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Sailing on Troubled Waters - Antiquated U.S. Maritime Liability Limits for Death and Injuries of Ship Passengers: Options for Reform

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SAILING ON TROUBLED WATERS—ANTIQUATED U.S. MARITIME LIABILITY LIMITS FOR DEATH AND INJURIES OF SHIP PASSENGERS: OPTIONS FOR REFORM

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On April 15, 1912, the British luxury liner Titanic sank in the North Atlantic off Newfoundland, less than three hours after striking an iceberg. About 1,500 people died. Far from the glamour of films now associated with the tragedy, the lives of family members of those who died were shattered, in part due to maritime liability limits offering lean compensation at best. Under the U.S. Limitation of Liability Act of 1851, Titanic's shipowner could limit liability to the value of the ship, passenger tickets, and cargo.[1] Many survivors and families of those who died received no compensation at all.[2] Four years after the tragic sinking, Titanic's owner, White Star, agreed to pay about $430 per each life lost, an exceedingly modest amount even in 1912.[3]

The reason for such a low amount was due to legal thinking at the time that shielded shipowners from liability, except where the shipowner had "'privity' or 'knowledge'" that the accident could occur.[4] Even in 1912, this approach to compensation was an outdated throwback to 1851, when shipowners were shielded from liability in order to promote development of a strong maritime industry.[5] Oddly, more than 150 years later, shipowners' liability is still limited by equally arcane laws codified at 46 U.S.C. §§ 30501-30512, Limitation of Shipowners' Liability Act and Fire Statute—the descendent statute of the Limitation of Liability Act of 1851.[6] Under the modern version, total compensation for all claims of personal injury or death arising out of one incident is limited to "$420 times the tonnage of the vessel" where the owner had no "privity or knowledge" of circumstances resulting in the accident.[7]

Although increasingly high shipping standards have substantially reduced the risk of fatal accidents, the limitation laws have not been updated to reflect current

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1. Cynthia Crossen, *Titanic's Sinking Plunged Survivors into Poverty*, WALL ST. J., Feb. 5, 2003, http://online.wsj.com/article/SB1044398577689669693-search.html.

2. *See id.*

3. *Id. See also* James E. Mercante, *In the Wake of 'The TITANIC': An Unsinkable Law*, N.Y. L.J. (Apr. 12, 2012), http://www.rubinfiorella.com/pdf/TITANIC.pdf (providing a brief procedural history of the court cases that followed the tragedy).

4. Mercante, *supra* note 3.

5. *See id.*

6. An Act to limit the Liability of Ship-Owners, and for other Purposes of Mar. 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. §§ 30501-30512 (2006)).

7. Limitation of Liability Act, 46 U.S.C. § 30506 (2006).

realities. This article explores the potential impact of outdated U.S. liability limits and options to reform the law. The author considers the *London Convention on Limitation of Liability of Maritime Claims ('76 and '96)* and the *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002* as alternatives to the current U.S. law, but ultimately concludes that liability for death and personal injury claims is best left to private insurers without statutorily defined limits. This article also considers *forum non conveniens* as a method of reducing litigation by foreign plaintiffs in U.S. courts—in order to address concerns that repeal of U.S. liability limits will result in even more suits in U.S. courts filed by foreign plaintiffs.

The article concludes that compensation is best left to private insurance due to the flaws of international regimes of liability and the capacity of maritime insurance clubs to competently compensate claims. More importantly, the need for limits that existed in prior centuries no longer exists. In effect, the limits of liability serve as little more than a subsidy to foreign flagged vessels, since only one major passenger vessel today is flagged as a U.S. passenger ship. This subsidy could be at the expense of U.S. claimants and others who file lawsuits in U.S. courts.

Critics of the 1984 Limitation of Shipowners' Liability Act (hereinafter "Liability Act" or "LOLA," where 1984 is the most current revised version) point to many reasons why the act should be repealed. First and foremost, policy considerations that motivated the passage of the original act in 1851 as a means of protecting an infant shipping industry no longer exist. Critics have also noted that modern legal avenues exist that carefully protect both the corporate entity (i.e. shipowners) and claimants—primarily through insurance policies.[8] In this modern context, the subsidy provided to shipowners has no justification, and unjustly weighs against a claimant, inhibiting a claimant's ability to obtain just compensation.

I. DEVELOPMENT OF THE MODERN LIMITATION OF LIABILITY ACT

The foundation of the current Limited Liability Act was created in the mid 19th century to ensure that the United States' shipping industry could compete with its European counterparts. This limited liability has been reformed over the years, usually in response to tragedies; however, the attempts to completely repeal this limited liability have yet to be successful.

A. Shipowners' Limitation of Liability Act of 1851

Passage of the Shipowners' Limitation of Liability Act of 1851 (hereinafter "the 1851 Act" or "1851 LOLA") is related to the early development of the ocean cargo industry of the 1840s. The California Gold Rush that started in 1850 provided an additional stimulant to an already growing shipping industry.

8. *See* Mark A. White, *The 1851 Shipowners' Limitation of Liability Act: Should the Courts Deliver the Final Blow?*, 24 N. ILL. U. L. REV. 821, 822-23 (2004). In addition, environmental statutes pre-empt the Liability Act for damage related to certain cargo. *Id.* at 838-39.

Congress' passage of the 1851 Act was also motivated in part by the Supreme Courts' decision in *New Jersey Steam Navigation Co. v. Merchants Bank of Boston.*[9] The Supreme Court held that a contract shielding the shipowner from liability was invalid.[10] The case arose out of an incident occurring on the night of January 13, 1840, involving consignment of goods through a business owner, Mr. Hernden.[11] Mr. Hernden ran a business transporting consigned goods.[12] He neither owned nor operated ships, but would contract for carriage of one wooden crate carrying goods under his custody aboard the steamship *Lexington*, travelling between New York and Boston.[13] Owners of the *Lexington*, N.J. Steam, negotiated a contract with Mr. Hernden absolving N.J. Steam from liability for loss or damage to Mr. Hernden's crate.[14]

On the night of January 13, 1840, the *Lexington* and its cargo caught fire in the Long Island Sound. Merchants Bank had consigned cargo with Mr. Herndon that was destroyed in the fire, and sued N.J. Steam for damages.[15] The Supreme Court determined that N.J. Steam's contract with Mr. Hernden did not shield it from liability and awarded a sum of $22,224, a windfall at the time.[16] The decision would eventually motivate Congress to set statutory liability limits.

In 1848, the same year as the Supreme Court's decision in *Merchant's Bank*, gold was discovered in California, stimulating commerce and transport. As a result, California became a state in 1850, and transport by land and sea continued to grow. United States transatlantic shipping also saw a boost, with shipping lines travelling from New York to Liverpool. The U.S. *Collins Line* was in direct competition with the British *Cunard Line*, but the British vessels had the advantage of protection from liability.[17]

With the rallying cry of "Remember the *Lexington*," Senator Hannibal Hamlin of Maine introduced the bill that became the 1851 Limitation Act.[18] The key provision of the act limits liability as follows: "That the liability of the owner or owners of any ship or vessel . . . shall in no case exceed the amount or value of

9. Walter W. Eyer, Note, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370, 372-73 (1964). In fact, the original statute directly references this case in its text. 9 THE STATUTES AT LARGE AND TREATIES OF THE UNITED STATES OF AMERICA 635 n.b (George Minot ed., 1853).

10. N.J. Steam Navigation Co. v. Merch.'s Bank of Bos., 47 U.S. (1. How.) 344, 385 (1848).

11. *Id.* at 347.

12. *Id.* at 345-46.

13. *Id.* at 379.

14. *Id.* at 345.

15. *Id.* at 378-79.

16. *Id.* at 354, 385.

17. *See* White, *supra* note 8, at 828-31.

18. Donald C. Greenman, *Limitation of Liability Unlimited*, 32 J. MAR. L. & COM. 279, 280 (2001). *See also* CONG. GLOBE, 31st Cong., 2d Sess. 713-20 (1851) (recording the Senate debate of this law); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861, at 125 n.13 (2005).

the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending" unless a loss is occasioned with his privity or knowledge.[19]

Interpreting the statute, the concept of limitation was further defined in Supreme Court cases from 1871: *Norwich Co. v. Wright* ("*Norwich I*"),[20] and *Place v. Norwich & New York Transport Co.* ("*Norwich II*").[21] In *Norwich I*, the Court determined that limitation is derived from the value of the vessel after the collision.[22] Hence, where a ship sinks or is completely destroyed, injured passengers receive no compensation at all. In *Norwich II*, the Court not only confirmed that claimants would receive no compensation when a ship sinks, but more importantly, that insurance proceeds paid to the shipowner are not part of the compensation fund because insurance proceeds are not part of the shipowners' "value of his interest in the vessel" as required under LOLA.[23] The result of the Court's logic produced a strange paradox—where the most serious and damaging accidents result in the lowest compensation fund.[24]

In holding that an owner is limited to the value of the vessel and cargo after the accident the Supreme Court explained: "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."[25] This concept of protecting shipowners as described by

19. An Act to limit the Liability of Ship-Owners, and for other Purposes of Mar. 3, 1851, ch. 43, 9 Stat. 635 (current version at 46 U.S.C. §§ 30501-30512 (2006)).

20. Norwich Co. v. Wright, 80 U.S. 104 (1. Wall.) (1871) [hereinafter *Norwich I*].

21. Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468 (1886) [hereinafter *Norwich II*].

22. *Norwich I*, *supra* note 20, at 119-25. In *Norwich I*, the Court referenced a variety of international maritime sources to frame Congressional intent in passing Section 3 of 1851 Liability Act. *Id.* at 116-120. The Liability Act is a compilation of clauses from English law and liability statutes of Massachusetts and Maine, referencing international maritime law. *Id.* at 119. The Supreme Court recognizes a divergence between English law and maritime sources on the issue of the point in time on a ship's voyage that its value determines compensation. *Id.* at 120-22. Maritime sources determine that a shipowner may surrender a ship and any remaining cargo *after* the accident to satisfy any liability. *Id.* at 116-20. English law, by passage of acts that carve out an exception from the maritime rule, require a shipowner to establish a compensation fund based on the value of freight and cargo *prior* to the accident. *Id.* at 118-19. The Supreme Court determined that Section 3 of the Liability Act did not mirror the language of English law providing an exception to the otherwise established maritime rule. *Id.* at 119-20. Moreover, Section 3 was derived from the laws of Massachusetts and Maine both of which uphold the maritime rule. *Id.* at 119. Although the state statutes address the issue of damage to cargo only, the language of the 1851 Liability Act extended also to personal injury. *Id.* at 120-22. As a result of the Supreme Court's interpretation, a compensation fund of zero is entirely possible when a ship sinks and cannot be recovered; that is, when the post-accident value of the ship is zero. *Id.* at 120-25.

23. *Norwich II*, *supra* note 21, at 536-41. In *Norwich II*, the Supreme Court held that insurance proceeds recovered by the shipowner cannot be included in the vessel's value for the purpose of allowing compensation. *Id.* at 536-37. Maritime insurance is indemnity insurance. *Id.* at 536. As such, insurance proceeds paid to a shipowner are not an "interest in property" that determines compensation under Section 3 of the 1851 Liability Act. *Id.* at 536-41. Significantly, maritime insurance today still functions as indemnity insurance and, as a result, injured parties cannot collect against insurance proceeds paid to a shipowner that has filed for bankruptcy. John D. Kimball, *The Central Role of P&I Insurance in Maritime Law*, 87 Tul. L. Rev. 1147, 1153 (2013).

