The Roots and False Aspersions of Shipowner's Limitation of Liability

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I

INTRODUCTION

Limitation of enterprise liability is today so commonplace that we see notice of it all around us in the words “incorporated” and “limited” and their abbreviations, and take it for granted that any sizeable business and many small ones enjoy limited liability. It was not always so, and long before it became generally available ashore the pioneer of enterprise liability limitation was that of shipowners. That it has survived the development and ready availability of corporate limitation is at first remarkable but becomes quite understandable when its history, its foundations in the policy of maritime nations, its relation to modern commercial maritime practice, and the economic pointlessness of abandoning it are known. A general ignorance of these considerations, almost entirely unrelieved in the bench and bar, is responsible for many and continual animadversions against it.

In the United States the legal literature exhibits widespread hostility to shipowner’s limitation of liability, not only among claimants but also among judges before whom their claims are brought. It is widely recognized that our Limitation of Shipowner’s Liability Act is out of date and needs amendment. Criticisms, however, tend not to address improvement of the Act but to attack the principle of limitation on any terms. Limitation has consequently a very bad name that discourages responsible discussion of it. The Act is not about to be repealed without replacement and it is apparent that nothing can be done about it in the present state of the legal and Congressional minds. The bad name is undeserved and results from ignorance of limitation’s history, economic role and alternatives.

Our Limitation of Shipowner’s Liability Act\(^1\) was passed in 1851 and modeled on the first English act, of 1734,\(^2\) which was in turn based on the French limitation system of abandonment, which means that it depended for its limitation amount on what survived, if anything, to be abandoned to creditors after a casualty. Its only major amendment, in 1936, was to provide a fund based on tonnage, later increased, for personal injuries and deaths where the “abandoned” amount is insufficient. It has long been widely recognized that the Act is outmoded and should be supplanted by one based on tonnage of the vessel, which would provide the same fund regardless of the vessel’s survival, such as the International Convention now in force in other major maritime nations.

Laws granting shipowners limited liability for the consequences of major casualties incurred through no fault of their own are usual in the world’s maritime countries. In most major maritime countries (but not the United States) the law is found in an international Convention on the Limitation of Liability for Maritime Claims of

\(^1\) 46 U.S.C. §§ 30505 \textit{et seq.} as amended.

\(^2\) 7 Geo. II c. 15 (1734).
1976, to which the United Kingdom, Japan, France, Germany, Spain, Liberia, the Scandinavian nations and 27 others are parties. Still others remain parties to the earlier Convention of 1957. The fact that others embrace limitation is to some degree a reason for doing so, but that so many others with whom we have much in common do so in good spirit is reason to examine critically the validity of its disparagement in this country.

There are two principal grounds of complaint with limitation. First, those who deal with it recognize that our Limitation of Liability Act is distressingly outmoded, both in structure and liberality. Second, apart from the inequitable caprice of our Act, such laws are viewed as expressing arcane doctrine affording shipowners a unique privilege with no economic justification. A third, less sweeping, ground is a view that a law of limitation has its basis, if any, in the finances of merchant shipping and therefore should not be applied to pleasure craft. The first ground is well taken and the faults of the Act could easily be remedied by Congress. The second and third are deeply founded in somewhat separate fields of ignorance. Granting the first ground, I will take up the other two.

Because hostility faces counsel with difficulties when they invoke and apply our Limitation Act, it is astonishing that there has been so little effort to educate courts and counsel in the background and economic function of limitation and the realistic alternatives to it. Experience shows, too, that ironically, until that is done, no progress can be made in bringing our law up to date and thus eliminating the first ground of hostility. Forward-looking lawyers, mainly in and through the Maritime Law Association of the United States, have pressed for this and been effectively opposed by interests that dislike the capriciousness of the present system and from it draw their dislike to all systems, regarding them falsely as a special privilege or subsidy to shipowners.

The Maritime Law Association of the United States (“MLA”), the most appropriate body to spearhead change in our present system, pursued it for some years. After considerable study it prepared a draft statute to modernize the system substantially as represented in the international convention to which most major maritime countries were parties, but with higher limits more generous to claimants. It was introduced in the Congress and a hearing was held in 1985. Although we had industry support, there was strong union opposition, not only to the continuation of the present act, as always, but to any amelioration of it. As a consequence, because of an oft-expressed reluctance of congressional committees to deal with changes in private law without agreement of all
major interests, the bill went no farther, and unfortunately the MLA has not pursued the subject, either in Congress or through the necessary education of bench, bar and others interested.9 My purpose here is not to argue for the present law but to show that, when properly constituted, limitation is a rational economic device rather than a quaint privilege, by explaining its history, its economic function and some undesirable, and largely unrecognized, aspects of the alternatives, and that disdain for the present law does not support opposition to better ones.

