

Limitation of Liability for Maritime Claims and Its Place In the Past Present and Future- How Can It Survive?

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This article deals with the subject of limitation of liability for maritime claims, both tracing its history and presenting argument on its current application and relevance. The situations in which limitation of liability are involved are outlined, based on an address by Lord Mustill on the subject. The article then moves on to the relevance of limitation of liability in the modern maritime business environment. It explores various points of view from individual writers and notably in the United States judiciary. Finally, the article gives an Australian perspective given this nation's extended coastline, unique environment and extensive involvement in international trade yet oddly low level of nationally flagged and operated shipping. The author concludes that the concept of limitation liability has a future providing both it and the shipping industry undergo some major changes in orientation.

Limits of this paper

What will be presented is a basic background to the development of limitation of liability in general. Also, as some question its legitimacy and relevance in today's maritime business environment, it is appropriate to present the views of some of those who are concerned with this area of maritime law.

It should be remembered that limitation of liability in its current guise applies to the whole maritime adventure not just when a ship is at sea. Although this paper is somewhat general in nature, giving a basic overview, any focus will be on the innocent third parties who have little to gain from a maritime adventure, did not voluntarily become involved but potentially have much to lose. Among the more publicised examples of this would be the *Exxon Valdez* and the *Torrey Canyon* disasters.

Introduction

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Limitation of liability is the rule that allows those who are parties to the marine adventure, with particular reference to shipowners and their representatives, to limit their liability in the event of loss or injury to persons or things caused by or on board a ship. In the present era this limitation is generally restricted to a value amount per ton of the ship's tonnage. Amounts may vary according to the various domestic laws and international conventions.¹ As a rule, if damages sustained exceed the amount arrived at under limitation rules then funds are paid into and held by the relevant court for distribution. These funds are then distributed among claimants in proportion to their original claims, with claimants having to prove against the fund in court. Normally this will be the total of their entitlement and once this amount is proven and claimed this amount constitutes full and final settlement.

Limitation of Liability has been part of the maritime business world for some centuries. Basically its original intention was to encourage commerce and trade. It was thought, by limiting the liability of various entities such as owners in regard to mishaps at sea, investment in shipping would be encouraged. This would help increase the wealth and influence of the maritime nations. Such a view was clearly stated by the court in the *Amalia*. "[T]he principle of limited liability is that full indemnity, the natural right of justice, will be abridged for political reasons."²

Decision makers of past centuries could not have envisaged the modern shipping world. It is unlikely they could have conceived the scale of maritime adventures involving many parties beyond just a single owner risking their life savings every time a ship sailed. Nor could they have foreseen complex modern insurance arrangements and communication technology that enable comprehensive protection and constant contact with ships and their cargoes. Finally, it is doubtful when formulating their commercially aimed limitation of liability concept that they would have contemplated huge ships with massive cargoes of materials

¹ This paper will basically remain restricted to the 1976 Limitation of Liability Convention (London) and its predecessors and the *Merchant Shipping Act* 1979 (UK) and its predecessors. It should be remembered that there are a number of conventions, particularly in regard to oil pollution, and alternative legislation of various states.

² *JF Cail and others v George Michael Papayanni* [1863] 1 MooNS 471 at 473.

that can and do wreak havoc on the environment and coastal communities when accidents occur.

History

It is obvious that the concept of limitation of liability goes against the basic concept in law of *restitutio in integrum*. That is, once the level of damages has been assessed then settlement should be in full. This conflict has been acknowledged for some time. Lord Blackburn in *Stoomvaart Maatschappij Nederland v Peninsula and Oriental Navigation Company*,³ agreed that there appeared to be some injustice in reducing liability owed by those who are to blame to those who are not to blame, he questioned whether this was the real intention of the Merchant Shipping Acts. Lord Denning, some years later, in *Bramley Moore* said that as disagreeable as the concept might be in justice this had always been its aim. His comment was:

"...The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more...a small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. *I agree there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has origins in history and its justification in convenience...*'⁴

Generally limitation of liability, from its inception, was based around this concept. It was originally a continental European concept dating back to the 17th century with provisions being contained in most civil codes of maritime powers of the time. They included the statutes of Hamburg of 1603 and the Maritime Ordinance of Louis XIV in 1681. This ordinance not only codified the French law on limitations but was also the model for the Netherlands, Venice, Spain and Prussia. The outstanding exception among the maritime nations of Western

³ (1882) 7 AppCas 795 (HL).

⁴ [1964] 1 All ER 105 at 109 (CA). (emphasis added).

Europe was the United Kingdom, who took no action in this area until 1733.⁵

The parliament was not stirred into action to bring English law into line with their trading competitors until the case of *Boucher v Lawson*.⁶ The case involved a ship owner being held fully liable for a load of gold bullion stolen by the master. After this case shipowners petitioned parliament to change the law to bring them into line with their Continental counterparts. They claimed the common law which made them fully liable for the actions of the masters with or without their privity (a useful maritime definition of this is found in *the Eurysthenes*⁷ - "privity did not mean that there was wilful misconduct by the shipowner but only that he knew of the act beforehand and concurred in its being done") as exposing them to unreasonable and insupportable hardships. They also added that such unfair treatment, in comparison to other trading nations, put their future viability at risk. They made it clear that not changing the situation would be a discouragement to investment in the English merchant marine.⁸

This took place at a time when the United Kingdom's trade frontiers were expanding and the shipping fraternity was becoming a powerful lobby, they would have included sitting parliamentarians among their number. Thus in 1733 the *Responsibility of Shipowners Act*⁹ was passed. The preamble to the original Act recognises its intentions of being founded more as a pragmatic means of enhancing or assisting shipping to flourish as opposed to being founded in real justice. It also demonstrates that limitation of liability is a creature of relatively recent statute and not, as is sometimes espoused, of customary or common law ancestry and of great antiquity.

When looking at this from a general point of view in the modern international context it is appropriate to follow the English development of limitation of liability. It is in the

⁵ Griggs, P, "Limitation of Liability for Maritime Claims: The Search for International Uniformity" [1997] *Lloyd's Maritime and Commercial Law Quarterly* 369, p 370.

