

The Limitation of Liability Act and DIVE BOAT Act's Impacts on Covered Small Passenger Vessels: Considerations from Tort Law and Other Protected Industries

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I. INTRODUCTION

The Limitation of Liability Act (LOLA) of 1851 substantially limits liability for seagoing, lake, and river vessels by capping their liability to the vessel's value and its pending freight after an accident for claims like personal injury, death, and collision damage.¹ An owner's liability is fixed, and if "the voyage ends with a total loss of the vessel and the pending freight, the limitation fund may be zero dollars."² A shipowner's liability is limited only if the owner did not have "privity or knowledge" of the negligence that caused the accident.³ For example, the 1967 sinking of the *Torrey Canyon* spilled nearly 120,000 tons of crude oil into the English Channel and spurred recovery claims totaling millions of dollars.⁴ Under the LOLA, the boat's owner successfully limited liability to the value of the only salvaged item: a \$50 life-boat.⁵ Only seagoing vessels, explicitly excluding pleasure yachts, tugs, towboats, towing vessels, and barges, face increased liability based on the ship's carrying capacity for personal injury or death claims.⁶ Aside from these financial liability limitations, the LOLA also impacts litigation through look-back periods⁷ and concursus.⁸ The LOLA prohibits vessels from contracting to limit the private statute of limitations (look-backs) for giving notice or bringing a civil actions to less than six months or one year, respectively.⁹ It allows shipowners to initiate concursus, "consolidat[ing] all actions which may be pending against the owner to a single case."¹⁰

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¹ Exoneration and Limitation of Liability Act, 46 U.S.C. §§ 30522, 30523.

² Dominic Dewey, *Is Limitation of Liability an Illusion? Examining the Numbers and Current Trends of the Limitation Act Today*, 23 LOY. MAR. L.J. 59, 69 (2024).

³ *Norwich Co. v. Wright*, 80 U.S. 104, 120–22 (1871).

⁴ *In re Barracuda Tanker Corp.*, 281 F.Supp. 228, 229 (S.D.N.Y. 1968).

⁵ *Id.* at 232.

⁶ 46 U.S.C. § 30526(a).

⁷ *Id.* at §30526(b).

⁸ Dewey, *supra* note 2, at 63.

⁹ 46 U.S.C. § 30526.

¹⁰ Dewey, *supra* note 2, at 63; *see also* *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1036 (11th Cir. 1996).

In 2019, the *Conception* boat fire killed thirty-four people in one of the deadliest recent maritime disasters in the United States.¹¹ The *Conception* was anchored overnight when, around 3:00 AM, a crewmember discovered that a large fire had broken out.¹² The fire blocked five crewmembers from accessing the bunkroom where thirty-three passengers and one crewmember slept below deck.¹³ The National Transportation Safety Board (NTSB) investigation concluded that the operator’s failure to properly oversee its crewmembers and ship by failing to follow requirements for roving patrols at night was responsible for the accident.¹⁴ The NTSB recommended new requirements for vessels with overnight accommodations (also called liveaboards) to have smoke detectors and to strengthen the enforcement of existing safety requirements.¹⁵ The *Conception*’s owners could not be held substantially financially liable for the 34 deaths because the *Conception* had no value after it was destroyed by the fire.¹⁶

In response to the *Conception* fire, Congress passed the Small Passenger Vessel Liability Fairness Act (SPVLFA) of 2021¹⁷ to narrow the liability protections afforded to “covered small passenger vessels” like the *Conception*.¹⁸ The SPVLFA amended the 1851 Act to completely exclude “covered small passenger vessels,” including small vessels weighing over 100 gross tons carrying fewer than forty-nine passengers on overnight domestic voyages (liveaboards) or fewer than 150 passengers on non-overnight domestic voyages (day-boats) from the LOLA’s financial liability limits.¹⁹ The amendment also extended the amount of time that claimants against “covered small passenger vessels” could give notice or bring a civil action to two years.²⁰

However, day-boat operators now complain that the increased liability drastically raised their insurance rates and harmed their businesses. Within weeks of the SPVLFA’s enactment, a day-boat operator in Hawaii reported a \$40,000 increase in their insurance premiums; another such operator in West Palm Beach, Florida reported a \$160,000 increase in their store and vessel liability coverage.²¹ Some operators report that their insurance spiked by 2–5

¹¹ *California Boat Captain Jailed for Fire That Killed 34*, BBC (May 2, 2024), <https://perma.cc/KD47-RASY>; *Captain Sentenced to 4 Years in Fiery Deaths of 34 Aboard Scuba Boat in California*, ASSOCIATED PRESS (May 3, 2024), <https://perma.cc/25YM-ZLB8>.