II

EXPRESSIONS OF DISAPPROVAL

For years discontent with the outmoded United States Limitation Act has provoked commentators10 and judges to bad-mouth not just that act but the idea of any limitation at all. Numerous district judges have expressed their antipathy to it and regret at having to apply it, with critical epithets, and without indicating an understanding of the place of appropriate limitation in the scheme of things.11 The Act has been said by appellate courts to have “been criticized as outmoded and no longer necessary”12, and to be “considered by many to be outmoded”13, “hopelessly anachronistic”14, “out of place in the modern economy … [m]isshapen from the start, the subject of later incrustations, arthritic with age”15.

That last quotation is from an opinion of the Ninth Circuit, in which the chorus reaches a climax of complete error in this statement: “The Liability Act provides shipowners a generous measure of protection not available to any other enterprise in our

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9 Its former, and long-standing, Committee on Limitation of Ship Owners’ Liability might appropriately have continued to pursue this responsibility in an institutional way.

10 Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 821-22 (2d ed. 1975) (“doubtful whether the motives that originally lay behind the limitation are not now obsolete”); Richard C. Angino, Limitation of Liability in Admiralty, an Anachronism from the Days of Privity, 10 Vill. L. Rev. 721 (1965); Walter W. Eyer, Shipowners’ Limitation of Liability—New Directions for an Old Doctrine, 16 Stan. L. Rev. 370, 379 nn. 58, 59 (1964) (collecting critical comment).


12 Signal Oil & Gas Co. v. The Barge W-701, 654 F.2d 1164, 1180, 1982 AMC 2603, 2627 (5th Cir. 1981).

13 Complaint of Three Buoys Houseboat Vacations U.S.A. Ltd.,878 F.2d 1096, 1101, 1989 AMC 2058, 2066 n. 3 (8th Cir. 1989).

14 Hellenic Limitation Proceedings, 252 F.3d 391, 394, 2001 AMC 1835, 1838 (5th Cir. 2001); University of Texas Medical Branch v. United States, 557 F.2d 438, 441, 1977 AMC 2607, 2608 (5th Cir. 1977), cert. denied, 439 U.S. 820, 1979 AMC 2019 (1978); Complaint of Keys Jet Skis, Inc. 893 F.2d 1225, 1228, 1990 AMC 609, 614 (11th Cir. 1990); Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1565 (11th Cir. 1985);

15 Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234, 239, 1989 AMC 1480, 1488 (9th Cir. 1989) (Kozinski, J.).
society.” It ignores the whole vast field of corporate limitation, which, unlike maritime limitation, contains no effective device casting unlimited, or indeed any, personal liability back upon the owners of the sunken corporation. After blaming the poor drafting of the present Limitation Act for not dealing better with the issue of timely notice, the court’s comments went beyond the defects of the Act to damn the idea of limitation itself: “With the availability of incorporation, insurance and other devices to protect shipowners against major disasters, the Liability Act seems oddly out of place in the modern economy”. Thus the court recognized the possibility of incorporation as an alternative, but did not examine its implications, as I shall do to some extent below. The same views were repeated by the same judge four years later with elaboration. That these opinions was written by a judge (now Chief Judge) with a reputation for learning and brilliance highlights the fact that there are large gloomy pits in the judicial awareness of maritime doctrines and the reasons for them, which the bar must illumine if they are to better lit at all.

At least one astute circuit judge, who cannot be suspected of a sentimental attachment to admiralty practice, has glimpsed the role of shipowner’s limitation in the larger pattern of limited liability. Judge Posner, introducing an opinion in a limitation case, wrote that limitation of shipowner’s liability

is not to be confused with the more common liability of corporate shareholders, which would prevent a maritime tort victim from going against the personal assets of a corporate shipowner’s shareholders (though by separately incorporating each ship the owner could probably achieve the same protection that the Limitation Act gives him …)  

III  

HISTORICAL ROOTS

A. The Limits of Personal Liability in Early Times

The early liabilities in tort of vessel owners appear to have run parallel in some respects to those of master and servant ashore, except most notably for the mediation of another kind of “masters” of vessels, men of a different and special character, having as owners themselves, or even as servants of owners, powers that must be acknowledged in one given authority over others at sea and abroad. As the maritime law has developed mainly in the civil law system, we may as well start with Rome, where we shall find some distinctions observed in dealing with this peculiarity of the maritime enterprise.

