Vanderbilt Journal of Transnational Law

Volume 2
Issue 2 *Spring 1969*

Article 3

1969

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SHIPOWNERS' LIMITATION OF LIABILITY IN INTERNATIONAL SEAFARING DISASTERS

I. Introduction

Adherence to the principle of strict limitation of liability in any area of the law has been out of vogue since the time of Winterbottom v. Wright.[1] This is true whether it be in the area of products liability, master-servant relations, or international air travel. The trend is to remove all limitation on recoveries available under our law for death or injury.[2] An exception is the limitation of liability in

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[1]Winterbottom v. Wright, 10 M&W 109, 152 Eng. Rep. 402 (1842), the liability of contracting parties to third persons in selling chattels has expanded as no other area of the law. Comparison can justifiably be made between what history has shown can happen there, and what is presently happening in maritime limitation law. The courts are expanding a doctrine to fit the need as they see it. One of the strongest possible arguments that is made for the adoption of international conventions on the subject is to prevent the haphazard growth that took place in products liability as the courts made the law on their own. See, PROSSER, TORTS, 3rd ed., 658-688 (1964).

[2]See, for background on recent attempts to avoid limitations of liability in state laws, Pearson v. N.E. Airlines, 309 F.2d 553 (2d Cir. 1962), Kilberg v. Northeast Airlines, 172 N.E. 2d 526 (1961), discussed in CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 690-721 (1963), for a further discussion of efforts to avoid Massachusetts' strict limitation of death liability statute. See also, Mass. Gen. Laws, C.229 § 2 (Supp. 1966), and accompanying notes. The limit was raised to $30,000 in 1962, and $50,000 in 1965; for the most recent case on this subject see, Eastern Airlines v. Scott, 399 F.2d 14(3 Cir. 1968), which involved another passenger's death in a Massachusetts air crash. This case, decided in Pennsylvania, was in essence brought under admiralty jurisdiction in the Federal District Court for the Eastern District of Pennsylvania (264 F.Supp. 673) although framed in terms of a diversity suit. That court below applied Pennsylvania law as to giving rise to the cause of action in spite of the situs of the crash in Massachusetts, and also held inapplicable the Massachusetts death limitation statute. The Scott case on appeal in the first hearing held in accord with Tungus v. Skovgaard, 358 U.S. 588 (1959), that that must be reversed, as the proper rule was that "any state stuatue which generally provides remedies for tortious death can and should be drawn upon by the maritime law in enforcing the federal cause of action", 603.

maritime disasters. Here, in this watery domain, the narrowness that formerly dominated the field of products liability continues to exist. Some critics condemn such strict limitation as an anachronism in our modern society, while others continue to cling to its principles steadfastly.[3] For example, it is argued that the American airline industry, which is held to a higher standard of liability than that of the Warsaw Convention, cannot be compared to the shipping industry.[4] That "[t]he airline industry enjoys an ever increasing volume of business and commensurate profit while the shipping industry is on a descending plane, existing on marginal profits,"[5] is but one expression of this opinion made by John F. Gerity, Chairman of the Association of Average Adjusters of the United States.

Although this paper deals with some of the more technical points of this complex admiralty controversy, it should also be of interest to all those remotely concerned with international law, or the concepts of equity and jurisprudence. This is because of the maze of international regulation in the area and the self-contradiction that exists in American law on the subject - principally, where damages are highest, the degree of fault more culpable, and the injured party's need for recovery greater, the liability is least or non-existent.

The clear implication was that Massachusetts law as the situs of the crash was the only applicable law. On rehearing this opinion was reversed and the District Court's opinion was reinstated, 25. Hastie, Chief Judge, and others joined in a strong dissent, at 32. The Supreme Court allowed this change in the maritime liability principles of Tungus when they refused to grant certiorai 37 U.S.L.W. 3209 (1969).

[3]Hearings Before the Merchant Marine and Fisheries Sub-Committee of the Committee on Commerce on S.2313, S.2314, 87th Cong. 2d Sess. (1962), [Subsequently cited-1962 Hearings]; Hearings Before the Merchant Marine and Fisheries Sub-Committee of the Committee on Commerce on S.555, S. 556, 88th Cong. 1st Sess. (1963), [Subsequently cited-1963 Hearings].

[4]The major airlines have consistently balked at having the limits raised and are at present operating on an ad hoc agreement which was forced upon them by the United States government. A recent decision has challenged the Warsaw limits as depriving the plaintiff of equal protection of the laws. Burdelly v. Canadian Pacific Airlines, No. 66 L10799, Circuit Court of Cook County, November 7, 1968, 8 INT'L LEG. MAT. 83(1969). This position is highly questionable in light of the maritime limitations that have been upheld, Murray v. New York Cent. R. Co., 287 F.2d 152(2d Cir. 1961), cert. denied, 366 U.S. 945.

[5]Gerity, Address Before the Annual Meeting of the Association of Average Adjusters of the United States, October 3, 1968.

The cyclical nature of the interest in this topic is one reason for the peculiarities of the law. Interest reaches a peak following a maritime disaster; piecemeal legislation is rushed through and then the entire subject is forgotten. In the modern age of supertankers and luxury liners American maritime liability rests on the basis of a law that was passed during one of those peaks of interest in 1851, when most shipping was still under sail.[6] That national legislation was prompted by a series of maritime disasters climaxed by the sinking of the Lexington, in which unlimited liability was found to exist for the owner.[7] No substantial change was considered until the Morro Castle disaster of September 8, 1934, demonstrated the inadequacy of the existing law.[8] Interest has

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[6]That bill was sponsored by Hanibal Hamlin who was at that time Chairman of the Senate Committee on Commerce and later Vice-President under Lincoln. It was passed on March 3, 1851, with "very scanty scrutiny of its provisions . . . The judicial controversies latent in every clause of the third and fourth sections were unperceived." Putnam, The Limited Liability of Ship-Owners For Master's Faults, 17 AM. L. REV. 1,14 (1883). See also 23 Cong. Globe 713-720, 31st Cong., 2d Sess. (1851), the congressional debates are reviewed in Sprague, Limitation of Shipowners Liability, 12 N.Y.U. L. REV. 568, 577-78 (1935).

[7]See, New Jersey Steam Navigation Co. v. Merchants Bank, 47 U.S. 344(1848). A crate containing gold and silver bullion was shipped aboard the defendant's vessel. He was not aware of its value under a contract exonerating the shipowner for any loss occasioned to the cargo. Due to gross negligence of the crew the ship caught fire and burned and later sank. The Court in allowing a full recovery of $18,000 for the value of the bullion, held that though the owner might contract out of his common law liability as a shipowner, he could in no event contract out of the obligation to use due care.

[8]That tragedy pushed Congress to amend the law to some degree; extensive hearings were held on the matter, Hearings Before the House Committee on Merchant Marine and Fisheries on H. 4550, 74th Cong. 1st Sess. (1935). [Subsequently cited-1935 Hearings]. At page 7 of these Hearings the motivational force for their existence is reflected in the statement of Mr. William I. Sirovitch, "Now, Mr. Chairman . . ., we have gone along in America since 1851 on a limited liability law which was copied from and imitated the law of Great Britain, limiting damages recoverable solely to the value of the ship when it foundered, or the salvage value if the ship was saved. So that we have the pitiful example in our country today of a most tragic indictment of this law, so tragic in its nature that I propose, as often as I can, to speak upon the floor of Congress and call the attention of the traveling public to the

waned again as repeated attempts to develop an international system or to modify American law have failed. A crisis situation presently exists. International law is totally disjointed on the subject, and the United States is at least 150 years behind other nations in developing realistic legislation. The needed catalyst to produce change may have just recently taken place.

In the fog of March 18, 1967, some seventeen miles off Land's End, England, the Torrey Canyon, then one of the world's ten largest tankers, ran hard aground on Seven Stones Reef, setting off a chain of legal disputes that will not be put to rest for decades.

