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Limitation of Liability

CRAIG H. ALLEN

I INTRODUCTION

In 1851, Herman Melville published *Moby Dick*, Donald McKay sent the record-setting clipper *Flying Cloud* on her maiden voyage, and Congress passed the Act of March 3, 1851, providing shipowners a qualified right to limit liability.¹ While *Moby Dick* went on to become a classic, the Limitation Act is now viewed by most as a relic of the clipper ship era in which it was launched. There is little reason to believe there will be many celebrants at next year's sesquicentennial banquet for the Act.

There are those who will argue that the Limitation Act now plays a relatively insignificant role in private maritime law and is therefore less deserving of judicial study than other, more critical, aspects of the law. Data compiled by the Maritime Law Association (MLA) lend some support to that position. According to the MLA study, between 1953 and 1996 only 166 limitations cases were pursued to judgment in the U.S.² Limitation was granted in 63 of those cases and denied in the other 103, a ratio that some attribute to the courts' hostility to the Act. Yet neither desuetude nor judicial animus is likely to lead to a repeal of the Act in the near future. No nation wants to be the first to abandon shipowner limitation and expose its shipowners to the competitive disadvantages of unlimited liability, or become the court system of choice for sophisticated international forum shoppers. Thus, the federal courts will likely continue to be called up to adjudicate limitation actions, often in the complex litigation setting that inevitably follows in the wake of a significant marine casualty.

Limited liability is hardly unique to admiralty. The Warsaw Convention limits the liability of international air carriers³ and the Price-Anderson Act prescribes a limited liability regime for nuclear power plant operators in the

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¹9 Stat. 635 (1851), codified at 46 U.S.C. app. §§ 181-189. The Act had no formal title.

²The MLA Report, MLA Doc. No. 729 (May 2, 1997), at 10487, 10527-36.

³Convention for the Unification of Certain Rules Relating to International Transportation by Air,

U.S.⁴ Congress has also enacted loss-specific statutes applicable in maritime cases, including the Carriage of Goods by Sea Act (COGSA),⁵ the Oil Pollution Act of 1990,⁶ and the Comprehensive Response, Compensation and Liability Act (CERCLA).⁷ Internationally, much of the world now adheres to the 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC Convention).⁸ The LLMC Convention prescribes limits that are generally higher than those prescribed by the U.S. Limitation Act, but are said to be unbreakable for all practical purposes.⁹ The related International Convention on Civil Liability for Oil Pollution Damage (CLC)¹⁰ limits a shipowner's liability for oil spill damages, while adopting a "personal act or omission" standard for depriving the owner of limited liability. The U.S. has declined to join either of the international liability conventions.

From the list of "problems" with the Limitation Act in the U.S. that are within the federal courts' power to resolve, I have elected to discuss three. Necessarily, the coverage of each problem will be brief. After a short summary of the Limitation Act's principal features, the essay examines the recurring confusion over the relevance of unseaworthiness in limitation actions. Second, it highlights the need to update the courts' choice of law doctrine for limitation issues. Finally, it turns to an issue that is only beginning to emerge, and one which the federal courts may yet save from idiosyncratic precedents that further separate the U.S. from the rest of the international community. By 2002, virtually all seagoing merchant vessels will be required to comply with the International Safety Management Code (ISM Code), a sweeping new mandate for vessel owners and managers to implement vessel safety management and environmental compliance systems. The effect of the ISM Code regime on shipowner limitation of liability may be dramatic. Some believe that a shipowner's qualified right to limit liability under U.S. law will effectively be eliminated by the new Code. They might be right, at least if federal courts in the U.S. continue to expand the

concluded Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) (limiting air carrier's liability for injury or death claims to \$75,000/passenger).

⁴42 U.S.C. § 2210(e) (generally limiting operator's public liability to \$500 million or less).

⁵46 U.S.C. app. § 1304(5) (limiting carrier liability to \$500/package or customary freight unit).

⁶33 U.S.C. § 2704(a) (limiting vessel liability to \$1200/ton for tankers and \$600/ton for other vessels).

⁷42 U.S.C. § 9607(c) (limiting vessel liability to \$300/ton).

⁸International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Ships, entered into force Dec. 1, 1986, reprinted in 6 Benedict on Admiralty Doc. No. 5-4 (7th rev. ed. 1997).

⁹Boal, Efforts to Achieve International Uniformity of Laws Relating to the Limitation of Shipowners' Liability, 53 Tul. L. Rev. 1277, 1296 (1979).

¹⁰Entered into force June 19, 1975, 973 U.N.T.S. No. 3, reprinted in 6A Benedict on Admiralty Doc. No. 6-3 (7th rev. ed. 1997).

concept of shipowner “privity or knowledge” under the Limitation Act to embrace objective knowledge. The result could be that within the U.S. only recreational boat owners and others who fall outside the ISM Code regime will have any chance of limiting liability under U.S. law, while shipowners in nations that adhere to the 1976 Limitation Convention, which rejects the vague privity or knowledge standard, will continue to limit their liability, without compromising their compliance with the ISM Code.

