THE WILLIAM TETLEY LECTURE ON MARITIME LAW DELIVERED BY THE HON. JUSTICE SARAH DERRINGTON AT TULANE LAW SCHOOL ON 3 APRIL 2024*

In its commitment to excellence in legal scholarship and its role as a leader in maritime law education in the USA, Tulane University Law School traditionally hosts the William Tetley Lecture on Maritime Law every year. The Maritime Law Center inaugurated this esteemed lecture series in honour of a distinguished Canadian maritime lawyer, professor at the McGill Law School in Montreal, and author of several influential books and numerous widely acclaimed articles that have become important resources for academics, practitioners, and students in the field of maritime law. Professor William Tetley's remarkable career spanned academia, politics, and legal practice. His deep engagement with maritime law was matched by his practical experience and academic rigour. His work has had a lasting worldwide impact on maritime law. In a generous act of dedication to education in the field of maritime law, Professor Tetley endowed the lecture series himself, ensuring its longevity and impact.

Hosted under the auspices of the Tulane Maritime Law Center, the lecture series continues to thrive, shedding light on the importance and complexities of maritime law and attracting the most distinguished speakers from around the globe.

This year, the William Tetley Lecture on Maritime Law was held on 3 April 2024. The lecturer was the Hon. Sarah Derrington, Justice of the Federal Court of Australia since 2018. The title of her address was "Has National Idiosyncrasy Trumped International Uniformity?".

Justice Sarah Derrington is one of the most prominent maritime lawyers and academics today. Her extensive contributions to maritime law, through both her academic work and her judicial decisions, have established her as a leading figure in this specialised field.

Justice Derrington started her journey in law at the University of Queensland, where she gained her law degree in 1990 and later earned a Master's degree from the same University. Her doctoral studies led her to specialise in marine insurance law, a field in which she has since established herself as an international

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authority. She became a professor at the University of Queensland in 2008 where she served as Dean of Law from 2013 until 2018. She also acted as a barrister specialised in maritime and shipping law, general commercial law and arbitration. In 2018, she was appointed to the Federal Court of Australia and also took on the role of President of the Australian Law Reform Commission.

Justice Derrington served as President of the Maritime Law Association of Australia and New Zealand and was a board member of the Australian Maritime Safety Authority from 2012 to 2017. Since 2006, she has been a member of the Admiralty Rules Committee. She served as President of the Australian Law Reform Commission. She also contributed her expertise to the Council of the Australian Maritime College (AMC) from 2012 until 2023. She is actively involved in the Council of the Australian National Maritime Museum.

Her professional accomplishments have been recognised through her election as a Fellow to several prestigious organisations, including the Academy of Law in 2009, the Nautical Institute in 2013, and the Queensland Academy of Arts and Sciences in 2018. She was honoured as an Honorary Bencher by Gray's Inn in 2021 and was appointed Member of the Order of Australia in the Queen's Birthday Honours List of 2022.

In her lecture, Justice Derrington delved into the core arguments advocating for international uniformity in maritime law and how this vision can be impeded by national idiosyncrasies. The discourse primarily centred on two key areas of maritime law: the carriage of goods by sea and the limitation of liability concerning maritime claims. In emphasising the importance of the international uniformity of maritime law, Justice Derrington quoted Lord Mansfield (1774), saying: "In all mercantile transactions the great object should be certainty; and therefore it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon".[1]

Furthermore, as Justice Derrington pointed out, the uniform application of law should ensure that equal rules, wherever and whenever applied, produce equal results, and the essential clarity of a norm is of utmost importance in reaching this aim.

Uniformity of law in international trade and commerce is deemed essential due to its operational nature, which largely transcends national state laws. Maritime law concerning the carriage of goods by sea serves as a prime example of the ongoing struggle for legal uniformity on an international scale. Deriving

[1] *Vallejo v. Wheeler* 98 Eng. Rep. 1012 (K.B. 1774).

from *lex maritima* through to the procedures of codification of maritime law at the international level, great efforts have been made to achieve convergence in this area. This year we are marking the 100th anniversary of the Hague Rules,[2] yet the current landscape is characterised by the fragmentation of laws affected by national legislation and the emergence of varied international regimes.

Countries such as Australia and the PRC have enacted their own unique national carriage of goods legislation. While these laws are based on the framework of the Hague and Hague-Visby Rules,[3] they incorporate certain modifications, reflecting the complexities of aligning national laws with international standards. The Scandinavian countries (Norway, Sweden, Denmark and Finland) have enacted the Nordic Maritime Code, incorporating much of the Hamburg Rules,[4] even though none of these States has ratified the Hamburg Rules and they formally adhere to the Hague-Visby Rules. This is another instance of regional adaptation, further complicating the quest for uniformity.

