynes on "Legislative, Executive and Judicial Powers in Australia". I wouldn't go so far as to say it has been my bedside reading since then but I have found it a mine of information over the years on Australian constitutional problems. I can therefore speak with a certain amount of sympathy on the present topic.

Those of us in New Zealand who are directly concerned with maritime matters were very pleased indeed when the Minister of Justice announced the setting up of a Law Reform Committee on Admiralty Jurisdiction.

The terms of reference were as follows :

"To examine and report on all aspects of the jurisdiction of the New Zealand Courts in Admiralty matters, including the desirability of -

(a) replacing United Kingdom legislation relating to the Admiralty at present in force in New Zealand by an Act of the New Zealand Parliament; and

(b) redefining the extent of Admiralty jurisdiction, and defining the vessels or craft which may appropriately or conveniently be made subject to it. "

There were 7 members appointed to the Committee which was fortunate in the extreme in having Mr Justice Beattie as its Chairman. The Judge had experience in the Navy during the war and has always had a particular interest in shipping matters. He is probably best known for his support for the Himalaya clause in the famous - or infamous case, depending which side of the fence you are on, - the "Eurymedon".

With one notable exception the Committee was well-balanced. There was a lawyer who is well known as an authority on consitutional law, a consulting engineer who is prominent in boating circles, one of the Counsel from the Crown Law Office who has the most incredible historical knowledge of the law,

another lawyer who acts for the Harbours Association in New Zealand, the Registrar of the Supreme Court in Wellington who was able to guide the Committee on questions of procedure, and finally, the notable exception I mentioned before, myself, a sea lawyer and general odd-job P & I man.

We were a good mixture of the practical and the theoretical and worked extremely well as a group.

The first comment I would therefore make is that if it is the intention to revise Admiralty Law in Australia, it should be done by a carefully chosen Committee and not by one person on his own. I must make it clear that I have read the report which was prepared by Zelling Q.C. (as he then was) and also the Bill for an Act which he drafted. How he managed it on his own I do not know because I am acutely aware of the volume of work which was involved in our own investigations in New Zealand and which, in fact, took us something in excess of two years to complete.

The first point our Committee had to settle was the form which the legislation should take. In other words, should we conform to the International Conventions or should we strike out on our own independent line?

After threshing the alternatives out very carefully we came to the conclusion that there would have to be cogent reasons before New Zealand could adopt any jurisdiction which was counter to the terms of the Admiralty jurisdiction vested in the High Court of England, in other Commonwealth Courts and in the United States. New Zealand has not signed, ratified or adhered to the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision or the International Convention Relating to the Arrest of Sea-going Ships, both signed at Brussels on the 10th May 1952, but it was felt quite strongly that we should not fly in the face of these Conventions.

For this basic reason our Admiralty Act follows quite closely the United Kingdom's Administration of Justice Act of 1956 which, because the U.K. ratified these Conventions, itself brings U.K. law into conformity with them.

Having decided that we must keep in step with the main body, so to speak, we were then faced with the problem of how the Admiralty jurisdiction should be exercised within our court system. We decided that there could be no question whatsoever of setting up a separate Admiralty Court and that jurisdiction had to be exercised through the existing court structure. There were 3 reasons for this -

- 1) the volume of Admiralty work is so small relatively that a separate court could not be justified :
- 2) by grafting Admiralty work onto the existing jurisdiction of the Supreme Court and the Magistrate's Court, practitioners would be encouraged to view what had formerly been a nightmare topic with less horror than in the past : and
- 3) and very important - we could relate the Admiralty Rules to our existing Rules of Court as closely as possible and thereby rationalise and simplify procedure.

Admittedly, it would have been very pleasant indeed to have had an Admiralty Court, and even to have had an expensive silver oar, but the volume of Admiralty work is so trifling that it was right out of the question to have a separate and perhaps elaborate establishment set up simply to deal with a handful of claims.

We therefore conferred specific jurisdiction and Section 3 of the Act provides that :

- 1) the Admiralty jurisdiction conferred by this Act -
 - (a) may be exercised by the Supreme Court in rem and in personam; and
 - (b) may be exercised by a Magistrate's Court in personam where the debt,

demand or damage or the value of
the chattels claimed is ... (within
the jurisdiction of that Court) and it
is hereby declared that a Magistrate's
Court shall not, for the purposes
of this Act, have jurisdiction in rem.

Pausing here for a moment I would just make the comment
that it was decided that the action in rem should,
because of its general complexity as far as the day to
day court system is concerned, be confined to the
Supreme Court. All the other stuff the Magistrate's
Court could look after more than competently up to
the limit of its monetary jurisdiction.

