Shipowner's Limitation of Liability in Canada and the United States: Problematic Aspects Under Private International Law

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Since the signing of the *Limitation of Liability Convention* in 1924 and the more recent similar *Convention* adopted in Brussels in 1957,[1] most shipowning nations have, in one form or another, enacted legislation which enables a shipowner whose vessel is involved in a collision to limit his liability immediately after the accident occurs. Although Canada has neither ratified nor acceded to the *Conventions*, it has adopted its principles and has given them the force of law in the *Canada Shipping Act*.[2] The United States, which is not a party to the *Conventions* either, has permitted the limitation of liability to shipowners since 1851 through its *Limitation of Shipowners' Liability Act*.[3]

Where no problems of *forum non conveniens* arise, a Canadian or American claimant may attempt to have his action tried in the court where he can expect to receive the most favourable verdict, *i.e.*, engage in "forum shopping". When the suit is brought outside the country in which the tort occurred or when the collision occurred on the high seas,[4] there is a problem in determining which limitation rules govern: those of the *lex fori*, those of the *lex loci delicti commissi* or those of the ship's flag?

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[1] *International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels*, 25 August 1924, and *International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Vessels*, 10 October 1957, in Comité Maritime International, *Admiralty Conventions on Maritime Law*, 19 and 67.

[2] R.S.C. 1970, c. S-9, ss. 647-53.

[3] *Limitation of Shipowners' Liability Act of 3 Mar. 1851*, ch. 43, § 3, 9 Stat. 635, 46 U.S.C. § 183 *et seq.* (1976).

[4] See, *e.g.*, *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 3(1) (a).

Canadian[5] and American[6] courts have had to deal with precisely this problem in recent cases which arose from the same set of facts. The Steelton, a Great Lakes steamship owned by the plaintiff, the Bethlehem Steel Corporation, collided with a bridge spanning the Welland Canal, which lies wholly within the territorial boundaries of Canada. The bridge, owned by the St Lawrence Seaway Authority, was extensively damaged and the canal was rendered completely impassable to marine traffic for two weeks. Bethlehem Steel filed an action in the Federal Court of Canada, Trial Division, for limitation of liability under the *Canada Shipping Act*, naming as defendants the Seaway Authority "and all other persons having claims against the plaintiff, its ship *Steelton* or the fund hereby to be created".[7] The Federal Court entered an order limiting liability.

At the same time a number of actions asserting claims arising out of the Steelton incident were brought against Bethlehem Steel in the United States District Court. Bethlehem Steel then filed a petition in that court for limitation of liability under the American *Limitation Act* while claiming the benefit of the smaller limitation fund provided by the *Canada Shipping Act*. The District Court ordered limitation but only on the basis of the American law.

In this comment, the two *Steelton* judgments will be compared and their consistency with previously enunciated law will be examined. Possibilities for reform in the area of limitation of shipowner's liability will also be suggested.

I. The basic of the dilemma — the different limits to liability imposed by Canadian and American statutes

Under s. 647(2) of the *Canada Shipping Act* a vessel owner may limit his liability according to the size of his ship. If an owner can discharge the onus that he was neither at fault nor in privity with the operator's negligence, he will be entitled to the benefit of the limitation.

The section sets up two limitation sums.[8] The first involves loss of life, either alone or together with property damage, and the limitation is set at 3,100 gold francs per ton. The second, which is the one relevant to the present discussion, involves cases of loss or damage to property alone and the limitation is set at 1,000 gold francs per ton.[8a] The Canadian dollar value

[5] *Bethlehem Steel Corp.* v. *St Lawrence Seaway Authority* [1978] 1 F.C. 464, [1977] 2 A.M.C. 2240 (T.D.) *per* Addy J. [hereinafter *Steelton (No. 1)*, cited to F.C.].

[6] *In the Matter of the Complaint of the Bethlehem Steel Corp.* 435 F. Supp. 944, [1977] 2 A.M.C. 2203 (N.D. Ohio 1976); *aff'd* 631 F. 2d 441, [1980] 2 A.M.C. 2122 (6th Cir. 1980); *cert. denied* 101 S. Ct 1370 (1980) [hereinafter *Steelton (No. 2)*].

[7] *Steelton (No. 1)*, *supra*, note 5, 464.

