



LIMITATION OF LIABILITY – A NIGERIAN PERSPECTIVE¹

John Hare
Professor of Shipping Law
University of Cape Town

Abstract

Part I

Limitation of liability in shipping has ancient roots, and has for many centuries been unashamedly promoted as an essential protection of the shipping industry. The origins of limitation are briefly examined, and an outline is then given of the way in which the English law and international convention have applied the law of limitation to shipping practice. The harmonization of limitation has been attempted, largely through continuing efforts of the Comité Maritime International, in the form of the 1958 and 1976 Limitation of Liability Conventions. Both are briefly examined. The law of Nigeria remains expressive of the principles of the 1958 Convention. An overview of the implementation of the 1958 principles in current Nigerian Law is tentatively offered.

Part II - (To follow)

Some of the shortcomings of the 1976 limitation regime are considered, both in the

- **The 1976 Convention and its Protocol and the conflict of laws - forum shopping and multiple funds**
- **Limitation in context - the criteria of other international regimes such as the HNS/Oil Pollution/Carriage conventions**
- **Shortcomings of the 1976 Convention and its Protocol - does the 3rd millennium require a re-think?**
- **Tentative suggestions for Nigeria (and South Africa) - follow the herd (back) to 1976 or voyage over the horizon?**

¹ Part I co-authored and researched by Megan van Zyl of the University of Cape Town

PART I

1. Introduction

A person who suffers loss or damage at the hand of another, whether in delict (tort) or in contract, may generally invoke the power of the law to claim damages designed to redress the wrong. This redress is not without limits. Even the most expansive system of law requires the loss or damage to be caused by the actions of the defendant. In maritime law however, the law draws a somewhat different line short of this already limited recompense by allowing a shipowner in appropriate circumstances to limit its liability. The concept of limitation is well-known throughout maritime law and has, in modern times, become a basic premise upon which maritime commerce is conducted.² It was conceived to meet the needs of commerce and has been justified as a commercially practicable device by means of which the effects of a maritime disaster are reasonably apportioned.³

The purpose of this paper is to consider the international development of a shipowner's right to limit his liability from its origins in 11th century maritime practice to its controversial place in modern maritime practice, with particular emphasis on the liability regime currently operating in the Nigerian maritime industry.

2. The History & Development of Limitation

As will appear below, the basic idea behind the creation of the right to limit maritime liability was to encourage shipowners to carry on their business, and capitalists to invest their money in the maritime sector, despite the horrendous perils of the sea, thereby increasing the wealth and influence of maritime nations.⁴

It is clear that the concept of limitation of liability goes against the basic legal concept of *restitution in integrum*. That is, once the level of damages caused by a specific incident has been assessed, settlement of such damages should be in full.⁵ This conflict was acknowledged by Dr Lushington in *The Amalia*⁶ where he stated "... the principle of limited liability is that of full indemnity, the natural right of justice, will be abridged for political reasons", and was confirmed by Lord Denning in *The Bramley Moore*:⁷

"The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more ... a small tug has a comparatively small value and it should have a correspondingly low measure of liability, even though it's towing a great liner and does great damage. I agree there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in

² Hare *Shipping Law and Admiralty Jurisdiction in South Africa*, 1999, 380-406 at 380.

³ Donovan *Admiralty Law Institute: Symposium on Limitation of Liability – The Origins and Development of Limitation of Shipowners' Liability* Tulane Law Review 1979 Vol 53, 999-1045 at 999.

⁴ Ozcayir *Liability for Oil Pollution and Collisions*, 1998, 299-380 at 299.

⁵ Killingbeck *Limitation of Liability for Maritime Claims and its Place in the Past Present and Future – How Can It Survive* SCU Law Review 1999 Vol 3 at 2.

⁶ *JF Cail and Others v George Michael Papayanni* (1863) 1 MooNS 471 at 473.

⁷ *The Bramley Moore* (1963) 2 Lloyds Rep. 429 at 432.

convenience...”.

The precise origin of the right of a shipowner to limit his liability to the value of his vessel is not entirely clear.⁸ Ozcayir is of the opinion that the Amalphitan Table, which was written for the Republic of Amalphia (Italy) in the 11th century, is the earliest existing evidence of a shipowner’s right to limit his liability.⁹ Sanborn, however, submits that the origins of a shipowner’s right to limit his liability can only be traced back to Mediterranean maritime practice around the 14th century.¹⁰

Notions of limitation can be traced back at to Roman law. The *noxal* action relating to damages suffered at the hand of animals allowed the owner of the animal to surrender the animal to the claimant in final settlement of damages.¹¹ But there is no indication of limitation in maritime law until the records of the early codes of the Mediterranean city states. And thus it was that the later law regulating the right of a shipowner to limit his liability was confirmed in the Barcelonian *Consols de la Mar*.¹² In terms of the *Consols de la Mar*, owners’ and part-owners’ liability in respect of debts incurred by the master in obtaining ship’s necessities, or for cargo damage arising from improper loading, or from unseaworthiness was limited to the extent of their respective shares in the ship.¹³ The relationship between fault of the managing owner and a resultant inability to limit liability referred to in the *Consols de la Mar* prompts Sanborn to comment: “Here, as regards contract, we already have at the end of the 14th century, all the essential provisions of the modern doctrine respecting limitation of liability”.¹⁴

Following the commercial revolution of the 16th and 17th centuries, provisions relating to the privilege of a shipowner’s limited liability were contained in almost all the respective civil codes of Continental maritime powers of the time. For example, both the Statutes of Hamburg (1603) and the Maritime Codes of Charles II of Sweden (1667) contained provisions protecting a shipowner’s other property from the claims of creditors where such creditors had abandoned the ship. Furthermore, in the Hanseatic Ordinances (1614 and 1644), the liability of a shipowner was limited to the value of his vessel, and the proceeds of the sale of the vessel were to be the extent of the satisfaction of all claims.

⁸ For a detailed analysis of the origin and development of limitation of shipowners’ liability see Donovan *op cit* at 999-1045.

⁹ Ozcayir *op cit* at 300.

¹⁰ Sanborn *Origins of the Early Maritime & English Commercial Law* 1930 at 120.

¹¹ This limitation applied also to torts committed by slaves.

