Act 1973 needs to be considered as well. With the passing of the 1973 Admiralty Act the relationship between the traditional maritime lien and the newly created statutory liens or statutory rights in rem needs to be kept in mind. It is also important to take account of the relationship of these claims to the Common Law possessory lien, and the position of the ship mortgage.

Under English law, as opposed to United States law, a more flexible approach has been taken so that there is more inter-action between the classes of claims to take account of the differing equitable considerations which apply in each individual case.

With the operation of the Common Law and the wide powers vested in the court under the Admiralty Act 1973 the New Zealand courts have a wide discretion when it comes to the determination of priority of claims. Nevertheless, the New Zealand courts would be bound to follow generally those orders of priority specified earlier.

The area of a conflict of laws must always be kept in mind in dealing with the claims from more than one jurisdiction. It is unlikely however that any problems will be caused in New Zealand courts as they are bound by the Privy Council's majority decision in *The Halcyon Isle* case.[37] This means that priority would be determined by the lex fori. The only possible alteration to this position would come about through New Zealand's ratification and adoption into law of any new international unification convention which may establish an approach to the conflict of laws along the lines urged by the minority in *The Halcyon Isle* or the Canadian decision of *The Ioannis Daskalelis*.[38]

International unification by its very nature of course would mean a more rigidly defined approach to the matter of determination of priorities.[39] Thus it would mean for New Zealand, if it adopted such a treaty, the abandonment of the very flexible approach to the determination of priority which its courts of admiralty are presently entitled to take in following the approach of the Common Law. It would, however, have the advantage of seeing an extension of the very limited definition under both English and New Zealand law of the maritime lien and overcome the necessity, in order to protect the ship repairer, of grafting into the order of priority the Common Law possessory lien.

37 *Bankers Trust International Limited* v. *Todd Shipyard Corporation, Halcyon Isle* [1981] A.C. 221.

38 *Todd Shipyards Corporation* v. *Altema Compania Maritima S.A., The Ship "Ioannis Daskalelis"* [1974] 1 Lloyds Rep. 174. (For a discussion on the conflict between the decisions see C. A. Ying "Priorities and the Foreign Maritime Lien" (1982) 8 Adelaide L.R. 95).

39 For a discussion on the unification convention see: (a) Kriz "Ship Mortgages, Maritime Liens and Their Enforcement: The Brussels Conventions of 1926 and 1952" [1963] Duke L.J. 671.
(b) Anon "The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention to Achieve International Agreement on Collision Liability, Liens, and Mortgages" (1955) 64 Yale L.J. 878.
(c) Anon "International Uniformity of Maritime Liens and Mortgages: The 1965 New York Conference of the Comite Maritime Internationale" (1966) 41 New York U.L.R. 939.

Shipboard torts and the conflict of laws

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The rules of private international law relating to torts have been the subject of much discussion, particularly because of their vagueness and the marked difference of approach between Britain and the United States. This article considers the rules in relation to torts committed on board ship. The author discusses proposals recently made by the English Law Commission and argues that the time has come to change the existing artificial and technical rules.

I. INTRODUCTION

Where a tort has a conflict of laws component, a court is required to determine two questions. First, whether it has the necessary jurisdiction to deal with the case. Secondly, the law to be applied to resolve the dispute. (Thirdly, and less frequently, there will sometimes be a policy question whether a court should recognise or enforce a foreign judgment which has determined the dispute).

The rules governing the choice of law for torts are very well established. Until recently, their impact on the general public was minimal. It is however an area of law whose importance is increasing, as has been explained by Dr. J. H. C. Morris when writing in the English context:[1]

> Just as the law of contract responded to the pressures of international trade in the 19th century, so in the 20th century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and the means of transport and communications. Most of these pressures operate regardless of national or other frontiers. Dangerous drugs can cause babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Unfair competition is no longer confined to a single country. Every year English motor cars visit the continent of Europe in their thousands; accidents occur; people are injured or killed. English television aerials receive programmes from continental Europe, and even (with the aid of satellites in space) from America and Australia; private reputations sometimes suffer. For these reasons the conflict of laws can no longer rest content with solutions designed for 19th century conditions.

The following discussion does not attempt to examine all the choice of law rules for torts, but only those relating to torts committed on ships, and whether the well-established principles should be re-examined in the light of contemporary needs. Nonetheless, the general English conflict of laws rules for torts have their

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1 J. Morris *The Conflict of Laws* (3rd ed., Sweet & Maxwell, London, 1985) 301.

genesis in admiralty law. *Blad's Case*,[2] for example, is a case having a wholly maritime element, and yet is often referred to as the father of English private international law.

This paper will therefore necessarily be involved in examining the principles in *Phillips* v. *Eyre*[3], *Chaplin* v. *Boys*[4] and recent American developments, in so far as they apply to shipboard torts. Finally, an examination will be made of very recent proposals for change in the working paper published by the Law Commission of England in late 1984.[5]

II. CHOICE OF RULES — TERRITORIAL WATERS

A. *External Consequences*

The general rule is that if a tortious act is committed within the territorial waters of a state, that state's law will be the applicable law for the resolution of a dispute (*lex loci delicti*). The rule in *Phillips'* case accordingly applies. In *Carr* v. *Fracis Times Limited*[6] an officer of the British Navy, acting under the orders of the British Government, seized ammunition which had been shipped by the respondents in London in the territorial waters of Muscat. An action for conversion of goods was brought, the defence to which was that the seizure was lawful by the law of Muscat. For this reason, no action could be maintained in England by the owner of goods against the Naval Officer. This is the first of several cases which will be referred to where a choice of law principle is extracted from the judgment, whereas in actual fact the reason for the decision may be different. It is not denied that in this case allegations were made that the defendant had converted the goods. However the main issue concerned the validity of the defence mounted by the Naval Officer that what took place was an act of state. The respondents argued that the Sultan had no authority to interfere with the rights of two British subjects *inter se* and that the right over territorial waters is not the same as over the land, but is limited and subject to the unfettered right of ships to peacefully pass through them.

Lord MacNaghten referred in his judgment to the rule in *Phillips'* case and particularly to the requirement that the act must not have been justifiable by the law of the place where it was committed:[7]

> It is not disputed that the alleged wrong would be have been actionable if it had been committed in England or on the high seas. It was, however, committed within the dominions of the Sultan of Muscat who is duly proved to be an independent sovereign. It was committed in the territorial waters of Muscat which are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over

2 (1673), quoted at Swans. 603; see also J. A. Clarence-Smith "Torts and the Conflict of Laws" (1957) 20 M.L.R. 447, 448.
3 (1870) L.R. 6 Q.B. 1.
4 [1971] A.C. 356. For the latest attempt at rationalising the decision in this case, see J. J. Fawcett "Policy Considerations in Tort Choice of Law" (1984) 47 M.L.R. 650.
5 The Law Commission, Working Paper No. 87, "Private International Law — Choice of Law in Tort and Delict", London, 1984, Her Majesty's Stationery Office.
6 [1902] A.C. 176.
7 Ibid. 182.

> which he exercises absolute and unquestionable sway . . . and if the act was legal in Muscat and therefore justifiable there, in my opinion there is a conclusive answer to the action, and I am therefore of the opinion that the action must fail.

Thus, the law of Muscat applied in the territorial sea to justify the act of the naval officers, so that the action could not be sustained in the forum.

In that case, the alleged tort (conversion) was one which had external consequences — that is, the consequences had effects which were felt beyond the ship itself. In *The Mary Moxham*,[8] the tort in question also had external consequences. An English company was the owner of a pier situated within the territory of Spain which was negligently damaged by an English ship. An action was brought in England by the pier owners. The shipowners argued that the collision occurred within the territory of Spain, and that if it was caused by negligence, it was the negligence of the master and mariners of the ship and, accordingly, by the law of Spain, the master and the mariners, and not the owners, were liable for damages. The law of Spain — the *lex loci delicti* — was held to apply by the Court of Appeal. Mellish L.J. said:[9]

> Here the ship was really within the Spanish Dominions at the time when it committed the wrong . . . [she] was coming into a Spanish port, where she had no right to go except by licence given to her by the law of Spain, and where she was bound to obey the law of that country while she was there. In that position she comes into contact with that which is stated to be part of the soil of Spain, and this brings the case within the general rule that no action can be brought in this country in respect of an alleged wrongful act committed in a foreign country which act is not wrongful by the law of that country.

