MARITIME LAW ASSOCIATION

OF

AUSTRALIA AND NEW ZEALAND

ELEVENTH ANNUAL CONFERENCE

Christchurch-Queenstown

12-19 OCTOBER, 1984

LIMITATION OF LIABILITY: FAULT AND PRIVITY

by

RON SALTER

LIMITATION OF LIABILITY: FAULT AND PRIVITY

In a discussion about what is a fairly narrow legal point, it seems opportune to commence with a brief examination of historical background. The Australians in the audience are no doubt familiar with the television advertisement placed by a leading motor vehicle insurer which graphically illustrates the consequences of a driver of a motor vehicle sneezing. The violence of the sneeze is such that the driver's glasses fall off, and while he tries unsuccessfully to retrieve them, he loses control of his vehicle which encounters an extraordinary series of mishaps. The result is, of course, a large number of claims against the driver, who can sleep securely at night despite this dramatic occurrence, knowing that his $80 third party property cover issued by a delightful girl called Ami will protect him completely.

Within the ordinary bounds of such concepts as foreseeability and remoteness, the driver of a motor vehicle has unlimited liability for loss or damage which he causes. So indeed does everyone in the community, in all forms of daily activity. The employer of our unfortunate driver faces the same unlimited liability, which he is unable to avoid by asserting that he was not personally to blame. The negligent solicitor is liable in full for the consequences of neglect by an employee and so is the negligent builder. There is no legislation to say that the employer of a negligent driver can limit his liability to an amount equivalent to the value of his car or that a builder can limit his liability to an amount equivalent to the size of the building he is constructing. While of course, parties to contracts are entitled - subject to certain legislative

restrictions - to limit or indeed, to exclude liability thereunder, it is only in the transport industry that the concept of limitation of liability is given legislative approval, by and large in consequence of the operation of international conventions. The question that must be asked therefore is why is this so.

What is clear is that the concept of limitation of liability grew out of maritime activity. Not all that long ago, the sending of a ship to sea was regarded as a highly adventurous activity. The despatch by an English ship owner of his ship to the Far East meant that the shipowner would have to wait patiently in his London club for many months before he knew whether the ship had arrived safely or not. It thus became apparent to all engaged in the import/export trade that adventurism ought to be encouraged, so that those persons with capital and who were prepared to accept the risks involved should receive some measure of protection. Today, governments encourage risk ventures with appropriate revenue concessions. In centuries gone by, shipowners were encouraged by the concept of limitation of liability.

Quite apart from this aspect, it seems apparent that the concept of limitation of liability arose from a recognition of the realities of commercial life. In times gone by, as now, the value of cargo shipped on a particular vessel would often be far greater than the value of the vessel herself. As a matter of commercial expediency therefore, the parties involved in the import/export trade recognized that if a shipowner organized his affairs carefully, he was unlikely to be able to provide more

than his ship and the freight to satisfy the many claims which might be made against him.

Thus, from these beginnings grew the concept of limitation of liability. Today, that concept is enshrined by convention and legislation, and extends to other areas of transportation. The purpose of this paper is not to examine the concept per se, but to examine one particular aspect of the concept. The particular aspect which we will discuss, i.e. fault or privity, is perhaps the most important area within the limitation of liability concept. For it is around discussions of fault or privity that the right of a shipowner to limit liability stands or falls.

Article 1 of the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships of 1957 provides as follows:-

> "The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner..."

The occurrences specified include personal injury, loss of life, damage to property, wreck removal expenses, and the like. The critical question in each case is therefore whether there has been actual fault or privity of the owner (in which case he cannot limit liability) or whether there has not been such actual fault or privity (in which case the owner is entitled to

limitation). For the purpose of seeing how the law has developed in this connection, I now propose to examine a number of the leading cases which have come before the courts during the 20th century, culminating with the relatively recent decision of the House of Lords in the case of the "Marion".

