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# The Wreck of the Andrew J. Barberi: Revaluating the Role of the U.S. and E.U. Limitation of Liability Statutes

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# THE WRECK OF THE *ANDREW J. BARBERI*: REVALUATING THE ROLE OF THE U.S. AND E.U. LIMITATION OF LIABILITY STATUTES

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"One more large-scale maritime disaster . . . should suffice to bring the whole structure tumbling down."[1]

## I. INTRODUCTION

On October 15, 2003, Richard J. Smith, while piloting the *Andrew J.*

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1. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 823 (2d ed., Found. Press 1975) (1957).

*Barberi*,[2] "lost conscious[ness] or situational awareness due to fatigue."[3] The ferry went off course and ran into maintenance pilings, which resulted in the loss of eleven lives.[4]

Smith, the assistant captain, piloted the *Barberi* on its regular run from New York City to Staten Island.[5] According to the NTSB Report, a lookout assisted Smith in the pilothouse until the ferry passed the Kill van Kull buoy, then left to prepare the ferry for docking.[6] The *Barberi*, with a speed of fifteen knots, can traverse the distance from the Kull buoy to the terminal in two minutes.[7]

Smith, a fifty-five-year old man, was the assistant captain on board the *Barberi*.[8] Smith, apparently unknown to the New York City Department of Transportation [NYC DOT], regularly took several prescription medications for a wide range of problems including "high blood pressure, high cholesterol, insomnia, and chronic back pain."[9] Smith arrived to work on October 15 completely exhausted due to babysitting his grandchildren the previous day, but he neglected to convey his fatigue to ferry management or to Captain Gansas, the other *Barberi* pilot.[10]

Although both captains were on board the *Barberi*, the captain, Gansas, was not present in the pilothouse while the *Barberi* was

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2. The *Barberi* possesses the capacity to carry 6000 passengers and fifteen crew; it weighs 3335 gross tonnage and has a service speed of sixteen knots. N.Y. CITY DEP'T OF TRANSP., Staten Island Ferry, http://www.nyc.gov/html/dot/ html/ferrybus/statfery.shtml#fleet (last visited Apr. 5, 2011) [hereinafter Staten Island Profile]; *see also* NAT'L TRANS. SAFETY BD. (NTSB), MARINE ACCIDENT REPORT: ALLISION OF STATEN ISLAND FERRY ANDREW J. BARBERI, ST. GEORGE, STATEN ISLAND, NEW YORK, Oct. 15, 2003, at 19-20 (providing the *Barberi*'s certification and inspection results) [hereinafter cited as NTSB REPORT].

3. *In re* Complaint of the City of New York, 475 F. Supp. 2d 235, 237 (E.D.N.Y. 2007); *In re* City of New York, 522 F.3d 279, 280, 281 (2d Cir. 2008).

4. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 236-37; NTSB REPORT, *supra* note 2, at ii.

5. The Staten Island Ferry Service, operated by New York City's Department of Transportation (DOT), transports commuters and tourists daily on the 5.2 mile run between Staten Island and New York City. Staten Island Profile, *supra* note 2. On average, the ferries carry 65,000 passengers daily, making over 110 daily trips. *Id; see In re City of New York*, 522 F.3d at 280 (stating that "Smith was at the helm.").

6. According to the NTSB REPORT, the Kill van Kull buoy is 1,000 yards away from the Staten Island ferry terminal. Normally, the ferry begins to slow down upon reaching the buoy. NTSB REPORT, *supra* note 2, at 3-4; *In re Complaint of the City of New York*, 475 F. Supp. 2d at 237.

7. NTSB REPORT, *supra* note 2, at 3.

8. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 236.

9. NTSB REPORT, *supra* note 2, at 13 (stating the assistant captain's medical status); *see also In re City of New York*, 522 F.3d at 281. The court also acknowledged that Smith "in fact, had previously falsely stated on a required Coast Guard form that he had no medical conditions and did not take any medication." *Id.*

10. *Id.*

underway.[11] The NYC Ferry Standard Operating Procedures (SOP) requires both the captain and assistant captain to remain in the pilothouse for the duration of the voyage.[12] However, the director of ferry operations later admitted that the SOP was poorly disseminated and enforced,[13] and existed only on paper.[14]

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11. NTSB REPORT, *supra* note 2, at 61.

> Given the circumstances, it is probable that (1) the captain considered it acceptable, both operationally and in terms of the evaluation of his performance, to be absent from the pilothouse for almost an entire voyage without informing any other crewmember of his location, and (2) his absence was sufficiently commonplace to have been accepted by those individuals without comment.

*Id.*

12. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 238-39 (referred to as the "two-pilot rule");*see also In re City of New York*, 522 F.3d at 281. *But see* NTSB REPORT, *supra* note 2, at 61-62 (stating there were "conflicting interpretations of the existence of a requirement for the vessel master to be present in the pilothouse after propulsion control had been transferred," and that "no procedure . . . [r]equired the captain to enter and remain in the pilothouse for the duration of the voyage once the transfer of propulsion control was complete").

13. The district court stated:

> It is not surprising that the Staten Island Ferry's rules were not followed given the haphazard way in which they were disseminated. At the time the accident occurred, the internal rules were neither well understood nor effectively enforced. The Staten Island Ferry had no formal safety management system. There was no single manual that was readily accessible to crew members. There was no mechanism to monitor who had received the procedures and at what time. And there was no system for ensuring that the rules were actually obeyed. Indeed, "there [were] no formal training programs at the Staten Island Ferry. Instead, according to Captain Gansas, "there was 'on the job' training and the policies and procedures were passed down from the Senior Captains and Assistant Captains" by word of mouth.

*In re Complaint of the City of New York*, 475 F. Supp. 2d at 238 (quoting Gansas Aff. ¶ 5); *see also* NTSB REPORT, *supra* note 2, at 60 (stating that the "ferry operating procedures [] were poorly understood, ineffectively disseminated, inconsistently applied, and inadequately overseen").

14. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 238 (stating Ryan's knowledge of the written rule). Patrick Ryan, the director of ferry operations, in his criminal plea "conceded that he knew that the Staten Island Ferry's Standard Operating Procedures (SOP) were not being followed." *Id.*

> Subsequently, Ryan further stated: "Your Honor, I knew the rules [were not] followed. I took measures to insure [that they were]. I drafted those SOPs. I didn't adequately-I didn't get them out . . . the right way. I didn't train people in it. I didn't instruct people in it. I didn't get it dissimulated [sic] the right way. I never followed up and enforced that."

*Id.* at 239 (quoting Ryan's Plea Allocution 53:17-25, Apr. 22, 2005).

At roughly 15:20 EST, the *Andrew J. Barberi* drifted off course while maintaining a speed of fifteen knots and collided with a maintenance pier.[15] Captain Gansas reported that Smith, the assistant captain, was slumped over the controls.[16] Captain Gansas then took "control of the vessel. . . . [B]y that time the allision had occurred."[17] On the day of the accident, the *Barberi* carried an estimated 15,000 passengers and fifteen crew on board.[18] Eleven[19] passengers died from the accident, and seventy people sustained injuries.[20] Smith's exhaustion resulted in a loss of situational awareness, causing him to have no memory of speed or position of the ferry until impacting the pier.[21]

The City of New York employed a nineteenth century maritime statute, the Limitation of Liability Act of 1851 (LLA),[22] to file a petition to limit its liability to the post-accident value of the *Andrew J. Barberi*, approximately $14.4 million.[23] The concept of limiting liability began as early as the tenth century, and very little has changed in the realm of limiting liability since then.[24] Legislatures adopted limitation of liability statutes to protect shipping interests by restricting a shipowner's personal liability surrounding accidents.[25]

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15. NTSB REPORT, *supra* note 2, at vi, 3-4.

16. *Id.* at 6.

17. *Id.* Allide comes from "Allision" which means the "striking or collision of a moving vessel against a stationary object." MICHAEL MCNICHOLAS, MARITIME SECURITY: AN INTRODUCTION 386 (2008).

18. NTSB REPORT, *supra* note 2, at ii, vi.

19. Ten passengers died in the accident, and the eleventh died two months later as a result of his injuries. *Id.*; *see also In re City of New York*, 522 F.3d at 281.

20. NTSB REPORT, *supra* note 2, at ii, vi; *In re City of New York*, 522 F.3d at 281.

21. *In re City of New York*, 522 F.3d at 281; *see also* NTSB REPORT, *supra* note 2, at 5.

22. Limitation of Liability Act, 46 U.S.C.A. § 30505 (2006) [hereinafter LLA]. "The [LLA] limits the owner of a vessel's liability for, among other things, 'any loss, damage, or injury by collision . . . done, occasioned, or incurred without the privity or knowledge of the owner,' to 'the value of the vessel and pending freight.'" *In re City of New York*, 522 F.3d at 283 (quoting § 30505(b)); *see also* 46 U.S.C.A. § 30511 (2006) (providing the procedure by which to file a petition).

23. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 239. "[T]he owner [of a vessel] . . . may ask that . . . his liability as owner shall be limited to the value of the vessel as appraised after the occurrence of the loss . . ." *Id.* (quoting Hartford Accident & Indemnity Co. v. S. Pac. Co., 273 U.S. 207, 214 (1927)); Michael Luo, *City Seeks To Limit Its Liability In Ferry Crash*, N.Y. TIMES, Aug. 6, 2004, *available at* http://www.nytimes.com/2004/08/06/nyregion/city-seeks-to-limit-its-liability-in-ferry-crash.html?ref=Richardjsmith.

24. James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1001 (1979) (stating, "[t]he limitation of shipowners' liability appears to have first developed in Italy . . . between the fall of the Western Roman Empire (454 A.D.) and the Crusades (1096-1291 A.D.)").

25. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 239 (stating that "Congress passed the Act in 1851 'to encourage ship-building and to induce capitalists to invest

Part I of this Article explores the historical policy reasons for enacting limitation of liability statutes, and traces the beginning of limitation of liability to its modern-day equivalent. Maritime transport, particularly in the past, was regarded as a dangerous and "risky business."[26] Shipowners were held accountable not only for the actions of its master and crew, but also for undertaking the perils of the sea.[27] "Any serious disaster would likely, especially in the old times, give rise to the possible bankruptcy of the shipowner."[28] To reduce the inherent risks and promote trade between nations, governments statutorily granted a shipowner the ability to limit his personal liability to the value of the ship in cases involving a collision, cargo damage, death, or personal injury.[29] In 2009, the world's foremost shipping nations can still be divided into two limitation theories: the "value" system and the "tonnage" system.[30]

Part II performs an in-depth analysis of today's modern "value" and "tonnage" limitation schemes by focusing on the U.S. Limitation of Liability Act of 1851, the 1976 Convention on the Limitation of Liability for Maritime Claims (LLMC), and the recent European Union civil liability initiative.[31] The United States and the international community roughly still abide by the limitation of liability schemes devised in the 1700s.[32] The 1976 LLMC manages to harmonize civil liability amongst the most of the world's shipping nations, but with a rigidity that creates an almost unbreakable right for the owner to limit his liability.[33] In 2005, the European Union, in their civil liability initiative, attempted to radically change the very concept of limitation of liability. The European Union's attempt to revolutionize limitation of liability failed, and was replaced by a mandatory insurance scheme.[34]

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money in this branch of industry.'" (quoting Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. 104, 121 (1872)).

26. Donovan, *supra* note 24, at 1002; XIA CHEN, LIMITATION OF LIABILITY FOR MARITIME CLAIMS: A STUDY OF U.S. LAW, CHINESE LAW, AND INTERNATIONAL CONVENTIONS xiii (2001).

27. CHEN, *supra* note 26, at xiii (2001).

28. *Id.*

29. *See id.* at xiii-xiv; Donovan, *supra* note 24, at 1002-04, 1007-09, 1017, 1028.

30. *See* Donovan, *supra* note 24, at 1044.

31. 46 U.S.C.A. § 30505 (2006); Convention on Limitation of Liability for Maritime Claims, 1976 (with final act), *concluded* Nov. 19, 1976, 1456 U.N.T.S. 24635 [hereinafter cited as 1976 LLMC]; Press Release, Third Mar. Safety Package, EU Press Release MEMO/05/438 (Nov. 23, 2005) [hereinafter Third Maritime Safety Package].

32. *See generally* Donovan, *supra* note 24, at 1009-45 (discussing the American development of shipowner limitation of liability).

33. *Proposal for a Directive of the European Parliament and the Council on the Civil Liability and Financial Guarantees of Shipowners*, at 3, COM (2005) 593 final (Nov. 23, 2005) (providing that "[t]he right of shipowners to limit their liability is [therefore] practically unbreakable.") [hereinafter Proposed Directive].

34. *See infra* Part II.C.3.

Part III analyzes the wreck of the *Andrew J. Barberi* through the three modern limitation of liability schemes (the U.S. Limitation of Liability Act of 1851, the 1976 LLMC, and the European Union's 2008 directive) to explore each scheme's strengths and weaknesses. The *Andrew J. Barberi* case highlights the similarities, benefits, and deficiencies of each of the three limitation schemes.

Finally, I conclude by questioning whether the underlying public policy reasons for limitation of liability have changed. The European Union's Proposed Directive failed to garner enough political support, but the Proposed Directive's existence demonstrates a need to address the serious problems associated with the current application of limitation of liability.

## II. A HISTORY OF LIMITING LIABILITY IN SHIPPING

### A. *Value System*

The exact origins of the limitation of a shipowners' liability remain a mystery.[35] In *The Common Law*, Oliver Wendell Holmes, Jr. claimed to trace the doctrine of limiting liability to the value of the ship "to the Roman legal principle of *noxae deditio*."[36] Many scholars disagree with Holmes's hypothesis and prefer to rely on the first evidence of the doctrine of limitation of liability, which appeared in the Amalphitan Table around the eleventh century.[37]

Limitation of liability spread during the commercial revolution of the sixteenth and seventeenth centuries with its incorporation into the Code of Valencia and *Consulato del Mare* of Barcelona.[38] During this period, the modern European nation-states were emerging, and the sovereigns attempted to use their divine right to codify international maritime law.[39] The premier codification of Louis XIV, in his Marine Ordinance of 1681, provided: "The owners of [the] ship shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight."[40] The Ordinance of 1681 eventually "became at once the universal law of maritime nations."[41] The French *Code de Commerce* of 1807 incorporated the Ordinance of 1681, which eventually was adopted into the *Code Napoleon*.[42] The Ordinance of

35. Donovan, *supra* note 24, at 1000.
36. *Id.* (referencing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 14 (2005)).
37. *Id.* at 1000-01.
38. *Id.*
39. *Id.* at 1003.
40. *Id.* at 1004.
41. *Id.*
42. *Id.* (quoting The Rebecca, 20 F. Cas. 373, 377 (D. Me. 1831).

1681 was highly regarded as non-authoritative "evidence of the general maritime law."[43] By the nineteenth century, most of continental Europe adopted the idea that shipowners' have the right to limit their personal liability to the value of ship post-accident, known as the "value" system.[44]

### B. *Tonnage System*

Limitation of liability remained confined to Continental Europe until 1733.[45] In 1733, the King's Bench in *Boucher v. Lawson* held a group of English shipowners personally liable for the full value of the cargo of bullion, which was stolen by the master after it was loaded in Portugal.[46] Because of the decision, English shipowners and merchants strongly petitioned the English Parliament for relief from this decision.[47] "The petitioners added that Parliament should realize 'that unless some provision be made for their relief, trade and navigation will be greatly discouraged, since owners of ships find themselves . . . exposed to ruin.'"[48]

The English Parliament yielded to the demands of the shipping industry by passing the Responsibility of Shipowners' Act of 1733.[49] In adopting this Act, the British parliament cited the need for its shipping industry to keep pace with Continental Europe's shipping industry, which had already possessed the protection of limitation of liability for several years.[50] The Act copied Continental Europe's provision that limitation of liability could only apply when the incident occurred without the "privity or knowledge" of the owner.[51] However, the Act did not put English shipping on equal footing with Continental Europe.[52] The English adopted a rule that provided that "the extent of the owner's liability was calculated on the value of the vessel immediately prior to the incident, rather than on the continental post-accident formula."[53] "Under this rule [an English] ship-owner found it [in] his best interest to send ill-found ships to sea and to refrain from increasing their value by repairs."[54] The British system was the basis for

43. *Id.* at 1005 (quoting Morgan v. Ins. Co. of N. Am., 4 Dall. 455, 458 (Pa. 1806)).

44. *See id.* at 1004-05.

45. *Id.* at 1007.

46. *Id.* (referencing Boucher v. Lawson, (1734) 95 Eng. Rep. 53).

47. *Id.*

48. *Id.* (quoting H.C. JOUR. (1733) 277).

49. *Id.*; CHEN, *supra* note 26, at xiv; Responsibility of Shipowners' Act, 1733, 7 GEO. 2, c. 15 (1734).

50. Donovan, *supra* note 24, at 1007-08.

51. *Id.*

52. *Id.* at 1008.

53. *Id.*

54. *Id.* Donovan also states that the English passed two other acts that slightly varied

the "tonnage" system, in which the weight of the ship determined absolutely the amount that a shipowner could limit his liability and the amount the injured party could recover.[55]

Limitation of liability made its first appearance in the United States in 1819.[56] "Statutes similar in principle to the English acts were passed in 1818 and 1821 by the legislatures of Massachusetts and Maine, differing slightly in form."[57] Massachusetts incorporated the 1734 enactment of the British rule directly into its state statutes.[58] Maine followed Massachusetts' lead by adopting a "very 'similar'" provision into its legislation.[59] Despite these statutes' similarity to the English statute law, the U.S. Supreme Court, in a series of decisions beginning with *Norwich & N.Y. Transportation Co. v. Wright* created an important distinction between the English and American limitation of liability systems by requiring U.S. courts to consider the negligence of the shipowner.[60]

## III. IN-DEPTH ANALYSIS OF MODERN DAY LIMITATION OF LIABILITY SCHEMES

### A. *United States' Twist to the Value System*

On January 13, 1840, William F. Harnden shipped a wooden crate on board the steamship *Lexington* from New York to Providence, Rhode Island.[61] According to the terms of the contract, Harnden shipped the crate with no declaration of its contents and completely at his own risk.[62] After leaving New York, the steamship *Lexington* caught fire, taking the lives of many of the crew and passengers, destroying most of the cargo, and destroying the vessel itself.[63] Harnden's wooden crate held eighteen thousand dollars worth of bank checks and drafts that

limitation of liability by including robbery and negligence in the event of collision under the fold of limitation of liability. *Id.* at 1007-08.

55. *Id.* at 1007-09.

56. *Id.* at 1009.

57. Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. 104, 119 (1871).

58. *See* Donovan, *supra* note 24, at 1009; An Act to Encourage Trade and Navigation within this Commonwealth, 1818 Mass. Acts ch. 122 (1819, repealed 1902).

59. Donovan, *supra* note 24, at 1009 (citing George C. Sprague, *Limitation of Ship Owners' Liability*, 12 N.Y.U. L. Q. REV. 568, 576 (1935)); *see also Wright*, 80 U.S. at 120 (explaining "[t]he laws of Maine and Massachusetts seem to have limited the shipowner's liability in cases of damage to cargo alone; and for complete relief, they refer him to a proceeding in equity").

60. *Wright*, 80 U.S. at 118-19.

61. N.J. Steam Navigation Co. v. Merchants' Bank, 47 U.S. 344, 346-47 (1848).

62. *Id.* at 346.

