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RAISE HIGH THE SILVER OAR! TEACHING ADMIRALTY LAW

JOHN D. KIMBALL*

INTRODUCTION

Admiralty always has been a specialized area of practice, aspects of which are so ancient and considered so arcane that it occupies a unique niche in the legal profession. It is a specialty which some perceive to be a derelict wreck, best left to frustrated sailors and retired mariners. But the truth is that admiralty is a dynamic field, which intersects with a wide range of practice areas.

At the outset of the course each year, it is worthwhile to take time to talk about the broad range of different practices in real the world which fall within the umbrella of admiralty and maritime law.¹ One branch of practice involves transactional lawyers who do corporate and tax work; ship building contracts; ship sale and purchase; contracts of affreightment of all kinds; and, in recent years, public securities work. Maritime dispute resolution is a second branch and covers many areas, ranging from litigation of claims arising from personal injury and death; ship casualties; salvage and general average; cargo loss or damage; and environmental damage. For certain admiralty lawyers, their work mainly involves arbitration, a practice quite distinct from courtroom litigation and which, for many years, has been the primary forum for dealing with charter party disputes. The prosecution and defense of criminal claims now occupies a prominent role in maritime law. This is especially true in the area of environmental crimes. In addition, there is a vibrant, indeed growing, regulatory practice due to the many federal and state agencies affecting shipping, boating, and fishing, as well as the foreign governments and international agencies which have roles in these industries.

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1. Students understandably want to know what, if anything, distinguishes “admiralty” from “maritime law.” The answer is more a factor of legal history than a meaningful one for practicing attorneys. Traditionally, “admiralty” embraces a practice focusing on special procedures for asserting maritime liens or arresting vessels in connection with maritime casualty cases. “Maritime law” is a more open-ended concept embracing charter-parties and other maritime contracts. See Graydon S. Staring, *The Proctor’s Dilemma: Certifying Specialties in Admiralty*, 28 J. MAR. L. & COM. 503, 504–05 (1997).

In addition to learning about the law itself, it is essential for students taking maritime law to learn something about the many facets of the shipping industry and the cluster of services supporting it. Admiralty as a body of law has been peculiarly driven by the industry governed by that law. Shipping is dominantly an international business and admiralty law has to be understood in an international context. In the United States, admiralty is governed by the general maritime law, which ebbs and flows subject to the different sources of power affecting its evolution, be it the Executive branch, Congress, or ultimately, the Supreme Court. Although the practice of admiralty law is mainly concerned with private disputes or transactions, there has been an increasing interface with public international law. As a consequence, international treaties and regulations have an important place in the curriculum, whether they concern safety of life at sea, oil spills, piracy, or cargo claims.

I. THE GOAL OF THE COURSE

The course I teach is an introductory one, and as is the case at most law schools, it is the only one offered in the field of admiralty law. A basic goal of my course, nonetheless, is to teach the building blocks needed for practicing admiralty law, in whatever form that may take. It is hoped that by the end of the course, the students could work in an admiralty law practice and have the knowledge of the subject required to begin their careers. To that extent, there is an element of basic vocational training in my class, which distinguishes it from many other courses.

But I also aim for much more. Like any successful law practice, a law school education is the sum of many parts. Many of the students with whom I have the privilege of sharing our maritime semester will not have lifetime careers as lawyers. They may practice a short time and go on to other things. Some of the students are foreign lawyers working towards a master's degree. They will practice law or work in a foreign country, many of which have civil law systems very different from our own.

Thus, a further goal is to teach about the legal system in the United States and its place in the world. I endeavor to at least introduce the intersections between maritime law and a very wide range of other subjects lawyers are likely to encounter, ranging from corporate, to constitutional, to criminal, to evidence, to alternate dispute resolution, to trial skills, to conflicts of laws, to international law, and others. And I always cover legal ethics and the code of professional conduct adopted by the Maritime Law Association of the United States,² which could well serve as a model for all lawyers.³ I endeavor to

2. CODE OF PROFESSIONAL CONDUCT, MAR. LAW ASS'N (1997), in MAR. LAW ASS'N OF THE U.S., HISTORY, PURPOSES, ORGANIZATION & ACTIVITIES, CORPORATE BY-LAWS, OFFICERS AND FORMER OFFICERS, COMMITTEES, DIRECTORY OF MEMBERS: 2008–2010 § 3, at 16 (2008).

discuss professional responsibility as often as possible simply because there is no more important concept for law students to embrace when they go into practice.

A further aim is the proverbial but, nonetheless true, one of teaching students to think like a lawyer and bring a legal analysis and framework to problem solving. Paying careful attention to detail, but also being able to create a logical construct for considering whatever the issue may be, are useful in virtually every context a lawyer may find herself in.