We therefore took an entirely different line to that adopted by Mr Justice Zelling in his Bill because he established a Federal Court to be called the Court of Admiralty, which was to be a court of record, of superior jurisdiction, have the same powers of summoning witnesses, obtaining evidence and punishing contempts as are from time to time possessed by the High Court of Australia, and consist of one or more Judges appointed by Commission. I have quoted there from clauses 3 and 4 of the Bill.

It is perhaps appropriate now to advert briefly to the rather unusual situation which prevailed in New Zealand prior to the enactment of the Admiralty Act.

Like Australia, we were bound by the antiquated provisions of the imperial enactment, the Colonial Courts of Admiralty Act of 1890, which vested in the superior court of the Crown Colonies and the Self-governing Colonies, the jurisdiction and powers which were exercised in Admiralty by the High Court in England at the commencement of the Act. We all therefore picked up willy nilly the jurisdiction which had been exercised in England by the High Court of Admiralty until 1875, at which stage it came to be administered by the Probate, Divorce and Admiralty Division of the High Court of Justice. The other odd aspect of the situation was that in New Zealand the Rules which were applicable came into force in 1884 under the Vice Admiralty Courts Act of 1863. That Act was repealed by the Colonial Courts of Admiralty Act of 1890 but the Rules were expressly kept in force until new ones

should be made in the various possessions and territories affected. In 1969, therefore, when the Admiralty Committee was constituted, the old 1884 rules were still in force and, as you can well imagine, they were almost impossible to lay hands on. On the P & I side we did remarkably well because we had what I think were the only 2 copies outside the Supreme Court Registry in Wellington. Anybody else who wanted to find the Rules had to delve into the archives of the New Zealand Gazette of 1884 and this made life difficult for our friends who sought to fight us from the other side of the fence.

To sum up the situation it is accurate to say that there was complete confusion in New Zealand on the question of Admiralty Law and this was reflected in the number of cases involving such matters as collisions between pleasure craft, particularly in Auckland Harbour, which were dragged into the Magistrate's Court much to the embarrassment of our hard working Stipendiary Magistrates who detested having this type of problem cast before them. One could be excused for thinking that as soon as two pleasure craft collided, the solicitors acting for the parties concerned at once leapt with glad cries into what they thought was Admiralty Law. They always seemed to forget that a famous Scottish pauper once propounded the proposition, admittedly through the House of Lords in London, that the categories of negligence are never closed and that even on a harbour the law of tort still runs around in its usual riotous manner.

I am aware that there is some form of mixed metaphor there but I know you will excuse this because it immediately conjures up in one's mind the vision of Lord Denning walking, if not sprinting, upon the surface of the water.

As I mentioned earlier, I do not think it appropriate to deal with the substantive law of Admiralty which is enacted in our Admiralty Act, but would just make a few comments in passing upon one or two aspects which we considered to be of importance in our own domestic context.

To start with, one has to be extremely careful when drafting an enactment such as that to bear in mind the effect it has upon other legislation and a wary eye must at all times be kept upon the wider effects of any provision which may be contemplated. To the list of questions or claims which are set out in the Administration of Justice Act of the U.K. we added one in respect of work done in connection with the loading or discharging of cargo or fuel on or from a ship. We did not think it unreasonable to put this in because there have been occasions in the past when fly-by-nighters have tried to shoot through without meeting their bills.

The Arrest Convention does not authorise the arrest of ships in respect of this type of claim but we felt justified in taking this liberty ourselves. There was a

parallel provision in our Shipping & Seamen Act so we had to make sure that an appropriate repeal took place.

Another minor point is that we felt it wise to define a maritime lien for the assistance of persons reading the Act, so we note in Section 2 that a maritime lien, "without derogating from the generality of the term, includes a lien in respect of bottomry, respondentia, salvage of property, seamen's wages, and damage."

It is not exclusive and it is not a work of art but at least it is a pier head from which the new chum can attempt to jump.

One of the more interesting traps, which we were fortunate to discover at the last moment, arose from the fact that New Zealand has not ratified the Collision or Arrest Conventions. The Administration of Justice Act states that an action in rem may, in the appropriate circumstances, be invoked against the offending ship if, at the time when the action is brought, it is "beneficially owned" as respects all the shares therein by the person who would be liable on the claim in an action in personam as Owner or Charterer of, or in possession or in control of the ship. In the St Merriel, a 1963 decision, it was held that the words "beneficially owned" did not include a charterer by demise. In 1971, in the Andrea Ursula the Admiralty Court held that the words must include a charterer by demise. The reason for the fact that the Court was able to take a different view in the later case was because there were two decisions

