

IN THE WAKE OF THE MONTREAL CONVENTION: WHY MARITIME LAW SHOULD ABOLISH LIMITED LIABILITY FOR PERSONAL INJURY AND DEATH CLAIMS

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1 Introduction

In 2002 a small inflatable boat operated by Yachting New Zealand collided with American windsurfer Kimberley Birkenfeld off the coast of Greece.¹ Ms Birkenfeld suffered severe injuries as a result of the collision and is now a tetraplegic suffering from post-traumatic stress disorder. She brought a claim for NZD 15 million in damages in the High Court of New Zealand. Yachting New Zealand brought a separate action and successfully limited their liability to less than NZD 400 000 on application of a tonnage formula.²

Given that the average first year costs alone associated with tetraplegia in California are between USD 700 000 and 1.2 million, the award to Ms Birkenfeld was consequently totally inadequate compensation for her injuries.³ She went from being a professional athlete to someone confined to a wheelchair for the rest of her life. The tragic nature of this accident and her failure to receive full compensation demonstrates the injustice that can result from maritime limitation of liability in a personal injury context.

Limitation of liability is the rule that allows the owner, charterer, manager or operator of a seagoing ship (hereafter referred to collectively as ‘shipowners’) to limit their liability for ‘claims in respect of loss of life or personal injury or loss of or damage to property’.⁴ Following an accident for which they are liable, the shipowner puts up a set fund in the amount of the liability limit.⁵ This can be done either by making a cash payment to the court or by presenting a letter of undertaking from a protection and indemnity (P & I) club.⁶ The funds are then distributed among claimants in proportion to their original claims (as been proved in court), so the amount of actual recovery depends on the number of claimants and the size of their respective claims.⁷ This payment constitutes full and final settlement.⁸

There are two situations where this system produces objectionable results. The first is where there is a catastrophic event in which there are numerous claimants and the limitation fund is exhausted. The second is where a small ship causes serious harm or fatality and its liability is determined by the application of a tonnage formula, as was seen in *Birkenfeld*. In both situations a claimant, having suffered harm at the hands of another, may be prevented from receiving full compensation.

I will argue that the limitation of liability is an unjust, discriminatory, and archaic rule that subsidises the shipping industry at the expense of those injured by vessels. The concept has been justified on protectionist and historical grounds that are no longer relevant. It is particularly difficult to defend its continuation following the passage of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the ‘Montreal Convention’).⁹ This convention introduced unlimited liability to the aviation industry 15 years ago and provides useful evidence of the viability of an unlimited liability scheme.

I will first outline the historical origins of the concept and the various international limitation of liability instruments. Next, I will trace developments in aviation law and draw analogies with the maritime industry. Then, I will discuss the arguments put forward supporting limitation, including the need to protect the industry,

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¹ *Yachting New Zealand Inc v Birkenfeld* [2005] NZAR 727 (HC).

² The result was unsuccessfully appealed to the Court of Appeal in *Birkenfeld v Yachting New Zealand Inc* [2007] NZCA 314; [2007] 1 NZLR 596. Leave to appeal to the Supreme Court was denied in *Birkenfeld v Yachting New Zealand Inc* [2006] NZSC 93; [2007] 1 NZLR 596.

³ Joseph Farzam Law Firm, *Paralyzed Accident Lawyer California* (2014) Joseph Farzam Law Firm <<http://farzamlaw.com/spinal-cord-injury-lawyer/>>.

⁴ Gotthard Gauci, ‘Limitation of Liability in Maritime Law: An Anachronism’ (1995) 19 *Marine Policy* 65, 65.

⁵ Either by making a separate application or by pleading it as a defence to proceedings: High Court Rules (NZ) r 792.

⁶ *Cosmotrade SA v Kairos Shipping Ltd* [2014] EWCA Civ 217 (6 March 2014); [2014] CP Rep 28.

⁷ Riaz Zaman, ‘Sailing on Troubled Waters - Antiquated US Maritime Liability Limits for Death and Injuries of Ship Passengers: Options for Reform’ (2013) 42 *Denver Journal of International Law and Policy* 41, 56.

⁸ Serge Killingbeck, ‘Limitation of Liability for Maritime Claims and its Place in the Past Present and Future: How Can it Survive?’ (1999)

3 *Southern Cross University Law Review* 1, 2.

⁹ *Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)*, 1999, 2242 UNTS 309.

the ability to get insurance, and the avoidance of litigation. Finally, I will discuss the ethical arguments against limitation and consider the purpose of private law. I will conclude by recommending the adoption of a two-tiered system of liability based on the Montreal Convention.

2 Historical Background

Limitation of liability arose originally as a European concept dating back to the 17th century.¹⁰ However, the United Kingdom did not adopt limited liability until the decision of *Boucher v Lawson*.¹¹ In that case, a shipowner was held fully liable for a load of gold bullion stolen by the ship's master, despite having no knowledge of the theft. Shipowners consequently petitioned Parliament in 1733 complaining that the common law exposed them to:¹²

... 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.

At this time, the United Kingdom's trade frontiers were expanding and the shipping fraternity was becoming a powerful lobby.¹³ It was argued that the common law would discourage investment in the English merchant marine and put them at an unfair advantage with their European competitors. Consequently, the *Responsibility of Shipowners Act 1733* was enacted with the express intention of assisting the shipping industry to flourish:¹⁴

[It was] of the utmost consequence and importance to the general welfare of this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants... which will necessarily tend to the prejudice of the trade and navigation of this kingdom.

The policy underlying the limitation of liability legislation was thus to protect a fledgling maritime trade and encourage investment in the shipping industry. This is clearly reflected in a statement of the Privy Council: 'the principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons.'¹⁵ Similarly, Lord Denning stated in *The Bramley Moore* that '[l]imitation of liability is not a matter of justice. It is a rule of public policy which has origins in history and its justification in convenience...'¹⁶

Although initially confined to claims arising from the dishonest acts of masters, the limitation of liability was extended to personal injury and loss of life in 1854¹⁷ following the enactment of the *Fatal Accidents Act 1846* ('Lord Campbell's Act').¹⁸ That legislation gave surviving relatives a right of action and coincided with an increase in the number of sea-going passengers.¹⁹

3 International Limitation of Liability Instruments

Being an international business, shipowners were keen to make the laws governing the limitation of liability uniform. Certainty in outcome would mean parties could operate shipping ventures with full knowledge of their rights and duties: this being conducive to international trade and investment.²⁰ This has been achieved, to some extent, through international conventions that provide the basis for national law. Today almost all maritime jurisdictions have limitation of liability for maritime claims.

The first international instrument relating to the limitation of liability was the 1924 *International Convention for the Unification of Certain Rules to the Limitation of Liabilities of Owners of Sea-Going Ships*.²¹ This provided shipowners the right to limit their liability for the acts or faults of the master, crew, pilot or any other party

¹⁰ Killingbeck, above n 8, 3.

¹¹ *Boucher v Lawson* (1733) 95 ER 53 (KB).

¹² Lord Mustill, 'Ships Are Different – Or Are They?' [1993] *Lloyd's Maritime and Commercial Law Quarterly* 490, 496.

¹³ Killingbeck, above n 8, 4.

¹⁴ *Responsibility of Shipowners Act 1733* (GB).

¹⁵ *Cail v Papayanni (The Amalia)* [1863] 15 ER 778, 780 (PC).

¹⁶ *The Bramley Moore* [1964] 1 WLR 1330, 1334 (PC).

¹⁷ *Merchant Shipping Act 1854* (UK) s 504.

¹⁸ *Fatal Accidents Act 1846* (UK).

¹⁹ Nigel Taylor, 'Limitation of Liability of Aircarriers to Aircrash Victims - Has the Warsaw Convention Reached its Retirement Age?' [1994] *Journal of Personal Injury Litigation* 113, 117.

²⁰ Bevan Marten, 'Limitation of Liability for Personal Injury in New Zealand: ACC Meets the Sea' (2006) 20 *Australia and New Zealand Maritime Law Journal* 16, 17.

