

## CHAPTER 1: Overview of the role of Classification Societies

### 1.1 Introduction

The original role of Classification Societies was to supply information about the condition of ships for the insurance sector that wanted to reduce uncertainty and manage marine risk.<sup>1</sup> This role has changed in the 19 centenary into one of inspection and regulation.<sup>2</sup> To day Classification Societies are involved in a dual role with an ever-increasing emphasis on maritime safety and environmental protection. This role has put societies at the epicentre of a rapidly changing market whereby future depends on their understanding of the market expectation.<sup>3</sup> Indeed, “Classification Societies are the institutionalised repository of the industry’s experience with shipping technology.”<sup>4</sup> Lord Steyn in *The Nicholas H* stated that “[f]or more than 150 years Classification Societies have classified merchant ships in the in interests of safeguarding life and ships at sea.”

Against this background the public's demand for a maritime transport system that promotes safety and environmental protection has grown. In turn so has political attention. Therefore there is a trend to hold all professional participants within the maritime industry accountable to a higher level of responsibility. However maritime safety can only be achieved within the competitive markets<sup>5</sup> of each maritime participant. Participants in the shipping industry, be they a marine underwriter, P & I clubs, Classification Societies or ship-owners are in a ‘safety partnership’ to achieve a single goal, namely: “[t]he goal of guaranteeing optimum ship safety according to the available technology, with modern management structures in markets which are open to competition.”<sup>6</sup>

### 1.2 The Prestige: A case in the making

On the 13 November 2002 *The Prestige*, an oil tanker carrying 76927 tones of heavy fuel oil, began listing and leaking oil while some 30 kilometers off the Cabo Finisterre (Galicia, Spain). While under tow away from the coast under instructions of the Spanish Maritime Authority, the vessel broke into two and sank roughly 260 kilometers west of Vigo (Spain). The break up and sinking released an estimated 25000 tones of cargo.<sup>7</sup> The environmental pollution damage was extensive and has resulted in major clean up operations.<sup>8</sup> The cause of the incident appears to be the result of structural failure.<sup>9</sup>

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<sup>1</sup> F Furger ‘Accountability and systems of self-governance: The case of the maritime industry (1997) 19 Law & Pol’y 445 at 457.

<sup>2</sup> P Boisson ‘Classification societies and the safety at sea: Back to basics to prepare for the future’ (1994) 18 Marine Policy 363 at 371.

<sup>3</sup> *Ibid.*

<sup>4</sup> Furger *op cit* n 1 at 457.

<sup>5</sup> The competitive market in which Classification Societies operate in is discussed above.

<sup>6</sup> B Kroger ‘Presentation on behalf of the German Ship-owner’s Association and The Maritime Law Committee of ICS’ (1997) CMI Y.B. 185.

<sup>7</sup> Report on the activates of the International Oil Pollution Compensation Funds in 2005 at 99.

<sup>8</sup> The west coast of Spain was heavily contaminated. The northern coasts of Spain and France were affected. Traces of oil were detected in the United Kingdom (the Channel Islands, the Isle of Wight and Kent) Report on the activates of the International Oil Pollution Compensation Funds in 2005 p 100.

<sup>9</sup> The report of the Bahamas Maritime Authority suggests that this was in the area of No 2 starboard aft and No 3 starboard wing tanks, probably in the bulkheads in between the two. The report of Spanish Ministry of Public Works ( Ministerio de Fomento) further stated that this was due to a local loss of strength due to deformation,

*The Prestige* was owned and operated by Liberian corporations (Mare Shipping Inc and Universe Maritime Inc. respectively) and registered under the Bahamian flag. The 5<sup>th</sup> special survey had been carried out by the American Bureau Shipping Inc. (ABS) in China on the 20 May 2001, 18 months before the incident. *The Prestige* had been subject to an Annual Survey by ABS in Dubai between the 15<sup>th</sup> and 26<sup>th</sup> May 2002.<sup>10</sup> The State of Spain has taken legal action against ABS before the Federal Court of first instance in New York. It alleges that ABS breached its duty to exercise care in inspecting and classifying the vessel because it failed to detect fatal structural weakness and that it had been negligent in classifying the vessel as fit to carry fuel cargoes. It therefore seeks compensation for all damages caused by the incident (current estimates exceed 1000 million US Dollars).

ABS denies these allegations. In defence it argues that the negligence of the Spanish State was a superseding cause that either wholly or partially, resulted in the damages.<sup>11</sup> The alleged negligent conduct was the refusal to allow *the Prestige* to enter in a “place of refuge” on the Spanish coast despite repeated distress calls; ordering *the Prestige* to move away from the coast line; wrongfully impeding salvage operations and failing to seek competent expert advice as required by the State of Spain’s National Plan for Contingencies caused by Maritime Accidents. ABS further alleged that the State of Spain had a duty to the “citizens of the world, to prevent oil damage to the coast of Spain and other nations”. It is alleged that it breached this duty.<sup>12</sup>

In the same Court, ABS has counter claimed and requested that the State of Spain be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgments made against it in relation to the *Prestige*.<sup>13</sup> This counter claim was dismissed on the ground that the State of Spain was entitled to sovereign immunity.<sup>14</sup> ABS unsuccessfully sought reconsideration<sup>15</sup> or permission to appeal.<sup>16</sup> The matter is still pending.

The incident of *the Prestige* shows the devastation caused by oil pollution. It illustrates the vulnerability of Classification Societies to claims made by its

detachment or fracture of the longitudinal shipside frames. Report on the activities of the International Oil Pollution Compensation Funds in 2005 p 116.

<sup>10</sup> Since the advent of the sinking of the *Erik*<sup>10</sup>, ABS rules were amended to include a requirement that certain water ballast tanks must be examined internally at annual surveys in respect of oil tankers that are 15 years and older. This requirement was not complied with at the Annual Survey undertaken in Dubai.

<sup>11</sup> Report on the activities of the International Oil Pollution Compensation Funds in 2005 p 122.

<sup>12</sup> The Regional authorities of the Basque Regions has made similar claims in the Federal Court of first instance in Houston Texas ( **Comunidad Autonomo Del Pais Vasco, et al v ABS**, 04 Civ 671 (LTS)(RLE), this action was transferred into the New York Court dealing with the claims made by the State of Spain. Subsequently, The Regional authorities of the Basque Regions were compensated by the Spanish government. The action is likely to be accordingly withdrawn. Report on the activities of the International Oil Pollution Compensation Funds in 2005 p 122.

<sup>13</sup> **Reino de Espana v. Am. Bureau of Shipping** 328 F Supp. 2d 489, 2004 U.S. Dist LEXIS 15180 (S.D.N.Y., 2004), 2004 AMC 2050.

<sup>14</sup> Spain had successfully argued that the Court lacked jurisdiction in respect of ABS counter-claim as the Court is barred in terms of section 1602-1611 of the Foreign Sovereign Immunities Act 28 U.S.C..

<sup>15</sup> **Reino de Espana v. Am. Bureau of Shipping et al.** 2006 U.S. Dist. LEXIS 49545

<sup>16</sup> **Reino de Espana v. Am. Bureau of Shipping et al.** 2006 U.S. Dist. LEXIS 51808 (S.D.N.Y., July 27, 2006) In addition ABS has sought summary judgment dismissing the State of Spain’s claim. This motion was denied in **Reino de Espana v. Am. Bureau of Shipping** 2005 U.S. Dist. LEXIS 15685 (S.D.N.Y., 2005)

customers and third parties. The purpose of this discussion is to determine how the Law can prevent incidents like the Prestige from re-occurring in the future and how maritime and environmental safety can be thereby ensure.

### 1.3 The Nature of the Classification Process:

Classification societies employ a system of certification. To certify implies that that a recognised authority gives a declaration of conformity of an object or organisation with the required minimum standards.<sup>17</sup> The ‘logic of certification’ has been successful and embraced by the maritime industry to ensure safer maritime transport.<sup>18</sup> This process entails the articulation of minimum standards. Societies have developed their own standards and rules, referred to as ‘class rules’.

The mechanisms used to ensure that a ship is compliant with the relevant standards are predominately ship surveys and the issuing of certificates.<sup>19</sup> The survey is preventative in nature in that it mainly seeks to detect defects in order to prevent a ship from going to sea in an unseaworthy condition.<sup>20</sup> Once the required survey has been done the ship is certified.

For a ship to obtain a certificate of classification (class certificate) it must be built according to the society's rules.<sup>21</sup> Therefore the construction process is monitored by the society through the use of trained surveyors to ensure adherence to the rules. For a vessel to maintain its class,<sup>22</sup> over its entire economic lifetime it must meet certain requirements. The vessel must be subject to periodic surveys in terms of ‘standard contracts of classification’, which must be undertake on an annual basis and a dry-dock survey which must be undertaken once in five years.<sup>23</sup> Then there are special surveys, which are undertaken in terms of a ‘contract for specific service’.<sup>24</sup> These would include, *inter alia*, pre-purchased surveys and repair surveys when the ship is suspected of having sustained damage.<sup>25</sup> The annual

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<sup>17</sup> Boisson *op cit* n 2 at 371.

<sup>18</sup> *Ibid.*

<sup>19</sup> JL Puilido Begines ‘The EU on Classification Societies: scope and liability issues’ (2005) 36 J.Mar.L. & Com. 487 at 488.

<sup>20</sup> P Boisson ‘Safety at sea; policies, regulations and international law’ (1999) “Marine Policy” at 399.

<sup>21</sup> Due to the fact that Classification Societies monitor the construction process it is possible to obtain comprehensive information on the construction, maintenance and survey of the ship from her Classification Society. However one would need the permission of the ship owner because Classification Society records are not public records. JE Hare ‘Shipping law & admiralty jurisdiction in South Africa’ (1999) published by Juta & Co, Cape Town at 239.

<sup>22</sup> **The Andreas P** [1994] 2 Lloyd’s Rep 183 the Court interpreted ‘Class maintained’ to mean that the vessel has to be in class. And, ‘Affecting class’ to refer to damage of such a character that it either prevents the vessel being in class or it leads a surveyor to conclude, upon becoming aware of the damage, that he must impose some qualification on class by way of recommendation. Referred by Mandaraka-Sheppard, S. “Modern Maritime Law” (2 ed) (2007), published by Routledge-Cavendish, London at 503.

<sup>23</sup> The following are normal classification survey programmes, namely, Hull and Machinery Special surveys [4 years], Dry-docking Survey [2 years]; Survey Afloat [1 year], Tailshaft Inspection [3 years], Boiler Survey [2 years to eighth year, then annually] Hare *op cite* n 21 at 240..

<sup>24</sup> Furger *op cit* n 1 at 456.

<sup>25</sup> **The Nicholas H** [1996] 1 A.C. 211, [1995] 2 Lloyd’s Rep. 299 (H.L.)

(Repair Contract), **The Sundancer** 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd’s Rep. 183 (conversion contract) **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648. ( Pre

surveys consist mainly of external inspections of the hull and outer parts. The classification survey and the special survey are more comprehensive investigations in which the internals of the ship are more carefully inspected.<sup>26</sup>

Therefore Classification Societies extend their services to compliance assurance.<sup>27</sup> In order to perform this service effectively societies have developed a network of branch offices and surveyors, which are located in many ports worldwide. The responsibility of these offices include, *inter alia*, the conducting of surveys, reporting results thereof, accident investigation and specific observations on any technical matter that is relevant to the classification process.<sup>28</sup>

The process of developing and formulating class rules involves extensive negotiations between all major industry experts such as naval engineers, component manufactures, major oil companies, shipyards and P & I clubs. This is particularly important when new technology and ship design are developed. This is a perpetual difficulty for Classification Societies because to define acceptable standards of safety for a new innovation or technology gives way to a process that is 'ridden with technical uncertainties' because past experience may be insufficient.<sup>29</sup>

#### **1.4 Dual Role: Distinction between Private and Public Function:**

The dual role of Classification Societies rises out of the fact that a society has to comply with two different sources of technical standards that are used involved in the classification process. These standards are partially developed by the IMO through international conventions. These are referred to as 'statutory requirements' and are only relevant to a Society to the extent that it acts on behalf of a flag state in carrying out its international obligations. The other part is developed by the Classification Societies through their own technical rules and regulations. These are referred to as 'class rules'.<sup>30</sup> What these requirements cover vary according to conventions, subject matter and vessel type.<sup>31</sup> By recognising this fundamental distinction one can appreciate that dual roles of Classification Societies. However both these functions have the same objective, and that is to ensure safer ships.<sup>32</sup> Further, the mechanics employed by both system of certification are identical, namely surveys and inspections that results in the issuing of a certificate if substantiated by compliance with the relevant standard.<sup>33</sup>

There are two elements that the private task of societies refers too. The first refers to the 'classification services' of a society, which is discussed above. The

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purchase Contract), **Otto Candies L.L.C v Nippon Kaiji Kyokai Co.** 346 F.3d 530, 2003 AMC 2409 (5<sup>th</sup> Cir. 2003) ( Pre-purchase contract).

<sup>26</sup> Puilido Begines *op cit* n 19 at 487.

<sup>27</sup> Furger *op cite* n 1 at 456.

<sup>28</sup> Furger *op cit* at 457.

<sup>29</sup> *Ibid* at 457.

<sup>30</sup> Class Rules cover the structural aspects of a ship (e.g.; strength or stability and buoyancy); machinery (steering gear, engines ect.); equipment to be fitted on board; some operation aspects (e.g. equipment for special cargoes and life-saving equipment.)

<sup>31</sup> EU: COM (2005) at 587.

<sup>32</sup> Boisson *op cit* n 2 at 371.

<sup>33</sup> *Ibid*.

second is the ‘appraisal services’.<sup>34</sup> Collectively, this is referred to as the ‘private function’ of Classification Societies. The appraisal service refers to the evaluation of the intrinsic and real quality of a ship.<sup>35</sup> In the private sphere a ship-owner would have a keen interest in using the services of a Classification Society as this helps him in two fundamental ways, namely, it affects the insurability as well as the marketability of his vessel.<sup>36</sup> These activities are mainly prompted by private interest from underwriters, cargo-owners, charterers and P& I Clubs. These activities indirectly benefit the public as this form of monitoring improves maritime safety.<sup>37</sup> As a result of these private functions the role of the Classification Society has become more significant with the maritime industry becoming more dependent thereon. Some have even gone as far as stating that these Societies “...are the driving force behind safety at sea.”<sup>38</sup>

The public function has been described as the ‘statutory services’ or “certification”. In terms of international maritime law, the *flag state* and the *port state* are burdened with the responsibility of ensuring the compliance of ships with the uniform international standards for safety and the prevention of the pollution of the seas. These national authorities delegate power to Classification Societies in order to comply with their international obligations. The extent of this delegation varies<sup>39</sup>. The powers that may be delegated may be categorised into two groups, namely, the power to inspect or survey a vessel and the power to issue safety certificates. By performing these delegated powers Classification Societies ensures the enforcement of maritime safety standards.<sup>40</sup>

Further, Classification Societies are authorised to undertake formal audits of ships and operating companies and issue certificates of compliance with the particular requirements of the ISM and ISPS Codes.<sup>41</sup>

### **1.5 The Distinction between Marine surveyors and Classification Society representatives**

There are customary differences in the role of Classification Society surveyors and marine surveyors. This distinction was highlighted in *Riverway Co v Trumbel River Services*<sup>42</sup> where the Court stated that the service of marine surveyors go beyond mere inspecting and reporting, particularly when they are authorized to undertake other tasks such as supervising towage or repairs. Therefore the services of a marine surveyor may entail a greater exposure to liability.<sup>43</sup> Furthermore, the distinction between surveyors of inspection services and societies

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<sup>34</sup> The work of evaluation requires the following, a general knowledge of factors that may affect the monetary value of a ship; an international network of surveyors and the financial independence of the evaluator in order to guarantee impartiality. Boisson *op cite* no 2 at 371.

<sup>35</sup> Boisson *op cit* n 2 at 372.

<sup>36</sup> Puilido Begines *op cit* n 19 at 488.

<sup>37</sup> *Ibid.*

<sup>38</sup> P Boisson ‘Classification society liability: Maritime law principles must be questioned?’ (1994) CMI Y.B. at 235.

<sup>39</sup> Puilido Begines *op cit* at 489.

<sup>40</sup> *Ibid* at 488.

<sup>41</sup> Mandaraka-Sheppard, *op cite* n 22 at 283.

<sup>42</sup> 674 F.2d 1146(7<sup>th</sup> Cir. 1982).

<sup>43</sup> JD Gordon III ‘The liability of marine surveyors and ship Classification Societies’ (1998) 19 J.Mar.L. & Com 301 at 304.

surveyors must be acknowledged. In *Otto Candies L.L.C v Nippon Kaiji Kyokai Co*<sup>44</sup> the Court stated that judgments in respect of the earlier, “[do] not automatically translate to the relations between Classification Societies and their clients and third parties.”<sup>45</sup> The writer heeds this warning but will nevertheless discuss such cases in order to isolate the issues. This approach will show that it is policy considerations as opposed to law that societies have avoided liability. In conclusion, the question will be asked as to whether these policy consideration warrant the liability of Classification Societies being ‘*sui generis*’

## 1.6 Accountability of Classification Societies?

Classification Societies argue that in reality ‘[they] are held to account in numerous different ways and to various parties.’<sup>46</sup> Although most arguments are perverse interpretations of factors that are actually the source of the ‘class crisis’, others are consequences of the materialization of it. For example societies in general argue that the ability of a its clients, be they a ship-owners, underwriters or flag state, to choose and move freely between Societies is a way in which Society are held accountable.<sup>47</sup> The fact that this leads to practices such as ‘class hoping’ and ‘flagging out’ as discussed below is somewhat irrelevant to these supporters of societies.

More plausible arguments that indicate that Classification Societies are being held more more accountable is *firstly*, the growing influence of port state control and, *secondly*, implementation of statutory offences and criminal liability on societies. Classification societies are not immune from criminal liability. This fact was illustrated in the Ramsgate Trail which was the result of the collapse of a passenger ferry walkway at Port Ramsgate in the United Kingdom, which resulted in the death of six and the serious injuring of seven persons.<sup>48</sup> In 1997 Lloyd’s Shipping Register pleaded guilty at the Central Criminal Court to a charge under section 3 of the Health and Safety at Work Act of 1974.<sup>49</sup>

Consequently, Lloyd’s Shipping Register was fined P500, 000 with cost of P 252, 000. The owner, Port Ramsgate Limited was fined P 200, 000 and the Swedish designer and builder of the walkway was fined P 1 million. The significance of this award was that the Court was satisfied that the owners responsibility for the damage causing event was lessened because it relied *inter alia*, on the expertise of the Classification Society.<sup>50</sup> Some have suggested that in view of this judgment, the

<sup>44</sup> 346 F.3d 530, 2003 AMC 2409 (5<sup>th</sup> Cir. 2003).

<sup>45</sup> 346 F.3d 530, 2003 AMC 2409 (5<sup>th</sup> Cir. 2003) at 2412 (citing *Coastal (Bermuda) Ltd v E.W Saybolt & Co* 1988 AMC 207 826 F 2d 424 (5<sup>th</sup> Cir 1987)

<sup>46</sup> Jim Harrison the Group legal Director of Lloyd’s Shipping Register of Shipping ‘Accountability of Classification Societies: The role of classification & market –orientated and policy issues, (The Erika)’ paper presented at the London Shipping Law Centre Seminar 21<sup>st</sup> February (University College London 2001) at 1.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 2.

<sup>49</sup> Section 3(1) of the Health and Safety at Work Act of 1974 stipulates:

‘It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.’

<sup>50</sup> Durr ‘An analysis of the potential liability of Classification Societies: Developing role, current disorder and future prospects’ LLM dissertation, University of Cape Town (1996) at 31.

position of the port of Ramsgate may be compared to that of that of a ship-owner.<sup>51</sup> However such a comparison is not free from complications.<sup>52</sup>

### 1.7. “Class Crisis”

Incidents like the *Prestige* and the *Erika* have increased the public scrutiny of the performances of Classification Societies. Due to catastrophes of this nature and the ailing safety standards of the maritime industry, Classification Societies have borne the brunt of increasing criticism as they continue to lose credibility in the public eyes.<sup>53</sup>

Under the umbrella of what has been termed “The Class Crisis” a number of problems have been identified. These factors have resulted in different levels of performance amongst Classification Societies. This defeats the objectives of international conventions and class rules that deal with maritime safety issues. The classification market is completely open. Anyone can sell certificates of compliance.<sup>54</sup> Further, international conventions do not discriminate and treat all certificates issued by societies authorized by a flag state as equal. This has been recognised, “... as a major impediment to raising the general standards of ship safety.”<sup>55</sup>

#### 1.7.1. Independence

Classification societies have maintained that they are independent and self-sustaining organizations that render a service that is objective and impartial.<sup>56</sup> The corporate structure of many Classification Societies creates doubt as to their independence because many are governed by committees controlled by ship-owners or other participants in the industry like ship builders and underwriters.<sup>57</sup> Further, when Classification Societies act under delegated authority their independence is curtailed to the extent that they are duty bound to comply with the guidelines and instructions issued by the relevant flag state national administration.<sup>58</sup>

However the market places pressure on all her participants. The operation costs of a Classification Society are high due to the demand for an extensive network of skilled surveyors and facilities for research and development.<sup>59</sup> The funding schemes of societies allow for the possibility of societies independence being curtailed because they rely on income generated from service provided to their clients, ship-owners. The predominant source of their income is new buildings; the remainder is made up of statutory and class surveys. Therefore the demand for classification service is dependent on the vagrancies of the upswings and troughs of the market place.<sup>60</sup> This is a market of extremities.

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<sup>51</sup> *Ibid.*

<sup>52</sup> See the discussion of the ship-owner’s non-delegable duty of seaworthiness below in chapter 3 of this study.

<sup>53</sup> See *Ships of Shame: Inquiry into ship safety*. Report from the House of Representatives Standing Committee on Transport, Communications & Infrastructure (1992) at 53.

<sup>54</sup> Furger *op cit* n 1 at 462.

<sup>55</sup> *Op cit* n 53 at 54 par 4.17 .

<sup>56</sup> Furger *op cit* at 463.

<sup>57</sup> Puilido Begines *op cit* n 19 at 492.

<sup>58</sup> *Ibid* at 449.

<sup>59</sup> Furger *op cit* n 1 at 463.

<sup>60</sup> Furger *op cit* n 1 at 463.

Generally, in market down turns, ship-owners, in an attempt to reduce operational costs began avoiding classification requirements by adopting a practice that has become known as ‘class hopping’. This practice is a consequence of a ship-owner’s taking advantage of the competition between Classification Societies. Within this competitive environment a ship-owner may abuse his choice by opting to use the services of society that demand lower standards of compliance due to economic constraints.<sup>61</sup> Another consequence of economic pressure was the development of questionable structural designs.<sup>62</sup> Ship-owners and ship-owners tend to argue for the fast tracking in the adoption of new and untested cost cutting materials and technologies.<sup>63</sup>

### 1.7.2 Competition between Classification Societies

Classification societies, in order to maintain their client base have become embroiled in competition. Factors for this competitive environment include, *inter alia*, the ‘flagging out’ of ships onto open registries<sup>64</sup> and the proliferation of marginal Classification Societies. Having to accommodate its regulatory responsibilities and the desire to respond to market pressures the standard of the services of Classification Societies have declined. Because of these factors a “mentality of convenience” has developed amongst Classification Societies towards their customers.<sup>65</sup> This has led to institutional failure.<sup>66</sup>

### 1.7.3 Number of Classification Societies

The major Classification Societies have formed a monopoly in the market.<sup>67</sup> Nevertheless, this has failed to prevent a proliferation of smaller marginal Classification Societies that are not IACS members.<sup>68</sup> Marginal Classification Societies exist for the sole purpose of selling cheap international certificates of compliance.<sup>69</sup> They generally do not have the organisational resources or technical expertise to conduct adequate surveys<sup>70</sup> Further, many of these societies have been established in order to service a particular trade, vessel type or flag state.<sup>71</sup> This has led to excessive competition within the industry. A number of these societies simply lack the capacity to perform these services at adequate standards.<sup>72</sup>

### 1.7.4 Nature of the certification process:

<sup>61</sup> *Op cit* n 53 at 54 par 4.17 (Transcript 734;735)

<sup>62</sup> Furger *op cit* at 463.

<sup>63</sup> An example was the adoption of high tensile steel. High tensile steel enables ship designers to build with less steel but with equivalent strength. Previously this steel was only used for unimportant parts of the ship. The extensive use of high tensile steels resulted in faster corroding ships.

<sup>64</sup> See chapter 4.

<sup>65</sup> Puilido Begines *op cit* n 19 at 493.

<sup>66</sup> Furger *op cit* n 1 at 454.

<sup>67</sup> *Op cit* n53 at 54 par 4.17 (Transcript 734;735).

<sup>68</sup> Currently there are more than 50 organisations worldwide which define their activities as providing marine classification. European Maritime Safety Agency: Assessment of Classification Societies. <http://www.emsa.europa.eu/end185d001d007d001d001.html> accessed on 2<sup>nd</sup> July 2007.

<sup>69</sup> Furger *op cit* at 471.

<sup>70</sup> Due to the small amount of world fleet covered by these societies it is difficult to assess their levels of competence. Ships of Shame: Inquiry into ship safety. Report from the House of Representatives Standing Committee on Transport, Communications & Infrastructure (1992) 54. par 4.17 (Transcript 734;735)

<sup>71</sup> *Op cit* n 53 at 54. par 4.17 (Transcript 734;735).

<sup>72</sup> Puilido Begines *op cit* n 19 at 493.

The nature of the certification process is in contradiction to the manner in which surveys and inspections are being conducted for purposes of the private function. The fact that Classification Societies makes rules and at the same time are responsible for ensuring that they are complied with raises doubts as to the impartiality of the society.<sup>73</sup> There is an inherent conflict of interest in being, “being judge and party” in such a competitive environment.<sup>74</sup>

### 1.7.5 Problems arising from Dual Role

When societies act in a dual role not only are they serving different interests (public interests and private commercial interests respectively) in terms of different rules (international conventions and class rules) but are also acting under different requirements namely certification and evaluation. Even though the private and public function of Classification Societies has the objective of maritime safety as a common denominator, they require different logics.<sup>75</sup>

The tension between private commercial interests and public interests leads to uncertainty as to exactly what is the scope of a Classification Society’s obligations.<sup>76</sup> Further, the public function demands a broader survey beyond mere technical aspect to include determinations of how a shipping companies policies and practices affect safety at sea.<sup>77</sup> This is even more so since the advent of the International Safety Management Code (ISM Code)<sup>78</sup>. The objective of the ISM Code is, *inter alia*, to ensure that a vessels safety management system is adequate and takes into account the various applicable codes, guidelines and standards that are required to be complied in order to achieve a safe maritime transport system.

Faced with these commercial realities, societies may fail to develop their public function with due diligence in order to appease their clients who merely want classification for private interests. It has been suggested that this lack of independence affects the credibility of Classification Societies in general<sup>79</sup>. The inherent risk that arises from a Classification Society acting in this dual role has ought to be addressed by the European Union. The most recent proposal on the matter has sought to strengthen the control- system of Classification Societies when acting under delegated authority.<sup>80</sup>

Some have suggested that ‘certification services’ and ‘evaluation services’ are incompatible.<sup>81</sup> The writer disagrees. It is submitted that one can appraise the value and quality of a vessel (this involves the use discretion of the ships trustworthiness) and also determine whether the vessel complies with a minimum set of standards. In fact, these may be supplementary to each other.

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<sup>73</sup> *Ibid* at 449.

<sup>74</sup> *Ibid*.

<sup>75</sup> Boisson *op cit* n 2 at 377.

<sup>76</sup> Puilido Begines *op cit* n 19 at 493.

<sup>77</sup> H Honka ‘The classification system and its problems with special reference to the liability of Classification Societies’ (1994) 19 *Tul.Mar.L.J.* 1 at 5.

<sup>78</sup> International Management Code for the Safe Operation of Ships and for Pollution Prevention, Nov. 4 Res.A.741 (18) [hereinafter ISM Code].

<sup>79</sup> Puilido Begines *op cit* at 494.

<sup>80</sup> The COM (2005) 587 final is discussed further in Chapter 4.

<sup>81</sup> Boisson *op cit* n 2 at 377.

### **1.7.6 Scale of exposure & absence of a liability mechanism:**

In recent times Classification Societies have had to endure increased exposure to the risk of liability. Reasons for this development include, *inter alia*, the increasingly wide variety of services that Societies provide in fulfilling its newly formed dual function. Further due to demand, societies are required to have an extended network of surveyors. This extended geographical range allows for the potential of ‘forum shopping’.<sup>82</sup> In addition, Societies are viewed as ‘deep pocket’ litigants. Aware of this exposure, societies have sought refuge in civil liability insurance. This potential solvency has perpetuated the situation because, “[i]nsurability has become synonymous with solvency.”<sup>83</sup> This increased exposure to liability has led to growing concerns about the continued survival of Classification Societies and the adverse effects on efficiency of their performance. Many of these concerns have filtrated through the judgments of Courts in various jurisdictions and are analyzed in order to determine the modern environment that Societies must operate in.

### **1.8 Solution to the ‘Class Crisis’**

To find a solution to the ‘class crisis’ acknowledgement must be given to the dual role that Classification Societies perform. In respect of each there must be stricter control of surveyors. There must be more stringent regulation and procedures and these must be harmonised on the international level. This entails the recognition and general regulation of Classification Societies liabilities.

#### **1.8.1 General Regulation of the Liability of Classification Societies**

From the analysis of the most recent case law from common and civil law jurisdictions it will become evident that there is no general consensus on the issue of whether a Classification Society should be held liable toward their clients and third parties in respect of their private functions. Unlike civil law Courts, common law jurisdictions fear the consequences of imposing liability on societies in practice. This has led common law Courts to thwart most claimants’ attempts to have classifications held accountable for shoddy performance of their duties. Once this discussion has dispelled with the legal objections to not imposing liability on Classification Societies it will become evident that the core issue is merely one of public policy (or policy considerations).

In order to appease this concern an analysis of the extent and possible limitation of liability will be undertaken. In this context, the efforts undertaken by the International Maritime Organisation (IMO), Committee Maritime International (CMI) and the EU to establish common standards and liability regimes for Classification Societies will be discussed. Further, I will discuss the best form in which these conclusions should be embodied, an international convention or a self-regulating instrument from the market. But from the onset, one must realise that because of the greater role in risk management that Classification Societies have

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<sup>82</sup> Boisson *op cit* n 38 at 235.

<sup>83</sup> *Ibid.*

undertaken it certain that a culture of safety at sea cannot be adequately nurtured and fostered under a 'veil of immunity'.<sup>84</sup>

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<sup>84</sup> Mandaraka-Sheppard *op cit* n 22 at 1024.

## CHAPTER 2: Classification Societies liability towards clients

### 2.1 Introduction

There is no international convention or similar instrument that establishes a liability regime for Classification Societies. The implication of this is that the matter has been left to domestic law. The case law that will be discussed below reflects domestic views on a matter that has international significance and implication. Indeed these decisions offer different solutions to the same problem.<sup>85</sup> Clients of Classification Societies have brought actions based on negligence and breach of warranties against them. In general international law permits every sovereign state to adopt its own rules on the title to sue in tort. Further, states may differ on the effects that an existing contractual relationship between two parties may have on a action in tort between them and may apply different criteria for establishing causation and the determination of levels of compensation.<sup>86</sup> The approach to contractual liability is more settled.<sup>87</sup> International jurisprudence does not support the imposition of liability on societies for claims made by their clients. This does not necessarily arise from an unwillingness in principle to apply general rules of professional liability for breach of contract but rather for other reasons.<sup>88</sup> These include the use of exception clauses that have the effect of practically excluding a societies liability for negligence *inter parties*. Also the Courts are reluctance to find negligence on the part of the society because of issues of causation and proximity.<sup>89</sup>

### 2.2 Liability for breach of contractual duty

The law of contract of the United States is similar to English contract law due to its common law origin and will be discussed together. In the United States a distinction is drawn between state and federal law. In general, maritime contracts that are not inherently local fall under the jurisdiction of federal law. The Federal Courts have jurisdiction over ‘maritime matters’. The United States Appeal Court in *The Sundancer* stated that, ‘a contract may acquire a maritime quality when, “the matter performed or entered upon under it pertain to the fitment of (the) vessel for navigation”’.<sup>90</sup> A ‘maritime matter’ is one that, “relates to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment.”<sup>91</sup> The Appeal Court (Second Circuit) approved of the dictum of Whitman Knapp DJ of the Court a quo when he stated,<sup>92</sup>

“A contract to inspect a ship for compliance with international safety rules and the rules of a vessel Classification Society is maritime in

<sup>85</sup> Puilido Begines *op cit* n 19 at 517.

<sup>86</sup> T Tsimplis & F Lorenzon ‘Classification societies and Directive 94/57/EC: Time for rethinking the unlimited liability issue?’ (2006) 6 Shipping & Trade Law 1 at 2 published at STL\_Sep06.pp1-4[1].pdf accessed on 2 July 2007.

<sup>87</sup> Boisson *op cit* n 38 at 236.

<sup>88</sup> K Kruger ‘Fault liability for Classification Societies towards third parties?’ Festschrift Till Kurt Gronfors (1991) 271 at 274.

<sup>89</sup> *Ibid.*

<sup>90</sup> *The Sundancer* 1994 AMC 1 at 5 (citing *Cox v Murray*, 6 F. Cas. 681 (S.D.N.Y. 1848).

<sup>91</sup> *The Sundancer* 1994 AMC 1 at 5 (citing *CTI-Container Leasing Corp v Oceanis Operations Corp.* 1982 AMC 2541 at 2543, 682 F.2d 377 at 379 (2 Cir. 1982) quoting IE. Benedict, Benedict on Admiralty 183 at 11-6 (7<sup>th</sup> ed 1981)).

<sup>92</sup> *The Sundancer* 1994 AMC 1 at 6 (quoting *The Sundancer* 1992 AMC 2946 at 2954 ).

nature. Contracts for vessel certification and classification are unique to the realm of admiralty; these inspections and resulting certificates are required either legally or practically before a ship-owner may ply navigable waters.”<sup>93</sup>

Classification Societies act under contracts for professional services. In general, a Classification Society could be held liable for a breach of an express contractual duty or the implied contractual duty to exercise reasonable care and skill. The contractual relationship between a Classification Society and a ship-owner, is that against the payment of fees by the latter, the society undertakes to perform certain duties. An implied term of this contract is that the society will exercise reasonable care and skill as would be expected of a reasonably skilled person.<sup>94</sup> Unlike the United States Federal Courts, the Courts of England have not had the opportunity to adjudicate upon an claim by a ship-owner seeking damages caused by performance or non performance by a Classification Society.

In determining the liability that flows from a breach of a contractual duty, of fundamental importance is the ability to define the scope of the obligations and implied warranties. Due to the fact that strict liability is imposed on contracting parties, the terms of the contract are of paramount importance.<sup>95</sup> To reiterate, the liability of classifications liability is limited to the confines of their contractual undertakings and customs.<sup>96</sup>

### 2.3 Liability for tort of negligence:

Both English and American jurisprudence permit a contracting party to have an action in contract and an action in tort against the contracting party concurrently.<sup>97</sup> However in the United States the East River Doctrine bars a claim in tort under certain circumstances.<sup>98</sup> The requirements for an action in tort and the required duty of care in respect of both English and American law are discussed extensively in chapter three. Suffice to say that in a contractual situation, the existence of a contractual relationship provides sufficient justification for the imposition of a duty of care. However where obligations of a party are defined in the contract, the law of tort imposes no wider duties.<sup>99</sup> Consequently, in practice a Classification Society’s duty in tort; mirror the duties that they owe to contracting parties.<sup>100</sup>

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<sup>93</sup> Therefore, “[t]o ascertain whether a contract is a maritime one,[a Court] cannot look to whether a ship or other vessel was involved in the dispute, as [it] would in a putative maritime tort case. Nor can [the Court] simply look to the place of the contract’s formation or performance. Instead, the answer” depends upon...the nature and the character of the contract,” and the true criterion is whether it has “reference to maritime service or maritime transactions”.’ N Lagoni ‘The liability of Classification Societies’ (2007) 9 Hamburg Studies on Maritime Affairs, published by Springer, Berlin at 70 (quoting Norfolk **Southern railway Co v Kirby**, 125 S.Ct. 385, 388 (U.S. 2004), reference omitted).

<sup>94</sup> Lagoni *op cit* n 93 at 59

<sup>95</sup> *Ibid.*

<sup>96</sup> **Gulf Tampa Drydock Co. v Germanischer Lloyd** 634 F. 2d 879 (1981) at 1974 as referred by Gordon *op cit* n 43 at 304.

<sup>97</sup> Lagoni *op cit* n 93 at 65 and 72.

<sup>98</sup> The East River Doctrine is discussed below.

<sup>99</sup> Lagoni *op cit* n 93 at 65 (citing **Smith v Eric S.Bush (a firm);Harris and Another v Wyre Forest District Council** [1990] 1 A.C 831.). See further the decision of **Skibs A/S Gylfe v Hyman-Michaels Co.** 304 F.Supp. 1204, 1220 (E.D.Mich., 1969) aff’d 438 F.2d 803 (6<sup>th</sup> Cir., 1971) (“The Gyda”).

<sup>100</sup> Lagoni *op cit* at 65.

## 2.4 Formulation of duties owed by Classification Societies towards its client

In *The Great American*<sup>101</sup> the central issue was whether a Classification Society that performed inspection and surveys for its customer was negligent and in and in breach of an implied warranty of workman like performance.

The vessel *Tradeways II* was enroute from Antwerp to the Great Lakes when it flooded and sank.<sup>102</sup> It was thought by some experts that the cause of the loss was the collapse of the transverse bulkhead. However this could not be confirmed because the captains log had been suspiciously lost overboard before the crew's rescue.<sup>103</sup> The insurers of the ship-owner and charterer, which made payment on the relevant policies, sought, by way of subrogation, to obtain indemnification from the Classification Society which surveyed and classified vessel prior to fatal voyage.

The Southern District Court of New York rejected the plaintiff's claims as they had failed to prove negligence, breach of warranty or causation.<sup>104</sup> The District Court held that "waviness of the transverse bulkhead"<sup>105</sup> was not necessarily negligent as numerous surveyors and investigators who inspected vessel had agreed that it was not in immediate need of repair nor could this been proven to be the cause of the vessels eventual sinking.<sup>106</sup> Nevertheless the District Court stated, in *obiter*, that in determining a ship-owners right of recovery or an insurer right to indemnification, the District Court must determine if any duties or warranties had been breached. But before this task can be undertaken it must be first established whether any warranties were given in favour of the plaintiffs or if any duties were owed in undertaking to classify and survey the vessel in question.<sup>107</sup> This further requires an understanding of the functions that a Classification Society performs.<sup>108</sup> But after considering the implications thereof, namely that the ship-owner would become a guarantor or warrantor of seaworthiness, the District Court concluded that liability should not be imposed on these societies.

In *obiter* the District Court recognised, the surveyor's professional duty to discover and warn in contract and tort. It stated that a Classification Society by undertaking to survey and classify a ship, obligates itself to perform two duties with due care,

"The first duty... is to survey and classify vessels in accordance with rules and standards established and promulgated by the society for that purpose. The second duty... is that of due care in detection of defects in the ships it

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<sup>101</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>102</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1001-1002. as referred by BJ Beck 'Liability of marine surveyors for loss of surveyed vessels: When someone other than the captain goes down with the ship' 64 (1989) Notre Dame L. Rev. 246 at 254.

<sup>103</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1006-1007. as referred by Beck *op cite* n 102 at 254.

<sup>104</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011.

<sup>105</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011.

<sup>106</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1006.

<sup>107</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011.

<sup>108</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011. The description of the functions of a Classification Society by the District Court corresponds to those functions identified and discussed in chapter 1.

surveys and the corollary of notification thereof to the owner and charterer.”<sup>109</sup>

In *Gulf Tampa Drydock Co. v Germanischer Lloyd*<sup>110</sup> the United States Court of Appeal (Fifth Circuit) cited *The Great American* with approval and stated that, “[a] Classification Society owes certain duties to a ship-owner. These duties include the determination that a ship conforms to certain standards of seaworthiness set by the society”<sup>111</sup> The second leg of the test set by *The Great American* was defined in context of recommendations made by the Classification Society. The District Court stated that,

“[a]n additional...duty is inspection of damaged ships to determine whether they continue to meet class standards, and if not, what must be undertaken to bring the ship back up to class standards.”<sup>112</sup>

However, the finding of the District Court joint tort liability against a Classification Society and the dry docking company was reversed by the Appeal Court and the case was remanded to the District Court for the determination of whether the society owed any duty towards the ship-owner; whether this duty was breached and to consider the effect of any exculpatory contractual clause;<sup>113</sup> as this was not clear from the record. The determination thereof was essential in view of the defendant society’s defence that a Classification Society’s responsibilities are limited by custom and contract. Therefore it argued that it’s role of inspecting damaged ships and making recommendations was limited, in that it did not extend to the directing or ordering of specific repairs.<sup>114</sup>

The issue of Classification Society liability arose a year later before the United States District Court for the Eastern District of Louisiana in *Steamship Mutual Underwriting Ass v Bureau Veritas*.<sup>115</sup> The Court implicitly recognised that a ship-owner had a cause of action against a Society, which should be governed by traditional principles of tort.<sup>116</sup> However the Court held that the negligence of a Classification Society is limited to failure to conform to it’s own Rules.<sup>117</sup> On the facts of the case the Court held that the Classification Society had breached its own rules and had negligently preformed the survey. However the plaintiff had failed to prove that the Societies negligent conduct had caused the sinking of the vessel. Further, the Court held that the presumption of seaworthiness was not available to the plaintiffs.<sup>118</sup>

A decade later the Southern District in New York in *Continental Insurance Co. v Daewoo Shipbuilding*<sup>119</sup> stated that a,

<sup>109</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011.

<sup>110</sup> 634 F. 2d 879 (1981).

<sup>111</sup> *Ibid* at 1975.

<sup>112</sup> *Ibid* at 1974.

<sup>113</sup> *Ibid* at 1975.

<sup>114</sup> *Ibid* at 1975.

<sup>115</sup> 380 F. Supp. 482, 492-493, 1973 AMC 2184 (E.D. La. 1973).

<sup>116</sup> *Ibid* at 493, 1973 AMC at 2201

<sup>117</sup> *Ibid* at 488, 1973 AMC at 2194-2198

<sup>118</sup> *Ibid* at 493, 1973 AMC at 2200

<sup>119</sup> 707 F.Supp. 123, 1988 A.M.C. 2526.

“[Classification Society’s] duty is delimited by its contract with [the ship-owner]. The terms of its contract required it only to exercise due care in reviewing design and surveying construction before certifying that the vessel met with [the societies] standards.”<sup>120</sup>

The Court held that the Classification Society (ABS) was only bound to certify that the vessel conformed to the societies rule and not that the vessel was “absolutely seaworthy.”<sup>121</sup> The Court concluded that, “[t]he mere fact a surveyor’s presence for purposes of observation [in terms of a shipbuilding contract] does not give rise to so sweeping a duty.”<sup>122</sup> Therefore, ABS motion for summary judgment was granted, as it could not be held liable for the leakage of manhole covers due to operational negligence.<sup>123</sup>

The United States Appeal Court, (Second Circuit) shortly thereafter was afforded an opportunity to adjudicate upon Classification Societies liability in tort and contract towards their clients in *Sundance Cruises Co. v. Am. Bureau of Shipping*.<sup>124</sup> Without a great deal of discussion or in depth analysis the Appeal Court (Second Circuit), the second circuit basically sounded the death knell for suits against Classification Societies by ship-owners and their subrogated insurers.<sup>125</sup>

*The Sundancer* was a luxury cruise ship that sank off the coast of British Columbia. The vessel was originally a passenger car ferry named *SVEA Corona*. The plaintiffs had purchased her and converted her into a luxury passenger cruise vessel. The owners of *the Sundancer*, claimed against the Classification Society which, two weeks prior to the sinking of the vessel, issued a certificates that represented that the vessel was in compliance with international safety standards and the Societies very own rules for classifying vessels. The Classification Society under delegated authority of the Bahamian government had issued the legislative safety certificates.<sup>126</sup>

The ship-owners and their insurer’s raised claims in contract and tort. They claimed that *The Sundancer* would not have sunk but for the Classification Societies, negligence; gross negligence; negligent misrepresentation, breach of contractual duty and breach of implied warranty of workman like performance, when it in carried out its contractual duties of inspecting the vessel and issuing safety and classification certificates and by not detecting the unseaworthy condition.<sup>127</sup>

Knapp J answer to the question of the imposition of liability in the negative. He found that the plaintiff had not adduced sufficient evidence that showed that that the incorrect classification caused the damage. They could not show that the

<sup>120</sup> 707 F.Supp. 123, 1988 A.M.C. 2526 at 2527.

<sup>121</sup> *Id* at 2527. (citing *Gulf Tampa Drydock Co. v Germanischer Lloyd* 634 F. 2d 879 (1981) at 878 and *Steamship Mutual Underwriting Ass. v Bureau Veritas*, 380 F. Supp. 482 at 488)

<sup>122</sup> *Id* at 2527.

<sup>123</sup> *Id* at 2527.

<sup>124</sup> 7 F.3d 1077 (2d Cir. 1993), 1994 AMC 1.

<sup>125</sup> MA Miller ‘Liability of Classification Societies from the perspective of United States law’ (1997) 22 Tul.Mar.L.J. 75 at 96.

<sup>126</sup> 1994 AMC 1 at 3.

<sup>127</sup> *Ibid* at 3.

damages flowed from the Societies issuance of the certificate. There were two additional grounds that were important for denying liability. The first of these was that the disparity between the fees charges by the Classification Society and the amount of the damages. The second ground was the ship-owner was held to be ultimately responsible for and in control of the activities on board the ship. This ongoing responsibility as supplemented by the historic maritime law requirement that that a ship-owner has a non-delegable duty to maintain his vessel in a seaworthy condition. By mentioning these two additional factors it is clear that the lack of causation was not the Courts sole basis for denying the imposition of liability on Classification Societies.<sup>128</sup> The Appeal Court (Second Circuit) concurred and saw the District Courts reasoning as sound. The Court saw the absence of causation as sufficiently conclusive to dispel the tort and contractual claims of the plaintiff. It only discussed the above mentioned additional grounds and no additional grounds.<sup>129</sup>

The Appeal Court decision in *The Sundancer* has been identified as a classic example of, “good facts making bad law.”<sup>130</sup> The facts of this case were indeed dramatic and the Courts response in context thereof was understandable. However the Court should have taken more precaution to ensure that the judgment had a more narrow application on Classification Society’s liability.<sup>131</sup> The wide sweeping-pronouncements are an obstacle to the imposition of liability on Classification Societies which may be appropriate in less dramatic and slanted circumstances. From the discussion to follow it will become evident that the Court avoided imposing liability on Societies as a matter of policy as opposed to law.<sup>132</sup> Because of this the writer doubts that this judgment creates blanket immunity for Classification Societies in respect of a ship-owner’s tort and contractual claims.

Only a year after the decision of *The Sundancer*, the United States Appeal Court (Second Circuit) was asked to determine the liability of an inspection surveyor that inspected cargo holds of a vessel in order to determine whether the holds were cargo worthy. This case does not deal with Classification Societies however the writer still deems it pertinent to the discussion because it indicates the incorrectness of *The Sundance* in law.

In *International Ore and fertilizer Corp v SGS Control services, Inc.*<sup>133</sup> a seller and charterer of fertilizer products entered into a sale agreement with a New Zealand based company for the sale of compound phosphate fertilizer. The agreement required the seller to have an independent hold inspection survey prior to the cargo being loaded. They required the inspection survey to be undertaken by the defendant. At the port of discharge it became apparent that the cargo had been contaminated with barley that had been trapped in the pockets behind the stringer. Consequently the purchaser refused to accept the shipment. In the action before the Appeal Court the seller-charterer was claiming damages.

<sup>128</sup> DJ Jacob Mishler in *International Ore and fertilizer Corp v SGS Control services* 1995 A.M.C. 944 at 959.

<sup>129</sup> These were the application of the East River Doctrine and the absence of the implied warranty of workman-like performance.

<sup>130</sup> Miller *op cit* n 125 at 96.

<sup>131</sup> PF Cane ‘The liability of Classification Societies’ [1994] LMCLQ at 363.

<sup>132</sup> Miller *op cit* at 98.

<sup>133</sup> 38 F.3d 1279, 1995 A.M.C. 944

The Eastern District Court of New York dismissed the contractual claim because of the disparity between the fees charged and the potential exposure to liability and the informal dealings between the parties as this was indicative that they parties did not attempt to allocate all the risks.<sup>134</sup> The District Court also rejected the cargo-owner's negligence claims<sup>135</sup> but held that the defendant was liable for negligent misrepresentation for the issuing of an inaccurate certificate of cleanliness and suitability.<sup>136</sup> The defendant appealed. It was claimed that the defendant's legal duties towards the plaintiff, arose entirely out of contract due to the East River Doctrine.<sup>137</sup>

The majority of the Appeal Court concurred with the defendant.<sup>138</sup> But the majority was of the view that the plaintiff-cargo-owner should have recovered full damages on its contract claim<sup>139</sup> in terms of the implied warranty of workmanlike performance.<sup>140</sup> Therefore the defendant was required to carry out its inspection of vessel's cargo holds for readiness to load cargo with reasonable care and in a 'work-man like' manner.<sup>141</sup> Consequently, the issuance of an inspection certificate by the service attesting to the vessel's readiness to load, when the inspecting surveyor knew or should have known that his inspection was not adequate to disclose all possible contaminants, was a breach of this contractual duty. The majority concluded that,

“[The defendant, an inspection service] is a professional organisation that issues formal certificates essential to commerce that inspections have been properly done. It is fully aware that a negligent inspection may cause the loss of an entire cargo. That is why parties to sales of goods to be transported by sea require such certificates. ... We see no reason whatsoever, therefore, why [the defendant] is not liable for [the cargo-owners] consequential damages as a result of its breach.”<sup>142</sup>

The majority held that the *The Sundancer*<sup>143</sup> was not to the contrary. The distinguishing factor was the purpose of the relevant certificates. The purpose of a classification certificate to a ship-owner, is to allow him to take advantage of insurance rates available to classed vessels.<sup>144</sup> In contrast the purpose of the inspection is to guarantee the condition of the hold, so as to ensure the preservation

<sup>134</sup> **International Ore & Fertilizer Corp. v SGS Control Service**. 1991 AMC 25,36,743 F.Supp. 250,257-258 (S.D.N.Y. 1990) (“Interior I”) (citing **Vitol Trading S.A v SGS Control Services**, 1989 AMC 1309,1315,875 F. 2d 76,81 (2Cir. 1989).

<sup>135</sup> *Ibid* at 258.

<sup>136</sup> *Ibid*.

<sup>137</sup> (citing **East River Steamship Corp. v Trans-American Deval Inc.** 476 U.S. 858, 1986 AMC 2027 (1986) or **New York law- Clark-Fitzpatrick, Inc v Long Island R.R. Co.**, 516 N.E.2d 190 (N.Y. 1987).

<sup>138</sup> (citing **East River Steamship Corp. v Trans-American Deval Inc.** 476 U.S. 858, 1986 AMC 2027 (1986) or **New York law- Clark-Fitzpatrick, Inc v Long Island R.R. Co.**, 516 N.E.2d 190 (N.Y. 1987). The East River Doctrine is discussed below.

<sup>139</sup> **International Ore and fertilizer Corp v SGS Control Services, Inc.** 1995 A.M.C. 944 at 950.

<sup>140</sup> The ‘implied warranty of work-man like performance is discussed below.

<sup>141</sup> **International Ore and fertilizer Corp v SGS Control services, Inc.** 1995 A.M.C. 944 at 951. (citing **Mayer Boat Works v Bright Marine Basin**, 1966 AMC 2340,2346,265 F.Supp. 352,355 (E.D.N.Y. 1966); **Lunn v Silfies**, 431 N.Y.S. 2d 282, 284 (Sup.Ct.1980)

<sup>142</sup> 1995 A.M.C. 944 at 952.