The same principle was applied in *The Arum*.[10] The ship in question was being moved by the pilot at Gibraltar when it took a sheer and struck *The Rossano* which was moored at a detached mole. There was nothing in the wind or weather which could have caused the collision. At the time of the collision *The Arum* was under requisition to the Admiralty under the terms of a charterparty. The defendants pleaded that *The Arum* was moved despite the protests of her master, and that the pilot who shifted her was not their servant and they were therefore not responsible for his navigation.

The plaintiffs commenced an action in England and sought to invoke section 15(1) of the Pilotage Act 1913 which made the owner or master of a vessel, navigating in circumstances in which pilotage was compulsory, liable for any damage or loss caused in the same manner as he would if pilotage were not compulsory. Hill J. held, however, that this Act did not expressly or by inference extend to Gibraltar. The tort was not one which gave rise to a cause of action against the defendants by the law of the place where the tort was committed. The defence of compulsory pilotage succeeded, although it would have failed had the acts complained of taken place in English territorial waters.

8 (1876) 1 P.D. 107.
9 Ibid. 112.
10 [1921] P. 12.

B. *Internal Consequences*

A distinction may be made between cases where the consequences of the tortious action are felt beyond the ship, and those where a tort is committed on board a ship passing through, or lying at anchor in, the territorial waters of a country other than that to which the ship belongs. Is the law of the ship's flag or that of the littoral State to be considered as the *lex loci delicti?*

There is very little authority in England or the Commonwealth on this question. The only maritime authority is the decision of the Inner House of the Court of Session of Scotland in *MacKinnon* v. *Iberia Shipping Company.*[11] The pursuer, an engineer on the *S.S. Baron Ramsay,* was injured in the course of his employment by an accident which he attributed to the negligence of the shipowners (or of a fireman for whom they were responsible). At the time of the accident, the ship was lying at anchor in an open roadstead off San Pedro de Maioris in the Dominican Republic. There was no foreign or external factor other than the situation of the ship at the time of the accident. All events giving rise to the action occurred on board the *S.S. Baron Ramsay.* Not surprisingly, the defenders sought to invoke the Scottish equivalent of the principle in *Phillips'* case and contended that the pursuer was required to show that his claim was actionable by Scots law and also by the law of San Domingo. On appeal, the pursuer contended that the usual test for foundation of liability was inapplicable since the events complained of had taken place entirely on board ship and the accident had been a purely domestic matter. As the incident only involved one ship which was registered in a Scottish port, the case for the *lex fori* was said to be strong. The pursuer claimed that the test of concurrence of *lex loci delicti* and *lex fori,* as laid down by Dicey, and the Scottish equivalent of *Phillips'* case, *M'Elroy* v. *M'Allister*[12] was inapplicable where all the events had taken place on board ship.

The Inner House rejected the pursuer's arguments, and re-asserted the traditional test. Lord Carmont however acknowledged the strength of MacKinnon's argument from a practical and commonsense point of view:[13]

> If the occurrence giving rise to the present case had happened when the vessel was four miles off the San Domingo coast, the law of the flag would have applied, and it would not have been of any moment whether the vessel was at anchor or not. It may seem strange that a vessel proceeding along the coast of a continent but allowing her course to bring her within three miles of the coast, should find the same occurrences as are averred in this case treated as having taken place in the territory of the littoral State which the vessel was passing at the time . . . I am unable however, to find any real support for the pursuer's contention that the mere passing along within territorial waters does not displace the law of the flag, or that something much more intimate . . . than anchoring is necessary to vouch presence within a State.

Lord Carmont also found attractive the argument about displacing the law of the littoral State where everything took place on board a ship. But he said that to give effect to such an argument would be breaking new ground and would

11 1955 S.C. 20.
12 1949 S.C. 110.
13 *MacKinnon* v. *Iberia Shipping Company* 1955 S.C. 20, 28-29.

run counter to everything to be found in the treatises on international law. Lord Sorn offered a similar view of the pursuer's alternative claim in his judgment:[14]

> The force of [the pursuer's] claim has impressed me, and *re integra* there would be much to be said for adopting the rule he suggests. I have, however, not found it possible to treat the matter as being an open question. The rule that the *lex loci delicti* applies to territorial waters appears to me to have stood for a long time without any distinction being drawn between one kind of act and another. Our leading textbooks state the rule in terms applicable to both external and internal acts. We were not referred to any case in which the distinction had been considered or even suggested. The inference to be drawn is, I think, that it has been tacitly accepted that the rule applies to all acts, including those which take place wholly on board ship.

Lord Sorn referred to an observation of du Parcq L.J. in *Yorke* v. *British and Continental Steamship Company*[15] (the facts of which were similar to *Mackinnon's* case in that all relevant events occurred on board a ship in foreign territorial waters. The difference in this case was that the ship concerned was anchored virtually permanently in Gibraltar harbour, where the *Baron Ramsey* was only temporarily anchored offshore). Du Parcq L.J. advised of the desirability in a case of this nature to plead that the act complained of is a wrongful act by the law of the country where the tort is alleged to have been committed. The Court of Appeal in this case held that although the English Dock Regulations did not apply in Gibraltar, there was common law negligence by the defendants, thus making them liable. The Court of Appeal was prepared to decide the case although it had no idea what the law in Gibraltar was, but decided that English common law principles would apply, even if English legislation only had a territorial effect. That is different from saying that the territorial law applied, although the Court of Session in Scotland relied on the case for that reason.

MacKinnon's case and *Yorke's* case have not been approved by the text writers, although there has not yet been a decision in either England or any Commonwealth country on the point since those two decisions. Dicey argues that there is much to be said in favour of the American practice which makes a distinction between an act done by those in charge of the vessel which affects the Government of the littoral State or its subjects or any other person external to the vessel, and those where everything takes place within the ship itself. Dicey[16] expresses the hope that *MacKinnon's* case not be followed in England, as do most other writers.[17]

In New Zealand, the general rule of *lex loci delicti* in territorial waters is confused by section 190 of the Shipping and Seamen Act 1952 which provides:

14 Ibid. 36-37.

15 (1945) 78 Ll. L. Rep. 181.

16 Dicey and Morris *The Conflicts of Laws* (10th ed., Stevens & Sons, London, 1980) 977. In fact, most commentators criticise this decision as being unjust. The writer submits that if any case illustrates the dangers of an inflexible rule, then it is this one.

17 C. G. J. Morse *Torts in Private International Law* (North-Holland Pub. Co., Amsterdam, 1978) 291 best summarises various opinions about this case: "The wisdom of this result is questionable in view of the fact that all the parties were Scottish, and the accident arose out of matters internal to a ship which was registered at a Scottish port. The sensible result in this case would have been the application of Scots law."

> Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Act any provision on the subject which is hereby made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the country in which the ship is registered or to which she belongs.

This section is similar to section 265 of the Merchant Seamen Act 1894 (U.K.) which has now been repealed. The section is confined to matters dealt with in Part II of the Act which concerns the affairs of masters, officers and seamen — their engagement, health, and discharge.

The scope of section 265 was considered by the House of Session in *MacKinnon's* case. The pursuer there argued that the section had a wider applicability than Part II of the Act, but that the effect of the section was to make Scottish law, as the law of the port where the ship was registered, the sole law applicable to the events which took place within the vessel and affected only the ship's personnel — officers and crew. Lord Carmont summarised counsel's argument on section 265 thus:[18]

> The pursuer is a person belonging to a ship, and on his bringing this action against his employers, the owners of the vessel, in the Scottish courts, on a matter relating to him as a person belonging to a ship, as there appears to be a conflict as to the extent of his right to reparation between the *lex fori* and the *lex loci delicti,* and as there is no provision in Part II of the Act which has been made so as expressly to extend the provision on the subject to his ship, then his 'case' (i.e., action) falls to be dealt with by the law of Scotland, since his ship is registered at the Port of Glasgow.

Lord Carmont, however, did not consider that section 265 was intended to cover matters arising beyond the scope of the precise language used. He said that there was nothing to suggest that the subject matter of the dispute falling under section 265 could be claims which fall outside Part II of the Act, within which the section was placed. He said that where the section contemplates the possibility of an express provision covering the matter being found in the Act, it may only be found in Part II of the Act and nowhere else.[19] Lords Russell and Sorn agreed with this restrictive interpretation of section 265; Lord Sorn saying it was applicable only to the contents of Part II, and would only apply where there was a question whether the situation was to be governed by a provision contained in that part of the Act or some other law.

