

Maritime and Aeronautic Torts¹

I. SURVEY OF PRINCIPLES

1. "General Maritime Law"

ENGLAND. English courts until 1862 applied the ordinary British rules of navigation to collisions of any ships occurring in British waters or involving two British ships on the high seas. They followed somewhat different rules of seamanship if a collision took place between a British and a foreign, or two foreign ships, on the high seas. The latter rules were assumed to be common to seamen of all nations, a "general maritime law," though administered in special form in England.² The duality of "British" and "general maritime" rules was abolished by the Merchant Shipping Act Amendment Act of 1862 providing that all ships, British and foreign, should be judged by British law with reference to the rule of the road and the extent of the owner's liability.³ Since then, the English statutory law is the expression of the "general" law of maritime torts.⁴

¹ The abundant literature on *collision*—French *abordage*, German *Schiffszusammenstoss*, Italian *urto di navi*, Portuguese *abalroação*—contains many contributions to conflicts law, of which the most useful at present are the following: MARDEN, *The Law of Collisions at Sea* (ed. 9 by Gibb, 1934) Ch. IX, 209-224; (Anonymous) *Abordage maritime*, 1 *Répert.* (1929) 38; FRITZ FISCHER, *Der Schiffszusammenstoss im Deutschen Int. Priv. R.* (Diss. Hamburg 1937); MARIO SCERNI, *Il Diritto Int. Priv. Marittimo* (ed. Aeronautico 1936) 299-308.

Conflicts problems with respect to *air navigation* have been studied by FERNAND DE VISSCHER, "Les concours de lois en matière de droit aérien," 48 *Recueil* (1934) II 279. "Largely conjectural rules" for English conflicts law have been suggested by McNAIR in Winfield, *Text-Book of the Law of Tort* (ed. 2, 1943) 197. Recently, DE PLANTA, *Principes de droit international privé applicables aux actes accomplis et aux faits commis à bord d'un aéronef* (1955); HONIG, *The Legal Status of Aircraft* (1956) p. 98-136.

² *The Dumfries* (1857) Swab. 63, 125.

³ 25 & 27 Vict., c. 63, ss. 54 and 57.

⁴ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521, 537 per Brett, L.J.; *The Belgenland* (1885) 114 U. S. 355, 366.

The persistent conception of a general maritime law represents a survival of the ancient idea that the law merchant, of which the maritime law is a branch, was uniform throughout the civilized world, different interpretations by different courts notwithstanding. It is significant that this idea has survived the breaking up of the former unity of the Christian world for a longer time in the English speaking countries than in the narrow horizons of Continental Europe, where reminiscences are found only in famous old texts.⁵ Nevertheless, the Supreme Court of the United States has made it very clear that "the general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof."⁶ But the rules of navigation on the high seas found a new and broad unification when the experiences of British seafaring were used throughout the world in laws and treaties after the British model, and the international conferences were reflected in the British enactments.

Insofar as there remain differences, English courts apply British rules. The chief principle is said to consist in the duty of navigating vessels so as not to cause damage to the life and property of others.⁷ With respect to the obligations of the shipowner, his liability under English law for the negligence of master or crew is considered mandatory, whatever a foreign law of the flag may ordain.⁸ Moreover, in all cases of collision either in British waters or on the high seas, the limit of the owner's responsibility is regarded as determined by the Merchant Shipping Act, 1894, s. 503. Thus, it has been held that the owners of a British ship in collision

⁵ See LYON-CAEN in Clunet 1882, 600; DIENA, 3 Dir. Com. Int. 425, 1; WESTLAKE § 202 (a).

⁶ Liverpool & Great Western Steam Co. v. Phenix Ins. Co. (1888) 129 U. S. 397, 444.

⁷ Submarine Telegraph Co. v. Dickson (1864) 15 C. B. N.S. 759, 779 per Willies, J.

⁸ The Leon (1881) 6 P.D. 148 per Sir R. Phillimore.

with a foreign ship on the high seas were liable only to the limited extent prescribed by the statutory English law, and that international law was not violated, since the owners of any foreign vessel, too, in a similar case are entitled to the benefit of the Act.⁹ The British rule concerning the division of loss by collision is applied to all vessels everywhere.

United States. The doctrine of general maritime law has been adopted in the federal courts exercising admiralty jurisdiction in this country, especially in cases of collisions between any vessels on the high seas. Also limitation of liability prescribed in acts of Congress is regarded as a part of the "general maritime law as administered by the admiralty courts of the United States."¹¹ And in a proceeding for such limitation, the speed a vessel has been allowed to run in a fog is determined "by international usage as understood and applied in the forum."¹² On the reason for preferring this part of the American law to any other law, in the case of *The Scotland* (1881) Mr. Justice Bradley alluded to the situation on the high seas "where the law of no particular state has exclusive force, when two ships of different nationality collide,"¹³ but in 1914 Mr. Justice Holmes speaking for the Supreme Court shifted the emphasis to public policy as laid down in the federal statutes.¹⁴

Modern writers in England,¹⁵ as well as in the United States,¹⁶ soberly state that "there is no such law" as a general

⁹ *The Amalia* (1864) Br. & Lush. 151, 1 Moo. P.C.Cas. (N.S.) 471.

¹⁰ This is true for Admiralty as well as the common law jurisdiction, *MARSDEN* 218 *ad. n.* (e).

¹¹ *The Scotland* (1881) 105 U.S. 24, 19; *The Titanic* (1914) 233 U.S. 718, *cf.* 2 *BEALE* 1331.

¹² *La Bourgogne* (1908) 210 U.S. 95, 116, 140.

¹³ 105 U.S. at 29.

¹⁴ 233 U.S. at 733.