II

OPERATION AND EFFECT OF THE U.S. LIMITATION ACT

A ship comes to grief, the *Lutine Bell* on the floor of Lloyd’s is solemnly struck, and cargo and injury claims in U.S. courts soon follow. The shipowner reflexively turns to the Limitation Act. There the shipowner learns that owners and demise charterers of U.S. and foreign vessels, including U.S. public vessels, may under some circumstances limit their liability to the value of their interest in the vessel and her pending freight at the end of the voyage.¹¹ Additional limits (\$420/ton) may apply to owners of seagoing vessels in cases involving liability for loss of life.¹² Some claims are not subject to limitation under the Act, including those for wreck removal, oil spill removal costs and damages in the U.S., and seamen maintenance and cure claims. Although a U.S. limitation action has no effect on claimants who choose to pursue their claims outside the U.S., the action may provide the benefits of a forum concursus within the U.S., enabling the shipowner (and the judiciary) to consolidate liability and limitation litigation in a single court.

A. The Burden of Proof

In evaluating a shipowner’s right to limit liability, the courts have adopted a two-step inquiry.¹³ The first step, generally referred to as the “exoneration” inquiry, determines whether the shipowner seeking exoneration or limitation, or those for whom the owner may be vicariously liable, committed actionable fault that caused the injury or loss giving rise to the claims for which limitation is sought.¹⁴ The fault may consist of negligence or an

¹¹See 46 U.S.C. app. § 183(a) and Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims. Limitation for public vessels is provided by 46 U.S.C. app. § 789.

¹²46 U.S.C. app. § 183(b).

¹³See *Hercules Carriers, Inc. v. Claimant State of Florida (The Summit Venture)*, 768 F.2d 1558, 1563–64 (11th Cir. 1985); *Farrell Lines Inc. v. Jones (The African Neptune)*, 530 F.2d 7, 10, 1976 AMC 1639 (5th Cir. 1976).

¹⁴A shipowner may also limit liability for some claims that sound in contract, but because such claims

unseaworthy condition of the vessel. Only those faults that were a cause of the claimants' loss are considered. Unless the shipowner has conceded fault, the claimants bear the burden of proof in this first step in the inquiry. In the absence of such proof, the owner is exonerated of liability and the court need proceed no further.

Should one or more claimants prove causative fault, liability for those claims is established. The court then advances to the second step in the inquiry, to determine whether the owner is entitled to limit its liability for those claims. The courts' "limitation" analysis turns on whether the causative fault giving rise to the claims established occurred with the owner's "privity or knowledge." The burden of proof is reversed in this second step, requiring the owner seeking limitation to prove that the causative fault occurred without the owner's privity or knowledge. The distinction is apparent in the Fifth's Circuit succinct conclusion in *Farrell Lines*, where the court stated that the "accident resulted from lack of care and failure to exercise proper procedures by those on the bridge. For this Farrell is liable, but it is also entitled to limit liability."¹⁵ Similarly, Judge Friendly, writing for the Second Circuit in *In re Kinsman Transit Co.*, evaluated the effect of the knowledge of the owner's mooring master on the owner's right to limit and held that his "knowledge is imputed to the corporation on the issue of *exoneration*, but that is precisely what the statute forbids on the issue of *limitation*."¹⁶

The reversing burden of proof is occasionally blurred, particularly in cases involving allegations of unseaworthiness. A leading collision law text suggests, for example, that the burden of proof requires an owner seeking to limit liability in the U.S. to prove: (1) seaworthiness of the vessel's hull and equipment; (2) competence of the crew, including proper licensing, training and shipboard experience; (3) a cause of the loss not involving privity (e.g., negligent navigation by a qualified watch officer, or elimination of all possible causes which would involve privity where the cause cannot be shown precisely); and, (4) absence of actual control of the activity causing the loss by corporate officers, directors, managing agents, or managerial employees of the owner.¹⁷ More accurately, the burden of proof on the first issue and probably the second, depending on the nature of the underlying claim, is on the claimants in the exoneration phase.¹⁸ Only after the

are not generally relevant to the liability implications of the new ISM Code this brief essay will focus on claims based on fault.

¹⁵*Farrell*, 530 F.2d at 13.

¹⁶*In re Kinsman Transit Co.* (The MacGilvray Shiras), 338 F.2d 708, 715, 1964 AMC 2503 (2d Cir. 1964), cert. denied, 380 U.S. 944 (1965).

¹⁷N. Healy & J. Sweeney, *The Law of Marine Collision* 390-91 (1998) (citations omitted).

¹⁸*Farrell*, 530 F.2d at 10 ("although the petitioner in limitation bears the burden of proving lack of

claimants prove causative negligence or unseaworthiness does the burden shift to the petitioning owner in the limitation phase on the latter two issues. In their discussion of seaworthiness and limitation, the authors also make no distinction between claims by those to whom a duty to provide a seaworthy vessel is owed and those to whom no such duty exists, a point I will come back to below.