Thus it seems that if a New Zealand ship were in Scottish waters and a question arose under one of the sections in Part II of the Act, New Zealand law would still apply, notwithstanding the ordinary conflicts rule of the *lex loci delicti.* The same would apply to a foreign registered ship in New Zealand waters where a section in Part II of the Act could be made to apply to that ship. The terms of section 190 do not limit the applicability of the section only to New Zealand and Commonwealth ships.

The other case that has dealt with this section is *Canadian National Steamship Company* v. *Watson*[20] which will be examined later in the context of torts occurring

18 1955 S.C. 20, 30.
19 Ibid. 32.
20 [1939] 1 D.L.R. 273.

on the high seas having internal consequences. In this case the tort was the negligent omission of the chief officer to erect safety lines so that the plaintiff was injured. After the jury found against the defendants, they moved for judgment *non obstante veredicto* on the grounds that by the law of England they were not legally responsible for the negligence of the officer. The plaintiff referred to section 265 and argued that Part II of the Act of 1894 (i.e. the original English Act) applied because the ship was registered in Vancouver. The Chief Justice said that the *lex loci delicti* was the law of British Columbia. Cannon J. said that there was no section in Part II to which the incident could relate, and held:[21]

> We, therefore, also reach the conclusion that the *lex fori* is the Quebec law; *lex loci contractus* is Quebec law, because the respondent was engaged in Montreal. The *lex loci delicti commissi* would be either the law of England or that of the port of registration.

No-one doubts the correctness of the decision of Cannon J., but it is submitted that the law of England is completely irrelevant in this context. Moreover, the reference by Cannon J. to "we" is somewhat confusing, as the Chief Justice gave judgment on behalf of Crocket, Kerwin and Hudson JJ. Cannon J. gave judgment on his own behalf. It is submitted that that part of the judgment of Cannon J. which makes reference to the law of England is wrong, and that the judgment of the Supreme Court is that the *lex loci delicti commissi* is British Columbia. Accordingly, the reference by D. P. O'Connell in Volume 2 of his work *The International Law of the Sea* to the judgment of the Supreme Court holding that the *lex loci delicti* is either the port of registration or English law is incorrect.[22] He only quoted from the judgment of Cannon J., and not the other judges. (Also, O'Connell's reference to section 265 of the New Zealand Shipping and Seamen Act 1952 is incorrect. It should be to section 190[23]). One cannot be sure where Cannon J. had the idea of applying English law. The case report does refer to the defendants making reference to the law of England, but that seems to have only been in the context of reference to the Merchant Shipping Act 1894 (U.K.) which was then in force in British Columbia.

That appears to be the way Tysoe J.A. in *Gronlund* v. *Hansen*[24] interpreted the judgments in *Watson's* case although his remarks would be *obiter,* as he did not consider there was a conflict of laws in the case before him. He referred to section 265 (now section 285 of the Canada Shipping Act) and said that if there were a conflict of laws then by the provisions of that section, British Columbian law would apply as the ship which sank (causing the death of the seamen whose estate brought the action) was registered in Vancouver. No reference was made to English law.

American law adopts a different approach to English and New Zealand law. American courts have in certain circumstances been prepared to adopt the law of the flag (although there are also instances where the *lex loci delicti* is said to

21 Ibid. 278.
22 D. P. O'Connell *The International Law of the Sea* (Clarendon Press, Oxford, 1984) 901.
23 Ibid. 901, n. 240.
24 (1969) 4 D.L.R. (3d) 435.

apply). Hancock gives as an example of the application of the *lex loci delicti,* the case of *Uravic* v. *Jarka,*[25] where a stevedore was killed while working on board a German vessel in New York harbour. The Supreme Court ruled that his dependants could maintain an action based upon the law of the United States. In *Western Fuel Company* v. *Garcia,*[26] the facts were essentially identical in that a stevedore was killed while working on a Norwegian ship in San Francisco Bay. Again United States law was applied. These cases, however, while involving a single ship, may be distinguished from *MacKinnon's* case in that there was an external component. It would be very odd if an American, by simply going on board a Norwegian ship, was to be the subject of Norwegian law in the event of an accident. Lord Carmont, in a passage cited above,[27] referred to the pursuer's contention about the need for something "more intimate" than anchoring for vouching presence within a State. It is submitted that going on board a ship to unload provided the necessary connecting factor to make the law of the territorial State apply in the event of an accident or some other tortious event.

It is now proposed to examine in some detail American law which is quite distinct from English law in that it does not mechanically apply the *lex loci delicti.* It will be argued that the American approach as exemplified by *Lauritzsen* v. *Larsen*[28] is to be preferred to the approach exemplified by the decision in *MacKinnon's* case which may provide some degree of certainty, but leads to absurd results. Recent developments in the United States have confused the *Lauritzsen* principle, and these will also be examined.

Traditionally the injured seaman in the United States had two remedies available — the first was for maintenance and cure; the second for indemnities against injuries received as a result of a vessel's lack of seaworthiness. The Merchant Marine Act of 1920 (Jones Act) went further and allowed any injured seaman to bring an action for damages when the injury was suffered in the course of employment and was due to the negligence of an employer. One of the major questions in American Conflict of Laws has been the meaning of the word "any" in the phrase "any seaman". The first case to clarify the meaning of the word "any" was *Lauritzsen's* case. While temporarily in New York, a Danish seaman joined the crew of the *S.S. Randa,* a ship of the Danish flag and registry owned by a Danish citizen. The seaman signed articles which provided that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union of which the seaman was a member. While in Havana harbour, the seaman was injured in the course of his employment as a

25 282 U.S. 234 (1931). The American authorities up to 1940 are referred to extensively in M. Hancock *Torts in the Conflict of Laws* (Callaghan and Company, Chicago, 1942).

26 256 U.S. 233 (1921).

27 Supra. n. 13.

28 345 U.S. 571 (1952); although the situation in the United States is now somewhat uncertain, largely thanks to the efforts of Douglas J. in the Supreme Court between 1959 and 1970. Surprisingly, *Dicey and Morris* op. cit. 976, n. 94, refer to *Lauritzsen* v. *Larsen* 345 U.S. 571 (1952) as though that case were the unchallenged authority in the United States in this field, when that is clearly not the situation.

result of negligence. He sued the ship's owner in a Federal District Court in New York for damages under the Jones Act. The issue before the Court was a narrow one, namely whether the statutes of the United States should be applied to this claim of maritime tort.

The United States Supreme Court held that the Jones Act did not apply. In the course of his opinion delivered on behalf of the Court, Jackson J. outlined seven factors which he said should be considered in determining whether a claim of this nature should be governed by American or some other law. He referred to the foreign nations which had some connecting factor with the tort:[29]

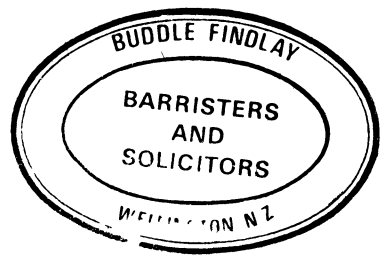
> . . . Denmark, because, among other reasons, the ship and the seaman were Danish nationals; Cuba, because the tortious conduct occurred and caused injury in Cuban waters. The United States may also claim contacts because the seaman had been hired and was returned to the United States, which is also the State of the forum. We therefore review the several factors which, alone or combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them.

The first factor that was considered was the place of the wrongful act. Jackson J. said that applying that rule to the case before him would indicate the application of the law of Cuba, in whose domain the actionable wrong took place, and referred to *Carr's* case and *Uravic's* case. In relation to maritime torts, the Judge did not see the *lex loci delicti commissi* as necessarily one to be applied:[30]

> The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over the waters she may navigate. These range from ports, harbours, roadsteads, rivers and canals which form of the part of the domain of various States, through bays and gulfs, and that band of the littoral sea known as territorial waters, over which control in a large, but not unlimited degree, is conceded to the adjacent State. It includes, of course, the high seas . . . This doctrine would seem to indicate Cuban law for this case. But the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.