A convenient case with which to start this examination is the well known decision of the House of Lords in Lennard's Carrying Company Limited v. Asiatic Petroleum Company Limited [1915] A.C. 705. The action arose out of the loss by fire of a cargo of benzine shipped aboard the vessel "Edward Dawson". The defendant ship owner was in fact seeking to avoid liability in full by reliance upon Section 502 of the Merchant Shipping Act 1894, in which Section it was provided that a shipowner was not liable at all for loss of or damage to cargo by reason of fire provided that such loss or damage occurred without actual fault or privity. A company related to the ship owning company and known as John M. Lennard & Sons Limited managed the ship, and the managing director of that company (not surprisingly, Mr. John M. Lennard) was the registered managing owner of the ship. It transpired that the boilers of the "Edward Dawson" were defective and that the fire was caused by the defective nature of the boilers. While Mr. Lennard did not give evidence at the trial, there was a body of evidence demonstrating that the problem with the boilers had been a continuing one, and it became clear that he knew or had the means of knowing of the defective condition of the boilers, yet gave no special instructions to the crew and took no steps to prevent the ship putting into sea with her boilers in an unseaworthy condition. While counsel for the ship owner conceded in argument that Mr. Lennard had the supreme

control of the technical management of the ship, he argued that he was simply an agent of the shipowning company and not the alter ego of the company. That submission was rejected by the trial judge, by the Court of Appeal, and by the House of Lords. In delivering the leading judgment, Viscount Haldane L.C. made the following remarks (at p.713):-

> "Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting, that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the Articles of Association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf

of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section 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. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so."

Let us now move on to look at the unfortunate ship "Clan Gordon". This rather sad vessel loaded a cargo of motor spirit, refined petroleum, and paraffin wax at New York and sailed from that port

on July 28, 1919 for China. When she sailed, two of her ballast tanks were full of water, but some two days out of New York, the master determined to trim the ship more by the stern in order to provide more freeboard and obtain more speed, and gave orders for the clearing of the ballast tanks. When the tanks were almost empty, and while the ship was altering course to port in a calm sea, she heeled over, turned turtle, and became a total loss.

The interesting fact which emerged during the trial of an action brought against the shipowner by the cargo owner was that some 10 years earlier, a sister ship of the "Clan Gordon", the "Clan Ranald" has sunk in similar circumstances. In consequence of this event, the builders had prepared general instructions for the loading of ships of the particular class and had forwarded such instructions to all their clients, including the defendant in the action. The instructions had contained a definite warning against loading of these vessels with a full homogeneous cargo such as that carried by the "Clan Gordon" without retaining water ballast. Unfortunately, those instructions had never been passed on by the defendant to the master of the "Clan Gordon", apparently because he was regarded as a person with considerable experience in operating vessels of that class. While the cargo owner was successful at first instance, an appeal by the ship owner to the First Division of the Court of Session in Scotland was also successful. On further appeal by the cargo owner to the House of Lords, the cargo owner finally triumphed. The shipowner was held to have been under a duty to have passed on the instructions from the builders to the master of the "Clan

Gordon", that accordingly, it had failed to use due diligence to make the ship seaworthy, and that in these circumstances, the loss did not take place without the fault or privity of the shipowner within the meaning of Section 503 of the Merchant Shipping Act 1894 - see Standard Oil Company of New York v. Clan Line Steamers Limited [1924] A.C. 100.

On December 1 1953, the fishing trawler "Hildina" was trawling downwind off the Shetland Islands, when the trawling gear became fast on the sea bed. While attempts were made to free the gear, the vessel took water as she veered into a position broadside to the sea and wind. The electric power to the trawl winch automatically cut off and a "magnetic disc" brake on the winch automatically applied when the vessel listed to starboard. She eventually sank with the loss of a number of crew. Actions were commenced against the owner by personal representatives of the deceased crew, and after these actions were consolidated and liability admitted by the owner, the owner brought an action in the Admiralty Division of the High Court seeking to limit liability. The defendants, i.e. the various personal representatives of the deceaseds, contended that when the "Hildina" proceeded to sea, she was unseaworthy in a number of respects. It was said that she was unseaworthy because the electric power to the trawl winch was automatically cut off when the vessel listed to starboard, that when the electric power to the winch was cut off, the magnetic disc brake of the winch was automatically applied at full strength, that by reason of this, the winch would not run back when the handbrakes were off unless electric power was supplied to it, that no tools or appliances

