

Why First Year Law Students Should Study Maritime Law¹

Maritime law should be mandatory in first year law school. Indeed, I make the case that it should be the only subject taught in first year law school. William Tetley, Q.C., friend – teacher – scholar, whose memory we honour today, would approve of my thesis. I will name my school the Tetley School of Law. I will be the first dean. Applications by faculty and students will be given careful consideration.

Let me explain my thesis and tell you about my curriculum.

Law students must fall in love with the law. For that to happen, they must discover the majesty of the law, the glorious history of the law and the joy and discipline of legal reasoning. They will not find these on the foggy bogs of England or on the banks of the Rideau Canal. They will find them in the salt air, in the tempests on the high seas, in the chafing of rope on wood and in the clash of steel on steel. Maritime law will excite them about law and will, incidentally, introduce them to every subject they will study at the law school.

Maritime law features prominently in most law school curricula, but no one bothers mentioning it. The wretched students are left to wrestle with arcane terms such as “fo’c’sle”, “stevedore”, “charter party” and “bill of lading”, without being taught the difference between the pointy end and the blunt end of the ship, or the port from the starboard. They don’t understand why so many cases are named after ships. They are left thinking about admiralty lawyers as people who wear funny three-cornered hats.²

Why do maritime cases occur so frequently in the law school syllabus? In the 18th and 19th centuries, when the common law was really developing, maritime issues dominated the commercial world. Maritime cases spawned big problems. They generally involved large amounts of money (shipwrecks, collisions, cargo disasters) and shipowners and their insurers could afford to litigate such cases. They were prepared to spend large amounts of money to set legal precedents to govern their commercial and insurance practices. It is no accident that many of the leading cases in tort and contract involved maritime law. The sea was the major commercial artery at the time this law developed and the treacherous nature of sea voyages and the physical distances from the rest of humanity brought core human interactions to the fore.

¹ I would like to express my thanks to Valerie Crystal, law clerk at the Court of Appeal for Ontario, for her research and assistance in the preparation of this paper. I thank as well my former law partners, Kristine Connidis and Marc Isaacs, who read and commented on drafts of this paper and made useful recommendations for the curriculum.

² I once met an Australian maritime law student at a cocktail party in Toronto. In his heavy Aussie accent he explained to everyone he met that he was writing his thesis on “merry time lore”. I mentioned to one of the guests that he seemed very bright. He replied, “Maybe, but I don’t know how anyone could write a thesis on Mary Tyler Moore.”

So welcome to the Tetley School of Law. Let me introduce you to the first year curriculum.

Legal History

Today's law students study cases originating, maybe, in the 19th or 20th centuries. They think the law sprung up sometime around the time that Mr. Baxendale (or was it Hadley?) was waiting for his mill shaft or Mrs. Donoghue (or was it Stevenson?) might or might not have swallowed a snail.³

This is an outrage. When the ancestors of common law lawyers were resolving their disputes with clubs and stones, there were sophisticated legal regimes in ancient China, Babylon, Phoenicia, and Rhodes in the Mediterranean. The law school's founder, Bill Tetley, wrote about this history in an article in the Tulane Law Journal entitled "Maritime Law as a Mixed Legal System".⁴ He pointed out that as early as 800 B.C. there existed a Maritime Code of the Rhodians, which was later incorporated into Roman Law. As recorded in Justinian's Digest, the Roman Emperor Anoninius (138-161 A.D.) stated: "I, indeed, am Lord of the world, but the law is lord of the sea. Let it be judged by Rhodian law, concerning nautical matters, so far as no one of our laws is opposed."

The students in our law school will learn that maritime law developed in different regions of the world, at different times. They will learn how the great maritime voyages of discovery, exploration and trade led to highly sophisticated written and unwritten legal regimes, cross-pollinating each other, and all shaped by the maritime environment, the perils of the seas, the great distances, and the absence of a regulatory environment.

Criminal Law

After an introduction to legal history, the interrelationship of legal systems, and the forces molding the development of admiralty law, students will examine the link between the law and morality. What better way than an examination of criminal law?

In many law schools today teachers now steal from the admiralty curriculum by teaching the case of *Her Majesty the Queen v. Tom Dudley and Edwin Stephens*.⁵ This is, as many of you will recall, the horrendous case of four shipwrecked sailors, adrift for 20 days in a lifeboat, who killed and ate their dying shipmate, a cabin boy by the name of Richard Parker, in order to save their own lives. After being rescued and returned to England, the three survivors were charged with murder. The court found that necessity provided no excuse to

³ I've always wondered how they knew it was a snail if she swallowed it.

⁴ William Tetley, Q.C., "Maritime Law as a Mixed Legal System", (1999), 23 Tul. Mar. L.J. 317.

⁵ *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.

murder, and Dudley and Stephens were convicted.⁶

Those of you who are students of Canadian literature, or film, will recognize the name of the poor cabin boy, Richard Parker – it was the name the shipwrecked Bengal tiger in the lifeboat in Jan Martel's *The Life of Pi*.

