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THE PUBLIC INTEREST AND PRIVATE INTERNATIONAL MARITIME LAW

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THE WANING DISTINCTION BETWEEN PRIVATE AND PUBLIC INTERNATIONAL LAW

One of the few areas not yet touched by the ever-growing influence of what is now colloquially known as "Naderism" is that of private international transportation law. Indeed, despite its often direct and serious personal impact, it is hardly known, much less understood, by the general public. Nor is there any facile distinction today between this law and what is generally called "public" international law. For as governments throughout the world become more and more involved in the functions of governing, the historical reasons that once served as a basis for distinguishing "private" from "public" international law are growing increasingly less obvious and less important.

A lawyer in private practice often tends to the easy distinction that everything involving his clients' interests—whether they be those of an American doing business abroad or those of a foreigner doing business in the United States—is "private" while everything involving relations between governments is "public." A government official, on the other hand, often draws the distinction on whether a particular international treaty or convention affects primarily public or pri-

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marily private interests. The limited nuclear test ban treaty,¹ in that it affected only intergovernmental relations, would thus be "public," while the 1957 Brussels Convention,² in that it pertained to the financial liability of vessel owners to private parties, would be "private." No one of these approaches is sound.

To suggest that some conventions or treaties are private while others are public tends in all too many cases to obscure the need for the widespread public interest and attention that every one of these "private law" treaties deserves. Consider, for example, the Warsaw Convention³ limiting the liability of airlines to passengers who are injured or killed while aboard international flights. Or consider the effort presently in progress to write an international treaty covering cases where oil tankers are involved in accidents resulting in the spilling of thousands of tons of oil on nearby coastal shores. To say—as has traditionally been said—that these are "private" matters because they involve only a lawsuit by the widow against the airline or a lawsuit by the Miami Beach hotel owner against the oil tanker is to ignore the very serious public concern that governments should have in these types of disaster situations.

No one really knows why these historical distinctions developed nor why they continue in international law parlance today. It can be suggested, of course, that once a treaty is characterized as "private," governmental interests must *ipso facto* be subordinate to the private interests who should have the controlling voice in deciding what the terms of the treaty ought to provide. Indeed, any one who has worked in these areas for any period of time begins to appreciate how this divisional approach, whether or not articulated, can be worked out in practice. A good example occurred during the recent international maritime law conference in Brussels, where the nations of the world adopted the 1968 Protocol to the 1924 Hague Rules Convention⁴ governing the terms and limits of a vessel owner's liability to shippers

1. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater, Aug. 5, 1963, 4 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (effective for the United States, Oct. 10, 1963).

2. International Convention Relating to the Liability of Owners of Sea Going Ships, Oct. 10, 1957 (Not ratified by the United States).

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 (effective for the United States, Oct. 29, 1934).

4. International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155 (effective for the United States, Dec. 29, 1937).

of cargo. At that conference, the officials of a surprising number of governments often played their major roles not in the negotiation of the limits or terms of liability but rather in those so-called "public law" areas, namely, drafting the clauses which provide for the countries that may ratify the treaty, how many ratifications will be necessary to bring the treaty into effect, etc. When it came to the limits and terms of liability, it was not the government officials nearly so much as the private interests—vessel owners and cargo insurance representatives—who played the major roles.

So long as there is an equal division of power between the competing private interests, one can legitimately hope that the treaty will emerge in a manner acceptable to the public and to all the parties directly involved. If the treaty were negotiated under laboratory conditions, where this equality could be assured, governments might well content themselves with some abdication of their responsibilities. Unfortunately, these test-tube conditions are never present and, therefore, governmental abdication of any type is never appropriate. For example, at the Brussels conference where the 1968 Protocol was negotiated, shipper interests—certainly in the United States and also generally throughout the world—were under-represented vis-a-vis vessel owner and cargo insurance interests. At least at this conference, however, each of the competing interests was professional, in the sense that each understood and should have fully appreciated what was at stake. Hence, they had at least an equal opportunity to exert their own pressures and influence; and if one or the other happened to be less adept or less well organized, one may say simply that it was their own fault.

But take the case of airline liability to passengers or oil tanker liability to coastal interests. What associations of passengers or resort hotel owners are there to represent their respective interests? How many international passengers are there who know of the Warsaw Convention, much less understand its complex limits and terms of liability? For the fifteen to twenty per cent who even think of the possibility of an accident on their flight, it is usually enough for them simply to buy a slot machine insurance policy at the airport; and even with such a purchase, they little realize that it pays adequately only if their accident is fatal, but inadequately in the event they survive but with extensive injuries. Another example is the Miami or Cape Cod hotel owner. Assuming he even thinks about the problem of oil pollution, what lobbying groups can he put together to press his interests be-

fore the Senate or House Commerce Committees? How often has he had, or even considered having, a representative on the United States delegation—as the vessel owners always have—to the international conferences where these issues will be resolved? Unlike the vessel owners, it is all too true that the risk of such an accident to a hotel owner is very contingent and hence, understandably, not a matter of priority—at least until the oil has spilled on his beach.

In short, it is impossible to hope, much less expect, that in these so-called private law areas, there can or ever will be an equal distribution of power between the competing interests. Accordingly, the assumption that in these areas governments should exercise a role subordinate to that of the competing private interests is unworkable and invalid. It plays only into the hands of the best organized and best represented pressure groups. Recognizing, therefore, that parity cannot be achieved even in the best of potential circumstances, governments then have no alternative but to use their powers to assure that the voice of no one single interest plays the dominant role and that the rights of unrepresented interests are adequately protected.

But simply assuring parity is by no means the only element of public interest in this area of private law. For to the extent that governments appreciate—as they do increasingly in these times—that air crashes and sea disasters are by their very nature matters of serious public concern and not simply matters to be left in the hands of private parties, they will also appreciate that the distinctions between private and public international law, however useful to theorists and historians, have no place in determining the scope of the role that they must play in fashioning the controlling law.

GROWING PUBLIC AWARENESS

The deficiencies of our industrial society disclosed in recent months by Ralph Nader have only added to the general basket of problems faced in ever-increasing numbers by the American public in these critical times. Vietnam, poverty, civil disobedience, growing crime rates, strikes by public employees—all of these, with their immense and often very personal impact, can and do largely obscure the importance of some of the specific problems with which this article will deal. So we have reached a point where, for the most part, these specific problems are dealt with neither in the newspapers, nor in congressional committees, nor even in the law journals unless there is a crisis, an event

of major significance which, by itself, thrusts the problem into the public eye and compels attention. Three such events have occurred in transportation law within the past three years, and while only one was satisfactorily resolved, albeit temporarily, there is still hope that the three together might help mobilize some unified directed effort to reform a host of archaic laws which, in some cases, have not been changed in over one hundred years.

The first of these events was the most serious American maritime tragedy since the Morro Castle burned off the coast of New Jersey in 1934, causing the loss of 134 lives. On November 13, 1965, the Yarmouth Castle, a 38-year-old vessel, flying a Panamanian flag of convenience (or "necessity" as the case may be) burned and sank in the Carribbean leaving 88 passengers and two crewmembers dead with scores of others among the 376 passengers and 176 crewmembers injured in varying degrees.

An investigation was immediately opened by the United States Government in an effort to determine how, in the face of the increasingly more stringent requirements of the Safety of Life at Sea (SOLAS) Convention of 1960,⁵ a disaster of this magnitude could still occur. Later in this article, we will have a chance to examine some of the details of the Government's multi-faceted approach to this catastrophe. Suffice it to say at this point, however, that one of the most important facets was a proposal to repeal entirely the outmoded and repressive limits of maritime liability imposed by federal statutes for personal injury and death. With the magnitude of the disaster still fresh in the public eye, the proposal to repeal the limits was introduced in the spring of 1966, with the hope of immediate enactment. It was not then and has not yet been enacted. However, the public and the Congress were at least put on notice that something was amiss.

The second of the three events occurred between November, 1965, and May, 1966—almost contemporaneously with the Yarmouth Castle disaster and the development of the Government's effort to cope with that problem. On November 15, 1965, after years of unsuccessfully exploring means to alter the archaic \$8,300 per passenger limit of international airline liability established by the 1929 Warsaw Convention, the United States formally submitted a notice of denunciation. This denunciation was to be effective, as Article 39 of the Convention

5. International Convention for the Safety of Life at Sea, June 17, 1960, [1965] 16 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27 (effective for the United States, May 26, 1965).

provided, six months later. Six months later, almost to the day, the major airlines of the world, faced with the imminent prospect of Americans traveling free from all effective limits of liability, agreed as an interim measure to increase the limits from \$8,300 to \$75,000. They further agreed, at the behest of the the United States Government, to a system of absolute liability so that a passenger or his survivors may recover up to the \$75,000 limit whether or not the airline was at fault.

The detailed history of the negotiations leading up to this accord or "interim agreement" as it has since become known, has been written elsewhere.⁶ The importance of the event, however, lay as much in the hope that it held out for reforms of other equally archaic areas of transportation law as it did in the specific reforms adopted there. The connection between air and sea law was not lost, neither on those involved in the Government nor on those in industry awaiting the Government's reaction. Especially in light of the extensive newspaper and congressional attention focused on the event, it seemed then not too much to hope that similar strides forward might also be achieved in maritime law. The first effort was the proposal, following the Yarmouth Castle disaster, to repeal all maritime limits of liability for personal injury and death.