[8] For an excellent discussion of s. 647(2), see E. Gold, *Canadian Admiralty Law* (1980), chap. IX, 4-7.

[8a] R.S.C 1970, c. S-9, s. 647(2) (f).

is obtained by a conversion formula established by regulation under the *Canada Shipping Act*.[9] Professor E. Gold[10] estimates that at 1980 rates, the limitation of liability for loss or damage to property alone amounts to approximately $100 per ton. Thus, the size of the vessel is an important factor.

The American law under the *Limitation Act* is relatively simple. The property damage claimants are still tied to the ancient formula of limiting recovery to the value of the vessel and the pending freight.[11] Gilmore and Black succinctly describe the dilemma:

> [U]nder varying circumstances, American law or foreign law might turn out to be more favorable to one party or the other.... Frequently therefore in limitation proceedings in American courts between foreign litigants or arising out of a tort committed within the territorial waters of another sovereign, either the claimants or the petitioning shipowner would find it advantageous to argue for the application of foreign rather than American limitation law.[12]

A simple illustration may make the point more clearly. A two thousand ton American-owned vessel is involved in a collision in Canadian waters or on the high seas and Canada is the ship's flag.[13] The claimant brings suit in an American court. Under the *Canada Shipping Act*, the limitation fund will be roughly $200,000. Depending upon the value of the vessel after the collision, the American fund may be less than or greater than the fund under the Canadian rules. If the value of the vessel is less than $200,000, the owner will argue that the American rules apply; if the vessel is worth more than $200,000, he will seek to have the Canadian limitation rules applied. Hence, the variance between limitations funds in Canada and the United States leads to "forum shopping" by claimants of shipowners.

II. How Canadian and American courts have categorized limitation of liability rules

Once the forum has been selected on the basis of its potential advantage with respect to the facts, it is nonetheless possible that the substantive law of that forum might not be held to govern the case. This is the procedural/substantive dilemma in the categorization of limitation of liability rules.

> One of the eternal verities of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy.

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[9] C.R.C. 1978, c. 1426.

[10] Gold, *supra*, note 8, chap. IX, 8.

[11] Volk & Cobbs, *Limitation of Liability* (1977) 51 Tul. L. Rev. 953, 984.

[12] G. Gilmore & C. Black, *The Law of Admiralty*, 2d ed. (1975), 940.

[13] *Oceanic Steam Navigation Co.* v. *Mellor (The Titanic)* 233 U.S. 718, 731-4 (1914) *per* Holmes J. holding that where collisions occur on the high seas the substantive law of the ship's flag nation applies.

> The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the *lex fori*.[14]

There appears to be little doubt that this is also the rule in the civil law of Québec.

> Il existe un très large accord tant dans le système de common law que dans le droit civil pour soumettre la procédure à la loi du tribunal saisi du litige. Et c'est là une règle bien compréhensible et tout à fait justifiable puisqu'elle met en cause l'organisation d'un service public, l'administration de la justice.[15]

Thus, whether such a problem arises in Québec or in any of the common law jurisdictions of Canada,[15a] the solution to this aspect of the problem should be the same.

This problem was dealt with by both the Canadian and American courts in the *Steelton* cases.[16] Bethlehem Steel, as owner of the vessel, sought to limit its liability under the *Canada Shipping Act* in both the Federal Court of Canada and the United States District Court. In the latter case the plaintiff argued that because s. 647(2) of the *Canada Shipping Act* is substantive law, it should also apply in determining the limitation fund for the claims against Bethlehem Steel in the American court. The obvious purpose of this argument was to obtain the benefit of the smaller limitation fund provided by the *Canada Shipping Act*.[17]

Addy J. of the Federal Court of Canada did not have to deal with this issue directly because Canada was both the *lex loci delicti commissi* and the *lex fori* for the action before him. Thus, the limitation of liability was properly determined by the *Canada Shipping Act*. However, Addy J. did make certain interesting statements in relation to a shipowner's right to claim against his own limitation fund amounts of damages which he may have been called upon to pay in another jurisdiction. He stated that s. 648(4) of the *Canada Shipping Act* recognized this principle, but added:

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[14] G. Cheshire, *Private International Law*, 10th ed. (1979), 691.

[15] E. Groffier, *Précis de droit international privé québécois* (1980), 101.

