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**The Maritime Law Association's Proposed Statute On
Shipowners' Limitation of Liability:
A Practical Alternative to the IMCO Convention**

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I. INTRODUCTION

From the time of its enactment, the Limited Liability Act¹ has been the topic of both great praise² and scathing criticism.³ The Act was originally passed in an effort to put American shipowners on an equal footing with their foreign counterparts, particularly the British. Since its passage, however, there has developed an almost universal recognition that the purposes and underlying justifications for the promulgation of the doctrine in 1851 no longer exist.⁴ In addition, while there have been dramatic changes in the maritime industry in the past century, particularly, technological achievements in maritime commerce, the almost universal use of marine insurance, and the creation of numerous causes of action for death and personal injury since passage of the Act, there have been no major modifications of the doctrine in over forty years. Notwithstanding these facts, both shipowners and insurance interests have defended the Limitation Act as a necessary subsidy which makes it possible for the United States maritime industry to remain competitive in the marine transportation market with most other maritime nations of the world which maintain a system of limited liability.

The above changes in the maritime industry, changing contemporary attitudes favoring compensation to the injured, and the cre-

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1. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635.

2. Roberts, *For Retention of Limitation of Liability for Shipowners*, 1968 A.B.A. Ins. Section 415; Ross, *Shipowners' Limitation of Liability Revisited*, 10 S. TEX. L.J. 1 (1968).

3. Comment, *Shipowners' Limitation of Liability and Personal Injuries: A Need for Re-evaluation*, 48 TUL. L. REV. 376 (1974); Adler, *For Abolition or Liberalization of Present Limitation of Liability Statutes*, 1968 A.B.A. Ins. Section 409; Comment, *Limitation of Liability: An Anachronism from the Days of Privity*, 10 VILL. L. REV. 721 (1965); Eyer, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370 (1964).

4. *Id.* See also Volk and Cobbs, *Limitation of Liability*, 51 TUL. L. REV. 953 (1977).

ation of new causes of action for death and personal injury, all have led courts to the realization that the underlying rationale which prompted passage of the Act in 1851 no longer exists.⁵ This realization has in turn resulted in unsuccessful judicial attempts to modify the Limitation Act in order to meet contemporary needs through juridical restriction of the limitation privilege.⁶ This juridical restriction, both substantive and procedural, fails to promote the best interests of tort claimants, shipowners, insurance underwriters, or the United States public policy.

The primary vehicle for this judicial restriction of the benefit of limitation has been an increasing judicial attitude to find "privity or knowledge" on the facts of the case, thereby denying limitation. Under section 183 of the Act, the shipowner's right to limit liability is conditioned on his being without "privity or knowledge."⁷ Similarly, under section 182 of the Act, the owner is exonerated from liability to cargo for fire damage unless the fire was caused by the owner's "design or neglect."⁸ Gilmore and Black have appropriately described these requirements:

5. In 1954, in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1953), Justice Black, in his dissent for four members of a 4-1-4 divided court, expressed what seems to have become the predominant judicial attitude toward limitation of liability:

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons. If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost. . . .

Id. at 437. See also *In Re Jacobson*, 52 F.2d 179 (S.D. Tex. 1931). The purpose of the Act is to encourage shipowners to send good, first class ships to sea. This is defeated if it is allowed to furnish protection to owners from the consequences of an ill-advised and ill-considered venture; *the Santa Rosa*, 249 Fed. 160 (N.D. Cal. 1918). The statutes (limitation) are to be enforced in such spirit and with such liberality as will effect their purpose—the encouragement of shipbuilding and the employment of ships in commerce. But such liberality should not be carried to an extent that will deprive cargo owners and passengers of that degree of care on the part of those owning and operating ships which their safety demands and to which they are entitled; *Place v. Norwich Transp. Co.*, 118 U.S. 468 (1886) (Matthews dissenting). The statute, as it has been construed, puts a premium on the destruction of property by taking away from shipowners a principal motive for regarding either their own or the interests of others.

6. Of 19 reported limitation petitions between 1973 and 1976, limitation was denied in all but four cases. See Greenman, *Statistical Analysis of Limitation Cases, 1953-October 1976*, Maritime L. Ass'n of U.S., Doc. No. 600 (1976).

7. 46 U.S.C. § 183 (1958).

8. 46 U.S.C. § 182 (1958).

"Privity or knowledge" and "design or neglect" are phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will. The statutes might as well say that the owner is entitled to exoneration from liability or to limitation of liability if, on all the equities of the case, the court feels that the result is desirable, otherwise not.⁹

9. GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, 877, § 10-20 (2d ed. 1975). One of the more in depth discussions of the requirement can be found in *Complaint of Farrell Lines (The African Neptune)*, 530 F.2d 7 (5th Cir. 1976), in which the court held a shipowner entitled to limit liability where his vessel struck a bridge due to the navigational error of a ship's helmsman. The court stated that the resolution of whether a shipowner is entitled to limit liability involves a two step process. First, the court must determine what acts of negligence and/or conditions of unseaworthiness caused the accident. Second, the court must decide whether the shipowner had knowledge or privity of such negligent acts or unseaworthy conditions. The court held that the shipowner's pre-accident knowledge of alleged inadequate shipboard procedures, personnel and/or equipment which may have caused the accident was not enough to deny the shipowner his right to limit liability, if such procedures, personnel or equipment did not in fact involve negligence or render the vessel unseaworthy. A comparison of the *African Neptune* with other privity or knowledge cases reinforces Gilmore and Black's conception of the standard. Despite the court's well reasoned test, the problems exist in all limitation cases of what exactly privity or knowledge entails in a particular fact pattern, and of determining just what specific acts of negligence were committed against which the admiralty court will subsequently apply the privity or knowledge standard. Thus, the privity or knowledge standard is so elastic that it provides the judiciary with a mechanism to support a decision, in most cases, for either party, that is in reality arrived at by a judicial balancing of the equities in the case at bar. There is little doubt that the facts of the *African Neptune* could have been interpreted to deny limitation under the standard enunciated by the court. Given the absence of an additional watch officer, the improper positioning of the vessel's rudder angle indicator, and that both the shipowner and the master knew prior to sailing of the extremely tricky navigational task that lay ahead in sailing down the river, requiring that a high degree of care be exercised in the ship's approach to and clearance of the bridge, not only could the shipowner have been in privity or knowledge of a failure to keep the vessel in a seaworthy condition, but in privity or knowledge to the negligent failure to apprise those aboard of the dangers to be encountered and how to best minimize them. See also *Complaint of Flota Mercante Grancolombiana*, 440 F. Supp. 704 (S.D.N.Y. 1977) (The owner had a duty to exercise due diligence to keep the vessel in a seaworthy condition, and was charged with knowledge of the corrosion that would have been uncovered by a thorough investigation. Since the shipowner did not, and could not, exhaust all the conceivable explanations for the power failure, for this ground alone the petition for limitation of liability must be denied); *Hamilton v. Canal Barge Co.*, 1977 A.M.C. 2274 (E.D. La. 1977) (Limitation denied for failure to prove absence of privity or knowledge of sub-demisee who knew of the corroded condition of the mooring bitt, and that the inland barge, which was neither designed nor certified for offshore operations, was being used offshore); *Cerro Sales v. Atlantic Marine*, 1976 A.M.C. 375 (S.D.N.Y. 1976) (Ocean carrier denied limitation for loss and damage to cargo where it had knowledge and privity as to the cause of the shipboard fire); *In Re Hi-Wal Sea Rambler*, 1970 A.M.C. 1449 (E.D. Va. 1970) (Owner of vessel involved in a collision who knew of the defective condition of the automatic pilot held guilty of privity resulting in a denial of limitation); *In Re Marine Sulphur Queen*, 1970 A.M.C. 1004