⁶ (1733) Cas t Hard 85.

⁷ *Compania Maritima San Basilia SA v Oceanus Mutual Insurance Underwriting Association (Bermuda) Ltd. (the Eurysthenes)* [1976] 2 Lloyd's Rep 171 at 179.

⁸ XXII *Commons Journal* 227 as cited in Griggs, already cited n 5, p 370.

⁹ 7 Geo 2, c15.

English version of limitation of liability that the international conventions¹⁰ on the subject have their basis. To quote Albert Lior “the Convention (1957 Convention) resolutely comes round to the British conception of a limitation on a forfeit basis, which takes into account the tonnage of the ship, whatever becomes of the latter”.¹¹

The original 1733 Act was limited to claims arising from the dishonest acts of masters and did not address claims as a result of loss or damage to property. As trade developed and English shipping grew it became obvious that there was a need to cover this in case of collisions or sinkings to maintain protection of investment in English shipping.

It must be kept in mind that navigational aids were rudimentary compared to today’s technology. There was no radar, global positioning technology, weather satellites, etc. Communications, whether ship to shore or ship to ship, were also of very limited range and did not extend beyond eyesight or earshot while a ship was at sea. Ships were very much at the mercy of the sea and the U.K. Parliament acknowledged that the marine adventure was a partnership with the cargo owner risking their valuable cargo and the ship owner risking their valuable ship. Both parties had the very real prospect of losing them to the vagaries of the sea and human error without fault or privity. In 1786 the Act was amended to include “any act, matter or thing or damage or forfeiture, done or occasioned or incurred by the said masters or mariners or any of them without the privity and knowledge of such owners”.¹²

At this stage valuation in limitation was to the value of the ship and freight on the voyage (freight being the amount payable under contract for the carriage of goods by sea). The reason being that the owner of a ship, like the cargo owner, should stand to lose no more than they were willing to risk.

As limitation developed the areas covered expanded. *The Merchant Shipping Act 1854* (UK) extended limitation to injury and loss of life.

¹⁰ Culminating in the *Limitation of Liability Convention* (London Convention) 1976.

¹¹ Lior, A, and van den Bosch, C, *Le Comité Maritime International 1897 - 1972*, 1. as cited in Griggs, already cited n 5, p 372.

¹² 26 Geo 3, c86.

The Merchant Shipping Act 1894 consolidated aspects of maritime law in the U.K. including limitation of liability. Section 503 of the Act allowed limitation of liability for loss of life or personal injury or loss or damage to property that took place without the owner's privity or fault. It would appear the Act also acknowledged the international nature of shipping by allowing both U.K. and foreign ships to be covered by this section. Although expanded by amendments this basic concept has remained in tact up to the current *Merchant Shipping Act 1984* (UK) in section 12.

The end of the 19th century also saw the method of settlement under U.K. statutes and continental statutes diverge. U.K. shipowners were now able to set a fund with the court in accordance with a formula as set out in the Act. Continental European countries maintained the concept of limitation by reference to the actual value of the ship after the event plus the freight.

The U.K. system, which basically prevails today both under U.K. law and international convention, is based on a monetary amount per ton of the vessel. Its current guise can be seen both in the current U.K. Act and in the 1976 *Limitation of Liability Convention*. Chapter II of the *Convention* sets out the actual limits according to the types of claims being made with Chapter III detailing how the fund is constituted and operated. Article 6(5) of the 1976 *Convention* states "for the purposes of this convention, ships' tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the *International Convention on Tonnage Measurement of Ships 1969*".¹³

The first international limitation convention was the 1924 *Limitation Convention*. This convention basically mirrored the *Merchant Shipping Act 1894*, section 503. In fact so close was it that U.K. legislators felt no need to amend the Act to fully comply with the convention. The convention was ratified and acceded to by 15 states and in fact is still applicable in several countries, even some who have acceded to subsequent limitation conventions. The 1924 *Convention* has been described as being a compromise and where this was not possible rights of reservation from particular articles were allowed. The Comité Maritime International (CMI) felt that

¹³ Griggs, P, and Williams, R, *Limitation of Liability for Maritime Claims*, 2nd ed, Lloyd's of London Press, London, 1991, p 44-5.

this convention was a failure, as it did not go far enough in actually harmonising international law in this area.

In 1957 CMI drafted a new convention that went some way further in the attempt to create an international standard. Unlike the 1924 *Convention*, the U.K. legislators were required to amend section 503 to accommodate the new convention. Not only did they increase the limits but also extended the influence of the convention. Areas now covered included contractual and extra contractual fields. Certain activities directly concerning the maritime adventure on water and on land including loading, carriage and discharge of cargo were also included. Also, shore personnel, as long as the situation involves the ship's management and transport, were included. The right of limitation was also extended to the manager, the charterer, the operator, the master, crew and certain other servants.¹⁴ Both CMI and the International Maritime Organisation (IMO) continued to review the current convention. Under the auspices of the IMO, the International Conference on the Limitation of Liability for Maritime Claims introduced a new convention in 1976. This occurred after it was agreed that changes were needed in areas including levels of limitation to account for inflation; circumstances when the right to limit should be forfeit and a way to reduce litigation. A balance was needed between suitable compensation levels for successful claimants and, for public policy reasons, the need for ship owners to limit liability to a readily insurable amount at a reasonable premium.

What was created, as a compromise, was a limitation fund which was as high as possible whilst remaining insurable at a reasonable cost and is contained in Chapter II of the *Convention (Limits of Liability)*.¹⁵ The compromise was the creation of an almost unbreakable right to limit liability under Article 4.¹⁶ The text no longer involves 'actual fault or privity'

¹⁴ id, pp 14-16.

¹⁵ id, pp 44-60.

¹⁶ *Convention on Limitation of Liability for Maritime Claims, 1976: Australian Treaties Series 1991 No.12*, Department of Foreign Affairs and Trade, Canberra.