The second factor that was examined was the "most venerable and universal" law of the flag. Notwithstanding commentators' criticism of the principle of territoriality, Jackson J. referred to the rule enunciated by the Supreme Court that the law of the flag will supersede the territorial principle because the ship is deemed to be part of the territory of that sovereignty "whose flag it flies", and not to lose that character when in navigable waters within the territorial limits of another sovereignty. Jackson J., said however, that Courts apply the law of the flag: " . . . on the pragmatic basis there must be some law on board ship that it cannot change in every change of waters, and no experience shows a better rule than that of the State who owns her."[31] He referred to a decision of the Supreme Court in *Cunard Steamship Company* v. *Mellon*[32] and in particular the origin of the law of the flag:[33]

29 Ibid. 582.
30 Ibid. 583.
31 Ibid. 585.
32 262 U.S. 100, 124 (1923).
33 Supra, n. 28, 584.



> . . . By comity it came to be generally understood among civilised nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that national or the interests of its commerce should require . . .

Such a consideration favoured Danish rather than American law. The Judge considered that this was of such weight that it must prevail unless some heavy counter-weight could be shown to displace it.

The third factor was the allegiance or domicile of the injured person. In looking at this factor, the respondent was seen to be neither citizen nor resident of the United States. His presence in New York was transitory and created no such national interest in, or duty toward him, as to justify intervention of the law of one State on the shipboard of another. The fourth factor which was of some importance in the judgment of Douglas J. in *Hellenic Lines Limited* v. *Rhoditis*[34] is the allegiance of the defendant shipowner. Here it was shown to be beyond doubt that the owner was a Dane by nationality and domicile.

The fifth factor was the law of the contract. Jackson did not see the place of the contract as being a substantial influence in the choice between competing laws to govern the maritime tort, but nonetheless did refer to it as one of the factors upon which a little weight should be placed in determining the proper law of the tort. In this case the contract was made in New York, and it was the factor on which the respondent chiefly relied in seeking application of American law. Again the Judge was not impressed by the importance of the place where the contract was made:[35]

> The place of contracting in this instance, as is usual to such contracts, was fortuitous. A seaman takes his employment, like his fun, where he finds it; a ship takes on a crew in any port where it needs them. The practical effect of making the **lex loci contractus** govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seaman.

The sixth factor was the inaccessibility of the foreign forum. It was suggested that justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum. Jackson J. saw that this was a jurisdictional question, and one that might be persuasive for exercising a discretionary jurisdiction, but was not persuasive as to the law by which the matter should be judged. He did not see that the respondent was disadvantaged in obtaining his remedy under Danish law from being in New York instead of in Denmark.

Finally, the law of the forum was examined. It was argued that as the American forum had perfected its jurisdiction over the parties and the defendant did regular business within the forum State, it should apply its own law to the controversy between them. Jackson J. referred to cases where the Supreme Court had held it a denial of due process of law where a state of the Union drew into the control

34 398 U.S. 306 (1970).
35 Supra, n. 28, 588.

of its own law otherwise foreign controversies, on slight connections, because it is a forum State:[36]

> The purpose of a conflict of laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable.

Accordingly the Court concluded that there was an overwhelming preponderance in favour of Danish law:[37]

> The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. As against these considerations is only the fact that the defendant was served here with proceess and that the plaintiff signed on in New York, where the defendant was engaged in our foreign commerce .The latter event is offset by provision of his contract that the law of Denmark should govern.

The Judge also criticised what he saw as a "candid and brash" appeal to extend the law to the situation as a means of "benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own".[38] He said that such an argument should be addressed to Congress, and that counsel familiar with the traditional attitude of the Court in maritime matters would not have to raise the point.

Accordingly, the facts in that case are distinct from *MacKinnon's* case in that the accident occurred within the territorial waters of Cuba, whose law was not sought to be applied by either the appellant or respondent. Nonetheless the Court was prepared to look at a variety of connecting factors in determining the proper law of the tort. It is submitted that even if the accident had occurred in New York harbour, the same decision would have applied as a result of a consideration of those factors.

Lauritzsen's case has been the subject of much discussion by writers, and referred to and approved by the Supreme Court in later years. The second major decision is *Romero* v. *International Terminal Operating Company et al.*[39] The petitioner to the Supreme Court of the United States in this case was a Spanish subject who was employed on board the *S.S. Guadaloupe* which was of the Spanish flag and registry, and owned by a Spanish corporation. He was employed for a voyage beginning and ending in Spain. He was injured while the ship was in American territorial waters when he was struck by a cable on deck. He filed suit in a Federal District Court in New York claiming damages under the Jones Act and under the general maritime law for unseaworthiness, maintenance and cure, and negligence against his Spanish employer and a New York corporation which acted as its husbanding agent in New York. Frankfurter J. delivered the opinion of the Court.

36 Ibid. 591.
37 Ibid. 592.
38 Ibid. 593.
39 358 U.S. 354 (1959).

The case contained both jurisdictional and choice of law issues, and it is to the latter that particular reference will be made. The question was as to the applicability of the Jones Act and American general maritime law to the claim by the plaintiff against the Compania Transatlantica, the Spanish Corporation. The way Frankfurter J. formulated the issue gives an indication of the decision of the Supreme Court. He said that the issue was whether the maritime law of the United States may be applied in an action involving an injury sustained in an American port by a foreign seaman on board a foreign vessel in the course of a voyage beginning and ending in a foreign country. The Judge referred to the principles enunciated in *Lauritzsen's* case:[40]

> The broad principles of choice of law and the applicable criteria of *Lauritzsen* v. *Larsen* were intended to guide Courts in the application of maritime law generally. But the similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes. Thus the reasoning of *Lauritzsen* v. *Larsen* governs all claims here.

The Supreme Court was not prepared to simply apply the *lex loci delicti commissi,* but sought application of modern and appropriate rules:[41]

> We must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. These principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicti commissi.* The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. We need not repeat the exposition of the problem which we gave in *Lauritzsen* v. *Larsen.* Due regard for the relevant factors we there enumerated, and the weight we indicated to be given to each, preclude the application of American law to the claims here asserted.

In particular, the Court looked at the status of the ship. The ship was of foreign registry and sailed under a foreign flag. The seaman and the shipowner had Spanish status; Romero's agreement was entered into in Spain, and Romero was injured while temporarily in American territorial waters:[42]

> This difference does not call for a difference in result . . . Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nationals in the regulation of their own ships and their own nationals, and the effect upon our interests and our treatment of the legitimate interests of foreign nations. . . . To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would not only be onerous but also an unduly speculative burden, disruptive of international commerce, and without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his employer when sailing on a foreign ship should not depend on the wholly fortuitous circumstances of the place of injury.

40 Ibid. 382.
41 Ibid. 383.
42 Idem.

In Scotland it is precisely that fortuitous circumstance that determined in *MacKinnon's* case the application of the law of San Domingo. It is submitted that the Supreme Court's approach in this case leads to a far more logical and just result. The application of the *lex loci delicti* in circumstances such as prevailed in *Romero's* case would be absurd.

Douglas J., however, dissented from that part of the Court's opinion dealing with the conflict of laws, and said he had also dissented in *Lauritzsen's* case, thinking it was based on the Court's concepts of what would be good or bad for the country internationally rather than on the actual interpretation of the language of the Janes Act. He especially dissented here on the grounds that the injury occurred in territorial waters. Douglas J. regarded the interpretation of the phrase "any seaman" as clearly extending to a foreign seaman, and particularly in *Romero's* case.

Douglas J. persuaded his colleagues to go along with him and completely muddy the waters in 1970 in the third of the cases to come before the Supreme Court. In *Hellenic Lines Limited* v. *Rhoditis*,[42a] an action was commenced in the United States District Court for the Southern District of Alabama for the recovery of damages for injury sustained by a Greek seaman while aboard a Greek flag ship in the port of New Orleans. The ship was regularly engaged in runs between the United States and foreign countries, and was managed by a Greek corporation — 95% of the stock of the corporation was owned by a Greek citizen who was a lawful permanent resident alien, and who managed the corporation out of New York. The seaman's contract of employment was entered into in Greece, and expressly provided for adjudication by a Greek Court of all matters which might arise thereunder.

The District Court gave judgment for the seaman, and the Court of Appeals affirmed the judgment. The Supreme Court of the United States also affirmed the District Court judgment, and held by a majority that the totality of the circumstances of the case, including the operational contacts that the ship and its employer had with the United States, meant that the Greek corporation was an "employer" under the Jones Act. Three judges dissented on the grounds that the Jones Act should not be extended to allow recovery by a foreign seaman who signed articles in a foreign country for employment on a foreign-owned, foreign-flag vessel, for shipboard injuries sustained while the vessel was in American territorial waters.

