

RICHARD COOPER MEMORIAL LECTURE ADMIRALTY LAW — WHAT IS IT GOOD FOR?

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I INTRODUCTION

It is a great privilege to deliver a lecture in honour of the life and work of Richard Cooper. Although I did not know Justice Cooper personally, we corresponded on a number of occasions, and I edited some of his extra-judicial writing.¹ I was very impressed by the breadth and depth of his scholarship, his modesty about his writing, and his excellent sense of humour. I will be speaking tonight about admiralty law; a topic that I know was dear to him. I wish to stress at the outset that, if some of my comments tonight might be interpreted as provocative, or even heretical, they are offered in the spirit of serious academic debate, and with sincere and profound respect for Richard Cooper.

Two decades ago, Australia comprehensively modernised and reformed its admiralty law. This reform was preceded by a substantial research programme, culminating in the Australian Law Reform Commission's magisterial Report 33 on civil admiralty jurisdiction,² which led to the enactment of the *Admiralty Act 1988* (Cth). Australia's admiralty jurisdiction — which had been left in that state of disjointed, illogical and arrested development common to all of the former British colonies that had inherited the *Colonial Courts of Admiralty Act 1890* regime — was then undeniably in need of reform.

Before moving on to specific reform details and recommendations, the Australian Law Reform Commission canvassed three appropriately fundamental questions about admiralty law in Chapter 6 of its Report.³ First, is the admiralty jurisdiction strictly necessary? Second, should the admiralty jurisdiction be abolished? Third, what makes the admiralty jurisdiction unique or distinctive? For those members of the audience for whom the Australian Law Reform Commission Report on civil admiralty jurisdiction is not preferred bedtime reading, and who cannot bear the suspense, I can immediately reveal that the Commission's answers were 'Yes', 'No', and 'Three things — a distinctive means of founding jurisdiction; a distinctive means of providing security; and unique rules regarding the ranking of claims'.

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¹ See, eg, Hon Justice Richard Cooper, 'Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations' in Paul Myburgh (ed) *The FS Dethridge Memorial Addresses 1989-1998* (2000) 152; Hon Justice RE Cooper, 'Crewing Vessels While Under Arrest' (1999) 14 *Maritime Law Association of Australia and New Zealand Journal* 22.

² Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (1986), <<http://www.austlii.edu.au/au/other/alrc/publications/reports/33/ALRC33.html>> (ALRC Report).

³ *Ibid* [83]-[96].

The broad purpose of this lecture is to revisit these questions and to reconsider — to the extent that is possible within the time constraints — whether a separate admiralty jurisdiction is theoretically and practically justifiable in the 21st century. This might seem like a relatively pointless exercise, given the Commission's comprehensive report just two decades ago, and the fact that admiralty reform is not exactly high on the legislative agenda. However, as the Commission itself acknowledged,⁴ it was constrained by its terms of reference which presumed the continued existence of an admiralty jurisdiction, and approached the issue from an unabashedly pragmatic perspective. Indeed, one commentator has gone so far as to suggest that the Law Reform Commission hardly did more than scratch the surface of these issues.⁵ So, with your indulgence, I would like to do a little more scratching tonight. It also seems to me, with due apologies to the philosopher,⁶ that an unexamined admiralty jurisdiction is one that is not worth exercising. Furthermore, since the Commission delivered its Report and the *Admiralty Act* was enacted in Australia, the conceptual map of admiralty law has been dramatically redrawn by the highly controversial judgment of the House of Lords in *The Indian Grace*,⁷ which appears to have stood some of the most tenderly held traditional admiralty beliefs on their heads. In the wake of *The Indian Grace*, we are all required to take stock of exactly what admiralty jurisdiction is, and what it is good for.

Proponents of a discrete institutional admiralty jurisdiction tend to employ four broad arguments to justify its continuing existence. First, there is the appeal to the grand historical heritage of admiralty law and its traditions. Some commentaries on admiralty law begin, if not with the Phoenicians, then at least with a judicious reference to the Rhodian Sea Law, before taking an apparently obligatory Cook's tour through Roman law, the medieval city-state maritime codes, and *The Black Booke of Admiralty*. Admiralty lawyers and commentators sometimes seem to glory in the arcane and the esoteric. As one American commentator breathlessly put it, there is a 'general aura of magic that surrounds admiralty'.⁸ This aura may also be enhanced by references to the exotic Civilian heritage of admiralty law.⁹ The purpose of this appeal seems to be two-fold: to assert the unique and special

⁴ Ibid [85].

⁵ BJ Davenport, 'Proposed Reforms of Admiralty Jurisdiction in Australia' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 317, 320.

⁶ Plato, *Πλάτωνος Ἀπολογία Σωκράτους*, 38: 'ἀνεξέταστος βίος οὐ βιωτὸς ἀνθρώπῳ'.

⁷ *Republic of India v India Steamship Co Ltd (No 2) (The 'Indian Grace')* [1998] AC 878 (HL) (*The Indian Grace*).

⁸ Preble Stoltz, 'Pleasure Boating and Admiralty: *Erie* at Sea' (1963) 51 *California Law Review* 661, 665, quoted by Ernest A Young, 'It's Just Water: Toward the Normalization of Admiralty' (2004) 35 *Journal of Maritime Law and Commerce* 469. See too Paul V Niemeyer, 'Applying *Jus Gentium* to the Salvage of the *RMS Titanic* in International Waters' (2005) 36 *Journal of Maritime Law and Commerce* 431: 'To talk about maritime law is to talk about a mysterious scripture of the ages.'

⁹ See, eg, William Tetley, 'Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)' (1999) 23 *Tulane Maritime Law Journal* 317; Hon Justice James Allsop, 'Australian Admiralty and Maritime Law — Sources and Future Directions' (2007) 26 *University of Queensland Law Journal* 179, 180: Admiralty law 'is a body of law, and the administration of a body of law, with roots in public international law, civil law, international commerce, international agreement and the laws of nations. Its history is rich and its contents are vibrant and modern. It is only an arcane or obscure branch of the law to those whose legal thinking is formed exclusively by land-based human activity.'

character of admiralty law, and to argue that such a precious historical tradition should under no circumstances be tampered with, still less reformed.

Second, there is the more practical appeal to the distinctive nature and needs of shipping and trade, or at least international shipping and trade. ‘Ships are different’,¹⁰ we are told. Everyone knows that the maritime venture is unique, and faces extreme risks and obstacles. Separate and special rules are needed to deal with these exceptional situations.

Third, at some point in the discussion, the shibboleths of international uniformity, certainty of outcome, the comity of nations, or the requirements of globalisation are bound to be uttered to justify the application of the admiralty jurisdiction, or to advocate the application of one particular admiralty rule over another.¹¹

Finally, there is the more complex argument that the nature of in rem jurisdiction (which is usually seen as the ‘real’ admiralty jurisdiction in both senses of the word, with in personam admiralty jurisdiction being customarily relegated to a Cinderella status) sets admiralty law apart conceptually from the rest of the general legal system, and renders it both unique and useful. This ‘real’ dimension of in rem admiralty jurisdiction is expressed in a bundle of dogmas peculiar to admiralty law:

- the presence of the res, rather than that of the shipowner, within the jurisdiction is sufficient to vest in rem jurisdiction in an admiralty court;¹²
- the proceeding is instituted directly against the res, and is commenced by direct service on the vessel rather than on the shipowner;¹³
- the ship or other maritime property is in some sense deemed to be the actual defendant, hence the peculiar intituling of in rem admiralty cases;¹⁴
- the action in rem is conceptually and practically distinct from an action in personam brought against the shipowner, either in admiralty or under the general law;¹⁵

¹⁰ Sir Michael J Mustill, ‘Ships are Different — Or Are They?’ [1993] *Lloyd’s Maritime and Commercial Law Quarterly* 490; David Steel ‘Ships are Different: The Case for Limitation of Liability’ [1995] *Lloyd’s Maritime and Commercial Law Quarterly* 77; *Barde AS v ABB Power Systems* (1995) 132 ALR 358 (FCA); *Birkenfeld v Yachting New Zealand Inc* [2007] 1 NZLR 596.