to cut the trawl warps were provided in a suitable position, and that the skipper, boatswain or mate of the vessel were not properly instructed in the use of the winch and/or the magnetic disc brake. There is little point in examining here the technical conclusions reached, but it is sufficient to say that the trial judge (Lord Merriman P.) concluded that the cut-out was not an unseaworthy form of equipment, that the failure to fit remote control for the winch gear was not an obvious omission, nor was there any evidence that it was the custom to fit such remote control gear, that sufficient instructions as to the hand release mechanism to the magnetic brake had been given and that in the circumstances, the shipowner had proved that the occurrence had taken place without actual fault or privity on its part. The case - City Steam Fishing Company Limited v. Robertson (The "Hildina") (1957) 2 Ll. L. R. 247 - is not of any great significance in terms of legal principle, but is referred to by way of illustration of the way in which the entire limitation of liability concept may be seen by many to operate unjustly. The limitation fund in that case - to be divided amongst several claimants - was less than 3,500 pounds sterling.

The next case of some importance is the case of the "Norman", Northern Fishing Company (Hull) Limited v. Eddom (1960) 1 Ll. L. R. 1. The "Norman" was also a trawler and sank with loss of life when she struck an uncharted rock on the night of October 4, 1952 off Greenland. In fact, of a crew of 20, there was only one survivor. The case is of significance in as much as it relates to issues concerning the question of navigation.

The evidence at the trial indicated that while the "Norman" was at sea, some new information was given to the owners as to some four new navigational hazards within the area immediately south of Cape Farewell, including information as to the particular rock upon which the "Norman" ultimately foundered. This information was not dispatched by the owners to the skipper of the "Norman" but nevertheless, they argued that the loss of the vessel had been without actual fault or privity on their part. In support of this argument, they relied upon two main contentions.

Firstly, the position was that the "Norman" was insured with a mutual insurer of which one of the joint managing directors of the shipowning company was himself a director, and which in practice, accepted the responsibility on behalf of trawler owners of providing up-to-date charts, handbooks, and information. Indeed, the new information provided to the owners had been provided by the insurer, and the owners contended that they were entitled to rely upon the judgment of the insurer, who would, if necessary, have sent out a general warning to all trawlers fishing in the vicinity. Secondly, the rock upon which the "Norman" came to grief was within Danish territorial waters, and there was evidence to show that the owners had given their skippers specific instructions to keep away from the territorial waters of another power.

At first instance, Willmer J. found in favour of the owners and held that they were entitled to limit liability. He said that the failure by the owners to transmit the new information to the skipper of the "Norman" did not contribute to the casualty, in

that it was not a reasonably foreseeable possibility that the "Norman" would navigate in that area deliberately and that, if by chance, the "Norman" was uncertain of her position, it was reasonably foreseeable that the new information would not have been of any assistance. In the Court of Appeal, Morris L.J. agreed with the view of the trial judge, but was the disentiant, as the majority (Hodson and Ormerod L.JJ.) allowed the appeal. On further appeal by the shipowners to the House of Lords, it was held that there was a duty on owners to communicate the latest information that would assist navigation, and that the failure of the owners in this case to send on new information was a fault. It was further held that the owners had failed to prove that such fault did not contribute to the loss, and that in the circumstances, the owners were not entitled to limit liability. It is of some interest, I believe, to set out here the conclusions reached by Lord Jenkins (at pp.16-17) it being noted that Mr. Hellyer was the joint managing director of the ship owning company, to whom reference has been made previously:-

> "In the face of Mr. Hellyer's failure to communicate to the skipper the contents and effect of the two circulars, and in particular the information contained in the second circular concerning the rock on which the "Norman" actually struck on October 4 1952, were the appellant owners in a position to discharge the onus which lay upon them of proving that the loss of the "Norman" occurred without their actual fault or privity?

In my judgment, they could only do so by showing either that Mr. Hellyer's failure to pass on to the skipper the contents or effect of the two circulars did not amount to a fault on his part, or, if such failure did amount to a fault on his part, that his fault in this respect was immaterial, inasmuch as it did not in any way contribute to the stranding of the "Norman", which would have happened just the same even if Mr. Hellyer had duly passed on to the skipper the information in question.