16 Id.
17 Id.
18 Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1266-67, 1993 AMC 855, 864-65 (9th Cir. 1993) (Kozinski, J. dissenting: “The Limitation of Liability Act is an anachronism, a holdover from the days when encouraging commerce by sea was considered more important than providing full redress to victims of maritime accidents. As I have said before, such a law no longer makes sense. … One of the many unfortunate consequences of the Limitation of Liability Act is that it leads courts to contort the law to avoid unjust results: ‘Misshapen from the start, the subject of later incrustations, arthritic with age, the Limitation Act has "provided the setting for judicial lawmaking seldom equaled."’ ” (citation omitted).
19 In Re Complaint of Holly Marine Towing, Inc., 270 F.3d 1086, 1087, 2001 AMC 2934, 2934 (7th Cir. 2001).
The Roman law summarized from Justinian by Judge Ware was that exercit ors (owners, charterers or others receiving the income of vessels)\(^{20}\) were liable for the acts of their vessels’ masters while engaged in the discharge of their functions as master, and that the masters were liable for their own acts, which would probably include acts of the crew in many instances under the direct charge of the master.\(^{21}\) Nothing is said there about the crew, however, and I cannot find in the Institutes any indication of direct responsibility for the acts of employees generally. The rules cited appear to have been special to the maritime law.

Although distinct in some points, the common law and the maritime law of England have not been products of unrelated principle and development. Pollock and Maitland say that “our common law when it took shape in Edward I’s day did not, unless we are much misled, make masters pay for acts that they had neither commanded nor ratified.”\(^ {22}\) And a scholar wrote in 1518 that “the master shall not be charged for his servant, unless he did it by his commandment.”\(^ {23}\) He went on to state a qualification that links the common and maritime law at this point: “Also, if a man desire to lodge with one that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, his master shall not be charged for the robbing: but if he had been a common hostler he should have been charged.”\(^ {24}\) The link is that this rule traceable to Roman law was also applied to shipowners with respect to their passengers and shippers. Holmes, explaining his view of the progress from exclusive in rem liability to personal liability of the owner, wrote:

> Still later, ship-owners and innkeepers were made liable as if they were wrong-doers for wrongs committed by those in their employ on board ship or in the tavern, although of course committed without their knowledge. The true reason for this exceptional responsibility was the exceptional confidence which was necessarily reposed in carriers and innkeepers. (Footnote omitted.)\(^ {25}\)

He later explains\(^ {26}\) that he “cannot say that I find until a later period [than Henry I] the unlimited liability of master for servant which was worked out on the continent…” and cites as an early instance in England a report from Edward III, quoted by Molloy, of an action against a master for embezzlement by his mariners, saying (as translated from the Latin): “the court considered that every master of a vessel is responsible for any


\(^{21}\) The Rebecca, 20 F. Cas. 373, 376 (No. 11,619), 2007 AMC 1193, 1198 (D. Me. 1833) (hereinafter Rebecca).

\(^{22}\) 2 Sir Frederick Pollock and Frederic William Maitland, The History of English Law 533 (2nd ed. 1899).

\(^{23}\) Christopher Saint Germain, Doctor and Student 236 (17th ed. London 1787).

\(^{24}\) Id. at 237.

\(^{25}\) Oliver Wendell Holmes, Jr., The Common Law 15-16 (1881).

\(^{26}\) Id. at 20 and n. 1.
transgression done by his servants on his vessel,” 27 which in the context probably means only things done to those to whom the vessel is contracted.