¹² See in this regard Hare *op cit* at 382, Ozcayir *op cit* at 300 and *Consols de la Mar* Chapters 141 and 162 (the text of which can be found in the *Black Book of the Admiralty* Book 3 at 93, 245, 344 and 381).

¹³ The relevant portion of the *Consols de lar Mar op cit* at 245 reads as follows: “But the managing owner of the ship is bound to replace and restore all those goods, which for the above reason have been lost or spoilt, or the value of them to the merchant to whom they shall belong. And if the managing owner of the ship has not the wherewithal to pay, he ought to sell the ship, which neither part-owner nor creditor nor anybody else can object to, nor ought to dispute for any reason, saving the mariners for their wages. And if the ship has not sufficed, and the managing owner of the ship has goods in another place, they ought to be sold so much of the same as will indemnify the merchant, *but the part-owners are not liable except for as much as the part which they have in the ship shall be worth*” (emphasis supplied).

¹⁴ Sanborn is referring to the limitation of the liability of the shipowner (excluding the managing owner) implied in the passages of the *Consols de la Mar* referred to in footnote 11 above.

The most important of these civil codes was the Maritime Ordinance of Louis XIV, compiled under the direction of Minister Colbert in 1681, which constituted the first attempt to codify and systemise international maritime law in general and, more particularly, the rules relating to a shipowner's right to limit his liability.¹⁵ The Maritime Ordinance of Louis XIV, was in turn, used as a model in the Netherlands, Venice, Spain and Prussia.¹⁶ Strangely, for a trading nation, no similar law existed in the United Kingdom.

3. History of Limitation of Liability in English Law

Although legal commentators disagree as to the origins of the principle that a shipowner should be entitled to limit his liability to those suffering damages as a result of the negligent navigation of his ship, as far as English law is concerned, limitation is clearly a creature of statute.¹⁷ It is in the English version of limitation of liability that the international conventions relating thereto, culminating in the Limitation of Liability Convention of 1976 ("the LLMC"), have their basis. Accordingly, it will be useful here to consider briefly the development of the English limitation of liability regime from its roots in 1734.

Limitation was first introduced in the United Kingdom in 1734, by way of the enactment of the Responsibility of Shipowners Act,¹⁸ one year after the noteworthy case of *Boucher v Lawson*¹⁹ came before the King's Bench. *In casu*, the shipowner was held liable, without limit and notwithstanding the absence of fault, for losses sustained as a result of theft by the master and crew of gold bullion being carried by his ship from Portugal. This finding served as a catalyst for the submission of a petition by English shipowners to Parliament calling for the reform of the blank cheque liability of shipowners, in the absence of which reform "trade and navigation will be greatly discouraged".²⁰ The shipping fraternity was, at this time, a powerful lobby in England and Parliament accordingly bowed to the supplications of the shipowners by passing the Responsibility of Shipowners Act, the first of a sequence of statutes limiting the English shipowners' liability.

It is clear therefore that the introduction of limitation of liability into the law of the United Kingdom by way of the Responsibility of Shipowners Act was a matter of policy. This is confirmed by the preamble to the Act which states that it was "of the greatest importance to this Kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein...".²¹

The Responsibility of Shipowners Act of 1734 limited a shipowner's liability to the value of his ship plus the freight for the voyage - but only in respect of losses

¹⁵ Ozcayir *op cit* at 300.

¹⁶ Griggs *Limitation of Liability for Maritime Claims: The Search for International Uniformity* 1997 Loyds Maritime and Commercial Law Quarterly 369-378 at 370.

¹⁷ Dillon *Limitation of the Shipowner's Liability* 1980 MB 105-109 at 106.

¹⁸ Responsibility of Shipowner's Act 7 Geo. 2 c.15 (1734).

¹⁹ *Boucher v Lawson* 95 Eng Rep 53 (KB 1733).

²⁰ Taken from the *Journals of the House of Commons Sessions 1733* at 277 cited by Dillon in *SA Maritime Law & Marine Insurance: Selected Topics* 1983 at 106.

²¹ Responsibility of Shipowner's Act 7 Geo. 2 c.15 (1734) as cited by Dillon *op cit* at 106.

resulting from embezzlement and theft by the master and crew.²² However, as seaborne trade developed during the 18th century, pressure grew for the restricted protection granted by the Act of 1734 to be extended. Accordingly, and by an Act of 1786, the right of a shipowner to limit his liability was extended beyond theft to cover losses resulting from "... any act, matter, or thing or damage or forfeiture, done or occasioned, or incurred by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners...".²³ The introduction of the concept of privity should be noted here. Thus, the shipowner could not limit if he himself was personally privy to the cause of the loss.

It is interesting to note that the United Kingdom adopted the Continental concept of allowing a shipowner to limit by reference to the value of his ship plus the freight which had been earned on the voyage in question. The thinking behind this approach was that of shared risk (ie if the owner of the cargo was prepared to hazard his goods upon a maritime adventure with a real prospect of losing them, the shipowner who was prepared to hazard his valuable ship upon the maritime adventure should equally stand only to lose the value of his vessel and no more). This concept of sharing the risks in a joint (ad)venture was appropriate in a time when insuring this type of risk was not particularly common.²⁴ However, when a generalized right of a shipowner to limit his liability in cases where he was not at fault was formulated in the 1854 Merchant Shipping Act,²⁵ the English departed from the practice of their European counterparts in one important respect: in recognizing that the value of the ship and freight should be a determining factor of the extent of the shipowner's liability, the English took the value of the ship before the accident causing the damage, not after.²⁶

Rights of limitation of liability, together with other aspects of maritime law, were consolidated in the United Kingdom in what Griggs refers to as the "... most important shipping statute of the 19th century ...",²⁷ the Merchant Shipping Act of 1894. Section 503 of this Act (which applied to both British and foreign ships) allowed limitation of liability for loss of life, personal injury or damage to property that took place without the shipowner's fault or privity.

Section 503 of the Merchant Shipping Act of 1894 takes us naturally to the first occasion on which the issue of limitation of liability for maritime claims was thought to warrant an attempt to introduce international uniformity.

4. International Law

As we have seen, for centuries many of the major trading nations have protected the

²² Griggs *op cit* at 370.

²³ Responsibility of Shipowners Act 26 Geo. 3 c.86 (1786) as cited by Griggs *op cit* at 371.

²⁴ Griggs *op cit* at 371.

