



Reflections on an ethic of care and the nature of the carriage relationship in the Titanic ticket cases and beyond

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Abstract

The care owed by the carrier of a passenger ship to a passenger is a complex and unique duty. The duty is characterised by the differences between the carrier and passengers (for example, power, control, and knowledge) and the specific context of shipping and its law. This analysis explores the early judicial desire to recognise an ethic of care in maritime law in considering the positions of the parties. An ethic of care contributes to protecting the various vulnerabilities of passengers, even as shipping continues to technically develop. This article argues, utilising the Titanic ticket cases, that the lens of an ethic of care as an underlying principle, supported by feminist and relational contract theories, advances a greater understanding of the relationship between carrier and passenger. It starts the conversation as to feminist and relational insights into the carriage of passengers by sea.

Keywords: carriage of passengers by sea; passenger shipping; ethic of care; maritime law; exclusion clauses; liability limitation; exemption clauses.

INTRODUCTION

The passenger on the great ocean liner is the quintessential little person: isolated from land, dependent on the ship, and at the mercy of marine perils. The carrier is the big concern with power, knowledge, and, most importantly, control of the means of carriage. Understanding the nature of the relationship between these parties is necessary in framing the law and its application. The law on the carriage of passengers by sea cannot be discussed without mention of RMS *Titanic*, a disaster with a legacy that reckoned with the failure of the maritime industry.¹ Therefore, this article utilises this case to reflect upon the underlying ethic of care in the relationship between carrier and passenger.

1 Helen Carr, Dave Cowan and Ed Kirton-Darling, 'Marginalisation, Grenfell Tower and the voice of the social-housing resident: a critical juncture in housing law and policy?' (2022) 18(1) *International Journal of Law in Context* 10–24.

In the loss of RMS *Titanic*, the passenger was on a technological marvel, the biggest and most luxurious ship of the time – a privilege and joy to be on her maiden voyage. Despite this, ultimately this carriage was a contractual arrangement. The terms of this carriage were not negotiable. The passenger had no right or ability to demand better terms against the powerful carrier. The passenger was also unlikely to read and understand the terms and their consequences. Therefore, they could not truly understand the nature of the bargain they had entered; then, in the wake of disaster, the passenger had to rely on the courts and the interpretation of the contract terms. This put them at the mercy of contract law, both the applicable common and statutory law.

Maritime law is a unique and distinct area of law, where domestic and international law interact to create a complete system of law.² Therefore, this article will consider critiques of traditional contract law in relation to maritime law, specifically the carriage of passengers by sea. As such, it argues that an ethic of care is central to understanding the contract of carriage of passengers by sea. Early evidence of judicial thinking that is inclined to an ethic of care is present in *Ryan v Oceanic Steam Navigation Company Ltd*, which concerns the *Titanic* ticket cases.³ This case is an overlooked aspect of the legacy of the RMS *Titanic*. However, without appreciating the emerging emphasis on care in the decision, the understanding of the scale of legal changes following the disaster is incomplete. The loss of RMS *Titanic* provided momentum for legal changes to address maritime safety issues, both before and after a shipping incident. These include the Unfair Contract Terms Act 1977, followed by the Consumer Rights Act 2015, the Athens Convention 1974, and the Safety of Life at Sea Convention 1974.⁴ These changes are experienced by passengers in a context governed by contract, and thus understanding the context of the relationship and underlying principle of an ethic of care is a necessary aspect of safe passenger shipping.

Although the *Titanic* ticket cases could have been explicit in their use of an ethic of care, their role in subtly challenging freedom of contract

2 William Tetley, 'The general maritime law – the *lex maritima*' (1994) 20 *Syracuse Journal of International Law and Commerce* 105–145, 107.

3 *Ryan v The Oceanic Steam Navigation Company Ltd; O'Connell v Same; Scanlon v Same; O'Brien v Same* [1914] 3 KB 731.

4 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (adopted 13 December 1974, entered into force 28 April 1987) 1463 UNTS 19; International Convention for the Safety of Life at Sea 1974 (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278; Hilton Staniland, 'The enduring and evolving legal legacy of the *Titanic*: an enquiry into marine casualty investigations and self-incrimination' (2012) 4 *Journal of Business Law* 299–318, 299.

should be recognised as part of their legacy. Therefore, instead of the Titanic ticket cases requiring a reimagining to provide evidence of the potential of an ethic of care, the reasoning itself provides that evidence.⁵ This analysis allows for a reframing of the legal understanding of the relationship between carrier and passenger, which embraces aspects of modern contract and consumer law, and maritime law. An ethic of care provides an underlying principle for the law applicable to the carriage relationship and thus informs the interpretation of contracts in the Titanic ticket cases and beyond.

This article will consider an ethic of care in the carriage of passengers by sea in the following sections, beginning with the relevance of feminist and relational theories to the carriage of passengers, focusing on the relational nature of the contract and the feminist concern for weaker parties. Then the underlying recognition of the essentiality of an ethic of care in the Titanic ticket cases is discussed. Finally, this article emphasises the ongoing importance of an ethic of care in contracts for the carriage of passengers by sea.

THE RELATIONAL NATURE OF AND A FEMINIST INTEREST IN THE CARRIAGE OF PASSENGERS BY SEA

This article is not advocating for a new intervention in the carriage of passengers by sea through an ethic of care but explains underlying thinking within the carriage of passengers by sea. Recognising the role of an ethic of care in the Titanic ticket cases acts as an invite to consider its role more widely in relation to the carriage of passengers by sea (for example, the perspective it can bring to limitation of liability) and more widely when the unique risks of maritime activities are considered in relation to other relationships.

An ethic of care and understanding its role in the carriage of passengers by sea provides an underlying principle in maritime law, which bridges the gap between maritime law and consumer law.⁶ Although, since the Titanic ticket cases, consumer law has become stronger in relation to the carriage of passengers, maritime law

5 Linda Mulcahy and Cathy Andrews, 'Judgment: Baird Textiles v Marks & Spencer plc' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010).

6 Jeannie Paterson and Elise Bant, 'Contract and the challenge of consumer protection legislation' in T T Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Hart 2020) 81.

remains an important part of the applicable law.⁷ Thus the carriage of passengers by sea is at the intersection of different areas of law, including contract law, consumer law, and maritime law.⁸ Maritime law itself does not operate with the aim of providing consumer protection. However, within it there does need to be care for passengers. Therefore, an ethic of care that provides interpretive guidance recognises the vulnerability of passengers within a commercially dominated area of law. The values of an ethic of care are necessary to balance the interests of the parties.

The values of an ethic of care, as including fairness, trust, solidarity, mutuality, and reciprocity, which require explicit recognition of the obligations of the stronger party to the weaker party, can support the aims of law in the carriage of passengers (including consumer protection and maritime safety). The values advocated for in this article are supported by feminist legal theory (FLT) and relational contract theory (RCT), and additionally as they have been combined in feminist relational contract theory (FRCT). Sharon Thompson's FRCT provides examples of FRCT's application to family property and prenuptial agreements, which are analogous due to the power disparity in the carriage relationship.⁹

These values provide a mechanism to engage with the contractual nature of carriage that considers fairness in the carriage relationship. This is in contrast to the prevalence of commercial thinking, in maritime law, even when one party is a consumer, and how effective the shipping industry is at promoting its interests.¹⁰ In other words, FLT and RCT support the judiciary's moral inclination towards care, as well as commercial interests in maritime law.