The third and most recent event bringing limitations of liability (which is perhaps the best synonym for "private international transportation law") to the public's attention was the wreck of the giant tanker *Torrey Canyon* in March, 1967. Running aground near southern England and spilling thousands of tons of crude oil on the British and French coasts, the *Torrey Canyon* disaster resulted in damages generally estimated to be around eighteen million dollars. The disaster and the desperate clean-up efforts that followed captured the attention and sympathy of people all over the world—much like the recent Santa Barbara off-shore drilling disaster. To date, however, United States law on vessel owner liability remains exactly as it was when this country adopted its first maritime limitation statute in 1851. Had the *Torrey Canyon* disaster occurred off the Florida or California coastlines, United States law would have insulated the vessel owner almost totally, with the consequence that the hotel, fishing, and wildlife interests would not have been entitled to any recovery, regardless of the extent of their losses.

6. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

In the face of these three major events—two of them major catastrophes—the public could have expected greater and more generalized reforms. Such has not been the case. Only air law has seen some reform and that mostly because of the presence of unusually fortuitous circumstances. Unfortunately sea law, while burdened by the tragedies, has not been graced by the same fortuitous circumstances for reform. But the purpose of this article is not to judge the air against the sea, however interesting that subject would be; rather, it is to examine in some detail two distinct areas of maritime limitation law in which reforms are essential. Each of these areas has been briefly examined earlier in this article though certainly not to the extent necessary for a full understanding of the issues involved. And it is only with such an understanding that the public and its public officials can hope to evolve measures of reform.

LIMITS OF LIABILITY FOR PERSONAL INJURY AND DEATH IN THE LIGHT OF YARMOUTH CASTLE

The Yarmouth Castle sank two days before the United States Government, on November 15, 1965, announced its intention to withdraw from the Warsaw Convention. Steeped in the intricacies and complexities of "private international air law," one would have expected that sea law on the same subject could not have been vastly different and certainly not more complex. It did not take long, however, before one realized that the major advantage of air law is that it has been with us for only some fifty years. Encrusted with centuries of tradition, antiquated statutes, and two international treaties, the sea laws of limitation challenge the intelligence of even the most arduous and dedicated lawyers. It is no wonder, therefore, that change is and always has been so slow to come about. For those without a vested interest in these laws seldom understand them, and those with a vested interest understand them but seldom wish to see them changed.

United States Law

Let us start first with the United States law and then later explore the intricacies of the two treaties. The law of this country today is, with one major exception, the same law that was adopted in 1851, establishing the first limit of liability for United States flag vessels. Intended as a device to protect our then fledgling maritime enterprises and to assure that one disaster did not bankrupt a shipping company,

the law provided that in the event of an accident, and absent an owner's "privity or knowledge," the owner's liability would be limited only to the value of the vessel.⁷ Perhaps even this law would have been partially tolerable were it not for a Supreme Court decision in 1871 holding that "value" meant value after, not before, the accident.⁸ As though that were not enough by itself to protect the vessel owner, a series of companion Supreme Court decisions in 1885 specifically held that even though an owner, after an accident, receives a total insurance recovery, that money is not a part of the vessel's value and hence need not be made available to pay survivor or personal injury claims.⁹

The law hobbled along in this state until the Morro Castle disaster in 1936, where 134 lives were lost and the owners allegedly offered as total settlement an amount of only \$20,000, representing the salvage value of the hull. With nowhere to go but up and with a disaster having dictated reform, Congress enacted the first and only major substantive change in the limitation law in its then almost one hundred year history. While retaining the value of the vessel as a limit, the law provided that if the vessel's post-accident value were less than \$60 per ton and if personal injury and death claims were involved, the shipowner would be required, as his limitation, to set up a fund equalling \$60 per ton of the vessel's "limitation tonnage" to pay these claims.¹⁰ Obviously, this law is quite liberal when only one or a few people are injured or lost on a liner and the liner largely escapes damage. In such a case, a limit based on the liner's value is really no limit at all. On the other hand, in the case of a vessel like the Yarmouth

7. 9 Stat. 635 as amended (1964).

8. *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

9. *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1885); *Dyer v. National Steam Navigation Co.*, 118 U.S. 507 (1885); *Thommessen v. Whitwell*, 118 U.S. 520 (1885). Senator Wayne Morse once introduced a bill to correct this situation, but the bill died. S. 1983, 85th Cong., 1st Sess., 103 CONG. REC. 6257-6258 (1957).

10. 49 Stat. 1479, 46 U.S.C. § 183(b) (1964). Vessel tonnage for purposes of limitation is computed by complicated formulas under both United States law and the 1957 Brussels Convention. Under our law, 46 U.S.C. § 183(c) provides that a vessel's limitation tonnage shall be its gross tonnage including engine room space but deducting space for the crew. Under the Brussels Convention, Article 3(7) provides for computing limitation tonnage by adding the vessel's engine room space to its net tonnage. In view of the difficulty of getting such precise figures, limitation tonnages and total amounts stated hereafter in the text are reasonably accurate estimates. (It should be noted that "gross tonnage" is always much higher than "limitation tonnage." For example, the gross tonnages of the Yarmouth Castle and the United States are recorded at 5,000 and 51,000 while their limitation tonnages under United States law are 4,000 and 38,000).

Castle, with hardly any post-accident value and with a limitation tonnage of some 4,000 tons, the law requires a fund, which is the owner's effective limitation, of only some \$240,000 ($\$60 \times 4,000$ tons). If those who were simply injured were to receive no recoveries at all, this would still leave the survivors of those 90 who were killed with only some \$2,700 per victim. Today, more than three years after the disaster, the law still remains unchanged.

The International Picture

Though American law remains as it was in 1936, two international treaties have since been worked out, both of which substantially alter, but hardly improve, the plight of the maritime passenger. Neither has as yet been ratified by the United States and it is extremely doubtful whether either ever will.

The 1957 Brussels Convention. The first of these is a treaty colloquially known as the 1957 Brussels Convention and more formally known as the International Convention Relating to the Liability of Owners of Sea Going Ships, formulated at Brussels, October 10, 1957. Under this Convention, a shipowner's limit of liability for personal injury and death claims, as well as for property damage claims, is determined—as under the 1936 United States amendment—on the basis of the vessel's limitation tonnage.¹¹ The total limit, however, is substantially higher—at least on the figure selected, which is \$207 per ton.¹² According to the terms of the Convention, \$140 of this \$207 amount is available exclusively for personal injury and death claims and the additional \$67 is available for all claims. If the personal injury and death claims exceed the \$140 per ton figure, these claimants would then share, together with cargo and other property, the additional \$67 per ton. While it thus appears to be a substantial improvement over present American law, if viewed in the context of the Yarmouth Castle disaster, it becomes plain that the improvement is hardly satisfactory.

If this Convention had been in effect in the United States on November 13, 1965, the limitation fund for the Yarmouth Castle would have been approximately \$868,000 ($\$207 \times 4,000$). Eliminating, even if only theoretically, all claims for personal injury and cargo damage and directing the total fund only for death claims, the survivors of each

11. See note 10, *supra*.

12. The actual figures in this and other limitation conventions are expressed in terms of Poincaré gold francs which is an artificial currency pegged to the fixed price of gold and having the equivalent U.S. dollar values used throughout this text.

of the ninety victims would still have recovered no more than \$11,500 per victim. Admittedly this is some improvement over the \$2,700 per victim available under American law, but in terms of current standards of accident compensation, the improvement is token at best.

Moreover, the Convention has two other disadvantages. First, it eliminates entirely the value of the vessel as an element of limitation. While this is unimportant in cases like the *Yarmouth Castle* where the vessel is a total loss, it can assume substantial importance in cases where the vessel is only moderately damaged. Consider, for example, a vessel of 15,000 limitation tons which after the accident still has a value in the area of 4 or 5 million dollars—which would thus become the owner's limitation under present American law. Under the Convention, the owner's limitation would be only some \$3.1 million ($\$207 \times 15,000$). A second and more serious disadvantage of the Convention is that under its very ambiguous jurisdictional provisions (Article 5), it appears that, in many cases, claims on behalf of Americans who are injured or killed might be required to be brought in foreign courts.¹³ It is hard to imagine that if an American passenger sails from New York on a prominent foreign liner and is lost during an accident at sea, his survivors may be forced to bring their action only in a foreign court. It is even harder to imagine this in the face of the fact that, but for the Convention, jurisdiction would so patently lie in the United States.¹⁴

Despite these serious inadequacies, two major efforts were made in 1962 and 1963 to enact a scheme of legislation which would have permitted the United States to ratify this Convention. It is itself an interesting question why with maritime international conventions, unlike

13. For the best and only comprehensive analysis of this problem and the Convention generally, see Note, *Limitation of Shipowner's Liability—The Brussels Convention of 1957*, 68 YALE L.J. 1676 (1959). When the industry submitted legislation in 1963 to implement the treaty, the legislation contained a jurisdictional provision different than Article 5. Its object was supposedly to clarify Article 5 so as to permit Americans to sue in American courts. It is questionable whether the industry's proposed provision would have fully protected American passengers. In any event, if that provision had been adopted, it would necessarily have meant that the United States could not have ratified the Convention. This, of course, poses the collateral question as to whether there is any purpose underlying the drive for "uniformity of international transportation law" other than that of achieving uniformity of low limits of liability. For an interesting view along these lines in air law, see Cabranes, *Limitations of Liability in International Air Law: The Warsaw and Rome Conventions Reconsidered*, 15 INT'L & COMP. L.Q. 660, 688 (1966).