Students will also study an earlier case of a capsized ship, *United States v. Holmes*,⁷ which will similarly force students to grapple with the philosophical question of whose life should take precedence in situations of extreme peril. A lifeboat carrying passengers and crew from the sinking ship was both overcrowded and leaking. The mate in charge of the lifeboat was convinced that all would perish if some were not thrown overboard. So the crew began throwing passengers overboard, without drawing lots, taking care to spare the women and not to part man and wife. These selection criteria were not accepted by the court, as “the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice”.

The students will then move to a modern-day maritime law case, *Perka v. The Queen*,⁸ which is taught superficially in conventional law schools for the three-part test for the defence of necessity. In the Tetley School of Law, the judicial test will be put in context and students will focus on the ocean hazards faced by the drug-smuggling sailors forced to take refuge on Canadian soil. Necessity cannot be fully appreciated without understanding the immediate peril of capsizing due to mechanical troubles and treacherous weather.

To show the students just how current these issues are, they will discuss the very recent decision of the court on which I sit, the Court of Appeal for Ontario, in *R. v. Aravena*,⁹ which considered *Dudley and Stephens*. The court held that the common law defence of duress may be available to a person charged as a party to a murder whose conduct was morally involuntary.

These cases will bring students face to face with the kinds of life and death issues, spawned by the marine environment, that have shaped maritime law. They will consider the intersections between the law of the jungle, the law of the sea and the law of the land.

Contracts and Torts

First year law students aren't really at peace with themselves until they study contracts and torts. They like the word “tort”. They bore their friends with it. They impress their friends with the significance of peppercorns. This is all very

⁶ No evidence was called against the third survivor.

⁷ 26 Fed. Cas. 360 (1842).

⁸ [1984] 2 S.C.R. 232.

⁹ 2015 ONCA 250.

juvenile, but nothing teaches legal reasoning like contracts and torts and nothing brings the subjects to life like maritime law.

The Tetley School of Law will introduce students to legal reasoning through selected maritime cases on the law of contracts and torts.

CONTRACT LAW

Open any first year text on contract law and admiralty cases leap from the pages. Why? Because in the 19th century in particular maritime commerce was the mainstay of the economies of the world's leading powers. Our maritime-only contracts course will require only the most minor adjustments from the way contracts is currently taught.

Consideration

As one of the three ingredients of an enforceable contract, consideration is an essential component of any contracts course. Luckily for our program, three of the foundational cases on consideration¹⁰ stem from agreements between sailors and their captains. When their ships got into trouble, the sailors promised to continue to perform their duties in treacherous conditions in exchange for higher wages. Once the ships got safely to shore, the captains refused to honour their end of the bargain. Should these contracts be enforceable? Students will learn that the answer is sometimes yes and sometimes no. They will become frustrated by the lack of consistency in the law, but will never forget that a promise to perform a pre-existing duty is no consideration.

Contract formation

Another key requirement for entering into a valid contract is a “meeting of the minds”. If there is no mutual intention in the offer and acceptance, then there is no true *consensus ad idem*. This concept will be eloquently conveyed to students with a case involving a ship – or rather two ships – called, ironically, the “Peerless”. In *Raffles v. Wichelhaus*,¹¹ a contract specified that goods were to be shipped from India on the *Peerless*. However, there were in fact two vessels called the *Peerless* leaving from Bombay within two months of each other. Should the contract be enforceable? The students will always remember that the answer depends on whether the parties had the same *Peerless* in mind.

Remoteness

¹⁰ *Harris v. Watson* (1791), Peake 102, 170 E.R. 94; *Stilk v. Myrick*, (1809), 2 Camp. 317, 170 E.R. 1168; *Hartley v. Ponsonby* (1857), 119 E.R. 1471, 7 El. & Bl. 872.

¹¹ (1864), 159 E.R. 375, 2 H. & C. 906 (Ex.).

Every first year law student studies *Hadley v. Baxendale*, learning about foreseeability and remoteness of damages. Our students will begin with its offspring, *The Heron II*.¹² If you recall, the *Heron II* was late in delivering a sugar shipment because it took a detour at sea. By the time the shipment arrived, the price in sugar had dropped. Students will enjoy debating whether falling sugar prices would be in the contemplation of the parties. Then they will turn to *Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilles)*,¹³ an important case that brings shipping customs into the foreseeability analysis. Law students will build on their knowledge of maritime history to determine what risks would be in the contemplation of the reasonable shipper. They will then be in ship shape to apply this principle to other industries.

Privity of contract

Maritime cases provide an ideal context for students to learn about privity of contract. Shipping, chartering, and even yacht racing involve multiple parties in complex relationships. It is no wonder they give rise to some of the leading privity cases that every law student should know.

In *The Satanita*,¹⁴ yacht owners had agreed in a contract with the yacht club that they would be liable for all damages arising from disobeying the club sailing rules. In a yacht race, the *Satanita* broke a rule and ran into and sank another yacht, the *Valkyrie*. When the owner of the *Valkyrie* sued the owner of the *Satanita*, the House of Lords “navigated” around the privity of contract rule by finding that the yacht club was acting as an agent on behalf of all other yacht owners, and thus the *Satanita* owners were liable to the *Valkyrie* owners.

