

Maritime law and jurisdiction

WORK ACCIDENTS AT SEA – A UK PERSPECTIVE

By Kathryn Hudson

Work accidents at sea are potentially fraught with difficulties for legal practitioners representing those injured. Does your court have jurisdiction to hear the dispute? If so, what is the applicable law?



Photo © Andreja Polivanovs / Dreimstime.com.

Answering these questions after an accident occurs on board a vessel means first identifying the target defendants.

IDENTIFYING THE DEFENDANT

The first line of enquiry is to examine the injured person's contract of employment. This will of course identify the employer and their domicile and may also contain

a jurisdiction clause, which will determine the agreed jurisdiction and confirm the applicable law.

If the employer recognises a union, there may be an agreement between the employer and the union which includes a jurisdiction clause.

In the absence of a jurisdiction clause, investigations need to be made to identify the relevant defendants. Depending on the allegations of negligence, you may need to take action

against the vessel's owner instead of, or in addition to, the employer. These are not necessarily the same party.

SERVICE OF PROCEEDINGS

In the courts of England and Wales,¹ the key to establishing jurisdiction is service of proceedings. If the defendant is within the jurisdiction of the English courts, then provided that the rules are followed and proper service is achieved, jurisdiction will be established.

If there are two defendants and one is within the jurisdiction of the English courts and the other outside, then it is possible to serve the foreign defendant. Sometimes it is necessary to obtain permission of the court to serve outside the jurisdiction; in other circumstances, service can validly be achieved without permission of the court.

In *Booth v Phillips*² the claimant was a widow whose husband had died while working on a ship in Egypt. The master of the vessel was domiciled in England and she brought a claim against him in England. She also applied to join in other defendants, who were not domiciled in England. These were the vessel's owners and managers. The judge found that the widow's claim against the master raised an actionable issue which it was reasonable for the court to try and, on that basis, the other defendants conceded that they were necessary or proper parties to the claim. The claimant had therefore established a ground to enable the court to grant permission to serve proceedings on the defendants who were not domiciled in England, subject to the court's discretion.

TERRITORIAL WATERS OR HIGH SEAS

Territorial waters are those waters that are within 12 nautical miles from the low water line of the country's coast. If an injury occurs within those waters, it is possible to bring your claim in the country to which those territorial waters belong, on the basis that the tort occurred within the jurisdiction of that country.

If the vessel is in international waters (also referred to as the 'high seas') then the flag of the vessel becomes relevant because the vessel is deemed to be a part of the state represented by the flag. The vessel is then under the jurisdiction of the flag state and subject to the laws of that flag state.

FLAG STATE

Each flag state keeps a ship register in which all ships that sail under their flag need to be registered.

A ship operates under the laws of its flag state, and therefore these are the laws that apply to the vessel.

The laws include the regulations governing health and safety on board the ship, which are more onerous and more rigorously enforced by some flag states than by others. This can result in the vessel being registered under a 'flag of convenience'.

Flags of convenience

Each ship is entitled to fly the civil ensign of the state in which she is registered. The flag state in which a ship

is registered exercises regulatory control over the vessel. The term 'flag of convenience' describes the practice of registering a merchant ship in a sovereign state different from that of the ship's owners. This can serve to reduce operating costs and can also avoid the regulations applicable in the country of the vessel's owners.

More than half of the world's merchant ships are registered under flags of convenience. There are currently 32 countries on the register, including the larger registries of Panama, Liberia, Marshall Islands and the Bahamas. Other significant flags which are also on the International Transport Workers' Federation (ITF) register include Cyprus and Malta.

Flags of convenience can enable shipowners to assume legal anonymity and difficult to pursue in a civil action. They can also lead to increased freedom in choosing employees from many different nationalities, reducing the operating costs.

Some of the flag of convenience registries place no restrictions on the nationality of the crew. This can result in language difficulties and seafarers being unable to communicate with each other. This puts safety at risk.

Criticisms of the flag of convenience system include that these flag states have insufficient or inadequate regulations, which are poorly enforced. In some cases, the flag state cannot identify a shipowner. If a party cannot even be identified, then of course it cannot be pursued by an injured seafarer.

The ITF retains a register of flag of convenience states which have been declared flags of convenience by the ITF's Fair Practices Committee, which runs the ITF campaign against flags of convenience.

ACTIONS IN REM AND ARREST

Personal injury actions are usually brought against either individuals or corporate bodies. These actions are actions *in personam*.

It is, however, possible to bring an action *in rem*, which is an action against the property itself.

This can result in the vessel being arrested, which prevents it from continuing to trade. An arrest is of course highly disruptive to a vessel and the threat of an arrest can be sufficient to cause the shipowner to take steps to avoid the arrest taking place.