14. Under Article 5(2), the owner seems to have the option of having the action tried in any of three places: the port where the accident occurred; the first port of call after the accident if the accident did not occur in a port; and the port of disembarkation or discharge presumably according to the passenger's ticket.

the Warsaw Convention, the enactment of a separate statutory scheme embodying the provisions of the Convention has been looked upon as an essential first condition to ratification of the convention by the United States. Certainly, the 1957 Convention would have been as self-executing as the Warsaw Convention. Since no legislation was thought necessary in order for the United States to ratify or enforce the legal regime under Warsaw, it seems clear that separate legislation should equally not have been necessary to ratify the 1957 or most any other maritime limitation convention.

Yet the legislative route, with all its potential hazards and certain delays, was followed in the case of the 1957 Convention just as it was followed in the case of the 1924 Hague Rules Convention which was not ratified by this country until 1937. Legislation covering the 1957 Convention was submitted in both the 87th and 88th Congresses, and extensive hearings were held in March, 1962, and May, 1963, before the Merchant Marine and Fisheries Subcommittee of the Senate Commerce Committee.¹⁵ The sides were drawn as usual with the vessel owners and insurance interests favoring ratification and the seamen's unions of the AFL-CIO opposed. Unlike the situation in the air, where the American Trial Lawyers Association (ATLA) has traditionally played the major role in opposing international limits, the task of opposition at sea has, until recently, fallen almost completely to the AFL-CIO whose interests in seamen's recoveries has fortunately been largely coincident with what appears also to be the best interests of the travelling public.

Perhaps the most unusual aspect of this attempt to ratify the 1957 Convention was the role-switching that took place. Following the 1957 conference at which the Convention was negotiated, the United States Maritime Law Association (MLA), which is an important organization representing most American maritime interests, though in varying degrees, opposed the Government's ratifying the Convention. The historical record then seems to suggest that the MLA reviewed and revised its position in large part because of the prodding of the executive branch of the Government which at that time seemed unanimously in favor of ratification. Yet, despite its unanimous position then, within just a few years the executive branch was itself to switch totally and, with similar unanimity, to oppose the treaty in virtually every respect.

15. *Hearings on S. 555 and S. 556 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce*, 88th Cong., 2d Sess. (1963); *Hearings on S. 2313 and S. 2314 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. (1962).

In any event, during 1962 and 1963, industry was joined by the executive branch in strongly recommending enactment of the legislation followed by ratification of the Convention. Despite this curious and almost unprecedented unity, and despite a favorable report by the Senate Commerce Committee,¹⁶ the legislation was never enacted and the Convention was never ratified. Though this outcome might well be attributed to the AFL-CIO's vigorous opposition, the unions certainly could not claim any real victory in the face of the fact that the American public was still left with the 1851 law as it was amended in 1936.

The CMI. The international community, however, was not content to let the situation with respect to personal injury and death rest only on the 1957 Convention limits. It is perhaps appropriate at this point to digress somewhat in order to discuss the most influential group of international maritime lawyers—the Comité Maritime Internationale. While it is hardly known in the United States, its influence on international maritime law has been overwhelming.

The CMI was set up in 1896 "to promote . . . the unification of international maritime and commercial law and practice."¹⁷ Its headquarters are in Antwerp, Belgium, and its membership is composed of the national maritime associations of twenty-nine nations.¹⁸ The United States Maritime Law Association (MLA) is the member association from this country. Like its counterpart associations in other countries, the United States MLA is composed primarily of lawyers in private practice who represent clients with maritime interests. It is fair to add that the United States MLA, again like its counterparts abroad, is more oriented to carrier and insurance interests than to the interests of shippers or passengers.

One of the most important functions of the CMI is to formulate drafts of international conventions which are later adopted by governments. The CMI's approach to formulating these drafts is to set up an international subcommittee which circulates questionnaires to the CMI member associations soliciting their views on the need for a particular convention and, if there is a need, what terms and provisions are most preferred. Given the general orientation of the national as-

16. SENATE COMMITTEE ON COMMERCE, LIMITING THE LIABILITY OF SHIPOWNERS, S. REP. NO. 1602, 87th Cong., 2d Sess. (1962).

17. CONSTITUTION OF THE INTERNATIONAL MARITIME COMMITTEE, art. 1 (1967).

18. These countries are: Argentina, Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Greece, India, Ireland, Israel, Italy, Japan, Mexico, Morocco, Norway, the Netherlands, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, and Yugoslavia.

sociations and the fact that carrier attorneys, having the greatest vested interests, are usually the most active participants, it is not surprising that the replies to the questionnaires generally advocate continued protection of existing carrier benefits.

In any event, once these preliminaries are completed, the subcommittee, which is composed of selected and more interested individual members from some of the national associations, meets to begin work on a draft convention. It usually requires several years and several international meetings before a draft is sufficiently perfected to warrant submitting it to governments. When it is so perfected, the draft is transmitted to the Belgian Government with a request that it call a diplomatic conference so that governments can approve and adopt the draft as an international treaty. Meanwhile, few governments have been privy to the work, and no one has yet been called upon to represent the passengers' interests.

This procedure need not be contrary to the public interest. The experts could initiate drafts with governments left to decide. But such a procedure could work only if governments were given an adequate opportunity to study and revise the draft. In practice, and especially for purposes of the United States, the procedure has not been successful. Out of sixteen conventions concluded via this route from 1910 through 1967, the United States has ratified only two—the 1910 Salvage Convention and the 1924 Hague Rules Convention. More recently, the United States signed though it has not yet ratified the 1967 Convention on limitations for loss or damage to passenger luggage and the 1968 Protocol to the 1924 Hague Rules Convention.¹⁹

19. The 1910 Salvage Convention, known formally as the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, appears at 37 Stat. 1658, T.S. 576 (effective for the United States Mar. 1, 1913). The Luggage Convention, known formally as the International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage by Sea, was signed on May 27, 1967 by the United States Delegation to the 1967 Brussels Conference. Under the terms of this Convention, limits of liability for damage to or loss of passenger luggage are set at some \$660 for cabin luggage and \$1,000 for "hold" luggage. This contrasts with the earlier limits, imposed by "contract" via the small print in the passenger's ticket, of \$200 for all first class luggage, \$150 for all cabin class and \$100 for all tourist class. During 1968, all segments of the United States industry agreed that the Convention should be ratified; and it is likely that the Convention will be transmitted to the Senate sometime during this session of the Congress. Unlike conventions dealing with personal injury, death, or cargo claims, however, the potential incremental costs of the Luggage Convention to industry are only very slight. As for the 1968 Protocol to the 1924 Hague Rules Convention (see note 4 *supra*), though it was signed by the United States Delegation to the Conference, there is now some doubt, in light of industry opposition, whether or when it will be ratified.

There seem to be several reasons why this procedure has not worked in the past for the United States and why, unless substantially altered, it is unlikely to work in the future. First, the United States Government does not participate in the drafting of the Convention—and usually is not even advised of its existence—until just a few months, and sometimes only several weeks, before the diplomatic conference is to take place. This hardly provides the time and opportunity to study and understand the complexities of one of these conventions, much less to help mould and influence its direction during the early important drafting stages.

Second, the period of time set aside for the diplomatic conference is usually so short that many government delegates— and not only those from the United States— have been led to the impression that the diplomatic conference had been called not so that governments could consider and possibly revise the draft but rather simply to “rubber stamp” it. Only eleven days, for example, were set aside for the 1957 conference which had before it two other draft conventions besides the limitation convention. The same number of days was set aside for the 1967 conference even though that conference had five draft conventions before it. While one should readily applaud the unusual international conference that does its work quickly and efficiently, nevertheless where the stakes are as high and the competing pressures as great as they are at the Brussels conferences, eleven days is simply too short.

Third, despite all these disabilities, one might still harbor hope if the United States MLA were at least to occupy a forceful and influential position within the CMI so that changes might be possible at some future time even if not immediately. That does not seem to be the case today, and there is only slight hope that the future will bring any improvement. The CMI is now and will probably continue to be dominated largely by British and Scandinavian interests with Belgium directly behind and everyone else, including the United States, a very poor third. Moreover, even were the United States MLA to occupy a forceful position within the CMI, it is doubtful whether the MLA's interests would be or become any more consistent with those of the United States Government or those of the traveling or shipping public. To raise this question, one need only point to the MLA's present carrier orientation and the fact that one of its foremost authorities on limitation law also wears a second hat as one of the official delegates of Liberia to maritime international conferences.