When you walk down the halls of a law school – which I regularly do in order to prepare myself for the role of law dean – sceptical students can be heard asking about why they should care whether stevedores can be third-party beneficiaries to a bill of lading or whether charterers can be covered by a vessel’s insurance policy. This is an unfortunate state of affairs, which an all-maritime curriculum will remedy. The cases of *Scruttons v. Midland Silicones*,¹⁵ *The Eurymedon*¹⁶ and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*¹⁷ deal with just those issues and are critical to grasping the shipping context underlying key legal concepts and the nuances of privity of contract.

Remedies

¹² *Koufos v. C. Czarnikow, Ltd (The Heron II)*, [1969] 1 A.C. 350 (H.L.).

¹³ [2008] UKHL 48, [2009] 1 A.C. 61.

¹⁴ *Clarke v Earl of Dunraven (The Satanita)*, [1897] A.C. 59 (H.L.).

¹⁵ [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.).

¹⁶ *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)*, [1975] A.C. 154.

[1974] 2 W.L.R. 865, (P.C.).

¹⁷ [1999] 3 S.C.R. 108.

A course in contracts would not be complete without a unit on remedies for breach of contract. What better way to learn about damages than by attempting to quantify compensation for the non-existence of a sunken ship, which by contract was supposed to exist. This is the case of *McRae v. Commonwealth Disposals Commission*¹⁸ from the High Court of Australia. McRae was awarded the rights to salvage an oil tanker on the Jourmaund Reef that had supposedly wrecked during WWII. As it turns out, there was no ship. Because it was impossible to know the expected profit that McRae could have made from salvaging the ship, had it existed, the court found that McRae was entitled to reliance damages instead of expectation damages.

After completing several fact patterns involving capsized ships and lost treasures that test their ability to calculate damages, students will turn their minds to the question of when breach of contract permits repudiation of the contract, rather than damages. The focus will be on *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha*,¹⁹ in which Diplock L.J. found that the seaworthiness of a vessel cannot necessarily be pigeonholed as either a “condition”, giving rise to repudiation, or a “warranty”, giving rise to damages. The category of “innominate” terms was thus created. This category was then narrowed by the House of Lords in *Bunge Corp., New York v. Tradax Export S.A., Panama*,²⁰ where the contractual term at issue was the length of notice of readiness to be given by a vessel.

TORT LAW

Standard of Care

The controversial case of *U.S. v. Carroll Towing Co.*²¹ will be the starting point for getting students to think about the fundamental negligence law question of how much care a “reasonable person” must take. Many law students are familiar with the “Hand formula” for the economic calculus of the standard of care. They may mistakenly believe it has something to do with the “invisible hand” of the economic market. They may not know that Justice Learned Hand developed this formula in order to decide whether it was negligent to leave a barge unattended, since “there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those around her.”²² Should standard of care be a cost-benefit calculation? The case of the negligent bargee provides the spark for curious law students to weigh in on the issue.

¹⁸ (1951), 84 C.L.R. 377.

¹⁹ [1962] 2 Q.B. 26 (C.A.).

²⁰ [1981] 2 All E.R. 513 (H.L.).

²¹ 159 F. 2d. 169 (2d Cir. 1947).

²² Justice Hand reasoned that the owner's duty was a function of three variables: “(1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.”

Duty to Rescue

A captain of a ship or boat takes on great responsibility for the safety of the crew and passengers. But does the captain have a legal duty to attempt a rescue when a sailor or passenger falls overboard? In 1913, the answer given by the Court of Appeal for Ontario was “no”: *Vanvalkenburg v. Northern Navigation Co.*²³ That all changed with the Supreme Court’s decision in *Horsley (Next friend of) v. The Ogopogo; Horsley v. MacLaren*,²⁴ which imposed a legal duty on a host and owner/operator of a ship to do the best he or she can to rescue a guest who has accidentally fallen overboard. This will be a relief to the students. They will know that they can sue me if I fail to rescue them during their final exam. This is probably a good point to mention that the final exam will take place on a ship.

Remoteness

The sea is the domain of the unexpected. Perhaps this is why someone who is confused or bewildered is said to be “at sea”. The modern doctrine of remoteness is concerned with unexpected harm, and three seminal remoteness cases involve something that one does not expect to mix with water – fire.

Re Polemis and Furness, Withy and Co.,²⁵ will be the jumping-off point for students to dive into remoteness. A Greek steamship, the *Thrasyvoulos*, was carrying cases of benzene, some of which were leaking, causing the air to fill inconspicuously with petrol vapour. One of the workmen caused a board to fall, which created a spark, igniting the petrol vapour and causing a fire. The defendant was found liable because the fire was a *direct* result of knocking down the plank, even if the fire was an unexpected result.