of the English Court of Appeal in the interim (Salomon v. Commissioners of Customs & Excise, and Post Office v. Estuary Radio) in which it was held that if the meaning of an Act of Parliament which is intended to give effect to an International Convention is not clear, and if the United Kingdom has ratified that Convention, the Court can look at the terms of the Convention, to assist it in construing the statute. In addition, the Court of Appeal further held that the statute should be construed in such a way as to give effect to the presumption that Parliament intended to fulfil, rather than to break, its international obligations. Evidence was put before the Court in the Andrea Ursula case, therefore, that Article 3 of the Brussels Arrest Convention specifically covered a Charter by Demise and provided that the

charterer of such a ship could be treated on the same footing as a beneficial owner. Since New Zealand is not a signatory to that Convention it follows that its terms would have been irrelevant if those words had come before the Supreme Court for interpretation. The earlier decision in the St Merriel would therefore have been followed. This was a gap the Committee felt it was important to fill and so we added the words, "or is on charter by demise" to the Section.

I mention these matters simply to show the difficulties which can so easily be encountered and to show that unless you have people on your Committee who know the difference between a bareboat and a time charter you can possibly land in all sorts of nasty strife.

A number of alterations had to be made to the provisions of the Administration of Justice Act but they do not affect the substantive law.

I must now say something briefly about the Admiralty Rules which we drafted in our Committee but which, thank God, were eventually taken over by the Rules Committee of the Supreme Court and were given a thorough going over by the real experts, judges and practitioners, who sit upon that Committee. In the result, it is safe and accurate to say that we now have a code of procedure for Admiralty which will be readily comprehensible to the staff of the Court Registries, legal practitioners and, with respect, to the judges themselves. The Rules prescribe the procedure and the forms to be used in all Admiralty matters from actions in personam and in rem, through trial, arrest, caveats,

appraisement and sale of property, collisions, preliminary acts - you name it, we have it.

Just to be on the safe side, however, and ex abundante, we have what in the P & I field we would describe as an "Omnibus Rule". This is a provision, contained in three of the Rules, that in cases not provided for the ordinary Rules of Court and the provisions of the Supreme Court Code shall apply. This is an excellent arrangement indeed and underlines the desire to link our Admiralty procedure with that of the Supreme Court.

One of the interesting and small additions which were made as we went through the Rules was to the Preliminary Act which, as most of you know, must be filed in a collision action and which sets out the circumstances which prevailed

at the time of the incident. The consulting engineer who was a member of our Committee was very irate, as a "boatie", at the number of times he passed ships at sea which did not appear to have anybody on watch. His wrath reached its highest point when he steamed into the Committee Meeting one day brandishing a cutting from a U.K. newspaper which reported that the fear of God was put into a young officer on the bridge of a ship going down the English Channel when he sighted a tanker coming towards him on a collision course, but could see nobody on the bridge keeping watch. He made the appropriate sound signals and was astonished to see a large black dog appear on the bridge and start opening its mouth in a manner which indicated it was barking. Thereupon somebody ambled out gently and the tanker altered course. We now have in Rule 24.1.b. a provision requiring

that the preliminary Act must give "particulars (referring to the period immediately before the collision) of the person in command, the persons on the bridge, and the persons keeping a lookout on the plaintiff's ship".

Notwithstanding the intention behind that provision of ours, however, I am sure that the ingenuity of the seafarer will be up to giving appropriate answers in the Preliminary Act. We also provide for the appointment of an expert to advise the Court and, if the parties cannot agree upon one the Court itself may make an appropriate appointment. The expert is given instructions and then sends his report to the Court which may, if necessary, request a further supplemental report. Any part of the expert's report which is not accepted by all the parties shall be treated as information furnished to the Court and be given such weight as the Court thinks fit. Provision is made for an application

to be made for leave to cross examine the expert on his report and this may be done on such terms as are considered appropriate. In addition, it is competent to any party, having given reasonable notice before the trial, to call one expert witness to give evidence on the question reported on by the Court Expert but nobody can call more than one such witness without the leave of the Court and, even then, only in exceptional circumstances. In the Appendix to our Report we came to the conclusion that in New Zealand conditions the appointment of assessors was no longer justified and we therefore followed a procedure which is in force in the High Court in England, in the High Court of Australia and in the Supreme Court of Alberta.

We think we now have a compact and workable code of Admiralty procedure.

Our Report was detailed and complete, and traversed such matters as Extra Territorial Jurisdiction, the Maritime lien, Assessors, which I have just mentioned, and the Historical Development of Admiralty Jurisdiction with special reference to New Zealand. It was a long but fascinating enquiry and I for one am more than proud to have been associated with the deliberations which took place.

I can commend to you the type of Committee which our Minister of Justice set up in New Zealand and would recommend that the sooner there is a similar enquiry in Australia the better it will be for Maritime and Admiralty Law.