The wrecked tanker, carrying a cargo of 118,000 tons of Kuwait crude oil, was owned by the Barracuda Tanker Corporation, a Liberian-based subsidiary of Union Oil of California.[9] Operating out of Bermuda, voyage-chartered by the British Petroleum Co., Ltd. (whose stock is 52% owned by the British Crown), registered in Liberia and manned by an Italian master and crew, the Torrey Canyon was insured by British and American underwriters in a ratio of 60/40. Further, the ship was stranded on a reef in international waters, abandoned by the owners, claimed by a Dutch salvage company, and completely destroyed by British naval forces using rockets and napalm.[10]

Approximately 80,000 tons of crude oil were swept into the sea by the churning tides of the English Channel as the ship lay helpless in the water. The residue from this giant oil slick soon coated the beaches and coves of Normancy and Wales, damaging foreshore property, ruining the lucrative tourist trade, and killing every form of plant and animal life.[11]

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fact that when the Morro Castle was sunk she was insured for $4,000,000, which went to the Ward Line, [the owner] but for the 135 people who lost their lives, and the countless men and women who were injured, and for the loss of cargo, the total amount of money that these 135 people can sue for, on the basis of the limitation of liability amounts to $19,000 or $20,000." As a matter of fact the Ward Line fearing that their petition for limitation would be denied settled the claims totaling $13,500,000 for the sum of $890,000 which was some 40% below the value finally fixed for the claims. 17 Am. Mar. Cas. 895 (S.D. N.Y. 1939), (settlement).

[9]GILL, BOOKER & SOPER, THE WRECK OF THE TORREY CANYON 17 (1967), [Subsequently cited-GILL]; for denial of corporate relationship by Union Oil, see N.Y. Times, July 18, 1967, at 33 col. 8.

[10]GILL, supra note 9 at 33,41.

[11]Torrey Canyon Pollution and Marine Life, a report by the Plymouth laboratory of the Marine Biological Association of the United Kingdom, ed. Smith (1968); also for accounts of the devastation, Life, April 14, 1967, at 34, N.Y. Times June 9, 1967, § M, at 80, coll.

Damages will run into several millions of dollars, including the value of the ship and cargo which were lost, insured to the extent of $16.5 million; this will be the single most expensive seafaring disaster in history.[12]

This situation dramatically presents the deficiencies that currently exist in the law relative to shipowner's limitation of liability. In spite of the tremendous damage acknowledged to have been done to many innocent third parties, their recovery will at best be a pittance in relation to actual damages suffered. If their actions are brought in the United States against the American corporate parent, it is likely that recovery will be severely limited or completely unavailable. If the actions are brought in Liberia, where the ship was registered, one can only specualte as to the outcome, since no major maritime claims of this nature have ever been filed there.[13] An action in Britain would yield the most for the claimants, but the amount would still be meager in comparison to the actual damages. What, then, is the basis for this system that seemingly serves to protect the shipowner with such a callous disregard for the rights of others?

II. Sources of Limitation Law

A. Early Sources

Roman law made liability co-extensive with the damages for accidents on land and sea alike. In each the rule was full compensation without regard to the value of the instrumentality causing the injury.[14] However, this concept was modified by the principle of the noxae deditio.[15] In effect, this was a law of abandonment whereby the owner of a slave or an inanimate object could free himself from the liability created by his slave or chattel by giving over the same to the injured party. This principle has been reflected in the

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[12]Marshall, The Black Wake of the Torrey Canyon, UNITED STATES NAVAL INSTITUTE PROCEEDINGS (December 1967) 39. Without including the value of the property destroyed on shore the Torrey Canyon was insured for $5 million more than the previous most expensive wreck, the Andrea Doria.

[13]1963 Hearings, supra, note 3, at 80. Statement made by Oscar R. Houston, before the Committee; "I happen to have drawn the maritime laws of Liberia, and I think they are a very good set of laws, but there has never been, so far as I know an admiralty case tried in the courts of Monrovia, ..."

[15]HOLMES, THE COMMON LAW 30 (1881), Holmes suggests that the origin of this practice may have been something other than the goodness of heart of the wrongdoer. He indicates that it was an expiatory act to placate threatened vengence, at 10.

development of admiralty law in civil law countries.

Other authorities believe it was in the formative years of trade development of the fourteenth century that the real concept of maritime limitation of liability had its beginning.[16] The earlier medieval maritime codes were silent as to this principle of limitation. No limitation was found in the laws of Oleron or in the laws of the City of Trani. The Valencian Code, however, declared that ship-owners were not personally responsible for loans negotiated by the shipmaster unless the master had acquired something in the nature of a power of attorney from them. The Consulato del Mare of about the same period stated that the owner responded for damages through his ownership in the vessel. More particularly, he was not liable beyond his interest in the vessel for goods laden on the deck or for maritime loans negotiated by the master.

During this era of Mediterranean commerce, expanding trade routes increased both the need for capital investment and the risk of loss. No longer could the merchant afford to travel with his goods or to be fully responsible for the acts of his agents. These early limitation laws provided a form of subsidy and encouragement. In 1624, Grotius wrote that it had long been the settled law in Holland that the owner was liable for the master's acts only to the extent of his ownership interest in the vessel and the cargo which it carried.[17]

It should be pointed out that the concepts enumerated above refer mainly to the limitation of the shipowner's liability in regard to contractual agreements made by the shipmaster. It is said, therefore, that the true source of admiralty limitation is in contracts law and the vague beginnings of the corporate form. According to this theory the limitation principle arose from the adoption of the contract de commande of the medieval period. This was a system developed during the Middle Ages by which a merchant might entrust his goods to another to be used in trade and limit his liability to the amount entrusted.[18] This entrusting by a capitalist to an active managing agent is the origin of corporate protection. Each trading venture was an early counterpart of the "judicial person", and the capitalist incurred no liability beyond the amount so entrusted to the enterprize. In this respect, each voyage of a ship was considered a separate entity.

Limitation of shipowner's liability for tortious acts,

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[16]Putnam, supra note 6 at 1, 6.

[17]H. GROTIUS, DE JURE BELLI AC PACIS, Book 2 ch. 11, 13 (Campbell transl. 1901).

[18]The Rebecca, 20 Fed. Cases 373, 376 (No. 11, 619) (C.C.D. Me. 1831).

rather than contract obligations of the shipmaster, seems to have developed more rapidly as the spirit of decentralization of business activity increased. There developed the need to protect those who were willing to risk capital in ventures that would benefit the state, and the overriding concern was to encourage shipping in one way or another. Just as countries of the world today desire to possess basic industries, nations earlier believed that a strong seafaring tradition would yield both wealth and protection. Thus, Grotius, writing in De Jure Belli ac Pacis, was one of the strongest proponents of the public need for employing the limitation principle, contending that if owners were perpetually in fear of unlimited liability for the acts of their masters, it would be detrimental to society as a whole. The preamble to the first British limitation act also gives further indication of the importance of the principle of protecting maritime commerce:

> It is of the greatest consequence and importance to this kingdom to promote the increase in the number of ships and to prevent any discouragement to merchants and others from being interested and concerned therein.
>
> 7 Geo. III c 15 (1734)

France and the United States had similar statements of belief in the importance of the maritime industry in their early limitation laws.[19]

By the middle of the nineteenth century four distinct systems of limitation had developed. The English system limited the shipowner's liability to the value of a fund fixed on the basis of the ship's tonnage before the injury. Under this concept there was a continuing personal liability for the owner, but the claimant's recovery was limited to a maximum amount independent of the injuries suffered. The French system of limitation allowed personal responsibility to cease when the shipowner took the affirmative step of abandoning to the claimants his interest in the ship and freight.[20] German law made the ship subject to an in rem action ab initio, but did not hold the owner subject to any personal liability.[21] The

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[19]MASS. GEN LAWS, c. 122 §1-3(1823); MAINE REV. STAT., c. 14 §8-10(1822).

[20]This civil law concept was an outgrowth of the noxae deditio, HOLMES, supra note 15, at 30.

[21]While the status of Germany is questionable because of the political division of that nation, both France and Britain have accepted the 1957 Treaty. Singh, International Conventions of Merchant Shipping, 8 BRITISH SHIPPING LAWS 1064(1963).

