Limitation of Maritime Claims

*Hon Mr Justice Peter Heerey**
Federal Court of Australia

When the common law confers a right to recover compensation for loss or damage from a wrongdoer, that right is usually unlimited, in the sense that the common law does not impose any monetary limit or ceiling.

From time to time classes of defendants who claim to have fared particularly badly in the courts seek legislative protection in the form of a cap or monetary limit. Recent examples are auditors who have suffered huge verdicts for professional negligence and media defendants who have been hit to leg by juries for libels like the one involving the unseemly dressing room exposure of a Rugby League footballer (if the mixed sporting metaphor may be pardoned). Such appeals to governmental protection usually fall on stony ground. The natural response is that some verdicts may be large; but if they are too large, they will be set aside on appeal (as in fact has now occurred with the dressing room defamation) and, if they are not, then why should the defendant not pay since the verdict reflects the loss or damage the plaintiff suffered from what was, ex hypothesi, unlawful conduct of the defendant.

The limitation of liability of shipowners is a long established exception. It goes back to an English Act of 1734, the short title of which was 'An Act to settle how far Owners of Ships shall be answerable for the acts of the Masters or Mariners'.[1] The legislation was introduced as a result of a petition from shipowners in 1733 which complained of:

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1 7 Geo II, c.15.

> the insupportable and unreasonable hardships to which no owners of ships are exposed in other nations . . . Unless some provision be made for their relief, trade and navigation will be greatly discouraged; since owners of ships find themselves, without any fault on their part, exposed to ruin.[2]

This was not entirely special pleading. Ships in those days might take voyages for months or even years, far beyond any communication with or control by their owners. The feelings of their owners must have mirrored those of Antonio, the Merchant of Venice. At the opening of the play some friends of Antonio suggest that his 'want wit sadness' is due to his mind 'tossing on the ocean'. Salario says:

> Believe me, sir, had I such venture forth,
> The better part of my affections would
> Be with my hopes abroad. I should be
> Plucking the grass to know where sits the wind;
> Peering in maps for ports, and piers, and roads;
> And every object that might make me fear
> Misfortune to my ventures out of doubt
> Would make me sad.[3]

Another rationale for limitation legislation developed. Since the one incident, such as a collision or shipwreck, might give rise to numerous claims, there was a need for orderly distribution of a limited amount. This was achieved by the mechanism of setting up a 'limitation fund' against which claims were to be made. In the words of Lord Sumner, without such a procedure

> . . . shipowners could not be fully protected and claimants would be remitted to a competitive scramble for the aggregate sum, in which the hindmost would come off as the hindmost proverbially do.[4]

There was a statutory regime for limitation of liability which operated in Australia up until 1991. I shall refer to it as 'the old law'.

Originally the old law applied in Australia as s.503 of *Merchant Shipping Act* 1894 (Imp.). In 1957 an international convention at Brussels adopted in substance the old law. The Commonwealth Parliament by the *Navigation*

2 Cheka, 'Conduct Barring Limitation' (1987) 18 Journal of Maritime Law and Commerce 487 at 488.

3 Act I sc i.

4 *Mersey Docks and Harbour Board* v *Hay* [1923] AC 345 at 379. See also *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172 at 185, 193.

Amendment Act 1979 (Cth) repealed the relevant provisions of the *Merchant Shipping Act* and inserted a new Part VIII (ss.330–338) into the *Navigation Act* 1912 (Cth).[5] In its amended form, s.333 of the *Navigation Act* provided that the Brussels Convention had the force of law as part of the law of the Commonwealth.

The old law provided a limitation of liability for claims rising from various occurrences such as loss of life, personal injury or damage to property. The limitation was fixed by a monetary amount per ton of the ship's tonnage. The monetary unit was a franc, sometimes known as the Poincaré franc since it was defined by reference to the gold equivalent of the French franc in 1928. The 'owner of a seagoing ship' was entitled to limit his liability 'unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner'.