<sup>143</sup> 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183

<sup>144</sup> 38 F.3d 1279, 1995 A.M.C. 944 at 953 (citing **The Sundancer**, 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep 183).

of cargo. The majority concluded that there is no other reason to perform such an inspection.<sup>145</sup>

Jacob Mishler D.J delivered the dissenting judgment. He held that the decision of the Appeal Court in *The Sundancer*<sup>146</sup> did not support the majority's findings.<sup>147</sup> He identified the grounds upon which the Appeal Court in that case did not impose liability, namely, the lack of causation, the disparity between the fees charged by the Society and the damages claimed, and the ship-owners responsibility and control over the vessel.

The second ground was applied in the context of a charterer. Jacob Mishler D.J. concluded that a charterer on the facts of the case would be more likely to anticipate the risk (because he knew of the strict requirements of the New Zealand customs authority); was in a better position to advert the risk (because he was in the fertilizer business and had shipped fertilizer to New Zealand before) and could have minimised the risk of loss by advising the inspection service of New Zealand's strict requirements.<sup>148</sup> He concluded that the additional grounds relied upon in *The Sundancer* are analogous to those in the trial Court and therefore dictate the same result.<sup>149</sup> This decision is discussed further in the conclusion of this chapter.

Fortunately there have been subsequent decisions that have recognised the possibility that Classification Societies may owe a duty of care towards ship-owners. In *The Amoco Cadiz*<sup>150</sup> the Northern District Court of Illinois (Eastern Division) recognised the availability of a cause action against a Classification Society but only under certain circumstances. However the Court did not recognise that a ship-owner had a contractual right to indemnification in terms of the Ryan Doctrine.

#### **2.4.1 Commentary on the Courts approach on duties owed by Classification Societies owed towards its clients**

It is submitted that the issue of class liability towards their clients is not settled. This is predominantly because the Court of Appeal (Second Circuit) in *International Ore and fertilizer Corp v SGS Control services, Inc.*<sup>151</sup> no valid grounds for distinguishing the services provided by the Classification Society in *The Sundancer*<sup>152</sup> from that of the inspection service before it. The majority judgments of these two decisions are in direct conflict. Hopefully the Courts will provide certainty in this area of the law in the future.

##### **2.4.1.1 The 'first duty' of *The Great American*: A Survey must be done in accordance with the Classification Society's Rules**

<sup>145</sup> 38 F.3d 1279, 1995 A.M.C. 944 at 953

<sup>146</sup> 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183.

<sup>147</sup> 1995 A.M.C. 944 at 959.

<sup>148</sup> *Ibid* at 960.

<sup>149</sup> *Ibid*.

<sup>150</sup> 1986 A.M.C. 1945.

<sup>151</sup> 38 F.3d 1279, 1995 A.M.C. 944.

<sup>152</sup> 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183.

The two-fold duty of care as formulated by the Court in the **Great American** and maintained by subsequent case law has been criticised for being narrow and too restrictive in scope. In respect of the first duty the Courts have not allowed a ship-owner to successful claim for breach of this duty in tort and it is unlikely that they will allow it for breach of the same duty in contract.<sup>153</sup> Nevertheless the starting point of determining of whether a survey has been done in accordance with the Rules must be the contract. One must ascertain what was required and whether the relevant standard was achieved. By comparison with surveyors in the construction industry it is arguable that a Classification Society has an obligation to possess sufficient knowledge and experience. And that it is obliged to only utilize the services of surveyors who have a sufficient degree of knowledge and expertise to adequately perform the required survey.<sup>154</sup> From the nature of a societies service one can reasonably presume that a society has the additional duty to analyse and provide technically review the design plans of a vessel and related documents; to attend the construction process in the ship yard and to subsequently inspect the vessel.<sup>155</sup>

As to what is a proper standard of inspection, the Courts should take cognizance of and seek recourse to the CMI Code of Conduct, various IMO resolutions, relevant EU and similar regional legislation and the regulations of self regulatory bodies such as IACS.<sup>156</sup> Some of these sources prescribe a standard of care for Classification Societies ('recognised organisations') acting under delegated authority in performing statutory inspections ('public function').<sup>157</sup> Nevertheless, these materials are the result of exhaustive consultation process amongst industry role players and experts and indeed reflect the industry standards.<sup>158</sup> These standards were established to prioritise the public interest in safer maritime transport. It is arguable that this standard is higher than what would have been required by commercial interests. However the plaintiff is burdened to produce evidence to this effect.<sup>159</sup>

Further, the first duty places emphasis on the functions of the Classification Society. This erroneously neglects the nature and content of these standards and rules. The adequacy of these rules is important. This is based on the assumption that if the rules are correctly formulation and complied with, the out come will be a seaworthy vessel.<sup>160</sup> Therefore it is suggested that Classification Societies have the duty to ensure that its prescribed rules and standards are adequate in this respect. Should the Societies rules be inadequate in achieving this result it is submitted that the imposition of liability should ensue.<sup>161</sup>

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<sup>153</sup> DL O'Brian 'The potential Liability of Classification Societies to marine insurers under united states law' (1995) 7 U.S.F.Mar.L.J. 403 at 411.

<sup>154</sup> Lagoni *op cit* n 93 at 61 (citing **Kenney v Hall; Pain and Foster** [1976] 2 EGLR 29 in relation to a valuation survey of a building).

<sup>155</sup> *Ibid* at 61.

<sup>156</sup> These various initiatives are discussed in detail in Chapter 4.

<sup>157</sup> The distinction between 'public' and 'private' functions of a Classification Society is outlined in chapter 1.

<sup>158</sup> Lagoni *op cit* n 93 at 62.

<sup>159</sup> *Ibid*.

<sup>160</sup> Miller *op cit* n 125 at 90.

<sup>161</sup> *Ibid*.

### 2.4.1.2 The second duty of *The Great American*: The duty to detect & notify

It has been suggested that the second duty arises in circumstances where the ship-owner is not aware of the defect but merely relies on the services of the Society.<sup>162</sup> This would turn on whether the ship-owner had legitimate expectations and reasons for his lack of knowledge. In *The Great American* the District Court stated that regardless of whether the Classification Society violated its own rules by incorrectly restoring class, the fact remained that the ship-owner was fully aware of the defects. Nevertheless, with this knowledge he still proceeded to put the vessel to sea. He thereby took a ‘calculated risk.’ The Court was of the view that the damages sustained by that risk materialising should not be imputed on to a third party such as a Classification Society.<sup>163</sup> When the Court in *The Amoco Cadiz*,<sup>164</sup> recognised the possibility of a cause of action against a Classification Society in favour of a ship-owner, one of the requirements set, was that the ship-owner must have relied on the services of the Society. In *The Sundancer*<sup>165</sup> the Appeal Court (Second Circuit) held that because of the ship-owner’s responsibility to maintain his vessel in a seaworthy condition he may not rely on the Classification Societies classification or certificates to absolve him of this liability.

According to these decisions a ship-owner to have cause of action based on the second duty he must, as a requirement, rely upon the Classification Society performing its services, which would have otherwise been performed by him. Further the Classification Society must have been aware of this reliance.<sup>166</sup> The writer disagrees. In this context ‘reliance’ is a ‘red herring’<sup>167</sup> This is because wrongful conduct by a professional can cause another party to suffer damages, irrespective of whether the later party placed reliance on the other parties conduct or not.<sup>168</sup> It is arguable that under certain circumstances, a society is under a duty to extend the scope of the survey conducted in terms of the contract. It is reasonable to expect that professional service provider, if he discovered certain deficiencies or suspected deficiencies to be present it would extend the scope of his survey so that information about what is required for he vessel to stay in class could be gathered and provided to the ship-owner.<sup>169</sup>

Logic dictates that when a Classification Society discovers a serious defect that poses imminent danger then the Society should take measures that will remove the vessel from class.<sup>170</sup> If it fails to do so it should accordingly be held accountable.<sup>171</sup> The reasonableness for imposing this additional duty is evident by the fact that most Classification Societies make provision in their rules that allow them to either revoke or suspend a vessels class if the ship-owner has failed to comply with the relevant Society’s rules. Further the effect that class has on the insurability of a vessel means that in practice a vessel will be removed from service

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<sup>162</sup> *Ibid* at 93.

<sup>163</sup> **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011.

<sup>164</sup> 1986 AMC 1945 at 1950 and 1954 as referred by Miller *op cite* n 125 at 93.

<sup>165</sup> 7 F.3d 1077 (2d Cir. 1993), 1994 AMC 1, at 12.

<sup>166</sup> Miller *op cit* n 125 at 93.

<sup>167</sup> Cane *op cite* n 131 at 370.

<sup>168</sup> *Ibid*.

<sup>169</sup> Lagoni *op cit* n 93 at 63.

<sup>170</sup> Miller *op cit* at 91.

<sup>171</sup> *Ibid*.

if class is revoked or suspended. According to *The Great American*<sup>172</sup> this practice does not mean that a Classification Society has *de facto* control over the ship. Judge Tayler DJ astutely pointed out that a ship-owner may nevertheless still elect to sail his vessel either without insurance or at higher premiums.

The writer suggests that the extent of the proposed duty must be limited to the ability of the Classification Society. In other words, a Classification Societies must do the most that it can do. It is obvious that a Society cannot physically stop a vessel from sailing but it has the capacity to revoke or suspend class and this is what must be done in terms of the proposed duty.

## 2.5 Classification Society's defences against the imposition of liability

The defences by Classification Societies against claims made by their customers are discussed below. The cumulative effect of these defences is that a ship-owner faces treacherous seas when he decides to embark on litigation against a Classification Society.

### 2.5.1 Common law defenses

If a claimant can establish that a duty was owed by a Society, he will often encounter great difficulty in proving that the duty was breached. In many cases the vessel is lost at sea. Therefore there is no evidence that can establish the breach or that the breach was the cause of the claimant's loss. In addition problem of lack of physical evidence is often made worse by conflicting evidence of expert witnesses.<sup>173</sup> In establishing a casual connection, the claimant is confronted with several related problems.<sup>174</sup> Boyle D.J in *Steamship Mutual Underwriting Ass. v Bureau Veritas* commented in respect of this dilemma faced by the ship-owner,

“[a]dmittedly, the result reached does place a heavy burden on the [ship-owner] since the vessel has sunk. However to lessen the plaintiffs burden would be to place the defendant more in the position of an insurer of the vessel...”<sup>175</sup>

The first issue is that the consequences of an improper survey are sometimes unforeseeable. The reasonable foreseeability of damages is a requirement for liability. The reasonable foreseeability of damages is in general a requirement for liability. The requirement of reasonable foreseeability is relevant to establishing culpability and causation. For a person to be culpable, the loss must have been capable of being foreseen by the reasonable person.<sup>176</sup> In respect of causation, the Privy Council in *The Wagon Mound*<sup>177</sup> disapproved of the 'directness approach'<sup>178</sup>

<sup>172</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>173</sup> Beck *op cit* n 102 at 254.

<sup>174</sup> Beck *op cit* n 102 at 254-256 (referring to W Posser & W Keaton 'Handbook on the Law of Torts' at 161 5th Ed (1984)

<sup>175</sup> 380 F. Supp. 482 at 494.

<sup>176</sup> *Overseas Tankship (U.K) v Morts Dock & Engineering Co Ltd (The Wagon Mound (no 1))* [1961] Lloyd's Rep. AC 388. The American equivalent is *Skibs A/S Gylfe v Hyman-Michaels Co.* 304 F.Supp. 1204, 1220 (E.D.Mich., 1969) aff'd 438 F.2d 803 (6<sup>th</sup> Cir., 1971) ("the Gyda"). As referred by Beck *op cite* n 102 at 257.

<sup>177</sup> *Overseas Tankship (U.K) v Morts Dock & Engineering Co Ltd (The Wagon Mound (no 1))* [1961] Lloyd's Rep. AC 388.

and instead favoured a test based upon reasonable foreseeability of damage to determine the cause and the remoteness of the damage. However this test does not enjoy unanimous application. Subsequent case law, in relation to physical injury, has applied the long standing ‘egg shell rule’ that states, ‘that the defendant takes his victim as he finds him.’<sup>179</sup>

The second issue is that the loss of the vessel may have been caused by *force majeure*. The third issue is whether the failure of the society to notify the ship-owner of a defect or dangerous condition is a supervening cause in respect of the ship-owners failure to maintain a seaworthy vessel.<sup>180</sup> The mere failure to detect a defect or dangerous condition without doing more will normally be insufficient basis for a claim of damages.<sup>181</sup> In *In re Oil Spill by the Amoco Cadiz* it was stated by the Northern District Court of Illinois (Eastern Division) that,

“to increase the risk of harm suggests a change to the status quo which makes matters worse. The failure to detect already existing dangerous conditions cannot be said to increase the risk in any real logical manner.”<sup>182</sup>

Therefore it is unlikely that the Classification society’s failure to detect and notify will interrupt the nexus between the ship-owners obligation to maintain seaworthiness and the loss. This is often used as a defense by Classification Societies<sup>183</sup> and is given credence by the fact that the ship-owner has far more control over the vessel than the society.<sup>184</sup> Further, Societies often argue that the ship-owners failure to remedy the defects that he has received due notice of, amounts to a supervening cause.<sup>185</sup> In *The Great America* the District Court stated,

‘...regardless of whether the defendant [Classification Society] acted in violation of the rules or not, the fact remains that the owners the owners and charteres were fully informed of the defects. With knowledge and opportunity to remedy defects, [the ship-owner]... “took a calculated risk and lost”’,<sup>186</sup>

## 2.5.2 Presumption of seaworthines

In an attempt to prevent Classification Societies from evading liability *ab initio*, plaintiffs have sought to employ the presumption of seaworthiness. This maritime

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<sup>178</sup> This approach was derived from the Court of Appeals decision in **Re Polemis & Furness, Withy & Co Ltd** [1921] 3 KB 56 and means that if the defendant is guilty of negligence, he is responsible for all the consequences, whether these were reasonably forceable or not. The only condition was that the loss must have been the direct consequence of the negligent conduct. As referred by M Lunney & K Oliphant ‘Tort law text & materials’ (2000) published by Oxford University Press, New York at 217

<sup>179</sup> **Overseas Tankship (U.K) v Morts Dock & Engineering Co** 1961 App. Cas. 388 (P.C. 1961). The American equivalent is **Skibs A/S Gylfe v Hyman-Michaels Co.** 304 F.Supp. 1204, 1220 (E.D.Mich., 1969) aff’d 438 F.2d 803 (6<sup>th</sup> Cir., 1971) (“the Gyda”). As referred by Beck *op cit* n 102 at 257.

<sup>180</sup> The ship-owners non-delegable duty to maintain a seaworthy vessel is discussed in chapter 3.

<sup>181</sup> Gordon *op cit* n 43 at 305.

<sup>182</sup> 1986 A.M.C. 1945.

<sup>183</sup> Gordon *op cite* at 305.

<sup>184</sup> *Ibid.*

<sup>185</sup> Beck *op cit* n 102 at 256.

<sup>186</sup> **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1011 (citing **Skibs A/S Gylfe v Hyman-Michaels Co.** 304 F.Supp. 1204, 1220 (E.D.Mich., 1969) aff’d 438 F.2d 803 (6<sup>th</sup> Cir., 1971) (“the Gyda”))

presumption means, “that a vessel lost under normal conditions, with fair weather and calm seas... was unseaworthy in the absence of proof that she was improperly handled.”<sup>187</sup> Attempts to extend this presumption to persons other than ship-owners have been entertained by the Courts. In *In re Marine Sulphur Transport Corp*<sup>188</sup> the Southern District Court of New York used it against a designer-converter who had negligently rebuilt a ship in an inherently unseaworthy manner. However this decision was over turned by the Appeal Court (Second Circuit) because,

“[t]he duty of providing the crew with a seaworthy ship runs only to the owner, and the shipbuilder neither employs the crew nor can he control what happens to the ship once she leaves the yard. Therefore the traditional tort concepts apply to claims against [shipbuilders] and contrary to the trial Court’s conclusion, neither justice nor logic compels the application against it of the permissible inference rule from the unseaworthiness doctrine.”<sup>189</sup>

In *The Great American*<sup>190</sup> the plaintiffs sought to use the presumption of unseaworthiness against the Classification Society. This presumption of unseaworthiness can only operate when the claimant has been able to establish to the satisfaction of the Court that the vessel was unseaworthy at the time it departed on its last voyage. The District Court stated that the plaintiff had additional the difficulty of showing that a Classification Society bore the responsibility for the seaworthy condition of a vessel that it surveys.<sup>191</sup> The Court held that Classification Societies are not responsible for the seaworthiness of the vessel.<sup>192</sup> The plaintiff maintained that the Society had control over the condition of the vessel because the owners were prohibited from sailing without classification certificates in terms of their insurance policies.<sup>193</sup> However, the Court astutely stated,

“While this might constitute control in some practical or economic sense, it is not sufficient to bring into play the presumption, for the owner and charterer could have either sailed without insurance or paid a higher premium.”<sup>194</sup>

Therefore the presumption of seaworthiness does not operate against Classification Societies and claimants are not alleviated from the difficulties in providing the Court with evidence of breach of duty.

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<sup>187</sup> *South Seas, Inc v Moran Towing & Transp.Co.*, 360 F.2d 1002,1005 (2d Cir.1966). As referred by Beck *op cite* n 102 at 255.

<sup>188</sup> 312 F.Supp. 1081 (S.D.N.Y 1970); 1970 A.M.C. 1004.

<sup>189</sup> *In re Marine Sulphur Transport Corp* 460 F.2d 89 (2d Cir.) at 101 as referred by Beck *op cit* n 102 at 256.

<sup>190</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) This judgment was given after the district Courts decision but before the Second Circuit reversal in *In re Marine Sulphur Transport Corp* 460 F.2d 89 (2d Cir.).

<sup>191</sup> The ship-owners non-delegable duty is discussed further in chapter 3 of this study.

<sup>192</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1009.

<sup>193</sup> The *de facto* control over a vessel that a Classification Society may have due to the insurance implications of sailing in an unclassed vessel was an issue in *The Nicholas H* for purposes of determining the requirement of proximity. Lord Steyn said that in practice it is the Classification Society that has control over the question of whether a damaged vessel, without permanent repairs, will be allowed to complete her intended voyage. [1995] 2 Lloyd's Rep.299 at 310. Lord Lloyd said that a Society had *de facto* control in respect of contract for specific service of repair work.

<sup>194</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1009.

### 2.5.3 Exculpatory clauses:

Exculpatory clause may either be in the form of ‘exclusion clauses’ or ‘indemnity clauses’. Exemption clauses protect societies against claims made by the contracting parties. Most if not all Classification Societies have a standard exemption clause incorporated in the service contract.<sup>195</sup> The objective of an exclusion clause is to exclude liability for errors in the performance of the relevant services against claims brought by customers or third parties for damages. The privity rule in English common law prevents these exculpatory clauses from being applicable to third parties if that party should claim directly against the Classification Society in tort.<sup>196</sup>

Indemnity clauses protect societies against third party claims.<sup>197</sup> An indemnity clause allocates risk, whereby one party assumes another’s liability.<sup>198</sup> “[T]he rational [is] that the party with the most control over the risk should be responsible for any loss”, regardless of who is at fault”.<sup>199</sup> These agreements are generally valid under maritime law.<sup>200</sup> However when it comes to the issue of safety it is unlikely that broad exemption clauses, which only render societies liable for willful or grossly negligent conduct would be legally unenforceable on grounds of public policy.<sup>201</sup>

In *The Sundancer*, in which both an indemnity and exclusion clause was present in the relevant service contract, the Appeal Court stated that even if the wording of such clauses were unambiguous it may violate public policy.<sup>202</sup> The Court further stated that since the relevant clauses were hidden behind several references further evidence should have been adduced regarding the party’s actual intention.<sup>203</sup> In *The Great American*<sup>204</sup> the Court held that the relevant disclaimer<sup>205</sup> was “overbroad and unenforceable as contrary to public policy.”<sup>206</sup> *In re Oil Spill by the Amoco Cadiz*<sup>207</sup> the Court doubted that the exculpatory clause contained in the certificate issued by the relevant Classification Society was legally enforceable. However it did indicate that between the ship-owner and the Society that the later did not intend to assume liability for seaworthiness<sup>208</sup>

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<sup>195</sup> Kruger *op cit* n 88 at 286.

<sup>196</sup> This is a distinguishing feature from Scandinavian law, which deems it to be within the party’s autonomy to benefit third parties. Therefore a Classification Society can invoke an exemption clause against a third party claimant. *Ibid* at 291.

<sup>197</sup> Honka *op cit* n 77 at 9.

<sup>198</sup> Sanchez, L. “Chartering the chaotic offshore waters: The validity of contractual indemnity provisions pertaining to injuries sustained offshore” (2006-2007) 31 Tul.Mar.L.J. 177.

<sup>199</sup> *Ibid* (citing **Henry v A/S Ocean**, 512 F.2d 401,406.1975 AMC 162,167 (2d Cir. 1975).

<sup>200</sup> *Ibid*.

<sup>201</sup> Honka *op cite* n 77 at 17.

<sup>202</sup> **The Sundancer**, 799 F.Supp. 363 at 378 as referred by Honka *Ibid* at 16.

<sup>203</sup> *Ibid*.

<sup>204</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>205</sup> The defendant Societies (Bureau Veritas) disclaimer appeared in the survey reports under the heading “general conditions”, and read as follows: “*The Bureau Veritas declines any responsibility for errors of judgment, mistakes or negligence which may be committed by its technical or administrative staff or by its agents.*”

<sup>206</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1010.

<sup>207</sup> 1986 A.M.C. 1945 at 1952.

<sup>208</sup> 1986 A.M.C. 1945.

Indemnity clauses are more likely to be acceptable to common law Courts by the mere fact that the Classification Society has the additional defence of foreseeability and proximate cause of the third parties damages. Therefore the use of this clause would prevent the need to have to deal with these requirements.<sup>209</sup> Alternative to the use of these exculpatory clauses would be for ship-owner to exercise their bargaining power and negotiate around them.<sup>210</sup> Classification societies could avoid these clauses by simply defining their duties in a more detailed and restrictive manner in their contracts of service with their clients.<sup>211</sup> It has been suggested that exculpatory clauses will be given effect by the Courts, which are “reluctant to impose an insurers liability on Classification Societies.”<sup>212</sup>

#### 2.5.4 The ‘East River Doctrine’

The Supreme Court in *East River Steamship Corp. v Trans-American Delevall Inc.*<sup>213</sup> formulated ‘the East River Doctrine.’ This Doctrine stipulates that a manufacturer in a commercial relationship has no duty under either negligence or in ‘strict product liability’ theory to prevent a product from injuring itself.<sup>214</sup> Thereby the commercial consumer is limited to whatever express or implied warranties it may have or elect to reject the product and claim for breach of contract.<sup>215</sup> The East River Doctrine focuses on product liability claims against manufactures. The Doctrine has no application to those that are outside the design, manufacture and sale chain.<sup>216</sup>

In *Shipping Corp. of India v American Bur. Of Shipping*<sup>217</sup> the purchaser of several vessels had causes of action in contract and tort against the Classification Society for economic loss due the Society’s negligence in respect of the design and construction of vessels and post-delivery inspection services. The plaintiff was unsuccessful because of the Courts interpretation of the East River Doctrine. This was the first case to apply the Doctrine to the contractual relationship between the ship-owner and Classification Society.<sup>218</sup>

The Southern District Court of New York concluded that the fundamental principle that both of the Courts in *East River Steamship Corp. v Trans-American*

<sup>209</sup> Honka *op cit* n 77 at 17.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid* at 11.

<sup>212</sup> Gordon *op cit* n 43 at 306.

<sup>213</sup> 476 U.S. 858, 1986 AMC 2027 (1986).

<sup>214</sup> **East River Steamship Corp. v Trans-American Delevall Inc.** 476 U.S. 858, 1986 AMC 2027 (1986). “The manufacturer is liable whether or not it is negligent...For similar reasons of safety, the manufacturer duty of care was broadened...”*Ibid* at 873, 1980 AMC at 2045. “The manufacture can restrict its liability, within limits...While giving recognition to the manufacturer’s bargain warranty law sufficiently protects the purchaser...” *Id* at 874, 1986 AMC at 2046 (“Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums...”) as referred by MA Bogot ‘The ebb and flow of east river: Consideration of the Supreme Court’s decision on product liability in shipbuilding contracts’ (2006) 30 Tul.Mar.L.J. 137 at 140.

<sup>215</sup> Bogot *op cit* n 214 at 140.

<sup>216</sup> *Ibid* at 142.

<sup>217</sup> 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) .

<sup>218</sup> The contract before the Court was concluded between the Classification Society and the shipyard with the ship-owner as the intended beneficiary. Based on this construction of the parties relationship the Court refuted the lack of privity defence of the plaintiff. **Shipping Corp. of India v American Bur. Of Shipping** 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2884.

*Deleval Inc.*<sup>219</sup> and *Employers Insurance of Wausau v Suwannee River SPA Lines, Inc.*<sup>220</sup> of the general law of contract provided adequate remedies in the commercial settings where parties have equal bargaining powers that allowed them to allocate the various risks of possible defects amongst themselves by way of negotiation.<sup>221</sup> It interpreted this principle to be the basis of the *East River Steamship Corp. v Trans-American Deleval Inc.*<sup>222</sup> and *Employers Insurance of Wausau v Suwannee River SPA Lines, Inc.*<sup>223</sup> The District Court rejected the argument that Classification Societies and ship-owners are not of equal bargaining power.<sup>224</sup> The District Court confirmed that Doctrine was applicable to both causes of action of negligence and of strict liability. The Court did not deem there to be a relevant distinction between a manufacturer of a product and a provider of services that are essential for production. Nevertheless it affirmed the Appeal Courts (Fifth Circuit) approach in *Employers Insurance of Wausau v Suwannee River SPA Lines, Inc.*<sup>225</sup> where Carolyn Dineen King, Ct.J stated,

"[w]hether the negligence alleged is in the performance of a contract for services, or in a contract for the sale of goods, the resulting economic loss 'is essentially the failure of the purchaser to receive the benefit of its bargain-traditionally the core concern of contract law.' "

The Appeal Court extended that application of the Doctrine to contracts for professional services rendered in connection with the construction of a product by a party other than a builder. The District Court in *Shipping Corp. of India v American Bur of Shipping*<sup>226</sup> concluded that there was no reason to impose an extra-contractual duty on a party who contracts to provide professional services in a commercial context.<sup>227</sup> Therefore the plaintiff was prevented from proceeding with his claims in tort.<sup>228</sup> *The Sundancer*,<sup>229</sup> confirmed the decision of *Shipping Corp. of India v American Bur of Shipping*.<sup>230</sup> However it limited the scope of the Doctrine by saying it was only applicable to economic loss and only applied in those circumstances where there were no large discrepancies in the bargaining power of the commercial parties.<sup>231</sup> The Doctrine did not bar those damages for personal injury.<sup>232</sup>

<sup>219</sup> 476 U.S. 858, 1986 AMC 2027 (1986).

<sup>220</sup> 1990 AMC 447, 866 F.2d 752 (1989).

<sup>221</sup> 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2884.

<sup>222</sup> 476 U.S. 858, 1986 AMC 2027 (1986).

<sup>223</sup> 1990 AMC 447, 866 F.2d 752 (1989).

<sup>224</sup> 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2885.

<sup>225</sup> 1990 AMC 446 at 467, 866 F.2d 752 at 765 (1989) (citing *East River Steamship Corp. v Trans-American Deleval Inc.* 476 U.S. 858 at 870, 1986 AMC 2027 at 2037 (1986)).

<sup>226</sup> 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) .

<sup>227</sup> AMC 2882 (S.D.N.Y. 1990) at 2886.

<sup>228</sup> From the academics perspective this is unfortunate because the plaintiff-ship-owner had interesting cause of action in tort. One these were that the Classification Society was negligent in formulating the rules and standards, which it used to review and approve the design, construction and classification of the vessel. Therefore the plaintiffs were alleging that the Classification Societies are under a duty to have adequate rules and standards.

<sup>229</sup> 7 F.3d 1077 (2d Cir. 1993) at 384 as referred by O'Brian *op cit* n 153 at 407.

<sup>230</sup> 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) .

<sup>231</sup> 799 F. Supp. 363 at 383 as referred by O'Brian *op cit* n 153 at 406.

<sup>232</sup> 7 F.3d 1077 (2d Cir. 1993) 1994 AMC 1 at 5.

It is clear that the ship-owner will be severely restricted under American Law by East River Doctrine if he sought to claim for damage for pure economical loss in these circumstances.<sup>233</sup>

### 2.5.5 Implied Warranty of Workmanlike Performance

The contractual warranty of workmanlike performance is a remedy that differs from the negligence remedy in that it purports to create a contractual remedy for loss, which may apply even when the service provider acts without fault.<sup>234</sup> The Ryan Doctrine was formulated in *Ryan Stevedoring Co. v Pan-Atlantic Steamship Corporation*<sup>235</sup> and is generally limited to maritime contracts.<sup>236</sup> The Court held that when a stevedoring contractor agrees to provide a service, implicit in the contract is a warranty that the contractor will provide the service in a workmanlike manner. The nature and extent of the implied warranty of workmanlike service depends upon the terms of the contract giving rise to the warranty.<sup>237</sup> Further the ship-owners failure to discover and correct the unseaworthy condition that was created by the contractor's breach is not an intervening cause that would eradicate a contracting party's liability to indemnity.<sup>238</sup> Subsequent case law has not applied the Ryan Doctrine to Classification Societies undertaking. Although the Courts have indicated a willingness to recognise duties of care, it has objected to these duties being raised to the status of warranties.<sup>239</sup>

In *The Great American*<sup>240</sup> the District Court interpreted the Ryan Doctrine to mean that where a contractor undertakes to provide a service, implicit in this contract is a warranty that service will be provided in a workmanlike manner and that warranty applies to each of inescapable elements of service undertaken. Therefore the Doctrine allowed for a ship-owners liability, that is otherwise absolute, to be shared in certain and limited circumstances.<sup>241</sup>

In *The Sundancer* the Appeal Court (Second Circuit) held that this shared liability was held to exist if the following requirements are met. *Firstly*, the ship-owner must have relied on the expertise of the would-be-indemnifier and entered into a contract. *Secondly*, in terms of this agreement the later must have agreed to perform services without supervision or control by the ship-owner. *Thirdly*, he must have foreseen that the incompetent execution of the services would render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; *fourthly*, the result thereof must have been to expose the ship-owner to liability for breach of his non-delegable duty of seaworthiness.<sup>242</sup>

<sup>233</sup> O'Brian *op cit* n 153 at 407.

<sup>234</sup> Beck *op cit* n 102 at 263.

<sup>235</sup> 350 U.S. 124, 133-134, 1956 AMC 9 (1955).

<sup>236</sup> *Societa per Azioni di Navigazione v Oregon Stevedoring Co., Inc.*, 376 U.S.315,319,84 S.Ct.748,11 L.Ed.2d 732 (1964) at 754 as discussed in *Great American Insurance Co. v Bureau Veritas* 338 F. Supp. 999 (S.D.N.Y. 1972) at 1014.

<sup>237</sup> *The Sundancer* 7 F.3d 1077 (2d Cir. 1993) at 385. (citing *Parks v United States* (1<sup>st</sup> Cir 1986). 784.2d.20 at 27).

<sup>238</sup> *The Sundancer* 799 F. Supp. 363 at 384.

<sup>239</sup> Beck *op cit* n 102 at 264.

<sup>240</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>241</sup> *The Sundancer* 7 F.3d 1077 (2d Cir. 1993) at 384. Honka *op cite* n 77 at 20

<sup>242</sup> *Sundance Cruises Corp. v American Bureau of Shipping*, 799 F. Supp. 363 at 384.

(citing *Fairmont Shipping Corp V Chevron International Oil Co* 511 F.2d 1252, 1975 AMC 261 (2d Cir.) cert.denied, 423 U.S. 838 (1975) ) This is the 'special relationship' that must exist between the ship-owner and

The District Court in *The Great American*<sup>243</sup> stated that a service contractor can be held liable for the failure to detect and correct defects not created by him, in terms of the Doctrine.<sup>244</sup> This is on condition that "workmanlike service" on the part of the contractor would have detected and corrected the defect. Further, the Doctrine has been expanded to cover the activities of a number of participants in the maritime industry.<sup>245</sup> These factors lead the Court in **Great America** to comment that, "... it is not difficult to make at least a colourable argument for the applicability of Ryan to Classification Societies in general."<sup>246</sup> Upon a strict interpretation a Classification Society may be liable. This is so despite the fact that the Classification Society neither created the defect nor was responsible for the seaworthy condition.

Nevertheless, the District Court refused to apply the doctrine for a number of reasons. The strict interpretation of the doctrine would make the Classification Society the absolute guarantor of seaworthiness of any vessels it surveys.<sup>247</sup> The danger of such a possibility was not supported by sufficiently good reason to shift the burden of maintaining a seaworthy vessel from a ship-owner to another. Further a society did not have sufficient control as they are functionally incapable of correcting the relevant defect. Further it is highly unlikely that a society could create a defect by its activities.<sup>248</sup> This was held to be a distinguishing factor from a stevedore and other similar service contractors. He concluded that all a society can do is observe and report to the owner whatever its inspections reveal.<sup>249</sup>

In *The Sundancer*,<sup>250</sup> the Appeal Court (Second Circuit) adopted the same approach of *The Great American*. The Appeal Court was absolute in its approach and concluded that as a matter of law the Doctrine could not apply in such cases. However upon reading the judgment it is evident that his decision was one of policy as can be deduced by his concluding remarks,

"to rule that a ship owner...can...pass off his historic primary duty to furnish a seaworthy vessel by strict application of the *Ryan* doctrine to a Classification Society, in my judgment, would work an unsound and unfair dilution of that legal duty."<sup>251</sup>

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the service provider whereby the later has taken control of the ship in connection with matters involving the safety and the prevention of maritime accidents, as identified by the Court in **Somerelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping** 720 F.Supp. 441, 1989 A.M.C. 2330<sup>243</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>244</sup> **DeGioia v United States Lines Co** 304 F.2d 421 (1962) as referred by as referred in **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1014.

<sup>244</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>245</sup> These persons include ship cleaners, painters, repair yards, launch operators, pilots and towing companies. **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1014.

<sup>246</sup> **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1014.

<sup>247</sup> Beck *op cite* n 102 at 264.

<sup>248</sup> **In re Oil Spill by the Amoco Cadiz** 1986 A.M.C. 1945. The limited function of control of a Classification Society is discussed above.( see causation heading).

<sup>249</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1015.

<sup>250</sup> 7 F.3d 1077 (2d Cir. 1993) at 384

<sup>251</sup> **The Sundancer** 799 F. Supp. 363 at 384.

The most recent case to deal with this matter is the District Court of Maryland (Northern Division) *Eternity Shipping Ltd., Et al., Limitation Proceedings*.<sup>252</sup> The District Court concurred with the above judgments and emphasised the passive role of the Classification Societies surveyor. It used this, as a distinguishing factor from the decision of *Royal Embassy of Saudi Arabia and Insurance Company of North America v Steamship Ioannis Martinos*<sup>253</sup> where the claimant successfully employed the Ryan Doctrine against marine surveyors. However in this case the marine surveyor's role was active and not passive. They were involved in the stowage activities whereby they supervised and directed the loading and securing of the cargo. Therefore his role was similar to that of a stevedore.

## 2.6 Analysis of Courts reasons only relevant to contractual liability

The analysis of the Courts reasoning in the various judgments given in relation to Classification Societies liability will be undertaken in three parts, namely (i) reasoning that is only relevant to contract, (ii) reasoning that is only relevant to tort, (iii) and reasoning that is relevant to both contract and tort claims. It is only the first part, which is to be discussed in chapter 2.

### 2.6.1 1 Principle of Channelling of Liability

The objective of the principle of channelling liability is to frame the law so as to provide a predictable and secure focus of liability.<sup>254</sup> A good example of channelling provisions can be found in The International Convention on Civil Liability for Oil Pollution Damage (CLC). The advantages of this principle is that it reduces legal costs and delays for the injured party and establishes a clear burden of risk so as to reduce double insurance and encourage appropriate safety precautions.<sup>255</sup> For the principle to be effectively applied, one must be certain of the main causes of the loss in question. By following this common sense approach liability should be channelled correctly.<sup>256</sup> The principle should give effect to both the repair function and preventative function of the law of damages. It seeks to ensure that the person, who is burdened with the costs of the damages, is the party who is in the best position to take precautions against losses of a similar nature from materialising in the future. The preventative element should serve as an "incentive for compliance."<sup>257</sup> Ideally, the stronger deterrence signal should be sent to the party who would have the most incentive to take future preventative measures.<sup>258</sup> The repair function is self-explanatory. It has been recognised that the repair function connected with liability for damages exists in Classification Society liability cases.<sup>259</sup> However it is uncertain that the preventative function is achieved.<sup>260</sup>

<sup>252</sup> 444 F. Supp. 2d 347, 2006 A.C. M.C 2034

<sup>253</sup> 1986 AMC 769 ( E.D.N.C. 1984)

<sup>254</sup> R Harling 'The liability of Classification Societies to cargo-owners: The Nicholas H' [1994] LMCLQ 1 at 3

<sup>255</sup> *Ibid.*

<sup>256</sup> Cane *op cite* n 131 at 366.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> Honka *op cite* n 77 at 33.

<sup>260</sup> *Ibid.*

Financial channelling' is a supportive feature of the principle of channelling.<sup>261</sup> Through the mechanism of liability insurance, there is a trend in the maritime world to channel 'financial liability' down to the ship-owner.<sup>262</sup> Accordingly the ship owner is required to take out insurance for a particular amount. The objective is to ensure that somebody is financially capable of meeting claims.<sup>263</sup> An associated principle of financial channelling is the principle of limitation of liability, "put crudely, it is the *quid pro quo* for the ship-owners' offering himself as the channel."<sup>264</sup> Other features that are supportive of this feature are reversed burdens of proof<sup>265</sup>, non-delegable duties, strict liabilities<sup>266</sup> and exclusive liabilities<sup>267 268</sup>.

Most common law Courts that have not imposed liability on Classification Societies have done so by comparing the responsibilities of the Classification Society to that of the ship-owner and placing emphasis on the later. An illustration of this was in *The Sundancer* in which the Appeal Court (Second Circuit) held that the ship-owner was responsible for the seaworthiness of the vessel whereas the Classification Society had merely failed to detect a lack of seaworthiness.

### 2.6.1.2 Channelling & the role of the ship-owner's insurers

It is within context of the objectives of the principles of financial channelling and of limitation of liability that the insurance industry charges premiums, which are based on the risk, insured against. Therefore should an insured place him in a position, which reduces the relevant risk he would likely enjoy the benefit of lower premiums. One way that a ship-owner can do this is to class his vessels accordingly. The insurer uses these classification certificates to determine the risk, to decide whether cover should be given and if so at what premiums.<sup>269</sup>

By an analysis of these principles and the insurance industries response thereto it is evident that the "ultimate recipient of the strong deterrence signal" of channelling liability received by the ship-owner is normally the ship-owners insurers.<sup>270</sup> Therefore the approach of the Court in respect of channelling liability has been somewhat naïve in assuming that the ship-owner is in the best position to take the most effective protective measures.<sup>271</sup> However the principle of channelling of liability is defective when applied to the ship-owner's insurer. By relying on the classification certificate, the insurer is limited and is not in the best position to take 'preventative steps'. This is because the relevant acts that require certification by a

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<sup>261</sup> This is a feature of the Convention on civil Liability for Oil Pollution Damage 1969 and the United States Oil Pollution Act of 1990 as referred by Harling *op cit* n 254 at 4.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> Examples of this are cargo claims made under the Hague and Hague-Visby Rules in terms of Art. IV, or The Hamburg Rules in terms of Art. 5(1).

<sup>266</sup> Such liability was the traditional basis for a ship-owners liability in terms of contract of carriage. The Hague Visby and Hamburg Rules have displaced this.

<sup>267</sup> An example is the Himalaya clauses which is often encountered in respect of cargo claims.

<sup>268</sup> Harling *op cit* n 254 at 3.

<sup>269</sup> The Appeal Courts stance in *The Sundancer* that a ship-owner only obtains classification certificates to obtain lower insurance premiums shows a lack of understanding of the insurer's reasoning, (as explained) for doing this. Cane *op cit* n 131 at 367.

<sup>270</sup> *Ibid* at 366.

<sup>271</sup> *Ibid.*

Classification Society are usually completed before the ship-owner requires insurance coverage. These certifiable acts include, *inter alia*, new building of vessels, repair work and conversions. Therefore insurers are defunct in their ability to put pressure on the ship-owner at this point.<sup>272</sup>

This can be compared with the position of the Classification Society who are involved at these early stages that require classification and who can put pressure on the ship-owner by simply with holding certification until the Classification Society's conditions are complied with. Further since insurers rely on classification certificates they have an interest in the quality of the performance of the Classification Society. Therefore from the point of view of the insurer, the imposition of liability on Classification Societies and not the ship-owner would indeed serve as deterrence and an incentive on the Societies to implement these relevant preventative measures.<sup>273</sup>

### 2.6.1.3 Channelling & arguments of policy

It has been suggested that, “the boundaries of channelling cannot be determined independently of its effects in practice”<sup>274</sup> Therefore in order to give effect to the principle of channelling one should consider arguments of policy and arguments of principle together and not independently of each other.<sup>275</sup> Supporters of this argument argue that the importance of this principle is inseparable from the normative effect in practice, especially in relation to when it comes to the issue of liability and the limitation thereof.<sup>276</sup> The writer concurs but maintains that there should be evidence of these normative effects.<sup>277</sup>

### 2.6.2 The ‘apportionment of responsibilities’ approach

By acknowledging the ship-owner's insurer as the ultimate recipient of the deterrence signal it is submitted that the ‘apportionment of responsibilities’ is an effective and satisfactory manner in which liability can be channeled. According to this approach all parties involved in the maritime industry should be held duly accountable for maritime safety and environmental protection. The balance of apportionment of responsibilities should be determined and dependent on the facts of the case.<sup>278</sup> A mechanism to ensure that each participant upholds its part of this ‘divided responsibly’<sup>279</sup> for maritime safety is the imposition of liability on all parties when lady justice so demands. It is only through this imposition whereby the financial resources are committed will public perception of the maritime industry as a whole improve.<sup>280</sup> However, apportionment of responsibility should not allow for the apportionment of different claims of the wrongdoers. If this were done it would give the impression that the ship-owners and Classification Societies are in the

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<sup>272</sup> Cane *op cit* n 131 at 367.

<sup>273</sup> *Ibid.*

<sup>274</sup> Harling *op cit* n 254 at 4.

<sup>275</sup> This has been the main source of criticism against the judgment of Hirts J who attempted to limit his judgment to the facts of the case and devoid of any policy considerations.

<sup>276</sup> Harling *op cit* at 7.

<sup>277</sup> See the discussion of policy factors as discussed in chapter 3.

<sup>278</sup> Cane *op cit* n 131 at 367.

<sup>279</sup> Kroger *op cit* n 5 at 185

<sup>280</sup> *Ibid.*

same position and are responsible for the same risk.<sup>281</sup> However in those rare circumstances the doctrine of joint and severable liability should be given effect. In all cases a claimant should be free to take action against either the ship-owner or the Classification Society or both, depending on the circumstances.

### 2.6.3 Class certificate is no warranty of seaworthiness

The crux of the Appeal Courts (Second Circuit) decision in *The Sundancer* was based on Whitman Knapp J of the Southern District Court of New York ‘attempts to distinguish the case before him from *Somerelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*.<sup>282</sup> He formulated the following question based on a ‘license analogy’; does an entity that issues licenses undertake to ensure that the licensee is fit to undertake the relevant activities that require certification, if that license enables the licensee to engage in those activities? He reasoned by way of analogy with a driver’s license, that the entity that issues licenses merely give permission for the licensee to operate in the public domain, be that on highways or on the open sea.<sup>283</sup> He held that the classification certificate was not an assurance to the customer-ship-owner that he had satisfied his non-delegable duty of seaworthiness. The District Court then proposed that the only reason a ship-owner wanted these documents was to ensure that he could operate his vessels without being in contravention with the relevant regulations.<sup>284</sup>

This led to George C. Pratt, Ct.J of the Appeal Court (Second Circuit) making a brash statement that,

“...the purpose of the classification certificate is ...merely to permit Sundance to take advantage of the insurance rates available to a classed vessel.”

The Appeal Court (Second Circuit) distinguished *Somerelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*<sup>285</sup> by stating that, the purpose of the tonnage certificate did not permit the licensee to do anything nor did it offer any form of ‘guidance’<sup>286</sup>. Its only purpose was to allow for the calculation of the ships tonnage so that the fees payable for the passage through the Suez Canal could be correctly estimated.<sup>287</sup> Further the Appeal Court did not see any relevance in the fact that the relevant tonnage calculations were required in terms of the International Tonnage Convention for the purposes of issuing tonnage certificate. The writer disagrees for reasons discussed below.

Other Courts have upheld this rejection of the notion that a Classification Society is not a warrantor or insurer of seaworthiness on numerous occasions. It

<sup>281</sup> Lagoni *op cit* n 93 at 327.

<sup>282</sup> civil no. 86.4615, U.N.D.C. District of New Jersey, 1989 A.M.C. 2330

<sup>283</sup> 799 F.Supp. 363, at 375.

<sup>284</sup> *Ibid* at 376.

<sup>285</sup> civil no. 86.4615, U.N.D.C. District of New Jersey, 1989 A.M.C. 2330

<sup>286</sup> It is submitted that this terms was used out of context. It appears that the Court extracted it from the requirements of section 552 of the Restatement (Second) of Torts.

<sup>287</sup> 799 F.Supp. 363, at 377.

commenced prior to *The Sundancer* with the judgment of *The Great American*<sup>288</sup> which was followed in *Continental Insurance Co. v Daewoo Shipbuilding*<sup>289</sup> in which the Court held that a Classification Society was not liable to a third party cargo-owner as an insurer of seaworthiness.<sup>290</sup> This rationale was used in *Cargill Inc. v Bureau Veritas*<sup>291</sup> where it was extended to ship-owners.<sup>292</sup> The ‘license analogy’ used by the Court is incorrect. A Classification Society is not an institution that is entrusted by the public to dispense authority or give permission. A national administration of a flag state or a ‘recognised organisation’ acting under delegated authority and performing statutory functions is an example of an institution that is vested with authority by the public. Further, a Classification Society does ensure that a ship-owner (‘licensee’) ‘is fit to perform’ and by doing so gives ‘guidance’. However, the condition that is warranted is that which is dictated in terms of the societies rules and standards. If these Rules were adequate, then there would be no difference with the condition of the vessel prescribed by the Rule and a seaworthy vessel.<sup>293</sup>

#### 2.6.4 Disparity between fees & potential damages

In respect of classification liability there are two elements to this argument that have been discussed by the Courts. The first is that the disparity of fees in comparison to the exposure of risk is a factor that indicates that the parties did not intend to transfer the risk of liability.<sup>294</sup> The second element is that, it is unfair, unjustifiable or unreasonable for such risk of liability to be transferred against the payment of disproportionately low fees. This is odd because it is the norm for professional fees to be small in comparison to the amount stated in a relevant transaction or to the potential exposure to liability. Further such a disparity has not been a concern for product liability cases where the cost of a manufactured product has generally not been a mitigating factor in the amount of damages awarded.<sup>295</sup> An indication of whether the parties intended such is their bargaining power.

Before it can be determined which party assumed the risk it first has to be determined who should have borne the risk. There is no moral duty to insure. It has been argued that such a duty may exist if one bears the risk of a liability but this is the very point in issue.<sup>296</sup> One could say the ship-owner is by the mere fact that he is insured. However a Classification Society could also obtain insurance for its liability. However this approach is undesirable because it fosters the phenomena of double insurance within the maritime industry.<sup>297</sup>

<sup>288</sup> 338 F. Supp. 999 (S.D.N.Y. 1972) at 1012.

<sup>289</sup> 707 F.Supp. 123, 1988 A.M.C. 2526

<sup>290</sup> *Ibid* 2526 at 2528.

<sup>291</sup> 902 F. Supp.49 ( S.D.N.Y 1995)

<sup>292</sup> *Ibid* at 53

<sup>293</sup> Arguably, the rules and standards of a Classification Society should ensure that a compliant vessel is in a seaworthy condition. See the discussion above relating to the proposed additional duties of a Classification Society.

<sup>294</sup> *The Sundancer* 1994 AMC 1 at 11 This disparity was held to be a strong indication that parties did not intend to transfer the risk of loss from the ship-owner to the Classification Society.

<sup>295</sup> Miller *op cit* n 125 at 98.

<sup>296</sup> *Ibid*.

<sup>297</sup> *Ibid*.

### 2.6.5 Presumption of insurance efficiency & equal bargaining power

When commercial parties are of roughly equal bargaining strength and they distribute the risk of transactions amongst themselves there is a presumption of insurance efficiency.<sup>298</sup> This presumes that the parties bargained for their optimal level of protection.<sup>299</sup> This presumption must be given effect unless it is refuted by evidence of market distortion that unfairly inhibited the parties from bargaining.<sup>300</sup> In the absence of such evidence, the contractual remedies and distribution of risk should be treated as fair.<sup>301</sup> The presence of this disparity does not mean that the parties did not intend to assume the risk or otherwise. Such an undertaking would in itself not be unreasonable in light of the ease that one can obtain liability insurance. To assume otherwise would require evidence that indicated that the fees charged did not include the cost of premiums for the appropriate liability insurance. The source of such evidence could be either the dealings between the parties or commercial practices.<sup>302</sup> When a party alleges that it did not intend to assume the risk of liability he is disputing the terms of the agreement in which the intention of the contracting parties is purportedly reflected. In settling the dispute the Court will need to have recourse to other considerations besides the intention of one contracting party.

Bargaining power does not require precise determination.<sup>303</sup> Classification societies and ship-owner have equal bargaining power.<sup>304</sup> This is easily comprehensible as both parties are familiar with the terms of the contracts that govern their relationship, which they regularly use. Another factor is that both parties are reliant on each other in the commercial sense. Therefore it is unlikely that there exists a bargaining discrepancy that would be sufficient to distort the bilateral nature of the contract.<sup>305</sup> It has been suggested that the commercial dealings between sophisticated parties of this sort should not be upset by legal rules altering such distribution in the name of some other notion of fairness and justice.<sup>306</sup> The writer concurs.

In *The Sundancer*<sup>307</sup> the Appeal Court (Second Circuit) did not go into any in depth analysis of the parties intention to assume the risk. It simply held that the great disparity between the fee charged by a Classification Society for its services and the potential exposure of liability, indicated that the Society had no intention to assume the risk neither as a guarantor of the vessels sea worthiness nor as an insurer of the ship-owner when it issued the classification certificate.<sup>308</sup> This disparity was

<sup>298</sup> Cane *op cit* n 131 at 368.

<sup>299</sup> PF Cane 'Classification Societies, Cargo Owners and the Basis of Tort liability- The Nicholas H' Lloyd's maritime law quarterly (1995) 433 at 437.

<sup>300</sup> The limited number of Classification Societies is not evidence of unequal bargaining power. **Shipping Corp. of India v American Bur. Of Shipping**, 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2885.

<sup>301</sup> Cane *op cit* n 131 at 368.

<sup>302</sup> *Ibid.*

<sup>303</sup> **Shipping Corp. of India v American Bur. Of Shipping**, 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2885

<sup>304</sup> **Shipping Corp. of India v American Bur. Of Shipping**, 752 F. Supp. 173 1990 AMC 2882 (S.D.N.Y. 1990) at 2885.; **The Sundancer**, 7 F.3d 1077 (2d Cir. 1993), 1994 AMC 1 at 5

<sup>305</sup> O'Brian *op cit* n 153 at 407.

<sup>306</sup> Cane *op cite* n 131 at 369.

<sup>307</sup> 7 F.3d 1077 (2d Cir. 1993), 1994 AMC 1, at 11.

<sup>308</sup> Cane *op cit* n 131 at 376.

held to be a strong indication that parties did not intent to transfer the risk of loss from the ship-owner to the Classification Society.