A second judicial restriction of the availability of limitation has been the tendency to equate the standard of care in the Limitation Act with the higher standards under the Harter Act¹⁰ and the Carriage of Goods by Sea Act (COGSA).¹¹ Although the older cases discerned different standards for "design and neglect" and "privity or knowledge,"¹² the more recent cases have treated the terms as virtually equivalent so that if the right to exoneration under those Acts is lost, the right to limitation vanishes as well.¹³ Thus, if the present judicial trend of restricting the availability of limitation continues, the standard of care in the Limitation Act could become superseded by the higher standard of care in Harter and COGSA with respect to cargo claims.¹⁴

The growing judicial hostility toward shipowners' limitation of liability can be explained by a combination of factors rather than merely the predilections of justices on the federal judiciary or a Lochnerized approach to substantive due process.¹⁵ First, the present Limitation Statute operates in most instances to deny an otherwise valid recovery to an injured party. Such a result is diametrically opposed to society's demand for increased protection and compensation for injured claimants in all fields of the law. This result is also contrary to the new remedies created in admiralty to protect the very people denied a meaningful recovery by limitation of liability. At the time the Limited Liability Act was passed seamen were precluded from recovering for injuries sustained as a result of their master's neg-

(S.D.N.Y. 1970), 460 F.2d 89, 1972 A.M.C. 1122 (2d Cir. 1972) (Limitation of liability denied to owner and bareboat charterer of a tanker that sank in Gulf of Mexico with all hands, where knowledge of the unseaworthy construction of the tank bulkheads was possessed by both the owner and charterer).

10. 27 Stat. 445 (1893), 46 U.S.C. §§ 190-196 (1958).

11. 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300-1315 (1958).

12. See GILMORE AND BLACK, *supra* note 9 § 10-21 at 879.

13. E.g., *Earle & Stoddart v. Ellerman' Wilson Line*, 287 U.S. 420 (1932); *Southern Pac. Co. v. United States*, 72 F.2d 212 (2d Cir. 1934); *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileirs*, 159 F.2d 661 (2d Cir. 1947); *Accinanto, Ltd. v. Cosmopolitan Shipping Co.*, 99 F. Supp. 261 (D. Md. 1951), *reversed in part* 199 F.2d 134 (4th Cir. 1952), *cert. denied* 345 U.S. 992 (1953); *Complaint of Caldas*, 350 F. Supp. 566 (E.D. Pa. 1972); *Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet*, 345 F. Supp. 814 (S.D.N.Y. 1972) *aff'd*, 480 F.2d 669 (2d Cir. 1973).

14. See GILMORE AND BLACK, *supra* note 9 § 10-21 at 878-79.

15. In this respect "Lochnerized" refers to the strict judicial analysis of legislative means-ends relationships and the underlying philosophy that the only valid government actions were those which promoted the "general welfare" rather than the promotion of private interests. See Tribe, *AMERICAN CONSTITUTIONAL LAW*, § 8-1 to 8-7 (1978).

ligence.¹⁶ In 1920 however, Congress undercut Justice Brown's fourth proposition in *The Osceola*¹⁷ by passing the Jones Act¹⁸ which permitted a seaman injured in the course of his employment by the negligence of the owner, master, or fellow crew members to recover damages for his injuries.

Second, at the time of the Limitation Statute's enactment, the seaman's right to recover for injuries caused by an unseaworthy ship was unknown in American admiralty law. In fact, the earliest opinions dealing with the concepts of unseaworthiness appeared in the context of mariners suing for their wages where they were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which would have otherwise resulted in a forfeiture of their right to the wages.¹⁹ However, in *Carlise Packing Co. v. Sandanger*,²⁰ the Supreme Court stated, "We think . . . the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages."²¹

This statement, along with Justice Brown's much quoted second proposition in *The Osceola*,²² which was dictum in that case, led to a substantial increase in litigation for damages based on unseaworthiness unrelated to negligence. This was further augmented when it became clear that the plaintiff did not have to elect between his Jones Act and unseaworthiness actions.²³

A third significant development since the passage of the Limitation Act has been the evolution of wrongful death actions. In *The*

16. See *The Osceola*, 189 U.S. 158 (1903).

17. Justice Brown's fourth proposition stated that the seaman is not allowed an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident. *Id.* at 175.

18. 41 Stat. 1007 (1920); 46 U.S.C. § 688 (1970).

19. See *The Cyrus*, 7 Fed. Cas. 755 (D. Pa. 1789).

20. 259 U.S. 255 (1922).

21. *Id.* at 259.

22. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in good order the proper appliances appurtenant to the ship. 189 U.S. at 175.

23. See *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3d Cir. 1949). Unlike most propositions of Admiralty law, this was not started by the Supreme Court in the first instance but at the Circuit level in an attempt to reconcile two previous Supreme Court decisions.

*Harrisburg*²⁴ the Supreme Court ruled that there was no cause of action for wrongful death under the general maritime law. However, consistent with the current judicial attitude of affording remedies to injured plaintiffs, in 1970, the Supreme Court explicitly overruled *The Harrisburg* in *Moragne v. State Marine Lines, Inc.*,²⁵ and held in a unanimous opinion that the general maritime law provided a remedy for wrongful death. In addition, Congress passed the Death on the High Seas Act (DOHSA),²⁶ which provides a recovery for death caused by wrongful act, neglect, or default occurring on the high seas beyond one marine league from the shore of any state or territory.

Another development since the promulgation of the Limitation Act, further contributing to its obsolescence, has been the rise and almost universal use of marine insurance. While the exact origins of marine insurance are unclear, it is believed to have developed along with the corpus of admiralty law during the Middle Ages.²⁷ Although the use of marine insurance was slow to develop in the United States, today most maritime risks are insured.²⁸ The result is that in many cases it is the profit oriented insurance company rather than the shipowner who is attempting to reap the benefits of the Limitation Act.²⁹ In addition, the technological developments in maritime transportation since the promulgation of the limitation doctrine have not only reduced the shipowner's risk of loss, but have also increased his control over the vessel even after it has left port.

The net effect of the aforementioned developments, along with the growing acceptance of the corporation as a form of doing business and single ship incorporation, is that the theoretical reasons for passage of the Limitation Act and the early justifications for its liberal interpretation are no longer valid. The present limitation doctrine operates in nearly all cases to deny an otherwise valid recovery. As a result, the sole justification of limited liability today is its subsidy

24. 119 U.S. 199 (1886).

25. 398 U.S. 375 (1970).

26. 41 Stat. 537 (1920), 46 U.S.C. § 761-68 (1970).

27. See Kierr, *The Effect of Direct Action Statutes on P & I Insurance, on Various Other Insurances of Maritime Liabilities, and on Limitation of Shipowner's Liability*, 43 TUL. L. REV. 638 (1969).

28. See generally Volk and Cobbs, *supra* note 4. Watson, *infra* note 30.

29. One of the major factors taken into consideration by the P & I underwriters is the shipowner's ability to limit liability in the event of a catastrophe. Libby, *Some Aspects of Protection and Indemnity Insurance*, 1952 INS. L. J. 684, 689. See also *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969); *Ema v. Compagnie Generale Transatlantique*, 353 F. Supp. 1286 (D.P.R. 1972).

value to the maritime industry in permitting shipowners to maintain lower shipping costs and remain competitive in the international maritime market. This subsidy is afforded to maritime transportation because limitation permits shipowners to pay less than fair and full compensation for the personal injury, death, and cargo damage that they exact in the course of their operations. This is, however, both an unusual and unjust subsidy as it is paid from the pockets of seamen, widows, children and injured victims.