¹⁵ Lushington, J., in *The Milford* (1858) Swab. 362, 166 Eng. Re. 1167; *WESTLAKE* 276; *CHESHIRE* 285.

¹⁶ 2 *BEALE* 1331; *HANCOCK* 259 n. 3. See also the criticism by *DIENA*, 3 *Dir. Com. Int.* 424 § 281; *CROUVÈS*, 1 *Répert.* 42 Nos. 12, 13.

maritime law and that, all things considered, it is but another name for the *lex fori*, although it has grown out of a world-wide traffic and a millennial history. In the United States its scope has been somewhat narrowed.

Collision is the historic prototype of a tort committed on the water. That the same problematic general maritime law should govern other torts also, seems to have been implied in an English leading case where a submarine cable (before the International Cable Convention and the Submarine Telegraph Act, 1885) was injured at the bottom of the sea by anchor of a navigating ship.¹⁷ Dicey and Cheshire advocated this solution.¹⁸

2. Modern Principles

The International Maritime Congress held in Antwerp in 1885 approved the following conflicts rules on collision of ships:

Collisions in ports and internal waters should be governed by the *lex loci*, for both formalities (such as demurrers, time limitations, prescription) and substantive rules, irrespective of the nationality of the vessels.¹⁹

The master of a ship suffering from a collision on the high seas may preserve its rights by observing the form and time prescribed (for protest or action) either by the law of his flag, or that of the flag of the offending ship, or that of the first port of refuge.

In the case of collision on the high seas, each ship is liable within the limits of the law of its flag, without being entitled to more than this law grants.²⁰

¹⁷ *Submarine Telegraph Co. v. Dickson* (1864) 15 C. B. N. S. 759.

¹⁸ DICEY 971; CHESHIRE 286; approved by WINFIELD, *Text-Book on the Law of Tort* (ed. 2, 1943) 196.

¹⁹ DICEY 973.

²⁰ I *Revue Int. Dr. Marit.* 427.

These rules have been fully adopted in the Codes of Portugal and Bulgaria.²¹ The first rule has been accepted everywhere in civil law countries with the exception that certain courts have applied the law of the forum to the formal requisites of actions.

On the high seas, the basic rule in civil law countries is in favor of the law of the flag whenever a tort can be localized on a vessel. In the case of collisions between two vessels of different flags, some courts have earnestly tried to find such a localization and have become resigned to the law of the forum only when it seemed inevitable, because the two laws involved appeared equally competent to govern and could not be meaningfully combined.

Entirely isolated, the Soviet Maritime Law of 1929 prescribes the application of the domestic law to all collisions wherever occurring.²²

II. UNIFICATION OF SUBSTANTIVE LAWS^{22a}

Collision. The municipal law on collisions on the high seas has been internationally unified in important aspects by the "International Convention for the Unification of certain Rules concerning Collision" of Brussels (September 23, 1910).²³ In 1951, the following countries were members:

Argentina, Austria, Belgium, Brazil, Denmark, Egypt, Finland, France, Germany, Great Britain, Dominions and Colonies, Greece, Haiti, Hungary, Ireland, Italy, Japan, Mexico, the Netherlands, Nicaragua, Norway, Poland,

²¹ Portugal: C. Com. art. 674.

Bulgaria: C. Marit. of Jan. 6, 1908, art. 189.

²² Soviet Russia: Law of June 14, 1929, art. 4 (d); see FREUND, 95 *Zeitschrift für das gesamte Handelsrecht* (1930) Beilage 70

^{22a} Texts are collected by GIANNINI, *Le Convenzioni Internazionali di Diritto Marittimo* (ed. 2, 1952).

²³ MARTENS, *Recueil*, 3rd Series, VII, 711; cf. RIPERT, 3 *Droit Marit.* (ed. 4) § 2063.

Portugal, Rumania, Soviet Union, Spain, Sweden, Uruguay, Yugoslavia.

Also bilateral treaties are in force between numerous countries.

The Convention, however, does not apply to collisions involving vessels of nonparticipant states,²⁴ including the United States which signed but did not ratify the Convention; does not deal with state ships;²⁵ and is restricted to the case where at least one vessel is plying on the high seas.²⁶ The national laws remain for the time in force also with respect to liability for compulsory pilots²⁷ and the scope and effects of contractual or legal provisions limiting the liability of shipowners to persons on board.²⁸ In all these respects, there exist conflicts problems, but they often are mitigated by the strong influence of the Convention on recent legislation. Recently signed Conventions on civil and penal jurisdiction in cases of collision supplement the unification of substantive law.^{28a}

Navigation. On the other hand, the navigation rules have followed a vigorous trend of unification. International regu-

²⁴ Art. 12 par. 2 (1). But France, Belgium and Italy enacted the convention as domestic law, cf. RIPERT, 3 *Droit Maritime* (ed. 4) § 2066.

²⁵ Art. 11. As to these, a special Convention was concluded, see *infra* n. 44.

²⁶ Art. 1.

²⁷ Art. 5.

²⁸ Art. 4 par. 4. See also the reservation in art. 7 par. 3. But see the Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, signed on August 25, 1924; HUDSON, 2 *International Legislation* 1332.