I hope students will finish the course with a deeply-rooted respect for the role of law in the world and, at least a curiosity, if not a fervent interest, for the fascinating field of maritime law. The student who can explain the unique role of the silver oar in converting an otherwise ordinary courtroom into the specialized realm of an admiralty court is on the right track indeed.⁴

Finally, participating in the experience of learning brings its own rewards. Learning how to learn most effectively is one of the student's most important challenges and is a process which continues long after students have become lawyers, judges, or teachers.

II. THE LESSON PLAN

Because the course I teach is introductory and lasts only one semester, it is not possible to cover every important area of maritime law. Indeed, a broad brush approach is required with the aim of recognizing key themes. As a result, the syllabus I have developed focuses on the following main subjects:

- Admiralty Jurisdiction and the Savings to Suitors Clause;
- The General Maritime Law;
- Marine Insurance;
- Charter Parties;
- Bills of Lading;
- Seafarers and Personal Injury and Death Claims;
- Admiralty Practice, Including Arrest Maritime Attachment and Suits Against Governments;
- Limitation of Liability;
- Oil Spills

3. See Charles L. Briant, Professionalism, Civility, and the Maritime Bar: A View from the Bench, Address at the Seaman's Church Institute (May 1, 1997), in 28 J. MAR. L. & COM. 551 (1997).

4. See Joseph C. Sweeny, *The Silver Oar and Other Maces of the Admiralty: Admiralty Jurisdiction in America and the British Empire*, 38 J. MAR. L. & COM. 159, 159 (2007).

The process of elimination this outline entails is difficult. Throughout the course, subjects such as maritime liens, collision, and general average are given emphasis as well. Because of their significant role in admiralty practice, especially in recent years, I have also devoted time to criminal law issues such as piracy and environmental crimes.

For the past several years, I have begun the course with a class devoted to the Titanic, and particularly the series of decisions from the Fourth Circuit dealing with salvage claims to the artifacts removed from the wreck.⁵ Judge Niemeyer's opinions in the cases⁶ are an excellent starting point, since they provide a virtual microcosm of much of the course and deal with many of the most important topics which must be covered in a course on admiralty law. The decisions provide a fascinating backdrop for discussing admiralty jurisdiction, as well as the important topic of in rem jurisdiction. We also discuss salvage law and the law of finds and consider the important concerns addressed by the Convention on the Protection of Underwater Cultural Heritage.⁷ Indeed, for several years, the final exam offered the students an opportunity to critique the Fourth Circuit's decisions and consider how the Supreme Court would deal with the assertion by a United States District Court of constructive in rem jurisdiction over personal property located in international waters.

III. MAIN THEMES

There are some main themes which I endeavor to develop, both in the overviews I provide at the beginning of each class and through class discussion. These include:

A. *Sources of Admiralty Law and The Significant Interplay between United States and Foreign Law*

One of the first things a student of admiralty law will learn is the subject is age-old and the formation of the law long predates the creation of the United States. Maritime law, as we know it today in the United States, has evolved from case law making up the general maritime law, as well as statutory law

5. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999). See also the district court's decision on remand granting R.M.S.T. a salvage award of 100% of the fair market value of the artifacts recovered. *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784 (E.D. Va. 2010).

6. *Titanic*, 435 F.3d at 523; *Titanic*, 286 F.3d at 196; *Haver*, 171 F.3d at 951.

7. See United Nations Educational, Scientific and Cultural Organization, Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40, 40-41 (2002).

going back to Rhodian law, Medieval Sea Codes, and the laws of Oleron.⁸ English law, of course, played a predominant role in the American colonies and continued to do so even after the Revolutionary War and the adoption of the Constitution. Even today, we look to English law for guidance, especially in areas such as marine insurance.⁹

Civil law also has served as a source of our maritime law, even though among our fifty states, only Louisiana has such a system of law. The important concept of in rem jurisdiction has its foundation in European civil law.¹⁰

B. *Uniformity in Maritime Law*

Uniformity always has been an overriding goal of maritime law. This is true domestically within the United States and on an international level. Since the landmark decision in *De Lovio v. Boit*, the Court has recognized there is a positive need to ensure that maritime law is consistent throughout the United States.¹¹ A shipowner whose vessel calls at New York should not be confronted with a different legal regime when the same vessel later calls at New Orleans. The same is true if the same vessel goes on to foreign ports. There are so many court decisions extolling the benefit of uniformity, it would be pointless to try to provide even a truncated list.

C. *Separation of Powers*

The ultimate authority of the Supreme Court to determine the general maritime law is a distinguishing feature of maritime law.¹² It is of great importance, therefore, for students to be at home with the separation of powers created by the Constitution and the Court's role in deciding maritime law

8. NICHOLAS J. HEALY ET AL., CASES AND MATERIALS ON ADMIRALTY 1 (4th ed. 2006); See also GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 4-8 (2d ed. 1975).

9. See, e.g., *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

10. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867). Professor William Tetley has explored the parallels between civil law and maritime law. See William Tetley Q.C., *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)*, 23 TUL. MAR. L.J. 317 (1999).

11. *De Lovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3776).