Past discussions of limited liability have failed to evaluate and balance the competing claims and interests of the various parties with a stake in the outcome. Such tunnel vision analysis has resulted in an all or nothing approach to limited liability, advocating either complete abolition of limited liability or ratification of the Intergovernmental Maritime Consultative Organization (IMCO) Convention,³⁰ with neither position advancing the best interests of the United States. *A priori*, with the drafting of the IMCO Convention on Limitation of Liability³¹ and the Maritime Law Association's proposed statute and Rule F,³² the time has come to evaluate carefully the underlying reasons and policy considerations for limitation of liability in order to develop a comprehensive doctrine that serves the best interests of all concerned parties.

In an effort to resolve the aforementioned problems in the status quo, and to keep pace with modern economic reality, this article will explore the possible alternatives open to the United States: retention of the current doctrine; complete abolition of shipowner's limited liability; ratification of the IMCO Convention; or enactment of the Maritime Law Association's proposal for domestic legislation. Following a comparison of the IMCO Convention with the Maritime Law Association's proposed statute, the article will conclude with a recommendation for enactment of the Maritime Law Association's (MLA) proposed statute as the only doctrine that effectively deals with all the major issues of limitation of liability and which equitably balances the interests of concerned parties.

30. See Volk and Cobbs, *supra* note 4; Watson, *The 1976 IMCO Convention: A Comparative View*; 15 HOUS. L. REV. 248 (1978).

31. For the text of the Convention on Limitation of Liability for Maritime Claims, 1976, see 8 J. MAR. L. & COMM. 533 (1976); 1977 A.M.C. 1607 (June 1977) (hereinafter cited as *The Convention*).

32. For the text of the Maritime Law Association's proposed statute on limitation of liability, see Appendix A of this article (hereinafter cited as *The Act*).

II. COMPARISON: THE IMCO CONVENTION AND THE MLA PROPOSED STATUTE

Following the work of the Comité Maritime International (CMI), IMCO held a conference in 1976, which produced the Convention on Limitation of Liability.³³ The United States delegation refused to sign the Convention. Following a considerable expenditure of time and manpower, the Maritime Law Association of the United States developed proposed federal legislation to deal with the problem of limited liability. Because the Maritime Law Association's (MLA) proposal incorporates necessary and substantial modifications to the limitation doctrine, which could not be obtained through ratification of the Convention, an analysis of the significant provisions of both proposals is presented below.

A. *Standard of Care—Privity or Knowledge*

A significant improvement over the current United States limitation doctrine, provided by both the IMCO Convention and the MLA statute, is the abandonment of the flexible privity or knowledge formula. In its place both the Convention and the MLA statute substitute a requirement of a "personal act or omission committed with the intent to cause the loss, or recklessly and with knowledge that such loss would probably result."³⁴

The use of "privity or knowledge" as a requirement for limitation proceedings is an anachronism. Although the vagueness of the terms provides room for judicial interpretation, as a result of judicial hostility toward limitation of liability, shipowners and insurers are unable to depend on the standard when planning their maritime services, rates, and insurance premiums.³⁵ The result leads to uncertainty in both the maritime and legal spheres, which require a high degree of certainty for their effective operation. As such, the shift to the intent or wilful misconduct standard by both the IMCO and MLA proposals is a much needed change.

B. *Burden of Proof*

A second significant change in the standard of care from current U.S. limitation law is that the IMCO Convention shifts the burden of

33. See note 31 *supra*.

34. The Act, *supra* note 32, art. 4.

35. Watson, *supra* note 30 at 271.

proof of conduct that will bar limitation from the shipowners to the claimants.³⁶ The Maritime Law Association has not taken an official position on this issue to date, and thus has developed two alternative proposals; one which places the burden of proof on the claimant³⁷ and the other which places the burden of proof upon the petitioner seeking to limit liability.³⁸ For the following reasons, it is submitted that the Maritime Law Association should support the second alternative and place the burden of proof upon the party seeking to limit liability.

The proposed version of Article 4 of the MLA statute that would allocate the burden of proof upon the claimant states: "A party liable shall *not* be entitled to limit liability *if it is proved* that the loss resulted from its personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."³⁹ In contrast, the version of Article 4 of the MLA statute which would place the burden of proof upon the party seeking limitation states: "A party liable shall be entitled to limit its liability unless the loss resulted from its personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."⁴⁰

The difference between the above proposal and the first alternative, which follows the wording of the IMCO Convention and places the burden of proof on the claimant, is that the above proposal omits the words "if it is proved." Because of that omission, United States courts would probably interpret the statute as imposing the burden of proof upon the party seeking to limit liability. This result is desirable for several reasons. First, as a practical matter, the determination of eligibility for limitation is seldom decided solely on the basis of burden of proof. The careful limitation petitioner presents all the evidence supporting his claim for limitation, allowing the court to base

36. The language "if it is proved" casts the burden of proof upon the party challenging the petition for limitation. The Convention, *supra* note 31, art. 4.

37. A party liable shall not be entitled to limit its liability if it is proved that the loss resulted from its personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. The Act, *supra* note 32, art. 4.

38. A party liable shall be entitled to limit its liability unless the loss resulted from its personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. The Act, *supra* note 32, art. 4.

39. The Act, *supra* note 32, art. 4.

40. *Id.*

its decision on the evidence presented regardless of the allocation of the burden of proof.⁴¹ Thus, in most cases this shift in burden of proof will do nothing to help the limitation petitioner.

Second, the only conduct that will bar limitation under both the Convention and the MLA proposal is a "personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."⁴² Thus, the standard of care is tantamount to intent. Because both proposals establish such an iron clad defense, the beneficiary of this extraordinary defense should bear the burden of proving his eligibility to assert it.

Further, in cases where the exact cause of the loss is unknown, the allocation of the burden of proof is determinative of the outcome of the petition for limitation. Under the Limitation Act and the second proposal of the MLA statute, when the exact cause of the loss cannot be established, it is impossible for the shipowner to prove that the loss was from a cause for which he was without privity or knowledge; thus limitation is denied.⁴³ However, in the identical fact pattern under the IMCO Convention or the MLA's first alternative, limitation would be granted since placing the burden of proof upon the claimants would make it impossible for them to prove the requisite fault or intent to bar limitation.⁴⁴ It is submitted that any change placing the burden of proof upon the claimants is ill advised, particularly since the beneficiaries of this defense are being given a virtually unbreakable standard.

Limitation of liability is an affirmative defense.⁴⁵ As such, the burden of proof should fall on the moving party, the shipowner, to establish his lack of wilful misconduct or intent. Since limitation's major justifications today are that of a subsidy to shipowners and a device to ensure commercial insurability, the beneficiaries of this defense should carry forth the burden of proof on an issue which they contend to be vital to both the nation's economy and the future propriety of their own enterprises. Finally, any change in the burden of proof requiring the claimants to prove intent or wilful misconduct

41. Commentary on the proposed Limitation of Liability Act, Maritime Law Association (Sept. 20, 1978) at 6-9. [hereinafter referred to as Commentary].

42. The Convention, *supra* note 31, art. 4; The Act, *supra* note 32, art. 4.

43. *Martin & Robertson, Ltd. v. The Barcelona*, 1968 A.M.C. 331, 334 (S.D. Fla. 1967). The Court held "that the cause of the loss of the S.S. Barcelona not having been established, it cannot be found that the loss of the S.S. Barcelona was from a cause without the actual fault and privity of the owner and/or charterer.