24. Greenman, *supra* note 18, at 283.

25. *Norwich* I, *supra* note 20, at 121.

the Supreme Court in 1871 continues to drive modern maritime limits. Indeed the Maritime Law Association ("MLA")[26] used the same arguments as recently as 2010 to justify its recommendations for continuing maritime limits.[27] The MLA is a non-governmental organization that states as its purpose to promote uniformity of U.S. maritime law.[28] On the issue of liability, the MLA promotes policies that have been advocated by shipowners for more than a century. Like shipowners, the MLA stands steadfast against repeal of the limit.[29]

B. *Amendments to the 1851 Limitation of Liability Act of 1936 and 1984*

Following its tendency to reform maritime laws only in response to tragic events, rather than proactive reform, Congress first amended the 1851 Liability Act in 1936 in response to the burning of the passenger line, *Morrow Castle*, on September 8, 1934, which caused 135 deaths off the shore of New Jersey. Invoking the 1851 Liability Act, owners of the *Morrow Castle* were limited in their liability to the meager sum of $20,000 for all claims for loss of cargo and death.[30] As a result of public outrage, Congress amended the Act's provisions relating to personal injury and death by requiring shipowners to establish a compensation fund amounting to $60 per gross ton of the vessel.[31] The law retained an exemption from the limit in cases where the master, superintendent, or managing agent had "privity or knowledge" of conditions leading to the accident.[32]

Congress amended the Limitation Act again in 1984 to raise the liability limit to $420 per gross ton of the vessel,[33] again where the incident occurs without "privity or knowledge" of the owner.[34] The MLA points out that modern courts

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26. The MLA was incorporated in 1993, but traces its inception back to 1899 as the U.S. counterpart to the Belgian-based organization, Comité Maritime International, an international body meeting for the first time in the 1880's with the purpose of compiling and codifying maritime law. *About the MLA*, MAR. L. ASS'N U.S., http://www.mlaus.org (last visited Jan. 10, 2014). The U.S. MLA today states its purpose in its Articles of Incorporation as, "to facilitate justice in its administration, to promote uniformity in its enactment and interpretation." *Id.*

27. *See* MAR. LAW ASS'N OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON THE LIMITATION OF LIABILITY ACT 7 (2010) [hereinafter MLA, REPORT], *available at* http://www.mlaus.org/archives/library/2094.pdf (describing the MLA's position against repeal of liability limits).

28. *About the MLA*, *supra* note 26.

29. MLA, REPORT, *supra* note 27, at 7.

30. Greenman, *supra* note 18, at 284.

31. *See id.* at 284-85.

32. *Id.* at 285.

33. Limitation of Liability Act, 46 U.S.C. § 30506 (2006) ("Minimum Liability. If the amount of the vessel owner's liability determined under Section 30505 of this title is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than $420 times the tonnage of the vessel, that portion shall be increased to $420 times the tonnage of the vessel. That portion may be used only to pay claims for personal injury or death.").

34. *Id.* § 30505(b). This Section reads:

> Claims subject to limitation. Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any

generally do not apply the 1984 Limitation Act based on one or more of the following findings that are deemed to constitute "privity or knowledge":

1. Failure to provide or insure adequate operations, equipment, or crew;
2. Failure to detect and/or correct defects;
3. Orders by owner to vessel that proved improper;
4. Improper operation of vessel by owner or knowledge of;
5. Personal contract;
6. Improper stowage or other operational act by sufficiently high person; and,
7. Failure of evidence to prove no privity and knowledge.[35]

Although this list provides significant potential exemptions from arcane liability limits, the MLA's position certainly does not render the issue moot. In his study, *Statistical Analysis of Limitation of Liability Cases*, Donald Greenman found that between 1993 and 1996, out of ten cases, courts applied the liability limit to six.[36] However, in periods surveyed since 1953, courts did have a tendency to break the limitation more than apply it.[37] Overall, Greenman's data shows that from 1953 to 1996, courts applied the limitation in sixty-three cases while breaking the limit in 103 cases.[38] Congressional action is essential in order to promote uniformity of law for the victims of maritime accidents. Today we have a situation where courts may break the limits for some, while denying it for others.[39]

More recently, in December 2011, a U.S. District Court in Wilmington, North Carolina, limited liability to $100,000 for the deaths of two plaintiffs on a vessel operated by defendant Marine Specialty Management.[40] The two plaintiffs, Cynthia Woodcock and Lorrie Shoup, were killed during a parasailing accident.[41] The court held that the vessel liability limits apply. Accordingly, the families were awarded $100,000 plus interest and costs.[42] Over the past several years, courts are

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> loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Id.

35. Greenman, *supra* note 18, at 287.

36. Donald C. Greenman, *Statistical Analysis of Limitation of Liability Cases 1953-1996*, *in* MAR. LAW ASS'N OF THE U.S., DOCUMENT NO. 729 THE MLA REPORT 10527, 10530 tbl.I (Gordon W. Paulsen et al. eds., 1997).

37. *See id.*

38. *Id.*

39. *See* Greenman, *supra* note 18, at 287-89.

40. *See* Jason Gonzales, *Insurance Company Ordered to Pay in Parasailing Deaths*, STAR NEWS (Sept. 20, 2012, 1:31 PM), http://www.starnewsonline.com/article/20120920/ARTICLES/120929957. In a related state-court action, the decedents' estates were awarded 9 million dollars. *Id.* The court had not determined the effect of the federal Limitation of Liability Act. *Id.* In this case, plaintiffs are fortunate that they had another remedy not subject to the limit. However, this commonly is not the case for many maritime death claims.

41. *Id.*

42. *Id.*

increasingly applying the limit to incidents involving owners of pleasure yachts, motorboats, and jet skis.[43]

Greenman's data about the number of courts applying the limit between 1953 and 1996 raises an interesting issue: Does diminished application of the limit really justify ignoring it? Should Congress and society not have a duty to ensure a legal system that provides just compensation for losses and a uniform standard of determining liability? Although Greenman's data demonstrates a general tendency to deny the limitation more than to apply it, the cases to which the limit applies represent real losses to individuals and families. These losses must be of concern to Congress and to the American public. To aggravate matters, compensation, even when the limitation may not apply, can be further reduced by court created interpretations that limit the types of damages available to plaintiffs.[44] Although all of these issues have been presented to Congress from time to time, it remains a mystery why Congress has so far failed to substantially reform or altogether repeal limits on shipowner liability.

C. *Proposed Legislation Before Congress to Repeal Liability Limits from 1966-2010*

Congress considers reform of maritime liability limits only in response to a disaster. This was the case in 1851 when the *Lexington Steamboat* disaster led to the passage of the 1851 Liability Act,[45] and similarly in 1936 when the burning of the *Morrow Castle* caused the deaths of 135 passengers and led to the 1936 amendments.[46] In 1966, Congress considered totally repealing the liability limits after the *Yarmouth Castle* sank *en route* to the Bahamas.[47] Again in 1983 and 1985 Congress considered total repeal.[48] But the 1983-1985 amendments resulted in raising the liability limit only to $420 per the vessel's tonnage.[49] Most recently, Congress considered reform in the wake of the Deepwater Horizon failure, where an explosion on the Deepwater Horizon oil-drilling platform resulted in the deaths

43. Dennis J. Stone, *The Limitation of Liability Act: Time to Abandon Ship?*, 32 J. MAR. L. & COM. 317, 332 (2001).

44. *See* Dooley v. Korean Airlines Co., 524 U.S. 116, 124 (1998) (holding that survivors are entitled to pecuniary losses, but not damages for loss of society or pre-death pain and suffering, when an action was brought under the Death on the High Seas Act ("DOHSA")). Nonetheless, pecuniary losses can be significant, as this would entitle survivors to lost income of decedent over their lifetime. *See* FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, 4 HARPER, JAMES AND GRAY ON TORTS 756-58 (3d ed. 2007). Damages for pain and suffering can also be a significant portion of overall recovery. Pain and suffering damages may be especially important where a decedent did not earn a high wage. *See id.* at 763-65. Hence, exclusion of such damages can be a significant loss for survivors.

45. White, *supra* note 8, at 827.

46. Greenman, *supra* note 18, at 284-85.

47. S. 3251, 89th Cong. (1966); *see also* Allan I. Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L. REV. 783, 805-06 (1969) (discussing proposals to revise the Limitation of Liability Act in response to the *Yarmouth Castle* incident).

48. H.R. 277, 99th Cong. § 5 (1985); H.R. 3156, 99th Cong. (1985); REP. WALTER BEAMAN JONES SR., MARITIME SAFETY ACT OF 1983, H.R. REP. NO. 98-525, at 10-11 (1983).

49. H.R. REP. NO. 99-767, at 22 (1986) (discussing the current law that legislates levels of maritime liability).

of eleven individuals and injury of 126 people.[50] Under maritime law, an oil-rig is considered a "vessel," allowing application of the Limitation Act.[51] An overview of this history provides some insight into Congress' failure to act as stemming from effective and continuing MLA lobbying success.

1. Proposed Reform in Response to the *Yarmouth Castle* Incident of 1965

In 1966, the 90th Congress considered a bill that would repeal the limitation entirely, in response to the sinking of the *Yarmouth Castle* on November 13, 1965.[52] The *Yarmouth Castle* caught fire on a journey from Miami to Nassau, Bahamas, while the source of the fire could not be determined, one possibility was a mattress near an electrical connection.[53] Due to inadequate fire protection and safety measures, the fire spread, eventually sinking the vessel with eighty-eight panicking passengers and two crew members going down with the vessel.[54] Others managed to escape via inflatable rafts (despite an undersupply of emergency equipment) and varying levels of assistance from crewmembers, some heroic, while other crewmembers attempted to save themselves in panic.[55] Following this tragedy, Congress considered Administration sponsored bills that would repeal the limit entirely and require both mandatory insurance and compliance with international safety standards mandated under the Convention on Safety of Life at Sea.[56]

Despite a strong endorsement of repeal from the Executive Branch, Congress inexplicably deleted the section relating to repeal of the liability limits in its final version of the law, while passing all the other sections.[57] Committee reports do not offer any explanation as to why Congress failed to repeal the limits in its final enactment. Executive departments and agencies that endorsed the repeal included: Department of Commerce, Maritime Administration, State Department, Treasury Department, Coast Guard, and the Federal Maritime Commission.[58] The Federal Maritime Commission, an independent agency responsible for regulating U.S.

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50. REP. JOHN CONYERS JR., CHAIRMAN, SECURING PROTECTIONS FOR THE INJURED FROM LIMITATIONS ON LIABILITY ACT, H.R. REP. 111-521, at 4 (2010). The Deepwater Horizon failure occurred on April 20, 2010, when an explosion on the Deepwater Horizon oil drilling platform enflamed the platform, causing a massive oil spill. *Id.*

51. *See* 46 U.S.C. § 115 (2006); 33 U.S.C.A. § 2701(37) (West 2013) (showing that for the purpose of maritime law, the platform is considered a "vessel," allowing application of liability limits).

52. S. 3251.

53. U.S. COAST GUARD, COMMANDANT'S ACTION ON THE MARINE BOARD OF INVESTIGATION CONVENED TO INVESTIGATE THE FIRE ON BOARD THE PANAMANIAN SS YARMOUTH CASTLE ON 13 NOVEMBER 1965 AND SUBSEQUENT SINKING WITH LOSS OF LIFE 2, 22 (1966), *available at* htttp://www.uscg.mil/hq/cg5/cg545/docs/boards/yarmouthcastle.pdf.

54. *Id.* at 1, 22-24.

55. *Id.* at 16-18.

56. S. 3251; H.R. 10327, 89th Cong. (1966); WARREN GRANT MAGNUSON, SAFETY OF LIFE AT SEA, S. REP. NO. 89-1483, at 4-6 (1966) (report of the Committee on Commerce about the bills at issue, stating endorsement of agencies).

57. *See generally* S. 3251; H.R. 10327; S. REP. NO. 89-1483.

58. S. REP. NO. 89-1483, at 11.

international maritime transport, worked closely with the other agencies and departments in drafting the legislation, including the repeal.[59] Indeed, speaking on behalf of these agencies, Rear Admiral John Harllee, Chairman of the Federal Maritime Commission, explained:

> We take the position that limitation of liability should be eliminated, unless insurance companies or passenger ship representatives offer compelling proof that (1) a complete absence of limitations on liability is not needed to provide proper safeguards to the public, and (2) elimination of limitations on liability would not be feasible from a cost or insurance placement viewpoint. *Even if this should be the case, we would strongly urge that liability limits be substantially raised.*[60]

Perhaps, having mandated amounts of insurance coverage and requiring compliance with international safety standards in its legislation, Congress saw no need also to repeal the limitation.