¹¹ For a selection of judicial appeals to the oracles of international uniformity and comity, see *The Tolten* [1946] P 135; *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202; *Heilbrunn v Lightwood Plc* [2007] FCA 1518; *The ‘Vasilii Golovnin’* [2008] SGCA 39.

¹² It is ‘a universal jurisdiction dependent only on local service of process on the res’: ALRC Report, above n 2, [136], quoted in *Tisand Pty Ltd v Owners of Ship MV Cape Moreton (Ex Freya)* [2005] FCAFC 68, [100].

¹³ For an interesting example of complications that can occur in this regard, see, *Sembawang Salvage Pte Ltd v Shell Todd Oil Services Ltd* [1993] 2 NZLR 97.

¹⁴ Which can cause difficulties where the defendant ship is either unbaptised (see *Fletcher Steel v Unnamed Double Ended Gravel Dredge*, Unreported, AD22, High Court, Dunedin, 27 July 1988) or has changed its name frequently (see *Tomita v The Unnamed Vessel formerly known as ‘Amami Taiki Go’ and also known as ‘Intrepid’* (2000) 16 PRNZ 459).

¹⁵ As illustrated by the ‘non-merger’ line of authority: *The John and Mary* (1859) Swab 471, 166 ER 1221; *Nelson v Couch* (1863) 15 CB (NS) 99; *The Cella* (1888) 13 PD 82; *The Joannis Vatis (No 2)* [1922] P 213; *The Rena K* [1979] QB 377.

- the security represented by the vessel remains available to the plaintiffs and intervenors while their claims are being heard;¹⁶
- in the case of maritime liens, liability in rem continues to attach directly to the res, irrespective of subsequent changes in its ownership status;¹⁷
- unless the shipowner appears, liability in rem is limited to the value of the res, and in the case of multiple claims that cannot be satisfied by the value of the res, priority of claims is determined by the application of ranking principles that are peculiar to admiralty law.¹⁸

II HISTORY

I will now examine each of these arguments or justifications for the admiralty jurisdiction in turn. First, a brief discussion of the appeal to history. This is problematic on a number of levels, particularly if the argument is simply based, as it so often is, on the lengthy historical pedigree of admiralty itself – ‘things were ever thus’. With all due respect to Oliver Wendell Holmes, the life of the law and its value cannot be measured in experience alone; logic must enter into it at some point.¹⁹ A significant historical pedigree is no automatic guarantee of worth. After all, slavery, discrimination against women and capital punishment also featured fairly prominently in Roman and medieval law, but we no longer continue to celebrate them simply because they have been with us for so long.²⁰

More importantly, the appeal to admiralty’s ancient historical pedigree is often to an ersatz, sanitised and distorted historical narrative that does not stand up to closer scrutiny. Although the Phoenicians, Greeks and Romans may have been formidable seafarers, their codes arguably tell us very little that is directly relevant or useful to the content or policy of modern maritime law.²¹ The dominant view amongst classical philological scholars has long been that the much vaunted Rhodian Sea Law was either a figment of Justinian’s propagandists’ imagination, or, at best, a very free neo-Classical interpolation.²² And, while mediaeval sea

¹⁶ *The Nordglimt* [1988] QB 183.

¹⁷ *Harmer v Bell (The Bold Buccleugh)* (1851) 7 Moo PC 267; 13 ER 884. The same is true of statutory rights of action in rem after the commencement of in rem proceedings: see *The Monica S* [1968] P 741; *Tisand Pty Ltd v Owners of Ship MV Cape Moreton (Ex Freya)* [2005] FCAFC 68.

¹⁸ *The Banco* [1971] P 137; *Corps (t/a Corps Bros) v Owners of the Paddle Steamer Queen of the South (The Queen of the South)* [1968] P 449; *The Leoborg (No 2)* [1964] 1 Lloyd’s Rep 380; *The Silia* [1981] 2 Lloyd’s Rep 534.

¹⁹ Oliver Wendell Holmes, *The Common Law* (1881) 1. Holmes himself was reasonably forgiving of maritime law’s ‘arbitrary seeming peculiarities’: see *ibid*, 27.

²⁰ The countervailing argument, of course, is that ‘if it has lasted so long it must be of some use’: James Crawford, ‘The Australian Admiralty Act: Project and Practice’ [1997] *Lloyd’s Maritime and Commercial Law Quarterly* 519.

²¹ Grant Gilmore and Charles L Black, *The Law of Admiralty* (2nd ed, 1975) 7, in their introductory section delightfully entitled ‘The Past — Or, The Rhodian Law and All That’, conclude that a recognition of the names of the medieval sea-codes ‘is all that is really needed even for ornamental purposes by the compleat admiralty proctor. ... They could hardly state much living law for the concerns of modern shipping.’

²² For a summary of the literature, see Edna Mercedes Luna Gamboa, ‘L’Avaria Comune’ <http://dspace.uniroma2.it/dspace/bitstream/2108/766/1/Luna_Gamboa_Tesi.pdf>; Nevenka Bogojevic-Gluscevic, ‘The Law and Practice of Average in Medieval Towns of the Eastern

codes such as the *Consolato del Mare* and the *Rôles d'Oleron* may contain the germs of a couple of concepts that still endure in modern admiralty law, such as reward for salvage,²³ the notion of general average²⁴ and the concept of global limitation of liability,²⁵ a reader is, hardly surprisingly, hard pressed to find much detail which mirrors or illuminates modern admiralty law.

This appeal to historical pedigree is, therefore, more than a little misleading.²⁶ It masks the reality that the modern admiralty jurisdiction is largely an early Victorian invention. Although the foundations of admiralty enforcement were laid down much earlier than that, the fourteenth century Admiral, a petty criminal enforcement official with a lucrative list of perquisites or 'perks',²⁷ has about as much to do with modern admiralty law as the Spanish Inquisition has to do with modern jury trials. In the Anglo-Common Law world, the structure and content of the modern admiralty jurisdiction was largely developed in the *Admiralty Courts Acts* of 1840 and 1861. The core conceptual framework of the jurisdiction was also first fully developed in the mid-nineteenth century with the decision of the Privy Council in *The Bold Buccleugh*,²⁸ which articulated a comprehensive meta-theory of maritime liens, rather than treating each maritime lien as a conceptually distinct 'mini-jurisdiction'. The procedural theory, which provides the theoretical basis for the action in rem in Anglo-Common Law countries, is of even more recent vintage, being hammered out in late nineteenth cases like *The Dictator*.²⁹ Prior to this, admiralty consisted of a loose and disparate collection of causes of action with little conceptual coherence or clarity.

The second crucial point that is often masked by an appeal to grand historical tradition is just how messy, painful and arbitrary the historical development of the admiralty jurisdiction has been. Admiralty was always the unpopular schoolboy with the foreign accent who got beaten up behind the bike sheds by Coke and his

Adriatic' (2005) 36 *Journal of Maritime Law and Commerce* 21, 22 n 5. Gilmore and Black, above n 21, 3, refer to 'this suppositious code'. The link between Roman law and the modern in rem admiralty action is equally suspect: see William Tetley, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 *Tulane Law Review* 1895, 1900; but cf Michael Jonsson 'The Nature of the Action In Rem' (2001) 75 *Australian Law Journal* 105, 105-106.