American system provided that the liability of the shipowner would not exceed the value of the vessel following the occurrence that gave rise to liability.

B. The British System

Limitation of liability for shipowners was nonexistent in the ancient law of England. In The Volant, decided in 1842, it is recited that the law was formerly that the owners were bound to make good for any damage, even when that amount exceeded the value of their vessel and freight. The first act limiting liability was 7 Geo. III, c. 15 (1734), which protected the owner beyond the value of the ship and freight, but only in the case of loss of cargo by the fault of master and crew. Various modifications of this rule took place during the next 150 years. In 1813, the rule of limitation was extended to ordinary acts of negligence outside the privity of the owner. The owner's liability was personal and became fixed in case of collision at the value of the injuring ship at the moment before the occurrence.[22] While assuring their protection the rule encouraged ship-owmers to keep their vessels in marginal repair.[23] This fault was overcome with respect to death claims by the act of 1854,[24] which stated for the first time the concept of the fixed sum certain. The act provided that the injuring vessel was assumed to have a minimum value of 15 pounds sterling per registered ton.

The measuring of liability under the English rule by a fixed standard independent of the amount of damages has several critical features. The limitation statute allows protection to owners of British or foreign ships for liability occurring without their actual fault or "privity". The "privity" concept, however, is a wedge that the court may employ to open the door for unlimited liability to the owner in certain cases. This has happened in the area of products liability and is happening in admiralty law.[25] The extent of the opening is still to be ascertained.

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[22] See, Acts, 53 Geo. III, c. 159 (813).

[23] Putnam, supra note 6, at 13.

[24] Acts, 17&18 Vict., c. 184, §§504,505(1854). For a concise history of British maritime limitation law see, COLOMBOS, INTERNATIONAL LAW OF THE SEA, 352-55(1967).

[25] "Privity or knowledge" is one of the most fluid concepts in the Limitation Act solely dependent "on the facts of particular cases." Coryell v. Phipps, 317 U.S. 406,411(1943). Courts in the United States at least are more quick to find privity under the Act in regard to corporate shipowners, id. The earliest cases found privity only when high level officers had knowledge, however more recent cases have disallowed limitation when

The fund upon which a British recovery is based consists of an arbitrary assignment of a value per ton of a ship's registered tonnage, plus or minus certain small variable factors, such as crew space and the engine compartment. The underlying thought behind this system can be analogized to domestic workmen's compensation in that it was not expected to allow all damaged parties full recovery, but some recovery was available to all. Also, since the size of the liability fund is determined by tonnage before any accident, the liability fund is wholly independent of any circumstances surrounding the accident. It will be seen that under the American system the injured parties prospects of any recovery are dependent on the survival of the offending vessel. The British plan, therefore, assures that there will be recovery of at least some amount, and at the same time it provides that all shipowners have a definite amount of liability which can be adequately insured against.

Two possible disadvantages to the British system are at once apparent. First, in times of steady inflation the amount fixed per ton soon becomes unrealistically small.[26] Second, the system fails to discriminate between classifications of vessels. While large passenger ships and oil tankers are likely to do more damage in a single accident than a standard commercial transport vessel, all vessels are treated the same way. When a relatively small vessel causes great damage, recovery is inadequate. Meanwhile, owners of larger vessels carry an unduly large insurance burden.

The fixed fund system has continued to be the dominant factor in Britain's position toward maritime limitation of liability down to the present day.[27] It also has been adopted

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supervisory personnel or even non-supervisory personnel had knowledge of facts that would impute knowledge to the owners. See, Note, 68 YALE L. J. 1676, 1688, n. 84(1959). That same Note indicates that the doctrine of privity has been treated more narrowly in Great Britain, at 1686. In a recent case a District Court judge went so far as to declare that the forseeability of disaster by a ship's master could give the owner "knowledge" within the meaning of the Limitation Act. "The Master could and reasonably should have foreseen and anticipated the danger of a disasterous fire, with the possibility of explosion, in failing to prevent smoking in the pressence . . . [of a highly volatile fertilizer substance]." (Emphasis by the court) Petition of Republic of France, 171 F. Supp. 497, 508 (S.D. Tex. 1959). The appellate court in rather ambiguous language did not follow the lower court's extension of the privity concept as the decision was reversed. Republic of France v. United States, 290 F.2d 395 (5th Cir. 1961).

[26]1962 Hearings, supra note 3, at 19, 77 137ff.

as the latest proposal toward an international rule in the Brussels Convention of 1957.

C. The French System

The Ordonnance de la Marine of Louis XIV compiled under direction of Colbert and published in 1681, was truly the precursor of the continental approach toward maritime liability limitation. Its far reaching influence is illustrated by the fact that the Ordonnance was incorporated into the maritime codes of France, The Netherlands, Belgium, Italy, Russia, Spain, Portugal, Brazil, Argentina and Chile with little or no modification and it had a large influence on the German code.[28]

A conflict has arisen as to the exact scope of the limitation under the Ordonnance. Some commentators believe that the owner was protected only for the negligence of the shipmaster, stressing that the source of the French concept was the noxae deditio. Others say that because of the developments of the Middle Ages all actions ex contractu of the master were also to be covered. The wording of the statute is ambiguous.

> II. The owners of ships shall be answerable for the deeds of the master; but shall be discharged [by] abandoning their ship and freight.

Intricate rules were developed as to the actual abandonment. These were particularly concerned with the type of title that was transferred and the time within which the owner could relieve his liability by abandonment.[29]

The French, however, faced increasing contraction of their merchant marine with broader limitation provisions, until finally the legislature relieved shipowners from liability for all acts of the master in 1841. An interesting comment as to why such strict limitation was adopted in France, when at the same time much more restrictive provisions existed in American and British law, is found in this statement: ". . . [a] certain protection was necessary to the more timid and less adventurous character

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[27]The Merchant Shipping Act, 57&58 Vict., c. 60, §§§. 503, 504(1894), also, for further changes in the Act, See, Merchant Shipping (Liability of Shipowners and others) Act, 63&64 Vict., c. 32, §. 2(1900), Merchant Shipping Act of 1906, 6 Edw. VII, c. 48, §§. 69-71(1906), Act, 11&12 Geo. V, c. 28, §. 1(1921), Merchant Shipping Act of 1958, 6&7 Eliz. II, c. 62(1958).

[28]The Main v. Williams, 152 U.S. 122, (1894).

[29]See, Putnam, supra note 6, at 8-10, for a statement on the development of French law of maritime liability limitation in regard to abandon, time of making, and the title transfered.

of our [the French] merchants; that each nation had special tendencies and a particular genius which prudent legislators should take account of."[30] The French in 1935, adopted the 1925 International Convention of Limitation of Liability for Shipowners.[31] This convention was an unfortuante mixture of concepts that limited a shipowner's liability much too severely. It provided that in no case could liability exceed a fixed sum based on a value per ton of the ship, and at the same time that the owner's liability could be limited to nothing if the vessel sank. This Convention never gained widespread acceptance, but was adopted by France because it conformed to her stringent limitation policy. In 1959, the French adopted the 1957 Brussels Convention on the same subject.[32] The later convention, as noted above, was closely patterned after the British limitation policy of a fixed fund.

D. The German System

While the German approach to limitation was similar to the French, it differed in one significant aspect: the owner was never held personally liable for injuries caused by his ship.[33] Rather, the injured party had to bring an *in rem* action against the vessel. In the French system the abandonment of the vessel was a condition precedent to the owner's limitation of personal liability, whereas in the German system, the abandonment was not a condition but merely a consequence.[34]

The extent to which other countries have followed German law in this significant difference is not agreed upon. One author suggests that Norway, Sweden, and Denmark have followed the German system. However, the Maritime Law Association of the United States refutes this proposition.[35] In any event these three nations did adopt the Brussels Convention of 1924.

The current status of German law on the subject is somewhat unclear. Germany participated in the Brussels Convention

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[30] *Id.*, at 10.

[31] British Shipping Laws, *supra* note 21, at 1064.

[32] *Id.*

[33] Sprague, *supra* note 6, at 571, citing SIEVEKING, THE GERMAN LAW OF THE SEA, 86.