Chapter 1: The Right Of Limitation

Article 4 – Conduct barring limitation

A person liable shall not be entitled to limit his (sic) liability if it is proved that the loss resulted from his (sic) personal act or omission,

but requires a personal act or omission committed with intent to cause loss or with recklessness to the knowledge of the likelihood of a particular loss.¹⁷ It also includes extending rights to salvors under Article 1(4) as a response to the decision in the *Tojo Maru*¹⁸ where the House of Lords did not allow a salvor to limit their liability for the negligent act of a diver assisting in the salvage operation. It also made allowance for wreck removal expenses incurred in Article 2(1)(d) in response to decisions such as the *Stonedale (No. 1)* in which such expenses were disallowed. The court claiming that such expenses were in the nature of a debt and not damages.¹⁹ Finally, it was the first time the concept of referring to the value of the vessel when assessing limitation amounts was abandoned. So this most current convention, although still a compromise and having a number of rights of reservation under Article 15, came into force on December 1, 1986.

Some countries have acceded to previous limitation conventions but not the 1976 one. Also, others have acceded to the 1976 *Convention* but have not denounced the previous conventions. So if a situation occurs there could be difficulties involving which convention provisions should apply. This is because of Article 30(4) of the 1969 *Vienna Convention on the Law of Treaties*. This rule says if two parties are in dispute and are signatories to particular treaty (convention) but one has also acceded to more recent version of the same treaty but has not denounced the previous one then the provisions of the treaty to which they are both signatories must apply. There are also those states, including the United States, which have not ratified any of the limitation conventions and pursue their own agenda in regard to the limitation of liability. Add to this the raft of reservations and it is plain to see this subject is far from settled in international law.

Another factor that has been brought into the equation in recent years, or in U.S. case law in recent decades, is the questions being raised as to the relevance and legitimacy of limitation of liability. Some have suggested that the limitation

committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

¹⁷ Griggs and Williams, already cited n 13, p 32.

¹⁸ [1971] 1 Lloyd's Rep 341.

¹⁹ [1956] AC 1.

of liability and its almost exclusive application to the shipping industry has no place. This is particularly in regard to claims made by innocent third parties. The fact that it does not apply to business and professionals in general and modern insurance arrangements make it obsolete and unnecessary. There are also those that argue in its favour. So it appears that limitation of liability may need to evolve if it is to be allowed to continue. What follows is an exploration of these issues.

Motives behind limitation statutes²⁰

In an address by Lord Mustill, later reproduced in *Lloyd's Maritime and Commercial Law Quarterly*, he outlined extensively and succinctly various factors with regard to limitation of liability for maritime claims. The following section is an interpretation of some of those factors presented.

1. The ideal of joint venture

The exploration of the history identifies that the concept has its roots in the General Average concept of the common adventure, benefit and risk. It was thought inappropriate that a heavy risk should be removed from one party and placed entirely on another. As was the case in the litigation which can be identified as probably being the original impetus for the concept of the limitation liability in the United Kingdom (*Boucher v Lawson*²¹). In this case a shipowner was held entirely liable for the theft of a valuable cargo by the master. Although both involved in the common maritime adventure, the owner of the cargo was able to sue the owner of the ship for the entire loss of the cargo although the shipowner was not privy to the theft. Under the common law of the time this kind of action by the cargo owner was entirely appropriate and was successful.

The English Parliament, under some pressure from the shipping lobby, agreed this was an unreasonable burden on the ship owner. They decided a ship owner should not be exposed to more financial risk than the value of their share of the adventure as such an exposure was leaving them open to

²⁰ Lord Mustill, "Ships are different - or are they?" [1993] *Lloyd's Maritime and Commercial Law Quarterly* 490.

²¹ (1733) Cas t Hard 85 at 88-89.

potential ruin so subsequently the *Responsibility of Shipowners Act 1733*²² was passed by Parliament.

2. High Cargo Values

There was also the concept that each party to the common adventure should only be liable, in the case of loss or accident, to the extent of their venture capital involved. This concept was introduced at a time when the value of the cargo often exceeded the value of the ship. It was viewed as unfair that a ship owner should be exposed to a risk in excess of the value of their contribution to the common adventure.

3. Limited Share Capital

With the introduction of statutes limiting liability for investors in joint stock companies to their investment it was felt that ship owners, at the time a very powerful lobby, deserved the same protection.

4. Ruin Without Fault

Limitation of Liability was created in an era before electronic transfers of title; advanced communication systems allowing constant contact with ship and cargo; or the ability to do independent checks on the competency claims of masters and crew in minutes not months. Other than thorough preparation for a voyage and trusting judgement and experience selecting masters and crew there was little an owner could do once the ship sailed. There was nothing that could be done at this stage about the actions and dishonesty of either masters or crew. Any neglect or dishonesty resulting in the loss of the ship and/or cargo meant the owner could be ruined through no fault of their own because of being liable for the full value of the adventure to co-adventurers. In 1733 the English Parliament, following the lead of other European states, deemed this to be unacceptable.

5. Attraction of Local Venture Capital

It was also felt that limiting the liability for the capital risked (ship and freight) would assist in developing investment in shipping. The purpose being to attract finance to develop a national merchant marine and thus help to expand the wealth and influence of the nation.

6. General Benefit to Users

²² (7 Geo 2, c15)(Imp).

Another motive for limitation or, as suggested by Lord Mustill, a more recently publicised justification is that limitation protects all who benefit from a carrier's service. Without limitation, large claims would drive carriers out of business thus reducing choice and competition; the inference being this would affect price. Also, as higher risk exposure would push up insurance premiums, the carriers would have increased cost thus freight rates would be increased to cover this and cover any potential shortfalls above what others may be willing to cover.

Situations involving limitation of liability

Continuing with Lord Mustill's address he also outlined three situations where limitation of liability was involved and they are:

Closed situations

This is where specific parties enter into an agreement voluntarily assuming a level of risk. In this situation the parties are fully aware of the risk and consider it being part of doing business in the maritime sector. An example of this would be a contract of carriage of goods between regular shippers and carriers. Both parties are well acquainted with the concept and workings of limitation of liability and obtain long term advantage from it.