¹² N.T.S.B., FIRE ABOARD SMALL PASSENGER VESSEL CONCEPTION PLATTS HARBOR, CHANNEL ISLANDS NATIONAL PARK, SANTA CRUZ ISLAND, 21.5 MILES SOUTH-SOUTHWEST OF SANTA BARBARA, CALIFORNIA, SEPTEMBER 2, 2019, 10-11 (2020).

¹³ *Id.* at 15.

¹⁴ *Id.* at vi.

¹⁵ *Id.* at viii-xi.

¹⁶ Press Release, Salud Carbajal, U.S. Congressman, Maritime Liability Reforms Inspired by Conception Boat Fire on Track to Become Law This Month (December 8, 2022), <https://perma.cc/P9Z5-9ARB>.

¹⁷ James M. Inhofe Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, §§ 11501—11507 (2022).

¹⁸ Maritime Liability Reforms Inspired by Conception Boat Fire on Track to Become Law This Month, *supra* note 16.

¹⁹ Exonerated and Limitation of Liability Act, 46 U.S.C. §§ 30501, 30523.

²⁰ *Id.* at § 30526.

²¹ *The DIVE BOAT Act: FAQs*, DIVING EQUIP. & MKTG. ASS’N, <https://perma.cc/A7UN-HM2U>.

times since 2022.²² In September of 2022, dive-boat operators and the Diving Equipment and Marketing Association (DEMA) wrote to Congress in favor of the “Don’t Imperil Vessel Employees, Business Owners, and Tourism Act” (DIVE BOAT Act).²³ The DIVE BOAT Act would pull back some of the SPVLFA reforms by reinstating day-boats (but not liveaboards) to their previous protections including liability limits and look-backs.²⁴ It would also reduce the look-backs for small liveaboards to a one-year minimum for claimants to provide notice and bring an action.²⁵ The DEMA demonstrated continued interest in passing the DIVE BOAT Act in 2025.²⁶

The question of whether the LOLA protection for vessels like the *Conception* is warranted can be analyzed through the lens of its relationship with tort law and comparisons to other protected industries like nuclear power and railroads. Section II will describe the background and history of the LOLA, Section III will analyze the LOLA’s relationship with tort law, and Section IV will compare considerations important in other protected industries with the considerations for the LOLA.

II. HISTORY AND CONTROVERSY: THE LOLA

Congress passed the LOLA in 1851 in response to “major concerns that the American shipping industry was at a competitive disadvantage compared to other major maritime actors (England specifically).”²⁷ The U.S. shipping industry was declining as unemployed marine workers, though willing to go to sea, lacked the capital needed to build ships.²⁸ Meanwhile, people with the capital to afford ships “lacked the incentive to invest in voyages due to the risk of the many perils of the sea, the inability of the owner to monitor or control the actions of the captain and crew, and the potential indefinite damages should a loss occur.”²⁹ To remedy these misaligned incentives for an important industry, “Congress enacted the Limitation of Shipowners Liability Act, which aimed to induce investment in the shipping industry and promote commerce by allowing shipowners to limit their liability following a loss to their interests in that voyage.”³⁰ The idea underlying the LOLA and other similar

²² *The DIVE BOAT Act: Please Ask Your Representatives for Their Support!*, DIVING EQUIP. AND MKTG. ASS’N, <https://perma.cc/H72T-4DTS>.

²³ Letter from Diving Equip. & Mktg. Ass’n, to Chairman Sam Graves, Chairwoman Maria Cantwell and Ranking Members Cruz and Larsen, House Committee on Transportation & Infrastructure (Sept. 24, 2024).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *New Year – New Congress and Time to Ask New Leaders to Support the DIVE BOAT Act*, DIVING EQUIP. & MKTG. ASS’N, <https://www.dema.org/news/694835/URGENT-ALERT-New-Year-New-Congress-and-Time-to-Ask-New-Leaders-to-Support-The-DIVE-BOAT-Act.htm>.