²⁵ Section 504 of the Merchant Shipping Act of 1854 accorded to shipowners, for the first time, the right to limit liability in respect of loss of life and personal injury claims. Section 504 was in due course replaced by the provisions of the Merchant Shipping Amendment Act of 1862 which made no alteration other than to extend its application to foreign ships as well as British ships.

²⁶ Hare *op cit* at 384. Limitation by reference to the value of the vessel was, as a concept, not abandoned until the introduction of the LLMC.

²⁷ Griggs *op cit* at 371.

solvency of shipowners by limitation statutes, and for decades those nations have banded together to regulate, by international conventions, the availability and extent of the limitation of maritime liability.²⁸

4.1 The 1924 Limitation Convention

The 1924 Limitation Convention was, in effect, an international adoption of s 503 of the English Merchant Shipping Act of 1894. In fact, the provisions of the 1924 Convention so closely mirrored s 503, that English legislators felt no need to amend s 503 in order to fully comply with the 1924 Convention.²⁹ The 1924 Limitation Convention, which was ratified or acceded to by 15 states (of which 6 subsequently denounced in favour of a subsequent Convention), has been described both as a “dismal failure”, as it did not go far enough in harmonizing international law in this area,³⁰ and as being “... the result of a laborious compromise ...”.³¹ Accordingly, the Comité Maritime International (“**CMI**”) revisited the subject of limitation of liability in the 1950’s and produced the Convention Relating to Limitation of Liability of the Owners of Seagoing Ships, which was signed in Brussels in October 1957 and entered into force in 1968 (“**the 1957 Limitation Convention**”).

4.2 The 1957 Limitation Convention

4.2.1 General

The 1957 Limitation Convention was ratified or acceded to by 46 states, of which 11 have since denounced in favour of the later 1976 Convention.³² Furthermore, several states adopted the 1957 Limitation Convention but failed to denounce the 1924 Limitation Convention. This has resulted in certain curious consequences as, in terms of Article 30(4) of the Vienna Convention on the Law of Treaties of 1969, where a dispute arises between two parties to a particular convention and one such party has acceded to a more recent version of the same convention but has not yet denounced the previous convention, the provisions of the convention to which they are both party must be applied in resolving the dispute.³³

Although the limitation system established under the 1957 Limitation Convention continued to closely mirror the English limitation regime, it was necessary for the United Kingdom legislators to amend s 503 of the Merchant Shipping Act of 1894

²⁸ Lord Mustill *Ships are different – or are they?* (1993) Lloyd’s Maritime and Commercial Law Quarterly 490-501 at 491.

²⁹ Killingbeck *op cit* at 4.

³⁰ Dillon *op cit* at 107.

³¹ Griggs *op cit* at 373.

³² Griggs *op cit* at 373.

³³ For example, if a vessel flying the flag of country X is involved in an accident in country Y, the courts of country Y would, under treaty law, be obliged to permit the owners of the vessel flagged to country X to limit in accordance with the 1957 Limitation Convention rather than the LLMC, which country Y has adopted but country X has not. This is because, when ratifying the 1957 Limitation Convention, both countries agreed to apply that Convention on a reciprocal basis; and, because country Y failed to denounce the 1957 Limitation Convention when ratifying the LLMC, it still has reciprocal treaty obligations to other states which have ratified the 1957 Limitation Convention.

in order to accommodate the 1957 Limitation Convention.

The drafters of the 1957 Limitation Convention used the opportunity to increase the limits of liability for claims in respect of property damage as well as claims relating to loss of life and personal injury, thereby providing a larger fund for distribution amongst victims of the loss or damage resulting from the accident. Furthermore, limitation of liability was made applicable to the expenses and charges of wreck raising, an important enlargement in modern times when the cost of removal of a sunken vessel can far exceed the value of the vessel itself.

4.2.2 An Analysis of the Requirement of Actual Fault or Privity

In describing the 1957 Limitation Convention, Albert Lilar wrote:

“The Convention resolutely comes round to the British conception of a limitation on a forfait (*sic*) basis, which takes into account the tonnage of the ship, whatever becomes of the latter ... What is more, the charterer, the manager, the operator, the master, the members of the crew and certain servants are assimilated to the owner and are likewise granted the same right of limitation of liability ... the actual fault or privity of the owner denies him the benefit of limitation.”³⁴

One of the main reasons for the extension of the right to limit to owners, charterers, managers and operators of the ship and to the master, members of the crew and other servants of the owner was to quash a practice which had arisen of suing the member of the crew responsible for the loss or damage in the knowledge that if a shipowner wished to keep his ships manned he would be obliged to stand by his employee.³⁵

As appears above, the primary exclusion of the right to limit liability in terms of the 1957 Limitation Convention is where a shipowner has acted with causative “actual fault or privity”. When most ships were owned by their masters it was a comparatively easy factual enquiry to determine whether the master was at fault, or whether he knew of the circumstances which were likely to, and did, give rise to an accident causing loss. In *The Eurysthenes*,³⁶ the vessel had sailed from the United States to the Philippines in a patently unseaworthy condition. The English Court of Appeal found that a shipowner needed only to have had knowledge of the condition of the ship and have concurred in her sailing in that condition in order to be regarded as having been privy to the loss. It was not required, however, that the shipowner’s knowledge be actual. If the shipowner ought to have known of the condition he could be deemed to have had knowledge.³⁷

The reality of modern shipping practice is, however, quite different from the owner-master operation and whilst the courts encountered few difficulties in determining actual fault or privity where the shipowner was a natural person, difficulties did, however, arise in relation to corporate bodies. The general rule in this regard, as stated by the House of Lords in *Lennard’s Carrying Co. v Asiatic Petroleum Co.*,³⁸ is that where an actionable wrong is committed by an officer or employee of a company who can be regarded as the directing mind or who is

³⁴ Lilar & Van den Bosch *Le Comité Maritime International 1897-1972* at 1.

³⁵ Dillon *op cit* at 107.

³⁶ *The Eurysthenes* [1976] 2 Lloyd’s Rep. 171 (CA).

³⁷ Hare *op cit* at 388.

³⁸ *Lennard’s Carrying Co. v Asiatic Petroleum Co.* [1915] A.C. 705.