In order to justify its decision Court cited section 351 of The Restatement ( second) of Contracts(3)(1981). This allows the Court to limit damages for foreseeable loss if it concludes that in the circumstances, justice so requires in order to avoid disproportionate compensation.<sup>309</sup> The Appeal Courts(Second Circuit) reliance on section 351 of The Restatement ( second) of Contracts(3)(1981) is incorrect. This section is only employed when it is proven that the damages were caused by the breach., only after the Court has determined this should it determine whether the damages are disproportionate. The Appeal Court held that the defendant Classification Society had breached no duties. Further section 351 of The Restatement (second) of Contracts (3)(1981) is usually used in circumstances when the contracting parties are not of equal bargaining power.

The majority of the Court in *International Ore and fertilizer Corp v SGS Control Services*<sup>310</sup> confirmed the decision of *Glazner v Shepard*<sup>311</sup> in which an independent weigher was held liable for damages that were above the contract fee. The damages were the result of his missmeasured of the relevant commodities. Therefore he issued an incorrect certificate to this effect. The Court held that the damages sustained by the buyer of the commodities were held not to be a mere indirect or collateral consequence of the action of the weigher. It was rather the end and the aim of the transaction according to the knowledge of the weigher.<sup>312</sup> Similarly the inspection surveyor performance of an accurate survey as opposed to one done in a hastily manner is the end and aim of the transaction entered into between the inspection service and the charterer-cargo-owner.<sup>313</sup> By this the Appeal Court was certain that the parties had agreed that the inspector assumed the risk of the loss that may arise from his negligently preformed services.<sup>314</sup>

The majority of the Appeal Court (Second Circuit) further found additional factors that proved the existence of this intention. These were that relevant certificate expressly stipulated that the inspection service would be responsible to exercise reasonable care.<sup>315</sup> That the defendant-inspection service provider was a professional service that preformed it services on a frequent and recurring basis.<sup>316</sup> Finally, that the defendant could insure against the liability for inaccurate inspection, which could result in major damage to the cargo and could set its price

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<sup>309</sup> Section 351 of The Restatement( second) of Contracts(3)(1981) as referred by DJ Jacob Mishler in **International Ore and fertilizer Corp v SGS Control Services** 1995 A.M.C. 944 at 959.

<sup>310</sup> 1995 A.M.C. 944 at 959.

<sup>311</sup> 135 N.E 275(N.Y.1922). The Appeal held that this decision was reflective of maritime law.

<sup>312</sup> 135 N.E 275(N.Y.1922) at 275 as reffered to Ralph K Winter Ct.J in **International Ore and fertilizer Corp v SGS Control Services** 1995 A.M.C. 944 at 952.

<sup>313</sup> Therefore the Court rejected the argument that the case was concerned with 'special damages'. These are damages that are above the contract but the potential of damage arising from the party's negligent conduct was not relised by the parties nor was the risk of such intended to be transferred between the parties. This argument was proposed in the minority judgment in **Vitol Trading S.A v SGS Control Services, 1989 AMC 1309, 874 F.2d (2 Cir. 1989).**

<sup>314</sup> 1995 A.M.C. 944 at 952.

<sup>315</sup> This is also the norm in certificates issued by Classification Societies.[find a source for this statement]

<sup>316</sup> 1995 A.M.C. 944 at 952.

accordingly.<sup>317</sup> It is submitted that all these factors are equally applicable to Classification Societies.

The dissenting judgment of Jacob Mishler D.J in *International Ore and fertilizer Corp v SGS Control services*<sup>318</sup> interpreted the decision in *The Sundancer* as supportive of the notion that in the interest of justice a Court may limit disproportionate compensation in those circumstances when causation has been proven as is permitted by Section 351 of The Restatement (second) of Contracts (3) (1981)<sup>319</sup> In *The Nicholas H* the House of Lords has held that the disparity is unjustifiable, unfair and unreasonable. An acknowledgment of the forum of the Court and legal rules ineptness to deal with the concept of insurance efficiency and its 'unwillingness' to disturb what they perceived to be agreed settled patterns of risk sharing amongst commercial parties, was clearly evident in the majority judgment in *The Nicholas H*.<sup>320</sup>

It is submitted that Lord Lloyd in his dissenting judgment in *The Nicholas H* was correct when he emphasised the fact that no sufficient evidential material was bought before the Court that could refute the operation of this presumption between the parties or support other insurance implications argued before the Court.

### 2.6.6 Certificate a key to low insurance premiums

It is obvious that a ship-owner, who is participant in the competitive maritime market, would what to take advantage of lower insurance rates that are applicable to classed vessels. What is important is not the actual amount of the premiums charged but rather the reasons why they are levied at that amount. The reasons why lower premiums are the result of having a vessel classed are because a classed vessel diminishes an insurer's risk. This is because insurers place trust in the classification process and in the fact that Societies will exercise reasonable care in issuing classification certificates.<sup>321</sup> It is essential for this element of trust to be maintained. It has been suggested that this can be better achieved if all role players who at some point ensure safety standards are given some incentive to perform the task with care.<sup>322</sup> The writer concurs.

### 2.7 An antidote to *The Sundancer*

The incorrectness the approach taken by the Second Circuit in *The Sundancer* in respect of Classification Society's liability towards their customer is best illustrated

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<sup>317</sup> *Ibid* at 952. It is this last factor, the inspection service providers ability to obtain insurance that is of particular interest. This is because this factor has generally been used by the various jurisdictions as a factor that mitigates against imposing liability on Classification Societies, and here it is being used as a factor that mitigates against another factor, the disparity between fees and damages, that has also been held to mitigate against liability. A possible reason for this is that the Court in this case does not view inspection service to be such a role player within the maritime industry that, as opposed to a Classification Society, that would lead to the phenomena of 'double insurance' or the creation of an extra -layer of insurance. However it has been suggested that the very fact that charterers-cargo-owners have to employ the services of these inspection service providers is because of the 'class crisis' and that charterers no longer trust the services of Classification Societies.(see Boisson n 2 at 363)

<sup>318</sup> 1995 A.M.C. 944 at 959.

<sup>319</sup> 1995 A.M.C. 944 at 959.

<sup>320</sup> *Ibid*.

<sup>321</sup> Cane *op cite* n 131 at 369.

<sup>322</sup> *Ibid* at 369.

by an analysis of the decision of the United States Appeal Court in **International Ore and fertilizer Corp v SGS Control services, Inc.**<sup>323</sup> This judgment should be viewed as an antidote to *The Sundancer*. The Southern District Court of New York in *The Sundancer* distinguished *International Ore & Fertilizer Corp. v SGS Control Servs. (“Interior I”)*<sup>324</sup> on the basis that

“[t]he facts before us present a sharp contrast...In that case [“**Interior I**”], rather than having asked the defendant for a certificate (or license) that would have permitted the operation of a ship or the obtaining of insurance, the ship-owner had asked the defendant to make an examination of its ship's holds for the *specific purpose* of determining whether or not they were sufficiently clean safely to receive a *specified delicate cargo*.”<sup>325</sup>

The majority of the Appeal Court (Second Circuit) in *International Ore and fertilizer Corp v SGS Control services, Inc*<sup>326</sup> perpetuated the misunderstanding that classification certificates merely allow a ship-owner to take advantage of insurance rates available to classed vessels.<sup>327</sup> This is incorrect.<sup>328</sup> The writer submits that there is not relevant distinction between the purposes of classification certificates and those provided by the inspection service in *International Ore and fertilizer Corp v SGS Control services, Inc.*<sup>329</sup> Classification Societies do not warrant that a vessel is seaworthy.<sup>330</sup> However, the writer is of the view that it is not unreasonable to view a Classification Societies certificate as a warranty that the vessel, at the very least complies with the specific Classification Societies rules and standards.<sup>331</sup> Therefore both certificates of Classification Societies and inspection services are a guarantee that the vessel is in a certain condition at the time the relevant survey is completed. It does not appear that the majority of the Appeal Court (Second Circuit) in *International Ore and fertilizer Corp v SGS Control services, Inc.*<sup>332</sup> viewed the content of the guarantee as being the definitive issue but rather the fact that it exists. If this is correct, the writer suggests that there are no distinguishing factors between this case and *The Sundancer* .

Therefore the majority decision in *International Ore and fertilizer Corp v SGS Control services, Inc* is supportive of the conclusion that the decision in *The Sundancer* was based more on ‘policy considerations’ than law. This is because the Appeal Court (Second Circuit) was willing to impose liability on an inspection service that performs similar functions to that of Classification Societies when it was not weighed down by policy considerations that preoccupied it in *The Sundancer*. The reasoning behind the majority judgment is correct and should have been the stance of the Appeal Court (Second), a year earlier, in *The Sundancer*.

<sup>323</sup> 38 F.3d 1279, 1995 A.M.C. 944.

<sup>324</sup> 1991 AMC 25,36,743 F.Supp. 250,(S.D.N.Y. 1990).

<sup>325</sup> 799 F.Supp. 363 at 382.(my italics).

<sup>326</sup> 38 F.3d 1279, 1995 A.M.C. 944.

<sup>327</sup> 38 F.3d 1279, 1995 A.M.C. 944 at 953 (citing **Sundance Cruises Co. v. Am. Bureau of Shipping (The Sundancer)**, 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183.

<sup>328</sup> The insurance advantages of classification is discussed below.

<sup>329</sup> 38 F.3d 1279, 1995 A.M.C. 944.

<sup>330</sup> See the above discussion on ‘ class certificate is no warranty.’

<sup>331</sup> This is why the content of these standards is very important, and why so much attention has been given by international organisations to the establishment and articulation of uniform and reasonable standards for Classification Societies.

<sup>332</sup> 38 F.3d 1279, 1995 A.M.C. 944

## Conclusion

The immunities afforded to Classification Societies in respect of contractual and tort liability towards their customers is unjustifiable. Both inspection services and Classification Societies essentially provide the same service. The writer deems it to be unfair that the former is burdened with liability whereas the latter enjoys immunity. This is even more so since cargo-owners and charterers have been compelled to use inspection services because of the loss of confidence in Classification Societies in general, due to the ‘class crisis’.<sup>333</sup>

Through the use of permissible exculpatory clauses Classification Societies can adequately protect themselves from the adverse consequences of negligently performed surveys. A duty to take *reasonable* care would protect Societies from the nuisance of minor defects that are reasonably undetected. No entity should be able to escape liability for conduct that is grossly negligent.<sup>334</sup> To argue otherwise would imply that the principle of freedom of contract is defunct in a market that is so distorted that it jeopardises the bargaining power of Classification Societies.<sup>335</sup> It has been suggested that this ‘is simply not the case’.<sup>336</sup> The writer concurs.

The risk of incurring liability for gross negligence would be commercially insurable and the costs could readily be passed onto the Classification Society’s clients. The recognition of a duty of care would simply mean that ship-owner would be liable on a basis of strict liability whereas Classification Societies would incur liability on a lower standard of negligence.<sup>337</sup> To conclude, “an industry that cannot survive under such a regime deserves to die.”<sup>338</sup>

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<sup>333</sup> Boisson *op cit* n 2 at 363

<sup>334</sup> Cane *op cit* n 131 at 374

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

## CHAPTER 3: Classification Society's liability towards third parties

### 3.1 Introduction

Classification societies have vigorously refuted and contested the imposition of liability in respect of third parties cause of actions.<sup>339</sup> Common law Courts have been reluctant to impose liability on Classification Societies in respect of third party claims. American jurisprudence recognition has been given but only on a strictly formulated basis. Nevertheless the tide is turning in this respect. Civil law Courts have been more open to the possibility.

When a negligent classification has been preformed, the direct consequences may affect the party that had contracted the services in question. However, in practice the claimant would be the third party and not the client.<sup>340</sup> This is because documentation produced and supplied by Classification Societies facilitates the execution of a number of maritime contracts. These include, *inter alia*, shipbuilding contracts, ship sales contract, maritime mortgage arrangements, hull insurance and charterparties.<sup>341</sup>

When a Classification Society incorrectly classifies a ship, the surveyor does not act as a professional and exercise the required duty of care. Therefore the core issue is professional negligence. The fact that this leads to a particular conclusion that is reflected as information in a relevant certificate is secondary in nature. It has been suggested that, judgments based on negligent misrepresentation concerning the supply of misleading information in the course of business do not resolve all the situations of professional negligence and indeed detract from the primary issue of unprofessional conduct from being resolved.<sup>342</sup> The writer concurs. The ill effects of undue emphasis on the cause of action negligent misrepresentation as opposed to the underlying professional conduct is best illustrated by judgments such as *Hellenic Investment Fund v Det Norske Veritas*.<sup>343</sup>

From the onset one should acquaint themselves with the consequences of a surveyor in failing to exercise proper care and skill. In *Reeman and Another v Department of Transport and Others*<sup>344</sup> Lord Justice, Philip in relation to a Classification Society performing a 'public function', identified the following possible consequences that are equally applicable to the negligent performance of the 'private function',

“[Firstly]. The danger which the regulations are designed to guard against may result in loss of life, injury or damage to third parties. [Secondly] The owner of the property concerned, with whom the authority is in direct relationship, may suffer pecuniary damage as a

<sup>339</sup> Although the issue of classification liability is topical in recent times, claims against societies by disgruntled ship owners and third parties have been entertained by the both common law and civil law Courts since the turn of the century. See *American Bureau of Shipping v Allied Oil Co.* 64 F.2d 509, 511; 1933 AMC 1217;1219 (6<sup>th</sup> Cir 1933) and *W. Angliss and Co. (Australia) Proprietary Ltd V Peninsular and Oriental Steam Navigation Co. Ltd* (1927) 28 L.L. and *The Amor* Cass.req.15 May 1923, (1923) 3 DOR 384,386 ff

<sup>340</sup> Kruger *op cit* n 88 at 272.

<sup>341</sup> *Ibid* at 271

<sup>342</sup> *Ibid* at 274

<sup>343</sup> 464 F. 3d 514; 2006 AMC 2312. This judgment is discussed extensively below.

<sup>344</sup> [1997] 2 Lloyd's Rep 648 at 679.

result, for instance, of being prohibited from using his property for its commercial purpose, or spending money on unnecessary modifications to it. [Thirdly] Third parties induced to purchase, hire, insure or finance the property in question may suffer prejudice.”<sup>345</sup>

Another interesting aspect that the question of classification liability towards third parties raises is the Court’s discussion of the different approaches of the law of tort (delict). There is a difference between civil and common law jurisdictions approach. In general civil law Courts have taken an ‘interactional view’ of the law of delict which focuses on the interaction between the victim and the wrongdoer.<sup>346</sup> Whereas common law Courts have adopted an approach that is concerned with the management and distribution of risk.<sup>347</sup> The distinction is best illustrated by the judgments given by the House of Lords in *The Nicholas H*.

The approach of the common law Courts adopted towards Classification Societies is not unanimously applied to other professional people such as doctors, dentists and attorneys. Therefore Classification Society’s liability towards third parties raises the question of whether a classifications societies liability towards third parties is *sui generis*. Is this a given area of law that is so special that general principles in law that would otherwise be applicable must yield to a *sui generis* solution?<sup>348</sup> This involves the balancing of ‘generalism in law’ with modern needs of a technical specialised field.<sup>349</sup> Clearly jurisdictions of the civil law system do not think so. But the use of the ‘risk management approach’ approach by the common law jurisdiction suggests that these jurisdictions favour a *sui generis* solution.<sup>350</sup>

From our discussion thus far it is apparent that the services of a Classification Society have an ‘influence on the safety and condition of the vessel’. This influence can be achieved through the society’s rules or when it recommends repairs to be carried out or sets conditions for class. Based on the general principle enunciated above, it has been suggested that a society should owe a duty of care whenever it has influence on the deficiency, which caused the accident.<sup>351</sup> It is within this vein that the tort of professional negligence and misrepresentation as well as alternative theories is discussed in respect of third party claims against societies.

### **Alternative theory of third party liability: Product liability**

Before discussing cause of actions of professional negligence and negligent misrepresentation a brief analysis an alternative theory of third party liability must be undertaken, namely the traditional cause of action of product liability. A third part who receives a defective product may claim pure economic loss because, had

<sup>345</sup> [1997] 2 Lloyd’s Rep 648 at 679.

<sup>346</sup> The ‘interactional view’ is discussed further below.

<sup>347</sup> The ‘risk management approach’ is discussed further below.

<sup>348</sup> Kruger *op cit* n 88 at 271.

<sup>349</sup> *Ibid*.

<sup>350</sup> See *The Nicholas H* [1996] 1 A.C. 211, [1995] 2 Lloyd’s Rep. 299 (H.L.), *Otto Candies L.L.C v Nippon Kaiji Kyokai Co.* 346 F.3d 530, 2003 AMC 2409 (5<sup>th</sup> Cir. 2003) and *Natcraft Pty Ltd & Henlock Pty Ltd v Det Norske Veritas & Peter Colley* [2001] Queensland Supreme Court, Australia 348.

<sup>351</sup> Lagoni *op cit* n 93 at 158-160.

he known the true condition of the product he may have paid less or not bought it. It is has been suggested that, if the product had been certified by a Classification Society which incorrectly did not reflect the defect and the purchaser bought the product on the strength of the certificate, the Classification Society may be liable.<sup>352</sup> Although, the certificate would not imply that the product is of the highest quality, is worth a particular price or indeed adequate for the intended service, it does imply that, at the time of inspection, the product complied with the stipulated rules.<sup>353 354</sup>

Most jurisdictions allow builders and manufacturers to be able to contract out of liability for latent defects towards the purchaser through the use of “as is clauses”.<sup>355</sup> Further, the law permits them to owe no duty of care to subsequent owners to avoid defects that cause pecuniary damage. The House of Lords decision *Murphy v Brentwood District Council*<sup>356</sup> held that there was no justification for introducing into English law something in the nature of a “transmissible warranty of quality”.<sup>357</sup> In *Reeman and Another v Department of Transport and Others*<sup>358</sup> the position of department of transport acting in the capacity of a certifying authority was compared with that of builder and manufacture. The Appeal Court conclude that if builders and manufactures owed no duty to subsequent purchasers then there was no justification for imposing such a duty on an authority which regulated the performance of these constructors or manufactures.<sup>359</sup> Further, there would be no obvious reason why a certifying authority whose duty is to regulate the fitness of vessels should impose a greater duty of care than that borne by those who build the vessels.<sup>360</sup> However this judgment is limited to third parties (potential purchasers) who have not paid for the services of the relevant certifying authority.<sup>361</sup>

A different perspective from which the product liability argument may be bought into the picture is by viewing a defective certificate itself as a product. This would resemble a cause of action based on ‘product liability’. In such circumstances this is distribution of ‘dangerous documentation’, which disregards latent defects and inherent risks in the object. Therefore the similarity with ‘physical product liability’ can be readily seen because the supply of dangerous information facilitates the distribution of goods and services with inherent safety defects.<sup>362</sup> Arguable the

<sup>352</sup> Lagoni *op cit* n 93 at 61.

<sup>353</sup> An example a service that would renders a classification possible liable would be when a Classification Society calculates and vets the blue prints of a vessel incorrectly which causes the vessel to be unstable, insecure, slower or more expensive to construct. *Ibid*.

<sup>354</sup> See the above discussion of warranty of seaworthiness.

<sup>355</sup> Kruger *op cit* n 88 at 279. The affect of an “as is clause” was illustrated in **The Morning Watch** [1990] 1 Lloyd’s Rep. 547.

<sup>356</sup> [1990] 2 Lloyd’s Rep. 467; [1991] 1 A.C 398.

<sup>357</sup> Lord Keith at 477; 469 and per Lord Bridge at 485; 481 in **Murphy v Brentwood District Council** as referred by Lord Justice Philips in **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648 at 782.

<sup>358</sup> [1997] 2 Lloyd’s Rep 648.

<sup>359</sup> *Ibid* at 782.

<sup>360</sup> Lord Oliver in **Murphy v Brentwood District Council** at 488-489 as referred by Lord Justice Philips in **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648 at 782

<sup>361</sup> The potential purchaser failed to produce evidence that they had paid for the services of the relevant Classification Society in **The Morning Watch** [1990] 1 Lloyd’s Rep. 547 and in **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648 enabled the Court to distinguish itself from the decision of **Smith v Eric S. Bush (a firm); Harris and Another v Wyre Forest District Council** [1990] 1 A.C 831.

<sup>362</sup> Kruger *op cit* n 88 at 279.

‘seller of the information’ (the Classification Society) should be liable for economic loss to the customer.

In this respect the decision of the House of Lords in *Smith v Bush a firm*); *Harris and Another v Wyre Forest District Council*<sup>363</sup> is of interest. The question before the House was whether a valuer valuing a house for a building society owed a duty of care to the purchaser of that house. The House of Lords answered in the affirmative. The decision of the House of Lords in *Smith v Bush a firm*); *Harris and Another v Wyre Forest District Council*<sup>364</sup> does allow for the establishment of sufficient proximity, when a prospective purchaser has indirectly paid the surveyor’s fees in the purchase price and this was known to the certifying authority. However in the normal course of events it is the ship-owner who pays for the services of the Classification Society. Therefore a third party claimant (potential purchaser) would need to prove that the purchase price of the vessel reflected the ship-owners payment to the society. Indeed it is a reasonable approach that a plaintiff should only claim the benefit of advice, which he has *inter alia* paid for.<sup>365</sup> However it remains uncertain whether the Classification Society need to have knowledge of such a payment.<sup>366</sup>

Nevertheless despite the difficulties that a third party may encounter in establishing a cause of action either on the traditional grounds of product liability or the alternative remedy which extends ‘product liability’ it has been suggested that the policy consideration of maritime safety favour the drawing of an analogy with ‘product liability’ cases.<sup>367</sup> The writer concurs.

### 3.3 Professional negligence under English law

In English law for a cause of action of negligence to be established the following prerequisites must exist, namely, the plaintiff must owe the defendant a duty of care, which must have been breached, and this breach must have caused the defendant loss. At present one of the most unsettled issues in English law of torts is the degree of protection that must be afforded to a third party’s financial interest.<sup>368</sup> Indeed, the liability of Classification Societies towards third parties is on the frontier of the English law of torts.

In English law the existence of a duty of care is considered separately in respect in respect of each different type of loss suffered by the wrongdoer. Therefore, the categorisation of the loss or damage inflicted upon the claimant is a matter that goes primarily to the existence of the duty of care.<sup>369</sup> English law more readily protect a person’s interest in physical integrity in person and property than a person’s financial interest.<sup>370</sup> Only in exceptional circumstances will the Courts protect a person’s financial interest. In *Dorset Yacht Co. Ltd. v Home Office*<sup>371</sup> it

<sup>363</sup> [1990] 1 AC 831

<sup>364</sup> *Ibid.*

<sup>365</sup> M Lawson ‘Determining the indeterminate class’ (1990) LMCLQ 482 at 489

<sup>366</sup> *Ibid* at 488.

<sup>367</sup> Kruger *op cit* at 280.

<sup>368</sup> Lunney & Oliphant *op cit* n 178 at 96.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> [1970] AC. 1004; 1 Lloyd’s Rep 453.

was generally held that a duty of care generally requires the prerequisites of foreseeability, proximity and considerations of fairness, justice and reasonableness, irrespective of the nature of damage.

Foreseeability is required because a duty of care can only be owed to an individual within the scope of the risk created and not the world at large. Therefore only a 'foreseeable victim' is relevant to a tort enquiry.<sup>372</sup> The foreseeability test is regarded as the factual component of the duty of care enquiry.<sup>373</sup> However, the establishment of the existence of a duty of care is not merely based on a factual investigation. It is more a matter of policy. It is within this vein that the Courts have utilised the 'proximity test' as set in *Donoghue v Stevenson*.<sup>374</sup> Lord Atkin stated,

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, when, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."<sup>375</sup>

In *Parrett v Collins*<sup>376</sup> Lord Justice Hobhouse gave an outline of the proximity test in respect of claims for physical and personal damages based on the cause of action of negligence. Lord Justice Hobhouse stated,

"that where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control<sup>377</sup> over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care if he causes a situation to exist which does in fact cause the plaintiff injury."<sup>378</sup>

Lord Hobhouse continued and stated that once this proximity exists, it ceases to be material what form the unreasonable conduct takes. The distinction between negligent misstatement and other forms of conduct ceases to be legally relevant, although it may have a factual relevance to foresight or causation.<sup>379</sup> The proximity test has been referred to as the legal aspect of the duty of care enquiry, which has been used by the Courts as an instrument to restrict the scope of liability.<sup>380</sup> However, what is required in addition to reasonable foreseeability is the additional consideration of fairness, justice and reasonableness.

<sup>372</sup> Lunney & Oliphant *op cit* n 178 at 100.

<sup>373</sup> *Ibid* at 111.

<sup>374</sup> [1932] A.C. 562 at 580 as referred to by Lord Justice Phillips in *Reeman and Another v Department of Transport and Others* [1997] 2 Lloyd's Rep 648 at 676.

<sup>375</sup> In *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* [1963] 1 Lloyd's Rep. 485.; [1964] A.C. 1129 the House of Lords held that the principle in *Donoghue v Stevenson* [1932] A.C. 562 could apply when the negligent conduct of a party caused economic loss to another in certain circumstances.

<sup>376</sup> [1998] 2 Lloyd's Rep 255.

<sup>377</sup> Lord Lloyd held that Classification Societies had *de facto* control.

<sup>378</sup> [1998] 2 Lloyd's Rep. 255. at 262. Therefore Lord Justice Hobhouse was in agreement with Lord Lloyd's views in this respect as given in his dissenting judgment in *The Nicholas H.*

<sup>379</sup> [1998] 2 Lloyd's Rep. 255. at 262.

<sup>380</sup> Lunney & Oliphant *op cit* n 178 at 111.

In *The Nicholas H*<sup>381</sup>, The House of Lords expressly sought to extend the requirements needed to establish a duty of care to all types of damages. In doing so the House sought to extend the analysis of Lord Oliver in *Caparo Industries Plc. v Dickman*<sup>382</sup> that has been described as ‘the classic exposition of the modern approach to establishing a duty of care’.<sup>383</sup> Lord Steyn considered the ‘three-stage’ test of foreseeability, proximity and fairness, justice and reasonableness, as “settled law” and confirmed the approach of Lord Justice Saville of the Court of Appeal in *The Nicholas H*.<sup>384</sup> Lord Justice Saville identified these requirements and recognised that,

“foreseeability, proximity of relationship and the question of whether it is fair, just and reasonable to impose a duty of care are matters which overlap and are really facets of the same thing. When confronted with a novel situation the Court does not, however, consider these matters in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would affect a significant extension to the law of negligence. Only in exceptional cases will the Court accept that the interests of justice justify such an extension of the law<sup>385</sup>. ”

Lord Steyn however acknowledged that there might be relationships between parties that are of a nature whereby it is obvious that a lack of care by one will create a risk of harm to the other. In these circumstances a duty of care, “...as a matter of common sense and justice”<sup>386</sup> must be imposed. He concluded that in respect of physical damages it may be more “...self-evident that a civilised system of law should hold that a duty of care has been broken.” Whereas claims for pure economic loss, “...may well pose a more difficult problem.”<sup>387</sup> The three so-called requirements for a duty of care should be treated as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. As opposed to being used as wholly separate and distinct requirements.<sup>388 389</sup>

<sup>381</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>382</sup> [1990] 2. A.C. 605

<sup>383</sup> Lunney & Oliphant *op cit* n 178 at 113.

<sup>384</sup> [1994] 1 Lloyd's Rep. 492 at 496.

<sup>385</sup> According to Lord Justice Philip in **Reeman and Another v. Department of Transport and Others** [1997] 2 Lloyd's Rep. 648. at 677 recent examples of such a case to which we have been referred was **White v Jones** [1995] 2 A.C. 207, arguably, was **Henderson v Merrett Syndicates Ltd.** [1994] 2 Lloyd's Rep. 468; [1995] 2 A.C. C 145. Both those cases involved professional men who had undertaken contractual duties for reward for the benefit of specific third parties. They were held, in the special circumstances of each case, to owe tortious duties of care to those third parties. The facts of those cases have nothing in common with the present case, and do not, in my view, provide any assistance to its resolution.

<sup>386</sup> Lord Justice Saville [1994] 1 Lloyd's Rep. 492 at 496. as confirmed at [1995] 2 Lloyd's Rep.299. at 313.

<sup>387</sup> *Ibid.*

<sup>388</sup> [1995] 2 Lloyd's Rep.299 at 313. Therefore the Court refrained from following the decision of the Court of Appeal in **Muirhead v Industrial Tank Specialties Ltd** [1986] 1 Q.B.507 (C.A.C. 1985). Judge Goff held that the requirement of foreseeability was required to be proven in respect of physical damages whereas, the additional requirement of proximity had to only be proven in respect of economic loss. [1986] 1 Q.B.507 (C.A.C. 1985) at 532 as referred by CE Feehan ‘Liability of Classification Societies from the British perspective: The Nicholas H’ (1997) 22 Tul.Mar.L.J.163 at 167.

<sup>389</sup> This approach of Lord Steyn is in part a confirmation of **Dorset Yacht Co. Ltd v Home Office** [1970] 1 Lloyd's Rep. 453 at 474 which held that at the very least the Court must consider proximity when dealing with physical damages. As referred by Feehan *op cit* n 388 at 181.

In *Parrett v Collins*<sup>390</sup> the plaintiff was claiming for compensation for damages arising from personal injury. The Lord Justices did not have a unanimous approach when interpreting Lord Steyn's judgment in respect of the requirements for the establishment of a duty of care. Lord Justice Hobbhouse interpreted Lord Steyn's judgment in *The Nicholas H*<sup>391</sup> as confirming an "over-arching formula" within which can be found all cases of recognised duties of care.<sup>392</sup> However Lord Justice Hobbhouse did not view this approach as being absolute in that it required the additional requirements of proximity and fairness, reasonableness and justice to be proven in respect of all types of loss. He relied on the fact that Lord Steyn had recognised that for some categories of conduct, which creates a risk of harm, "it is obvious that as a matter of common sense and justice a duty should be imposed".<sup>393</sup> Lord Hobbhouse interpreted this as referring to matters such as personal injury.<sup>394</sup> Further, he saw the fact that Lord Steyn had treated these three factors as interlinked as being supportive of his interpretation.<sup>395</sup>

Lord Justice Hobbhouse further held that the trend of the Courts to give greater importance to the more traditional categorization of established situations of liability as opposed to allowing elaborate extensions thereof was maintained by Lord Steyn.<sup>396</sup> He did not view that the 'over-arching formula' would affect the outcome of the case before him because the established categories were sufficient to provide the answer, with or without the assistance of "common sense and justice". As Lord Justice Hobbhouse noted it would have indeed been surprising if Lord Steyn had, by his decision of what he described as a *novel* question that related to property or economic interests, intended thereby to depart from established decisions and principles relating to personal injury.<sup>397</sup>

The nature of Lord Justice Swinton Thomas' approach in *Parrett v Collins*<sup>398</sup> can be ascertained with his approval of the following quotation, "[f]ormulae can help organise thinking but they cannot provide answers."<sup>399</sup> He referred to Lord Justice Balcombe of the Court of Appeal in *The Nicholas H*<sup>400</sup> who had doubted whether the words "fair just and reasonable" imposed a test additional to that of 'proximity' because he deemed these, to be criteria that were

<sup>390</sup> [1998] 2 Lloyd's Rep 255.

<sup>391</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>392</sup> [1998] 2 Lloyd's Rep. 255 at 263.

<sup>393</sup> [1995] 2 Lloyd's Rep 299 at 313.

<sup>394</sup> [1998] 2 Lloyd's Rep 255 at 263.

<sup>395</sup> It is worth mentioning at this point that this was the argument put forward by the plaintiff ship-owner in *The Nicholas H*. The plaintiff argued that the requirements of fairness, justice and reasonableness was not required when physical damage was claimed. The majority of the House of Lords disagreed.

<sup>396</sup> [1998] 2 Lloyd's Rep. 255. at 263. This is in accordance with Lord Bridge who stated that the law should "develop novel categories of negligence incrementally and by analogy with established categories". *Caparo Industries Plc. v Dickman* [1990] 2. A.C. 605 at 618. He went on further to state that the Courts must determine the scope of the duty with reference to the type of damage that one must take care not to cause in order to avoid harming another. *Caparo Industries Plc. v Dickman* [1990] 2. A.C. 605 at 627

<sup>397</sup> [1998] 2 Lloyd's Rep. 255. at 263.

<sup>398</sup> [1998] 2 Lloyd's Rep 255.

<sup>399</sup> *Cook P. South Pacific Manufacturing Co. Ltd. v. New Zealand Security Consultants and Investigations Ltd.*

<sup>400</sup> Lord Justice Balcombe stated, "I doubt whether the words "fair just and reasonable" impose a test additional to that of "proximity"; in my judgment these are criteria to be adopted in considering whether the necessary degree of proximity exists." [1994] 1 Lloyd's Rep. 492 at 504.

necessary to be considered when determining the sufficient degree of proximity. However he viewed the element of foreseeability as being of assistance when considering justice and fairness. Lord Justice Balcombe saw there, to be a real danger in approaches that compartmentalise the components in duty of care for negligence.<sup>401</sup> Lord Justice Swinton Thomas recognised the distinctiveness of each element as each pertained to personal damages, but for the sake of convenience and because he was of the view that the facts of the case permitted him, the questions of "proximity" and whether it is "fair, just and reasonable" to impose a liability were considered together.<sup>402</sup>

Lord Justice Buxton considered the questions of proximity and justice, fairness and reasonableness were relevant for putting the nature of the damages in "the right perspective." However he considered these questions particularly pertinent when the physical damage in question is other than 'direct'.<sup>403</sup> Due to these remarks the writer is of the opinion that like Lord Justice Swinton Thomas, Lord Justice Buxton shares the approach of Lord Steyn in *The Nicholas H*, that the elements of foreseeability, proximity and fairness, justice and reasonableness are relevant to all categories of damages.<sup>404</sup>

Based on the thorough analysis of Lord Steyn's judgment in this respect by the Court of Appeal in *Parrett v Collins*<sup>405</sup> the writer concurs that it was correct in relation to physical and economic loss. The writer agrees with the approach of Lord Justice Hobbhouses, for reasons given by him, which explained the adequacy of the traditional approach for personal damages and its independent from Lord Steyn's 'overarching-formula'. However as is illustrated by the remaining Lord Justices this distinction is not as relevant in that the additional requirements for a duty of care as required by the 'overarching-formula' find application in any case of the traditional approach of determining liability for personal loss.<sup>406</sup>

The approach adopted by the English Courts in recent times, as illustrated by the cases discussed above, is an approach which has been referred to as a 'retreat from Ann' which in essence "starts from a presumption of a duty, and requires the invocation of policy factors if the duty is to be negated..."<sup>407</sup> Whereas the approach taken by the House of Lords in *The Nicholas H*, following *Caparo Industries Plc. v Dickman*<sup>408</sup>, that, "...starts from a presumption of no duty, and requires the invocation of policy factors if a new duty is to be established."<sup>409</sup>

The third stage of the duty of care enquiry of considerations of justice, fairness and reasonableness has been described as,

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<sup>401</sup> [1998] 2 Lloyd's Rep. 255. at 268. This is in sink with the warning given by Lord Bridge in **Caparo Industries Plc. v Dickman** [1990] 2. A.C. 605 at 618, when he warned that proximity and foreseeability are incapable of precise definition. He suggested that they rather serve as labels for features of the specific species of case in which the law imposes a duty.

<sup>402</sup> [1998] 2 Lloyd's Rep. 255. at 268.

<sup>403</sup> *Ibid* at 274.

<sup>404</sup> *Ibid*.

<sup>405</sup> *Ibid* at 255.

<sup>406</sup> This is in accordance with the approach of the House of Lords in **Caparo v Dickman** [1990] 2 A.C.605 at 618, were the Court never maintained that in case involving one type of loss, a Court cannot require the same elements that are required in a case involving another type of harm. As referred by Feehan *op cite* n 388 at 181.

<sup>407</sup> Lunney & Oliphant *op cit* n 178 at 114 (citing **Stovin v Wise** [1996] AC 923 at 949; per Lord Hoofman)

<sup>408</sup> [1990] 2. A.C. 605

<sup>409</sup> Lunney & Oliphant *op cit* at 114

“...the general repository for a miscellaneous set of policy arguments, undefined in nature and unlimited in number, which are invoked haphazardly and in an ad-hoc fashion by the Courts in determining whether a duty of care should arise.”<sup>410</sup>

This stage of the enquiry is employed by the Courts to prevent the imposition of a duty of care in those circumstances where the Court view such imposition to be undesirable on grounds of fairness and reasonableness. The judgment in *The Nicholas H* is an apt illustration of this.

The most obvious circumstances in which these considerations will trump and otherwise legitimate claim for compensation is when there are a number of ‘policy factors’ at play, the cumulative effect of which, creates a fear that the imposition of liability will ‘open the flood gate of liability’ that would create an unsustainable exposure to risk for the defendant.<sup>411 412</sup>

### 3.4 Negligent misrepresentation under English law

Prior to *Donogue v Stevens*<sup>413</sup> English law did not allow for the recovery of economic loss by way of a cause of action in negligence.<sup>414</sup> This is because the nature of economic loss, “... is altogether a more sophisticated concept.”<sup>415</sup> It relates to the variables of economic benefit in the context of business activities. Due to the nature of competition in an economic market an economic society does not unjustifiably prevent a participant from only be concerned with his interest alone.<sup>416</sup> The infliction of physical injury to the person or property of another universally requires to be justified. Whereas, the causing of economic loss does not.<sup>417</sup> Therefore more, “sophisticated criteria which have to be used in relation to allegations of liability for ... economic loss”<sup>418</sup>

English law, since the decision of *Nocton v Lord Ashburton*<sup>419</sup> had recognised that a negligent-innocent misrepresentation that is made outside of a contractual relationship and in the absence of fraud, may give rise to liability for economic loss if a ‘special relationship’ existed between the plaintiff and defendant. In this case the Court found a solicitor liable for a non-fraudulent

<sup>410</sup> Lunney & Oliphant *op cit* n 178 at 114.

<sup>411</sup> *Ibid* at 116.

<sup>412</sup> These ‘policy factors are discussed in detail below.

<sup>413</sup> [1932] A.C. 562.

<sup>414</sup> *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453 confirmed by the House of Lords in *Simpson v Thompson* (1877) App Cas 279.

<sup>415</sup> Lord Hobhouse in *Parrett v Collins* [1998] 2 Lloyd’s Rep 255 at 261

<sup>416</sup> *Parrett v Collins* [1998] 2 Lloyd’s Rep 255 at 261

<sup>417</sup> Lord Oliver in *Murphy v Brentwood District Council* [1990] 2 Lloyd’s Rep. 467; [1991] 1. A.C.398 at 498; 487 referring to Lord Diplock in *Dorset Yacht Co. Ltd v Home Office* [1970] 1 Lloyd’s Rep. 453, [1970] A.C. 1004 at 1060 as referred to by Lord Justice Hobhouse in *Parrett v Collins* [1998] 2 Lloyd’s Rep 255 at 260.

<sup>418</sup> Lord Justice Hobhouse in *Parrett v Collins* [1998] 2 Lloyd’s Rep 255 at 261 therefore concurred with Lord Reid in *Dorset Yacht Co. Ltd v Home Office* [1970] 1 Lloyd’s Rep. 453; A.C. 1004 at 455, 1027, when he stated that Lord Atkin’s formulation of the proximity test in *Donoghue v Stevenson* [1932] A.C. 562 at 580 ought to be applied as a matter of principle, “... unless there is some justification or valid explanation for its exclusion.” E.g. public policy or lack of proximity. He therefore recognised that this test necessarily required qualification in cases where the only loss caused by the defendant’s conduct was economic.

<sup>419</sup> [1914] AC 932.

statement given to his client. The Court held that a duty was imposed because of the fiduciary relationship between him and his client.<sup>420</sup> Prior, to this decision it was thought that an innocent but negligent misstatement could only give rise to liability if there was a breach of contract or fraud.<sup>421</sup> Subsequent to the *Nocton v Lord Ashburton*<sup>422</sup> decision the only ‘special relationship’ that was recognised as giving rise to a duty of care in respect of a statement was the fiduciary relationship.<sup>423</sup>

However, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>424</sup> the Appeal Court stated that a duty of care may arise in respect of economic loss where the defendant ‘voluntarily assumes responsibility’ towards the plaintiff. The Court therefore recognised that those who relies upon the negligent provision of information or advice may suffer economic loss for which the advisor may be liable. The decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>425</sup> has been extended to impose a duty of care on a maker of a statement in favour of a third party who is a recipient of information.<sup>426</sup>

‘Voluntarily assumption of responsibility’ occurs when two factors are present, *firstly*, an assumption of responsibility by the defendant and, *secondly*, reasonable reliance by the plaintiff. These factors are not mutually exclusive and the presence of one may be used to establish the existence of the other.<sup>427</sup> When both factors exist a ‘special relationship’ for the imposition of a duty exists between the parties.<sup>428</sup> An objective test is used when determining whether the defendant assumed liability either expressly or impliedly. The tests being whether the plaintiff could reasonably rely on the assumption of personal responsibility by the individual.

Lord Slynn in *Phelps v London Borough of Hillingdon* stated,<sup>429</sup>

“[i]t is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is however clear that the test is an objective one... The phrase means simply that the law recognises a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.”

Lord Griffiths in *Smith v Eric S. Bush (a firm); Harris and Another v Wyre Forest District Council*<sup>430</sup> stated that,

<sup>420</sup> As referred by Lunney & Oliphant *op cit* n 178 at 332. (citing *Pasley v Freeman* (1789) 3 TR 51 and *Deery v Peek* (1889) 14 App Cas 337)

<sup>421</sup> *Ibid* at 332.

<sup>422</sup> [1914] AC 932.

<sup>423</sup> Lunney & Oliphant *op cit* at 333. (citing *Candler v Crane Christmass* [1951] 2 KB as an example where the Courts adopted a restrictive approach)

<sup>424</sup> [1964] AC 465.

<sup>425</sup> In *Hedley Byrne* the Appeal Court was merely concerned with a two party situation, whereby A gives information or advice to B which B relies upon to his detriment.

<sup>426</sup> *Caparrio and Smith v Eric S. Bush (a firm); Harris and Another v Wyre Forest District Council* [1990] 1 A.C 831.

<sup>427</sup> Lunney & Oliphant *op cit* n 178 at 339.

<sup>428</sup> *Ibid*.

<sup>429</sup> [2003] 3 W.L.R 776 at 790 as referred by Lagoni, *op cit* n 93 at 110.

“...the voluntary assumption of responsibility is unlikely to be a helpful or realistic test in most cases. I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts on the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act on his advice? I would answer: only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficient proximate relationship between the parties and that it is just and reasonable to impose liability.”

From the approach of Lord Griffiths it is readily ascertainable that the three-stage enquiry of a duty of care in respect of a cause of action on negligence is applicable to a cause of action of negligent misrepresentation. It is only the ‘proximity test’, which adapts to the particular circumstances. The sufficient degree of proximity will usually be inferred as a result of the characteristics of the ‘special relationship’ that exists between the parties.<sup>431</sup> In *Caparo Industries Plc. v Dickman*<sup>432</sup> the Court clearly formulated the proximity test as applied in respect of a cause of action based on negligent misrepresentation for economic loss. Lord Oliver eloquent formulation reads as follows;

“...the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and (4) it is so acted upon by the advisee of his detriment ...”<sup>1</sup>

Further, Lord Bridge viewed the necessity to prove the sufficient degree of proximity between the plaintiff and defendant as "limit or control mechanism" on the liability of the wrongdoer. Subsequent to this decision of the House of Lords, a body of law has developed that surprisingly offers less protection that would have been envisaged at the time that the judgement had been delivered. Lord Oliver’s approach was more flexible than that of Lord Bridge. The latter’s approach does not render indirect dealings between the parties to be a bar to liability. However Lord Oliver recognised that a duty could be owed to an unidentified member of an ascertainable class.<sup>433</sup> In *Reeman and Another v. Department of Transport and*

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<sup>430</sup> [1990] 1 AC 831.

<sup>431</sup> KM Stanton ‘Case Comment: Hedley Byrne and Heller: The relationship factor’ (2007) 23(2) P.N. at 94.

<sup>432</sup> [1990] 2 A.C.605 at 638.

<sup>433</sup> This dicta was confirmed by Mr. Justice Phillips (as he then was) in *The Morning Watch*. 1 Lloyd’s Rep. 547. The first part of the judgment was written after the judgment of the Court of Appeal in *Caparo v Dickman* [1990] 2 A.C.605, however while Mr. Justice Phillips the typed draft of his judgment, the House of Lords delivered there speech in *Caparo v Dickman* [1990] 2 A.C.605.

**Others**<sup>434</sup> Lord Olivier's requirements that the statement must be 'purpose specific' and 'transaction-specific' was readily accepted. It is the actual identification of the 'advisee' that has been proven to be the contentious issue. Lord Justice Philip in *Reeman and Another v. Department of Transport and Others*<sup>435</sup> formulated the required "identifiable class" as being a person or a group of persons who could be identified at the time when the advice was given as opposed to only subsequently thereto. These persons must be distinguished from those persons those that may foreseeable read and rely on this advice.<sup>436</sup> For such an identifiable class to exist its membership should be capable of ascertainment at the time when the advice was given.<sup>437</sup> Nevertheless, he submitted that if this was not the rule he further suggested that the group of persons should at the very least have identifiable characteristics that necessarily limited the number of its members.<sup>438</sup>

Lord Bingham of Cornhill approved of the second approach<sup>439</sup> whereas Lord Justice Peter Gibson favoured the first.<sup>440</sup> Both approaches are not free from difficulties. The first adversely affects the unidentified members of a limited class of persons.<sup>441</sup> Whereas the second approach still retains the problem of lacking a sufficient degree of specificity beyond that required by the reasonably foreseeable test.<sup>442</sup> This is because the questions that this approach poses are when does one have sufficient characteristics in common which would qualify them to be a class? In answering this, it would be arguable that all persons foreseeably affected by conduct are in one way an identifiable class.<sup>443</sup> Therefore the pertinent issue remains, just how restricted does a class need to be in order to justify recognition of a duty of care?

<sup>434</sup> [1997] 2 Lloyd's Rep. 648 .

<sup>435</sup> [1997] 2 Lloyd's Rep. 648

<sup>436</sup> In *Caparo v Dickman* [1990] 2 A.C.605 it was emphasised that foreseeability does not suffice to constitute a group of persons into an identifiable class.

<sup>437</sup> In *Reeman and Another v. Department of Transport and Others* [1997] 2 Lloyd's Rep. 648 at 681 the Appeal Court used the example of shareholders who could be identified by consultation of the share register. This is reflective of the facts in *Caparo v Dickman* [1990] 2 A.C.605

<sup>438</sup> *Reeman and Another v. Department of Transport and Others* [1997] 2 Lloyd's Rep. 648 at 681 as referred by Stanton *op cit* n 431 at 94-107.

<sup>439</sup> Lord Bingham held that these authorities showed that before a plaintiff can recover damages for economic loss caused by negligent misrepresentation his claim must meet, *inter alia*, the following requirements for the preconditions of the doctrine of voluntary assumption of responsibility:

Firstly, the statement (whether it be in the form of advice, an expression of opinion, a certificate or a factual statement) must be '**plaintiff (advisee)-specific**'. Therefore it must be given to the actual plaintiff (advisee) or to a member of a group to which the actual plaintiff belongs, which is identifiable at the time, the statement is made. Secondly, the statement must be '**purpose-specific**'. This means that the statement must be made by the defendant (advisor) for the very purpose for which the actual plaintiff (advisee) has used it. Thirdly, and perhaps overlapping with the second condition, the statement must be '**transaction-specific**'.

<sup>440</sup> Lord Justice Peter Gibson in *Reeman and Another v. Department of Transport and Others* [1997] 2 Lloyd's Rep. 648 at 684 held that membership of a 'generic class' was insufficient. He found support for this submission from the Lord Griffiths exclusion of future purchasers in *Smith v Eric S. Bush (a firm); Harris and Another v Wyre Forest District Council* [1990] 1 A.C. 831. [1990] 1 A.C. 831 at 865.

<sup>441</sup> Examples of such groups of persons can be found in situations such as in *Aiken v Stewart Wrightson Members' Agency Ltd* [1995] 3 All ER 449 or where a "*White v Jones* [1995] 2 A.C. 207 claim" is brought by members of class of beneficiaries of a failed will (such as X's children). As referred by Stanton *op cit* n 431 at 94-107.

<sup>442</sup> This question was posed by the Court *Hedley Byrne v Heller & Partners Ltd* [1964] A.C. C. 465 (HL)

<sup>443</sup> So too are persons who purchase of vessels or shares. However the Courts have rejected the notion that such persons have sufficient characteristics in common to form an identifiable class in *Reeman and Another v. Department of Transport and Others* [1997] 2 Lloyd's Rep. 648 and *Caparo v Dickman* [1990] 2 A.C.605. In *Payne v John Setchell Ltd* [2002] PNLR 146 the Court held that purchasers of houses do. Stanton *op cit* n 431 at 94-107.

Subsequent English cases have adopted a restrictive approach and required the specific identity of the individual to be known before the Court will impose a duty of care. The leading case is **Barex Brokers v Morris Dean & Co**<sup>444</sup> where the valuer's lack of knowledge of the claimant was decisive to defeat his claim. This has been criticised as a long way removed from Lord Oliver's 'identifiable class.'<sup>445</sup> Many of these cases have been involved with the work done by valuers.<sup>446</sup> It has been suggested that in this situation the indeterminacy as to identity does not equate to indeterminacy in terms of the extent of exposure.<sup>447</sup>

However there is authority that suggests that English law may be willing to countenance a general move in favour of protecting the 'unidentified class'.<sup>448</sup> The leading case in this respect is **Aiken v Stewart Wrightson**<sup>449</sup> where Potter J held that persons were owed a duty of care in spite of the fact that they could not possibly be identified at the time the advice was given. In **Payne v John Setchell Ltd**<sup>450</sup> the Court held that a duty of care was owed to prospective purchasers and those who financed such purchases by engineers who had confirmed that the construction of the cottages in question had been carried out satisfactorily.<sup>451</sup> In his judgment HHJ Humphrey Lloyd QC referred back to a dictum of Lord Justice Neil in **James McNaughten Paper Group Ltd v Hick Anderson & Co.**<sup>452</sup> where he held that the central issue in determining the scope of a duty of care is the purpose for which the statement was communicated. Using the terminology of Lord Bingham in **Caparo Industries Plc. v Dickman**<sup>453</sup> the statement must be 'purpose-specific' and 'transaction-specific'.

This approach gives the Court great leeway in exercising its discretion when attempting to define the purpose behind the work or advice given.<sup>454</sup> The advantages of this approach are that 'unidentified' individuals are not automatically excluded by the application of a strict test. Further it would ensure that those who have been paid a fee cannot avoid the consequences of responsibility that they agreed to undertake when they gave advice with the intention of giving guidance as yet unidentified individuals.<sup>455</sup>

<sup>444</sup> [1999] PNLR 344 as referred by Stanton *op cit* n 431 at 94-107.

<sup>445</sup> See above quotation.

<sup>446</sup> Stanton *op cit* at 94-107. (citing **Omega Trust Co Ltd & Banque Finidus v Wright Son & Pepper** [1997] PNLR 424. and **Barex Brokers v Morris Dean & Co** [1999] PNLR 344)

<sup>447</sup> For example in **Reeman and Another v. Department of Transport and Others** [1997] 2 Lloyd's Rep. 648, if one was to assume that the damages, should they have been awarded, would be calculated in accordance with the difference in the value of the vessel at the time of survey, then there would be no increase in exposure of the surveyor whether the plaintiff would be the owner or the many possible purchasers of the vessel. as referred by Stanton *op cit* at 94-107.

<sup>448</sup> *Ibid.*

<sup>449</sup> [1995] 3 All ER 449.

<sup>450</sup> [2002] PNLR 146 as referred by Stanton *op cit* at 94-107.

<sup>451</sup> The engineers letter was held to fulfill a similar function of an NHBC guarantee which was common practice in the construction industry

<sup>452</sup> [1991] 2 QB 113 at 125-128 as referred by Stanton *op cit* at 94-107.