7 The Merchant Shipping (Passengers' Rights) Regulations 2013; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; Travel and Linked Travel Arrangements Regulations 2018; Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004; and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

8 Kate Lewins, *International Carriage of Passengers by Sea* (Thomson Reuters 2016) 175.

9 Sharon Thompson, 'Feminist relational contract theory: a new model for family property agreements' (2018) 45(4) *Journal of Law and Society* 617–645; Sharon Thompson, 'Using feminist relational contract theory to build upon consentability: a case study of prenu' (2020) 66(1) *Loyola Law Review* 55–74.

10 James Allsop, 'Comity and unity in maritime law' in *Comité Maritime International Yearbook* 2016 (Comité Maritime International 2017) 170; Paterson and Bant (n 6 above) 89.

There are some theories which may be more obvious, and consistent with commercial reasoning, to apply (for instance, economic theory).¹¹ However, in this article, the aim is to advance the expansion of the role of legal theory in maritime law through FLT and RCT and address the more overlooked moral considerations which are reconcilable with instrumental economics.¹² Through challenging maritime law, which has been dominated by a perspective that favours formalism, freedom of contract and the primacy of commercial interests, this article seeks to contribute to a dialogue which supports ethical concerns being at the forefront of maritime law.¹³

Thus, this article argues that the increased role of consumer law in the carriage of passengers by sea is not sufficient to address underlying commercial assumptions within maritime law.¹⁴ Yet, an ethic of care, which has similarities with consumer welfarism and realism, can provide the interpretive guidance needed within maritime law and its influence on judicial decision-making on contracts can be seen through the Titanic ticket cases.¹⁵

Feminist and relational theories are not monolithic within themselves, but each represents a diverse set of perspectives. Feminist and relational theories are not necessarily in agreement, and feminist scholars have critiqued relational approaches.¹⁶ However, where they have been most closely aligned is through the emergence of FRCT, and the relationship between FLT and RCT has been acknowledged.¹⁷ This can then be developed through its application to maritime law. FLT is used in this article due to its concern for weaker, vulnerable, parties which enhances relational considerations to provide a stronger theoretical foundation against traditional contracting assumptions.

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- 11 Richard A Posner, *Economic Analysis of Law* 9th edn (Wolters Kluwer Law & Business 2014) 297; Hannah Stones, 'Not just an inconvenience: a defence of the regulatory value of liability rules for remote-controlled and autonomous ships' (2023) 18(4) *Journal of Ocean Technology* 1–8.
 - 12 Mulcahy and Andrews (n 5 above) 200; Irimi Papanicolopulu (ed), *Gender and the Law of the Sea* (Brill Nijhoff 2019).
 - 13 Marko Pavliha, 'Ethics of international maritime law and ocean governance' in Alexandros X M Ntovas (ed), *The IMLI Treatise on Global Ocean Governance Volume II: UN Specialized Agencies and Global Ocean Governance* (Oxford University Press 2018) 339.
 - 14 Steven Hedley, 'Two laws of contract, or one?' in Arvind and Steele (eds) (n 6 above) 153 and 155.
 - 15 John N Adams and Roger Brownsword, 'The ideologies of contract' (1987) 7(2) *Legal Studies* 205–223, 205 and 210–213.
 - 16 Mairead Enright, 'Contract law' in Rosemary Auchmuty (ed), *Great Debates in Gender and Law* (Palgrave 2018) 11; Thompson, 'Feminist relational contract theory' (n 9 above) 630.
 - 17 John Wightman, 'Commentary on Baird Textile Holdings v Marks & Spencer plc' in Hunter et al (n 5 above) 186–188.

There is a shared approach between FLT and RCT in the challenging of traditional assumptions, such as the primacy of the written contract and formal contract rules.¹⁸ FRCT requires contextual interpretation of a contract foregrounding the relationship between the parties and the values that support the continuation of fair contractual relationships.¹⁹ These are the values of cooperation and reciprocity, the recognition of which prevents the favouring of the stronger party. FRCT allows the contract to be understood in the context of reliance and trust that weaker parties place on stronger parties. Trust that has become a habitual part of contract making: a social necessity for all parties, but it is significant for weaker parties.²⁰ FLT and RCT frame contracting through the reality of the positions of the parties, reflecting the roles of values such as cooperation, reliance, and fairness in contractual relationships.

FLT and RCT emphasise the importance of the context of the relationship, and related values, when interpreting contracts. FLT acknowledges that feminist values, such as solidarity and mutuality, have been excluded from the construction of law.²¹ Within the traditional contract approach, equality of bargaining positions and objective interpretations have been emphasised to support not interfering with freedom of contract. Yet, feminist values recognise that freedom of contract must be interpreted to support equality and reflect an ethic of care in bargaining.²² Through a societal focus, RCT also emphasises the role of factors that are dismissed by the traditional approach.²³ The relational contract emphasises values such as trust, reciprocity, cooperation, continuation of the relationship, and reputation.²⁴ Therefore, the overlooking of the values of an ethic of

18 These are rationalised as the courts are incentivising clear drafting through narrow interpretation: Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 275.

19 Thompson, 'Feminist relational contract theory' (n 9 above) 617; Thompson, 'Using feminist relational contract theory' (n 9 above) 56.

20 Hugh Collins, *Regulating Contracts* (Oxford University Press 1999) 1.

21 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993) 73; Linda Mulcahy, 'The limitations of love and altruism – feminist perspectives on contract law' in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Routledge 2005) 3; Debora A Threedy, 'Feminists and contract doctrine' (1999) 32 *Indiana Law Review* 1247, 1248 and 1258.

22 Joanne Conaghan, 'Reassessing the feminist theoretical project in law' (2000) 29(3) *Journal of Law and Society* 351–385, 362–363.

23 Ian R Macneil, 'The new social contract' in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001) 127.

24 Sally Wheeler, 'Visions of contract' (2017) 44(1) *Journal of Law and Society* S74–S92, 79 and 83.

care, as understood as embracing values of FLT and RCT, has been to the detriment of maritime law as it has been elsewhere in law.²⁵

Through combining the two theories, FRCT, for example, allows feminism to address some of the critiques of RCT to further their shared normative vision.²⁶ An FRCT approach acknowledges that a contractual relationship needs solidarity and reciprocity, as well as certainty.²⁷ FRCT is thus in contrast with stereotypically masculine assumptions of traditional contract law, including arm's length dealing, voluntariness of obligations, and strategic behaviour.²⁸ This allows law to support the goals of contracting and reflect the necessity of cooperation.²⁹ It provides a theoretical basis for the necessity of contextual analysis as being pragmatic and holistic.³⁰

This article applies FLT and RCT values to an unusual type of contractual relationship, thus expanding their application. Thompson has applied FRCT to familial contractual relationships, and RCT has been substantially applied to ongoing business-to-business