It appears to me that the appellants have failed to make good either of these alternatives. As to the first, the information given in the circulars was obviously intended for the safety and protection of trawlers operating off a notoriously dangerous coast. Why should the skipper of the "Norman" not have been given the benefit of these warnings at the earliest possible moment? No satisfactory answer has been given to this question. It was not as though communication with the skipper was a difficult or expensive transaction, the disadvantages of which fell to be weighed against the value of the information to the skipper if communicated to him. No more was needed than a simple wireless message, and none was sent. It is clear from Mr. Hellyer's evidence that the reason why no message was sent was that it never occurred to Mr. Hellyer to do so, the appellants' practice having been to give skippers chart corrections on sailing, but not to send out chart corrections to skippers already at sea when they came to hand. I think that this was a bad practice, and, in this

matter of the circulars, I find it impossible to acquit Mr. Hellyer of fault.

The appellants must then fall back on the second of the two alternatives above stated, and show that, granted the fault in the matter of the circulars, it had no bearing on the stranding of the "Norman", which would have happened in any case. Here again, as I have already said, the appellants appear to me to have failed. It was not for the respondents to prove that the fault in the matter of the circulars caused or contributed to the loss of the "Norman". It was for the appellants to prove that the fault did not cause, or contribute in any degree to, such loss; and I find it impossible to hold that they have done so. It seems to me to be beside the point that, on the morning of the disaster, the "Norman" was in so dangerous a situation that no warnings then given would have been of any avail. If the contents or effect of the circulars had been promptly communicated to the skipper, he would have received the warnings thus conveyed a matter of two or three days before. If he had received the warnings on October 1 or 2, and had paid due regard to them - and I see no justification for assuming against him that he would not have paid due regard to them - he might have altered his plans, proceeded with greater caution, given the shore a wider berth, and so, in one way or another, have kept clear of the rock on which the "Norman" struck 2 or 3 days later. He might in fact have been miles away from the rock on October 4. These possibilities are, of course, largely matters of

speculation, but they cannot be dismissed as too remote for consideration, and I think they suffice to defeat the appellants' attempt to prove that the fault in the matter of the circulars did not cause or in any degree contribute to the loss of the "Norman"".

The catalogue of disaster continues with the well-known case of Arthur Guinness, Son and Company (Dublin) Limited v. "The Freshfield" (Owners) sub. nom. "The Lady Gwendolen" [1965] P. 294. Here, the court was concerned with a collision which occurred shortly after 7 o'clock in the morning of November 10, 1961 in the River Mersey between "The Lady Gwendolen" which was inward bound for Liverpool and the vessel "Freshfield" which was at anchor. The collision occurred in dense fog.

The ship "The Lady Gwendolen" was a coaster of 1,166 tons and owned by the well-known brewers of stout. She was fitted with a Decca radar with ranges of 1, 3, 9 and 24 miles. Despite the fog, "The Lady Gwendolen" proceeded at full speed. The radar was switched on and was operative, but was not being continuously manned. The other principal facts which emerged at first instance were as follows:-

1. The master admitted in evidence that he had habitually navigated in fog at excessive speed.

2. The master admitted that he had been given no instructions as to the use or misuse of radar.

3. The master had read an important Ministry of Transport Notice issued about a year beforehand relating to navigation with radar in reduced visibility.

4. However, no steps had been taken by the owners of the vessel to draw the master's specific attention to, or emphasize the importance of this Notice.

5. Although all the ship's logs were regularly submitted to the marine superintendent of the shipowner, this person had failed to observe the master's practice of going at excessive speed in fog, even though that fact was apparent from a simple examination of the engine room records and deck logs.

6. Neither the assistant managing director in charge of the Traffic Department nor the traffic manager displayed any interest in navigational matters, and were content to leave all such matters to the marine superintendent.

7. Accordingly, the master's practice of going at excessive speed in fog was never detected, and he was never warned of the gravity of the risks inherent in it.

Needless to say, there was no question about the liability of the owners of "The Lady Gwendolen". The question for decision

by the court was whether the collision had occurred without actual fault or privity on their part, so as to entitle them to limit liability. At first instance, Hewson J. held that the assistant managing director of the plaintiff company who was responsible, inter alia, for the company's vessels, was the alter ego of the company and that the radar problem merited his personal attention. He held also that the master's total lack of a sense of urgency of the problem posed by radar navigation was one which should have been instilled in him from the highest level, and that accordingly, the owners were guilty of actual fault and not entitled to limit. The appeal to the Court of Appeal was dismissed unanimously. Some of the points made by members of the Court of Appeal, and which are worth noting, are as follows:-

1. "It is no excuse for the plaintiffs that their main business was that of brewers, and that the ownership of three ships was incidental to this business and solely for distributing their products to Liverpool and Manchester.