To prevent the arrest from taking place, or to have the vessel released once she has been arrested, the shipowner can provide security for the claim. This is sometimes achieved by paying into court a sum sufficient to satisfy the claim but, more usually, security is provided by a bank or the vessel's Protection and Indemnity Club (P&I Club³) providing a letter of undertaking. This is also known as a 'letter of comfort'. It gives an undertaking to pay, up to a specified amount, any judgment that is entered in favour of the claimant, to include damages, interest and costs.

A note of caution – once a vessel has been arrested and her voyage interrupted, there is usually a loss of revenue to the owner or charterer. If a vessel is arrested maliciously, then damages for losses may be awarded against the arresting party. If the vessel is arrested unreasonably, then >>

the costs of the arrest may not be recovered in the costs of the claim in the event that the claim is successful.

Arrest is therefore not a step to be taken lightly. When a party places a vessel under arrest, it is necessary to give an undertaking to the Admiralty Marshal to be responsible for the costs of keeping the vessel where she is, including paying the crew's wages, bunkers, dock dues, etc.

It is possible in some circumstances for shipowners to protect their ships from arrest by entering a caution against arrest in the Register held by the Admiralty Court.⁴

Flags of convenience can reduce operating costs and the regulations applicable, and enable shipowners to assume legal anonymity.

It is possible for the parties to extend the two year limitation period under the Athens Convention. This can be done by a declaration by the carrier or by agreement of the parties after the cause of action has arisen, but the declaration or agreement must be in writing.

SECTION 190 MERCHANT SHIPPING ACT 1990

The second circumstance in which a two-year limitation period applies to claims against the ship or her owners in respect of damage or loss caused by the fault of that ship, to another ship, its cargo or freight or any property onboard it, or for damages for loss of

MARITIME LIEN

An action *in rem* can be brought to enforce a maritime lien. In admiralty law, a maritime lien is a privileged claim on maritime property, usually a ship but also possibly a claim on her cargo or the proceeds of sale of the ship. It is not a claim against the owner.

For this reason, an action *in rem* is said to be against 'all the world' and can therefore be hugely advantageous to an injured seafarer.

A maritime lien can arise in respect of various types of claim, including wages of the ship's master and crew; salvage operations; preferred ship mortgages and, in some countries, bunker supplies. The important claim for crewmembers is that a lien can arise in respect of maritime torts, including personal injury and death.

As the lien attaches to the thing itself (the *res*), it survives the sale of the vessel to an innocent new owner. The lien can be discharged by an execution sale in a *rem*. This will remove the attachment of the lien and the new shipowner will receive the vessel with clear title.

Destruction of the *res* results in the extinction of the lien so if the whole ship is destroyed, the lien is lost. Partial destruction will not serve to extinguish the lien, so the lien will attach to the remaining part of the vessel.

Where an action *in rem* is brought against a ship, the ship must be arrested to enforce the lien.

LIMITATION PERIODS

The usual limitation period for a claim in tort is three years, under the *Limitation Act 1980* (UK).

There are two circumstances under English law in which a shorter period of two years applies.

THE ATHENS CONVENTION⁵

The first circumstance arises in respect of passengers travelling under a contract of carriage. It does not apply to seafarers/crew members working on a vessel who are contracted as employees.

Article 16 of the Athens Convention provides for a time limit for personal injury claims of two years from the date of disembarkation.

life or personal injury caused by the fault of that ship to any person on board another ship, is when s190 of the *Merchant Shipping Act 1990* applies.

It is a common misconception that s190 applies where there is injury resulting from collision between ships. It is not actually necessary for a collision to occur, merely for there to be a 'two-ship' incident.

If a ship-to-ship mooring operation is taking place, therefore, and a crew member on the first ship is injured by the negligence of a crew member on the second ship, that claim will be subject to s190 and the two-year limitation period will apply.

ENGLISH COURTS AND THEIR JURISDICTION

Having considered all of the potential parties who could be brought into a claim, a decision has to be made as to whether the English courts would have jurisdiction to hear the case.

The domicile of the defendant is relevant.

However, there have been a number of instances in which the English courts have heard cases which may, at first sight, appear to fall outside the jurisdiction.

We have already considered *Booth v Phillips* above, in relation to whether the widow had satisfied the requirements to enable her to obtain permission to serve proceedings outside the jurisdiction.

That case was also considered when determining whether the claimant could pursue the foreign defendants in relation to tort. One of the grounds for doing so required damage to be sustained within the foreign jurisdiction. The defendants unsuccessfully contended that only the damage that completed the cause of action would suffice to satisfy the definition. The claimant had claimed funeral expenses and damages under the *Fatal Accidents Act 1976*. Those ongoing losses were sufficient to satisfy the requirement for damage to be sustained within the jurisdiction.