63. *Id.* at 347.

were to be delivered to Harnden's employers—the Merchants' Bank of Boston.[64] The Merchants' Bank of Boston sued the owners of the *Lexington*.[65] The Supreme Court in 1848 stated that a shipowner could not contract away his liability "to use ordinary care in the custody of goods, and in their delivery, and to prove proper . . . means of conveyance for their transportation."[66]

The *Lexington* Supreme Court decision provided the same stimulus to the American shipping industry as *Boucher v. Lawson* did in England.[67] The shipping industry lobbied Congress to protect their interests by adopting a limitation of liability statute.[68] Senators briefly argued that the bill would hamper the free market, but the bill passed within a day, placing "[the American] commercial marine upon an equal footing [as that of England]."[69] Congress ultimately enacted the LLA,[70] which was designed to shield shipowners from ruinous liability.[71]

The LLA lay dormant until 1866, when the owners of the *City of Norwich* steamship, which sunk following a collision, claimed the statute's protection.[72] The *Norwich* court found the statute to be "so imperfect, fragmentary, and ambiguous as to be unworkable."[73] The statute reads "the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight."[74] The statute left open whether the assessment of the ship's value should be pre-accident or post-accident.[75]

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64. *Id.*; Donovan, *supra* note 24, at 1011.

65. *N.J. Steam Navigation Co.*, 47 U.S. at 380, 382.

66. *Id.* at 383.

67. The Main v. Williams, 152 U.S. 122, 128 (1893) (stating that "[t]he attention of congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of The Lexington, reported under the name of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, was decided by this Court."); *see also* Donovan, *supra* note 24, at 1007.

68. Donovan, *supra* note 24, at 1012.

69. Sprague, *supra* note 59, at 578; *see Wright*, 80 U.S. at 121 (stating "[t]he great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry").

70. 46 U.S.C.A. § 30505 (2006). For a history of the development of American limitation of liability, see *The Main*, 152 U.S. at 126-28 (tracing briefly the appearances of limitation of liability from the 1500s to 1800s.); GILMORE & BLACK, *supra* note 1, at 818-24 (explaining the American roots of limitation of liability).

71. *In re* Complaint of Mowhawk Assocs., 897 F. Supp. 906, 909 (D. Md. 1995).

72. GILMORE & BLACK, *supra* note 1, § 10-2, at 818-20; *see Wright*, 80 U.S. at 106-07.

73. GILMORE & BLACK, *supra* note 1, § 10-2, at 820.

74. 46 U.S.C.A. § 30505 (2006).

75. *Wright*, 80 U.S. at 120; *see also* Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 490 (1886) (considering "what time ought the value of the vessel and her pending freight to be taken, in fixing the amount of her owners' liability? Ought it to be taken as it was immediately before the collision, or afterwards? And if afterwards, at what time afterwards?") In *Place*, the Supreme Court granted *certiorari* to the same parties as in *Wright* to determine when the value

The *Norwich* court interpreted Congress's intent to unequivocally limit a shipowners' liability to the value of the ship post-incident, which meant in that case that the recovery value could be $0 or $100.[76]

The other major question the *Norwich* court considered was whether the word "interest" in the LLA covered insurance proceeds.[77] The court held that interest only "refer[red] to the extent or amount of ownership which the party had in the vessel . . . insurance which a person has on property is not an interest in the property itself, but is a collateral contract . . . not conferring upon him any interest in the property."[78] The court opined that if the insurance proceeds were considered interest, then the post-incident value of the vessel becomes meaningless, and in effect would "bring back the law to the English rule . . . the very thing which, in all our decisions on the subject, we have held it was the intention of [C]ongress to avoid . . ."[79]

Subsequent cases attempted to limit the scope of the LLA by arguing the Act did not apply to collisions, loss by fire, personal injuries, lost property, or property damage.[80] The Supreme Court dismissed such notions by firmly stating, "if [these] positions[s] can be maintained, the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired."[81] The LLA mandates that shipowners must limit their losses to a value not greater than the value of their ship.[82] The LLA, however, provides certain procedural safeguards that attempt to protect the injured third-party interests.

One procedural safeguard lies in the statute's requirement that the

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of the vessel should be determined and whether the word "interest" in the LLA included insurance proceeds. *Id.*

76. *Place*, 118 U.S. at 490.

77. *Id.* at 493 (considering "whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer as a part of their interest in the same. . . . [and whether] insurance [is] an interest in the vessel or freight insured, within the meaning of the law?").

78. *Id.* at 493-94.

79. *Id.* at 505.

80. Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 550 (1889).

> Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretense was disallowed by the decision in Norwich Co. v. Wright [sic], 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of Steam-Ship Co. v. Manufacturing Co. [sic], 109 U.S. 578.

*Id.*

81. *Id.*

82. 46 U.S.C.A. § 30505(a) (2006); *Wright*, 80 U.S. at 123.

owner must submit a petition to the court in order to limit his liability.[83] Therefore, the LLA does not confer an immediate grant of limitation of liability to shipowners.[84] In order to limit their liability, shipowners must petition a U.S. District Court by filing a complaint within six months from receipt of written notice of a claim for damages.[85] Once the complaint is filed, the court automatically stays all proceedings for damage or loss against the shipowner until the court decides the outcome of the owner's limitation claim.[86]

After receipt of the petition, the LLA institutes the second safeguard by placing the burden of proof to support the petition on the shipowner and not on the injured plaintiff. The shipowner must "show [to the court that] it lacked privity or knowledge[87] of the condition" which caused the accident.[88] A shipowner's "privity or knowledge" of the cause of the accident destroys his ability to limit his liability.[89] Modern American courts construe "privity or knowledge" broadly to include whether the shipowner had constructive knowledge of the accident—whether he should have or could have known about the cause of the accident.[90] Constructive knowledge encompasses the condition and operation of a vessel as well as the competence of both managerial personnel and the crew of the ship. A failure by the owner of the vessel to exercise due diligence in assuring that the vessel was seaworthy, which results in loss or damage, will defeat any plea for limitation of liability.[91]

However, courts are quick to point out that "mere negligence of a crew member does not mean that owner could have or should have prevented such negligence."[92]

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83. 46 U.S.C.A. § 30511 (2006).

84. *See id.*

85. Federal Rules of Civil Procedure Supplemental Rule F requires the owner to petition in suits for limitation for liability, and imposes a strict six-month deadline. GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 189 (1997).

86. *Id.* at 190 (stating that "[w]here the facts alleged by the shipowner show no possibility that the owner could limit his liability, the federal court may dismiss the complaint").

87. 46 U.S.C.A. § 30505(b); *see* GILMORE & BLACK, *supra* note 1, § 10-20, at 877-79.

88. *In re* Kristie Leigh Enters., Inc., 72 F.3d 479, 481 (5th Cir. 1996). The court stated, "[a] corporate owner, however, will not satisfy its burden by merely demonstrating ignorance. It is charged with the knowledge of any of its managing agents who have authority over the sphere of activities in question." *Id.*; *see also* Cupit v. McClanahan Contractors, Inc., 1 F.3d 346, 348 (5th Cir. 1993) (quoting Coryell v. Phipps, 317 U.S. 406, 410 (1943)).

89. *See* MANGONE, *supra* note 85, at 191.

90. *Id.*

91. *See id.* (suggesting that modern technology, *e.g.*, rapid communications systems, places a higher burden on the shipowner to exerciser reasonable diligence in foreseeing conditions that might cause accidents).

92. *See id.*; *see also In re Kristie Leigh Enters., Inc.*, 72 F.3d at 481 (quoting Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1377 (5th Cir. 1983) (en banc) (Rubin, J.), "no court has previously denied a corporate shipowner limitation of liability for a master's navigational errors at sea when the owner has exercised reasonable care in selecting the master"); *see also*

Many scholars note that the phrase "privity or knowledge [is an] exceedingly poor guide[] to the investor concerning what he must do or avoid in order to obtain limitation."[93] The phrase "[p]rivity or knowledge" is such a vague concept that it is an "empty container[] into which the courts are free to pour whatever content they will."[94]

Scholars detest the American method for determining how much funds are available to plaintiffs as "the worst feature of United States limitation law. It is based on the *fortune de mer* concept, which has been loosely translated as a 'floating crap game.'"[95] The American rule limits liability to the post-accident value of the wreck.[96] The compensation, in other words, available to the injured, the injured families, or the other creditors, depends on the value of the vessel *after* the accident.[97] Therefore, the size of the disaster determines the monetary compensation, and, the bigger the disaster, the less money available in damages for plaintiffs.

The practical effect of the *fortune de mer* method is that courts employing common law principles of equity render "fair" judgments that leave the plaintiffs with an inequitable result. The courts usually find it easier to find evidence of a subjective intent that destroys the owner's ability to limit his liability, removing the inequitable remedy for the plaintiffs.[98] Greenman argues that the courts' attempt to balance

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*Coryell*, 317 U.S. at 410 (providing "the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred"); *see also Continental Oil Co.*, 706 F.2d at 1376 (noting "[t]he navigational negligence of a master who also occupies a managerial position in a corporation does not of itself deprive the corporation of the right to petition for limited liability"); *see also In re* Complaint of Patton-Tully Transp. Co., 797 F.2d 206 (5th Cir. 1986) (providing the corporate officers' and managers' privity or knowledge is not based on actual knowledge but what the officers and managers should have known); *see also* Tittle v. Aldacosta, 544 F.2d 752, 756 (5th Cir. 1977) (providing "this is to afford protection to the physically remote owner who, after the ship breaks grounds, has no effective control over his water-borne servants"); *Cupit*, 1 F.3d at 348 (considering the employee's scope and authority and noting the employee's "authority did not extend to the basic business decisions made by the drilling supervisors and the president of the company"); *In re* the Complaint of Hellenic Inc., 252 F.3d 391 (5th Cir. 2001) (providing eight factors to determine whether a corporate employee's may preclude limitation of liability).

93. Donald C. Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 TUL. L. REV. 1139, 1145 (1983).

94. GILMORE & BLACK, *supra* note 1, § 10-20; *see also* Gibboney v. Wright, 517 F.2d 1054, 1057 (5th Cir. 1975) (stating "[w]hat is meant by privity or knowledge is not easy to pin down"); Fecht v. Makowski, 406 F.2d 721, 722 (5th Cir. 1975) (relaying "the meaning of 'privity or knowledge' has been the subject of considerable speculation").

95. Greenman, *supra* note 93, at 1174.

96. *Place*, 118 U.S. at 490.