Douglas J. delivered the majority judgment of the Court. He directly contradicted the decision in *Lauritzsen's* case while ostensibly paying respect to it:[43]

> The Jones Act speaks only of "the defendant employer" without any qualifications. In *Lauritzsen* v. *Larsen* however, we listed seven factors to be considered in determining whether a particular shipowner should be held to be an employer for Jones Act purposes.

He then listed them and indicated that of the seven factors, it was urged that four of them favoured the shipowner and went against jurisdiction: "The ship's flag is Greek; the injured seaman is Greek; the employment contract is Greek;

42a 398 U.S. 306 (1970).
43 Ibid. 308.

and there is a foreign forum available to the injured seaman."[44] Douglas J. indicated, however, that the *Lauritzsen* test was not a mechanical one, and that the list of seven factors was not intended to be exhaustive. He preferred a liberal interpretation of the Jones Act.

One of the major criticisms of *Lauritzsen's* case is its failure to indicate a set of factors applicable to cases other than the Jones Act situation where there are numerous connecting factors. Douglas J. is correct in saying that the *Lauritzsen* test is not intended to be exclusive. Nonetheless, Douglas J. and the majority of the Supreme Court in *Hellenic Lines* cast doubt on the applicability of *Lauritzsen's* case in the United States. This point is clearly made in the dissent of Harlan J. (joined by the Chief Justice and Stewart J.):[45]

> While some legislation in its purpose obviously requires extension beyond our borders to achieve national policy, this is not so, in my opinion, with an Act concerned with prescribing particular remedies, rather than regulating commerce or creating a standard for conduct.

Harlan J. saw the primary purpose of *Lauritzsen's* case as reconciling the all-embracing language of the Jones Act with those principles of comity embodied in international and maritime law that are designed to "foster amicable and workable commercial relations".[46] He saw no reason to disregard either the law of the flag or the plaintiff's contractual undertaking to accept Greek law as controlling.

Some writers have attempted to say that the decision in *Hellenic Lines* is entirely consistent with that in *Lauritzsen's* case.[47] That is not so. The lack of uniformity among the circuit courts as to the criteria to be applied to admiralty choice of law determinations has resulted in the call by some writers for the Supreme Court to

44 Idem.

45 Ibid. 313. Harlan J. (at 315-16) gives a particularly good overview of what *Lauritzsen* was all about. He suggested at 318 that the majority decision in the case before him suggested the courts have become mesmerized by contacts, and that notwithstanding the purported eschewal of a mechanical application of *Lauritzsen,* "they have lost sight of the primary purpose of *Lauritzsen* which, as I conceive it, was to reconcile the all-embracing language of the Jones Act with those principles of comity embodied in international and maritime law that are designed to 'foster amicable and workable commercial relations'."

46 Ibid. 318.

47 See, for example, William Gaudet *"Forum Non Conveniens, Choice of Law and the Foreign Seaman: The Fifth Circuit Makes a Choice"* (1981) 27 Loyola L.R. 309, 313 where the writer talks about guidelines established by the *Lauritzsen - Romeo - Rhoditis* trilogy of cases. The guidelines were in fact established by *Lauritzsen,* and developed a little by *Romero,* but scuttled by Douglas J. in *Rhoditis.* C. John Caskey's claims that the argument that the *Rhoditis* language means that virtually no contact of a foreign shipper with the United States would be insignificant, is proving to be prophetic: "A New Look at *Lauritzsen* v. *Larsen,* Choice of Law and *Forum Non Conveniens"* (1977/78) 38 Louisiana Law Rev. 957, 964-65. He argues (968) that what is needed in the United States is a re-examination of the principle by the Supreme Court: "Gone is the consistency of the *Lauritzsen* test in determining when the Jones Act will apply. What is left is a case by case highly inconsistent analysis of the 'contacts' a foreign shipper may have with the United States and whether they are sufficient to invoke the Jones Act. The courts may have come a full circle to the uncertainty of those pre-*Lauritzsen* days."

again review this area of law. The attempt by Douglas J. to revert to what is in effect the *lex loci delicti commissi* is out of step with other decisions in recent years in America, which have ratified the move away from the *lex loci* test to the more flexible one provided in the American Restatement.

It is submitted that such an approach in determining the proper law of the tort is preferable to a simple application of a rule such as *lex loci delicti,* particularly in a maritime tort case where the consequences of the action are not felt beyond the ship itself. What seemed to have occurred in *MacKinnon's* case, as is illustrated by the cases that were cited in judgment, was that the jurisdictional and choice of law questions merged. While there is no doubt that in some circumstances the Court of the littoral State will have jurisdiction (for example, *Romero's* case[48]), choice of law is a separate issue. Jurisdiction does not necessarily mean that *lex loci delicti* should be invoked. Rather what is needed is a close analysis of all the factors involved in determining whether the consideration of all connecting events leads to the application of the law of the littoral State or rather the law of the flag. To apply the *lex loci delicti* would, as Lord Sorn readily conceded, result in absurdity. A certain result should be replaced by a relatively certain sensible approach in determining the proper law of the tort.

In conclusion, therefore, it is submitted that the rule in *Chaplin* v. *Boys*[49] is ill-suited to contemporary conditions in determining choice of law questions of maritime torts committed in territorial waters. It is mechanically applied, and notwithstanding the call for flexibility in the judgment of Lord Wilberforce,[50] it does not provide a satisfactory means of resolving conflicts disputes. The *lex loci delicti* (or second limb of the test) is often inappropriate — rather the law of the flag should be applied. In this regard, the American authorities (notwithstanding the lamentable confusion engendered by the decision of Douglas J. in *Hellenic Lines*[51]) are to be preferred.

III. CHOICE OF LAW RULES — HIGH SEAS

> The modern expression "high seas" refers to the area of water outside the territorial sea, but this is a relatively modern usage, and to avoid confusion it must be remembered that the common law uses the concept differently. The terms "altum mare", "high seas" or "the main sea" refer to the area of sea within the admiral's jurisdiction. There have been, however, differences of opinion as to exactly the location of this area. According to one view, the expression covered the sea between high and low water at full tide, and below low water at low tide. According to another view, it was the sea below low water, and according to a third, it meant the sea which was navigable.

This extract taken from O'Connell[52] provides an explanation for some of the cases which will be examined within this category which *prima facie* appear

48 Supra n.39.
49 [1971] A.C. 356.
50 Ibid. 391.
51 Supra n.42[a].
52 See in relation to the juridical nature of the high seas, D. P. O'Connell *The International Law of the Sea* (Clarendon Press, Oxford, 1984) 792.

anomalous. For example, reference will be made to *R.* v. *Carr*.[53] This is the leading case on the question of criminal jurisdiction in relation to British ships abroad. At the time of the incident, the ship was in a river near Rotterdam, but it was nonetheless said to be on the high seas for the purposes of conferring on admiralty the necessary jurisdiction to try the prisoners.

As in the case of territorial waters, an examination will be made of the torts that are committed on the high seas having external consequences, and those with only internal consequences.

A. *External Consequences*

The rule of law that the general maritime law of England is to be the applicable law where a tort takes place on the high seas and has external consequences, finds its origins in the *Johann Friederich*.[54] This case involved a collision between two foreign ships upon the high seas, and the question was whether or not the law would be *communis juris*. Again it could be said that this case is more properly a jurisdictional rather than a choice of law case. In giving judgment, Dr Lushington considered that no doubt as to the Court's jurisdiction could be entertained if the vessel that was lost had been the property of British subjects, but was of the view that the question was whether a foreigner should be deprived of the same privilege and protection.

The Judge distinguished between collision cases which were all *communis juris,* and cases involving seamen's wages which had been cited in support of the argument that English law was applicable[55]

> . . . but in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law.

The defendants also raised the question of the convenience of proceeding with foreign litigation in English Courts. But Dr Lushington considered that such inconvenience could be set off against the inconvenience that would arise if no remedy was available here for the injured party — a refusal to exercise the jurisdiction would in several cases amount to "a total denial of justice". Thus the Court was prepared to assume jurisdiction on the grounds that if all causes of collision are causes *communis juris* the vessel at the time of her arrest was within Admiralty jurisdiction and the collision took place on the high seas close to the English coast.