²³ Paul Niemeyer, 'Applying *Jus Gentium* to the Salvage of the *RMS Titanic* in International Waters' (2005) 36 *Journal of Maritime Law and Commerce* 431, 440-446; but cf James AR Nafziger, 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck' (2003) 44 *Harvard International Law Journal* 251.

²⁴ Nevenka Bogojevic-Gluscevic, 'The Law and Practice of Average in Medieval Towns of the Eastern Adriatic' (2005) 36 *Journal of Maritime Law and Commerce* 21, 24-34.

²⁵ James J Donovan, 'The Origins and Development of Limitation of Shipowners' Liability' (1979) 53 *Tulane Law Review* 999, 1000-1007.

²⁶ The ongoing debate over the coherence, influence and relevance of a *lex maritima* dating back to ancient times may be seen as a subset of the broader *lex mercatoria* controversy. For a similarly sceptical take on the *lex mercatoria* question, see, Stephen E Sachs, 'From St Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant"' (2006) 21 *American University International Law Review* 685. The appeal to antiquity provides a useful ideological weapon when arguing for a current 'general' or 'universal' maritime law: See, eg, William Tetley, 'The General Maritime Law — The *Lex Maritima*' (With a Brief Reference to the *Ius Commune* in Arbitration Law and the Conflict of Laws) (1994) 20 *Syracuse Journal of International Law and Commerce* 105.

²⁷ On which, see FL Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970) 8-9.

²⁸ *Harmer v Bell (The Bold Buccleugh)* (1851) 7 Moo PC 267; 13 ER 884.

²⁹ [1892] P 304, followed in *The Gemma* [1899] P 285.

Common Law henchman. Admiralty's origins in bitterly contested political favours, and the ensuing centuries of turf warfare, cast a much longer shadow over Admiralty than over Equity, in the sense that they continued to cabin and confine the substantive boundaries of the admiralty jurisdiction as well as its procedural enforcement by the admiralty courts. Two centuries later, the admiralty jurisdiction was still so crippled that the *Admiralty Court Acts* of 1840 and 1861 are perhaps more accurately described as an iron lung or respirator than a triumphal return to earlier glories.³⁰

Is the admiralty lawyer's preoccupation with history merely a charming romantic affectation? I would argue that it is potentially more unhelpful than that. The over-emphasis of history and tradition has led, in my view, to an unduly cautious approach to the jurisdiction's development in the light of modern circumstances, and a resistance to change, rationalisation and modernisation. This resistance has manifested itself in a number of ways. While the admiralty rules in Australia and New Zealand are certainly catching up, or have caught up, to a great extent in recent years, there are still remnants of procedural formalism and technicality in admiralty law that have long since disappeared in the general jurisdiction.

More significantly, the emphasis on history has often strait-jacketed the substantive development of admiralty, or left it in a time warp. For example, it is somewhat incredible that, in 1999, a New Zealand admiralty court should still be seriously debating whether the concept of 'damage' in the maritime damage lien can extend beyond physical damage to include personal injury or death.³¹ Admiralty judges have similarly struggled with how modern developments in employment law can be accommodated within the strictures of the admiralty jurisdiction, seemingly to a greater extent than their colleagues in the general jurisdiction.³²

An exaggeration of the importance of historical tradition has perhaps also informed an overly cautious modern judicial approach to the development of new maritime liens, and a sparing use of inherent jurisdiction in the admiralty context.³³ This has resulted in a statutory jurisdiction that, although originally expressed in open-ended terms, became effectively codified — some might even say calcified — a century ago, and that is increasingly losing its flexibility and commercial relevance.

Another difficulty is the relative scarcity of admiralty precedent. The comment most frequently made about my area of specialisation by my non-admiralty

³⁰ For blow-by-blow accounts of these jurisdictional brawls, see Daniel R Coquillette, *The Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law* (1988) and G D Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (1977).

³¹ *Fournier v The Ship 'Margaret Z'* [1999] 3 NZLR 111.

³² See, eg, *Mobil Oil New Zealand Ltd v The Ship 'Rangiora' (No 2)* [2000] 1 NZLR 82 (seafarers' lien does not extend beyond single-ship employment contracts — but cf *Canadian Imperial Bank of Commerce v The Owners and All Other Interested Parties in the Ships Le Chene No 1, L'Orme No 1, Le Saule No 1 and WM Vacy Ash* [2003] FC 873 (TD)); *Ultimate Lady Ltd v The Ship 'Northern Challenger'* Unreported, High Court, Auckland, AD7-SW2000, 17 September 2001 (damage lien not available where damages caused by independent contractor rather than employee of shipowner).

³³ *The 'Acru'x'* [1965] P 391; *ABC Shipbrokers v The Ship 'Offi Gloria'* [1993] 3 NZLR 576; *Fournier v The Ship 'Margaret Z'* [1999] 3 NZLR 111 [22]-[23]; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 [114]; *Elbe Shipping South Australia v The Ship 'Global Peace'* [2006] FCA 954 [130].

colleagues is that we only seem to study ancient cases. There is certainly an element of truth to this generalisation. Part of the reason for this may be that there are comparatively few modern admiralty cases to cite. Fairly fundamental issues of admiralty law still remain undecided or relatively unexplored. There are a number of perfectly good reasons for this dearth of precedent, but it can result in curiosities. So, for example, it may seem more than a little quixotic to non-maritime lawyers that the United States Supreme Court should be deciding an important point of environmental and tort law in 2008, namely the level of punitive damages to be awarded as a result of the *Exxon Valdez* disaster,³⁴ on the basis of a few throw-away remarks made by Justice Story in 1818 about a trigger-happy United States privateer, aptly named the *Scourge*, that was authorized to attack British merchant ships in the West Indies in the Anglo-American War of 1812.³⁵

In sum, I would argue that admiralty law needs to escape the claustrophobic confines of its history, rather than celebrate them, and that admiralty scholars and judges should adopt a more critical and contextual approach towards historical admiralty precedents, given the dramatic social, commercial and economic changes that have occurred over the last two centuries.

III SHIPS ARE DIFFERENT?

The second argument commonly put forward to support a substantive admiralty jurisdiction is that ‘ships are different’, in the sense that the maritime enterprise is unique, both in its character as a joint venture of cargo and ship, and in terms of the peculiar risks and perils faced by maritime ventures. In addition, the needs and nature of international maritime commerce, with its often tight timetables, volatile markets, perishable goods and particularly mobile assets, are often cited as reasons for the peculiar procedural and substantive attributes of admiralty law.³⁶

There was once considerable weight to this argument. Centuries ago, ships were literally ‘floating islands’ that traversed the globe, with no way of communicating with their onshore owners or managers, and having to rely entirely on their own resources. However, the floating island analogy has long since been discredited.³⁷ In the twenty-first century, technological advances mean that international commercial ships are just as wired into their company hierarchies and organisations as land-based workplaces or enterprises. The globalisation of

³⁴ *Exxon Shipping Co v Baker* 128 S Ct 2605; 171 L Ed 2d 570; 2008 AMC 1521 (2008). See Chris Bergen, ‘*Exxon Shipping Co v Baker*: The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards’ (2008) 22 *Tulane Environmental Law Journal* 141; David W Robertson, ‘Punitive Damages in American Maritime Law’ (1997) 28 *Journal of Maritime Law and Commerce* 73.

³⁵ *The Amiable Nancy* 16 US 546, 3 Wheat 546, 4 L Ed 456 (1818).

³⁶ See, eg, *Polar Shipping v Oriental Shipping Corp*, 680 F 2d 627, 637 (9th Cir 1982): ‘A ship may be here today and gone tomorrow, not to return for an indefinite period, perhaps never. Assets of its owner ... within the jurisdiction today, may be transferred elsewhere or paid off tomorrow.’