²¹ *International Convention for the Unification of Certain Rules to the Limitation of Liabilities of Owners of Sea-Going Vessels*, 1924, 120 LNTS 123.

serving the vessel, except where the owner themselves was at fault.²² It also created separate limits (and hence separate funds) for property damage and personal injury/loss of life claims. However, this convention did not receive widespread acceptance.²³

The next attempt at international uniformity was the 1957 *International Convention relating to the Limitation of Liability of Owners of Sea Going Ships*.²⁴ This convention was much more widely accepted, although it only received a sufficient number of ratifications to enter force in 1968. Although the limits were originally based on the value of the ship, they were now expressed by a monetary amount per ton of the ship's tonnage.²⁵ The right to limit was again subject to the proviso that it was lost if it 'resulted from the actual fault or privity of the owner'.²⁶

The law quickly became unsuitable because inflation rendered the limit inadequate for plaintiffs and courts increasingly made it difficult to show lack of actual fault or privity.²⁷ Consequently, the *International Convention on Limitation of Liability for Maritime Claims* (the 'LLMC')²⁸ was adopted in 1976 and came to be the predominant liability regime around the world. The LLMC made several significant changes to the previous regimes. Firstly, the right to limit liability was extended to parties other than the owner, including charterers, managers, operators and salvors of a seagoing ship.²⁹

Secondly, the conduct barring limitation provisions of the 1924 and 1957 Conventions based on 'actual fault or privity' of the owner were replaced. Instead, the shipowner's right to limit liability is barred only if 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'.³⁰ This effectively introduced a *mens rea* element.³¹ 'Knowledge' in this context means actual knowledge; constructive knowledge – that the person should have known – will not suffice.³² The onus was also reversed so that the claimant must establish the fault of the shipowner.³³ This has led many commentators to describe the test as 'almost unbreakable'.³⁴ The LLMC thus protects shipowners who are not aware that their operators are acting negligently. For example, a shipowner will be able to limit their liability for a collision caused by an operator's error in navigation.³⁵

Thirdly, the LLMC significantly increased the limitation levels.³⁶ It also established that where the life/personal injury fund is insufficient, the property fund could potentially contribute to the outstanding balance.³⁷ This arguably increases the likelihood of a claimant receiving full compensation. However, in this situation claims for personal injury and loss of life rank equally with any concurrent property claims, so complete compensation may still be impossible following a catastrophic incident that gives rise to a great number of claims.³⁸

The LLMC was further amended in 1996 to increase limitation limits by an average of 240%.³⁹ The new limit of liability for claims for loss of life or personal injury on ships not exceeding 2 000 gross tonnage was 2 million SDR. For larger ships, 800 SDR is added on for each ton from 2 001 to 30 000 tons, 600 SDR for each ton from 30 001 to 70 000 tons, and 400 SDR for each ton in excess of 70 000 tons.⁴⁰ These amendments came into force in 2004.

Article 6 of the Protocol also introduced an 'opt-out' provision permitting States to set higher maximum compensation limits for personal injury and death. This was included to encourage certain states that had

²² Ibid art 7.

²³ Killingbeck, above n 8, 6.

²⁴ *International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships*, 1957, 1981 ATS 2.

²⁵ Ibid art 3.

²⁶ Ibid art 1.

²⁷ Peter Heerey, 'Limitation of Maritime Claims' (1994) 10 *Australia and New Zealand Maritime Law Journal* 1, 3.

²⁸ *Convention on Limitation of Liability for Maritime Claims (LLMC)*, 1977, 1456 UNTS 221.

²⁹ Ibid art 1(2).

³⁰ Ibid art 4.

³¹ Zaman, above n 7, 62.

³² Norman Gutiérrez, *Limitation of Liability in International Maritime Conventions: The relationship between global limitation conventions and particular liability regimes*, (Routledge, 2011) 65.

³³ Heerey, above n 27, 12.

³⁴ Proshanto Mukherjee and Mark Brownrigg, *Farthing on International Shipping* (Springer, 2013) 325.

³⁵ Zaman, above n 7, 62.

³⁶ Compensation was initially set by reference to the gold franc but this was replaced, through a 1979 Protocol, by the Special Drawing Rights (SDR) of the International Monetary Fund in order to mitigate future inflation: Taylor, above n 19, 120.

³⁷ Grahame Aldous, 'Claims by Personal Injury and Fatal Accident Claimants on Property Funds in Limitation Proceedings' [2001] *Lloyd's Maritime and Commercial Law Quarterly* 150.

³⁸ LLMC, 1977, 1456 UNTS 221, art 6(2).

³⁹ *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976*, 1996, 2004 ATS 16.

⁴⁰ Ibid art 3.

expressed a desire for higher limits, such as Japan, to ratify the convention.⁴¹ However, even if a state opts out of the LLMC there may still be limits on what a passenger can claim under the 1974 Athens *Convention relating to the Carriage of Passengers and their Luggage by Sea* (the 'Athens Convention')⁴² or other regime. Thus, states that wish to have unlimited liability for personal injury and death claims of passengers must take further action and denounce the Athens Convention or, if not a party to it, then abolish the provisions in their domestic law which allow limitation.⁴³ Furthermore, the opt-out provision defeats the goal of creating an internationally uniform liability scheme and possibly encourages forum shopping.

Recently the International Maritime Organisation (IMO) Legal Committee agreed to increase the limit for personal injury, loss of life and property claims by 51% to reflect inflation. This increase takes effect from 8 June 2015.⁴⁴

3.1 Athens Convention

A separate convention was drafted for the international carriage of passengers. The Athens Convention established that carriers were liable for passenger claims for personal injury or death if the claimant could prove that they were at fault. However, there is a rebuttable presumption that the carrier was liable for shipwrecks, collisions, stranding, explosions, fires, or defects in the ship.⁴⁵ Liability was limited at 46 666 SDR.⁴⁶ An attempt was made in 1990 to increase this amount to 175 000 SDR.⁴⁷ However, this Protocol has still not obtained sufficient ratification to bring it into force. Some commentators suggest the lack of support can be attributed to the perception that the new level was too low.⁴⁸ Indeed, the figure had been 300 000 SDR in the United Kingdom since 1999.⁴⁹

Renewed efforts led to another Protocol being created in 2002⁵⁰ (the 'Athens Convention 2002'). This instrument established a two-tiered liability system. In the first tier, the carrier is strictly liable up to 250 000 SDR unless it can prove that the loss was caused solely by an act of war, natural phenomenon, or the act of a third party.⁵¹ If the provable damage exceeds this amount, the carrier is further liable unless it proves that the loss occurred without its fault or neglect.⁵² This second tier is subject to an overall liability limit of 400 000 SDR multiplied by the number of passengers the ship is authorised to carry.⁵³

Carriers are not strictly liable, however, for non-shipping incidents (such as slips, trips and falls) and claimants have the burden to prove that the shipowner was at fault.⁵⁴ This distinction is important because the drafting delegations were concerned that strict liability for all incidents occurring on board a ship would effectively render the shipowner an insurer of all injuries, thereby encouraging frivolous claims.⁵⁵ The 2002 protocol also introduced compulsory insurance for carriers of 250 000 SDR per passenger.⁵⁶ Like the LLMC, there is an 'opt-out' provision allowing individual states to set higher liability limits for personal injury and death.⁵⁷

Compensation under the Athens Convention is thus significantly higher than under the LLMC. The conflicts between the LLMC and the Athens Convention have been resolved by giving contracting states the option as to which is to apply.⁵⁸ States have the power to decide if a shipowner can limit liability for personal injury and

⁴¹ Baris Soyer, 'Sundry Considerations on the Draft Protocol to the Athens Conventions Relating to the Carriage of Passengers and Their Luggage by Sea 1974' (2002) 33 *Journal of Maritime Law and Commerce* 519, 533.

⁴² *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens Convention)*, 1974, 1463 UNTS 19.

⁴³ Baris Soyer, '1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?' [2000] *Journal of Business Law* 153, 167.

⁴⁴ International Maritime Organisation, *Convention on Limitation of Liability for Maritime Claims (LLMC)* (2015) International Maritime Organisation <[http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx)>.

⁴⁵ Athens Convention, 1974, 1463 UNTS 19, art 3(3).

⁴⁶ Mukherjee and Brownrigg, above n 34, 329.

⁴⁷ *Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974*, 1990, IMO Doc LEG/CONF.8/10 (not yet in force).

⁴⁸ Mukherjee and Brownrigg, above n 34, 329.

⁴⁹ *Ibid* 329.

⁵⁰ *Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (Athens Convention 2002)*, 2002, IMO Doc LEG/CONF.13/20.

⁵¹ *Ibid* art 3(1).

⁵² *Ibid* art 3(1).

⁵³ *Ibid* art 7(1).

⁵⁴ *Ibid* art 3(2).

⁵⁵ Soyer, above n 41, 522.

⁵⁶ Athens Convention 2002, 2002, IMO Doc LEG/CONF.13/20, art 4(1).