This case was followed forty-two years later by *The Leon*[56] which involved an action by the owners of a British vessel against the owners of a Spanish vessel as a result of a collision on the high seas. The defendants pleaded that they were Spanish subjects, and if that there was any negligence on the part of the Spaniards,

53 (1882) 10 Q.B.D. 76.
54 (1839) 1 W. Rob. 35; 166 E.R. 487.
55 Ibid. 487.
56 (1881) 6 P.D. 148.

it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain. The defendants argued that there is no such thing as a general maritime law in universal use amongst all nations, but that each nation adopted whatever portions of what was once known as the general maritime law as was thought desirable, and that the law differed widely from jurisdiction to jurisdiction.

Sir Robert Phillimore did not agree. He considered that from ancient times the law administered in the Court of Admiralty was the general maritime law, and that law was still to be followed in England. Accordingly the applicable law was the general maritime law of England as administered in England. He relied on the following passage of Dr Lushington in *The Zollverein*[57]:[58]

> Generally when a collision takes place between a British and a foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owners cannot be supposed to know or to be bound by the municipal law of the country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if a foreigner comes before the Tribunals of this country the remedy and the form of the proceeding must be according to the *lex fori.*

The leading English authority on collisions is *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*[59] where the English plaintiffs sued the defendants in England for negligence for damage done to their goods by the negligence of one of two Dutch ships which had collided on the high seas. *The Mary Moxham*[60] was distinguished on the grounds that that case arose entirely in Spain, compared with this case where the tort was committed on the high seas "which is the common ground of all countries." Brett L.J. considered that the case concerned whether an action for tort committed on the high seas between two foreign ships could result in an action being maintained in England, although it is not a tort according to the laws of the courts in the foreign country:[61]

> From time immemorial, as far as I know, such actions have been maintained in the Court of Admiralty, and the rule of the liability of the shipowner for the acts of his servants has been invariably employed, and in as much as the rule of exclusive jurisdiction cannot apply, it seems to me that if a foreigner in this country can be served with a writ for an act of his servants done on the high seas, which are as much within the jurisdiction of England as they are within the jurisdiction of any country, an action can be maintained in a Court of common law.

What law? Brett L.J. contended that the question of negligence should be tried, not by the common law of England, but by maritime law, which is part of the common law of England as there administered, and by the maritime law of England as administered in England. Thus the shipowner would be liable for the negligence of the master and the crew of his ship.

57 (1856) Swab. 96; 166 E.R. 1038.
58 Ibid. 99; 1040.
59 (1883) 10 Q.B.D. 521.
60 (1876) 1 P.D. 107.
61 (1883) 10 Q.B.D. 521, 537.

Lindley L.J. also addressed the question of the applicable law, and the submission that Dutch law applied as distinguished from English law or the general maritime law:[62]

> The reason alleged is that each ship being Dutch, the law of the flag, i.e. the Dutch law, regulates the persons on board each ship and determines the rights and liabilities of her owners both towards the captains and crews, and toward the owners of the cargoes on board. This reason is based on a very common and fruitful source of error, viz, the error of identifying the ships with the portions of the territory of States to which they belong. . . . In this particular case the analogy seems more misleading than usual. I am not aware of any decision in this country to the effect that when two ships come into collision on the high seas the rights and liabilities of their respective owners have been held to depend on the laws of the respective flags of the ships. The law applicable in this country to cases of collision on the high seas is the maritime law as administered in England and not the laws of the flags.

The references in these judgments to "the general maritime law" of England have excited much judicial and academic comment.

In *The Tojo Maru*,[63] Lord Denning M.R. made passing reference to the "maritime law of the World" which the English Court of Admiralty "has done so much to form". He then cited a passage of Brett L.J. in *The Gaetano and Maria*[64] which explained what the Court was actually applying:[65]

> It is not the ordinary municipal law of the country but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law.

On appeal to the House of Lords, Lord Diplock dispelled any notion of a general maritime law:[66]

> . . . it is, in my view, based on a misconception. Outside the special field of "prize" in times of hostilities there is no "maritime law of the World" as distinct from the internal municipal laws of its constituent sovereign States, that is capable of giving rise to rights or liabilities enforceable in English Courts. Because of the nature of its subject matter and its historic deviation from sources common to many maritime nations, the internal municipal laws of different states relating to what happened on the seas may show greater similarity to one another than is to be found in laws relating to what happens on land. But that the consequences of applying to the same facts the internal municipal laws of different sovereign States would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from "a maritime law of the World" and not from the municipal law of a particular sovereign State.

Academic writers have also criticised the term "maritime law of the World". Thomas[67] says that such a reference is not an allusion to an esoteric and supranational body of maritime law to which the municipal law of sovereign States is subservient, but simply "a euphemism for the maritime law administered by the English Admiralty Court" (which is exactly what Brett L.J. said in the passage from *The Gaetano and Maria* referred to above).

62 Ibid. 544.
63 [1970] P. 21 (C.A.).
64 (1882) 7 P.D. 137.
65 [1970] P. 21, 62.
66 *The Tojo Maru* [1972] A.C. 242, 290-291.
67 Thomas *Maritime Liens* (Stevens & Sons, London, 1980) 317.

Hancock says there is no uniform maritime law and that there are many substantial reasons why the theory of a general maritime law will not appeal to American Courts:[68]

> There is no reason why a collision between a French and a British ship ought to be adjudicated according to American law upon the pretext it is "general maritime law". In the maritime field as elsewhere, uniformity in all Courts and other choice of law ideals can best be achieved by the thorough going application of choice of law principles.

Hancock considers that the English predeliction for a general maritime law theory is explained by the "notorious indifference of the English to choice of law principles".[69] Notwithstanding this emphatic denunciation of the term by Hancock, it is interesting to note that the term has been used in the United States.[70]

Hancock may well be correct in his assertion that English Judges prefer to decide a problem on jurisdictional rather than choice of law grounds. It is submitted, however, that the phrase has never had a mystical symbolism in the minds of either English Judges or academics. Cheshire and North accurately summarise the position in the following passage:[71]

> The expression, in truth, means nothing more than that part of English law which, either by statute or by reiterated decisions, has been evolved for the determination of maritime disputes.

The Restatement (First) on Conflict of Laws[72] adopted the following principles for ships on the high seas involved in a collision:

> Liability for an alleged tort caused by collision on the high seas outside the territorial waters of any State is governed, (a) by the laws of the State whose flags the vessels fly if the laws of such States are the same, (b) by the law of the forum if the laws of the States whose flags the vessels fly are not the same.

In *The Belgenland,*[73] the United States Supreme Court approved the judgment of the English Court of Appeal in *The Leon*[74] (after citing from the judgment of Brett M.R.):[75]

> . . . This seems to us a very sound view of the subject, . . . Indeed, where the parties are not only foreigners, but belong to different nations, and the injury . . . takes place on the high seas, there seems to be no good reason why the party injured . . . should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris* . . .

68 Hancock, op. cit. 279.
69 Ibid. 280.
70 See, for example, *Liverpool and Great Western Steam Co.* v. *Phoenix Ins. Co.* 129 U.S. 397, 444 (1888), where the Supreme Court said that: "The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof."
71 Cheshire and North *Private International Law* (10 ed., Butterworths, London, 1979) 291. The same position was taken by Brett L.J. in *The Gaetano and Maria* (1882) 7 P.D. 137.
72 These principles were not repeated in the Second Restatement.
73 114 U.S. 355 (1885).
74 (1881) 6 P.D. 148.
75 114 U.S. 355, 368-369 (1885) (per Bradley J.).

The Supreme Court relied on the English cases *The Johann Friederich*[76] and *The Leon* to support its conclusion on cases between ships of different nationalities, arising on the high seas, that the governing law is the general maritime law, as understood and administered in the courts of the country in which the litigation takes place. It did refer to two exceptions; one pertaining to navigation, and the other being that if the maritime law of the two parties is the same — in respect to liability or obligation — then that law should be followed even if different from the maritime law of the country of the forum. That was, of course, *dicta* for in that case the ships involved in the collision were Norwegian and Belgian.