Yet, the fault does not lie wholly within the United States MLA. The United States Government is in many respects equally at fault. Since the death in 1938 of Charles S. Haight, Sr., one of the most prominent American practicing lawyers in the history of international maritime law, there has been no one in the private sector who has been able to stimulate or command the Government's attention. As a consequence, the Government seems largely to have ignored the developments and the work in these areas. Delegations have often been selected for the international conferences not on the basis of knowledge, merit, or experience but rather on the basis of which official wishes, or is available for, a two week trip abroad. Continuity of effort, not to mention personnel, has been conspicuous in the United States Government by its absence. Responsibility is so diffuse that there is no one agency or Department in the Government which can even be looked upon as exercising primary authority. Moreover, with rare exceptions, very few senior officials in any of the agencies or Departments of the Government have interested or involved themselves in these areas. Perhaps this is because the law is complex and the processes of international negotiation are slow. But perhaps it is also because advocacy of passenger interests is not a career-rewarding task in the face of a well-organized and well-represented adversary such as American carrier interests are today. Whatever the reason, it seems clear that the United States Government could have done a great deal more to rectify or improve the situation than it has done in the past. Whether it is too late to do this today and whether the only alternative is to supplant the CMI and replace it with the newly created Legal Committee of the Intergovernmental Maritime Consultative Organization (IMCO) are serious issues which are being faced by the United States Government and the entire international maritime community at this time.

The objective of this article, however, remains the more limited one of examining certain specific situations. To this end, we shall now turn to the second international convention, developed by the CMI, dealing with personal injury and death.

The 1961 Brussels Convention. With the 1957 Convention agreed upon and concluded, there would seem to have been no need for another convention dealing with personal injury and death—unless the object were to assure the passenger a recovery better than he might be entitled to under the 1957 Convention. This is not what happened. In a convention known formally as the International Convention for

the Unification of Certain Rules Relating to the Carriage of Passengers by Sea, adopted at Brussels, April 29, 1961, the international maritime legal community, operating through the customary CMI route, arrived at a contrary result.²⁰ Under the terms of this Convention, a passenger is limited in his recovery to only \$16,600—the same amount which the air law community adopted in 1955 in the Hague Protocol to the Warsaw Convention.²¹

However unsatisfactory this amount was to Americans when it was adopted in 1955 in the Hague Protocol, its readoption six inflationary years later by the maritime community would almost have been a matter for amusement—were it not for the fact that agreement on such a figure also reflected the dominant state of thought at that time in international maritime circles. Moreover, the drafters of this 1961 Convention specifically made it subordinate to the limits of the 1957 Convention with the result that the survivors of a disaster involving, say, one thousand victims would not even be permitted to recover the \$16,600 amount.²² In other words, in the case of a disaster involving five hundred victims, and a vessel, like the SS Constitution, of 18,000 limitation tons, the owner's total limitation of liability would be only \$3,700,000 (207 x 18,000 tons) rather than \$8,300,000 (\$16,600 x 500 passengers). What the Convention thus accomplishes is to assure: (1) that a passenger can recover no more than \$16,600 even though the 1957 Convention limits might otherwise permit more, and (2) that a limits imposed under the 1957 Convention. So far, this Convention has passenger can recover not even the \$16,600 limit when the total of all such claims might exceed the limits imposed under the 1957 Conven-

20. Other than the 1924 Hague Rules Convention and the 1910 Brussels Salvage Convention (see note 19, *supra*), which were ratified by the United States and appear respectively at 51 Stat. 233 (entered into force for the United States, Dec. 29, 1937), T.S. 931, L.N.T.S. 155, and 37 Stat. 1658 (entered into force for the United States, Mar. 1, 1913), T.S. 576, none of these Brussels Conventions is easily available. There is a volume published by the Belgium Ministry of Foreign Affairs which contains all the texts, but this volume seems not to be in any American library and can probably be obtained only by writing to the Treaty Service of that Ministry. Unlike the 1961 Brussels Convention which seems not to have been generally reprinted anywhere in this country, the 1957 Brussels Convention at least appears in one accessible publication. See Note, *supra* note 13, at 1714-1719. Both the 1957 and the 1961 Brussels Conventions are presently in force, but neither seems so far to have been registered with the United Nations and, hence, neither is available in the United Nations Treaty Series (U.N.T.S.)

21. Protocol to Amend the [Warsaw] Convention, Sept. 28, 1955, and entered into force (though not for the United States) Aug. 1, 1963. 478 U.N.T.S. 371.

22. 1961 Brussels Convention, art. 8.

tion. So far, this Convention has been ratified by Cuba, the U.A.R., Peru, France, Switzerland, and Iran. It is safe to say that it will not be ratified by the United States.²³

There seems to be a small and perhaps healthy movement now in progress to amend and modernize this 1961 Convention. Largely as a result of some open criticism directed at this Convention when it was reexamined at the 1967 Brussels Conference in the context of that Conference's successful work on the Luggage Convention, the CMI appointed a subcommittee last year to distribute a questionnaire and begin the long process of revision. The subcommittee is under the chairmanship of Dr. Walter Muller, who was recently appointed one of the CMI's executive officers and who, coming from the landlocked country of Switzerland, appears to be one of the most able and objective authorities in the CMI. But in the face of past history and the traditional orientation of the CMI's membership, it is questionable whether even this subcommittee, however well-intentioned and well-directed, can succeed in arriving at limits quickly enough and high enough to make the Convention attractive to the United States. Perhaps the most important impetus for success, however, is that failure would probably mean the transfer of virtually all of these issues, whatever their future importance, from the CMI to the newly created Legal Committee of IMCO. This Legal Committee would then function almost in the same manner as the Legal Committee of the International Civil Aviation Organization—slowly and ponderously but with governments, including several from less developed countries, playing the dominant roles.

Meanwhile, however, the immediate problem facing the United

23. There are, however, two unusual aspects to this Convention which are worth mention. First, it contains no jurisdictional provision, which means that a passenger or his survivors can bring an action anywhere, provided, of course, there is personal or in rem jurisdiction over the carrier in the jurisdiction where the action is brought. This may well be the only limitation convention, in air or maritime law, in which no jurisdictional limitations (traditionally favoring carriers) have been imposed on where the passenger may bring his action. Cf. Article 5(2) of the Brussels 1957 Convention (*supra* at p. 792) and Article 28(1) of the Warsaw Convention. Second, Article 6(3) of the 1961 Convention specifically permits a contracting state to unilaterally set any higher per capita limits of liability "as far as the carriers who are subjects of such State are concerned." Were the United States to ratify this Convention, it might well be able to do so and at the same time set a limit for United States flag vessels substantially higher than the \$16,600 limit in the Convention. Is it not peculiar that a limitation convention would specifically permit this discretion when the whole object of such a convention is to assure uniformity precisely by eliminating the possibility for such competitive differences?

States is whether anything should be done about the 1851/1936 limitation law. It is with this in mind that we can now turn to the aftermath in this country of the Yarmouth Castle disaster.

The Aftermath of Yarmouth Castle

The Administration's Package. The legislative package that the Administration prepared and submitted to the Congress in the wake of the Yarmouth Castle disaster included a bill to assure that passengers would be given adequate warning of the fire safety standards of all passenger vessels calling at United States ports, and another bill to assure that passengers would be able to recover passage money from cruise ship operators who cancelled scheduled sailings.²⁴ But the two most important parts of the package were the bill to repeal entirely the United States limits of liability for personal injury and death and the related provision in the same bill to require evidence from each shipowner that he has adequate financial responsibility to pay judgments in the event of personal injury and death claims.²⁵

This financial responsibility provision was an integral part of the proposal to repeal the limits, because, like the Yarmouth Castle, many other vessels were one-ship corporations. If the ship went down, all the corporate assets would go down at the same time. The shipowner could probably thus assure that his liability would effectively be limited only to the statutory requirement that he post the \$60 per ton fund. In other word, with no corporate assets, the shipowner could insulate himself under United States law against any liability in excess of the \$60 per ton fund even in the face of a finding by a court that the owner had "privity or knowledge."

Privity or Knowledge. It is appropriate at this point to examine the "privity or knowledge" concept and how American courts have been reacting generally to the application of archaic limits of liability. One

24. S. 3250, 89th Cong., 2d Sess. (1966). S. 3251, 89th Cong., 2d Sess. § 3 (1966). There was also a related effort to call an extraordinary session of the IMCO Assembly in order to improve the fire safety measures under the Convention for the Safety of Life at Sea, S. REP. NO. 1483, 89th Cong., 2d Sess. 5 (1966). In retrospect, it can probably be said that this was the most successful of the Administration's efforts following the disaster, for substantial improvements in SOLAS were achieved. See Mortimer, *Recent Responses to Passenger Vessel Safety*, 8 HARV. INT'L L.J. 339 (1967); SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE AMENDMENTS TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1960, S. EXEC. DOC. NO. E., 90th Cong., 1st Sess. (1967).

25. S. 3251, 89th Cong., 2 Sess. §§ 1, 2 (1966).

increasingly important way to break these limits has been to attempt to show that the shipowner had "privity or knowledge" of the acts that caused the damage. Historically, because a vessel traveled far from its owners and home port, the owners were protected against negligence of the vessel's captain or crew during the voyage. Thus, if the owner did not have privity or knowledge of the acts, he was entitled to invoke the limits.

Most independent maritime law experts today look on this concept as an historical vestige remaining from the era of the clipper ships. They argue that with modern means of communication and with the highly sophisticated technological and electronic equipment that vessels now have, all owners should be responsible for the acts of the officers and crew and, as a consequence, should be presumed as a matter of law to have privity or knowledge at all times both before and during the voyage. There is no reason today not to have *respondeat superior* apply here as in other commercial and corporate activities. But since this would deprive vessel owners of the more important justifications for having limits, the maritime industry strongly disagrees and the argument has never been resolved.