[34] Sprague, *id.* at 571, also Putnam, *supra* note 6, 10, 11.

[35] Putnam, *supra* note 6, suggests that Norway, Sweden and Denmark followed the German system. The Maritime Law Association of the United States refutes this, Document 196, 1058, 1935 Hearings, *supra* note 8, at 236. The three nations did adopt the Brussels Convention of 1924, British Shipping Laws, *supra* note 21, at 1058.

of 1924, but never signed that treaty.[36] West Germany signed the 1957 Convention but has not yet ratified the treaty.[37] The state of East German law is difficult to determine because of the political division of Germany.

III. The United States System

A. History

Like British law, the early law concerning maritime limitation of liability for shipowners in the United States provided for no limitation. This situation continued until 1848 when the Lexington case forcefully brought home to shipowners the extent of their possible liability.[38] The early statutes of Massachusetts and Maine show that the American seafaring states were well aware of the hazard to shipowners. The bill enacted in March of 1851, was primarily designed to put United States owners on the same footing as British shipowners.[39] The legislators, while recognizing the rights of injured parties, were more concerned with protecting America's infant seafaring industry.

The Bill was a composite of the earlier colonial statutes on the subject and the even earlier British Law.[40] Section one of the bill was commonly known as the "Fire Statute", because it completely protected the owner from liability if his ship and cargo were consumed by fire. Section two concerned the shipment of valuable items such as gold or silver and contained the stipulation that unless their shipment was disclosed in a manifest or bill of lading, the owner was completely free from liability. Section three is the most relevant because it is the basis of present day American law on the subject:

> And be it further enacted, that the liability of the owner or owners of any ship or vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of

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[36] British Shipping Laws, supra note 21, at 1050, 1057.

[37] Id. at 1064. West Germany has not as yet ratified the treaty, but did sign the treaty. Further, it is doubtful that that signature alone would amount to self-ratification because of the narrow scope of such instances under the Basic Law of the German Federal Republic, Article 59.

[38] Supra note 7.

[39] 1935 Hearings, supra note 8, at 7.

[40] See, Act of March 3, 1851, 31st Cong., ch. 43, Stat. 635.

the interest of such owner or owners, respectively, in such ship or vessel and the frieght then pending.

Section four added that if the value remaining was insufficient to meet all claims against the owner, he could discharge his obligation by making a pro-rata distribution to the parties, or by turning over his interest in the vessel to a competent trustee for the claimants. Section five extended the privilege of limitation of liability to charter parties who "man, victual and navigate" the vessel, essentially as an owner would.[41]

While the statute covered other details of the limitation situation, notably that the liability of the master was not limited, it was the first five sections that articulated the fundamentals of American maritime limitation of liability. First, owners could invoke the limitation principle only if they could first show lack of privity to the incident giving rise to the damages. Second, the amount recoverable by injured parties was strictly construed to be limited to the value of the vessel. Third, discharge of all personal claims against the owner could be achieved by a pro-rata distribution of the value of his ship following the incident. The enactment of this statute represented an adoption by the United States of a hybrid of the continental and British limitation principles. That was the closest point ever reached toward achieving an international norm; since then only divergence in the systems has taken place.

B. Court Interpretations of American Limitation Law

In the years immediately following the passage of the 1851 Act the courts of this country were guided by one major premise concerning the legislation: that protection of the shipping industry was essential.[42] In the case of Norwich Co. v. Wright[43] the Supreme Court defined the terms of the third section of the Act; ". . . shall in no case exceed the amount or value of the interest of such owner . . . in such vessel," to mean that the owner's liability was measured according to the value of the vessel following the accident. The Court, therefore, construed the limitation principle more strictly than the British statute

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[41]The modern term to describe such a charter would be a, "Bareboat Charter".

[42]Eyer, Shipowner's Limitation of Liability - New Directions for an Old Doctrine, 16 STAN. L. REV. 370, 374(1964). "The vagueness of the Limitation Act and its failure to provide intelligible guidelines for administration provided the setting for judicial lawmaking seldom equaled."

[43]80 U.S. 104(1871).

upon which its American counterpart was supposedly fashioned.[44] Under the comparable British law the level of possible liability was fixed at the value of the ship the moment before the occurrence, thus there would be some liability even if the vessel were a total wreck. The stricter limitation was a greater aid to the American shipowners because it often limited their liability to less than the amount of capital they had invested in the venture, if the vessel were destroyed in the accident the owner's liability was eliminated. Further protection was brought about by the Court in a later opinion, The City of Norwich,[45] where it was held that the owner's interest subject to the claims of the injured was exclusive of hull insurance. The Morro Castle case cited earlier illustrates a situation where four million dollars of insurance was available to the owners to cover their losses, yet liability to all claimants could have been limited to twenty thousand dollars because the vessel was a total wreck.[46] These cases demonstrated the courts' willingness to protect shipowners, but at the same

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[44]The valuation under the British statute of 1813, (53 Geo. III, c. 159) had been construed to be the value of the vessel, in the case of collision, at the moment before impact, Brown v. Wilkinson, 15 M&W 391, 153 Eng. Rep. 902, 903(1846). This was the law in effect when Hamlin, in the debates of Congress of 1851, said, "I desire to call the attention of the Senate to a singular point—this bill is predicated on what is now the British law." 20 Appendix, U.S. Cong. Globe 332, 31st Cong., 2nd Sess.(1851). At the time of the speaking of those words, the British statute of 1813, was the law to which Hamlin was refering. The Supreme Court of the United States in Norwich, id. adopted a position that clearly rejected the English court's interpretation in the Brown case at 903. The value of the vessel after collision is purely speculative at any previous point in time, and always diminished; thus, the Court more severely limited liability. But see, Eyer, supra note 47 at 374, the Court ". . . reject[ed] the more restrictive English law which Congress thought it was adopting." The reference of the courts in regard to the historical basis of limitation of liability in maritime matters seemingly has always followed the position of Judge Ware's analysis contained in the Rebecca, supra note 18, and this may account for its seeming disregard of British law principles on the subject. See also, Baer, "Down To The Seas Again," 40 N.C. L. REV. 377,398(1962).

[45]118 U.S. 468(1886).

[46]One of the most striking examples of the improper functioning of this phase of interpretation is seen in the case, The Princess Sophia, 61 F. 2d 339, 344-55 (9th Cir. 1932), cert. denied, 288 U.S. 604(1933). There existed only a $600 limitation fund available to cover all losses including 350

time they generated animosity sufficient to cause change in Congress.[47]

C. The Sirovich Amendment

In the hearings prior to the enactment of any modifications, the tone of those testifying was reminiscent of William Jennings Bryan's eulogies on the "cross of gold". Suddenly, those faults so long hidden in the seven sections of the Limitation Act were brought to light in the blazing heat of the Morro Castle.[48] The traveling public were going to be protected at least when they were killed or injured.[49] However, the initial bill was introduced by William Sirovich to create the funded sum certain system for all types of injuries as had been adopted in England in 1862.[50] The supporters of the Sirovich amendment argued that if the original purpose of the American legislation was to put United States owners on a parity with those in Great Britain, these changes were necessary in American law because of British legislative changes.[51] The main stimulus was, of course, the inequity of the old system.[52]

There were arguments against the adoption of the proposed amendment. The first of these was that it unfairly operated against poorer quality ships. The measure was designed to treat

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deaths, and the Court held that the City of Norwich, id. had settled the question of the disposition of insurance proceeds, at 354.

[47] See, 1935 Hearings, supra. note 8.

[48] Id. at 7, ". . . This administration is founded upon the fundamental concept of a 'new deal'. We have been the tragic victims of the old, rotten deal and raw deal. We have the merchantile marine operators who are coming here to us and asking for subsidies to help them. . . [T]he traveling public . . . are the ones who are paying the frieght; . . . in the name of everything that stands for liberality and freedom and tranquility. . ." Id. at 14.

[49] This is in reference to the fact that the $60 per ton fund which was established would only be used to increase liability if death or personal injury were involved.