Over the years the old law became increasingly unsuitable, basically for two reasons. First, the erosion in real value of the monetary limit worked injustice to plaintiffs. Secondly, and perhaps to some extent because of the first reason, court decisions made it more and more difficult for shipowners to show lack of actual fault or privity. As a consequence, a new system ('the new law') was introduced by the London Convention of 1976.[6] That Convention came into force in Australia on 1 June 1991 as a result of the *Limitation of Liability for Maritime Claims Act* 1989 (Cth). In *Victrawl Pty Ltd* v *AOTC Ltd*[7] the Full Court of the Federal Court held that the new law did not apply to an occurrence which occurred before that date.

The underlying philosophy of the new law is to grant a higher monetary limitation figure in return for a limitation formula which is harder to avoid. The first object is achieved by defining the monetary limit in terms of the special drawing rights (SDR) of the International Monetary Fund. This change had been to some extent anticipated in Australia by Statutory Rule No. 2 of 1981 which turned the Brussels Convention limit into SDR at the fixed equivalence of 15 francs to one SDR. The value in Australian dollars of the SDR limit was to be calculated at the date of the establishment of the limitation fund. The new law introduced by the 1989 Act provided for a

5 The validity of the repeal was upheld by the High Court in *Kirmani* v *Captain Cook Cruises Pty Ltd (No. 1)* (1985) 159 CLR 351.

6 For the background of the London Convention see the article by Sir Barry Sheen 'Limitation of Liability : The Law Gave and the Lords Have Taken Away' (1987) 18 Journal of Maritime Law and Commerce 473.

7 (1993) 117 ALR 347. See also *The Sanko Steamship Co Ltd* v *Sumitomo Australia Ltd* (unreported), a judgment delivered by the same Full Court on the same date.

much higher SDR limit: see Article 6. The effect of the change can be illustrated by the example given in the Minister's Second Reading speech for the Bill for the 1989 Act. Under the old law, the total fund for claims arising from one incident for a ship of 10,000 gross tonnage would be only about $3.22m. In the case of the *Herald of Free Enterprise* disaster in 1987 when 193 lives were lost the average amount per claim would be $16,700. The equivalent figures under the new law would be $39m and $202,000, a twelve-fold increase.[8]

The test of entitlement to liability under the new law is expressed in these terms (Art. 4):

> 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 loss would probably result.

The new law introduced a number of other important changes. Just to take one example, the right to limit liability is extended to salvors. However this paper will be confined to a comparison between the limitation criteria under the old and new laws.

I THE OLD LAW

1. Actual Fault or Privity

Many of the cases in which shipowners sought to limit their liability under the old law raised the issue of the dividing line between the responsibility of owner on the one hand and master and crew on the other. The owner was regarded as responsible for providing a seaworthy and properly equipped ship with a competent master and adequate crew. If there was a breach of that responsibility resulting in loss, there would be 'actual fault' on the part of the shipowner and the limitation claim would fail. If however the causative fault was a matter of, say, navigation or seamanship, the limit applied. In general that dividing line of responsibility seems a rational one and consistent with the historical origins of the old law.

Initially the courts embraced limitation legislation with enthusiasm. Usually courts in the British tradition are very defensive of common law

8 Hansard, 12 April 1989, at 1482–3.

rights against intrusion by statute. Countless statements to this effect will be found in the law reports. For example, Barton ACJ spoke of:

> ... the fact, repeatedly pointed out by this Court, that the common law rights of citizens are to be regarded as unhampered except so far as a Statute diminishes them expressly or by necessary implication.[9]

However in 1883, Butt J, speaking of a limitation provision in an earlier Merchant Shipping Act, remarked:

> At the outset I may say that I cannot agree with what has been said in disparagement of the limitations set on the shipowner's liability by statute. The Acts in question seem to me to be valuable ones, and the fact that they interfere with a plaintiff's common law right is no reason why they should be construed differently from any other Acts of Parliament.[10]

Similarly Lord Denning MR, with characteristic pungency, said:

> ... limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.[11]

But more recently the English courts made it progressively harder for shipowners to establish that they were not at fault. Whether that change had anything to do with the decline of Britain as a ship-owning nation after the Second World War is a line of enquiry best left to adherents of the critical legal studies movement.