^{28a} International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in the Field of Collision and International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in the Field of Collision and other Events of Navigation, both signed in Brussels on May 10, 1952; see GIANNINI (*supra* n. 22a) 503, 506. But even this convention granting alternative jurisdiction at several places will not prevent burdens on the shipowner caused by separate claims of different creditor groups in various jurisdictions, insofar as the shipowner's limited liability is thought to be governed by the *lex fori*; illustrative is the case adduced by KNAUTH, "Renvoi and Other Conflicts Problems in Transportation Law," 49 *Col. L. Rev.* (1949) 1, 3 and cf. *Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.* (1949) 336 U.S. 386

lations of 1897, 1905, and 1927, largely adopting the experiences of Great Britain, have succeeded in attaining a high degree of uniformity.²⁹

Aerial law. Parallel to the endeavors of the *Comité Maritime*, the *Comité International Technique d'Experts Juridiques Aériens* (CITEJA) has succeeded in obtaining a few very useful, though fragmentary, conventions. The conventions of Warsaw, October 12, 1929, on transport,³⁰ in which the United States participates, and of Rome, May 29, 1933 and October 7, 1952, on damage done to third parties on the surface of the earth,³¹ unify a part of the liability problems. But the remaining conflicts are even more important and less well worked out than the traditional maritime questions. The Warsaw Convention itself simply envisages the application of the *lex fori* to the treatment of contributory negligence, the possibility of paying periodical amounts of damages, the concept of gross negligence, and other problems.³²

III. TORTS DONE WITHIN A STATE TERRITORY

I. Torts in Territorial Waters

The territory of a state, according to the predominant opinion, includes in addition to ports, rivers, and channels,

²⁹ At present, see in particular Regulations for Preventing Collisions at Sea, Annex II, to the Convention of London, May 31, 1929, on Safety of Life, HUDSON, 4 Int. Legislation 2825; and the British Merchant Shipping (Safety and Load Line Conventions) Act, 1932, 22 & 23 Geo. 5, c. 9 Sched. 1.

³⁰ Convention for the Unification of Certain Rules regarding International Air Transport, HUDSON, 5 Int. Legislation 100, U.S. Treaty Series No. 876. Hague Protocol of Amendment of September 28, 1955 (MANKIEWICZ, "Hague Protocol to Amend the Warsaw Convention," 5 Am. J. Comp. Law (1956) 78-97).

Great Britain: Carriage by Air Act, 1932, 22 & 23 Geo. 5., c. 36.

³¹ Convention for the Unification of Certain Rules relating to Damages Caused by Aircraft to Third Parties on the Surface, HUDSON, 6 Int. Legislation 334. Convention of October 7, 1952 (Revue française de Droit Aérien 1952, 423).

³² Arts. 21, 22, 25, 28, 29.

“a belt of sea,”³⁸ the coastal seas of a certain mileage.

(a) *Rule.* The universally settled rule calls for the application of the law of the state to which the waters belong.³⁴ In England, this rule is not unequivocally settled with respect to foreign waters, but seems now to prevail over the doctrine of “general maritime law.”³⁵

Illustration. After the English Pilotage Act, 1913, came into force, in which the liability of a shipowner for fault of a compulsory pilot was recognized (and no longer considered to be against public policy, as it was deemed to be in *The Halley*³⁶), a suit was dismissed in the case of a foreign pilot whom the ship was compelled to take on but for whose fault the shipowner was not responsible under the local law.

The territorial law governs the wrongs committed on board a vessel,³⁸ as well as those inflicted through faulty navigation,³⁹ and has its particular and oldest application in cases of collisions of ships in territorial waters.⁴⁰

³³ Articles provisionally approved at the Hague Conference on International Law, 1930, see Am. J. Int. Law. 1930, Supp. 239.

³⁴ United States: *Smith v. Condry* (1843) 1 How. 28; *The Albert Dumois* (1900) 177 U.S. 240; Restatement § 404. See citations *infra* n. 40.

³⁵ This has been concluded from the dicta of Brett, then L. J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B. 521, 537 (C.A.) and Mellish, L. J., in *The Mary Moxham* (1876) 1 P. D. 107, 111, 113. See *MARSDEN* 215; *CHESHIRE* 283.

³⁶ See *supra* pp. 242, 276.

³⁷ *The Arum* [1921] P. 12.

³⁸ *Uravic v. Jarka Co.* (1931) 282 U.S. 234, opinion of Mr. Justice Holmes (a stevedore killed on board a German vessel in New York harbor); *The S.S. Samovar* (1947) 72 F. Supp. 574; *cf.* *HANCOCK* 262.

³⁹ Restatement § 407.

⁴⁰ United States: Restatement § 409; *The Albert Dumois* (1900) 177 U.S. 240 (domestic waters); *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro* (D. C. E. D. N. Y. 1928) 31 F. (2d) 757; *Standard Oil Co. of New York v. Tampico Nav. Co.* (D.C.E.D.N.Y. 1921) 21 F. (2d) 795 (foreign waters).

Treaty of Montevideo on Commercial Law (1889) art. 11; text on Commercial Navigation (1940) art. 5.

Código Bustamante, arts. 290, 291.

Belgium: App. Bruxelles (Nov. 21, 1884) *Pasicrisie* 1885.2.39 and many other

According to universal custom, usually followed also in the United States, the rule does not cover, however, the internal management and discipline of a ship which, instead, is governed by the law of the flag the vessel flies.⁴¹ The idea is that torts, like contracts creating obligations between the owner, the shipmaster, the officers and the crew, are subject to the individual law of the vessel. Ordinarily, port

cases (domestic waters); Trib. com. Antwerp (March 4, 1853) *Jur. Port Anvers*, 1857.1.267 and many other cases, see 1 *Répert.* 73 Nos. 172-174 (foreign waters); Trib. Antwerp (Jan. 23, 1936) 36 *Revue Dor* (1937) 158, *Jur. Port Anvers* 1936, 197.

Bulgaria: *C. Marit.* of Jan. 6, 1908, art. 189.

Denmark: Trib. Marit. Copenhagen (May 31, 1905) *Clunet* 1907, 1178.

Egypt: Trib. civ. Alexandria (Feb. 2, 1926) 17 *Revue Dor* 328; see also Trib. com. Alexandria (March 4, 1929) 20 *Revue Dor* 237.