In *The Eagle Point*[77] however, where both ships were British, the Third Circuit Court of Appeals applied English rather than American law, notwithstanding that in doing so full recovery was denied to the cargo owner; as English law (unlike American) entitled the cargo owner to one-half of the damages. This case is therefore quite different in result from *Chartered Mercantile Bank of India and China* v. *Netherlands Steam Navigation Company Limited.*[78]

Hancock compares the more liberal American approach with that of England which clings "steadfastly to the principle that all collisions upon the high seas ought to be adjudicated according to the law maritime, as understood and applied by English courts."[79] There is no reason why the *Eagle Point* principle should not be applied in England provided foreign law is properly pleaded and proved.

In oil pollution cases, questions may arise as to choice of law where the spillage occurs on the high seas, but damage is caused in the territorial waters of a state. At Common Law, if an oil tanker sinks 120 miles out to sea in the Tasman, and the resultant oil slick reaches the New Zealand coast, does New Zealand law apply in the same way as English law is said to apply in collision cases referred to above? It is submitted that the principles in *Chartered Mercantile Bank of India and China* v. *Netherlands Steam Navigation Company Limited*[80] would apply in the case of oil pollution. There seems to be no disagreement that the rule is not limited to cases of collision but applies also to such claims as those arising from damage done to fishing installations, and injuries to submarine cables. In *Submarine Telegraph Cable Company* v. *Dickson*[81] the Court applied English law where the cable of the plaintiff was fouled by the defendant's anchor on the high seas. Willes J. said that the rights and duties of persons navigating vessels apply equally whether in port or on the high seas:[82]

> It is the duty of the persons navigating so to exercise their rights as to do no damage to the property of others. I see no substantial difference between a telegraph cable and another ship.

76 (1839) W. Rob. 35; 116 E.R. 487.
77 142 Fed. 453 (1906).
78 (1883) 10 Q.B.D. 521.
79 Hancock, op. cit. 276.
80 (1883) 10 Q.B.D. 521.
81 (1864) 15 C.B.N.S. 760; 143 E.R. 983.
82 Ibid. 779; 991.

Such a principle would seem to accord with American conflict of laws principles, with the proviso that if the pollution was the result of a collision between two ships of the same flag, it would apply the flag's law. Against that proposition is the argument that there is a new factor, namely damage to United States territory which would warrant the application of American law.

Abecassis[83] raises one other possibility. That is, where the ship in foreign territorial waters spills oil which causes damage in the territorial waters of another State. He would apply the rule in *Phillips* v. *Eyre,*[84] based on the conclusion that the *locus delicti* is the place where the discharge occurred, and not where the damage occurred. The principal alternative is to say that the tort is committed where the damage last occurred, but the objection of Abecassis thereto is the need to apply more than one *lex loci delicti* in the event that damage is suffered in more than one state.

There is authority for the proposition that the tort of negligently causing damage by pollution is committed in the place where the pollutant is poured in, not where the eventual damage results. In *Interprovincial Co-operatives Limited* v. *The Queen*[85] the Supreme Court of Canada upheld an appeal by the defendants, the operators of chlor-alkali plants in Ontario and Saskatchewan, against the finding of a Manitoba Court that they were liable under a Manitoba statute prohibiting pollution of Manitoban waters. The offending mercury had been poured into water-courses that drained into Manitoba. The second recent case was decided by the European Court of Justice, on jurisdictional grounds. The question in *Handelskwekerij Bier* v. *Mines de Potasse*[86] concerned the interpretation of the phrase "the place where the harmful event occurred" appearing in Article 5(3) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The defendant discharged quantities of salt into the Rhine in France, causing damage to the property of the plaintiffs in the Netherlands. The Court considered that the phrase must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it. Neither of those cases is directly on point, as the European decision was jurisdictional; while the Canadian decision involved questions of exterritoriality of a Manitoban statute. In the case of oil pollution there are good grounds for applying the "proper law of tort doctrine".[87] In this way, the criteria referred to in the Restatement would mean that the law of the state where the damage was done would apply.

Such an approach increases the likelihood of the application of the governing law of the state affected by the pollution, rather than the effect of applying the

83 D. W. Abecassis *Law and Practice Relating to Oil Pollution from Ships* (Butterworths, London, 1978) 109.
84 (1870) L.R. 6 Q.B. 1.
85 (1975) 53 D.L.R. (3d) 321.
86 [1978] Q.B. 708.
87 Without necessarily using the phrase "the proper law of a tort" which as Nygh says in "Some Thoughts on the Proper Law of a Tort" (1977) 26 I.C.L.Q. 932, 933, is meaningless.

rule in *Phillips* v. *Eyre*.[88] It may also be possible that the Lord Wilberforce formulation of the *lex loci delicti* with the exception for particular cases would also result in the application of the law of the state where the pollution damage was caused, although there have been no cases which have applied that test. Accordingly, it is not possible to state with certitude how the gloss to the established rule would operate. Morse[89] accepts that often the principles in sections 145 and 6 of the Second Restatement will often point in different ways so that the Court must face up to the policy implications and the values which underlie its decisions in each individual case. He finds support for an analysis of this sort in a 1951 article by Dr Morris in which he said that if the proper law of the tort is adopted, "we can at least choose the law which, on policy grounds, seems to have the most significant connection with the chain of acts and circumstances in the particular situation before us."[90] It is submitted that having made the analysis of the individual factors in a case involving oil pollution, if there was any doubt as to which law to apply, the underlying policy considerations would tend to suggest the law of the state where the damage was done.

B. *Internal Consequences*

In this situation, the law of the flag of the ship is held to be the governing law. Where the country is a federation (e.g., Australia), the governing law is the law of the state or province where the ship is registered. This rule applies both in the United States and in England. Two Canadian cases illustrate the English application of the rule. In *Canadian National Steamship Company* v. *Watson*,[91] the S.S. Cornwallis, a British vessel registered at Vancouver, British Columbia, was proceeding on the high seas. The respondent, Watson, was a carpenter working on board putting locking bars on the hatches. A wave crashed on deck, swept Watson off his feet and, as a result, he was very badly injured. The jury found that the company was negligent in that the Chief Officer should have ordered life lines erected. It appears from the judgment that counsel for the plaintiff erred in not pleading in his statement of claim that British Columbian law was the proper law. That was held to be the law of the port at which the ship was registered, and accordingly a new trial was ordered for want of proof of the law of the port. The Chief Justice held that as the vessel was registered in British Columbia, the law of that province on negligence would have applied if it had been alleged and proved.

This case was followed thirty years later in *Gronlund et al* v. *Hansen*,[92] the facts of which indicate an external component, but it is still held to be an authority for the proposition that where the tort has internal consequences, the law of the flag applies. In this case the motor vessel *Aleutian Queen*, registered at the port of Vancouver, British Columbia, collided with a Russian

88 (1870) L.R. 6 Q.B. 1.
89 G. J. Morse *Torts in Private International Law* (1978, North Holland Publishing Co., Amsterdam) 228.
90 J. H. C. Morris "The Proper Law of a Tort" (1951) 64 Harv. L.R. 880, 888.
91 [1939] 1 D.L.R. 273.
92 (1969) 4 D.L.R. (3d) 435.

trawler, the *Maxhank,* and was badly damaged. After what is described in the judgment as "superficial" inspection of the damage, the master of the *Aleutian Queen* took his ship away from the Russian trawler which had been close by and proceeded to sea. The ship sank a little later, and one of his crew was drowned. An action for the wrongful death of the seaman was brought in British Columbia. The Supreme Court of British Columbia, on appeal, held that the defendant (appellant) negligently failed to appraise the extent of the damage caused by the collision with *Maxhank,* and that going back out to sea was the proximate cause of Gronlund's death.

It was also held that where an accident occurs, it is necessary for the plaintiff to prove that the act was actionable if committed in British Columbia and not justifiable in the place where it was committed — this was held in the absence of proof to the contrary to be the same as the law of British Columbia. That is, the law of the flag required the application of the rule in *Phillips* v. *Eyre,*[93] which at the relevant time in British Columbia required actionability and non-justifiability to be proved.

As there is no direct English or New Zealand authority on point, writers have tended to turn to public international law cases. In *R.* v. *Carr,*[94] which is really a jurisdictional rather than a choice of law case, a British vessel, the *Avalon,* was lying in the river Maas, at Rotterdam about twenty or thirty feet from the quay and against a dolphin. It was alleged that the defendants, British subjects, stole certain parcels from the ship. One of the questions was whether a British subject or even a foreigner could be tried in England. The Crown contended that it was a fallacy to call the ship part of Holland; although it came into Dutch jurisdiction, it never ceased to be subject to the Admiralty jurisdiction of England. The defendants contended that crimes were necessarily local in nature, and as the ship was in port, it was attached to Holland and was under Dutch law.