Before looking briefly at that development, we should note two important practical factors which helped to tip the scales against shipowners. First, the onus was held to be on the shipowner to establish that the plaintiff's loss was *not* caused by the shipowner's actual fault or privity. (I shall use 'plaintiff' as a convenient term for the person making a claim in respect of loss or damage caused by the ship. However very often the limitation issue arose in proceedings commenced by the shipowner seeking a declaration of entitlement to limitation.) As Dixon J said in *James Patrick & Co Ltd* v *Union Steamship Co of New Zealand Ltd*:[12]

9 *Australian Tramway Employee Association* v *Prahran and Malvern Tramway Trust* (1913) 13 CLR 680 at 687.
10 *The Workworth* (1883) 9 PD 20 at 21.
11 *The Bramley Moore* [1964] 1 All ER 105 at 109.
12 (1938) 60 CLR 650 at 654.

> Unless [shipowners] discharge the burden of excluding actual fault or privity on their part, they cannot obtain a decree for the limitation of their liability, and, if a given fact or state of facts would stand in the way of their doing so, it is enough that its existence appears probable or even to be a reasonable supposition. It is not necessary that it should be positively found.

Secondly, it was sufficient if the fault of the shipowner was *a* contributing cause of the loss; it did not have to be the sole or dominant cause: *The England*.[13]

Turning to the cases, a convenient starting point to illustrate the trend is the *James Patrick* case itself. Dixon J was sitting as a trial judge in the original jurisdiction of the High Court in an action arising out of a collision which occurred between the *Kakariki* and the *Caradale* in Hobson's Bay, near the mouth of the River Yarra, with the loss of five lives. The *Caradale* was held to blame. One of the issues raised was the failure of the *Caradale* to have an extra lookout on the forecastle head. The master on the bridge was himself the sole lookout. Dixon J held that the failure to have the extra lookout was not a cause of the collision, but that in any case that was not a fault of the owner, who was not obliged to lay down rules or to give instructions or to institute enquiries as to the maintenance of a lookout. His Honour said that the maintenance of a proper lookout was

> ... such a practical matter of ordinary everyday seamanship that it did not present itself to [the owner] as a thing upon which there was any need for him to lay down rules, to give instructions or to institute enquiries.[14]

A major turning point came with the decision of the English Court of Appeal in *The Lady Gwendolen*.[15] The *Lady Gwendolen*, owned by the Guinness Company, was regularly engaged in the carriage of stout from Dublin to Liverpool. While steaming at full speed in very thick fog in the River Mersey she collided with and sank a ship at anchor. The master was navigating by radar. On the more traditional view, setting a speed for a vessel appropriate to the prevailing conditions might seem to be very much a navigational decision within the sole province of the master. The Court of Appeal rejected this argument. Sellers LJ said:

> A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned but also requires safe navigation. Excessive speed in fog is a grave breach of duty and shipowners should use all their influence to prevent it. Insofar as high speed is encouraged by radar the installation of radar requires particular vigilance of owners.[16]

13 [1973] 1 Lloyd's Rep 373 at 380.
14 (1938) 60 CLR at 671.
15 [1965] P 294.

Thus *The Lady Gwendolen* showed that a failure by a shipowner to give warnings or directions to the master as to the carrying out of functions of navigation or seamanship might defeat a limitation claim.

Other cases confirmed the trend. In *The England*[17] a failure of the owner to ensure that the master had on board a copy of the latest Port of London River By-laws defeated a limitation claim. In *The Marion*[18] an oil pipeline on the sea bed was damaged by the anchor of the vessel because the master was navigating with the aid of an obsolete chart on which the position of the pipeline was not marked. The shipowner made the master solely responsible for keeping the vessel's charts up-to-date but the House of Lords held that the owner was at fault in not providing a proper system for ensuring that this was done. Lord Brandon of Oakbrook said:

> There was a time when courts dealing with contested limitation actions considered that shipowners or ship managers sufficiently discharged their responsibilities if they appointed a competent master and thereafter left all questions of safe navigation, including the obtaining at their expense of all necessary charts and other nautical publications, entirely to him. That former approach of such courts has now been out of date for more than 20 years, as appears from the decision of the Court of Appeal in *Rederij Erven H. Groen* v *The England (Owners) (The England)* [1973] 1 Lloyd's Rep. 373.[19]

The *Marion* thus complemented *The Lady Gwendolen* and showed that failure by a shipowner to supervise, as well as a failure to warn or direct, could amount to actual fault or privity.