97. *Id.*

98. Greenman, *supra* note 93, at 1174.

the situation renders the statute unpredictable and inconsistent.[99] The vagueness of "privity or knowledge" and the *fortune de mer* method strip the shipping industry of its ability to remotely predict the outcome of suits.[100] To add to the confusion, courts also employ several other common law exceptions where the LLA does not apply.[101] These common law exceptions protect the plaintiffs' interests, but make it difficult to predict the outcome of litigation.

Gilmore and Black argue that the statute only continues to exist in its current form due to the fact that suits involving limitation of liability claims are so rare; that "[i]t is, perhaps, not unreasonable to conclude that if the cases just discussed have not been litigated in the past hundred and twenty-five years, they will probably not be litigated in the next hundred and twenty-five either."[102] The LLA remains unchanged despite overwhelming criticism from maritime scholars. Unfortunately, the maritime community appears to be the only group advocating to amend the statute while the LLA remains largely ignored by Congress and the public. Perhaps, as Gilmore and Black suggest, this vague statute will not be revised until a large-scale maritime disaster concludes in an inequitable result for the public.[103]

### B. *1976 Convention on Limitation of Liability*

In an attempt to synchronize the shipping industry, several international conventions[104] were convened to discuss the limitation of liability.[105] None of these conventions were particularly successful in

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99. *Id.* at 1173-74.

100. *See id.* at 1174.

101. MANGONE, *supra* note 85, at 194. Common law exceptions to limitation of liability are

> where the loss is (a) the consequence of personal contract; (b) a claim for maintenance and cure and/or wages due to employees of the shipowner; (c) due to marine pollution where a statute pre-empts limitation; (d) under contracts of affreightment where there has been impermissible deviation and in charter parties; and (e) the result of a violation of the Wreck Removal Act by failing to mark and/or remove a wreck.

*Id.* at 193.

102. GILMORE & BLACK, *supra* note 1, § 10-49, at 957.

103. *Id.* at 956-57.

104. 1924 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, Aug. 24, 1924, 120 L.N.T.S. 123 [hereinafter the 1924 Convention]; 1957 International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships, and Protocol of Signature, Oct. 10, 1957, 1412 U.N.T.S. 23642 [hereinafter the 1957 Convention].

105. For brevity, I have omitted the individual history of the 1924 and 1957 Conventions, which laid the foundation for the 1976 LLMC. *See* Erling Selvig, *An Introduction to the 1976*

securing worldwide consensus until the Convention on the Limitation of Liability for Maritime Claims of 1976 (1976 LLMC).[106] Even then, the 1976 LLMC opened for signature on November 19, 1976, but did not enter force until December 1, 1986.[107] Thus, in 1986, the international community began using the standards of the 1976 LLMC.[108]

The 1996 LLMC provides specific limitation amounts[109] for loss of life/personal injury and property damage claims, such as damage to other ships, property, or harbors, and sets up a system of sliding scales that determine the limitation of funds of different sized vessels.[110] For example, for personal claims, a vessel weighing 500 tons or less restricts the liability of the shipowners to 333,000 units of account.[111] However, for each additional ton between 501-3,000 tons, 500 units of account must be added to the initial 333,000 units.[112]

The unit of account refers to the International Monetary Fund (IMF) "Special Drawing Right (SDR)."[113] The value of the SDR is calculated on a basket of key international currencies, which is reevaluated every five years.[114] The tonnage of the vessel is multiplied by the SDR to reach a value, which is then converted into the member state's currency.[115] If a country does not belong to the IMF, the unit of account

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*Convention*, *in* THE LIMITATION OF SHIPOWNERS' LIABILITY: THE NEW LAW 3, 3-17 (1986).

106. *See* 1976 LLMC, *supra* note 31; *see* Selvig, *supra* note 105, at 4-17 (discussing the 1924 Convention, the 1957 Convention, and the 1976 LLMC).

107. IMO.org, Convention on Limitation of Liability for Maritime Claims (LLMC), http://www.imo.org/about/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-(llmc).aspx (last visited Apr. 9, 2011) [hereinafter IMO.org]; *see* 1976 LLMC, *supra* note 31, art. 17.

108. *See* IMO.org, *supra* note 107.

109. Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims of Nov. 19, 1976, *adopted* May 2, 1996, 1456 U.N.T.S. 24635 (*entered into force* May 13, 2004) [hereinafter the 1996 Protocol]. The 1996 Protocol exists separate from the 1976 LLMC. *Id.* arts. 9(1), (2), & (4). Those countries that signed the 1976 LLMC are not required to ratify the 1996 Protocol, and a country may subscribe to the 1996 Protocol without signing the 1976 LLMC. *Id.* art. 9(4). The 1996 Protocol increased the amount of compensation payable after an incident. *Id.* art. 3 (replacing 1976 LLMC art. 6(1) for general claims); *Id.* art. 4 (replacing 1976 LLMC art. 7(1) for personal claims).

110. 1976 LLMC, *supra* note 31, arts. 2(1), (6).

111. *Id.* art. 6(1)(a)(i); *see also id.* art. 8 (providing that "unit" in the 1976 LLMC refers to International Monetary Fund (IMF) "Special Drawing Right (SDR)"). If a country does not belong to the IMF, the unit of account "shall be calculated in a manner determined by that State Party." *Id.*

112. 1976 LLMC, *supra* note 31, art. 6(1)(a)(ii); *see also* CHEN, *supra* note 26, at 88.

113. 1976 LLMC, *supra* note 31, art. 8.

114. Currently, the basket contains the Euro, Japanese yen, pound sterling, and U.S. dollar. Press Release, Int'l Monetary Fund, IMF Determines New Currency Weights for SDR Valuation Basket (Nov. 15, 2010), *available at* http://imf.org/external/np/sec/pr/2010/pr10434.htm.

115. *See* 1976 LLMC, *supra* note 31, art. 8(1).

"shall be calculated in a manner determined by that State Party."[116]

The 1976 LLMC manages to restrict the class of people that may limit liability by defining specific categories of people who possess the option to limit their liability.[117] Article 1 defines specific categories of people who possess the option to limit their liability,[118] providing the person's conduct does not violate Article 4 of the 1976 LLMC.[119] After qualifying under Article 1, the 1976 LLMC grants the automatic right to limit liability.[120] To prevent limitation, the complainant (plaintiff) carries the burden to prove that the Article 1 owner's conduct prohibits limitation of liability from attaching.[121]

Article 4 of the 1976 LLMC provides the conduct which bars an owner from limiting his liability as "[a] person liable shall not be entitled to limit his liability if it [was] proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."[122] Article 4 represents the "most radical change in the philosophy underlying the concept of a shipowner's right to limit the extent of his liability for his acts and those of his servants"[123] by requiring *proof* of loss resulting from the "personal act or omission" of the person liable for the loss.[124] In addition to a high burden of proof, the "personal act or omission" must be "committed with the *intent* to cause such loss, or recklessly and with knowledge that such loss would probably result."[125] Whether an owner's conduct bars the 1976 LLMC's

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116. *Id.* art. 8.

117. PATRICK GRIGGS ET AL., LIMITATION OF LIABILITY FOR MARITIME CLAIMS 7-10 (4th ed. 2005).

118. 1976 LLMC, *supra* note 31, art. 1 (providing those categories of persons entitled to limit their liability). Also note, that while the 1976 LLMC restricts the persons who may limit their liability, the definition of ship includes "any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship." *See* MARTIN DOCKRAY, CASES & MATERIALS ON THE CARRIAGE OF GOODS BY SEA 347 (3d ed. 2004).

119. 1976 LLMC, *supra* note 31, art. 4 (detailing the conduct which eliminates the owner's right to limit his liability.).

120. NORMAN A. MARTINEZ GUTIERREZ, LIMITATION OF LIABILITY IN INTERNATIONAL MARITIME CONVENTIONS 69 (2011) (citing *The "Capitan San Luis"* court's reasoning that "[t]he shipowner merely has to establish that the claim falls within art 2 of the convention. Once he establishes that, he is entitled to a decree limiting his liability, unless the claimant proves the facts required by Article 4").

121. *Id.*

122. 1976 LLMC, *supra* note 31, art. 4. The LLA requires a different standard by allowing limitation to attach only if the loss occurred "without the privity or knowledge of the owner." 46 U.S.C.A § 30505(b) (2006).

123. GRIGGS ET AL., *supra* note 117, at 31.

124. *Id.* at 37 (noting that Article 4 references "loss" without any reference to life, injury, or property damage, but Griggs submit[s] that the word "loss" "is plainly intended to encompass all the various types of loss or damage or injury or expense to which Article 2 refers").

125. 1976 LLMC, *supra* note 31, art. 4; GRIGGS ET AL., *supra* note 117, at 32.

protection, directly relates to *who* seeks to invoke the claim of limitation.[126]

The key to this convoluted definition is in understanding the link between a *personal* act or omission and a *person liable*. The language of Article 4 broadly refers to "a person liable" without providing a concrete definition for "person."[127] Although the 1976 LLMC remains vague, maritime scholars tend to agree that the Article 4 "person" refers to the parties identified in Article 1 categories.[128] Assuming "person" refers to an Article 1 party, the personal acts of an Article 1 owner will prevent the owner from limiting his liability. However, that leaves the question as to what classifies as a "personal act" of an Article 1 owner.

An Article 1 owner will not be stripped of the ability to limit his liability unless a claimant (plaintiff) establishes proof of the owner's personal act that caused such loss. What constitutes proof of a personal act? The 1976 LLMC sets the plaintiff's burden of proof quite high.[129] Griggs pinpoints the words "such loss" in Article 4 as indicators of what plaintiffs must prove.[130] He maintains that "such loss" means an owner's right to limit is only barred if "the type of loss intended or envisaged by the 'person liable' is the *actual loss* suffered by the claimant."[131] In other words, the "person liable" for the accident must have the *mens rea* to cause the maritime loss in order to defeat limitation of liability.[132] Under the 1976 LLMC, the "person liable" must have "actively intended the loss."[133] It is not sufficient that a reasonable person should have or could have known that an action could have lead to damage.[134] However, national courts still maintain some discretion in determining the meaning of "*actively* intended." For example, Britain construes this passage to include the reckless acts of an owner who carelessly or heedlessly does not "[consider] the probability or even the possibility of a likely result."[135]

In the modern era of multinational corporations, a struggle emerges to link an employee's actions with the corporate body. When do the

126. 1976 LLMC, *supra* note 31, art. 4.