⁵⁷ *Ibid* art 7(2).

⁵⁸ Barnabas Reynolds and Michael Tsimplis, *Shipowners' Limitation of Liability* (Kluwer Law International, 2012) 240.

death under either, neither or both of the conventions.⁵⁹ This freedom, however, undermines the goal of an internationally uniform limitation of liability regime.

The Athens Convention has several other fundamental flaws. Firstly, it is arbitrary to have a strict liability scheme for passengers of a cruise ship but not other potential victims of shipping. Passengers' lives are not more valuable than those of crew or swimmers. Secondly, countries are only likely to sign up to the Athens Convention if they have a direct interest in the cruise industry, as opposed to simply being a destination.⁶⁰ This explains why many countries, like New Zealand, have signed up to the LLMC but not the Athens Convention. Thirdly, it is still possible for claims of compensation to exceed the limitation fund because there is a maximum liability cap of 400 000 SDR.

In summary, the Athens Convention 2002 is a step in the right direction because the two-tiered system of liability allows for swift compensation of minor incidents without sacrificing the ability to sue for greater sums. However, it does not go far enough because it only applies to passengers of cruise ships and is ultimately capped at 400 000 SDR so exceptional claims may not be covered.

4 Analogy with the Aviation Industry

Both the maritime and aviation industries involve the 'utilisation of movable, high value assets to carry passengers and freight over long distances, often from one country to another'.⁶¹ Consequently, they face similar challenges both legally and economically, and are similarly subject to international legal regimes. However, David Steel QC, a well-known proponent of the limitation of liability, outlined several characteristics of the shipping industry that he believed to be in 'stark contrast' with the airline industry.⁶² First, the costs of maintenance and crew are low. Second, competition is intense and is not restricted by bilateral treaties in terms of price or route. Third, the market is mostly freight not passenger oriented, making safety considerations less of a premium. Fourth, the shipping industry is largely unsubsidised.

These differences are not as pronounced today as in the past and do not necessarily preclude comparisons being made between the two industries. Firstly, it is no longer possible to say there is not intense competition in the aviation industry following the privatisation of most airlines.⁶³ Besides, the competition within the shipping industry will not be affected if there is universal adoption of a new convention barring limitation. Secondly, the fact that the shipping industry predominantly carries freight does not justify second-rate safety measures or in any way lessen an individual's claim for compensation. In fact, if the airline industry can cope with unlimited liability for claims of personal injury and death, then by implication the maritime industry can do so too (given the former has a greater number of potential claimants). Thirdly, although the shipping industry was largely unsubsidised when Steel wrote his article, the limitation of liability can be seen as an artificial subsidy itself.⁶⁴

Thus, none of these differences detract from an analogy between the maritime and aviation industries because they are either negligible or no longer applicable. The next step is to trace the development of aviation law in the personal injury context and analyse why two industries that are fundamentally alike now have divergent approaches to the limitation of liability.

4.1 Aviation Law

Until recently the liability of airlines toward their passengers was governed by a combination of international conventions, legislation and contractual commitments, collectively referred to as the 'Warsaw system'.⁶⁵ The foundation of the system was the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the 'Warsaw Convention'), which entered into force on February 13 1933.⁶⁶ This convention introduced limited liability to passengers in exchange for a reversal of the traditional burden of proof; that is, the onus was on the airline to prove that the loss was not caused by their negligence or wrongdoing. Although the

⁵⁹ Ibid 240.

⁶⁰ Marten, above n 20, 21.

⁶¹ Taylor, above n 19, 117.

⁶² David Steel, 'Ships Are Different: The Case for Limitation of Liability' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 77, 81.

⁶³ Michael Milde, 'Liability in International Carriage by Air: The New Montreal Convention', (1999) 4 *Uniform Law Review* 835, 837.

⁶⁴ This was the view of Black J in *Maryland Casualty Co v Cushing* (1954) 347 US 409, 429.

⁶⁵ Taylor, above n 19, 113.

⁶⁶ *Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)*, 1929, 137 LNTS 1.

limit on injury and death claims was initially set at 125 000 Francs per passenger, later instruments subsequently increased this to nearly five times that amount.⁶⁷

Like the maritime industry, limitation of liability was adopted when the aviation industry was in its infancy. Flying was one of the most dangerous modes of transportation and carriers had difficulty obtaining insurance that would protect them from bankruptcy following a crash.⁶⁸ The government was thus keen to encourage a fledgling industry. There were, however, significant technological developments to the point that flying is now one of the safest forms of transportation. This was accompanied by enormous growth in the industry and its revenues.⁶⁹

Consequently, major airlines started paying full compensation to passengers in the 1960s regardless of the legal limitations. Compensation to the relatively few people who were injured or died constituted only a fraction of their revenue.⁷⁰ In addition, international instruments were introduced which attempted to replace the system of liability from one of presumed fault to strict liability. The IATA Passenger Liability Agreement of 1995 was one such example.⁷¹ The trend towards full compensation culminated in the Montreal Convention, which was adopted by the International Civil Aviation Organization (ICAO) on May 28 1999. It entered into force on 4 November 2003 with 97 parties and will eventually replace the Warsaw Convention and its protocols after having been ratified by all states.⁷²

The Montreal Convention established a two-tier liability system. On the first tier, air carriers are strictly liable for proven damages up to 100 000 SDR per passenger.⁷³ Under Article 24 this figure is reviewed every five years by the ICAO and was increased to 113 100 SDR in 2009.⁷⁴ For damages above this figure, the airline is liable for an unlimited amount unless it can prove that it was not negligent or that a third party was solely responsible for the loss.⁷⁵ The burden of proof remains with the airline, as in the Warsaw Convention. The Montreal Convention requires all air carriers to have liability insurance up to the limits specified in the first tier so they always have the funds to pay out claims.⁷⁶

Thus, air carriers cannot contest claims for compensation up to 113 100 SDR. The plaintiff merely has the burden of establishing that there was an 'accident' within the meaning of the Montreal Convention,⁷⁷ which occurred on the aircraft or while embarking or disembarking and caused bodily injury or death.⁷⁸ Above this amount, the airline can only defend itself by proving that 'it was not negligent or otherwise at fault.'⁷⁹

This burden of proof will never be easy to discharge because of the 'technical and operational complexity of aviation'.⁸⁰ The complicated chain of facts makes it difficult to prove the complete absence of any negligence, wrongful act or omission.⁸¹ Consequently, aviation lawyer Jonathan Reiter says 'there is a very low standard for proving negligence in the second tier' and that 'the airlines don't really contest it.'⁸² Nevertheless, there have been few exceptionally high compensation claims. This is because claimants can only recover actual proven compensatory damage. 'Punitive, exemplary or any other non-compensatory damages' are specifically

⁶⁷ 1 250 000 Gold Francs under the *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 1929, as amended by the *Protocol done at the Hague on 28 September 1955*, 1971, 478 UNTS 371.

⁶⁸ Taylor, above n 19, 115.

⁶⁹ Ibid 116.

⁷⁰ Ibid 127.

⁷¹ Milde, above n 63, 847.

⁷² Zaman, above n 7, 58.

⁷³ Montreal Convention, 1999, 2242 UNTS 309, art 21(1)

⁷⁴ Butterworths, *Personal Injury Litigation Service*, 'Division XVIII Personal Injury Litigation Outside the United Kingdom, Personal injury in the USA, C Private international law with travel conventions and US air and sea law, 12 The Warsaw Convention 1929, the Montreal Protocol 1975 and the Montreal Convention 1999', 257: equivalent to approximately USD 167 000.

⁷⁵ Montreal Convention, 1999, 2242 UNTS 309, art 21(2).

⁷⁶ Ibid art 50.

⁷⁷ There has been a notable divergence between the approaches of the highest courts in the United States, the United Kingdom and Australia as to what constitutes an 'accident': Milde, above n 63, 846.

⁷⁸ *Siddiq v Saudi Arabian Airlines Corp* No 6:11-cv-69-Orl-19GJK (MD Fla Jan 9, 2013) [14]. In that case, a passenger who had a heart attack during a flight and sued the carrier for refusing to declare an emergency and land at the nearest suitable airport was denied summary judgment because it did not satisfy the required meaning of 'accident'.

⁷⁹ Butterworths, above n 74, 259.

⁸⁰ Milde, above n 63, 847.

⁸¹ Ibid 847.