After *Polemis*, students will forge ahead with *Wagon Mound Nos. 1 and 2*,²⁶ where they will learn that the key to remoteness is foreseeability, not directness. Both *Wagon Mound* cases turned on the question whether it was foreseeable that furnace oil could ignite when carelessly spilled into a bay. In fact, both cases arose from the same accident. Servants on a vessel called the “Wagon Mound” allowed a large quantity of furnace oil to be spilled into the bay, and made no efforts to disperse the oil. Then, molten metal from the wharf fell onto a piece of debris, which ignited the floating oil and severely damaged the wharf and two other vessels. *Wagon Mound No. 1* was a law suit by the wharf owner; *Wagon Mound No. 2* was a law suit by the owners of the damaged vessels. Although arising from the same incident, the cases had separate trials with separate evidence, and ultimately resulted in separate conclusions by the Privy Council on whether it was foreseeable for furnace oil to ignite on water. Once more, students

²³ (1913), 30 O.L.R. 142 (C.A.).

²⁴ [1972] S.C.R. 441.

²⁵ [1921] 3 K.B. 560, [1921] All E.R. 40 (C.A.).

²⁶ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* (New South Wales), [1961] UKPC 2, [1961] All E.R. 404 (*Wagon Mound No. 1*); *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1966] UKPC 10, [1967] A.C. 617 (*Wagon Mound No. 2*).

will become frustrated by inconsistencies in the law, but always able to visualize the context for this judicial reasoning.

Vicarious liability

The American case of *Ira S. Bushey and Sons*²⁷ will serve as the main teaching case on vicarious liability. Why? Because the question of whether an employee is carrying out an authorized act is memorably illustrated by asking whether drunken sailors are acting in the course of duty. Of course, the answer is yes. The Court of Appeals for the Second Circuit essentially took judicial notice that sailors will get drunk, stating that it is among “the risks characteristically attendant upon the operation of a ship” and that “the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation”.²⁸ The employer was held vicariously liable when the sailor, “in the condition for which seamen are famed”²⁹ opened flood valves which sank part of the drydock and ship.

Relational economic loss

Relational economic loss is notoriously difficult for first year students, often referred to as the Bermuda Triangle of tort law. However, it will be smooth sailing for the first-years at the Tetley School of Law with a solid maritime foundation in the cases of *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*³⁰ and *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*³¹

In *Norsk*, a barge being towed down the Fraser River collided into the New Westminster Railway Bridge, causing extensive damage to the bridge, which in turn caused economic loss to CN Railway, as it had to reroute railway traffic to a different bridge. The Supreme Court split on whether recovery for such relational economic loss should be subject to a general exclusionary rule due to concerns of indeterminate liability, leaving the state of the law unsettled. *Bow Valley Husky* cleared up the law, but students must draw complex diagrams in order to understand the facts. Using their navigational skills and a number of acronyms, students will draw diagrams showing that HOOL and BVI incorporated BVHB, which owned an oil rig constructed by SJSJ, using a heat trace system by R, which caused a fire on the oil rig, causing economic loss to HOOL and BVI because they had to pay day rates to BVHB for the time that the oil rig was out of service. Tetley students will sail through these convoluted facts to understand the special categories in which relational economic loss is recoverable. One of the three exceptions is general average cases, an ancient maritime law principle that

²⁷ *Ira S. Bushey and Sons v. United States of America*, 398 F.2d 167.

²⁸ Pp. 171-172.

²⁹ P. 168.

³⁰ [1992] 1 S.C.R. 1021.

³¹ [1997] 3 S.C.R. 1210.

applies when cargo is sacrificed in order to save the ship.³² Nursed on general average since their very first day at the law school, our students will readily grasp this exotic exception.

Property Law

Possession is at the heart of property law. Establishing possession can be difficult when the thing you hope to possess is floating away or sinking.

The first case in our Property Law curriculum will be *Clift v. Kane*,³³ also known as “the Canadian *Pierson v. Post*”. *Clift v. Kane* is a much better case than *Pierson v. Post* because seals are just as interesting as foxes and less menacing to pets. Here is what happened. One seal hunting team killed three thousand seals in Green Bay, but then shifting ice moved the seals farther from the vessel, making it impossible for them to haul all the seals on board. The crew of another vessel then took the remaining seals. The Newfoundland court divided over whether killing and marking the seals was sufficient to establish possession (the majority finding that it was).

This will be followed by *The Tubantia*,³⁴ and the question of who possesses the wreck of a sunken ship. One crew undertook preliminary work to salvage the wreck of a Dutch steamship which sank in the North Sea. Then a rival salvage company dove in at the last minute to secure possession of the wreck. The court concluded that the first crew had established possession.

While possession may be nine tenths of the law, it is not the only unit taught in property law. Tetley students will also study the law of bailments through the case of the *The Winkfield*, which sank along with hundreds of bags of mail.³⁵ Who can sue for the loss of the mail? Could the Postmaster General recover the full value of the letters and packages from the wrongdoer, even though he might have a defence to a claim by the owners of the mail?

Constitutional Law

Unfortunately, students will have to take a step onto dry land to study the *Charter of Rights and Freedoms*, as it does not have a centuries old history rich in maritime adventure. Fortunately, they can submerge themselves once again for the unit on division of powers under ss. 91 and 92 of the *Constitution Act, 1867*.

The outstanding federal power for Tetley students, of course, will be the power over navigation and shipping in s. 91(10). The case of *British Columbia (Attorney*

³² The reasons of McLachlin J. were agreed to by Iacobucci J. for the general principles articulated (see paras. 112-114).