²⁷ Dewey, *supra* note 2, at 62.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 62-63.

mechanisms is that “the vessel itself is liable for torts and contracts, even though its owner may not be.”³¹ To achieve these ends, the Court demanded that the LOLA was to be liberally construed.³²

Advocates for the LOLA’s protections are concerned that repealing protection would “make American law radically different from that of its trading partners and be contrary to modern international law,” which could incentivize shipowners to shift litigation and business to countries with more liability protection.³³ In 1979, researchers argued that “marine liability policies are written on the general premise that shipowners have the right to limit their liability. . . it was estimated that liability insurance premiums might increase twenty-five to thirty percent” if the right to limit liability was taken away from shipowners.³⁴

Advocates in favor of the LOLA’s protections argue that its protections have a built-in mechanism to prevent over-protecting ships. As the 5th Circuit notes, “[t]o obtain the benefit of the Act the [ship’s] owners must establish a right to it. That involves the always difficult—and oftentimes impossible—burden of establishing that the casualty occurred without the owner’s privity and fault, including prevoyage unseaworthiness. The books are filled with hundreds of cases denying limitation of liability.”³⁵ Though the 5th Circuit is correct that limitation is not granted easily, courts continue to grant it regularly. There is a gradual trend of courts increasingly allowing shipowners to limit liability since 1976.³⁶ Between 1961 and 1976, limitation was only granted in 14 out of 57 cases, but from 1976 to 1982, limitation was granted in 11 out of 28 cases.³⁷ Between 1982 and 1996, limitation was granted 17 out of 37 times it was invoked.³⁸

Aside from the *Conception* boat fire, the LOLA’s protections were invoked in famous crashes like the *Titanic*, *Deepwater Horizon*, and the *MV Dali* (involved in the collapse of the Francis Scott Key Bridge in 2024).³⁹ In 2010, the House passed a bill to repeal the LOLA’s core limitation provisions, but the bill stalled in committee in the Senate.⁴⁰

Oppositely, some courts have criticized the LOLA as “hopelessly anachronistic” because its liability limits were designed for an era before

³¹ 2 BENEDICT ON ADMIRALTY, CLAIMS AGAINST THE VESSEL § 22, at 2-10.

³² *Larsen v. Northland Transp. Co.*, 292 U.S. 20, 24 (1934).

³³ Patrick J. Bonner, *Limitation of Liability: Should It Be Jettisoned After the Deepwater Horizon?*, 85 TUL. L. REV. 1183, 1197 (2011).

³⁴ Leslie J. Buglass, *Limitation of Liability from Marine Insurance Viewpoint*, 53 TUL. L. REV. 1364 (1979).

³⁵ *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296, 1303 (5th Cir. 1986).

³⁶ Dominic Dewey, *Is Limitation of Liability an Illusion? Examining the Numbers and Current Trends of the Limitation Act Today*, 23 LOY. MAR. L.J. 59, 71 (2024).

³⁷ COMMITTEE ON LIMITATION OF LIABILITY, MARITIME LAW ASSOCIATION, *STATISTICAL ANALYSIS OF LIMITATION OF LIABILITY CASES 1953-1996* (1998).

³⁸ *Id.*

³⁹ Andrew Stakelum, *The Limitation of Liability Act of 1851: Recent Court Decisions Highlight Significant Issue for Offshore Energy Industry*, JDSUPRA (Jan. 13, 2017), <https://perma.cc/V4P2-MFUB>.

⁴⁰ Securing Protection for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong. § 4 (2010).

modern limited liability shareholder liability corporations and extensive insurance coverage.⁴¹ The 5th Circuit noted in 1977 that the LOLA “has been due for a general overhaul for the past seventy-five years.”⁴² The 9th Circuit agreed that the LOLA “provides shipowners a generous measure of protection not available to any other enterprise in our society. Many have suggested that the Act, a relic of an earlier era, provides protections that are neither warranted nor consistent with reality.”⁴³ With modern liability-limiting mechanisms like incorporation and insurance, the 9th Circuit called for “congressional attention” to the LOLA seeming “oddly out of place in the modern economy.”⁴⁴

III. RELATIONSHIP WITH TRADITIONAL TORT LAW

The LOLA caps liability in qualifying maritime cases, essentially providing an owner’s maximum liability and a victim’s maximum possible compensation. Liability limits like this are de facto caps on tort damages.⁴⁵ If the relationship between the vessel owner and the claimant is contractual, then all vessels that an owner owns can be included in the limitation; if the claim is “based exclusively in tort,” then the owner is only required to surrender the “vessel to which a lien attaches *in rem*.”⁴⁶ The LOLA “loosens the normal rules of *respondeat superior* in admiralty cases by allowing shipowners to insulate their personal assets (beyond the value of the ship) in cases where any negligence is committed without the owner’s privity or knowledge.”⁴⁷

The court applies a two-step analysis to determine whether the LOLA applies after an accident: First, the court must determine what negligent act(s) caused the accident, before next determining whether the shipowner had “knowledge or privity” of those negligent act(s).⁴⁸ “Privity or knowledge” is a term of art meaning “complicity in the fault that caused the accident, and if the [shipowner] is free from fault his actual knowledge of the facts does not prevent limitation.”⁴⁹ A shipowner could limit their liability through the LOLA even if they were at the helm when the accident occurred if they did not know

⁴¹ *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (quoting *Univ. of Tex. Med. Branch at Galveston v. U.S.* 557 F.2d 438, 441 (5th Cir. 1977)).