44. The Convention, *supra* note 31, art. 4.

45. *Terracciano v. McAlinden Const. Co.*, 485 F.2d 304 (2d Cir. 1973).

could arouse strong opposition to passage of the statute from those that believe that equity requires the beneficiary of an affirmative defense to prove his eligibility to assert it.

C. Persons Entitled to Limitation

Unlike the Limitation Act which restricts the right of limitation to shipowners, bareboat charterers, and owners *pro hac vice*,⁴⁶ the IMCO Convention extends the benefit of limitation to the owner,⁴⁷ manager and operator,⁴⁸ master,⁴⁹ members of the crew,⁵⁰ salvors,⁵¹ insurers,⁵² all charterers,⁵³ and any person for whose negligence or default the shipowner or salvor would be liable under the terms of Article Two.⁵⁴ Likewise, the MLA proposal expands the category of persons entitled to limit liability in three important areas: 1) salvors; 2) all charterers, managers or operators; and 3) insurers.⁵⁵

1. Charterers

Although as a practical matter demise charterers would more often be in a position to incur liability,⁵⁶ the extension of limitation to all charterers would provide a more rational approach than the present system. It is uncommon for a shipping line, during a period of short tonnage, to supplement its own fleet with time or voyage chartered vessels. If one of those vessels became involved in a maritime catastrophe in which the shipping line and not the vessel owner were liable, under the present U.S. doctrine, the shipping line would be denied the right to limit liability. However, if the identical disaster occurred to a vessel owned or demise chartered, then limitation would be available. Thus, under the status quo, the availability of limitation is not commensurate with possible liability, but is based, in

46. 46 U.S.C. § 186 (1970).

47. The Convention, *supra* note 31, art. 1, para. 1.

48. *Id.*, art. 1, paras. 1, 2.

49. *Id.*, art. 1, para. 4.

50. *Id.*

51. *Id.*, art. 1, para. 1.

52. *Id.*, art. 1, para. 6.

53. *Id.*, art. 1, paras. 1, 2.

54. *Id.*, art. 1, para. 4.

55. The Act, *supra* note 32, art. 1.

56. The demise charterer is viewed as the owner *pro hac vice*. Thus, he warrants the seaworthiness of the vessel, is regarded as the "employer" for purposes of liability under the Jones Act, and is responsible for the negligence of his crew. See GILMORE AND BLACK, *supra* note 9 § 4-23 at 242.

part, on the status of the vessel in question.⁵⁷ Since the charterer in most cases will be purchasing marine insurance in the same market and against the same risks as the shipowner, although at different premiums, extension of the benefit of limitation to this class of seafarers is necessary to keep up with modern economic realities.

2. Masters and Members of the Crew

One of the more disturbing aspects of IMCO's liberalization of the benefit of limitation is the Convention's extension of the right to limit to all masters and members of the crew.⁵⁸ This expansion is based on the Convention's language granting limitation to "any person for whose act, neglect or default the shipowner or salvor is responsible."⁵⁹ For the reasons set forth below this expansion is overbroad and thus restricted in the MLA proposal.

First, extension of limitation to this class of employees is based on the dubious assumption that their employers, the shipowners, would rush to their assistance if sued.⁶⁰ However, while this assumption might be valid in reference to small claims, it is extremely doubtful that such loyalty would be exhibited in a situation where the potential liability was enormous.⁶¹ Ironically however, it is only in those latter situations when limitation will arise since it is only applicable when there has been a catastrophic loss.

Second, one of the traditional reasons for limitation was to encourage the risk of investment in a hazardous activity.⁶² However, there is no evidence to demonstrate that this expansion of the benefit of limitation is necessary to encourage seamen to go to sea.⁶³

Third, extension of limitation to masters and members of the crew will do nothing to assure shipowners commercial insurability or a competitive position in the international maritime transportation market.⁶⁴

57. Watson, *supra* note 30 at 253-54. See also Palmer, *Liability "As Owner of the Vessel Named Herein": Coverage of Liability of Non-Owners*, 43 TUL. L. REV. 481 (1969).

58. The Convention, *supra* note 31, art. 1, para. 4.

59. *Id.*

60. Watson, *supra* note 30 at 255.

61. *Id.* at 255-56.

62. The purpose of the Act is "to encourage shipbuilding and to induce capitalists to invest money in this branch of industry." *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 121 (1871).

63. See Watson, *supra* note 30 at 255-56.

64. In most cases these persons would not be listed as insureds in the P & I policy. Thus it would have little impact on the cost of insurance premiums.

Since extension of the benefit of limitation to masters and members of the crew would not promote any of the underlying justifications for the doctrine, this expansion is unwarranted. Considering the growing concern for providing adequate compensation to tort claimants, such innocent parties should not be barred from recovery by expansion of a doctrine which promotes neither the underlying justifications for limited liability or a sound governmental interest. The only beneficiaries of such an extension of the right to limitation would be masters and crew members, who would secure a windfall at the expense of tort claimants. Thus, the Maritime Law Association was correct in its conclusion that this aspect for the IMCO Convention is too broad to be acceptable for domestic legislation.⁶⁵

3. Insurers

In an obvious attempt to protect insurance companies from direct action statutes, both the IMCO Convention⁶⁶ and the MLA proposed statute⁶⁷ extend the benefit of limitation to insurers. Despite Mr. Burr's analysis,⁶⁸ this author strongly disagrees with the contention that direct action statutes are a loophole in the present U.S. limitation doctrine. It is the author's opinion that it is both unnecessary and unwarranted to extend the benefit of limitation to insurers. As such, it is hoped that the final version of the MLA statute to be submitted to Congress will not extend the right of limitation to insurers.

Under the current U.S. doctrine, in jurisdictions with a direct action statute,⁶⁹ a claimant may bring suit against the insurer without joining the assured (shipowner) as a party defendant, "whether the policy of insurance . . . was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the state of Louisiana."⁷⁰ The statute is thus an

65. Commentary, *supra* note 41 at 3.

66. The Convention, *supra* note 31, art. 1, para. 6.

67. The Act, *supra* note 32, art. 1, para. 5.

68. Burr, *Limitation of Liability*, 10 LAW. AM. 799 (Winter 1978).

69. See *id.* at 805-08.

70. La. R.S. 22:655 (1968) provides in part:

The injured person or her survivors or heirs . . . shall have a right of direct action against the insurer within the terms and limits of the policy . . . and said action may be brought against the insurer alone or against both the insured and insurer jointly and *in solido* This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the state of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the

express manifestation of the state's policy that "all liability policies . . . are executed for the benefit of all injured persons to whom the insured is liable."⁷¹

The case of *Maryland Casualty Co. v. Cushing*⁷² brought before the Supreme Court the question of the inter-relationship of marine insurance, direct action statutes, and limitation of liability. In May 1950, five seamen drowned in the Atchafalaya River when their vessel collided with a concrete bridge pier and capsized. Following their challenge to the owner and charterer's petition for limitation, the decedent's survivors brought a separate action in the same United States District Court against the insurer of the shipowner under Louisiana's direct action statute in an attempt to reach the proceeds of two insurance policies. Justice Clark's opinion broke the 4-4 deadlock and became the mandate of the Court.⁷³ Convinced that the Limited Liability Act was intended to afford protection only to shipowners and charterers, since Congress had made no mention of insurers, Justice Clark determined that the direct action against the insurance company would be permitted but would be stayed until completion of the limitation proceeding. Thus, Justice Clark's resolution of the case provided substantial security to both claimants and shipowners. The claimants were given the possibility of recovering the full amount of the insurance while the shipowners were permitted to satisfy the claimants in the concursus out of the insurance proceeds before the claimants were entitled to attack those proceeds directly. This ensured that it would be a rare occasion when the shipowner would be denied the benefit of his insurance.