Partly closed situations

This is when there are some parties regularly involved in situations that are subject to limitation and thus reap long term financial gains, such as savings in insurance costs. This is supposed to encourage them to stay in this area of business. There are also other parties in the same adventure who are not regularly involved such as passengers or 'one off' shippers. Thus they voluntarily assume a known risk of the maritime adventure but are only involved from time to time. As a result, if a situation arises where a claim to limit liability is involved, they are likely to suffer by not receiving full settlement for a legitimate claim against other parties. They have not received the benefits of limitation from regular involvement in maritime business but it must be kept in mind that they did voluntarily assume a certain known risk. The less generous could even suggest that it is up to them to be fully informed of their rights and liabilities if a situation arises where the risk they know about becomes reality.

Open situation

This is when one of the groups involved in a situation that involves a potential claim to limit liability are not members of a predetermined group and have not chosen to run a particular risk. They would be best described as innocent third parties (for the purposes of this paper this includes the natural environment whose 'legal' representation is in the form of concerned action groups and various public offices). Their only link to a particular situation that creates adverse consequences for them is an unfortunate convergence of place and circumstance. An example of this is the fishing communities that were devastated by *Exxon Valdez* disaster. These groups suffer through no fault of their own or prior acceptance of a risk. Upon settlement of their claims they may find that they will not necessarily receive full compensation but only their share of a fund constituted and limited under a limitation convention or similar type domestic legislation.

Current Views

Does Limitation of Liability have a place in the modern maritime business environment?

Lord Mustill, in his article "Ships are different - or are they?",²³ raises three issues that question the legitimacy of limitation of liability in the current economic and business environment. He contends that perhaps limitation of liability is no longer justifiable and it may be time to do away with it. His three contentions are as follows:

1. The original economic considerations that generated the development of limitation of liability in shipping no longer have any resemblance to the business environment of the modern shipping industry. What has been left is a rather general interest that shipping organisations should be encouraged to remain in the shipping business for society's benefit.

The principle as espoused in the *Amalia* case that "full indemnity, the natural right of justice, shall be abridged for

²³ [1993] *Lloyd's Maritime and Commercial Law Quarterly* 490.

political reasons²⁴ involved political reasoning that may no longer be considered sound. The politicians of the day may have had a need to placate what was an extremely powerful business lobby and there was a perceived need to expand international commercial trade above all other considerations. Such reasoning may have been appropriate in the nineteenth century but questions have to be raised as to whether it is reasonable or even politically expedient to maintain such an attitude. The commerce at all costs ideal is no longer considered sound in many circles. The shipping business and associated insurers can no longer expect the arguments to remain within the confines of the International Maritime Organisations or cloistered government conferences. Other organisations such as community action groups and environmental groups are demanding a say in how business conducts its affairs and their political influence is also increasing as can be seen by the way politicians court the 'green vote'. As much as business would like to think these are just fringe 'green' loonies they have become mainstream and the changing attitudes of society are reflecting this.

Lord Mustill identifies that groups not within the sphere of influence of the shipping or insurance businesses are raising questions about full accountability. These organisations are not easily swayed or influenced, they do have the ear of contemporary government and have little sympathy for rules that appear to benefit business at the cost of communities or the environment. The current social climate is leaning toward demanding that governments ensure that business be fully accountable for their actions and any damage they cause. Prima facie, limitation of liability is totally at odds with such sentiments.

2. The second of Lord Mustill's contentions is the unsystematic way in which limitation of liability is applied. He states that application can vary greatly according to the form of transport used, the starting point of a venture and even the terminus of the venture citing, among other things, the vast differences between rights of claim for passengers on aircraft and those on ships. He calls this a 'lottery' for the potential levels of compensation that is not only illogical but also immoral.

²⁴ [1863] 1 MooNS 471 at 473.

This 'lottery' is not fatal to insurers, as they are able to spread their risks to sustain an erratic regime. It is in their interest to maintain a system that has the ability, wherever possible, to limit their exposure to risk. It is the injured parties who suffer from the maintenance of such a regime as the extent of the compensation depends on what appears to be chance as much as anything. Apparently this situation is acknowledged by the industry but is yet to be fully realised outside industry circles. There is no doubt that the insurance industry would like to see it stay that way.

It would appear the situation is beginning to change in regard to oil pollution with transport and subsequent accidents being specifically covered and the obligations on the shipping business owners and subsequently insurers being far more onerous. This has mostly been as a result of the pressure brought to bear after the well-publicised disasters such as the *Torrey Canyon* and *Exxon Valdez*. It has also been helped by reports such as the Donaldson report²⁵ that was very critical of shipping standards and, in particular, the fact that some 95% of shipping accidents are a result of avoidable human negligence and incompetence. In the face of such events and criticisms in the public arena it logically makes it inevitable that public pressure will be such that government will be forced to demand more accountability from the shipping industry.

It is also easy to see that it is going to become harder for an industry to justify the existence of rules that allow it to limit liability when reports indicate that shipping safety standards are less than acceptable. Particularly when all the indications are that there appears to be an industry attitude that it is entirely acceptable to compromise safety to improve profitability. Nor is the resistance from certain sectors of the industry to adhere to the International Safety Management Code (ISM) of the International Maritime Organisation (IMO) assisting the shipping industry's reputation. It may be the oil transport industry that has been hardest hit but it is only a matter of time before the rest of the shipping industry is called to account. Lord Mustill believes it is inevitable that questioning of the ethics of limitation of liability as it exists will come to the fore.

²⁵ *Safer Ships, Cleaner Seas*, HMSO, London, 1994. Report of Lord Donaldson's Inquiry into the prevention of pollution from merchant shipping.

It would appear that the only way for the insurance and shipping industries to resist the pressure to change is to remove those elements of this issue that are indefensible. Ultimately, the industry will have to justify the particular existence of limitation of liability in a modern society, as tradition cannot be a defence. Maintaining a rule created in a long gone social and business environment may be difficult to justify.

3. Finally, Lord Mustill questions the discriminatory nature of limitation of liability even if it does have merits in capping compensation payments and bringing some form of discipline to the extent of claims. He believes, in considering the viability of limitation of liability, that all who are exposed to unlimited liability must be considered. Although he acknowledges the difficulty of bringing in new businesses, insurers, lawyers, etc. it has to be done. It is unreasonable that a single group in society are the beneficiaries of a rule whilst others exposed to similar risks are left unprotected. He sums this up in his final comment that, irrespective of what society, the law or politicians decide “ships are no longer different”.²⁶ They have no more right to protection than any other commercial enterprise.