⁸² Miriam Kelliher, *Plane Crash Victim Compensation Under the Montreal Convention* (3 April 2014) Consumer Eagle <<http://www.consumereagle.com/2014/04/03/plane-crash-victim-compensation-under-the-montreal-convention/>>. Jonathan Reiter represented relatives of victims in litigation arising out of the '1999 EgyptAir crash, the crash of SwissAir Flight 111, and the American Airlines crash into Belle Harbor, Queens'.

excluded.⁸³ Consequently, a large number of claims are fairly modest.⁸⁴ For example, under both English and US law the estate of an unmarried adult with no financial dependents will only be entitled to the cost of a funeral.⁸⁵ If the deceased had financial dependents they may be awarded damages for lost income or mental distress, but these are usually well below USD 3 million.⁸⁶ In addition, the air carrier is still free to bring actions against third parties and plead a defence of contributory negligence.⁸⁷

The aviation industry has now had unlimited liability for personal injury and death claims for over 15 years. The continuing success of the Montreal Convention provides cogent evidence that can be used to assess the arguments for and against the limitation of liability for maritime claims.

5 Parties Affected by Limitation

Before evaluating the arguments for the limitation of liability, it is useful to identify the parties affected by its operation. Lord Mustill, in his seminal address ‘Ships Are Different – Or Are They?’⁸⁸ outlined three ‘situations’ where limitation of liability arose:

5.1 Closed Situations

This category comprises specific parties who voluntarily enter into an agreement and thereby assume a level of risk. The parties are fully aware of and accept the risks of the venture. Lord Mustill provides the example of a standard contract of carriage between a cargo owner and a carrier. Both parties are aware of the limitation of liability and obtain a long-term benefit from it.⁸⁹

5.2 Partly Closed Situations

This category comprises parties who are regularly involved in situations where their liability is limited, such as a regular exporter of goods by sea. They also obtain a long-term financial benefit, such as cheaper insurance. This supposedly encourages them to remain in that area of business.⁹⁰

5.3 Open Situation

The third situation envisages innocent third parties who have not chosen to run any risk. They are only connected to the incident by an ‘unfortunate convergence of place and circumstance.’⁹¹ Lord Mustill provided the striking example of a passenger aircraft crashing in a residential area. The victims suffer equally despite an uneven distribution of risk. The victims on the ground have nothing to gain from the carrier’s right to limitation. They suffer through no fault of their own and in no way, directly or indirectly, accrue some benefit from the right to limit the carrier’s liability.⁹² Nevertheless, they must compete with other claims for the limitation funds and may not receive full compensation.

Lord Mustill’s categories fail to account for the parties of the venture who are not regularly involved in the shipping industry, such as one-off shippers or passengers. These parties do not receive the benefit of limitation from regular involvement. On the other hand, it could be argued that they voluntarily assumed a risk when embarking on the voyage (so as to fall under Lord Mustill’s ‘closed’ situation). Some may even go so far as saying that the onus is on the passenger to be fully aware of the risks and liabilities of his or her journey.⁹³

Nevertheless these classifications are useful because there are numerous parties affected by the limitation of liability, each with different priorities and liabilities. When analysing the arguments for and against the limitation of liability, it is therefore important to bear in mind that each argument will be stronger for some parties more than others.

⁸³ Montreal Convention, 1999, 2242 UNTS 309, art 29.

⁸⁴ Taylor, above n 19, 118.

⁸⁵ Ibid 118; for example, a jury upheld a verdict awarding only funeral costs to the estranged spouse of a man killed in a car accident in *McGowan v Estate of Wright* 524 So 2d 308 (Miss 1988).

⁸⁶ Eric Posner and Cass Sunstein, ‘Dollars and Death’ (2005) 72 *The University of Chicago Law Review* 537, 549.

⁸⁷ Montreal Convention, 1999, 2242 UNTS 309, art 20.

⁸⁸ Mustill, above n 12.

⁸⁹ Ibid 493.

⁹⁰ Ibid 493.

⁹¹ Killingbeck, above n 8, 12.

⁹² Mustill, above n 12, 494.

⁹³ Killingbeck, above n 8, 11.

6 Arguments for Limitation

6.1 Protecting the Industry

As already discussed, the historical justification for the limitation of liability was to protect a fledgling shipping industry. Limitation was allowed to attract investment in shipping and help develop a national merchant marine. However, Lord Mustill points out that ‘the original economic considerations that generated the development of limitation of liability in shipping no longer have any resemblance to the business environment of the modern shipping industry.’⁹⁴

Indeed, maritime limitation dates back to an era when ocean voyages were incredibly perilous and ‘[s]ailing ships spent many months, sometimes years, away from their home ports, out of touch with the shipowner’.⁹⁵ The shipowner’s involvement was restricted to preparation and selection of trustworthy masters and crew.⁹⁶ Once the ship set sail it was essentially at the mercy of the masters and crew. It was also relatively common for the value of the cargo to exceed that of the ship. This meant that following the failure of the venture through the ‘neglect, dishonesty or incompetence’ of the crew, the shipowner would ‘almost certainly face financial ruin: having lost his ship and incurred legal liability to the cargo owner’.⁹⁷

In the centuries since there have been massive improvements in the speed and reliability of ships.⁹⁸ The shift toward prefabrication, made possible through innovations such as welding, has greatly improved the quality of construction and safety of ships.⁹⁹ Navigational aids such as radar, global positioning technology, and weather satellites have greatly reduced the unpredictability and danger of ocean voyages.¹⁰⁰ Radio and satellite technology allows instant communication with the shipowners so there is constant oversight, and shipowners are able to do instantaneous background checks of masters and crew.¹⁰¹ There have also been a plethora of international rules and regulations governing safety following the establishment of the IMO in 1948.¹⁰²

Consequently, the loss of life and property in shipping is now relatively modest and the overall trend is one of reduction in the number of fatalities. For instance, amongst bulk carriers an average of 26 lives and 5.9 ships was lost per year in the period 2001-2010 compared to 74 lives and 135 ships a decade earlier.¹⁰³ In addition, the fatal accident rate in UK shipping per 100 000 seafarers was 358 in 1919 compared to just 11 from 1996 to 2005.¹⁰⁴ These statistics are even more impressive given the increasing number of ships in the world fleet and the corresponding increase of passengers and crew at risk.¹⁰⁵ The European Transport Safety Council data now ranks marine transport in Europe as the fourth safest means of passenger transport after bus, rail and air.¹⁰⁶ This is supported by the fact that the US transport fatality figures for 2009 show that ship-related fatalities were the second safest only to air transport.¹⁰⁷ Thus, shipping today is considerably safer and only slightly behind airlines in regards to loss of life.

There have also been several significant commercial developments that have reduced the financial risk of shipping. Modern finance and ownership arrangements are complex and involve many parties beyond a single owner risking their life savings.¹⁰⁸ Limitation of liability was created ‘in an era before the corporation had become the standard form of business organization’.¹⁰⁹ Modern corporations distribute risk amongst

⁹⁴ Mustill, above n 12, 499.

⁹⁵ AHE Popp, ‘Limitation of Liability in Maritime Law – An Assessment of its Viability from a Canadian Perspective’ (1993) 24 *Journal of Maritime Law and Commerce* 335, 336.

⁹⁶ Killingbeck, above n 8, 10.

⁹⁷ Taylor, above n 19, 117; as was seen in *Boucher v Lawson*, above n 11.

⁹⁸ Mustill, above n 12, 492.

⁹⁹ Carly Fields, *Safety and Shipping 1912-2012: From Titanic to Costa Concordia* (2012) Allianz Global Corporate & Specialty <<http://www.agcs.allianz.com/insights/white-papers-and-case-studies/safety-and-shipping-report/>>.

¹⁰⁰ Killingbeck, above n 8, 2.

¹⁰¹ Mustill, above n 12, 492.

¹⁰² Fields, above n 99, 28.

¹⁰³ International Maritime Organisation, *International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment* (2012) International Maritime Organisation

<<http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/MaritimeTransport/Pages/default.aspx>>.

¹⁰⁴ Fields, above n 99, 13.

¹⁰⁵ These statistics exclude the loss of life when overcrowded ships sink whilst carrying migrants from the developing world, as well as acts of piracy and armed robbery, because they do not reflect safety standards on ships in general.

¹⁰⁶ Fields, above n 99, 15.

¹⁰⁷ *Ibid* 15.

¹⁰⁸ Killingbeck, above n 8, 2.

