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PROSECUTION OF BP *DEEPWATER HORIZON* WELL SUPERVISORS ENDS WITH A MISDEMEANOR PLEA FOR ONE AND A TRIAL ACQUITTAL OF THE OTHER

By Michael W. Magner, Avery B. Pardee, Joseph Davis

In the wake of the *Deepwater Horizon* disaster, federal authorities have shown increasing willingness to use criminal charges to address serious personal injuries and deaths in the offshore setting. At least in the *Deepwater Horizon* prosecutions, however, the intricacies of admiralty and maritime law, as well as the limits of federal jurisdiction, have impeded those enforcement efforts.

Donald Vidrine and Robert Kaluza were the Well Site Leaders on board the *Deepwater Horizon* on April 20, 2010, when, in the course of temporarily plugging and abandoning the Macondo well, there were multiple explosions and a fire that resulted in the deaths of eleven crewmen and the sinking of the rig. Vidrine and Kaluza were rescued from the rig along with the other surviving crewmembers. In 2012, a federal grand jury indicted them for their alleged role in bringing about the incident, resulting in charges of eleven counts apiece of seaman's manslaughter and negligent manslaughter, as well as one count apiece of negligently discharging oil in violation of the Clean Water Act. Vidrine and Kaluza were two of five individuals who were criminally charged for conduct related to the spill, and

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The Limitation of Liability Act: Arcane But Ours

By Marissa Marriott Henderson

Maritime law enjoys a reputation of being rooted strongly in history, conjuring an image of clipper ships and black-robed jurists in powdered wigs. In many ways the reputation is apt: for example, today's shipowners still benefit from a qualified limited liability right written into United States law in 1851. In essence, this statute caps the liability of the owners of a vessel involved in a marine casualty to an amount equal to their interest in the vessel and its pending freight at the time of the loss. The cap only applies to losses incurred without the owner's "privity or knowledge."[1] This law, the Limitation of Liability Act,[2] was based on a 1819 Massachusetts statute intended to promote shipbuilding and protect, among others, Nantucket whaling ship investors from catastrophic liability when a ship and its valuable whale oil was lost at sea.[3] The Massachusetts law[4] was in turn based on an English Act of 1734.[5] This English Act and its 1813 extension is still readily recognizable in the text of today's Limitation Act.[6] Not surprisingly, then, the Limitation Act has been referred to as arcane and anachronistic. Legal commentators and jurists have long called for the Act's overhaul or predicted its demise.[7] Yet maritime attorneys today must understand the Limitation Act, or "risk facing [unlimited] liability of their own."[8] This article will briefly address the purposes of the Act and how its scope has expanded and contracted over time, then examine arguments that the Act no longer serves its

[1] 46 U.S.C. § 30505(a) & (b).

[2] Now codified at 46 U.S.C. §§ 30501-30512, this statute is the Limitation of Shipowners' Liability Act (the "Limitation Act").

[3] A Maine statute of 1821 for limitation of shipowner liability is also the basis for the Limitation Act.

[4] An act to Encourage Trade and Navigation Within this Commonwealth, 1819 Mass. Acts 193, as amended by Mass. Gen. Laws ch. 32 §§ 1-4 (1935).

[5] A detailed examination of the historical underpinnings of the Limitation Act, while fascinating to this author, is beyond the scope of this article. This topic has been addressed admirably by numerous commentators and jurists, including the following: Dennis J. Stone, The Limitation of Liability Act: Time to Abandon Ship?, 32 Mar. L. & Com. 317, 318-25 (2001); Carter. T. Gunn, Limitation of Liability: United States and Convention Jurisdictions, 8 Mar. Law. 29, 30-31 (1983) ("The United States Limitation Act was a composite: its framework was that of the English statute; apart was borrowed from Maine and Massachusetts statutes; and, the remainder was the product of imaginative American draftsmanship.").