Georgetown University Law Center Professor Allan Mendelsohn, who worked on the repeal proposal for the State Department, stated that industry witnesses defeated the proposed repeal with arguments ancillary to the issue of the insurance industry's capacity to insure against unlimited liability.[61] Arguments from industry witnesses in 1966 have now been appropriated by today's MLA, keeping them alive as recently as 2010, when Congress considered amending LOLA after the Deepwater Horizon spill. In 2010, the MLA doubted the insurance industry's capability to handle claims beyond liability limit, making the limits necessary.[62] Industry argues that historically most countries have maritime liability limits and that repeal of liability limits would place the United States at a distinct disadvantage.[63] These limits, however, are a historical anomaly, enacted at a time when a shipowner did not exercise any degree of control over the operation of its vessel. Instead, vessels were operated by a captain and crew beyond contact, and at sea thousands of miles from the shipowner. In past times, limits may well have had the equitable and economic justification of protecting maritime transport vital to commerce. Today, shipowners, aided by modern technology, are responsible for vessel operations, no matter how distant. Moreover, and perhaps most important, all other modes of transport have no liability limits of any type in the United States. Carriers by road, rail, and air that operate throughout the United States do so without any liability limits.[64] Nor would unlimited liability be unduly prejudicial against U.S. carriers simply because unlimited liability would apply to all suits brought in U.S. courts regardless of a vessel's flag.[65]

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59. *Id.* at 11-16.
60. *Id.* at 13-14 (emphasis added).
61. Mendelsohn, *supra* note 47, at 803-07.
62. MLA, REPORT, *supra* note 27, at 2-4.
63. Mendelsohn, *supra* note 47, at 803-04.
64. *Id.* at 803.
65. *Id.*

Professor Mendelsohn also discusses other industry arguments during the 1966 Congressional hearings related to the *Yarmouth Castle*, that have now again been adopted by the MLA.[66] Industry has long argued that the marine insurance industry is incapable of providing sufficient insurance coverage to cover unlimited liability and that unlimited liability would thus become the financial ruin of the maritime shipping industry.[67] But the capacity of the insurance industry to handle unlimited liability in road, rail, and air transport indicates that this argument is simply not true. Industry experts also argue that the procedure of concursus is best preserved in limited liability systems.[68] Through the procedure of concursus, a shipowner can bring multiple claims from one incident into one court. However, with a few minor procedural amendments, concursus can be equally preserved in a system of unlimited liability.[69] Alternatively, the same multidistrict litigation statute that allows all victims of air disasters to sue in one court could be equally applicable to victims of a maritime disaster.[70]

2. Proposed Reforms in 1983 and 1985

Congress again considered repealing liability limits in its 98th Session in 1983 and in its 99th Session in 1985. In its 98th Session, Congress resolved to raise the limit of liability to $420 per ton as an interim measure, despite expert testimony detailing many flaws of this approach.[71] Professor Allan Mendelsohn, testifying as an expert in maritime law, noted that the concept of maritime liability limits is currently unnecessary and outdated:

> We may have reached the point in this 20th century, in the development of our domestic and international law, where limits of liability have become outmoded. They do not exist in domestic bus transportation. They do not exist in railroad transportation, and they do not even exist in domestic air transportation.[72]

Even more poignant is Professor Mendelsohn's belief that raising the limit to $420 per ton would be more harmful to injured passengers than the $60 per ton limit at that time.[73] Professor Mendelsohn stated two reasons. First, he explained that courts view the $60 limit as having no real legal meaning and will readily break it to prevent the injustice of its application.[74] Second, raising the amount to

66. *Compare* Mendelsohn, *supra* note 47, at 802-05, *with* MLA, REPORT, *supra* note 27, at 2-4.

67. Mendelsohn, *supra* note 47, at 804.

68. *See id.*

69. *Id.* at 804. Concursus could be available to plaintiffs through an amendment to Rule F of the Federal Supplemental Rules for Certain Admiralty and Maritime Claims, especially when read in conjunction with 28 U.S.C. § 1407, allowing consolidation of claims in multidistrict litigation. *Id.*

70. *Id.*

71. REP. WALTER BEAMAN JONES SR., MARITIME SAFETY ACT OF 1983, H.R. REP. NO. 98-525, at 10-11 (1983).

72. *Limitation of Shipowner's Liability Oversight: Hearing Before the Subcomm. on Merch. Marine of the H. Committee on Merch. Marine and Fisheries*, 98th Cong. 100 (1983) (statement of Professor Allan Mendelsohn, Adjunct Professor Georgetown Law School).

73. *Id.* at 109-10.

74. *Id.* at 110.

$420 implies that Congress had considered the issue and passed the $420 per ton limit intending that courts actually apply it.[75] This could lead to inadequate compensation.[76]

Professor Mendelsohn explained:

> Were there another *Yarmouth Castle* disaster aboard a vessel like the *Constitution*, for example, a $420 figure would yield a fund of about $7,560,000. Divided among the survivors of 90 fatal victims, however, each would receive only about $84,000; and this would leave nothing for the injured, no matter how serious the injury. If more than 90 people died—as was the case with the *Morro Castle* and the *Titanic* disasters—the recoveries would be even more inadequate. I would not wish to be responsible for adopting legislation that produces such wholly unfair results, and I am sure each of you shares my sentiments fully.[77]

Despite Professor Mendelsohn's warning, Congress adopted the $420 per ton limit justifying it as an interim measure to adjust for the cost of living increase from the 1936 limit, when the limit was $60 per ton.[78] The increase was supposed to be interim or temporary—until Congress could pass a more comprehensive reform.[79] Twenty-eight years later, Congress has not yet passed that reform.

A year after it raised the limit, the same committee considered a bill in 1985 to modify the $420 liability limit by adopting the 1976 Convention on Limitation of Liability for Maritime Claims, ('76 London Convention "LLMC") an international agreement that aimed to consolidate and modernize prior international maritime liability agreements.[80] In testimony before the committee, then Assistant Secretary for the Department of Transportation and current Georgetown University Law Center Professor Warren Dean brought to light several deficiencies in the LLMC.[81] On the issue of repeal of the limits, Professor Dean agrees that the matter is best left to private insurers without interference from liability limits set by the government.[82] Professor Dean explained that *any* limit is inadequate because inflation can render the limit an outdated anachronism within a short time frame from its passage:

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75. *Id.*

76. *See id.*

77. *Id.*

78. REP. WALTER BEAMAN JONES SR., MARITIME SAFETY ACT OF 1983, H.R. REP. NO. 98-525, at 10-11 (1983).

79. *Id.*

80. H.R. 277, 99th Cong. (1985), *and* H.R. 3156, 99th Cong. (1985).

81. *Department of Transportation: Hearing on H.R. 277 and H.R. 3156 Before the Subcomm. on Merch. Marine of the H. Comm. on Merch. Marine and Fisheries*, 99th Cong. 4-7 (1985) (statement of Warren L. Dean, Jr., then Assistant Gen. Counsel for International Law, Dep't of Transp.) [hereinafter Dean's Statement].

82. *Id.* at 4 ("We believe that the Committee should examine the need for preserving the application of limits for both personal and cargo claims to determine whether market forces could resolve the problem of compensation through private contracts, thereby removing any need for government intervention.").

> Finally an inherent weakness of the legislative approach to liability limitation is its failure thus far to provide for adjustment of liability limits to compensate for erosion by inflation. Indeed, there may be no reliable indicator to which a liability limit could be indexed. That is another reason these matters are best left to the insurance marketplace. The current Limitation of Liability Act became obsolete due to erosion by inflation over the years.[83]

The Committee on Merchant Marine and Fisheries did propose a set of reforms to liability and workers' compensation affecting commercial fishing vessels, while failing to reform liability limits for vessels carrying passengers.[84] The committee offered no persuasive explanation as to why it failed to repeal the liability limit. Its report merely states:

> There was general agreement among the witnesses that the laws regarding liability for loss of life or bodily injury are out of date and should be amended to reflect present conditions. There was also a feeling that all types of vessels, particularly commercial vessels, should be treated the same. Some stated that a wait-and-see policy should be adopted. They felt that the recent change from a $60- to a $420-per-gross-ton limitation of liability, as required by 46 App. U.S.C. 183(b), might be adequate without further legislation. Many others said that legislation should be enacted that closely parallels the present Convention of Liability for Maritime Claims, 1976. They felt that this would provide the most effective and equitable means of protecting the rights of victims and vessel owners.[85]

3. Proposed Reform After the Deepwater Horizon Spill in 2010

More recently, H.R. 5503 was introduced by Congressman John Conyers on July 13, 2010.[86] Amongst other changes, the bill sought to repeal the Limitation of Liability Act.[87] This proposal was a direct result of a petition filed by Transocean, owner of the Deepwater Horizon oil rig, to limit its liability for injuries and deaths to those aboard the rig, using the Limitation of Liability Act.[88] The act would limit

83. *Id.* at 9.

84. H.R. 5013, 99th Cong. (1986).

85. H.R. REP. NO. 99-767, at 22 (1986).

86. Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong. (2010).

87. *Id.* § 4. The bill also proposes changes to DOHSA, which originally created a cause of action for wrongful death under the Act, but limited remedies to pecuniary damages. *Id.* § 2. The amendment would allow for non-pecuniary damages (e.g. pain and suffering, loss of care, comfort and companionship, etc.). *Id.* § 2(2). However, under DOHSA liability limits contained in the Limit of Liability Act apply. 46 U.S.C. § 30502 (2006). Congressmen Conyers also sought to amend the Jones Act, an act that provides a right of action for seamen against their employer for wrongful death and personal injury. H.R. 5503, 111th Cong. § 3 (2010). The amendment would have allowed for non-pecuniary damages for wrongful death claims brought under the act. *Id.*

88. REP. JOHN CONYERS JR., CHAIRMAN, SECURING PROTECTIONS FOR THE INJURED FROM LIMITATIONS ON LIABILITY ACT, H.R. REP. 111-521, at 4 (2010).

Transocean's liability to $26,764,083, being the weight of the salvaged vessel and its cargo multiplied by $420.[89] The Deepwater Horizon failure occurred on April 20, 2010, when an explosion on the Deepwater Horizon oil-drilling platform caused a massive oil spill.[90] The explosion resulted in the deaths of 11 workers and several injuries to the 126 workers on the platform.[91] In a committee memo, Congressman Conyers states, "Section 4 repeals this antiquated law, which has little relevance in our age of instant global communication and makes little sense at a time when there are precious few U.S. flagged ships who could even benefit from the liability limitations."[92] As of September 2012, the *Pride of America* is the only major U.S. flagged cruise ship—a one-ship company[93] operated by Norwegian Cruise Lines.[94]

The bill passed the House of Representatives on July 1, 2010.[95] Its companion bill in the Senate, S. 3600, died after being read twice in the Committee of Commerce, Science, and Transportation.[96] Senate reports provide no explanation for not passing the bill. In the House of Representatives, a member who was in the minority of the vote argued that the bill was rushed through in response to the Deepwater Horizon spill without hearing expert testimony and could result in unanticipated adverse effects.[97] A member in the majority of the

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89. Mark Long & Angel Gonzales, *Transocean Seeks Limit on Liability*, WALL ST. J., May 13, 2010, http://online.wsj.com/article/SB10001424052748704635204575241852606380696.html.

90. H.R. REP. 111-521, at 4.

91. *Id.*

92. Memorandum from John Conyers, Jr., Chairman of the H.R. Comm. on the Judiciary, on Full Committee Markup of H.R. 5503, at 7 (June 22, 2010), *available at* http://judiciary.house.gov/_files/hearings/pdf/Memo100623.pdf.

93. The "one-ship" company is a legal device that shipowners use to limit recovery amounts for claims. *See* Malcolm Wallis, *Recovery of Maritime Debts and the Role of the Associated Ship*, 28 BANKING & FIN. L. REV. 103, 109-10 (2012) (discussing the increased registry of one-ship companies and difficulties in collecting debts against them). A shipowner can register a ship as its own corporate entity, with little or no assets to the corporate name other than the value of the vessel. *See id.* Recovery of debts against these one-ship companies is then limited to the meager assets available in the corporate name. *Id.* at 110-12. One-ship companies could render unlimited liability ineffective. *See id.* at 112-14. The limited recovery imposed by one-ship companies can, however, be overcome by requiring vessels to carry insurance coverage that could adequately cover claims. *See* Mendelsohn, *supra* note 47, at 802.

94. *Pride of America Set for Major Upgrades*, MARINE LOG (Sept. 7, 2012), http://www.marinelog.com/index.php?option=com_k2&view=item&id=2899:pride-of-america-set-for-major-upgrades&Itemid=230.

95. H.R. 5503, 111th Cong. (as passed by House, July 1, 2010).

96. S. 3600, 111th Cong. (2010). The bill was read twice in committee and no further action was taken. Library of Congress, *Bill Summary and Status, 111th Congress (2009-2010), S.3600*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03600:@@@L&summ2=m& (last visited Sept. 28, 2013).