   In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management and control of a vessel or of a fleet of vessels. A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires safe navigation. Excessive speed in fog is a grave breach of duty, and shipowners should

use all their influence to prevent it. In so far as high speed is encouraged by radar the installation of radar requires particular vigilance of owners." (per Sellers L.J. at p. 333)

2. The assistant managing director of the plaintiff in charge of the traffic department "admitted in his evidence that the master's conduct in habitually navigating at excessive speed in fog was "a lamentable state of affairs" and that he, the witness, had not known of it until after the collision. He did say that he thought that the plaintiffs had good competent management in the traffic department and that the master of "The Lady Gwendolen" was a good and competent master, as were their other commanders, and that he assumed that safety and the proper management of their ships was being looked after well by those below him in the traffic department. But he also said that he had no knowledge of navigation of ships, and that he never concerned himself about the safe running of the ships." (per Sellers L.J. at p. 334)

3. "This lack of managerial control over the navigation of the plaintiffs' vessels is to be contrasted with the practice prevailing in other companies, as disclosed in evidence given by independent witnesses on both sides." (per Willmer L.J. at p. 339)

4. "I think the true view is that where shipowners delegate the performance of a duty of the kind conveniently described as "non-delegable" they are held constructively guilty of fault for its non-performance. This means that so far as liability is concerned they cannnot escape. But such fault falls short in my view of what is meant by "actual fault" within the meaning of Section 503 of the Act of 1894. Constructive fault goes only to liability, and leaves untouched the question whether there is such actual fault on the part of the shipowners themselves as will defeat their right to limitation." (per Willmer L.J. at p. 342)

5. "But neither in the Court of Appeal nor in the House of Lords (in Lennard's case) was it said that a person whose actual fault would be the company's actual fault must necessarily be a director. Where, as in the present case, a company has a separate traffic department, which assumes responsibility for running the company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the company itself, so far as concerns anything to do with the company's ships. In the present case Boucher was not only the head of the traffic department, but he was also the registered ship's manager." (per Willmer L.J. at pp. 343-4)

6. "I agree with the submission made on both sides that the test to be applied in judging whether shipowners have been guilty of actual fault must be an objective test. A company like the plaintiff company, whose ship owning activities are merely ancillary to its main business, can be in no better position than one whose main business is that of ship owning. It seems to me that any company which embarks on the business of ship owning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation." (per Willmer L.J. at p. 345)

7. "The evidence in this case established, and indeed Captain Meredith admitted, that from 1953 to 1961 he had "habitually" proceeded too fast in fog: this fact was not known to Boucher or to D. O. Williams because there was no system in operation which could have brought it to their notice. Boucher agreed in evidence that it was "not satisfactory" that such navigation of one of the company's ships could have occurred without anybody in the management being aware of it: if he had known of it, he said, he would have instructed the marine superintendent to tell the master to stop the practice and would have instituted a system of checks. He also agreed that it would have been better if such notices as were sent out after the collision had been sent to masters long before.

> For such a state of basic lack of administration and of undistributed and undefined responsibilities in relation to the navigation of their ships the plaintiffs have failed to satisfy me, as they failed to satisy Hewson J. that they were free from "actual fault" which contributed or may have contributed to cause the collision." (per Winn L.J. at pp. 356-7)

A collision in fog on March 19, 1969 between the Polish ship "Zaglebie Dabrowski" and the Liberian ship "Garden City" in the North Sea gave rise to litigation between the respective ship owners. Following the determination of an admiralty action apportioning blame for the collision, the owners of the "Zaglebie Dabrowski" sought to limit liability. The owners of the "Garden City" disputed the entitlement of the plaintiffs to limit liability, asserting that they had failed to ensure that the vessel was manned with competent officers, that they had failed to ensure that there was a system providing for two officers to be on the bridge when the vessel was in fog, and that they had failed to supervise and check how their vessels were navigated especially in fog, with regard to speed and use of radar. In the Admiralty Court, Staughton J. allowed the owners to limit liability, thus producing the opposite result to that in "The Lady Gwendolen" (supra). However, in reaching that conclusion, His Lordship in fact adopted the principles set out in "The Lady Gwendolen" (supra), the difference in result, of course, being reached in consequence of the different facts. The arguments in the case were wide ranging, and His Lordship's conclusions