³⁷ See *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co* (1883) 10 QBD 521, 544-5; *Chung Chi Cheung v R* [1939] AC 160, 174 per Lord Atkin: ‘However the doctrine of extraterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore.’

litigation practices and improvements in international reporting mean that it is increasingly difficult for plaintiffs to argue that a ship or shipowner is elusive or inaccessible.

The argument that 'ships are different' is also significantly undercut by the fact that a similar specialist jurisdiction never developed in respect of other modes of international transport, which are subject to similar policy considerations. It is particularly telling that, apart from a few early false starts, a similar jurisdiction has never fully developed in respect of the international aviation industry.³⁸ This tends to suggest that either special treatment was never warranted in respect of the maritime industry, or that the development of the admiralty jurisdiction was much more a historical accident than a logical or necessary development.

In an excellent paper defending the personification theory of admiralty law, Davies argues that, despite these changes, ships are still different, not because of what they are, but because of the way in which they are owned and operated.³⁹ The true ownership of a commercial ship can be difficult to ascertain. They tend to be owned by an elaborate structure of one-ship companies, and may be registered in open-registry (or more pejoratively, flag-of-convenience) jurisdictions. Davies argues that it is this concealing and splintering of ownership interests that justifies the use of the in rem admiralty jurisdiction, and notes that courts will otherwise be required to unravel a web of ownership interests and play a 'corporate shell game' in a very short time frame at the beginning of admiralty proceedings.⁴⁰ There is some force to this argument. However, as Davies acknowledges, sophisticated use or abuse of the corporate form is not unique to admiralty, but commonly occurs in land-based business enterprises as well.⁴¹ Further, it might be argued that Davies' argument is somewhat ahistorical. Although one-ship companies are a product of the nineteenth century, their use exploded after the Brussels Arrest Convention first allowed for the arrest of sister ships in 1952. It would therefore seem to be more accurate to view the ubiquity of one-ship companies as a relatively recent reaction to tax laws and the expansion of the admiralty jurisdiction, rather than as the rationale for originally developing the jurisdiction in the first place.

Davies further argues that the maritime enterprise is still unique in that the joint venture vehicle is the ship itself. It is therefore appropriate that the focus of admiralty is on the ship itself, that proceedings in rem are brought against the ship, and that liability in rem is limited to the value of the ship.⁴² While this was probably truer of maritime ventures in the eighteenth or nineteenth century, I would again question whether it remains true in the twenty-first century, where international transport of goods is increasingly multimodal and conducted on a door-to-door basis by a network of transport operators. In these circumstances,

³⁸ See also Davenport, above n 5, 319: 'Surely, plaintiffs may need as much security against fly-by-night defendants who own aircraft as against such defendants who happen to own ships?' But see Crawford, above n 20, 522, who argues that the shipping industry is more 'varied and diffuse' than the aviation industry, and that 'the phenomenon of flags of convenience or open registry shipping has [as] yet no analogue in the area of aviation'.

³⁹ Martin Davies, 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tulane Law Review* 337, 362-366.

⁴⁰ *Ibid.*, 364.

⁴¹ *Ibid.*, 364-365.

⁴² *Ibid.* 365. However, exactly the same practical result (from the perspective of creditors) can be achieved by the strategic application of corporate ownership structures to land-based venture assets.

where the sea leg may constitute an insignificant fraction of the overall transport, and where the dominant players may be freight forwarders or non-vessel owning carriers, why should the maritime sector continue to be singled out for special legal treatment?⁴³

Ships remain vital to international commerce. But they are no longer particularly different from any other mode of international transport, and they arguably no longer deserve exceptional treatment.

IV INTERNATIONAL UNIFORMITY

Thirdly, it is often argued that international uniformity, the comity of nations or the requirements of international commerce demand the retention of a separate admiralty jurisdiction. This consideration carried some weight with the Australian Law Reform Commission, as did the notion that retaining an admiralty jurisdiction would be in Australia's national interests.⁴⁴ However, much like the appeal to the golden thread of admiralty's history, international uniformity is often overstated as a relevant consideration. There is a deep and abiding continental divide between the United States and the rest of the Common Law world in admiralty law. And, despite the Civilian origins of English admiralty law, the potential to get lost in translation between Common and Civil Law maritime jurisdictions nowadays is just as great as in any other area of law. Two marginally successful Arrest Conventions,⁴⁵ and three spectacularly unsuccessful Maritime Liens and Mortgages Conventions, have failed to provide anything near the level of international uniformity in admiralty law that we have witnessed in other areas of international commercial law, for example, international sales law.⁴⁶

Furthermore, the decision by the House of Lords in *The Indian Grace*, which I will discuss next, is likely to lead to further schisms within the community of Anglo-Common admiralty law, as will the inevitable future subsumption of traditional English admiralty jurisdiction into the elaborate and all-encompassing machinery of the European jurisdictional framework. Conflict of laws is a growth industry in the context of admiralty jurisdiction, as in other areas of maritime law. In short, while international uniformity is a laudable goal, it does not, and it should not, exclude a critical evaluation of the admiralty jurisdiction.

⁴³ See, eg, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, to be signed on 23 September 2009 in Rotterdam ('The Rotterdam Rules'), which 'aims to create a uniform legal regime providing for modern door-to-door container transport including an international sea leg, but not limited to port-to-port carriage of goods': available at <<http://www.unis.unvienna.org/unis/pressrels/2008/unisl125.html>>.

⁴⁴ ALRC Report, above n 2, [91]-[96].

⁴⁵ On which, see Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (4th ed, 2006).

⁴⁶ At the time of writing, the International Convention on Arrest of Ships 1999 has 7 parties and is not yet in force, and the International Convention on Maritime Liens and Mortgages 1993 has 13 parties. By comparison, the United Nations Convention on Contracts for the International Sale of Goods 1980 has 73 parties.

V THE FETISHIZATION OF SHIPS

The final and central argument put forward by proponents of the admiralty jurisdiction to justify its unique nature is the personification, or perhaps more accurately the fetishization, of ships: the treatment of a hunk of inanimate steel or wood as having some of the powers and characteristics of a human being for the purposes of admiralty jurisdiction. This personification doctrine, in either a strong or weak form, is central to the in rem admiralty jurisdiction. The doctrine has always been controversial, for fairly obvious reasons, and it remains under attack in modern times. It has been described extra-judicially by a former New Zealand admiralty judge as making about ‘as much sense as the medieval practice of putting animals on trial for criminal behaviour’.⁴⁷ Gilmore and Black famously pleaded for the wholesale abandonment of personification, arguing that such a move would be ‘a clear gain for legal thought’.⁴⁸

The doctrine has its supporters, however. In the United States, personification has always been taken rather literally and seriously, as evidenced by the following classical exposition by the United States Supreme Court in *Tucker v Alexandroff*:⁴⁹

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron — an ordinary piece of personal property In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner’s agents may not be her agents, and her agents may not be her owner’s agents. . . . She is capable, too, of committing a tort, and is responsible in damages therefore. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale.

In Anglo-Common Law jurisdictions, however, the Admiralty courts have retreated almost entirely from the strong personification fiction since the end of the nineteenth century. The exact reasons for this remain mired in controversy. The resulting theory is usually labelled the procedural theory, although it is more accurately described as a mixture of various degrees of proceduralism and personification manqué. In terms of the classical version of the procedural theory articulated in *The Dictator*,⁵⁰ the action in rem is not an end in itself. Rather, it is a procedural stratagem or weapon, designed to flush out the true defendant, the shipowner behind the ship.

⁴⁷ Robert Fisher, ‘The Purpose of Admiralty Law’ (2004) 18 *Maritime Law Association of Australia and New Zealand Journal* 14, 16. For a contrary view on the cultural role of actions in rem, see Paul Schiff Berman, ‘An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects’ (1999) 11 *Yale Journal of Law and The Humanities* 1, 18-38.