With limits as low as those in United States law, courts in this country have shown a tendency to find privity or knowledge in any number of situations that obviously would not have been so deemed when the statute was enacted in 1851. Faced with a choice either of "stretching the law" a little or imposing a totally inequitable limit, the courts have tended to stretch the law. Later in this article, we will see just how far the court stretched in the Yarmouth Castle litigation.

For its part, the maritime industry looks upon this, with some justification, as an example of improper judicial legislation. But the industry recognizes that the situation exists and that it is not about to change unless the limits are increased very substantially. Not wishing to see such an increase, the industry seems content to let the situation remain as it is. Their reaction, however, is that in any doubtful case where privity or knowledge might be proved, they are usually prepared to negotiate out-of-court compromise settlements rather than face the possibility, with a court finding of privity or knowledge, that they must pay the damages in full.²⁶

26. Much the same informal method of resolving a similar type of impasse was found until recently in airline personal injury and death cases falling within the \$8,300 limit of the Warsaw Convention. Under Warsaw, an airline lost its right to invoke the limit upon proof that it was guilty of "wilful misconduct." As a legal concept, "wilful

Financial Responsibility. The one ship corporation, however, was an added device to assure that even without the defense of no privity or knowledge, the vessel owner could effectively insulate himself against any liability in excess of the \$60 per ton limit. With this loophole in mind, the Government proposed the financial responsibility provision. For, recognizing that the one-ship corporation could continue, indeed burgeon, in the face of a repeal of the limits, the only way to counteract such a development seemed to lie with such a provision.

The scheme ultimately proposed by the Administration required every vessel owner to show financial responsibility, by way of insurance policies or other evidence, sufficient to pay \$20,000 for each passenger accommodation up to and including 500 accommodations, \$15,000 per accommodation up to 1,000, \$10,000 per accommodation up to 1,500 and \$5,000 for each accommodation over 1,500. For a vessel like the SS United States with accommodations for some 2,000 passengers, the insurance requirement would be about \$25 million. Provision was also made to reduce these requirements substantially in the case of reputable owners operating more than one vessel.

To those who drafted the legislation, these financial responsibility requirements had very little function unless the limits were repealed. If the limits remained as they were, and absent a finding of privity or knowledge, no purpose was served by imposing such stringent requirements.

Congressional Action. The entire package, except for the repeal of the limits, was passed by the Congress in late 1966.²⁷ Almost immediately, calls and inquiries began to be made to determine the function and purpose of the financial responsibility requirements when the limits were not repealed. Beyond the thought (developed much later) that more and possibly all cases will ultimately come to be regarded as involving an owner's privity or knowledge—which would itself amount to repealing the limits—no really meaningful explanation was ever worked out, and the requirements are in force today for whatever purpose they might serve.²⁸

misconduct" is as accordion-like as "privity or knowledge." So long as the limit was only \$8,300, courts tended more easily to find "wilful misconduct" and, as a result, airlines and insurance companies were more prepared to negotiate out-of-court compromise settlements. In the face of the increase to \$75,000, however, the wilful misconduct exception will probably lose much of the potential that it once had.

27. — U.S.C. —, 80 Stat. 1356 (1966).

28. When the Senate Commerce Committee favorably reported out the package

The repeal itself was defeated largely by a succession of industry witnesses. Their arguments are worth some examination. The most traditional argument is the one that records the long list of countries (beginning with France in 1681) that have always had limitations and concludes on the note that everyone has them, why not the United States? No one bothers to examine why millions of motorists in this country have no limits of liability nor why Congress has never imposed limits on airline, train, or bus travel in this country. Is it really enough simply to say that just because other countries have had them for years, the United States must too? Moreover, were the United States to repeal the limits, no one doubts that, from a competitive point of view, the effect of such a repeal would not be limited only to American flag vessels. Rather, it would affect every vessel, foreign and American flag, doing business in this country and carrying American passengers (as well as other passengers who might properly be able to bring suit in this country). Indeed, since more Americans travel on foreign vessels than on the few United States flag passenger vessels that still exist, the overall competitive impact should be much greater on the foreign flag owners than on the American owners. In short, a careful examination of this specific issue could raise any number of provocative questions.

Another industry approach is to argue persuasively that the United States really does not need a very substantial increase in the limits because, after all, there are some ten or twelve states with death statute limits of only \$25,000 to \$35,000 and, in any event, figures for the State of New York show that eighty-one percent of all accident claims result in judgments or settlements under \$2,000. Under these circumstances, so the argument implies, life is not nearly as dear as the proponents of repeal would have you believe.²⁹ A big increase, therefore, or—as the industry argued during the hearings—any increase beyond the limits of the 1957 Convention is totally unnecessary. In short, the industry renewed its support for the 1957 Convention and its limits, but nothing higher.

without the repeal, their report did not contain even a single mention either that the Administration had proposed repealing the limits or that this was the only part of the Administration's package not favorably acted on by the Committee. SENATE COMMITTEE ON COMMERCE, SAFETY OF LIFE AT SEA, S. REP. NO. 1483, 89th Cong., 2d Sess. (1966).

29. *Hearings on S. 1351, S. 2417, and H.R. 10327, S. 3250 and S. 3251 Before the Subcom. on Merchant Marine and Fisheries of the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 214-217 (1966) [hereinafter referred to as *1966 Hearings*].

The reverse approach was also tried. This was to argue that life being as valuable as it so obviously is in this country, unlimited liability would be a ruinous financial burden for the vessel owner. Here the figures used were \$200,000 per person. Thus, if 1,000 persons are lost in a disaster, the vessel owner would be subject to \$200 million in liability. It is ridiculous, so the industry argued, to conceive of such capacity of liability insurance in today's insurance market. Even one-half or one-third of that amount would be impossible.³⁰

Another interesting argument often advanced by industry is that one of the essential purposes of limitation is to permit the shipowner to bring all the multiple claims arising out of a disaster into what is called a "concourse" in one court and thus to avoid the obvious burden of defending individual suits in different courts throughout the country. Relying largely on the language of Chief Justice Taft's opinion in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*,³¹ and Justice Frankfurter's opinion in *Maryland Casualty Co. v. Cushing*,³² the suggestion is made that the limitation law must be preserved in order to preserve concourse. This fails to take any consideration of the fact that concourse can be made possible, even without limitation, simply through judicious amendments to rule F of the Federal Supplemental Rules for Certain Admiralty and Maritime Claims coupled with use of the recently enacted 28 U.S.C. § 1407, calling for transfers and consolidations in multidistrict litigation.³³ Indeed, there is an effort presently in progress in aviation law to do just this—namely, permit concourse but with no limits of liability.³⁴

For their part, the arguments of the unions who vigorously support repeal are often equally subject to question. For example, in adverting to the 1957 Convention and its \$207 per ton fund, they will argue that on a vessel like the S.S. United States with a limitation tonnage of approximately 38,000 tons, the limitation fund would be around \$8 million which, if divided equitably between passengers and cargo as the Convention requires, leaves each of the 2,700 passengers and crewmen with an effective recovery of something less than \$3,000. Even under intense questioning by staff counsel, it is hard to elicit the admission that

30. *Id.* at 236-238.

31. 273 U.S. 207, 215-17 (1927).

32. 347 U.S. 409, 415, 417 (1954).

33. 28 U.S.C. § 1407, 82 Stat. 109 (1968).

34. S. 3305 and S. 3306, 90th Cong., 2d Sess. (1968).

for decades there have been no disasters at sea of such a total and definitive magnitude and hopefully there will be none in the future.³⁵

Unfortunately, certain questions have never been examined in any of these voluminous hearings. These 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.³⁶

Until these questions are raised, fully examined, and answered, it is very doubtful whether even another catastrophe of the magnitude of the Yarmouth Castle could bring about changes in the present state of our law. What is even more disturbing is that so long as our law remains as it is today, there is little incentive for the international maritime law community and the CMI to produce limits substantially exceeding those in the 1957 Convention. Only if the United States were to repeal its limits altogether or to raise them substantially would there be hope for real and rapid progress in the international community. But were that to happen, ironically there might then be no need for international action at all. Meanwhile, there is no progress at all on any front.

Later Congressional Developments. It was with this stalemated situation in mind that efforts were continued to keep the repeal legislation alive. The first and certainly the most forceful and important effort in years was made by President Johnson who, when he signed the Yarmouth Castle Bill that did not include the repeal of the limits, stated:³⁷

35. 1966 Hearings at 330-337.

36. It is interesting to note that when the aviation limits were raised from \$8,300 to \$75,000, the aviation insurance market proved its extraordinary ability to absorb this nine-fold increase immediately. It is also interesting to note that, on the basis of recent conversations with two directors of Lloyds of London, the aviation insurance market foresees no major capacity obstacles despite the imminent introduction of "jumbo jets" to be followed, sometime later, by the supersonics.

37. Weekly Compilation of Presidential Documents 1629-1630 (Monday, Nov. 14, 1966).

There is, however, a significant omission in the law. No action was taken to repeal the inadequate limitations on the liability of a shipowner for personal injury or death. To protect the traveling public, we shall make another effort next year to repeal those outmoded limitations on a shipowner's liability.

This statement was made in November, 1966, at the close of the 89th Congress; it left many with the hope that the matter might be resolved early in the next Congress. But then the bill got bogged down somewhere in the executive branch in a review and reexamination of the possibilities for compromise.