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- 25 Mary J Frug, *Postmodern Legal Feminism* (Routledge 1992) 54; Sandra L Bem, *The Lenses of Gender* (Yale University Press 1993) 2; Nicola Lacey, 'Feminist legal theory beyond neutrality' (1995) 48(2) *Current Legal Problems* 1–38, 3–4, 8–9 and 139; Frances Olsen, 'The sex of law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* 3rd edn (Basic Books 1998) 691–692; Alice Belcher, 'A feminist perspective on contract theories from law and economics' (2000) 8 *Feminist Legal Studies* 29–46, 36–37; Conaghan (n 22 above) 363.
- 26 Threedy (n 21 above) 1258; Mulcahy (n 21 above) 6; Tamara L Kuennen, 'Private relationships and public problems: applying principles of relational contract theory to domestic violence' (2010) *Brigham Young University Law Review* 515–596, 539; Enright (n 16 above) 11; Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart 2015) 146; Thompson, 'Feminist relational contract theory' (n 9 above) 630.
- 27 Macneil, 'The new social contract' (n 23) 130; Wheeler (n 24 above) 80; Michèle Paulin, Jean Perrien and Ronald Ferguson, 'Relational contract norms and the effectiveness of commercial banking relationships' (1997) 8(5) *International Journal of Service Management* 435, 437–438.
- 28 Belcher (n 25 above) 35; Wightman (n 17 above) 187.
- 29 Threedy (n 21 above) 1259.
- 30 Margaret J Radin, 'The pragmatist and the feminist' in Patricia Smith (ed), *Feminist Jurisprudence* (Oxford University Press 1993) 560 and 565; Peter Goodrich, 'Gender and contracts' in Anne Bottomley, *Feminist Perspectives on Foundational Subjects of Law* (Routledge-Cavendish 1996) 20; Orit Gan, 'A feminist economic perspective on contract law: promissory estoppel as an example' (2021) 28 *Michigan Journal of Gender and Law* 1–50, 38–39.

relationships.³¹ Passengers as the weaker party are analogous to the weaker business or family member in this expansion. The analogy in their application to a business–consumer relationship is justified on the relationship of trust and reliance that the passenger has on the carrier. Both provide insights that support a fairer approach, which this article develops through its application to business-to-consumer contracts in the unique maritime context.

This use of FLT and RCT also raises two points of potential critique. First, that the carrier–passenger contractual relationship is not sufficiently relational. Second, that it is not deserving of feminist scholarship as it is not a woman-centred issue.

In addressing the first potential critique that the contractual relationship is not sufficiently relational it is conceded that it is not obviously characterised as relational. However, despite the carrier–passenger relationship not being typically characterised as relational it is inaccurate to characterise it as a clearly discrete transaction on the spectrum of relationality. RCT is being applied to a transaction that is more discrete than many previous applications, but this shows the further relevance of RCT and the need for cooperation more widely in contracting.³² Additionally, the less discrete aspects in the carriage of passengers are significant, such as: carriage is a contract for the provision of a service; ongoing safety obligations; carriers want to maintain the relationship and encourage repeat custom through a good reputation.³³

In addressing the second potential critique that it is not an issue deserving of feminist scholarship, this analysis is admittedly not woman-centred.³⁴ Previous scholarship has explored the question of the life-saving efforts in the sinking of RMS *Titanic*, and whether a women and children first policy reflects a male-bias and detrimental

31 Stewart Macaulay, 'Relational contracts floating on a sea of custom? Thoughts about the ideas of Ian Macneil and Lisa Bernstein' (2000) 94(3) *Northwestern University Law Review* 775–804; Ian R Macneil, 'Reflections on relational contract theory after a neo-classical seminar' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Bloomsbury 2003); Thompson, 'Feminist relational contract theory' (n 9 above); Thompson, 'Using feminist relational contract theory' (n 9 above).

32 Ian R Macneil, 'The many futures of contracts' (1974) 47 *Southern California Law Review* 691–816, 696; Gillian K Hadfield, 'An expressive theory of contract: from feminist dilemmas to a reconceptualization of rational choice in contract law' (1998) 146(5) *University of Pennsylvania Law Review* 1235–1285, 1283; Ian R Macneil, 'Relational contract theory: challenges and queries' (2000) 94(3) *Northwestern University Law Review* 877–907, 904.

33 F Robert Dwyer, Paul H Schurr and Sejo Oh, 'Developing buyer–seller relationships' (1987) 51(2) *Journal of Marketing* 11–27.

34 Conaghan (n 22 above) 363–371.

approach to women.³⁵ Whereas this article explores the wider contribution of feminist scholarship to the protection of weaker parties at sea as a moral obligation. It is valuable in challenging the *status quo* of traditional contractual reasoning in the carriage of passengers by sea.³⁶ It also has a significant role in critiquing and developing RCT. The feminist perspective thus enhances RCT to require explicit protection for weaker parties and obligations upon stronger parties within unequal relationships.³⁷

It is the ability of FLT and RCT to challenge the commercial bias in law and provide an alternative values-based system which makes the potential for FLT and RCT in maritime law promising. FLT, in particular, is needed in maritime law to go beyond the contribution of just an RCT analysis by emphasising the moral obligation to protect weaker parties as part of a truly reciprocal contractual relationship.³⁸

Challenging commercial thinking

The values of an ethic of care challenge the commercial bias that is prevalent across maritime law. Maritime law is a complete system of law, which is distinct from a state's law, but raises issues of national and international law as well as civil and common law.³⁹ Maritime law, despite having both private and public law aspects, is interesting in the strength of the commercial interests in the area and how they have shaped law. Maritime law, or *lex maritima*, can be considered as a 'daughter' of *lex mercatoria* and has emerged from the need to utilise the ocean to carry goods and people.⁴⁰ Therefore, commercial maritime law benefits from the certainty and consistency of a formalistic approach. However, when passengers are involved, the commercial focus needs to be tempered to account for the moral responsibility the industry has to individuals. This is akin to the need to recognise

35 Assaf Jacob, 'Feminist approaches to tort law revisited – a reply to Professor Schwartz' (2001) 2(1) *Theoretical Inquiries in Law* 211, 232-235; Gary T Schwartz, 'Feminist approaches to tort law' (2001) 2(1) *Theoretical Inquiries in Law* 175; Christine Schwöbel-Patel, 'The "ideal" victim of international criminal law' (2018) 29(3) *European Journal of International Law* 703-724, 710.

36 Conaghan (n 22 above) 375; Hedley (n 14 above) 159.

37 Conaghan (n 22 above) 375; Threedy (n 21 above) 1258; Mulcahy (n 21 above) 6.

38 Enright (n 16 above) 11; Thompson, 'Feminist relational contract theory' (n 9 above) 630.

39 William Tetley, 'Maritime law as a mixed legal system (with particular reference to the distinctive nature of American maritime law, which benefits from both its civil and common law heritages)' (1999) 23(2) *Tulane Maritime Law Journal* 317, 320.