97. REP. JOHN CONYERS JR., CHAIRMAN, SECURING PROTECTIONS FOR THE INJURED FROM LIMITATIONS ON LIABILITY ACT, H.R. REP. 111-521, at 31 (2010) ("Nonetheless, without the benefit of even a single legislative hearing, H.R. 5503 virtually re-writes U.S. maritime law, making portions of it out-of-step with the maritime-liability laws of nearly every other seagoing nation; eliminates important provisions of the Class Action Fairness Act, a statute passed just 5 years ago, with strong bi-partisan support, to ensure that class actions are decided in a neutral, fair forum—the Federal courts; and makes significant amendments to provisions of the Bankruptcy Code for debtors with oil-spill liability. Given

vote in the House of Representatives however, reported strong favor for repealing the limit:

> LOLA [Limitation of Liability Act] has clearly outlived any legitimate purpose it may once have served. Its original purpose—to promote American shipping interests—is now largely serving the interests of carriers incorporated in Third World countries and using foreign-flagged vessels in order to avoid having to pay U.S. taxes or follow U.S. health and safety regulations. Moreover, Congress could not possibly have envisioned in 1851 that movable industrial oil exploration and development platforms would qualify as "vessels" under LOLA and attempt to shield their liability in this type of disaster.
>
> When LOLA was enacted, a shipowner could communicate with the captain and crew of a vessel away from home port only through documents transshipped on other vessels. LOLA was intended to protect those owners in light of that difficulty in staying in communication. Today's communication technology allows shipowners to oversee their vessels as constantly as they wish, even when the vessel is on the other side of the world. Owners today have direct communication by radio, computers, and phone, and a ship can be positioned and monitored constantly using satellite systems. Continued use of LOLA simply removes healthy incentives for owners to properly oversee their ships.
>
> Finally, there are better, more sophisticated alternatives for protecting shipowners than LOLA. Today, shipowners have a wide variety of legal tools available that better protect their financial interests. For example, insurance, contract, charter, mortgage, and the separate incorporation of vessels are alternative methods that offer more appropriate financial protection than LOLA.[98]

Despite excellent arguments put forth in the House of Representatives, Congress once again failed to reach an agreement to repeal the limit in 2010 as it failed after the *Yarmouth Castle* disaster in 1966.[99] An increase in the limit to $420 passed as an interim measure in 1984[100] still exists as an anachronism in 2013 as the law of the land: a law that threatens and could well justify inadequate compensation of victims or their survivors after a future maritime disaster.

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the sweeping nature of the changes in this bill and the lack of committee process to create a record so members could understand its full effects, we were unable to support this legislation.").

98. *Id.* at 11.

99. S. REP. NO. 89-1483, at 8-9 (1966) (discussing the justifications for the limits that were included).

100. REP. WALTER BEAMAN JONES SR., MARITIME SAFETY ACT OF 1983, H.R. REP. NO. 98-525, at 10-11 (1983) (discussing Congress' decision to increase the limits instead of repealing them).

II. INTERNATIONAL CONVENTIONS COMPARED TO THE U.S. LIMITATION OF LIABILITY ACT

International law has developed standards for the liability of maritime vessels. There are some aspects of these laws that are more favorable than the U.S. model, but they would also not cure all of the deficiencies of the current system in the United States.

A. *Liability Limits in the LLMC and 2002 Athens Convention Compared to U.S. LOLA*

International maritime agreements present Congress with alternative systems of compensation that could be adopted into U.S. law, thereby harmonizing U.S. requirements with international standards. However, like the U.S. LOLA, international systems also set liability limits that may not always offer adequate compensation while adopting a stricter standard to break the liability limit than required under U.S. LOLA. The MLA advocates for adoption of the Convention on Limitation of Liability for Maritime Claims ('76 London Convention, "LLMC").[101] The International Maritime Organization ("IMO") drafted the LLMC in 1976 to address liability limits for claims arising out of personal injury and death.[102] The LLMC mandates a higher limit than its predecessor, the '57 Brussels Convention,[103] but provides shipowners with a limit that the MLA deems

101. MLA, REPORT, *supra* note 27, at 4. *See also* Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221 [hereinafter LLMC].

102. *See Convention on Limitation of Liability for Maritime Claims (LLMC)*, http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx (last visited Jan. 16, 2014) [hereinafter IMO, *LLMC*].

103. International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships arts. 1, 3, Oct. 10, 1957, [1982] A.T.S. 2 [hereinafter '57 Brussels Convention] (the convention aimed to set international liability standards for death, injury, and damage to cargo). The convention establishes a compensation fund based on a vessel's weight. *Id.* art. 2. An accident resulting in passenger injuries (or deaths) and property damage will have a total compensation fund limited to 3,100 francs per ton of the vessel. *Id.* art. 3. The compensation fund is apportioned so that 2,100 francs per ton is for claims arising out of injury or death with the remainder allocated to property claims. *Id.* art. 3(1)(c). *Compare id.* art. 3, *with* Limitation of Liability Act, 46 U.S.C. § 30506 (2006) (each basing limits on the tonnage of the ship in question). The international community would do away with this approach in the LLMC and subsequent maritime liability conventions, instead establishing a liability limit based on the number of passengers a vessel is certified to carry. *See* LLMC, *supra* note 101, art. 7(1). Another notable difference between the '57 Brussels Convention and the LLMC and its progeny is the standard to break the liability limit. *See* LLMC, *supra* note 101, art. 4. Under the '57 Brussels Convention, an owner would not be entitled to the limit where he could have reasonably foreseen circumstances that caused the accident. *See* DUYGU DAMAR, WILFUL MISCONDUCT IN INTERNATIONAL TRANSPORT LAW 162-166 (Hamburg Studies on Mar. Affairs Vol. 22, 2011) (providing an analysis of the standards to break the limit in the '57 Brussels Convention and the LLMC). The LLMC has a higher standard to break the limit. *See id.* at 167-70. The limit should only be broken where the owner intended the harm that occurred. *See id.* at 170-72. The approach taken in the LLMC is discussed further below in this article. *See infra* Part II.B. *See also Limitation of Shipowners' Liability—The Brussels Convention of 1957*, 68 YALE L.J. 1676 (1959) (discussing the standards contained in the '57 Brussels convention, their development, and a comparison to U.S. law).

almost unbreakable.[104] Of equal importance to the issue of liability limits is the standard of negligence that defines when an owner or operator is entitled to the limit and when it can be broken.[105] According to the MLA, adoption of the LLMC in the United States would resolve potential inequities of the 1851/1984 U.S. Limitation Act without subjecting the maritime industry to claims with no limits.[106] Unlimited claims, according to the MLA, are uninsurable.[107]

The Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea ("the 2002 Athens Convention" or simply "Athens") provides still another liability system that the United States could adopt to replace LOLA.[108] This convention establishes higher liability limits than both the LLMC and LOLA.[109] The Athens Convention was originally adopted in 1974 to establish a homogenous liability system by consolidating the 1961 and 1967 Brussels Conventions.[110] The international community considered the convention a significant advancement. Prior to its adoption, liability was determined by contracts of carriage that often excluded a carrier from any liability.[111] In 2002, the original Athens Convention was amended to raise liability limits.[112]

The international conventions at issue require a shipowner to pay a set fund in the amount of the liability limit. All claimants can then file for compensation from the set fund, but the amount of actual recovery varies by the amount of claimants.[113] These liability amounts are greater than the liability amount provided in the U.S. LOLA. The LLMC, Athens, and U.S. LOLA provide for limitation of liability to the shipowner for death or injury of passengers, as follows:

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104. *See* IMO, *LLMC*, *supra* note 102.

105. Standards of negligence as defined in the conventions and breakability of the limit is discussed in more detail below. *See infra* Part II.B.

106. MLA, REPORT, *supra* note 27, at 7.

107. *Id.* at 3-4.

108. The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002, *entry into force* Apr. 23, 2014, 2008 O.J. C74-E/567 [hereinafter Athens Convention]. This treaty incorporates the updated language that was approved in a 2002 Protocol with the original 1974 treaty. *Compare* Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Dec. 13, 1974, 1463 U.NT.S. 19, *with* Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Nov. 1, 2002, [hereinafter Protocol to the Athens Convention] *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261628/Misc.6.2013_Prot_2002_Athens_8760.pdf (which updates the levels of liability utilizing the International Monetary Fund's Special Drawing Right).

109. *See Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL)*, INT'L MAR. ORG., http://www.imo.org/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx [hereinafter IMO, *Athens Convention*].

110. NORMAN A. MARTÍNEZ GUTIÉRREZ, LIMITATION OF LIABILITY IN INTERNATIONAL MARITIME CONVENTIONS 116-17 (2011).

111. *Id.*

112. IMO, *Athens Convention*, *supra* note 109.

113. LLMC, *supra* note 101, arts. 9, 11; Athens Convention, *supra* note 108, art. 12.

Athens: 400,000 SDR (about USD $614,290) multiplied by the number of passengers the ship is authorized to carry in the ship's certificate;[114]

LLMC: 175,000 SDR (about USD $268,752) multiplied by the number of passengers the ship is authorized to carry in the ship's certificate;[115] and,

U.S. LOLA: USD $420 multiplied by the tonnage of the vessel.[116]

Although Athens and the LLMC establish higher liability limits then LOLA, the amount paid to each individual (or to the estate of a decedent) varies based on the number of passengers filing a claim against a set compensation fund, in the amount of the liability limit.[117] In effect, these conventions value life based on the number of passengers on board a vessel at the time of an accident.[118] In contrast, the U.S. system of tort liability values life based on a complex set of factors related to conditions during the life of a decedent or injured individual. Compensation can be based on loss of economic support to a decedent's family, loss of services, loss of companionship, and pain and suffering, among other factors. Despite the novel approach to compensation international conventions pose, in some cases compensation may be adequate. But international systems cannot guarantee that compensation will always be adequate.

114. Article 7(1) of the 2002 Athens Convention provides a maximum limit of liability fund of "400,000 units of account per passenger on each distinct occasion." Athens Convention, *supra* note 108, art. 7(1). Article 9 dictates that conversions are based on International Monetary Fund's Special Drawing Rights; when converted, this equals USD $614,290 times the number of passengers the ship is authorized to carry. *Id.* art. 9; *see also Currency Units per SDR for January 2012*, INT'L MONETARY FUND, http://www.imf.org/external/np/fin/data/rms_mth.aspx?SelectDate=2012-01-31&reportType=CVSDR (last visited January 20, 2014) [hereinafter IMF, *Currency Units*] (based on conversion rates in effect on Jan. 13, 2012, for conversion from SDR to U.S. dollars, and are used for the following conversions).

115. Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims art. 4, May 2, 1996, 35 I.L.M. 1433 (1996) [hereinafter Protocol to LLMC]. Article 4 of the 1996 Protocol specifies the limit:

> In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

Id. (replacing the language of article 7, paragraph 1 of the original). LLMC establishes a fund based on weight of the vessels for claims other than passenger claims. LLMC, *supra* note 101, arts. 6, 11 (these are updated in article 3 of the Protocol to LLMC). *See also* IMO, *LLMC*, *supra* note 102 (explaining that the LLMC also uses the International Monetary Fund's Special Drawing Rights).

116. Limitation of Liability Act, 46 U.S.C. § 30506 (2006).

117. *See* LLMC, *supra* note 101, arts. 9, 11; Athens Convention, *supra* note 108, art. 12.

118. *See* Athens Convention, *supra* note 108, art. 7(1); Protocol to the LLMC, *supra* note 115, art. 4 (updating the language of article 7 of the 1976 LLMC).

Take for example, a "Voyager" class vessel of the Royal Caribbean Cruise Line, certified for 3,114 passengers, weighing about 138,000 tons.[119] In a disaster resulting in the deaths of half the passengers, 1,557 people, maximum liability under Athens, LLMC, and U.S. LOLA would be as follows:

Athens: USD $1,228,580 per person;[120]

LLMC: USD $537,504 per person;[121] and,

U.S. LOLA: USD $37,225 per person.[122]

Courts may be also required to reduce these figures in order to provide compensation to those who survived but filed claims for injuries.[123] These amounts would also be less if more passengers die or are injured in the accident.[124] In some situations, limits set in Athens and LLMC may be comparable to damages for loss of life under U.S. tort law, but this may not always be the case.

In aviation law, the international community recognized the very real potential for injustice with any liability limits. With passage of the 1999 Montreal Convention, aviation now has unlimited liability.[125] The 1999 Montreal Convention unified and replaced various systems of liability for air carriers provided in the 1929 Warsaw Convention and related agreements.[126] The Warsaw Convention liability system set a maximum recovery for personal injury and death at 125,000 gold francs (approximately US $8,300 at the time).[127] The 1999 Montreal Convention entered into force on November 4, 2003, with 97 parties, including the United States, thereby becoming the law of the land in the United States.[128] The 1999 Montreal Convention demonstrates that unlimited liability is very clearly a viable and desirable option. Unlimited liability in the air context allows for compensation based on usual tort approaches instead of the approach

119. *Royal Caribbean Voyager of the Seas*, RCC RESERVATIONS, http://www.rccreservations.com/royal-caribbean-ships/voyager-of-the-seas (last visited Jan. 20, 2014).