Like earlier reviews, however, this one too yielded no fruitful results. There was little additional information or statistics available beyond what was available earlier and, without the aid of a full congressional committee hearing, there seemed to be no way by which such information could be obtained. Faced with the familiar option either of no limits or the 1957 Convention limits, the Administration again decided to seek repeal. This decision, however, was not so much motivated by any deep-seated philosophical antipathy to limits as it was by two other factors. First, the Administration wanted Congressional hearings because only through such a vehicle could hard information and statistics be requested and received from the industry. Second, the Administration certainly did not wish to be subject to the criticism—should another Yarmouth Castle disaster have occurred—that it had failed even to resubmit the legislation, particularly in the face of President Johnson's direct statement some months earlier. So with no other alternatives at hand, the Administration finally resubmitted the repeal bill on December 14, 1967, the eve of the adjournment of that session of the 90th Congress.

The second session of that Congress opened early in January but the bill was not introduced in the opening days, as one would have expected. Then weeks and months passed and the bill was still not introduced in either the Senate or the House. Finally, on May 14, 1968, the Admiralty Section of the American Trial Lawyers Association delivered to both the Senate Commerce and the House Merchant Marine and Fisheries Committees a pointed and pungent appeal that the legislation be introduced immediately and enacted in that session.³⁸ That very day, Chairman Garmatz of the House Merchant Marine

38. *Statement of the American Trial Lawyers Association Through Its Admiralty Section on Limitation of Liability in Maritime Cases* (May 14, 1966).

and Fisheries Committee introduced the bill into the House, specifically noting, however, that he was introducing it only "by request."³⁹ This "by request" notation seemed to telegraph to all concerned that the Chairman himself was not particularly interested in the fate of the bill. But despite this notation, the bill had at least been introduced in the Congress.

Still there was no movement in the Senate and none foreseen, despite the movement in the House. Finally, on June 6, Chairman Magnuson of the Senate Commerce Committee introduced the bill into the Senate though, like his counterpart in the House, he too marked it as introduced "by request."⁴⁰ Moreover, he also introduced, by industry request, the 1957 Brussels Convention bill that had been introduced though not passed in 1962 or 1963.

By this time, however, there was almost no hope for progress, particularly with the political developments being what they were and the word having been circulated that Congress was not about to open up this controversial issue with an election less than six months away. So it was that hearings were never held and the bill died in the 90th Congress. It will be interesting to see whether this or any other bill will be introduced by the new Administration.

The Yarmouth Castle Litigation. The "check and balance" system that has worked so well in our constitutional system very often works in ways that are far less obvious than when the Supreme Court declares unconstitutional or narrowly interprets an act of Congress. In the face of what could be looked upon as Congressional abdication of its responsibility to revise and modernize our archaic limitation laws, the courts have tried to make their own balance in an effort to fill the gap. We discussed earlier how the courts are more inclined today than perhaps ever before to find privity or knowledge in order to avoid application of the limitation laws. It is hard to judge whether this is a healthy or an unhealthy movement. To the extent that it avoids application of the limits in particularly deserving cases, it is no doubt healthy. At the same time, each time the limits are avoided, there is less pressure on the Congress to revise the law.

There are two distinct approaches to resolving this problem and no one can tell which might work best. The first approach is to leave

39. H.R. 17254, 90th Cong., 2d Sess. (1968).

40. S. 3600, 90th Cong., 2d Sess. (1968). See also 114 Cong. Rec. 97 (daily ed. June 6, 1968). For a review of the general situation at this time, see Mendelsohn, *Liability at Sea: A World Problem*, N.Y. Times, June 2, 1968, § 5, at 16, col. 1.

the law exactly as it is but to encourage the courts to avoid the limits by any practical means. Ultimately, and after a sufficient number of cases, the industry could find itself without any effective limits and, once realizing this, it would be much more receptive to high limit compromises that might be acceptable to the Government. The second approach is to increase the scope and emphasis of direct efforts on both the national and international fronts. Those favoring the first approach argue that a concentrated direct effort might possibly bring a resolution but with a limit much lower than could be obtained if the courts were to be permitted, indeed, encouraged to continue their current tendencies. Those favoring the second view argue as purists that this is a problem for the legislative branch, and judicially devised means to avoid the limit are not only inappropriate but quite often very troublesome. While a combination of both approaches seems to be the present policy—if such it can be called—the litigation presently pending in the Yarmouth Castle case seems quite clearly to support the approach of the purists.

Within weeks following the November, 1965 disaster, hundreds of lawsuits were filed involving claims totalling millions of dollars. Meanwhile, the shipowner filed a limitation petition offering to post security for the \$60 per ton fund. On April 6, 1967, the Federal district court in Florida handed down a decision which most lawyers find troublesome.⁴¹

The court held that it was not *lex fori* or the United States limitation law that controlled the case but rather the limitation law of Panama—the flag country of the vessel and, therefore, where the damage can be deemed to have occurred and where the cause of action arose. This decision thus not only departs from the application of *lex fori*—which has traditionally been assumed to be the controlling law in maritime cases of this nature—but it applies what has become by this time the very largely discredited doctrine of *lex loci delicti*, or the law of the place of the accident (in this case, the vessel where the accident occurred), for purposes of determining the governing law of damages. Whether or not the automatic application of *lex fori* was in any case appropriate, the fact remains that to apply *lex loci* is to run contrary to the dominant modern trend of applying the law of the country hav-

41. Petition of Chadade Steamship Co., 266 F. Supp. 517 (S.D. Fla. 1967). See *Remarks of Raymond Greene, SELECTED REMARKS FROM THE SEMINAR OF THE FEDERAL BAR ASSOCIATION ON "WHY LIMITATIONS OF LIABILITY IN ADMIRALTY,"* 28-34 (Apr. 28, 1967).

ing the most contacts with the case or, as it usually turns out, the law of the victim's domicile.⁴²

What the court seemed to be doing—however analytically founded its decision appears to be—was simply trying to avoid applying the outmoded United States limitations. Instead of finding privity or knowledge (which may well not have helped in this prime example of a one-ship corporation), the court settled on the application of Panamanian law which, unlike United States law, provides that the hull as well as the protection and indemnity ("P&I") insurance proceeds are to be added together to make up the value of the vessel and thus the shipowner's total limitation. The difference was between a limitation of some \$240,000 under United States law and a limitation of some \$6,500,000 under Panamanian law.

Obviously, the court is reaching for a much fairer and just solution on behalf of the victims of the disaster. But what is to happen in future cases where the limitation law of the flag country is even lower than that of the United States? Will this case serve as precedent for the application of that lower limit? Could this not mean that low limits of liability might become yet another significant attraction of registering foreign in those few still popular countries? What effect might this decision have in other conflict of laws contexts where courts now try to avoid *lex loci* in order to apply the contacts approach or *lex domicilii*? In short, could not the purist, who prefers the direct legislative route for reform, argue that these are the problems that inevitably arise when indirect and questionable means are used to achieve an end?

A petition for rehearing was filed in the Florida district court several months ago. It has not yet been acted on. Settlement efforts appear to be actively underway.

THE TORREY CANYON PROBLEM

Within the space of little more than one year, there were one major and two minor oil tanker disasters, which for the first time brought to the public's attention the myriad of pollution and pollution liability problems. On March 18, 1967, the Torrey Canyon, with 119,000 tons of crude oil aboard, broke apart off the coast of Britain. Several months later, the problem was brought closer to American homes when,

42. Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. Note, *A Proposal to Make Lex Domicilii the Required Choice of Law Under Article 28 of the Warsaw Convention*, 9 WM. & MARY L. REV. 1118 (1968); AIR L. & COM. 624 (1967).

within the space of only a few weeks, two oil tankers were involved in accidents which spilled tons of oil along the coastlines of both Puerto Rico and the Bahamas. Added to these incidents were scattered reports coming out of London suggesting that serious structural weaknesses had been found in a number of the recently built giant tankers and several that were still under construction. Since then, the dangers of oil pollution by means other than vessels have been brought to light by the very recent Santa Barbara off-shore drilling disaster.

But the Torrey Canyon disaster was the first to pose the problem in its most serious light. With oil slicks polluting both the British and French coastlines, coupled with preliminary damage estimates pegged at around \$18 million, governments began to mobilize their forces to find some solution. Since the United States Government had only recently reviewed completely its limitations laws in the Yarmouth Castle context, the review for Torrey Canyon was very short but with results even more discouraging than those which followed the Yarmouth Castle.

Because only property damage claims were involved in the Torrey Canyon disaster, the controlling law was only the 1851 statute. Under that statute, as was pointed out earlier, the shipowner can limit his liability to the value of the vessel (after the accident) which, in a case like the Torrey Canyon, means no liability at all. In other words, if the Torrey Canyon had broken apart off the Miami or Cape Cod coastlines, the resort, fishing, and wild life interests would have been left without any recovery unless, of course, the court were to find "privity or knowledge" or some other means to avoid applying the law's letter.

Shocking as this situation was, the Administration was in no position in 1967 to propose repealing or even amending the 1851 law as it applied to property damage. For the Administration's effort to repeal the personal injury and death limits had been rejected by the Congress only some six months earlier; and until some progress could be made on that more important front, it would have seemed almost callous to commit the Administration's political and personnel resources on the property damage front. Moreover, with the bill to repeal the personal injury and death limits still not having been resubmitted to or reintroduced in either the Senate or the House and with the suspicion that the Congress was not particularly anxious to receive this bill, the Administration was understandably reluctant to add to the woes by submitting a new bill directed at repealing or revising the property limits.