⁴² *Univ. of Tex.*, 557 F.2d at 441 (quoting G. Gilmore & C. Black, *The Law of Admiralty* 677 (1st ed. 1957)).

⁴³ *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989) (*citing* *In re United States Dredging Corp.*, 264 F.2d 339, 341 (2d Cir.) (Hand, J.) (“it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete”).

⁴⁴ *Esta Later Charters, Inc.*, 875 F.2d at 239.

⁴⁵ Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 6 (2005).

⁴⁶ Arthur A. Crais, Jr., *Recent Developments in the Shipowner’s Limitation of Liability Act*, 21 LOY. MAR. L.J. 1, 11 (2022).

⁴⁷ *Bensch v. Estate of Umar*, 2 F.4th 70, 73 (2d Cir. 2021).

⁴⁸ *Farrell Lines Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976).

⁴⁹ *Blackler v. F. Jacobus Transportation Co.*, 243 F.2d 733, 735 (2d Cir. 1957).

about the negligent acts that caused the accident.⁵⁰ The shipowner bears the burden of proving that the injury or death occurred without its privity or knowledge.⁵¹ LOLA “does not require a vessel owner to take every possible precaution; it only obliges the owner to select a competent master and remedy deficiencies which he can discover through reasonable diligence.”⁵² However, the knowledge of executive officers, managers, or superintendents who supervise the business area in which the injury or loss occurred can be imputed to the shipowner for their “privity or knowledge,” if the actor is a “managing agent” of the field that the negligence occurred.⁵³ This is where the primary difficulty for shipowners to receive LOLA liability protection arises.⁵⁴

IV. COMPARISONS TO OTHER PROTECTED INDUSTRIES: RAILROADS AND NUCLEAR POWER

A. SIMILAR MOTIVATIONS BETWEEN PROTECTED INDUSTRIES

Advocates for the LOLA’s broad liability limits point to other areas where the U.S. legal system shields liability for economic development including liability limitation for corporations, railroads, and nuclear plants.⁵⁵ The motivations behind other liability limitation laws, like the Atomic Energy Act of 1946,⁵⁶ were similar to some of the motivating concerns for the LOLA.⁵⁷

Just as the Shipping Limitation Act of 1851 was enacted to benefit U.S. shipowners, the Atomic Energy Act of 1946 was enacted to foster the development of atomic energy by private enterprise. . . Both industry and the Atomic Energy Commission saw that industry and private insurance were not sufficient to absorb the risk of a major nuclear accident causing extensive damage.⁵⁸

From the early days of nuclear power, “it was argued that commercialization of nuclear energy would require liability limits for electric utilities and reactor suppliers.”⁵⁹ Congress passed the Price-Anderson Act,⁶⁰ which has since been extended and amended, to establish “accident liability limits for the nuclear industry and a mechanism to ensure that damage

⁵⁰ *Id.*

⁵¹ *M/V Sunshine v. Beavin* (Petition of *M/V Sunshine*, II), 808 F.2d 762, 763 (11th Cir. 1987).

⁵² *In re Omega Protein, Inc.*, 548 F.3d 361, 374 (5th Cir. 2008).

⁵³ *Cupit v. McClanahan Contractors, Inc.*, 1 F.3d 346, 348 (5th Cir. 1993) (*citing* *Coryell v. Phipps*, 317 U.S. 406, 410 (1943)).

⁵⁴ *See* *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296, 1303 (5th Cir. 1986).

⁵⁵ Bonner, *supra* note 33, at 1194.

⁵⁶ Atomic Energy Act of 1946, 42 U.S.C. § 2011 (2006).

⁵⁷ Bonner, *supra* note 33, at 1190-91.

⁵⁸ *Id.*

⁵⁹ CONG. RSCH. SERV., IF10821, PRICE-ANDERSON ACT: NUCLEAR POWER INDUSTRY LIABILITY LIMITS AND COMPENSATION TO THE PUBLIC AFTER RADIOACTIVE RELEASES (2024).