¹⁰⁹ *Ibid* 20.

shareholders and ‘an individual is only liable for a company’s debts to the extent of their investment’.¹¹⁰ In addition, more than one limitation regime may be applicable to a particular loss, such as where a property claim under the Hague-Visby Rules is further limited under the LLMC.¹¹¹ The development of maritime insurance, enabling shipowners to obtain extensive cover, has also mitigated the financial risk. Thus, a shipowner is provided several layers of protection beyond the maritime limitation of liability.

Finally, the maritime industry is no longer fledgling; it has come a long way since the 18th century and now generates multi-billion dollar revenues. The industry no longer needs protection, and even if it did, it is more appropriate that subsidies come from the state and not at the expense of injured parties.

Thus, the limitation of liability can no longer be justified on protectionist grounds in the context of the modern shipping industry. Given the comparable casualty rate to the airline industry, it is unlikely that shipowners will be exposed to an excessive number of claims for compensation.

6.2 Joint Venture

The idea of a joint venture was another one of the early motives behind the limitation of liability in shipping, with roots in the general average concept of the common adventure.¹¹² It was reasoned that even if there was no formal partnership, the shipowner and the cargo owner were participants in a common adventure ‘for the benefit of both, and at the cost of both, and ... at the risk of both.’¹¹³ It was seen as inappropriate that only one co-adventurer bore the full risk of the venture. In *Boucher v Lawson* the cargo owner was able to sue the shipowner for the theft of its gold bullion despite the latter not being privy to the theft.¹¹⁴ Parliament consequently allowed limitation of liability so that shipowners were not exposed to financial risks greater than their share of the venture.¹¹⁵

However, the extension of the limitation of liability to personal injury and death represents a departure from this logic because third parties, such as passengers, could not be said to be co-adventurers.¹¹⁶ Similarly, the adoption of a tonnage formula meant the shipowner’s liability was not limited to the value of his ship.¹¹⁷ The effect of these developments is that the limitation of liability is no longer confined to the venture capital of each party.

From this perspective, the limitation of liability has served its purpose and is now redundant.

6.3 Ability to get Insurance

The major argument for the maritime limitation of liability has shifted from encouraging trade and investment to that of capping potential insurance payouts so that insurance can be purchased at a reasonable rate.¹¹⁸ Indeed, ‘if the maximum liability of the shipowner can be assessed in advance then it should be easier and cheaper to obtain insurance cover.’¹¹⁹ This sentiment was seen in the legal committee of the IMO prior to adopting the LLMC.¹²⁰

The earlier concept of limitation held that a shipowner should be able to free himself from liabilities which exceeded his total interest in a venture subject to marine perils. The more modern view is that the shipowner should be able to free himself from liabilities which exceeded amounts recoverable by the insurance at reasonable cost.

¹¹⁰ Ibid 26.

¹¹¹ Gotthard Gauci, ‘Compulsory Insurance Under EC Directive 2009/20/EC – An Adequate Solution for Victims, or is it also Time for Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer of Last Resort?’ (2014) 45 *Journal of Maritime Law and Commerce* 77, 80.

¹¹² Killingbeck, above n 8, 9.

¹¹³ Mustill, above n 12, 492.

¹¹⁴ *Boucher v Lawson*, above n 11.

¹¹⁵ Killingbeck, above n 8, 9.

¹¹⁶ Mustill, above n 12, 498.

¹¹⁷ Ibid 498.

¹¹⁸ Steel, above n 62.

¹¹⁹ Yang Ming, ‘Limitation of Liability for Claims for Personal Injury & Death Following a Collision’, in *Proceedings of the International Congress of Maritime Arbitrators XIIIth Meeting, Auckland, New Zealand* (International Congress of Maritime Arbitrators, 1999) 3, 4 <<http://gmaa.de/images/stories/gmaa/pdf/icma/ICMA%20Auckland%201999.pdf>>.

¹²⁰ Steel, above n 62, 79.

Steel argues that if shipowners' liability is unlimited then insurance companies will demand excessive premiums or refuse coverage because shipping is particularly susceptible to catastrophic incidents.¹²¹ Consequently, shipowners will be encouraged to pursue bad practices such as self-insurance and there will be an increasing number of one-ship companies to avoid claims against the owner's other assets.¹²²

Steel greatly underestimates the insurance market's ability to provide the levels of cover required by shipowners with unlimited liability. Killingbeck notes that 'the forms of modern marine insurance are at least as numerous and comprehensive as those available to other commercial and transport enterprises.'¹²³ If an individual can get insurance for a hurricane or an earthquake in the Lloyd's reinsurance market, for example, it seems very odd that a shipowner could not get insurance for major maritime catastrophes.¹²⁴ Shipping has the added advantage of P&I clubs to provide extra liability cover.¹²⁵ Moreover, the airline insurance industry is functioning well and efficiently with unlimited liability. In 2012 insurers experienced the lowest level of airline insurance losses for over 25 years and consequently premiums are generally being reduced.¹²⁶ It may even be possible for air insurers to fill the void if P&I clubs are unable to provide adequate insurance to shipowners.¹²⁷

There is little evidence that unlimited liability will lead to excessive premiums. This seems particularly unlikely in light of the global trend of declining losses. In fact, experience tells us that it is unlikely that unlimited liability will result in significantly higher insurance costs. Professor Peter Wetterstein addressed the point, by saying that:¹²⁸

The role played by insurance costs in competition... seems to have been exaggerated in international discussion. The introduction of unlimited liability would mean only a marginal - if even that - increase in costs. I cannot accept insurance costs as a key argument for limitation of maritime liability. Such arguments are not normally acceptable in other fields and, furthermore, there exist other means to give favourable treatment to national merchant fleets and to improve their international competitiveness. This should not be at the expense of the injured party/ies.

Many airlines made similar arguments against removing liability limits prior to the signing of the Montreal Convention. They argued that unlimited liability would bankrupt them due to uninsurable claims, which benefits neither claimants nor the industry.¹²⁹ Yet 15 years later the airline industry is not excessively burdened by abolishing the limits of the Warsaw Convention, with most claims being fairly modest.¹³⁰ The adoption of the Montreal Convention demonstrates that even a substantial increase in passenger liability cover has a very small effect on the overall insurance costs. Liability premiums paid by the world's airlines amount to approximately 0.15% of global operating revenues and are actually decreasing.¹³¹ Furthermore, the highest levels of liability cover can usually be bought at lower premium rates that reflect the smaller risk of paying out.¹³²

Even if unlimited liability did increase the cost of insurance, it is more effective and fair to spread the risk (and therefore the cost) of maritime disasters amongst all participants in international trade. Following a catastrophe there will always be an ultimate insurer or State that has to cover the loss, so it is preferable to spread the loss to as wide a base as possible. One suspects that most rational actors in the shipping industry would prefer to pay slightly higher freight costs to protect themselves from the eventuality of catastrophic events. The position is comparable to product liability where businesses do not enjoy the ability to limit their liability beyond the corporate structure. In the celebrated case *Escola v Coca-Cola Bottling Co*, Justice Traynor explains that:¹³³

... the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

¹²¹ Ibid 82.

¹²² Ibid 81.

¹²³ Killingbeck, above n 8, 25.

¹²⁴ Dwight Jaffee and Thomas Russell, 'Catastrophe Insurance, Capital Markets, and Uninsurable Risks' (1997) 64 *The Journal of Risk and Insurance* 205, 207.

¹²⁵ Killingbeck, above n 8, 25.

¹²⁶ Willis – Global Risk Advisor, Insurance and Reinsurance Broker, *Airline Insurance Market* (2013) Willis – Global Risk Advisor, Insurance and Reinsurance Broker
<http://www.willis.com/documents/publications/industries/aerospace/Q1_2013_Airline_Insight_PDF_version.pdf>.

¹²⁷ Zaman, above n 7, 72.

¹²⁸ Peter Wetterstein, 'Damage From International Disasters in the Light of Tort and Insurance Law' in *Proceedings of the AIDA 8th World Congress, Copenhagen, General Reports* (AIDA, 1990) 102-103.

¹²⁹ Zaman, above n 7, 72.

¹³⁰ Ibid 72.

¹³¹ Taylor, above n 19, 120.

¹³² Ibid 120.

¹³³ *Escola v Coca-Cola Bottling Co* 150 P 2d 436 (Cal 1944) 441.

Some may argue that individuals should get their own insurance instead of the carriers.¹³⁴ However, shipowners can purchase appropriate insurance much more economically and efficiently than individuals and pass the cost on through pricing. This is because shipowners are in a better position to assess the risks and potential liabilities of the venture (for example, they will have extensive knowledge of the safety measures in place). In contrast, individuals cannot foresee all risks to themselves and it would place an undue burden on victims to require them to insure against the negligence of others. This is especially the case considering bystander victims, such as swimmers, that are not in a common venture and may not even be aware that they are in danger. It is also unrealistic to expect the average seafarer to be able to afford personal injury insurance.