With nowhere else to turn, the Administration looked to the inter-

national scene with the hope that, since Great Britain and France suffered the greatest damage from the Torrey Canyon, they might now be spearheading a drive for some immediate reform. For even under the terms of the 1957 Brussels Convention, the Torrey Canyon's liability would still be limited only to some \$5 million—in the face of damages estimated at around \$18 million.

But if the United States were to turn to the international scene, there seemed to be no place to go except to the CMI. But by this time, there were already considerable misgivings within the Government as to whether the CMI could or should handle the task.

It was in the light of these circumstances that the United States early in May, 1967, informally circulated to many countries throughout the world a proposal looking toward the creation, within the International Maritime Consultative Organization (IMCO), of a permanent legal committee having a broad jurisdiction over all maritime legal issues. The model for such a committee was to be that of the Legal Committee of the International Civil Aviation Organization which, while not without its faults, at least served as a forum where the United States and other governments could play a direct role in fashioning the law.

Fortunately, other countries must have seen the same problem at the same time, because when the proposal was advanced formally at an IMCO Council Meeting, it was adopted—though not without some dissent and concern among a few countries about the role that the CMI would henceforth play in international maritime law.⁴³ It was then generally understood, however, that the Legal Committee would direct its efforts only to the Torrey Canyon problem and that it would work as closely as possible with the CMI. At the same time, all concerned also understood that there was nothing in the IMCO constitution that might prevent the Legal Committee in the future from turning its

43. One contemporaneous international development that helped to make the United States proposal more palatable than it might otherwise have been in the eyes of some of the major maritime countries dominant in the CMI was the resolution (TD/II/RES 14) adopted on March 27, 1968, by the United Nations Conference on Trade and Development (UNCTAD). This resolution requested the establishment of a Working Group on International Shipping Legislation to work together with the United Nations Commission on International Trade Law (UNCITRAL) to draft new conventions covering the commercial and economic aspects of international maritime law. Considering that this resolution was sponsored largely by the less-developed countries and that it would have contemplated still another potential competitor to the CMI, it is easy to see how an IMCO Legal Committee was the lesser of the evils.

attention to the other "private international law" issues that had traditionally been the province of the CMI. The stage was thus set for an interesting experiment.

It is always difficult to understand how international organizations work and what impels them to arrive at their decisions. Certainly, this was true of the first decision by the IMCO Legal Committee to set up two working groups—one directed to public and the other to those so-called private international law issues. Moreover, the two working groups were scheduled to meet separately rather than one following the other. To those familiar with the situation, it seemed that the specious public versus private law distinction was thus again being used to preserve the separation of functions and even possibly to lay the groundwork for two separate conventions—one through the IMCO directed at the public law issues and the other through the CMI and the Belgium Government directed at the private law issues.

Once the decision had been made, however, the only approach for the United States Government was to play as active a role as possible in both of the working groups. The first meeting of Working Group II (Private Law) took place in September, 1967, and it may be said that it was one of the most forward-looking international meetings ever to be held on limitations of liability. Easily the highest point of the meeting was the presentation by Lord Justice Devlin, a distinguished and scholarly British jurist, of a lengthy report which he had prepared on behalf of the CMI. Lord Devlin's report not only detailed the panoply of issues concerned with pollution, but it also suggested, even if only tentatively, solutions looking toward a convention that would contain high limits, absolute liability for the shipowner, no serious restrictions on the selection of the court where a claimant could bring his action, compulsory insurance requirements, and coverage against all pollution damage not just pollution by oil.⁴⁴ Moreover, the delegates who were present and particularly those who spoke for the CMI seemed to recognize that the single most important issue was that of insurance capacity and cost—what were the highest limits the insurance market could absorb and what the costs of such (or progressively lower) limits would be to shipowners. The CMI spokesmen even agreed informally that they would set up a group to

44. *Preliminary Report to an International Subcommittee, (Torrey Canyon)* of the CMI, IMCO Leg./WG(II). 11WP.1 (Sept. 8, 1967).

examine these insurance questions and have a study prepared for the next meeting.⁴⁵

Unfortunately, little progress seems to have been made since that September, 1967, meeting. The Devlin Report, despite its scholarly and forward-looking approach, seems to have disappeared apparently because it had been presented before being approved by the entire CMI and thus represented only Lord Devlin's views, not those of the CMI. The insurance study that was to have been prepared by the CMI has neither appeared nor is it any longer even mentioned. The direction that the draft seems now to be taking, after the second and third meetings of Working Group II which took place more than one year later in October, 1968, and January, 1969, is a convention limited in its coverage only to oil pollution.

It is interesting to speculate on what might have brought about the changes between September, 1967, and October, 1968. For one thing, of course, the disaster was no longer fresh in the public eye. Governments had to a certain extent satisfied the public outcry even if it was only by referring the matter to an international organization like IMCO and its Legal Committee.⁴⁶ Moreover, when the European countries began to examine the legal aspects closely, they realized that a new convention would necessarily mean some change in the limits under

45. *Report of the United States Delegation to the Meeting of the Second Working Group of the IMCO Legal Committee on Problems Relating to the Torrey Canyon Disaster*, London, Sept. 25-26, 1967, 7-8 (submitted to the Secretary of State, Oct. 13, 1967).

46. For a very readable account of the Torrey Canyon disaster, its details, and aftermath, see COWAN, *OIL AND WATER* (1968). See also the recent United Kingdom Publication *Coastal Pollution, Observations on the Report of the Select Committee on Science and Technology*, Cmnd. 3880 (Jan. 1969). For a legal analysis of the problem generally, see Sweeney, *Oil Pollution of the Oceans*, 37 *Fordham, L. Rev.* 155 (1968).

As for the legal aftermath in the United States, on September 19, 1967, Union Oil Company of California, which seems ultimately to have owned the Torrey Canyon, filed a limitation petition in the federal district court in New York. In an unpublished order handed down on September 22, 1967, and a published decision handed down on March 1, 1968, the district court held in sum that under United States law, Union Oil could limit its liability to a total of \$50 representing the value of one of the Torrey Canyon's lifeboats which was not destroyed. *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968). These orders are now under appeal. Meanwhile, the British Government, which attached a sister ship of the Torrey Canyon in Singapore, is pursuing independent actions in both Singapore and Bermuda. The French Government has started its own action in Rotterdam. Recent unconfirmed reports suggest that a settlement of some \$7 million might be worked out to cover the clean up costs of the French and British Governments. Ironically, Union Oil was the company whose offshore drilling resulted in the Santa Barbara disaster.

the 1957 Brussels Convention. Of course, the simplest and least obtrusive way of effecting this might well be through a new convention taking precedence over the 1957 Convention though limited only to pollution damage by oil. But even this would represent a rather major assault on the 1957 limits. Was it not likely, particularly with the United States Government playing a major role, that this assault on the 1957 limits would continue, indeed escalate, into other areas, not the least of which was personal injury and death?

It is impossible to assess what influence, if any, these second thoughts might have had on the policies of those governments, particularly European, who were active in the IMCO. What is possible to assess, however, is the reaction of the United States MLA both to the disaster and to its legal ramifications. For it is in the light of their reaction in this case that one might well question whether there can ever be a more public and less carrier-oriented approach within that organization or the CMI.

Following the September, 1967 meeting on private law issues, the CMI reverted to its customary practice and appointed a subcommittee to prepare a questionnaire for distribution to its twenty-nine association members. The questionnaire was distributed in late October and the United States MLA submitted its replies in February, 1968. For the first time, the United States Government not only received the questionnaire but decided, with a view toward maximum cooperation with the CMI, to submit its own replies. This was done in May, 1968.⁴⁷ A comparison of a few of the replies of the United States Government and those of the United States MLA should suffice to demonstrate the wide if not unabridgeable gap between the two institutions.

The questions follow with abbreviated replies:

	<i>USG</i>	<i>USMLA</i>
1. In the light of the Torrey Canyon incident, do you consider there is a need for change in the present state of the law?	Yes. "A pressing need."	No
2. If you favor a new convention, what should be its scope?	Very broad	No need for new convention.

⁴⁷ The Government's replies to the questionnaire have been reprinted in 62 *AMER. J. INT'L L.* 949 (1968).

	<i>USG</i>	<i>USMLA</i>
3. In a new convention, should there be liability without fault?	Yes	No
4. Should liability be limited?	No objection to limits provided they are high and coupled with a system of liability without fault.	Yes. Renewed support for Brussels 1957 Convention limits.
5. Do you consider it desirable and practical that the person liable should be required to provide security by insurance or otherwise?	It is "essential."	"Neither desirable nor practical."

Obviously, the significance of the gap between the two sets of replies was not lost on those who were following the situation within the Administration. For it meant that even if success were possible in the international treaty-making arena, it would be extremely doubtful whether, in the face of such deep differences, the resulting treaty could ever be ratified in this country. This fact was probably as obvious to those who were directing the work in the CMI as it was to those in the United States Government. In short, even if at some point there might have been some incentive among some members of the CMI to work with the United States Government toward a broad review of maritime limitation law, that incentive probably disappeared on reading the United States MLA's replies.