<sup>453</sup> [1990] 2 A.C.605 at 638

<sup>454</sup> An example of such an exercise of discretion can be seen in **Reeman and Another v. Department of Transport and Others** [1997] 2 Lloyd's Rep. 648. Stanton *op cit* n 431 at 94-107.

<sup>455</sup> A trend to recognise these advantages of this approach can be ascertained from the judgment in the decision of **Independents' Advantages Insurance Co. v Cook** [2003] EWCA Civ 1103; [2004] PNLR as referred by Stanton *op cit* n 431 at 94-107.

In all circumstances the relevant statement must be made with reference to the very transaction into which the plaintiff has entered in reliance on it. Accordingly, if these conditions are met, the plaintiff would have succeeded in proving the required degree of proximity.<sup>456</sup> The thrust of this dictum is that the threshold for the imposition of a duty of care is not mere foresight but rather specific knowledge of certain facts.<sup>457</sup> It has been suggested that formulation is a pragmatic solution that falls between the ‘floodgate opening test of reasonable foreseeability of loss and the narrow test of individual identification.’<sup>458</sup>

### 3.5 English case law not in favour of imposing a duty of care on Classification Societies

#### 3.5.1 The Morning Watch

The central issue in *Mariola Marine Corporation v Lloyd’s Register of Shipping* (“*The Morning Watch*”)<sup>459</sup> was whether English law imposed a duty of care upon a Classification Society towards those whose economic interests are likely to be harmed if the classification of a vessel is not carried out with proper skill and care? The question was viewed as one of general importance to the maritime world and one that had not been bought before the Court of England before.

The plaintiff was the purchaser of the vessel, *the Morning Watch*. The plaintiff claimed that he had been induced to purchase the vessel by the negligent misrepresentation of the Classification Society as contained in the interim class certificate. As a result the plaintiff sustained economic loss. The cause of action arose from the following facts. The Society had been requested by the seller to perform a Special Survey as the vessel, *the Morning Watch* was to be sold early next season. After the survey had been completed an interim certificate was issued by the Society subject to recommendations that certain repairs should be done. The vessel had been given a “clean bill of health” by the Society, despite her unseaworthy condition which had been caused by corrosion which had been not be detected by the surveyor. After the completion of the relevant survey, an interim certificate was sent to the seller’s agents. The agents issued particulars offering *the Morning Watch* for sale and stated *inter alia* that, “...[a]lways maintained to 100 A1 at Lloyd’s...[h]as passed current special survey ( November 1984) with no difficulty so purchase is spared expense of a survey.”<sup>460</sup>

The purchaser was informed of the sale of *The Morning Watch* by a third party, Captain Piggim whom had been previously requested by the purchaser to be on the look out for such potential sales. He also had the opportunity of inspecting the vessel at the request of the purchaser. During this inspection the owner’s agents informed Captain Piggim of the special survey that had been conducted and of the minor repairs that were required by the Classification Society. The seller’s agent thereafter sent sale particulars to the purchaser. In a addition, the purchaser was

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<sup>456</sup> [1997] 2 Lloyd’s Rep 648 at 685.

<sup>457</sup> Stanton *op cit* at 94-107.

<sup>458</sup> *Ibid.*

<sup>459</sup> 1 Lloyd’s Rep. 547.

<sup>460</sup> [1990] 1 Lloyd’s Rep. 547 at 548.

given a detailed and accurate summary of the vessels survey position by Captian Piggan who had also suggested that no further independent survey needed to be done.<sup>461</sup> He recommended the purchase. Thereafter the purchaser telexed the owner's agents that and made an offer subject to the term "as is, where is". Subsequently, the surveyor signed the interim certificate recommending that the remaining repairs be deferred pending certain modifications as envisaged by the purchaser. It was during these modifications that the corrosion was discovered.

Mr. Justice Phillips (as he then was) highlighted a number of characteristics of the relationship between a Classification Society and a third person (a potential purchaser) involved in a commercial transaction with a ship-owner relating to the classed vessel. This was done in order to establish if there was sufficient proximity for the imposition of duty of care. His decision was given in the context of Appeal Court Judgment of *Caparo Industries Plc. v Dickman*.<sup>462</sup>

The relationship does not reflect any statutory scheme to protect purchasers of vessels.<sup>463</sup> The objects of Classification Society (Lloyd's) are not primarily directed to the protection of such interests.<sup>464</sup> This is referring to those commercial interests of potential buyers. Further, there is no relationship akin to contract.<sup>465</sup> There is no more a voluntary assumption of responsibility to purchasers than there is a voluntary assumption by auditors of responsibility to potential purchasers of shares.<sup>466</sup> However it was held that in it was possible to postulate some assumption of responsibility, "but only in a loose sense."<sup>467</sup>

Mr. Justice Phillips concluded that to accept the general proposition that a Classification Society owes a duty of care to those foreseeably liable to suffer economic loss in consequence of reliance on the negligent classification of a vessel would make a substantial further advance in the law of negligence that cannot be allowed.<sup>468</sup> Based on this reason the Court rejected this general proposition.<sup>469</sup> However the plaintiff further argued that upon the particular set of facts of the case that there was sufficient proximity between the Classification Society and the third party purchaser that gave rise to a duty of care. These particular facts were firstly, that the Classification Society knew that the vessel was to be sold, secondly, before the survey was to be completed the Classification Society made known that the vessels class would be maintained.<sup>470</sup>

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<sup>461</sup> Lawson *op cit* n365 at 483.

<sup>462</sup> [1990] 2. A.C. 605. The first part of the judgment was written after the judgment of the Court of Appeal in **Caparo v Dickman**, however while Mr. Justice Phillips the typed draft of his judgment, the House of Lords delivered there speech in **Caparo v Dickman** which reversed the Court of Appeal. Therefore the later part of his judgment was added in the form of a postscript.

<sup>463</sup> [1990] 1 Lloyd's Rep. 547 at 560.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.*

<sup>467</sup> Lord Justice Bingham at 333 of **Caparo Industries Plc. V Dickman** [1990] 2. A.C. 605. as referred by Mr. Justice Philip in **The Morning Watch**

<sup>468</sup> [1990] 1 Lloyd's Rep. 547 at 560. Mr. Justice Philip stated that in his judgment the decision of the Court of Appeal in **Caparo Industries Plc. V Dickman** [1990] 2. A.C. 605 marked the furthest extension of the law of negligence. [1990] 1 Lloyd's Rep. 547 at 560.

<sup>469</sup> [1990] 1 Lloyd's Rep. 547 at 560.

<sup>470</sup> *Ibid.*

The Court rejected this argument based on the following grounds. *Firstly*, the third party paid no fees in respect of the services rendered by the Classification Society.<sup>471</sup> *Secondly*, the relevant survey was not carried out for the sole reason of the sale because it was an incident in the regular schedule of inspections that were involved in keeping *the Morning Watch* classed at the relevant Classification Society. *Thirdly*, the survey was not carried out for the benefit of a specific individual purchaser. On the facts of the case, the purchaser was not on the scene when the survey was ordered. The purchaser was of an indeterminate class of persons who might act on the results of the survey. It was not envisaged that Mariola (the purchaser) would specifically do so.<sup>472</sup> He concluded by stating that there was no “overwhelming probability” that Mariola (the purchaser) would act upon the advice (as contained in the interim certificate) given by the Classification Society (the advisor) to the ship-owner (advisee), by being induced to purchase the vessel.<sup>473</sup>

Therefore the plaintiff had not proven the requirement of proximity. Because of this the Court did not deem it necessary to determine whether it was just and reasonable to impose a duty of care on the Society.<sup>474</sup> Therefore the Court held that the purchaser had failed to establish that the Classification Society owed them any duty of care when the Special survey was carried out or when the interim certificate was issued.<sup>475</sup> Moreover, the Court rejected the general proposition that the a Classification Society owes a duty of care to those foreseeably likely to suffer economic loss as a result of relying on the negligent classification of a ship, because to hold otherwise would be an unjustifiable encroachment in to the law of negligence.<sup>476</sup>

### 3.5.2 The Nicholas H

In *The Nicholas H*<sup>477</sup> the plaintiffs approached the House of Lords with a novel issue, this being;

“[W]hether a Classification Society owed a duty of care to a third party, the owners of cargo laden on a vessel, arising from the careless performance of a survey of a damaged vessel by the surveyor of the Classification Society which resulted in the vessel being allowed to sail and subsequently sinking.”<sup>478</sup>

<sup>471</sup> [1990] 1 Lloyd's Rep. 547 at 560. This was an important factor that distinguished the decision of House of Lords in **Smith v Bushand Harris v Wyre Forest District Council [1989] 2 W.L.R 790** from the plaintiffs case.

<sup>472</sup> This is in clear contradiction to the facts of the purchaser in **Otto Candies L.L.C v Nippon Kaiji Kyokai Co. 346 F.3d 530, 2003 AMC 2409 (5<sup>th</sup> Cir. 2003)**

<sup>473</sup> [1990] 1 Lloyd's Rep. 547 at 562. Mr Justice Philips was heeding the warning given by Lord Griffiths in **Smith v Bushand Harris v Wyre Forest District Council [1989] 2 W.L.R 790** at 816. Lord Griffiths had wished to stress that in cases where the advice has not been given for specific purposes of the recipient acting upon in, then in such cases a duty of care should only be imposed if the adviser knows that there is a high degree of probability that some other identifiable person should act upon it. It would impose an intolerable burden upon those who give advice in a commercial or professional context if they were to owe a duty of care to any person who may choose to act upon it and not merely those to whom it were given.

<sup>474</sup> [1990] 1 Lloyd's Rep. 547 at 563.

<sup>475</sup> *Ibid* at 562.

<sup>476</sup> *Ibid* at 560.

<sup>477</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>478</sup> *Ibid* at 310.

This issue arose from the following facts. On the 20<sup>th</sup> of February 1986 the *Nicholas H* was in the course of a loaded voyage from South America to Italy when a crack appeared in the vessel's hull. On 22<sup>nd</sup> of February she anchored off San Juan, Puerto Rico, where further cracks developed. On 25<sup>th</sup> of February the master called in a non-exclusive surveyor employed by Nippon Kaiji Kyokai. He recommended permanent repairs, for which, as it happened, facilities were available locally. But the owners were hesitant, as this would have involved dry-docking, with consequential discharge and reloading of the cargo. The surveyor however changed his mind. For on the 2<sup>nd</sup> of March, he pronounced that the vessel was fit to proceed on her intended voyage after completing some temporary repairs to the shell plating. She sailed the same day. On March 3 the welding in way of the temporary repairs cracked. On the 9<sup>th</sup> of March the vessel sank, fortunately at the expense of no person's lives.

The parties agreed to four assumptions of facts. These were that *first*, that the plaintiff's would have a cause of action against the Classification Society by virtue of their proprietary interest in the cargo if the Society owed them a duty of care.<sup>479</sup> *Secondly*, that it was reasonably foreseeable that lack of care by the Classification Societies surveyor was likely to expose the cargo to danger of physical damage;<sup>480</sup> *thirdly*, that the plaintiffs had sustained physical damage and not economic loss.<sup>481</sup> *Fourthly*, that the loss of the vessel and cargo was the result of the carelessness of the Society's surveyor.<sup>482</sup>

### 3.5.2.1 The majority judgment

Lord Steyn held the majority view, which was supported by Lord Keith of Kinkel, Lord Jauncy of Tullichettle and Lord Browne-Wilkinson. The House of Lords held that the parties, "tour of many of the landmark cases on negligence"<sup>483</sup> provided no reasonable analogy to the case at hand.<sup>484</sup> Instead, it sought to decide the case, "on the basis of an intense and particular focus on all its distinctive features..".<sup>485</sup> Only after this appreciation were the established legal principles able to find application. These principles for present purposes could be readily identified and required no further re-examination.<sup>486</sup> Consequently, Lord Steyn considered it settled law that all the so-called requirements of duty of care, namely, foreseeability, proximity and fairness, justice and reasonableness had to be proven by the claimant

<sup>479</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.) at 312.

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

<sup>482</sup> The allegedly negligent conduct of the surveyor was to be found in (a) reversing the initial recommendation in favour of immediate permanent repairs and permitting the vessel to continue on her voyage when only temporary repairs had been carried out and (b) in failing to ensure that the repairs in fact carried out were suitable to ensure that the strength of the vessel was adequate for the voyage. [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.) at 312.

<sup>483</sup> Lord Steyn cited *Donoghue v Stevenson* [1932] A.C. 562 and *White v Jones* [1995] 2 A.C. 207

<sup>484</sup> [1995] 2 Lloyd's Rep. 299 (H.L.) at 313. At the time this appeared to be correct. The most factually analogous cases was *Yuen Kun Yeu v Attorney General* [1988] 1 App. Cas. 175 (P.C.1987), *Caparo Industries Plc. v Dickman* [1990] 2 A.C. 605 and *The Morning Watch* [1990] 1 Lloyd's Rep. 547. All were concerned with cause of actions based on negligent misrepresentation. All dealt with claims for economic loss and not physical loss. As referred by Feehan *op cit* n 388 at 181

<sup>485</sup> [1995] 2 Lloyd's Rep. 299 (H.L.) at 313

<sup>486</sup> *Ibid* at 312.

irrespective of the nature of the damage.

Lord Steyn put the case in the “right perspective” by considering a number of factors in order to determine whether a duty of care should be imposed. These factors were considered under six headings, namely;

(a) Did the surveyor's carelessness cause direct physical loss? (b) Did the cargo-owners rely on the surveyor's recommendations? (c) The impact of the contract between the ship-owners and the owners of the cargo. (d) The impact of the contract between the Classification Society and the ship-owners. (e) The position and role of N.K.K. (f) Policy factors arguably tending to militate against the recognition of a duty of care.<sup>487</sup>

Each factor will be discussed in greater detail under the appropriate heading. However for the readers interest the following brief summary of Lord Steyn’s analysis of these factors, as eloquently summarised by Lord Hobbhouse in *Parret v Collins*<sup>488</sup> is set forth below,

“...[Lord Steyn] pointed out that there was no element of reliance as between the cargo-owners and the surveyor; the cargo was already on board the ship and in the charge of the ship-owner. The carriage was covered by bill of lading contracts with the ship-owner on Hague-Visby terms, an internationally recognised scheme for the division of risk between ship and cargo interests, including undelegable obligations of the carrier. This was a regime where all parties were covered by insurance and principles of limitation of liability apply which would be disrupted if the alleged liability was to be accepted. He considered the special role of Classification Societies within this scheme and the position of [Nippon Kaiji Kyokai], a non profit-making body performing functions, some of which would have to be performed by governments if Classification Societies did not exist. He took into account the relationship of [Classification Society] to the ship-owners and ship interests and the desirability of a simple and clear scheme for the resolution of disputes between cargo interests and ship interests....”

In conclusion the House of Lords stated that it was willing to assume that, “there was sufficient degree of proximity in this case to fulfil that requirement for the existence of a duty of care.”<sup>489</sup> However the crucial question before the House was whether it was fair, justifiable and reasonable to impose a duty. This was determined from the point of view of the three parties concerned, namely the ship-owner, the Classification Society and the cargo-owner. Lord Steyn answered this in the negative by considering the cumulative effect of the policy factors, in particular “the outflanking of the bargain between ship-owners and cargo-owners”<sup>490</sup> and the adverse effect on the public role of Classification Society that the imposition of

<sup>487</sup> [1995] 2 Lloyd's Rep.299. at 313.

<sup>488</sup> [1998] 2 Lloyds's Rep 255. at 263-264.

<sup>489</sup> [1995] 2 Lloyd's Rep.299. at 316.

<sup>490</sup> *Ibid* at 316.

liability would cause. Consequently, in his judgment the lesser injustice was done by not recognising a duty of care.<sup>491</sup>

### 3.5.2.2 The minority judgment

Lord Lloyd likewise sought to apply ordinary and well established principles of law in determining whether the Classification Society held a duty of care to the cargo-owners. In his judgment he provided a precise summary of the judgment of Mr. Justice Hirst of the Court of first instance<sup>492</sup>, which he affirmed, and the judgment of the Court of Appeal.<sup>493</sup>

Lord Lloyd concluded that there were two primary grounds for Lord Justice Saville of the Appeal Court decision. The first of these concerned the contractual relationship contained in the contract of carriage between the ship-owner and cargo-owner that incorporates the Hague Visby Rules. In turn he thereby placed emphasis on the non-delegable duty of seaworthiness of a ship-owner. The second ground was that there was not a sufficient degree of proximity between the cargo-owner and the Classification Society. Lord Lloyd held the principle established in *Morrison Steamship Co. Ltd v Greystoke Castle (Cargo Owners)*<sup>494</sup> to be directly relevant to the present case. Therefore, when the master called in the surveyor, and thereafter incurred expenditure for the common safety, he was acting as much in the interests and on behalf of the cargo as of the ship.<sup>495</sup>

The first ground of Lord Justice Saville judgment, the reliance on the Hague Visby Rules was criticised by Lord Lloyd by simply pointing out that these rules are not necessarily applicable by force of international convention, to all circumstances whereby cargo is carried by ship on the high sea.<sup>496</sup> <sup>497</sup> Lord Lloyd concluded that the incorporation of the Hague Visby Rules were consequently irrelevant. He then proceeded to discuss what the writer has termed the “The Alternative Remedy & Limitation Issue” so as to ascertain whether the existence of the contract of carriage is in its self a relevant factor for the determination of the imposition of liability on a surveyor.

Lord Lloyd approached this question firstly by acknowledging that the ship-owner is primarily responsible for getting cargo to its destination and is under a duty to take proper care of the cargo as bailee subject to the terms of the contract of carriage.<sup>498</sup> He then proceeded to discuss the relationship between the functions between the law of contract and the law of tort. Lord Lloyd cited a number of cases where a duty in tort was owed to the claimant irrespective of the contractual duties owed by other persons. A number of these cases concerned stevedores. He equates their position to that of Classification Societies in that both are third parties which owe a duty of care towards cargo-owners despite the primary responsibilities of

<sup>491</sup>[1995] 2 Lloyd's Rep.299. at 317.

<sup>492</sup>[1992] 2 Lloyd's Rep. 481.

<sup>493</sup>[1994] 1 Lloyd's Rep. 492.

<sup>494</sup>(1946) 80 Li.L.Rep.55; [1947] A.C. 265

<sup>495</sup>[1995] 2 Lloyd's Rep.299. at 307.

<sup>496</sup>*Id* at 304.

<sup>497</sup>An example of such circumstances was illustrated by Lord Lloyd. He referred to the use of charter parties in the bulk trade. In terms of Art. V of the Hague Visby Rules, these do not apply to charter parties unless expressly agreed upon between the parties.

<sup>498</sup>[1995] 2 Lloyd's Rep. 299 at 305.

ship-owners under the Hague Visby Rules.<sup>499</sup> After analysing the cases he concludes, “[i]t would have been hopeless to argue that the stevedores should not be liable on the ground that it would not be “just, fair and reasonable” to impose on them a duty of care in tort with unlimited liability, having regard to the ship-owners’ limited liability...”<sup>500</sup> He doubted the existence or even so, the distinction between direct and indirect physical damage and concluded that the existence of a contract (of carriage) is irrelevant when determining the liability in tort of a third person such as surveyor.<sup>501</sup>

The second ground of the Court of Appeal, namely, that there was an insufficient degree of proximity was dispelled by Lord Lloyd who was of the opinion that *de facto* control of the Classification Society was sufficient to determine the existence of the necessary degree of proximity required to establish a duty of care. In addition he used the law of general average to argue that there was indeed a sufficient degree of proximity. Based on the facts of the case the ship-owner and cargo-owner were on a joint venture.

As to the requirement of “fairness, justice & reasonableness” he applied the Courts decision in respect of a salvor’s duty of care in *The Tojo Maru*<sup>502</sup> to Classification Societies. He concluded that the possibility of unlimited liability did not prevent the imposition of a duty of care on Classification Societies. Further, rationale of *The Tojo Maru*<sup>503</sup> was used to defeat the argument that a Classification Society’s performance, which is in public interest, mitigates against the imposition of liability. Lord Lloyd saw it too be correct to equate the positions of Classification Societies to that of salvors.

In considering the insurance implications of imposing liability Lord Lloyd’s approach was that the Courts should not simply speculate, the allegations must be supported by evidentiary material. He concluded by saying that a decision in favour of the cargo-owners would be welcomed by members of the shipping community at large, who are increasingly concerned by the proliferation of sub-standard Classification Societies.<sup>504</sup>

### 3.5.3 Reeman and Another v. Department of Transport and Others<sup>505</sup>

The central issue before the Court of Appeal was whether the national administration authority (Department of Transport) owed any duty to exercise reasonable care not to cause the purchasers of the surveyed vessel pecuniary loss by imposing requirements that go beyond those justified by the Department of Transport’s regulations.<sup>506</sup>

Mr. and Mrs. Reeman bought a fishing vessel called *Cornelis Johanna*. No British registered fishing vessel can be put to sea unless she carries a certificate

<sup>499</sup> [1995] 2 Lloyd’s Rep.299 at 306.

<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid.*

<sup>502</sup> [1971] 1 Lloyd’s Rep. 341; [1972] A.C. 242.

<sup>503</sup> *Ibid.*

<sup>504</sup> [1995] 2 Lloyd’s Rep.299. at 309.

<sup>505</sup> [1997] 2 Lloyd’s Rep. 648.

<sup>506</sup> *Ibid* at 679.

issued by the Department of Transport that certifies that she complies with various statutory regulations designed to ensure that she is seaworthy. When the Reemans bought the vessel she carried such a certificate. They relied on this as demonstrating that the vessel's design and construction rendered her fit for service as a fishing vessel. Unfortunately the department surveyor responsible for the issue of that certificate had failed to carry out his duties in relation to it with due skill and care. He had made an arithmetical error in calculating the vessel's stability. This led him to issue a certificate indicating that her stability was satisfactory when, in fact, she was unstable. The error came to light in the year after the purchase of the vessel by the Reemans when, the department carried out stability tests and found that the vessel did not meet the minimum requirement. The result was a financial disaster for the Reemans. The vessel's certificate was withdrawn, so that she could no longer put to sea. Attempts to make modifications to her to improve her stability were unsuccessful without major expenditure that was beyond the Reemans' means.<sup>507</sup>

Lord Justice Philips gave the leading judgment. He described the duties imposed on national administrations and concluded that these are to regulate the activities of ship-owners so as to ensure that they later comply with their respective obligations when using their vessels for commercial purposes which involve potential risks to third parties. The duties of the ship-owner, which are regulated by the national authority, are designed to ensure the seaworthiness of the vessels. Lord Justice Philips stated that this duty of seaworthiness was imposed for protection of the crew, owners of cargo carried as well as those who are at risk of being damaged by pollution in the event of escape of cargo.<sup>508</sup> Further he identified analogous industries in which similar regulatory functions are carried out by designated authorities in relation to the safety of premises frequented by the public such as hotels, theatres and dance halls. Similarly motor vehicles are required to be regularly tested to ensure that they are roadworthy.<sup>509</sup>

Lord Justice Philips then gave a thorough analysis of the nature of the survey process as preformed by national administration in the determination of the possibility of duty of care being owed towards ship-owner. He noted that the process of survey and certification involves the exercise of the discretion of a professional person. Further, most national administration that act as certifying authorities have rules which expressly make provision for a ship-owners right of appeal against a refusal to issue a certificate. Based on these factors alone Lord Justice Philips thought that it was at least arguable that no duty of care is owed to ship-owners in relation to surveys and certifications preformed by national administrations.<sup>510</sup> <sup>511</sup> He concluded that the purpose of issuing a certificate is not

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<sup>507</sup> [1997] 2 Lloyd's Rep. 648 at 674.

<sup>508</sup> *Ibid.*

<sup>509</sup> *Ibid.* The writer suggests that this is the correct context in which the 'license analogy' as used in **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>510</sup> [1997] 2 Lloyd's Rep. 648 at 679.

<sup>511</sup> *Ibid.* (Citing **North Cornwall District Council v. Welton** [1997] Ad.L.R. 45 The Court left open the question of whether any duty of care would have arisen in respect of a survey preformed in accordance with statutory duties. The facts were that an environmental health officer employed to perform the statutory duties of a local authority in relation to food hygiene advised the owners of a bed and breakfast establishment that they ought to carry out expensive works that went well beyond the statutory requirements. The Court of Appeal held that, because in giving this advice he was acting beyond the scope of the local authority's statutory duties, a duty of care had arisen giving rise to liability for pecuniary loss).

to encourage reliance on them. In actual fact the purpose of issuing certificates was rather to help to prevent vessels that are uncertified and possibly unseaworthy, from being put to sea. The purpose of issuing certificates is therefore the promotion of safety at sea.<sup>512</sup> The scheme adopted to achieve this is to impose duties as to seaworthiness on the owners of vessels and then to provide for the department to check and certify that these duties have been complied with.

The Appeal Court was asked to consider the possibility of dual purposes of the national administrators duties. Lord Justice Philips stated the advice, if one so describes the certification, was given in the performance of the department's statutory duties. The Appeal Court conceded that the legislature may intend a statutory duty to have possibility of dual purposes and an advisor may give advice for more than one purpose.<sup>513</sup> However the Court concluded that there to be no subsidiary purpose of assisting parties in commercial transactions in the statutory duty of issuing certificates for safety compliance. The Appeal Court identified this case as falling within the category under which authorities issue certificates as part of schemes designed to ensure that property is not used for commercial purposes in circumstances that may result in physical injury or damage to third parties.<sup>514</sup> It is for this reason that the Appeal Court held that there was insufficient proximity between the plaintiffs and the national administration. The advisor did not intend the advice given, to be used for the purposes that the third party used it for.

The Appeal Court rejected the notion of a "transmissible warranty of quality" being applicable to certifying authorities.<sup>515</sup> In determining the requirement of whether it was fair, just and reasonable for imposing a duty of care, the Appeal Court was swayed by general implications of imposing liability on a public authorities as discussed in *Murphy v Brentwood District Council*.<sup>516</sup> Lord Bridge stated that,

“...the shoulders of a public authority are only "broad enough to bear the loss" because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses.”<sup>517</sup>

In addition the Appeal Court feared the implications of imposing liability on an authority that certify that property complies with safety requirements. The threat of application to analogous cases was too great.<sup>518</sup> Another mitigating factor was that national administrations such as the defendant exist for the purpose of furthering safety at sea rather than for the protection of commercial interests.<sup>519</sup> The

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<sup>512</sup> [1997] 2 Lloyd's Rep. 648 at 780.

<sup>513</sup> *Ibid* at 781.

<sup>514</sup> *Ibid* at 681.

<sup>515</sup> [1997] 2 Lloyd's Rep. 648 at 682. (citing *Murphy v Brentwood District Council* [1990] 2 Lloyd's Rep. 467).

<sup>516</sup> [1990] 2 Lloyd's Rep 467

<sup>517</sup> *Ibid* at 482.

<sup>518</sup> [1997] 2 Lloyd's Rep. 648 at 682.

<sup>519</sup> This conclusion was based on the acceptance of the defendant's submission by the Court that Classification Societies and national administrators perform a similar roles. Lord Justice Philips identified this as a factor to which the Appeal Court in *The Morning Watch* [1990] 1 Lloyd's Rep. 547 and the House of Lords in *The*

Court concluded that to hold that a duty of care was owed to persons who may suffer economic loss as a result of reliance on such certificates would make a significant extension to the ambit of the tort of negligence. Therefore the requirements for imposing a duty of care based on negligent misrepresentation when economic loss was sustained were not met.<sup>520</sup>

### 3.5.4 Parrett v Collins<sup>521</sup>

The central issue in this case was whether a third party could claim damages for personal injury from a certifying authority which had negligently performed its regulatory functions of safety.

The plaintiff brought an action for personal injuries when the plane in which he was being carried as a passenger crashed. It was alleged that this was caused by the negligence of one or more of the defendants. He alleges that the aeroplane had a propeller, which did not match the gearbox fitted to the engine of the aeroplane thereby rendering the plane unable to fly safely. The aeroplane was a light aircraft, which belonged to and had been assembled by the first defendant who was piloting the aeroplane at the time that it crashed. The second defendant was the inspector of the PFA (ULAIR) Ltd. The third defendant traded under the name the Popular Flying Association (PFA) and was approved by the Civil Aviation Authority (the CAA), pursuant to Art 110 of the Air Navigation Order 1989. The first defendant was one of their members and the second defendant was one of their inspectors. The second defendant had inspected the aircraft at various stages during its construction and upon its completion and had certified that it was in an airworthy condition. Therefore a certificate of fitness was issued that covered the flights of the aircraft with the pilot and a passenger. The purpose that underlay this statutory scheme<sup>522</sup> was the safety of air navigation including the safety of aircraft and persons carried in them.<sup>523</sup>

#### 3.5.4.1 Judgment of Lord Hobbhouse:

Lord Hobbhouse applied the traditional ground for establishing a duty of care for personal injury claims. No point has been taken in this case on the question of reasonable foresight. The Court held that the likely hood of an accident and a passenger being personally injured was foreseeable and ought to have been contemplated when the relevant inspections took place and the certificate of compliance was issued.<sup>524</sup> He interpreted Lord Steyn's "over-arching formula" in *The Nicholas H*<sup>525</sup> in a manner that allowed for this.<sup>526</sup> Lord Justice Hobbhouse found that the second and thirds defendants' reliance on *The Nicholas H*<sup>527</sup> was

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**Nicholas H** [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.) placed great importance on. [1997] 2 Lloyd's Rep. 648 at 683.

<sup>520</sup> It follows that neither of the last two limbs of Lord Bridge's test in **Caparo Industries Plc. v Dickman** [1990] 2. A.C. 605 is satisfied.

<sup>521</sup> [1998] 2 Lloyd's Rep. 255.

<sup>522</sup> As contained in Civil Aviation Act, 1982. Part III

<sup>523</sup> [1998] 2 Lloyd's Rep. 255. at 258.

<sup>524</sup> *Ibid* at 256.

<sup>525</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>526</sup> [1998] 2 Lloyd's Rep. 255. at 263.

<sup>527</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

misconceived.<sup>528</sup> The Court distinguished this case for the following reasons. The reasoning in *The Nicholas H*<sup>529</sup> pertained to economic loss and did it purport to, re-open established categories of liability for personal injury. It was based on policy considerations that related reorganization and structure of maritime trade which were peculiar to that situation. Further the role of the inspector (second defendant) was not subsidiary to the owner (first defendant). The inspectors' role was critical. Further it was recognised that he had de facto control. Further the liability of the owner would not be duplicated.

Lord Justice Hobbhous held that a passenger of an aircraft is entitled to assume that the aircraft is compliant with the relevant safety requirements<sup>530</sup> and that those involved have taken proper care. Further the plaintiff was entitled to place reliance thereon. He concluded that the analogy drawn between the third defendant and the position of a Classification Society as in *The Nicholas H*, to the extent that it was sought to negate the imposition of liability of public bodies for personal injury was incorrect.<sup>531</sup> Further he cited the decision of Appeal Court in *Philcox v. Civil Aviation Authority*<sup>532</sup> to be against second and third defendant. He saw the judgment in *Reeman and Another v Department of Transport and Others*<sup>533</sup> as reinforcing the distinction to be made when considering claims of personal injury and economic loss.<sup>534</sup> He found the Canadian Courts decision in *Swanson et al v. The Queen*<sup>535</sup> as supportive of the plaintiff's submission.<sup>536</sup> He concluded that the second and third defendant owed a duty of care towards the plaintiff, an third party that sustained personnel injury.<sup>537</sup>

### 3.5.4.2 Judgment of Lord Justice Swinton:

Lord Justice Swinton Thomas's approach in establishing a duty of care differed from Lord Justice Hobbhouse. He confirmed the approach taken by Lord Justice Balcombe of the Court of Appeal in *The Nicholas H*.<sup>538</sup> However, this did not prevent him from applying the Lord Steyn's "lesser Injustice concept" to the matter before him. Lord Justice Swinton Thomas held the whole purpose of the regulatory framework in terms of the Civil Aviation Act, 1982,<sup>539</sup> was one of air safety that recognised the inherent dangers of flying.<sup>540</sup> That this was the very purpose lying behind the prohibition on taking aeroplanes into the air without a certificate of airworthiness and the appointment of the Civil Aviation Authority (National Administration) or those authorized by them to issue such certificates.<sup>541</sup>

<sup>528</sup> [1998] 2 Lloyd's Rep. 255. at 265..

<sup>529</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>530</sup> Lord Hobbhous however does not give reasons for this assumption of compliance with safety standards. The judgment of Lord Justice Thomas Sweany discusses this aspect in greater detail.

<sup>531</sup> [1998] 2 Lloyd's Rep. 255. at 264..

<sup>532</sup> (1995) 92(27) L.S.G.33.

<sup>533</sup> [1997] 2 Lloyd's Rep 648(citing *Donoghue v Stevenson* [1932] A.C. 562; *Caparo Industries Plc. v Dickman* [1990] 2. A.C. 605 and *The Morning Watch* [1990] 1 Lloyd's Rep. 547.)

<sup>534</sup> [1998] 2 Lloyd's Rep. 255. at 265.

<sup>535</sup> 80 D.L.R. 741 (citing *Murphy v Brentwood District Council* [1990] 2 Lloyd's Rep. 467)

<sup>536</sup> [1998] 2 Lloyd's Rep. 255. at 265.

<sup>537</sup> *Ibid.*

<sup>538</sup> [1994] 1 Lloyd's Rep. 492 at 504.

<sup>539</sup> See Section 3 and Section 60 of the Civil Aviation Act, 1982 and art. 7(1) ;art. 8(1)and art. 110 of the Air Navigation Order 1989.

<sup>540</sup> [1998] 2 Lloyd's Rep. 255. at 272. (citing Lord Justice Millet in *Philcox v. Civil Aviation Authority* unreported, May 25, 1995 at pg 14. and Linden, J.A *Swanson et al v. The Queen* 80 D.L.R. 741)

<sup>541</sup> *Ibid* at 272.

He sought to distinguish *Reeman and Another v Department of Transport and Others*<sup>542</sup> by highlighting the fact that the regulatory scheme<sup>543</sup> in that case imposed duties as to seaworthiness on the owners of the vessels.<sup>544</sup> Unlike the regime under which the CAA operates, until the certificate of fitness is granted, the aircraft cannot fly. The CAA issues permits that enable the aircraft to fly. He then interpreted the Appeal Courts insistence in *Philcox v. Civil Aviation Authority*<sup>545</sup> that required the owner to ensure the airworthiness of his aircraft and concluded that it was not a bar to a certification authority owing a duty to the general public.<sup>546</sup> The primary purpose of the intervention of the CAA is the safety of person who fly in a certified aircraft. The intervention aims to prevent physical injury as opposed to mere damage to property.<sup>547</sup> He further drew a distinction between the position of plaintiff and the position of ship-owner as in *The Nicholas H*. He noted that the plaintiff, a mere private enthusiast, was unlikely to rely on any expertise other than that provided by a certifying authority such as Professional Flying Association (PFA) while the ship-owner was likely, in addition, to employ their own experts to ensure that the ship is seaworthy<sup>548</sup>

Further Lord Justice Swinton acknowledged that the public has a legitimate expectation to rely on the existence of a regulatory system that is in force for the purposes of ensuring air-safety. This would be a legitimate expectation of any reasonably well-informed member of the public. Further in pursuance of this, members of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so.<sup>549</sup>

In conclusion he held that the plaintiffs damage was foreseeable.<sup>550</sup> Further he saw no reason why a duty of care should not be imposed on the part of the regulatory authority or its delegates if they were negligent. To hold the opposite would cause a serious injustice to third party passengers, especially if the owner were held not to be liable or insured.<sup>551</sup> Therefore he deemed it fair, just and reasonable to impose a duty on the second and third defendants.

### 3.5.4.3 The Judgment of Lord Justice Buxton:

Lord Justice Buxton gave his judgment under the following headings, ‘the role of the Court’; ‘direct physical loss’; ‘personal injury’; ‘other cases’ and ‘policy’. Under these headings he attempted to distinguish the case before him from the decision of the House of Lords in *The Nicholas H*<sup>552</sup> He concurred with the Judge Hallgarten, Q.C. of the Court of first instance and with Lord Justice

<sup>542</sup> [1997] 2 Lloyd’s Rep 648.

<sup>543</sup> In *Reeman and Another v Department of Transport and Others* [1997] 2 Lloyd’s Rep 648 the Appeal Court was concerned with the Fishing Vessels (Safety Provisions) Act, 1970,

<sup>544</sup> [1998] 2 Lloyd’s Rep. 255. at 270.

<sup>545</sup> (unreported, May 25, 1995)

<sup>546</sup> *Ibid* at 14.as referred in [1998] 2 Lloyd’s Rep. 255. at 271.

<sup>547</sup> [1998] 2 Lloyd’s Rep. 255. at 272.

<sup>548</sup> *Ibid.*

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

<sup>551</sup> *Ibid.*

<sup>552</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd’s Rep. 299 (H.L.)

Hobhouse and Lord Justice Swinton Thomas. Therefore only those point that he placed emphasis on will be discussed.

Lord Buxton recognised the distinction between direct and indirect physical loss<sup>553</sup> and concurred that in respect of the later a claimant would have to establish the requirements of proximity and fairness, reasonableness and justice.<sup>554</sup> He further concurred with Lord Justice Hobhouse analysis of Lord Steyns judgment in *The Nicholas H* in this respect. He held that the role of the inspector (the second defendant) was not subsidiary. This was based on two considerations, the first being the very close involvement of the inspector in the construction of the plane, and the second, the very close involvement in organisational terms<sup>555</sup> between the owner and the PFA (third defendant).<sup>556</sup> Within this scheme it was held that the owner was “essentially an amateur”.<sup>557</sup>

Lord Justice Buxton concurred with Lord Justice Hobhouses statement of law in respect of personal injury.<sup>558</sup> He concurred with both Lords Justices Hobhouse and Swinton Thomas analysis of the purpose of the statutory scheme and that the Appeal Courts desicion in *Philcox v. Civil Aviation Authority*<sup>559</sup> was indeed favourable with the plaintiff’s case.<sup>560</sup> He referred to Lord Justice Philips dictum in *Reeman v Department of Transport and Others*<sup>561</sup> in respect of personal damage as further support.<sup>562</sup> He interpreted Lord Justice Philips as referring to the ‘double damages argument’ and concluded that a plaintiff who can recover in respect of one type of damage does not necessarily mean that he can recover for damage of a different type inflicted by the same act of the defendant.<sup>563</sup>

He agreed with the trail Court Judge Hallgarten who concluded that when personal injury was so foreseeable then this is a potent factor that indicates the existence of a duty of care.<sup>564</sup> Further in respect of the fear of possible effect on analogous cases, he said that these cases must dealt with as they arise, on the case by case basis recognised<sup>565</sup> and that there is no danger in imposing liability in terms of a recognised category of the law of negligence.<sup>566</sup>

Lord Justice Buxton drew a distinction between the nature of the activities of the certifying authority in his case, the PFA and the Classification Society in *The*

<sup>553</sup> [1998] 2 Lloyd’s Rep. 255 at 273. ( citing Lord Oliver in *Murphy v Brentwood District Council* [1990] 2 Lloyd’s Rep. 467 at 476 where it was acknowledged that the Court in *Anns v Merton London Borough Council* [1978] A.C. 728 wrongly classified the damage as physical instead of pecuniary)

<sup>554</sup> *Ibid* (citing Lord Steyn in *The Nicholas H* [1995] 2 Lloyd’s Rep. 299 (H.L.).

<sup>555</sup> Lord Justice Buxton drew attention to the fact that the declared aims of the PFA, were:

“...to get enthusiastic aviators into the air as cheaply as possible and to promote and supervise the design and construction of light aircraft by amateurs.” [1998] 2 Lloyd’s Rep. 255 at 273.

<sup>556</sup> [1998] 2 Lloyd’s Rep. 255. at 273. Lord Justice Buxton held that this put the case in line with both *Clay v A.C. J Crump & Sons Ltd*, [1964] 1 Q.B. 533 and *The Nicholas H* [1995] 2 Lloyd’s Rep. 299 (H.L.).

<sup>557</sup> [1998] 2 Lloyd’s Rep. 255. at 273.

<sup>558</sup> *Ibid* at 275.

<sup>559</sup> (1995) 92(27) L.S.G.33.

<sup>560</sup> [1998] 2 Lloyd’s Rep. 255. at 275.

<sup>561</sup> [1997] 2 Lloyd’s Rep. 648.

<sup>562</sup> The writer disagrees. Lord Justice Philips dictum indicated that he doubted that a third party would be successful in his claim for personal injury against a Classification Society. [1997] 2 Lloyd’s Rep 648 at

<sup>563</sup> [1998] 2 Lloyd’s Rep. 255. at 275. (citing *Caparo Industries Plc v Dickman* [1990] 2 A.C 605.)

<sup>564</sup> *Ibid* at 276.

<sup>565</sup> *Ibid*.

<sup>566</sup> *Ibid* (citing Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 A.C 605 at 618.).

**Nicholas H.** Both organisations were recognised as being non-profit making entities. The distinction lay in the fact that the earlier was ‘voluntary’, whereas the latter was ‘commercial’.<sup>567</sup>

Judge Hallgarten of the Court of first instance held that this was undoubtedly a factor in favour of the PFA but, “not one<sup>568</sup> Lord Justice Buxton held a firmer stance. He noted that the PFA is supporting activities that are voluntarily undertaken by its members; that they are undertaken for the pursuit of their own interests; and that they are extremely dangerous to third parties unless performed with due care. He concluded that the fact that these activities were carried out for recreational purpose and not commercial does not assist the certifying authority when a third party is injured.

Under the heading of ‘policy’ Lord Justice Buxton warned of the dangers of speculation about matters of policy<sup>569</sup> that are all too readily argued by defendant classification authorities<sup>570</sup> and yet not substantiated by expert witness or evidential material.<sup>571</sup> Nevertheless, he concluded that even if evidently material adduced about these policy considerations he could not see it as being right to withhold relief from a claimant merely because the imposition of liability might lead to an increase in the certifying authority insurance premiums or even lead to a more expensive system of surveying.<sup>572</sup>

Lord Justice Buxton sought to distinguish this case from the decision of the Court in **The Nicholas H**<sup>573</sup>. His approach was that neither the reasoning nor the of that case should constrain the Court in the case before him. He concluded that the balance of justice came down firmly on the side of imposing a duty on the certifying authority, and that members of the public would expect to be protected from injury by careful operation of the regulatory system and to be compensated if injured by its negligent operation.<sup>574</sup>

Due to the reasoning and distinction made between economic loss and personal injury by the Court it has been suggested that Classification Societies may be liable towards third parties for personnel injury or death in circumstances similar to those that existed in **The Nicholas H**.<sup>575</sup> However the judgments discussed above drawn a distinction between airworthy and seaworthy certificates. Therefore it may be argued that **Parret v Collins** does not extend a duty of care to class. Indeed one must ask whether it is even desirable or logical to adopt two distinct rules in relation to the duty of care owed by Classification Society, one for physical damage and another for personal injury.<sup>576</sup>

<sup>567</sup> [1998] 2 Lloyd's Rep. 255 at 274.

<sup>568</sup> *Ibid* at 275.

<sup>569</sup> He made particular reference to policy considerations relating to insurance or industry practices and other technical issues. *Id* at 277. These and other policy considerations are discussed in chapter 3.

<sup>570</sup> The defense had referred to the approach of the majority of the House of Lords in **The Nicholas H** [1995] 2 Lloyd's Rep. 299 (H.L.). However Lord Buxton held that the House of Lords had not speculated but rather had drawn from their, “...considerable knowledge of the Judges concerned in the case as to the terms and operation of the Hague Visby Rules.” *Ibid*.

<sup>571</sup> This is further discussed in chapter 3. [1998] 2 Lloyd's Rep. 255. at 277.

<sup>572</sup> [1998] 2 Lloyd's Rep. 255. at 277.

<sup>573</sup> [1995] 2 Lloyd's Rep. 299 (H.L.).

<sup>574</sup> [1998] 2 Lloyd's Rep. 255. at 277.

<sup>575</sup> **Mandaraka-Sheppard** *op cit* n 22 at 531.

<sup>576</sup> *Ibid*.

### 3.6 Professional negligence under Federal Maritime law of the United States of America

#### 3.6.1 The Federal Court's jurisdiction & maritime law

Under Federal maritime law of the United States of America the judiciary has traditionally had the authority to formulate maritime law in a flexible and fair manner.<sup>577</sup> Federal maritime law governs maritime tort and thereby the differences in state law of torts that is decentralised and not governed by statute, is avoided. However 'an admiralty Court should look primarily to these legislative enactments for policy guidance'.<sup>578</sup> Federal maritime law is based on common law. In this respect guidance is sought from the United Kingdom in respect of admiralty matters.<sup>579</sup> More recently the Federal Court has relied on consensus of amongst the world' maritime nations and even the views of respected judges and scholars.<sup>580</sup> In order for a matter to fall within the jurisdiction of federal admiralty Courts, general maritime law requires that the wrong committed must bear a significant relationship to a traditional maritime activity<sup>581</sup> and must have a potential impact on maritime commerce.<sup>582</sup> The services provided by a Classification Society fall within this category.

Third parties would mostly invoke the tort of negligence when a Classification Society has made no representations.<sup>583</sup> Therefore the limited circumstances in which a cause in tort of negligence may arise include, *inter alia*, when a society negligently develops, misinterprets or revises its rules, or when exceptions are granted or conditions withdrawn with no reasons being furnished, or when a society request a shipyard to modify the relevant blue prints; to the extent that these actions have either caused or contributed towards the deficiency of the ship.<sup>584</sup>

#### 3.6.2 The Restatement (Second) of Tort & Professional Conduct

The basis for a third parties cause of action in tort of negligence is the general principle that each individual is under a legal duty to prevent or minimize risk of harm to others to the extent that this is possible. For a claimant to be successful in a cause of action of negligent tort, Federal maritime law requires the claimant to prove that the tortfeasor owed him a duty of care that was breached by conduct of the tortfeasor which was the 'proximate cause' of the damage sustained by him.<sup>585</sup>

<sup>577</sup> BD Daniel 'Potential liability of marine Classification Societies to non-contracting parties' (2007) 19 U.S.F. Mar.L.J. 183 at 275 (citing **United States v Reliable Transfer Co.**, 421 U.S 397, 409, 1975 AMC 541 (1975))

<sup>578</sup> *Ibid* (citing **Miles v Apex Marine Corp.**, 498 U.S 19,27, 1991 AMC 1(1990))

<sup>579</sup> *Ibid.* (citing **Moragne v States Marine Lines, Inc.**,398 U.S 375, 388-89, 1970 AMC 1967 (1970))

<sup>580</sup> *Ibid.* (citing **United States v Reliable Transfer Co.**, 421 U.S 397, 409, 1975 AMC 541 (1975))

<sup>581</sup> Lagoni *op cit* n 93 at 146 (citing **Kermarec v Compagnie Generale Transatlantic**, 358 U.S 625, at 630, 79 S.Ct 406, at 409, 3 L.Ed.2d 550 (1959); **Romero v International Terminal Operating Co.**, 358 U.S. 354, 373-375, 79 S.Ct. 468, at 480-481, 3 L.Ed.2d 368 (1959)).

<sup>582</sup> Lagoni *op cite* (in fn 554) at 146 (citing **Jet Aviation, Inc v City of Cleveland**, 409 U.S. 249, 253, 93 S.Ct. 493, 497,34 L.Ed. 454 (1973); **Foremost Ins. Co., et al. v Richardson, et al.** 457 U.S. 668,73 L.Ed.2d. 300, 102 S.Ct. 2654 (1982).

<sup>583</sup> Lagoni *op cit* n 93 at 160.

<sup>584</sup> *Ibid.*

<sup>585</sup> *Ibid* (referring to Dobbs, The Law of Torts (2000) 269 ).

The key provision of The Restatement (Second) of Tort for determining potential liability towards third parties is section 324A that is commonly referred to as The Good Samaritan Doctrine. This Doctrine reads as follows;

One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of a third person or his things, is subject to liability to the third person for *physical harm* resulting from his failure to exercise reasonable care to protect his undertaking, if  
(a), if his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or third person upon the undertaking.

Although this provision has only been referred to directly on limited occasions,<sup>586</sup> it is clear that it has been indirectly referred to and influenced the judgments of, *inter alia*, **The Great American** and **The Sundancer** when the Classification Society's degree of control and influence on the cause of damage has been discussed.<sup>587</sup> And is not conducive to imposing liability on Classification Societies. However it must be noted that section 324A only relates to physical harm to a person and property and does not extend to economic loss.

Another provision of the Restatement (Second) of Tort that may possibly be utilised by a third party litigant is section 282. This section defines negligence as 'conduct, which falls below the standard established by law for the protection of others against unreasonable risk of harm.' Particular emphasis is placed on the fact that negligent conduct must involve 'unreasonable risk'. As in English law, the primary question is whether the Classification Society owes a duty of care to third parties.<sup>588</sup>

Factors considered by the Courts in determining the existence of a duty include, *inter alia*, (i) the extent to which the transaction was intended to affect the plaintiff;(ii) the foreseeability of harm to him;(iii) the degree of certainty that the plaintiff suffered injury;(iv) the closeness of the connection between the defendant's conduct and the injury suffered (v) the moral blame attached to the defendant's conduct;(vi) the policy of preventing future harm by deterrence and (vii) factors relating to administration which include the feasibility of administering a rule that imposes a duty. In respect personal injury, the relationship of the parties and the customs to which the tortfeasor and victim subscribe must be considered in place of the first point mentioned above.<sup>589</sup> As with English law, Federal maritime law requires further justification for protecting an individual's financial interest.

<sup>586</sup> The Good Samaritan Doctrine was referred to in **The Amoco Cadiz** 1986 A.M.C. 1945 in respect of a claim for negligence as discussed in chapter 2 and in **Eternity Shipping Ltd., Et al., Limitation Proceedings** 444 F. Supp. 2d 347,2006 A.C. M.C 2034 in respect of a claim for negligent misrepresentation as discussed below.

<sup>587</sup> See the discussion of the application of the Principle of the 'workman-like performance' to Classification Societies in chapter 2.

<sup>588</sup> Dobbs describes a duty of care as , "the duty to exercise the care that would be exercised by a reasonable and prudent person, under the same or similar circumstances to avoid or minimise risks of harm to others." (Citing **Mansfield v Circle K Corp.**, 877 P.2d 1130 (Okla. 1994); **Gossett v Jackson**, 249 Va. 549, 457 S.Ed.2d 97/(Va. 1995). **Compare Brown v Kendall**, 60 Mass. 292 (1850) as referred by Lagoni *op cite* n 93 at 149.

<sup>589</sup> Lagoni *op cit* n 93 at 149.

Section 289 the Restatement (Second) of Tort sets out the objective standard for a profession, namely, that of a skilled man.<sup>590</sup>

The closest that the Courts have come to acknowledge a third party's cause of action based on negligence was in *Steamship Mutual Underwriting Association v Bureau Veritas*<sup>591</sup> before the Eastern District Court of Louisiana. The plaintiff was the insurer of the vessel and had settled cargo and other claims. As subrogee of the vessel owner it filed suit-seeking indemnity from the Classification Society. The subrogee alleged that the society was negligent in conducting its surveys of the vessel that caused the *SS Pensacola* to sink. Based on the evidence before it the District Court found that the society had preformed the survey negligently because it violated the specific rules for determining shell plating thickness<sup>592</sup> and that it breached its own rules in not inspecting internal double-bottom tanks.<sup>593</sup> But that it was not negligent in respect of the inspection of the cargo hold.<sup>594</sup>

It is clear that the Classification Society liability was determined within the confines of the cause of action of the tort of negligence. This can readily be ascertained by Boyle D.J when he commented, “[o]bviously, plaintiff seeks a presumption that the negligence of the defendant cause the sinking. However, the evidence presented cannot justify such a presumption.”<sup>595</sup> The District Court held that there was insufficient evidence to concluded that the sinking of the vessel was “caused by some defect which was discoverable by a completely adequate survey”<sup>596</sup>

### 3.7 Negligent misrepresentation under Federal Maritime law

American jurisprudence favours a construction and interpretation of a third parties cause of action in tort against Classification Societies as being based on negligent misrepresentation. This has be approved in by the recent decision in United States District Court for the District of Maryland (Northern Division) in *Eternity Shipping Ltd., Et al., Limitation Proceedings*.<sup>597</sup> The claimant was a widower of a seaman who was killed by a collapse of a crane aboard the M/V *Leon I*. She claimed against the Classification Society that inspected and certified ship's cargo gear. The plaintiff expressly argued that they were not alleging a negligent misrepresentation claim but rather common negligence. However the District Court disagreed and found no legal support for this allegation. Therefore the District

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<sup>590</sup> Section 289 reads as follows; Recognising Existence of Risk:

The actor is required to recognise that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising

(a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and

(b) such superior attention perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as the actor himself has.