[50] 1935 Hearings, supra note 8, at 1,2. In 1862, Britain repealed her prior law on the subject which established only a funded sum certain for death and personal injury claims, Act, 17&18 Vict., c. 104, §§ 504(1854), and substituted in its place legislation that gave for every ton of the ship, for the loss of life or personal injury 15 pounds sterling, and 8 pounds for ordinary collision damages, Act, 25&26 Vict., c. 63, §. 54(1862).

[51] 1935 Hearings, supra note 8, at 74,75.

[52] Id. at 48, 49.

both luxury liners and the "tramps" the same way, on a basis of tonnage rather than worth or number of passengers carried.[53] Second, it was submitted that the proposed changes in American law would not put the United States back on a parity with Britain but would in fact be much harsher on American owners.[54] Particularly in dispute was the increased opportunity of finding the owner privy to the master's negligence, thereby diminishing the owner's chances of limiting his liability. This arose from the phrase contained in section 181 of the amendment: "The privity or knowledge of the master of a vessel, or of the superintendent or managing agent of the owner or owners thereof, shall be deemed the privity or knowledge of the owner or owners of such vessel."[55] This would have provided a great expansion of the privity concept beyond the original act, where privity of the owner meant that some authority higher than the ship's master must have knowledge. These basic complaints regarding the proposed change in the law were embodied in a separate bill proposed by the American Steamship Owners' Association.[56]

Nonetheless, the furor created by the Morro Castle fire and the House Hearings resulted in certain changes in the law being made regarding death and personal injury claims. While retaining the previous limitation concept for all vessels, the legislation directed itself to the situation in which damages exceeded the amount available for distribution and which involved death or personal injury. The statute provided that then, and only then, a $60.00 per ton sum certain was available for distribution to such claimants injured on seagoing vessels.[57] The privity concept was also changed, but only in relation to the death and personal injury claims. In all other respects "privity" remained as it was.[58]

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[53] Id. at 15.

[54] Id. at 99.

[55] Id. at 2.

[56] Id. at 91 - 97, extensive discussion surrounding this proposal is found at pages 97ff of the Hearings.

[57] 49 Stat. 1479(1963), 46 U.S.C. §183(1958). The situation envisioned here is where the vessel is a total loss and according to the prior law the owner's liability would be non-existent; now, in regard to personal injury and death claims there would exist a fund to allow some recovery. While the limitation option is open to owners of all vessels the necessity of providing a $60 - per ton sum certain in case of personal injury or death is only required in relation to seagoing vessels. There is a clear dispute, however, in the situation where a seagoing vessel is operating on inland waters as to whether it remains a seagoing vessel.

[58] Id. These amendments altered other portions of the Act to some extent. Some restrictions were raised on the right to limit liability and there was a requirement for separate limitation funds for each "distinct occasion".

This is the present state of American statutory law. While British law has attempted to remain somewhat current by raising the amount available in the limitation funds, there has been no parallel effort in United States legislation.[59] Except in death and personal injury actions, which are governed by the Sirovich amendment adopted in 1935, the standards of liability with which today's courts must deal are those established in the 19th century. The courts reiterate the maxium that the act must be liberally construed, yet there are signs that they grow tired of defending such miniscule recoveries.[60] American judges are now moving in an uncharted area while softening the harshness of the law and narrowing its broad sweep. This change can be seen in the reasoning of the case In Re Independent Towing Company,[61] where shipowners' limitation of liability was denied to an insurance carrier under a state's direct action statute.[62]

> Also to be considered is the noticeable trend against the principle of limitation itself. In the recent case of In re Petition of the A. C. Dodge, Inc., 282 F. 2d 86 (2d Cir. 1960), this trend was clearly reflected. . . .: 'However, we think that ambiguous language in statutory provisions relating to limitation of liability should be resolved in favor of interpretations increasing the instances where full recoveries from the limiting vessel are possible.'

As in the law of products liability the inroads of judge-made maritime law are beginning to be felt. Even similar terms such as implied, or express warranties, and a readiness to find "privity", are present.[63]

D. United States Choice-of-Law Rule

The Unites States' concept of conflicts law in this field

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[59]British modifications and upward revisions of the per ton value can be seen throughout the statutes cited in note 27 supra.

[60]See, note 42 supra.

[61]242 F. Supp. 950, 955 (E.D. La. 1965).

[62]See, Note, Direct Action Against Marine Insurer - Unavailability of Limitation of Shipowner's Liability As a Defense, 40 TUL. L. REV. 150(1965).

[63]"These judicial developments include (1) the 'personal contract' doctrine whereby a shipowner is held fully liable to charterers for breach of express or implied warranties; (2) higher standards of care; (3) a readiness to find 'privity or knowledge'; (4) the requirement that the owner prove lack of 'privity or knowledge'; and (5) the preservation of claimants' rights at common law . . ." Eyer, supra note 47, at 377, 378.

is detrimental because it draws many cases under the American principle of limitation that could be more properly decided on the basis of another system. The way was opened for applying the American limitation of liability law to owners of foreign vessels by the United States Supreme Court in the case of The Scotland, in 1881.[64] In 1935, this modification of the original Act of 1851, was adopted by Congress by adding to the Act that the provisions limiting liability were open to the owners of ships "whether American or foreign".[65] United States choice-of-law decisions still hold that the forum's law applies to limitation of shipowner's liability, while foreign substantive law may apply to all other aspects of the case. Not only is the difference between substance and procedure often difficult to ascertain, but the application of such a mechanical rule is incorrect when it always leads to one result when justice demands another. Authorities in the field feel that limitation of liability should be applied as a part of the substantive law of the locus delecti, or upon other even more reasonable bases such as relevant contacts.[66]

The case which is cited as stating the current American choice-of-law rule is Oceanic Navigation Company v. Mellor.[67] There, in a situation involving the liability of a British shipowner for acts of negligence done to a British national on the high seas aboard a British flagship, Mr. Justice Holmes ruled that the American limitation law should apply. In arriving at this controversial opinion, he merely said,

> It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose.[68]

Holmes's position has been interpreted as a strengthening of the meaningless substance-procedure dichotomy; and although this dichotomy has been increasingly criticized as a choice-of-

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[64] See, The Scotland, 105 U.S. 24(1881); 49 Stat. 960(1935), 46 U.S.C. § 183 (1958).

[65] Id.

[66] Extensive articles have been written on this facet alone of the maritime limitation concept. See, Comment, 17 U. CHI. L. REV. 388, 393 (1950), Knouth, 49 COLUM. L. REV. 1(1949), Note, Limitation of Shipowner's Liability in American Courts, 78 U. PA. L. REV. 393, 400 (1930).

[67] 233 U.S. 730 (1913).

[68] Id. at 732. See, for discussion of Titanic case 17 U. CHI. L. REV. at 393 supra note 71.

law rule,[69] it has been followed consistently. In the Western Farmer,[70] which involved a collision in the English Channel of an American vessel and a Norwegian vessel, where the suit was brought by a German corporate owner of lost cargo, Judge Learned Hand said: "It is necessary to say no more than that the Titanic [Oceanic Navigation case, citation omitted]. . . finally settled it for us that such statutes are part of the remedy, and that the law of the forum applies."[71]

E. United States Law of Damage Division

One further distinctive feature of American maritime law regarding shipowner liability relates to the law of damage division. The basic United States position on assessing damages between two vessels involved in a collision, where each has been guilty of contributing fault,[72] is that each vessel is assessed one-half of the combined damages. The degree of culpability of one party is of no consequence in apportioning damages. This concept was first recognized in the United States in the 1858 case of the Schooner Catherine v. Dickinson.[73]

This doctrine has been subjected to much criticism because it protects the wrong party in many circumstances. It does not require much imagination to realize that in many instances one vessel may be guilty of a greater degree of fault than the other, and yet damages are shared. In the case of N. M. Patterson & Sons,

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[69]Comment, "Maritime Limitations of Liability: a Study in Conflicts of Laws," 1962 DUKE L. J. 259, 266, 267 (1962).

[70]210 F.2d 754 (2d Cir. 1954).