Despite the divergence of opinions in *Cushing*, all nine members of the Court did agree that the insurers should not be extended the right to limit liability. Whatever doubt there may be regarding the

accident or injury occurred within the state of Louisiana It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this section that all liability policies within their terms and limits are executed for the benefit of all injured persons . . . to whom the insured is liable.

71. *Id.*

72. 347 U.S. 409 (1954).

73. The case was originally heard by an even numbered bench of eight Justices because Mr. Justice Clark was sitting on the War Trials at Nuremberg. The split decision was rendered by reargument of the case after Mr. Justice Clark returned, with the original eight Justices split 4-4.

ultimate issue of direct actions because of a badly fractioned Court, it is well settled that insurers will be denied the right to limitation under the present U.S. limitation doctrine.

The most recent attempt to reconcile the murky waters following the Supreme Court's badly fractioned decision in *Cushing* was the Fifth Circuit's decision in *Olympic Towing Corp. v. Nebel Towing Company, Inc.*⁷⁴ In that case the Fifth Circuit held that direct actions were permitted against insurers, but that the limitation court should use both its law and equity jurisdiction to ensure that the insurance fund was not exhausted before the shipowner would receive the benefit of his insurance.

It is difficult to see how the allowance of direct actions against insurers amounts to a loophole in the doctrine of limitation of liability. First, as stated in *Norwich v. New York Transportation Co. v. Wright*,⁷⁵ the accepted rationale for the creation of limitation in the United States was "to encourage capitalists to invest money in this branch of the industry."⁷⁶ It is extremely doubtful that it is necessary to extend limitation to insurers to encourage their investment in this industry. Likewise, extension of limitation to insurers is unnecessary to protect shipowners from the possibility of bankruptcy resulting from a catastrophic maritime loss. Shipowners' limitation of liability itself protects against that very contingency. Further, it must be remembered that under the present U.S. limitation formula, claimants often will be seeking recovery from a very small limitation fund. Thus, taking into consideration modern attitudes favoring compensation to the injured, it is not surprising that in many cases either limitation is denied or a direct action permitted so that these claimants will receive a meaningful recovery.

For two reasons, it is submitted that this issue should be resolved by not extending the right of limitation to insurers. First, as noted above, extension of limitation to insurers is not necessary to encourage insurers or shipowners to invest their capital in this industry. Nor would the extension of limitation to this group promote shipping, trade or commerce. Second, it is not necessary to extend the benefit of limitation to insurers to guarantee commercial insurability for shipowners and charterers. The insurability argument is based on the reasoning that the liability risks for various maritime adven-

74. 419 F.2d 230 (5th Cir. 1969).

75. 80 U.S. (13 Wall.) 104 (1871).

76. *Id.* at 121.

tures are immense, yet the market in which insurance coverage can be purchased is limited. Therefore, as the argument proceeds, it is technically impossible to obtain sufficient insurance to cover all possible risks. However, even if it were theoretically possible to insure to the maximum limit of potential liability, it would be "commercially impossible" to purchase this insurance.⁷⁷

The extension of limitation to insurers, however, is not the solution to this problem for several reasons. There is no evidence to show that if insurers' liability were limited, those parties entitled to limitation would insure to the maximum limit of their potential liability. None of the supporters of ratification of the IMCO Convention have demonstrated that there would be any practical change in the purchasing of insurance coverage by extending limitation to insurers. Thus, the possibility certainly exists that even if insurers were granted the right to limit liability, there would be no change in current insurance practices, and such right would secure a windfall for insurers. Second, at present it is alleged that the cost of purchasing maximum coverage is too high to be included within the price for maritime services. However, under the present U.S. limitation doctrine, most petitions for limitation have been denied in recent years.⁷⁸ Thus, this increase in potential liability must eventually manifest itself in both higher insurance costs and consumer prices. A limitation formula which guaranteed a high degree of certainty to shipowners in limiting their liability, however, would permit them to purchase greater insurance coverage for reduced premiums and thereby pass on to the consumer the cost of full insurance without substantially increasing existing prices for maritime services.

In construing limitation of liability as a personal defense of the shipowner and those seeking coverage in the marine insurance market for the same risks as the shipowner the courts promote both the purposes of limited liability and the demand for increased compensation to injured claimants while restricting the availability of an unpopular doctrine. In sum, extension of the benefit of limitation to insurers would advance neither the reasons for the doctrine's enactment nor the justifications for its continuance. Thus, it is hoped that the MLA statute would be amended to exclude insurers from the benefit of limitation.

Because the Maritime Law Association's proposed statute provides an adequate limitation fund, there is no need for claimants to

77. See Watson, *supra* note 30 at 251.

78. See note 6 *supra*.

proceed against insurers to obtain full recovery if the MLA statute is enacted. Thus, under the MLA proposal, there is no need for a direct action and *a priori* no need to extend the benefit of limitation to insurers. Only under a system with an inadequate limitation fund, and in a jurisdiction with a direct action statute, would insurers be subjected to potential liability without the benefit of limitation. Under the MLA proposal, however, no such vulnerability would exist.

4. Salvors

Extension of the right to limit liability to salvors is logical and promotes a sound purpose. Both the concept and law of salvage are premised on the encouragement of such conduct. The removal of the threat of unlimited liability is more consistent with the goal of the doctrine and may promote this activity. Thus, extension of the right to limitation to salvors by both the IMCO Convention⁷⁹ and the MLA proposed statute⁸⁰ is a desirable modification.

C. Claims Subject to Limitation

Article Two of the MLA proposed statute, which enumerates the claims subject to limitation, expands the category of such claims in several important areas.⁸¹

1. Damage for Delay

Article 1 (b) of MLA statute is an extension of the current U.S. law as it expands limitation for claims resulting from delay. This provision, which is nearly identical to the IMCO provision, is a justifiable expansion of limitation, since recovery for claims arising from delay in transit are potentially substantial and thus are the very sort of risk which limitation is designed to protect the shipowner against.

2. Wreck Removal

Both IMCO and the MLA statute extend the right of limitation to wreck removal costs.⁸² Under the current U.S. doctrine such ex-

79. The Convention, *supra* note 31, art. 1, para. 3.

80. The Act, *supra* note 32, art. 1, paras. 1, 3.

81. *Id.*, art. 2.

82. The Convention, *supra* note 31, art. 1, paras. d, e; The Act, *supra* note 32, art. 1, paras. 1(a), 1(d), 1(e).

penses are denied the benefit of limitation.⁸³ These expenses are also the sort which limitation is designed to protect against since they are unpredictable, substantial, and greatly exceed the shipowner's investment in the vessel.

3. Personal Contract Doctrine

Article 2 (2) of the MLA statute is intended to overrule the personal contract doctrine. The concept of "personal contract" emerged from the Supreme Court's statement in *Richardson v. Harmon*⁸⁴ that the Limitation Act left a shipowner "liable for his own fault, neglect and contracts."⁸⁵ Although the exact dimensions of the doctrine are unclear, the Supreme Court has made it clear that although a bill of lading is not a personal contract, thereby permitting the shipowner to limit liability,⁸⁶ a charter party is a personal contract precluding the owner from limiting liability.⁸⁷ The uncertainty engendered by this doctrine is a sufficient consideration to warrant its abolishment.