Thus, in an industry where insurance is vital it is inappropriate to insert an artificial subsidy that interferes with actuarial risk spreading. Unlimited liability is unlikely to have a significant impact on insurance rates, yet it would make a substantial difference for the few victims of maritime accidents whose compensation would otherwise be limited.

6.4 Quid Pro Quo

Another justification for the limitation of liability is that all users of the shipping industry benefit from reasonably priced transport.¹³⁵ It is argued that unlimited liability would expose shipowners to large claims that could put them out of business, thus reducing competition and choice amongst carriers. This reduction of competition, combined with increased insurance premiums, is then supposedly passed on to the customer through increased rates.¹³⁶

There are two key flaws in this argument. Firstly, as already discussed, unlimited liability is unlikely to increase insurance costs significantly, if at all, and modern insurance and finance arrangements will protect shipowners from going out of business. Secondly, this argument does not account for victims that are not regularly involved in the maritime industry, such as one-off travellers or swimmers in the water (Lord Mustill's 'open' category). One cannot benefit from reasonably priced transport if they do not in fact use it.

Another quid pro quo for shipowners being able to limit their liability under the current regime is said to be that the aggrieved party has the benefit of a reversed burden of proof.¹³⁷ However, the value of a reversed burden of proof is greatly reduced by the fact that a plaintiff may rely on the legal principle of *res ipsa loquitor* in cases of catastrophic accident.¹³⁸ The current liability regime is tipped heavily in favour of shipowners, and one suspects that most claimants would prefer to take back the burden of proof if it meant removing the limits on compensation.

Thus, neither a reversed burden of proof nor marginally cheaper rates sufficiently justify the maritime limitation of liability scheme.

6.5 Avoidance of Litigation and Certainty of Compensation

A pragmatic argument for the limitation of liability is that it provides simplicity and certainty to the compensation process by encouraging settlement.¹³⁹ Steel put forward a compelling argument that a limited claim that is certain is better than an unlimited claim against potentially insolvent parties.¹⁴⁰ This is because the LLMC provides a limitation fund even where the vessel has lost all value following the accident, so there will always be some compensation. Furthermore, limitation arguably avoids costly litigation since only a single action is necessary to prove elements such as negligence.¹⁴¹

However, there is no evidence that the limitation of liability reduces litigation. In fact, Taylor believes that before the Montreal Convention was adopted 'the single most important reason for the volume of litigation that arises from air crashes [was] the limitation of liability...' ¹⁴² He suggests that placing an artificial cap on the compensation of victims with a legitimate claim is likely to provoke conflict and litigation, not avoid it. The

¹³⁴ Popp, above n 95, 355.

¹³⁵ Killingbeck, above n 8, 11.

¹³⁶ Ibid 11.

¹³⁷ Taylor, above n 19, 121.

¹³⁸ Ibid 121.

¹³⁹ Killingbeck, above n 8, 17.

¹⁴⁰ Steel, above n 62, 87.

¹⁴¹ Killingbeck, above n 8, 16.

¹⁴² Taylor, above n 19, 121.

limitation of liability may in fact increase the amount of litigation. This is because where the provable damage exceeds the limitation figure the claimant is forced to cast his net wide and pursue other parties that do not enjoy the limitation of liability, such as the manufacturer of the ship and its components.¹⁴³

Killingbeck suggests that the only real alternative to the limitation of liability is 'an American style unlimited liability with free for all litigation'.¹⁴⁴ However, the Montreal Convention demonstrates that there is in fact a workable middle-ground. By having strict liability of 113 100 SDR coupled with compulsory insurance, all claimants are guaranteed to have funds available to them. This arrangement also enables advance payments so families avoid suffering immediate hardship following an accident.¹⁴⁵ In many cases this payout may be sufficient compensation in itself. However, in circumstances where the provable damage exceeds this amount then claimants are still able to sue for additional compensation. They may wish to avoid the costs associated with litigation and forgo extra compensation, but that is their choice as a victim.

Thus, a system of strict liability coupled with compulsory insurance would provide at least the same level of certainty as limitation of liability, without having to sacrifice the victim's right to full compensation.

6.6 Channelling Liability

It could be argued that the limitation of liability has a procedural advantage in that all claims are channelled to a single forum where the fund is constituted. This avoids parallel proceedings where the claimants come from different jurisdictions. Where a limitation fund has been constituted under the LLMC and a person has made a claim against the fund, all other parties are debarred from 'exercising any right' in respect of that same claim against any other assets of the shipowner.¹⁴⁶ This has the effect that once a limitation fund is formed all the claims are channelled through that forum, and the shipowner's other ships are free to carry on trading.¹⁴⁷ The aim of the subsection is to protect the assets of the shipowner from arrest or detention. If this protection were not available then there would be a rush around the world to arrest the shipowner's vessels (similar to when a multinational shipowner becomes insolvent). That would freeze the shipowner's business, which is adverse to international trade.¹⁴⁸

There are several critiques of this argument. Firstly, the convention's protection of shipowners is misplaced. Maritime law should prioritise full compensation to victims regardless of the disruption it may cause the defendant or the fact that parallel proceedings may result. It is difficult to imagine a land-based company wanting to carry on 'business as usual' immediately following a catastrophe before settling its liability. Secondly, the advantage of channelling liability does not apply to the many one-ship companies that do not have other assets vulnerable to arrest. In 2012 40% of world shipping involved one-ship companies registered in Liberia, Panama and the Marshall Islands.¹⁴⁹ Thirdly, and most significantly, the channelling of liability is essentially a procedural issue that does not necessitate a limit of liability. This could just as easily be resolved with a convention that requires shipowners to put up a set fund that must be topped up if it proves inadequate and have all claims go there; it being in the interest of all parties that the actions are brought together.

Thus, the channelling of liability is a completely separate issue to the limitation of liability and can be achieved through more attractive means.

¹⁴³ Ibid 123.

¹⁴⁴ Killingbeck, above n 8, 28.

¹⁴⁵ Butterworths, above n 74, 257.

¹⁴⁶ LLMC, 1977, 1456 UNTS 221, art 13(1).

¹⁴⁷ Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims* (Informa, 4th ed, 2004) 74-75.

¹⁴⁸ Ibid 76.

¹⁴⁹ Malcolm Wallis, 'Recovery of Maritime Debts and the Role of the Associated Ship' (2012) 28 *Banking & Finance Law Review* 103, 109-110.

7 Arguments Against Limitation

7.1 Ethics

In his paper Lord Mustill suggests ‘the time will come when the ethics of limitation of liability will be firmly put in issue.’¹⁵⁰ Having debunked the traditional justifications of maritime limitation in light of the successful implementation of the Montreal Convention, that time is now.

Lord Mustill complained about the unsystematic way in which the limitation of liability is applied. Indeed, the amount of compensation that an injured passenger can expect depends on a range of arbitrary variables such as the form of transport used, the legislation in force at the location of the accident, and where the claimant brings proceedings.¹⁵¹ The resulting ‘lottery’ is ‘not only illogical but immoral.’¹⁵² For example, had Ms Birkenfeld’s injuries resulted from a car crash then precedent tells us she could have been awarded USD 3 million.¹⁵³ Had she been able to bring a claim in a jurisdiction where the higher limits of the 1996 Protocol were in force then she would have received closer to NZD 3.7 million. Had the collision occurred within 12 nautical miles of New Zealand then she would have been fully compensated under ACC.¹⁵⁴ It is ‘unacceptable that the financial future of injured persons should depend on chances as whimsical as these.’¹⁵⁵

The maritime limitation of liability is also arbitrary in the sense that the limit depends on the tonnage of the culpable ship. As was seen in *Birkenfeld*, a vessel of any size can do serious damage to an unprotected human. The fact that she was run over by a small inflatable boat being driven at high speed meant she received the minimum level of compensation. Had she had been run over by a container vessel, in contrast, she would have received substantially greater compensation. While a rough formula that bigger ships cause more damage may be generally justifiable, *Birkenfeld* illustrates that it can produce perverse results. There is much less correlation between the size of a vessel and the severity of the personal injury it can cause, as compared with property damage. Moreover, the values of the tonnage formula itself are completely arbitrary, having been based on the levels of insurance available at the time of drafting and not the value of the ship.¹⁵⁶

The current liability system is thus totally arbitrary and unjust, at times producing ‘freakish results’.¹⁵⁷ This lottery of compensation is advantageous for insurers because they are able to spread their risks.¹⁵⁸ It is in their interest to continue the limitation of liability because it significantly limits their exposure to risk. It is the victims of maritime accidents who suffer under this regime because the amount of compensation they can expect to receive depends on what appears to be chance as much as anything.