[71]Id. at 757. But see, Comment, supra note 69 at 265, where the author in discussing a Supreme Court case later in time than the Titanic, supra note 74, Black Diamond S.S. Co. v. Robert Stewart & Sons, (The Norwalk Victory), 336 U.S. 386 (1949), suggests that that case by inference may have modified the Titanic, "drawn from dictum and implications of the Norwalk Victory that in an appropriate situation for application of foreign substantive law, a foreign limitation of liability will be applied if the creating state considers it substantive, absent compelling policy reasons to the contrary." This has not yet occured, and the Western Farmer, did not even consider the modification, note 75.

[72]"Fault" in this sense under maritime doctrines is considered to be an actionable tortious act or ommission. Such an occurrence as is described above is referred to as a "mutual fault" collision.

[73]58 U.S. 171(1854). See, the case of The Sapphire, 85 U.S. 51(1873), where it is set out at 56, "It is undoubtably the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggragate divided between the two. . . . If one in fault has

Ltd. v. City of Chicago,[74] a district court went so far as to say that the Supreme Court did not really mean in the Sapphire case that damages were to be divided equally in situations where the degrees of fault were grossly disproportionate, but the case was reversed on appeal.[75] The appellate court there found that the lower court's basic misconception was that the term "mutual fault" was interpreted to mean "equal fault". The court stated, ". . . the rule [equal division of damages] prevails in all cases where there is mutual fault, even though one of the vessels may have been much more in fault than the other."[76]

The English, from whom America adopted the equal division doctrine, discarded it in 1913, and substituted for it the doctrine of comparative negligence. Now courts in the United States are growing restless under the equal division doctrine, much as they are in the general area of limitation of liability. Judge Learned Hand wrote,

> If we were free to choose, we might well agree at least to the law of proportional fault. That has now become the rule in collisions in most civilized countries; and it is becoming more and more in general use in torts of negligence ashore. It responds to the feeling of most people that it us just that lapses from the care that a situation demands may be of different moral quality, and should have different consequences.[77]

What Judge Hand was referring to as the "rule in most civilized countries" was the Brussels International Convention of 1910. Articles 2-4 provide a uniform standard that has been accepted throughout the world. Although the United States was present at the Convention, it stands almost alone in having refused to accept the measures there adopted.[78]

Generally, therefore, American law in the field of limitation of maritime liability can be criticized on two fronts. First, the law is out of step with the times, and second, the law is out of step with that of the world community. Refinements in the law have been made by other nations since 1851, and most of these refinements have been reflected in international conventions

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sustained no injury, it is liable for half the damages sustained by the other, though that other was also at fault. . . ."

[74]209 F. Supp. 576 (N.D. Ill. 1960).

[75]324 F.2d 254 (7th Cir. 1963), citing The Atlas, 93 U.S. 302 (1876).

[76]Id. at 257 (emphasis by the court).

[77]The Western Farmer, 210 F.2d 754, 757 (2d Cir. 1954).

[78]BRITISH SHIPPING LAWS, supra note 21, at 1050, 1051.

which the United States has not signed. The problems which the United States faces in relation to maritime limitation law are not unique. Other nations in working toward their solutions have been much more ready to cooperate with each other. This is perhaps one major reason why the United States currently seems to be in such an unsound position. While most of the world's seafaring nations have been active in the series of Brussels conventions the United States action has been notably restrained.

IV. International Conventions

The historical lack of international uniformity in maritime limitation practice is readily apparent. This want of uniformity was so obviously unsound that the International Maritime Committee was developed in 1897 with the official support of the Belgian government. It consisted principally of jurists with a knowledge of maritime affairs, most of whom were from the major seafaring nations of the world. Their goal was to represent the interests of the shipping industry, cargo owners, the traveling public and underwriters.[79] Their work has resulted in a series of conventions covering a broad spectrum of international seafaring problems. The first convention concerning the present topic occurred in 1910, and dealt with the subject of collisions. The latest was in May, 1962, dealing with the "liability of Operators of Nuclear Ships".[80]

A. The 1910 Convention

Article Four of the International Convention for Unification of Certain Rules of Law With Respect to Collisions Between Vessels, signed at Brussels, September 23, 1910, was of major significance.[81] That section concerned itself with the proportionate fault rule in the situation previously described as a "both to blame" collision of vessels. The Convention adopted the position previously relied on in England and the Continent: that the liability of each ship was governed by the degree of fault of each vessel. The thought was that this position was clearly the majority view on the subject and, therefore, the treaty would be a first step toward uniformity in international maritime matters. Uniformity was important because it discouraged forum shopping, increased certainty of result in a confused area of the law, and made judicial administration simpler in the increasing number of disputes with international elements. The drafters of the con-

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[79] COLOMBOS, supra note 24, at 354.

[80] BRITISH SHIPPING LAWS, supra note 21, at 1071-1079.

[81] Id. at 1048.

vention were correct to the extent that the treaty received almost unanimous support from the nations of the world, with the notable exception of the United States.[82] As of today, the Convention of 1910 has been ratified or acceded to by over fifty nations, including all of the major maritime powers except the United States.[83]

The reason the American position has been so arbitrary may not be thoroughly understood unless the whole perspective of United States maritime law is considered. The limited reformation of limitation laws in 1936 did not treat the subject of proportionate fault with so much as a comment. The reason then may have been the legislators' preoccupation with the specter of the Morro Castle. Recently, however, as in the 1962 and 1963 Hearings, the position of proportionate fault has become more popular.[84]

The basic lines of disagreement have been drawn between the cargo owners who favor the present law and the ship owners[85] who favor adopting the principles of the 1910 Convention. The cargo interests oppose any change because of the unique advantage which they presently hold under American law. In the typical collision, because of Federal legislation, cargo owners cannot recover directly from the carrying vessel for damages due to the errors of that ship; however, they can recover in full from the non-carrying ship if she is even partly at fault.[86] The non-carrying ship then recoups half its payment to the cargo owner from the carrying ship in a mutual fault situation because of the American principle of damage division. Therefore, the cargo interests are permitted to do indirectly what they cannot, by the express declaration of Congress, do directly.[87]

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[82] Id. at 1050, 1051.

[83] Id.

[84] Senate bill 2313 discussed in the 1962 Hearings and number 555 in the 1963 Hearings both substantially adopt the Brussels Convention of 1910.

[85] Realistically speaking it must be noted that the real controversy is most often between the insurers of these two separate branches of the industry.

[86] 1963 Hearings supra note 3, 25 65. The prohibition against cargo recovering from its carrying vessel is found in the Harter Act 27 Stat. 445, c. 105 (1893), 46 U.S.C. 192. "If the owner of any vessel transporting merchandise. . .shall exercise due diligence to make the vessel in all respects seaworthy. . . neither the vessel, her owner or owners,. . .shall become or be held responsible for damages or loss. . . ."

[87] See, Harter Act, id. Carriage of Goods by Sea Act §4(2) (1936), cited in 1963 Hearings, supra., note 3, at 65, "'Neither the carrier nor the ship shall be responsible for loss or damage (to its cargo) arising or resulting from- (an) act, neglect or default of the master, mariner, pilot or the servants of the carrier. . . .'"

"The anomaly is sharpened by the fact that, if it [the carrying ship] alone had been negligent, it would have paid nothing on account of its own cargo, for that cargo would have had nobody to sue."[88] The cargo owner, of course, is always able to collect from his underwriter, so the only real loss is suffered by that insurance carrier. In foreign jurisdictions which have adopted the proportionate fault rule under the 1910 Convention, the cargo owner who utilizes such vessels cannot collect from the carrying vessel, and can collect from the non-carrying vessel only to the extent she is at fault.[89]

A further argument against adopting the 1910 Convention is that the courts in the United States are hesitant and untried at using such an unfamiliar concept which arguably is not even popular in British courts.[90] At least some courts in the United States have expressed the opposite opinion, speaking in such terms as our ". . .obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. . ."[91] As for the inexperience of American courts in handling the proportionate fault rule, this objection must also seemingly fail, because it has already been applied in United States maritime law as comparative negligence, ". . .in litigation involving death and injury cases under the general maritime law of torts and unseaworthiness, as well as under the Death on the High Seas Act (46 U.S.C. 766) and the Jones Act (46 U.S.C. 688)."[92]

In spite of the great advantage of international uniformity that militates strongly toward adopting the 1910 Convention, such an accession by the United States would pose problems. It is argued that the legislation seeking to enact the 1910 Convention into American law defines liability in terms of fault.[93] While in certain instances the word might mean something other than negligence, it would be quite possible to equate fault with negligence under the proposed legislation. In that case, the argument continues, the shipowner's warranty of seaworthiness, which presently operates without the necessity of showing negligence,[94] would be destroyed. With this destruction, one of the area's most effective remedies against the owner would be lost, particularly with respect to sea-

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[88] GILMORE & BLACK, ADMIRALTY 153 (1957).