120. *See* Athens Convention, *supra* note 108, art. 7. Using the liability limit prescribed in Article 7 of the Athens Convention: (USD $ 614,290 x 3,114 certified passengers) / 1,557 actual passengers = $1,228,580 per person.

121. *See* Protocol to LLMC, *supra* note 115, art. 4. Using the liability limit prescribed in Article 4 of the Protocol to LLMC: (USD $ 268,752 x 3,114 certified passengers) / 1,557 actual passengers = $537,504 per person.

122. *See* Limitation of Liability Act, 46 U.S.C. § 30506. Using the liability limit prescribed in LOLA: (USD $420 x 138,000 tons) / 1557 actual passengers = $37,225 per person.

123. *See* LLMC, *supra* note 101, arts. 9, 11; Athens Convention, *supra* note 108, art. 12.

124. *See* LLMC, *supra* note 101, arts. 9, 11; Athens Convention, *supra* note 108, art. 12.

125. Montreal Convention for the Unification of Certain Rules for International Carriage by Air art. 21, May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

126. Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 4 U.S.T. 5250, 137 L.N.T.S. 11. *See also* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) (discussing the development of accident compensation in international air law and the United States' initial rejection and eventual adherence to the Warsaw Convention).

127. Lowenfeld & Mendelsohn, *supra* note 126, at 499.

128. *Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, INT'L CIVIL AVIATION ORG., http://legacy.icao.int/icao/en/leb/mtl99.pdf (last visited Jan. 20, 2014) (containing a list of signatories to Montreal Convention).

taken in maritime conventions, valuing life based on the number of passengers or weight of a vessel. Like airlines, vessels subject to the jurisdiction of U.S. courts should be subject to a similar liability system without limits.[129]

Although adopting unlimited liability in the maritime context would be the ideal solution, adopting the liability system in the Athens Convention is a viable second alternative. Athens provides higher liability limits and contains an option for unlimited liability.[130] However, as will be discussed further below, Athens could impose a stricter standard to break liability limits—imposing its liability limit in most cases—like the LLMC would.

Before getting to the standard to break the limit, it is worth taking a closer look at liability limits under Athens. Article 3 of Athens establishes the burden of proof for liability claims, by establishing a two-tiered system of liability.[131] In the first tier, the carrier may be held strictly liable up to 250,000 SDR (USD $383,931), unless the carrier can prove that the incident was the result of an act of war, natural phenomenon, or the act of a third party intending to cause damage.[132] Regarding the second tier of liability, Article 3 provides that: "If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier."[133] This second tier of liability is subject to the overall liability limit of 400,000 SDR (USD $614,290)[134] times the number of passengers the ship is certified to carry.[135]

Article 3 (the second tier of liability) is the result of a compromise. Japan proposed the same two-tiered liability system used in air transport, with *unlimited* liability in the second tier.[136] The Japanese delegation were also the authors of this two-tiered system as it exists today for air transport liability in the 1999 Montreal

129. Montreal Convention, *supra* note 125. Article 21 stipulates the strict liability clause: "For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability." *Id.* art. 21(1). In cases of damages above 100,000 SDR (USD $153,572), Article 21(2) provides no limit. *Id.* art. 21(2). However, strict liability does not apply to this clause. A carrier may escape liability where it can prove: "(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servant or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party." *Id.*

130. Athens Convention, *supra* note 108, art. 7.

131. *Id.* art. 3. *See also* MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 130-33 (detailing the two-tiered system of liability throughout the drafting process).

132. Athens Convention, *supra* note 108, art. 3(1). *See also* IMF, *Currency Units*, *supra* note 114.

133. Athens Convention, *supra* note 108, art. 3(1).

134. *See* IMF, *Currency Units*, *supra* note 114.

135. Protocol to the Athens Convention, *supra* note 108, art. 7(1). The revised article reads:

> The liability of the carrier for the death of or personal injury to a passenger under Article 3 shall in no case exceed 400,000 units of account per passenger on each distinct occasion. Where, in accordance with the law of the court seized of the case, damages are awarded in the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit.

Id.

136. MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 130-31.

Convention, with unlimited liability in the second tier.[137] During negotiations for Athens, Japan's second tier alternative ultimately resulted in a compromise to create the two-tiered approach to liability under Article 3, but with a limit in the second tier. But the original Japanese proposal with unlimited liability under the second tier should have been adopted—as it was and remains today, in international air law—in the 1999 Montreal Convention,[138] adopted by the U.S. in 2003.[139]

As an alternative to the limits imposed in Article 3, however, Athens provides states with the option to set their own liability limits, provided the limit is not less than those in Article 3 and Article 7(1).[140] More importantly, the convention allows states to declare no limit of liability. This "opt-out" clause is in Article 7(2).[141] State actors must inform the Secretary General when choosing to use the opt-out clause.[142] Adoption of the Athens Convention would thereby allow the United States considerably more flexibility in determining whether any liability limits should apply to U.S. citizens and parties subject to U.S. jurisdiction, while still being part of an international regime.

B. The Almost Unbreakable Limit in the LLMC and Athens Convention

In addition to potentially inadequate limits, Athens and LLMC could establish a higher standard to break the limit than the current approach in the United States. The LLMC is appealing to shipowners because this limit is considered unbreakable, except in cases of defined "willful misconduct" on the part of the shipowner,[143] whereas the United States requires only an owner's "privity or knowledge" to break the limit—a vaguely defined term allowing flexible application.[144] Under the Athens Convention, the standard to break the limit is

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137. *Id.* at 130-33. *See also* Jennifer McKay, Note, *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, 34 CASE W. RES. J. INT'L L. 73, 83-84 (2002).

138. MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 131. Japan's proposal regarding Article 3 liability limits was not adopted, but did receive additional consideration later in negotiations. *Id.* at 130-31. Norway included Japan's proposal as an alternative text in a draft submitted to the 81st Session of the Legal Committee. *Id.* at 131. Japan also resubmitted its proposal at the 81st Session. *Id.* Although the proposal was not adopted at that time, it is worth noting that there is some recognition amongst the international community that current maritime liability systems can be unjust. *See id.* at 130-33.

139. Richard Boucher, *Ratification of the 1999 Montreal Convention*, U.S. DEP'T OF STATE (Sept. 5, 2003), http://2001-2009.state.gov/r/pa/prs/ps/2003/23851.htm.

140. Athens Convention, *supra* note 108, art. 7(2).

141. Article 7(2) of the 2002 Athens Convention mandates:

> A State Party may regulate by specific provisions of national law the limit of liability prescribed in paragraph 1, provided that the national limit of liability, if any, is not lower than that prescribed in paragraph 1. A State Party, which makes use of the option provided for in this paragraph, shall inform the Secretary-General of the limit of liability adopted or of the fact that there is none.

Id.

142. *Id.*

143. LLMC, *supra* note 101, art. 4.

144. Limitation of Liability Act, 46 U.S.C. § 30505 (2006). *See also infra* note 167.

harmonized with the LLMC.[145] Article 4 of the LLMC provides the relevant provision defining the *willful misconduct* standard by which the limit can be broken: "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, *committed with the intent to cause such loss*, or recklessly and with knowledge that such loss would probably result."[146]

Article 13 of Athens contains similar language as the LLMC, providing that a carrier may lose its right to the limit if "the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[147] This is the same as the defined "willful misconduct" standard required to break the limit under the LLMC.[148]

Under the U.S. Limitation Act, a shipowner is not entitled to limitation where causative fault occurred with the owner's "privity or knowledge." The MLA considers the LLMC's defined "willful misconduct" standard as stricter than the "privity or knowledge" standard required to break the limit in the United States.[149] The LLMC therefore offers greater protection to shipowners with a higher standard to break the limit, according to the MLA.[150] The standard in the LLMC is

145. *See* Athens Convention, *supra* note 108, art. 13(1).

146. LLMC, *supra* note 101, art. 4 (emphasis added). The Comité Maritime International ("CMI" or "Committee"), an international body responsible for drafting this provision, later explained that the prior draft had to be changed since it could give rise to unlimited liability and varying court interpretations. *See* COMITE MAR. INT'L, THE TRAVAUX PRÉPARATOIRES OF THE LLMC CONVENTION, 1976 AND THE PROTOCOL OF 1996, at 121-22 (1997) [hereinafter TRAVAUX PRÉPARATOIRES OF THE LLMC CONVENTION]; DAMAR, *supra* note 103, at 166-67. The Committee then submitted its final amended version to the IMO. DAMAR, *supra* note 103, at 166-67. The phrase included at the end, "or recklessly and with knowledge that such loss would probably result" is meant to establish a "wilful misconduct" standard. *See* TRAVAUX PRÉPARATOIRES OF THE LLMC CONVENTION, *supra* note 146, at 122-24. CMI is an international non-governmental organization with the purpose of unifying all aspects of maritime law. F. L. Wiswall, Jr., *A Brief History*, COMITE MAR. INT'L, http://www.comitemaritime.org/A-Brief-History/0,27139,113932,00.html (last visited Jan. 26, 2014). The CMI was established in 1897 with the purpose of compiling and codifying maritime law. *Id.*

During conference negotiations, the IMO sought to broaden the 1976 LLMC's strict willful misconduct standard by adding the phrase "or from his own gross negligence" at the end of Article 4. DAMAR, *supra* note 103, at 166-67 (regarding the CMI Committee's intent to define a "willful misconduct" standard in Article 4 of the LLMC and the IMO's position during negotiations). The French delegation also sought to add language ensuring that shipowners could not benefit from the limit where an accident is caused by actions of servants acting within their scope of duties. *Id.* at 167. Neither proposal had support in conference. *Id.* As a result, Article 4 was passed as proposed with the intent of maintaining a limit that is almost unbreakable, except in the most rare, or even absurd, circumstances, where the damage or injury was a direct result of an individual's "willful misconduct." *See id.* at 166-70.

147. Athens Convention, *supra* note 108, art. 13(1).

148. MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 126.

149. MLA, REPORT, *supra* note 27, at 5.

150. *Id.*

> Since the Convention has been adopted by most of the rest of the world's shipping nations, the Committee majority questioned if it is economically viable and advisable to remove such major claim components from limitation in the U.S., and to expose U.S. shipping to

generally considered to allow breakability of limits only where the shipowner in fact knew and intended the damage to occur.[151]

The LLMC introduces a *mens rea* element into the standard to break liability limits. Depending on implementation by national law and interpretation of courts, the LLMC may protect owners whose operators indulge in negligent behavior where the shipowner was not aware of such behavior.[152] For example, the limit will not be broken in an action against a shipowner for damage caused by a collision resulting from an operator's error in navigation.[153] The limit can only be broken in an action against the shipowner where the shipowner is directly culpable for damage.[154] In a suit against vessel crew as agents of the shipowner, the limit will more than likely be upheld where the shipowner is only vicariously liable for actions of his agents.[155] The liability limit may extend to a suit against an operator also, where damage is a result of the operator's conduct.[156]

A court must consider an inquiry into a shipowner's or any defendant's *mens rea* on a case-by-case basis, under Article 4 of the LLMC.[157] In addition, courts would need to interpret the application of limits in actions against operators in relation to the doctrine of *respondeat superior*, whereby an employer is liable for the actions of its employees performed in furtherance of the employer's business.[158] On this issue, the LLMC appears to conflict with the doctrine of *respondeat superior*, by attempting to shield a shipowner from unlimited liability for damages caused by the willful misconduct of an operator. In contrast, U.S. courts do break the limit against an owner for operator misconduct.[159]

> unlimited liabilities, putting U.S. shipping at a disadvantage in the international shipping world. Excluding personal injury and death claims from the Limitation Act might also have impacts in insurance markets, again with a competitive disadvantage in the potential for added costs to U.S. vessel owners.

Id. at 4.

151. BARNABAS W.B. REYNOLDS & MICHAEL N. TSIMPLIS, SHIPOWNERS' LIMITATION OF LIABILITY 75 (2012).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 27.

157. *See id.* at 83.

158. *See* DAMAR, *supra* note 103, at 196-97 (explaining that international maritime conventions hold a servant or agent responsible for his own willful misconduct instead of placing liability on the owner; hence, "there is no need to prove that the act or omission of the servant or agent was within the scope of his employment").