D. The Limitation Fund

1. IMCO

In determining the limitation fund, the Convention utilizes a formula based on the gross tonnage of the vessel, and reflects the CMI's "guiding principle" that the limitation amounts reflect commercial insurability. The IMCO limitation fund takes into consideration the fluctuations of various currencies by expressing the amounts

83. See *University of Texas v. United States*, 1977 A.M.C. 2607 (5th Cir. 1977). This case casts us adrift on muddied waters that lie at the convergence of two desultory streams of 19th century thought. On the one hand, Congress sought to ensure that navigable waterways remained free of obstructions, including sunken vessels—thus the Wreck Act. On the other hand, Congress sought to ensure that American shipping attract investment capital that the threat of unlimited economic exposure might divert to England. Accordingly, it limited the shipowner's liability for losses caused without his privity or knowledge by the operation of the vessel by enacting the Limitation Act; *Complaint of Pacific Far East Line, Inc.*, 1970 A.M.C. 1592 (N.D. Cal. 1970). Even though the owner of a vessel wrecked as the result of a mutual fault collision may otherwise be entitled to limit its liability, the statutory obligation to remove the wreck is not subject to limitation since the noncompliance is within the owner's privity or knowledge.

84. 222 U.S. 96 (1911).

85. *Id.* at 106.

86. *E.g.*, *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 278 U.S. 420 (1932).

87. *E.g.*, *Capital Transp. Co. v. Cambira Steel Co.*, 249 U.S. 334 (1919); *Pendleton v. Benner Line*, 246 U.S. 353 (1918); *Luchenbach v. W.J. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918).

in terms of special drawing rights (SDR).⁸⁸ Examined in this light, the IMCO Convention provides for substantially higher limitation amounts than are currently available under the Limitation Act.⁸⁹

The IMCO Convention utilizes one formula to establish the death/personal injury fund⁹⁰ and another for the property damage fund.⁹¹ While both operate on a system based on tonnage, the IMCO proposal provides for a death/personal injury fund that is approximately 200 percent of the property damage fund. Nevertheless, Article 6.2 provides that whenever the death/personal injury fund is insufficient to satisfy its claimants, they may share ratably with the property damage claimants from the latter fund.

The Convention uses a different formula for the establishment of a limitation fund for passenger claims, reflecting the realization that a passenger vessel of relatively low gross tonnage can carry a disproportionately large number of potential claimants.⁹²

88. The Convention's limitation formula is expressed in terms of units of account or special drawing rights, which the Maritime Law Association of the United States converted into meaningful figures whereby one SDR is equal to \$1,2285. See Status Report on Limitation of Liability Project, Mar. L. Ass'n. Doc. 612 at 6812-16 (March 27, 1978).

89. To illustrate this increase, the comparative limitation funds for a 50,000 ton vessel lost in a major maritime disaster would be:

Limitation of Liability Act: \$60 per ton x 50,000 tons =
 \$3,000,000 total fund

IMCO Convention:

1. Personal injury and death claims

First 500 tons	—	= 333,000
2500 tons x 500 units of account		= 1,250,000 units of account
27,000 tons x 333 units of account		= 8,991,000
20,000 tons x 250 units of account		= 5,000,000

15,574,000 x \$1.2285 =
 \$ 19,132,713

2. Other claims and those unsatisfied from the above

First 500 tons	—	= 167,000
29,500 tons x 167 units of account		= 4,926,500 units of account
20,000 tons x 125 units of account		= 2,500,000

7,593,500 x \$1.2285 =
 \$ 9,328,640

Total IMCO Fund: \$28,461,353.

90. The Convention, *supra* note 31, Art. 6, para. 1(a).

91. *Id.*, Art. 6, para. 1(b).

92. To determine the limitation fund for passenger claims, the number of passengers that the vessel is authorized to carry according to the ship's certificate is multiplied by a set amount of 46,666 units of account or approximately \$57,000. The Convention, *supra* note 32, Art. 7. In addition, it must be noted that this is not merely

While at first glance the limitation fund for passenger claims, with a maximum ceiling of \$30,712,586 may seem sufficient, upon closer scrutiny the fund is remarkably similar in its inadequacy to the current American limits. Assuming under the Convention that a passenger ship with 1500 authorized passengers and a limitation fund of the thirty million maximum perished at sea, the maximum recovery per claimant, assuming all brought major personal injury or death actions, would only amount to \$20,475.⁹³ Although supporters of the Convention will undoubtedly assert that it would be rare for all passengers to assert major death or personal injury claims, the relatively low limits reflect a striking similarity to the insufficiency and inequity of the Limitation Act. In rebuttal, even if all passengers did not assert major claims, it is manifest that the IMCO limits are far too low.

Conversely, under the current U.S. limitation formula, a merchant ship of approximately 17,750 tons with a crew of 71 seamen would yield a maximum average fund of \$15,000 if personal injury or death claims were asserted by all the crew members.⁹⁴ Despite the fact that it would be a rare occasion when all the crew members or passengers would file a major claim, the present U.S. limitation fund is grossly inadequate. In contrast to the \$15,000 average limitation fund per seaman under the U.S. formula, the IMCO Convention would establish a fund of approximately \$125,000 per seaman for a vessel of 20,000 gross tons and a crew of 71 seamen.⁹⁵ While this is a substantial improvement over the existing limits in the United States, it is questionable whether even the IMCO amounts are really adequate to provide for fair and equitable recoveries.

2. MLA Proposed Statute

a. Death and Personal Injury Claims

While Article Six of the MLA proposed statute is consistent with the underlying rationale of the IMCO Convention that death and per-

\$57,000 for each passenger, but rather the passenger capacity of the ship is used to determine the limitation fund against which all passengers would proceed in the event of a disaster.

$$93. \frac{30,712,586}{1500} = \$20,475.$$

$$94. \frac{17,750 \text{ [tons]} \times \$60/\text{ton}}{71 \text{ [seamen]}} = \$15,000$$

$$95. \frac{8,899,278 \text{ dollars}}{71 \text{ [seamen]}} = \$125,482$$

sonal injury claims should have a separate fund, it differs substantially in its limitation formula. Unlike the Limitation Act which uses a value formula, or the IMCO Convention which uses a gross tonnage formula, the MLA limitation fund is based on the number of persons on board the vessel at the time of the disaster.⁹⁶ The value formula suffers from the inherent flaw that in cases when the need is the greatest, the fund is the least. Likewise, the gross tonnage formula fails to take into consideration the economic reality that in many cases smaller vessels have larger crews than the large vessels.⁹⁷ Thus, the MLA death/personal injury fund is determined by the number of persons actually on board the vessel multiplied by \$200,000.⁹⁸ Article Six establishes one fund which is available to all persons with death or personal injury claims arising out of the event, in contrast to IMCO's establishment of a separate fund for passengers based on the number of passengers that the vessel was authorized to carry.⁹⁹

In an effort to give added protection to seamen, the MLA Article Six fund provides an additional sum of up to \$100,000 for each crew member of the vessel for which limitation is sought. However, the statute limits the availability of this reserve fund only to the crew member or his personal representative and only to the extent that his claim has not been fully satisfied from the primary fund.¹⁰⁰ Finally, based on the Coast Guard's report concerning the number of deaths and injuries in major disasters recently,¹⁰¹ the Maritime Law Association concluded that a one million dollar minimum fund was necessary.¹⁰² Thus, under the MLA proposed statute, a 10,000 ton vessel with a crew of 45 would have a primary fund of \$9 million, plus the reserve fund of \$4.5 million for a total death/personal injury fund of \$13.5 million. This is a significant improvement over IMCO's fund for the identical vessel of \$4,803,364 plus a theoretical possibility of some additional recovery from the property damage fund.¹⁰³

96. See Commentary, *supra* note 41, at 11.

97. *Id.*

98. The Act, *supra* note 32, art. 6.

99. The Convention, *supra* note 31, art. 7, para. 1.

100. The Act, *supra* note 32, art. 6, para. b.

101. See Memorandum of Major Marine Casualties by the United States Coast Guard, Appendix B of this article.

102. The Act, *supra* note 32, art. 6, para. c.

103. MLA Proposed Statute;

$$\$200,000 \times 45 \text{ persons} = \$9,000,000 \text{ (primary fund)}$$

$$\$100,000 \times 45 \text{ persons} = \$4,500,000 \text{ (reserve fund)}$$

b. Claims Other Than Death and Personal Injury

The current U.S. doctrine of determining the limitation fund by the value of the vessel after the event carries the inherent flaw that in cases of a major disaster, when the need is the greatest the fund is the least. To circumvent this problem, the MLA statute uses the tonnage formula of the IMCO Convention for claims other than death and personal injury,¹⁰⁴ with four major modifications.