When this is added to the other factors which were discussed earlier, it becomes somewhat easier to understand why Lord Devlin's report largely disappeared, why a second meeting on the "private law" issues was delayed for more than one year, and why the direction that the draft now seems to be taking is very narrow.

Under these circumstances, it is hard to exude any great optimism for progress on the international scene. As for the domestic scene, even if it were possible, progress on property damage limitations still seems to be precluded until there is some progress on revising or repealing the limitations for personal injury and death. There is nothing at this point that would inspire any optimism on that front either. In short, all that can be said may already have been said by Gilmore and Black who in 1957 made the pithy observation 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 be one hundred and fifty years overdue.⁴⁸

48. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 677 (1957). There are, however, several movements in the property damage area that should be mentioned though for the moment they seem to be directed largely to the limited problem of suits by governments to collect clean-up costs resulting from pollution. First, late last year a group of seven major oil companies proposed a voluntary scheme contemplating a limit of liability of \$100 per ton not to exceed a total of \$10 million. Liability is based only on fault though with a presumption of negligence. The scheme is known formally as "Tanker Owners' Voluntary Agreement Concerning Liability For Oil Pollution" or simply "TOVALOP". It will not go into effect, however, until it has been adopted by companies aggregating at least 50% of the world's privately owned tanker tonnage. In any event, TOVALOP would not affect present limits as they apply to suits by private parties to collect damages. *N. Y. Times*, Nov. 7, 1968, at 93 col. 1. A final draft of the scheme, together with explanatory questions and answers, was publicly released on Dec. 16, 1968.

In this same limited area of the right of governments to collect clean-up costs for pollution damage, the past Administration introduced bills providing not only for absolute liability on the part of the tanker owner but also for the repeal of all limits of liability to the extent that they might affect this Government's right to recover its clean-up costs. See S.2760, 90th Cong. 1st Sess. (1967) and S.3206, 90th Cong., 2d Sess. (1968). Due to strong industry opposition, the bills did not pass. At the opening of the 91st Congress, two bills were introduced which eliminated absolute liability, based recovery on a presumption of negligence, and included a limitation. However, the limitation figures were higher than any previously advanced—\$450 per gross registered ton not to exceed a total of \$15 million. See S.7 and S.544, 91st Cong. 1st Sess. Following the Santa Barbara disaster, Secretary of Interior Hickel testified before the Senator Muskie's Public Works Committee on February 28, 1969. His testimony was sympathetic to restoring the absolute liability feature. A short time prior to the testimony, Secretary Hickel issued a regulation which, while limited in its application only to pollution damage from off-shore drilling, made liability both absolute and without limitation. Moreover, the regulation appears to permit suits by private parties for damages as well as suits by the Government for its clean-up costs. See 34 *Fed. Reg.* 2503-2504 (Feb. 21, 1969). It will be interesting to see whether—or, indeed, how far—the limited legal progress made as a consequence of the Santa Barbara off-shore drilling disaster will spill over into the more encrusted areas of ship-owner liability generally.

According to recent reports, Senator Muskie, who is spearheading the drive for reform, is prepared to support a very forward looking bill while recognizing that some compromise might later be necessary if any progress at all is to be made. The bill would require from all tanker owners adequate proof of financial responsibility and, at the same time, establish a system of unlimited and absolute liability. Were this bill to be passed, it would reflect the first real progress in U.S. history towards modernizing our maritime limitation laws. And though the bill covers only clean-up costs, it is at least a first step. Moreover, depending on how broadly "clean-up costs" are defined, this first step could well cover the major proportion of damages. Interestingly enough, this drive to modernize our maritime law is taking place in the Senate Public Works Committee.

CONCLUSION

It may well be true, as Gilmore and Black suggest, that the archaic limitations of maritime liability will not soon be changed in this country. Yet, this article would be less than complete in its task if it did not at least examine some possibilities for compromise short of complete repeal, yet much beyond the 1957 Convention limits. It should immediately be emphasized, however, that it will be impossible to work out any compromise without the active interest and assistance of either or both of the congressional committees concerned with these problems. For the executive branch does not have at its command the tools or the means to conduct the kind of sweeping and searching examination that is absolutely essential to any proper understanding of the problems involved—most important of all being the questions of insurance capacity and incremental costs. Nor is the international community about to undertake such an examination even assuming, which is doubtful, that it would have any better means or tools at its disposal than the executive branch of the United States Government. In short, if any progress is to be made in this area, it will come on the heels of detailed congressional hearings through which it could be hoped that the interests on all sides might learn enough to temper their views, soften their positions and possibly reach some resolution before another Yarmouth Castle or Torrey Canyon spreads its wave of tragedy.

It will be interesting to see whether a searching examination might disclose, for example, that unlimited liability is as possible from an insurance market capacity and cost point of view in maritime as it is in auto, bus, rail, and domestic air travel in this country. But assuming the inaccuracy of that conclusion is clearly demonstrated, as it well may be, there still remain at least two other avenues of approach.

The first is to extend the insurance requirements, spelled out in the financial responsibility provisions of the 1966 Yarmouth Castle legislation, so as to make them statutory limitations of liability for personal injury and death claims. In the event of a catastrophe, the total insurance held pursuant to those provisions would be available to pay such claims. On a vessel like the *United States* with, say, 2000 passenger accommodations, the total available fund and thus limitation would be some \$25 million. On a vessel with 1000 accommodations, the limitation fund would be some \$17.5 million. One significant factor favoring this general approach is that passenger vessels in the United States trade have been required since the legislation to insure up to

these amounts. Hence, it may be said that the carrying capacity of the insurance market is to this extent already proven.

Simple as it may seem on first glance, however, this approach is not without its problems. Probably the major problem is that the insurance policies covering liability up to the required amounts were negotiated in the context of the very low limitations that exist today. Were the 1966 required amounts themselves to become the limits, it is inevitable that premiums on the policies would be higher—though how much higher no one knows at this time. Another problem is that of the owner of a fleet of vessels for whom the insurance requirements are today relaxed depending on how many vessels there are in the fleet. Were the requirements themselves to become the limits, there could be no similar relaxation—though here again it is difficult to tell what effect if any this might have on premiums.

Nevertheless, the fact that there may be problems to this approach—as there are to any other—should not preclude it as a fruitful starting point for opening an examination. The insurance requirements are part of our law today, the insurance market has presumably absorbed them, and, were they to become the limits of liability, they would probably prove adequate in most if not all cases. Certainly they would have been far superior in the Yarmouth Castle case than those we have now.

Still another possible approach is to adopt some form of the per person limitation much like the present air law system under the \$75,000 absolute liability scheme of the interim agreement to the Warsaw Convention. Depending on what the insurance statistics reveal, the limitation could be pegged somewhere between \$100,000 to \$150,000 per person and could include, like its aviation counterpart, a system of absolute liability so that passengers or their lawyers need not spend years litigating obtuse issues of negligence or privity or knowledge. In return for such a system, the industry could be guaranteed in the legislation that the limit adopted would be the only and exclusive limit, and no recovery could exceed that amount notwithstanding an owner's privity or knowledge, gross negligence, unseaworthiness of the vessel, or similar stretchable concepts of a largely bygone era. If further industry protection is needed, the legislation could also contain a provision to the effect that damages in every case would be determined and calculated in accordance with the law of a victim's domicile. This would preclude forum shopping in American and particularly in New York courts by victims who, whether the suit be against an American or a foreign vessel owner, can generally expect a much more

liberal recovery in New York than they would receive if the damage laws of their own country were to apply.

Finally, it would even be possible to work out some combination of both approaches. For example, the per person limitation could be pegged at \$125,000, but in no event could the shipowner's total liability exceed some figure which, in the case of a vessel like the *United States*, could be the same \$25 million discussed in the first approach. In the event of a major catastrophe involving total recoveries in excess of \$25 million, passenger recoveries would be reduced on a pro rata basis. Adoption of this type of combined limit system (which but for the price tag parallels the combined approach of the 1957 and 1961 Brussels' Conventions) would seem to offer the industry several advantages. Most important, it would establish certain and definite limitations for the shipowner and his insurer not only in the case of individual passenger accidents but also in the case of major catastrophes. This certainty—which has long been absent in marine insurance—should readily appeal to both shipowners and their insurers. As for the passenger, provided the limits are high, he fares well in the event of a minor accident, less well in the event of a major catastrophe, but still substantially better than he has ever fared under any American or international law. In short, it would be a compromise, the adoption of which might be dictated only after it is demonstrated that neither unlimited liability nor the two approaches separately would be economically feasible without substantially increased public subsidy.

Turning if only briefly to the *Torrey Canyon* type of damage, similar compromise solutions should likewise be possible. One solution that comes quickly to mind is simply to adopt the limit of \$207 per ton in the Brussels 1957 Convention but direct it exclusively to property damage. It could as well be some higher figure or even some lower figure though it would, in any case, need to be substantially higher than the \$67 per ton figure that yielded the \$5 million limitation in the *Torrey Canyon* case. What the precise figure is must depend, again, on first resolving the two vital issues of insurance capacity and cost.

With a myriad of fruitful avenues to explore, it seems clear that a serious and comprehensive examination by the Congress should be able to produce a rational and equitable system for maritime liability. Realism and openmindedness—characteristics largely lacking on all sides in the past—will be essential. But with these, and with a determined Congressional Committee that hears public as well as industry spokesmen, Gilmore and Black may yet be proven wrong.