⁴⁸ Gilmore and Black, above n 21, 616.

⁴⁹ 183 US 424, 438, 22 SCt 195, 201 (1902).

⁵⁰ [1892] P 285.

This shift to the procedural theory entails a number of necessary corollaries. The ship is only personified selectively and to the extent to which this suits the procedural stratagem. Personified ships are always defendants, rather than plaintiffs. They cannot employ lawyers to defend themselves.⁵¹ Instead, when an owner or his lawyer appears to defend his ship, he is deemed to have submitted to the admiralty jurisdiction and incurs full personal liability. Further, taking the rationale to its logical conclusion, if the dominant purpose of the procedural approach is to winkle out the ‘correct’ defendant behind the ship, then any incentive will do: arresting any other ship owned or controlled by the same shipowner should produce the same desired effect. Hence the extension of the in rem jurisdiction to allow for sister or surrogate, or in its most extreme form, associated ships.⁵²

However, the conceptual complication is that procedural theory seeks to eat its cake and still have it. Despite an appearance on the part of the owner, the action in rem still remains against the vessel, in addition to the action in personam against the shipowner.⁵³ And, if the owner does not take the bait and chooses not to appear, default judgment will still be entered against the vessel itself as the in rem defendant.⁵⁴ And of course, in respect of maritime liens, a strong version of personification still persists, with maritime liens being enforceable against the ‘offending’ vessel only, and to the extent of the value of vessel.⁵⁵ This blending or blurring of aspects of proceduralism and personification has traditionally been justified as a pragmatic compromise. However, following the decision of the House of Lords in *The Indian Grace*, this compromise has been placed under more intense scrutiny.

The facts of *The Indian Grace* were relatively straightforward. The *Indian Grace* was carrying munitions from Sweden to Cochin for the Indian Government. A fire on board resulted in 51 shells being dumped overboard. Radiant damage to the remainder of the cargo (which comprised the vast majority of the ordinance) also rendered it unusable. The Indian Government instituted an action in personam in Cochin against the shipowners and obtained judgment for its small claim for the value of the 51 dumped shells. It subsequently also instituted an action in rem against a sister ship of the *Indian Grace* in the Admiralty Court in London: a vastly larger claim for the loss of the remainder of the cargo. This latter action was resisted by the defendants on the basis of issue estoppel. Their argument was that, as the plaintiff’s claim had merged with the earlier Indian judgment in personam, the later action in rem was estopped as *res judicata*. The defendants also pointed to the statutory estoppel contained in section 34 of the *Civil Jurisdiction and*

⁵¹ *Bank of Nakhodka v The Ship ‘Abruka’* (1996) 10 PRNZ 219, 223: ‘In this case, the plaintiff bank has arrested the *Abruka*. Unless an appearance is entered by the “owners and all others interested in the ship” the plaintiff may enter judgment by default and sell the res. If an appearance is entered by the owners or any other person interested in the ship, as the authorities demonstrate liability in personam may follow. What may not be done however, as the authorities make plain, is that the res itself may not enter an appearance.’ See also *The August 8* [1983] 2 AC 450, 456.

⁵² On which, see Hilton Staniland, ‘*Ex Africa Semper Aliquid Novi*: Associated Ship Arrest in South Africa’ [1995] *Lloyd’s Maritime and Commercial Law Quarterly* 561; Malcolm Wallis ‘The Associated Ship Jurisdiction in South Africa: Choice Assorted or Only One Bite at the Cherry?’ [2000] *Lloyd’s Maritime and Commercial Law Quarterly* 132.

⁵³ *The Dictator* [1892] P 304; *The Gemma* [1899] P 285; *The Duplex* [1912] P 8.

⁵⁴ See, eg, *The Lyrma (No 2)* [1978] 2 Lloyd’s Rep 30.

⁵⁵ *Harmer v Bell (The Bold Buccleugh)* (1851) 7 Moo PC 267; 13 ER 884.

Judgments Act 1982 (UK), which provides that an action cannot be brought in England and Wales ‘between the same parties, or their privies’ on a cause of action in respect of which the plaintiff has already received a favourable foreign judgment, unless there are difficulties with enforcement or recognition of the foreign judgment.

The House of Lords decided in emphatic and uncompromising fashion that the Indian Government’s subsequent action in rem was indeed estopped and should be struck out. In delivering the reasons of the House, Lord Steyn went considerably beyond an examination of the technical parameters of issue estoppel and section 34 of the *Civil Jurisdiction and Judgments Act*, and proceeded to a large extent to demolish the remnants of personification in English admiralty law as a fiction well past its use-by date. Lord Steyn said:⁵⁶

The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building. Fortunately, the scaffolding can usually be removed with ease. ... The idea that a ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts this fiction helped to defend and enlarge Admiralty jurisdiction in the form of an action in rem. With the passing of the Judicature Acts that purpose was effectively spent. ... The fiction was discarded.

Perhaps predictably, Lord Steyn’s remarks about the nature of the admiralty action in rem ignited something of a firestorm amongst maritime law commentators.⁵⁷ *The Indian Grace* has subsequently been distinguished — it must be said on rather formalistic and technical grounds — in New Zealand⁵⁸ and Singapore.⁵⁹ It has also recently been rejected outright by the Full Court of the Federal Court of Australia in *Comandate Marine*.⁶⁰ It has been trenchantly criticised for its supposed historical inaccuracies; its misunderstandings of admiralty and sovereign immunity

⁵⁶ *The Indian Grace* 913.

⁵⁷ However, private international lawyers and European law scholars have regarded Lord Steyn’s judgment as being relatively unremarkable. See, eg, Peter Barnett, ‘The Prevention of Abusive Cross-Border Re-Litigation’ (2002) 51 *International and Comparative Law Quarterly* 943. I am indebted to my colleague Chris Hare for pointing out this absence of *Indian Grace* fever amongst non-maritime lawyers.

⁵⁸ See *Raukura Moana Fisheries Ltd v The Ship ‘Irina Zharkikh’* [2001] 2 NZLR 801, [2001] 2 Lloyd’s Rep 319 [84]: ‘Lord Steyn was speaking for the House of Lords and, plainly, I must pay considerable respect to what he said. For all that, however, it is also true that what he said in that speech must be read *secundum subjectam materiam*.’ See also Mark West, ‘Arbitrations, Admiralty Actions *In Rem* and the Arrest of Ships in the Hong Kong SAR: In the Twilight of *The Indian Grace* (No. 2)?’ [2002] *Lloyd’s Maritime and Commercial Law Quarterly* 259, 272-276.

⁵⁹ See *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721 [24]: ‘The portions of the House of Lords judgment relied on by the appellants were theoretical expositions on the nature of in rem actions and did not constitute the ratio. Moreover, the comments were due to the specific context of the facts in the case.’ See also West, above n 58, for a discussion of *The Britannia* [1998] 1 HKC 221, which ignored or overlooked *The Indian Grace*.

⁶⁰ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (*Comandate Marine*), discussed in Sarah Derrington, ‘The Continuing Utility of the Action In Rem’ (2007) 123 *Law Quarterly Review* 358.

precedents, the procedural theory, the in personam link, and the true nature of the action in rem; its use of sub-par building metaphors; and its side-lining of maritime liens. The list goes on and on.⁶¹

And yet, Lord Steyn poses a question that demands to be answered: is personification still a necessary or useful fiction? It seems to me that there are several answers to this question. First, the admiralty jurisdiction remains useful in a strictly procedural sense, by allowing the plaintiff to bring its claim on the basis of the mere presence of the ship within the jurisdiction. This has undeniable utility in a situation where the vessel is in foreign ownership, or is about to depart the jurisdiction. An invocation of the full panoply of personification is, however, not required in this context. Put another way, the judicial seizure of an asset of the defendant in order to vest jurisdiction in the admiralty court does not necessarily entail the use of the fiction that the proceeding is brought against the asset itself, rather than the person owning the asset.