First, the fund is expressed in U.S. dollars rather than special drawing rights.¹⁰⁵ Second, as is evident from the chart below, the MLA proposed statute dramatically increases the size of the fund for smaller vessels.

COMPARATIVE PROPERTY DAMAGE LIMITATION FUNDS¹⁰⁶

size of vessel (gross tons)	IMCO property damage fund	MLA property damage fund
500 & under	\$ 205,161	\$ 500,000
1,000	307,740	600,000
3,000	718,060	1,000,000
5,000	1,128,380	1,400,000
10,000	2,154,181	2,400,000
20,000	4,205,575	4,400,000
30,000	6,257,382	6,400,000
50,000	9,328,640	9,400,000
70,000	12,399,899	12,400,000
100,000	15,458,872	15,400,000

Third, in contrast to the Convention, the Article 7 Fund cannot be invaded by the personal injury and death claimants who are restricted

IMCO Convention

First 500 tons	= 333,000
2,500 tons x 500 units of acct.	= 1,250,000
7,000 tons x 333 units of acct.	= 2,331,000
10,000 tons	= 3,914,000
3,914,000 units of account x \$1.2285	= \$4,808,364.

104. *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

105. One special drawing right (SDR) equals \$1.2285.

106. The Act, *supra* note 32, art. 7.

to recovery from the Article 6 Fund.¹⁰⁷ Finally, the MLA statute establishes a minimum fund of \$500,000, and a maximum fund of \$25 million.¹⁰⁸

Viewed collectively, the two funds under the MLA proposed statute provide for a more complete and equitable recovery for claimants, while keeping pace with modern economic realities.

E. *Pleasure Craft*

1. IMCO Convention

Initially, it would appear that the IMCO Convention would exclude small pleasure craft from limitation, not by specific proscription, but as a practical matter because of the formula for the limitation fund in Article Six.¹⁰⁹ However, upon more careful analysis, such may not be the case.

In regard to the scope of application, Article 15 (2) states in relevant part:

(2) A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:

- (a) according to the law of that state, ships intended for navigation on inland waterways;
- (b) ships of less than 300 tons.¹¹⁰

By stating that a country *may* regulate by national legislation "vessels intended for navigation on inland waterways and ships of less than 300 tons," it is obvious that the delegates intended for the Convention to apply only to seagoing vessels, and that states would be permitted to alter the terms of the Convention with regard to small vessels of less than 300 tons, although such vessels would be covered by the Convention unless the state explicitly provided to the contrary.¹¹¹

This provision allows two possible courses of action for the United States should it ratify the IMCO Convention, both of which are undesirable. First, the United States could permit the IMCO fund to also govern small pleasure craft. That course of action, how-

107. See Commentary, *supra* note 41, at 14-15.

108. The Act, *supra* note 32, art. 7, para. 1 (c).

109. See Burr, *supra* note 68, at 808.

110. The Convention, *supra* note 31, Art. 15, para 2.

111. See Watson, *supra* note 30, at 260.

ever, would produce an inequitable result by singling out owners of small vessels to establish a minimum limitation fund greatly in excess of their investment in the ship. Further, the extension of limitation to owners of pleasure craft is unwarranted. Permitting this class of owner to limit will not promote shipping, trade, or commerce. Nor will it provide a "necessary" subsidy to the U.S. shipping industry. Second, if supporters of ratification would prefer to deal with small vessels through the national legislation exception, as appears likely, then it is incumbent upon this group to inform all interested parties exactly how they plan to resolve this issue so that a well informed decision can be made in the forthcoming debates over ratification.

2. MLA Proposed Statute

In developing the proposed statute, the working committee of the Maritime Law Association was unable to arrive at a final solution regarding whether or not to exclude pleasure craft from the right to limit liability. The Association therefore decided to permit the joint committees and the Association's membership to resolve this issue.¹¹² Despite arguments to the contrary,¹¹³ this issue should be resolved against extending the benefit of limitation to pleasure craft. First, the underlying rationale for promulgation of the doctrine was to promote the growth of maritime commerce in the United States, and to encourage the investment of capital in this industry. Yet, extension of the benefit of limitation to pleasure craft will do nothing to promote the reasons for the establishment of the doctrine nor the justifications for its continuance today.

Second, inclusion of pleasure craft within the right to limit liability would place an unwarranted limit on the recovery of death or personal injury claimants. Under the proposed statute, the death/personal injury fund is calculated by the number of persons actually on board the vessel multiplied by \$200,000, with a minimum of one million dollars.¹¹⁴

112. The words "except pleasure craft" have been placed in brackets in the statute until the membership arrives at a final decision. See The Act, *supra* note 32, art. 1, para 2.

113. See Commentary, *supra* note 41, at 14. Reasons cited in favor of granting limitation to pleasure craft include: a workable definition of pleasure would be difficult to arrive at; that granting limitation to these owners will help sales in the pleasure craft building industry and related businesses, and that the statute establishes adequate amounts in its limitation fund.

114. The Act, *supra* note 32, art. 6.

Finally, there is no support for the contention that extension of the right to limit liability to pleasure craft would promote the pleasure craft building industry and related businesses. Notwithstanding the per annum expenditures on pleasure craft,¹¹⁵ it is highly unlikely that purchasers of pleasure craft seriously consider the ability to limit liability should they be involved in a maritime disaster; or that sales would decline merely because of a denial of the benefit of limitation. None of the policy reasons behind limited liability are applicable to pleasure craft. As such, those who own pleasure craft should accept financial responsibility for their actions and thus should be denied the right to limit liability.

III. ANALYSIS OF ALTERNATIVES

To date, most discussions of limitation have used a tunnel vision approach by restricting the available alternatives open to the United States to either: 1) retention of the present limitation doctrine, 2) complete abolition of limited liability, or 3) ratification of the IMCO Convention. As noted above, the present U.S. limitation doctrine is an anachronism. Likewise, complete abolition of limitation is undesirable. Such an action would place the United States at a serious competitive disadvantage with other maritime powers. Moreover, ratification of the IMCO Convention is not the answer to the limitation problem. Although IMCO is an improvement over the present limitation doctrine, there are four major disadvantages with the Convention which, on balance, make ratification undesirable.