127. *Id.*

128. *Id.* arts. 1(1)-(2), (6) (defining "persons entitled to limit liability" as shipowners, salvors, and certain insurers). The category of "shipowner" includes "owner[s], charter[s], manager[s], and operator[s] of [] seagoing ship[s]." *Id.* art. 1(2).

129. GRIGGS ET AL., *supra* note 117, at 38.

130. *Id.*

131. *Id.* (emphasis added).

132. *See id.*

133. *Id.*

134. *Id.* The LLA also requires the act of an owner to break limitation, but requires a significantly lower threshold to prove the personal act, by the inclusion of constructive knowledge.

135. *Id.* at 39.

actions of an employee become classified as the "personal act" of the owner? Courts strain to link the employee to the corporate owner within the terms of the 1976 LLMC.[136] As the number of corporations steadily increased, most of the countries who adopted the 1976 LLMC developed the "alter ego" concept.[137] The "alter ego" legal fiction focuses on whether the individual whose action or inaction lead to the accident was the "the very action of the company itself."[138]

The 1976 LLMC provides a uniform and predictable method for the shipping industry to write off their losses, but at an extreme cost to potential plaintiffs. The 1976 LLMC saddles plaintiffs with an extremely high burden of proof with no practical means of obtaining such proof.[139] Noting the plaintiff's predicament, the Commission of the European Union (Commission)[140] investigated the 1976 LLMC's effect on plaintiffs and reported that the 1976 LLMC established a virtually unbreakable right of a shipowner to limit his liability.[141]

### C. *European Union's Third Maritime Safety Package*

The recent maritime disasters, namely the *Erika* and *Prestige* oil tanker accidents prompted the European Union to reconsider its maritime safety strategy.[142] The Commission also analyzed the extent to which it should aim to restrict shipowners' ability to limit their financial

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136. *Id.*

137. Lennard's Carrying Co. v. Asiatic Petroleum Co., (1915) A.C. 705, 713-14 (H.L.).

> [U]pon the true construction of [section 502 of the Merchant Shipping Act of 1894] in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.

*Id.*

138. *See* Lady Gwendolen, (C.A.) [1965] P. 294, 343-44.

139. *See* Proposed Directive, *supra* note 33, at 3. Plaintiffs must establish that a shipowner was negligent or grossly negligent, a difficult threshold to breach. *Id.*

140. *Id.* at 1.

141. *Id.* at 3.

142. *Communication from the Commission to the European Parliament and to the Council on Improving Safety at Sea in Response to the Prestige Accident*, at 4, 10, COM (2002) 681 final (Dec. 3, 2002); *see also* Resolution on Improving Safety at Sea, EUR. PARL. DOC. P5_TA 350 (2004), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2004-0350+0+DOC+PDF+V0//EN; Decision Setting Up a Temporary Committee on Improving Safety at Sea, EUR. PARL. DOC. P5_TA-Prov 483 (2003), *available at* http://www.europarl.europa.eu/meetdocs/committees/mare/20031126/p5_ta-prov(2003)0483_en.pdf.

liability.[143]

The Commission reported that the 1976 LLMC provided shipowners with "almost complete limitation of operator liability."[144] The Commission recognized that shipowners only lost the right to limit their liability if the plaintiffs "proved that the damage 'resulted from [the shipowner's] his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result.'"[145]

The Commission found that "negligence or even gross negligence on behalf of the owner does not meet these criteria and it is evident that in most circumstances it would be very difficult to breach this threshold. . . . The right of shipowners to limit their liability is [therefore] practically unbreakable."[146] In response, the Commission introduced the Third Maritime Safety Package[147] containing seven distinct proposals creating standardized rules for all Member States and some third party countries.[148] The seventh proposal, "[a] Directive on the extra-contractual liability of shipowners,"[149] is aimed to reduce shipowners' "traditional right to limit their liability in the event of grave negligence"[150] in order to make operators more accountable and ensure adequate compensation for victims.[151] In its proposal, the Commission asserted that Member States lack the monitoring systems to adequately control civil liability,[152] and therefore aimed to increase the European Union's ability "to coordinate the essential points of existing national legislation, such as removing ceilings on civil liability and making

143. *Communication from the Commission to the European Parliament and to the Council on Improving Safety at Sea in Response to the Prestige Accident*, *supra* note 142, at 10.

144. Proposed Directive, *supra* note 33, at 3.

145. *Id.* (referring to the intent required to break limitation contained in Article 4 of the 1976 LLMC).

146. *Id.*

147. Third Maritime Safety Package, *supra* note 31.

148. The Maritime Safety Package contains seven distinct proposals which are as follows: compliance with flag State requirements; common rules and standards for ship inspection and survey; port State control; Community vessel traffic monitoring and information system; investigation of accidents in the maritime transport sections; liability of carriers of passengers by sea and inland waterways in the event of accidents; and civil liability and financial guarantees of shipowners. *See id.*

149. *Id.*; *see also Parliament Tightens EU Maritime-Safety Rules*, EURACTIV.COM (Mar. 29, 2007), http://www.euractiv.com/en/transport/parliament-tightens-eu-maritime-safety-rules/article-162888 (last visited Apr. 10, 2011).

150. Third Maritime Safety Package, *supra* note 31.

151. *Id.*

152. Proposed Directive, *supra* note 33, at 7-8 (providing "[t]he minimal legislation drawn up at Community level ties in with national civil liability legislation. As regards obligatory insurance, the conditions for issue certificates are not harmonised . . .").

insurance obligatory."[153]

### 1. Components of the Proposed Directive

The Proposal for a Directive of the European Parliament and the Council on the Civil Liability and Financial Guarantees of Shipowners (Proposed Directive)[154] possesses four main components that significantly alter the European Union's approach to civil liability: (1) Article 4 requires Member States to become contracting parties to the 1996 Protocol;[155] (2) The Proposed Directive calls for the incorporation of the 1996 Protocol into European Community law;[156] (3) Article 7 imposes upon Member States the requirement to issue certificates for financial guarantees to all of their flag ships,[157] and Article 5 requires Member States to ensure that every owner passing through their Exclusive Economic Zone possesses a financial guarantee for civil liability;[158] and (4) The Proposed Directive creates a new threshold for barring limitation of liability in Article 4 by stating that a shipowner will "lose[] the right to limit his liability if it is proved that the damage resulted from his personal act or omission, committed with the intent to cause such damage, or through gross negligence."[159]

The first two components of the Proposed Directive ultimately aim to "establish stringent liability rules applicable to all ships."[160] Recognizing that European Union Member States account for approximately seventeen percent of the world's trade in goods via maritime shipping,[161] the European Union seeks to circumvent the "slow pace"[162] of implementing international conventions by ensuring "swift[] and uniform[] appli[cation]" of its financial guarantee system.[163] Through the Member States' uniform application of the 1996 Protocol, the European Union attempts to wield the contracting Member States as a bloc to push for revisions to IMO international conventions

153. *Id.* at 8.

154. *Id.* at 1.

155. *Id.* at 13.

156. *Id.* at 7.

157. *Id.* at 14. Article 7 sets forth the procedural requirements for how Member States should certify their flag ships with financial guarantees. *Id.*

158. *Id.* at 13.

159. *Id.*

160. *Id.* at 6.

161. *External and Intra-European Union Trade*, EUROSTAT EUROPEAN COMMISSION 11 (2010), *available at* http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-CV-10-001/EN/KS-CV-10-001-EN.PDF (reporting that EU-27 contributed values of 1,094 billion Euros of the world's export and 1,199 billion Euros of the world's import).

162. Proposed Directive, *supra* note 33, at 5.

163. *See id.*

for limitation of liability.[164]

At the same time, the Proposed Directive indirectly creates repercussions for non-European Union (third party) nations who traverse through European Union waters. "[S]hips flying the flag of a State that is not party to [the 1996 Protocol will be] subject to a more severe liability regime with gross negligence as conduct barring limitation."[165] The subjection to "a more severe liability regime" indirectly requires, or at the very least serves as an incentive, for third-party nations to become parties to the 1996 Protocol.[166]

The third part of the Proposed Directive sets up a system of obligatory financial guarantees and insurance requirements in the hopes of removing ceilings on liability.[167] The Proposed Directive requires "the financial guarantee must be a sum equivalent to double the ceilings laid down in the [1996 Protocol]."[168] Article 9 provides for mutual recognition of one Member State's financial guarantee by all other Member States; however, Member States do have the right to "request an exchange of views" with the other Member States if they should "believe that the insurer or guarantor named on the certificate is not financially capable of meeting the obligations imposed by this [Proposed] Directive."[169] The Proposed Directive, in Article 5, also possesses consequences for third- party countries because Member States must ensure that any third-party flag ships traveling within the Member State's Exclusive Economic Zone possess a financial guarantee as well.[170]

Finally, the Proposed Directive would replace the "reckless with knowledge" international convention threshold for barring shipowners' rights to limit liability with a "gross negligence" standard.[171] The "gross negligence" standard might serve to balance the interests of the shipping industry versus the injured party. The "gross negligence" standard, by directly contradicting the 1976 LLMC standard, creates confusion as to which standard should apply in the aftermath of an accident.[172]

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164. *See id.* at 4.

165. *Id.* at 7.

166. *See id.* at 4.

167. *Id.* at 7.

168. *Id.*

169. *Id.* at 15.

170. *Id.* at 13.

171. *See id.* at 3.