B. Direct Shipowner Liability for Own Faults

Under familiar tort principles a shipowner is directly liable as an actor if the owner breaches a legal duty thereby causing harm to another. Fault under those circumstances is determined by traditional duty, breach, and causation principles. The owner may also incur direct liability in its capacity as master (in the agency sense) with respect to its servants employed in operating or maintaining the vessel. The Restatement of Agency recognizes at least four instances where a master may be directly liable for harm. They include negligence or recklessness by the master in: (1) giving improper or ambiguous orders or failing to establish proper regulations; (2) employing improper persons or instrumentalities in work involving risk of harm to others; (3) supervision of the activity; or, (4) permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servant, upon premises or with instrumentalities under his control.¹⁹

Admiralty courts addressing a shipowner's direct liability in its capacity as master have imposed liability (and denied limitation) where the shipowner failed to exercise reasonable care in selecting or training the vessel master or crew.²⁰ The courts have also concluded that providing instructions to vessel masters and crews may not be sufficient to avoid direct liability. In *Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King)*,²¹ for example, the Supreme Court held that mere instructions to subordinate employees to comply with the company's safety directives will not entitle the owner to limitation of liability if the employees fail to follow those directives. The owner must also implement measures to ensure compliance or follow up those instructions with inquiries or inspections. In *Coryell v. Phipps (The Seminole)*, the Supreme Court acknowledged that an owner may delegate some of its responsibilities as owner to an agent, so long as the agent is

privity or knowledge, the initial burden of proving negligence or unseaworthiness rests with the libellants.") (citation omitted).

¹⁹Restatement (Second) of Agency § 213 (1958).

²⁰See, e.g., *Hercules Carriers, Inc. v. Claimant State of Florida (The Summit Venture)*, 768 F.2d 1558 (11th Cir. 1985).

²¹285 U.S. 502, 1932 AMC 503 (1932).

competent to perform the task.²² Later decisions have further defined the circumstances under which an owner may limit liability for negligence by its agents and employees.²³

C. Shipowner Vicarious Liability for Faults of Agents and Employees

In addition to potential direct liability for the shipowner's own acts or omissions, the owner may be vicariously liable for the torts of its servants. In general, one is not liable for the torts of an independent contractor.²⁴ The owner (or charterer) may, however, be liable for negligence by contractor who performs a non-delegable duty of the owner.²⁵ The shipowner, as master, may also be vicariously liable for torts by its servants committed within the scope of the agent's employment.²⁶ It is well established that the master and crew of a vessel under demise charter are servants of the charterer and not the owner. Under such circumstances the owner is not vicariously liable for torts committed by the crew. Similarly, neither an owner nor a charterer is liable for the torts of a compulsory pilot. In both cases, the master-servant relationship necessary for imposing vicarious liability is lacking.

D. Privity or Knowledge of Faults of Agents or Employees

Even where the shipowner would otherwise be vicariously liable for the torts of its agents, the Limitation Act may permit the owner to limit that liability if the underlying fault occurred without the owner's "privity or knowledge."²⁷ Unfortunately, Congress expended no effort in the legislation in providing guidance on what it intended by those terms. It is common to attribute the oversight to the novelty of the corporate form of enterprise organization in 1851, but Congress was no more enlightening when it incorporated those same terms into CERCLA over a century later.²⁸ The

²²317 U.S. 406, 1943 AMC 18 (1943) (holding that shipowner who selects competent persons to inspect a vessel and is not on notice as to existence of a defect cannot be denied limitation).

²³See *In re Complaint of Sheen*, 709 F. Supp. 1123, 1989 AMC 1345 (S.D. Fla. 1989) (holding that shipowner is entitled to limitation in cases where inspection and management is delegated to another only if the owner (1) inspects or arranges for a reasonable inspection service; (2) chooses employees with reasonable care; and, (3) gives suitable general instructions).

²⁴Restatement (Second) of Torts § 409 (1965). The person engaging the contractor may, however, be liable where the contractor or its employee has injured another if the person was, for example, negligent in selecting the contractor. See *id.* § 411.

²⁵Restatement of Agency, *supra* note 19, § 214.

²⁶*Id.* §§ 219 & 243-249.

²⁷46 U.S.C. app. § 183(a).

²⁸See 42 U.S.C. § 9607(c)(2).

cases examining privity or knowledge reveal two dimensions to the analysis. First, the court must examine whose knowledge “counts,” as it were; particularly where the owner or charterer is a corporation which acts through its agents and employees. Second, the court must determine the kind of knowledge that counts, perhaps distinguishing between actual and constructive knowledge (or subjective and objective knowledge).

Early decisions seeking to define the bounds of privity or knowledge concluded that:

[P]ersonal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it.²⁹

Thus, “privity” extends to those faults in which the owner actually participated, while “knowledge” includes those faults of which the owner had personal cognizance. In the ensuing years, the courts have added considerably to this early attempt at definition. Whether the later verbal formulations dispel the doctrinal brume is debatable.

1. Whose Privity or Knowledge Precludes Limitation?

The test for determining whether causative fault was committed with the owner’s privity or knowledge depends in part on the nature of the owner. The test for individual owners presents few problems, except where the individual owner delegates some or all of his or her duties as owner to another. Under circumstances involving reasonably limited delegation, only the owner’s personal knowledge or participation is relevant to the limitation inquiry. If, however, the scope of authority delegated by the individual owner is overly broad, the delegee’s privity or knowledge may be imputed to the owner.³⁰ And, of course, the individual owner may be denied limitation if he or she failed to select competent persons to inspect and operate the vessel (a basis for direct liability) or if the owner was on notice as to the existence of the fault giving rise to the claims.³¹ It should also be noted that in claims for personal injury or loss of life involving “seagoing vessels,”³² whether against individual or corporate owners, the privity or

²⁹Lord v. Goodall, Nelson & Perkins S.S. Co., 15 F. Cas. 884, 887–88 (C.C.D. Cal. 1877), *aff’d*, 102 U.S. (12 Otto) 541 (1880).