More general liability was to come later in the rule *respondeat superior*, which was not earlier regarded as one of natural law. 28

**B. The Shipping Enterprise as a Pre-Corporate Entity**

The enterprise represented by a vessel and her voyage began very early to be recognized as a community. Often she had several owners, often enough that in the absence of the modern corporation, laws were thought necessary to deal with the liabilities and rights of “shareholders”. This was so in Roman law, again as Judge Ware tells us from Justinian:

> If there were several exercitors, each was bound in solido for the full amount of the obligations of the master, arising ex contractu. … But for obligations ex delicto, each was bound only for his part, that is, in proportion to the interest he had in the ship. 29

From the same era comes the Rhodian Law of Jettison, adopted in Roman law and now developed as general average, in which vessel and cargo and freight are partnered under the authority of the master. 30

These and other evidences were carried forward into the Middle Ages and beyond, as we see in the Laws of Oleron, Laws of Wisby and Laws of the Hanse Towns. 31 In those collections we find provisions for the relations of majority and minority owners, among themselves and with masters, the obligations of masters to consult with their mariners and cargo owners about risks and measures such as jettison, the obligations of masters for the safety and care of their crews, and agent of necessity for the cargo owners.

All of these regulations survive with refinement today. Their early development was unique in its distinction from the regulation of other businesses and the recognition in these and other ways of the marine adventure as an entity to be protected and encouraged can be understood as recognition of its economic importance both to the power of the state and the prosperity of its society, a motive explicit from long ago 32 to

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28 See Rebecca at 380, 2007 AMC 1207 (“[A]s it is a rule founded merely in expediency, and not in natural justice, …public policy must also determine to what cases the rule shall extend.”).

29 Rebecca, at 376, 2007 AMC at 1198.


31 1 Peters Admiralty Decisions, Appendix (Philadelphia 1807), reprinted in 30 F. Cas.1175 et seq.

32 See 1 *M**O**NUMENTA JURIDICA, THE BLACK BOOK OF THE ADMIRALT**Y* (Sir Travers Twiss, ed.) 5 (1871) (An ordinance in or about 1337 required the Admiral to make a roster of all the “shipps, barges, bilanders and other vessels of war the king may have in his realme, when he pleaseth, or need shall require and of what burthen they are, and also the names of the owners and possessors thereof”).
this day. These were considerations that no doubt underlay the development of limited liability as a doctrine before it was to become a feature of other business enterprises.

C. The Rise of Limitation as a Doctrine of Western Maritime Law

On this subject I shall refer to, but not repeat the research and rewrite the exposition of, two very able writers separated by a century and a half. The first was judge Ashur Ware, one of the most learned admiralty judges in our history, whose opinion in *The Rebecca* was declared by the Supreme Court to “leave little to be desired” on “the history of the limitation of liability of ship-owners”. The modern work, longer and in some respects more detailed, is an article by the late James J. Donovan, a prominent practitioner and Sometime President of the Maritime Law Association of the United States.

From at least as far back as the 12th century a device called *contrat de commande* had come into use. It was a sort of qualified partnership analogous to the modern limited partnership common today, whereby an inactive investor ashore could invest in a vessel or voyage and share in profits without personal liability. It was said by Ware to be suited to the conditions of trade he describes and to drawing out otherwise dormant capital. Its use spread over the continent of Europe and was expressly regulated by several of the medieval maritime codes. In the Middle Ages it had developed into and been superseded by a genuine limited partnership of the vessel owners with the master in which his contracts and delicts did not bind them personally but bound only their shares in the vessel. This form of the business, like its predecessor, was dependent on the contract between owners or investors and master and, again, was recognized and enforced in the jurisprudence of the times.

The limitation of owners’ liability as a matter of law rather than contract begins in the Mediterranean codes perhaps as early as the 11th century and clearly as early as the 14th century *Consulato del Mare*. In the 16th and 17th centuries limitation, on the abandonment principle, became the law of almost all continental maritime countries, but not of England until 1734. Its most famous and influential expression is found in the *Ordonnance de la Marine* of Louis XIV, which states the rule briefly [as translated]:”The owners of ships shall be answerable for the deeds of the master; but shall

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33 See, e.g., Merchant Marine Act, 1936, § 1, 46 U.S.C. § 50101 (“It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine [etc.]”).


36 *Rebecca*, at 378, 2007 AMC 1203; Donovan, at 1001.

37 *Rebecca*, at 379, 2007 AMC at 1204.