[15a] Generally, admiralty matters fall within the jurisdiction of the Federal Court: *Federal Court Act*, R.S.C. 1970 (Supp. II), c. 10, ss. 2, 3, 22, 42, 43. However, some doubt arises as to whether provincial (incorporated by reference) or some specie of federal conflict rules should be applied by this forum: see *Tropwood A.G.* v. *Sivaco Wire and Nail Co.* [1979] 2 S.C.R. 157, 166 *per* Laskin C.J.C., Evans, *Federal Jurisdiction — A Lamentable Situation* (1981) 59 Can. Bar Rev. 124, 137 and Laskin & Sharpe, *Constricting Federal Court Jurisdiction: A Comment on Fuller Construction* (1980) 30 U.T.L.J. 283, 300. Nevertheless, it would appear that the procedural/substantive dilemma remains unresolved whichever rules are applied.

[16] *Steelton (No. 1)*, *supra*, note 5, and *Steelton (No. 2)*, *supra*, note 6.

[17] Under the *Canada Shipping Act*, R.S.C. 1970, c. S-9, s. 647(2) the liability of Bethlehem Steel would have been limited to U.S. $691,000 rather than U.S. $850,000. See *Steelton (No. 2)*, *supra*, note 6, 631 F. 2d 441, 443.

> It is nevertheless of prime importance to bear in mind that where the tort on which the claims are founded has been committed in Canada, this Court must not allow any credit against the limitation fund here for a claim declared valid by a foreign court unless that claim would have been recognized as valid at law in Canada; it would be nothing short of ludicrous to hold otherwise, for Canadian claimants would then be obliged to suffer a reduction in the amount to which they would otherwise have been entitled to receive from the fund merely because a claimant has chosen to appeal to a foreign jurisdiction rather than to a Canadian court where his claim would have failed.[18]

It is implicit in this passage that Addy J. found the *lex loci delicti commissi* principle to be applicable.

Krupansky J. concluded that ss. 647(2)(e) and (f) of the *Canada* issue of categorizing the limitation of liability sections of the *Canada Shipping Act* and the *Limitation Act* as procedural or substantive law in *Steelton (No. 2)*[19] in order to determine the *quantum* of the limitation fund: would it be the larger fund under the American law or the smaller fund under Canadian law?

Krupansky J. agreed with Addy J. that:

> [I]t is a well-settled principle that "in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred", the *lex loci delicti commissi*.[20]

The right to a remedy in tort is clearly governed by the substantive law of the place where the tort occurred.[21] But at the same time there is a generally recognized conflict of laws principle that the *lex fori* will apply its own procedural laws in all cases:

> It is equally well-established that even "where the rights of the parties are grounded upon the law of jurisdictions other than the forum... the forum will apply the foreign substantive law, but will follow its own rules of procedure".[22]

In considering whether or not the limitation statutes in question were either substantive or procedural in order to determine the applicable law, Krupansky J. undertook a careful analysis of the United States Supreme Court decision in *Black Diamond S.C. Corp.* v. *Robert Stewart & Sons (Norwalk Victory)*:[23]

> Prior to the decision of the Supreme Court of the United States in *Black Diamond*... it appeared to be settled that statutes limiting the liability of vessel owners in maritime collision actions were procedural and the law of the forum controlled. Thereafter, the Supreme Court, in *Black Diamond*, modified its former pronouncements, announcing

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[18] *Steelton (No. 1)*, *supra*, note 5, 476.

[19] *Supra*, note 6.

[20] *Ibid.*, 435 F. Supp. 944, 946.

[21] Biezup & Abeel, *The Limitation Fund and its Distribution* (1979) 53 Tul. L. Rev. 1185, 1195.

[22] *Supra*, note 20.

[23] 336 U.S. 386 (1949).

> therein, that if the foreign limitation *"attaches"* to the right created under the foreign law, then the foreign limitation governs, notwithstanding the existing remedies of the forum.[24]

Krupansky J. thus interpreted the Supreme Court's decision as one directing the courts to make a preliminary inquiry into the substantive or procedural nature of the foreign limitation of liability rule.

Krupansky J. concluded that ss. 647(2)(e) and (f) of the *Canada Shipping Act* merely quantify the limit of the fund.

> Applying, by analogy, the language of the Supreme Court in *Black Diamond* to the *Canadian Shipping Act*, the Act "merely provides procedural machinery by which claims otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund".[25]

In this case, the law of the forum — the American *Limitation Act* — was applied.