France: Cass. (civ.) (July 18, 1895) S. 1895.1.305, *Clunet* 1896, 130; Cass. (req.) (Feb. 15, 1905) S. 1905.1.209, *Revue* 1905, 114, 128, *Clunet* 1905, 347; App. Rouen (June 26, 1907) *Clunet* 1908, 776. The cases refer to domestic waters only, because the courts refuse jurisdiction as to foreign waters. The rule, however, is recognized to extend to these in the literature, see 6 LYON-CAEN et RENAULT 192 §§ 1048 to 1051 (despite personal opposition); ROLIN, 3 *Principes* § 1071; PILLET, 2 *Traité* § 551; 1 *Répert.* 67 No. 143.

Germany: RG. (May 30, 1888) 21 *RGZ.* 136; (Feb. 18, 1929) *IPRspr.* 1930 No. 59 (domestic waters); (July 12, 1886) 19 *RGZ.* 7; (June 25, July 9, 1892) 29 *RGZ.* 90 (foreign waters); OLG. Hamburg (April 17, 1907) *Hans. GZ.* 1907, HBl. No. 73; OGH. Brit. Zone (June 1, 1950) *IPRspr.* 1950-51 No. 29; BGH. (Nov. 6, 1951) 3 *BGHZ.* 321, *IPRspr.* 1950-51 No. 30. *Cf.* RG. (July 1, 1896) 37 *RGZ.* 181 (fluvial waters).

Italy: As in France, Cass. (July 19, 1938) *Foro Ital.* 1938 I 1216, 7 *Giur. Comp. DIP.* 307 No. 161. Jurisdiction was not taken as to foreign vessels in foreign waters, Cass. (Jan. 16, 1939) *Giur. Ital.* 1939 I 1264; but see now *Codice della Navigazione* (1942) art. 14.

The Netherlands: H.R. (June 24, 1927) W. 11704, 17 *Revue Dor* 522, Rb. Rotterdam (Feb. 8, 1939) W. 739.

Norway: S. Ct. Christiania (Dec. 15, 1905) *Clunet* 1907, 852, 23 *Revue Int. Dr. Marit.* 128 (Canal of Kiel, German law).

Panama: *C. Com.* (1919) art. 1462.

Portugal: *C. Com.* art. 674.

⁴¹ *Grand Trunk R. Co. v. Wright* (C. C. A. 2d 1928) 21 F. (2d) 814, 815; *Lauritzen v. Larsen* (1953) 345 U.S. 571; see for other cases *Restatement* § 405; 2 *BEALE* 1328 § 405.1; *HANCOCK* 264 n. 7 who notes, however, a few contrary decisions. An exception has been recently made by majority vote in a case where a Greek seaman signed on a Greek vessel in a United States port and was injured in United States territorial waters, *Kyriakos v. Goulandris* (C. C. A. 2d 1945) 1945 *Am. Marit. Cas.* 1041; Judge Learned Hand (at 1052) dissenting, urged the long list of precedents.

Treaty of Montevideo on Commercial Law of 1889, art. 20; text on *Commercial Navigation of 1940*, art. 21.

authorities also refrain from taking jurisdiction in such matters.⁴²

Through this important restriction on the local legal order, the troublesome question regarding the subjection of foreign warships to the private law of the territory is to a large extent eliminated. For the rest of the problems, the ordinary rules on immunity from territorial jurisdiction are observed.⁴³ The liability of state vessels, employed in the transport of passengers or cargoes, has been defined by an international convention,⁴⁴ in which the United States does not participate. That the Soviet Russian State acting through its commercial agencies is not exempted from liability has been declared in several countries.⁴⁵ Commercial vessels chartered by a state but not commanded by a captain appointed by the government, are not held exempt from attachment and still less is the owner free from action for damages.⁴⁶

(b) *Exceptions.* By analogy to the preference given in some quarters to a national law common to plaintiff and defendant in tort actions, it has been assumed in a few instances that the law of a flag flown by both vessels involved

⁴² Treaty of Montevideo, Draft on Commercial Navigation of 1940, arts. 22, 23. Preparation for an international convention on penal and civil jurisdiction in the matters of navigation and collision was started by the International Maritime Committee; instructive reports have been printed in the Publications of the Committee, Nos. 98-102. A convention on civil jurisdiction in case of collision and another on penal jurisdiction in matters of navigation were signed on May 10, 1952 in Brussels, GIANNINI (*supra* n. 22a) 503, 506.

⁴³ Cf. BALDONI, "Les navires de guerre dans les eaux territoriales étrangères," 65 *Recueil* (1938) III 185.

⁴⁴ Convention concerning the Immunity of State-Owned Vessels, Brussels, of April 10, 1926, and Additional Protocol of May 24, 1934, 176 L. of N. Treaty Series 199, HUDSON, 3 *Int. Legislation* 1837 and 6 *id.* 868.

⁴⁵ See French Cass. (req.) (Dec. 15, 1936) *Revue Crit.* 1937, 710; *cf.* in general, Cass. (req.) (Feb. 19, 1929) S.1930.I.49 and Note, NIBOYET; *cf.* for contracts, Ital. Cass. (Aug. 3, 1935) *Giur. Ital.* 1936 II 109, *Rivista* 1935, 372. See later cases in *Annual Digest* 1938-40, 237, 246f., 249.

⁴⁶ RG. (May 16, 1938) 157 *RGZ.* 389 explaining Continental, British, and American concepts.

should govern torts even in territorial waters.⁴⁷

The contrary opinion, however, prevails universally. It is supported by the territorialism obtaining in tort matters, as well as by the fact that the shipowners are not the only interested persons; passengers, affreighters, and insurers of ship or cargo or passengers share the risk.⁴⁸ German courts, however, inconsistently have resorted to the common national law in the case of two German vessels colliding in foreign waters.⁴⁹

2. Collisions of Aircraft Flying over State Territory

By no means a matter of course, it has nevertheless been categorically recognized by the international conventions on air navigation "that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters."⁵⁰ It follows that collisions between two airplanes occurring in the air over a state territory are subject to the law of the state.⁵¹

That damage done by an aircraft to third persons on the surface of the earth is governed by the law of the territory has been noted earlier.⁵²

⁴⁷ France. VALÉRY § 979 n. 2.

