

II. THE PLAINTIFFS' PERSPECTIVE

It is very clear from the extended list of maritime claims in Section 4 and their broad expression, and from the procedural changes such as surrogate ship arrest that the scope for plaintiffs' lawyers to bring actions in Admiralty has been greatly increased. I have selected below some of the changes which I feel may be of particular interest to plaintiffs' lawyers.

1. Cargo Claims - Section 4(3)(d)(e) and (f)

As a preliminary matter it is important to note that Section 4(3)(a) "Damage Done by a Ship" does not extend to cover damage to cargo aboard that ship e.g. in a collision case in which one vessel is wholly to blame the owners of cargo onboard that ship could not arrest the ship for damage to their cargo under this head, although they could do so under other heads as considered below.

Section 4(3)(e) of the new Bill will bring into the list of general claims "a claim for loss of, or damage to, goods carried by ship". This follows the language of the UK Supreme Court Act 1981 Section 20(2)(g), and accordingly the various English practice texts such as Meeson "The Practice and Procedure of the Admiralty Court" Lloyds Press 1986, will be of assistance to plaintiffs' lawyers.

The new head broadens the previously existing head under Section 6 of the Admiralty Courts Act 1861 in a number of ways:-

- (a) The new head does not retain the qualification requiring the goods to be "carried into a port in Australia", with the result that suit can now be brought in respect of

inward and outward shipments, shipments neither to nor from Australia (subject to a defendants' ability to seek a stay on the ground of forum non conveniens, bearing in mind that such a stay is an exercise of jurisdiction not a denial that jurisdiction exists - See ALRC Para 88)), and also in respect of non-delivery (e.g. where a container is lost overboard and thus not carried into any port).

- (b) The previous exclusion under the 1861 Act of cargo claims in Admiralty where the ship was owned or part-owned by an Australian, is also not retained.
- (c) The new section widens the cover to "goods" rather than "cargo". Under Section 3(3) "goods" includes such items as baggage, crew belongings and stock in trade of concessionaires on passenger ships (ALRC Report Para 167).
- (d) The new head does not require that goods be carried pursuant to a bill of lading, and carriage under other types of agreement e.g. charterparties, short sea transit consignment notes, hire tickets, or under verbal agreement will be covered.

The new Section 4(3)(f) covers "a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise". It follows the wording of the English Section 20(2)(h). It extends the jurisdiction beyond claims connected with the care of cargo and would

include for example claims for freight and demurrage and failure to perform a full number of voyages. The head also includes carriage "of persons" so that passenger ticket disputes would be covered. The ALRC Report (Para 168) refers to various UK decisions as indicating that the claim may be in tort arising out of the agreement as well as in contract e.g. wrongful detention of goods by the ship operator.

Section 4(3)(d) will also affect cargo claims resulting from the acts or omissions of ship owners or operators in the "navigation or management" of a ship. The wording is similar to the English Section 20(2)(f). The ALRC Report (Paras 181 to 184) indicates that this head is intended to extend jurisdiction over maritime torts not involving physical injury and where the loss is purely economic e.g. where one ship negligently blocks another's exit from anchorage.

In proceedings in rem in respect of owners and demise charterer's liabilities under Sections 17 and 18, a Plaintiff's Solicitor will need to check that the relevant person comes within the requirements of those sections both at the time the cause of action arose and at the time the proceedings are commenced, presumably by telex enquiry to the relevant Ships Register.

Notwithstanding the extended jurisdiction under the new bill, there will still be many cargo claims where Admiralty proceedings in rem alone will not be sufficient e.g. where in addition to the ship's owner and/or demise charterer, the cargo claimant also wishes to add as defendants a freight forwarder who has issued a combined

transport house bill as principal and/or a terminal operator. In those circumstances it will remain necessary to sue in personam or in the appropriate Common Law or Commercial Division against all parties, and in addition to issue a Writ in Rem against the ship to encourage the owner or demise charterer to enter an Appearance to the non rem proceedings and to provide a security bond.