[6] Familiar language is, for example, in the 1734 English Act, which stated ship owners were not liable for "any Loss or Damage" due to embezzlement "without the Privity and Knowledge" of the owner "further than the Value of the Ship or Vessel, with all her Appurtenances, and the full Amount of Freight due or grow due for and during the Voyage." *See* Stone, *supra* note 5, at 321, citing 7 Geo. 2 ch. 15 (1734). The operative language of Limitation Act now in effect provides:

> (a) [T]he liability of the owner of a vessel for any claim, debt, or liability ... shall not exceed the value of the vessel and pending freight.
>
> (b) ... [C]laims ... subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property ... shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing ... done ... without the privity or knowledge of the owner.

46 U.S.C. § 30505(a) & (b).

[7] A recent case from August of 2015 includes a quote from a 1977 opinion which agreed with commentary from 1957 that the Limitation Act "has been due for a general overhaul for the past seventy-five years; seventy-five years from now that statement will be still true, except that the overhaul will then be one hundred and fifty years overdue." *See In re American River Transp. Co.*, 800 F.3d 428, 440-41 (8th Cir. 2015) (Riley, C.J., concurring in the judgment) (agreeing with and quoting *Univ. of Tex. Med. Branch at Galveston v. United States*, 557 F.2d 438, 441 (5th Cir. 1977), *cert. den.*, 439 U.S. 820 (1978), which agreed with 1957 criticism of the Limitation Act). We are almost at that prescient 75 year mark, and the Limitation Act suffers the same criticisms but is still the law.

[8] Gunn, *supra* note 5, at 30.

purpose. Along the way, we hope to reveal a snapshot of the Act as applied to modern maritime activities.[9]

The Limitation Act was enacted in response to a tragedy and resulting large judgment against the shipowner in *New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*. In 1840, the steamboat *Lexington*, known as the fastest ship on Long Island Sound, caught fire and all but four of its 143 crew were lost due to overcrowded lifeboats and rough weather. Its owner was held liable for the loss of a crate containing $18,000 in gold and silver coin, which was shipped for the bank with an agreement to limit the ship's liability. The Supreme Court in 1848 would not honor the agreement, finding the ship owner liable for the lost specie due to the owner's "gross negligence."[10] Congress responded in 1851, passing the Limitation Act, primarily for the protection and promotion of the United States maritime commerce, and particularly to allow this sector to compete with the vibrant English shipping sector.[11] Notably, gold was also discovered in California in 1848, and American transatlantic shipping lines did not yet have the English lines' advantage of a cap on liability.

Early litigation under the Limitation Act determined a few issues that still invite criticism today. First, the Supreme Court held the value of the vessel (and therefore the cap on liability) was determined at the *end* of voyage on which the casualty occurred.[12] The worst casualties—in which the ship is sunk—therefore provide the smallest funds for recovery. This seeming inequity became apparent after another maritime disaster—the sinking of the *Titanic*.[13] Also, early on the Court determined that insurance proceeds for a vessel were *not* to be included in the limitation fund.[14] Therefore, even when insurance would otherwise cover a loss, that pot of money is not available to claimants if the vessel owner can prove its right to limitation. Next, the Court in 1914 clarified that foreign vessel owners facing claims in United States courts could invoke limitation rights under the Act.[15] International vessel interests, therefore, fare differently in United States courts than under global liability conventions.[16] This "expansion" of the Act to foreign owners was followed later by an expansion through lower court holdings to purely *recreational* vessels. The expansion to pleasure craft was reluctant, but the Act applies on its face to "vessels," not just "commercial vessels."[17] An early Fifth Circuit case in 1927 found the Act applied to pleasure craft,[18] and Congress failed to address the Act's vessel definition when it made other subsequent amendments. Whether by Congressional design or by poor drafting, the Act

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[9] The article makes no attempt to take a position on the repeal or reform of the Limitation Act. Indeed, as a practicing maritime attorney often representing shipowners, the author is no stranger to filing petitions under the Act.

[10] *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 344, 385 (1848).

[11] *Norwich Co. v. Wright*, 80 U.S. (13 Wall) 104, 121 (1871) ("The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of the industry.").

[12] *Place v. Norwich & New York Transp. Co*., 118 U.S. 468, 491-93 (1886).