Finally I might immodestly mention a case I heard, *Alstergren* v *The Territory Pearl*.[20] The *Territory Pearl* was a trawler engaged in fishing for orange roughy off the south coast of Tasmania. Orange roughy fishing in these waters was at the time both lucrative and highly competitive. With good luck and good weather a trawler like the *Territory Pearl* might make a full catch in a return voyage of four to five days which could be worth $70,000 net on the wharf at Hobart. The master and crew of the *Territory*

16 [1965] P 332.
17 [1973] 1 Lloyd's Rep 373.
18 [1984] 1 AC 563.
19 [1984] 1 AC at 572.
20 (1992) 36 FCR 186.

Pearl shared 27.5 per cent of the catch with 8.5 per cent going to the master. At the time the only regulatory regime was what was called a 'total allowable catch' system. This meant that a total catch was fixed for the whole fishery and as soon as that figure was reached the season would close. As the end of the season approached the *Territory Pearl* and other orange roughy trawlers were going lickety split back and forth to the fishing grounds to catch as many fish as they could. When the *Territory Pearl* headed off down the D'Entrecasteaux Channel on 19 November 1990 the master had slept for less than six hours in the previous forty eight. After a few hours he fell asleep. The vessel collided with the plaintiff's Atlantic salmon fish farm and 4,000 Atlantic salmon, appreciating this reprieve from the fate which would befall many of their orange roughy cousins, escaped.

There were two watch alarms fitted to the vessel, but no directions that they be used. There was no radar alarm fitted. Nor was there any direction by the owners to have more than one man on watch. These factors, coupled with the knowledge of the owners of the demands of orange roughy fishing and indeed knowledge of the fact that the particular master 'had fished harder than other skippers' and had the capacity 'to be able to push himself beyond the limits of other trawler operators' combined to make me conclude that the owners had not discharged the onus of showing the collision occurred without their actual fault or privity.

2. CORPORATE SHIPOWNERS — THE 'DIRECTING MIND AND WILL'

When the original Limitation Act was passed in 1734, most British merchant ships were owned by individuals, just as they had been in Shakespeare's time. The first of the modern Companies Acts was not passed until over a century later. By the last quarter of the 19th Century, if not earlier, the limited liability company had become the logical legal structure for shipowning, as for most other forms of major commercial activity. Since a company is an artificial entity, and can only act or fail to act through the medium of flesh and blood individuals, or what the law calls 'natural persons', the question inevitably arose as to what would constitute the 'actual fault or privity' of a company shipowner. Oddly enough, it was not until 1915 that there was an authoritative judicial examination of these issues. What resulted has been in my respectful view something of a mixing and confusion of two quite separate questions, viz

(i) Was the relevant act or default that of the shipowner?
(ii) Was that act or default something within the province of the shipowner as distinct from that of the master or crew?

In *Lennard's Carrying Co Ltd* v *Asiatic Petroleum Co Ltd*[21] the appellant company was the owner of a tanker which was carrying a cargo of benzine from Novorossisk on the Black Sea to Rotterdam. Off the Dutch coast she struck a heavy gale and was driven ashore. The tanks ruptured and the escaping benzine was ignited by the ship's furnaces causing a total loss of the ship and her cargo. The ship ran aground because her engines could not raise sufficient steam. This in turn was caused by the furnaces having become silted up with salt from leaking boilers. When she had reached Novorossisk, after a journey which was substantially shorter than the next voyage from that port to Rotterdam, the furnaces were salted up above the bridge, a state of things which Sir Fortescue Flannery said he 'had never heard of in his life'.[22] The salt was cut out, but by the time the ship reached the English Channel the boilers had salted up again.

The cargo owner contended that there was actual fault on the part of the owner because a Mr John M Lennard was aware of the ship leaving Novorossisk with its boilers in defective condition. By the time the case reached the House of Lords the main issue was not whether Mr Lennard was at fault, but whether his fault was the 'actual fault or privity' of the owner. Counsel for the owner contended in argument that while Mr Lennard had

> . . . the supreme control of the technical management of the ship, he was nothing more than an agent of the appellant company. He was not the alter ego of the company. He did not represent the company in the sense of making his fault the fault of the company.[23]

The facts of the case did not provide a promising foundation for such a submission. Mr Lennard was a director of the appellant company and was registered in the ship's register as the person to whom the management of the vessel had been entrusted. The ship was managed by another company, John M Lennard & Sons Limited, and Mr Lennard was the active director of that company also. In a case where the shipowner carried the onus, Mr

21 [1915] AC 705.
22 [1914] 1 KB at 434.
23 [1915] AC at 709.