“really the directing control and will of the corporation”, then the wrong is committed by the company.³⁹ Although this may be understandable in the case of the chairman or even the directors of a company, there are other officers, lower in the company’s hierarchy, who have raised difficulties when considered by the courts. These difficulties are clearly illustrated in the English case of *The Norman*.⁴⁰

The trawler *Norman* sank with a loss of 19 of the 20 lives on board after running onto uncharted rock in fog off the coast of Greenland. The master had been briefed by the owner’s marine superintendent about the navigational difficulties and dangers he would be up against in the course of a fishing expedition off the inhospitable coast of Greenland. The master had specifically been instructed by the owners not to fish in Greenland territorial waters in which the rock was situated. When the owners were apprised of the position of the rock in question, only after the vessel had sailed, they deemed it unnecessary to radio this information to the vessel, in what Willmer J in the Court *a quo* found to be the reasonable expectation that the master would comply with their instructions and avoid the area. Willmer J absolved the owners of any actual fault or privity and allowed limitation of the crew dependants’ claims. On appeal to the House of Lords, the clearly unpopular result of allowing the owners to limit was reversed.⁴¹

The decision of the House of Lords in *The Norman* had the effect of altering the previous practice with regard to the onus of proof. Although s 503 of the English Merchant Shipping Act of 1894 was generally construed as imposing the burden of proof on the shipowners who claimed its protection, “as a matter of universal practice before the decision in *The Norman*, the defendants in a limitation action had to plead the actual fault of which the owners were alleged to be guilty”.⁴² In *The Norman*, the House of Lords required the shipowners to prove the negative (ie that their failure to transmit new-found information about the uncharted rock had no causative bearing on the casualty).⁴³

What many regard as the low water mark of the limitation of maritime liability, is the case of *The Marion*.⁴⁴ In *The Marion*, a ship’s manager failed to ensure that the vessel was supplied only with the most up-to-date charts and, when using old charts, the vessel’s anchor fouled a seabed oil pipeline, it was held that the ship’s manager was at fault and that this fault was the actual fault of the shipowners.

Shipowners were greatly prejudiced by, and cargo claimants could take unfair advantage of, the judicial obfuscation of actual fault and privity indicated above. Breaking limitation in English practice became little more than a tactical game, which has led to an undue amount of forum shopping to find a venue for a trial in which, rather than obtain the generally accepted increased levels of the LLMC,

³⁹ Marsden *Marsden on Collisions at Sea*, Editor Simon Gault (12ed) 1998 at 545.

⁴⁰ *The Norman* [1960] 1 Lloyd’s Rep. 1 (HL).

⁴¹ Hare *op cit* at 389.

⁴² As per Sheen J in the decision of *The Norman op cit* at 480. The “defendants” referred to by Sheen J would be the cargo claimants who alleged actual fault or privity in defence of the limitation action commenced by the shipowners.

⁴³ Hare *op cit* at 389.

⁴⁴ *The Marion* [1984] 1 Lloyd’s Rep. 1 (HL).

claimants try their luck at breaking limitation, if only for purposes of exacting a higher out-of-court settlement from shipowners.

4.2.3 Limitation Actions and the Limitation Fund

Under the 1957 Limitation Convention, limitation of liability can be invoked in one of two ways. First, it can be pleaded as a defence so that where damages exceed the limit of liability, judgment is given for the limit of liability. It is not necessary for the party pleading limitation as a defence to constitute a limitation fund prior to judgment. Second, a party can commence limitation proceedings to establish its right to limit liability. In the latter scenario, it is again not necessary to constitute a fund with the court until the right to limit liability had been decided by such court.

4.2.4 The Limitation Fund's Unit of Account

The 1957 Limitation Convention initially used the Poincare gold franc, which would be given sterling equivalents by periodic statutory instruments, as its unit of account. However, as a result of fluctuations in its value, the gold franc method of calculation became increasingly inconvenient. Accordingly, in 1979, a Protocol was added to the 1957 Limitation Convention which replaced the gold franc with the Special Drawing Right (“SDR”) of the International Monetary Fund (“IMF”).⁴⁵

4.3 The 1976 Limitation Convention

4.3.1 General

The unrealistically low limits of the 1957 Limitation Convention (due to depreciation in monetary values), the difficulties of establishing a currency equivalent of the gold franc,⁴⁶ the need to establish circumstances when the right to limit would be forfeited, and the adoption of the Convention on Civil Liability for Oil Pollution Damage of 1969 (which was in some respects inconsistent with the 1957 Limitation Convention) were some of the factors giving rise to an initiative of the CMI to achieve international support for a new liability regime in 1972.⁴⁷ It was necessary to establish a balance between the need for suitable compensation levels for successful claimants and, for public policy reasons, the need for shipowners to limit liability to a readily insurable amount at a reasonable premium.⁴⁸ The result of these efforts was the LLMC, which was adopted on

⁴⁵The value of the SDR is calculated daily by the IMF on the basis of the relative values of a “basket” of five major currencies. The daily conversion rates for SDR’s can be found on the IMF website at www.imf.org.

⁴⁶ From its time of replacement with the SDR, there was no ready way of ascertaining the value of the gold franc.

⁴⁷ Hare *op cit* at 397.

⁴⁸ Killingbeck *op cit* at 4.

19 November 1976, and entered into force on 1 December 1986.⁴⁹

The overall effect of the LLMC has been to completely transform the law in relation to the rights of shipowners (and others) to limit their liability. As we have seen, under the 1924 and 1957 Limitation Conventions a successful claimant is entitled to full reimbursement of his claim unless the defendant is able positively to prove his right to limit liability by satisfying the court that there is no “fault or privity” on his part.⁵⁰ However, in terms of the LLMC, “actual fault or privity” is no longer the criterion by which a shipowner is barred from exercising his right to limit his liability. A shipowner’s right to limit his liability in accordance with the provisions of the LLMC will only be removed “if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result”.⁵¹

4.3.2 The Basic Principles of the LLMC

Professor Selvig, in his contribution to *Limitation of Shipowner’s Liability: The New Law*⁵² sets out the basic principles of the LLMC as follows:

- (1) personal claims relating to members of the crew, passengers and other persons on board the ship should be excluded from the tonnage limitation system;
- (2) the level of liability for personal claims remaining subject to tonnage limitation should be sufficient to ensure full compensation in most cases;
- (3) the level of liability for property claims should be moderate and take into account that the property involved is usually covered by insurance; and
- (4) the tonnage limitation system should actually be “unbreakable”.