40 Albrecht Cordes, 'Lex maritima? Local, regional and universal maritime law in the middle ages' in Wim Blockmans, Mikhail Krom and Justyna Wubs-Mrozewicz (eds), *The Routledge Handbook of Maritime Trade around Europe 1300-1600* (Routledge 2017) 69.

the duty of good faith in relation to some relationships in English law (although the controversial nature of the introduction and expansion of the duty of good faith is well-established) and thus the need to depart from the traditional approach in certain circumstances.⁴¹

The conflict within contract between the dominance of the stronger party and concern for the weaker party has been considered in relation to consumer interests and the development of consumer protection law. John N Adams and Roger Brownsword consider this through the ideologies of market individualism and consumer welfarism.⁴² An ethic of care operates beyond consumer welfarist considerations to acknowledge the obligatory nature of the carriage relationship, as rooted in the unique nature of the relationship which imposes an obligation on the stronger party.

The contract of sea carriage between carrier and passenger is more than a contract: it embodies a relationship. It is a contractual relationship where one party is considerably bigger and more powerful than the other; a relationship where one party carries the life of the other. In a recent Australian decision, Stewart J recognised this unique relationship between carrier and passenger as an essential aspect of his decision.⁴³ For a fair decision to be reached, an appreciation of the significance of the trust and reliance of the passenger upon the carrier cannot be ignored by their voluntary decision to contract with the carrier and to board the ship.⁴⁴ The relationship between carrier and passenger requires a contract that emphasises the obligation of the powerful party to require balance between parties in practice and law.⁴⁵

The assumptions of the traditional approach to contract law result in a fundamental misunderstanding of the power dynamics between the carrier and passenger to the detriment of the passenger. Thompson has acknowledged the potential of FRCT to address issues of power, while respecting the agency of parties.⁴⁶ Therefore, an ethic of care provides a counter to the commercial bias within the traditional approach to contracts and maritime law to rebalance power.⁴⁷ The ongoing need for this lies in the unique nature of the system of maritime law of including aspects of contract law, personal injury law and so on, and thus the applicability of other laws than consumer law to passengers.

41 Hedley (n 14 above) 159.

42 Adams and Brownsword (n 15 above) 205–206.

43 *Karpik v Carnival plc (The Ruby Princess)* [2023] FCA 1280, paras 539–544.

44 Adams and Brownsword (n 15 above) 211; Hedley (n 14 above) 147.

45 Hannah Stones, 'The long legacy of Covid-19' (2023) 23(10) *Lloyd's Shipping and Trade Law* 1.

46 Thompson, 'Feminist relational contract theory' (n 9 above) 617.

47 Hedley (n 14 above) 157.

The role of an ethic of care in the carriage of passengers by sea

The traditional approach to contracts focuses on contractual wording and an objective approach to interpretation.⁴⁸ It thus provides a high level of consistency but is procedurally focused. This has not necessarily precluded outcomes that are consistent with morality. The case of *Ryan v Oceanic Steam Navigation Company Ltd* has such an outcome, but its wider reasoning was congruous with an ethic of care to support the straining of formalism towards an optimal outcome. It was decided during the 'heyday' of freedom of contract, when contracts were most formalistically approached in deference to freedom of contract and thus limited considerations of fairness to the wider reasoning.⁴⁹ To an extent, statutory developments meant that the judiciary did not have to consider issues of fairness provided that in the instant case the statute would produce the same outcome.⁵⁰ Unlike in many areas of consumer law, the statute does not clearly support consumer protection or develop a principle of welfare.⁵¹ Therefore, the *obiter* comments provide a fuller understanding of considerations of an ethic of care that underpin the decision.

Considerations of fairness have become more central and reflect the necessity of limiting commercial and formalistic thinking in some areas of maritime law. This is necessary in addressing commercial bias and protecting law's legitimacy. It also supports passenger confidence in law and the industry, which facilitates the continuation of the industry.

Doing so reflects the reality of the positions of the parties and the relationship. The contract can then reflect the nature of each party's goals and acts as a cooperative mechanism in their achievement.⁵² The carrier seeks a profitable business, and the passenger seeks to be carried to their destination unharmed. Therefore, for both parties to attain their goals, the carriage of passengers must be reasonably safe. Both parties must contribute to the overall safety, but a relational approach, as enhanced by feminist concerns for the weaker party, conceptualises this obligation for safety as being greater for the stronger party.⁵³ The cooperative nature of safety needs to be recognised by law and

48 Threedy (n 21 above) 1248–1249; Belcher (n 25 above) 35; Wightman (n 17 above) 187.

49 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 296–297.

50 Collins (n 20 above) 49; Paterson and Bant (n 6 above) 79 and 85.

51 Adams and Brownsword (n 15 above) 208.

52 Wheeler (n 24 above) 83.

53 Una Obiose Kriston Nwajei, 'How relational contract theory influences management strategies and project outcomes: a systemic literature review' (2021) 39(5) *Construction Management and Economics* 432–457.

supported by legal mechanisms beyond regulations (including the carriage contract).

In the traditional approach, the formal validity of the agreement is the dominant issue. Whereas an ethic of care offers an alternative understanding of the agreement that accounts for the disparity of power and emphasises the responsibility that should encumber the powerful party. Furthermore, FLT and RCT approach party autonomy with the recognition that weaker parties are constrained when they accept onerous terms.⁵⁴ The perceived neutrality, and assumed equality, of contract law risks furthering the unequal distribution of power between contracting parties.⁵⁵ Alternatively, an ethic of care in contract complements regulations and liability rules in protecting passengers and promoting maritime safety.

This article will now proceed to address the question of the role of an ethic of care and relational values in the relationship between carrier and passenger by examining the reasoning in the Titanic ticket cases and their historical context.

ETHIC OF CARE AS PART OF THE LEGACY OF RMS *TITANIC*

After the sinking of RMS *Titanic*, there were many legal responses, but the contract of carriage was the focus of the Titanic ticket cases.⁵⁶ The contract of carriage was, at that time, on the ticket. This contract placed the carrier, as contract drafter, in a position of considerable power in relation to the consequences of a failure of maritime safety.

Ryan v Oceanic Steam Navigation Company Ltd was a combined action of four claims (Ryan, O'Connell, Scanlon, and O'Brien) against Oceanic Steam Navigation Company brought by the relatives of steerage (third-class) passengers who died.⁵⁷ The decision was favourable to the plaintiffs in not upholding the exclusion clause and thus providing compensation. The traditional approach to contracting was determinative of the decision. However, the underpinning reasoning was reflective of the relationship between passenger and carrier and evidences an emerging ethic of care in the carriage of passengers by sea.

54 Sheila A M McLean, *Autonomy, Consent and the Law* (Routledge 2010) 215; Thompson, 'Feminist relational contract theory' (n 9 above) 625; Nancy S Kim, *Consentability: Consent and its Limits* (Cambridge University Press 2019) 73.

55 Mulcahy (n 21 above) 7–8; Thompson, *Pre-nuptial Agreements* (n 26 above) 133.

56 Staniland (n 4 above) 299.

57 Michael S Sweeney, 'Setting sail' in *Titanic* (National Geographic Society 2020) 22–27.

On the front of the ticket 'see back' was stated, which referred to conditions on the back of the contract ticket. The defendants claimed reliance on one of those conditions excluding their liability for the negligence of the carrier's servants. This term said:

Neither the shipowner, agent or passage broker shall be liable to any passenger carried under this contract, for loss, damage or delay to the passenger or his baggage ... damage or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible ...⁵⁸

There were many passengers, notably in steerage, for whom a ticket to travel on RMS *Titanic* was their ticket to a new life and freedom regardless of what the ticket said, on the front or on the back.⁵⁹ Additionally, if they did not like the terms, passengers did not have the ability to negotiate with White Star Line, one of the greatest shipping companies of the time. The terms were simply the terms.