Lennard did not enter the witness box, usually a circumstance to excite the suspicion of judges.

In that setting the House of Lords had little difficulty upholding the decision of the Court of Appeal. Counsel for the respondents were not called upon and the decision was given on the spot. The principal speech was that of the Lord Chancellor, Viscount Haldane. His Lordship said:

> 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.
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> ...
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> 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 to be liable at all, have been an action which was the action of the company itself within the meaning of s.502.[24]

The application of *Lennard* creates the risk of a familiar precedential non sequitur. You have a precedent where factors A plus B plus C equal result X. It is easy to slip into the trap of concluding that in another case where factors A and B are present, but not C, the result must be non X. Thus while it was perfectly reasonable to hold that Mr Lennard was the alter ego of the appellant company, it should not follow that a shipowning company would be able to show lack of 'actual fault or privity' just because the relevant act or omission was that of a company employee who was not its alter ego or 'directing mind and will'.

The point is made by *The Lady Gwendolen*. The person on whom the court focused for the purpose of determining the presence of absence of the relevant fault was a Mr Williams who was one of the three assistant managing directors of the company and in charge of the traffic department, having previously been head brewer. He said that he had no knowledge of

24 [1915] AC at 713.

the navigation of ships and had never concerned himself about the safe running of ships. The highest individual in the management who had any real knowledge of shipping was the marine superintendent. I suspect the aristocratic Guinness family would have been startled at the suggestion that Mr Williams was 'the directing mind and will' of their company and the 'very ego and centre' of its personality.

With large modern corporations there is little practical sense in speaking of an individual as the alter ego of the corporation, even in cases where an individual is well known and publicly identified with a company, like Mr Hugh Morgan of Western Mining or Mr Peter Bartels of Coles Myer. As a matter both of law and business reality such chief executive officers are constrained by their Boards, by general meetings of the company and by the complex statutory regulation of corporations and the officers of corporations which operates in a modern capitalist economy. There are thousands of people who would make Coles Myer or Western Mining vicariously liable in tort because of their acts or omissions in the course of their employment. Once the search for the supposed 'alter ego' is disregarded — because there is none — there is no rational reason for searching further down the corporate tree to find some branch, for the conduct of persons below which the company will not incur liability. (The present context of course is one of civil liability. The criminal liability of corporations, where the *Lennard* concept of the 'directing mind and will' has been seminal, involves quite different considerations.)[25]

Limitation claims usually concern acts of omission rather than commission. Once there has been a failure to do something which was within the shipowner's area of responsibility, it is difficult to see why the status within the company of the particular individual who failed in his or her duty should be determinative of the company's liability. Whether high or low, if that individual did or (more likely) failed to do something in the course of his or her employment, that is a matter for which the company should be responsible, as a matter of civil liability. It is an 'actual' fault of the company.

A course more consistent with the philosophical basis of limitation laws, and with general principles of corporate responsibility for civil wrongs, is to focus on the alleged fault and ask whether the act or omission in question involves a breach of the responsibility of the owner — as distinct from master or crew.

25 *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153, *Lamb* v *Toledo-Berkel Pty Ltd* [1969] VR 343, *R* v *Andrews* [1972] 1 WLR 118, Heerey 'Corporate Criminal Liability — a Reappraisal' (1962) 1 Tas Univ Law Review 677.

Take for example the function of providing up-to-date charts, which is undoubtedly part of the owner's responsibility in properly equipping the ship. The function of despatching current amendments to the company's ships may be a routine clerical function done at a low level. If the individual fails in that responsibility, why is that not the fault of the company? If the ship were owned by a natural person, and the lowly clerk failed to send off an amendment, the owner would not escape; why should it be different with a company?

II THE NEW LAW

1. 'Personal Act or Omission'

Against the background we can consider the expression introduced by the new law, viz 'personal act or omission'. Under the new law the onus is reversed — the plaintiff must establish fault of the defined kind on the part of the shipowner. Onus of proof will often be important, but not always. For example, I do not think the *Territory Pearl* would have been decided differently had the onus under the old law been the other way.