172. Opinion of the Committee of the Regions on the 3rd Maritime Safety Package, 2006 O.J. (C 229) 49.

> [D]isparity between this Directive and the Hague/Hague–Visby Rules and the Hamburg Rules, governing shipowners' liability under Bills of Lading, Sea Waybills and Charter parties as used in international maritime transport, which

The Commission, in its Proposed Directive, introduced several preventative measures aimed at resolving deficiencies with the 1976 LLMC's application of limitation of liability. The Proposed Directive's financial guarantee system would help eliminate the existence of substandard ships by harmonizing the Member States' rules for shipowners' liability and financial guarantees.[173] Implementing the financial guarantee system, however, requires the passage of national legislation and regulations, rather than working with the measures currently in place.[174] The Proposed Directive's removal of ceilings and obligatory insurance requirements increases the ability of injured plaintiffs to recover.[175] However, it remains unclear which accidents should employ the 1976 LLMC standard, and which should employ the "gross negligence" standard. The next section fully explores the practical problems with implementing the Proposed Directive.

### 2. Proposed Directive on Civil Liability Scuppered

The Presidency of the Council of the European Union announced on April 23, 2008 that "[w]hereas the Council has already adopted common positions on five proposals of [the Third Maritime Safety Package], no majority could be found on [the proposal for civil liability]."[176] In the Council of Ministers' vote, only five of the twenty-seven Member States backed the civil liability directive.[177] Lloyd's List reported the European Union civil liability "to be 'shelved indefinitely.'"[178] Gilles Savary, Euro MP and rapporetur, was "very surprised at the reaction in the council because the European parliament has voted massively in favour [of the civil liability directive]."[179]

The Proposed Directive, despite Parliament's approval,[180]

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> may give rise to confusion as to which liability regime would apply as it is felt that the wording of this Directive does not make it totally clear whether it applies to pollution damage only, or whether it includes other damage to third parties.

*Id.*

173. *See* Proposed Directive, *supra* note 33, at 11.

174. *Id.* at 8.

175. *Id.* at 6.

176. Presidency, *Report on Proceedings in the Council's Other Configurations*, at 7, 8700/08 POLGEN 40 (Apr. 23, 2008).

177. Justin Stares, *EU Civil Liability Directive to be 'Shelved Indefinitely,'* LLOYD'S LIST, Apr. 24, 2008, *available at* http://folk.uio.no/erikro/WWW/HNS/press/LL25apr08.pdf.

178. *Id.*

179. *Id.*

180. Legislative Resolution of 29 March 2007 on the Proposal for a Directive of the European Parliament and of the Council on the Civil Liability and Financial Guarantees of Shipowners, EUR. PARL. DOC. P6_TA 94 (2007), *available at* http://eur-lex.europa.eu/LexUri

encountered strong opposition from the shipping industry.[181] The International Shipping Foundation and International Chamber of Shipping strongly opposed the proposed civil liability directive.[182] Moreover, Stares reported that P&I Clubs argue that

> The financial guarantee provisions . . . will be irrelevant to and will not positively contribute to issues of ship standards/safety or loss prevention and . . . will create a very substantial and unnecessary administrative burden on states . . . ." "There is a perfectly workable and effective system of evidencing insurance in place through certificates of entry which are issued to all vessels entered in the Group clubs.[183]

The European Economic and Social Committee (EESC) opinion[184] appears to agree with the industry. The EESC views individual Member State financial guarantees as creating an unnecessary administrative burden when financial guarantees could continue to be issued by P&I Clubs.[185] The EESC noted the industry's reluctance to provide financial security certificates covering double the 1996 Protocol limits. According to the EESC opinion, "P & I Clubs have declared that they are not willing to provide certificates exceeding the level laid down in [the] 1996 LLMC Protocol."[186] The EESC, however, heavily encouraged the Commission to take further steps to encourage Member States to ratify the 1996 Protocol.[187] The EESC concluded its opinion by requesting that the Commission undertake an economic analysis of whether the civil liability regime should be adapted or thrown out altogether.[188]

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Serv/LexUriServ.do?uri=OJ:C: 2008:027E:0166:0166:EN:PDF.

181. Press Release, ICS and ISF Meet in Washington DC, Int'l Chamber of Shipping (May 10, 2006), *available at* http://www.marisec.org/2006.htm#10/5/06.

182. *Id.*

183. Stares, *supra* note 177.

184. Eur. Econ. & Soc. Comm. [EESC], *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Proposal for a Directive of the European Parliament and the Council on the Civil Liability and Financial Guarantees of Shipowners,* 2006 O.J. (C 318/32), § 4.7.1 (Dec. 23, 2006) [hereinafter EESC opinion].

185. *See id.* § 4.7.4.3.

186. *Id.* § 4.7.2.

187. *Id.* § 4.7.4 (noting the EESC's "perception and estimation of extent of damage and responsibility have changed a great deal over recent years;" and that the EESC requested "the Commission carry out an economic analysis of its proposal"); *see also id.* § 4.7.5 (stating the EESC's belief "that the proposal, in its present form, is in conflict with Directive 2004/35/EC of 21 April 2004 . . . which recognized the primary application of IMO Conventions, including the LLMC").

188. *Communication from the Commission to the European Parliament,* at 4, COM (2008)

### 3. Amendments to the Proposed Directive

On December 9, 2008, the Council and Parliament responded to the concerns of the industry, the EESC, and the Committee of the Regions in the "common position" on the civil liability directive.[189] The common position's compromises were fully adopted into a new directive, the Directive on the Insurance of Shipowners for Maritime Claims (Directive),[190] replacing the Proposed Directive.[191] The title shift alone indicates that the emphasis shifted from reforming civil liability to a compulsory insurance requirement for all Member State ships plus any ship entering Member State waters.

The Directive removes the previous Proposed Directive's requirement for Member States to ratify the 1996 Protocol through Community law.[192] Alternatively, Member States agreed to individually ratify the 1996 Protocol by January 1, 2012.[193] The Member States' agreement to ratify the 1996 Protocol appears to fulfill the Proposed Directive's aim to ratify the 1996 Protocol at the Community level. The effects of individual Member State ratification, however, lead to very different results. The Proposed Directive intended to incorporate the 1996 Protocol into the Community to provide uniformity amongst the Member States. Alas, by allowing the Member States to individually ratify the 1996 Protocol, the Member States are now free to choose how to implement the treaty into national law, killing any hope of uniformity.

The Directive requires obligatory insurance coverage, yet removes the Member States' enforcement obligation to ensure ships comply with the Directive's insurance and financial guarantee requirements.[194] Additionally, ships are not required to present the Member States with their insurance certificate upon entry into the Member State's maritime area.[195]

The obligatory insurance coverage must correspond to the ceilings set forth in the 1996 Protocol for all Member States' flag ships and ships entering Member State ports.[196] Each ship must display a

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846 final (Sept. 12, 2008) (providing the Member States' obligation to have insurance).

189. Council Common Position (EC) No. 29/2008 of 9 Dec. 2008, art. 1, 2008 O.J. (C 330), at 7 (stating that "[t]his Directive lays down rules applicable to certain aspects of the obligations on shipowners as regards their insurance for maritime claims").

190. Council Directive 2009/20, 2009 O.J. (L 131) 128-31 (EC) [hereinafter Directive].

191. Proposed Directive, *supra* note 33, at 1-31.

192. Directive, *supra* note 190, at 128.

193. Council of the Eur. Union, Statement by the Member States on Maritime Safety, 15859/08 ADD 1, ¶ 3 (Nov. 19, 2008).

194. Directive, *supra* note 190, art. 4, at 129.

195. *Id.*

196. *Id.*

commercial insurance certificate to be shown upon inspection in accordance with Port State Control Directive.[197] If a ship does not possess an insurance certificate, the ship may be detained or expelled "without prejudice" by the Member State, who has the discretion to issue a financial penalty.[198] The Directive postpones the enforcement date until January 1, 2012, the date by which all Member States should have adopted the 1996 Protocol.[199]

Despite the drastic changes from the Proposed Directive, the Directive manages to target, and to hopefully resolve, a major problem of substandard ships within the maritime community. According to the ECSA newsletter, some ships lack basic insurance to cover their proceeds.[200] The Directive, at least, ensures that all ships entering European Union waters possess minimum insurance coverage set out by the 1996 Protocol.[201] Therefore, the European Union Directive's obligatory insurance requirement will help eliminate substandard ships and provide basic protection for accidents.

The Proposed Directive provided a platform to push the Member States to agree to individually ratify the 1996 Protocol, but individual ratification means the Member States decide how to incorporate the 1996 Protocol into their national legislation. The Member States, therefore, retain significant discretionary powers at the national court level. The Directive mandates obligatory insurance without providing any cohesive or coordinated measures to regulate and monitor the system. In short, the Directive fails to address the exact problems the European Commission identified in the Proposed Directive.

The recent European Union legislation hopefully marks the beginning of reevaluating the issue of limitation of liability. The original impetus for enacting limitation of liability statutes was to encourage investment and trade, and to promote competitiveness in the

197. *Id.* art. 6, at 129.

198. *Id.* arts. 5, 7, at 129.

199. *Id.* art. 9, at 130.

200. ECSA NEWSLETTER, (Eur. Community Shipowners' Assoc. (ECSA), Brussels, Belg.), Jan. 2006, at 4, *available at* http://www.ecsa.be/newsletters/061.pdf.

201. 1996 Protocol, *supra* note 109, art. 3 (replacing article 6(1) of the 1976 LLMC with the following minimum limits for claims, *except* those listed in article 7 of the 1976 LLMC: "for loss of life or personal injury, (i) 2 million Units of Account for [ships $\leq$ 2,000 tons] . . . for each ton from 2,001 to 3,000 tons [add 800 units/ton.]; for each ton between 30,001 to 70,000 tons [add 600 units/ton]; for each ton in excess of 70,000 tons [add 400 units/ton]. . . . in respect to any other claims," the limitation amounts are as follows: "1 million Units of Account for [ships $\leq$ 2,000 tons], for each ton from 2,001 to 3,000 tons [add 400 units/ton]; for each ton from 30,001 to 70,000 tons [add 300 units/ton]; and for each ton in excess of 70,000 tons [add 200 units/ton]"); *see also id.* art. 4 (replacing article 7 of the 1976 LLMC with "for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate").

early days of shipping,[202] when one shipwreck had the potential to ruin an entire company.[203] The Commission, in its Proposed Directive, appeared to believe that the historical policy reasons for limitation of liability did not warrant the 1976 LLMC unbreakable chain of protection for shipowners.[204] Have increases in technology, insurance markets, and government subsidies rendered the underlying policy reasons for adopting limitation of liability obsolete?[205]

## IV. *ANDREW J. BARBERI*: THE PRACTICAL EFFECTS OF MODERN DAY APPROACHES

### A. Andrew J. Barberi *and the U.S. "Value" System*

In accordance with the LLA, the City of New York filed a petition in the U.S. District Court for the Eastern District of New York to limit its liability.[206] Unlike the 1976 LLMC, where shipowners are entitled to automatic protection, the LLA requires the "owner" (here, the City of New York), not the plaintiff, to prove the lack of "privity or knowledge."[207]

The district court, reviewing the City's petition, considered the "privity or knowledge" of Patrick Ryan as the director of ferry operations.[208] The court first addressed the question of what constitutes "privity or knowledge."[209] The LLA provides no clues,[210] and in the absence of statutory guidance, courts have long employed the common law reasonable care standard of negligence to judge "privity or knowledge."[211] The district court assessed Ryan's privity or knowledge

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202. Donovan, *supra* note 24, at 1002.