Norway: S. Ct. (1923) cited by CHRISTIANSEN, 6 Répert. 582 No. 187.

Código Bustamante, art. 289, Convention of Brussels, *supra* n. 23, art. 12 par. 2 (2).

⁴⁸ See ARMINJON, 2 Précis § 122.

⁴⁹ OLG. Hamburg (Feb. 7, 1913) Hans GZ. 1913, HBl. 117 No. 52; (March 19, 1915) *id.* 1915, HBl. 139 No. 69; see also (Nov. 12, 1906) *id.* 1906, HBl. 312 No. 154 (river boats).

⁵⁰ Pan-American Convention on Commercial Aviation, of February 20, 1928, art. 1. HUDSON, 4 Int. Legislation 2354, 2356; conforming to Convention of Paris (1919) art. 1; Ibero-American Convention of Madrid (1926) art. 1; preamble to the British Air Navigation Act, 1920. Convention on International Civil Aviation of Chicago (1944) arts. 1, 2. United States: Uniform Aeronautics Act, 1922, § 2, adopted in 22 states.

⁵¹ SCERNI 367 and cited authors, rejecting the exception made by others in favor of the national laws common to both aircraft.

Switzerland: Law of Dec. 21, 1948, art. 11 par. 1.

United States: Uniform Aeronautics Act, 1922 (*supra* n. 50) § 7.

⁵² Pan-American Convention on Commercial Aviation, of Feb. 20, 1928, art. 28, HUDSON, 4 Int. Legislation 2365. *Supra* p. 328 and n. 08.

Wrongs done on board an aircraft are governed by the national law of the aircraft.^{52a}

IV. TORTS ON THE HIGH SEAS

I. Torts on Board One Vessel

According to a universally settled rule, a tortious act done on board a vessel on the high seas, whereby only persons or property on board are injured, is governed by the law of the flag the vessel flies.⁵³ This rule covers personal injuries sustained by seamen on the high seas,⁵⁴ including American seamen on foreign-owned vessels.⁵⁵ Hence, a Yugoslav seaman on a Yugoslav vessel, even during the wartime occupation of that country, could not ask for relief under the American Seamen's Act for injury he suffered on board.⁵⁶

In England, it is discussed whether the analogy of wrongs done in a foreign country must be followed by requiring that a maritime tort be actionable by English law.⁵⁷

Aircraft. It is an open question whether the rule should be transferred to tortious acts committed on an aircraft flying

^{52a} Belgium: Law on Air Navigation of June 27, 1937, art. 10 par. 1.

France: Law of May 31, 1924, art. 10 par. 1.

Greece: Law No. 5057 of June 3, 1931, art. 5 par. 1.

Italy: Codice della Navigazione (1942) art. 5.

In the United States, the Uniform Aeronautics Act, 1922 (*supra* n. 50) § 7 seems to submit even these internal torts to the territorial law.

⁵³ United States Federal Death Act, 1920, 41 Stat. 537 c. 111 § 4, 46 U. S. Code (1952) § 764 (summarizing the conflicts rule); Restatement § 406; *The Titanic* (1914) 233 U. S. 718; *Sonnesen v. Panama Transport Co.* (1948) 298 N. Y. 262, 82 N. E. (2d) 569.

Italy: Codice della Navigazione (1942) art. 5.

⁵⁴ *Petter Lassen* (D. C. N. D. Cal. 1939) 29 F. Supp. 938; Norwegian fireman on Danish vessel time-chartered to an American company, Danish law.

⁵⁵ *Hogan v. Hamburg American Line* (1934) 152 N. Y. Misc. 405, 272 N. Y. Supp. 690.

⁵⁶ *Radovic v. Prince Pavle* (D. C. S. D. N. Y. 1942) 45 F. Supp. 15.

⁵⁷ In contrast to Dicey 970, supported by Canadian National Steamships Co. v. *Watson* (1938) [1939] 1 D.L.R. 273, 11 Giur. Comp. DIP. (1954) 339. *CHESHIRE* (ed. 4) 272 hypothetically denied the requirement (but see now 284). For the latter view *HANCOCK* 269 invokes the precedent of *The Halley*, *supra* p. 242, and *FALCONBRIDGE*, *Essays* 823, English and Canadian statutory provisions.

over the high seas or such territories as the North Pole. Although it is well settled that aircraft, too, have nationality, Fernand de Visscher has pointed out that in actual practice the commercial airlines of many nations use the same fields and the parties dealing with them do not care about the flag, except in the case of contractual obligations subjected to the law of the flag by express stipulation. As the Warsaw Convention on Air Transport confines lawsuits to either the principal business place of the carrier or the place of destination, at the election of the victim, de Visscher thinks it would be in the spirit of the Convention to apply the law of the forum of the court seized.⁵⁸ Several statutes on the Continent have resolved the question in favor of the flag.^{58a} In the United States, courts have been able to apply the Federal Statute concerning Death on the High Seas by Wrongful Act to airplane accidents on the high seas.⁵⁹

2. Collision

Where two vessels flying the same flag collide on the high seas, most courts apply the law thus common to the vessels.⁶⁰ As in this case no other law is in competition, this principle is the best possible and has appropriately been

⁵⁸ FERNAND DE VISSCHER, 48 *Recueil* (1934) II at 335.

^{58a} *Supra* n. 52a.