A striking feature of the new law is that, alone of all comparable provisions in international transport conventions, in defining the circumstances which will prevent a carrier obtaining the benefit of limitation, it refers to a 'personal' act or omission of the carrier. The Athens Convention on carriage of passengers, the Hague-Visby Rules on carriage of goods and the Hamburg Rules all speak of an 'act or omission of the carrier'. The Warsaw Convention on air transport uses the expression 'act or omission of the carrier, his servants or agents'.

In *The European Enterprise*[26] Steyn J held that the word 'carrier' in the Hague-Visby Rules meant only the personal acts of the carrier and contrasted that expression with the specific reference to 'servants or agents' in the Warsaw Convention. In *The Lion*[27] Hobhouse J came to a similar conclusion in relation to the word 'carrier' in the Athens Convention.

There is, as far as I am aware, no decided case on the meaning of the expression 'personal act or omission' in the new law. In their excellent work 'Limitation of Liability for Maritime Claims'[28] Griggs and Williams point out that it will still be necessary to consider, in the case of corporations,

26 [1989] 2 Lloyd's Rep 185.
27 [1990] 2 Lloyd's Rep 144.
28 Lloyd's of London Press, 2nd Edition, 1991 at 35.

whose act or omission will be treated as the 'personal' act or omission. The learned authors express the view that

> ... the concept of the alter ego co-opted from the law developed from the limitation provision of (the old law) will have to be applied in order to ascertain whose 'action is the very action of the company itself'.

I agree that the cases under the old law will bear heavily on this issue, but for the reasons already expressed when discussing the old law, I would respectfully suggest that the concept of the alter ego, the individual who personifies the company, the corporate puppet-master, does not accord with commercial or legal reality in the case of large modern companies.

I think the expression 'personal act or omission' necessarily assumes that the company would otherwise be vicariously liable because of the act or default of some natural person acting within the scope of his or her employment; were this not so the question of the company's liability would not arise at all.

In the historical context of limitation legislation the adjective 'personal' makes sense as a reference to the shipowning activity of the shipowner, to what the shipowner, as distinct from master and crew, has done or failed to do.

As we have seen, the real change in the application of the old law by the courts was the extension of the functional responsibility of shipowners to areas previously regarded as solely the province of master and crew. This was done with an unusually frank recognition by the courts that an older order of things was being changed; cf the passage from *The Marion* cited above.[29] The new law should I think be taken as implicitly recognising that change. If it was thought that this clear shift in the dividing line of responsibility between shipowner and master was to be pushed back, the language of the new law itself shows no hint of such an intention.

But should anyone be bold enough to use this paper as an aid to navigation in the area of limitation claims, I draw attention to some reefs and shoals in the form of dicta that indicate a judicial predisposition towards applying the 'directing mind and will' test in all transport Convention claims.[30]

29 N.19 supra.
30 See *The European Enterprise* at 191 and *The Lion* at 149.

2. Intent or Recklessness

It is obvious enough that the wrongdoing required to defeat the right to limitation under the new law is of a substantially more serious kind.

'Intent to cause such loss' must mean actual subjective intent — or what criminal lawyers call *mens rea*.[31] In the nature of things, that is likely to be a very rare occurrence and calls for no further consideration.

The reference to recklessness has been judicially considered in relation to the similar, but not identical, expression in the Warsaw Convention. Article 25 of that Convention is in the same terms as the new law except that it uses the words 'with knowledge that damage would probably result'. In the new law the corresponding phrase is 'with knowledge that *such loss* would probably result'.

In *Goldman* v *Thai Airways International Ltd*[32] a passenger was seriously injured when the defendant's aircraft encountered severe clear air turbulence. This form of turbulence, unlike thunderstorm turbulence, is not detectable before it is encountered. The weather chart for the flight showed an area in which clear air turbulence was forecast. The defendant's flight operations manual contained instructions that the 'Fasten seat belts' sign should be switched on 'when turbulence can be expected'. The pilot failed to switch on the sign. He believed that minor turbulence would give sufficient time to operate the sign. The turbulence in fact encountered was severe. Turbulence of that degree is quite rare; one expert witness with 30 years flying experience had encountered it only once.