[89] 1963 Hearings, supra note 3, at 65.

[90] 1962 Hearings, supra note 3, at 229. Other faults with the 1910 Convention are detailed, id., at 228-238.

[91] National Bulk Carriers, Inc. v. United States of America, 183 F.2d 405, 410 (2d Cir. 1950).

[92] 1963 Hearings, supra note 2, at 13.

[93] Id.

[94] GILMORE & BLACK, supra note 88, at 58,59. Seaworthiness relates to the condition in which an owner must maintain his vessel. A finding of unseaworthiness. . .

men.[95] Finally, the 1910 Convention and its American version impose a two year statute of limitations that conflicts with the present three year statute under the Jones Act,[96] or the rule of laches otherwise now in effect.

While it is impossible to pinpoint the reason for its failure, the bill seeking to adopt the Brussels Convention of 1910 was never reported out of Senate committee in 1962 or 1963.[97] One reason for the failure of this subcommittee to report the bill out can be attributed to the opposing factions that represented the shipping companies and the cargo-plaintiff group at the Hearings in 1962 and 1963.[98] These two groups had been meeting for months, attempting to hammer out a reasonable compromise, but the negotiations finally broke down. The irreconcilability of their positions is reflected in this statement: "We have reached no conclusion and agreement with anybody on the subject matter. We met for a period of 4 months. . .and we reached no basic agreement on any point."[99] Apparently, with such a split of opinion between the parties involved, the committee was unwilling to step into the breach and propose any measure at all. In 1963, there was no public outcry to revise the law and this as much as anything else led to its defeat.

B. The 1924 Convention

The 1924 Brussels Convention--the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels--attempted compromise on an international scale. It was an effort to combine the British concept of sum certain and the American doctrine

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[95]"is essentially a species of liability without fault, analogous to well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . ." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1945).

[96]1962 Hearings, supra note 3, at 161.

[97]Those who are perplexed as to why the alternative route of simply seeking the "advice and consent" of the Senate and ratifying the Convention was not followed, will be answered by saying that that attempt failed also. "The Brussels Collision Convention of 1910 was signed by the four American delegates. It was not sent to the Senate for its advice and consent until 1937. It was favorably reported by the Committee on Foreign Relations in 1939, with reservations, but the Senate did not act. The Convention was returned to the President in 1947 without having been acted upon." 1963 Hearings, supra note 3, at 132.

[98]Id. at 162, 163.

[99]Id.

of limitation of the owners liability to the value of the vessel following the accident. In doing so the Convention adopted the worst element of both plans. 1924 Brussels Convention reads:

> Art. 1
> The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel. . .in respect of;
>
> (1) Compensation due to third parties by reason of damage caused by collision. . . .
>
> Art. 3
> . . .The value of the vessel shall be based upon the condition of the vessel at the. . .time of her arrival at that first port [reached after the collision].
>
> Art. 1
> . . .Provided that,. . .the liability. . .shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.[100]

In effect the convention removed the sum certain concept, since if the ship were lost there would be no liability, and used the 8 pounds as an upper limit on the injured parties' possible recovery if the ship survived. At least under the American system, if the vessel survived basically intact, the claimants were usually adequately protected.

There was never any widespread acceptance of the treaty by the major seafaring nations of the world. France was the largest maritime power to accept it, but few of those nations normally following the French did so in regard to the 1924 Convention.[101] Britain continued to follow the sum certain system, and in the United States only brief mention was made of the Treaty in the 1935 Congressional Hearings.[102] Clearly this Treaty had major faults, e.g., its failure to protect the injured parties, but

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[100] BRITISH SHIPPING LAWS, supra, note 21, at 1052, 1053.

[101] Id. at 1058.

[102] For the caustic comments of Mr. William Sirovitch on this convention see, 1935 Hearings, supra note 8, at 103,104. The 1924 Convention was cited by the shipowner interests as the exterme to which they would not attempt to push Congress. It represented the maximum gain for them that they were willing to forego to see legislation enacted that would put a much higher, but still very limited, ceiling on their possible liability. Id. at 101-106.

the events of that period were partly responsible. Inflation was rampant on a world-wide basis, and as never before big business rather than the individual was the dominant interest of society. Soon after the Treaty's proposal came the great depression; political and economic leaders turned inward to solve the crisis, and this convention on shipowner's liability was forgotten.

C. The 1957 Convention

Following World War II there was a resurgence of internationalism. This was reflected in the development of the United Nations and other international economic and social organizations. The co-operative effort of the Brussel's Conference was likewise spurred into action, this time at the behest of the International Maritime Committee at Brighton, England.[103] Following a conference at Madrid in 1955, the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships was adopted.[104] The agreement reached by that Convention represented the results of over half a century of efforts by maritime nations to resolve the conflicting elements of their liability provisions in regard to shipowners. New elements were contained in the Treaty, but in effect it was an adoption of the British principle of a sum certain.

The articles of major significance of this Treaty were made part of the proposed legislation brought up before the 1962 and 1963 Congressional Hearings.[105] The effort was apparently made to avoid bringing the Convention to the Senate for its advice and consent because of the requirement of a two-thirds majority.[106]

By the Treaty and the American legislative versions of it, S. 2314 (1962) and S. 556(1963), limitation is extended to all personal injury, death, or property claims arising on shipboard or in connected land injuries. There is no limitation provision for contract claims of the owner, either to the crew or third parties.[107] The Convention established a fund approach for all types of injury along the lines of British law. The

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[103] 1962 Hearings, supra note 3, at 55.

[104] Id. Done at Brussels, on October 10, 1957. See, for text of treaty, British Shipping Laws, supra note 21, at 1058-1064.

[105] Compare text of Treaty id. with the proposed legislation; S. 2314 1962 Hearings, supra note 2, at 2-6, S. 556, 1963 Hearings, supra note 2, at 2-6.

[106] Id. at 12.

[107] 1962 Hearings, supra note 2, at 81, 82.

values set out are $67.00 per ship's ton for property claims, and $140.00 per ship's ton for personal injury and death claims. The amount which is set aside for personal injury and death is to be used exclusively for that purpose, and if all such claims are not paid off, the claimants will then share the $67.00 per ton fund with the property claims on a ratable basis.[108] Furthermore, limitation privileges are extended to a broader range of charter parties, giving a protection that is hardly needed.[109]

To avoid the multiplicity of suits that have hindered shipowners, the fund which must be established by the owner under the Convention may be deposited in any of the adhering nations.[110] Under the 1957 Convention as reflected in the proposed American law an owner could not be forced to set up funds in more than one location if he chose to deposit the original sum in: the port where the accidents occurred; in the first port of call after the accident; or at the port of disembarkation for persons or cargo claiming damage.[111]

The United States thus far has rejected the 1957 Convention and has continued to follow its domestic law. Following the Madrid meeting in 1955, a position paper was prepared by the United States government in conjunction with the Maritime Law Association to articulate the goals of the American delegation at Brussels.[112] First, the United States opposed allowing the shipowner to make any choice of forum. It was thought that this would work an undue hardship on American claimants. Second, it was objected that Article 1 of the proposed 1957 Convention would change the burden of proof regarding privity of the owner. The government favored the present rule that the owner must carry the burden. Third, the paper argued that the limitation amount was too low and that it discriminated against the older, less valuable ships, since the liability was to be measured in every case on tonnage alone. Fourth, the attempt to force acceptance of the treaty by allowing signatory states to disregard any limitation in regard to ships of non-signatory powers was protested as being against the principle of international comity. Last, the expansion of

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[108] S. REP. NO. 1602, 87th Cong., 2d Sess. 7 (1962).