159. U.S. Courts have broken liability limits for operator misconduct, where operators failed to follow procedures established by shipowners. *See* XIA CHEN, LIMITATION OF LIABILITY FOR MARITIME CLAIMS: A STUDY OF U.S. LAW, CHINESE LAW AND INTERNATIONAL CONVENTIONS 60-62 (2001). An example, can be found in the *Barberi* incident of October 15, 2003. *In re* City of New York, 522 F.3d 279 (2d Cir. 2008). Here the court found that a collision occurred due to operator misconduct and that the shipowner failed to adequately enforce operating procedures. *Id.* at 288.

On that afternoon, the *Barberi* collided with a maintenance pier during a routine run from New York City to Staten Island, killing eleven and injuring seventy five from amongst 1,500 passengers. *Id.* at 280-81. Standard operating procedure ("SOP") required the captain and assistant captain to be in the

On the issue of *mens rea*, if unable to prove intent of an individual, the party seeking to break the limit must prove recklessness, where recklessness is proof of reckless conduct "with knowledge" that the loss "would probably result."[160] This too is considered a much stricter standard than the U.S. "privity and knowledge" standard. Under the LLMC, a claimant cannot break the limit by proving damage was a *possible* outcome of conduct.[161] A claimant must prove a person had knowledge that the damage was a *probable* outcome of conduct.[162] "Knowledge" as used in Article 4 of the LLMC means that the liable person had *actual knowledge*, meaning the person actually knew damage would occur.[163] "Knowledge" does *not* mean *constructive knowledge*, meaning that the person should have known the damage would occur.[164] In contrast, the U.S. approach

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pilothouse for the duration of the voyage. *Id.* at 281. In the moments prior to the collision, the captain was not in the pilothouse. *Id.* at 281. The *Barberi* was being steered by the assistant captain. *See id.* at 280-81. Unknown to the shipowner, the assistant was on a regimen of prescription medications contributing to fatigue, compounded by babysitting his grandchildren the previous day. *Id.* at 281. The ship collided with a maintenance pier at approximately 15 knots. *See id.* at 280-81.

In evaluating negligence, the court applied a common law "reasonable care" standard of negligence (so interpreting the U.S. Limitation of Liability Act). *See In re* City of New York, 475 F. Supp. 2d 235, 241 (E.D.N.Y. 2007). In breaking the liability limit, the court took note that the shipowner neither disseminated nor enforced the SOP. *Id.* at 247-49. Thus, the shipowner's failure constituted the type of "privity or knowledge" that warrants breaking the limit. *Id.* at 249-50. It reasoned that "[t]his rule could have easily been complied with on the *Barberi*, because there were two pilots on the vessel at all times. Instead, Captain Gansas spent the entire voyage in the aft, or Manhattan-facing, pilothouse. Had he been present, the disaster would have been avoided." *Id.* at 238. If the Limitation of Liability Act applied, the shipowner would have been able to limit claims to about \$14.4 million. *Id.* at 239. Instead, in 2008, New York City agreed to pay victims and their families \$54.3 million. Andy Newman, *Judge Gives Man Paralyzed in Ferry Crash Highest Award So Far*, N.Y. TIMES, Sept. 17, 2008, http://www.nytimes.com/2008/09/18/nyregion/18ferry.html.

Applying the "willful misconduct" standard of the LLMC to the event causing the *Barberi* collision may well produce a different outcome. Failure to enforce an SOP does not constitute the *mens rea* or *actual knowledge* element of willful misconduct that demonstrates the shipowner intended or could know the outcome, in this case, a collision with a maintenance pier. U.S. courts commonly break Limitation of Liability Act limits for violations of IMO ship standards, failure to detect defects, improper stowage, etc. *See supra* notes 35-39 and accompanying text. These factors may well not be available to break limits when applying the "willful misconduct" standard that would govern if the LLMC were to be adopted into U.S. law.

160. LLMC, *supra* note 101, art. 4.

161. MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 65.

162. *Id.*

163. *Id.*

164. *Id.* The *Leerort* case provides an example of how unbreakable the limitation can be, at least in the interpretation of the British Court of Appeal. DAMAR, *supra* note 103, at 168. The case involved the collision of the vessel *Zim Pireaus* into the *Leerort*. *Id.* The *Leerort* was standing still in water at the time of collision. *Id.* The *Zim Pireaus* on the other hand was racing towards the Leerort at excessive speed. *Id.* The vessel was simply out of control. *Id.* The crew experienced an engine failure. *Id.* The engine would shut off in the astern mode but function intermittently in an emergency mode. *Id.* The court characterized the engine failure at a critical moment as "almost incredible" but found that it did not justify breaking the limit. *Id.* The court asserted that the engine failure could not be attributed to a "personal act or omission of the owners done with the intent to cause a collision or recklessly and with knowledge that such a collision would probably occur." *Id.*

allows a court to break the limit where the owner had *privity or knowledge*—as earlier indicated, a vaguely defined phrase that allows flexible, albeit inconsistent application, resulting in a lower threshold to break the limit than under the LLMC or Athens.[165] Although the MLA has indicated judicial economy is a benefit of adopting the LLMC,[166] this may not be the case. Requiring analysis of *mens rea*, the LLMC may lead to complex and prolonged court proceedings.

Testifying before Congress in 1985, when Congress considered adopting the LLMC's liability system through H.R. 277, Georgetown University Law Center Professor Warren Dean explained that the standard to break the limit presents claimants with an almost insurmountable hurdle to overcome in order to obtain adequate compensation.[167] Moreover, unbreakable and low limits in the LLMC may well provide a disincentive for owners to maintain safe and seaworthy vessels:

> Even though this provision shifts the burden of proof from claimant to the party wishing to limit liability, it will result in a nearly unbreakable limit to liability. It is very difficult for claimants to establish that an owner acted recklessly, knowing that loss would probably occur or intending to cause the loss of the ship. This new, nearly unbreakable limit is the trade-off for the bill's higher—but in our view inadequate—liability limits.
>
> Section 5 (of the bill adopting the LLMC) would replace the current legal duty of the owner to provide a seaworthy ship before being entitled to limit liability. The courts have been liberal in voiding owners' attempts to limit liability by finding that an owner provided an unseaworthy ship and the insurance market has been able to provide insurance and to meet those costs. We are concerned that that elimination of the owner's duty to provide a seaworthy ship could result in unsafe shipping.[168]

With modern corporations, many layers of command and organizational intricacies further complicate the relationship between a shipowner and his employee. Inquiries into *mens rea* are complicated when analyzing "willful misconduct" as defined in the LLMC. With the LLMC extending the limit to persons other than the shipowner, the inquiry into *mens rea* is even further complicated. The LLMC extends the limit to apply to actors other than the shipowner, including charterers, managers, operators, salvors, and generally any

165. Donald C. Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 TUL. L. REV. 1139, 1145-46 (1983) (noting that flexible interpretation leads U.S. courts to refer to common law concepts in applying the standard and quoting Professors Gilmore and Black describing U.S. statutory "privity or knowledge" and "design or neglect" as "empty containers into which the courts are free to pour whatever content they will") (referencing GRANT GILMORE & CHARLES L. BLACK, Jr., THE LAW OF ADMIRALTY 695-97 (1957)). For a discussion about U.S. courts' attempts to define the standard and difficulties in its application, *see* CHEN, *supra* note 159, at 60-65.

166. MLA, REPORT, *supra* note 27, at 5.

167. Dean's Statement, *supra* note 81, at 9.

168. *Id.* at 8-9.

person for whom an owner or salvor is responsible—a salvor being a person providing salvage operations.[169]

Professor Dean cautioned Congress against extending application of the limit by amending U.S. LOLA to adopt the LLMC:

> We believe that, before such an expansion is made, there should be a full evaluation of the question of liability limitation respecting modern maritime activities—a process advanced by this hearing today. For example, factors pertaining to the question of whether charterers or managing operators should be allowed to limit their liability are different from those pertaining to salvors, i.e., consideration should be given to whether a salvor should not be entitled to limit liability, while the owner of the vessel being salved is so entitled, as in the case of an incident involving a response to an oil spill or release of hazardous materials.[170]

Besides a clear and almost unbreakable limit, the MLA points to several other advantages of adopting the LLMC into U.S. law.[171] The LLMC would provide a limitation fund even in cases where the vessel has no post-accident value, preventing a zero compensation outcome.[172] MLA further argues that the defined "willful misconduct" standard focuses litigation away from establishing "privity or knowledge" of the owner as required under LOLA. Instead, litigants can focus on ordinary fault and valuation of damages.[173] This also provides, so they say, for better and more accessible insurance. MLA argues that without legal adjudication for privity and fault in causality, vessel owners will be able to insure at least against limit amounts.[174] Moreover, this fund has a higher likelihood of actually being paid to litigants. MLA also posits that the fund discourages formation of a one-ship company to avoid liability.[175] LLMC also provides distinct funds for personal injury and cargo liability, providing a clearer path to compensation.[176] In addition, LLMC preserves the procedure of concursus that can be used to prevent a rush to individual litigation and inequitable outcomes amongst multiple litigants.[177] MLA also sees benefits in adopting LLMC's reference to SDRs as opposed to dollars, whose value fluctuates, based on international markets.[178]

Although the LLMC would be an improvement over the arcane liability limits established in LOLA, the benefits stated by MLA would appear to be inflated and not to work to benefit the U.S. shipping industry much less passengers—simply because the beneficiary of these limits would be foreign flagged cruise ships. This

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169. LLMC, *supra* note 101, art. 1.
170. Dean's Statement, *supra* note 81, at 7.
171. *See* MLA, REPORT, *supra* note 27, at 5-7.
172. *Id.* at 5.
173. *Id.*
174. *Id.*
175. *See id.*
176. *Id.*
177. *Id.*
178. *Id.*

is because cruise ships, designed to carry passengers, do not operate as U.S. flagged vessels. As of September 2012, only one major cruise ship operated as a U.S. flagged vessel, the *Pride of America*, a one-ship company operated by Norwegian Cruise Lines.[179] Cruise vessels register abroad (the Bahamas is one favorite registry) mostly to avoid labor laws and standards required of U.S. flagged vessels.[180] Contrary to the MLA's list of benefits of adopting the LLMC,[181] the convention would only serve to protect and subsidize foreign flagged cruise vessels by limiting their liability, at the expense of U.S. citizens or other passengers able to file suit in the United States.

Other benefits stated by the MLA are also questionable. MLA's arguments, such as that the LLMC would prevent litigation over "privity or knowledge" while providing clear compensation funds,[182] would seem to advance judicial economy, but at the expense of fair compensation. MLA's position is ironic. It undermines a fundamental purpose of courts, namely, to provide a fair resolution of disputes, and instead promotes a policy that allegedly favors judicial economy and protection of foreign flagged vessels. As noted above, the LLMC may not even provide efficient resolution of disputes with complex inquiries into *mens rea* while extending the limit to parties other than the shipowner. Such litigation is contrary to MLA's position that the LLMC promotes "timely resolution of claims."[183]

The basic purpose behind the LLMC and U.S. LOLA is the same. Both seek to protect shipping lines.[184] In discussing the United States' adoption of the LLMC in 2010, the MLA stated, "[t]he majority of the Committee feels that this purpose of providing the global economic competitiveness of America's maritime industry remains a valid policy supporting the Limitation Act."[185] Yet, the need to encourage growth of a nascent industry that existed in 1851 no longer exists. Moreover, there is hardly a U.S. flagged passenger line industry to protect. In addition, the LLMC would introduce into U.S. law a far more stringent standard for breaking liability limits.

Regarding unbreakability of limits, the issue caused enough concern in the European Community to inspire a proposed directive in 2005 that would have amended the standard to provide greater breakability.[186] Although the final amendments did not include modification of the defined "willful misconduct" standard under the LLMC, the European Community has committed to negotiate

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179. MARINE LOG, *supra* note 94.

180. James Walker, *What Cruise Lines Don't Want You to Know*, CNN (Feb. 14, 2013, 3:21 PM), http://www.cnn.com/2013/02/13/opinion/walker-cruise-ships (reporting on the recent incidents of cruise ship mishaps).

181. MLA, REPORT, *supra* note 27, at 5-7.

182. *Id.* at 5.

183. *Id.* at 3.

184. *See* DAMAR, *supra* note 103, at 11-14 (discussing the historical development of maritime liability limits as a way protecting the shipping industry).

185. MLA, REPORT, *supra* note 27, at 2.

186. *Proposal for a Directive of the European Parliament and the Council on the Civil Liability and Financial Guarantees of Shipowners*, COM (2005) 593 final (Nov. 23, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0593:FIN:EN:PDF.

with the IMO to revise the "level at which shipowners lose their right to their liability."[187] When the international community shows concern about the defined "willful misconduct" standard, this must be a signal to the U.S. Congress to proceed with caution, if it all, towards adopting the LLMC, despite the MLA's recommendation.