The point was also considered in *Cooley v Ramsey*.⁶ The claimant was a British citizen with close family living in England. He was on a working visa, living in Australia, where he sustained serious injury in an accident, when his

motorcycle collided with the defendant's car in New South Wales. The defendant was domiciled in Australia. The claimant was repatriated to England and Tugendhat J granted permission to serve the proceedings on the Australian defendant, following the decision in *Booth v Phillips*. The case was appealed and heard by the Court of Appeal, although it was subsequently settled before the judgment of the Court of Appeal was handed down. The dispute in the case centred on whether the courts should follow the restrictive approach adopted by the Rules of the Supreme Court, which were in force prior to the inception of the Civil Procedure Rules⁷ and the European cases, or adopt the more liberal approach of Commonwealth jurisdictions, notably Australia and Canada.⁸

APPLICABLE LAW

Having accepted that the English courts have jurisdiction, it is necessary to identify the applicable law. The law that applies is divided into substantive law and procedural law. The substantive law is determined according to certain rules and the procedural law is the law of the forum. If the case is brought in England, the procedural law is English law.

In deciding on the applicable substantive law, consideration is given to the following issues:

- (1) Is the substantive law foreign or English?
- (2) If the substantive law is foreign, what issues are covered by procedural law?
- (3) If the substantive law is foreign, how is that law proven and what limitation rules apply?
- (4) If the substantive law of a claim with a foreign element is English, to what extent will English law apply to the claim?

There is a general rule in determining substantive law, and that is that the applicable law is the law of the country in which the events constituting the tort in question occur. Where elements of those events occur in different countries, the applicable law under the general rule is taken to be – for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury – the law of the country where the individual was when s/he sustained the injury.

In *Roerig v Valiant Trawlers Limited*,⁹ a Dutch fisherman died on board a ship which was registered in England and which was in international waters at the time of his death. In these circumstances, the tort occurred in England and the applicable law under the general rule was English law.

The general rule can be displaced upon application of either party, although they would have to show that from a comparison of the significance of the factors that connect the tort with the country whose law would be the applicable law under the general rules, and the significance of any factors connecting the tort with another country, it is *substantially more appropriate* for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country. The general rule is then displaced and the applicable law for determining the issue or issues is the law of that other country.

The relevant factors are construed very broadly, but the

key factors taken into account are where the tort occurred, and the nationality and domicile of the parties. This includes not only the claimant and defendant, but also the defendant's insurer.¹⁰

In *Roerig v Valiant Trawlers Limited*, the court emphasised that the general rule should not be displaced easily and that due weight should be given to the word 'substantially'. The factors connecting the tort with the other country must make it substantially more appropriate to displace the general rule.

Thus, in *Roerig*, the claimant, a Dutch widow, brought a claim under the *Fatal Accidents Act 1976* (UK) for loss of dependency. The accident occurred on an English-registered vessel owned by an English company. The deceased was also Dutch. Under the general rule, the applicable law was English law. The claimant lived out her losses in Holland and also benefitted from substantial state benefits in Holland. The defendant argued that Dutch law should apply, but the fact that the defendant was English and the accident occurred in England (although the vessel was in international waters at the time, but flying an English flag) was enough to rebut the defendant's application.

CONCLUSION

As can be appreciated from the various topics covered briefly here, there are many factors to be taken into account when deciding whether the English court has jurisdiction to determine a claim which involves a defendant in another country. Regard should be paid to the various factors considered above to identify the target defendant and establish where they can be served. If they cannot be served with the jurisdiction, you will need to consider whether the rules will allow you to serve without obtaining the court's permission and, if not, on what grounds you can apply for permission. Only if you can obtain permission to serve the proceedings will the case be allowed to proceed in the English courts. ■

Notes: **1** All references in this article to 'English law' or to the 'English courts' refer to the courts governing England and Wales. **2** *Booth v Phillips* [2004] EWHC 1437. **3** A non-profit making body providing indemnity cover for its shipowner members. **4** The Admiralty Court is based at the Royal Courts of Justice in London. **5** The Athens Convention is enacted into English law by Schedule 6, *Merchant Shipping Act 1995*. It covers passengers on a contract of carriage, but does not cover crew members working on a ship under a contract of employment with the shipowner. **6** *Cooley v Ramsey* [2008] EWHC 129. **7** Civil Procedure Rules 1998 (UK). **8** See *Flaherty v Girgis* (1985) 4 NSWLR 248, where the Court of Appeal in NSW considered whether the plaintiff, who had suffered injuries as a result of a car accident in Queensland, but who had been treated in NSW where she had incurred expense, could establish jurisdiction in NSW. It was held that she could. See also the judgment of the High Court in *Booth v Phillips* [2004] EWHC 1437 (Admlty) (17 June 2004). **9** *Roerig v Valiant Trawlers Limited* [2002] 1 WLR 2304. **10** See *Edmunds v Simmonds* [2001] 1 WLR 1003.

Kathryn Hudson is a solicitor and partner at Bridge McFarland Solicitors, England. **PHONE** (+44) 1472 316622
EMAIL kmh@bmcfc.co.uk **WEBSITE** www.bmcfc.co.uk.