³³ (1870), 5 Nfld. L.R. 327.

³⁴ (1924), 18 Ll. L. Rep. 158.

³⁵ *The Winkfield*, [1900-03] All E.R. Rep. 346 (C.A.).

General) v. Lafarge Canada,³⁶ will provide an opportunity for students to engage with navigation and shipping jurisdiction, while absorbing the doctrines of interjurisdictional immunity and paramountcy.

They will then study *R. v. Crown Zellerbach Canada Ltd*,³⁷ one of the leading cases on the national concern doctrine of the federal POGG (peace, order and good governance) power. This case was about whether the federal government had jurisdiction to regulate pollution in internal marine waters. It turned on the degree of difference between marine and fresh waters. This issue divided the Supreme Court of Canada. According to the majority, marine waters are clearly distinguishable from fresh water, a matter of provincial concern, because of “the differences in the composition and action of marine waters and fresh waters” and the unique “characteristics and scientific considerations” of seawater.³⁸ Justice Beetz, for the dissent, saw things differently on the basis that all water is connected in the hydrological system: “It should require no demonstration that water moves in hydrologic cycles and that effective pollution control requires regulating pollution at its source.”³⁹

Conflict of Laws, Jurisdiction and Civil Procedure

Most lawyers go through life with only a pitiful awareness of jurisdiction and what it means. No one should graduate from law school today without having studied conflict of laws. Why? Two reasons. The study of conflicts teaches legal reasoning and analysis more effectively than any other subject. Two, conflict issues come up time and again and many lawyers don't have the faintest clue how to resolve them.

Wherever there is a conflict of laws, someone will likely have travelled from one jurisdiction to another, often on a ship.⁴⁰ The 1868 Privy Council decision of the *Halley*,⁴¹ involving the collision of a British ship in Belgian waters, established the *lex fori* rule, that a defendant could not be liable in an English court unless it was liable under the law of England. This rule has been abandoned in Canada for *lex loci delicti* – a defendant is liable under the law of the place where the tort was committed.⁴²

The doctrine of *forum non conveniens*⁴³ also traces its origins to maritime law, as

³⁶ [2007] 2 S.C.R. 86.

³⁷ [1988] 1 S.C.R. 401.

³⁸ Para. 39.

³⁹ Para. 60.

⁴⁰ However, in our age of mass motor vehicle transportation, many modern cases involve car crashes, e.g. *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022.

⁴¹ *Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham (The Halley)* (1867-69), L.R. 2 P.C. 193.

⁴² *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022.

⁴³ In *Spiliada Maritime Corp. v. Cansulex Ltd*, [1987] A.C. 460, the problem was wet cargo, and though the voyage was from Vancouver to India, the ship owner wanted to sue in England. The

does the *Mareva* injunction. Most common law lawyers forget that the *Mareva* was a ship, and the *Mareva* case,⁴⁴ with the injunction that flowed from it, was in fact a maritime law case.

One of the most important features of admiralty jurisdiction, exercised in Canada by the Federal Court concurrent with the provincial courts, is the ability to proceed *in rem* – that is, against the ship or other property that is the subject of the action.⁴⁵ The ship, or cargo or freight money, is actually named as a defendant. When the action is instituted, the plaintiff may obtain a warrant for the arrest of the ship or other *res* which can then be held as security for the plaintiff's claim. The owner of the arrested property, for example the ship owner, can free the ship from arrest by providing bail – a sum of money, bond or bank guarantee that stands as security for the claim, interest and costs.

This extraordinary remedy, virtually unknown in the common law but known as *saisi conservatoire* in civil law, provides the plaintiff in an admiralty action with a huge advantage over the landlubber litigant. If the plaintiff is successful, there is no worry about recovering the claim – just ask the Sheriff to sell the ship. The only source of worry is the claims of other creditors.

The civil procedure curriculum will include a lecture on the unique procedural requirement of a “preliminary act” in collision cases. Shortly after pleading, each party is required to file a sealed statement containing full particulars of the circumstances leading up to the collision. The document is not opened up until the court orders it, sometimes shortly before trial. The statements made in the preliminary act are treated as admissions by the parties and can only be departed from with leave of the court. Thus, there is an early and binding statement of each party's claims about how the collision took place. As can be imagined, this procedure tends to discourage parties from advancing wild theories about how the collision occurred. Imagine the value of having such a procedure in cases of car crashes and other civil cases.

Family Law

I am a little troubled about how family law fits into my curriculum and still searching for a professor to teach it.

The students will certainly be taught about the history of the Probate, Admiralty

House of Lords developed a two-branch test for *forum non conveniens*, and this formed the starting point for the Supreme Court of Canada's articulation of the test in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, and *Van Breda v. Village Resorts Ltd*, [1993] 1 S.C.R. 897.

⁴⁴ *Mareva Compania Naviera S.A. v. International Bulkcarriers, S.A.*, [1980] 1 All E.R. 213 (C.A.).