<sup>591</sup> 380 F.Supp 482

<sup>592</sup> *Ibid* at 489.

<sup>593</sup> *Ibid* at 489.

<sup>594</sup> *Ibid* at 491.

<sup>595</sup> *Ibid*.

<sup>596</sup> *Ibid* at 493.

<sup>597</sup> 444 F. Supp. 2d 347,2006 A.C. M.C 2034

Court held that the plaintiff's cause of action was that of negligent misrepresentation.<sup>598</sup>

The tort of negligent misrepresentation is dealt with in The Restatement (Second) of Torts (1965) in section 311 and section 552. Section 311 addresses causes of action, which involve physical damage whereas, section 552 deals with those in which economic loss is sustained. These sections are more specific in nature in that both apply specifically to the provision of information in the business context, whereas section 324A (c) is of a general nature as it applies broadly to all types of services.<sup>599</sup> Therefore it has been suggested that it is arguable that the more specific provisions should apply to classification services. The writer concurs.

In terms of section 311<sup>600</sup>, the following are prerequisites for a cause of action based on negligent misrepresentation; *firstly*, the information must be negligently provided by the defendant, *secondly*, the recipient of that information must have acted on it as a result of relying on the received information; *thirdly*, physical damage must have ensued from that action taken and finally, the injured third party must be a person whom the defendant knows or ought to have known would sustain damage because of his negligent misrepresentation.<sup>601</sup> The standards used to determine whether the defendant is negligent are set out in section 311(2). Accordingly, if he fails to exercise reasonable care in ascertaining the information<sup>602</sup> or in communicating that information<sup>603</sup> he can be held liable.

Section 522<sup>604</sup> is intended to impose liability upon professional organizations for negligently supplying information for the guidance of others that results in pecuniary loss. Subsection 522(2) however limits the class of persons who

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<sup>598</sup> 444 F. Supp. 2d 347, *Id* at 2050 (citing Miller *op cite* n 125 at 75. Miller argued that a third parties claim could be best understood only when one enquired as follows, “[w]hether a party (the Classification Society), who undertakes to gather information, assess it, and make representations of suitability and who then imparts that information to its customer (the ship-owner) knowing that the customer intends to supply that information to a third party (cargo-owners, charterers), who, in turn, will make business judgments based upon the first party's representations, is liable to that third party for damages resulting from the third party's reliance upon those representations.” From this perspective he argued that it was clear that a third party's claims was based on the cause of action of negligent misrepresentation. Miller, *op cite* n 125 at 101.

<sup>599</sup> Daniel *op cit* n 578 at 279. The author incorrectly groups section 324A(c) with section 522(1). Section 324A(c) should be grouped with section 311(2) as both are concerned with the same type of damage, physical damage.

<sup>600</sup> Section 311(1) provides:

One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

<sup>601</sup> Miller, M.A. “Liability of Classification Societies from the perspective of United States law”(1997) 22 Tul.Mar.L.J. 75 at 102.

<sup>602</sup> Section 311(2) a.

<sup>603</sup> Section 311(2) b.

<sup>604</sup> Section 552(1) provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Section 552(2) provides:

[T]he liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

may claim in terms of subsection 522(1). The prerequisites for the operation of this section are firstly; the defendant must be in a business in which he supplies information for the guidance of others in their business transactions; secondly, the defendant in the course of that business must have supplied false information; thirdly, the defendant must have failed to exercise reasonable care in obtaining the relevant information; fourthly, the plaintiff must have been the person to whom the defendant intended to supply the information to or in the alternative, a person to whom the defendant knows that the recipient intends to supply the information too. Finally the plaintiff must have justifiably relied on the information supplied by the defendant and consequently he must have sustained pecuniary loss.<sup>605</sup>

The Restatement (Second) of Torts (1965) has been used in number of case over different districts within The United States of America. It is indeed a suitable instrument that encourages uniformity for federal admiralty jurisdiction which purpose is to create uniformity in general maritime law as applied in the United States of America.<sup>606</sup>

### **3.8 American case law in favour of imposing a duty on Classification Societies for negligent misrepresentation towards third parties**

#### **3.8.1 The Founding case law**

The *Great American*<sup>607</sup> has been referred to as, '[t]he seminal decision concerning Classification Society liability to vessel owners.'<sup>608</sup> The introduction of the judicially created duty as discussed in chapter 2 has been the impetus for much of the Classification Societies industries tort litigation that would follow.<sup>609</sup> It is through the conduit of the common law doctrine of negligent misrepresentation that Federal Courts have sought to adjudicate Classification Societies liability. This is due to the early decision of *Glanzer v Shepard*<sup>610</sup> that for the first time allowed a buyer, a third party to a contract of certification to be able to recover from the certifier pure economic loss it sustained as a result of a misrepresentation contained in the certificate.<sup>611</sup>

In *Coastal (Bermuda) Ltd v E.W. Saybolt & Co*<sup>612</sup> the charterer of the *Haki* hired Saybolt, a cargo inspection company to determine the amount of oil loaded onto the vessel and to perform quality analysis on oil samples before, during and after loading. While the tanker plied towards Amsterdam the fuel oil was sold to Coastal. Upon arrival Coastal refused the shipment. It argued that the oil had too high viscosity and excess water.<sup>613</sup> The Appeal Court (Fifth Circuit) found that

<sup>605</sup> Section 522(1) as referred by Miller *op cit* n 125 at 102.

<sup>606</sup> *Ibid.*

<sup>607</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>608</sup> Miller *op cit* at 88

<sup>609</sup> CP Cochran 'Otto Candies, L.L.C v. Nippon Kaiji Kyokai Corp: Further extending negligent misrepresentation to protect third-party buyers that rely on erroneous certificates issued by vessel Classification Societies' (2004) 28 Tul.L.Rev. 613 at 615.

<sup>610</sup> 135 N.E. 275 (N.Y. 1922). This decision was discussed and affirmed in **International Ore and fertilizer Corp v SGS Control Services, Inc.** 38 F.3d 1279, 1995 A.M.C. 944

<sup>611</sup> Previously this cause of action was only applied in respect of personal injury. Cochran *op cit* n 609 at 614. (citing **MacPherson v Buick Motor Co** 111 N.E 1050 (N.Y. 1916))

<sup>612</sup> 1988 AMC 207

<sup>613</sup> *Ibid.*

there was no evidence; that Saybolt supplied false information for Coastal's guidance in its business transaction; that it failed to exercise reasonable care; or that Coastal relied on Saybolts final ship report. The Appeal Court (Fifth Circuit) held that Coastal had failed to show *prima facie* case of negligent misrepresentation and reversed the District Courts decision. Commentators have held that this judgment 'recognises the tort [of negligent misrepresentation] in the maritime ream.'<sup>614</sup>

In *Somerelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*<sup>615</sup> the District Court of New Jersey found that the ship-owner, as the indemnifier was successful in bringing an action for negligent misrepresentation in terms of Restatement (Second) of Torts section 552. Relying on the decision of the Appeal Court (Fifth Circuit) in *Coastal (Bermuda) Ltd v E.W. Saybolt & Co*<sup>616</sup> the District Court held that this cause of action was recognised by maritime law. It has been suggested that this case was a definitive indication that Classification Societies might owe a duty of care towards third parties, when the later act in accordance with a ship-owners reliance on the services of a society, which involve a high degree of expertise.<sup>617</sup> The writer concurs.

WOLIN,D.J in respect of the requirement of the advisors knowledge, held that the plaintiff only had to show that the Classification Society had knowledge and understanding of the importance of Suez Canal Special tonnage certificate to the maritime industry. This, supported by the additional fact that the certificates were issued with no disclaimer nor addressed to any specific party lead him to conclude that the society had foreseen that time charterer and voyage charteres respectively would rely on certificates.<sup>618</sup>

In *The Sundancer*<sup>619</sup> the Appeal Court (Second Circuit) acknowledged that the possibility that a third parties who rely on safety or classification certificates may have a cause of action against Classification Societies for negligent misrepresentation. This possibility was given effect and established by the following case law.

### 3.8.2 Cargill Inc. v Bureau Veritas & Carbotrade s.P.A v Bureau Veritas

In particular it was the Southern District Court of New York decision in *Cargill Inc. v Bureau Veritas*<sup>620</sup> that extended the reasoning of *The Great American* and *The Sandancer* to third party claims. In *Cargill Inc. v Bureau Veritas*<sup>621</sup> cargo-owners, shippers and assignees of vegetable oil bought an action against a Classification Society. The plaintiff alleged that Burea Veritas, by classifying the vessel, owed them a duty to ensure the vessel was seaworthy and had

<sup>614</sup> Cochran *op cit* n 609 at 615.

<sup>615</sup> The Appeal Court in *Otto Candies* 346 f.3d 530, 2003 A.M.C. 2409 (5th Cir. 2003) at 2413 merely referred to this case by saying the theory behind this case predated but was consistent with *The Sundancer*. In *The Sundancer* 799 F.Supp. 363 at 377 that district Court held that the Classification Society gave 'guidance' to the ship-owner but that the certificates in question did not a solicit the ship-owner to do anything.

<sup>616</sup> 1988 AMC 207

<sup>617</sup> Durr *op cit* n 50

<sup>618</sup> 720 F.Supp. 441 at 453.

<sup>619</sup> 7 F.3d 1077 (2d Cir. 1993), 1994 AMC 1, [1994] 1 Lloyd's Rep. 183.

<sup>620</sup> 902 F. Supp.49 ( S.D.N.Y 1995).

<sup>621</sup> *Ibid.*

breached this duty by failing to revoke classification and by making certain misrepresentations.

District Judge Sprizzo extended the reasoning of *The Great American* in *The Sandancer*, in respect of the first two causes of action, when he stated that, “[i]t is well established that a Classification Society is not liable to ship-owner as an insurer of seaworthiness of a vessel.”<sup>622</sup> He held that if a Classification Society was deemed to be a warrantor of a ship's seaworthiness, the liability created thereby would not be, “... commensurate with a Classification Society limited control over a vessel, the intent of the parties, the fees charged for classification or services performed.”<sup>623</sup> He went on to say, “[t]he same rationale compels the conclusion that, by classifying a vessel, a [society] is also not liable as an insurer of a vessel's seaworthiness to third party cargo-owners, such as the plaintiffs.”<sup>624</sup>

In respect of the remaining two causes of action, namely, the allegation that by negligently inspecting the vessel and failing to revoke its class, the Classification Society had negligently misrepresented the vessel as being fit to sale. The District Court conceded that third parties may have a cause of action for negligent misrepresentation.<sup>625</sup> However for this action to be successful the plaintiffs had to establish, *inter alia*, that they actually and reasonably relied on the certificates issued by the Classification Society.<sup>626</sup>

The District Court pointed out a number of factors that were held not to evidence reliance on the performance of the Classification Society. The facts of the case rendered it virtually impossible for the District Court to conclude otherwise. The cargo-owners had hired their own independent surveyor a week after the defendant-Classification Society surveyed the vessel. Major repair work was done on the vessel with the no approval or knowledge of the defendant Classification Society. Furthermore the cargo-owners did not consult the society's register and cargo was loaded after most recent visa and certificates had expired.

The District Court further held that even if the plaintiff had relied on the relevant Classification Society's registrar<sup>627</sup>, which was not evidenced, that this would not suffice because this only reflects a ship's condition at the time of the survey and not that a ship's class has been suspended. Further the plaintiff did not request an “attestation of class.” The cumulative effect was held to indicate the lack of reasonable reliance on the classification on the part of the cargo-owners. The Southern District Court of New York concluded that the plaintiffs were unsuccessful because they did not meet the requirements of Restatement (Second) of Torts section 552. Bureau Veritas motion for summary judgment was accordingly granted.

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<sup>622</sup> 902 F. Supp.49 ( S.D.N.Y 1995) at 52 ( citing **The Sundancer** 7 F.3d 1077 (2d Cir. 1993) and **Great American** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1012.)

<sup>623</sup> *Ibid* at 52 (citing the **Great American** 338 F. Supp. 999 (S.D.N.Y. 1972) at 1012.)

<sup>624</sup> *Ibid.*

<sup>625</sup> *Ibid.*

<sup>626</sup> *Ibid* at 53 ( citing **The Sundancer** 7 F.3d 1077 (2d Cir. 1993) at 1084; **Glanzer v Shepard** 233 N.Y. 236, 135 N.E. 275 (1922); **Utramers Corp v Touche** 255 N.V. 170, 174 N.E. 441 (1931)

<sup>627</sup> The Classification Society registrar was The Bureau Veritas Register.

The following day the same District Court gave judgment in *Carbotrade s.P.A v Bureau Veritas*.<sup>628</sup> Likewise the District Court found that a third party can have a cause of action against a Classification Society based on negligent misrepresentation but, as in *Cargill Inc. v Bureau Veritas*<sup>629</sup>, the plaintiff had failed to adduce evidence of reliance. The District Court however sought to limit a third party's claim by requiring a relationship that approaches privity between the advisor and the third party.<sup>630</sup>

These cases set the stage for the case *Otto Candies, L.L.C v Nippon Kaiji Kyokai Corporation*,<sup>631</sup> the facts of which were ideal for the application of Restatement (Second) of Torts section 552. This is one of the very few cases where the Courts have imposed liability on a Classification Society.

### 3.8.3 Otto Candies, L.L.C v Nippon Kaiji Kyokai Corporation:

In *Otto Candies, L.L.C v Nippon Kaiji Kyokai Corporation*<sup>632</sup> the purchaser, Otto Candies entered into a Memorandum of Agreement ("MOA") with Diamond to purchase the *Speeder*. As a condition of sale, a clause in the MOA required that NKK make current the *Speeder's* coastal classification free from any outstanding recommendations. Accordingly, NKK issued a Class Maintenance Certificate to Diamond that indicated the *Speeder* was certified within class as a coastal passenger ferry with no outstanding deficiencies. With this condition of the MOA being satisfied, Otto Candies paid for the *Speeder*. Upon receipt of the vessel, Otto Candies in order to transfer the vessel's classification from NKK to American Bureau of Shipping ('ABS'), arranged for a survey by ABS. The ABS surveyor discovered a number of significant deficiencies that required repair before ABS would classify the *Speeder*. In response to Surveyors report, Otto Candies had the *Speeder* repaired. When repairs were completed, ABS issued an interim class certificate.

Otto Candies filed the instant suit against NKK to recover the costs of repairs needed for the *Speeder* to obtain a class certificate from ABS. Otto Candies's sole claim against NKK was based on the tort of negligent misrepresentation as stated in the *Restatement (Second) of Torts* 552.

The Appeal Court (Fifth Circuit) proceeded by defining what a Classification Society is<sup>633</sup> and indicated what sectors of the maritime industry rely on their services.<sup>634</sup> It then referred to various cases that had explored the duties of Classification Societies.<sup>635</sup> The Appeal Court (Fifth Circuit), relying on the decision of *Coastal (Bermuda) Ltd v E.W. Saybolt & Co*<sup>636</sup> acknowledged that general

<sup>628</sup> 901 F. Supp.737,1996 AMC 561 (S.D.N.Y.1995)

<sup>629</sup> 902 F. Supp.49 ( S.D.N.Y 1995).

<sup>630</sup> 901 F. Supp.737,1996 AMC 561 (S.D.N.Y.1995) as referred by Cochran *op cite* n 610 at 623.

<sup>631</sup> 346 F.3d 530, 2003 A.M.C. 2409

<sup>632</sup> *Ibid.*

<sup>633</sup> 346 F.3d 530; *Ibid* at 2409 at 2413 (referring to O'Brian *op cite* n 153 at 403)

<sup>634</sup> These sectors included, ship-owner, insurers, charterers, cargo-owners, buyers, and bankers. 2003 A.M.C. 2409 at 2413 (referring to Miller *op cite* n 125 at 77 and Honka *op cit* n 77 at 3).

<sup>635</sup> 2003 A.M.C. 2409 at 2413 (Citing *The Sundancer*, 799 F.Supp. 363, 1994 AMC 1, [1994] 1 Lloyd's Rep. 183; *Cargill Inc. v Bureau Veritas*, 902 F. Supp.49 ( S.D.N.Y 1995); *Somereff, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*, 720 F.Supp. 441, 1989 A.M.C. 2330)

<sup>636</sup> 1988 AMC 207.

maritime law recognise that a Classification Society could be liable in the tort for negligent misrepresentations.<sup>637</sup> This was by virtue of the Restatement (Second) of Torts section 552. However, the Appeal Court (Fifth Circuit) noted that *Coastal (Bermuda) Ltd v E.W. Saybolt & Co*<sup>638</sup>, “does not automatically translate to the relations between maritime Classification Societies...and third parties.”<sup>639 640</sup>

However the cautious approach adopted by the Appeal Court (Fifth Circuit), especially after it noted the possible harmful consequences of unduly imposing liability, meant that these claim when made against a Society must be strictly and carefully interpreted. Within these confines the plaintiff-purchaser was successful. The Appeal Court (Fifth Circuit) stated that to prevail on a cause of action of this nature against a Classification Society under federal maritime law, a number of very specific requirements have to be established by the claimant in terms of Restatement (Second) of Torts section 552. Therefore the Appeal Court (Fifth Circuit) required the plaintiff to establish, *inter alia*,

- “(1)[The Classification Society], in the course of its profession, supplied false information for [the third party’s] guidance in a business transaction;
- (2) [The classification] society failed to exercise reasonable care in gathering the information;
- (3) [The third party] justifiably relied on the false information in the transaction that [the Classification Society] intended to influence; and
- (4) [the third party] thereby suffered pecuniary loss.<sup>641</sup>

[In addition], a plaintiff ... must be a “person or a member of a limited group’ of persons, for whose benefit and guidance the defendant either intends to supply the information or knows that the recipient intends to supply it.”<sup>642</sup>

From the onset the Appeal Court (Fifth Circuit) emphasised that for the purposes of section 522 the information provided by the society must be false. The Appeal Court held that when a Classification Society issues a certificate free of recommendations, the Society is stating that the certified vessel complies with the society's rules and standards for ships of the relevant class.<sup>643</sup> Therefore the issuing of a certificate indicates compliance with the Societies Rules.<sup>644</sup> Therefore the Appeal Court (Fifth Circuit) reiterated a Classification Society’s duties as set out in *The Great American*<sup>645</sup> The Appeal Court (Fifth Circuit) confirmed that when a

<sup>637</sup> 2003 A.M.C. 2409 at 2412 Relying on the decision of *Coastal (Bermuda) Ltd v E.W. Saybolt & Co* 1988 AMC 207.

<sup>638</sup> 1988 AMC 207.

<sup>639</sup> 2003 A.M.C. 2409 at 2412 as referred by Cochran *op cit* n 609 at 618.

<sup>640</sup> In *Coastal (Bermuda) Ltd v E.W. Saybolt & Co* 1988 AMC 207 the defendant was an independent oil inspector. For a further discussion of the liability of non-Classification Society surveyors see *International Ore and fertilizer Corp v SGS Control services, Inc.* 38 F.3d 1279, 1995 A.M.C. 944 as discussed above in chapter 2.

<sup>641</sup> (Citing *Coastal (Bermuda) Ltd v E.W. Saybolt & Co* 1988 AMC 207 at 212

<sup>642</sup> 2003 A.M.C. 2409 at 2413 (quoting *Great Plains Trust Co. v Stanley Dean Witter & Co.* 313 F.3d 305,318

<sup>643</sup> *Otto Candies L.L.C v Nippon Kaiji Kyokai Co.* 2003 A.M.C. 2409 at 2412 (referring to Miller *op cit* n 125 at 77)

<sup>644</sup> *Ibid.*

<sup>645</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

society undertakes to classify a vessel it accepts a duty to survey and classify the vessel in accordance with society's own rules and standards.

The Appeal Court (Fifth Circuit) gave a definitive analysis on the relevance of a third party reliance on certificates. This involves a two-part enquiry.

The first part of the enquiry is the whether the third party's reliance was justifiable. Factors that indicated that reliance was justifiable was that the certificate was issued free of recommendations. Another factor was membership of the International Association of Classification Societies ("IACS"). The significance lay in the fact that this organisation has a set of prescribed standards and qualified membership.<sup>646</sup> On the facts the Appeal Court (Fifth Circuit) held that the purchaser would have not bought the vessel, *the Speeder* unless NKK's certified *the Speeder* as a coastal passenger vessel free of recommendations.<sup>647</sup>

It is the Appeal Court's analysis of the 'reliance element' that has drawn criticism. Particularly in view of the 'cautious approach' adopted by the Appeal Court in respect of imposing liability. These commentators argue that if the Appeal Court "...[employed] every available means of buttressing against the overexposure of Classification Societies,"<sup>648</sup> it would have imposed a greater limitation than merely requiring 'justifiable reliance'. For example in *Carbotrade S.p.A v Bureau Veritas*<sup>649</sup> the District Court stated that a claim by a third party based on negligent misrepresentation is "only appropriate where there is a relationship approaching privity between the defendant and third party."<sup>650</sup> In a prior decision, the Fifth Circuit had interpreted 'justifiable reliance' to comprise of two parts<sup>651</sup>, namely, 'actual reliance' and 'reasonable reliance'<sup>652</sup>, which was to be "...judged in light of the plaintiff's intelligence and experience."<sup>653</sup>

The second part of the enquiry is the knowledge of the advisor. The Appeal Court (Fifth Circuit) held that mere foreseeability of third party reliance is insufficient to establish a negligent misrepresentation claim.<sup>654</sup> There must be actual knowledge on the part of the advisor. Therefore even a party who customarily relies on certain information are not entitled invoke a section 522 claim unless the advisor knew at the time the information was supplied for that persons benefit and guidance.<sup>655</sup> Therefore, there is no need for direct communication between the misinformer and the third party.<sup>656</sup> The Appeal Court (Fifth Circuit)

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<sup>646</sup> Only eleven out of the currently 50 operating Classification Societies qualify for membership. IACS is discussed further in Chapter 4.

<sup>647</sup> 346 F.3d 530, 2003 AMC 2409 (5th Cir. 2003) at 537.

<sup>648</sup> Cochran *op cit* n 609 at 623.

<sup>649</sup> 901 F. Supp.737,1996 AMC 561 at 573 (S.D.N.Y.1995) as referred by Cochran *op cit* n 609 at 623.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid* at 623 (citing **Scottish Heritable Trust v Peat Marwick Main & Co** 81 F.3d 606)

<sup>652</sup> *Ibid.*

<sup>653</sup> *Ibid*

<sup>654</sup> Such third- parties may include, with out limitation, cargo-owners, longshoremen, passenger, crew and charters. **Otto Candies L.L.C v Nippon Kaiji Kyokai Co.** 2003 A.M.C. 2409 at 2415 ( Fifth Cir. 2003) (citing **Scottish Heritable Trust, Plc** 81 F. 3d at 612 and **First Nat'l Bank of Commerce v Monco Agency Inc,** 911 F.2d 1053,1059-1060.)

<sup>655</sup> 2003 A.M.C. 2409 at 2415 (citing **First Nat'l Bank of Commerce v Monco Agency Inc,** 911 F.2d 1053, 1061)This is because Restatement (Second) of Torts section 552 expressly limits liability to a select group of 'non clients' whom the misinformer actually knows will receive the information.

<sup>656</sup> *Ibid* at 2416

saw this requirement as a limitation to the scope and effect of its judgment that imposed liability on a Classification Society for negligent misrepresentation. The supplier, by virtue of this requirement receives notice of potential third party claims. This is in comparison to the countless number of unknown persons that could give rise to unlimited liability. He is thereby afforded an opportunity to make a rational decision regarding the undertaking in light of the scope of known liability.<sup>657</sup>

### 3.8.4 Eternity Shipping Ltd., Et al., Limitation Proceedings

In *Eternity Shipping Ltd., Et al., Limitation Proceedings*<sup>658</sup> in United States District Court for the District of Maryland (Northern Division) the claimant was a widower of a seaman who was killed by a collapse of a crane aboard the M/V *Leon I*, a vessel owned by Eternity Shipping. The plaintiff, claimed against a Classification Society that inspected and certified the ship's cargo gear. From the onset Benson Everett Leg, ChJ of the District Court of Maryland stated in respect of such claims that,

“[o]verall, the Courts have trod carefully in this arena, hesitant to open the liability door too far given the limited nature of the Classification Society’s undertaking, which is to conduct a specified inspection of a ship for the owner and *only* the owner.”<sup>659</sup> (my emphasis).

He cited the leading authorities and summarise the leading arguments that the Appeal Court in *Otto Candies L.L.C v Nippon Kaiji Kyokai Co.* held to mitigate against the imposition of liability. The third party plaintiffs had two causes of action against the Classification Society, namely, negligence and breach of an implied warranty of workman like performance which was alleged to have been owed to the ship-owner and to which the plaintiffs are third party beneficiaries.<sup>660</sup> In respect of the cause of action of negligence the plaintiffs expressly stated that they were not alleging negligent misrepresentation but rather that the Classification Society could be held liable for common law negligence. However the Court found there to be no authority for this and held that “claims of injured third parties against Classification Societies fit [section 522 of] the Restatement’s concept like a glove.”<sup>661</sup> Within this ambit the Court held that the claim for negligent misrepresentation failed as a matter of law as not all the requirements of section 522 of the Restatement<sup>662</sup> had been satisfied. The Court found there to be absolutely no evidence that the third party plaintiff relied on Classification Societies certificate.<sup>663</sup>

<sup>657</sup> 2003 A.M.C. 2409 at 2416 (citing *Bily v Arthur Young & Co.* 8434 P. 2d. 745 (Cal. 1992) at 769).

<sup>658</sup> 444 F. Supp. 2d 347, 2006 A.C. M.C 2034.

<sup>659</sup> 444 F. Supp. 2d 347, *Id* at 2047 (citing *Otto Candies* 346 F.3d 530 at 535, 2003 AMC 2409 at 2414; *Cargill Inc. v Bureau Veritas*, 902 F. Supp.49 at 53 (S.D.N.Y 1995); *The Sundancer* 752 F. Supp. 173 at 381-382 1990 AMC 2882 at 2974 (S.D.N.Y. 1990) . *Somarel v American Burea of Shipping* 1989 AMC 1061 at 1068, 704 F. Supp 59 at 64 (D.N.J. 1988)

<sup>660</sup> 444 F. Supp. 2d 347, 2006 A.C. M.C 2034 at 2049.

<sup>661</sup> *Ibid.* (citing Miller *op cit* n 125 at 75.)

<sup>662</sup> *Ibid.* (citing *Otto Candies* 901 F. Supp.737, 1996 AMC 561 (S.D.N.Y.1995)) 346 F.3d 530, 2003 AMC 2409

<sup>663</sup> *Ibid.*

The plaintiffs further alleged that the Classification Society was liable due to the Good Samaritan Doctrine.<sup>664</sup> The application of this doctrine requires, *inter alia*, that the harm suffered must arise from the third party relying on the wrongdoers undertaking.<sup>665</sup> As stated above, the Court found no evidence that the third party plaintiff relied on the society's certificate that would have constituted the relevant undertaking.<sup>666</sup> The plaintiffs further contended that the Classification Society owed an implied warranty of workman like performance to the ship-owner when it surveyed the cranes and that they were third party beneficiaries of this warranty. The Court rejected this argument because of the passive role of the society, which was held not to give rise to this warranty being implied.<sup>667</sup>

### **3.8.5 Commentary: The status of the cause of action of negligent misrepresentation:**

The decision of the Appeal Court (Fifth Circuit) in *Otto Candies, L.L.C v Nippon Kaiji Kyokai Corporation*<sup>668</sup> as confirmed by *Eternity Shipping Ltd., Et al., Limitation Proceedings*<sup>669</sup> must have initially sent chills up Classification Society's spines, but these fears should have been short lived. This is because the Appeal Court liability only imposed liability through the narrow confines of section 522 of the Restatement (Torts). Interestingly, the Federal Courts focus and in some instances, on the cause of action of negligent misrepresentation as opposed to the underlying liability of professional negligence, has left the door open and exposed third party claims to be possibly defeated by exemption clauses by the defence of 'selective representation' as discussed below.

### **3.9 Negligent misrepresentation and selective reliance by third parties**

The danger of a third party who selectively relies on particular statement whilst ignoring other statements that may negate and relieve the alleged wrongdoer from liability was illustrated in the recent decision of the United States Appeal Court (Fifth Circuit) in *Hellenic Investment Fund v Det Norske Veritas*.<sup>670</sup> In this case the appellants cause of action was negligent misrepresentation due to the respondents representation made in the classification documents of *The Mariannis*. The respondent, Det Norske Veritas, sought the dismissal of the action and the enforcement of the forum selection clause as contained in the Det Norske Veritas Rules.<sup>671</sup> It was alleged that the appellant was bound by the forum selection clause under a number of theories, *inter alia*, estoppel.<sup>672</sup>

<sup>664</sup> **The Good Samaritan Doctrine** is set out in section 324A of the Restatement (second) of Torts. The requirements are summarised above in *Shipe v Chesapeake Bay Fishing Parkes, Inc.* 1997 AMC 1091 at 1094-1095; 940 F. Supp. 130 at 133-134 (D.Md. 1996).

<sup>665</sup> (citing *Shipe v Chesapeake Bay Fishing Parkes, Inc.* 1997 AMC 1091 at 1094-).

<sup>666</sup> 444 F. Supp. 2d 347,2006 A.C. M.C 2034 at 2051.

<sup>667</sup> This is discussed in greater detail in chapter 2.

<sup>668</sup> 346 F.3d 530, 2003 A.M.C. 2409 .

<sup>669</sup> 444 F. Supp. 2d 347,2006 A.C. M.C 2034.

<sup>670</sup> 464 F. 3d 514; 2006 AMC 2312.

<sup>671</sup> The Rules read '[a]ny dispute arising in relation to or as a consequence of these Rules shall only be resolved by the Courts of Norway, the Municipal Court of Oslo being the proper venue.'

<sup>672</sup> The other theories alluded by DNV was 'third-party beneficiary' and 'an implied-in-fact contract'. The Court took no position on whether these were applicable and binding upon the appellant.

The Appeal Court (Fifth Circuit) interpreted the theory of direct-benefit estoppel too,

‘involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate [a] clause in the contract.’<sup>673</sup>

The Appeal Court recognised that in cases where a non-signatory has bought a suit against a signatory based partly on the agreement, the Court would seriously consider applying the theory of direct-benefit estoppel.<sup>674</sup> Because the appellants claim for negligent misrepresentation arose from various certificates issued by the Society based on surveys conducted on *the Mariannis* the Appeal Court (Fifth Circuit) held that the claims are ‘at a minimum’ based in part on the DNV Rules.<sup>675</sup> The appellant argued that the direct-benefit estoppel was not applicable because, *firstly*, it received no benefit from the Societies services and; *secondly*, the appellant was not advancing a claim based in contract but rather on the tortious claim of negligent misrepresentation.

The Appeal Court accepted an earlier decision of the second circuit in *American Bureau of Shipping v Tencard Shipyard S.P.A.*,<sup>676</sup> in which the obtaining of low insurance premiums due to the relevant vessel being in class and the ability to have the vessel to be registered under the French Flag as constituting ‘benefits’ for the purpose of applying the theory direct-benefit estoppel.<sup>677</sup> The Appeal Court (Fifth Circuit) brushed over the fact that in hind-insight that ‘Det Norske Veritas’s assurance and classification services ultimately proved to be of little benefit to Hellenic’ on the basis that these services were essential to Hellenic’s decision to purchase the vessel.<sup>678</sup> However the Appeal Court placed more emphasis on the fact that the conceded in its statement of claim that Det Norske Veritas’s representation was intended for Hellenic’s ‘guidance and benefit in a business transaction’ as it was pleading negligent misrepresentation. Indeed the Court found this to be a requirement for the cause of action of negligent misrepresentation.<sup>679</sup>

In respect of the second point, the Court stated that although ‘Hellenic claim was sounding in tort it was nevertheless based upon the Societies failure to act in accordance with its own Rules when classing the vessel.’<sup>680</sup> The Court concluded that a duty based on negligent misrepresentation was owed by Det Norske Veritas to Hellenic.<sup>681</sup> However this duty arose from Det Norske Veritas’s Rules.<sup>682</sup> Hellenic’s claim is based on Det Norske Veritas’s failure to perform in accordance

<sup>673</sup> *Ibid* at 516; 2006 AMC 2312. (Citing **Du Pont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates, S.A.S** 269 F.3d. 187 at 200 (3d Cir.2001))

<sup>674</sup> 464 F. 3d 514 at 516 (citing **Bridas S.A.P.I.C v Government of Turkey** 345.3d. 347; 353 at 362.)

<sup>675</sup> *Ibid* at 518.

<sup>676</sup> 170 F3d. 349 at 353

<sup>677</sup> 464 F. 3d 514 at 518.

<sup>678</sup> *Ibid* at 519.

<sup>679</sup> *Ibid*. (citing **Otto Candies L.L.C v Nippon Kaiji Kyokai Co.** 346 F.3d 530 at 535)

<sup>680</sup> *Ibid*. citing (**Stolt Parcel Tankers Inc V Det Norske Veritas AS, No OO-CV- 1335**, at 8-9 and n4 (S.D. Tex July 3,2001) in which the Court enforced an identical forum selection clause and noting that the “[non-signatory’s] action in this case is essentially founded upon its claims that DNV did not comply with its rules and should be liable to [the non-signatory] for damage.

<sup>681</sup> *Ibid* at 520.

<sup>682</sup> *Ibid*.

with these rules. Therefore the Court concluded that the appellants claim was subject to the forum selection clause as contained in Det Norske Veritas's Rules.<sup>683</sup> The Appeal Court reasoned by stating,

'Hellenic [ a third party] cannot embrace the Rules by bringing a claim under *Otto Candies* [negligent misrepresentation] alleging, in essence, a violation of [Det Norske Veritas's] Rules without accepting the consequences of those Rules.'<sup>684</sup>

Based on this the Appeal Court held that Hellenic was estopped from denying the entire contract, including the forum selection clause to which it was held bound. There is no indication in the judgment that the Court intended it to be limited to only forum selection clauses.

It has been suggested that a third party who alleges to have detrimentally placed reliance on a particular statement that, is one of many others that appear on a document, cannot be deemed to have ignored or close his eyes to these other statements.<sup>685</sup> In view of the judgment of **Hellenic Investment Fund v Det Norske Veritas**,<sup>686</sup> common sense would dictate that all terms and conditions that are contained in a document should be deemed to have been acknowledged by the third party.<sup>687</sup> This approach proposes that a claim for negligence misrepresentation should be analysed in conjunction with all the representations made by a Classification Society in the document relied upon by the third party.<sup>688</sup> Simply put

<sup>683</sup> *Ibid.*

<sup>684</sup> 464 F. 3d 514 at 520 (citing **Du Pont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates**, S.A.S 269 F.3d. 187 at 200 (3d Cir.2001; **Stolt Parcel Tankers Inc V Det Norske Veritas AS, No OO-CV-1335**, slip op. at 8-9 and **American Bureau of Shipping v Tencard Shipyard S.P.A** 170 F3d. 349 at 353 (2d Cir.1999)).

<sup>685</sup> Clyne & Saville 'Classification societies and limitation of liability' (2007) 81 Tul.L.Rev. 1399 at 1422.

<sup>686</sup> 464 F. 3d 514; 2006 AMC 2312.

<sup>687</sup> Clyne & Saville *op cit* n 686 at 1422.

<sup>688</sup> *Ibid.* Clyne & Saville refer to an number of Certificates of Classification issued by Classification Societies (at fn 94 page 1421) to illustrate that a Classification Society certificate contains a number of other references other than those which relate to the survey of a vessel in accordance with class rules.

See **Am. Bureau of Shipping Certificate of Classification (2006)**. ABS provides at the bottom of the Certification of Class:

NOTE: This certificate evidence compliance with one or more of the Rules, Guides, standards or criteria of American Bureau of Shipping and is issued solely for the use of the Bureau, its committees, its clients or other authorised entities. The classification certificate is a representation only that the vessel, structure, item of material, equipment or machinery or any other item covered by the certificate has met one or more of the Rules of American Bureau of Shipping. This certificate is governed by the terms and conditions on the reverse side hereof, and governed by the Rules and standards of American Bureau of Shipping who shall remain the sole judge thereof.

See Am. Bureau of Shipping, *supra*.

The reverse of the ABS Class Certificate includes further clauses regarding the scope of ABS's representation, arbitration, liability limitations, indemnifications, ect.

The same approach is adopted by Lloyds Register of Shipping (herein after referred to as Lloyd's Register). The face of the Certificate of Class (1999) indicates compliance with Lloyd's Register Rules and Regulation for the Classification of Ships. The bottom of the Certificate of Class provides as follows:

Notice: 1 This certificate is subject to the terms and conditions as shown overleaf.

2 ...

‘the scope of one’s reliance may well be limited by the very terms of the certificate upon which reliance is placed.’<sup>689</sup> It has been suggested that, *prima facie* there is nothing unfair or inequitable in holding a third party to the entire representation upon which it has claimed reliance and that to hold otherwise may result in the third party having more rights against the Classification Society than the original contracting party.<sup>690</sup>

Proponents of this approach further argue that it can be stretched further to include the notion of incorporation by reference, whereby terms and condition that are not specifically contained in the relevant document but are referred too therein and expressly stated as being incorporated into the document by reference.<sup>691</sup> The writer is not convinced. As stated from the onset, a negligent Classification Society acts unprofessionally. The liability imposed for negligent conduct is not limited to that which is defined in the Classification Society’s Rules. It is the public’s notion of blameworthiness that defines and determines the wrongfulness of the defendant’s conduct. Further the approach of the Fifth Circuit does not discuss whether the Society’s Rules should be required to be of a certain standard before these rules are used. This is indeed an oversight of the Fifth Circuit, particularly when it placed emphasis on the Rules and the content of the certificate. In chapter 2 it has been argued that Classification Societies should be obliged to ensure that their Rules are adequate and are of a reasonable standard. Further, for an indication of what a reasonable standard may be for Society’s Rules one can look at efforts of the IMO, the CMI Principle of Conduct and the Directive 94/57 EC and its amendments of the European Union<sup>692</sup>

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The reverse of the **Lloyd’s Register Class Certificate** states, *inter alia*

LR (Lloyds Register of Shipping), its officers, employees or agents (on behalf of each of whom this notice is given) shall be under no liability or responsibility in negligence or otherwise howsoever to any person who is not party to the agreement with LR pursuant to which any certificate, statement, data or report is issued in respect of any information or advice expressly or impliedly given by LR or in respect of any omission or inaccuracy therein or in respect of any act or omission which has caused or contributed to any certificate, statement, data or report being issued with the information and the advice it contains (if any).

Further down the Certificate of Class further contains a statement that reads as follows; ‘Continuance of class is subject to compliance with the requirements of LR’s Rules and Regulations for Classification...’

The Certificate of Class further includes *inter alia*, further clauses regarding the scope of Lloyd’s Register representation, liability limitations, indemnifications, payment and circumstances in which class may be withdrawn.

The **GL Certificate of Class** is similar in that it too provides that the “latest edition of the General Terms and Conditions of Germanischer Lloyd is applicable. “See Germanischer Lloyd, Certificate of Classification (2006). The Germanischer Lloyd General Terms and Conditions contain provisions concerning liability, payment, confidentiality, governing law and jurisdiction. See Germanischer Lloyd, General Terms and Condition section D-H (2007). Bureau Veritas likewise provides that the certificate is issued within the scope of the General Condition of Bureau Veritas’s Marine Division and further states that the limitation is in accordance with the Bureau Veritas Rules on the Classification of Steel Ships. See **Bureau Veritas, Certificate of Classification (2006)** Referred by Clyne & Saville *op cite* n 686 at 1421 fn 94.

<sup>689</sup> Clyne & Saville *op cit* n 686 at 1424.

<sup>690</sup> Clyne & Saville *op cit* n 686 1429.

<sup>691</sup> The notion of incorporation by reference is known in general contract law and insurance law and is extensively utilised in the development electronic commercial law.

<sup>692</sup> These initiatives of the international community are discussed further in chapter 4.

### 3.9.1 The Starsin & the need for business efficiency

It is suggested that before Societies eagerly implement the decision of *Hellenic Investment Fund v Det Norske Veritas*<sup>693</sup> in practice, cognisance must be given to the approach of the House of Lords in *The Starsin*<sup>694</sup> that gives credence to the importance of business efficiency in the shipping industry. In its judgment the House of Lords sought to give effect to the businessperson's legitimate expectations and the objective of commercial efficiency when interpreting the contract of carriage as evidenced by the bill of lading. The issue in dispute was the identity of the carrier. The demise clause contained on the reverse indicated that the Master on behalf of the ship-owner signed the bill. However, at first glance of the face of the bill of lading it was evident that the Master had not signed the bill. Rather it was *prima facie* apparent that agents of the charterer had signed the bill as "the carrier". The House concluded that if the identity of the carrier was obvious and plainly identified by the language on the front of the document, one would never retreat to the reverse side of the document to scratch around for a demise clause. As Lord Bingham stated, 'the language on the front simply took priority and no attempt at reconciliation was needed.'<sup>695</sup>

The House gave credence to the legitimate expectations of businessmen. It held that a reasonable businessperson would expect the identity of the carrier together with other variables that describe the objects of the particular voyage to be found on the face of the bill of lading and not 'tucked away among standard terms and conditions printed on the back'. This approach is readily ascertained from the judgment of Lord Steyn where he states;

'How is the problem to be addressed? For my part there is only one principled answer. It must be approached objectively in the way in which a reasonable person, versed in the shipping trade, would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specially chosen, such as the words, which appear above the signature, rather than standard form printed conditions. Moreover, I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill. Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business common sense for a shipper to turn to the face of the bill, and in particular to the signature box, rather than clauses at the bottom of column two of the reverse side of the bill.'<sup>696</sup>

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<sup>693</sup> 464 F. 3d 514; 2006 AMC 2312.

<sup>694</sup> [2003] 1 Lloyd's Rep 571.

<sup>695</sup> *The Starsin* [2003] 1 Lloyd's Rep 571 at 578.

<sup>696</sup> *Id* at 783.

However *The Starsin*<sup>697</sup> should not be interpreted as authority for completely ignoring the terms and conditions that are on the reverse side of a document. *The Starsin*<sup>698</sup> merely qualifies when a reasonable businessperson is expected to have resort to those terms and conditions. As Lord Bingham stated;

‘I can well understand that a shipper or transferee of a bill of lading would recognise the need to consult the detailed conditions on the reverse of the bill in any one of numerous contingencies which might arise and for which those conditions make provision. He would appreciate that the rights and obligations of the parties under the contract are regulated by those detailed conditions. But I have great difficulty in accepting that a shipper or transferee of a bill of lading would expect to have to resort to the detailed conditions on the reverse of the bill... in order to discover who he was contracting with. And I have even greater difficulty in accepting that he would expect to do so when the bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is.’<sup>699</sup>

The question that *The Starsin*<sup>700</sup> therefore begs to be asked is whether it is reasonable for a third party to place reliance on what is *prima facie* stated on the face of a Certificate of Classification instead of having to look on the reverse or even burdened with having to seek recourse to Rules that are incorporated by reference but not necessarily in its possession. In other words having regard to only the representations on face of the document, is a third party able to claim misrepresentation even though, in taking into account of what is stated on the reverse side of the document, this may constitute ‘selective representation’?

It is odd that despite, amply opportunity on previous occasions, the issue of ‘selective representation’ has not been used by classification Societies to invoke the protection of exculpatory clauses against a claim of negligent misrepresentation.<sup>701</sup> At the very least the decision of the Fifth Circuit in *Hellenic Investment Fund v Det Norske Veritas*<sup>702</sup> means that such a defence is not legal heresy and will most likely be entertained by the Courts in the future.<sup>703</sup>

### 3.10 Other common law jurisdictions not in favour of imposing liability

#### 3.10 .1 Australia Jurisprudence

In the *Natcraft Pty Ltd & Henlock Pty Ltd v Det Norske Veritas & Anor (The Sundancer)*<sup>704</sup> the plaintiff Natcraft (Pty) Ltd had entered into a building contract with Mantacat (Pty) Ltd. The contract provided for the construction a newly designed 14.3 meter catamaran named *the Sundancer*. *The Sundancer* was to be

<sup>697</sup> [2003] 1 Lloyd’s Rep 571.

<sup>698</sup> *Ibid.*

<sup>699</sup> [2003] 1 Lloyd’s Rep 571 at 578.

<sup>700</sup> [2003] 1 Lloyd’s Rep 571.

<sup>701</sup> Further the issue has gone unnoticed by most authors on the subject. The only exception is the article by Clyne & Saville ‘Classification societies and limitation of liability’ (2007) 81 Tul.L.Rev. 1399.

<sup>702</sup> 464 F. 3d 514; 2006 AMC 2312.

<sup>703</sup> See the discussion of exception clauses in Chapter 2. In particular see the discussion of the ‘Limitation Issue’ below.

<sup>704</sup> [2001] QSC,348.

built in accordance with annexed plans and specifications, and was required the vessel to be in fit condition in order to be awarded a survey certificate and permit from the Department of Harbours and Marine. Det Norske Veritas (D.N.V) was the Classification Society that was engaged by Mantacat (Pty) Ltd to provide ‘type approval’ for the vessel. In due course DNV sent a communication to the Department of Harbours and Marine that indicated that the vessel had been constructed in accordance with the approved plans. However, this statement was incorrect because a number of changes had been made to the original plans and the society had never received the final ‘as built’ drawings. After only eight voyages<sup>705</sup> *the Sundancer* developed serious structural defects that resulted in a large crack in her hull. As a consequence the plaintiffs business was wound up. The plaintiff sought to hold DNV liable for economic loss for its negligence in failing to inform the plaintiff that the vessel had not been built in accordance with the societies rules pertaining to construction and certification.<sup>706</sup>

The Supreme Court of Queensland considered in some detail to the decisions of *The Morning Watch*<sup>707</sup> and *The Nicholas H.*<sup>708</sup> However the Court conceded that the rationale of these cases could not be relied on because English law has a different approach in determination of liability for economic loss. Australian law requires, in addition to the requirements of foreseeability, proximity and fairness, justice and reasonableness, the further requirements of “vulnerability to the loss”, “knowledge” and “control” in order to establish liability for pure economic loss.<sup>709</sup>

The Supreme Court found that there was a contract between Natcraft (Pty) Ltd and Mantacat (Pty) Ltd, which made no reference to DNV. It further held that there was a contract between Mantacat (Pty) Ltd and DNV. However, no contract existed between the plaintiff and DNV. The existences of these contracts were relevant factors, which would restrict liability for economic loss. This is because DNV would lose the benefit of the exclusion clause in its contract with Mantacat (Pty) Ltd if it were to be made liable in tort towards the plaintiff. In addition, the Court held that the protection of the plaintiff’s contractual warranty meant that no duty of care was owed by DNV. The Court further contended that even if a duty to inform the plaintiff was owed, on the facts, the plaintiff had no occasion to ask the defendant to perform that duty. Therefore it was held that DNV did not owe a duty of care.

Even though the Supreme Court of Queensland employed different reasoning, the same conclusion as the House of Lords in *The Nicholas H.* was reached. It has been suggested that judicial resistance to imposing liability on

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<sup>705</sup> These voyages were in the Great Barrier Reef (in particular, from Mackay to and from island south of the Whitsunday Islands)

<sup>706</sup> Han Lixin & Yu Ping. “New developments regarding the liability of Classification Societies” (2006) 12 JIML 243 at 244

<sup>707</sup> [1990] 1 Lloyd’s Rep. 547.

<sup>708</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd’s Rep. 299 (H.L.)

<sup>709</sup> [2001] Queensland Supreme Court, Australia 348. As referred by Vaughan, B. “The liability of Classification Societies” (LLM assignment, University of Cape Town, 2006) published at [www.uctshiplaw.com](http://www.uctshiplaw.com) accessed on 1 Sep 2007.

societies is, “perhaps rather stronger than might be admitted overtly.”<sup>710</sup> The writer concurs.

### 3.10.2 New Zealand jurisprudence

In *Carter and Wright v Western Viaduct Marine Ltd*<sup>711</sup> the plaintiffs purchased the vessel, *The Nivanga*. The plaintiff claimed damages for economic loss from *inter alia* the Ministry of Transport (MoT). The claims arise out of the surveys allegedly carried out negligently and in breach of statutory standards. William J gave his judgment under three headings, namely, ‘contract cause of action’, negligent cause of action’ and ‘breach of statutory duty’.<sup>712</sup>

In respect of the plaintiffs cause of action based in contract the Court held that it had prescribed in terms of the governing legislation. However in the event that this conclusion was questioned the Court continued and stated that the statutory regulatory scheme<sup>713</sup> in this case did not give rise to a contractual relationship.<sup>714</sup> William J found, “the notions of required submissions, prescribed standards, breaches giving rise to criminal liability...and rights of appeal against adverse decisions are wholly contrary to the notion of contract.”<sup>715</sup>

William J held that the ultimate question to determine the existence of a cause of action of negligence, “... is whether in light of all the circumstances of the case it is just and reasonable to recognise a duty of care by the defendant to the plaintiff.”<sup>716</sup> The Court therefore applied the test as applied in English law. It

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<sup>710</sup> S Derrington & M White ‘Australian Maritime Law Update: 2001’ (2002) 33 J.Mar.L. & Com. 275 at 291. This commentary was made in respect of the trial judge, Chesterman J (unreported), in **Natcraft Pty Ltd & Henlock Pty Ltd v Det Norske Veritas & Peter Colley**

<sup>711</sup> CP6-SD99 in the High Court of New Zealand as referred by Vaughn *op cit* n 710 .

<sup>712</sup> The discussion of cause of action of breach of statutory duty is beyond the scope of this work.

<sup>713</sup> This statutory scheme included the Ship and Seaman Act of 1952 Act which was repealed as from 1 February 1995 by the Maritime Transport Act 1994 which has partially been repealed by the Maritime Transport Act 1993 which, amongst other things, set up the Maritime Safety Authority. However the facts of the act arose prior to 1 February 1995 thereby rendering the Ship and Seaman Act of 1952 Act (the ‘1952 Act’) still applicable.

The Court eloquently summarised the relevant provisions. Aspects of safety were dealt with in particular in Part VII of the 1952 Act .The original Part IV was repealed by an Amendment Act in 1987 headed "Construction Survey and Equipment". Section 199 required ships of over 6 metres to be surveyed. Failure to comply was an offence. Section 206 required initial, intermediate and periodical surveys as prescribed by regulation to determine compliance with the 1952 Act rules and regulations and "whether or not the ship is in all respects satisfactory for the service for which the ship is intended to be used". Section 209 obliged owners and agents to co-operate with surveyors and supply information, it again being an offence to fail to comply. The Shipping (Survey) Regulations 1989 made under s 210 created ten classes of ships, (*The Nivanga* was in Class IV ) and set out in considerable detail matters to be covered in initial, periodical and intermediate surveys. Part VI required continuous surveys of hull machinery and equipment and created an offence for default in compliance. Sections 211 and 212 made it mandatory for surveyors to give a Declaration of Survey or an Interim Certificate of Survey if the ship complied or to give written notice to the owner if it failed. Sections 214 and 215 gave owners rights of appeal to the Director of Maritime Safety and to the Minister if they were dissatisfied with surveyors' or the Director's decisions. Sections 216-219 prescribed forms of declarations and certificates of survey and interim certificates and s 220 made it an offence for ships covered by the regime to "proceed on any voyage" without an appropriate survey certificate. Section 501 empowered the fixing of fees for surveys and other matters. The details appeared in the Shipping (Fees) Regulations 1990. These provisions are akin to those discussed in **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd's Rep 648. CP6-SD99 at para 77 page 20

<sup>714</sup> CP6-SD99 at para 62 page 14

<sup>715</sup> *Ibid* at 14.