It appears from the above that the LLMC created a compromise: a limitation fund which was as high as possible whilst remaining insurable at a reasonable cost, together with the creation of a virtually “unbreakable” right to limit liability.

Further important innovations introduced by the LLMC can be summarized as follows:

- 1) the method in terms of which the limitation fund is calculated has been altered – the SDR of the IMF replaced the gold franc as the unit of account in order to overcome the problems associated with the gold franc mentioned above;⁵³
- 2) the decision in the *Tojo Maru*,⁵⁴ which determined that a salvor not working on board a salvage vessel was not entitled to limit his liability, has been reversed to the extent that a salvor is, under the LLMC, entitled to limit his

⁴⁹ As at 30 November 2003, the LLMC had 41 contracting states, including Australia, Denmark, France, Germany, Greece, Japan, the Netherlands, New Zealand, Norway, Spain, Turkey and the United Kingdom. These represent Nigeria’s major trading partners.

⁵⁰ See discussion under paragraph 4.2 above.

⁵¹ Article 4 of the LLMC. As will appear, this cast-iron shield has cost the shipowner and his insurer a significantly higher exposure.

⁵² Institute of Maritime Law, University of Southampton, 1986 at 14.

⁵³ See discussion in paragraph 4.2.4 above.

⁵⁴ *The Tojo Maru* [1971] 1 Lloyd’s Rep. 341; (1972) A.C. 242.

liability when rendering services in direct connection with salvage operations;

- 3) specific provision has been made for claims arising on any distinct occasion for loss of life or personal injury to the passenger of a ship being carried under a contract of passenger carriage, or who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods;⁵⁵ and
- 4) limitation is made available to an insurer of liability for claims subject to limitation in accordance with the rules of the LLMC and such an insurer is entitled to the benefits of the LLMC to the same extent as an assured.⁵⁶

4.3.3 Claims for which Limitation is Available

Under the previous regime, limitation was available only in respect of claims sounding in damages and not by way of debt⁵⁷ or for breach of contract.⁵⁸ Article 2(1) now provides that limitation is available to claims "... whatever the basis of liability be ..." and so appears to remove the old distinction. It should be noted that in terms of Article 5, where a person who is entitled to limit his liability under the LLMC has a claim against the claimant (ie a counterclaim arising out of the same incident) their respective claims shall be set-off against each other and the provisions of the LLMC shall apply only to any remaining balance.

The claims covered by the LLMC are set out in Article 2. There are seven main types of claims:

- 1) loss of life or personal injury;
- 2) damage to property "occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss arising therefrom";
- 3) claims for the delay in the carriage of goods or passengers or their luggage;
- 4) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations (delict or tort claims);
- 5) wreck removal claims;
- 6) cargo removal or destruction claims; and
- 7) third party damage control claims phrased as "claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this convention, and further loss caused by such measures".

All of the above claims may be limited even if brought by way of recourse or for

⁵⁵ Dillon *op cit* at 108.

⁵⁶ Article 1(6) of the LLMC. This extension will be of importance to insurers proceeded against directly by injured victims who are entitled to limit liability to the same extent as their assureds.

⁵⁷ In *The Stonedale No. 1* [1956] A.C. 1 the Court found that wreck removal expenses were disallowed as such expenses were in the nature of a debt and not damages.

⁵⁸ See *The Kirkness* [1956] 2 Lloyd's Rep. 341.

indemnity.⁵⁹ As will appear below, the inter-relationship of the above categorization of claims produces two separate funds: one for loss of life and personal injury, and another for the remaining so-called “other” claims.⁶⁰

4.3.4. Limitation Actions and the Limitation Fund

In terms of Article 11 of the LLMC, any person alleged to be liable may constitute a fund with a court or other competent authority in any state party in which legal proceedings are instituted in respect of claims subject to limitation. The fund should be constituted in the sum of such amounts, as set out in Articles 6 and 7 of the LLMC, as are applicable to claims for which such person may be liable, together with interest from the date of the incident giving rise to the liability until the date of the constitution of the fund.⁶¹

Under the limitation regime created by the LLMC, there are, in fact, two distinct limitation funds: one for loss of life and/or personal injury claims and the second for “other” claims. Where the incident results in both types of claims and the fund for loss of life and personal injury is not sufficient to satisfy those claims, claimants may claim the balance rateably with the other claimants against the fund for “other” claims.⁶² In respect of both claims for loss of life and/or personal injury and “other” claims, a type of sliding scale has been introduced in terms of which the number of units of account to be made available to claimants changes as one moves up the tonnage scale of the offending ship.⁶³

In terms of Article 8(1) of the LLMC, the value of the unit of account is fixed at the date of, *inter alia*, the constitution of the fund. Accordingly, the person

⁵⁹ Article 2(2) of the LLMC.

⁶⁰ Hare *op cit* at 399-400.

⁶¹ Article 6 of the LLMC records the general limits of liability as follows:

“1(a) ... in respect of claims for loss of life or personal injury,

- (i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 3,000 tons, 500 Units of Account;
 - for each ton from 3,001 to 30,000 tons, 333 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 250 Units of Account;
 - for each ton in excess of 70,000 tons, 167 Units of Account.

(b) In respect of any other claims;

- (i) 167,000 Units of Account for a ship with tonnage not exceeding 500 tons,
- (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 30,000 tons, 167 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 125 Units of Account;
 - for each ton in excess of 70,000 tons, 83 Units of Account.”

Article 7 imposes a different limit in respect of claims arising for loss of life or personal injury of passengers on a ship. In terms of Article 7, the shipowner will be liable in an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry, provided that the shipowner’s liability shall not exceed 25 million Units of Account.

⁶² This ability to claim against the other fund will, however, only apply where there is another fund by virtue of their having been “other” claims.

⁶³ In the words of Marsden, “(this) sliding scale recognizes the fact that small ships can cause large damage”. Marsden *op cit* at 546.

seeking to limit his liability bears the risk of currency fluctuations until the fund is constituted. Furthermore, it is only upon the constitution of the limitation fund that the shipowner obtains the protection provided for under Article 13 of the LLMC, such as immunity of his other assets.⁶⁴ Payments out of the fund will be made on an order of court once the court is satisfied that sufficient publicity has been given to enable other possible claimants to appear and make their claims.