⁶⁰ Price-Anderson Act, 42 U.S.C. § 2210 (1957).

compensation to the public would be readily available within those limits.”⁶¹ It also establishes *concursum* for nuclear accidents.⁶² This is a “modern version of the 1851 Limitation Act and recognizes the policy that the public good may trump the concept of fully compensating victims of a major disaster.”⁶³ Critics similarly argue that the Price-Anderson Act overly protects the nuclear power industry and distort energy markets, while supporters argue that it “provides an assured source of damage compensation that might not be available, or be paid as quickly, under the normal tort process.”⁶⁴

Similar debates regarding liability limitation for passenger railroads arose. The Interstate Commerce Commission Termination Act “preempts any laws that attempt to regulate rail transportation,” including some tort claims.⁶⁵ However, the differing goals “between the public’s desire for expanded passenger rail service at minimal cost to taxpayers and the public policy goal of holding tortfeasors accountable to civil liability for reckless and negligent behavior,” point in conflicting policy directions.⁶⁶

B. WHY ARE THE LOLA AND THE SPVLFA DIFFERENT FROM OTHER INDUSTRIES?

The LOLA, and specifically the SPVLFA, seem different from nuclear energy and railroad liability limits because the public benefit of protecting liveaboards appears less salient and because modern limited liability corporations can achieve the originally intended benefits of the LOLA.

Nuclear power plays a critical role in the American economy, providing 19-20% of total annual U.S. electricity generation between 1990 and 2021.⁶⁷ The American nuclear power industry’s total economic contribution to U.S. GDP in 2022 was \$63.8 billion.⁶⁸ The total GDP impacts attributable to the U.S.’s private shipbuilding and repairing industry totaled \$42.4 billion in 2019, but the impacts from small covered passenger vessels in question in the SPVLFA are likely a much smaller portion of that.⁶⁹ The impact is also very concentrated in just five states, with 64% of all private direct employment in the industry being located in Virginia, Connecticut, Mississippi, California,

⁶¹ Cong. Rsch. Serv., *supra* note 59.

⁶² Bonner, *supra* note 33, at 1191.

⁶³ *Id.*

⁶⁴ Cong. Rsch. Serv., *supra* note 59.

⁶⁵ Justin Hymes, *Railroads Running Roughshod: The Preemptive Power of the Interstate Commerce Commission Termination Act on Tort Claims*, 123 PENN ST. L. REV. 535, 537-38 (2019).

⁶⁶ Justin Marks, *No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers*, 36 TRANSP. L.J. 313, 313-14 (2009).

⁶⁷ *Nuclear Explained*, U.S. ENERGY INFORMATION ADMINISTRATION (2023), <https://perma.cc/T2FM-EBBW>.

⁶⁸ Dan Martin, *The Economic Contribution of the U.S. Nuclear Power Industry*, OXFORD ECONOMICS, 4 (2024), <https://perma.cc/6WKR-PQ65>.

⁶⁹ *The Economic Importance of the U.S. Private Shipbuilding and Repairing Industry*, MARITIME ADMINISTRATION, 1 (Mar. 30, 2021).

and Louisiana.⁷⁰ Ships like the *Conception* do not appear to be public goods with public benefits as much as other industries with comparable liability protection.

The LOLA was created to induce capital to flow from the wealthy who could afford to fund ships to the shipping industry by preventing investors and owners from becoming bankrupted for an accident.⁷¹ However, this has become less prevalent as alternative methods of liability protection have proliferated.⁷² Many boat owners and businesses, like those advocating for the DIVE BOAT Act, take ownership of their vessels through entities like limited liability companies to protect themselves from liability.⁷³ As the 9th Circuit identified in *Esta Later Charters*, these modern alternative methods of liability protection substantially reduce the risks to boat owners that LOLA first sought to relieve.⁷⁴

V. CONCLUSION

The Limitation of Liability Act (LOLA) substantially limits the liability that ships face in personal injury and death claims. Ever since the Small Passenger Vessel Liability Fairness Act (SPVLFA) of 2021 was passed in response to public outcry regarding perceived overprotection in the *Conception* boat fire case, dive-boat operators have lobbied to reinstate their liability and look-back protections from the pre-SPVLFA LOLA. Because the LOLA supersedes traditional tort liability and may even fully prevent victims from receiving financial compensation, this extensive protection demands strong public benefit justifications. In comparison to the public benefits that other industries with similar liability protections provide, like nuclear power and passenger railroads, small covered passenger vessels do not appear to warrant the LOLA's protection.

⁷⁰ *Id.* at 7.

⁷¹ Dewey, *supra* note 2, at 62-63.

⁷² *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983).

⁷³ See, e.g. Raleigh P. Watson, Esq., *Forming an Entity for Boat Ownership*, MARLIN MAGAZINE (Jun. 29, 2022) <https://perma.cc/CYU8-F597>.

⁷⁴ *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989).