12. See Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law*, 24 J. MAR. L. & COM. 249, 284 (1993) ("Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution."); John D. Kimball, Miles: "*This Much and No More . . .*", 25 J. MAR. L. & COM. 319, 320 (1994) ("While Congress unquestionably has power to pass legislation which affects all aspects of the maritime law, under the Constitution the Court has an equal, if not preeminent, role and is vested with jurisdiction to declare the general maritime law.")

under Article III, Section 2, Clause 1 which provides: “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”¹³

Although the Supreme Court has at times seemed to defer to Congress in creating maritime law,¹⁴ the Court has asserted its power in recent years in various cases.¹⁵

D. Exclusive Admiralty Jurisdiction vs. Savings to Suitors

It is vitally important for students of maritime law to grasp the role of the “savings to suitors” clause in 28 U.S.C. § 1333(1), which provides: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

The import of this clause is to preserve the right of plaintiffs in most types of maritime cases to choose either a federal or state court.¹⁶ There are only a limited category of cases for which federal court jurisdiction is exclusive.¹⁷ Thus, in most cases, state and federal courts have concurrent jurisdiction to hear and decide maritime claims, and the plaintiff has a right to choose his preferred forum.

IV. LECTURES

As a formerly often bored student and only fairly good listener, I am acutely aware of the limits any professor should keep in mind when presenting a lecture. Even the best prepared and presented lecture will keep the attention of most of the students for only part of the normal class time. My own practice is to provide a short overview of the most important points the students are expected to learn about whatever subject we are discussing. The most difficult task for students is to know what main points they should take away from the reading material and class discussion. I endeavor to outline these points at the beginning of each class. By using the problem method of teaching discussed below, I try to reinforce those same points at the end of each class.

Whenever possible, I try to place the legal concepts under discussion in a real world context. Most of the cases we will find in a case book involve the outer boundaries of whatever area of law they concern, as opposed to the mainstream matters most practitioners and courts encounter. It is, of course, important to highlight the far edges of the legal world we inhabit. But, it

13. 28 U.S.C. § 1331(1) (2006).

14. *E.g.* *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24, 27, 36 (1990).

15. *See Exxon Shipping Co. v. Baker*, 552 U.S. 471, 489–90 (2008); *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004).

16. *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 443–46 (2001).

17. These include in rem cases, suits against the United States and foreign governments, and other cases brought under statutes giving the federal courts exclusive jurisdiction.

equally is important for students to be grounded in the real world their future clients occupy on a normal daily basis. It does not help prepare students to practice law when they are more at home with abstract concepts than real life issues. Clients usually need guidance on what to do in a given situation and have less concern about the conceptual framework for that advice or the nuances of what might or might not be permitted.

V. CLASS DISCUSSION

Class discussion can be very useful, especially if a wide-range of students in the class participate. This is when the learning experience becomes three-dimensional. I generally designate two or three student discussion leaders for each class so that at least those students will come to the class very well prepared to discuss the materials. There is an incentive for the students to be well-prepared in that their grade for the course can be adjusted to take account of their contribution. Class participation provides the students with an opportunity for oral presentation; and that, by itself, is a significant benefit. It also provides an opportunity for the students to ask questions and allows the professor to determine whether the students are “getting” the material.

At times, questions arise which enable the class to engage in debate on unsettled issues and even to debate the wisdom of a particular decision.

My own practice also includes using the problem method. I use at least one problem for each class. The problems have the great advantage of providing a framework for discussing the main points which emerge from the cases we are reviewing. The problems also allow an opportunity to go beyond the basic points and focus on more advanced and more difficult issues. Finally, the problems provide an excellent vehicle for the students to outline an overview of the course and prepare for the final exam. I suggest the students prepare answers to the questions raised in the problems, as these will provide a foundation for preparing for the final exam.

VI. THE FINAL EXAM

For many years, I have given a take-home exam consisting of a fact pattern and series of questions. Most of the questions relate to the fact pattern. The questions also include one or two opportunities to write a short essay about a particular issue or case of significance. For example, should the Supreme Court agree to decide a particular issue and, if so, why and what should the outcome be?

I consider the final exam to be a vehicle for bringing together the many and varied legal threads we have reviewed during the semester. It provides an opportunity for the students to understand how the various topics relate to one another and how they might arise as a result of a given maritime casualty. The

hope is that by the end of the exam, the students have an opportunity to apply what we have learned in the course.

In my first few years of teaching, I gave an in-class exam with a three-hour time limit. The results were often distressing, especially when it was apparent a student's performance suffered only because of the arbitrary time limit for the exam. I became firmly convinced that timed-exams are a poor indicator of a student's ability to be successful in practicing law. The student who may need six hours to complete an exam is just as deserving of an "A" as the student who was able to complete the test in three hours. As a result of this experience, I became convinced a take home exam would give students a more equal opportunity to perform well.

The greatest reward for a professor is receiving exam papers which demonstrate the students have not only understood, but can apply what we have learned to a real life scenario. To those students, I raise high the silver oar!