Lord Mustill also critiqued the discriminatory nature of maritime limitation of liability. He considers it ‘unreasonable that a single group in society are the beneficiaries of a rule whilst others exposed to similar risks are left unprotected.’¹⁵⁹ He points out that that we have protected the solvency of shipowners for centuries through the limitation of liability, but have not extended the benefit to other situations where the moral case is just as great. He provided several notable examples – the momentary inattention of a motorist, or a simple slip of the surgeon – of single faults which potentially result in substantial liabilities and yet are not protected by limitation.¹⁶⁰ Lord Mustill concluded over 20 years ago that ships were no longer different, with ‘no more right to protection than any other commercial enterprise.’¹⁶¹

Limited liability is, of course, still available to businesses through the corporate structure provided by company law. Consequently, if a person is killed or injured and a company is held liable, his or her compensation is essentially limited to that company’s assets. It is questionable whether this form of limitation is justified, but there are several distinguishing features that may justify the limitation of liability in the financial sphere, such as the ongoing need to foster innovation in the market. Regardless of whether limited liability via the corporate

¹⁵⁰ Mustill, above n 12, 500.

¹⁵¹ Ibid 500.

¹⁵² Ibid 500.

¹⁵³ *Waldorf v Shuta* 142 F 3d 601 (3rd Cir 1998) 96.

¹⁵⁴ *Accident Compensation Act 2001* (NZ) s 20.

¹⁵⁵ Mustill, above n 12, 500.

¹⁵⁶ Ibid 499.

¹⁵⁷ Ibid 500.

¹⁵⁸ Killingbeck, above n 8, 14.

¹⁵⁹ Ibid 15.

¹⁶⁰ Mustill, above n 12, 491.

¹⁶¹ Killingbeck, above n 8, 15.

structure is justified (an issue beyond the scope of this paper), the extension of this benefit through maritime limitation of liability clearly lacks justification.

Finally, it is rather troubling that in this instance the law appears to put a cash amount on the life of a human being. Limitation law does not discriminate between the unique circumstances of each individual but rather treats them all the same. That is not to say that some people deserve compensation more than others, but rather that the financial sum required to compensate each individual is necessarily unique. These Conventions value life based on the number of passengers on board the ship at the time of an accident, whereas tort law looks at a range of complex factors. For example, compensation can be based on 'loss of economic support to a decedent's family, loss of services, loss of companionship, and pain and suffering'.¹⁶² The money available in the limitation fund will not always be adequate to compensate the victims according to their individual circumstances.

Thus, the limitation of liability is applied in an unsystematic manner that discriminates against other modes of transportation and puts an arbitrary figure on an individual's level of compensation.

7.2 The Purpose of Private Law

7.2.1 Functionalism

The dominant contemporary view is that private law is the legal manifestation of independently justifiable goals.¹⁶³ These goals are independent from both the law to which they are applied and from each other, and may require balancing when in conflict.¹⁶⁴ This goal-oriented understanding of private law stems from the idea that 'the object of the law is to serve human needs' and promote human welfare.¹⁶⁵ The primary goals of tort law are said to be compensating accident victims and deterring behaviour that might produce injuries (thus minimising the frequency and seriousness of accidents).¹⁶⁶ The maritime limitation of liability achieves neither of these goals.

As already discussed, maritime limitation of liability produces two clear situations where victims are barred from receiving full compensation from the tortfeasor. Firstly, where there is a catastrophic event in which there are numerous claimants and the limitation fund is exhausted, all the victims receive limited compensation in proportion to their original claims. Secondly, where a small ship causes serious harm or fatality the application of a tonnage formula can result in a limitation fund that does not cover the injury. In both situations a claimant, having suffered harm at the hands of another, may be prevented from receiving full compensation. The limitation of liability thus infringes the fundamental tort principle of *restitutio ad integrum* by partially absolving shipowners from responsibility. By limiting the right of compensation and unjustly allocating responsibility to the victims, the limitation of liability undermines one of tort law's fundamental goals.

Furthermore, the incentive for shipowners to maintain safe and seaworthy vessels is greatly reduced by unbreakable and low limits in the LLMC.¹⁶⁷ By partially absolving shipowners of responsibility following an accident and capping their liability so that they can easily cover it with insurance, the incentive to avoid tortious conduct is significantly less. Lord Donaldson claims that unlimited liability would not make shipowners implement stricter safety measures.¹⁶⁸ He believed the only way to do this was by 'making other groups in the maritime industry put pressure on shipowners, such as encouraging insurance companies to only provide cover for vessels that meet minimum standards.'¹⁶⁹ However, Lord Donaldson failed to elaborate exactly how to put pressure on insurance companies to do so. Unlimited liability is the solution. Insurance companies always look to minimize their exposure to risk so they will be incentivised to take precautions if shipowners face unlimited liability. It will be in the interest of insurance providers to require higher safety standards and conduct regular inspections as a condition of providing cover.¹⁷⁰

¹⁶² Zaman, above n 7, 57.

¹⁶³ Ernest Weinrib, *The Idea of Private Law* (OUP, 2012) 3.

¹⁶⁴ *Ibid* 5.

¹⁶⁵ *Ibid* 4.

¹⁶⁶ *Ibid* 4.

¹⁶⁷ Zaman, above n 7, 64.

¹⁶⁸ Killingbeck above n 5, 18.

¹⁶⁹ *Ibid* 18.

¹⁷⁰ Soyer, above n 41, 526.

Tort law incentives have the greatest impact on corporate tortfeasors; that is, businesses that are held liable for not preventing particular accidents.¹⁷¹ This is because if a company has regular involvement in the industry, and the type of accident is likely to happen again, then it is more likely that the company or others in a similar position will take efforts to prevent those accidents from occurring again.¹⁷² It therefore follows that corporate shipowners, at least, would respond to the deterrent threat of unlimited liability. The fact that a company has liability insurance does not diminish the economic deterrence of tort law if responsively priced to the company's level of risk.¹⁷³ If shipowners are fully liable for their losses they will be incentivised to implement stricter safety measures in order to avoid future loss and keep insurance premiums low.

From an instrumental perspective, the maritime limitation of liability fails to achieve either of the goals of tort law: neither compensation nor deterrence. Limitation creates situations where victims do not receive full compensation and it fails to deter future accidents by partially absolving shipowners of responsibility.

7.2.2 Corrective Justice

Professor Ernest Weinrib, among other leading scholars, has argued against the functionalist understanding of private law.¹⁷⁴ He posits that private law is an autonomous and non-instrumental moral practice, which must be understood from within the structure of tort liability itself and not in reference to extrinsic and independent goals.¹⁷⁵ Private law, according to Weinrib, is a 'juridical enterprise in which coherent public reason elaborates the norms implicit in the parties' interaction'.¹⁷⁶

Weinrib points out that the fundamental feature of our private law system is that the liability of any given defendant is also a liability to a particular plaintiff.¹⁷⁷ The parties are treated as doer and sufferer of the same injustice and each party's position is only intelligible in light of the others.¹⁷⁸ The individual agents are thus linked together in a 'single, coherent bipolar relationship'.¹⁷⁹ Weinrib asserts that this relationship functions as a form of corrective justice, as formulated by Aristotle.¹⁸⁰

According to Weinrib, '[c]orrective justice regards the interaction between the plaintiff and defendant as an integrated whole in which both parties have an equal standing'.¹⁸¹ The action required to do justice depends on the correlativity of normative gains and losses between the parties.¹⁸² As the tortfeasor gains what the victim loses, it is insufficient to simply remove the tortfeasor's gain or restore the victim's loss.¹⁸³ The law must both restore the victim's loss and remove the tortfeasor's gain. Thus, when a defendant breaches its duty and infringes the correlative right of a plaintiff, corrective justice requires a remedy (usually damages) paid directly from the defendant to the plaintiff so as to restore the latter's rightful position as far as money allows.¹⁸⁴

Corrective justice thus rejects the idea that private law is justified by independent goals irrespective of whether it is fair to both parties.¹⁸⁵ Courts are not required to consider what is the best remedy for the future all things considered.¹⁸⁶ The role of private law is simply to correct the injustice done by one party to the other.

