

4. COMMENTARIES AND CASE NOTES

A. TRANSCRIPT OF AN ADDRESS BY Mr JUSTICE SHEEN

On Friday 27 August 1982 Mr Justice Sheen delivered a lively and interesting address to members (and their guests) of the New South Wales Branch of the MLAANZ. The transcript of that address is reproduced below.

It is not just a matter of common courtesy that I would like to start by thanking all of you for inviting Diane and me to be here with you this evening.

In any circumstances that would have given us great pleasure and what better surroundings could one have for a nautical meeting than this room with pictures of ships around us, called "The Ward-room" and, to my horror, no less than four clocks facing me over there all apparently on different times. As long as you don't take the view before I have finished that those clocks must have stopped, I don't mind.

During the last four or five years Diane and I have had a growing interest in Australia because one of our sons, our middle son, has settled in this country. He is a doctor over here and two weeks ago we acquired an Australian daughter-in-law, so that our interest in this country has grown rapidly and, no doubt, in the future we shall make regular visits to this country. Furthermore, I think we both appreciate the fact that you were taking a great deal on trust by inviting us here on what I might call "a blind date".

I suppose at a Maritime Law Association Dinner it would be difficult to avoid breaking what I regard as one of the cardinal rules of etiquette and that is that on occasions when ladies are present you should never invite a lawyer to speak. There are sound reasons for most rules of etiquette and this one can be explained by four simple facts:

- in the Lord's Prayer there are 69 words;
- in the Ten Commandments there are 300 words;
- in the American Declaration of Independence there are just over 350 words; but
- in the E.E.C. Regulations which control the import of caramel and caramel products into England there are 26,600 words.

It is my view that judges should be like naval officers — members of the "Silent Service" limiting themselves, of course, to the occasional sentence. Now I realise, of course, that there are some barristers who practice in the Admiralty Court in London who take the view that I do not always obey that precept. Not long ago I complained to a Queen's Counsel, appearing in my Court, that the case had been estimated to last eight days and we were then on the sixteenth day

of the hearing. It was characteristic of that leading Counsel, who in his early days had been my pupil, and it was in accordance with the best traditions of the Bar that, without hesitation, he accepted full personal responsibility. I was so impressed by the robust and frank way that he accepted my rebuke that I recall his actual words. He said, "My Lord, it is entirely my fault — I completely underestimated the number of points on which your Lordship would require assistance."

Now as a Judge of the Admiralty Court I have not been required to try any criminal cases and that, I think, is fortunate because I have at times taken the view that our jury system is really designed to provide for the constitutional right of every shifty, half-witted, scheming villain to be tried by his equals! When the Admiralty cases have settled, I have tried a number of personal injury cases and these have given me an insight into the personal tragedies and misfortunes of people who have suffered from accidents and the fortitude with which they have borne their misfortunes.

In the Admiralty Court I play my part in the activity which is common to those of us here this evening who are lawyers and that is sorting out the financial consequences of marine casualties. It has been said of Mr Justice Hill who was the Judge of the Admiralty Court about 50 or 60 years ago that, when he had to apportion blame for a collision, his method was to assess the credibility of the witness and then to apportion blame in inverse ratio to their credibility. If that is true, he displayed a certain wisdom because my own experience is that when it comes to liability, I have never ceased to be amazed at the blatant "lie-ability" of mariners. In fact, I often feel that Mr Justice Langton — who succeeded Mr Justice Hill — was right when he divided witnesses into two categories — on the one hand you had the hopeless liars and on the other hand you had the hopeful ones.

The Admiralty Court in London has a history which stretches back for 620 years and I am very proud to preside over the Court which has, I believe, by its decisions exercised a profound influence upon the whole maritime world. Today there are Admiralty Courts in many different countries and all those courts are of equal standing. I pay great regard to the decisions of other courts and I am conscious of the fact that, with one notable exception recently, the judges of other courts take notice of what is said in London. (I can't think who it was!) I regard it as a keystone in the world structure of Admiralty Jurisdiction that there should be comity between the Admiralty Courts of all countries and this really has two aspects.