At first instance, the jury found in favour of the plaintiffs to award damages owing to the negligence of the defendant's servants in the speed of navigation.⁶⁰ Following section 320 of the Merchant Shipping Act 1894, a steerage passenger was to be issued with a contract ticket in a form approved by the Board of Trade. This included a direction that the contract ticket will not contain a condition, stipulation, or exception that is not in the approved form. Bailhache J's reasoning focused on form and statutory wording.⁶¹ The Court of Appeal affirmed the decision of Bailhache J that the condition, having not been in the form approved by the Board of Trade, was invalid. Vaughan Williams LJ, Buckley LJ, and Kennedy LJ all gave judgments dismissing the appeals (although Buckley LJ dissented on one). It should be noted that the statutory law was significant in this decision as it provided the judiciary with a way to act on their moral inclination without having to openly confront the unfairness of freedom of contract.

The development of statutory contract law, especially in relation to consumers, has thus been significant in judicial decision-making.⁶² However, it is argued, despite these developments, welfarist considerations and – beyond those an ethic of care – are a necessary principle of judicial decision-making and statutory application.⁶³ An ethic of care, as an underlying principle, is a necessary interpretative

58 *Ryan* (n 3 above) 735–736.

59 Legal and moral issues of voluntary migration are also raised by the loss of RMS *Titanic* but are beyond the scope of this work. Sweeney (n 57 above) 22–27.

60 *O'Brien v The Oceanic Steamship Navigation Company (Ltd)* (1912–1913) TLR 629.

61 *Ibid* 630–631.

62 Paterson and Bant (n 6 above) 79.

63 *Ibid* 80.

tool to provide protection as levels of statutory protection for consumers and intervention in contract vary.

Freedom of contract, especially in relation to exclusion clauses, is one of the most significant legal obstacles in the carriage of passengers by sea.⁶⁴ This is because it gives the carrier the power to undermine the foundation of trust that a passenger has in the carrier to carry them safely and results in a bad bargain.⁶⁵ Therefore, despite taking a formalistic approach within their *obiter* comments, an ethic of care emerges.⁶⁶ It is argued that, despite statutory developments at the time, and significantly since, this underlying ethic of care is significant to the carriage relationship in contract and beyond.⁶⁷

The dominance of form and formalism in reasoning

Due to the concern of the courts in not challenging freedom of contract, they relied on the approved form. This allowed the courts to take an approach, which maintained an emphasis on not interfering with autonomy and not imposing obligations.⁶⁸ In doing so, considerations that reflected an ethic of care were present but not considered determinative.⁶⁹

Bailhache J at first instance referred to how much the term modified the duty of seaworthiness, and removed the remedy for negligence, and thus showed a desire to consider the substance.⁷⁰ Bailhache J also noted the role of the Board of Trade in safeguarding the interests of passengers and showed awareness of the particular vulnerability of steerage passengers.⁷¹ Although he mentioned these factors, as well as the knowledge and understanding of passengers, and their inability to negotiate, his decision was determined by the construction of the statute.⁷² Bailhache J said:

But after all, when these various matters have been discussed and investigated, I must come to the construction of the statute itself, and in doing so I remind myself that if the words of the statute are plain and unambiguous, it is to them and them alone I must look in deciding the question before me.⁷³

64 Nicholas Gaskell, 'International carriage of passengers by sea, Kate Lewins' (2017) 3 *Journal of Business Law* 261–267, 261–262.

65 Hadfield (n 32 above) 1238.

66 Ibid 1257.

67 Hedley (n 14 above) 156 and 159.

68 Threedy (n 21 above) 1260.

69 Ibid 1264.

70 *O'Brien* (n 60 above) 630.

71 Ibid.

72 Ibid 630–631.

73 Ibid.

Focusing on the terms and statutory wording thus relegated the unique risks and vulnerabilities for which law needs to account to *obiter*, but its presence provides the underlying rationale for his and the Court of Appeal's reasoning.⁷⁴ It also indicates what is wrong with the positions of the parties in law.⁷⁵

Vaughan Williams LJ focused on the position of 'see back' as being below the signature of the defendants' representative, which detached it from the signature and did not incorporate it or the terms referred to into the contract.⁷⁶ Vaughan Williams LJ did note that the approved form contains conditions that will, as a matter of course, be supported by implied conditions, including the duty to use all reasonable skill and care in the carriage of passengers.⁷⁷ This allowed Vaughan Williams LJ to conclude that the implied condition had not been excluded, as the clauses on the back were not part of the approved form.⁷⁸

Kennedy LJ reasoned that the approved form contains that which is sufficient in law to constitute a complete contract.⁷⁹ Although he stated that the exclusion materially altered the contract between the parties in the approved form.⁸⁰ He went on arguing that in its approved form it is absolute and that it is only modified by the implied duty to use reasonable care in performance.⁸¹

In the reasoning, there was a clear emphasis on relying on statutory law, established contract principles, and the utilisation of abstraction. Instead of seeing the priority of statutory law as constraining judicial interpretation, the relational context and ethic of care should have been seen as part of the context of the statute and a necessary (instead of peripheral) judicial consideration. Although this outcome was not prejudicial to the claimants, the decision rests on proper form in the incorporation of the exclusion clause into the contract, and had it been properly incorporated the reluctance to take the considerations of an ethic of care further would have risked the opposite outcome. As recognised by Adams and Brownsword, this is the nature of the challenge of judicial decision-making and the ideologies judges are caught between.⁸² It is also the risk they take in not providing clear statements of principle. An ethic of care could have had a greater

74 Macneil, 'Reflections on relational contract theory' (n 31 above) 210–212.

75 Hedley (n 14 above) 150.

76 *Ryan* (n 3 above) 747–749.

77 *Ibid* 750.

78 *Ibid*.

79 *Ibid* 765.

80 *Ibid*.

81 *Ibid*.