The proliferation of different legal frameworks, from the original Hague Rules to the Hague-Visby Rules, Hamburg Rules, and the more recent Rotterdam Rules,[5] exemplifies the challenges in harmonising international maritime law. The lack of a single, universally accepted set of rules leads to inconsistencies in legal application across borders, affecting the predictability and certainty required for smooth international transactions.

Justice Derrington's reference to the recent Australian case law, notably *The BBC Nile* [2022][6] and *Poralu Marine Australia Pty Ltd v MV Dijksgracht* [2023],[7] elucidates the practical ramifications of the current fragmented legal environment. These cases highlight how the absence of universally applied legal rules in the carriage of goods by sea can result in protracted and costly legal disputes with unpredictable outcomes.

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2 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature, Brussels, 1924 (Hague Rules).

3 The Hague Rules were amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1968 (Visby Rules). The Hague-Visby Rules were furthermore amended by the Protocol of 1979, signed in Brussels (SDR Protocol).

4 United Nations Convention on the Carriage of Goods by Sea, Hamburg, 1978.

5 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 2008 (Rotterdam Rules).

6 *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (The BBC Nile)* [2022] FCAFC 171 (12 October 2022).

7 *Poralu Marine Australia Pty Ltd v MV Dijksgracht* [2023] FCAFC 147 (8 September 2023).

Justice Derrington further provided a review of the harmonisation of international rules on limitation of liability. The discussion centred on the LLMC 1976/1996.[8] This was contrasted with specific national legislative approaches, such as the US Limitation of Liability Act of 1851, which attracted renewed attention following the incident involving the M/V Dali and the Francis Scott Key Bridge in Baltimore Harbor in March 2024.

An analogy was made to the similar limitation of liability provisions in the CLC and the Fund Conventions of 1992.[9] A focal point of Justice Derrington's overview was the interpretation challenges surrounding Article 4 LLMC 1976/1996. This segment delves into the intricacies of breaking the limits of liability, especially given the international norm's silence on the matter of corporate attribution. The critical issue hinges on determining the appropriate level of fault of a corporate entity (such as a shipowner or salvor, as defined under the LLMC) and identifying which individual's conduct and state of mind (*mens rea*) within the corporation is pertinent for attributing the necessary level of fault for breaking the liability limit. The Convention specifies this as a "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".

Justice Derrington highlighted the divergence in judicial approaches towards this matter, with the identification doctrine utilised by courts in the UK, Canada, and New Zealand. This doctrine scrutinises the conduct and mental state of senior management as opposed to the vicarious liability doctrine prevalent under the common law doctrine of agency, adopted by courts in the US and Australia. Furthermore, Justice Derrington touched upon the evolving legal frameworks regarding the concept of organisational blameworthiness, particularly in the context of corporate criminal responsibility. This included an examination of the notion of "corporate culture" in the context of the Australian Criminal Code whose innovative provisions allow state of mind to be proven through corporate culture. Reference was made to currently the only reported maritime criminal case applying the said provisions of the Criminal Code – *R v Potter and Mures Fishing Pty Ltd* [2015].[10]

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[8] Convention on Limitation of Liability for Maritime Claims, London 1976 and the subsequent Protocol of 1996 (LLMC 1976/1996).

[9] International Convention on Civil Liability for Oil Pollution Damage, London, 1969, replaced by the 1992 Protocol (CLC 1992); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 1971, superseded by the 1992 Protocol (Fund) and supplemented by the 2003 Supplementary Fund Protocol (Supplementary Fund).

[10] *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015).

The silence of the LLMC on the attribution issue means that the interpretation of this key international norm relies on domestic legislation – another illustration of the divergence in the application of international maritime conventions. This reliance on national laws to fill the gaps in international legal frameworks represents a significant challenge to achieving uniformity in maritime law.

Justice Derrington proceeded to discuss a similar challenge in the interpretation of "loss or damage" as defined under Article 2(1)(a) of the 1976/1996 LLMC and the usage of the same term within the context of pollution damage, specifically under Article 1(6)(a) of the 1992 CLC and under the Fund regime, respectively. She highlighted the notable differences in the concepts of civil liability for "loss or damage" between the legal traditions of civil law and common law. Justice Derrington further emphasised the inconsistency within various national legal systems that follow the civil law tradition, especially regarding the acceptance of claims for pure economic loss.