2. Personal Injury Claims - Section 4(3)(a)(c) and (d)

The extension of jurisdiction in this area is substantial and brings in injuries resulting from the ship as both an active and a passive object, and widens the ambit beyond the previous requirement for the injured person to have had a physical connection with the wrongdoing ship.

Section 4(3)(a) adopts unchanged the present wording of Section 7 of the Admiralty Court Act 1861 (UK), which brought personal injury within "Damage Done by a Ship" but only where the ship was the active instrument of the injury, e.g. where the ship ran down a fishing dinghy and injured its occupant. Section 4(3)(c) will extend the head to personal injury resulting from the ship as a passive premises or structure ("arising from a defect in a ship or in the apparel or equipment of a ship") e.g. a plaintiff's claim that he fell from a defective gangway.

Section 4(3)(d) whereby an action in rem can be based on the acts or omissions of owners, charterers or operators in navigating or managing a ship, is broadly expressed to include within admiralty all personal injury claims linked to the operation of a ship (ALRC Para 166) so that the injury can be suffered on the

wrongdoing ship or some other ship, or even by a person having no physical connection with the ship e.g. a claim for nervous shock by a family member of a person killed onboard a ship. It is similar to the UK S.20(2)(f).

A proposed related amendment to the Navigation Act (Section 59A) will abolish the former defence of common employment in respect of crew personal injury claims.

3. Claims for Goods, Materials or Services Supplied to a Ship  
- Section 4(3)(m)

This new head will extend the present "necessaries" head of jurisdiction. Those things presently regarded as "necessaries" will remain within the new head and in addition maintenance (including non-essential maintenance) and services are added (although many services such as towage, repairs, agent's disbursements, pilotage and salvage will be subject of other specific heads of jurisdiction under Section 4). Stevedoring and lighterage services, which were not previously covered, will now be within the head. The former restriction preventing "necessaries" claims where the goods were supplied in the ship's home port or its owner was a local resident, is not continued.

In practice, the "necessaries" head gave rise from time to time to agency work e.g. where an overseas ship received necessaries in Adelaide and left port for Sydney, without paying for the necessaries, instructions might be given to Sydney solicitors to arrest the vessel to obtain security for payment for the necessaries. In those circumstances, because the cause of action

did not arise in New South Wales, it was not possible to initiate proceedings in the Admiralty Division of the New South Wales Supreme Court and it was necessary to file the Writ in Rem in the original jurisdiction of the High Court. That will now change as the result of the jurisdictional and procedural changes under Parts 2 and 3 of the new Act - the High Court will no longer have any original jurisdiction in admiralty and proceedings in this type of claim could either be issued in the Federal Court in Adelaide or Sydney (or at any other Federal Court Registry in Australia for that matter) and then served on the ship in Sydney (or at any other place in Australia): Section 22(1), or alternatively a New South Wales Supreme Court Writ in Rem could be filed provided the plaintiff's solicitor was confident that the ship would in fact call into a port in New South Wales during the currency of the Writ: Section 22(2).

4. Marine Insurance - Section 4(3)(s)

This new head will enable in rem proceedings against a ship in respect of a claim for insurance premium in relation to a ship, but will not extend to in rem proceedings against cargo for unpaid cargo insurance. It expressly covers P & I premiums. The other side of marine insurance disputes, i.e. an action by an insured against an insurer for refusal to indemnify, does not need in rem jurisdiction.

5. Surrogate Ship Arrest - Section 19

As indicated earlier, a surrogate vessel may be arrested where the relevant person was its owner at the time the Writ was

issued and had a nexus with the wrongdoing ship as its owner, charterer or person in possession or control, at the time the cause of action arose.

This is one of the most interesting of the extended procedural rights in admiralty under the new Bill, and is expected to be a benefit to plaintiffs in respect of domestic Australian claims and also to benefit plaintiffs' lawyers in respect of new work from overseas sources.

I expect that most instructions from overseas sources will be in respect of the enforcement of foreign arbitral awards or foreign in personam judgments (surrogate ship arrest is not available on a foreign judgment in rem against another ship - that being a proprietary maritime claim - Section 4(2)(c)), or to compel the provision of security whilst the claimant continues overseas proceedings, rather than to lead to a hearing on the merits in Australia.