82 Adams and Brownsword (n 15 above) 218.

role in the outcome and clearly establishing the principle, but it was significant as an undercurrent and moral concern.⁸³

Moral inclinations and judicial limitations

The inclination towards the interests of passengers can be seen in the judgments, especially when referring to the significance of the statute and the role of the Board of Trade in protecting passengers, notably the steerage class.⁸⁴

These concerns, as previously stated, provide the underlying reasoning for the decision, and since then have been more explicitly recognised. Admittedly, to have taken a radical moral approach would have been highly unlikely during that period. Concern as to the contractual strength of some parties was not uncommon at the time, as commented upon by Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, *Ryan v Oceanic Steam Navigation Company Ltd* was decided in 1914, and Lord Denning in 1983 noted significant decisions favouring freedom of contract occurred even later than 1914.⁸⁵ Lord Denning refers to it as ‘the heyday of freedom of contract’ and the ‘bleak winter’ of contract law.⁸⁶ *Ryan v Oceanic Steam Navigation Company Ltd* can be considered as akin to the judiciary using a ‘secret weapon’ to provide justice despite the necessity to ‘keep up appearances’ by focusing on form and incorporation rather than the substantive fairness of an exclusion clause.⁸⁷

Decisions such as *Ryan v Steam Navigation Company Ltd* reflect a frustration within law and a desire to utilise more radical moral judicial reasoning. Instead, those who were willing used form to provide substantive justice in the cases before them. Lord Denning refers to quite a few House of Lords and Privy Council decisions and praises the judiciary for what they did (while noting how legislation then addressed the issue to allow judges to make a different analysis).⁸⁸ His praise for them was rooted in his own belief that the role of the judiciary is to mould law towards justice.⁸⁹ It can be seen in the Titanic ticket cases that statutory intervention does not necessarily address

83 Elizabeth Mertz, ‘An afterword: tapping the promise of relational contract theory – “real” legal language and a new legal realism’ (2000) 94(3) *Northwestern University Law Review* 909–936, 914–915.

84 *O’Brien* (n 60 above) 630; *Hedley* (n 14 above) 158.

85 *George Mitchell* (n 49 above) 297–298.

86 *Ibid* 296–297.

87 *Ibid* 297.

88 *Ibid* 297–301.

89 J D Heydon, ‘How the courts develop commercial law by looking outside the trial record into the external world’ (2012) *Lloyd’s Maritime and Commercial Law Quarterly* 30, 31, 61 and 63; J Wilson, *Lord Denning: Life, Law and Legacy* (Wildy, Simmonds & Hill 2023) 263.

the substance of the issue and judicial decisions need to start with the contractual relationship to support statutory interpretation, which is why the underlying principle is significant.⁹⁰

The judiciary's approach at the time of *Ryan v Oceanic Steam Navigation Company Ltd* involved them doing what they could within the constraints of freedom of contract or relying on statutes to reach fair outcomes without considering fairness directly.⁹¹ Lord Denning said: "They still had before them the idol, "freedom of contract." They knelt down and worshipped it, but concealed under their cloaks a secret weapon. They used it to stab the idol in the back."⁹² There was a reticence to confront freedom of contract directly. Freedom of contract had become the goal of law, ethics, politics, and economics.⁹³ The concern was that, if they did more then, they would not be acting with neutrality and objectivity.⁹⁴

However, by continuing to worship the idol in *Ryan v Oceanic Steam Navigation Company Ltd*, the judges were constrained by the traditional approach and the only recourse for their 'skill and ingenuity' was the form and the statute.⁹⁵ A secretive approach constrained by freedom of contract, using strained interpretations, arguably makes less commercial sense. The predictability and certainty of law are key arguments used to support freedom of contract; yet it could not be certain which strained approach would be taken.⁹⁶ Thus, a principled approach provides consistency to the departures from traditional contract law.⁹⁷

If it is accepted that freedom of contract is a principle of contract law, as in this article, the issue was in its interpretation and its strict adherence. It meant that the big concern could be as vague or as clear in what they were seeking to do, because they could not be practically rejected.⁹⁸ The reason for this was that the big concern 'knew well that the little man would never read the exemption clauses or understand them'.⁹⁹ This is an easy economic choice for the big concern, and illustrates why law has to provide some constraints to the market. Ian Macneil considers this as a power game, and the big

90 Paterson and Bant (n 6 above) 99 and 105.

91 Smith (n 18 above) 275.

92 *George Mitchell* (n 49 above) 297.

93 Linda Mulcahy, *Contract Law in Perspective* 5th edn (Routledge-Cavendish 2008) 26.

94 *George Mitchell* (n 49 above) 298.

95 *Ibid* 297.

96 Collins (n 20 above) 8 and 10.

97 Paterson and Bant (n 6 above) 47–49.

98 *George Mitchell* (n 49 above) 297.

99 *Ibid*.

concerns have all the power and thus all the benefits of victory.¹⁰⁰ The big concern makes the relationship exploitative.¹⁰¹ By only looking at it as a market transaction, the judiciary cannot truly account for and confront the power game. Relying on judicial strain, or statutory interpretation, alone to provide justice, risks the fact that not all judges are willing to strain (as per Buckley LJ's reasoning) even when faced with catastrophic losses, such as in the sinking of RMS *Titanic*, and ignores the reality of what law permits.¹⁰² Buckley LJ dissented from the majority on *O'Brien's* case concluding that O'Brien had sufficient notice. In relation to the validity of the term, Buckley LJ argued from an especially formalistic perspective that the freedom of the parties could not be fettered by the Board of Trade. Although Buckley LJ did defer to the other judges, Buckley LJ's reasoning provides an example of the consequences when the judiciary is not willing to strain within formalism or is resistant to interpreting statutory protection against traditional contractual approaches.¹⁰³ This is why underlying legal principles are necessary for consistent and fair judicial interpretation and application of common and statutory law.¹⁰⁴

Nurturing an ethic of care in the carriage of passengers by sea

Although an ethic of care is present in the *Titanic* ticket cases, it does not have as much power as it could have had as the judges were able to reach a satisfactory outcome through statutory law application.¹⁰⁵ Thus, it is necessary to highlight the significance of an ethic of care and advocate for its recognition as an underlying principle in the carriage of passengers by sea beyond the outcome for the claimants in the *Titanic* ticket cases.

An ethic of care provides the judiciary with the freedom to utilise the values that they are reluctant to utilise, or at least not openly, under the traditional approach. An ethic of care shows that cooperation in sharing the burden of risk is beneficial for both parties in supporting the activity and its continuation.¹⁰⁶ Interestingly, this is not in conflict with an economic approach, which is favoured in commercial areas of law such as maritime law.¹⁰⁷ As Linda Mulcahy and Cathy Andrews

100 Ian R Macneil, 'Contracting worlds and essential contract theory' (2000) 9 *Social and Legal Studies* 431–438, 436.

101 Kim (n 54 above) 95.

102 *Ryan* (n 3 above) 752 and 757.

103 Paterson and Bant (n 6 above) 81.

104 *Ibid.* Hedley (n 14 above) 158.

105 Adams and Brownsword (n 15 above) 213, 216, and 219.

106 Mulcahy and Andrews (n 5 above) 200.

107 *Stones* (n 11 above).

state: 'In the words of classical economics, co-operation and flexibility promote utility maximisation rather than undermine it.'¹⁰⁸ Passengers ultimately provide cost-spreading of the risk through ticket prices, which only works if tickets are then used to compensate their loss when an incident does occur.

An ethic of care situates law in context.¹⁰⁹ Although the carriage of passengers by sea is commercially minded it also involves consumers and unique risks.¹¹⁰ In the Titanic ticket cases, the position of passengers is an emerging consideration. Therefore, to support the ongoing interest in maritime safety and consumer interest in the carriage of passengers, the role of an ethic of care and its values needs to be appreciated within maritime law. The context of the potential extent of loss, the position of trust that the carrier is in, and the risks posed by marine perils, are important in determining the validity of a contractual term.