<sup>716</sup> *Ibid* at 6.

acknowledged the lack of New Zealand authority in these matters and considered the English decisions of *The Morning Watch*,<sup>717</sup> *The Nicholas H*,<sup>718</sup> *Reeman and Another v Department of Transport and Others*,<sup>719</sup> *Philcox v. Civil Aviation Authority*<sup>720</sup> and *Parrett v Collins*.<sup>721</sup> The Court acknowledged that this case drew a distinction between economic loss and personal injury. In this context the decision of *Parrett v Collins*<sup>722</sup> was less suited than the other cited judgments.<sup>723</sup>

The High Court held the following as mitigating actors against the imposition of liability on the defendant. The High Court interpreted the relevant statutory provisions<sup>724</sup> as only certifying that the vessel complied with the regulatory requirement at the survey date and no further.<sup>725</sup> Further that it was unreasonable to elevate such certification to mean that the vessel hull and equipment was in compliance beyond the survey date thereby burdening the Mot and M & I with a continuing obligation.<sup>726</sup>

The High Court held that recognition of a duty of care would expose the defendant to unacceptable levels of exposure of liability to an indeterminate class of persons that may have relied on the surveying certificates.<sup>727</sup> This is even more so when the defendant has no way of limiting the number of persons who rely on these certificates.

The High Court further held that whilst the issuing of certificates was, “ an acknowledgment to owners that independent and expert examination had found the construction and equipment in satisfactory condition at the date...”<sup>728</sup> this did not relieve the plaintiff of their primary and continuing responsibility of ensuring that the vessel was seaworthy when used for purposes for which the vessel required to be surveyed.<sup>729</sup>

The High Court held MoT role to be administrative and limited to merely granting or with holding the relevant certificate in terms of prescribed legislation. Consequently, the defendant did not have a right to insist on repairs or that these would be carried out. Furthermore their decision was subject to appeal. Within this vein of thought the Court stated further, that were responsibility for compliance with particular regulations is on those being regulated or entities controlled by them, then the regulator is less likely to be burdened with a duty of care.<sup>730</sup> This is

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<sup>717</sup> [1990] 1 Lloyd's Rep. 547.

<sup>718</sup> [1995] 2 Lloyd's Rep. 299 (H.L.)

<sup>719</sup> [1997] 2 Lloyd's Rep 648.

<sup>720</sup> (1995) 92(27) L.S.G.33.

<sup>721</sup> [1998] 2 Lloyds's Rep 255.

<sup>722</sup> [1998] 2 Lloyds's Rep 255.

<sup>723</sup> CP6-SD99 at para 107 p29.

<sup>724</sup> Sec 206 of the Shipping and Seaman Act 52 and Regulations 1989 reg 5

<sup>725</sup> CP6-SD99 at para 110 p27.

<sup>726</sup> *Ibid.*

<sup>727</sup> *Ibid.*

<sup>728</sup> *Ibid* at 28.

<sup>729</sup> *Ibid.*

<sup>730</sup> *Ibid.* (citing *Philcox v. Civil Aviation Authority* (1995) 92(27) L.S.G.33; *Reeman and Another v Department of Transport and Others* [1997] 2 Lloyd's Rep 648. and *Oceania Aviation Ltd v Director of Civil Aviation* ( HC Wellington CP 162/98 9 August 2000)

even more so when those who are responsible for carrying out the work are asserting the duty of care required to obtain certification.<sup>731</sup>

The High Court further held that if a purchaser of a vessel, such as the claimants, had concerns about the condition (seaworthiness) of the vessel, then they could have had the vessel independently surveyed or protected themselves in contract.<sup>732</sup> Another mitigating factor against imposing liability was that the defendant had no indemnity. Therefore the Court reasoned that the imposition of liability would give rise to the need for insurance, which would result in an increase in the cost of the service offered by them. This in turn may inhibit the defendant discharging their services.<sup>733</sup> Within this context the Court stated that,

“Mot is a body operated in the public interest in ensuring compliance by owners and others with statutory and regulatory requirements principally relating to seaworthiness and safety.”<sup>734</sup>

The High Court further stated that these bodies operate a statutory scheme that is subject to appeal. It further stated that, “[t]hey are not profit-making bodies accepting liability in negligence to other persons which replace the primary responsibility of vessels’ owners and operators.”<sup>735</sup>

Applying Lord Bingham’s CJ test enunciated in his judgment in *Reeman and Another v Department of Transport and Others*,<sup>736</sup> the Court concluded that the declarations and certificates in this case were not ‘plaintiff-specific’, ‘purpose-specific’ nor ‘transaction-specific’.<sup>737</sup> Nor were prospective purchasers deemed to be amongst the class of persons for whose protection a survey certificate was issued. The High Court concluded that, “[a]ll [these] factors would appear...to extend the test of forceability and proximity to unreasonable degree [and]... militate against the reasonableness of this Court finding a duty of care exists.”<sup>738</sup> The High Court acknowledged that the plaintiff could not operate *the Nivanga* commercially without the relevant certificates. However the High Court held that this to be indicative of a breach of a statutory duty as opposed to negligence.<sup>739</sup>

### 3.11 Civil Law jurisprudence on the issue of Classification Society’s liability

#### 3.11.1 French jurisprudence

The French system of delict is based primarily on five articles of the Civil Code. Art. 1382 reads,

‘Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.’

<sup>731</sup> *Ibid.*

<sup>732</sup> *Ibid.* (citing *The Morning Watch* [1990] 1 Lloyd’s Rep. 547 and *Reeman and Another v Department of Transport and Others* [1997] 2 Lloyd’s Rep 648. In both cases this option was mentioned by the Court.

<sup>733</sup> CP6-SD99 at para 101 at 28.

<sup>734</sup> *Ibid.*

<sup>735</sup> *Ibid.*

<sup>736</sup> [1997] 2 Lloyd’s Rep 648.

<sup>737</sup> CP6-SD99 at para 107 p29.

<sup>738</sup> *Ibid.*

<sup>739</sup> The discussion of cause of action of breach of statutory duty is beyond the scope of this work.

This is extended by Art.1383 which states that,

‘Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.’

Similar provisions are found in other continental countries, for example the Italian Civil Code, art 2043 and art 914<sup>740</sup> of the Greek Code for Civil Law.<sup>741</sup> Art. 1382 requires that the harm must be attributable to the wrongdoer culpable behaviour.<sup>742</sup> The Code does not define ‘culpable behaviour’ (*faute*). It is thought to mean “a failure to observe a precept of behaviour which [the wrongdoer] should have respected.”<sup>743</sup> Like common law jurisdictions, this is divided into intentional conduct (*delictuelle*) and negligent conduct (*quasi-delictuelle*). The later is further divided into gross negligence (*faute lourde*) and ordinary negligence (*faute legere*).<sup>744</sup>

In respect of causation, Art. 1382 requires there to be a sufficient link of causation between the damage-causing event and the damage. This can be shown if the damage would not have occurred but for the damage-causing event.<sup>745</sup> Therefore the more cumbersome and complex requirement of proximity is of no relevance. Without the aid of this requirement Societies are exposed to liability, which is evident by recent case law that is discussed below. The approach of the French is best illustrated by an analysis of the case law.

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<sup>740</sup> The Greek Civil Code was dealt with by the United States district Court in **Carbotrade S.P.A v Bureau Veritas, No 92 Civ.1459 (JGK)**, 1998 WL 397847 (S.D.N.Y. July 16, 1998). [1999 U.S .Dis. LEXIS 13980]Art 914 provides that a ‘person who through his fault has caused in a manner contrary to the law prejudice to another shall be liable for compensation.’ The elements of this civil code negligence cause of action are therefore ‘(a) an act (or an omission)of a person; (b) this act must be unlawful;(c) negligence (or intent) on the part of the person;(d) damage and; (e) an adequate causative link between the act (or omission) and the damage suffered.

The district Court, with the assistance of Greek legal experts testifying, concluded that conduct in this context is unlawful whenever there is a violation of the general rules of care and safety and the general principles of good faith and decent business usages. The district Court then concluded that to constitute an unlawful act, the person does not necessarily have to violate a certain rule of law; the act need only contravene ‘the general spirit of justice or the command of legal order’. Consequently, negligence and unlawfulness are both evaluated in view of the prevailing standards of the industry

Therefore the experts concluded that the duty of good faith and decent business usages ‘require the surveyor to act with the same degree of care as an average and reasonably prudent Classification Society surveyor.

Therefore, a violation of a Classification Society Rule and general standards by a surveyor could be ‘evident that the surveyor failed to act in good faith in conformity with decent business usage’s 444 ‘ A cause constitutes an appropriate or adequate cause if it was the cause in fact and proximate cause of the loss. A determination of proximity entail considering ‘ whether there were other adequate causes and the remoteness in time between the alleged cause and the resulting loss’ As referred and discussed Daniel *op cite* n 578 at 269-70.

<sup>741</sup> Siccardi, ‘Pollution Liability and Classification Societies: Is the system a fair one?’ Pirates Bar Association, 5<sup>th</sup> International Conference in Maritime Law, 29 sept-2 Oct 2004,p 331 as referred by Vaughan *op cite* n 710 at12.

<sup>742</sup> J Basedow & W Wurmnest ‘Third-Party liability of Classification Societies’ (1998) 2 Hamburg Studies on Maritime Affairs, published by Springer, Berlin 34.

<sup>743</sup> *Ibid.*

<sup>744</sup> *Ibid.*

<sup>745</sup> Boisson *op cit* n 38 at 243.

### 3.11.1.1 The *Armor*<sup>746</sup>

In *The Armor*, a surveyor employed by Bureau Veritas issued a confirmation of class in spite of the existence of defects that related to class. The surveyor was aware of the pending sale of the vessel. The classification society had excluded any liability with regard to the certification of vessel in its rules. Despite the existence of these exculpatory clauses the Court of Appeal found the surveyor to have acted grossly negligent and awarded FF 60 000.<sup>747</sup> This judgement was affirmed by the French Supreme Court (*Cour de cassation*). It held that a person cannot exclude liability for gross negligence and wilful intent for his own or his agents conduct in advance. Such a limitation was held to be ‘non enforceable and contrary to public order’ (*illicite et contraire a l ordre public*).

### 3.11.1.2 The *Chalutier C.T. 2*<sup>748</sup>

In *The Chalutier C.T. 2* a purchaser claimed damages because he could not use the purchased vessel as a fishing vessel due to latent defects. Registro Italiano Navale had certified the vessel. In addition, a surveyor employed by Bureau Veritas for purposes of issuing a preliminary certificate de navigabilite had briefly inspected it prior to sale.<sup>749</sup>

In giving judgment the Court of Appeal held that a Classification Society can only be held liable for gross negligence and wilful intent. It further confirmed the approach adopted in *The Armor*.<sup>750</sup> The Court of Appeal further stated that due to the special circumstances of the case, namely, that the surveyor was neither given time nor the means to inspect the vessel as a whole, which he did not act with wilful intent or in a grossly negligent manner. Consequently the Court dismissed the plaintiff’s claim for damages.

### 3.11.1.3 The *Energo*<sup>751</sup>

In *The Energo* the Court of Appeal confirmed the approach *The Chalutier C.T. 2* and dismissed an action of a ship-owner for similar reasons. Of particular interest in this case was the Appeal Courts statements made in *obiter*. It stated that a Classification Society couldn’t invoke a contractual limitation of liability clauses against claims of third parties.<sup>752</sup>

### 3.11.1.4 The *Elodie II*<sup>753</sup>

A French owner purchased a Moroccan coaster, the *Elodie II*. The vessel was subject to a special survey by Bureau Veritas, the defendant-Society that issued the corresponding certificates. In addition to this, the purchaser requested a further

<sup>746</sup> Cass.req.15 May 1923, (1923) 3 DOR 384,386 ff as referred by Basedow. & Wurmnest *op cit* n 742 at 35.  
<sup>747</sup> *Ibid*.

<sup>748</sup> certifying authority Tunis 23 February 1955, (1956) DMF 87,93. as referred by Basedow. & Wurmnest *op cit* n 742 at 35.

<sup>749</sup> This is distinguishable from a confirmation of class certificate.

<sup>750</sup> Cass.req.15 May 1923, (1923) 3 DOR 384,386 ff

<sup>751</sup> CA PARIS 12 December 1968, [1969] DMF 223. Basedow. & Wurmnest *op cit* at 35.

<sup>752</sup> *Ibid* at 229.

<sup>753</sup> Tribunal de Commerce de Nanterre, 26 Juin 1992, Revue Scapel 1992, 109, D.M.F. 1994, 19

survey by the defendant-Society. The defendant endorsed the classification certificate, which included several recommendations, one of these being that certain repairs had to be completed within a month of the survey. During this period the deed of sale was signed. Shortly thereafter the French maritime authorities inspected the vessel and withdrew its navigation licence. Due to the costs of repair the purchaser decide to have the vessel scraped. The purchaser alleged that the defendant had been negligent in respect of the special survey, an intermediate survey carried out a year thereafter following a collision and the pre-sale survey. The purchaser therefore claimed damages for economic loss from the defendant.<sup>754</sup>

The judge of The Nanterre Commercial Court concluded that the relevant defects had existed for several years and remained undetected. The Court held that class had been wrongly assigned and maintained by the defendant. Accordingly the defendant was required to compensate the plaintiff but only for the direct harm suffered. Both parties appealed against this verdict.<sup>755</sup> On appeal, however, the decision was upheld.<sup>756</sup>

The Court of Appeal of Versailles<sup>757</sup> also found their to be clear evidence that the Classification Society acted in a grossly negligent manner over a period of several years in maintaining the ships class whilst extensive defects that adversely affected class existed. The Court of Appeal accordingly found the Classification Society to be liable in terms of Art. 1382 and Art. 1384 of the Civil Code.

The Appeal Court adopted a similar approach to that of *The Amor*,<sup>758</sup> when it emphasised that the Society would have been liable towards its client, the seller of the vessel. The reason being, that the exculpatory clauses in the classification agreement between these two contracting parties would not be upheld in the case of gross negligence or wilful intent The Appeal Court continued and stated that even if a contract was presumed to have existed between the Classification Society and the third party purchaser, it would not have contained such exculpatory clauses. This is because the purchaser at the time of taking notice of the certificate of confirmation of class issued free of recommendations, the purchaser had no knowledge of such exculpatory clauses.<sup>759</sup>

In reaching its decision, The Court of Appeal left open the question of whether a purchaser of a vessel should base their claim against a Classification Society on the law of delict or contract.

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<sup>754</sup> Boisson *op cit* n 38 at 245 as referred by Basedow. & Wurmnest *op cit* n 742 at 35.

<sup>755</sup> Boisson *op cit* n 38 at 245.

<sup>756</sup> Durr *op cit* n 50 at 27.

<sup>757</sup> Certifying authority Versailles 21 March 1996 as referred by Basedow. & Wurmnest *op cit* n 742 at 35.

<sup>758</sup> Cass.req.15 May 1923, (1923) 3 DOR 384,386 ff

<sup>759</sup> From this dictum of the Court of Appeal, it is obvious that the Court of Appeal did not consider their to be any reference to exculpatory clauses as contained in the Societies rules by any representation on the certificate that was issued. It is submitted that the argument of 'selective representation' as discussed in the American judgment in **Hellenic Investment Fund v Det Norske Veritas** 464 F. 3d 514; 2006 AMC 2312 was not considered. This is discussed further in Chapter 3.

### 3.11.1.5 The Wellborn.<sup>760</sup>

In *CGU Courtage et Grouporama Assurance c/ Bureau Veritas, Cass lère, 27 Mars 2007*, *The Wellborn* sank in October 1994 along with her cargo of manganese during a voyage from Gabon to China. She sank in Port Dauphin (Madagascar) and nothing could be done to save the cargo due to her very poor state. Four insurance companies, including the French company CGU Courtage had to indemnify the recipient of the cargo, Bogay Investment. On the 3rd October 2001 CGU sued Bureau Veritas in front of the commercial Court of Nanterre for the amount that it had had to pay. Bureau Veritas checked the quality of the ship's steel plate and delivered issued relevant certificates that indicated that the vessel was seaworthy. The last survey was on the 3rd Oct 1993.

The Court of Appeal of Versailles<sup>761</sup> held that the degree of corrosion of the ship was far above the limits permitted by the Classification Society's Rules and should have been discovered when the vessel had been surveyed. Consequently this omission was found to amount to grossly negligent conduct. It was further held that the issuing of the highest class to a vessel amounted to a form of guarantee that the transport will be carried out under the best conditions possible.<sup>762</sup> The Appeal Court further held that the negligence on the part of the ship-owner does not exonerate a Classification Society from liability for its own wrongdoings.<sup>763</sup>

The French Supreme Court sought to apply the law most closely linked with the facts, applied French law. To this, the Cour de Cassation judged that the applicable law to a claim founded on tort is the law of the State where the damaging act occurred. In the case of a complex delict, this location is extended from the location of the act that caused the damage to the location where the damage actually occurred. When the location where the damage occurred is fortuitous, one must seek to locate the damaging act. Having noted that the classification company had its main office in France, that the rules on which it classed ships had been established in France, that the classification folders could be examined there, that the classification decisions were taken in France, the Court held that the law with the most links to the damaging act was French law and was applicable. The Court held that the question of applicable law in respect of the insurers claim is not related nor determined by the law applicable to the contract between Bureau Veritas and the ship owner.

The Supreme Court affirmed the Court of Appeal and held that had the true condition of the Wellborn been made known to CGS, it would not have insured the relevant cargo under the same terms and conditions. Further, the Supreme Court held that had it not been for the error of Bureau Veritas, the Wellborn would never have set sail and subsequently sunk. Therefore the Supreme Court concluded that the professional negligence of Bureau Veritas was the direct cause of the loss and consequently liable to indemnify the cargo insurer, CGS.

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<sup>760</sup> A fellow LLM student provided this English summary.

<sup>761</sup> CA Versailles 9 December 2004,[2005] DMF 313 Basedow. & Wurmnest *op cit* n 742 at 36.

<sup>762</sup> CA Versailles 9 December 2004,[2005] DMF 313 at 317.

<sup>763</sup> *Ibid.*

### 3.11.1.6 The Erika incident:

On the 12 December 1999 the Maltese-registered tanker, The Erika broke in two in the Bay of Biscay, about 60 nautical miles off the coast of Brittany, France. The tanker was carrying a cargo of 31 000 tonnes of heavy fuel oil, of which, 19 800 tonnes spilt at the time of the incident. Some 400 kilometres of shoreline was affected by oil.<sup>764</sup> Despite more than 250 000 tonnes of oily waste being collected up to 300 000 sea birds are said to have perished, the largest death toll recorded.<sup>765</sup>

A Classification Society, RINA ( Spa/ Registro Italiano Navale) had surveyed the Erika in 1998 and 1999 at Bijela and Augusta. In addition, Burea Veritas had inspected The Erika prior to the transfer of class to RINA.<sup>766</sup> It has been accepted by various French Courts and tribunals that the level of corrosion of the internal structures of the Erika at the time of her demise was well beyond acceptable standards of the Classification Society and contradicted the thickness measurements taken at the time of the above mentioned surveys. However that of Total, the vessel's charterer, had down played the role of the Classification Society. Despite being actively involved in clean up operation to the value of €200 million, Total had become 'the principle target of the many compensation claims.'<sup>767</sup> This is because of the public's perception of Total's role in the disaster and their view of Total as "the quintessential embodiment of big business... [in] the pursuit of profit at human expense." The French public felt betrayed by one of France's most well known corporate citizens and this perception was an aggravating factor that led to the imposition of liability.<sup>768</sup> To a lesser extent, it is suggested that the same contempt was an aggravating factor against the defendant Classification Society, RINA.<sup>769</sup>

#### 3.11.1.6.1 Litigation involving the International Oil Pollution Compensation Funds (IOPC)

The CLC was applicable to the oil pollution disaster caused by the sinking of the *Erika*. As a protective measure against the prescription of claims, the Director of the International Oil Pollution Compensation Funds (IOPC) has taken recourse action against, *inter alia*, the Classification Society, RINA and Burea Veritas by instituting actions in the Civil Court (Tribunal de Grande Instance) in Lorient on 11 December 2002.<sup>770</sup>

Since the Fund may possibly seek indemnification from the allegedly negligent Classification Society it is worthwhile mentioning the number of Court

<sup>764</sup> Report on the activities of the International Oil Pollution Compensation Funds in 2005 p 73.

<sup>765</sup> S Bell 'Oil giant must pay millions for slick' published 17 February 2008 The Scotsman available at <http://thescotsman.scotsman.com/world/Oil-giant-must-pay-millions.3681415.jp> accessed on 18 February 2008.

<sup>766</sup> Report on the activities of the International Oil Pollution Compensation Funds in 2005 at 75.

<sup>767</sup> A Spurrier 'Court to deliver Erika verdict' published 16 January 2008 Lloyds List available Westlaw International accessed on 18 January 2008.

<sup>768</sup> *Ibid.*

<sup>769</sup> No criminal action has been taken against Bureau Veritas.

<sup>770</sup> The Director is acting in terms of the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage as amended by the 1992 Civil Liability Convention and the International Oil Pollution Compensation Fund 1992.

judgments in respect of claims made against the 1992 Fund.<sup>771</sup> Most of these claims have been for economic loss and were assessed by the Fund in terms of its admissibility criteria, which, *inter alia*, includes the requirement of proximity and stipulates that the damage-causing event is the contamination and not the incident itself.<sup>772</sup> The French Courts have taken different approaches as to the use of these criteria.<sup>773</sup> The Court of Appeal and other Commercial Courts have held that the admissibility of claims and the interpretation of ‘pollution damage’ in the 1992 Civil Liability Convention should be determined exclusively on French law as discussed above, and that it was not bound by the Funds admissibility criteria. In other cases, the Funds criteria was applied or at least taken into account.<sup>774</sup> In particular, the Commercial Court in Brest and the Commercial Court in Vannes, in respect of a claims of an oyster grower and an agency recruiting temporary workers respectively, stated that it was in accordance with the French Constitution that the 1992 Civil Liability and Fund Conventions took precedence over French law. Therefore the admissibility criteria of the Fund were used.<sup>775</sup>

Irrespective of the approach adopted, in many cases even the barest degree of causation could not be established. Causation was not a stumbling block for the criminal Court of Paris, which has in criminal proceedings, as discussed below, imposed liability on *inter alia* the Classification Society of the *Erika*. This finding is indeed favourable to a claim for indemnification by IOPC

### 3.11.1.6.2 The Erika Trial:

The Conseil General of Vendee instituted action in the Paris Criminal Court and requested that the defendants should be held jointly and severably liable for any claims not covered by the 1992 Civil Liability Convention.<sup>776</sup> Some have said that the fact that this trial even took place as late as seven years after the incident, involving a number of disputes and investigations was a milestone.<sup>777</sup> The defendants were made up of fifteen individuals, who include, *inter alia*, the ship-owner, ship operators, the Master and four navy coastguard officers together with corporate defendants, which include, *inter alia*, the Classification Society (Rina), the charterer (Total)<sup>778</sup> and the ship-owner (Tevere Shipping). The charges were principally for having caused pollution at sea, endangered human life and in the case of certain of the individual defendants, failing to take action to prevent the

<sup>771</sup> All judgments rendered against the 1992 Fund are reported in documents submitted to Executive Committee which are available on the IOPC Funds’ website ( [www.iopcfund.org](http://www.iopcfund.org))

<sup>772</sup> The Civil Court in Paris has defined these admissibility criteria as requiring a reasonable degree of proximity between the contamination and damage incurred by the claimant and that account should be taken of the geographic proximity between the claimants activities and the contamination, the degree to which the claimant was economically dependant on an affected resource, the extent to which the claimant had alternative sources of supply or business opportunities, and the extend to which the claimants business activity formed an integral part of the economic activity within the affected area of the spill. Report on the activates of the International Oil Pollution Compensation Funds in 2005 p.89

<sup>773</sup> The Funds admissibility criteria for claims of pure economic loss are set out in the Claims Manual (available at [www.iopcfund.org](http://www.iopcfund.org)).

<sup>774</sup> Report on the activates of the International Oil Pollution Compensation Funds in 2005 at 81.

<sup>775</sup> Report on the activates of the International Oil Pollution Compensation Funds in 2005 at 87; 92.

<sup>776</sup> Report on the activates of the International Oil Pollution Compensation Funds in 2005 at 75.

<sup>777</sup> A Spurrier ‘We are today on hypotheses, uncertainties and contradictions’ published 15 June Lloyds List available at <http://listserv.v-net.org/archives/marine-1html> accessed on 18 January 2007

<sup>778</sup> Three Total companies were charged, namely, Total SA, Total Transport Corp and Total Petroleum Services

occurrence of the casualty.<sup>779</sup> At the close of trial the prosecutors recommended the discharge for a number of the accused individuals.<sup>780</sup>

Total had argued the point of law that as the charterer, it was not responsible for the physical condition of or the manner in which the vessel was operated. It further argued that it chartered the vessel in good faith as it relied on official documentation that certified that the vessel was seaworthy.<sup>781</sup> Total further argued that the MARPOL Convention took precedence over French law in pollution cases.<sup>782</sup> RINA sought to minimize its role by arguing that, “it [is] just one link in a chain of parties responsible for the safety of the Erika.”<sup>783</sup>

At the trial of Criminal Court of Paris expert witnesses of the litigating parties were unable, with any degree of certainty, to shed any light on the direct cause of the vessel sinking.<sup>784</sup> Both experts postulated that corrosion which resulted from inadequate repair and maintenance had played a pertinent role in the collapse of the *Erika*. However, a comprehensive explanation for the demise of the vessel could only be achieved with reference to other factors, notably extreme sea conditions and erroneous handling of the vessel by the Master.<sup>785</sup> Against this background the defence for the ship-owner and Classification Society although not putting forward an explanation, argued that the ‘slushing theory’ together with the hidden cracks that had been previously detected by the Classification Society, “at least provided explanations which fitted with the known facts of the casualty”.<sup>786</sup> Olivier Metzner, the defence attorney for RINA, eloquently stated, “[w]e are today on hypotheses, uncertainties and contradictions...Does the law permit us to content ourselves with that-so little?”<sup>787 788</sup>

The Court answered this by holding that French law applied to the matter and that the corrosion and the defective maintenance record of the vessel had a

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<sup>779</sup> A Spurrier ‘Day of reckoning for Erika defendants’ published 9 February 2007 Lloyds List available at <http://listserv.v-net.org/archives/marine-1html> accessed on 18 January 2007.

<sup>780</sup> These individuals were, the four navy coastguards officers, Total shipping chief Bertrand Thouilin, former Rina fleet operations manager Gianpiero Ponasso and the commercial manager of the Erika, Alessandro Ducci and Mauro Clemente. Spurrier *op cit* n 777.

<sup>781</sup> Article of the Mail & Guardian published on 17<sup>th</sup> of January 2008

<sup>782</sup> Spurrier *op cite* n 779.

<sup>783</sup> *Ibid.*

<sup>784</sup> Spurrier *op cit* n 777.

<sup>785</sup> *Ibid.*

<sup>786</sup> *Ibid.*

<sup>787</sup> *Ibid.*

<sup>788</sup> In relation to litigation in which the International Oil Pollution Compensation Funds (IOPC) was involved, the Commercial Court (Tribunal de Commerce) in Dunkirk at the request of various parties appointed a panel of experts. These experts suspected the cause of the Erika sinking to be the result of serious corrosion of the internal structures of the vessels No. 2 ballast tanks that resulted in their collapse as soon as the vessel encountered sustained heavy seas. Similar investigations were undertaken by the Malta Maritime Authority in terms of a Flag State investigation (the report was issued in September 2000) and the French Permanent Commission of Enquiry into Accidents at Sea (La Commission permanente d’ enquete sur les evenements de mer, CPEM). The report was published in December 2000( the conclusion of these reports are summarised in The Annual Report 2001 of the International Oil Pollution Compensation Funds at p118 &p119)The experts appointed by the Commercial Court (Tribunal de Commerce) further concluded that the level of corrosion was well beyond acceptable standards of the Classification Society and contradicted the thickness measurements made of the tank internals in 1997 and 1998 by the Classification Society, RINA( Spa/ Registro Italiano Navale) . It further stated that the level of corrosion should have been detected when the vessel was subject to a special survey in 1998 that, was monitored by the ship-owner and the management company and also when it was surveyed by RINA in 1999 at Bijela and Augusta. Report on the activates of the International Oil Pollution Compensation Funds in 2005 p 75

‘casual role in her sinking. In respect of the role of Total, the investigating judge, Dominique de Talance concluded that it had “effective control of the vessel.”<sup>789</sup> In giving judgment Mr Jean-Baptiste Parlos, held that Total had failed to take into account the age of the ship and its defective maintenance history. This amounted to “a fault of carelessness.”<sup>790</sup> He went on to state that this carelessness had “a casual role in the sinking and, as such *provoked the accident*.”<sup>791</sup> The Court thereby looked beyond the fact that Total was merely a charterer which is in terms of traditional maritime law is exempt from such liability.<sup>792</sup>

The Classification Society and the charterer were found to be guilty of negligence. But the fines imposed were moderate as the fine were imposed under the provision of 1983 French legislation and not the current law.<sup>793</sup> The later was fined the maximum amount of €375 000<sup>794</sup> and ordered to pay compensation of € 192 million. Rina was also fined the maximum amount for a company under French law which amounted to €175 000.<sup>795</sup> The Court only acquitted the defendants of the charge of complicity of endangering human life This judgment opens the way for both defendants to be sued by local bodies, regional authorities and ecological organizations for environmental damage caused by the spill for up to an amount of €2 billion.<sup>796</sup> The significance of the judgment is that it sets a legal precedent in French law by recognising the ‘polluter pays principle’<sup>797</sup>, which stipulates that a polluter can be held accountable for harming the environment.<sup>798</sup> Therefore victims of natural disasters would be able to claim compensation for ‘environmental damage’ for the first time under French law.<sup>799</sup>

Some have suggested that, “the fact remains that the trail has been notable more for the questions it has left unanswered than for those for which it provided answers.”<sup>800</sup> Many of these will no doubt be answered if an appeal is made against the verdict that is highly probable.

### 3.11.1.7 The Cap-de-la -Hague<sup>801</sup>

This case was a criminal action against a Classification Society. It arose when a dredger, which had been, rebuilt a general cargo vessel named *The Cap-de-la -Hague*. Bureau Veritas had certified it. However an error was made and faulty

<sup>789</sup> Spurrier *op cit* n 777

<sup>790</sup> Bell *op cit* n 765.

<sup>791</sup> My italics. As quoted by an article titled “Erika” of the Mail & Guardian published on 17<sup>th</sup> of January 2008.

<sup>792</sup> Bell *op cite* n 765

<sup>793</sup> Spurrier *op cite* n 767.

<sup>794</sup> Unknown author. “Total weighs Court appeal over Erika oil spill ruling” at 1 published 17 January 2008 by Agence France-Presse available at West Law International accessed on 17 January 2008.

<sup>795</sup> Bell *op cite* n 765.

<sup>796</sup> *Ibid.*

<sup>797</sup> This principle is discussed further in Garcia, I.P. “ “Nunca Mais!” How current European environmental liability and compensation regimes are addressing The Prestige oil spill of 2002”(2004) 25 U.Pa.J.Int’l Econ.L. 1395.

<sup>798</sup> Unknown author. “Total weighs Court appeal over Erika oil spill ruling” published 17 January 2008 by Agence France-Presse available at West Law International accessed on 17 January 2008.

<sup>799</sup> Spurrier *op cite* n 767.

<sup>800</sup> Spurrier *op cite* n 777.

<sup>801</sup> G Bourceau c. Federation Generale des Gens de Mer, Caass.Fr. 30 Mei 1980, D.M.F. 1981, p. 146-152 As summarised by M Snip ‘Aansprakelijkheid van classificatiebureaus-rechtsvergelijking en internationale ontwikkelingen’ (LLM dissertation, University of Leiden, 2001) 25. The translation from Dutch was done by Prof Donovan Marais of the University of South Africa.

stability measurements were used. This resulted in the vessel being lost along with the death of twelve seamen in bad weather. The Court held there to be a causal relationship between the loss and the inspection that resulted in the incorrect stability measurements being used. Consequently the manager employed by Burea Veritas was found to be liable and ordered to indemnify the family of the crewmembers.<sup>802</sup> Similar sanctions were imposed by the Court in *The Number One*<sup>803</sup> on the Japanese Classification Society, NKK.

### 3.11.1.8 Commentary on the stance of France

Unlike the judiciary, French commentators are not in favour of imposing liability on Classification Societies in respect of third parties for similar reasons as put forward by the common law jurisdictions.<sup>804</sup> They argue that basing Societies liability on a general clause of the Code would be too harsh a measure because cannot seek the protection of exemption clauses in contract. Rather it is argued that it is best to place the Societies under a quasi-contractual regime. In terms of the theory of the “contractual whole” (the doctrine of *ensembles contractuelles*) the duties towards a third party may be evaluated with reference to previous contractual commitments even though the third party who suffered damage was not a party to this contract.<sup>805</sup>

### 3.11.2 Jurisprudence from other civil law jurisdictions

#### 3.11.2 .1 The Paula<sup>806</sup>

The Appeal Court in Antwerp in May 1994 and in February 1995 gave a verdict on the liability of a Classification Society and concluded that liability should be imposed. On the 22<sup>nd</sup> of March 1982 *the Paula*, a canal barge, was loaded with 1475 tons of charcoal. During the laden voyage she imploded in the centre and sank immediately, taking the life of her Captain with her. The Paula was built in 1987 and modernised in the 1950's. Nautilus Classification Society classified her. A surveyor of Nautilus Classification Society had inspected the vessel in 1982 and issued a certificate of compliance. The certificate was valid to the 15th April 1982. The vessel was classed as a ‘class 2’ which is only awarded to vessels that are in optimal condition. However an expert report stated that at the time of the accident the vessel was in completely unseaworthy condition and was not safe for any practical use. This unseaworthy condition was due to serious corrosion and damage caused by loading cranes over the years.

The judge did not view the actions of Nautilus Classification Society in a likely manner. The Court of first instance only mentions that Nautilus Classification Society had ‘a great moral responsibility in issuing the certificate of compliance.’ The Court of Appeal also held such a responsibility to exist and particularly

<sup>802</sup> Basedow & Wurmnest *op cit* n 742 at 37.

<sup>803</sup> Certifying authority Douai 6 July 1978, {1981} DMF 153ff. as referred by Basedow & Wurmnest *op cite* n 743 at 37.

<sup>804</sup> Basedow & Wurmnest *op cite* n 742 at 34.

<sup>805</sup> Cour de Cassation, 21 Juin 1998. Dalloz 1989, 5 as referred by Boisson *op cit* n 38 at 243.

<sup>806</sup> Antwerp Court of Appeal 10 May 1994, Rechtspraak Antwerpen 1995, p. 301 As summarised by Snip *op cit* n 801 at 23. The translation from Dutch was done by Prof Donovan Marais of the University of South Africa.

relevant to the casual relationship that was held to have existed between the unseaworthy condition and the accident.

The Court of Appeal was of the opinion that a Classification Society certificate is not to be considered an absolute guarantee (warranty) of seaworthiness and that a Classification Society is not to be considered to be an insurer of the ship-owner. However the Court held that this did not protect a Classification Society against the imposition of liability nor did it come into consideration when a certificate is issued in contradiction to the Rules and set standards of that Society. The Court held that evaluation must be done in terms of these Rules and general standards of the relevant society.

In addition the Court of Appeal held that should it be established 'without a shadow of a doubt'<sup>807</sup> that there exists a casual relationship between the faulty conduct of the Society and the accident, then the Society should be liable for the damages. The Court of Appeal went on to state that it is incomprehensible that the Classification who seeks to deny responsibility and evade liability should be able to do so by reason of the existence of an operative exception in the agreement between the ship-owner and Classification Society. The Appeal Court noted that if the exclusion clause were to be accepted then it would be also be applicable in all similar cases in which Nautilus Classification Society was involved. The Appeal Court refused to give effect to the exception clause because the clause was held to have no effect on claims by third parties who are not bound by such exception clauses.

### 3.11.2.2 The Spero<sup>808</sup>

*The Spero* sank on the January 5<sup>th</sup> 1987. *The Spero* had been classified as 'Class 1' by Unitas Classification Society in 1986 after certain repairs had been affected on the barge. The classification was valid until 30 June 1988. The owners claimed that the barge sank due to a collision with a sharp object. The Court rejected this contention. Instead it held that the vessel was unseaworthy before the loading of cargo. The barge had taken a few hours to sink. The Court held that the sinking of the vessel could have been avoided had the skipper taken the normal safety measures. In this respect it was argued that a water pump could have prevented the e barge from sinking. The Court stated that a ship-owner is not relieved of his duty to maintain a seaworthy vessel by virtue of the fact that had been classified by a Classification Society. Further, the obtaining of such classification was insufficient proof that he had complied with this duty.

The Court stated that a Classification Society had a general duty of care towards all those parties who could be affected by its classification. The Court did not distinguish between societies customers and non-contracting third parties. If this duty is breached through professional fault, the Society should be liable to the injured third parties. An expert report suggested that the Classification Society was not justified in granting 'Class 1' status to the barge. It was held that, during the last survey on 7 May 1986, too little attention had been paid to the water input pipe,

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<sup>807</sup> This comment must be viewed as only referring to the civil standard of liability and not that of criminal liability.

<sup>808</sup> Antwerp Court of Appeal (4e Ch) 14 February 1995.

which, at that stage, must have been heavily corroded. The Court held that this was a professional fault that was casually connected to the sinking of the vessel. Further, it acknowledged that the granting of the classification certificate was not regarded as absolute proof of seaworthiness. The Court held that the fact that the classification certificate was not regarded, as absolute proof of seaworthiness did not prevent the Court from imposing liability for carelessness classification service. The Court concluded that the fault of the ship-owner and the Classification Society had caused the same damages. Therefore both were jointly and severally liable.

This case is dynamic in its approach in determining a society's liability towards third parties. It is also significant in that it gives credence to the importance of the ship-owner's non-delegable duty to maintain seaworthiness and to the argument that a Classification Society certificate is not a warranty of seaworthiness, and yet still maintains why a general duty is owed towards a third party. Further, as is characteristic of civil law legal systems, the determination of proximity beyond mere factual causation is not dealt with.

### 3.11.2.3 Ningbo Marine Group v Germaisher Lloyd<sup>809</sup>

The central issue in this case was whether the defendant – Classification Society was negligent and liable for cost of repair and other economic losses. On the 20<sup>th</sup> of December 2000, the plaintiff entered into a contract of sale with Odengdorff, a German company for the vessel, The M/V Baltic Mermaid. This contract further provided that the vessel subsequent to being purchased would be demise chartered to Odengdorff. The vessel was re-delivered to the plaintiff in March 2001. At this time the crew of the Ningbo noticed some leakage in the rudder tiller, and emulsified lubricants in the tail stalk.<sup>810</sup>

On the 24<sup>th</sup> of March, the plaintiff approached Germanischer Lloyd, the defendant in order to have the vessel inspected. The defendant gave a report that, *inter alia*, indicated that the steering system was in a good condition. However when the vessel's classification was transferred from the defendant Society to China Classification Society, a survey conducted by the latter revealed substantial defects in the steering system. The plaintiff claimed for various losses including the cost of repairs and other economic losses.

The Chinese Maritime Court held that the plaintiff could not prove that the defendant breached the contract that existed between the two parties. Despite the findings of China Classification Society, no evidence was adduced that showed that the findings in the inspection undertaken by the defendant could be rejected. The Court continued and concluded that once the defendant had conducted the inspection with due care and provided the plaintiff with the report, it had properly performed its duties. The plaintiff could not prove that the defendant was negligent or that there was a causal connection between the defendant's conduct or the sustained losses of the plaintiff.<sup>811</sup>

<sup>809</sup> Ningbo Admiralty Court [2001] 1<sup>st</sup> Instance Judgment No 460.

<sup>810</sup> Han Lixin & Yu Ping. 'New developments regarding the liability of Classification Societies' (2006) 12 JIML 243. at 245.

<sup>811</sup> *Ibid* at 245.

In *Ningbo Marine Group v Germaisher Lloyd*<sup>812</sup> the Chinese Maritime Court took into account the constraints under which the defendant –Classification Society performed the inspection and the limited contact with the vessel.<sup>813</sup> It was within this context that the existence of a duty of care was determined. Further, as is characteristic of a civil law jurisdiction the Court relied primarily on the applicable statute.

### **3.12 The different approaches to Classification Society liability between civil law & common law jurisdictions**

The different approaches taken by common law and civil law jurisdictions are a cause for concern for an industry with such an international character. The reasons for this different approach are not limited to the different treatment of the element of causation whereby common law jurisdictions require proximity in addition to factual causation to be proven.<sup>814</sup> The distinction arises out of the respective weight given to policy considerations which are considered in adjudicating the fairness, justice and reasonableness of imposing liability. This is because civil Courts have not distinguished classification societies from other professional entities and has simply adopted an ‘interactional view’ of the law of delict. Further, common law jurisdictions fear the impact that a finding of liability on Classification Societies would have on analogous cases. This is due to the common law Doctrine of *stare desesis*.<sup>815</sup> The resultant litigation involved with The Erika in the French Courts is a clear example of the non-existence of this doctrine in the civil law legal system.

### **3.13 Analysis of Courts reasons relevant to contractual & tort liability**

Reasons that are only relevant to the contractual relationship between a classification society and their customers have been discussed in chapter 2 Reasons used by the Court that relate to both contractual and tortuous claims made against classification societies are discussed separately below.

#### **3.13.1 The ship-owner’s non-delegable duty of seaworthiness**

The existence of a ship-owner’s non-delegable duty of seaworthiness *prima facia* renders the imposition of liability on Classification Societies to be misplaced. It appears, far more logical to burden the ship-owner with liability because he has misrepresented his vessel as being seaworthy to a third party. However, sight must not be lost of the fact that a ship-owner’s erroneous reliance on a defective class certificate does not negate the unprofessional conduct of a Classification Society. It is the latter’s conduct, which gives rise to a defective certificate that contains a misrepresentation of fact. Both the common law and civil law Courts discuss the ship-owner’s non-delegable duty of seaworthiness; because of this it will be

<sup>812</sup> Ningbo Admiralty Court [2001] 1<sup>st</sup> Instance Judgment No 460

<sup>813</sup> Han Lixin & Yu Ping *op cit* n 810 at 246.

<sup>814</sup> The requirement of proximity was not a contentious issue in *The Nicholas H*. The majority presumed proximity to exist without deciding on the issue and the minority deduced it from the relationship between the cargo-owner and the ship-owner who in terms of the Law of General Average were on a ‘joint venture’.

<sup>815</sup> This was a particular concern for the Appeal Court in **Reedman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648 in which the Court was particularly concerned with the analogous cases of the manufacturer and building constructor.

discussed. However, it will become apparent that this obligation of the ship-owner is irrelevant in relation to claims made by third parties against Classification Societies, upon a proper understanding of the Doctrine of vicarious liability.

The security system at sea demands a vessel to be in a seaworthy condition.<sup>816</sup> Seaworthiness is a holistic concept<sup>817</sup> and is relevant to many commercial transactions.<sup>818</sup> Since the advent of the International Management Code (the 'ISM' Code) recognition had been given to the 'human dimension' of seaworthiness which Classification Societies have deemed to be crucial and out of their domain or control.<sup>819</sup> This statement is only correct if one is referring to the private and not the public function of a Classification Society. This human dimension refers to human safeguards which ensure that a vessel is *inter alia*, properly navigated, skippered, maintained and managed.<sup>820</sup> The other element of seaworthiness refers to the fitness and safety of the vessels machinery, apparatus, appliances, equipment and structure for the intended use. It is this later which falls within the domain of the private function of a Classification Society.

In discussing the ship-owner's non-delegable duty of seaworthiness a distinction must be drawn between situations that are governed by a contract of carriage and those that are not. Outside of the scope of the carriage of goods the duty of the ship-owner under the doctrine of seaworthiness is absolute and non-delegable. This means that the ship-owner must do all in his power to keep his vessel in a seaworthy condition.<sup>821</sup> This duty is applicable to both contract and the law of tort. Liability under this doctrine does not rest upon fault or negligence. Therefore liability to provide a seaworthy vessel arises independent of any duty to exercise reasonable care. In this regard seaworthiness is treated as a breach of warranty as opposed to the narrower duty-breach inquiry for negligence. The ship-owner is strictly liable for seaworthiness. Therefore he can be held liable despite the fact that he lacked knowledge, fault or the opportunity to correct the condition.<sup>822</sup>

However, in relation to the carriage of goods the burden of the ship-owners duty of seaworthiness has been lessened. The minimum standard of seaworthiness is no longer that of strict liability but rather the exercising of 'due diligence' on the part of the carrier. The Harter Act that introduced the notion of 'due diligence' along with a list of exceptions which the carrier may rely on in the event of a claim for damages.<sup>823</sup> The Hague Visby Rules and Hamburg Rules have adopted this approach which has been said to have become the 'benchmark for party's obligations for the carriage of goods by sea.'<sup>824</sup>

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<sup>816</sup> Honka *op cit* n19 at 3.

<sup>817</sup> J Harrison 'Accountability of Classification Societies: The role of classification & market –orientated and policy issues, (The Erika)' paper presented at the London Shipping Law Centre Seminar 21<sup>st</sup> February (University College London, 2001) at 3.

<sup>818</sup> These include, *inter alia*, the carriage of goods and passengers, the sale and purchasing of ships, chartering and other vessel employment contracts. Honka *op cit* n19 at 3.

<sup>819</sup> Harrison *op cit* n 817 at 3.

<sup>820</sup> *Ibid.*

<sup>821</sup> J Bourdeau et al 'American Jurisprudence' (2ed) (2007) retrieved from Westlaw International 70 Am. Jur. 2d shipping section 23.

<sup>822</sup> *Ibid* section 25.

<sup>823</sup> Hare (1999) 487.

<sup>824</sup> *Ibid.*

This has been argued by ship-owners on a number of occasions. It is submitted that the only place at which the ship-owner's obligation of seaworthiness should come into the fray is when it needs to be determined whether a favourable survey by a Classification Society that held the vessel to be in class is proof of the ship-owner exercising 'due diligence' to maintain a seaworthy vessel. The ship-owner's attempts thus far have been unsuccessful. *In re Marine Sulphur Transport Corp*<sup>825</sup> the Southern District Court of New York stated that this defence will not be successful even when the Classification Society has certified a vessel contrary to its very own rules. The District Court explained that if a Classification Society's surveys or classifications were allowed to operate as defences then the purpose of the non-delegable duty would be negated and third parties such as seamen and cargo-owners would have no effective remedy.

In an earlier decision in *Federazione Italiana Dei Corsorzi Agrari v Mandask Compania De Vapores*<sup>826</sup> the Court held that a favourable survey cannot be made the basis for a 'due diligence defence'. Both these decisions were approved in the *Great American Insurance Co. v Bureau Veritas*<sup>827</sup> in which policy considerations lead the District Court to disallow the ship-owner the luxury of avoiding this duty.<sup>828</sup> The writer disagrees. The fact that a ship-owner has engaged the services of a Classification Society should be regarded as a factor that indicates that the ship-owner has exercised 'due diligence'.

The Courts approach of using the ship-owner's non-delegable duty as a mitigating factor against imposing liability on Classification Societies is incorrect. The stance of the common law Courts suggests that the ship-owner by virtue of his non-delegable duty of seaworthiness warrants the correctness of the class certificate

### 3.13.2 The Doctrine of vicarious liability

In *the Mancater Castle*<sup>829</sup> the House Lords discussed the Doctrine of non-delegable duty. It was held that this formed part of the law of vicarious liability. The House of Lords held the ship-owner liable to the cargo-owner for damages sustained by the later as a result of negligent fixing of a storm valve inspection covers, by an employee of independent contractors.<sup>830</sup> This case contained no hint that the cargo-owners might have sued the independent contractors directly.<sup>831</sup>

The implication of 'non-delegable' is that the ship-owner is liable for work done by independent contractors who were used to discharge this non-delegable duty. Thereby the employer can be sued in addition to the employee or independent contractor. This Doctrine presupposes the liability of the contractor, who would in this context be the Classification Society.<sup>832</sup> Based on this one can more easily identify that the ship-owners non-delegable duty of seaworthiness is irrelevant to those cases in which it has been used as a factor that militated against imposing

<sup>825</sup> 312 F.Supp. 1081 (S.D.N.Y 1970); 1970 A.M.C. 1011.

<sup>826</sup> S.A. 388 F 2d 434,436 (2d Cir) Cert.denied 393 U.S. 828,89 S.Ct. 92,21 L.2d 99 (1968)

<sup>827</sup> 338 F. Supp. 999 (S.D.N.Y. 1972).

<sup>828</sup> Subsequent decisions on the issue have followed the lead set in **The Great American**.

<sup>829</sup> (1961) A.C 807

<sup>830</sup>

<sup>831</sup> Harling *op cit* n254 at 1.

<sup>832</sup> Cane *op cit* n 131 at 369.

liability on Classification Societies. This is because the doctrine of vicarious liability does not prevent a third party claimant from claiming directly from the employee or independent contractor. It merely affords the third party the right to sue an additional defendant, namely, the employer.

### 3.13.3 The ship-owner's right of recourse

Further, once the ship-owner (employer) has settled the third party claim, he may have a right of recourse against the wrongdoer employee or the independent contractor should the House of Lords decision in *the Mancater Castle*<sup>833</sup> be followed. This possibility was best described in *Somereff, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*<sup>834</sup> when the District Court of New Jersey stated that,

“The basic purpose of tort-based indemnification is to shift the burden of compensating the victim of a tort to the party who is principally, if not solely, responsible for the tort's occurrence. As the Court previously stated, tort-based indemnification has usually been available only where the party seeking it was merely passively negligent while the would-be indemnitor was actively at fault. 'Passive negligence' has been limited to instances in which the indemnitee was vicariously or technically liable. Where the party seeking indemnification was itself guilty of acts or omissions proximately causing the plaintiff's injury, tort indemnification is inappropriate.”

The District Court held that the ship-owner of the *Happy Spirit* and the *Jolly Spirit* were liable to the charterer due to the warranties contained in the time charter agreements for the two vessels. The District Court was satisfied the ship-owner was ‘technically liable’ whereas ABS was ‘actively at fault’ because it was the Society which had miscalculated the Suez Canal tonnage certificates that directly lead to the time charters loss. The District Court held this to constitute negligent misrepresentation in terms of section 522 of Restatement (Second) of Torts.<sup>835</sup>

### 3.14 Analysis of Courts reasons only relevant to liability in tort

In general, there has been more discussion and commentary by the Courts and academic authors of the issue of classification society's liability towards third parties. This is in part due to the affects of exculpatory clauses that have vastly limited the scope for the imposition of liability on classification societies in respect of their customers, leaving the issue settled and indisputable. The writer disagrees for reasons discussed above. The same constraints do not affect third party claims and this and other reasons have encouraged litigation against Societies by third party claimants.