³⁰In re Guggenheim (The Trillora II), 76 F. Supp. 50, 1948 AMC 132 (E.D.S.C. 1947).

³¹See Coryell v. Phipps (The Seminole), 317 U.S. 406, 412, 1943 AMC 18 (1943).

³²The statutory class of “seagoing vessels” excludes, *inter alia*, pleasure yachts, tugs, towing vessels, and fishing vessels and their tenders. 46 U.S.C. app. § 183(f).

knowledge of the vessel's master or of the superintendent or managing agent at or prior to the commencement of each voyage is imputed to the owner,³³ thus enlarging the test. Where the limitation action includes mixed claims, some of which are for loss of life, the court may be called upon to conduct separate privity or knowledge analyses for each, examining the owner's privity or knowledge regarding the causative fault for property damage or personal injury claims under the general test, then separately examining the master's knowledge regarding the causative faults relevant to the death claims.³⁴

The test for corporate owners turns on the facts of the particular case, but emphasizes the "knowing" individuals' position and responsibilities. The nature of the problem in evaluating corporate privity and knowledge was described the Supreme Court in *Coryell v. Phipps (The Seminole)*.³⁵ The Court acknowledged that corporations necessarily act through human beings. The privity of some of those persons must be imputed to the corporation or the corporation could always limit liability. On the other hand, if the privity or knowledge of everyone within the corporation were imputed to it the corporation would never be permitted to limit liability. The key, determined the Court, is to determine "where in the managerial hierarchy the fault lay."³⁶ As some have put the issue, a corporation is charged with the privity or knowledge of its employees when they are "sufficiently high on the corporate ladder."³⁷

The Court in *The Seminole* included corporate executive officers, managers, or supervisors "whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred"³⁸ within the class of corporate actors whose privity or knowledge would presumably be imputed to the corporate owner. Citing the Court's earlier decision in *Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King)*,³⁹ *The Seminole* defines the circle of corporate attribution by position, but also ties the definition to the person's actual responsibility. The question of keen interest under the new ISM Code regime will be the extent to which the privity or

³³Id. § 183(e).

³⁴See *Moore-McCormack Lines, Inc. v. Armco Steel Corp. (The Mormackite)*, 272 F.2d 873, 1960 AMC 185 (2d Cir. 1959) (denying limitation as to seamen death claims, for which master's knowledge of unseaworthiness was imputed to owner, and granting it as to cargo claimants, for which master's knowledge was not imputed), cert. denied, 362 U.S. 990 (1960).

³⁵317 U.S. at 410-11 (dictum).

³⁶Id. at 411.

³⁷*Cupit v. McClanahan Contractors, Inc.*, 1 F.3d 346, 348, 1994 AMC 784 (5th Cir. 1993), cert. denied, 510 U.S. 1113 (1994).

³⁸317 U.S. at 410 (citing *The Linseed King*, *infra*).

³⁹285 U.S. 502, 1932 AMC 503 (1932) (concluding that "Stover's position as works manager . . . and the scope of his authority render his privity or knowledge that of the company.").

knowledge of the shipowner's "Designated Person Ashore" will be imputed to the owner or demise charterer in U.S. limitation actions under the position-plus-responsibility test.

2. What Kind of "Knowledge" Precludes Limitation?

To give effect to the Limitation Act the courts must determine what kind of knowledge Congress intended would defeat a shipowner's qualified limitation privilege. The trend in decisions in the 19th century reflects a focus on the petitioning shipowner's subjective or actual knowledge of the causative fault or, where relevant, unseaworthy condition. Early decisions expressly rejected a constructive knowledge test.⁴⁰ Knowledge of an unreasonable risk of harm to another, where there is a duty to protect another from such harm, is the foundation for tort liability. One who has knowledge of a dangerous condition and fails to take reasonable steps to remedy it or to warn of the danger may be liable in negligence for harm proximately caused. This principle is generally understood to mean, however, that a person will not be liable unless the person had "knowledge" of the danger at a time when it could be remedied. If the person is an employee who was acting within the scope of his or her employment, the employer may be vicariously liable for the harm. If the employer is a qualified shipowner, however, the owner will be entitled to limit its liability unless the fault occurred with the owner's privity or knowledge.

As evidenced in the Supreme Court's 1932 decision in *The Linseed King*,⁴¹ the knowledge inquiry was later enlarged to include an objective standard, in which the courts ask not only what the owner actually knew but also what the shipowner should have known.⁴² Implicit in the objective standard is that privity and knowledge will depend on the owner's compliance with a duty to reasonably inspect and inquire.⁴³ Whether viewed as an expansion of the owner's direct liability for negligence or a curtailment of the owner's right to limitation under a theory of constructive knowledge the

⁴⁰The 84-H, 296 F. 427, 1924 AMC 774 (2d Cir. 1923) ("[t]he privity or knowledge must be actual and not merely constructive."), cert. denied, 264 U.S. 596 (1924).

⁴¹285 U.S. 502, 1932 AMC 503 (1932).

⁴²G. Gilmore & C. Black, *The Law of Admiralty* § 10-24, at 886 (2d ed. 1975); see also Restatement of Torts, *supra* note 24, § 12 ("should know" denotes the fact "that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.").