39 Note 2, *supra*. 

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be discharged, abandoning their ship and freight.” Implicit in the rule of abandonment was that the limit was the value at the end of the voyage, which for a sunken vessel might be nil, since abandonment could hardly occur at another time. The spread of statutory limitation in this period has been attributed to the growth of trade and its capital demands, and changes in the business relationships of owners and masters, as well as the risks of sea adventures and inability of owners to control the fortunes they sent on sea voyages. All this was before limitation for terrene enterprises generally was envisioned.

D. The Development of Enterprise Limitation through the Modern Corporation

Blackstone, writing on corporations a century after the period we have just left, observed that the corporate device was of long standing for the purpose of providing an entity for ownership and management that outlived its individual members, but saw none worth discussing beyond those for public or quasi-public purposes, principally municipal, religious, academic and charitable. And these could be created only by the king in Parliament. From the late 16th century companies that can certainly be styled commercial were chartered to develop foreign trade and colonies, as seen to be justified by national interest. The notorious South Sea Bubble was the outcome of one of these, and while it burgeoned before its collapse, the restrictive Bubble Act of 1719 was passed at the instance of powerful figures to restrict competition from similar corporations, in which it appears to have been effective for about a century, during which investors turned to other devices which, however, lacked limited liability. The commercial corporation we know, with limited liability, would develop slowly through the stages of special governmental permission to ministerial creation on request.

In the United States, there was little demand for corporate charters for local enterprise in the 18th century, and in the early 19th century it was discouraged and seriously restricted by Jeffersonian hostility to concentrations of capital. In the first half of the 19th century, corporations were chartered in America very selectively for what was considered to be the public benefit, notably to steamboat corporations and ferry companies for operation on inland waters, some with monopoly features but not limited liability, and to banks, many of which failed leaving behind no good feelings for the

40 Ordonnance de la Marine, Tit. 4, Art. II (1681).
41 Rebecca, at 379-80, 2007 AMC at 1205-06.
42 I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 18 (1765).
44 Id.
45 Id. at 13.
46 Id. at 14.
limited liability of stockholders.\textsuperscript{49} It is reasonable to regard New York as the bellwether in the development of general self incorporation. Separate statutes with various terms were passed for various classes of enterprise. From 1847 to 1854 there were 22 of them in which the lack of uniformity and nicety of distinction in our field of concern are illustrated by statutes on ocean \textit{steam} navigation 1852, ferries in 1853, navigation of Lake George in 1854, and lake and river navigation generally in 1854.\textsuperscript{50} In New York and other states “Eternal life was not the rule,” in charters, and limited life and other qualifications restricting stockholding, control and use of capital were common,\textsuperscript{51} and no doubt detracted from the corporation as an entirely suitable vehicle for business.

It was in this setting that limited liability of shipowners, already long regarded as a characteristic of the general maritime law,\textsuperscript{52} became positive law in the United States.

\textbf{IV}

\textbf{THE MODERN RETENTION OF SHIPOWNER’S LIMITATION}

\textbf{A. The Reception of Limitation in the United States Before and After 1851}

English common law was impervious to Continental limitation law until 1734, when a law was passed substantially in accord with the Continental doctrine, but with the difference that the limitation value was that before the casualty rather than at the end of the voyage.\textsuperscript{53} It was this law with which the colonies would have been familiar at the time of the Revolution. As amended in 1786, the act also exonerated owners from liability to cargo for loss by fire, a much-dreaded peril.\textsuperscript{54}

In 1819 a limitation act was passed in Massachusetts\textsuperscript{55} and in 1821 another in Maine.\textsuperscript{56} The two were much alike and neither mentioned abandonment, as to which the Continental laws followed the French, although Judge Ware construed that of Maine to provide for it.\textsuperscript{57} Apart from that, they might have been thought intended to codify the general maritime law in force, but there is no support for the idea of that doctrine’s having any force except by statute. We see no trace of it earlier and it would have been contrary to the opinion of the two outstanding authorities of the day. Judge Ware stated:

\begin{footnotesize}
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\item \textsuperscript{49} \textit{Id.} at 93.
\item \textsuperscript{50} \textit{Id.} at 191-92.
\item \textsuperscript{51} \textsc{Lawrence Friedman}, \textsc{A History of American Law}, 167-68 (1982).
\item \textsuperscript{52} \textsc{See Rebecca,} at 377, 2007 AMC at 1200-01.
\item \textsuperscript{53} Note 2, \textit{supra}.
\item \textsuperscript{54} 26 Geo. 3, c. 86, § 2 (1786).
\item \textsuperscript{55} An Act to encourage Trade and Navigation within this Commonwealth, 1818 Mass. Acts ch.122 (1819 (repealed 1902).
\item \textsuperscript{57} Stinson v. Wyman, 23 Fed. Cas. 108 (No. 13,460) (D. Me. 1841).
\end{itemize}
\end{footnotesize}
This principle of the general maritime law has never been received in this country as part of our customary law, but we have followed the common law of England, and hold the owners responsible for the full amount of any damage occasioned by the faults or negligence of the master or any of the crew. … But in this state, by statute in conformity with the principles of the general maritime law, their liability is restricted to their interest in the ship and freight. 58

And Justice Story, construing the Massachusetts act in 1844, contrasted it with the law of Pennsylvania, which would have allowed no limitation because there was no act and it followed “the law of England as it was before the limitations prescribed by the acts of parliament”. It would have been quite unlike Story not to have commented further if he thought that the general maritime law of limitation had been implanted in the admiralty law of the United States (although his enthusiasm for the wholesale translation of the Continental maritime law to the United States must have cooled since 1815). 59

It is interesting, however, to view the readiness and selectivity with which Continental doctrine was nevertheless resorted to. In The Rebecca, Ware not only referred with acceptance many times to its sources and oracles in deciding the issue of the shipper’s lien but also in construing the Maine limitation act, 60 and Story reviewed the teaching of no fewer than six French writers to construe the Massachusetts act. 61

Thus before 1851, when our present Limitation Act 62 was passed, limitation was available only to shipowners in northern New England. And from 1874 it should have been understood that the constitutional doctrine of uniformity left the State acts to history. 63 The structure and amendments of the Act have been much discussed elsewhere 64 and I do not go into its details or compare it with others, because this article concerns the existence rather than the choice of a limitation system. The bill is understood to have been moved at the behest of shipping interests in response to a decision 65 imposing liability for the loss of a valuable shipment of commercial paper in the catastrophic loss of The Lexington by fire. 66 There was evidently spirited debate in Congress, in which the proponents represented that the act was needed to place American

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58 Id. at 109.
59 See De Lovio v. Boit, 7 F. Cas. 418, 443, (No. 3,776), 1997 AMC 550, 603 (C.C.D. Mass. 1815) (Story: “Of this great system of maritime law it may be truly said [quoting Cicero], ‘Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebit’; The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions…”).
60 Rebecca, at 376-77, 2007 AMC at 1200-01.
63 The Lottawana, 88 U.S. (21 Wall.) 558, 575, 1996 AMC 2372, 2380 (1874) (declaring uniformity of admiralty throughout the country).
64 See, e.g., Donovan, supra note 35
66 Donovan, supra note 35 at 1010-12.
shipping on a competitive footing with British shipping and statistics were presented on the relative capacities and actual volumes carried, from which it was inferred that foreign vessels were able to charge lower freight.\textsuperscript{67}

It should be recalled that in that era enterprise limitation by incorporation as we know it was only available grudgingly if at all,\textsuperscript{68} and also that, while shipowners were ordinarily insured against loss of their vessels, the insurance ultimately provided by protection and indemnity clubs only started to become available in 1855 as to death and injury and not until 1874 as to cargo losses.\textsuperscript{69} The accepted view of the Limitation Act was not that it was passed merely for the benefit of the existing shipowners, but to encourage maritime investment and construction in the national interest. This was recognized by the Supreme Court when limitation had become common in other fields:

The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. … How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent!\textsuperscript{70}

The Act has been a prominent feature of maritime litigation to the present day and has been much criticized for its economic backwardness, as expressed above, in light of changes prevailing in the limitation systems of other leading maritime countries, mainly through international conventions that the United States has never ratified. As we know who have worked to modernize the Act, efforts fail because of opposition to limitation by any system except presumably the often harsher one of incorporation, a questionable alternative discussed below.