lengthy. In essence however, it really boiled down to the conclusion that the law did not require perfection on the part of shipowners, but merely required the standard of care required of others, i.e. reasonableness. In this case, unlike the case of "The Lady Gwendolen", the owners in fact had a system of inspections, by which after every voyage the chief navigator or one of his staff would go on board every vessel of the company when it returned to a Polish port. While there was fault here on the part of the chief navigator in not detecting all cases of improper navigation by the master of the "Zaglebie Dabrowski" over the period prior to the collision and in not taking steps to prevent their repetition, the fault was not causative of the collision and in any event, was not in itself the result of a defect in the system - see The "Garden City" (1982) 2 Lloyds Rep. 382.

What might be regarded as the last word on the subject of actual fault or privity, at least for the moment, is the case of the "Marion". The facts giving rise to the litigation in this case were that on March 14, 1977, the "Marion" had anchored off Hartlepool and that the anchor had fouled a North Sea oil pipeline which was not shown on the obsolete chart being used by the master. Faced with claims by various oil companies for up to about 18 million pounds, the owners of the "Marion" sought to limit liability under the provisions of the Merchant Shipping Act 1894 to an amount to just under 1 million pounds. At first instance, Sheen J. found in favour of the owners - (1982) 2 Lloyds Rep. 52, but on appeal, that finding was unanimously reversed by the Court of Appeal - (1982) 2 Lloyds Rep. 156. On

May 17, 1984, the House of Lords unanimously dismissed a further appeal by the owners - (1984) 2 W.L.R. 942.

The "Marion" was managed by an English company, Fairfield-Maxwell Services Ltd. The managing director of that company was a Mr. Downard. The company employed three other persons in a managerial capacity, being a Mr. Lowry as operations manager, a Mr. Graham as assistant operations manager, and a Mr. Martinengo as an engineer superintendent. There was evidence to the effect that in April 1976, i.e. about 11 months prior to the casualty, a document was received by Fairfield-Maxwell Services Ltd. from the Liberian Marine Inspectorate following a safety inspection of "Marion" in February 1976, and that this document, being a safety inspection report, noted that navigational charts aboard the vessel had been uncorrected for several years. Mr. Downard had not himself seen this report, which had not been drawn to his attention by his subordinates.

The leading judgment in the House of Lords was given by Lord Brandon of Oakbrook, who restated some basic points. He said firstly that the burden of proof was always on the shipowner to prove the absence of actual fault or privity or alternatively, that such fault did not contribute to the damage. Secondly, as the owners of the "Marion" had delegated the management and operation of the vessel entirely to Fairfield-Maxwell Services Ltd., the person whose fault would constitute the actual fault was the managing director of Fairfield-Maxwell Services Ltd., i.e. Mr. Downard. He then went on to say that the question

whether, where damage had been done by a ship, such damage occurred without actual fault of the owners or managers was primarily one of fact to be decided by reference to all the circumstances of any particular case, but that nevertheless, there was an element of law involved in that the answer to the question depended in part at least on the approach which the courts might adopt in cases of this nature as to the responsibility of masters on the one hand and shipowners on the other.

His Lordship then pointed out that it was quite clear that three requirements as to charts had to be fulfilled to ensure the safe navigation of a ship:-

1. She should have on board and available for use the current versions of the charts necessary for her voyages.

2. Any obsolete or superseded charts should be destroyed or, if not destroyed, at least segregated from the current charts in such a way as to avoid any possibility of confusion between them.

3. Current charts should either be kept corrected up-to-date at all times, or at least, that corrections should be made prior to their possible use on any particular voyage.

The evidence in the case was that Mr. Downard, as managing director of Fairfield-Maxwell Services Ltd., had deliberately and as a matter of considered policy adopted the view that the provision and maintenance of charts was a matter for masters, so that neither he nor his underlings exercised any supervision at all over the way in which the master of the "Marion" fulfilled his obligations. His Lordship noted that the majority of reputable shipowners, while relying primarily on their masters for obtaining and maintaining charts, exercised a degree of supervision over them in order to satisfy themselves that they were carrying out properly their duties. He thus concluded that it was Mr. Downard's duty to ensure that an adequate degree of supervision of the master of the "Marion" was exercised either by himself personally, or by his subordinate managerial staff, and that, having been in breach of this duty, he rendered the owners of "Marion" guilty of actual fault.