⁴³See, e.g., *Empresa Lineas Maritimas Argentinas S.A. v. United States*, 730 F.2d 153, 155, 1984 AMC 1698 (4th Cir. 1984) (holding that the shipowner's knowledge need not be actual. "The shipowner is chargeable with knowledge or acts or events or conditions of unseaworthiness that could have been discovered through reasonable diligence.").

effect on limitation will be largely the same. It will be seen in Part V of this essay that the ISM Code creates new affirmative duties to inspect and inquire. When combined with the owner's other duties to exercise reasonable care in hiring, training, and supervising its employees, the duty to inspect and inquire may well complete a construct of liability that dramatically limits the possibility that the vessel's condition or the conduct by those on board can occur without the owner's "privity or knowledge."

III LIMITATION IN CASES ALLEGING UNSEAWORTHINESS

The analysis by some courts in limitation actions demonstrates a misunderstanding of the relevance of the unseaworthiness doctrine in exoneration and limitation. The confusion may be attributable in part to what Professors Gilmore and Black once argued was a "non-delegable" duty to provide a seaworthy vessel in the "primitive sense,"⁴⁴ for which privity or knowledge should be, in the authors' opinion, automatic. The concept found limited acceptance in the courts,⁴⁵ and even the authors conceded in the second edition of their treatise that their assertion that such a duty existed lacked authority.⁴⁶

It will be recalled that only those claims that survive the exoneration step in the analysis are considered in the second (limitation) step. Thus, any shipowner "privity or knowledge" of acts or omissions which do not give rise to liability in the first instance are irrelevant to the analysis of a shipowner's right to limitation. This distinction is particularly important in analyzing the effect of vessel unseaworthiness on the owner's right to limitation. U.S. courts on occasion wrongly apply the privity or knowledge test to allegations of unseaworthy conditions under circumstances where the shipowner owed no duty of seaworthiness to the claimants.

⁴⁴Gilmore & Black, *supra* note 42, § 10-24, at 886-87.

⁴⁵See *Federazione Italiana dei Corsorzi Agrari v. Mandansk Compania de Vapores, S.A. (The Perama)*, 388 F.2d 434, 1968 AMC 315 (2d Cir.) (recognizing in dictum a non-delegable duty to provide a seaworthy vessel "in the primitive sense"), cert. denied, 393 U.S. 828 (1968). But see *Waterman S.S. Corp. v. Gay Cottons (The Chickasaw)*, 414 F.2d 724, 729, 1969 AMC 1682 (9th Cir. 1969) (rejecting the non-delegable duty basis for denying limitation in a case involving liability to cargo after finding that "[n]otwithstanding the conclusion of Gilmore & Black, we have found no case which has denied limitation of liability because of the negligence of a non-managerial employee. On the contrary, all cases denying limitation of liability to a corporate shipowner have emphasized that the negligence or lack of due diligence to make seaworthy was attributable to managerial personnel.").

⁴⁶Gilmore & Black, *supra* note 42, § 10-24, at 887 n.101.

A. The Limited Duty of Seaworthiness

In the exoneration step of the court's limitation analysis the court will recognize that a shipowner may owe a duty of seaworthiness, whether by express or implied contract or under the general maritime law, but only to select classes of potential claimants. In some cases, the warranty is said to be non-delegable; in others it is not. The duty of seaworthiness may be imposed on the vessel owner, the charterer, or the seaman's employer, each of whose entitlement to limitation must be separately analyzed. In claims alleging injury caused by an unseaworthy condition arising after a vessel has been demise chartered, and without the owner's fault, privity, or knowledge, the owner may limit liability, even though the demise charterer might not. Finally, the applicable standard of care and the point in time at which the vessel's seaworthiness is relevant vary according to the status of the claimant.

A warranty of seaworthiness extends to the vessel's crew and the so-called *Sieracki* seamen, but no such warranty (or duty) extends to passengers,⁴⁷ visitors,⁴⁸ or longshore and harbor workers.⁴⁹ The duty to crewmembers to provide a seaworthy vessel is absolute and non-delegable.⁵⁰ In other contexts, the claimant might have to demonstrate some degree of culpability on the part of the owner or charterer. Decisions such as that by the Eleventh Circuit in *The Summit Venture*⁵¹ that equate negligence and seaworthiness because both are tested by "reasonableness" lose sight of the important distinction between the two fault concepts. "Reasonableness" is the metric by which the shipowner's level of care in taking precautions against injury in a negligence action is evaluated. A shipowner that fails to exercise reasonable care under the circumstances is liable for an injury proximately caused by that negligence. By contrast, reasonableness is the metric by which the condition of the ship is measured in seaworthiness actions. A vessel that is not reasonably fit for her intended service is unseaworthy. The level of care the owner must exercise in providing a seaworthy vessel varies according to the type of claim involved. A COGSA

⁴⁷*Gibboney v. Wright*, 517 F.2d 1054, 1059, 1975 AMC 2071 (5th Cir. 1975) (holding that a racing sloop owner owed his passengers a duty of reasonable care, but not a warranty of seaworthiness).

⁴⁸*Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959) (holding that a shipowner owes visitors a duty of reasonable care).

⁴⁹See 33 U.S.C. § 905(b).

⁵⁰*Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 1971 AMC 277 (1977) (explaining that "[u]nseaworthiness is a condition, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.").