This is equally true in respect of the second procedural purpose of the action in rem, to provide security for the admiralty claimant. Seizing a vessel and holding it as security for the admiralty claims against its owner can be justified perfectly well without recourse to the fiction that it is the ship that is actually the defendant. Similarly, invoking the personification fiction is not necessary to explain the judicial sale of vessels or the distribution of proceeds amongst plaintiffs and intervenors.

The only two areas where the personification concept appears to remain key to Anglo-Common Law admiralty law are the default judgment in rem, where the owner has chosen not to put in an appearance, and maritime liens. Lord Steyn dealt with the first issue by implication,⁶² and fudged the second.⁶³ As to the first issue, if one accepts Lord Steyn's view, which I will discuss shortly, that every statutory right of action in rem is also equally an action in personam *from its inception*, then any conceptual difficulties fall away: the default judgment, although executed against the defendant's assets, is in reality being enforced against the defendant shipowner.

Maritime liens, however, are a different kettle of fish. These are substantive proprietary rights in the vessel itself. They arise secretly by operation of law and attach like a barnacle on the hull of the relevant ship until it is destroyed, regardless of subsequent changes of ownership.⁶⁴ While maritime liens contain a procedural element, in the sense that the substantive right remains inchoate until the subsequent bringing of a proceeding in rem triggers a retrospective metousiosis

⁶¹ See generally, Nigel Teare, 'The Admiralty Action In Rem and the House of Lords' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 33; BJ Davenport, 'End of an Old Admiralty Belief' (1998) 114 *Law Quarterly Review* 169; Derrington, above n 60; Sarah C Derrington and James M Turner *The Law and Practice of Admiralty Matters* (Oxford University Press, Oxford, 2007) Ch 2; *Comandate Marine* [99]-[128]. See also Davies, above n 39, 408-409.

⁶² By stating that 'an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction': *The Indian Grace* 913.

⁶³ *The Indian Grace* 908, 911-912: 'But this case is not concerned with maritime liens. That is a separate and complex subject which I put to one side.'; and 'It [the non-merger rule as applying to maritime liens] is an ancient and strange rule which I would not wish to extend beyond the limits laid down by authority.'

⁶⁴ See DC Jackson, *Enforcement of Maritime Claims* (4th ed, 2005) 501-508; Jeremy Browne 'The Extinction of Maritime Liens' [2003] *Lloyd's Maritime and Commercial Law Quarterly* 361.

or transubstantiation of the lien⁶⁵ — a piece of metaphysical dogma that has given rise to considerable confusion over the true nature of maritime liens — they cannot be completely or satisfactorily explained by a purist procedural theory shorn of all personification fictions.

Lord Steyn grudgingly admitted as much by referring to the ‘ancient and peculiar rule’ in respect of maritime liens, and by setting aside the issue of maritime liens for the purposes of deciding the case before him.⁶⁶ Critics have accused Lord Steyn of thereby ‘fragment[ing] the necessary consistency of doctrine in international shipping law’.⁶⁷ However, I would argue that his judgment merely exposes the already existing cracks in the admiralty amalgam. The uncomfortable but undeniable truth is that a conceptual fault line runs right down the middle of Anglo-Common Law admiralty law. There are, and have always been, two distinct admiralty laws: a maritime liens law, which predates the Victorian statutes, and is based on the strong personification doctrine, and a statutory jurisdiction of rights of action in rem, which dates from the Victorian codifications and extensions of admiralty jurisdiction, and is based squarely on procedural theory.⁶⁸ The fault line between the two jurisdictions is not always visible because they potentially arise out of the same or similar fact patterns, and maritime liens and statutory rights of action in rem have been bracketed together in the modern Admiralty Acts; but it yawns open from time to time, for example in tensions over whether, and to what extent, maritime liens are, or should be, co-extensive with statutory rights of action in rem.⁶⁹

If nothing else, Lord Steyn’s speech in *The Indian Grace* will hopefully provoke more sustained and sophisticated debate over the relationship between maritime liens and statutory rights of actions in rem, the justification for the ‘secretive and unconditional quality’ of maritime liens,⁷⁰ and indeed the justification for the continued existence of maritime liens.

Even if Lord Steyn’s obituary for the personification fiction is clearly a little premature in respect of maritime liens, the question remains whether his demolition of the fiction in respect of statutory rights of action in rem is really as destructive as some commentators would have us believe. I have already argued that the personification fiction is not necessary to maintain the essential procedural features of statutory rights of action in rem. I would go even further and argue that the maintenance of the personification fiction has a number of potentially negative consequences. It encourages plaintiffs to engage in opportunistic jurisdiction shopping, and to manipulate the conflicts between the general and admiralty jurisdictions, particularly in areas where the parallel regimes talk past each other, or have different priorities or policies. The maintenance of a specialist admiralty jurisdiction based on a personification fiction that is quite alien to the rest of the general legal system, and that focuses solely on the bundle of rights and interests

⁶⁵ *The Bold Buccleugh* (1851) 7 Moo PC 267, 284-285.

⁶⁶ *The Indian Grace* 908, 911-912.

⁶⁷ Derrington, above n 60, 361.

⁶⁸ A fundamental distinction clearly recognized by the House of Lords in *C & J Northcote v The Owners of the Henrich Björn (The Henrich Björn)* (1886) 11 App Cas 270. West, above n 58, 268, 271, is to similar effect, referring to the distinction between ‘true actions in rem’ and ‘actions quasi in rem’. Contra Derrington and Turner, above n 61, 35-36.

⁶⁹ *The Henrich Björn*, 283 per Lord Bramwell: ‘[T]he confusion which exists in [the earlier decisions] is attributable to a notion that Admiralty jurisdiction only existed where there was a maritime lien, so that to give jurisdiction was to give a lien.’

⁷⁰ *Paterson (NM) & Sons Ltd v Ship ‘Birchglan’* (1990) 36 FTR 92, 96.

most directly connected with the personified ship, inevitably leads to strategic games and distorted outcomes.

This is illustrated time and again in insolvencies of international shipping companies, such as that of ABC Containerline in 1996, where the collapse of the company resulted in admiralty and general litigation in Belgium, Canada, Israel, New Zealand, Singapore and the United States.⁷¹ It is difficult to see why general creditors' legitimate claims against the insolvent shipping company should be thwarted or devalued by strategic admiralty actions in rem brought across the globe by creditors who can establish admiralty claims. The resulting decisions, in terms of which some admiralty courts held that international insolvency principles should prevail on the basis of some vague notion of 'comity of nations', while others held that domestic admiralty law should prevail, on equally inarticulate grounds, do not make for particularly edifying reading. There have been similar messy clashes between admiralty law and fisheries law, employment law, personal injury and personal property securities law.⁷² The lack of clear rules of articulation, compromise or precedence between the admiralty and general jurisdictions, does little to assist in what are already complex legal issues.

The personification fiction also provides a vehicle for defendant shipowners to limit their liability to the value of the relevant ship. Indeed, an analogy to corporate limitation of liability is often cited in support of the personification doctrine.⁷³ However, that analogy would actually seem to me to undermine its necessity. By adopting the corporate form, shipowners already have full access to the privilege of limitation of liability under general company law.⁷⁴ An additional layer of limitation of liability available only to one particular maritime asset may add unnecessary complexity, skew outcomes, or provide a perverse incentive for shipping companies to gear their corporate structures artificially around the personification fiction and the sister ship rule, rather than the commercial realities of their business operations, in order to avoid liability.⁷⁵

⁷¹ See *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 907; *Antwerp Bulcarriers NV (Re)* [2001] 3 SCR 951; *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110; *The Hudig Ellen*, available at <<http://www.courts.co.il/SR/mechozi/I618400@.htm>>.