⁴⁵ Only British Columbia has adopted rules of court that permit an action *in rem* to be commenced in the superior court. Lawyers in other provinces must either commence an action in the Federal Court or sue in the provincial court.

and Divorce Division of the High Court of Justice. How did admiralty cases come to be tried together with will and divorce cases? The rationale is somewhat obscure. It was suggested by the humourist A.P. Hebert that it was because they dealt with wrecks: wrecks of wills, wrecks of marriages, wrecks of ships. A more plausible explanation, advanced by a respected British author, is that these subjects were at one point under the jurisdiction of courts that applied Roman civil law and ecclesiastical law and were the province of a separate body of lawyers, referred to as “Doctors”.⁴⁶ Others have suggested that they share the common feature of engaging jurisdiction *in rem* – i.e., against the “thing” (the estate, the marriage or the ship) – and the judgments in them are binding on all the world, not just the immediate parties.

The course will definitely include the case of *Sullivan v. Letnik*.⁴⁷ You may know Mr. Letnik as Captain John – the same Captain John whose seafood ship has been a landmark of Toronto’s waterfront for decades. Alas, it has recently been towed from its berth and is destined for the cutting torch. Captain John’s family law case was a saga of love and ships, and the issue of whether he and his conjugal partner were “spouses” for the purposes of spousal support under the *Family Law Act* turned in part on how much time Ms. Sullivan spent on the boat. Reference will also be made to the case of *Ricci v. Tully*⁴⁸ in which the primary family asset, a sailboat, aptly named “*Forever Lost*,” was arrested and ordered sold in the course of matrimonial proceedings in another court.

I may also include *Fisher v. Fisher*, a 1929 decision of the New York Supreme Court,⁴⁹ which recognized the validity of a marriage performed by a ship captain. The authority of this decision is dubious and should not be relied upon by those contemplating sea cruises.

I expect that the course on family law will include something about ships’ husbands⁵⁰ and sister ship arrest.⁵¹

Commercial Law

Tetley students will be taught about charter parties, which would not only extend their familiarity with international commerce but will give them something to talk about at cocktail parties. They would learn that the name comes from the Latin – *carta partita*. They would learn that there are 64 shares in a ship and the reason

⁴⁶ See J.R. Spencer, *Jackson’s Machinery of Justice*, (New York: Cambridge University Press, 1989) at p. 38.

⁴⁷ (1994), 5 R.F.L. (4th) 313 (Ont. U.F.C.).

⁴⁸ 2009 F.C. 493.

⁴⁹ (1929), 250 N.Y. 313, 165 N.E. 460.

⁵⁰ A ship’s husband is appointed by the ship owner and is responsible for providing supplies and maintenance for a ship while in port.

⁵¹ See *The Convention relating to the Arrest of Seagoing Ships*, Brussels, 1952; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 43(8). The legislation permits a party with an *in rem* claim against the ship to arrest a sister ship – i.e., a ship in the same ownership.

is that a piece of paper could be folded to make 64 squares. They will learn to practice folding paper.

Insurance

Having written two of the leading Canadian texts on marine insurance, I think, in all modesty, that I would be a good choice and would bring some prestige as professor of insurance at the Tetley School of Law. Students will learn that there are only two types of insurance – marine insurance and all the rest, known as “non-marine insurance”. And they will learn that modern insurance traces its roots to marine insurance. More importantly, they will learn about the elegance and practicality of marine insurance, how it evolved in different ways in all the major seafaring nations, and how it was so perfectly suited to the needs of the shipping community and those who financed and “underwrote” their maritime adventures. They will learn about the development of Lloyd’s Coffee House, where underwriters and merchants met to drink coffee, finance maritime expeditions and make wagers. They will study the seminal marine insurance cases, such as *Carter v. Boehm*,⁵² holding that marine insurance is a contract *uberrimae fidei* – of the utmost good faith.

Students will also learn the ancient and glorious history of marine insurance, and the principles of general average – the first form of maritime loss sharing. A master of a ship, faced with a storm or other maritime peril, had the authority to throw cargo overboard (jettison) to lighten the ship and thereby save the entire maritime adventure – the ship, the cargo and the freight money. By ancient convention, it was agreed that all those interested in the adventure – the other cargo owners, the shipowner, and those interested in the freight would bear the loss in proportion to the value of their respective interests. The loss (“*avaris*”) fell not on the owner of the particular property lost (“particular average”) but generally, on all parties to the adventure – hence, “general average”.

The Trial Process and the Standard of Appellate Review

Every law student must understand the standard of appellate review – why is an appellate court entitled to review the decision of a lower court and what are the parameters of the review. Maritime cases have proven to be a fertile ground for jurisprudence in this area – no doubt due to the importance of determining facts from eyewitness testimony. There are generally few witnesses to maritime accidents. They occur in remote places, often at sea, and the witnesses are notoriously partisan.

A biographer of the great American Judge Henry Friendly recounts an incident in which the judge was hearing an admiralty case and was dismayed that the sailor witnesses consistently gave evidence favourable to their ship. Upset at what he regarded as perjury, he sought advice from his colleague Learned Hand, who

⁵² (1766) 3 Burr. 1905.