⁵⁹ 46 U. S. Code §§ 761ff.; *Choy v. Pan-American Airways Co.* (1941) *Am. Marit. Cas.* 1941, 483; *Wyman v. Pan-American Airways, Inc.* (1943) 181 *N. Y. Misc.* 963, 43 *N. Y. Supp.* (2d) 420.

⁶⁰ Restatement § 410 (a); *The Eagle Point* (1906) 73 *U.S.C.C.A.* 569, 142 *Fed.* 453; *dicta* in *The Scotland* (1881) 105 *U. S.* 24, 31; *The Belgenland* (1885) 114 *U. S.* 355, 369.

Bulgaria: *C. Marit.*, art. 189.

France: *RIPERT*, 3 *Droit Marit.* (ed. 4) 19 § 2076; 6 *LYON-CAEN et RENAULT* § 1050.

Germany: *RG.* (Nov. 18, 1901) 49 *RGZ.* 182 (holding that Danish and Norwegian laws are essentially the same); *RG.* (Nov. 12, 1932) 138 *RGZ.* 243 at 245.

Italy: *Codice della Navigazione* (1942) art. 12.

Portugal: *C. Com.* art. 674 No. 2.

Treaty of Montevideo on Commercial Law (1889) art. 12, sent. 1; *Código Bustamante*, art. 292.

extended to vessels whose flags are different but whose laws are essentially the same.⁶¹

English courts, however, apply their "general maritime law" also in this case.⁶²

The case where two vessels, flying the flags of different countries, collide on the high seas, is desperate. None of the familiar contacts is suitable when no territory is affected and the connections established by the flags neutralize each other. Among the innumerable strained attempts to reach a solution, the following have been supported by various authorities:

(i) The Montevideo Treaty of 1889 on Commercial Law provided that the law of the flag more favorable to the defendant should be applied.⁶³

(ii) Another opinion distinguishes whether both vessels have violated the rules of navigation or only one of them is to blame. In the latter case, the law applicable would be that of the vessel at fault.⁶⁴ Where both are found to be guilty of fault, opinions are divided; each vessel should pay 50 per cent of the damages to which it would be liable under its own law and 50 per cent of those imposed by the other vessel's law,⁶⁵ or liability is divided *ex aequo et bono*,⁶⁶ or the law of the forum is applied.⁶⁷

(iii) More generally, as a consequence of the allegedly general principle that the national law of the debtor or the

⁶¹ United States: Dicta in *The Scotland* (1881) 105 U. S. 24, 29; *The Belgenland* (1885) 114 U. S. 355; *The Presidente Wilson* (D. C. D. Mass. 1929) 30 F. (2d) 466. Germany: 49 RGZ. 182, *supra* n. 60.

⁶² Brett, L. J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521, 537.

⁶³ Art. 12 sent. 2; probably this is also the meaning of the Treaty of 1940, on Commercial Navigation, art. 7.

⁶⁴ Congress of Genoa (1892) art. 7, see 8 *Revue Int. Dr. Marit.* 181.

France: PILLET, 2 *Traité* § 551; CRÉMIEU, 5 *Répert.* 493 No. 21.

Germany: RG. (July 6, 1910) 74 RGZ. 46; overruled (Nov. 12, 1932) 138 RGZ. 246, *infra* n. 71.

⁶⁵ Código Bustamante, art. 294.

⁶⁶ Congress of Genoa (1892) art. 7.

⁶⁷ See below n. 76.

defendant should prevail, it has been advocated that each vessel's liability should be determined in accordance with the law of its own flag.⁶⁸

(iv) In 1885, the Institute of International Law and the Congress of Antwerp advocated the rule that a vessel should be liable only when it would be liable under both laws concerned.⁶⁹ This rule has found a following.⁷⁰

(v) The German Supreme Court, in a recent decision, has attempted to apply to collisions on the high seas the theory of that court that every place where a substantial element of a tort occurs is a place of wrong. Thus, since the vessel whose crew is guilty of fault as well as the vessel which has been damaged through such fault, are places of wrong, the owner of the damaged vessel has the choice of suing under that law which is more favorable to him.⁷¹

This latter view may encounter the objection once raised by Fedozzi⁷² that the delict has been committed not *on* but

⁶⁸ United States: Judge Learned Hand in *The James McGee* (1924) 300 Fed. 93; Note, 25 Col. L. Rev. (1925) 96; *The Aquitania* (1924) Am. Marit. Cas. 1924, 1440; *Powers v. Cunard S. S. Co.* (1925) 32 F. (2d) 720.

England: *Davidson v. Hill* [1901] 2 K. B. 606.

France: App. Rennes (Dec. 21, 1887) Clunet 1888, 80, affirmed on other questionable grounds, Cass. (civ.) (Nov. 4, 1891) Clunet 1892, 153; Cass. (civ.) (Nov. 7, 1904) 20 Revue Int. Dr. Marit. 517. The courts decide the question of fault under French law reputed to be universally good and in the case of fault apply varying tests. 6 LYON-CAEN et RENAULT 1050, 1052.

Germany: RG. (July 6, 1910) 74 RGZ. 46.

Greece: App. Athenai (1933 No. 1085) 45 Themis 268; approved by FRAGISTAS, 10 Z. ausl. PR. (1936) 643.

Italy: Cass. Torino (April 17, 1903) 19 Revue Int. Dr. Marit. 478.

⁶⁹ Inst. Dr. Int. (Lausanne, 1888) 10 Annuaire (1889) 152; Congress of Antwerp (1885) *supra* n. 20, art. 8 sent. 2.

⁷⁰ Bulgaria: C. Marit. art. 189.

Portugal: C. Com. art. 674, No. 3.