The English Court of Appeal overturned the trial judge's finding in favour of the plaintiff. Eveleigh LJ, with whom the other members of the court agreed, said that if the Convention had stopped at the word 'recklessly' the plaintiff would have succeeded because the pilot had deliberately ignored his instructions which he knew were for the safety of the passengers, 'and thus demonstrated a willingness to accept risk'.[33] But it had not been shown that the pilot knew damage would probably result. In this context Eveleigh LJ said, knowledge is the actual subjective knowledge of the pilot; it is not equivalent to the well-known phrase 'when he knew or ought to have known'. His Lordship pointed out that although an act may be reckless when the danger envisaged is a *possible* consequence, the

31 See Griggs and Williams op cit, p.38.
32 [1983] 1 WLR at 1186.
33 [1983] 1 WLR at 1194.

language of the Convention required that the resulting damage be probable or likely; 'In other words, one anticipates damage from the act or omission'.[34]

Finally, the 'damage' referred to must be the same kind of damage as actually occurred. Contrary to the trial judge's holding, it was not enough that the pilot would foresee a different kind of damage, perhaps of a trivial kind. (One can say immediately that on this point the new law is even stricter since it speaks explicitly of 'such loss').

The construction adopted in *Goldman* was followed by Rogers CJ Comm D in *SS Pharmaceutical Co Ltd* v *Qantas Airways Ltd*.[35] In my respectful opinion other Australian courts are likely to take the same view.

While the language of Article 25 of the Warsaw Convention compelled the result in *Goldman*, it does seem a somewhat harsh outcome on the facts. It would have required not the slightest trouble or expense for the pilot to do what the manual explicitly required him to do, viz switch on the sign.

Nevertheless, plaintiffs can succeed, as is demonstrated by *SS Pharmaceutical*. The plaintiff consigned pharmaceutical products to Japan via Qantas. The packing bore stencilled umbrellas as an indication of susceptibility to water damage. The goods were left by Qantas on the tarmac at Sydney Airport for five hours on a rainy day. The goods arrived in Tokyo in a badly water damaged condition. The Qantas manual required that loads on a tarmac be adequately secured and protected against adverse weather. Qantas did not lead any evidence as to what, if anything, was done to protect the goods. It argued that if there was some breach of proper practice by its employees on the tarmac then that was mere negligence and not recklessness. The learned judge gave short shrift to that argument. His Honour said:

> To have cargo, which is particularly vulnerable to damage by rain, and leave it exposed to the elements without particular precautions, is reckless. Here the defendant, who had such goods in its care, declined to give evidence of what, if anything, it did to protect the goods.
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> . . .
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> The cartons got wet. If properly waterproofed, they would not have got wet. Why they were not properly protected, the defendant did not condescend to explain. Mr Sheller [counsel for the defendant] submitted that to approach the question thus is to guess. There are explanations consistent with precautions having been taken but which turned out, for one reason or another, to be

34 [1983] 1 WLR at 1196.
35 (1988) 22 NSWLR 734 at 750.

> ineffective. He suggested the tarpaulin may not have been adequately tied down or it may have been defective. These are all matters exclusively within the defendant's knowledge.
>
> ...
>
> I am entitled on the evidence, as I do, to hold the defendant's conduct to have been reckless. In my view there was clear knowledge of the likelihood of damage to specially vulnerable cargo in the weather conditions then obtaining.[36]

The point is that, while it is doubtless harder to establish actual knowledge as opposed to a conclusion that someone ought to have known the fact in question, actual knowledge, like any other fact, can be inferred from other evidence and the surrounding circumstances.

III CONCLUSION

The new law raises substantial barriers for those who seek compensation and loss suffered as a result of the negligent operation of seagoing ships. While consistent with the general approach taken by international transport conventions, the point can be made that plaintiffs affected by this particular convention do not gain the compensation of some of the other conventions. They will still have to show fault without the benefit of a limited no fault right such as is provided by the Warsaw Convention. And many plaintiffs affected by the new law do not receive any commercial benefit, unlike cargo owners carrying goods under the Hague-Visby Rules who at least might expect shipping charges to be lower because of reduced premiums.

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36 (1988) 22 NSWLR at 750.