An ethic of care in the carriage of passengers thus addresses the initial inequality of the parties.¹¹¹ It also requires that autonomy within freedom of contract must be constrained in relation to some risks. By preventing some risks from being excluded by the strongest party, while accepting passengers bear some risk in exercising their autonomy in being carried, law provides a more equitable approach.¹¹²

ETHIC OF CARE IN THE FUTURE OF PASSENGER SHIPPING: THE START OF A CONVERSATION

Care is fundamental to the relationship between carrier and passenger, and thus the contract of carriage. An ethic of care with a strong theoretical foundation of values is as necessary for passengers now as it was in 1914. Recognising this and its role within the carriage of passengers as early as the Titanic ticket cases deepens the understanding of maritime law.

108 Mulcahy and Andrews (n 5 above) 200.

109 Threedy (n 21 above) 1249; Jay M Feinman, 'Relational contract theory in context' (2000) 94(3) *Northwestern University Law Review* 737–748, 742; Mulcahy (n 21 above) 10.

110 Amalia Tzima and Phillip Morgan, 'Justifying global limitation of liability for maritime claims in the modern business environment' (2021) *Lloyd's Maritime and Commercial Law Quarterly* 292–315; Stones (n 11 above).

111 Threedy (n 21 above) 1258.

112 David Campbell, 'Ian Macneil and the relational theory of contract' in Campbell (ed) (n 23 above) 10–11; David Campbell, 'Afterword: feminism, liberalism and utopianism in the analysis of contracting' in Mulcahy and Wheeler (eds) (n 21 above) 172.

The carriage relationship has greatly benefited from the increased strength of consumer law, as contract law has generally.¹¹³ However, as consumer law is not the only law that applies to the carriage relationship, those other areas of law (such as liability regimes in maritime law) require an ethic of care to provide something akin to consumer protection in the interpretation of non-consumer law. Despite the important rights and duties embodied within the liability regime, it needs the underpinning principle of an ethic of care to address the unique relationship between carrier and passenger to balance the underpinning principles of contracts.¹¹⁴

This contractual relationship, which is embodied in a contract, is subject to different aspects of law and from an ethic of care reconceptualising that contractual relationship there are further insights it can provide relevant to that relationship. Therefore, despite national statutory developments and international conventions, law still maintains an emphasis on protecting the interests of carriers.¹¹⁵ The most common example of this is the right of carriers to limit their liability.¹¹⁶ This final section will briefly consider some of the later developments in maritime law and the proliferation of standardised terms. In particular, it reflects upon limitation of liability under international conventions and the impact of technology on shipping.¹¹⁷ This discussion of the wider implications of an ethic of care shows its potential in the ongoing discourse in the carriage of passengers by sea despite the growth of consumer law.¹¹⁸

Consent and standardised terms

Taking a relational approach is especially beneficial when standardised terms have become more prolific in transactions, especially consumer transactions. Such an approach would have allowed law to be better prepared for this to protect passengers faced with long standardised

113 Hedley (n 14 above) 155.

114 Adams and Brownsword (n 15 above) 217.

115 Gotthard Gauci, 'Limitation of liability in maritime law: an anachronism' (1995) 19(1) *Marine Policy* 65–74, 71; Kate Lewins, *International Carriage of Passengers by Sea* (Sweet & Maxwell 2016).

116 Tzima and Morgan (n 110 above) 293 and 301.

117 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974; Protocol of 2002 to Amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (adopted 1 November 2002, entered into force 23 April 2014).

118 The Merchant Shipping (Passengers' Rights) Regulations 2013; Regulation (EU) No 1177/2010; Travel and Linked Travel Arrangements Regulations 2018; Directive (EU) 2015/2302; *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92; *Norfolk v My Travel* [1997] AC 430 (HL); *Lee and Another v Airtours Holidays Ltd and Another* [2004] 1 Lloyd's Rep 683; Case C-629/24 MH, *Costa Crociere SpA v Costa Crociere SpA, and Others*.

terms, which they do not read, generally do not understand, and certainly do not negotiate. Macneil argued that standard terms will not be read and understood, and that is the reality of a functioning economy, but some clauses (such as 'see back' clauses) are so egregious that no actual consent will justify them.¹¹⁹ This means that knowledge and understanding cannot be said to be sufficient to balance the power of the parties, and with the awareness that powerful parties might seek to exploit this situation, an ethic of care in contracts can more effectively hold them to account by enforcing the moral obligation to care for weaker parties.¹²⁰

Consent is used to defend contract law's ambivalence to inequality.¹²¹ Yet, it can be seen through FLT and RCT that consent is not enough. A passenger, even if they have read the terms is unlikely to fully appreciate their meaning and consequences; yet contract law would superficially consider that as adequate, even informed, consent.¹²² Contract law cannot depend on the assertion of informed consent and voluntariness when the reality is that consumers do not read and negotiate long contracts, and do not give actual informed consent.¹²³ Macneil argues that to insist on consumers reading such contracts would be inefficient and disastrous for the technically advanced modern world.¹²⁴ Therefore, law must consider what is good, right, or just to do within freedom of contract.¹²⁵

The Titanic ticket cases serve as a historical example of the recognition of the inequality of bargaining.¹²⁶ As passenger contracts get longer than the early ticket cases, the same issues of understanding and consent pervade the carriage of passengers while passengers continue to venture, reliant on the carrier, into the uncertainty of the seas and on newer and unfamiliar modes of shipping. Issues being approached through an ethic of care is more appropriate for a complex world and reduces the ability of the powerful party to rely on this superficial understanding of consent to the detriment of the weaker

119 Ian R Macneil, 'Bureaucracy and contracts of adhesion' (1984) 22 *Osgoode Hall Law Journal* 5–28, 6.

120 Macaulay (n 31 above) 804.

121 Hadfield (n 32 above) 1247.

122 As it would the opportunity to read the terms: Gillian K Hadfield, 'The dilemma of choice: a feminist perspective on the limits of freedom of contract' (1995) 33(2) *Osgoode Hall Law Journal* 337–351, 345.

123 Macneil, 'Bureaucracy and contracts' (n 119 above) 5–6; Macaulay (n 31 above) 778; Mindy Chen-Wishart, 'Transparency and fairness in bank charges' (2010) *Law Quarterly Review* 157, 160–161; Paterson and Bant (n 6 above) 97.

124 Macneil, 'Bureaucracy and contracts' (n 119 above) 5–6.

125 Renata Grossi, 'What can contract law learn from #MeToo?' (2022) 49(2) *Journal of Law and Society* 263–276, 266 and 270.

126 Thredy (n 21 above) 1264.

party. It is part of the wider law on the carriage of passengers by sea, which includes some elements which favour the carrier and thus an ethic of care in favour of the passenger is needed to provide balance between the parties.

Fairness in limitation

In an analysis of the role of exclusions of liability it is necessary to also consider limitation of liability. In maritime law, a key feature of international liability regimes is limitation of liability. This is a prime example of how the liability regime itself is not intended to operate as a consumer protection regime or entirely deprive carriers of the full extent of their contractual power. The liability regime can be critiqued for not reflecting the developments in contract and consumer law, and it could be argued that this is a reason that its application to passenger shipping could be considered less significant than consumer law.¹²⁷ An ethic of care could both be used to critique and develop the liability regime to balance the interests of the parties more effectively.