The *Black Diamond* decision, in which Frankfurter J. delivered the judgment for a bare majority of the Court, has been severely criticised as "baffling".[26] Commentators have stated that the decision "hopelessly confused the choice-of-law rules to be applied in *Limitation Act* proceedings".[27] The case has therefore cast some doubt on the continuing validity of *The Titanic*[28] which until 1949 had been accepted as stating the law for nearly forty years. The result of *The Titanic* was that litigants who chose to sue the owners of a vessel in the United States were limited in their recovery by the American law of limitation.

The suggestion has been made that the *Black Diamond* decision, "[i]n requiring courts to determine whether a foreign limitation statute is substantive or procedural... opened the door to illogical and inconsistent decisions".[29] Three cases illustrate the confusion which arose from various applications of *Black Diamond*. In *Petition of Chadade Steamship Co. (Yarmouth Castle)*,[30] the Court found that the amount of the limitation fund was a substantive matter governed by the laws of Panama, the ship's flag. The larger fund was created by interpreting the relevant sections of the Panamanian *Commercial Code* as substantive law.

In *Ta Chi Navigation (Panama) Corp.* v. *M.V. Eurypylus*,[31] the Court

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[24] *Supra*, note 20, 946-7.
[25] *Ibid.*, 948-9.
[26] Gilmore & Black, *supra*, note 12, 942.
[27] Volk & Cobbs, *supra*, note 11, 981-2.
[28] *Supra*, note 13.
[29] Volk & Cobbs, *supra*, note 11, 982.
[30] *Petition of Chadale Steamship Co. (Yarmouth Castle)* 266 F. Supp. 517, [1967] 2 A.M.C. 1843 (S.D. Fla. 1967).
[31] *Complaint of Ta Chi Navigation (Panama) Corp. (The Eurypylus)* 416 F. Supp. 371, [1976] 2 A.M.C. 1895 (S.D.N.Y. 1976).

rejected the above position, and the limitation statute was categorized as procedural. The conclusion that can be drawn from these two cases is that a court, citing *Black Diamond*, may justify a determination of a limitation statute as either substantive or procedural[33] on the basis of equity.[34]

An even more surprising result was reached in a decision of the Second Circuit in 1954 in *The Western Farmer*.[35] Learned Hand J. held that:

> [i]t is necessary to say no more than that *The Titanic* finally settled it for us that such statutes are part of the remedy, and that the law of the forum applied. What the respondent finds in *Black Diamond*... that qualifies this, we have been unable to discover.[36]

Learned Hand J. in effect overruled the precedent established by the Supreme Court in *Black Diamond*; at the very least, Learned Hand J.'s reasoning is illustrative of a very liberal attitude towards *stare decisis*.

It should be noted that in affirming Krupansky J.'s decision in *Steelton (No. 2)* Pierce Lively J. also attempted to make sense of the conflicting cases:

> It is not surprising that the cases have produced different results. *The Titanic* concerned a disaster on the high seas. [*Black Diamond*], on the other hand, dealt with a collision in Belgian territorial waters. One case involved great loss of life, the other only property damage. In some cases the parties seeking to limit their liability have been insurers rather than shipowners. See [*The Eurypylus*].... In a field as complex as maritime tort law the choice-of-law problems are difficult, and the circumstances of each case determine the ultimate choices which the courts make.[37]

It is submitted that Pierce Lively J.'s explanation is an accurate statement of the law. It should be added that the present position fosters uncertainty. The issue of "forum shopping" remains unresolved.

III. The solution to the substantive/procedural dilemma

The law in this area is clearly unsettled. The law in Québec also appears to be in an uncertain state.

> Bien que l'on admette que la qualification de la procédure appartienne à la loi québécoise... on ne s'entend pas toujours pour définir ce qui relève du fond du litige, par exemple, le droit d'action, la prescription d'une action, les modes de preuve d'un acte juridique ou la validité de la clause compromissoire.[38]

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[32] Volk & Cobbs, *supra*, note 11, 983. "After a careful examination of *The Titanic*, *Black Diamond* and *Chadade*, the court refused to abandon the rule of *The Titanic*, holding reexamination of that case to be a legislative rather than a judicial prerogative".