There are a number of procedural provisions in the new Rules, bearing upon surrogate ship arrest -

1. Rule 16 requires that a Writ must name both the wrongdoing ship and the surrogate ship as defendants, and permits the naming of more than one ship as a surrogate ship. I expect that Australian plaintiffs' lawyers will follow the English practice of listing all arrestable ships with respect to the cause of action in question and then to amend before or immediately after service to strike out all but the ship finally selected for service.

2. Rule 17 enables amendment of a Writ by substituting one ship for another, with the proviso that, unless the Court otherwise orders, the proceedings shall be treated as having been commenced against the substituted ship at the time when the order for substitution is made. That being the case, plaintiffs' lawyers will need to ensure that any such substitution is within the time bar applicable to the cause of action.
3. Plaintiffs' lawyers who receive telex instructions from overseas parties to arrest a ship may need to bear in mind the provision for damages where an arrest is held to have been "unreasonable and without good cause", and will need to stress that provision to the instructing party. Subject to the relationship with the instructing party and the nature of the instructions given, a plaintiff's lawyer may need to obtain independent confirmation of present ownership of the surrogate ship and nexus with the wrongdoing ship at the time the cause of action arose, perhaps to require the faxing of copies of sufficient relevant documentation to establish "good cause" and to search the Federal Court Registry to establish whether a Caveat against Arrest has been filed under Rule 6. Requirements will vary with each case, but my basic point is that it will be a very brave plaintiff's lawyer indeed, who rushes off to arrest a vessel on the basis of a short telex from some previously unheard-of overseas instructing party.

6. Transfer and Remittal of Proceedings - Part IV

I anticipate that the provisions for transfer and remittal of admiralty cases will be used in practice, at least in my own State, New South Wales, where the Admiralty Judge has expressed concern that some cases involving relatively small amounts, while properly commenced in the present admiralty jurisdiction, take up disproportionate time of a Senior Judge who could otherwise be hearing larger cases, and I anticipate that many of the smaller admiralty cases in New South Wales will be remitted to lower courts under Section 28 and also that questions of damages and accounts will be referred to a Registrar under Part 9 of the Rules.

7. Validity of Initiating Process - Rule 20

Plaintiffs' lawyers are regularly asked to issue Writs in Rem, particularly in cargo claims, to prevent the operation of time bars, while the parties negotiate possible settlement.

In New South Wales Writs are presently current for six months and can be renewed for further periods of six months each on having the Writ resealed by the Court counter staff - without having to show any prior attempt at service as I understand is the requirement in some other States. The new Rule 20 will provide that "initiating process in a proceeding commenced as an action in rem is effective for service for a period of twelve months

after it is issued and may not be served after that time without the leave of the Court". This appears to mean that renewal as such is not possible and that time for service will not be extended by the Court without evidence of some sufficient prior attempt at service or some other explanation as to why service was not effected within the twelve month period.

8. Third Party Cargo on Arrested Vessels

A problem which has arisen in recent years as the result of the financial failure of a number of shipping companies, is the position of cargo owned by otherwise uninvolved third parties, which remains in a ship when it is arrested. The new Rule 47(2)(b) will empower the Admiralty Marshall to remove cargo from an arrested vessel and store it. Application could then be made to the Court under Rule 48 for Directions as to who should pay the costs of removal, storage and release of the cargo.

9. Damages for Unjustified Arrest

The present position in this area is that Admiralty Courts will not award damages for what is ultimately held to be an ill-founded arrest of a ship, unless there is proof of bad faith or gross negligence (ALRC Report Para 301). The new provision in Section 34 renders a party liable in damages where he has acted "unreasonably and without good cause". That provision would not permit damages where the arrest appeared reasonable at the time but later turned out to be unjustified. Plaintiffs' lawyers will

nonetheless bear the section in mind when considering the arrest of a vessel and as mentioned earlier will need to search the Federal Court Registry to establish whether a Caveat against Arrest has been filed under Rule 6.

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