B. International Agreements and Other National Laws

As results of the work of the Comité Maritime International, three successive international conventions have provided uniform systems of limitation in most of the principal maritime nations for more than three-quarters of a century, the trend being to raise the amounts and liberalize the recoveries for loss, especially for death and injury. The first, of 1924, had 13 parties, mainly from Europe, and remains in force for about half of them.\textsuperscript{71} The next, of 1957 gathered 46 parties, the bulk of the world’s shipping except that of the United States, and again remains in force for a few.\textsuperscript{72} Its successor of

\begin{itemize}
\item \textsuperscript{67} Id. at 1018-19 and nn. 134, 135.
\item \textsuperscript{68} See text at notes 46-51, supra.
\item \textsuperscript{69} Jeremey Kingsley, Bræhus & Rein Handbook on P&I Insurance 31-32 (3d ed. 1988)
\item \textsuperscript{70} Norwich & New York Transportation Company v. Wright, 80 U.S. (13 Wall.) 104, 121, 1998 AMC 2061, 2071 (1872).
\item \textsuperscript{71} Comité Maritime International, CMI Yearbook 2005-2006, 410.
\item \textsuperscript{72} Id. 437.
\end{itemize}
1976\textsuperscript{73} garnered 50 parties, and a Protocol of 1996 further raising values was ratified by 23 of them.\textsuperscript{74}

The international scheme is not that of abandonment, which may produce a fund of little or nothing, but is based on fixing the value based on the tonnage of the vessel, which is not affected by a casualty. The United States has participated in the formation of all these conventions but has ratified none. The earliest was no doubt opposed by shipping interests and the later ones too as limitation values increased, and joined then by maritime unions objecting to any limitation at all. This was my experience in trying to promote ratification of the 1976 Convention. Our experience is that, short of some emergency or electrifying disaster, congressmen are reluctant to take up changes in private law without first having concurrence that they should do so by all major segments of the industry affected. The result is stalemate leaving us out of step with the maritime world at large, and more importantly unable to replace or improve the unsatisfactory present law.

V

ALTERNATIVES AND THEIR UTILITY

A. One-Ship Corporations

As Judge Posner wrote in the passage quoted above,\textsuperscript{75} the shipowner has the alternative of separately incorporating each ship, referring to a New York case where it was alleged that an enterprise with a fleet of taxicabs split their ownership among 10 corporations, each owning two cabs to limit liability as to particular cabs and the court said that this practice, evidently common, was a legitimate resort to the law of limitation.\textsuperscript{76} This observation could be supported without analogy to taxicabs by reference to the shipping industry itself.

An article, “Economic Analysis of Limitation of Shipowners’ Liability” has recently been published by a candidate for the degree of LL.D. at the University of Ottawa, analyzing the economic utility of limitation by its effect on behavior through over- and under-deterrence in respect of risk. He finds that insurance should now solve the problem of over-deterrence and that, if this is not enough, incorporation of the owner should be relied on.\textsuperscript{77} He points out that an owner of several vessels may form a limited liability corporation for each of them with the vessel its only asset.\textsuperscript{78} Granting, as he apparently does, that deterrence should be reduced by limitation in some form, he appears


\textsuperscript{74} \textit{Id.} at 487 and 494.

\textsuperscript{75} Text at note 19, \textit{supra}.

\textsuperscript{76} Walkowski v. Carlton, 18 N.Y.2d 414, 417-18, 223 N.E.2d 6, 8-9 (N.Y. 1966).


\textsuperscript{78} \textit{Id.} at 312-13.
to err in supposing that deterrence is the only economic concern of shipowner’s limitation as such in comparison with incorporation.

However that may be, single-ship incorporation is in fact widely done in trades where that is practical. “Many shipowners set up single ship corporations for liability reasons and then have the vessel chartered to an operator…” 79 Instances are noted in court from time to time illustrating the practice of separate ownership and operation. 80 The object, of course, is to separate ownership and management. The only property of the owner is the vessel and, because the owner does not operate the vessel, its likelihood of being in direct fault is slight; the liability of the vessel in rem is limited to its value; and if liability exceeds that amount it runs into corporate limitation in approximately the same amount. The managers, on the other hand, have the higher exposure to fault but, being an incorporated service organization without extensive property such as vessels, have an effective corporate limitation. It gives the shipowner an advantage because of the possibility that shipowner’s limitation alone may be broken by a showing of privity, as it often is, while the manager leaves the owner at some distance from the risk of privity.