Although Lord Mustill does raise this issue his arguments point to another contention. By changing limitation of liability to encompass all sectors of business and professions ultimately all will benefit from limitation. There will be no ‘open’ situation as all in some way receive long term benefits of limitation whether it be reduced cost of insurance, general goods, professional services.

The place of limitation of liability in the modern business world

The argument for limitation of liability in the modern context was put by David Steel QC in an article in *Lloyds Maritime and Commercial Law Quarterly* of February 1995.²⁷ The following is a summation of that argument.

²⁶ Lord Mustill, already cited n 20, p 501.

²⁷ Steel, D, “Ships are Different: the Case for Limitation of Liability,” [1995] *Lloyd’s Maritime and Commercial Law Quarterly* 77.

The basis of the argument for limitation of liability is, as has been since its inception, largely commercial in nature. It appears that this is still the impetus behind maintaining limitation of liability in the international maritime industry. It is the focus that appears to have shifted from encouraging trade and maintaining the development of shipping to that of capping potential insurance pay-outs. The basis of the argument being that it is simply a matter of insurability and the cost of insurance. Even the International Maritime Organisation legal committee agrees that a ship owner's liability should not exceed, in the modern context, that amount which is recoverable from insurance.²⁸

Macdonald Denning²⁹ argued that having limitation on liability and having set rates according to the vessel tonnage brings a level of certainty. Funds can then be set up which have set amounts available to claimants. The claim being that it gives certainty to an equitable distribution to claimants and affording shipowners protection in the advent of 'rare disasters'. It also means litigation time is reduced as only a single action is required to ascertain elements such as privity, negligence recklessness, etc. Once these are established a single equitable distribution among claimants can occur. Once again this appears to revert to insurability and that insurance companies obviously desire to limit their exposure to risk for the premium they charge.

Steel states specifically that "limitation, as already observed, was historically justified as needed to promote the industry".³⁰ It would appear that, in his opinion, this is still the major argument in favour of limitation although its emphasis appears to have shifted from commerce to insurability. He claims that the removal of limits to liability will encourage shipowners to pursue practices that would be to the detriment of the industry and potential claimants. Proliferation of activities such as self-insurance because insurance companies will want exorbitant premiums or may not be willing to insure certain classes of risk at all is a likely result. Fleets are likely to be reduced to a number of one ship companies to avoid claims against an owner's other assets. Increased freight rates due to increased insurances and

²⁸ *ibid.*

²⁹ Giving evidence before a U.S. Congressional hearing, as cited in Steel, already cited n 27, p 80.

³⁰ *id.*, p 81.

coverage for claims against shipping organisations would probably also occur. Finally, increased use of flags of convenience, the inference being further reductions in levels of safety and seaworthiness of vessels thus the increase in the likelihood of accidents occurring.

This is all supposed to occur because of the nature of shipping, which Steel encapsulated as being:³¹

- a) Shipping is a comparatively low investment industry; individual ships and even whole fleets can be within the reach of personal finances; and
- b) Maintenance and crew costs are low;
- c) The market is mostly freight not passenger orientated making safety considerations less of a premium;
- d) Competition is intense and is not restricted by bilateral treaties in terms of price or route;
- e) The industry is largely subsidised.

The implication here appears to be that the industry simply cannot afford to be exposed to unlimited liability as it is already on the edge of economic viability. This is particularly pertinent at a time when much of the world's fleet is due, in some cases overdue, for replacement. The inference being ship owners have pressing financial requirements that must override any attempt to change the concept of limitation of liability. It would appear that Steel believes the financial protection of the shipping and insurance industries is more important than full compensation to claimants for damages caused by shipping mishaps.

There is also the contention that by having a limitation to the extent of liability not only lessens risk exposure to those covered by international conventions or national legislation of non-signatories but it also streamlines the process for claimants. The claim being that limitation allows for stable insurance with fair compensation encouraging settlement and discouraging forum shopping.

He goes on to claim that, often with the influence of environmental groups, unlimited liability would lead to 'unconstrained revenge' as opposed to fair and full compensation; citing the *Exxon Valdez* as an example of this.

³¹ ibid.

He poses this question by citing that, although it involved oil pollution and invoked an insurance cap of \$500 million, punitive damages had reached \$5 billion by 1995 and considered the *Lloyd's List* description of this as 'grotesque' being restrained. His opinion of the U.S. attitude toward limitation of liability is, to say the least, not a supportive one. The approach to unlimited liability and giving juries 'carte blanche' in awarding damages he believes would be disastrous if this approach were to be adopted at an international level. The U.S. judiciary's attitude to limitation of liability will be presented later in this paper.

Steel believes limitation of liability still has a place in the modern maritime industry to encourage worldwide investment in shipping and insurance underwriting. It helps to ensure a level playing field for international competition by exposing all those involved to the same level of risk in what is a global business. It allows insurance a level of comfort by having their exposure to risk capped. Finally, it leads to a consistent and disciplined approach for claimants and discourages a 'free for all' approach to litigation which can lead to an inconsistent and confused system of settlement.

His final comment is that limitation really is the best way for victims of maritime disasters. Apparently concurring with the old adage of 'a bird in the hand is worth two in the bush' Steel claims that a limited claim that is certain in payment is best. The alternative being unlimited claim against potentially insolvent parties.