“told him that he wouldn’t think much of a sailor who wouldn’t lie for his ship.”⁵³

In such cases, the trial judge has the unique advantage of seeing the witnesses testify, watching them as they do so, and observing how they respond to cross-examination.

It is not surprising, therefore, that a maritime collision is the basis of the leading Canadian case on the standard of appellate review on fact-based appeals: *The Kathy K.*⁵⁴ In that case of a collision between a barge under tow and a sailboat, the Supreme Court drew heavily on English maritime law cases⁵⁵ in concluding that “these authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned judge made some palpable and overriding error which affected his assessment of the facts.” The court added that while an appellate court must examine the record to see that no such error occurred, “it is not ... part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.”

The leading Canadian case on the application of this principle to the testimony of expert witnesses is also a maritime case: *The Hasselt*,⁵⁶ a case of general average arising out of a ship fire.

One of the old cases cited in *Kathy K.* was *The Julia*,⁵⁷ in which the court emphasized the importance of deference on issues of seamanship in particular:

[I]n these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for

⁵³ David M. Dorsen, *Henry Friendly, Greatest Judge of His Era* (Cambridge, Mass.: Harvard University Press, 2012) at p. 82. This parallels an unattributed quote, said to emanate from a famous British Judge: “A sailor who would not lie for his ship is a rogue and a scoundrel and I wouldn’t believe him if he swore on a stack of bibles.” A somewhat less forgiving view of nautical nose-stretching, and one of my personal favourites, comes from the late Justice George Addy, who observed: “Witnesses should know that by concocting such evidence not only do they expose themselves to the very serious risk of being charged with perjury, but they should realize that the nauseating stench of deceit generated by such tales cannot help but pollute the remainder of their testimony.”: *Algoma Central Railway v. Cielo Bianco (The)*, [1984] F.C.J. 1037 (F.C.T.D.), varied, [1987] 2 F.C. 592, leave to appeal ref’d. [1987] S.C.C.A. No. 251.

⁵⁴ *Stein v. Kathy K (The)*, [1976] 2 S.C.R. 802.

⁵⁵ See, *S.S. Honestroom (Owners) v. S.S. Sagaporack (Owners)*, [1927] A.C. 37 at 47-8; *The Sir Robert Peel* (1880), 4 Asp. M.L.C. 321 at 322. See also *Bland v. Ross (The “Julia”)*, (1860), 14 Moo. P.C. 210 (P.C.).

⁵⁶ *N.V. Bocimar S.A. v. Century Insurance Co. of Canada* [1987] 1 S.C.R. 1247.

⁵⁷ *Bland v. Ross (“The Julia”)*, (1860) 14 Moo. P.C. 210 (P.C.).

themselves, and certainly cannot have better means of forming an opinion than the Judge of the Admiralty Court.⁵⁸

Another was *Owners of the Hontestroom v. Owners of the Sagaporack*,⁵⁹ which highlighted the difficulty in ascertaining who is to blame for a collision at sea:

These questions must always be very difficult, when the data can only be ascertained from the evidence tainted by the frailty and fallibility of human nature, in the person of a pilot whose navigation is impugned....

Again, a good deal of fun has been poked at what is called 'Admiralty arithmetic,' but the scoffer always has to fall back on the use of it himself. What else can he do? As tests of the credibility of a nautical tale these calculations are invaluable, but they cannot be infallible. They sometimes prove logically that there was no collision at all.⁶⁰

Today's lawyer will cite *Housen v. Nikolaisen*⁶¹ for the standard of review and move on, without appreciating the centuries of alleged navigational errors that set the course for the deferential standard.

Corporate Law

Corporate law will be an upper year subject for students, but the first year curriculum will introduce them to the subject by asking and answering the question: What is a corporation and what effects does it have?

Three maritime cases will assist students in answering that question. In *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*,⁶² the steamship *Edward Dawson* was destroyed along with its cargo of 2011 tonnes of benzene due to a fire caused by defective boilers. The House of Lords found that the managing director of the corporate owner had the means to know that the ship was not seaworthy, but did nothing to prevent the ship from being put to sea in its condition. In finding that the fault of the managing director was one and the same as the fault of the owner, Viscount Haldane L.C. articulated a central premise of corporate law:

[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called

⁵⁸ P. 236.

⁵⁹ [1927] A.C. 37.

⁶⁰ Pp. 48-49.

⁶¹ 2002 SCC 33, [2002] 2 S.C.R. 235.

⁶² (1915) A.C. 705 at 711 (H.L.).

an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation....⁶³

In *R. v. Canadian Dredge & Dock Co.*,⁶⁴ a number of corporations were charged with criminal offences for participating in collusive bidding for contracts for dredging in the St. Lawrence River and the Great Lakes. This case is important because of the discussion of the “identification doctrine”, whereby the acts of the directing mind of the corporation can be identified with the corporation for the purposes of certain forms of liability. The Supreme Court stated that for this doctrine to operate, the actions of the directing mind must be within his/her field of operation, not totally in fraud of the corporation and by design or result partly for the benefit of the corporation.