⁷² See, eg, *Readhead v The Admiralty Marshal* (1998) 87 FCR 229, discussed in Sarah C Derrington, 'My Ship, My Castle: The Forfeiture of Property Rights in the Admiralty Context' (2007) 26 *University of Queensland Law Journal* 341 and Paul Myburgh, 'Shipping Law' [2001] *New Zealand Law Review* 118; *The Stryker* [2005] NZAR 385, discussed in Paul Myburgh, 'Shipping Law' [2005] *New Zealand Law Review* 287; *KeyBank National Association v The Ship 'Blaze'* [2007] 2 NZLR 271, discussed in Paul Myburgh, 'Shipping Law' [2007] *New Zealand Law Review* 749; Aisha Lala 'KeyBank National Association v The Ship 'Blaze'' (2007) 21 *Australian and New Zealand Maritime Law Journal* 183.

⁷³ See, eg, Davies, above n 39, 340-341, 347-348; Benjamin Allums, 'Learning to Live in the New Republic: How the Supreme Court Jettisoned the Res from Admiralty in Rem Procedure' (2007) 81 *Tulane Law Review* 1637, 1642.

⁷⁴ On which, see Ross Grantham 'The Limited Liability of Company Directors' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 362.

⁷⁵ The corporate structure itself is susceptible to similar manipulation or abuse. See, eg, the international restructuring of the James Hardie group of companies in 2001, which was cynically designed to quarantine its liability for asbestos claims to Australian assets: Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27 *Sydney Law Review* 339; Peta Spender, 'Weapons of Mass Dispassion: James Hardie and Corporate Law' (2005) 14 *Griffith Law Review* 280.

Having demolished the personification fiction, Lord Steyn turned briefly to the nature of the modern action in rem, concluding that:⁷⁶

It is now possible to say that ... an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or, where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service. ... From that moment the owners are parties to the proceedings in rem.

This is undoubtedly a more extreme or radical version of procedural theory than the traditional exposition in cases such as *The Dictator*, in which it was held that the shipowner becomes personally liable if, and only if, it enters an appearance on behalf of the vessel, at which point the action continues as parallel actions in rem and personam.⁷⁷ However, it arguably represents the next logical step in a process of evolution that began over a century ago when Anglo-Common admiralty law started resiling from the personification fiction.⁷⁸ While it is certainly unfortunate that Lord Steyn did not elaborate further on the implications of his statements, they provide enough of an analytical framework to posit some thoughts for the future.

As Lord Steyn indicates in the above quotation, the immediate consequence of equating actions in rem and in personam, and thereby pursuing the procedural theory to its logical end result, is that the commencement of an action in rem by service on the ship automatically amounts to service on the shipowner as well. The unconditional appearance by the shipowner as formal submission to the admiralty jurisdiction is thus no longer required. A conditional appearance to protest jurisdiction is presumably still available. While Lord Steyn's approach may not be consistent with traditional common law rules on service and vesting jurisdiction,⁷⁹ it certainly fits the primary objective of the procedural theory: to get the shipowner before the court. It is also arguably more consistent with restrictions on actions in rem being brought against Crown vessels or foreign state vessels: these are barred or restricted precisely because their practical effect is that they do implead the sovereign behind the vessel.⁸⁰

⁷⁶ *The Indian Grace* 913.

⁷⁷ *The Dictator* [1892] P 304, 320: 'It may well be that, if the owners do not appear, the action only enforces the lien on the res, but that, when they do, the action in rem not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it.'

⁷⁸ For an earlier signal in this direction, see Brandon J's dicta in *JH Pigott & Son Ltd v Owners of the Conoco Britannia (The Conoco Britannia)* [1972] 2 QB 543, 555.

⁷⁹ See *Comandate Marine* [118].

⁸⁰ Cf *Comandate Marine* [121] and Teare, above n 61, 39 for the critique that the sovereign immunity cases do not provide a 'logical basis' for Lord Steyn's argument that the shipowner is a party to the cause of action prior to appearance, as they do not contain any criticism of *The Dictator* and subsequent cases. However, given that these two lines of authority focus on very different specific issues (the impleading of a sovereign protesting jurisdiction, as opposed to the extent of liability in a case where jurisdiction is not, per se, in issue) it is hardly surprising that they do not refer to each other. The critique also ignores the fact that Lord Steyn was focusing on the practical 'reality' of the effect of an action in rem from the perspective of a shipowner, which has to choose between either the Scylla of

It may be argued that Lord Steyn's ruling that the action in rem is taken to be an action in personam from the outset is unfair to shipowners, in the sense that bringing an action in rem or arresting a vessel cannot be seen as providing appropriate or adequate notice of service on the owner. However, the commercial reality is that the owner will be notified immediately of the ship's arrest. This position has obtained in the United States for years, and has apparently not caused any practical problems or due process concerns.⁸¹ Coincidentally, this practical consequence of Lord Steyn's reasoning serves to align Anglo-Common Law admiralty law more closely with United States admiralty practice. It also cannot be argued that treating service on the vessel as sufficient simultaneous service of an action in personam results in a more exorbitant or objectionable exercise of admiralty jurisdiction by the courts. If the shipowner elects to enter an appearance, he is no worse off than he was under the traditional approach. If he does not, he is no worse off than a defendant who chooses to ignore foreign proceedings under the general civil jurisdiction, thereby running the risk of having a foreign default judgment entered against him.

Indeed, Lord Steyn's analysis may provide defendant shipowners with greater scope to utilise forum non conveniens arguments against actions in rem brought against their vessels in inappropriate jurisdictions. If actions in rem are now also simultaneously actions in personam against the shipowner from the outset, admiralty courts will have to be more receptive to forum non conveniens arguments raised by shipowners, and will have to take into account a broader range of factors relating to *the shipowner* in determining whether to hear the matter, rather than simply focusing on the narrow issue of the security provided by *the ship* under arrest, to the exclusion of other factors relevant to the in personam defendant.⁸²

Lord Steyn's analysis, and particularly his view that issue estoppel and the merger rule apply as fully in admiralty law as they do in the general civil law, has also come under fire for being unfair to plaintiffs⁸³ and for introducing elements of risk and uncertainty into admiralty law. So, for example, in *Comandate Marine*, the Full Court of the Federal Court of Australia held that bringing an action in rem against the ship was not inconsistent with subsequently insisting that the action in personam between the parties be referred to arbitration under the charterparty arbitration clause, because the original election to litigate was taken in respect of the ship and not the shipowner. The majority of the Full Court categorically rejected *The Indian Grace* approach in favour of the traditional formulation of the procedural theory, namely that an action in rem is theoretically and practically distinct from an action in personam, at least until such time as the owner enters an appearance. To do otherwise, Allsop J concluded, would risk the action in rem becoming a 'dangerous lottery'.⁸⁴

deserting its ship or the Charybdis of exposing its other assets to liability from the moment an action in rem is commenced against its vessel.

⁸¹ See Davies, above n 39, 354 (footnotes omitted): 'Service of process on the ship within the jurisdiction at the time of the arrest is adequate notice to the true defendant to the action, in the same way that personal service of process on a nonmaritime defendant satisfies due process requirements.'

⁸² *Tomita v The Unnamed Vessel formerly known as 'Amami Taiki Go' and also known as 'Intrepid'* (2000) 16 PRNZ 459.

⁸³ See, eg, West, above n 58, 277, who describes *The Indian Grace* as 'claimant unfriendly'.

⁸⁴ *Comandate Marine* [118].