Treaty of Montevideo, draft of 1940 on Navigation, art. 7. Recently SCERNI 308 resigns himself to this solution.

DIENA, 3 Dir. Com. Int. 432 called this view the only one based on solid legal principles.

⁷¹ RG. (Nov. 12, 1932) 138 RGZ. 243, 246; IPRspr. 1932 No. 60; 28 Revue Dor 45; Nouv. Revue 1935, 74; 1 Giur. Comp. DIP 177 (English steamer *Henry Stanley*). *Contra*: RAAPE, IPR. 543.

⁷² Opinion, in the matter of the *Lotus case* Revue de Droit International (LA PRADELLE 1928) 361; *cf.* SCERNI 306 n. 3.

by a commercial vessel. Moreover, we have often been warned not to take too seriously the fiction that a vessel is a floating part of a territory.⁷³ However, looking for the least inappropriate local connection, American courts, with their traditional localization at the place of the injury, could well apply the law of the vessel which, or on board of which life or property, is injured. Occasionally, in fact, this view seems to have been floating through the mind of a court.⁷⁴

(vi) The law of the forum is applied, either as representing a maritime custom of world-wide application,⁷⁵ or as a last resort in all cases,⁷⁶ or where one of the vessels belongs to the forum.⁷⁷

3. Other Torts

English writers have discussed the case of two whale fishers of different nationality contending about the same whale.⁷⁸ The English case of an injury done to a submarine

⁷³ See the argument of CHESHIRE 284.

⁷⁴ 2 BEALE 1331 n. 4 mentions with hesitation *La Bourgogne* (1908) 210 U. S. 95, 138, and *The Saginaw* (1905) 139 Fed. 906.

⁷⁵ England: *The Leon* (1881) 6 P. D. 148. United States: *The Windrush* (D. C. S. D. N. Y. 1922) 286 Fed. 251, *aff'd* (C.C.A. 2d 1924) 5 F. (2d) 1425; but *cf.* HANCOCK 279, and against him, COOK, *Book Review*, 5 U. of Toronto L. J. (1943) 192.

⁷⁶ Belgium: Older practice, see CROUVÉS, 1 *Répert.* 73 No. 175 and *Trib. com.* Anvers (July 23, 1892) *id.* n. 2.

Denmark: S. Ct. (May 10, 1904) cited by CHRISTIANSEN, 6 *Répert.* 225 No. 89.

France: 1 *Répert.* 67 No. 144: the parties by bringing their suit to French jurisdiction, implicitly submit themselves to French law, including all provisions and prescriptions of the French Commercial Code! ASSER et RIVIER, *Eléments* § 113; VALÉRY § 978; ARMINJON, 2 *Précis* § 122.

Germany: Older practice: Oberapp. Ger. Lübeck (Jan. 30, 1849) 4 *Seuff. Arch.* No. 4 (The General Washington).

Prussia: Obertribunal (Oct. 25, 1859) 14 *Seuff. Arch.* No. 197 (The *Columbus*, British ship). RG. (Nov. 10, 1900) cited and restricted by RG. (Nov. 18, 1901) 49 RGZ. 182, 187 (case of "Kong Inge") and RG. (July 6, 1910) 74 RGZ. 46 (case of "Seine"). Return to *lex fori* has been advocated by REINBECK, "Schiffszusammenstöße auf hoher See etc.," *Hans. RGZ.* 1933 A, 337, 345.

Greece: 2 STREIT-VALLINDAS 264 n. 23.

Italy: *Codice della Navigazione* (1942) art. 12.

U.S.S.R.: See *supra* n. 22.

⁷⁷ This result is reached by a few recent writers, such as FISCHER, *supra* n. 1, and SCERNI, *supra* n. 1, 307.

⁷⁸ *Supra* ns. 18, 19.

cable on the bottom of the high seas,⁷⁹ and the American case of the Titanic's collision with an iceberg⁸⁰ are other examples. Should an analogy be drawn from torts done on board only one vessel, or from collision? This is just a nice question for law students.

V. SPECIAL PROBLEMS

1. Rules of Navigation

It is recognized in the United States that if the responsible persons of a vessel on the high seas observe the sailing regulations of the government shown by the flag, they are not to be blamed.⁸¹ The case has become rare that regulations are different, but the doctrine should be adopted abroad. That local port and coast regulations ought to be complied with by all ships is settled beyond need of proof.

2. Extent of Damages

The old European customary rule that an innocent shipowner may exclude his personal liability for maritime tort by surrendering (abandoning) the ship, or what is rescued from it, to the injured party,⁸² has not been transferred to the common law countries, but the United States, in the Act of 1851, introduced by statute a remedy conferring on the shipowner the election between abandonment and limited pecuniary damages.⁸³ Great Britain and some other countries have a different system of limiting the amount of damages to certain *maxima* computed upon the tonnage of the vessel.⁸⁴

⁷⁹ *Submarine Telegraph Co. v. Dickson* (1864) 15 C. B. N. S. 759.

⁸⁰ (1914) 233 U.S. 718.

⁸¹ See 2 BEALE § 408.1; 15 C.J.S. 17 § 3.

⁸² The rule is still in use in France, Germany, Italy, Mexico, Portugal, Rumania, Spain, Egypt; cf. NEUHÄUSER, 6 *Rechtsvergl. Handwörterbuch* 193.

⁸³ Congressional Act of March 3, 1851, with amendments, Rev. Stat. §§ 4983-89, 46 U. S. C. A. §§ 183-189.

⁸⁴ Great Britain: Merchant Shipping Act, 1894/1932, s. 503. The Netherlands: C. Com. art. 541.

Certain features of this system have recently been adopted in the United States.⁸⁵ The variants within the groups are considerable.