First, I believe that so far as possible there ought to be uniformity of marine law or maritime law throughout the world because that is in the interests of all those who carry on international trade. I don't

know whether you know that the United States of America did not follow the Brussels Convention of 1911 and for years and years they had the old fashioned rule, which used to be the rule in England, that if one ship was even slightly to blame it carried 50 per cent of the blame. This was changed by the Supreme Court in a decision a few years ago which has been a great advantage. I recall vividly, from my practice at the Bar, the terrible problems and the great injustices which were caused when the United States did not conform with the rule adopted by almost the whole of the maritime world.

The other aspect of comity is in enforcing the judgments of other Admiralty Courts. Recently I had occasion to give leave to arrest a vessel in order to enforce a Swedish judgment. It was strongly argued that I had no jurisdiction to do so; I cared very little whether or not I did because I ordered the ship to be arrested and within two days the debt was paid. Justice was done — that is what it is all about.

Before I come to the Court as it is today, I would like to tell you a little bit about its earlier days. These stories that I would like to tell you suggest to my mind that, as the centuries roll by, men in general and mariners in particular do not change very much. I expect that you will all remember that in the 17th century there lived in England a man called Samuel Pepys and he kept a diary. I expect that at school some of you had to read it. Let me give you one short extract from that diary for 1 December 1663.

After dinner I to Guild Hall to hear a tryal at King's Bench, before Lord Chief Justice Hyde, about the insurance of a ship, . . . it was pleasant to see what mad sort of testimonys the seamen did give, and could not be got to speak in order: and then their terms such as the Judge could not understand; and to hear how sillily the Counsel and Judge would speak as to the terms necessary in the matter, would make one laugh: and above all, a Frenchman that was forced to speak in French, and took an English oathe he did not understand, and had an interpreter sworn to tell us what he said, which was the best testimony of all.¹

Things have not changed much!

Now to read the reports of the Admiralty Court is really to read much of the maritime history of the world, not merely English history. During the last war, as your Chairman mentioned, I served throughout the war on convoy duty in various parts of the Atlantic. Looking around at you all this evening I think there are very few of you who would have been old enough to do the same. Perhaps some of you did but, if any of you did, this short extract from the Admiralty Court will ring a bell.

¹ H. B. Wheatley (ed.) *The Diary of Samuel Pepys M.A., F.R.S.* (1913) 340-341.

There is no branch of the service more unpleasant to naval officers than that of convoying a fleet of merchant vessels; it is a duty which is painful in its own nature, and extremely difficult in its execution, even when there is no misconduct on the part of those who are to act under their orders. It must frequently happen, that among the different vessels confided to their care, some are navigated by unskilful masters, or they sail badly from some fault in their own structure, and are not capable of paying prompt obedience to the signals that are made; and therefore officers bringing with them the best disposition to the service usually find that they have difficulties enough to struggle with.

Now let me tell you that what I have been reading is part of a judgement written in 1809 — the convoy in question was one of Lord Nelson's convoys and it took four years to bring the master, who had failed to obey an order, before the Court. The offence was committed in 1805, Nelson's last year. So as I say, men don't change very much. When the master did come to court in 1809 he was fined 50 pounds which, in those days, was a lot of money.²

But I couldn't really overlook the last war. Very early in the war a convoy left Halifax for England — it was protected only by an armed merchant cruiser the "Jervis Bay". Early in November 1940 Captain Fagin of the "Jervis Bay" was alerted to the presence, on the horizon, of a German raider. He immediately ordered the convoy to scatter and steamed straight towards the German raider and to certain death. He was awarded a posthumous V.C. His action saved most of the ships in the convoy but that German raider managed to score a hit on a tanker called the "San Demetrio". She was carrying petroleum spirit from North America to England and was soon ablaze and her crew had to abandon ship. They took to two small boats in a North Atlantic winter gale. On the third day of their ordeal they saw smoke on the horizon and they rowed towards it. To their surprise it was their own ship still afloat. With great difficulty they re-boarded her; her bridge was gutted, there were no charts, no navigation instruments. In one of the cabins they found a schoolboy atlas and the engineers managed to get the engines working again. With a mariner's instinct for direction from the stars at night they steamed to the east and eventually eight days later made a landfall on the west coast of Ireland. They had been spotted by a British aircraft which kept a patrol around the Western approaches and tugs went out and she came into the Clyde. The crew brought an action for salvage and the general rule is that salvage cannot be awarded to the crew of a ship whose duty it is to save her. But on this occasion the point arose as to whether, having abandoned the ship for three days, they were entitled to salvage. Indeed, it was held they were. The judgment of Mr Justice