III. FORUM NON CONVENIENS

Any change to maritime death and injury liability limits is likely to have some impact on the number of foreign plaintiffs bringing suit in the United States. Since the adoption of the 1999 Montreal Convention by the United States in 2003, the United States has seen a large increase in foreign plaintiffs suing in the United States to take advantage of many features of U.S. law and a judicial system that may result in far more generous recoveries for plaintiffs than what they would get in their home courts.[188] On the one hand, this can lead to congestion in U.S. courts. On the other, it provides international plaintiffs with access to remedies and a judicial system that may not be available in their homes or elsewhere.

U.S. courts have found a method of dealing with the influx of foreign plaintiffs by dismissing suit on the basis of *forum non conveniens*, forcing foreign plaintiffs to re-file in their countries of domicile or permanent places of residence. To demonstrate that dismissal for *forum non conveniens* is warranted, a defendant must establish "that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice."[189]

In *Gulf Oil Corporation v. Gilbert*, the U.S. Supreme Court described the public and private interest factors that a court must consider when evaluating potential dismissal on *forum non conveniens* grounds.[190] In *Gilbert*, a warehouse owner in Virginia filed suit in the Southern District of New York in diversity against a corporation incorporated in Pennsylvania, but doing business in both Virginia and New York.[191] The plaintiff brought action in tort against the defendant for negligence in handling gasoline delivered to plaintiff's warehouse in Virginia, causing an explosion which damaged the warehouse and goods stored therein.[192] Plaintiff sought damages in the amount of $365,529.77.[193] On defendant's *forum non conveniens* motion, the Court decided in favor of dismissal

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187. *Id.* at 4.

188. *See* Allan I. Mendelsohn, *Foreign Plaintiffs, Forum Non Conveniens, and the 1999 Montreal Convention*, 36 AIR & SPACE L. 293, 293 (2011) (discussing the influence of the U.S. contingency fee system in attracting foreign plaintiffs after an international air incident and the increased use of *forum non conveniens* by U.S. courts).

189. Leon v. Million Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001).

190. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947).

191. *Id.* at 502-03.

192. *Id.*

193. *Id.*

out of New York, concluding that Virginia was the appropriate alternative forum.[194]

The Court also emphasized, however, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[195] Factors considered relating to the litigants' interests, termed *private interests*, included: ease of access to sources of proof, ease of access to witnesses, possibility of viewing premises, enforceability of the judgment once obtained, and any other considerations "that make trial of a case easy, expeditious and inexpensive."[196] The Court also weighed factors it called *public interest* factors such as congestion from existing case load and the burden on citizens of jury duty especially where the litigation has no relation to the community.[197] The Court explained, "[t]here is a local interest in having localized controversies decided at home."[198] Further, where state law applies to a diversity action, there is an interest in maintaining a forum located in the state of the applicable law.[199] When a court is satisfied that an alternative forum is available and the balance of public and private factors is in favor of the defendant, a court may dismiss the case.[200]

Although *Gilbert* dealt with domestic litigants, the test outlined in *Gilbert* has regularly been used also to dismiss foreign plaintiffs from U.S. courts on the grounds of *forum non conveniens*. In applying *forum non conveniens*, the Supreme Court has also held that a plaintiff's choice of forum deserves less deference when the plaintiff is foreign.[201] *Forum non conveniens* dismissals in the domestic U.S. context are today handled under federal law, enacted in 1948.[202]

A recent example of the applicability of *forum non conveniens* is a ruling by the U.S. District Court for the Southern District of Florida in *Giglio Sub S.N.C. v. Carnival Corporation*, deciding a matter related to the wreck of the *Costa Concordia* that occurred on January 13, 2012.[203] The *Costa Concordia*, with 4,200 people aboard, hit a reef and sank off Italy's Tuscan coast on January 13, 2012, causing the deaths of thirty-two passengers and over a hundred injuries.[204] The Southern District of Florida dismissed an action, on *forum non conveniens* grounds, brought by Italian business owners and residents of the island of Giglio,

194. *Id.* at 511-12.
195. *Id.* at 508.
196. *Id.*
197. *Id.* at 508-09.
198. *Id.* at 509.
199. *Id.*
200. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).
201. *Id.* at 256.
202. 28 U.S.C. § 1404 (2012).
203. Giglio Sub S.N.C. v. Carnival Corp., No. 12-21680-CIV, 2012 WL 4477504, at *1-2 (S.D. Fla. Sept. 26, 2012).
204. Barbie Latza Nadeau & Laura Smith-Spark, *5 Convicted Over Deadly Costa Concordia Cruise Liner Wreck in Italy*, CNN (July 21, 2013, 9:16 PM), http://www.cnn.com/2013/07/20/world/europe/italy-costa-concordia-trial/index.html.

Italy, alleging damage to tourism, property values, and the environment.[205] Other actions are still pending in U.S. courts for personal injury and wrongful death.[206]

Applicability of *forum non conveniens* may occasionally be complicated by blocking statutes, which are statutes passed in foreign jurisdictions to prevent plaintiffs from re-filing in their home country after first filing in the United States and being dismissed under *forum non conveniens*.[207] Blocking statutes thus would seem to prevent the availability of an alternative forum, thereby frustrating an essential element of a U.S. court's *forum non conveniens* analysis. Blocking statutes have been used in Latin American countries, with the Latin American Parliament, Parlatino, issuing a model blocking statute for adoption by member countries.[208] For many Latin American and other civil law countries, blocking statutes do not create new law; rather they clarify existing jurisdictional requirements as applied to a tort action first filed in the United States, to bar such actions from being re-filed in the plaintiff's home country. Under the laws of these countries, courts permanently lose jurisdiction once the case has been filed in an alternative forum, in this case the United States.[209]

This unique jurisdictional concept is rooted in the idea of deference to the plaintiff's choice of forum. Once the plaintiff has chosen his forum amongst viable alternatives, dismissal on the grounds of *forum non conveniens* is viewed by Latin American countries as an illegal violation of the plaintiff's right to select an appropriate forum.[210] Moreover, the holding in *Piper v. Reyno*, that foreign

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205. *Giglio Sub S.N.C.*, 2012 WL 4477504, at *21.

206. *See New York Law Firm Ronai & Ronai, LLP Files Wrongful Death Lawsuit Seeking 400 Million Dollars on Behalf of The Family of Violinist Sandor Feher Killed in the Concordia Disaster*, PR NEWSWIRE (Aug. 7, 2012), http://www.prnewswire.com/news-releases/new-york-law-firm-ronai--ronai-llp-files-wrongful-death-lawsuit-seeking-400-million-dollars-on-behalf-of-the-family-of-violinist-sandor-feher-killed-in-the-concordia-disaster-165267716.html (this particular suit has been filed in the Southern District of New York (12CV-5814) on behalf of the family of Hungarian Violinist, Sandor Feher, who died in the tragedy, seeking $400 million in damages).

207. *See* Allan I. Mendelsohn & Carlos J. Ruiz, *The United States vs. France: Article 33 of the Montreal Convention and the Doctrine of Forum Non Conveniens*, 77 J. AIR L. & COM. 467, 480-84 (2012) (discussing a recent and still current blocking problem in aviation under the 1999 Montreal Convention).

208. MODEL LAW ON INTERNATIONAL JURISDICTION AND APPLICABLE LAW TO TORT LIABILITY (Latin Am. Parliament (Parlatino) 1998), *reprinted in* HENRY SAINT DAHL, DAHL'S LAW DICTIONARY/DICCIONARIO JURÍDICO DAHL: SPANISH-ENGLISH/INGLÉS-ESPAÑOL 260-261 (5th ed. 2010).

209. *See* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 25-29 (2004) (discussing national laws of Ecuador, Guatemala, Dominica, Nicaragua, and Costa Rica that divest jurisdiction when a national of these countries first files suit in a foreign court, usually in the United States). *See also* Jena A. Sold, Comment, *Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdictional Standoff Between the United States and Latin America*, 60 EMORY L.J. 1437, 1454-1457 (2011) (discussing common law jurisdictional concepts in Latin American countries that bar jurisdiction once a case is filed in a foreign court while also discussing Parlatino's model blocking statute and blocking statutes of Ecuador and Guatemala).

210. SAINT DAHL, *supra* note 208, at, 26-27.

plaintiffs deserve less deference in their choice of forum, is seen as unduly discriminatory.[211]

Another approach adopted by Latin American countries to discourage defendants from seeking a *forum non conveniens* dismissal, is imported law statutes. Such statutes attempt to apply the law of the courts where plaintiff originally filed an action.[212] Hence, a Latin American court hearing a case dismissed from the United States would apply U.S. law. Such statues also increase the chances of enforcement of a judgment against U.S. defendants.[213]

The response of U.S. courts to blocking statutes has been increasingly to ignore them.[214] Courts reason that many blocking statutes contain potential exceptions that may allow a plaintiff to re-file. However, even where *forum non conveniens* is outcome determinative (leaving a plaintiff with no available forum), U.S. courts have determined that its application of the *forum non conveniens* doctrine must not and cannot be precluded or undermined by foreign blocking statutes.[215] Although the issue of foreign plaintiffs in U.S. courts must not be a key consideration in maritime liability reform, it is an issue that Congress and/or the courts may need to consider when revising liability limits and requirements.

211. *Id.* at 27-28.

212. Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 628-34 (2008).

213. *See id.* at 660.

214. *See* Rivas *ex rel.* Estate of Gutierrez v. Ford Motor Co., No. 8:02 CV-676-T-17 EAJ, 2004 WL 1247018, at *4, *14 (M.D. Fla. Apr. 19, 2004) (the court rejected plaintiff's argument that a court in Venezuela is not an available forum when applying the doctrine of *forum non conveniens* to a wrongful death action against Ford Motor Company arising out of an accident in Venezuela); Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 674-76, 689-90 (S.D. Tex. 2004) (the court ruled that plaintiffs who were Venezuelan nationals who had filed an action in the Southern District of Texas, could assert jurisdiction in Venezuelan courts, despite affidavits from experts explaining that plaintiffs' assertions of jurisdiction in a U.S. court divests jurisdiction in Venezuelan courts when filing in Venezuela after a *forum non conveniens* decision in the United States). *See also* Sold, *supra* note 209, at 1460-61 (discussing both *Rivas* and *Morales*).

215. *See* Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1017-18 (Fla. Dist. Ct. App. 3d Dist. 2008):

> Expressed another way, if our courts determine that a foreign forum is available and adequate, it is the obligation of the plaintiff to assent to jurisdiction there and to *support* that court's exercise of jurisdiction over the matter and the parties. Further, that plaintiff may not assume that a foreign country's preemption or blocking laws will be recognized here. If the foreign country chooses to turn away its own citizen's lawsuit for damages suffered in that very country, and if the other *Kinney* factors warrant dismissal here, it is difficult to understand why Florida's courts should devote resources to the matter.

Id. at 1018. *See also* Chandler v. Multidata Systems Int'l Corp., 163 S.W.3d 537, 546-48 (Mo. Ct. App. 2005) ("As to Plaintiffs' argument that Panama is not an available forum, Plaintiffs merely recite favorable testimony from Dr. Berrios and argue that 'the trial court had a legal obligation to conclude that the Panamanian court system was not available to these Plaintiffs.' As stated above, the trial court did not have a legal obligation to conclude that the Panamanian court system was unavailable.").

IV. THE MARITIME INSURANCE INDUSTRY'S CAPACITY TO HANDLE CLAIMS

The maritime insurance industry has generally argued against removal of liability limits, claiming that vessels may be subject to claims that are uninsurable due to excessive verdicts.[216] Maritime insurance is protection and indemnity ("P&I") insurance provided by P&I Clubs. The nature of this coverage is as typical indemnity insurance, where an insurer is responsible to reimburse a shipowner only for losses the shipowner paid. This varies from liability insurance where the insured pays a set amount so the insurer will handle claims without further payment from the insured.