[13] *Oceanic Steam Navigation Co., Ltd. v. Mellor*, 233 U.S. 718 (1914). The owner of the *Titanic*, after over 15 hundred lives were lost at sea, petitioned a New York federal court for limitation of liability in the amount of under $92,000, based on the value of the passage fares, pending freight, and 14 recovered lifeboats. *See The Titanic*, 209 F. 501, 502 (S.D.N.Y. 1913). The limitation action was tried in 1915, and before verdict a global settlement was reached in the amount of $664,000. Robert D. Peltz, The *Titanic's* Legacy: The History and Legal Developments Following the World's Most Famous Maritime Disaster, 12 U.S.F. Mar. L.J. 45, 54-55 (2000).

[14] *Norwich*, 118 U.S. at 493-502.

[15] *Mellor*, 233 U.S. at 732-34. The Court had held the Act applicable to foreign vessels as far back as 1881 in *The Scotland*, 105 U.S. 24 (1881).

[16] The limitation of liability conventions in place internationally, but not in the United States, are beyond the scope of this article. Though a vast oversimplification, the 1976 International Convention on Limitation of Liability for Maritime Claims, accepted in much of the globe, has generally higher limits (*not* based on post-casualty value), it applies more broadly to an array of shipping actors, and it is incredibly tough to defeat the right to limitation. *See* International Convention on Limitation of Liability for Maritime Claims, November 19, 1976, 1456 U.N.T.S. 221.

[17] 46 U.S.C. §30502 ("[T]his chapter ... applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.").

[18] *See Warnken v. Moody*, 22 F.2d 960, 961-62 (5th Cir. 1927) (limitation of liability allowed to owner of 30-foot duck hunting and fishing boat).

now applies to recreational vessels and their "weekend sailors."[19] Owners of yachts, powerboats, small johnboats—all have a right to limit liability. Indeed, courts have found even personal watercraft—jet skis—are subject to the protections of the Act.[20]

There have also been some notable contractions of rights under the Limitation Act. Another major maritime tragedy and outrage caused Congress put breaks on the Limitation Act in 1936. Owners of the *Morro Castle*, the fiery deathbed for 130 people while *en route* from Havana to New York in 1934, petitioned to limit their liability to a mere $20,000. Appalled, Congress created a new fund under the Act for injury and death cases, based on the tonnage of the vessel, when the limitation fund was otherwise inadequate.[21] Congress increased this so-called "death fund" to $420 per gross registered ton of seagoing vessels in 1984. To put this amount in perspective, the tonnage-based death fund in the *El Faro* case is a little over 13 million dollars, while the value of the vessel post-casualty was zero and its pending freight value was just over two million dollars.[22] However, now that the Act applies to pleasure craft, which are generally not oceangoing or have tonnage, this death fund does not help claimants injured or killed in a recreational boating casualty.

Congress has considered repeal or drawback of the Limitation Act on a few occasions. In 1966, a bill was introduced to repeal the Act, in response to the sinking of the *Yarmouth Castle*, with 90 lives lost on the Miami to Nassau cruise route. However, while other provisions regarding insurance and fire safety passed, the part of the bill to repeal the Limitation Act did not. Likewise, after the 2010 *Deepwater Horizon* oil spill, involving a drilling unit recognized as a "vessel" under maritime law, Congress considered amending the Act. The most recent high-profile maritime disaster, the October 2015 sinking of the *El Faro* in a hurricane while en route from Florida to Puerto Rico, has generated renewed interest in the repeal of the Act.

The Limitation Act has been eroded over time through both environmental legislation and judicial tweaking. Certain environmental liabilities, which can be massive, are not subject to limitation under the Act. Most notably, the Oil Pollution Act of 1990 imposes liabilities not subject to limitation.[23] Since liability for environmental cleanup can be nearly unlimited, these statutory exceptions to limitation significantly undermine the purposes of the Limitation Act. Indeed, while Transocean, the rig/"vessel" owner in the *Deepwater Horizon* litigation, filed a petition under the Limitation Act, the court found against limitation because Transocean had privity and knowledge of its employees' negligence.[24]

Judicial gloss on the arcane term "privity or knowledge" has made it more difficult for vessel owners to be granted limitation. Once a claimant establishes owner negligence, the owner must then prove its lack of privity or knowledge as to the factors giving rise to the loss. Early attempts to define the term focused on an owner's actual participation in or knowledge of factors in the loss. However, the concept has expanded beyond actual knowledge to include constructive knowledge. Over time, courts, possibly hostile to limitation petitions, have held owners to a more stringent duty to inspect and inquire into vessel safety and seaworthiness under the Act's "privity or knowledge" analysis. For example, in a recent case in the Eastern District of New York, the trial court denied limitation to a

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[19] *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1975) (finding "little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic for the injured claimants provisions of the Limitation Act" but noting it must heed caselaw and the statute's text).