With respect, this begs the fundamental question of why the plaintiff should be allowed two bites at the cherry, particularly in a case like *Comandate Marine*, where there was access to both the vessel and the shipowner. Such luxuries are not available to any other civil litigant. Why should the plaintiff not be required to elect litigation or arbitration and then stick to that election? The only lottery, it would seem to me, was that enjoyed by admiralty plaintiffs prior to *The Indian Grace*, who had the opportunity of trying their luck with an action in rem, and, if that did not succeed, having a second spin at the in personam wheel (or vice versa). Lord Steyn's approach simply requires admiralty plaintiffs to make their election up front and stick to it — a discipline that is imposed on any other civil plaintiff.

With respect, the concerns expressed by Allsop J in *Comandate Marine* that *The Indian Grace* approach might work to an admiralty plaintiff's disadvantage, might have a chilling effect on admiralty actions in rem, or might aid collusion or fraud on the part of shipowners, appear unfounded on a careful reading of the scope of the decision in *The Indian Grace* and the implications of Lord Steyn's reasoning.⁸⁵ It must be remembered that the litigation strategy in *The Indian Grace* was decidedly peculiar, with two separate consecutive actions being brought in respect of two separate aspects of loss arising from a single cause of action. It was this litigation strategy (or lack thereof) that triggered the issue estoppel and worked to the plaintiff's disadvantage.

Had the plaintiff, for example, brought an action in rem for its full loss which could not be satisfied because of the low priority of its claim or the insignificant value of the ship, then Lord Steyn's analysis would allow the unsatisfied portion of the judgment to be subsequently enforced against the shipowners in personam, precisely because, just as a claim in rem simultaneously constitutes a claim in personam against the shipowners from its inception, so too a judgment in rem must, as a matter of logic, simultaneously constitute a judgment in personam against the shipowners for the full amount of the claim.

The contrary view — that the judgment would be limited to the value of the res, and could not be enforced against other assets of the defendant — would require a hasty resurrection of the personification fiction at the judgment or enforcement of judgment stages. Having systematically demolished the fiction, it is entirely implausible that Lord Steyn would sanction its subsequent rebuilding. On this analysis, the subsequent enforcement of this mixed judgment in rem/in personam would not fall foul of the res judicata principle or section 34 of the *Civil Jurisdiction and Judgments Act 1982* (UK), precisely because it is not an attempt to institute a second proceeding on the same cause of action between the same parties.

While Lord Steyn's approach does, therefore, require the admiralty plaintiff (like all other plaintiffs) to shoot only one bolt, the trajectory of that missile is no longer confined to the value of the vessel. The admiralty plaintiff is therefore also no worse off than she would have been under the traditional formulation of the procedural theory — in fact, Lord Steyn's application of the merger doctrine in

⁸⁵ Allsop J's concerns, as set out in *Comandate Marine* [118], appear to be based on the cumulative effect of the twin premises that a plaintiff whose in rem claim remains unsatisfied: (1) is precluded from proceeding again in personam, and (2) is also precluded from enforcing its judgment against other assets of the defendant, because there has been no personal appearance by the defendant, and therefore no submission to the jurisdiction. Although premise (1) undoubtedly follows from Lord Steyn's judgment, with respect, premise (2) does not.

admiralty law probably means that the plaintiff is in a better position. Rather than having to track down the defendant shipowner and institute a separate second action in personam in respect of the unsatisfied portion of her claim, she can simply directly enforce the unsatisfied portion of the existing judgment in rem/in personam against the defendant.

Lord Steyn's demolition of the personification fiction opens up other tantalising theoretical implications for the admiralty jurisdiction. It would seem, for example, to finally lay to rest the vestigial concept of an 'offending' vessel, thereby providing a cleaner justification for sister, surrogate or associated ship arrests. It may also furnish a clearer rationale for multiple ship arrests to provide security for the full amount of the claim, which is now permitted under the 1999 Arrest Convention.⁸⁶

In sum, I would argue that it is far better to engage with *The Indian Grace* constructively, treating it as an important opportunity to debate the future development and reconceptualization of the admiralty jurisdiction, than to reject it out of hand as an act of destructive vandalism.

VI CONCLUSION

At the outset of this lecture, I posed the question, 'Admiralty law – what is it good for?' Rather than the obvious, churlish answer, a more thoughtful response would seem to be 'A Gordian knot'. The fundamental theoretical weakness of Anglo-Common Law admiralty law is that it has tied together three separate strands of the jurisdiction: first, the procedural vesting or founding of the jurisdiction; second, the security aspect of the jurisdiction; and third, the substantive or subject-matter aspect of the jurisdiction, which involves the demarcation of substantive maritime causes of action and the identification of the parties. As Jackson has pointed out in his scholarly work on enforcement on maritime claims, this conflation of ideas is not present in the maritime laws of Civil Law jurisdictions.⁸⁷ In the course of the lengthy historical conflict surrounding English admiralty jurisdiction, the scope of the subject-matter jurisdiction was used to curb the ambit of admiralty courts' powers. The substantive heads of in rem jurisdiction, expressed in terms of the personification fiction, have therefore historically delineated and driven the procedural and security aspects of the jurisdiction. As a consequence, the personification fiction has become intertwined with all three aspects of the admiralty jurisdiction, without regard to whether this was either necessary or ultimately useful. To extend Lord Steyn's metaphor, the scaffolding has overrun the entire building project. These three issues have to be teased apart before the admiralty jurisdiction can develop in a rational manner.

In respect of the first two procedural aspects of vesting jurisdiction and providing security for maritime claims, direct service and action against ships can still be justified today on the basis of the original rationale for the admiralty jurisdiction, namely to provide the plaintiff with an effective means of establishing and enforcing his claim against a foreign defendant whose only link to the forum is a highly mobile asset. This same rationale would seem to apply equally to other transport vehicles such as aircraft. A logical application of such principles to the

⁸⁶ Art 5(2).

⁸⁷ Jackson, above n 64, 1: 'In English law we are not blessed with such logic.'

procedural and security aspects of the admiralty jurisdiction would result in a regime which is more closely aligned with the Mareva injunction or freezing order, with attachment orders under United States admiralty law, and with the concept of saisie conservatoire found in Civil Law jurisdictions.⁸⁸

What cannot be justified or sustained, however, is the continued existence of a fixed, formalistic shopping list of substantive heads of admiralty jurisdiction; a shopping list informed, mapped out and ultimately imprisoned by the conceptual limitations of an outdated personification fiction. Rather than damaging the admiralty jurisdiction, Lord Steyn in *The Indian Grace* has signposted the way to set it free. If the substantive subject-matter of admiralty jurisdiction is reintegrated into, or at least realigned with, the broader theory and practice of the general civil jurisdiction, it can grow, develop and remain relevant to the realities of twenty-first century international commerce.⁸⁹ The alternative is to cling to a nineteenth-century chart of heads of admiralty jurisdiction, which will inevitably be consigned, at best, to increasing irrelevancy as a romantic historical quirk; at worst, to a mere footnote of legal history. At which point, admiralty law unfortunately will be good for ... absolutely nothing.

⁸⁸ On which, see generally George K Walker, 'The Personification of the Vessel in United States Civil In Rem Proceedings and the International Law Context' (1991) 15 *Maritime Lawyer* 177, 200-208; William Tetley, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 *Tulane Law Review* 1895; William Tetley, 'Attachment, the Mareva Injunction and Saisie Conservatoire' [1985] *Lloyd's Maritime and Commercial Law Quarterly* 58.

⁸⁹ See also Young, above n 8, 521; Jonsson, above n 22, 123; Neill Hutton, 'The Origin, Development, and Future of Maritime Liens and the Action in Rem' (2003) 28 *Tulane Maritime Law Journal* 81, 112.