² *The King v. Wayth* Edw. 81; 165 E.R. 1040.

Langton is stirring in the extreme and I just want to read you a few lines from it, in which he refers to an American sailor who had volunteered before America entered the war (as you will appreciate from the date) to serve in the "San Demetrio". Mr Justice Langton said,

[n]o finer tribute can be paid to this man than the unanimous request made by all on board that the Red Ensign which the vessel was flying all through the action and until she arrived in port should be presented to their American shipmate.

I dwell with pleasure upon this incident, for I am sure that seaman Oswald Preston is of a quality to treasure this bit of bunting, the only flag which remained on board the *San Demetrio*. He will remember, as we in England will remember, that it was flying at the masthead of the *San Demetrio* when she first met her troubles, that it remained flying through the worst of her misfortunes, and that it still flew when at long last on Nov. 16, shell-torn and fire-scarred, but undefeated, she came steaming up the sheltered waters of the Clyde.³

Today, the Admiralty Court in London is very busy. During the course of twelve months I heard witnesses from the Phillipines and Korea, from China and Thailand, from Benin, Mexico, Russia, Greece, France and other countries. I cannot conceal the pleasure which, as a mariner myself, I get from hearing stories of the sea from the mouths of those who take part in these events.

It is almost axiomatic (and I have referred to this already) that these cases would not reach court if everyone told the truth; if they did their legal advisers could resolve their differences without trouble. It is, therefore, for me a fascinating exercise to find out where the truth lies.

There are collision cases; there are cases arising from damage to cargo and there are many which arise from blatant fraud upon underwriters. Of the collision cases one of the most interesting and enjoyable (and perhaps you will forgive me if I just tell you one case) arose from two collisions which occurred within the space of a few minutes in the Malacca Straits. Three ships were involved, a Russian dry cargo vessel was steaming north west, a Filipino tanker and a Liberian V.L.C.C. were going south east down the Malacca Straits. The first collision was between the Russian and the Filipino — those ships had been in a position to pass safely port to port when the Russian turned to port for reasons which I do not understand and could never find out. But I had no doubt about it. I should just go on and say the second collision occurred immediately afterward because the Filipino, in taking avoiding action from the Russian, ran into the V.L.C.C. The Russian master had cheated by cutting 50 minutes off the course

³ *The "San Demetrio"* (1941) 69 Ll. L. Rep. 5, 12.

record. How he thought he would get away from it I don't know, but it was soon demonstrated by counsel who unrolled the reel. You could tell then, by marrying up what the ship had done, that 50 minutes had been cut away. Once it became obvious that the Russians were lying in that case everything then fell into place. I hear salvage cases and damage to cargo cases. I sit with two Elder Brethren of Trinity House to advise me on matters of seamanship and that I think is different from what happens in your Court. I am not sure that you haven't got the better system although it would be difficult in London now, after so many years, to change it. I think it would be a very good thing if the experts were cross-examined as they are in your Courts.

Not only do I enjoy the work which I do, but I have also an additional bonus. Maritime lawyers the world over are comparatively few in number and they have much in common. And I have found that wherever I have travelled in the world, and my work has taken me all over the world, I have made good friends, I have always enjoyed their company. This evening is just such an occasion and after all, as someone once said, it is good to dine with nice people, it's good to talk with nice people and it's good to sleep with a clear conscience.