[33] Gilmore & Black, *supra*, note 12, 943-4, suggest that Mr Justice Mehrtens used the substantive/proeedural distinction to do justice in the *Yarmouth Castle* case.

[34] Volk & Cobbs, *supra*, note 11, 982.

[35] *Kloeckner Reederei und Kohlenhandel, G.M.B.H.* v. *A/S Hakedal (The Western Farmer)* 210 F. 2d 754, [1954] 1 A.M.C. 643 (2d Cir. 1954); leave to appeal refused 348 U.S. 801 (1954).

[36] *Ibid.*, 757.

[37] *Steelton (No. 2)*, *supra*, note 6, 631 F. 2d 441, 445.

[38] Groffier, *supra*, note 15, 101.

However, there are several options available to resolve the outstanding issues. First, the basic rule of private international law could be emphasized: procedure is governed by the *lex fori* and limitation statutes are procedural. Cheshire writes:

> A rule as to the measure of damages in the narrow sense is a mere rule of calculation that operates only after the injury or loss in question has been found to be free from vice or remoteness. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be tort or breach of contract, for which his liability has already been determined by the proper law. A plaintiff who seeks to recover compensation in England in respect of an obligation that is governed as to substance by a foreign law has already acquired a right the nature and extent of which have been finally determined.[39]

It is submitted that the United States Supreme Court in *Black Diamond* erred by focusing almost exclusively on the shipowner's right to limit his liability. Perhaps the result might have been determined more precisely had the Court also emphasized that limitation statutes restrict the quantum of damages to be received by claimants and hence affect their remedy for breaches of pre-existing rights. Remedies are generally considered to form part of the procedural law.[40] Admittedly, this solution does not alleviate the "forum shopping" problem.

Secondly, the argument that limitation rules are substantive has some validity. If one characterizes theses rules as creating a right in the shipowner to limit his liability as the Court did in *Black Diamond*, it may be argued that such limitation rules are, to a certain degree, aimed at protecting shipowners.

The latter solution implies that the limitation statute of the ship's flag ought to govern. Such a result has been suggested in *Yarmouth Castle*.[41] The *lex loci delicti commissi* would govern the parties' rights, the *lex fori* would govern basic procedural matters, and the ship's flag's rules of limitation would govern the extent of the shipowner's liability. This suggests that the limitation rights attach to the *personam* of the ship. This option would eliminate the procedural/substantive dillemma and the issue of "forum shopping". However, it would not appear to eliminate the isolated American adherence to "the ancient formula of limiting recovery to the value of the vessel and the pending freight".[42] Both claimants and shipowners are disadvantaged by the lack of uniformity between the United States and most other maritime nations.

When the vessel has been lost, American law is most favourable to the shipowner concerned to protect himself against property claims. When the vessel survives and is worth more than the limitation ceiling set by the

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[39] Cheshire, *supra*, note 14, 711.
[40] *Ibid.*, 691.
[41] *Yarmouth Castle*, *supra*, note 30.
[42] Volk & Cobbs, *supra*, note 11, 984.

Brussels *Convention* or the foreign law, American law is also to the advantage of the shipowner.[43]

The third option in resolving the problem is simply that the United States could accede to the *Convention on Limitation of Liability* recently adopted by the Intergovernmental Maritime Consultative Organization (IMCO).[44] By this approach "the United States could align itself with other maritime nations by subscribing to a uniform limitation law".[45] The attendant consequences would be to provide an equitable fund for claimants, elimination of the *Black Diamond* problem of determining the substantive or procedural character of limitation statutes and eliminate the issue of "forum shopping". The embodiment of IMCO's principles (the Canadian approach) into the American *Limitation Act* would serve equally as well.

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[43] Gilmore & Black, *supra*, note 12, 940, cite as a dramatic example *M/S Bremen and Unterweiser Reederei, G.M.B.H.* v. *Zapata Off-Shore Co.* 407 U.S. 1 (1972), [1972] 2 A.M.C. 1407, in which the limitation fund under American law was $1,390,000 while the English limitation fund would have been $80,000.

[44] Intergovernmental Maritime Consultative Organization, *Convention on Limitation of Liability for Maritime Claims* (1976). This convention represents the most recent attempt, by the United Nations, to achieve consensus with respect to the limitation of liability in maritime law.

[45] Volk & Cobbs, *supra*, note 11, 985.