4.4 The 1996 Protocol

The 1996 Protocol to the LLMC, which was adopted on 3 May 1996, will enter into force 90 days after being accepted by 10 states.⁶⁵ The Protocol substantially increases the amount of compensation payable in the event of an incident causing loss or damage.⁶⁶ It also introduces a “tacit acceptance” procedure for updating these amounts. Generally, amendments to an international convention are adopted by way of “explicit acceptance”. Under this procedure, the amendments enter into force a specified period after having been accepted by a predetermined number of parties to the original convention. However, in terms of the “tacit acceptance” procedure, amendments which are nearly always adopted unanimously enter into force on a set date, unless they are specifically rejected by a specified number of countries. It follows that under “tacit acceptance” everyone involved knows exactly when an amendment will enter into force, which is impossible under the “explicit acceptance” system.⁶⁷

5 Nigerian Law

5.1 Influence of English Law on Nigeria’s Admiralty Jurisdiction

The colonisation of Lagos by the English in 1862 marked the advent of the fundamental incorporation of English law in Nigeria’s legal system which left little room for a subsequent radical change from that legal system.⁶⁸ English law continued to form the basis for the Nigerian legal system until Nigeria became a federation in 1954, at which time the Federal Supreme Court, as well as separate High Courts for Lagos and each of the three regions of the Federation, were created.⁶⁹

Nigeria’s admiralty practice started with the establishment of the Vice Admiralty Courts under the Vice Admiralty Courts Act of 1863.⁷⁰ When the Vice Admiralty

⁶⁴ This immunity also applies in respect of the arrest of any vessels owned by the person who has constituted a limitation fund.

⁶⁵ As at 30 November 2003, there were 9 signatory countries to the Protocol, including the United Kingdom, France, Sweden, Germany, Canada, Norway and Denmark.

⁶⁶ Under the Protocol for ships not exceeding 2,000 gross tons liability is limited to 2 million SDR’s for loss of life or personal injury and 1 million SDR’s for “other” claims. Liability then increases with tonnage to a maximum above 70,000 gross tons of 2 million SDR’s plus 400 SDR’s per ton for loss of life or personal injury and 1 million SDR’s plus 200 SDR’s per ton for “other” claims

⁶⁷ *Ozcayir op cit* at 353.

⁶⁸ *Sasegbon Nigeria: Arrest of Ships* Vol. 4 13 at 52. For a detailed account of the history of Nigeria’s legal system see Elias *The Nigerian Legal System*, 2ed 1963.

⁶⁹ *Olakunle Carriage of Goods by Sea – Cargo Claims and Defences in Nigeria* 1999 at 7.

⁷⁰ *Ibid*

Courts were replaced by the Colonial Courts of Admiralty pursuant to the Colonial Courts of Admiralty Act of 1890,⁷¹ it was determined that the Colonial Courts of Admiralty would enjoy jurisdiction over "...the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."⁷² It follows that Nigerian admiralty law and jurisdiction is substantially a product of the 19th century English admiralty law and jurisdiction.

The first attempt at codification of admiralty jurisdiction and practice in Nigeria post its independence on 1 October 1960 occurred in 1962 with the promulgation of the Admiralty Jurisdiction Act.⁷³ The Admiralty Jurisdiction Act was subsequently repealed in 1991 by the Admiralty Jurisdiction Decree,⁷⁴ which expressly grants to the Federal High Court jurisdiction in respect of "... any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property ...".⁷⁵ The 1991 Decree also grants unlimited original jurisdiction to the Federal High Court over *incolae* and *peregrini* within the territorial waters of Nigeria.

5.2 Exclusion of Liability under the Nigerian Merchant Shipping Act of 1990

In terms of s 362 of the Merchant Shipping Act of 1990⁷⁶ ("the Nigerian MSA"), a shipowner is entitled not only to limit, but to exclude liability where, without his fault or privity, goods or merchandise on board his ship are lost or damaged as a result of a fire on board the vessel, or where gold, silver, diamonds, watches, jewels or precious stones, the true nature and value of which was not declared, are lost or damaged by reason of robbery, embezzlement or theft.⁷⁷

5.3 Limitation of Liability under the Nigerian MSA

The crux of a shipowner's right to limit its liability under Nigerian law can be found in section 363 of the Nigerian MSA. Section 363 was adopted from s 383 of the Nigerian Merchant Shipping Act of 1962, which was, in turn, taken verbatim from s 503 of the English Merchant Shipping Act of 1894. As indicated in paragraph 3 above, the English legislators were compelled to amend s 503 of the 1894 Merchant Shipping Act in order to bring it into line with the 1957

⁷¹ Colonial Courts of Admiralty Act of 1890 (53 & 54 V.C.T)

⁷² Section 2(2) of the Colonial Courts of Admiralty Act as cited by Olakunle *op cit* at 8.

⁷³ Admiralty Jurisdiction Act No. 34 of 1962.

⁷⁴ Admiralty Jurisdiction Decree No. 59 of 1991 Laws of the Federation of Nigeria.

⁷⁵ Section 1(1)(d) of the Admiralty Jurisdiction Decree of 1991.

⁷⁶ Merchant Shipping Act Cap. 224 Laws of the Federation of Nigeria 1990.

⁷⁷ Wilson *Impact of Limitation Order on Insurer's Right to Limit Liability* available at www.agbakoba-associates.com

Limitation Convention. Accordingly, by the time of its adoption into Nigerian law in 1962 by means of the Nigerian MSA, s 503 of the English Merchant Shipping Act of 1894 was in keeping with the approach of the 1957 Limitation Convention to limitation of maritime liability. In this way, key provisions of the 1957 Limitation Convention were introduced into Nigerian law without Nigeria having to ratify the 1957 Limitation Convention.⁷⁸

Section 363 of the Nigerian MSA reads as follows:

“(1) No owner of a Commonwealth ship, or a foreign ship shall, where all or any of the following occurrences take place without his actual fault or privity –

- (a) where any loss of life or personal injury is caused to any person being carried in the ship;
- (b) where any damage or loss is caused to any goods, merchandise or other thing whatsoever on board the ship;
- (c) where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, or in the loading, carriage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passengers, or through any other act or omission of any person on board the ship;
- (d) where any loss or damage is caused to any property, other than any property mentioned in paragraph (b) of this subsection, or any rights are infringed through acts or omission of any person, whether on board the ship or not, in the navigation or management of the ship, or in the loading, carriage or disembarkation of her passengers, or through any other act or omission of any person on board the ship;

be liable to damages beyond the following amounts –

- (i) in respect of loss of life or personal injury, either alone or together with such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection, an aggregate amount not exceeding an amount equivalent to three thousand one hundred gold francs for each ton of their ship's tonnage;
- (ii) in respect of such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection, whether there is in addition such loss of life or personal injury, or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of their ship's tonnage.”⁷⁹

An analysis of s 363 reveals the following:

- 1) it applies to the “owner” of a Commonwealth or foreign ship.⁸⁰

⁷⁸ As we have seen, however, the 1957 Limitation Convention was amended in 1976 with the introduction of the 1976 Limitation Convention, which caters for a fundamentally different regime of limitation of liability from its predecessors of 1924 and 1957. As Nigeria has not yet signed or ratified the 1976 Convention, it does not carry the force of law.