Justice Derrington referred to the clauses concerning pure economic loss within the IOPC Funds Claims Manual.[11] These clauses define pure economic loss as a separate category of claim permitted under the 1992 CLC and Fund conventions. She pointed out that although this manual serves as a significant source of soft law, consistently employed by the IOPC Funds in handling claims related to marine oil pollution damage, it is not binding on the courts of the State parties to the 1992 CLC and Fund conventions when they apply the provisions of these conventions. This distinction underscores a critical point: the interpretation and application of international norms are heavily influenced by the relevant domestic laws.

As examined in Justice Derrington's lecture, the judicial disputes following from the sinking of the Prestige laid bare the stark contrasts in judicial interpretations across different jurisdictions, exemplified specifically by the conflicting decisions of the Spanish Supreme Court and the English courts when applying the 1992 CLC and Fund conventions, ultimately also leading to the decision of the European Court of Justice (ECJ)[12] concerning the interpretation of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[13]

[11] Available at https://iopcfunds.org/wp-content/uploads/2018/12/2019-Claims-Manual_e-1.pdf (accessed on 8 April 2024).

[12] *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* (Case C-700/20) EU:C:2022:488, 20 June 2022.

[13] OJ 2001 L 12, p. 1. *Nota bene*, Regulation No 44/2001 which was applicable to the respective dispute was later repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, OJ 2012 L 351, p. 1.

The Spanish Supreme Court held the master criminally liable for pollution caused by the sinking of the Prestige and extended this liability to the shipowner through the principle of vicarious liability. Consequently, the Court found that the shipowner's right to limit liability under the 1992 CLC was lost due to the master's acting "recklessly and with knowledge that such loss would probably result". It further held that the London P&I club was directly liable for the pollution damage over and above the liability limits prescribed by the CLC 1992 up to the full amount of the policy coverage, although under the Convention the liability insurer is entitled to limit its liability even in the case of the insured shipowner's loss of the right to limit. Lastly, the IOPC Fund was held liable up to the limits of the 1992 Fund Convention.[14]

On the other hand, the London P&I club (the shipowner's liability insurer) initiated arbitration in London against Spain pursuant to the insurance policy terms and conditions (the P&I club rules) in 2013. The arbitral award absolved the club from liability towards the Spanish State based on the club's "pay to be paid" rule and it was also held that the Spanish State as a claimant against the P&I club was bound by the arbitration clause in the club's rules and could therefore not proceed against the club in the Spanish court. The arbitral award was subsequently given the effect of a judgment of the English court.[15] In the meantime, Spain filed for an *ex parte* order for registration of the Spanish court's judgment in the English court, and these proceedings eventually resulted in the English court setting aside the *ex parte* order for registration of the Spanish court's judgment in the UK.[16]

This variation in judicial outcomes between the UK and Spain underscores a broader issue within international maritime law: the lack of uniform interpretation and the absence of reciprocity among States parties to the 1992 CLC and Fund conventions. Such discrepancies not only undermine the predictability and fairness that these international treaties strive to provide but also highlight the pitfalls in current efforts to harmonise legal approaches to maritime pollution incidents.

The *Prestige* cases, as discussed in the context of Justice Derrington's comprehensive overview, vividly illustrate the challenges facing the international

[14] See Spanish Supreme Court (Criminal Chamber) judgment no. 668/2018 of 18 December 2018.

[15] See *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The "Prestige") (No 2)* [2014] 1 Lloyd's Rep. 309.

[16] See *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The "Prestige")* [2023] EWHC 2473 (Comm).

maritime legal framework in fostering a consistent and universally accepted approach to liability and compensation for pollution damage.

Finally, Justice Derrington commented on IMO Resolution A.1164(32) adopted in 2021, relating to the interpretation of Article 4 of the LLMC. She noted that the Resolution marks a significant effort towards resolving the issues related to uniform interpretation of this provision of the Convention. This Resolution specifically addresses the ambiguities surrounding Article 4 of the LLMC, signalling progress in the quest for a more harmonised understanding of limitations on liability within maritime law. However, as Justice Derrington pointed out, the Resolution stops short of addressing the complex issue of attribution of corporate liability. This gap persists in relation to the LLMC, but also in relation to other international maritime conventions containing similar provisions, including the 1992 CLC. This is particularly relevant given the difficulties identified in cases like those emanating from the Prestige disaster, wherein the intricacies of attributing liability to shipowners as corporate entities were brought to the fore. Despite this shortcoming, the adoption of the Resolution by approximately 95% of the States parties to the LLMC signifies substantial consensus among the international maritime community regarding the need for clearer guidance on these matters. Furthermore, it was noted that although the Resolution has garnered wide support of the States parties, it stands as a soft law instrument. This designation implies that, while the Resolution provides valuable guidance and reflects broad agreement among the participating States, it does not possess formal binding power under the international law of treaties. According to the established principles of international treaty law, a treaty can only be amended or modified through an agreement reached by all States parties to that treaty. Thus, while IMO Resolution A.1164(32) makes strides towards mitigating some of the issues related to the uniform interpretation of Article 4 of the LLMC, its influence is inherently limited by its status as soft law, leaving the responsibility for its application and compliance to the discretion of individual States. This underscores the ongoing challenges within international maritime law to achieve uniformity and predictability, yet it highlights the intricate dance between soft law instruments and formal treaty obligations in the international legal framework, as well as the need for continued efforts towards greater harmonisation and clarity.