[109] Eyer, supra note 42, at 384.

[110] British Shipping Laws, supra note 26, at 1062. But see Note, 68 YALE L. J. 1676, 1683 (1959); the convention does not preclude litigation in multiple nations.

[111] 1963 Hearings, supra note 2, at 44, 48, 52.

[112] 1963 Hearings, supra note 2, at 115. But see Id. at 50-61. For text of position paper see Id. 81.

limitation availablilty to masters and a broader range of charter parties seemed objectionable.

The opponents of the enacting legislation in the United States often referred to the fact that none of the American points were acceded to at the Brussels Convention.[113] Particularly, the provision allowing the shipowner to choose the forum was attacked as unfiar to claimants. It was argued that the added expense and difficulty in obtaining foreign counsel could in many instances effectively bar any recovery. The United States courts, however, could protect the rights of such a claimant if they concluded that the place where the fund was deposited made it not "actually available"; of course, this would depend on judicial interpretation in each instance. The argument advanced that there might be a devaluation of the fund deposited in a foreign country[114] is also met to a certain extent by the American courts' right to determine the availability. Nonetheless, the procedures involved in dealing with a foreign fund in foreign courts would be more costly and time consuming to American claimants.[115]

The fear was expressed about the 1957 Convention, as it had been about the 1910 Convention, that the adoption of the British phraseology concerning privity would cause adverse restriction of the American seaworthiness doctrine.[116] This would be particularly true in regard to seamen who are turning in ever increasing numbers to this doctrine for their recoveries.[117] Present law refers to the privity of the owner, but the proposed statute refers to "the actual fault or privity".[118] Therefore, the opponents of the measure say that it is not inconceivable that the courts might give a more narrow construction to the words "privity plus" which would allow the owner to limit his liability more easily.[119]

Finally, it was suggested that the 1957 Convention is not even the uniform international standard that its proponents claim it to be.[120] At the time of this assertion only Canada and Great Britain had adopted it, but today the statement is no less relevant. The United States herself has proposed a variation of the 1957 Convention in the law that seeks to enact it. This

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[113] Id. at 81, 151.
[114] Id. at 78,79.
[115] Id. at 44,48.
[116] Id. at 158.
[117] Comment, 2 VANDERBILT INTERNATIONAL 59, 62 (1969).
[118] 1963 Hearings, supra note 3, at 5.
[119] Id. at 158.
[120] Id. at 94.

modification makes it explicit that insurors have the right to limit their liability as would the shipowners they represent.[121] In the United States this would constitute a federal overruling of several of the states' direct action statutes which deprive the underwriters of the limitation benefit.[122] On the international scene this would provide but one example of how the Convention is shaped to meet each nation's specific needs at the expense of uniformity. Most of the nations of the world are waiting to see if the large maritime countries accept a uniform convention. Therefore the United States is in a very important position. If she adopts the whole Convention it will hasten the development of an international norm, but the question is relevant: should this be done in the face of the apparent defects contained in the articles of the 1957 Convention?

Proponents of the Convention seem to present the same reasons for its enactment as were offered for the 1910 Convention. This is not to say they are not valid or persuasive. Adoption of the Convention would give the American shipping industry the same advantages already held by the industry of foreign nations. The changes espoused by the Convention would rectify the presently inequitable American system, and American ratification of the Convention would help bring about international maritime uniformity. Would, however, the Convention solve all the problems of American or international shipping disasters? That is very doubtful at best. New legislation would necessitate a whole series of new court interpretations that would keep the several nations still widely divergent, and the Convention in its terms of limitation would at best be a stopgap measure. No new method of determining a reasonably flexible method of limitation has been developed and the fixed amounts of the fund would soon be out of date and unreasonably low. Finally, the spirit of unlimited liability is too strong to allow the 1957 Convention to be accepted as it is.

This last point is demonstrated by observing two areas of special importance which exist in international maritime law today: nuclear ships and oil pollution. The Brussels Convention of 1962 concerning the Liability of Operators of Nuclear Ships[123] holds to a very strict liability for owners. Upon proof of nuclear damage of any sort caused by the nuclear characteristics of his ship, the owner is held absolutely liable for the damage. No fault of the operator need be shown, and no set-offs are allowed. The only defense available to a defendant is that the claimant intentionally brought about the accident. Further,

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[121] 1963 Hearings, supra note 3, at 5 (§8b).

[122] See materials cited note 67, supra.

[123] British Shipping Laws, supra note 21, at 1071.

the Convention does not exclude liability brought about by forms of force majeure. Likewise in the area of oil pollution,[124] the 1954 Convention for the Prevention of the Pollution of the Sea by Oil imposes strict rules for the dumping of wastes and severe penalties for their violation by accident or otherwise.[125] The United States has adopted this latter Convention and has been deeply involved in legislation of its own to protect the water from pollution.[126] Presently, there are indications that there are those in the Department of State who wish to see the owners' liability extended even further.[127]

V. Conclusion

The foregoing discussion indicates that some changes must be made in United States law, whether by legislation or convention. The trend is clearly away from limitation and it is difficult to believe that the 1957 Convention can be adopted intact. It is no longer feasible to speak in terms of limiting liability to a fixed standard. What must be developed is a flexibility that takes into account the type of ship involved and the degree of damage she can generate. This can be expedited to a large extent by the underwriters' working in a close accord with the ship owners and claimant representatives. The industry and its insurors seem peculiarly fixed in the fantasies of another era, as they play the game according to rules that seem unchanging, while their world crumbles around them.

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[124]The threat of oil pollution and the damage it causes is increasing. Each year, more than 700 million tons of petroleum are carried over the seas and while the pre-World War II tankers had a capacity of 15,000 tons, the modern ones being build today, such as the Idemitsu Maru, are close to 300,000 tons. Some ships being planned or having their keels presently laid will be well over 500,000 tons. The possibility of these ships becoming involved in maritime disaster is ever present, as was evidenced by the Torrey Canyon; the damages that are produced are catastrophic and the entire ecology of the water may be upset by the introduction of large quantities of oil.

[125]Temperly, 11 British Shipping Laws, 1692-1733 (1963).

[126]Nanda, The Torrey Canyon Disaster; Some Legal Aspects, 44 DENVER L.J. 400, 401 (1967).

[127]Gerity, supra note 23, at 9, Dept. State Memo May 15, 1968: "The United States Government believes that a new convention in the area should provide for liability without fault. . .to cover all reasonably foreseeable damages and should be sufficiently flexible to allow fur the effect of inflation on property and personal values. . .' The sum of $30,000,000.00 as a limitation amount was discussed."

Limitation has ceased to be the tool it had been during the 14th century when it served to encourage the increase of foreign commerce. Ships today are no longer owned by men; they are owned by corporations. Losses are no longer suffered by the owner but are absorbed by insurance underwriters. If limitation of liability were still a subsidy, it could no longer be morally justified. If the government wishes to promote this industry, it may do so, but not at the expense of injured parties. "If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost."[128] On the other hand, an unwarranted removal of all limitation at this time would be unfortuante.

In the short run two steps should be undertaken while more comprehensive changes are contemplated. First, the 1910 Convention containing the proportionate fault rule should be enacted at once. This measure alone would be a great aid to the shipping industry without unduly affecting cargo owners or personal injury claimants. Second, the limitation funds required to be deposited under the Sirovich Amendment should be increased to a reasonable figure from the present $60.00 per ton. Admittedly this is only a stop-gap measure and would work certain hardships, but an adequate basis for recovery must be assured at once. Beyond these elements, those reforms presented earlier should be worked for on a formal basis by the disputant parties. International uniformity is unfortunately still many years off, but in the meantime American maritime limitation law must be thoroughly revised.

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[128]Maryland v. Cushing, 347 U.S. 409, 437 (1957), (Dissenting opinion).

Joseph N. Barker