Similarly, His Lordship found that Mr. Downard failed to have in force a proper system of being kept informed by his subordinates about significant matters such as the receipt of the safety inspection report of the Liberian Marine Inspectorate. The evidence was to the effect that when that report was received, Mr. Downard was himself in Greece, but this proved to be of no comfort to him or his principals. His Lordship said that not only were Mr. Lowry and Mr. Graham to blame for not bringing the report to Mr. Downard's notice (this fault on their part not giving rise to actual fault or privity on the part of the owners, they not being people in sufficient authority), but that Mr. Downard was himself to blame for not

4. However, once having such a system in place, and ensuring its continued smooth operation, there will be no actual fault or privity on the part of a ship owner where the particular casualty arises from negligence on the part of non-executive personnel.

Secondly, it is appropriate to comment on the fact that every one of the cases we have examined is English. Within Australia at least, there have been some notable decisions on limitation of liability points - see, e.g. China Ocean Shipping Co. v. South Australia (1979) 145 C.L.R. 172 - but these have often dealt with constitutional and jurisdictional issues rather than the practical issue of fault or privity. The most recently reported Australian decision is that of the Full Court of the Supreme Court of Queensland in Gates v. Gaggin 51 A.L.R. 721, in which the leading judgment was delivered by Connolly J., who had no difficulty in accepting the principles laid down in a number of the cases of which we have spoken. Clearly enough, Australian and New Zealand judges will continue to accept - at least sub-consciously - that London is the home of conventional wisdom in the field of maritime law, and will maintain the approach adopted by their British brethren in the interests of uniformity.

The third matter to which I should refer is the absence of any significant reference in the decided cases to the concept of "privity" as distinct from the concept of "fault". Indeed, having regard to the way in which the law has developed, it is sumbitted that if the word "privity" was excised from the words of Article 1 of the 1957 Convention, nothing would change. As

I perceive the situation, this arises from what might be described as an extension of the "fault" concept. To use the illustration of the "Marion", might it not be said that the failure of Messrs. Lowry & Graham to inform Mr. Downard of the terms of the safety inspection report amounted to "fault" on their part with the "privity" of Mr. Downard in the form of slack administration? Whether that is correct or not is perhaps an academic question, but the fact remains that the word "privity" appears today to be superfluous.

Finally, a look at the future. For lovers of the expression "actual fault or privity", the future might be regarded as bleak. The 1976 Convention on Limitation of Liability for Maritime Claims provides firstly for the replacement of the 1957 Convention and secondly, by Article 4, as follows:-

> "A person liable shall not be entitled to limit his liability if it is 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 would probably result."

The monetary limits are raised quite considerably from those presently applying, but the test for conduct barring limitation is much different and narrower. While it is almost 8 years since the new Convention was signed in London, the likelihood is that the Convention will come into force in 1985. Once the requisite number of states have completed the formalities required to bring the Convention into force, there is likely to be something of

a "snowball" effect, with the result that the 1957 Convention and the words "actual fault or privity" will disappear forever. Whether the courts faced with interpreting Article 4 of the 1976 Convention will draw any comfort from the law which we have been considering is a moot point. The term "personal act or omission" will no doubt involve considerations similar to those first raised in Lennard's case (supra), but quite different questions must be considered when thought is given to the concept that any personal act or omission is committed "recklessly and with knowledge that such loss would probably result".

In closing, I thank the Association for inviting me to contribute to the 1984 Conference, and I also thank Mary Anne Hartley for the invaluable assistance provided to me in the preparation of this paper.

RON SALTER

October 1984.

See also :-

"Tirrenia" 1986 2 LR 210

Koumani v Caplani Cook P/L (High Court - yet to be heard)

(i) FORDY. Podmores case 1984 (NSWLR) owners failure to provide adequate communication system ∴ not entitled to limit liability.

Marrons case - imposes strict supervision requirements on owners.

When do you limit - Tropical Reef enterprises (unreported Qld case)

- after j'ment - successfully sought declaratory relief in separate application limiting liability.