From this perspective as well, maritime limitation of liability undermines and perverts the entire purpose and framework of private law because it creates situations where victims are not fully compensated. It is a major failing of our private law that it does not always correct the injustice done to victims of maritime accidents at the hands of shipowners.

¹⁷¹ Willem van Boom, 'Compensating and Preventing Damage: Is There Any Future Left for Tort Law?' in Hugo Tiberg (ed), *Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa* (Jure, 2006) 287, 289.

¹⁷² Ibid 289.

¹⁷³ Gary Schwartz, 'Ethics and the Economics of Tort Liability Insurance' (1990) 75 *Cornell Law Review* 313, 363.

¹⁷⁴ Weinrib, above n 163.

¹⁷⁵ Ibid 6.

¹⁷⁶ Ibid 8.

¹⁷⁷ Jared Marshall, 'On the Idea of Understanding Weinrib: Weinrib and Keating on Bipolarity, Duty, and the Nature of Negligence' (2010) 19 *Southern California Interdisciplinary Law Journal* 385, 386.

¹⁷⁸ Ernest Weinrib, *Tort Law as Corrective Justice* (2009) *VR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law* <www.ivr-enc.info>.

¹⁷⁹ Marshall, above n 177, 389.

¹⁸⁰ Ibid 386.

¹⁸¹ Ernest Weinrib, 'The Insurance Justification and Private Law' (1985) 14 *The Journal of Legal Studies* 681, 686.

¹⁸² Marshall, above n 177, 389.

¹⁸³ Ibid 389.

¹⁸⁴ Weinrib, above n 163, 56.

¹⁸⁵ Weinrib, above n 178.

¹⁸⁶ Ibid.

8 The Way Forward

The Montreal Convention confirms that unlimited liability is a viable and desirable option for reform. I therefore propose that the maritime industry adopt a new convention modelled on the Montreal Convention. This would involve a two-tiered liability system. On the first tier, shipowners would be strictly liable for proven damages up to a set amount per passenger. This could initially be set at 113 100 SDR so as to mirror the liability in the aviation industry, but it would ultimately be subject to negotiation by the various drafting parties. There would, however, need to be a mechanism for the IMO to review this amount every 5 years in order to counter inflation. For damages above this figure, the shipowner will be liable for an unlimited amount unless it can prove that it was not negligent or that a third party was solely responsible for the loss.

Like the Athens Convention 2002, it is reasonable to distinguish between shipping and non-shipping ‘incidents’ with strict liability only attaching to the former. The alternative would render the shipowner an insurer of all risks, even if unrelated to shipping and beyond the shipowner’s control. The term ‘incident’ or ‘event’ is preferable to ‘accident’ because they have a much wider scope. This should avoid divergent interpretations of ‘accident’ across major jurisdictions, as is seen under the Montreal Convention.¹⁸⁷ The term ‘personal injury’ as opposed to ‘bodily injury’ is also preferable because it will also avoid disagreement as to whether mental injury can be compensated.¹⁸⁸

Like the Montreal Convention, the new convention would have to make it compulsory for all shipowners to have liability insurance up to the limit amount in the first tier. This would allow swift payment of compensation and certainty to victims of maritime accidents, as well as providing financial security to the shipping companies themselves. This concept is not foreign to the maritime industry having been introduced in the Athens Convention 2002. Moreover, an EC Directive in 2009 made it compulsory for ships exceeding 300 gross tonnage to have insurance up to the liability limitation thresholds under the LLMC.¹⁸⁹ Port state authorities will play a crucial role because they are in a position to check that visiting vessels have proof of their liability insurance.¹⁹⁰

One commentator has suggested that the IMO should also establish an international fund as a top-up system and insurance of last resort in a similar vein to marine pollution schemes.¹⁹¹ Although this is a good idea to address the possibility that an uninsured or inadequately insured ship will go undetected, it has yet to be seen whether such a system is feasible or even necessary.

Some may argue that unlimited liability ‘coupled with a presumption of liability tips the scales too far in favour of the claimants’.¹⁹² While I believe that such a balance is justified when dealing with personal injury and death, a possible compromise is to remove the presumption of liability so that the claimant must prove fault of the carrier. However, this arguably places too great a burden on the claimant in regards to gathering sufficient evidence to prove the shipowner’s wrongdoing in a technically complex industry.

The success of any convention depends on it being signed by a large number of states. Indeed, Steel made the point that ‘maritime nations move at the speed of the slowest country.’¹⁹³ If some countries cling to previous regimes of limited liability then forum shopping is likely to be a significant problem. The difficulty with reaching the required international consensus is that each part of the world has different concerns, expectations and priorities.¹⁹⁴ One division that is particularly acute is that between developed and developing countries.

India led a Third World initiative during negotiations of the Montreal Convention which expressed the view that unlimited liability ‘would be against the interests of air carriers, especially the small and middle size’, and ‘would make the very survival of the carriers questionable’.¹⁹⁵ It was also suggested that ‘the main beneficiaries of unlimited liability would be the passengers of developed countries,’ even though all carriers would have top

¹⁸⁷ Milde, above n 63, 846.

¹⁸⁸ Ibid 846.

¹⁸⁹ Directive 2009/20/EC of the Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L 131/128.

¹⁹⁰ Soyer, above n 41, 527.

¹⁹¹ Gauci, above n 111, 96; see also the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*, 1992, 1110 UNTS 57.

¹⁹² Taylor, above n 19, 130.

¹⁹³ Steel, above n 62, 81.

¹⁹⁴ Soyer, above n 41, 154.

¹⁹⁵ Milde, above n 63, 842.

pay higher insurance premiums.¹⁹⁶ A similar division was seen when the LLMC was first negotiated. The developed countries advocated very high limits but a few developing nations were reluctant to do so. The latter ‘saw such increases as a threat to their own small but growing fleets.’¹⁹⁷ This indicates the likely reaction if there was a proposal to abolish the maritime limitation of liability.

However, the successful implementation of the Montreal Convention shows that a model catering for all interests can be achieved. Drafters were able to reach a ‘delicate balance between the needs and interests of all partners in international civil aviation, States, the travelling public, air carriers and the air transport industry.’¹⁹⁸ Moreover, at the Correspondence Group at the seventy-seventh session of the Legal Committee proposing the 2002 Protocol to the Athens Convention, several delegations including Japan, Belgium and Norway pushed for the two-tier liability system because they thought maritime law should follow aviation law toward strict liability.¹⁹⁹

It will require a few determined states to take the initiative and a thorough discussion with all the actors of the industry, but reform is necessary to ensure adequate compensation of those injured by vessels.

9 Conclusion

The shipping industry is currently subjected to a one-sided regime that places the victims of maritime accidents in a worse position than those killed or injured in other circumstances. There needs to be serious reform to reflect modern realities and unify private law compensation.

The historical justification that limitation of liability is needed to protect the maritime industry can no longer be sustained. Today, sea voyages are much safer and the industry is well established. Shipowners are typically complex corporations that are able to control all aspects of the ship’s operation through modern technology: a far cry from single owners risking their life savings. It is difficult to justify a rule created in a long-gone social and business environment. Tradition alone cannot be a defence.

Modern insurance markets can undoubtedly provide adequate coverage for shipowners if liability limits are abolished. There is no evidence that unlimited liability will significantly increase premiums but, even if it did, it is more efficient and fair to spread the cost of maritime disasters amongst all participants in international trade.

A system of strict liability coupled with compulsory insurance will provide the same level of certainty as the limitation of liability without having to sacrifice the victim’s right to full compensation. Similarly, the channelling of litigation is essentially a procedural issue that can be achieved through more attractive means.

The maritime limitation of liability for personal injury and death claims is ethically objectionable. It places a monetary value on a human life, produces a lottery of compensation, and discriminates against all other modes of transportation. Innocent parties who have been injured by the actions of another should not be expected to subsidise industrial interests by receiving less than full compensation.

From both instrumental and non-instrumental perspectives of private law, the limitation of liability undermines and perverts the purpose and framework of our private law because it creates situations where victims are not fully compensated. It also decreases the incentive for shipowners to maintain safe and seaworthy vessels.

In 1999, most countries around the world accepted that protecting and subsidising the airline industry through limiting its liability to passengers was no longer justifiable. Undoubtedly those same conditions exist in the maritime industry today. Ships are no longer different.

¹⁹⁶ Ibid 842.

¹⁹⁷ Popp, above n 95, 347.

¹⁹⁸ Milde, above n 63, 843.

¹⁹⁹ Soyer, above n 41, 522.