British courts, being bound by the Merchant Shipping Acts since 1862,⁸⁶ and those of the United States⁸⁷ apply the domestic method of reducing damages, irrespective of the place of tort and of the nationality of the ships. The usual British argument is the long since refuted classification of measures of damages as relating to the remedy rather than to the right. The United States Supreme Court, however, made it clear that at the bottom of the reasoning lies a plain consideration of public policy.⁸⁸

Kuhn has wondered why resort should be had to American law to limit the liability of a foreign vessel for injuries to American citizens on the high seas.⁸⁹ Also a law review note⁹⁰ declared it "difficult to see why the principle of the *lex loci* should be departed from merely because the case came up in admiralty" and recalled the former leading case, *Smith v. Condry*,⁹¹ where the *lex loci* was applied rather than the *lex fori*. In fact, the majority of the Continental European courts without hesitation apply that law which in their view governs the tort claim as a whole.⁹² As the French courts observe, one could not, in fact, juridically

⁸⁵ Congressional Acts of August 29, 1935 and June 5, 1936, 46 U.S.C.A., Supp. 1944, § 183, 49 Stat. 960, 49 Stat. 1479.

⁸⁶ Merchant Shipping Act, 1894, s. 503.

⁸⁷ Restatement § 411; *Oceanic S. N. Co. v. Mellor (The Titanic)* (1914) 233 U.S. 718.

⁸⁸ Bradley, J., in *The Scotland* (1881) 105 U.S. 24 at 33; Holmes, J., in the case of *The Titanic* (1914) 233 U.S. 718 at 733.

⁸⁹ KUHN, *Comp. Com.* 308.

⁹⁰ 27 Mich. L. Rev. (1929) 206.

⁹¹ (1843) 1 How. 28, 11 L. Ed. 35.

⁹² Belgium: Trib. com. Antwerp (June 26, 1890) 7 *Revue Int. Dr. Marit.* 582; App. Bruxelles (May 26, 1905) 21 *Revue Int. Dr. Marit.* 114 (both speaking in general terms).

France: Unanimous. The only question raised in this respect has been whether a foreign defendant may use the right to abandon the ship to his maritime creditors

conceive that consequences of one sole act, the compensation of the same damage, be appreciated according to different laws and rules. The German Reichsgericht grants the owner of a ship damaged on the high seas the choice between the laws of both ships involved; he may recover the amount of damages determined by the law stating the high maximum limit.⁹³

Does it indicate a serious doubt that in a recent English case the High Court judge reserved for judicial decision the question whether the total loss of an Argentinian ship in a collision in the Paraná River should free the shipowner according to Argentine law, or English law should apply?⁹⁴

3. Public Policy

The requirements under which the action must agree with the domestic law, as in England and in a certain respect in Germany, have been applied to maritime torts.⁹⁵

4. Formal Requirement of Suit

The position of a plaintiff is difficult, if the court where he finally is able to sue makes relief dependent on his having

as according to the French law of the forum. In the approved opinion he may not, except when French law governs the collision. See Cass. (civ.) (Nov. 4, 1891) Clunet 1892, 153, 161ff.; cf. FISCHER, *supra* n. 1, 31-33.

Germany: 29 RGZ. 93; 37 RGZ. 182; OGH. Brit. Zone (June 1, 1950) IPRspr. 1950-51 No. 29.

Italy: App. Genoa (Dec. 10, 1894) Clunet 1896, 907; Cass. Torino (April 17, 1903) Clunet 1906, 508; BOLAFFIO, 8 C. Com. (1923) 932; DIENA, 3 Dir. Com. Int. 354 n. 1.

The Netherlands: H.R. (June 24, 1927) W.11704, N.J. (1927) 129 (Swedish and German vessels colliding in Belgian territorial waters; Belgian law); Hof s'Gravenhage (Feb. 14, 1935) W. 12895 (Belgian shipowner, territorial Dutch waters); *id.* (Dec. 28, 1935) 35 Revue Dor. (1937) 359 (two Dutch vessels, Argentine waters).

Norway: CHRISTIANSEN, 6 Répert. 582 No. 185 (law of the flag).

The Scotch Court of Sessions in *Kendrick v. Burnett* (1897) 25 R. 82, 35 Scot. L. R. 62, adjusted the ordinary English double law rule in the absence of a *lex loci delicti* to the effect that the measure of damages has to be agreeable to the domiciliary laws of both parties.

⁹³ 138 RGZ. 242, 246.

⁹⁴ The Madrid [1937] P. 40, [1937] 1 All E.R. 216.

⁹⁵ See for England *supra* n. 57.

Germany: EG. BGB. art. 12; SCHAPS, *Das Deutsche Seerecht* (ed. 2) § 485, n. 29.

complied with the prescriptions of the law of the forum demanding protests or notices and limiting the time of bringing action. The Antwerp Congress gave him a broad option (*supra* p. 339), while the Brussels Convention simply abolished all formalities.

It is noteworthy that the Supreme Court of the United States has liberally declared a foreign vessel excused from observing the American formal provisions,⁹⁶ while various courts in other countries have clung to their local laws.⁹⁷

⁹⁶ *The Scotland* (1881) 105 U.S. 24, 33.

⁹⁷ France: *Lex fori* as to the time granted for bringing the suit: Cass. (civ.) (March 6, 1891) S. 1892.1.193, also published in 1 *Répert.* 67, Note (Curaçao waters); App. Rennes (Jan. 7, 1908) *Revue* 1908, 395 (Danish waters). *Contra*: in case of collision on the high seas, App. Aix (Dec. 23, 1857) D.1858.2.39; and in a broad survey, LYON-CAEN, Notes, S. 1893.1.193.

In Belgium the courts have been divided, see CROUVÉS, 1 *Répert.* 72 Nos. 167, 169; likewise in the Netherlands, see VAN HASSELT 366.