As further support for Steel's argument the *Donaldson Report*³² came out in favour of limitation of liability generally, although it did recommend much tighter controls in regard to safety and accountability. Lord Donaldson was damning of both the shipping industry in general in its approach to safety and its attitude toward the effects of sub-standard shipping on innocent third parties. Alternatively, the point was made that limitation of liability has a place and the U.S. approach is not appropriate. He made the point that making ship owners more responsive to demands for reasonable safety levels could not be resolved by taking away the right to limit liability. The key was making other groups involved in the maritime industry put pressure on ship owners to improve safety levels, such as encouraging insurers to insure only those vessels that

³² *Safer Ships and Cleaner Seas*, already cited n 24.

meet minimum standards. Donaldson concurs with Steel that unlimited liability will not encourage improved shipping standards but in fact encourage irresponsible behaviour by ship owners.³³

What the United States judiciary has to say about limitation of liability

Although this section is relatively short in comparison, this does not in any way subtract from the weight it should carry in considering alternative arguments on the subject of limitation of liability. Some writers have called the introduction of the 1990 *Oil Pollution Act* (OPA) a knee jerk reaction³⁴ that was merely a cynical political act to gain public support but it could be contended that this is not the real truth. Judicial support in the U.S. for the concept of limitation of liability has been waning since the 1930's.³⁵ The current changes in U.S. legislation is the culmination of that as public sentiment allows legislators to put into law what the judiciary has been calling for years. In fact some writers think that the major problem with the OPA and associated legislation is that it, in only applying to oil pollution, is too specific and should apply to the shipping industry across the board.³⁶ The OPA appears to reflect the attitude of a number of U.S. judges over several decades.

Black J in *Maryland Casualty Co. v Cushing*³⁷ saw limitation of liability as, in reality, a form of subsidy to the shipping industry. He felt that the fact that congress already willingly subsidised shipping, it was more appropriate, if subsidies were needed, that they should come from the public purse and not at the expense of injured parties. T.F. Lambert was probably a little stronger in expressing an opinion on the subject by writing "an act which is vicious in its impact, unconscionable in its results and outmoded in an age of institutionalised protective insurance, if it cannot be repealed

³³ id, p 285.

³⁴ Ibrahim, I, *The Background and the Ramifications of the 1990 United States Oil Pollution Act*, unpublished Masters thesis, University of Plymouth, 1991.

³⁵ Gilmour, G, and Black, C, *The Law of Admiralty*, 2nd ed, The Foundation Press, New York, 1975.

³⁶ id, p 825.

³⁷ 98 LEd 806 (1954) at 826.

outright, deserves only a narrow, grudging and conservative construction.”³⁸ This attitude appears to summarise what is still the opinion of the U.S. Judiciary on the subject of limitation of liability.³⁹ In fact higher courts in the U.S. have indicated that they only continue to support the use of limitation of liability because of its legislative status. The concept as it exists currently is what they continue to object to.⁴⁰ After reading this it is easy to see that much of the genesis of the OPA was from within the U.S. legal community and not mere political grandstanding.

The argument from the point of view of the U.S. Judiciary is well summed up in Gilmour.

“Such an attitude reflects, it is suggested, not so much hostility to the shipping industry as a recognition of the fact that the limitation act was passed in the era before the corporation had become the standard form of business organisation and before present forms of insurance protection (such as protection and indemnity insurance) was available, shows increasing signs of economic obsolescence”.⁴¹

It appears the belief is that the financial burden is already limited to corporate funds not the personal assets of the individual under the rules of corporatisation of companies. Also the legislators would not have had modern indemnity and protection insurance schemes in mind when drawing up this protective legislation. The court called limitation of liability an ‘anachronism’ in the modern business world in *Pettus v Jones & Laughlin Steel Corp.*⁴²

³⁸ (1959) 24 NACCA LJ 223, p 225 in Steel, already cited n 26, p 77.

³⁹ *Re Oswego Barge Corporation (NDNY)* 439 F. Supp. 312 (1977) at 320; *In re Complaint of Armater, S.A.* 710 F Supp 390 (D. Puerto Rico 1988) at 397 per Laffitte J.

⁴⁰ *Keys Jet Ski Incorporated v Kays* 893 F2d 1225 (11th Cir 1990) at 1228-29.

⁴¹ Gilmour already cited n 35, p 812.

⁴² 322 F Supp 1078 (W. D Pa. 1971) at 1082.

The Australian Position

Overview

For the benefit of Australian readers it is appropriate to make some mention of the position of limitation of liability in Australia. Basically, it appears to be related to this country's recent history of colonial rule by England and shows a very close correlation to the position in the United Kingdom. The 1976 *International Convention of Limitation of Liability for Maritime Claims* came into force in Australia on 1 June, 1991 being enacted in Australian law by the *Maritime Claims Act 1989 (Cth)*.⁴³

Events that would be subject to limitation claims prior to 1 June, 1991 would be subject to the 1957 *Convention* that was accepted into Australian law by virtue section 65 of the *Navigation Amendment Act 1979 (Cth)*. This act amended Part VIII of the *Navigation Act 1912 (Cth)*. Prior to this amendment coming into force limitation of liability was applied, through the *Navigation Act*, as it appears in the *Merchant Shipping Act 1894 (Imp.)* which has been previously mentioned. The close correlation between English and Australian law means that the discussion presented in this paper is relevant to the current Australian position on limitation of liability in shipping.

Australia's status as a shipping nation

According to the Australian Shipowners Association's recent report '*Australia's Maritime Transport 1998*' 8.9 % of world seaborne trade is generated from Australia.⁴⁴ With 13.1% of seaborne task (billion tonnes/kilometres) being Australian in origin.⁴⁵ Contrasting with this is the fact that investment in Australian shipping has actually declined by 21.8% in the last four years to the point of capital outflow with only 61 vessels in the national flag fleet in 1998.⁴⁶ This means that Australian seaborne trade has increased in real terms yet Australian

⁴³ Also known by the short title of *Limitation of Liability Act 1989 (Cth)*. The long title for this Act is the *Limitation of Liability for Maritime Claims Act 1989 No 151 of 1989 (Cth)*.

⁴⁴ Australian Shipowners Association, *Australian Maritime Transport, 1998*, prepared by the Apelbaum Consulting Group Pty. Ltd., 1999, p 6.

⁴⁵ id, p 7.