⁵¹*Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1564 & n.3 (11th Cir. 1985) ("merging" its analysis of negligence and unseaworthiness "because the test of reasonableness is the primary inquiry under both categories.").

carrier owes cargo a statutory duty to exercise due diligence to ensure the vessel is seaworthy at the beginning of her voyage. An owner (or head charterer) may extend express or implied warranties of seaworthiness to a charterer. Such warranties may be superseded by including in the charter party a Clause Paramount, substituting the COGSA "due diligence" standard for the default warranty under general maritime law.

Turning from the exoneration inquiry regarding fault to the limitation analysis regarding privity or knowledge, the court will recognize that under agency principles, "knowledge" of an unsafe condition is generally not imputed to the owner until there has been a reasonable opportunity to communicate the information to the owner.⁵² Alternatively, the injured party may seek to prove that the unseaworthy condition was not timely detected because the owner failed to discharge its duty of inspection. However, notwithstanding the urgings of Professors Gilmore and Black, automatic imputation of knowledge of an unseaworthy condition to the owner is otherwise inconsistent with the privity or knowledge standard.

Any generalized analysis of an owner's privity or knowledge of an unseaworthy condition in the second step of a limitation of liability analysis that overlooks the integral limitations on the seaworthiness doctrine is inconsistent with the terms of the Limitation Act and its relationship with the underlying bases of liability. The error is apparent in the Fifth Circuit's decision in *Empire Seafoods, Inc. v. Anderson*.⁵³ *Anderson* concerned claims against the *F/V Bora Bora* vessel interests arising out of the vessel's allision with the bridge. Construction workers on the bridge were injured in the accident. The Fifth Circuit assumed, without discussion, in its limitation analysis that the vessel owner owed bridge workers and owners a duty to provide a seaworthy vessel. Had the court properly conducted its limitation analysis in two steps, it would have first determined whether the bridge owner and the bridge workers injured in the allision established actionable fault on the part of the vessel and her crew. Because a vessel owner owes no duty of seaworthiness to a bridge owner or to workers on the bridge, the "exoneration" analysis would turn on the claimants' proof of causative negligence by the vessel's crew. The second step "limitation" analysis would then ask whether the causative negligence occurred with the owner's privity or knowledge—not whether the owner knew or should have known of an unseaworthy condition. The Court of Appeals for the Eleventh Circuit committed a similar error in *Hercules Carriers, Inc. v. Claimant State of*

⁵²See Restatement of Agency, *supra* note 19, § 278.

⁵³398 F.2d 204, 210, 1968 AMC 2664 (5th Cir.), cert. denied, 393 U.S. 983 (1968). The same court, in *Farrell Lines Inc. v. Jones (The African Neptune)*, 530 F.2d 7, 10–12, 1976 AMC 1639 (5th Cir. 1976), embarked on an analysis of whether the vessel involved was unseaworthy when it allided with a bridge without first identifying any parties to whom a duty of seaworthiness was owed.

Florida (The Summit Venture),⁵⁴ a limitation action by the vessel owner for claims arising out of the vessel's tragic allision with the Sunshine Skyway Bridge in Tampa Bay.

By contrast, Judge Friendly, writing for the Second Circuit in *In re Kinsman Transit Co.*, recognized that limitation would be denied for an alleged breach of a warranty of seaworthiness only as to those claimants to whom the duty was owed.⁵⁵ Building on Judge Friendly's analysis, the correct rule is that an owner will be denied limitation for damage or injury caused by an unseaworthy condition of the vessel only: (1) with respect to those claimants to whom a duty of seaworthiness is owed; (2) upon proof of an unseaworthy condition; (3) upon proof of breach; and, (4) where the shipowner cannot prove that the unseaworthy condition occurred without its privity or knowledge.

B. Unseaworthiness and the Personal Contracts Exception

The duty to provide a seaworthy vessel may be imposed by statute, as in COGSA,⁵⁶ or by the general maritime law. The general maritime law duty may sound in warranty.⁵⁷ In evaluating the precedential value of decisions denying limitation in cases alleging unseaworthiness, it is critical to determine in each case whether the result was dictated by the personal contracts exception to limitation.⁵⁸ Where the duty to provide a seaworthy vessel derives from a "personal contract" by the petitioning shipowner, limitation may be denied on that basis alone.⁵⁹ Because the warranty is a

⁵⁴768 F.2d at 1565-66 (holding that because the owner has "a non-delegable duty to provide a competent master and crew, unseaworthiness can be caused by insufficient manning of the vessel or an incompetent crew."). The court did not identify to whom such a duty was owed.

⁵⁵*In re Kinsman Transit Co. (The MacGilvray Shiras)*, 338 F.2d 708, 716, 1964 AMC 2503 (2d Cir. 1964) (holding that Continental's claim that Kinsman may not limit liability because of its breach of the warranty of seaworthiness in the storage contract is defeated both by the lack of proof breach "and by the fact that the exception would apply only to damage to the stored cargo, which did not occur."), cert. denied, 380 U.S. 944 (1965). The court also distinguished between the scope of the duty to provide a seaworthy vessel to crewmembers and the distinct duty to cargo. *Id.* at n.3.

⁵⁶46 U.S.C. app. § 1304(1).