P&I insurance present problems in collecting judgments for injured parties. A P&I Club cannot be held directly accountable to pay a verdict.[217] The insured shipowner must first pay.[218] Only then will the P&I Club pay the insured. Where a verdict leads a shipowner to file for bankruptcy, an injured party with a judgment may not collect.[219] The P&I Club is not obligated to pay damages filed by a judgment creditor in a bankruptcy proceeding against a shipowner.[220]

The judgment creditor is generally barred from filing an action directly against a P&I Club.[221] Some states have modified this general rule, allowing third party claims against a P&I Club, although third party actions raise additional complications.[222] When third party actions are allowed by state law, the P&I Club is entitled to raise any defenses it has against the insured.[223] The insured must meet all terms and conditions in the policy before the P&I Club will pay a judgment creditor.[224] Policies typically include an arbitration clause.[225] Courts have held that a third party judgment creditor is subject to a policy's arbitration clause.[226]

216. Professor Mendelsohn considered the shipping industry's position while advocating for reform of liability limits in the aftermath of the Yarmouth Castle's drowning in 1965. Mendelsohn, *supra* note 47, at 803-05. Professor Mendelsohn notes the following arguments made by industry in arguing against repeal of liability limits: (1) limitations on maritime claims is the international norm; (2) unlimited liability would be the financial ruin of vessel owners and the U.S. shipping industry; and, (3) a limited compensation promotes judicial economy by consolidating all actions through the procedure of concursus. *Id.* The MLA has adopted these same arguments in its position paper advocating for adoption of the LLMC. *See* MLA, REPORT, *supra* note 27, at 2-4.

217. Kimball, *supra* note 23, at 1149-50.

218. *Id.*

219. *Id.* at 1153.

220. *See* Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, 95 F.3d 400, 404-05 (6th Cir. 1996) ("The narrow question presented is whether, five years after the close of the bankruptcy of a member, a maritime protection and indemnity association with a 'pay first' clause in its contract is liable to seamen in direct actions. We conclude that the 'pay first' clause in this contract may not be set aside and that it defeats plaintiffs' cause of action.").

221. *See id.*

222. Kimball, *supra* note 23, at 1153-55.

223. *Id.* at 1154 (referencing Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n, 62 F.3d 1356, 1364 (1995)).

224. *Id.* at 1156-57.

225. *Id.* at 1152-53.

226. *Id.* at 1150-51.

According to the maritime insurance industry, liability limits are necessary to avoid these complications.[227] Maritime insurers argue that limitation of liability assures that claims will be paid, whereas unlimited liability may lead to excessive verdicts that may not be paid by their P&I Clubs, driving shipowners to bankruptcy.[228] Rather than maintaining liability limits, the maritime industry could shift away from P&I insurance to liability insurance. Using liability insurance, the insured shipowner would be subject to a premium for insurance coverage in the amount that the market will bear with the insurer handling claims.

The airline industry made arguments against eliminating liability limits, similar to arguments of the maritime industry,[229] prior to the signing of the IATA Intercarrier Agreement in November 1996 that waived all liability limits of the Warsaw Convention.[230] The industry argued that unlimited liability would bankrupt airlines due to uninsurable claims—a situation that neither benefits injured claimants nor the airline industry.[231] Today, almost 20 years later, the airline industry is not unduly burdened by removing the arcane limits provided in the 1929 Warsaw Convention, and its progeny. Around 1996, most developed countries accepted the proposition that the policy of protecting and subsidizing the airline industry by way of limiting its liability to passengers was no longer relevant or necessary.[232] There can be no question that the same conditions exist in the maritime industry today.

Moreover, with a highly developed airline insurance industry already functioning well and efficiently without any liability limitations, there is every likelihood that air insurers can fill the void if and when maritime P&I Clubs are unable to provide adequate insurance when liability limits are lifted. In testimony before a Congressional subcommittee in 1985, Professor Dean commented on the capacity of the air insurance industry:

> Considering that liability in other modes of domestic transportation is unlimited—and that these modes of passenger carriage are able to cover their unlimited risks by conventional insurance—we seriously question the continuing validity of the limitation of liability concept to passenger carriage. Air carriers routinely cover passenger liability for aircraft carrying 400 passengers. Their insurance cost is [low]. We make this recommendation fully recognizing that the market structure for maritime insurance may differ from other transportation insurance and that insurance capacity is not unlimited. However, we have no indication that insurance coverage will be

227. *See generally* Mendelsohn, *supra* note 47, at 803-05.

228. Kimball, *supra* note 23, at 1149-50.

229. *See* Reed v. Wiser, Jr., 555 F.2d 1079, 1089 (2d Cir. 1977).

230. Doo Hwan Kim, *The Innovation of the Warsaw System and the IATA Intercarrier Agreement*, *in* THE UTILIZATION OF THE WORLD'S AIR SPACE AND FREE OUTER SPACE IN THE 21ST CENTURY 65, 68-70 (Chia-Jui Cheng & Doo Hwan Kim eds., 2000).

231. *See Reed*, 555 F.2d at 1089.

232. Doo Hwan Kim, *supra* note 230, at 68, 70-72.

> unavailable. Moreover our recommendation [to repeal liability limits for personal injury] increases shipowners' incentives to avoid loss.[233]

It is difficult to imagine that the existence of maritime P&I Clubs would somehow be endangered if the United States were to repeal its maritime liability limits. First, the current arcane U.S. limit is frequently broken, rendering no liability limit under the current law.[234] Hence, lifting the liability limit altogether is unlikely to cause a flurry of excessive claims. Second, current P&I Clubs have the capacity to insure in excess of their general policy limit of $30 million through a special contract with Lloyds of London as the underwriter.[235] Third, if and when a profusion of foreign plaintiffs begin to seek remedies in U.S. courts, the maritime industry can employ the same *forum non conveniens* defenses as the aviation industry is employing so effectively today.

V. CONCLUSION

The Limitation of Liability Act of 1851 was passed to protect and encourage a nascent shipping industry. The act was a reaction to *New Jersey Steam v. Merchant's Bank*, a case in which liability against a shipowner was seen as a windfall. U.S. shipowners of the 1800's were in direct competition with British vessels that had the advantage of liability limitation protections. Congress and the Supreme Court in 1851, and the years thereafter, determined that U.S. shipowners must have strong protections to develop maritime transport and encourage commerce. In the late 1800s, limits not only served an economic purpose, but also advanced the cause of equity by relieving shipowners from liability where they were not responsible for an accident simply because they often had no control of vessels operating at sea thousands of miles away. Today, shipowners are complex corporations often exerting control over all aspects of operations, made possible by modern technology.

Having inherited protections to U.S. shipowners from the 1851 Limitation of Liability Act, U.S. maritime liability limits today only serve to protect owners of foreign flagged cruise vessels. Only one cruise vessel today operates as a U.S. flagged vessel, benefiting from the limit. The limit thus places U.S. citizens under a threat of being undercompensated for loss of life or injuries occurring aboard foreign-flagged passenger vessels.

To be sure, the MLA has adopted a contrary view. As recently as 2010, the MLA stated, "[t]he majority of the Committee [MLA] feels that this purpose of providing the global economic competitiveness of America's maritime industry remains a valid policy supporting the Limitation Act."[236] However, this is an overly simplified position that not only fails to recognize that there is only one

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233. Dean's Statement, *supra* note 81, at 6-7.

234. *See supra* notes 35-39 and accompanying text.

235. Patrick J. Bonner, *Marine Insurance Considerations*, FREEHILL, HOGAN & MAHAR LLP, http://www.freehill.com/articles/marineinsurance.cfm (last visited Jan. 23, 2014).

236. MLA, REPORT, *supra* note 27, at 2.

U.S. flagged passenger vessel in existence today, but also fails to consider the sophistication of modern shipping and their corporate owners. These corporations and their owners reap benefits from registering their vessels outside the United States, avoiding U.S. labor standards and taxes that apply to U.S. flagged vessels—all the while benefiting from U.S. liability limits at the expense of U.S. citizen-claimants.

Congress has considered the issue from time to time but has consistently failed to repeal the limit, despite strong support from the State Department and most Executive agencies in 1966, during congressional hearings after the *Yarmouth Castle* sank. Congress passed the current limit as in interim measure in 1984, establishing a fund of $420 times the weight of the vessel, intending to pass permanent reforms at a later time.[237] Now, nearly 30 years later, Congress has not reformed the law. This failure could produce inequitable outcomes, as Congress noted in 2010 when Transocean attempted to use the Limitation of Liability Act to limit its liability for personal injuries after the Deepwater Horizon oil spill in April 2010.[238] Hearings on the issue from 1966, 1984, and 1985 indicate that Congress seems to have been overwhelmed by industry witnesses, representing and lobbying for shipowners' interests.[239] But their arguments have no relevance in 2013, when shipowners have the benefit of protections in modern corporate law, and corporate shipowners exert control over all aspects of ship operation, a control that shipowners of the 1850's did not have the technology to exert.

Congress must undertake a detailed inquiry into the capacity of the marine insurance industry to handle maritime claims without the subsidy of current limits.[240] Such an inquiry is more than likely to reveal the resilient capacity of the industry to handle claims without a statutory limit—as is currently the case in all

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237. REP. WALTER BEAMAN JONES SR., MARITIME SAFETY ACT OF 1983, H.R. REP. NO. 98-525, at 10-11 (1983).

238. REP. JOHN CONYERS JR., CHAIRMAN, SECURING PROTECTIONS FOR THE INJURED FROM LIMITATIONS ON LIABILITY ACT, H.R. REP. 111-521, at 11 (2010).

239. *See* Mendelsohn, *supra* note 47, at 802-05 (describing the industry arguments in the 1966 hearings); *see also* H.R. REP. NO. 98-525, at 10-11; H.R. 277, 99th Cong. § 5 (1985); H.R. 3156, 99th Cong. (1985).

240. Mendelsohn, *supra* note 47, at 805. Professor Mendelsohn articulated areas for congressional inquiry in a paper published in 1969, analyzing options to reform LOLA in light of the *Yarmouth Castle* incident in 1965. *Id.* These recommendations are still relevant today as they deal with the maritime insurance industry's capacity to handle claims and include:

> (1) what capacity the insurance market can withstand today; (2) to what extent or how this capacity can be expanded in the face of the most urgent circumstances; (3) what would be the incremental insurance cost to American flag owners if limits were repealed altogether or if they were increased very substantially; (4) what would be the percentage increase in the owner's gross operating expenses resulting from these incremental costs; and, finally, (5) if the costs to the owner are, as they well may be, too high, is the government prepared to increase direct public subsidies rather than continuing the present system of indirect private subsidies through the means of depressing the recoveries of the victims and survivors of disasters.

Id.

modes of U.S. transport including air, rail, and road.[241] The Montreal Convention of 1999 also provides unlimited liability for death and injury claims in international air transportation.[242]

The MLA supports adoption of the 1996 LLMC.[243] Both the 1996 LLMC and the 2002 Athens Convention would increase the limit over the current one in U.S. LOLA. But adoption of international conventions could potentially implement a stricter standard for the breakability of limits, depending on U.S. courts' interpretation. As written, both international conventions implement a "willful misconduct" standard, as defined therein, that the drafters intended as almost unbreakable.[244] Although both conventions provide higher compensation funds, the adequacy of compensation would vary based on the number of passengers making claims against a fund. Compensation could be inadequate, especially applying the LLMC, which has the lower limit of the two.[245]

The 2002 Athens Convention would at least provide the United States with an option to opt out of all liability limits, through the opt-out clause in Article 7(2) of the Convention, while enjoying the benefit of being part of an international regime.[246] Opting out of the liability limits may also provide an incentive at the global level for other countries to do the same. Europe has indicated an interest in negotiating with the IMO to repeal all maritime liability limits, making international maritime law in this respect identical to international air law.

In the U.S. system of tort compensation, damages in personal injury and wrongful death actions can be estimated by seemingly mystical actuarial data that attempt to approximate intangibles such as life expectancy. An expert opinion is needed to estimate earning potential, degree of dependence of survivors, and other factors. Although the U.S. system of compensation is not perfect, U.S. courts nonetheless manage to evaluate monetary compensation for injuries, and even the incompensateable loss of life, to provide compensation that would be more just than those that result from shipowners' liability limits. Congress should not wait for the next maritime disaster to consider repeal of the "interim" liability limits it set in 1984 in the now antiquated U.S. Limitation of Liability Act.

241. S. 3251, 89th Cong. §1(b) (1966), H.R. 10327, 89th Cong. (1966) & S. REP. NO. 89-1483, at 10-20 (1966) (report of the Committee on Commerce about the bills at issue, stating endorsement of agencies).

242. Montreal Convention, *supra* note 125, art. 21(2).

243. MLA, REPORT, *supra* note 27, at 7.

244. MARTÍNEZ GUTIÉRREZ, *supra* note 110, at 126.

245. *Compare* Protocol to LLMC, *supra* note 115, art. 4 (USD $268,752 multiplied by the number of passengers the ship is authorized to carry), *with* Athens Convention, *supra* note 108, art. 7(1) ($614,290 multiplied by the number of passengers the ship is authorized to carry).

246. Athens Convention, *supra* note 108, art. 7(2).