⁷⁹ Section 363 of the Nigerian MSA as cited by Wilson in *Scope of Limitation of a Ship Owner's Liability under Section 363 of MSA* which is available at www.agbakoba-associates.com

⁸⁰ Does this have the rather curious result that owners of Nigerian flagged vessels are not entitled to limit their liability in accordance with s 363? Or would Nigeria be brought into the limitation net by being a member of the Commonwealth?

Section 361 of the Nigerian MSA defines “owner” as including a charterer, any person in possession of the ship, any manager or operator of the ship and any master or member of the crew or servant of the owner.

- 2) the right of an owner to limit its liability may be invoked *vis-à-vis* claims relating, *inter alia*, to loss of life or personal injury caused to any person carried on the ship and damage or loss caused to goods, merchandise or other property on board the ship, provided that the aforesaid events occur without the actual fault or privity of the owner. As we have seen, the notion of actual fault or privity has, by virtue of a series of decisions handed down by the English Courts prior to the entry into force of the LLMC in 1986, become a confused and difficult one, particularly when compared to the clear standard laid down in the LLMC.⁸¹ Accordingly, Nigerian maritime practice would certainly benefit from adopting the LLMC, if only to leave behind the confused notion of actual fault and privity in favour of the LLMC's almost unbreakable formula which is rapidly becoming the norm of liability.⁸²
- 2) the limitation amount is calculated on the basis of the ship's tonnage; and
- 3) liabilities which have been excluded by contract may not be limited.⁸³

5.4 The Limitation Fund and the Limitation Amount

As indicated above, sections 363(1)(d)(i) and (ii) of the Nigerian MSA provide the basis upon which the amount in respect of which a shipowner can be liable for damages caused by its vessel is calculated. In respect of loss of life or personal injury either alone or together with any other loss or damages to goods, merchandise or property, the shipowner is liable to pay an aggregate amount not exceeding an amount equivalent to 3,100 gold francs for each ton of the ship's tonnage. In respect of claims for loss or damage caused to any goods, merchandise or property or any infringement of rights whether or not there is in addition loss of life or personal injury, the shipowner is liable to pay an aggregate amount not exceeding an amount equivalent to 1,000 gold francs for each ton of the ship's tonnage.⁸⁴

In 1964, the Nigerian Minister of Transport designated the pound equivalent of

⁸¹ In terms of Article 4 of the LLMC, an owner or other person will only be precluded from claiming limitation where the loss "... resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result".

⁸² In the countries in which the LLMC applies, this almost unbreakable limitation formula has resulted in greater certainty and simplicity.

⁸³ Wilson *Scope of Limitation of a Ship Owner's Liability under Section 363 of MSA* at 2.

⁸⁴ According to Wilson, in his article entitled *Low Level of Liability of Ship Owners in Limitation Proceedings* at 2, it is not entirely clear what distinction the Nigerian MSA intends to make between claims for loss of life and bodily injury to persons on the one hand, and claims for loss of and damage to goods, merchandise, other property and infringement of rights on the other. Wilson notes that in terms of s 363(1)(d)(i), a shipowner's liability will be limited to 3,100 gold francs per ton of the offending vessel where damages are suffered in respect of loss of life or personal injury, either alone or together with loss of or damage to goods, merchandise and other property. Whereas, in terms of s363(1)(d)(ii) a shipowner's liability will be limited to 1,000 gold francs per ton of the offending vessel where loss and/or damages are suffered in respect of goods, merchandise and other property, irrespective of whether there are also claims in respect of loss of life or personal injury. Wilson goes on to submit that where an accident involves loss of life and personal injury as well as loss of or damage to goods, merchandise or property, the basis of the calculation of the shipowner's liability is not clear and asks the question: "...would it be 3,100 gold francs or 1,000 gold francs?"

the gold franc by means of the Merchant Shipping (Currency Equivalent on Limitation of Liability) Order.⁸⁵ The Nigerian pound currency equivalent has now been converted into naira by means of second Merchant Shipping (Currency Equivalent on Limitation of Liability) Order.⁸⁶ In terms of this later order, approximately 146 Naira is designated as the equivalent of 3,100 gold francs, and approximately 47 Naira is designated as the equivalent of 1,000 gold francs.⁸⁷

A limitation fund is constituted when a shipowner pays into Court the naira equivalent of the aggregate amount to which he is entitled to limit his liability. The advantages of the limitation fund are clearly set out by Wilson⁸⁸ as follows:

- 1) the ascertained extent of the shipowner's liability shall not be affected by a subsequent variation of the limitation amounts due by shipowners by means of the introduction of new thresholds;
- 2) any vessel or other property arrested (including any security given to prevent or procure the release from such arrest) in connection with a claim in respect of which the shipowner has successfully limited its liability and constituted a fund, will be released; and
- 3) no judgment, other than an order for costs, may be enforced against the shipowner in relation to the claim.⁸⁹

5.5 Invoking the Nigerian Limitation Action

Section 9 of the Admiralty Jurisdiction Decree of 1991 reads as follows:

"9 (1) A person who apprehends that a claim for compensation under any law, including the Merchant Shipping Act, that gives effect to a Liability Convention may be made against him by some other person, may apply to the Court to determine the question whether the liability of the first-mentioned person in respect of the claim may be limited under that law.