In *The Rhône v. The Peter A.B. Widener*,⁶⁵ the Supreme Court refused to equate a captain of a ship with the captain of a company, stating that “[t]he key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.” Navigational decisions do not count.

Students will also be introduced to the important case of *Salomon v. Salomon*,⁶⁶ which confirmed the separate legal personality of the corporation, distinct from its shareholders. Although it deals with fish rather than ships, it deserves mention.⁶⁷

Our students will also learn that long before limitation of liability became available to corporations and their shareholders, legislatures permitted shipowners to limit their liability, first based on the value of the ship then based on its tonnage. Like corporate limitation of liability, this public policy was designed to encourage investment and risk-taking. Shipowners were prepared to make the significant financial investment in building ships and financing maritime voyages because they were permitted to protect their other assets from potentially ruinous losses.

International Law

International law provides the excitement and adventure sought by law students. Several important international law principles can be traced to misadventures, crime and intrigue at sea.

Students will learn the principles of state immunity in the context of an American ship that was forcibly taken under the orders of Napoleon Bonaparte in *Schooner*

⁶³ *Ibid*, at p. 713.

⁶⁴ [1985] 1 S.C.R. 662.

⁶⁵ [1993] 1 S.C.R. 497.

⁶⁶ [1896] UKHL 1.

⁶⁷ So does the mis-use of the words “founder” and “flounder.” A ship “founders” at sea. A “flounder” is a fish, but fish also “flounder” when the flop about on a dock. A figurative use might be: “Our founder floundered before he foundered.”

Exchange v. McFaddon.⁶⁸ When the now French war ship arrived in American waters, the original owners wanted the court to restore the vessel back to them. The U.S. Supreme Court refused to do, as France was at peace with the United States and the war ship had the benefit of immunity.

Students will then turn to *The S.S. "Lotus" Case*.⁶⁹ The incident was a collision between French and Turkish ships on the high seas. The result was the death of eight Turkish sailors. The question was whether Turkey could prosecute the French captain. The takeaway for students will be the principles of territoriality and state jurisdiction – a state may not generally exercise power in the territory of a foreign state.

Then there is the *Rainbow Warrior Arbitration (New Zealand v. France)*,⁷⁰ where French agents sabotaged a Greenpeace ship harboured in New Zealand, killing one person. France and New Zealand reached an agreement that the responsible agents would be required to spend three years on the island of Hao, and that they would not be permitted to leave the island for any reason without the consent of both governments. When France unilaterally allowed the agents to leave the island for compassionate reasons, the UN Arbitral Tribunal took the opportunity to delve into the circumstances in which a state can deviate from an international obligation.

Finally, students will be captivated by the case of *Chung Chi Cheung v. The King*,⁷¹ the murder of a captain of a Chinese war ship by a British cabin boy in the territorial waters of Hong Kong. This case will introduce them to the challenges of applying international law domestically. It will also teach them that the law of the land applies on territorial waters, even when on a boat.

Access to Justice

The great purpose of the judicial system of every modern state is to do justice in resolving disputes. Maritime law was shaped by the environment and it responded to the environment. It was practical and tailored to the needs of those who sailed the seas and invested in ships and their cargos.

One of the greatest contemporary challenges to the justice system is to deliver speedy and cost-efficient access to the same justice to all members of society, including those who have little means or less good fortune than others.

The students in our law school will learn that maritime law addressed this issue centuries ago. And the solution, like most solutions in maritime law, was practical and effective.

⁶⁸ (1812), 7 Cranch 116.

⁶⁹ (1927), P.C.I.J. Ser. A, No. 10.

⁷⁰ (1990), 82 I.L.R. 499.

⁷¹ (1938), [1939] A.C. 160.

It was not at all uncommon for the admiralty court to sit at all hours, “from high tide to high tide.” The judge would come to the ship, where the merchants, the captain and other interested parties would meet to have their dispute resolved. The law went to the litigants, not the other way around. What an interesting concept in today’s world.

Maritime law recognized the rights of the weakest member of the maritime system, the sailor, and gave fair and effective remedies. The maritime law was prepared to intervene to set aside unconscionable contracts made with mariners. It gave the mariner a special remedy to recover wages – a “maritime lien” against the ship, giving the mariner a right to arrest the ship in any port, to secure the claim for wages.⁷² The most economically disadvantaged members of maritime society were thus able to obtain redress against the wealthy and powerful.

Our students will learn that the law has to work. It has to be practical and efficient. It has to serve the needs of the public and not the other way around.

Conclusion

Bill Tetley was a great teacher of maritime law and a brilliant lawyer. He was intellectually curious. He loved a good debate and a good puzzle. One of his favourite quotations was a variant of this, from Sir Isaac Newton:

“If I have seen further it is by standing on the shoulders of giants.”

This will be the motto of our law school. After our founder. A giant.

⁷² (1924), 18 Ll. L. Rep. 158The case of *Dartmouth Ferry Commission v. Marks* (1904), 34 S.C.R. 366, provides interesting historical background on the right to sick pay. Unlike contemporary employment standards, the Supreme Court in *Dartmouth Ferry* thought that “common humanity” required employers to compensate employees for missed work due to temporary illness.