This arrangement is convenient, if not ideal, for vessels in tramping and certain other bulk trades but by no means for those in liner service. In liner service general cargoes and passengers are carried on regular routes and regular schedules with regular services, on all of which their patrons depend. This is not done with the industrial facilities of shippers and consignees, ad hoc contracts and services. It requires permanent facilities, booking agents and other contract services in its ports of call, the ability to reschedule, substitute vessels, pool and transship, and therefore to treat vessels as fungible and maintain the staffs nationally and internationally to do so. It could not be plausible to contend that one-ship corporations in such circumstances were anything but alter egos of a large enterprise. There lies the error of supposing that that incorporation is a ready substitute for shipowner’s limitation. This objection is not limited to liner services; it extends *mutatis mutandis* to fleets of fishing vessels and tugs. As to these smaller vessels, it may be objected also that the cumbrousness of the corporate structures and management complications they entail is greatly disproportionate to the values involved and also that the likelihood of privity of the individual owner or principal stockholder in the operation of the vessel devalues both forms of limitation and tends to justify his leaving matters to the maritime law alone, which requires no formality or expense until it is needed.


In short, while abolition of shipowner’s limitation of liability and reliance only on enterprise limitation might be possible, it would require major restructuring of the maritime industries with no apparent benefit and considerable detriment.

B. Pleasure-Craft Exclusion—Definition and Consequence

In addition to uninformed objections made to the entire principle of shipowner’s limitation, a special unfounded objection is voiced to its application to “pleasure” craft. The Supreme Court has recognized the great difficulty of defining a class of pleasure craft for legal purposes and for good reason declined to do so:

Yet, under the strict commercial rule proffered by petitioners, the status of the boats as “pleasure” boats, as to “commercial” boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in Executive Jet. Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been, rented, or whether it had ever been used for commercial fishing, control the existence of federal court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line drawing into maritime transportation.

Since that was said in 1982, the problematic situations described have proliferated. Of course, private owners, now in greater numbers, continue to charter out their vessels when not using them. This applies not only to small yachts but to mega yachts of great size. And charter services abound, to let “pleasure boats” ranging from rowboats through houseboats to large sailing and motor yachts, all commercially, of course. The larger ones have regular crews and, whether sailing with the owner aboard or not, the operation of respondeat superior makes limitation of liability significant, but for the vast majority whose vessels are crewed only by themselves or charterers, the limitation law is not an effective limitation at all, for reasons that follow.

Apart from respondeat superior and the warranty of seaworthiness enjoyed by commercial seamen, the general maritime law (like the common law in most States) charges the owner with liability only for his own fault. This same fault appears in limitation law by the name of privity, which results in denial of limitation. Therefore, if the owner negligently commands his pleasure craft at the critical moment of displeasure, he will probably be liable as if there were no limitation act. This is not to say that the act would be of no social value, however, where the owner’s privity is not obvious. The limitation proceeding “looks to a complete and just disposition of a many-cornered

82 Look on line for “mega yachts”, “yacht charters” and “boat charters” to see impressive indications of the scope of commercial pleasure boating.
controversy ….”\textsuperscript{85} Where there are several claims to be brought into concourse, the action combines the social and judicial advantages of the equitable remedies of interpleader and bill of peace and creditor’s bill\textsuperscript{86} with the later developments of declaratory judgment and class action; it is an instance of progressive judicial procedure. But there is nothing to the complaints of judges and lawyers that it ultimately gives the owner any substantive relief from damages, or to the notion that the results would be different if the matter were relegated to State laws, as some have unwisely advocated.\textsuperscript{87}

In short, it does no harm and does well at least in averting frequent confusion and litigation over an inevitably vague distinction of pleasure craft.\textsuperscript{0}

VI

CONCLUSION

The doctrine of \textit{respondeat superior}, although an important tool of social justice when well-tempered, is an invention for that purpose and not a feature of natural justice. The limitation of shipowner’s liability as a curb on the doctrine has a long history antedating the development of corporate enterprise limitation. Around and through it the industry of sellers, owners and operators and their insurers has developed in a way that depends for economic efficiency on a system of limitation rationally related to the sizes, values and uses of their vessels in a more liberal way than corporate limitation. Nothing is to be gained socially from renouncing it, and certainly nothing from embracing a less pliant system harsher than modern maritime limitation. Unquestionably the maritime system should be kept up to date economically and socially. This cannot be done in an atmosphere of hostility to the whole idea and therefore, if it is to be done, the industry and the admiralty bar must undertake a program of study and persuasion to educate the Congress, the jeering section in the courts and others.


\textsuperscript{86} Hartford Accident, \textit{supra}.