First, although the establishment of a fund based on tonnage is an improvement over the status quo, the Convention establishes limits that are too low. Thus, the Convention fails to provide a sufficient fund from which tort claimants can recover. Second, the Convention fails to enunciate a comprehensive scheme to deal with the controversy surrounding limitation for pleasure craft. Third, while abolition of the loose privity or knowledge standard in favor of the tighter language of intent is a welcome change, the allocation of the burden of proof upon the claimant is both unnecessary and unwise. The "intent" standard establishes such an ironclad defense that it will be rare for a claimant to defeat limitation. As such, it would have been a sufficient *quid pro quo* to give claimants a significantly larger limitation fund in exchange for the shipowners acquiring the intent

115. According to the National Association of Engine and Boat Manufacturers and the Marketing Department of Marex, there were 9,740,000 pleasure crafts in the United States in 1975, with per annum retail expenditures of \$4,800,000,000. Commentary, *supra* note 41, at 5.

standard. Further, placing the burden of proof upon claimants will put a premium on ignorance for owners, and for those that are knowledgeable as to the cause of the loss, it will provide an incentive for concealment and noncooperation. Also, under IMCO, when the exact cause of the loss cannot be determined, whatever slight chance the claimant had to preclude limitation is automatically defeated. This results in a windfall to those petitioning for limitation since they are already guaranteed a substantial degree of certainty by the tighter language used in the Convention. Finally, extension of the benefit of limitation to insurers is unwarranted. Limitation should not be extended where it does not promote the underlying reasons for its enactment or the justifications for its continuance today. Thus, although the Convention is an improvement over the status quo, it encompasses these four major disadvantages which cannot be removed if it is to be ratified.

Further, supporters of ratification of the Convention allege that there is a need for international uniformity which only their proposal can satisfy. However, the potential for forum shopping in limitation cases is augmented by the different standards for limitation as well as the judicial attitudes toward limitation and the basic structural differences between the legal systems of the United States and European countries. The Convention can do little to change the judicial attitudes and structural differences between various legal systems. Further, enactment of the MLA statute would place the United States in harmony with most other maritime nations of the world, even those ratifying IMCO, without the disadvantages inherent in the Convention. It is therefore apparent that of the four choices available to the United States, only the enactment of the Maritime Law Association's proposed statute will provide a formula in which advantages outweigh disadvantages.

IV. MERITS OF ADOPTING THE MLA STATUTE

Resolution of the question of limitation of liability requires a formula that presents a comprehensive solution to the four major problem areas in the current U.S. doctrine: 1) the loose privity or knowledge standard; 2) the low limitation fund; 3) the controversy surrounding extension of limitation to pleasure craft; and 4) the dilemma of direct action statutes or extension of the benefit of limitation to insurers. To date, only the Maritime Law Association's proposed statute has been able to present a comprehensive solution to the problems of limitation, without containing inherent flaws itself. Moreover, the MLA statute is particularly appealing because it is

presented within the framework of a balancing approach, giving a *quid pro quo* to all interested parties.

A. Trial Lawyers

During the past several years there has been a movement by the Trial Lawyers of America Association to have Congress completely abolish shipowners' limitation of liability. Their obvious reasoning for such a proposal is that the elimination of limited liability would create a potential for very large judgments for their clients, with correspondingly higher contingent fees for themselves. Considering the dramatic increase in no fault automobile legislation, such an economic analysis by American trial lawyers is not surprising. As noted above, however, complete abolition of limited liability would place the American merchant marine at a competitive disadvantage in the international marketplace. The MLA statute would resolve this by maintaining limited liability for owners of commercial vessels with a significantly larger limitation fund, and by excluding pleasure craft from the benefit of limitation. Thus the MLA statute gives a *quid pro quo* to both parties; owners of commercial vessels are guaranteed the right to limitation while trial lawyers have the potential for unlimited liability in cases involving pleasure.

B. Shipowners

Shipowners allege that their industry could not withstand unlimited liability. They assert that the resulting increased insurance rates and the loss of concursus would drive the American merchant marine out of the competitive market. Such an argument contains several problems however. First, as Abraham Freedman said while General Counsel to the National Maritime Union:

In the vast majority of cases under the present law the petitions for limitation have been defeated, particularly where large casualties are inflicted Accordingly, in these cases the shipowner is required to pay all damages in full In view of the fact that most petitions to limit liability are denied, it is correct to say that there will be little, if any, change in the insurance rates.¹¹⁶

A second problem with the insurance argument is that neither the shipowners nor the insurers, who apparently have all the neces-

116. 3 COLUM. J. LAW & SOC. PROB. 105, 114 (1967).

sary data at their disposal, have provided Congress or the public with any specific data estimating the probable increase in insurance premiums because of a change in the law of limitation. It is necessary for these groups to substantiate their claims rather than making bold assertions. The MLA statute recognizes both the insufficiency of the present limitation fund and the problems that would be created by complete abolition of limited liability. Thus, the proposed statute guarantees the shipowners a greater certainty in limiting liability by tighter language of wilful misconduct or intent in exchange for a significantly larger limitation fund.

C. Tort Claimants

It is difficult to reconcile the current movement in favor of compensation for the injured with the realization that such claimants are effectively denied recovery under the Limitation Act by a doctrine promulgated over one hundred years ago. The MLA proposed statute resolves this problem by establishing a significantly larger limitation fund. Thus, both the shipowners and tort claimants are given a *quid pro quo*. The shipowners are given a greater certainty in limiting liability by the abandonment of the "privity or knowledge" standard in exchange for a larger limitation fund and the allocation of burden of proof upon the party seeking limitation.

D. Admiralty Lawyers

An elite group with a vested interest in limitation that has been expending considerable manpower over the question of limited liability includes the admiralty bar and the Maritime Law Association of the United States. Their desire to extend the right of limitation to insurers, who in many cases are their clients, is balanced against their demand for a significant increase in the limitation funds. Their proposals reflect a realization that the present limitation doctrine must be modified to keep up with the times.

If steps are not taken to liberalize our limitation of liability law . . . there is going to be public clamor for a law which does away with limitation in its entirety and therefore, if we want to preserve limitation in order to encourage investment in shipping, we should try to keep up with the times and enact amendments which will make limitation more acceptable to the courts and to the public at large.¹¹⁷

117. Address of Chairman Nicholas J. Healy III to Ass'n of Average Adjusters of the United States, 1960 Annual Report, 313-13 (quoted in GILMORE & BLACK, *supra* note 9, at 824 note 13i).

E. Insurers

Article 1 (5) of the proposed statute extends the benefit of limitation to insurers in an effort to protect them from direct action statutes. Because of this expansion, it is possible that shipowners could purchase greater insurance coverage at reduced premiums. This would provide equivalent benefits to both shipowners and insurers. Shipowners could contract for liability insurance up to the maximum and use that to pay off any claims and still have the hull insurance to purchase a new vessel. Likewise the insurers could sell more insurance policies for higher limits.

F. United States Public Policy

Finally, the federal government as an interested party itself must make a decision in the near future regarding what formula for limitation of liability should be used in the United States. The present limitation is an anachronism. Likewise, even if statutory limitation of liability were abolished, shipowners would probably still be able to limit their liability through use of the corporate veil and single ship incorporation. Further, as noted above, the IMCO Convention does not present a comprehensive solution to the problem of limitation and contains several inherent disadvantages of its own.

The question of limited liability must be viewed pragmatically. Thus, it will be difficult for supporters of the Convention to lobby sufficient support in the Senate for ratification when the U.S. delegation refused to sign it and when special interest groups are supporting passage of the MLA proposed statute instead. Considering all the lobbying that will be done in Washington, it is exceedingly difficult to imagine that the Senate would ratify the IMCO Convention while the House was considering the MLA proposal.

VI. CONCLUSION

To date, the Maritime Law Association's proposed statute is the only doctrine that presents a comprehensive solution to the four major problem areas in the law of limitation without creating any new ones. The statute balances the interests of all interested parties, giving to each a *quid pro quo*, while also promoting the public policy goals of the United States. As such, it warrants serious consideration for enactment within the United States.