⁵⁷See, e.g., *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 1955 AMC 488 (1955) (holding owner liable for "breach of the warranty of seaworthiness" to seaman injured by fellow crewmember).

⁵⁸*Richardson v. Harmon*, 222 U.S. 96, 106 (1911) (holding that shipowner may not limit liability for "his own fault, neglect, and contracts."). But see *Earl & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. (The Galileo)*, 287 U.S. 420, 429, 1933 AMC 1 (1932) (bills of lading are "ship's documents," and do not fall within the personal contracts exception).

⁵⁹See *Coryell v. Phipps (The Seminole)*, 317 U.S. 406, 410, 1943 AMC 18 (1943) ("[w]e are not concerned here, however, with the question of limitation of liability where the loss was occasioned by the unseaworthiness of the vessel. The limitation acts have long been held not to apply where the liability of the owner rests on his personal contract.") (citations omitted).

personal contract, no privity or knowledge inquiry is necessary to defeat limitation.

IV LIMITATION AND CHOICE OF LAW

The federal courts' outdated choice of law approach in limitation of liability has been examined ably elsewhere.⁶⁰ Most would agree that Justice Holmes' *lex fori* choice of law rule in *The Titanic*,⁶¹ and the enigmatic "attaches-to-the-right" gloss added by Justice Frankfurter in *The Norwalk Victory*,⁶² will poorly serve the needs of international maritime litigation in the 21st century and should be replaced with the modern *Lauritzen-Rhoditis* admiralty choice of law approach.⁶³ In evaluating the need for a modern choice of law approach, the courts should be mindful of the unique context of international maritime litigation and the growing importance of its choice of law methodology. Foreign defendants are generally protected against the burden of litigating in the U.S., when unreasonable, by principles of personal jurisdiction and *forum non conveniens*. Shipowners may find, however, that neither principle affords them the same level of protection as it does for non-maritime defendants. Claimants may, for example, avoid personal jurisdiction limitations by invoking *in rem* or maritime attachment procedures under the admiralty supplemental rules. And even if a federal court determines that the claims against the foreign shipowner should be dismissed on *forum non conveniens* grounds a state court may be free to permit those same claims to go forward.⁶⁴ Thus, the courts' limitation of liability choice of law approach may take on added importance.

As the court's choice of law approach in limitation gains sophistication, the courts may be confronted with the question whether a decision to deny limitation under U.S. law, after finding that the causative fault occurred with the owner's knowledge, necessarily precludes the court from granting limitation under the law of the vessel's flag. The U.S. Limitation Act provides that the qualified owner's liability "shall not exceed" the amount prescribed by the Act.⁶⁵ Nothing in the text of the statute itself precludes application of foreign law under circumstances where the owner is denied

⁶⁰See W. Tetley, *International Conflict of Laws: Common, Civil and Maritime* 518-31 (1994); Comment, *A New Role for Interest Analysis in Admiralty Limitation of Liability Conflicts*, 21 *Tex. Int'l L.J.* 495 (1986).

⁶¹*Oceanic Steam Nav. Co. v. Mellor (The Titanic)*, 233 U.S. 718, 1998 AMC 2699 (1914).

⁶²*Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 1949 AMC 393 (1949).

⁶³See *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 1970 AMC 994 (1970).

⁶⁴*American Dredging Co. v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994).

⁶⁵46 U.S.C. app. § 183(a).

the right to limit under U.S. law, and nothing in the Act dictates the substance-procedure distinction in the existing choice of law methodology. Professor Tetley concludes that the *right* to limit is generally seen as a question of substantive law, to be governed by the same law that determines the responsibility for the casualty, while the *amount* of the limitation fund was characterized as a matter of procedure, to be governed by the *lex fori*.⁶⁶ The question might well be raised by a party who would not, under U.S. law, be entitled to limit liability, but obtains such rights from the 1976 LLMC, or by an owner who is not eligible for limitation under the U.S. privity or knowledge standard but would be eligible under the more forgiving standard in the 1976 LLMC Convention. Would such a result do violence to the rule in *The Titanic*?⁶⁷ I think not.

V

LIMITATION AND THE INTERNATIONAL SAFETY MANAGEMENT CODE

In 1994, the International Convention for the Safety of Life at Sea (SOLAS)⁶⁸ was amended to require vessel operators to implement the ISM Code.⁶⁹ SOLAS and the ISM Code require vessel operators to establish a Safety Management System (SMS) for their business and its vessels. The Company's SMS must include a safety and environmental protection policy, instructions, and procedures to ensure vessels are operated in accordance with relevant flag State and international regulations, defined levels of authority and lines of communication between and among shore and shipboard personnel, procedures for reporting accidents and non-conformities with the ISM Code, procedures for preparing and responding to emergencies, and procedures for internal audits and management reviews.

To ensure the safe operation of its vessels and to provide a link between the Company and those on board the vessels, each Company must designate a person ashore who will be responsible for monitoring the safety and pollution-prevention aspects of the operation of each vessel. The Company's Designated Person Ashore (DPA) must have direct access to the highest

⁶⁶Tetley, *supra* note 60, at 509–10 & 524–31.

⁶⁷*Oceanic Steam Nav. Co. v. Mellor (The Titanic)*, 233 U.S. 718, 732, 1998 AMC 2699 (1914) (holding that claimants who elect to sue the defendant in the U.S. are limited by the U.S. Limitation Act). The Court was not required to address situations in which the owner was *not* eligible for limitation under the U.S. Limitation Act.