⁴⁶ id, p16 and 22.

controlled shipping has decreased. This is highlighted by the fact that only 2.2% of the indigenous market was on Australian controlled shipping.⁴⁷ Finally, on the world stage Australia occupies 34th position on the list of most influential maritime nations in regard to dry weight tonnage (DWT) controlled.⁴⁸

Some may question the relevance of this information in a discussion about limitation of liability for maritime claims when it has been acknowledged that this legislation applies to all seagoing craft in Australia. The vast majority of which are not large commercial cargo vessels. This is demonstrated by the fact that the leading case on the acceptance of the 1976 convention into Australian law is the *Victrawel* case that concerned a fishing trawler damaging an international communications cable. The report's information is relevant because it deals with large commercial cargo vessels. These vessels are large enough to carry diverse cargoes in large volumes that can, in the advent of a misadventure, wreak havoc on the environment and coastal communities far in excess of any damage caused by coastal fishing vessels or recreational craft.

The report's figures assist in showing that Australia, as a nation, benefits considerably less from the concept of limitation of liability as it currently exists than nations more prominent in the control of shipping. For example, Greece would have an interest in maintaining the concept as it currently exists considering Greek shipping controls 17.4% of world shipping (as at December 1996). This figure indicates that Greek shipping would be a large contributor to that country's gross domestic product and community. This contrasts significantly with the Australian shipping position which only controls 0.48% of world DWT⁴⁹ and all water transport (not just seaborne shipping) contributes only 0.2% to Australian GDP.⁵⁰

Unfortunately the Australian controlled shipping figure does not truly reflect Australian involvement in world seaborne trade but this is an issue for politicians and business and is not the subject of this paper. What is relevant when reviewing the concept of limitation of liability and ensuring some

⁴⁷ id, p 10.

⁴⁸ id, pp 24-25.

⁴⁹ id, p 24.

⁵⁰ id, p 30.

relevance to Australia is that Australian controlled shipping plays a very minor role in the domestic economy and community. It appears to be a reasonable proposition, when considering limitation of liability in Australia, that the protection of the community and environment should play the most influential roles.

This view is further reinforced when comparing the length of the coastline combined with the volume of cargo that moves around the coast (112 billion tonne/kilometres⁵¹) with the level of Australian controlled shipping moving that cargo. Also, the reasonable contention that foreign controlled vessels would not have the protection of the Australian coastline as an imperative over the minimising of operating costs must be factored in. Any discussion of the limitation of liability for maritime claims that considers the Australian situation must have these realities in mind when reaching an overall conclusion.

The *Victrawel* case and its importance to limitation of liability in Australia.

In the case of *Victrawel Pty. Limited v AOTC Limited and Others*,⁵² Gummow J clarified a number of issues regarding the acceptance of the *Convention for the Limitation of Liability for Maritime Claims 1976*. The case involved a commercial fishing company applying to the Federal Court to invoke the 1976 *Convention* in regard to a claim against it. The claim arose when in April of 1991 the trawler *Lorna Dane*, owned by Victrawel, fouled a trans Tasman communication cable. The plaintiffs argued that the 1976 *Convention* should be invoked even though the legislation⁵³ bringing it into Australian law did not come into force until June of that year.

The Federal Court held that Victrawel could not invoke the 1976 *Convention* retrospectively as this was contrary to both the common law and international customary law regarding application of legislation. Gummow J stated that "the applicable rules for interpretation of the 1976 *Convention* are those recognised by customary international law, as codified

⁵¹ id, p 11.

⁵² *Victrawel Pty. Limited v AOTC Limited and Others* (1993) 45 FCR 302.

⁵³ *Limitation of Liability for Maritime Claims Act 1989* (Cth).

by the *Vienna Convention on the Law of Treaties* 1969⁵⁴.

In particular he drew attention to section 28 of that treaty which states:

"Non-retroactivity of treaties.

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

Gummow J also stated, in regard to retrospectivity, that "[a]s a general precept of interpretation, the regime created by the convention would, in the absence of contrary intention, be construed as not attaching new legal consequences to facts or events which had occurred before its commencement".⁵⁵

It was with this line of reasoning that, in this particular case, the court held that the 1976 *Convention* could not be invoked in regard to events which took place before the *Limitation of Liability for Maritime Claims Act* 1989 (Cth) came into force on June 1, 1991. Gummow J also describes how the 1976 *Convention* has come into force in Australia by virtue of the 1989 Act.⁵⁶ This clearly indicates that the Federal Court will accept that events taking place after June 1, 1991 will be subject to the 1976 *Convention*. Gummow J also made it clear that the Federal Court has jurisdiction in hearing applications to limit liability in maritime claims by virtue of s25 of the *Admiralty Act* 1989 (Cth).⁵⁷

Marine Insurance

Although the subject of insurance has been raised in this paper a comprehensive discussion of marine insurance is, in itself, an entire subject beyond the scope of this paper. This is evidenced by the vast array of institute clauses, policy types and standardised forms used. Also, the existence of

⁵⁴ *Victrawel Pty. Limited v AOTC Limited and Others*, already cited n 50, p 304.

⁵⁵ *id.*, p 312.

⁵⁶ *id.*, p 306-7.

⁵⁷ *id.*, p 309.

protection and indemnity (P&I) clubs which, very simply described, act as co-operative self-insurance associations would have to be included. The reason being that they provide indemnity cover for gaps between liability insurance cover provided and actual liability. P&I clubs themselves could be the subject of extensive discussion as their array of covers are as numerous as commercial insurance policies relating to ships, shipping and cargo.⁵⁸

Basically, what needs to be remembered about marine insurance when exploring the relevance of limitation of liability in current society is that the forms of modern marine insurance are at least as numerous and comprehensive as those available to other commercial and transport enterprises. Plus shipping also has the added advantage of the existence of P&I clubs to narrow the gap between liability cover and actual liability.

Conclusion

Limitation of liability was created in an era when insurance of any sort was rudimentary or non-existent. Commercial law was also a wholly undeveloped area and investment in an area, such as shipping, meant risking everything. The concept of companies being separate financial entities from the private individuals who invested in them is a relatively recent concept in law. It was a time when communication with vessels at sea was, compared to modern facilities, ostensibly non-existent. It was also a time when the maritime nations of Western Europe were competing with each other for international dominance. Governments were prepared to give whatever was needed to any group who expanded national influence, even changing the laws to assist commerce and trade. In this era such practice was considered acceptable and reasonable. In this climate a system of laws that made ship owners only liable to the extent of their investment was justifiable and logical. Limitation of liability simply brought the ship owner onto an even legal footing with the common law rights of cargo owners.