Lord Coleridge C.J. referred to the evidence that the stealing had taken place whilst the vessel was moored to a quay at a dolphin and "thus attached to the land of the country of Holland". The first issue turned on whether the ship was within the jurisdiction of the Admiralty, so that the stealing took place locally within the jurisdiction of the Court which tried the prisoners:[95]

> The place is clearly within the old description of a place within the ebb and flow of the tide where great ships are accustomed to go. The ship was accustomed to go there in its trading, it was there in the course of its trading. That is enough to make it clear that the place is within jurisdiction.

The second question involved the persons concerned. Lord Coleridge C.J. asked whether there was anything in the personality of the thief, who stole from a place within the jurisdiction, to render him not triable in England:[96]

93 (1870) L.R. 6 Q.B. 1.
94 (1882) 10 Q.B.D. 76.
95 Ibid. 84.
96 Ibid. 85.

> The true principle is, that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and liable to the punishment it inflicts upon those who infringe its requirements. I can draw no distinction betweeen those who form part of the crew, those who come to work in or on the ship, those who are present involuntarily, or those who come as passengers.

The exact locality of the ship would appear to bring it within foreign territorial waters if the tests in the earlier cases are to be accepted. This case is cited, however, in relation to acts on a ship on the high seas where there are no external consequences. Pollock B., however, said that the ship was in tidal waters "where great ships do go"; Lopes J. said the ship was on the high seas, "where great ships do go". Stephen J. also agreed that the Court had jurisdiction, and could see no reason founded on expediency or authority to induce the Court to say that:[97]

> . . . a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment of the ship to land, or to enquire when the flag is lowered or hoisted.

A case that is also cited in support of the high seas proposition is *R.* v. *Keyn*,[98] although it is purely jurisdictional, and has nothing to do with choice of law. There the question was as to the jurisdiction of the English Court to hear a criminal case resulting from a collision. It was held that the Central Criminal Court had no jurisdiction; but in the course of his judgment Lindley J. said on the question of the law of the flag:[99]

> When, indeed, a ship is out at sea in waters which are not the territorial waters of any state, it is right that those on board her should be subject to the laws of the country whose flag she bears; for otherwise they would be subject to no law at all. To this extent a ship may be said to be part of the territory of the country of her flag; but so to speak of her is to employ a metaphor and this should never be lost sight of.

Lord Atkin expressed contrary views in *Chung Chi Cheung* v. *The King*[100] where the doctrine of territoriality, which regards the public ship as a floating portion of the flag state, was rejected. Lindley L.J. in *Chartered Mercantile Bank of India and China* v. *Netherlands Steam Navigation Company Ltd.*[101] expressed a disinclination to use either the term or the doctrine. Indeed he cautioned against such use. Reference has also been made to the decision of the United States Supreme Court in *Lauritzsen's* case where Jackson J. looked at the law of the flag (albeit for an accident in territorial waters). He also referred to the criticism of the concept of the ship as a floating part of the flag state and mentioned the decision of the Permanent Court of International Justice in *The Lotus*,[102] which considered that a ship is assimilated to the territory of the state of the flag that it flies.

97 Ibid. 86.
98 (1876) L.R. 2 Ex. D. 63.
99 Ibid. 94.
100 [1939] A.C. 160.
101 (1883) 10 Q.B.D. 521.
102 (1927) P.C.I.J. Rep. Ser. A, Nos. 9 and 10.

Should the law of the flag be the governing law in such circumstances? There is really no other choice. The *lex fori* is theoretically an option, but that has the same objections as those relating to the application of the *lex loci delicti* in the territorial waters cases where all relevant events take place on board ship. If a tort was committed, for example, on a Taiwanese ship on the high seas, it would be quite strange if New Zealand law were to be applied in the unlikely event that a New Zealand court was the forum. (Unlikely, because doubtless the Court would declare itself to be a *forum non conveniens,* unless both parties submitted to the jurisdiction of the New Zealand Court.) The other option is to apply a general law of the sea, but this has been rejected by the Circuit Court of New York in *Lindstrom* v. *International Navigation Company,*[103] where a passenger was washed overboard and drowned in the high seas. It was held that the steamship company operating an American vessel the *St Paul,* registered in New York, was liable to the deceased's administrator under New York law. Again the proposition was accepted that the vessel was the territory of New York.

Hancock[104] proposes one other option, namely that there is no law in force on the high seas, so that an injured man could receive nothing. He correctly says, however, that such a proposal is objectionable on policy grounds. It is hardly conducive to justice.

Section 406 of the First American Restatement is not repeated in the Second Restatement but the old principle has not been doubted. It provides that liability for an alleged tort committed on board a vessel while the vessel is on the high seas outside the territorial waters of any state is determined by the law of the state whose flag the vessel flies. The *locus classicus* in the United States is the decision of the Supreme Court in *The Titanic.*[105] The Supreme Court held that the foreign ship may resort to the courts of the United States for a limitation of liability (presumably on the ground that limitation is a procedural question, and all questions of procedure are determined by the *lex fori*). Holmes J. also said, however, that the foundation for recovery upon a British tort is an obligation created by British law. In *La Bourgogne,*[106] the Supreme Court held that the *lex fori* governed fault and the liability of a limited liability fund, but that the right of action was governed by the law of the flag.

The other important American decision is that of Learned Hand J. in the Second Circuit Court of Appeals case *O'Neill* v. *Cunard White Star Limited,*[107] where the wife of Richard O'Neill, a British subject, sued the British corporation, Cunard, to recover damages resulting from his death while an able seaman on one of its ships. She alleged that he had been washed overboard on the high seas as a result of the negligence of the company. The claim was based on the Jones Act, of which mention has already been made. Learned Hand J.

103 117 Fed. 170 (1902).
104 Hancock, op. cit.
105 233 U.S. 718 (1914).
106 210 U.S. 95 (1908).
107 160 F. 2d 446 (1947).

relied on the First Restatement to hold that liability would be determined by the law of the flag, "that being the pattern for which rights and duties are declared for acts done on the high seas".[108]

In conclusion, therefore, New Zealand law, where a tort is committed on the high seas having no external consequences, must be that of the law of the flag. If an Australian ship is the site of the tort, it follows that the rule of *Phillips* v. *Eyre*[109] applies and must be satisfied before the law of the flag will be applied.

IV. CONCLUSIONS

The questions raised in this paper until recently were of interest to academic writers only. Rarely, if ever, would a problem come before the courts of either England or New Zealand where the law of tort committed on a ship was required to be determined. But times change. The increasing interrelationship between nations and systems of law has necessitated a reappraisal of the choice of law principles in tort. The Law Commission in England recently published a consultative memorandum on choice of law in tort and delict, and made various proposals for reform.[110] No change was proposed for the choice of law principles where a collision occurs on or over the high seas. Thus the *lex fori* will continue to be the applicable law. Reform has, however, been proposed where torts involving ships and aircraft are committed in other places. Where a train of events is confined to one ship on or over the high seas, the Commission concludes that the appropriate law is the state to which the ship belongs. In territorial waters, the Commission has case and to the rejection of the double actionability rule in *MacKinnon's* case.

Where events are not confined to one ship, new tests are also suggested. Thus, where a train of events occurs wholly or partly on or over the high seas, such as a defamatory statement communicated from one ship to another or from a ship on the high seas to dry land or vice versa, it is suggested that the event which occurs on board a ship should be treated, for choice of law purposes, as having occurred within the state to which the ship belongs. Where, however, the train of events occurs wholly within or over national waters or partly in national waters and partly on adjoining land, it is suggested that no provision be made, but that any legislative enactment should provide only that a train of events confined to a single ship should be considered for choice of law purposes as having taken place in the state to which the ship belongs. The reason for the lack of provision where the train of events is not confined to a ship is the likely rarity of such an occurrence. The alternative proposed by the Commission is to regard the events as having taken place in the state to which the ship belongs.

Whether or not the English Law Commission proposals are made the subject of legislation, it is clear that the time has come to change the existing rules. Cer-

108 Ibid. 448.
109 (1870) L.R. 6 Q.B. 1.
110 Supra. n. 5, particularly at 205 *et seq.* (para 5.76).