(2) On an application under subsection (1) of this section, the Court may, in accordance with the law referred to in that subsection –

- (a) determine whether the applicant's liability may be so limited, and so determine the limit of the liability;
- (b) order the constitution of a limitation fund for the payment of a claim in respect of which the applicant is entitled to limit his liability; and
- (c) make such orders as are just with respect to the administration and distribution of that fund.

(3) Where the Court has jurisdiction under this decree in respect of a proceeding, that jurisdiction shall extend to entertaining a defence in the proceeding by way of limitation of liability under a law that gives effect to the provisions of a Liability convention."

It is clear from s 9 of the Admiralty Jurisdiction Decree of 1991 that Nigerian law allows a person of to use his right to limit his liability either preemptively or

⁸⁵ No. 94 of 1964. In *The Allegra* (1993) 5 NSC 250 at 267 the Nigerian Supreme Court found that the "pound" referred to in this Order was the Nigerian Pound and not the English Pound.

⁸⁶ Cap. 224 Laws of the Federation of Nigeria 1990.

⁸⁷ See *The Allegra op cit* at 267. These limitation amounts are unrealistically low and need to be amended in order to more closely resemble the international limitation figures reflected in the 1996 Protocol to the LLMC.

⁸⁸ Wilson *The Mechanics of Limitation Fund* available at www.agbakoba-associates.com at 1.

⁸⁹ *Ibid*

defensively. In the former instance, a shipowner preempts the institution of claims against himself by potential claimants by means of initiating limitation proceedings as soon as the loss or damage caused by his vessel occurs. Alternatively, a shipowner can plead his right to limit his liability as a defence so that where damages exceed the limit of liability, judgment is given for the limit of liability. It is however important to note that, when used as a defence, a shipowner's right to limit his liability will bind only those claimants against whom it has been specifically raised. It is also important to note that irrespective of whether a person seeking to limit its liability does so preemptively or defensively, it will not be necessary for such person to constitute a limitation fund with the court prior to judgment.

6. Does Limitation of Liability have a place in Modern Maritime Law?

It may be useful at this stage to contemplate some of the arguments put forward in favour of the retention of limitation of liability in the modern maritime context, and those against such retention.

6.1 The Case Against Limitation of Liability in Modern Maritime Law

Lord Mustill in his article *Ships are different – or are they?*⁹⁰ questions the legitimacy of the concept of limitation of maritime liability by making the following observations:

- 1) The economic considerations which are said to justify the continued existence of limitation of a shipowner's liability no longer bear any resemblance to those which originally led to its creation. All such considerations have fallen away, leaving only the comparatively modern proposition that it is in the general interests of society at large that shipowners should be permitted and indeed encouraged to remain in their traditional business; performing it in the traditional way. Furthermore, the principle of limited liability espoused by Dr Lushington in *The Amalia*⁹¹ that "... full indemnity, the natural rights of justice, shall be abridged for political reasons ..." is no longer universally accepted as sound. The current social climate is leaning towards demanding that governments ensure that so-called "big business" be fully accountable for their actions and any damage they may cause.
- 2) It is unreasonable that a single group is the beneficiary of an outdated rule whilst others exposed to similar risks are left unprotected.
- 3) The unsystematic manner in which limitation of liability operates can lead to results which are not only illogical, but also immoral. The rights of an injured claimant are determined according to the following random considerations: whether he is carried in a motor vehicle, an aircraft or a ship (and, if the latter, what kind of ship); the legislation in force in the places where the accident occurs and where the injured claimant enforces his claim; and in the case of an

⁹⁰ Mustill *op cit* at 499.

⁹¹ *JF Cail and Others v George Michael Papayanni op cit* at 473.

aircraft, by the place where he boarded the aircraft and the place where the journey was intended to terminate. Accordingly, the rights of the parties who suffer from the maintenance of a regime of limitation of liability, including the extent to which such parties shall be entitled to claim compensation, are determined by what appears to be chance. If the international insurance market is to effectively resist the continued questioning of the ethics of limitation, it must first eliminate the elements which would rightly be identified at first sight by any objective observer as wholly indefensible.

Lord Mustill goes on to contend that although limitation does have a place in modern legal practice, members of international commercial practice, including the shipping industry, must be compelled to become accountable for the way in which they conduct their respective businesses. Furthermore, if system of capped liability across all businesses and professions is introduced, the discriminatory nature of limitation of maritime liability in its present form will be removed. Finally, Lord Mustill notes that by allowing a system whereby liability may be limited, the whole of society is said to benefit from reasonably priced transport. Therefore, it is not unreasonable that society at large be expected to take some responsibility for the negative impacts of our commercial activities.

6.2 The Case for Limitation of Liability in Modern Maritime Law

David Steel QC, in his article entitled *Ships are different – the case for limitation of liability*,⁹² puts forward an argument in support of the retention of the concept of limitation of liability in the modern maritime industry on the following basis:

- 1) It still has a role to play in the encouragement of investment in the shipping industry worldwide and helps to ensure a level playing field for international competition by exposing all those involved to the same level of risk in what is a global business. Shipping is a comparatively low investment industry as individual ships and even whole fleets can be within the reach of personal finances, maintenance and crew costs are low, the market is mostly freight as opposed to passenger orientated making safety considerations less of a premium and the industry is largely subsidized.⁹³
- 2) It affords a considerable degree of comfort to the insurance industry that catastrophe exposure will be capped.⁹⁴
- 3) It tends to impose a discipline on claimants and discourages the development of

⁹² Steel *Ships are different – the case for limitation of liability* (1995) Lloyd's Maritime and Commercial Law Quarterly 77-87.

⁹³ The implication here appears to be that the shipping industry is already on the edge of economic viability and thus, cannot afford to be exposed to unlimited liability. See also in this regard Killingbeck *op cit* at 9.

⁹⁴ It appears that the rationale for limitation of liability has shifted from encouraging trade and developing the world's shipping fleet to capping potential insurance payouts thereby stabilising the cost of insurance.

a system of recovery based on punishment rather than compensation.⁹⁵

- 4) It is better for an injured claimant to have a limited claim which he can be certain that can be paid rather than an unlimited claim against an insolvent party.
-

⁹⁵ Steel cites the *Exxon Valdez* incident, where punitive damages claims had reached US\$5 billion by 1995 (an amount described by *Lloyds List* as “grotesque”), as an example of a regime of unlimited liability leading to “unconstrained revenge” by environmental groups and other affected parties.