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<sup>833</sup> (1961) A.C 807

<sup>834</sup> 720 F.Supp. 441 at 451, 1989 A.M.C. 2330 (quoting *Araujo v Woods Hole, Martha's Vineyard, Nantucket Steamship Authority*; 693 F.2d 1,3 (1<sup>st</sup> Cir 1982)

<sup>835</sup> (citing *Coastal (Bermuda) Ltd v E.W. Saybolt & Co* 826 F.2d 424, 1988 AMC 207 (5<sup>th</sup> Cir. 1987)

### 3.14.1 Different approaches to the law of tort

The judgments given in the *Nicholas H* are dynamic. The decision of both the majority and minority judgments can only be appreciated if the different approaches to tort law in each are appreciated. Lord Lloyd's minority judgment is an example of what can be stated as the "Interactional view of tort law" and Lord Steyn's majority judgment reflects a "Risk management view of tort law."<sup>836</sup>

The 'risk management approach' views tort law as a mechanism which secures a certain distribution of risk of loss among persons engaged in particular activities. This view seeks to determine how risk attached to certain activities is best managed. Therefore question of tort liability is dependent on the determination of whether shifting the victim's loss to the wrongdoer would result in an improvement in the distribution of risk pertaining to those losses within the society. This approach does not merely look back upon the past dealings between the victim and the wrongdoer but rather the implications of these dealings for future conduct on the activities in which the parties were engaged in. Insurance is a common and important instrument used in the management of risk. Therefore patterns and likely trends within the insurance market is relevant to the determination of liability.<sup>837</sup> Lord Steyn's judgment is an illustration of this approach. He considered the matter before him in some detail in relation to a number of participants in the maritime industry, namely, cargo-owners, Classification Societies and ship-owners. Indeed he was concerned with the impact on the third party (the ship-owner) that the imposition of liability on a Classification Society would have.<sup>838</sup>

The 'interactional view' focuses on the interaction between the victim and the wrongdoer. Therefore tort liability is rendered to be a function of this interaction in that the victim's right to compensation is correlative to the wrongdoers conduct. This approach allocates risk in accordance with personal responsibility. Therefore, he who causes damages is held responsible. The wrong done is corrected through compensation. In addition to this objective, tort liability seeks to prevent and deter the wrong from being committed in future. Further, this approach demands that a potential victim should be responsible for his own protection and not merely seek redress in the law of tort.<sup>839</sup> However, the Court may consider, to lesser extent, the impact of its decision on third parties in similar circumstances.<sup>840</sup> According to this approach the impact of tort liability in the insurance market is simply irrelevant.<sup>841</sup> The 'interactional view' is consistent with the traditional conceptual structure of the law of tort which has a trend of viewing tort law more as mechanism for compensation than for personal responsibility<sup>842</sup>

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<sup>836</sup> This discussion is based on the article by Cane (1995) *op cite* 433 which the writer found to be very insightful.

<sup>837</sup> Cane *op cit* n 299 at 434.

<sup>838</sup> The direct impact of the imposition of liability on a Classification Society o a ship owner envisaged by Lord Steyn was, the effective increase of the ship-owners liability; the complication of the settlements of claims by cargo-owner against ship-owners and the reduced availability of Classification Societies services or the encouragement of defensive surveying which would increase the costs without increasing the benefits to the ship-owner. All these factors are dealt with in more detail below.

<sup>839</sup> Cane *op cit* n 299 at 434.

<sup>840</sup> *Ibid* at 433. (citing **Donoghue v Stevenson** [1932] AC . 562 as an example when the Court was concerned with manufactures as a 'class' and with consumers as a 'class')

<sup>841</sup> *Ibid* 435.

<sup>842</sup> *Ibid.*

Lord Lloyd recognised that traditionally Courts have regarded the availability of insurance as an irrelevant factor when determining whether a duty of care should be imposed.<sup>843</sup> However he conceded that this view may be subject to change.<sup>844</sup> However he argues that the Courts are not free to simply reach conclusions on the availability of insurance or the impact of imposing new liability on the insurance market in general by negating the need for evidential material being presented before the Court.<sup>845</sup> The Courts should not simply speculate. Nevertheless, he doubted the relevance of arguments relating to insurance implications. Further, Lord Lloyd expressly stipulated that his judgment was limited to the facts of the matter before. It is submitted that Lord Lloyd's use of the 'interactional' approach is correct.

Nevertheless the majority decided otherwise. The various policy considerations that these jurisdictions have relied on will be discussed below with particular reference to *The Nicholas H*.

### 3.14.2 The "Crux" of The Nicholas H

The House of Lords in *The Nicholas H* held that where a claimant has a contractual cause of action against the ship-owner which is subject to limitations and shaped by an international regime like The Hague Visby Rules, it is unfair, unjust and unreasonable to impose an additional liability in tort on a Classification Society which would not be subject to the same protection as afforded by the limiting provisions. This stance taken by the House of Lords requires one to analyse the effect of the Hague Visby Rules on these relationships between the ship-owner, cargo-owner and Classification Society. It further raises two other contentious but interrelated issues. The first has been identified as "the alternative action issue"<sup>846</sup> and the second as "the limitation issue,"<sup>847</sup> both of which are discussed further below.

The Hague Visby Rules have been described as "... an intricate blend of responsibility and liabilities, rights and immunities. . . indemnities and liberties."<sup>848</sup> Lord Steyn was swayed by the actual existence of these Rules. He affirmed Lord Justice Saville of the Court of Appeal who stated, that it would not be fair and just to impose on Classification Societies an identical duty as imposed on ship-owners, "... without any of the balancing factors, which are internationally recognised and accepted."<sup>849</sup> Based on this contractual relationship he concluded that there was no need to impose further duties on Classification Societies because, "... the balance of rights and duties between the principal parties (cargo-owners and ship-owners) has been settled on an internationally acceptable basis..."<sup>850</sup> He viewed the contract of carriage that incorporated the Hague Visby Rules as an instrument that allocated

<sup>843</sup> [1995] 2 Lloyd's Rep.299. at 308. (citing Markesinis and Deakin, Tort Law, 3rd ed. (1994) at 114).

<sup>844</sup> [1995] 2 Lloyd's Rep.299. at 309. (citing Lord Justice Bingham and Lord Justice Taylor in **Caparo Industries Plc. v Dickman** [1989] Q.B 653 at 689;703).

<sup>845</sup> The necessity for evidential material was also recognised in **Caparo Industries Plc. v Dickman** [1989] Q.B 653 as referred in [1995] 2 Lloyd's Rep.299. at 308.

<sup>846</sup> Cane *op cit* n 131 at 371.

<sup>847</sup> Cane *op cit* m 131 at 371.

<sup>848</sup> Sir John Donaldson M.R **Leigh and Silavan Ltd. v Aliakmon Shipping Co.Ltd** [1985] 1 Lloyd's Rep. 199 at 206 as quoted by Lord Steyn in **The Nicholas H** [1994] 1 Lloyd's Rep. 492.at 498.

<sup>849</sup> [1994] 1 Lloyd's Rep. 492.at 498 as referred by Lord Lloyd at 304.

<sup>850</sup> [1994] 1 Lloyd's Rep. 492.at 500 as referred by Lord Lloyd at 304.

risk. He held that this system achieved a balance that was intended to protect and benefit of the ship-owner.

Lord Lloyd held that the Appeal Court was mistaken in its reliance on the Hague Visby Rules for the following reasons. He pointed out that these rules are not necessarily applicable by force of international convention, to all circumstances of carriage of cargo by sea.<sup>851</sup> <sup>852</sup> Further, the limitation provisions on which ship-owners rely on in the case before him to limit their liability was not contained in the Hague Visby Rules.<sup>853</sup> <sup>854</sup> Further, the application of the Hague Visby Rules is limited to the relationship between ship-owner and cargo-owners. Finally, the Rules make no references to the duty of care of Classification Societies either directly or indirectly. Therefore he concluded that the existence and incorporation of The Hague Visby Rules was irrelevant. The writer concurs.

### 3.14.3 “The alternative remedy”

The question involved herein is whether an injured party with a cause of action in contract against another for damages should, in the alternative, be allowed to sue a third party in tort in respect of the same loss. In other words the question is whether the liability of a Classification Society should change when the original claimant institutes action against the society in tort as opposed to claiming against the ship-owner in contract, who may in turn have a right of recourse against the society. The English Court was confronted with this scenario in *Grant v Australian Knitting Mills Ltd.*<sup>855</sup> The Court allowed the plaintiff to sue the manufacturer in tort, despite the fact that he had the right to sue the retailer in contract.

Critics of this decision argue that the objective of the law of damages to adequately compensate an injured party would have been achieved by claiming against the retailer. To the extent that such a claim may be limited by the insolvency of the retailer, critics argue that this is a ‘commercial realities and risk’.<sup>856</sup> Further, the objective of deterrence would also be satisfied because the retailer would have a right of recourse against the manufacture. However this ignores the fact that a ship-owners liability is limited. Therefore the victim would not necessarily be adequately compensated.

Critics further argue that another approach to that adopted in *Grant v Australian Knitting Mills Ltd.*<sup>857</sup> would be to give effect to both remedies. Therefore the injured party would claim in tort but only to the extent that his contractual remedy is insufficient to compensate him. In terms of this approach the ‘adequacy’ of the alternative remedy must be judged from the point of view of the

<sup>851</sup> [1995] 2 Lloyd's Rep.299. at 304.

<sup>852</sup> An example of such circumstances was illustrated by Lord Lloyd. He referred to the use of charter parties in the bulk trade. However in terms of Art. V of the Hague Visby Rules, these do not apply to charter parties unless expressly agreed upon between the parties.

<sup>853</sup> See Sec. 503 of The Merchant Shipping Act that was in force at the time of judgment. This has been re-enacted in Sec. 185 of Schedule 7 of The Merchant Shipping Act of 1995 as referred by Lord Lloyd [1995] 2 Lloyd's Rep.299. at 305.

<sup>854</sup> This aspect was down played by Lord Steyn when he said that, “This is not a point of substance” at [1995] 2 Lloyd's Rep.299. at 315.

<sup>855</sup> [1936] A.C. 85.

<sup>856</sup> Cane *op cit* n 131 at 372.

<sup>857</sup> [1936] A.C. 85.

injured party. If he should only be partially compensated in contract then recourse to an alternative remedy in tort may be justifiable to the extent that his loss remains.<sup>858</sup> However this amounts to apportionment of the different claims against the wrongdoers, namely the ship-owner and the Classification Society, which is incorrect.<sup>859</sup> Further this criticism ceases to be relevant due to judgment of the House of Lords in *Henderson v Merrett Syndicates Ltd*<sup>860</sup> The House of Lords reiterated that the function of the law of Tort is not limited to filling the gaps by the law of contract. The law of tort is not supplementary to the law of contract. Therefore, the approach that a person only has a remedy in tort when he has no remedy in contract is incorrect.<sup>861</sup> In fact the law of tort is the general law out of which parties seek to contract out of if the law permits.

The House of Lords in *The Nicholas H* did not discuss these criticisms. Instead it interpreted the decision *Grant v Australian Knitting Mills Ltd*<sup>862</sup> as implying that liability should be imposed on the person who is 'primary responsible. The decision in *Grant v Australian Knitting Mills Ltd*<sup>863</sup> was used to impose liability on the ship-owner. The majority of the House felt that a "coherent system of law" should provide a remedy against the person who is primarily responsible, for the loss notwithstanding the fact that the injured party might have a cause of action against some other party.<sup>864</sup> The House therefore equated the position of the ship-owner to that of the manufacturer and the position of the Classification Society to that of the retailer in *Grant v Australian Knitting Mills Ltd*.<sup>865</sup>

The 'primary responsibility argument' originates from the importance placed on the ship-owner's non-delegable duty to maintain a seaworthy ship.<sup>866</sup> The House reasoned that a claimant should claim from the person who is primarily responsible for causing the loss which was the ship-owner due to, *inter alia* his primary duty of seaworthiness. Therefore, the House concluded that any possible cause of action in tort against the society is irrelevant. The decision of the majority is a contradiction because by approving of the dictum of *Grant v Australian Knitting Mills Ltd*,<sup>867</sup> the House acknowledges that a third party has an alternative remedy in tort against the Classification Society. But then the House proceeds to reason that this alternative remedy must not be given effect if it would mean that the person who is 'primary responsible' would evade liability. Clearly Lord Steyn saw the role of the surveyor as being subsidiary position to that of the ship-owner.<sup>868</sup>

Lord Lloyd did not see the logic in the "primary responsibility" argument. He saw the ship-owner as solely responsible for getting the cargo to its destination

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<sup>858</sup> Cane *op cit* n 131 at 372.

<sup>859</sup> The apportionment of responsibilities has been discussed in chapter 2.

<sup>860</sup> (sub nom. *The Lloyd's Litigation*) [1994] 2 Lloyd's Rep. 468 as referred by Lord Lloyd [1995] 2 Lloyd's Rep. 299. at 305.

<sup>861</sup> Lord Goff of Chieveley [1994] 2 Lloyd's Rep. 468 at p 787 as referred by Lord Lloyd [1995] 2 Lloyd's Rep. 299. at 305.

<sup>862</sup> [1936] A.C. 85.

<sup>863</sup> *Ibid.*

<sup>864</sup> [1994] 2 Lloyd's Rep. 468 at 499.

<sup>865</sup> [1936] A.C. 85.

<sup>866</sup> Cane *op cit* n 131 at 372.

<sup>867</sup> [1936] A.C. 85.

<sup>868</sup> [1996] 1 A.C. 211, [1995] 2 Lloyd's Rep. 299 (H.L.) at 314.

and exercising care as bailees in terms of the relevant contract of carriage between the parties. Lord Lloyd was unable to see why the existence of the contract of carriage (in which the duty of seaworthiness is set out) should "militate against" a duty of care being owed by a third party in tort. He referred to and agreed with the House of Lords in *Henderson v Merrett Syndicates Ltd.*<sup>869</sup> Lord Lloyd further cited a number of cases where a duty in tort was owed to the claimant irrespective of the contractual duties owed by other persons. These cases concerned stevedores. He equates their position to that of Classification Societies in that both are third parties which owe a duty of care towards cargo-owners despite the primary responsibilities of the ship-owner.<sup>870</sup> Classification societies are professional organisations which must be held accountable for their conduct. A third party should be able to give effect to all the remedies available to him in order to be compensated. For reasons discussed above this would not undermine the role or obligations of the ship-owner.

Further, it has been suggested that undue emphasis on the ship-owner as being 'primarily responsible' fails to give credence to the common law Doctrine of joint and severable Liability or the notion of apportionment of responsibilities.<sup>871</sup> The argument that by, imposing liability on one wrongdoer for his negligent conduct (the ship-owner), should be a factor to immunize and free the other wrongdoer (the Classification Society), is absolutely foreign to the Doctrine of joint and severable liability. In terms of this Doctrine an injured third party is able to recover from two or more wrong doers, when the negligent acts of both conjoin in the same damage-causing event and results in the same common harm. This construction of the relationships between a ship-owner, Classification Society and an injured third party where damage is due to the unseaworthy condition of a vessel equates the contractual duty of the ship-owner to exercise due diligence in respect of maintaining his vessel in a seaworthy condition to the duty to exercise reasonable care. Therefore lack of due diligence in this respect is negligence. According to this

<sup>869</sup> (sub nom. *The Lloyd's Litigation*) [1994] 2 Lloyd's Rep. 468 as referred by Lord Lloyd [1995] 2 Lloyd's Rep. 299, at 305.

<sup>870</sup> In *Adler v Dickson* [1954] 2 Lloyd's Rep. 267, [1955] 1 Q.B. 158 the plaintiff was injured when boarding a ship due to the negligence of the master and boatswain. Her ticket excluded all liability on the part of the company. So she sued the master and boatswain in tort. Her claim was successful. Lord Justice Jenkins<sup>870</sup> aptly illustrated the inter-relationship between these two fields of law in his judgment. His analysis can be divided in to two parts, the distinguishing feature is the presence or absence of exception provisions in the relevant contract. Based on the given facts he stated that, if of the contract with the company had contained no exempting provisions, the plaintiff would have had separate and distinct rights of action against the company for breach of contract or, alternatively, based the principle of vicarious liability a claim in tort. In addition to this he has a claim against the defendants as the persons whose wrongful conduct caused the damage. These are separate and distinct right of actions. Therefore, should exceptions provisions be at play, the independent and separate actions against the defendants as the actual tortfeasor should be given effect.

In *Wilson v Darling Island Stevedoring and Lighterage Co. Ltd* [1956] 1 Lloyd's Rep. 346. the Australian High Court adopted the judgment of Lord Justice Jenkins. The facts of this case did not avail the plaintiffs with the option of suing on vicarious liability as the tortfeasor was an independent contractor. The facts were that the plaintiffs' goods were in course of carriage under a bill of lading which incorporated the Hague Visby Rules. After discharge, but before delivery, they were damaged by the negligence of a stevedore. Mr. Justice Fullagar eloquently stated that, "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms... .If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."<sup>870</sup>

In *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep. 365; [1962] A.C. 446. the facts were in all material respects were similar to that of *Wilson v Darling Island Stevedoring and Lighterage Co. Ltd* [1956] 1 Lloyd's Rep. 346.. Lord Lloyd quoted Lord Justice Viscount Simond agreed with Mr. Justice Fullagar's judgment. [1961] 2 Lloyd's Rep. 365; [1962] A.C. 446. at 373;472.

<sup>871</sup> The apportionment of responsibilities is discussed above in chapter 2.

construction, the ship-owner and the Classification Society are joint wrongdoers, each responsible for the relevant loss to the extent that each was contributory negligent.<sup>872</sup> There is no logical basis for such an obscure conclusion.<sup>873</sup> Indeed it would be preferable for the ship-owner to be held vicariously liable and to be able to seek recourse against the Classification Society as this would give rise to a 'fairer' situation and illuminate the effects of the ship-owner's ability to limit his liability. Nevertheless, the writer concurs with Lord Lloyd's decisive rejection of the 'primary responsible argument.'

### 3.14.4 The protection afforded to Classification Societies by international conventions and private undertakings

The notion of limitation is peculiar to maritime law. In modern times, the concept of limitation has become a basic premise on which maritime commerce is conducted.<sup>874</sup> The perception that the ship-owner is liable for the actual damage caused by its ships, with or without fault, is founded in public policy.<sup>875</sup> It is believed that the imposition of limited liability stimulates shipping for international commerce by encouraging vast capital investments in an industry which is in turn is, "subject to perhaps more than its fair share of exposure to disaster and calamity."<sup>876</sup> Ultimately, by limiting the ship-owner's risk of exposure, customers enjoy lower freight rates.<sup>877</sup> In *The Bramley Moore*<sup>878</sup> Lord Denning eloquently summarised the situation by stating,

“[t]he principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. ... I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.”

The ship-owner ability to limit his liability has been criticised in recent times. Therefore it is ambitious to argue that this form of protection should be extended to another major participant in the maritime industry such as Classification Societies.<sup>879</sup> Before this issue is discussed in greater detail it needs to be ascertained whether Classification Societies are able to limit their liability in terms of the governing international convention.

It is worthwhile noting that in terms of The Vienna Convention on the Law of Treaties, provisions of international conventions must be interpreted be given a grammatical, systematic and functional interpretation.<sup>880</sup> A grammatical interpretation gives effect to the ordinary meaning of the words. A systematic

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<sup>872</sup> Miller *op cit* n 125 at 90.

<sup>873</sup> *Ibid* at 92.

<sup>874</sup> Hare (1999) 380.

<sup>875</sup> *Ibid* at 381.

<sup>876</sup> *Ibid*.

<sup>877</sup> *Ibid*

<sup>878</sup> [1963] Lloyd's Rep. 429 at 437

<sup>879</sup> This is most evident from the recent initiatives undertaken by the European Union in respect of maritime safety. This is discussed further in chapter 4.

<sup>880</sup> Lagoni *op cit* n 93 at 280.

interpretation places emphasis on the context of the convention and a functional interpretation aims to give effect to the objects and purport of the relevant text.

#### 3.14.4.1 The Hague Visby & Hamburg Rules:

Unlike ship-owners, Classification Societies do not fall within the scope of the cargo limitation provisions of either the Hague Visby<sup>881</sup> or the Hamburg rules.<sup>882</sup> This is because a Classification Society is neither a servant nor an agent of ship-owner. It is an independent contractor.<sup>883</sup> It is in relation to the Hague Visby Rules that the Courts have discussed classification liability.

#### 3.14.4.2 The Convention on Limitation of Liability for Maritime Claims of 1976

The Convention on Limitation of Liability for Maritime Claims of 1976 (LLMC) does not expressly state those entitled to limit their liability. However it is doubtful that a ship-owner could be found to be 'responsible' for a Classification Society's 'act, neglect or default' which would be required by art 1(4) and art 9(1)(a) of the LLMC. Art 1 refers to persons entitled to limitation of liability. There is express mention of "ship-owners and salvors". "Ship-owner" includes the "owner, charterer, manager and operators of seagoing ship." In terms of Art. 2 if a person whose act, negligent or default the ship-owner or salvor is responsible, entitled to avail himself of the limitation of liability provide for in the Convention. Art 9 (1)(a) states that the limits of liability determined in accordance with Art 6 will apply to the aggregate of all claims which arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Art 1 and any person for whose act, neglect or default he or they are responsible.

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<sup>881</sup> Art. IV *bis* reads as follows;

(1) The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage, whether the action be founded in contract or in tort.

(2) If such an action is brought against a servant or agent of the carrier (*such servant or agent not being an independent contractor*), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

(3) The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

(4) Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provision of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

<sup>882</sup> Art 7 reads as follows;

(1) The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of the delay in delivery whether the action is founded in contract, tort or otherwise.

(2) if such action is brought against a *servant or agent* of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

(3) Except as provided in Article 8, the aggregate of the amount recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention

<sup>883</sup> Section 409 of Restatement (Second of Torts) defines independent contractor to be "any person who does work for another under conditions which are not sufficient to make him a servant of the other. It is immaterial whether the work is done gratuitously or is done for pay, or, indeed if the later, whether is done under a specific contract or under a general contract of employment." As referred by Lagoni, *op cite* 286.

Art 1(4) of the LLMC allows for ‘all persons for whom the ship-owner had a civil responsibility to be entitled to invoke protection.’ The question as to who are the persons that a ship-owner would be ‘responsible’ for was purposefully left open for domestic law and its interpretation of the Principle of vicarious liability.<sup>884</sup> In both English and United States Federal Law, this Doctrine is not applicable to independent contractors.<sup>885</sup> Therefore, on a literal interpretation; Classification Societies are outside the scope of the LLMC.<sup>886</sup>

### 3.14.4.3 The International Convention on Civil Liability for Oil Pollution Damage

The International Convention on Civil Liability for Oil Pollution Damage (CLC) is of particular importance to Classification Societies because the magnitude and scale of costs incurred in respect of pollution claims could easily bring about liquidation of these societies.

The CLC abides by the principle of channelling liability. Indeed these ‘channelling provisions’ are crucial components of the structure on which the CLC operates.<sup>887</sup> Barring a few exceptions<sup>888</sup> the ship-owner is held strictly liable.<sup>889</sup> However, in this context, the CLC expressly stipulates that only the ship-owner is entitled to limit his liability under the Convention.<sup>890</sup> Further no claim for compensation for pollution damage can be made against the ship-owner otherwise than provided in terms of this convention.<sup>891</sup> Art 3(5) preserves the ship-owner’s right of recourse against third parties. The CLC is broader in scope than the LLMC, Art 3(4) reads as follows;

Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the *servants* or *agents* of the owner or the members of the crew;
- (b) the pilot or *any other person* who, without being a member of the crew, performs services for the ship;
- (c) ...
- (d) ...
- (e) *any person taking preventative measures*;
- (f) all servants or agents of persons mentioned subparagraphs (c),(d) and (e)

<sup>884</sup> Lagoni, *op cit* n 93 ( see fn 1123) at 285.

<sup>885</sup> See the discussion on the Doctrine of Vicarious Liability Above.

<sup>886</sup> This fact is not appreciated by all. Some continue to argue that view the ship-owners non-delegable duty to maintain a seaworthy vessel burdening him with the responsibility of a Classification Society. Daniel, B.D. ‘Potential liability of marine Classification Societies to non-contracting parties’ (2007) 19 U.S.F. Mar.L.J. 183 at 233.

<sup>887</sup> Daniel, B.D. ‘Potential liability of marine Classification Societies to non-contracting parties’ (2007) 19 U.S.F. Mar.L.J. 183 at 229.

<sup>888</sup> As provided for in Art3(2) and Art 3(3).

<sup>889</sup> Art 3(1).

<sup>890</sup> Art.5.

<sup>891</sup> Art 4.

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

A Classification Society, in the capacity of an independent contractor, does ‘perform services for a ship’<sup>892</sup> in performing either its private or public functions. If this is disputed then societies could fall within the broader category of persons that take preventative measures in respect of a ship.<sup>893 894</sup> It has been suggested that if third parties were able to circumvent the channelling provisions and claim against Classification Societies directly the purpose of the CLC would be frustrated.<sup>895</sup> The writer concurs.<sup>896</sup> Furthermore, a functional interpretation of the preamble of the CLC which states,

‘that the main objects of the convention are to ensure adequate compensation to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships and to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in these cases;’<sup>897</sup>

indicates that a Classification Society falls within the ambit of protection of the CLC.<sup>898</sup>

However there are others who argue that Classification Societies do not fall within the ambit of the CLC. Supporters of this argument suggest that because Art.3 makes mention of particular persons, namely ‘a pilot’, upon a systematic interpretation the reference to ‘any other person [...]’ means that the later category of persons should perform similar services to that of a pilot.<sup>899</sup> Classification societies perform a vastly different service to that of a pilot. Furthermore, the same approach is used to argue that the channelling provisions of Art. 3(4) are narrow. Therefore, only the liabilities of those third parties that are specifically referred too are channelled onto the ship-owner. Simply put, if the provision intended complete channelling of all third party liabilities it could have been drafted in a far simpler and concise manner.<sup>900</sup>

#### 3.14.4.4 The “limitation issue” & contracts in benefit of third parties

The imposition of contractual limitation in tort is not a legal anomaly nor is it heresy. “The limitation issue” is concerned with whether the contractual limitation on a contracting party’s obligation (the ship-owner), in respect of a

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<sup>892</sup> Art 3(4)(b).

<sup>893</sup> Art 3(4)(e).

<sup>894</sup> BD Daniel ‘Potential liability of marine Classification Societies to non-contracting parties’ (2007) 19 U.S.F. Mar.L.J. 183 at 227. Although the author incorrectly views a Classification Society as an ‘agent’ of the ship-owner because the society is a ‘[person] paid by the owner for services inextricably connected to the owner’s maintenance of the condition of the ship, particularly those related to the ability of the vessel to avoid oil spills’ at 226.

<sup>895</sup> *Ibid* at 232.

<sup>896</sup> See the discussion in chapter 3 on ‘The principle of channelling of liability’.

<sup>897</sup> Lagoni *op cit* n 93 at 288.

<sup>898</sup> *Ibid*.

<sup>899</sup> *Ibid*.

<sup>900</sup> *Ibid* at 289.

particular loss, should affect the liability of another (the Classification Society) in respect of the same loss.<sup>901</sup> The “limitation issue” can be viewed from two different angles. The first of these is; where a party who has agreed that his claim for loss will be subject to a contractual limitation, and has paid a contract price reflecting this limitation he should not be allowed to bypass the agreement (with the ship-owner) by suing another third party (a Classification Society). This view can be dealt with a swift blow by simply asking oneself why should the dealings between two contracting parties (the ship-owner and the claimant) affect either’s contractual right against a third party (the Classification Society). But this is only the case if the notion of benefit in favour of third parties is not at play.<sup>902</sup>

An example of this can be found in this context The Contracts (Rights of Third Parties) Act, 1999 of the United Kingdom. The long title of the Act reads , “An Act to make provisions for the enforcement of contractual terms by third parties”. This Act provided that a third party may enforce a term of a contract in his own right where the contract expressly provides that he may do so.<sup>903</sup> It further allow a party who is only designated by class and not name enforce a stipulated benefit.<sup>904</sup> Sec. 6 contains the exceptions to a third party as described in sec1 form enforcing the contractual benefit. Of particular relevance is sec 6(5) a in terms of which a third party may not exercise a benefit if such was stipulated in a “contract for the carriage of goods by sea.”<sup>905</sup> However there is an exception to this exception, namely, when a third party seeks to rely on the benefit of the protection of an exception or limitation of liability in such a contract.<sup>906</sup>

In *The Nicholas H*, the Classification Society did not comply with these requirements.<sup>907</sup> A further reason for the Society not being construed as a beneficiary was because it did not argue that it was entitled to the protection of the contract of carriage. Nevertheless, in terms of this notion a contract concluded between two contracting parties for the benefit or protection of a third party beneficiary may be invoked by that beneficiary. Under these circumstances the beneficiary would have a legitimate expectation to benefit. Therefore the circumstances may permit a beneficiary’s to claim that his liability should be subject to the same extent as the other contracting party’s.<sup>908</sup> This would be the situation if a ‘Himalaya-type clause’ in favour of a Classification Society was inserted into the contract of carriage between the ship-owner and potential claimants such as a cargo-owner.

In these circumstances the Classification Society’s liability would be equal to that of the ship-owner. This is an example of a Classification Society limiting its liability by way of private undertaking. Independent contractor often incorporate a

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<sup>901</sup> Cane *op cit* n 131 at 373.

<sup>902</sup> See the above discussion on the contract in the benefit of third parties.

<sup>903</sup> sec 1(1)a.

<sup>904</sup> sec 1(1)(1)b and sec 1(3)

<sup>905</sup> A “contract for carriage of goods by sea” is defined as either “contained on or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction”(sec 6(6)a or one “under or for the purpose of which there is a given undertaking which is contained in a ship’s delivery order or a corresponding electronic transaction”(sec. 6(6)b

<sup>906</sup> sec 6(5)a

<sup>907</sup> These reasons included, *inter alia*, that fact that no mention was made of the Classification Society in the relevant contract(s) between the ship-owner and the cargo-owner.

<sup>908</sup> Cane *Ibid*.

‘Himalaya-type clause’ into their relationship with a ship-owners. This exculpatory clause is based on Art. IV *bis* of the Hague Visby Rules. It has been suggested that to bring a Classification Society within the typical Himalaya clause that appears in most bills of lading would require a rather broad and expansionist view. This is because even an independent contractor is in general required to perform some of the requirements of his ‘instructor’. This is evident from the definition of an independent contractor as ‘ordinarily understood’ by the House of Lords in *The Starsin*<sup>909</sup> which gave the following definition,

“in the context of a head contract [the contract of carriage] to mean a third party with whom a party to a contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract [the contract of carriage], in other words a subcontractor.”<sup>910</sup>

One may argue that the a Classification Society acting in a ‘supplementary capacity’ is undertaking to some extent the obligation of the carrier to make his vessel seaworthy and fit to carry cargo. This would not undermine the ship-owner ‘primary responsibility’ to provide seaworthy vessel. However if a ‘Himalaya-type clause’ for Classification Societies, in view of imposing and limiting liability were to be construed, such a clause would most likely be more palatable for the Courts than a broad exception clause.<sup>911</sup> Indeed such a clause could be a viable alternative to the imposition of an international convention.<sup>912</sup>

### **3.14.5 Fairness & reasonableness of imposition of liability on ‘secondarily responsible’ party**

The second angle from which the “limitation issue” can be viewed is that, it is not fair, justifiable or reasonable to impose on a party, who is “secondarily responsible” for a loss, a liability in respect of that loss, that is greater than that resting on the party who is “primarily” responsible.<sup>913</sup> This approach was adopted by Lord Steyn who formulate the following question due to the existence of the contract of carriage with the Hague Visby Rules incorporated. He stated that,

“The question is not whether the Classification Society is covered by the Rules, but whether in all the circumstances it is just, fair and reasonable to require them to shoulder a duty which by the Rules primarily lies on ship-owners, without the benefits of those Rules or other international conventions.”<sup>914</sup>

There is not obvious judicial basis on which the Classification Society could enjoy the benefits of limitation enjoyed by the ship-owner. Therefore the only basis for Lord Justice Saville’s and the majority of the Appeal Court in *The Nicholas H* was policy consideration. To relieve the Classification Society from all liability was deemed to be the best result in the absence of any contractual or statutory limitation

<sup>909</sup> [2003] 1 Lloyd’s Rep 571.

<sup>910</sup> Lord Bingham of Cornhall [2003] 1 Lloyd’s Rep 571 at 580.

<sup>911</sup> Honka *op cit* n 77 at 10.

<sup>912</sup> *Ibid.*

<sup>913</sup> Cane *Ibid.*

<sup>914</sup> [1994] 1 Lloyd’s Rep. 492 at 499

that could regulate the relationship and liabilities between all three parties involved.<sup>915</sup>

Lord Lloyd in *The Nicholas H* by way of comparison pointed out the inability of salvor's or stevedore's to limit their liability for negligence has never been used as a factor to dissuade the Courts from imposing liability.<sup>916</sup> No such arguments were raised in the *Midland Silicones Ltd v Scruttons Ltd*<sup>917</sup> or in *Adler v Dickson*.<sup>918</sup> But this issue was raised in *The Tojo Maru*<sup>919</sup> in which a vessel had been lost due to the negligent actions of salvors.<sup>920</sup> The writer concurs.

### 3.14.6 Policy Factors

Certifying authorities at some point tend to raise a number of policy arguments in their defence against the imposition of a duty of care.<sup>921</sup> These are repetitious in nature to say the very least. Lord Steyn in *The Nicholas H*<sup>922</sup> held that a number of these factors are individually, "far from decisive", however collectively, "they merit consideration."<sup>923</sup> This raises the concern that the defendant will be 'over burdened' by the disproportionate exposure to liability to his fault. This is particularly the case when a single incident can give rise to numerous claims.<sup>924</sup> Another concern is that a defendant who performs a service in the public interest, will as a result of the imposition of liability, render his service in a 'defensive manner'. This may lead to conduct, referred to as 'overkill' whereby the defendant takes excessive preventative measures to avoid liability. It is argued that this is detrimental to the public who rely on his services being efficiently rendered.<sup>925</sup> In *Otto Candies L.L.C v Nippon Kaiji Kyokai Co*<sup>926</sup> these factors formed the basis for the cautious approach adopted by the Appeal Court (Fifth Circuit) when considering to impose liability. Edith H Jones, J of the Court of Appeal (Fifth Circuit) set out these factors briefly as follows;

"Imposition of undue liability on Classification Societies could be harmful in several ways. The societies could be deterred by the prospect of liability from performing work on old or damaged vessels that most need their advice. The spreading of liability could diminish owners' sense of responsibility for vessel safety even as it complicates liability determinations. Ultimately, broader imposition of liability upon Classification Societies would increase their risk management costs and rebound in higher fees charged to the societies' clients throughout the maritime industry."<sup>927</sup>

<sup>915</sup> Cane *op cit* n 131 at 373.

<sup>916</sup> [1995] 2 Lloyd's Rep.299. at 308.

<sup>917</sup> [1961] 2 Lloyd's Rep. 365; [1962] A.C. 446.

<sup>918</sup> [1954] 2 Lloyd's Rep. 267, [1955] 1 Q.B 158. as referred by Lord Lloyd [1995] 2 Lloyd's Rep.299. at 305.

<sup>919</sup> [1971] 1 Lloyd's Rep. 341; [1972] A.C. 242.

<sup>920</sup> This will be further discussed below.

<sup>921</sup> *Parrett v Collins* [1998] 2 Lloyd's Rep 25 at 277

<sup>922</sup> [1995] 2 Lloyd's Rep.299.

<sup>923</sup> [1995] 2 Lloyd's Rep.299. at 316.

<sup>924</sup> The maritime disasters of the *Erika* and the *Prestige* which both caused substantial oil pollution are prime examples of such incidents.

<sup>925</sup> Lunney & Oliphant *op cit* n 178 at 116 (citing *Hill v Chief Constable of West Yorkshire* [1989] AC 53).

<sup>926</sup> 346 F.3d 530, 2003 AMC 2409 at 2414.

<sup>927</sup> *Ibid.*

In *Parrett v Collins*<sup>928</sup> it was contended by the defence that the Court should merely ‘speculate’ in relation to these aspects.<sup>929</sup> Lord Justice Buxton however took the same stance in this respect, as did Lord Lloyd in *The Nicholas H*<sup>930</sup> and warned that the Court about the dangers of speculation. He said that,

“the Court should be very cautious before reaching or acting on any conclusions that are not argued before it in the way in which technical issues are usually approached, with the assistance of expert evidence.”

Nevertheless despite the lack of evidential material in support of these policy arguments they have swayed the Courts on many occasions to not impose liability on Classification Societies. However these arguments have not been used as successfully by other role players in the maritime industry such as salvors. The House of Lords in *N.V. Wijsmuller v “Tojo Maru” (owners) (The Tojo Maru)*<sup>931</sup> considered a number of the policy arguments as used by salvors in order to mitigate against the imposition of liability in tort. The Courts have readily acknowledged that actions of a salvor should be judged leniently.<sup>932</sup>

In *The Tojo Maru*,<sup>933</sup> The respondents argued that salvors perform an important public role, and on grounds of public policy their efforts need to be encouraged.<sup>934</sup> Lord Reid thought it desirable to encourage professional salvors to maintain their vessels so that their services could be utilised in a wide variety of situations.<sup>935</sup> Furthermore he contemplated the burden of exposure to liability and the difficulty that the salvage industry will encounter when seeking to attain liability insurance.<sup>936</sup> He acknowledged that the salvors inability to limit their liability.<sup>937</sup> Nevertheless Lord Reid stated that,

“... a Court must go by the provisions which have been agreed and enacted. If the special position of salvors was unforeseen then we must await alteration of those provisions if those concerned see fit to make some alteration.”<sup>938</sup>

It was held that the language of section 2(1) of the Merchant Shipping (liability of Ship-owners and Others) Act, 1958 restricted its application to the exclusion of salvors. Lord Morris of Broth-Y-Gest held that this issue had “far-reaching consequence for contractors and ship-owners alike.”<sup>939</sup> He deemed the salvors right to limitation, “at least as meritorious as that of other ship-owners,”<sup>940</sup> however he came to the same conclusion as the majority of the Court.

<sup>928</sup> [1998] 2 Lloyds’s Rep 255.

<sup>929</sup> *Id.* at 277.

<sup>930</sup> [1995] 2 Lloyd’s Rep.299. at 308.

<sup>931</sup> [1971] 1 Lloyd’s Rep. 341

<sup>932</sup> **The Rene** [ 1955] 1 Lloyd’s List L.Rep.101;112 (adm.1955) as referred by Brice, G. “Salvoral negligence in English and American law” 22 (1997-1999) Tul.Mar.L.J. 569.

<sup>933</sup> [1971] 1 Lloyd’s Rep.341.

<sup>934</sup> *Ibid* at 346.

<sup>935</sup> *Ibid.*

<sup>936</sup> *Ibid.*

<sup>937</sup> At the time of judgment salvors did not fall within the scope of the LLMC.

<sup>938</sup> [1971] 1 Lloyd’s Rep. 341 at 347.

<sup>939</sup> *Ibid* at 349.

<sup>940</sup> *Ibid* at 356.

In *The Tojo Maru*,<sup>941</sup> the House of Lords held that policy considerations did not tip the scale and negate the imposition of liability for reasons of fairness, justice and reasonableness. *The Tojo Maru*<sup>942</sup> remains an obstacle to those who contend that these policy arguments render it fair, just and reasonable despite the fact that all other requirements for the imposition of a duty have been met.<sup>943</sup> However public policy factors have been decisive in preventing the imposition of a duty of care in other occasions because they outweighed the need for individual justice.<sup>944</sup> A number of these ‘policy factors’ will be discussed below. It should be noted however that the only evidence of the actual impact of these factors in practice to date is the response of Classification Societies acting as ‘recognised organisations’ for member states of the European Union in terms of Directive 57/94/EC and its amendments.<sup>945</sup>

### 3.14.7 Role of Classification Societies acting in the Public Interest

Classification societies are numerous and diverse.<sup>946</sup> Societies differ in legal and corporate structure. In modern times some societies are private companies whereas others are par governmental organisation agencies.<sup>947</sup> Further there is no generally accepted legal concept of what is a Classification Society.<sup>948</sup> Although formally they may be non profitable organizations, societies, “...cannot escape their context: They work in a competitive environment.”<sup>949</sup><sup>950</sup> Indeed the business of providing maritime classification and certification is indeed a “highly profitable venture.”<sup>951</sup>

Nevertheless the Common Law Courts have readily embraced, with out recourse to evidence, the traditional notion that Classification Societies are charitable non-profit making organisations that act in the collective public welfare, with the sole purpose to promote maritime safety.<sup>952</sup> The Courts have held that this formal status and public role must be taken into account when considering the reasonableness and fairness of imposing a duty of care.<sup>953</sup> Lord Lloyd in *The Nicholas H*<sup>954</sup> acknowledged societies service to the public but nevertheless concluded that, “[r]emedies in the law of tort are not discretionary.”<sup>955</sup> According to him the novelty of this argument had already worn off as it had been unsuccessfully

<sup>941</sup> *Ibid* at 341

<sup>942</sup> *Ibid.*

<sup>943</sup> Feehan *op cit* n 388 at 188.

<sup>944</sup> **Hill v Chief Constable of West Yorkshire**[1989] 1 A.C.53 **Yuen Kun Yeu v Attorney General** [1988] 1 App. Cas. 175 (P.C.1987)and **Elguzouli-Daf v Commissioner of Police of the Metropolis** [1995] 2 W.L.R. 173 (C.A 1994) as referred by Feehan *op cit* at 163.

<sup>945</sup> This directive and other international initiatives is discussed further in chapter 4.

<sup>946</sup> This has been identified as a contributing factor to the “class crisis.”

<sup>947</sup> Puilido Begines *op cit* n 19 at 511.

<sup>948</sup> *Ibid.*

<sup>949</sup> *Ibid.*

<sup>950</sup> The environment in which Classification Societies operate is discussed in chapter 1.

<sup>951</sup> Puilido Begines *op cit* at 511.

<sup>952</sup> **The Morning Watch** [1990] 1 Lloyd’s Rep. 547 at 558; **The Nicholas H** [1995] 2 Lloyd’s Rep.299 at 316; **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd’s Rep 648 at 683.

<sup>953</sup> Lord Steyn in **The Nicholas H** [1995] 2 Lloyd’s Rep.299 at 316;( citing **Hill v Chief Constable of West Yorkshire**[1989] 1 A.C.53 and **Elguzouli-Daf v Commissioner of Police of the Metropolis** [1995] 2 W.L.R. 173 (C.A 1994) )

<sup>954</sup>

<sup>955</sup> [1995] 2 Lloyd’s Rep.299. at 308.

raised in *The Tojo Maru* in respect of the public nature of salvour services.<sup>956</sup> He also held that it should not prevent the imposition of liability. The writer concurs.<sup>957</sup>

### 3.14.8 Complication of Legal Proceedings:

Classification societies view towards the trend of increased litigation is best summarised by a statement by the Group Legal Director of Lloyd's Shipping Register who stated '[i]t would be a very sad day indeed if the number of naval architects, engineers and surveyors working for a Classification Society were to be outnumbered by lawyers employed to defend them from commercial litigation.'<sup>958</sup> However the view that Classification Societies are 'deep pocket litigants' has been one of the many factor that has been used by Common Law Courts to mitigate against the imposition of liability. This protective approach is best illustrated by Lord Steyn when indicated that legal and arbitration proceedings would become more complex by virtue of the fact that Classification Societies would become a third defendant to many proceedings.<sup>959</sup> The notion of the 'deep pocket' litigant has been whipped to death by societies who have raised the argument when ever the whiff of potential liability is in the air.<sup>960</sup>

### 3.14.9 Disincentive for ship-owners

Another argument used by the Courts that stems form the emphasis on the ship-owners non-delegable duty of seaworthiness is that, should liability be imposed on a Classification Society, ship-owner's will be discourage from taking effectively maintaining their vessels in a seaworthy condition.<sup>961</sup> It has been suggested that this is not a persuasive basis for not imposing liability on Societies.<sup>962</sup> If such an approach is allowed to foster then surely whenever two parties are at fault, the Court should have to make a choice and elect which party is solely liable. Because to conclude otherwise and find them, jointly and severably liable, may encourage one of them to commit the wrongful act in the future. This line of reasoning is obviously flawed.<sup>963</sup> Further, the deference objective of the law of tort would be achieved because both parties would be liable for his proportionate share of fault. In American jurisprudence this would be done in terms of the Doctrine of Comparative Fault<sup>964</sup> and in other common law jurisdictions in terms of the principles of apportionment of damages.

<sup>956</sup> [1971] 1 Lloyd's Rep. 341; [1972] A.C. 242

<sup>957</sup> There is a trend amongst Classification Societies to diversify their corporate structure in an attempt to protect themselves against liability. This was the finding of the EU Commission as set out in 'Commission Working Document on the control of recognised organisations by the Commission and on the impact of civil liability regime in accordance with Directive 94/57/EC -COM(2006) 588 final.' This is discussed further in chapter 4.

<sup>958</sup> The Group Legal Director, Lloyd's Shipping Register, Jim Harrison, "Accountability of Classification Societies: The role of classification & market -orientated and policy issues, (The Erika)" paper presented at the London Shipping Law Centre Seminar 21<sup>st</sup> February (University College London, 2001) 4.

<sup>959</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 316.

<sup>960</sup> See the discussion of the working group of the CMI and the 'Gothenburg Group' set up in negotiations in respect of the EU Directive 57/94. Both these initiatives are discussed extensively in chapter 4.

<sup>961</sup> **Great American Insurance Co. v Bureau Veritas** 338 F. Supp. 999 (S.D.N.Y. 1972). At

<sup>962</sup> Miller *op cit* n 125 at 92.

<sup>963</sup> *Ibid.*

<sup>964</sup> Miller suggest that the doctrine of comparatives advantage should be applied in the circumstances were both the ship-owner and Classification Society are liable for the unseaworthy condition of a vessel which causes damage to a third party. See, **United States v Reliable Transfer Co.**,421 U.S. 397, 1975 AMC 541 (1975)

### 3.14.10 Insurance Implications

In terms of the ‘risk management approach’ to the law of tort, the insurance implications that the imposition of liability will have is decisive to Courts decision. Therefore patterns and likely trends within the insurance market are most relevant in the determination of liability.<sup>965</sup>

#### 3.14.10.1 The ‘extra layer of insurance argument’

The judgments in *The Nicholas H* are a good illustration of the lively debate surrounding this issue of risk management within the maritime industry. The ‘extra layer of insurance argument’ presupposes that if liability were to be imposed on Societies that that risk would be uninsurable.<sup>966</sup>

It has been suggested that the insurance of international trade is dependent on the contractual structure between the ship-owners and cargo-owner as contained in the Hague Visby Rules.<sup>967</sup> This is because this system of insurance is based on double or overlapping insurance of cargo. Ship-owners take out liability insurance in respect of breaches of their duties of care in respect of the cargo. Mean while cargo-owners take out direct insurance in respect of the cargo. The insurance system is structured on the basis that the potential liability of ship-owners towards the cargo-owners is limited by virtue of the Hague Visby Rules and by virtue of tonnage limitation provisions. Therefore the insurance premiums that are payable by the respective owners are reflective of the ship-owners' exposure in accordance with the limitation provisions.<sup>968</sup> In *The Nicholas H* Lord Steyn held that according to such a system the cargo interests to be adequately protected by sufficient insurance cover.

Based on the above construction of the insurance of international trade Classification Societies have raised the defence that the imposition of duty of care would lead to the creation of an ‘extra-layer of insurance’. This may arise as a practical solution to the imposition of a duty of care on Classification Societies. As alternative arrangements, the Classification Societies in an attempt to avoid the need to buy the appropriate liability insurance for claims made by third-party cargo-owners may seek to secure indemnity from ship-owners. Lord Steyn was persuaded that it was, “...readily predictable that Classification Societies will require owners to give appropriate indemnities.”<sup>969</sup> Such contractual arrangements would in effect render the protection afforded by the limitation provisions under the Hague-rules ineffective.<sup>970</sup>

<sup>965</sup> Cane *op cit* n 299 at 434.

<sup>966</sup> The insurability of a Classification Societies risk created by the imposition of liability is discussed further in chapter 5 as a factor that justifies the introduction of a limitation mechanism should liability be imposed on Classification Societies.

<sup>967</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 315.(citing Clarke, M. “Misdelivery and Time Bars” [1990] LMCLQ 314 )

<sup>968</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 315.

<sup>969</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 315.

<sup>970</sup> Cane [1994] *op cit* 375.

If these arrangements were legally enforceable then ship-owners would need to increase their insurance coverage in respect of losses sustained by cargo-owners that could be attributed the negligence of Classification Societies. However, at the same time cargo-owners would still need to insure against losses which were not cause by the negligence of the Classification Society but which exceeded the amount recoverable in terms of The Hague Visby Rules.<sup>971</sup> Further, to the extent that Classification Societies could not arrange indemnity, they would have to seek insurance for their new exposure of third-party liability arising from the imposed duty of care.

Lord Steyn approved of the simpler approach of not imposing a duty of care. He stated that, “at least if Classification Societies are immune from non-contractual liability, they can confidently go without insurance in respect of third-party losses, leaving third parties to insure themselves in respect of losses for which they could not recover from ship-owners.”<sup>972</sup> In effect the risk management approach adopted by the majority of the House of Lords was that ship-owners should be protected from having to pay premiums for unlimited liability or for any additional premium in an indirect manner by paying higher fees to Classification Societies. Some commentators have suggested that such objectives enunciated by the Courts do not form part nor are indicated in any international convention.<sup>973</sup> The writer concurs.

### **3.14.11 Influence of competition between Classification Societies:**

Those who disfavour the imposition of liability further argue that if a duty of care was imposed on Classification Societies resulting in greater exposure to risk, the increased costs of insurance would simple be passed onto ship-owners. Persuaded by the position of ship-owners in the maritime industry, Lord Steyn stated that “[u]limatly ship-owners will pay.”<sup>974</sup> It has been suggested that the entrepreneurial nature of the shipping industry must not be ignored in this context because it is more likely that these extra costs will be passed onto their customers.<sup>975</sup> Further still, the competition between Societies may inhibit any significant fee increase on the part of Classification Societies.<sup>976</sup> But, if Classification Societies are brought to task for their involvement in maritime disasters, the resultant increase in premiums would increase the costs of services which filter through to fees charged which in turn would result in the loss of customers to competitors with a better safety record. Further, a bad safety record of a society would render vessels classed by it subject to increased port state inspections which would adversely affect its customers. The cumulative effect would adversely affect the reputation of a society.<sup>977</sup> Therefore competitive environment in which societies operate may actually promote maritime safety if liability is imposed on societies.

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<sup>971</sup> Cane [1995] *op cit* 315.

<sup>972</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 315.

<sup>973</sup> Lagoni (2007) *op cit* 306.

<sup>974</sup> Lord Steyn [1995] 2 Lloyd's Rep.299. at 315.

<sup>975</sup> Lagoni *op cit* n 93 at 306.

<sup>976</sup> *Ibid.*

<sup>977</sup> It had been suggested that the maritime industry offers an excellent platform on which a ‘system of reputation insensitive’ could be implemented. Furger *op cit* n 1 467.

### 3.14 Conclusion

Arguments favoring the imposition of liability are based on both policy and practical consideration. The role and function of Classification Societies is decisive and pertinent to the maritime transport safety and environmental protection.<sup>978</sup> The liability of Classification Societies towards third parties is not *sui generis*, this issue should be brought back into general contract and tort law.<sup>979</sup> It is uncertain on what grounds the professional fault of Classification Societies could be distinguished from other professionals such as, *inter alia*, legal advisors, dentists, other medical professionals and chartered accountants.<sup>980</sup> All these professions are subject to insurance cover; services are rendered in the course of business and upon payment and the organisation of business are similar.<sup>981</sup>

The main objections to imposing liability, although based on ‘pragmatic policy observations’ have not protected other professional organizations or inspection services<sup>982</sup> from the imposition of liability.<sup>983</sup> Imposing liability on Classification Societies would satisfy the repair function of the law of tort.<sup>984</sup> In respect of the preventative function it must be determined whether greater accountability would lead to safer maritime transport and environmental protection.<sup>985</sup> However in respect of this function, imposing liability on societies towards their customers in particular, may be defeated by liability insurance. The customer relationship is subject to the protection of exemption clauses which facilitates more effective liability insurance coverage.<sup>986</sup> Even though the standards of care and exemption clauses are the product of negotiation between equal commercial parties, as a matter of professionalism, the liability of Classification Societies towards their client is still relevant.<sup>987</sup> Further, traditional deterrent considerations favour the use of economic sanctions to ensure that the duty to exercise due diligence in relation to environmental matters is complied with.<sup>988</sup>

One cannot evade the fact that ultimately, “...the very purpose of Classification Societies is to facilitate ship-owners’ dealings with third parties and to protect third parties who deal with and/or come into contact with their ships.”<sup>989</sup> Classification societies should be held accountable for their professional faults. Whether a Classification Society’s liability should be limited or unlimited is discussed further in chapter 5.