203. CHEN, *supra* note 26, at xiii.

204. Proposed Directive, *supra* note 33, at 3.

205. CHEN, *supra* note 26, at xv.

206. *In re* Complaint of the City of New York, 475 F. Supp. 2d 235, 239 (E.D.N.Y. 2007).

207. *See id.*

208. *Id.* at 239-40.

> The Supreme Court has ruled that, when a ship is owned by a corporation, liability may not be limited "where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred."

*Id.* (quoting Coryell v. Phipps, 317 U.S. 406, 410 (1943)); *see also supra* text accompanying note 92 (providing several cases which determine when an employee's negligence may be imputed to the corporation).

209. *See In re Complaint of the City of New York*, 475 F. Supp. 2d at 239.

210. *See, e.g.*, *supra* text accompanying note 92.

211. *See, e.g.*, *supra* text accompanying notes 87-94 (generally stating that there is very

by the common law reasonable care standard for negligence.[212]

The district court held that the City not only foresaw the possibility of pilot incapacitation, but drafted a rule to prevent such accidents from occurring.[213] The City simply failed to enforce the rule.[214] Ryan admitted the Ferry had adopted Standard Operating Procedures (SOP), internal regulations requiring that the captain and the assistant captain both be in the pilothouse at all times while the Ferry was underway.[215] Unfortunately, the SOP were poorly disseminated and enforced, and effectively existed only on paper.[216] The district court noted that "[t]his rule could have easily been complied with on the *Barberi*, because there were two pilots on the vessels at all times. Instead, Captain Gansas spent the entire voyage in the aft, or Manhattan-facing pilothouse. Had Gansas been present, the disaster would have been avoided."[217] The district court, therefore, denied the City's petition to limit its liability.[218]

The City appealed the district court's ruling, and the U.S. Court of Appeals for the Second Circuit reviewed the district court's finding of

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little statutory guidance for LLA "privity or knowledge," and therefore it is judged by the common law reasonable care standard of negligence, encompassing what should have been or could have been known).

212. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 241 (stating that a shipowner owes a duty to her passengers to exercise "reasonable care under the circumstances." (quoting Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959))).

213. *Id.* at 238-39.

214. *Id. Compare id. with In re* Complaint of Sea Wolf Marine Towing & Transp., Inc., No. 03-CV-5578 (KMW)(THK), 2007 WL 3340931, at *4 (S.D.N.Y. Nov. 6, 2007) (holding that the Captain's negligence was not within the privity or knowledge of the owner. The Court distinguished *In re Complaint of the City of New York*, 475 F. Supp. 2d at 235 by stating:

> The [*In re Complaint of the City of New York*] court found that while the two-pilot rule was written, it was "neither well understood nor effectively enforced." In contrast, Sea Wolf Marine did not establish written protocol regarding weather conditions, visibility, or adherence to the lookout rule. But as discussed above, Captain Sprague understood how to proceed regarding each of these matters. . . . Amtrak criticizes Sea Wolf Marine's distribution, content, updating, and lack of compliance mechanisms for the vessel policy manual and employee safety manual. Despite this broad argument, Amtrak fails to set forth specific facts that these alleged deficiencies in any way contributed to or caused the collision. Therefore, the Court need not address Sea Wolf Marine's knowledge or privity of the allegedly haphazard dissemination of its other safety rules and regulations.

*In re* Complaint of Sea Wolf Marine Towing & Transp., Inc., No. 03-CV-5578 (KMW)(THK), 2007 WL 3340931, at *4 (S.D.N.Y. Nov. 6, 2007) (internal citations omitted).

215. *In re Complaint of the City of New York*, 475 F. Supp. 2d at 239.

216. *Id.* at 238-39.

217. *Id.* at 238.

218. *Id.* at 248.

negligence *de novo*.[219] The Second Circuit held that "[u]nder admiralty law, the owner of a ship in navigable waters owes a duty to its passengers to exercise 'reasonable care under the circumstances.'"[220] The court considered the City's duty to the *Barberi* passengers by looking to Judge Learned Hand's formula for determining the reasonable standard of care, set out in *United States v. Carroll Towing Co.*[221]

In determining the City's "burden of adequate precaution,"[222] the court noted that the City already employed and maintained two licensed pilots on the *Barberi*, so the City would not incur any additional cost by requiring two licensed pilots to remain at, or near, the pilothouse during the operation of the ferry.[223] The Second Circuit, therefore, found that the City had a relatively small burden to prevent accidents resulting from pilot incapacitation.[224] "[T]he City is not entitled to limit its liability if Director of Ferry Operations Patrick Ryan's admitted failure to enforce a 'two-pilot rule,' requiring the captain and assistant captain to be in the operative pilothouse while the ship is underway, constituted negligence that was causally connected to the crash."[225] The court, therefore, affirmed the District Court's decision to deny the City's petition to limit its liability, stating: "[b]ecause Ryan failed to enforce not only a strict two-pilot rule but *any* policy that would meet even this minimum applicable standard of care, we find that the negligence was within the privity or knowledge of the City."[226] As of 2008, "123 of 186 lawsuits have been settled for a total of $34 million,"[227] whereas the City, if the courts granted their petition, could limit its liability to just $14.4 million, the post-accident value of the *Barberi*.[228] The fickle outcome of an accident should not determine the future compensation available to injured parties.[229]

If the courts had allowed the City to limit its liability, would the

219. *In re* City of New York, 522 F.3d 279, 282 (2d Cir. 2008).

220. *Id.* at 283 (quoting Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959)).

221. *Id.* at 284 (applying Judge Learned Hand's formula for determining reasonable care, as found in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), the court stated that "whether the burden of adequate precautions (B) is less than the gravity of the injury (L) discounted by the probability that the injury will occur (P), *i.e.*, whether B< PL").

222. *Id.*

223. *Id.*

224. *Id.* at 283-84.

225. *Id.* at 283.

226. *Id.*

227. Stefanie Cohen, *Ferry Victim Gets $6.5M*, N.Y. POST, Feb. 21, 2008, *available at* http://www.nypost.com/p/news/regional/item_QBC157ZP3SXDwA4CkIAluO.

228. *In re* Complaint of the City of New York, 475 F. Supp. 2d 235, 239 (E.D.N.Y. 2007).

229. *See Greenman*, *supra* note 93, at 1174 (*fortune de mer*" method); *see also supra* text accompanying note 101 for a discussion on common law exceptions to limitations of liability.

*Barberi* wreck have served as the incentive to revise the American concept of limitation of liability? While the *Barberi* is unlikely the "large-scale maritime disaster" envisioned by Professor Gilmore,[230] the *Barberi* wreck did receive nationwide attention following the aftermath of 9/11.[231] The *New York Times*, which followed the criminal and civil lawsuits, disdainfully remarked that the City sought to limit its liability by invoking a "19th-century maritime statute."[232] It is likely that if the City's claim had been successful, the media would have extensively and publicly explored this "19th-century maritime statute" in greater detail.

When, not if, the media discovered that all injured plaintiffs' claims would be limited to the post-accident value of the wreck, which would have ranged from zero dollars to fourteen million dollars, the resulting public outrage might have finally led to the revision of the LLA. The judiciary, practitioners, and scholars, despite their frustration with the statute, have been unable to make any significant changes to the statute in the last one hundred years.[233]

### B. *Barberi and the 1976 LLMC "Tonnage" System*

The *Andrew J. Barberi* accident demonstrates several key differences between the American LLA and the 1976 LLMC, such as: when liability attaches; the requisite knowledge to bar a limitation claim; and the determination of a ship's value. In the *Barberi* case, the City petitioned for a claim of liability, but it failed to prove that it lacked "privity or knowledge" of the accident.[234] The 1976 LLMC eliminates many of the City's hurdles. The 1976 LLMC would automatically entitle the City to limit its liability. Additionally, the 1976 LLMC shifts the burden from the City to the plaintiffs to prove that it had actual knowledge (meaning the City's action or inaction directly caused the ferry damage).

Despite the higher burden of proof, a court applying the 1976 LLMC would most likely find the City liable for damages. The question, however, truly depends on how the individual Member State adopts the 1976 LLMC into national legislation and how the state courts treat the director of ferry operations: as either simply a servant or the "alter ego" of the company.

The United Kingdom is a Member State that has wholly adopted the 1976 LLMC directly into its national legislation. According to the

230. GILMORE & BLACK, *supra* note 1, at 823,

231. *See, e.g.*, LUO, *supra* note 23, at B1.

232. *Id.*

233. Greenman, *supra* note 93, at 1174.

234. *In re* City of New York, 522 F.3d 279, 282 (2d Cir. 2008).