[20] *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990).

[21] 46 U.S.C. § 30506(b).

[22] *See In re Sea Star Lines, LLC*, No. 3:15-cv-1297 (M.D. Fla. Filed Oct. 30, 2015) (Verified Complaint).

[23] However, claims by the government under Section 408 of the Rivers and Harbors Act, which prohibits injury to public works on navigable waters, are subject to limitation under the Act. *See In re American River Transp. Co.*, *supra* note 5, at 437. Another tactic used by the government to try to go around the Limitation Act is to argue repeal by implication in a newer statute.

[24] The complexities of the BP/*Deepwater Horizon* litigation are well beyond the scope of this article.

recreational boat owner, finding he should have investigated and discovered the vessel's maximum weight and passenger capacity.[25] Moreover, courts increasingly charge corporate vessel owners with the knowledge of a wider scope of people within the corporate organization. In an era when safety management systems required for some vessels under SOLAS require extensive crew reporting to the company, it has become increasingly difficult for an owner to prove lack of privity or knowledge. The right to limit liability now turns on a fact-intensive inquiry. Accordingly, whether limitation will be allowed is often uncertain.

Gone are the days when Nantucket whaling ship investors would send their whaling ships to sea for two or more years, without communication or control, and at the risk of being liable for far more than their individual investment in the ship. Today, technology makes master and crew reachable at all times, and the vessel can be constantly monitored. The corporate form protects personal wealth by affording limited liability. Marine insurance covers vessel owners' risks. Indemnity agreements can shift liability risks, and they are generally enforceable under American maritime law.

Moreover, the Limitation Act is out of step with its origins now that owners of *recreational* vessels have the right to limit under the Act. It seems odd that a statute created to protect and encourage investment in the American transatlantic shipping economy now protects an individual, weekend day tripper on his bass boat or jet ski.

Examples abound of harsh and seeming unfair application of the Limitation Act. The value of the vessel is determined at the *end* of a voyage. A burned or sunk vessel is worth nothing. Paradoxically, then, the largest casualties tend to create the smallest recovery funds. The Limitation Act is back in the public eye with last year's *El Faro* disaster. However, thanks to the 1936 and 1984 amendments to the Act increasing the death fund by ship tonnage, the limitation fund for the 33 deceased crew interests is not insignificant—over 15 million dollars. Indeed, there have been several settlements with crew in the *El Faro* case, and the district court may never have to address whether the owners are entitled to limitation. Perhaps the death fund amendments have tempered the Act just enough to allow it to survive public scrutiny—at least until another disaster with many deaths and injuries results in a woefully inadequate limitation fund.

However, until Congress acts to repeal or reform the Limitation Act, it is the law.[26] Proponents of the Act enjoy its continued existence, while opponents may find some comfort knowing limitation is often uncertain due to judicial expansion of the concept of owner privity or knowledge. The Act still exists as a maritime defense tool, but caselaw gives injured claimants a fighting chance at defeating limitation. The Act has remained on the books through several unpopular periods, and Congressional inertia and perhaps maritime industry support keep the Act alive. Relic of the past or not, maritime attorneys need to understand how to use the Limitation Act or to defeat it, depending on which side of the lawsuit they are on.

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[25] *In re Treanor*, __ F. Supp. 3d. __, 2015 A.M.C. 2857, 2869 (E.D.N.Y. Nov. 6, 2015). A 34 foot Silverton with a passenger capacity of 10 was carrying 27 people for a July Fourth voyage; it capsized and three children drowned.

[26] "Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals." *In re Cavanagh*, 306 F.3d 726, 731-32 (9th Cir. 2002).