⁶⁸Done at London, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, reprinted in 6D Benedict on Admiralty, Doc. No. 14–1 (7th rev. ed. 1997).

⁶⁹International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management Code), Annex to IMO Res. A.741(18), done at London, Nov. 4, 1993, reprinted in 6D Benedict, *supra* note 68, Doc. No. 14–2.

level of management. The advent of the ISM Code and its well-informed and communicative DPA is likely to render limitation in the U.S. even more elusive if the DPA's actual or constructive knowledge or negligence by the DPA is imputed to shipowners.

A. Limitation Analysis for ISM Code Vessels

Limitation in the ISM Code era will present two issues. First, whether the DPA will be deemed "sufficiently high" in the ship-owning corporation such that the DPA's acts, omissions, and knowledge are considered those of the corporation. The answer to this question will require a particularized analysis of the DPA's position in the Company seeking limitation and the extent of his or her authority over the vessel and her operations. The privity or knowledge of shoreside managers⁷⁰ or managing agents⁷¹ may be imputed to the owning corporation. However, nothing in the ISM Code requires the DPA to have actual management authority. Indeed, the ISM Code speaks only of the DPA having "direct access" to the Company's management. Thus, unless the owner confers management authority on the DPA beyond that which the ISM Code requires, the DPA will not likely be "sufficiently high" in the corporation to automatically attribute the DPA's actions or knowledge to the owner.

If the DPA is not sufficiently high in the corporation for direct attribution of privity or knowledge, the second question that arises, under circumstances where causative fault by the shipowner has been established, is what kind of knowledge by the DPA will be imputed to the corporation and when? If the Restatement of Agency approach is adopted for guidance, the DPA's actual knowledge will be imputed to the owner,⁷² but only after a reasonable time for communication has passed.⁷³ The Restatement would not, however, impute the DPA's constructive knowledge to the shipowner.⁷⁴

B. An Opportunity for Greater International Harmony?

It would be extravagant to suggest that it is within the discretion of the federal courts to completely harmonize the U.S. Limitation Act with the

⁷⁰*Hellenic Lines, Ltd. v. Prudential Lines, Inc. (The Hellenic)*, 813 F.2d 634, 1987 AMC 2470 (4th Cir. 1987).

⁷¹*In re New England Fish. Co.*, 465 F. Supp. 1003, 1979 AMC 1910 (W.D. Wash. 1979).

⁷²*Cf. Restatement of Agency*, supra note 19, § 275 (where an agent has a duty to disclose knowledge to the principal, knowledge by the agent is imputed to the principal).

⁷³*Id.* § 278. Illustration 2 to comment a describes an example in which an insured has not yet learned of a vessel's sinking at the time he insures it, even though his agent has learned of it.

⁷⁴*Id.* § 275, comment b. See also *id.* § 277 (information which an agent "should" know is not imputed to the owner unless the principal has a duty to exercise care in obtaining the information).

widely accepted 1976 LLMC. The LLMC Convention extends to a far broader class of actors and prescribes very different limits of liability. Under U.S. law, limitation is denied if any causative fault occurred with the owner's privity or knowledge, while the 1976 LLMC Convention denies limitation only if the loss resulted from a personal act or omission by the party seeking limitation, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.⁷⁵ Despite these important differences between the regimes, it is within the courts' province to construe the U.S. privity or knowledge standard in a manner that promotes international harmony while remaining consistent with the language and purpose of the statute.

In the final analysis, limitation decisions turn on the construction and application of a statute. Accordingly, the text and structure of the statute control the courts' decision. In deciding how to evaluate the role of the DPA and the effect of the DPA's knowledge on shipowner limitation, the courts have considerable latitude under the very general language of both the Limitation Act and the statutes implementing the ISM Code to adopt constructions that best serve the legislative purposes of each. Congress did not define privity or knowledge in the Limitation Act. It will be recalled that early decisions limited the fatal "knowledge" element to actual knowledge, expressly rejecting the constructive knowledge standard.⁷⁶ It might therefore be asked whether it would be consistent with the language and intent of the Limitation Act and the ISM Code to adopt a construction that penalizes the shipowner who is most aggressive in implementing the ISM Code regime by denying that shipowner the benefits of the Limitation Act through an expansive interpretation of privity and knowledge.

VI CONCLUSION

In one version or another, shipowner limitation of liability regimes are likely to be with us for the foreseeable future. Though the present U.S. regime is badly in need of congressional attention, it remains within the federal courts' power to improve its utility by modernizing the choice of law approach and by closely scrutinizing the relevance of vessel seaworthiness in their limitation analyses. With the implementation of the new ISM Code, the privity or knowledge analysis will also take on added importance. Those who seek to promote international harmony and reduce the incentives for

⁷⁵LLMC Convention, *supra* note 8, art. 4.

⁷⁶The 84-H, 296 F. 427, 1924 AMC 774 (2d Cir.) (holding that "[t]he privity or knowledge must be actual and not merely constructive"), cert. denied, 264 U.S. 596 (1924).

forum shopping in the era of the ISM Code will seek to avoid an expansive construction of the privity or knowledge standard under the U.S. Limitation Act that will only widen the gap between the U.S. and the parties to 1976 LLMC Convention.