British Merchant Shipping Act,[235] the "alter ego" of the company allows faceless corporations to be held liable for their actions or inactions.[236] According to the "alter ego" analysis, the ferry director must constitute "the very action of the company itself."[237]

In the *Lady Gwendolen*, the assistant managing director of a brewing company was not specifically authorized to act in the board's name, but his duties rendered him the person ultimately responsible for the company's shipping traffic.[238] The court found that his daily duties to direct the traffic could constitute the "very action" of the company for ship traffic management and held that the collision did not take place without the actual fault or privity of the owner, and that the owning company was barred from limiting its liability.[239]

Like the *Lady Gwenodolen* case, Patrick Ryan, the director of ferry operations for the City, was the person ultimately responsible for promulgating, monitoring, enforcing, and ensuring that rules were followed, and he was authorized by the City to perform those functions.[240] Ryan promulgated a safety protocol.[241] He knew the protocol was not correctly disseminated to the ferry employees.[242] He knew the protocol was not being followed, and he failed to correct the situation.[243] More importantly, the safety protocol was specifically aimed at preventing the *Barberi* situation from occurring.[244] Therefore, the collision was a direct result of Ryan's inaction. The British system, therefore, would most likely find that the City did not act without actual fault or privity of the owner, and would bar the City from limiting its liability.

For a moment, assume that the British system did not bar the City from invoking its limitation claim. The British system evaluates the value of the vessel by the "tonnage" rule.[245] To calculate tonnage for any personal injury claims, one takes the tonnage of the vessel prior to the accident and multiplies it by the units of accounts (SDR).[246] The

235. Merchant Shipping Act of 1995, c. 21, § 185, *available at* http://www.legislation.gov.uk/ukpga/1995/21/contents.

236. *See, e.g.*, GRIGGS ET AL., *supra* note 117, at 31; Lady Gwendolen, [1965] P. 294, 298; Lennard's Carrying Co. v. Asiatic Petroleum Co.,(1915) A.C. 705, 713-14 (H.L.).

237. *See, e.g.*, Lady Gwendolen, (C.A.) [1965] P. 294, 298; Lennard's Carrying Co. v. Asiatic Petroleum Co., (1915) A.C. 705, 713-14 (H.L.).

238. *Lady Gwendolen*, P. 294 at 304.

239. *Id.* at 343-48.

240. *In re* Complaint of the City of New York, 475 F. Supp. 2d 235, 238-39 (E.D.N.Y. 2007).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See supra* Part I.B.

246. *See supra* Part II.B.

*Barberi* weighed approximately 2,800 gross tons,[247] which falls into the second range of between 501-3,000 tons.[248] For the first 500 tons, the City limits its liability to 333,000 SDR, but for each additional ton, the amount increases by 500 SDR.[249] For 2,800 tons, the City would be able to limit its liability to 1,150,000 SDR.

The SDR (Special Drawing Right) is calculated daily and valued at 0.6209500000.[250] Using a convoluted formula, 1,150,000 SDR converts into $1,852,000.[251] Therefore, the City may limit its liability for personal injury or loss of life claims to $1,852,000.

| Fund for Personal Claims | |
|---|---|
| Tonnage of Vessel | Units of Account |
| 300-500 | 333,000<br>each additional ton |
| 501-3,000 | 500 |
| 3001-30,000 | 333 |
| 30,001-70,000 | 167 |
| in excess of 70,000 | 167 |

For any other claims, the City would be able to limit its liability for the 2,800-ton *Barberi* vessel to 551,100 SDR, which converts to $887,511.

247. *See In re* City of New York, 522 F.3d 279, 280 (2d Cir. 2008) (stating the *Barberi* "displaced 2712 long tons").

248. *See supra* Part II.B.

249. *See id.*

250. As of Wednesday, Nov. 25, 2009, the IMF website evaluates 1 SDR equals 1.61 USD and 1 USD equals 0.620950 SDR. Please *see* http://www.imf.org/external/np/fin/data/param_rms_mth.aspx for daily SDR valuations and exchange rate archives.

251. *See* IMF, *Articles of Agreement of the International Monetary Fund*, art. XV, § 2, *received* Apr. 25, 1947, 60 Stat. 1401, 2 U.N.T.S. 39 (*entered into force* Dec. 27, 1945) (providing the "valuation of the special drawing right."), *available at* http://www.imf.org/external/pubs/ft/aa/aa15.htm#2; *see also* IMF, *Selected Decisions and Documents of the IMF*, Thirty-Fourth issue, art. XV, § 2, at 709-11, Decision No. 12281-(00/98) *as amended by* Decision No. 13595-(05/99), *available at* http://imf.org/external/pubs/ft/sd/2010/Selected_decisions_and_selected_documents_of_the_International_Monetary_Fund_Thirty-fourth.pdf (providing "SDR Valuation Basket-Revised Guidelines for Calculation of Currency Amounts"); *id.* art. XV, § 2, at 712-13, Decision No. 6709-(80/189) *as amended by* Decision No. 12157-(00/24) (providing the "Method of Collecting Rates for the Calculation of the Value of the SDR for the Purposes of Rule O-2(a)).

| Fund for Other Claims | |
|---|---|
| Tonnage of Vessel | Units of Account |
| 300-500 | 167,000<br>each additional ton |
| 501-30,000 | 167 |
| 30,001-70,000 | 125 |
| in excess of 70,000 | 83 |

The *Barberi* wreck resulted in eleven deaths, nineteen severely injured passengers, and fifty-seven passengers who suffered minor injuries.[252] Under the 1976 LLMC, the injured plaintiffs' personal claims would have been limited to a paltry $1.9 million, even less than the LLA limitation of $14.4 million. At first glance, these numbers suggest that the American "value" system provides greater compensation and protection for the injured plaintiffs. The compensation and protection, however, provided by the American "value" system depends entirely on the state of the vessel after the wreck. For example, assuming the post-accident value of the *Barberi* vessel was $10, the injured plaintiffs would only receive $10 to cover their injuries and suffering.[253]

Society has a strong interest in ensuring consistent court judgments, but common law courts tend to avoid inequitable results. Although the rigid and mechanical formulations of the 1976 LLMC could provide the necessary consistent litigation results, it completely favors shipowners, even to the wrongful detriment of the injured party. The 1976 LLMC's rigidness should be balanced with a lower standard than "actual knowledge," or with the removal of the shipowner's automatic right to limit his liability.

### C. *The European Union Directive*

The amended European Union Directive acts as a supplement to the current limitation of liability regime. By mandating that ships carry insurance double the 1996 LLMC limits, the directive provides a minimum level of coverage for victims and losses, but it does not limit the shipowner's ability to limit losses greater than insurance coverage.[254] Thus, the Directive would have automatically allowed the *Barberi* victims access to a greater compensation fund. However, the Directive fails to address the fundamental problem that the 1976 LLMC

252. *In re City of New York*, 522 F.3d at 281.

253. *See* Greenman, *supra* note 93, 1173-74; MANGONE, *supra* note 85, at 192-93.

254. Proposed Directive, *supra* note 33, at 3.

grants shipowners the "unbreakable" right to limit their liability.[255] In other words, under the European Union Directive, the City of New York possessed the automatic right to limit its liability, and the families of the deceased or injured had to prove the wreck was a result of the City's personal act. Ryan, the director of ferry operations, neglected to properly disseminate and enforce the two-pilot rule, but Ryan was unaware of Smith's fatigue, or his medical condition, on the day of the accident.[256] Ryan, therefore, did not possess the necessary *mens rea* to intend for the accident to occur. Under the European Union Directive, the City of New York would likely be able to limit its liability to approximately $1.9 million.[257]

Under the Proposed Directive, the City still possessed the automatic right to limit its liability. However, in order to break the City's limitation, the plaintiffs had only to demonstrate that the City's gross negligence led to the accident—a much lower threshold than the 1976 LLMC "actual fault" standard. Ryan specifically created the two-pilot rule in order to prevent accidents resulting from one pilot's incapacitation, but he simply failed to enforce the rule.[258] Ryan's failure directly created the situation which led to the *Barberi* wreck. Courts would likely rule that the City's failure to enforce the two-pilot rule was the City's grossly negligent act, and subsequently bar the City from limiting its liability.

## V. CONCLUSION

As Professor Gilmore once predicted, "[o]ne more large-scale maritime disaster . . . should suffice to bring the whole [limitation of liability] structure tumbling down."[259] It appears that Professor Gilmore was partially correct. It took the *Erika* and *Prestige* shipwrecks to induce the European Commission to investigate the effects of the 1976 LLMC. After discovering the shipowner's right to limit liability under the 1976 LLMC was "practically unbreakable,"[260] the Commission aimed to reform the concept of limitation of liability in the Proposed Directive.[261] The Proposed Directive failed in its reform efforts, but in its wake, tough questions arose as to whose interests society should protect.

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255. *Id.*
256. *See supra* Introduction.
257. *See supra* Part III.B (regarding the 1976 LLMC calculation of the *Barberi* wreck).
258. *See supra* Introduction.
259. GILMORE & BLACK, *supra* note 1, at 823.
260. Proposed Directive, *supra* note 33, at 3.
261. *Id.*

The 1976 LLMC provides predictability, but it heavily favors the shipping industry by affording automatic protection to owners and by shouldering plaintiffs with a high burden to prove "actual fault or privity." The American "value" system, on the other hand, provides better protection for plaintiffs at the outset by requiring the owner to prove the lack of "privity or knowledge" of the circumstances leading to the accident. However, if American courts allow the owner to limit his liability, the amount of compensation available to plaintiffs depends on whether the vessel survived the accident relatively intact—truly a floating craps game. Because of this floating craps game, American courts tend to wield the subjective intent standard as a sword to reach an equitable result that avoids any unjust awards to the plaintiffs or defendants, which makes predicting the outcome of litigation difficult. The Commission attempted to correct the problems with limitation of liability in two ways: (1) providing a cohesive regulatory and monitoring system aimed to eliminate substandard ships;[262] and (2) providing greater protection to injured parties by lowering the "actual fault" standard to a "gross negligence" standard.[263] Despite its failure, the creation of the Proposed Directive demonstrated the Commission's recognition and desire to alter the inherent unfairness in limitation of liability. The U.S. Congress should recognize that the same inherent unfairness exists in the LLA, and reconsider whether the current limitation of liability approach meets modern shipping needs, and if it does not, whether revision or abolishment is appropriate.

262. *See supra* Part II.C.1 (providing a uniform regulatory system.).

263. *See supra* Part II.C.1 (citing the Proposed Directive's gross negligence standard.).