SHENANIGANS IN THE ANTARCTIC

BY MARTY LOGAN

Most people will be aware of the collision that occurred on January 6 in Antarctic waters involving the "Batmobile" boat, the *Ady Gil*, and a Japanese vessel linked to Japanese whalers.

The advent of YouTube has turned analysis of this collision in one of the remotest parts of the world into a popular spectator sport. I am not going to venture an opinion on who is to blame, but in this article I will look at the legal framework for deciding the legal issues arising from such a collision.

As I understand the factual background, the whaling support vessel is Japanese-owned and flagged, with a Japanese master. The *Ady Gil* is a New Zealand-owned and flagged vessel with a New Zealand master and a multi-national crew.

The collision took place in Antarctic waters, which Australia claims as part of its exclusive economic zone (but not within 12 miles of the coast of territory claimed by Australia, and therefore outside of Australia's territorial sea).

Vessel collisions can result in criminal prosecutions under maritime safety legislation and also in civil claims for damages between the vessels' owners. Civil litigation usually begins in the form of an arrest of the vessel that is allegedly at fault. Legal issues often involve which country's law governs liability and where proceedings can be brought. These two issues often overlap, of course.

The *Ady Gil* collision could involve Australian, Japanese or New Zealand laws, or the laws of another country where a relevant vessel is arrested. Given the fact that the collision took place within an area claimed by Australia as its EEZ, but outside of its territorial sea, it is unlikely Australia's laws or courts will have much to do with any collision action, because maritime laws of the coastal state have little application within an EEZ.

The relevant International Convention relating to EEZs gives the coastal state the power to exercise rights of "exploitation, conservation, management and control, and enforcement thereof".

However, outside of these areas it does not give any right to the coastal state to interfere with shipping passing through its EEZ, and for many maritime purposes the EEZ is still effectively the same as the high seas.

For example, if two foreign-registered trawlers collide 14 miles off New Zealand shores while fishing under New Zealand authorisations, Maritime New Zealand would not have any jurisdiction to investigate and act on the accident, as it involved two foreign vessels colliding outside our territorial waters. If the vessels returned to a New Zealand port, Maritime NZ could then become involved, but only to the extent of ensuring there were no pollution or safety issues within New Zealand's territorial sea.

Accordingly, Australia might have the power to prosecute the Japanese vessel for aiding and abetting what it considers illegal whaling within its EEZ. However, it would not have the power to deal with any issues arising from the collision.

Any power to prosecute the Japanese parties for whaling would involve practical issues as to whether the Japanese company has any vessels or assets within the Australian jurisdiction. For example, the Humane Society International has obtained an injunction from the Federal Court of Australia restraining the Japanese parties from conducting whaling within Australia's EEZ. But the Japanese parties ignored the court proceedings and have been able to ignore the injunction.

Incidentally, the issue of claiming an EEZ in Antarctic waters is a very sensitive one, and few countries recognise Australia's claim to an Antarctic EEZ. Japan does not recognise Australia's claim.

With regard to any criminal prosecution, the New Zealand and Japanese maritime authorities, as the respective flag states, will have jurisdiction to investigate the incident and even lay charges against offenders. There may well be practical limitations on this, and in particular if the offenders are foreign nationals and are not present in the flag state jurisdiction then there is very little that can be done.

With regard to the civil liability, this could be initiated by proceedings in a jurisdiction where the *Sea Shepherd* or the Japanese company has their business base. Alternatively, "in rem" proceedings can be brought against the vessels involved in the collision, or their sisterships, in whatever jurisdiction those vessels subsequently are found. The rules of the arresting jurisdiction are generally used to determine liability.

In theory, it should not matter a great deal where any prosecution or civil proceedings are brought, as there is an international convention governing the prevention of collisions at sea, and most maritime states have incorporated that convention into their laws.

For example, New Zealand has adopted the Convention into the Maritime Transport Act and Part 22 of the Maritime Rules. Accordingly, liability should be determined by the same standard no matter what the nationality of the courts.

With regard to the application of the rules to the *Ady Gil* collision, I assume that *Sea Shepherd* supporters would rely on the "Give way to starboard" rule and the Japanese supporters will point to the requirement for the stand-on vessel to maintain a consistent speed and course. Neutral observers will point to the requirements of both vessels to proceed at all times at safe speeds and to take proper effective action to avoid collisions.

The fascinating aspect of any legal proceedings seeking to apportion blame for the collision would be how the court deals with the whaling/protest action background to the collision.

For example, would the fact that the whaling operation was, in the eyes of the crew of *Ady Gil* and in Australian law, an illegal operation be an answer to claims they breached the collision rules by adopting an erratic course and speed in front of the Japanese vessel?

On the other hand, would the claim that the Sea Shepherd fleet had been harassing the whaling fleet and interfering with economic activity be an answer to a claim that the Japanese vessel failed to take any steps to prevent a collision, even where it was aware another vessel was in close proximity apparently off her starboard bow.

The answer to these questions may depend on the nationality of the court hearing the dispute. It is possible a court, and particularly a neutral court, may discount these considerations and decide that as any collision in such a dangerous, remote and pristine area involved a significant risk to life and the environment the collision rules may be strictly applied, regardless of the motivation of either vessel at the time.

We all wait with keen interest whether this matter does in fact proceed further through any court and whose unfortunate lap the dispute may end in.