Limitation of liability allows for some reduction of liability cost, but not full exemption of liability. The bar on the exclusion or restriction of negligence liability in section 65 of the Consumer Rights Act 2015 does not apply when there is an international convention providing for limitation.¹²⁸ This means that there is an exception to the consumer protection regime to accommodate the maritime law regime, which makes limitation of liability acceptable to consumer protection law. However, as the limitation of liability provisions within the liability regime are not founded on providing consumer protection, the liability regime needs the interpretive guidance of an ethic of care to account for the interests of passengers.¹²⁹

The maritime industry depends upon the pillar of limitation to stabilise the industry. There are justifications and debates concerning the limiting of liability, which are beyond the scope of this work. However, it should be noted that an ethic of care in carriage contracts would have added to this debate. As the liability regime relates to the contract and requires that it is treated differently than most consumer contracts to reflect the interests of both parties, an approach to contractual interpretation which accounts for power disparity and inequality provides protection for passengers which is not within the liability regime itself.¹³⁰

More widely, the existence and the amount of the limits can also be subject to critique, and an ethic of care could have supported the

127 Adams and Brownsword (n 15 above) 216–217.

128 Consumer Rights Act 2015, s 73.

129 Paterson and Bant (n 6 above) 80–81.

130 Consumer Rights Act 2015, s 73.

argument for higher limits. It could have contributed to a discussion as to whether they will be enough to enforce the obligation to ensure reasonably safe carriage upon the carriers. In the future, it could contribute to discussions as to whether states depart from the agreed limits or whether limitation remains a feature of the liability regime.¹³¹

Detachment in contracts and shipping

This section will now briefly reflect on the significance of this analysis for the future of the carriage of passengers by sea. The law is currently being challenged by the development of new technology – remote-controlled and autonomous systems. Similarly to the developments in scale and luxury with RMS *Titanic*, this technology represents an exciting new future in passenger shipping. However, technology also similarly represents new and changing risks, whether apparent or not, and the potential and inevitability of losses remains a part of passenger shipping – risks that are not necessarily fully comprehended by a passenger. Yet, the fundamentals in the obligations between the parties remain the same. The goal of the performance of safe carriage is the same.

The development of these systems is significantly linked to the development of contract law and has the ability to further the issues of detachment, ignorance of relational factors, and distance from the obligation to care.¹³² These come from the market and contracting rejecting human interaction, care, responsibility, and social considerations.¹³³ Indeed, the focus on economic and social power in contract law is one of the great problems of contract law.¹³⁴ Detaching contracts from people assumes that contracts are more discrete than they are.¹³⁵ It ignores the important influence of social relations and responsibilities on powerful parties, and thus law lacks completeness in its understanding and application.¹³⁶ For passenger shipping, it ignores the need to care for the passenger and how that defines the relationship between the parties. The industry should not be empowered through legal objectivity to become detached from that obligation and its consequences. The argument of this article that contractual interpretation and its reasoning are an important aspect

131 This article earlier mentioned the affinity between maritime law and an economic approach. Due to these considerations, an approach that allows for unlimited liability instead of limited liability cannot be sustainably supported.

132 Collins (n 20 above) 9; Hedley (n 14 above) 148.

133 Hadfield (n 122 above) 340.

134 Collins (n 20 above) 5; Campbell, 'Ian Macneil' (n 112 above) 5.

135 Macneil, 'The new social contract' (n 23 above) 133.

136 Macneil, 'The many futures of contracts' (n 32 above) 696; Ian R Macneil, 'Exchange revisited: individual utility and social solidarity' in Campbell (ed) (n 23 above) 115–116.

of the law of the carriage of passengers by sea can thus be extended to provide protection against detachment from the core of the carriage relationship due to technological innovation.

As technology makes the carriage of passengers more standardised, with less direct interaction, there is a temptation to ignore the relational and moral entirely. Macneil conceived of the ‘technical man’ and how technology will continue to detach contracting and contract law from its messy reality.¹³⁷ Autonomous and remote-control technology further distances carriers from the messy reality of passenger shipping by their crew (meaning the operational crew compared to leisure aspects of passenger shipping) not interacting with the shipping risks to passengers.¹³⁸ This can then increase as more aspects of carriage become technologically dependent. Yet, the relational and moral obligation are still there – the passenger and the carrier – and that core should not be forgotten.¹³⁹ The relationship is ‘special’ and of an ‘exceptional kind’.¹⁴⁰ FRCT combines the normative vision of RCT and FLT in emphasising human connection and a rejection of detachment and transactionism, which is needed to protect the special relationship which provides reasonable safety.¹⁴¹ As in the underlying reasoning in the Titanic ticket cases, there is a need to consider the passengers and their position. It is imperative for ethics and justice in law to emphasise the relational and care to counteract the potential negative consequences of this technological drive or other threats to the centrality of the carriage relationship.

CONCLUSION: THE BIG CARRIER AND THE LITTLE PASSENGER

This article has focused on the importance of the context of the relationship between the carrier and the passenger, and the nature of carriage by sea, as encapsulated by an ethic of care as understood through RCT and FLT. These factors are crucial to a fair approach to liability. Ensuring law takes a fair approach in this context requires consideration of trust, mutuality, reciprocity, the moral obligation of the powerful to the weak, and the obligation of care. This allows the judiciary to follow their inclination to think differently to provide

137 Macneil, ‘The new social contract’ (n 23 above) 141–152; Wheeler (n 24 above) 87.

138 Michael Tsimplis, ‘Carriage of passengers’ in Yvonne Baatz (ed), *Maritime Law* 5th edn (Routledge 2021) 227.

139 *The Ruby Princess* (n 43 above) paras 539–544.

140 *Ibid* para 539.

141 *Threedy* (n 21 above) 1258; Kuennen (n 26 above) 539.

a moral response to failings in safety and not hide their inclination behind freedom of contract and formalism.

The loss of RMS *Titanic* and the *Titanic* ticket cases are a determinative moment in the history of the law of the carriage of passengers by sea. This article recognises the role of an ethic of care in that moment, but also the ongoing necessity for an ethic of care. Through this article highlighting an ethic of care historically and currently, it aims to increase the discourse as to the moral and legal obligations of carriers to passengers.

As the next era of shipping begins, contracts continue to become more complex, and debates regarding limitation of liability continue, an ethic of care supports an argument against commercial assumptions of maritime law and to protect passengers. Without the theoretical underpinning of an ethic of care, the exploitation of passengers is still possible and, as technology moves the industry forward, law must utilise these values for the ongoing protection of passengers and other weaker parties.

Shipping incidents such as the loss of RMS *Titanic* show the potential scale of losses in passenger shipping, but the reason why they can be so devastating is rooted in the dependence of passengers on carriers. The *Titanic* ticket cases, as others have since, illustrate the innate human regard for this and thus the role of moral values in the legal approach to the carriage of passengers by sea. An inclination that the judiciary had in 1914 shows that, even when maritime law was at the height of formalism, there was an emerging ethic of care in the carriage of passengers by sea; that ethic of care needs to be understood as essential to and underpinning the carriage relationship going forward.