⁵⁸ For a comprehensive introduction to the subject of marine insurance the following text is recommended, as used by lecturers in Marine Insurance at University of Plymouth in the United Kingdom - Bennett, H, *The Law of Marine Insurance*, Clarendon Press, Oxford, 1996.

Also, when considering the historical legitimacy of limitation of liability in the context of the prevailing conditions of the day, the physical properties of ships and cargo cannot be ignored. Limitation of liability came about in a time when industrial technology was such that the most hazardous materials of the day would today be considered as relatively innocuous. Even those materials that may have some impact if carried and lost in a large amount created few problems simply because cargoes were relatively small and any loss had little environmental impact. This was mainly because ships of the day, at their largest, were little bigger than a reasonably sized ocean-fishing trawler of the late twentieth century. In fact coastal communities such as the Scilly Islands, off the Cornwall coast, saw wrecks as economic opportunity. Not so today, with ships of a size capable of carrying tens of thousands of tonnes of cargo, often of materials that can cause biological disasters if lost in any amount in a marine accident. It is unlikely that any coastal community would see a ship breaking up on their coastline as anything but disastrous.⁵⁹

So historically limitation of liability in its originally conceived form which, with some window dressing, is still basically unchanged had a place. The question is does it still have a legitimate place?

The American Judiciary apparently thinks it does not have a real place in the current legal commercial environment. They say, in its present form as a law, it is an anachronism and the author believes this would appear to be the case, although not precisely for the reasons they have presented. Unlimited liability being allowed on the basis of modern insurance practices is an unsustainable argument. Evidence of this is seen by the often inconsistent and out of control settlements being allowed under the insurance and compensation arrangements of professions that cannot limit their liability.

The argument that modern incorporation of companies negates the need for limitation of liability has some legitimacy. The original concept of limitation of liability was to ensure that ship owners did not lose everything but the proverbial 'shirt on their back' when they were not personally at fault for a maritime loss. Now commercial law and incorporation of most companies is such that an individual is only liable for a

⁵⁹ The author recommends a recent article on the effects of the Exxon Valdez disaster of 1989 as an example of this: Mitchell, JG, "In The Wake Of The Spill" (1999) 195:3 *National Geographic*, p 96.

company's debts to the extent of their investment (noting the familiar ring to this concept of protection when considering the original basis for limitation for shipowners). Accordingly an investor will not lose all their worldly possessions simply because of an adverse compensation decision, even in areas of business not covered by limitation laws. From this point of view limitation of liability has served its purpose and really is obsolete and discriminatory. Why should a particular area of business be allowed a level of financial protection afforded to no other?

Lord Mustill's view is the most sensible as he appears to support the concept of expanding not contracting limitation of liability. His contention that in its present discriminatory form it is not legitimate is a reasonable one. It would be better to introduce a system of capped liability across all business and professions as we see out of control compensation awards in areas of commercial liability not capped by limitation legislation. This in turn begins to force insurance levels to prohibitive levels as insurance companies attempt to set premiums on financial risks of unknown or at least unpredictable extent.

If limitation of liability is to survive it must be expanded rather than contracted. In saying this the approach of the shipping industry, business and society in general towards responsibility in certain situations must change. For example when environmental disasters occur or communities are devastated as a result of shipping accidents the approach of the various groups must be far more mature; they need to change their emphasis from finding or avoiding fault and exacting revenge to one of seeing to it that the damage is repaired. If limitation of liability is to survive then all must be prepared to accept the cost of capping compensation and bringing reason and discipline into this area of law.

The international community as a whole must accept responsibility to make up the difference when communities are devastated or the environment is threatened as a result of accidents; at no time should any innocent party (including the environment) be expected to subsidise any business by their personal loss. Nor is it acceptable that commerce should take precedence over maintaining the environment in a reasonably livable state. Claiming not to be able to afford to maintain a safe level of operation or adequate insurance is no excuse in any other commercial endeavour so it can never be used as a

reason to limit liability in shipping. By allowing limitation of liability the whole of society is said to benefit from reasonably priced transport. Therefore it is not unreasonable that society at large be expected to take some responsibility for the result of an accident requiring assistance above the deemed level to which the liability of the groups directly involved is limited. Alternatively if limitation in shipping is to survive the shipping business must take a far more responsible and harder attitude toward organisations that consider their own profit margin the extent of their responsibility to the community. This was also the view supported by Lord Donaldson in his report to the United Kingdom parliament on ship safety standards and the threat to the community and environment created by the current attitude of many in the international shipping industry. The bottom line is that the community as a whole must take some real responsibility for the negative impacts of our standard of living and commercial activities.

By allowing limitation to spread to other parts of the business community Lord Mustill's completely unjust 'open' situation in regard to claims involving limitation of liability will not exist. We should all benefit in some way from a broad introduction of limitation of liability with reduced insurance and costs to business trying to protect themselves against potential litigation. Although such broad long-term gains may not be immediately obvious they are none the less there. Such a broadening of the application of limitation of liability reinvents it as a just and equitable arrangement in both commerce and law.

With the continuation and expansion of limitation also comes the responsibility of seeing to it that the difference between compensation paid by defendants and insurance companies and the level of damage sustained is made up. At no time can the innocent, who have been injured, be expected to subsidise business by being expected to receive less than just compensation. The idea of this, in this day and age, is both unjust and immoral and has no place in society.

Limitation of liability has a place and should remain as law but governments must resolve to demand, not ask, business, including shipping, to be more accountable for the way they conduct their business. This is because the only real alternative is an American style unlimited liability with free for all litigation sending insurance pay-outs and premiums to unacceptable levels. This is the potential outcome as it would be difficult to explain to layman how limitation is little more

than a way for a company to get out of paying the full amount in a reasonable award for damages against them. It is unreasonable for the shipping industry to expect individuals to accept limitation of liability in shipping alone when investors, in the advent of a claim, are not likely, as their forebears were, to lose everything. The community at large cannot be expected to subsidise a single branch of the transport industry irrespective of how important the shipping industry may think it is. Limitation of liability can only continue if it, and the shipping industry in general, undergoes a change in priorities and approach.