In her concluding remarks, Justice Derrington pondered whether the current state of international maritime law invites pessimism or optimism. The proliferation of alternative rule sets and the adaptation of international conventions by domestic law are reasons for pessimism. However, optimism is warranted by

the presence of soft law tools like interpretative guidelines and resolutions from relevant international organisations, as well as the reciprocity among States parties to the international maritime conventions.

At the end of the lecture, Justice Derrington cited a poignant observation made by Professor Tetley himself: "…world society is not yet ready for monolithic international law. It cannot give up its diversity of social purpose and manner of doing things. International laws in any form must recognise this diversity in substance and style or they will fail. They must… avoid imposing one legal system or legal tradition, at the cost of marginalizing another".

This statement remains as relevant today as it was when first articulated, and perhaps even more so.

The full text of Justice Derrington's paper will be published in one of the upcoming issues of the *Tulane Maritime Law Journal*.

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Sažetak:

PREDAVANJE IZ POMORSKOG PRAVA POSVEĆENO WILLIAMU TETLEYU ODRŽALA JE SUTKINJA SARAH DERRINGTON 3. TRAVNJA 2024. GODINE NA PRAVNOM FAKULTETU SVEUČILIŠTA TULANE

Kao predvodnik u obrazovanju u području pomorskog prava u SAD-u, Centar za pomorsko pravo pri Pravnom fakultetu Sveučilišta Tulane redovito organizira posebno predavanje posvećeno profesoru Williamu Tetleyu, istaknutom pomorskom pravniku s visokim međunarodnim ugledom te autoru nekoliko utjecajnih knjiga i brojnih citiranih članaka koji su postali nezaobilazan izvor literature za znanstvenike, stručnjake i studente pomorskog prava diljem svijeta. Profesor William Tetley bio je pravni stručnjak – praktičar, političar (1968. – 1976.) te profesor na Pravnom fakultetu McGill u Montrealu. Od 1984. do 1998. godine, svake je godine predavao kratki tečaj u sklopu programa studija pomorskog prava na Pravnom fakultetu Sveučilišta Tulane. Serije predavanja koje se održavaju u čast profesoru Williamu Tetleyu na Sveučilištu Tulane ističu važnost i kompleksnost pomorskog prava te privlače najistaknutije svjetske govornike. Ove je godine, odnosno 3. travnja 2024. predavanje održala ugledna sutkinja Saveznog suda Australije Sarah Derrington, jedna od najistaknutijih pomorskih pravnica i znanstvenica današnjice. Njezin opsežan doprinos pomorskom pravu, kroz akademski rad i sudačku karijeru, etablirao ju je kao vodeću osobu u ovom specijaliziranom području. Svoj je put započela na Sveučilištu Queensland gdje je diplomirala pravo 1990. godine, a poslije i magistrirala na tom sveučilištu. Njezin doktorski studij doveo ju je do specijalizacije prava pomorskog osiguranja, polja u kojem se dokazala kao međunarodni autoritet. Postala je profesorica 2008. godine na Sveučilištu Queensland gdje je bila dekanica Pravnog fakulteta od 2013. do 2018. godine. Također je djelovala kao odvjetnica specijalizirana za pomorsko i plovidbeno pravo, opće trgovačko pravo i arbitražu. Imenovana je sutkinjom Saveznog suda Australije 2018. godine. Sutkinja Derrington aktivna je sudionica i u brojnim tijelima i udruženjima koja oblikuju i promiču pomorsko pravo. Njezin rad ima izravan utjecaj na praksu i razvoj pravnih normi u tom području. Na ovogodišnjem predavanju iz pomorskog prava posvećenom Williamu Tetleyu, sutkinja Derrington obratila se naslovom »Je li nacionalna idiosinkrazija nadjačala međunarodnu uniformnost?«. U svom je predavanju dublje istražila osnovne argumente zagovaranja međunarodne uniformnosti pomorskog prava te kako ta vizija može biti otežana specifičnim nacionalnim pravnim rješenjima. Diskurs se uglavnom usredotočio na dva ključna područja pomorskog prava – prijevoz robe morem i ograničenje odgovornosti brodara za pomorske tražbine.