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<sup>978</sup> See Chapter 1.

<sup>979</sup> Kruger *op cit* n 98 at 294.

<sup>980</sup> *Ibid.*

<sup>981</sup> *Ibid.* at 276.

<sup>982</sup> See **International Ore and fertilizer Corp v SGS Control services, Inc.** 38 F.3d 1279, 1995 A.M.C. 944

<sup>983</sup> Kruger *op cit* at 294.

<sup>984</sup> Honka *op cit* n 77 at 33

<sup>985</sup> Puilido Begines *op cit* n 19 at 538.

<sup>986</sup> Honka *op cit* n 77 at 33.

<sup>987</sup> *Ibid.*

<sup>988</sup> Kruger *op cit* n 88 at 276.

<sup>989</sup> Miller *op cit* n 125 at 76.

## CHAPTER 4: International efforts to regulate the liability of Classification Societies

### 4.1 Introduction

The International Maritime Organisation (IMO) no longer has a monopoly on laying safety standards. Certain regional organizations have claimed the right to establish their own set of standards. Some have suggested that the maritime industries system of governance has displayed the ability to address its own institutional failures in a timely manner.<sup>990</sup> This is debatable considering shipping accidents such as the Prestige and The Erika. Solutions at the international level to determine the accountability and liability of Classification Societies has been undertaken by the IMO, The Committee Maritime International (CMI) and the European Union (EU). The only international attempt that deals directly with the classification (private function) of Classification Societies and the issue of its liability towards its clients and third parties is the CMI.<sup>991</sup> The EU and IMO only regulate the liability of a Classification Societies when acting in the capacity of a recognised organisation as agents of flag state administrations in terms of an authorization agreement.

This study will discuss the liability of recognised organisation in terms of the relevant authorization agreement in terms of which the flag state administration can seek indemnification from the recognised organisation for breach of contract. However, it will only briefly discuss the liability of the flag-state administrations toward its citizens.

This study will analyze the outcome and effects of the approach of the EU in Directive 57/94/EC<sup>992</sup> because the success of this approach may assist in the determination of the feasibility and necessity of an international convention that regulates the liability of Classification Societies in respect of both statutory and classification functions. Further, within this context the IMO, CMI and EU initiatives will be discussed in order to highlight the inadequacies and short comings of the Anglo- American Courts formulation of societies obligations owed towards their clients and third parties<sup>993</sup> and the standards by which Societies are expected to perform the classification (private) function. In addition it will be determine whether support or material evidence for the various policy considerations used by the Courts to mitigate against the imposition of liability on Societies can be found. Finally it will be determine whether various alternatives to the current role of Classification Societies are feasible. These propositions include, inter alia, that unless greater legal accountability is bestowed upon Classification Societies, that these Societies should be striped of the capacity to perform what has become their 'dual roles'.<sup>994</sup>

<sup>990</sup> Furger *op cit* n 1 at 462.

<sup>991</sup> See Part II: For inclusion in the Rules of the Societies (which contain the terms of agreements between Societies and the Ship-owners) The Contractual Module Clause.

<sup>992</sup> COM (2006) 587 final. The Commission stated that Directive 57/94/EC in no way affected or regulated the liability of flag –state administrations. This is discussed further below.

<sup>993</sup> This is discussed in Chapter 2 and Chapter 3 respectively.

<sup>994</sup> AW Skou 'Presentation on behalf of IACS to the centenary conference of the CMI' (1997) CMI Y.B. 180.

The approach of the IMO and EU in not regulating the liability of Classification Societies in terms of its private function supports maintaining the traditional approach of channeling liability and in turn financial liability to ship-owners<sup>995</sup> and gives credence to the risk sharing management and practices within the maritime industry. However, Societies are held accountable indirectly through measures such as Port State Control, whereby non compliance or substandard Societies are subjected to more inspections by port authorities and other measures which adversely affect the reputation of the defective society.<sup>996</sup> This study will not discuss measure undertaken in terms of Port State Control. Through adopting a ‘three pronged approach’<sup>997</sup> the EU seeks to ensure safer maritime transport, environmental protection and solution to the “class crisis”.

#### 4.2 The role of national administrations of flag states

Both the EU and the IMO demand a flag state to have a competent national administration.<sup>998</sup> The nature of the regulatory regimes under which these national administrators operate was discussed by the English Appeal Court in *Reeman and Another v. Department of Transport and Others*.<sup>999</sup> This case was concerned with the statutory provisions in relation to fishing vessels. Nevertheless Lord Justice Philip dictum gives a broad introduction to the nature of regulatory regimes whereby national administrations undertake the statutory functions of surveying and certification vessels that are concerned with issue of safety in the maritime industry. He stated that,

“[t]he statutory provisions in relation to ...vessels form part of a complex regime of primary and subordinate legislation designed to ensure that merchant vessels of all descriptions are constructed and maintained in seaworthy condition. Much of this regime represents compliance with the requirements of international convention, designed to ensure a common approach to maritime safety on the part of all maritime nations. Aspects of ship safety covered by this regime include design and construction of both dry cargo vessels and tankers, tonnage measurement, load lines, navigational equipment, life-saving appliances and wireless telegraphy. There is a common scheme to most aspects of this regime. The relevant department [national flag state administration] is required to ensure compliance with the various regulations by periodic survey and by the issue of certificates of compliance. Putting to sea without the requisite certificates is subject to penal sanctions.”<sup>1000</sup>

Lord Justice Philip further stated that national administrations regulators in performing their functions play a very similar role to those of Classification

<sup>995</sup> As is evident by the Proposal for a Directive of the European Parliament and Council on the Civil Liability and Financial Securities of Ship-owners

<sup>996</sup> Furger *op cit* n 1 at 462.

<sup>997</sup> Firstly, Port State Control (the monitoring of Classification Society performances), strengthening of Flag State Administrations and the Channelling of liability onto ship-owners.

<sup>998</sup> Art. 3(1) of Directive 94/57/EC.

<sup>999</sup> [1997] 2 Lloyd's Rep. 648 at 648.

<sup>1000</sup> *Ibid* at 682.

Societies.<sup>1001</sup> Indeed the distinction is blurred greatly when a Classification Society performs a statutory function.

### 4.3 The traditional relationship between Flag State & Classification Societies

Traditionally, a Classification Society was associated with a flag state.<sup>1002</sup> Under these arrangements ships carrying a certain flag would use a particular Classification Society.<sup>1003</sup> This provided for an invaluable client basis for these societies.<sup>1004</sup> However since the advent of ‘flagging out’ of ship to open registers this traditional association has waned.<sup>1005</sup> This has resulted in Classification Societies having to operate in a competitive environment.<sup>1006</sup> Classification Societies relationships with flag states then began to be governed in a simple manner through the use of authorization agreements.<sup>1007</sup> These memorandums of understandings sought to define all the legal relationships between the parties. In terms thereof a flag state delegated its authority to perform statutory services to a particular society.<sup>1008</sup>

As the popularity of these agreements increased it became apparent to societies that the difficulties caused by having to interact with different legal systems resulted in the inefficient performance of statutory services.<sup>1009</sup> Because of these complications, there has been a trend to harmonise these approval agreements. This trend is evident from the efforts of the IMO, the CMI, the EU and the International Association of Classification Societies (IACS).

### 4.4 General principles of State liability

The basis for state liability is the wrongful performance of a public duty. The principle of delegation<sup>1010</sup> does not relieve the state from liability for the wrongful conduct of her agents. The distinction can be drawn by acknowledging that a state can delegate her functions but not her responsibilities.<sup>1011</sup> It is in this vein that a flag state must properly perform her functions of monitoring the work done by the Classification Societies.

Consequently an injured third party may start a civil action<sup>1012</sup> in tort based on vicarious liability against the competent national administration of the state on whose behalf the Classification Society had performed the statutory functions and at

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<sup>1001</sup> In addition Lord Justice Philip, acknowledged the practice of national administrations delegating authority to Classification Societies. The basis for this similarity came from fact that both performed duties in the public interest<sup>1001</sup> and have a non-profit making structure<sup>1001</sup> [1997] 2 Lloyd's Rep. 648 at 682.

<sup>1002</sup> For example Lloyd's Register of Shipping was associated with the United Kingdom flag.

<sup>1003</sup> *Op cit* n 53 at 54, par 4.14 (Transcript 444)

<sup>1004</sup> Boisson *op cit* n 2 at 363 ( interesting historical account of the development of Classification Societies in general with particular focus on Lloyd's and Veristas).

<sup>1005</sup> *Op cit* n 53 at 52, par 4.13 (Transcript 443,444)

<sup>1006</sup> see the discussion in chapter 1 on competition.

<sup>1007</sup> In 1978 Liberia became the first country to conclude a memorandum of understanding with a prominent Classification Society. Boisson, P. "Classification society liability: Maritime law principles must be question?"(1994) CMI Y.B. 235 at 248.

<sup>1008</sup> Boisson *op cit* n 2 at 248.

<sup>1009</sup> *Ibid.*

<sup>1010</sup> As discussed above.

<sup>1011</sup> Puilido Begines *op cit* n 19 at 518.

<sup>1012</sup> In certain jurisdictions such as France this is referred to as an 'administrative action'.

the same time sue the society in contract if the circumstances permit<sup>1013</sup>. It is therefore necessary to determine firstly, under what circumstances these national administrations would be held liable and secondly, the circumstances under which it is able to seek indemnification based on breach of contract, from a Classification Society acting on its behalf.<sup>1014</sup> The liability of national regulators acting as certifying authorities has received much attention from the English Courts in recent times.<sup>1015</sup>

#### 4.5 Initiative of the International Maritime Organisation

The International Maritime Organisation passed Resolution A. 739(18)<sup>1016</sup> Guidelines for the Authorization of Organisations Acting on behalf of Administrations. The IMO recognised that a flag State may authorise Classification Societies<sup>1017</sup> to act on their behalf in the certification, surveying and determination of tonnages as required by the international conventions such as those referred to.<sup>1018</sup> The aim of this initiative was to develop uniform procedures and a mechanism for the delegation of authority to recognised organisations acting on behalf of flag administration, which would in turn assist flag states in the uniform and effective implementation of the relevant IMO conventions. In addition the IMO sought to formulate minimum standards for recognised organisations which aimed to undertake to perform the relevant delegated statutory duties.<sup>1019</sup> Resolution A. 739(18) is not legally binding. However this was the first initiative of its kind undertaken on an international level. Subsequently, its provisions have been made mandatory by Regulation 1 of New Chapter XI-1 Of SOLAS. The provisions of Appendix II of Resolution A. 739(18) have been made mandatory in the European Union by Art. 6.2 (a) of Directive 57/94/EC.<sup>1020</sup> Further, these provisions are retained in the Proposal.<sup>1021</sup> The purpose of Resolution A. 739(18) is to serve as a source that can be followed and applied by governments.<sup>1022</sup>

<sup>1013</sup> See the discussion of the 'alternative issue' as discussed in chapter 3.

<sup>1014</sup> *Tsimplis & Lorenzon op cit* n 86.

<sup>1015</sup> **Philcox v. Civil Aviation Authority** (1995) 92(27) L.S.G.33.; **Reeman and Another v Department of Transport and Others** [1997] 2 Lloyd's Rep 648; **Parrett v Collins** [1998] 2 Lloyd's Rep 255. These cases were all extensively analysed by the High Court of New Zealand in **Carter & Wright v Western Viaduct Marine Ltd and others (The MV Nivanga)**

<sup>1016</sup> Adopted on 4 November 1993 (Agenda item 11) In attempt to fine tunes these guidelines to the modern concern of environmental protection the IMO requested the Maritime Safety and Marine Environment Protection Committees to review the guidelines so that they can be improved in this regard, if need be. The outcome of this cooperation was the Model Agreement for the Authorization of Recognised Organisations Acting on Behalf of the Administration as set out in Circular MSC/Circ.788-MEPC/Circ.325. Further, annexure 4 of Resolution A.847(20), Guidelines to Assist Flag States in the Implementation of IMO Instruments Res. 733-799, seeks to promote uniformity of inspections and to maintain the standards that had been set out in the prior resolutions.

<sup>1017</sup> Resolution A. 739(18) does not use the term "Classification Society." Instead reference is simply made to an "organisation" and was the context dictates "recognised organisation." This approach was adopted in Directive 57/94/EC.

<sup>1018</sup> Recital 2 of Resolution A. 739(18) refers the following international conventions: SOLAS 74; Load Lines 66, MARPOL 73/78 and STCW 78. Further, Para 1 of the Annex to Resolution A. 739(18) refers to; SOLAS 74, art.13 of Load Lines 66, regulation 4 of Annex I and regulation 10 of Annex II of MARPOL 73/78 and article 6 of Tonnage 69.

<sup>1019</sup> Recital 2 of Resolution A. 739(18)

<sup>1020</sup> By amendment from Art.1.5 (a) Directive 2001/105.

<sup>1021</sup> Art. 8.2 (a) COM (2005)587 final.

<sup>1022</sup> Para./Item? 2(a)(b) of Resolution A. 739(18)

Resolution A. 739(18) contains particulars relating to, elements to be included in an authorising agreement<sup>1023</sup>, a system of verification and monitoring of Classification Societies<sup>1024</sup> and a list of the minimum quality standards that need to be met by an organisation in order to be recognised by a state administration in order to perform statutory work.<sup>1025</sup> Should one have the joy of perusing through the Principle of Conduct<sup>1026</sup> drafted by the CSJWG or the Annex to Directive 57/94/EC<sup>1027</sup> one can easily see the influence of the IMO's minimum standards of quality in Resolution A. 739(18). In particular these standards were refined and clarified in Directive 94/57/EC.

The model authorisation agreement envisaged by the IMO is contained in Appendix II. Appendix II stipulates what items should be included in such an agreement. However it does not stipulate the contents of the items that must be mentioned. For example it states that provision must be made for 'liability'<sup>1028</sup> and nothing more. No reference is made to the circumstances, grounds, standard or extent of liability or to who is burdened with liability. However the (MSC/Cir. 788-MEPC/Cir.325) does suggest that some limitation of liability should exist but this aspect is left to the parties to specify in their agreement.<sup>1029</sup> Nevertheless the success of the IMO Model Agreement is reflected in its common usage amongst most Classification Society and national authorities by forming the basis for authorisation agreements in conjunction with the Classification Society own General Terms and Conditions.<sup>1030</sup> These rules are generally considered to meet the minimum standards for such agreements which may be subject to change at the discretion of the national authority.<sup>1031</sup>

Resolution A. 739(18) has been refined and developed by Resolution A.789 (19), Specifications on the Survey and Certifications Functions of Recognised Organisations Acting on Behalf of the Administration.<sup>1032</sup>

#### **4.6 Efforts at self regulation: International Association of Classification Societies (IACS)**

The classification industry is made up of weak ties between Classification Societies at all hierarchical levels. Although there exists a flow and exchange of technical information there is no tradition of cooperation between societies in relation to matters of policy.<sup>1033</sup> Nevertheless, the main and largest Classification Societies of the world have been organized into the International Association of

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<sup>1023</sup> See Appendix II.

<sup>1024</sup> Resolution A. 739(18) requires the flag state administration to establish a system that can adequately verify and monitor the performance of the recognised organisations. This system should include procedures for communication (para3.1), reporting and processing of reports.(para3.2) Further it must allow for additional vessel inspection by the flag state administration (para3.3) and evaluation of the certification of the quality system of the organisation by recognised body of auditors (para3.4)Further it must monitor and verify applicable class related matters.(para3.5)

<sup>1025</sup> See Appendix I.

<sup>1026</sup> The Principle of Conduct is discussed further below.

<sup>1027</sup> The minimum standards of quality of Directive 57/97/EC is discussed further below.

<sup>1028</sup> Para 8.4 of Appendix II.

<sup>1029</sup> Puilido Begines *op cit* n 19 at 532.

<sup>1030</sup> *Ibid* at 496.

<sup>1031</sup> Puilido Begines *op cit* at 496.

<sup>1032</sup> Res. 780-838.

<sup>1033</sup> Furger *op cit* n 1 at 466.

Classification Societies (IACS). Members of IACS classify up to 90 % of the worlds fleet. This organisation was slow to respond to the ‘class crisis.’ This is because its activities have been traditionally confined to technical matters. Until recently it had not been regarded by its members as a self-policing institution.<sup>1034</sup> The organisation has as its primary objective the promotion and control of these services through regulation of their work. This is an attempt by Classification Societies to improve the negative public perception and restore their credibility.<sup>1035</sup> As an indication of approval, the IMO granted IACS consultative status in October 1969.

In an attempt to provide the maritime industry with proof that efforts were being made to improve quality control and standards the IACS Quality System Certification Scheme was introduced as a qualification for membership. Failure to qualify and comply with the schemes recommendation can result in expulsion from the organisation<sup>1036</sup>. The standards contained in the IACS Quality System Certification Scheme have been an inspiration for the initiatives undertaken by the CMI and the EU.<sup>1037</sup> In addition, IACS has formulated the Transfer of Class Agreement (TOCA). This was an attempt to end the practice of “class hoping”. TOCA stipulates that a Classification Society may only accept a new ship if all the requirements of the previous Classification Society have been met and surveyed.<sup>1038</sup> In more recent times IACS has made attempts to make the rules and technical standards of its members more uniform. Presently, members of IACS already have similar practices.<sup>1039</sup>

It is unclear whether IACS has been successful in restoring the publics confidence in Classification Societies when maritime regions such as the European Union envisage the establishment of a body which has the same objectives and seeks to perform similar activities.<sup>1040</sup> Further many shipping disasters have occurred during its existence. Arguably this is due to IACS membership not including all Classification Societies and having universal membership which has allowed for the situation whereby smaller pariah societies are left to wreck havoc.

#### 4.7 Initiative of the Committee Maritime International (CMI)

The Joint Working Group on a Study of Issues re classification Societies (CSJWG) was formed in 1992 upon the initiative of the Executive council of the Committee Maritime International (CMI). The issues that were to be considered were the rights and obligations and liabilities of Classification Society as well as the relationship between the Classification Society and ship-owner.

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<sup>1034</sup> *Ibid.*

<sup>1035</sup> Puilido Begines *op cit* n 19 at 499.

<sup>1036</sup> This fate fell upon the Polish Register. It was suspended in for non-compliance in 1997. However it has re-obtained conditional membership.

<sup>1037</sup> The Principle of Conduct for Classification Societies and para 6 of Sec B of annex to Directive 57/94 respectively.

<sup>1038</sup> Puilido Begines *op cit* at 500.

<sup>1039</sup> Mandaraka-Sheppard at 468.

<sup>1040</sup> Art 21 of the ‘The Proposal for a Directive of the European Parliament and of the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrators’. This is discussed below.

The principle, upon which the CSJWG was established, was that measures that are adopted through co-operative efforts within the industry are generally felt preferable to those that originate outside the industry. In addition the threat posed by the “deep pocket litigant”, being a matter of maritime private litigation of civil liability, meant that the CMI was particularly well suited to undertake this in study.

From the onset the CSJWG formed a number of premises for their undertaking. *Firstly*, that Classification Societies play a unique and increasingly vital role in the promotion of maritime safety and environmental protection. *Secondly*, they were unique because of the dual role which they perform. *Thirdly*, this dual function was increasingly vital because more statutory work was being delegated to Societies, and the rules and regulations in terms of which their work is performed was growing in complexity. And *lastly*, that, the present-day-role of Classification Society act in the public interest as they promote the safety of life and ships at sea.

The CSJWG held thirteen working sessions over a period of nearly five years. Unfortunately the issue of how the risk of the Classification Society was too measured and the limitation of liability were such a contentious issues that the lack of consensus lead to the undoing of the whole initiative.<sup>1041</sup> Nevertheless the discussions and outcome of the CSJWG are pertinent to the analysis of classification liability.<sup>1042</sup>

#### 4.7.1 Principle of Conduct for Classification Societies

The Principles of Conduct for Classification Societies<sup>1043</sup> (hereafter ‘Principles of Conduct’) was an attempt to fill a void and provide the public with instrument that could set out in a uniform manner what Classification Societies do and on whose behalf they act.<sup>1044</sup> This would thereby serve as a set of standards which could be applied any given case to measure the conduct of a Classification Society. The drafters of the Principle of Conduct intended to be consistent and a further development of the IMO initiative as set out in Guidelines for the Authorization of Organisations Acting on behalf of Administrations in Resolution A. 739(18).<sup>1045</sup> The Principle of Conduct is applicable to a Classification Society performing the private and/or the public function. Membership to IACS is not a prerequisite. Further, the Principles were envisaged to apply equally to Classification Societies that are privately owned corporations or public organisations that were established and/or owned by the Government.<sup>1046</sup>

The Principles of Conduct require Classification Society to accept a number of duties upon adoption. These duties are set out in paragraph 5 and include, *inter alia*, the duty to formulate and publish rules that are regularly reviewed and updated

<sup>1041</sup> F Wiswall ‘Report on the Joint Working Group on a study of issues re Classification Societies’ (1996) CMI Y.B. 328 at 331.

<sup>1042</sup> The contentious issue of limitation of Classification Society liability and the mechanisms thereof that lead to the failure of this initiative is discussed further in chapter 6.

<sup>1043</sup> Annex A to Report of Joint Working Group on a study of issues Re Classification Societies submitted by Dr.F.L. Wiswall, JR. dated London, 10 March 1997.

<sup>1044</sup> Wiswall *op cit* n 1041 at 329.

<sup>1045</sup> Dated 4 November 1993 Res. 733-799, IMO Resolutions, 18th Sess. 1993.

<sup>1046</sup> Wiswall *op cit* at 329.

for classification and guidelines for other services;<sup>1047</sup> to carry out its plan approval and its surveys in accordance with its established rules<sup>1048</sup>; to establish an international network of surveyors<sup>1049</sup> and to use only suitable qualified persons in the performance of their services.<sup>1050</sup> In addition the Principle of Conduct also give credence to the IACS self regulatory initiative by requiring Classification Societies to achieve and maintain compliance with the Quality System Certification Scheme (QSCS). If a Classification Society is not a member of IACS, then such a society must be in compliance with a published quality system based upon the ISO 9000 series of quality system which is at least equivalent to the QSCS.<sup>1051</sup> A further requirement is for the Classification Society to be independent from ship-owner, governments and other persons with an interest in Classification Society services. Independence is recognised as factor that ensures that a Classification Society is competent to act.<sup>1052</sup> Finally, in order to take advantage of modern developments Classification Society are required to implement a programme of technical research and development that is directed towards ship safety.<sup>1053</sup> It is clear that the Principle of Conduct require a far more comprehensive list of duties than that required by the common law Courts.

However, it will become evident from our discussion below that these criteria and obligations of Classification Societies have been dealt with in a far more comprehensive manner by the European Union.<sup>1054</sup> Further, these standards are the only basis of similarity or common ground between the CMI initiative and the EU directives concerning Classification Societies, otherwise both initiatives concern different relationships within a the matrix of maritime transport.

#### **4.7.2 The Draft Model Contractual Clauses**

The Draft Model Contractual Clauses<sup>1055</sup> was seen as a short term solution to regulate and limit the liability of Classification Societies. These clauses were intended to be used by the individual societies. They were intended to be subject to any appropriate modification in accordance with commercial practices, national laws and regulations.<sup>1056</sup> This outcome is indeed an indication that there was weak consensus on the issue of limitation of liability.<sup>1057</sup> The model clause are divided into two parts

##### **4.7.2.1 Part I of the Model Contractual Clauses**

Part I was intended to be included in the authorising agreements between Classification Societies and governments. It is self explanatory and rather simplistic in its approach. This is because the CSJWG felt that the relationship dealt with

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<sup>1047</sup> Para 5 (a).

<sup>1048</sup> Para 5(b).

<sup>1049</sup> Para 5(c).

<sup>1050</sup> Para 5(d).

<sup>1051</sup> Para 5 (e).

<sup>1052</sup> This is discussed in chapter 1.

<sup>1053</sup> Para 5 (f).

<sup>1054</sup> See the discussion of Directive 57/94/EC

<sup>1055</sup> Anex B to Report of Joint Working Group on a study of issues Re Classification Societies submitted by Dr.F.L. Wiswall, JR. dated London, 10 March 1997.

<sup>1056</sup> Wiswall *op cit* n 1041 at 330.

<sup>1057</sup> Puidido Begines *op cit* n 19 at 531

therein involves inherent public policy issues that are better served through encouragement by the adoption of national legislation.<sup>1058</sup> Therefore the model clauses are of a supplementary nature that are to be included in the agreement between that Classification Society and the national administration of state.<sup>1059</sup>

Clause 1 allows for provision to be made for the functions and duties of the Classification Societies which are to be set out in Annex I.<sup>1060</sup> <sup>1061</sup> Further, provision is made for the verification of the Societies quality system and performance through the use of appropriate audit methods.<sup>1062</sup> The standard of measurement of performance of Societies is to be that which is stipulated in the Principle of Conduct.<sup>1063</sup> Clause Two stipulates that the relationship between the delegating state and the Society is to be based on the Principle of Agency.<sup>1064</sup>

The Model Contractual Clauses of the CMI undertakes a simple approach that actually avoids having to deal with the liability of a Classification Society when acting under delegated authority of a flag state in any fundamental way.<sup>1065</sup> Clause 3 reads,

*“In any claim arising out of the performance of a duty or responsibility, or out of any certification with regard to work covered by Annex I [Classification Society] and its employees and agents shall be subject to the same liabilities and be entitled to the same defences (including but not limited to any immunity from or limitation of liability) as would be available to [Administration’s] own personnel if they had themselves performed the work and/or certification<sup>1066</sup>”*

Clause 3 relates to claims of third parties made either directly against the national administration or the Classification Society in respect of work done by the society.<sup>1067</sup> In these circumstances a Society would be entitled the same defences and liabilities that national administrations would enjoy. Clause 3 does not deal with the right of recourse of a national administration of a flag state may have against a recognised organisation.<sup>1068</sup> Therefore the Module Contractual Clause and the Directive regulate different relationships and are for the most part unrelated.

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<sup>1058</sup> Further the CSJWG noted to efforts of the IMO (Resolution A.789(19), Specifications on the Survey and Certifications Functions of Recognised Organisations Acting on Behalf of the Administration) and the EU (Directive 57/94/EC).

<sup>1059</sup> Wiswall *op cit* n 1041 at 330.

<sup>1060</sup> A model for Annex I is not offered. The Joint Working Group intended that Annex I should contain the technical and operational requirements to be agreed between the Government and the Classification Society.

<sup>1061</sup> Clause 1 (a).

<sup>1062</sup> These appropriate audit methods may include the recognition of audits undertaken on societies, by an independent body of auditors that effectively represent the administrations efforts. Specific reference was made to IACS QSCS auditors as a n example of such an auditing body.

<sup>1063</sup> Clause 1(b).

<sup>1064</sup> This relationship is discussed below.

<sup>1065</sup> Liability and the limitation thereof towards ship-owners in respect of classification is set out in Part II and discussed below.

<sup>1066</sup> This clause was accompanied with the following footnote. “(Fn. 5) Reference to applicable provisions of national law should be added following the text of the clause. ( Amendment of national law may need to be pursued in some States)”

<sup>1067</sup> The Doctrine of Vicarious Liability is discussed in Chapter 3.

<sup>1068</sup> The national administrator’s right of recourse against the recognised organisation (Classification Society) is dealt with in the EU Directive 57/94/EC.

In any event it is clear that clause 3 envisages the only limitation of a societies liability to be restricted to the extent to which the administrator would be held liable by the Court in respect of third party claims. Therefore it is therefore submitted that the JWGCS left the mechanism for liability to be the law of damages of the national law.

#### 4.7.2.2 Part II of Model Contractual Clauses

The drafters of Part II intended these clauses to be included in the Rules of Societies so that they would become terms of the agreement between Classification Societies and ship-owners. Part II stipulates obligations of the ship-owner and Societies, and regulates the limitation of the liability of Classification Society. The CSJWG recognised the benefits of imposing a liability regime on a Society.<sup>1069</sup> There was a general consensus that Classification Societies owe a duty of care towards their clients when performing the agreed services. They saw the potential of the threat of litigation as serving as an incentive for Classification Societies to be aware of the possible damages that may arise from their conduct.<sup>1070</sup> It was alleged by the CSJWG that this was not an attempt to afford Classification Societies immunities for their wrongful conduct.

#### 4.7.3 Obligations of the ship-owner

The CSJWG proposal reflected the ‘traditional approach’ when it formulated the obligations of the ship-owner. The recognition of the ship-owner’s non-delegable duty to maintain seaworthiness was absolute.<sup>1071</sup> Accordingly, terms of the agreements entered must include the following obligations of the ship-owner, that he is responsible for the maintenance of his ship, its machinery and equipment in compliance with the Rules and requirements of Classification Society;<sup>1072</sup> the operation of the ship in accordance with the conditions of class and applicable Rules;<sup>1073</sup> the submission of any plans of alteration of hull, equipment or machinery that may affect the condition of class to the relevant society for prior approval,<sup>1074</sup> and that all such alterations are carried out in terms of the Rules.<sup>1075</sup> Further, the ship-owner must make his ship available for necessary surveys<sup>1076</sup> and comply with any recommendation made pursuant thereto.<sup>1077</sup> The Society must be informed of *inter alia*, any use of ship which may adversely affect class<sup>1078</sup>, changes of ownership and flag;<sup>1079</sup> any collision,<sup>1080</sup> incident of navigation, other damage or proposed repair work that may also adversely effect class.<sup>1081</sup>

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<sup>1069</sup> Wiswall *op cit* n 1041 at 330.

<sup>1070</sup> Wiswall, F. “Report on the Joint Working Group on a study of issues re Classification Societies” (1996) CMI Y.B. 328 at 330.

<sup>1071</sup> This is discussed in Chapter 3.

<sup>1072</sup> Clause 5 (a) (i).

<sup>1073</sup> Clause 5 (a) (ii).

<sup>1074</sup> Clause 5 (b) (i).

<sup>1075</sup> Clause 5 (b) (ii).

<sup>1076</sup> Clause 5 (c) (i).

<sup>1077</sup> Clause 5 (c) (ii).

<sup>1078</sup> Clause 5 (d) (iv).

<sup>1079</sup> Clause 5 (d) (i).

<sup>1080</sup> Clause 5 (d) (ii).

<sup>1081</sup> Clause 5 (d) (iii).

The CSJWG held that the Classification Society's right in terms of clause 6 to *inter alia*, withdraw or suspend class as being sufficient to ensure that the ship-owner will comply with these obligations.

#### 4.7.4 Obligations of Classification Societies

Classification societies are required to perform their service in accordance with the Principle of conduct. These services must be performed impartially and in good faith.<sup>1082</sup> The Principles further stipulate that,

“Each Classification Society which adopts these Principles of Conduct undertakes via its contract with clients to perform all agreed services related to ship classification and statutory certification using reasonable skill, care and judgment.”<sup>1083</sup>

The Module Contractual Provisions require a Classification Society to agree that this standard will be the standard for the performances of its services.<sup>1084</sup> The Module Contractual Clause further stipulates that liability will be imposed on the Classification Society if it, or its servants or agents violate this standard of reasonable care.<sup>1085</sup> However this provision allowed for the possibility of different standards to be substituted in accordance with the applicable national law.<sup>1086</sup> Furthermore, provision was also made for the use of different terminology.<sup>1087</sup> The writer suggests that the CSJWG envisaged a minimum standard of care that would be expected from a reasonable professional person.

#### 4.7.5 Assessment of initiative of the Committee Maritime International

One can only appreciate the undertakings of the CMI in context of the limited case law across various jurisdictions that dealt with the liability of Classification Societies at the time. The CSJWG placed much emphasis on the role of Classification Societies. Societies felt as if they were harassed litigants but were nevertheless confident in the fact that it would be most unlikely that liability would be imposed by the Courts. Therefore the meagre attempts to recognise and impose liability on Societies can be appreciated. Indeed the lowest common denominator of minimum standards has been put forward for adoption.<sup>1088</sup> The CMI efforts of formulating a liability regime for Classification Societies is best summed up in the Afrikaans phrase “*dis min maar dis in!*”<sup>1089</sup>

<sup>1082</sup> Provision 4 of the introduction to The Principle of Conduct.

<sup>1083</sup> *Ibid.*

<sup>1084</sup> Clause 4 (b).

<sup>1085</sup> Clause 7 (a).

<sup>1086</sup> Clause 7 (a) Fn 9, Wiswall *op cit* n 1041 at 341.

<sup>1087</sup> Clause 7 (a) Fn 9 *Ibid.*

<sup>1088</sup> **This has been identified as an adverse consequence that weakens an approach that uses international conventions as a solution. Lord Donaldson of Lynton. ‘The ISM Code: the road to discovery’[1998] LMCLQ 526 at 527.**

<sup>1089</sup> English translation: “It’s not much but at least it’s in!”

## 4.8 General framework of the Maritime Safety Policy of The European Union (EU)

Traditionally, the issue of safety at sea that was exercised by member states by participating in the international conventions promoted by the IMO as sovereign nations. Therefore a number of these states objected to issue of maritime safety becoming part of EU's maritime transport policy.<sup>1090</sup> However this approach changed direction because of the advent of a number of serious marine accidents<sup>1091</sup> and the impetus of the EU to establish an internal market by 1992 which required a uniform coherent integrated transport system.<sup>1092</sup>

The EU legislation in this field should be assessed within the general framework of The Maritime Safety Policy.<sup>1093</sup> The body of measures already in force consist of some twenty-five legal instruments covering a number of related issues<sup>1094</sup>. Prior to The Erika incident most of these measures were aimed at safeguarding the interests of coastal and port States and the effect of the legislation was to ensure enforcement of the international and EU rules. But subsequent to the Erika catastrophe, the EU's policy shifted to a more interventionist one with the adoption of the two Erika packages of legislative measures which mostly strengthened existing EU legislation.<sup>1095</sup> However since the advent of The Prestige, the EU introduced the Erika III package

### 4.8.1 EU measures prior to *The Erika*

Classification societies were subjected to the Maritime Safety Policy<sup>1096</sup> by virtue of Directive 94/57/EC<sup>1097</sup> of 22 November on Common Rules and Standards for Ship Inspection and Survey Organisation and for the Relevant Activities of Maritime Administration( herein after referred to as 'Directive 94/57/EC') The original text was amended by Directive 97/58/CE<sup>1098</sup> in order to comply with IMO Resolution A.789(19)<sup>1099</sup> Specifications on the Survey and Certifications Functions of Recognised Organisations Acting on Behalf of the Administration, which was incorporated as an annexure.<sup>1100</sup> Other issues that were covered that are not of direct relevance to this discussion that are within the general maritime safety policy were port state control<sup>1101</sup>, safety standards for passenger and fishing vessels<sup>1102</sup>, management requirements for ro-ro ferries<sup>1103</sup> and training of seafarers<sup>1104</sup>.

<sup>1090</sup> R Greaves 'Current Development of European Union Law' (2007) 56 I.C.L.Q. 415 at 416

<sup>1091</sup> Primarily two major oil pollution accidents in European waters: the Aegan Sea (Dec 1992) and The Braer (Jan 1993).

<sup>1092</sup> Greaves *op cit* n 1090 at 416

<sup>1093</sup> 'Common Policy for Safe Seas', COM(93) 66 final.

<sup>1094</sup> Puilido Begines *op cit* n 19 at 500.

<sup>1095</sup> Greaves *op cit* n 1090 at 418.

<sup>1096</sup> 'Common Policy for Safe Seas', COM(93) 66 final.

<sup>1097</sup> O.J. 1994 L319/20 (as amended)

<sup>1098</sup> O.J. L274/8.

<sup>1099</sup> Res. 780-838. Resolution A.789(19) is discussed in further detail above.

<sup>1100</sup> Puilido Begines *op cit* at 504.

<sup>1101</sup> Directive 98/18 O.J. 1998 L144/1 (as amended). and Directive 95/21 OJ 1995 L157/1 (as amended)..

<sup>1102</sup> Directive 97/70, OJ 1997 L34/1 (as amended)

<sup>1103</sup> Regulation 3051/95, OJ 1995 L320/14 (as amended)

<sup>1104</sup> Directive 2001/25, OJ 2001 L136/17 (as amended).

#### 4.8.1.1 Directive 94/57 EC

The objective of Directive 94/57 EC is to ensure that only ‘recognised’ Classification Societies are allowed to act under delegated authority of an EU member state administrations for purposes of compliance with international conventions on safety at sea and the prevention of marine pollution. Directive 94/57/EC thereby seeks to establish in a uniform manner, a more efficient system of inspection, surveying and certification of ships.<sup>1105</sup> Directive 94/57/EC at the same time seeks to further the objective of freedom to provide services by preventing member states from refusing this delegation in a discriminatory manner.<sup>1106</sup> Directive 94/57/EC promotes competition between societies and by its very nature deems this to be beneficial.<sup>1107</sup> Through its limited scope Directive 57/94 maintains the dual role of Classification Societies.

#### 4.8.2 The Erika I package<sup>1108</sup>

The EU responded to the Erika incident and the consequent public and media outcry within three months by introducing The Erika I package which contained a number of measures. Directive 2001/105<sup>1109</sup> that amended Council Directive 94/57/EC<sup>1110</sup> was the first post-Erika package measure that reached the status of general law<sup>1111</sup>. This along with other Directives<sup>1112</sup> relating to port-state control tighten the safety checks and controls of ships undertaken by Classification Society whilst acting on behalf of EU flag states and those carried out by states whose ports are visited by the ships. The primary of these amendments are to make the inspection regimes of potentially dangerous ships more rigorous.<sup>1113</sup> The **Erika I** package also included Regulation 417/2002<sup>1114</sup> that sets up a timetable for phasing out single-hull oil tankers worldwide.

##### 4.8.2.1 Directive 105/2001 EC

The purpose of this amendment contained in Directive 2001/105/EC was to beef up Directive 57/94/EC so as to make for greater control of the activities of Classification Societies.<sup>1115</sup> A number of new rules were introduced. Further, the Commission, by way of a Committee is involved in the process of granting initial authorisation to the Classification Societies for recognition through the assessment of the applicant society.<sup>1116</sup> More stringent sanctions were formulated whereby approval of recognised organisation could be suspended for a year which could lead to complete withdrawal of approval if the deficiencies resulting in the suspension

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<sup>1105</sup> Art. 1 Honka *op cit* n 77 at 7.

<sup>1106</sup> Honka *op cit* n 77 at 8.

<sup>1107</sup> Puilido Begines *op cit* n 19 at 542.

<sup>1108</sup> COM (2000) final.

<sup>1109</sup> O.J. 2001 L19/9.

<sup>1110</sup> O.J. L319/20

<sup>1111</sup> Puilido Begines *op cit* at 504.

<sup>1112</sup> Directive 2001/106/EC that amends Council Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions (Port State Control),

<sup>1113</sup> Puilido Begines *op cit* n 19 at 487 at fn 73.

<sup>1114</sup> O.J. 2002 L64/1.

<sup>1115</sup> Com(2000) 142 final.

<sup>1116</sup> Art. 4 Mandaraka-Sheppard *op cit* at 998.

persist.<sup>1117</sup> The requirement of good safety and pollution prevention control performance as a condition of approval was introduced.<sup>1118</sup> Further, stricter rules pertaining to independence<sup>1119</sup> and quality criteria<sup>1120</sup> and grater transparency in the communication of information of vessels in class<sup>1121</sup> were laid. Finally, the EU for the first time, set specific minimum levels of civil liability for recognised organisations.<sup>1122</sup> This amending directive was required to be transposed into national law by the 22 July 2003.<sup>1123</sup> However by this date, up to ten states had not done so.<sup>1124</sup> The Commission had decided to institute infringement actions against these states.

#### 4.8.3 The Erika II package:<sup>1125</sup>

The Erika II package measures were aimed at improving maritime safety in EU waters. None of these measures were directly dealing with Classification Societies. Nevertheless these measures are indicative of the approach of the EU. Regulation 1406/2002, makes provision for the establishment of a European Maritime Safety Agency<sup>1126</sup> that is responsible for the improvement of the enforcement of the maritime safety measures of the EU. A traffic monitoring and information system for EU vessels was established by Directive 2002/59<sup>1127</sup>. In addition, the Commission had proposed schemes to improve compensation for victims of oil pollution<sup>1128</sup> but the Member States preferred to have this matter dealt with at international level and referred the discussion to the IMO<sup>1129</sup>

Due to the incident of The Prestige on the 6 December 2000 the EU introduced further measures.<sup>1130</sup> These measures lead to the timetable for setting up the European Maritime Safety Agency to be brought forward. Further, the phasing-out of single hull oil tankers was accelerated.<sup>1131</sup> In addition, a sanction regime for ship-source pollution offences, which provides for the imposition of criminal sanctions on persons who violate the international discharge standards, was established.<sup>1132</sup>

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<sup>1117</sup> Art 10(1)

<sup>1118</sup> Art. 9(2).

<sup>1119</sup> Sec. A: General Minimum Criteria para 6 of Annex.

<sup>1120</sup> Sec. B: Specific Minimum Criteria para 6 of Annex.

<sup>1121</sup> Art. 15.

<sup>1122</sup> Art 6

<sup>1123</sup> Art 2.1 of Directive 2001/105/EC.

<sup>1124</sup> MA Nesterowicz 'European Union legal measures in response to the oil pollution of the sea' (2004-2005) 29 Tul.Mar.L.J. 29 at 34.

<sup>1125</sup> COM() final

<sup>1126</sup> Council Regulation 1406/2002 Establishing a European Maritime Safety Agency 2002 O.J. (L 208) 1

<sup>1127</sup> European Parliament and Council Directive 2002/59/EC Establishing a Community Monitoring, Control and Information System for Maritime Traffic" and repealing Council Directive 93/75/EEC, 2002 O.J. (L 208) 10

<sup>1128</sup> Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures: COM(2000) 802

<sup>1129</sup> Fn 27 of Greaves *op cit* n 1090 at 416.

<sup>1130</sup> Communication from the Commission to the Council and the European Parliament on Improving Safety at Sea in Response to the Prestige Accident COM(2002) 681. as referred by Puidilo Begines *op cit* n 19 at 504.

<sup>1131</sup> This was due to the adoption of Regulation 1726/2003 O.J. 2003 L249/1 that amended Regulation 417/2002. O.J. 2002 L64/1.

<sup>1132</sup> The Pollution Sanctions Directive 2005/35 O.J. 2005 L191/59. and the associated Framework Decision 2005/667/JHA. O.J. 2005 L255/164 as referred by Greaves *op cit* n 1090 at 418.

#### 4.8.4 The Erika III package <sup>1133</sup>

Erika III package has seven legislative measures, presented by the Commission in 2005 and expected to be adopted during 2007. Three of the proposed measures concern important amendments to existing legislation, namely the Port State Directive<sup>1134</sup>, Traffic Monitoring and Information System<sup>1135</sup> and the Classification Societies Directive<sup>1136</sup>. It has been suggested that these amendments should not pose much difficulty in being adopted.<sup>1137</sup> Besides for the proposed Directive on ship-owner civil liability, the other measures are regarded by the Commission as merely developing existing legislation and implementing existing international rules within the EU.<sup>1138</sup>

##### 4.8.4.1 Proposal for a new Directive for ‘Recognised Organisations’

The Proposal for a Directive of the European Parliament and of the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrators (herein after referred to as ‘the Proposal’) took into account the findings of the report of the Commission that examined the economic impact of the new liability regime in accordance with art. 6(5) and gave an account of the control of the recognised organisations and the progress made in respect of maritime safety and pollution prevention under Directive 94/57/EC.<sup>1139</sup>

The Proposal is intended to reform the present system for the recognition of Classification Societies within the European Union as established by Directive 94/57EC. In particular the proposal seeks to strengthen the control systems of recognised organisations, harmonise the current dual system of ordinary and limited recognition of organisations, improve the structure of the recognition criteria, reform the system of penalties and clarify the scope and facilitative certain provisions in the Directive. Some of these amendments will be discussed further below in context of Directive 94/57/EC.

##### 4.8.4.1.1 Reform of the system of penalties

The basis of the EU approach is that policy aimed at the protection of maritime transport safety and the environment requires the cooperation and partnership between the recognised organisations, the member states national administration and the Commission for it to be effective. However it has been acknowledged that this must be backed up by a system of penalties that would ensure public control over the activity of recognised organisations which do not fulfill their obligations. The Commission seeks to, in a more efficient manner, to strengthen the principle of rectifying mistakes at the source. Therefore it was

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<sup>1133</sup> COM ( ) final.

<sup>1134</sup> Directive 95/21 O.J. 1995 L157/1 (as subsequently amended)

<sup>1135</sup> Directive 2002/59 O.J. 2002 L208/10

<sup>1136</sup> Directive 94/57/EC

<sup>1137</sup> Greaves *op cit* at 419.

<sup>1138</sup> Greaves *op cit* n 1090 at 419.

<sup>1139</sup> ‘Commission Working Document on the control of recognised organisations by the Commission and on the impact of civil liability regime in accordance with Directive 94/57/EC -COM(2006) 588 final.’ This is discussed below.

considered necessary to simplify the present system of penalties and to make it more flexible and effective.

At present, Directive 94/57/EC relies on two forms of penalties. Art. 9 deals with the withdrawal of recognition by the Commission<sup>1140</sup> and Art 10. deals with the suspension of recognition by the Commission.<sup>1141</sup> After the expiration of the suspension period the Commission may withdraw recognition if the shortcomings have not been adequately rectified. Further, Art. 10 allows the suspension of recognition by a member state subject to confirmation by the Commission.<sup>1142</sup>

The approach of the reform of the Commission is two folded: Firstly, it reformulate the present dual system<sup>1143</sup> and creates a single list of infringements<sup>1144</sup> and penalties<sup>1145</sup> that are applicable to both the failure to comply with the recognition criteria, obligations and inadequate performance of the recognised organisations. Secondly, the Proposal seeks to replace the penalty of suspension of recognition by rather imposing financial penalties. This is because a system of periodic penalty payments would be more appropriate and compatible in bringing about corrective action. Therefore, the drastic and possible disastrous consequences of withdrawal of recognition on an organisation would be avoided in circumstances where the gradual approach of financial penalties would be fairer.

The envisaged fines of proposed art 12 may be imposed on a recognised organisation which fails to fulfill the criteria set out in Annex I or its obligations under this Directive or whose worsening performance reveals grave shortcomings in its structure, systems, procedures or internal controls<sup>1146</sup> Further, if the recognised organisation has provided incorrect information to the Commission for the purposes of its assessment under Article 16(3)<sup>1147</sup> Further, if the organisation

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<sup>1140</sup> If the organisation does not fulfil the criteria set out in the Annex or fails to meet the safety and pollution prevention performance records in terms of Art. 9 (2), then recognition as referred to in Art.4. will be withdrawn by the Commission in terms of Art 9 (1).

<sup>1141</sup> Art.10(2). If the Commission determines that the safety and pollution prevention performance of the recognised organisation is unsatisfactory but not to the extent that withdrawal of recognition is warranted in terms of the criteria referred to in art. 9(2) which is, firstly, the safety and pollution prevention performance records of the organisation, measured for all the ships they have in class irrespective of the flag of the ship. Secondly, the criteria of the Annex on which the assessment in terms of art.11 is based on, it may require the recognised organisation to take appropriate measures to improve its safety and pollution prevention performance record. Should such appropriate measures not be taken by the recognised organisation, then the Commission may suspend recognition for a period of one year. This must be done in terms of the procedure set out in art.7(2). In terms of Art.10(2).The effects of this suspension are that the recognised organisation is prohibited from issuing or renewing any certificates to ships that fly the flag of member states. However, certificates issued or renewed in the past remain valid.

<sup>1142</sup> Art. 10(1)(a). A member state can suspend recognition, in despite of the criteria stipulated in the Annex, if it considers based on substantial reasons relating to ship safety and environmental protection, that the recognised organisation can no longer carry out the task specified in art. 3. The procedure which must be followed by the member state is set out in art.10(1)(b). the member states decision to suspend must be confirmed by the Commission in terms of art.10(1)(c).

<sup>1143</sup> This is referring to art. 9 (withdrawal of recognition by the Commission)and art. 10 ( suspension of recognition by the Commission) of Directive 94/57/EC

<sup>1144</sup> Art 13.1 of the Proposal

<sup>1145</sup> The Proposal contains the following provisions: Art 11 that requires the undertaking of necessary preventative and remedial action, art. 12 that makes provision for the imposition of fines and penalties, art. 13 that allows for the withdrawal of recognition of the recognised organisation by the Commission and art.15 that concerns the suspension of recognition of the recognised organisation by a member state (art.15.1) and by the Commission (art.15.2) of the Proposal.

<sup>1146</sup> Art 12.1(a) of the Proposal.

<sup>1147</sup> Art 12.1(b) of the Proposal.

fails to implement or incurs unjustified delays, the preventive and remedial action required by the Commission in terms of art 11, the Commission may impose periodic penalty payments until the organisation is in compliance.<sup>1148</sup> These fines and periodic penalty payments shall be imposed only after the organisation concerned has been given the opportunity to submit its observations.

The Commission stressed that financial penalties must be proportionate to the severity of the infringement and the economic capability of the organisation concerned. Therefore the proposed art.12.3. states *inter alia*,

“The fines and periodic penalty payments...shall be dissuasive and proportionate to both the gravity of the case and the economic capacity of the organisation concerned, taking particularly into account the extent to which safety has been compromised...”

The Commission wanted to use a mechanisms that was fair but dissuasive. Two mechanisms were considered, firstly a percentage of turnover and secondly an amount per gross ton of the organisation's registered fleet. The second option was preferred as it was felt that it took better account of the normal revenue structure of these organisations.<sup>1149</sup> Therefore the proposed art 12.3 states,

“The aggregate amount of the fines and periodic penalty payments shall not exceed 10% of the total turnover of the recognised organisation in the preceding business year for the activities falling under the scope of this Directive”

The Committee of the Regions recommended that the fines should be levied by the European Court of Justice using the advice of the Commission rather than directly by the Commission. It was believed that this would be more acceptable to the offending party.<sup>1150</sup>

#### **4.8.4.1.2 Power of inspection**

The right of access of inspectors to ships and to information for the purpose of the evaluation of recognised organisations already exists as a requirement in the Directive 57/94 EC. The proposal gives more flesh to these provisions. Firstly it prohibits confidentiality clauses, that when invoked would restrict an inspectors' access to information that is deemed necessary for the assessment of a recognised organisation.<sup>1151</sup> Secondly, it prohibits recognised organisation from including in their contracts with third parties for the issuance of statutory and class certificates provisions that make issuance conditional to good cooperation between these

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<sup>1148</sup> Art.12 2

<sup>1149</sup> The Commission therefore considers it is sufficient for the legislator to determine the principles of the system and to establish a maximum amount of fine that can be imposed on a recognised organisation committing an infringement. Detailed implementing rules can then be adopted by the Commission with a committee procedure following a more detailed study carried out together with the Member States and with consultation of the recognised organisations.

<sup>1150</sup> Opinion of the Committee of the Regions on the 3rd Maritime Safety Package Official Journal C 229, 22/09/2006 p. 38 at 48 recommendation 5.1

<sup>1151</sup> Proposed art. 17(1).

parties to the extent that inspector's accesses to the ship would be contractually excluded.<sup>1152</sup>

#### 4.8.4.1.3 Legal structure of recognised organisations

The response of many recognised organisations to Directive 54/94 EC was to further develop and sometimes significantly changed their legal structure.<sup>1153</sup> This has resulted in a large number of legal forms including foundations and limited liability companies as well as exclusive forms under certain non-Community legal systems. Therefore to prevent any adverse effects on the implementation of safety and environmental protection measures the Commission has proposed to introduce a broad organisational concept that will take into account any foreseeable relationship of dependence between legal entities conducting, under the same umbrella, activities which fall within the scope of the Proposal. The aim of these measures is to ensure that recognition applies at the highest level which corresponds to that concept. Therefore it is envisaged that both horizontal and vertical company groupings will thereby be sufficiently covered and will be either fully inside or outside of the system.

Therefore art 2 (e) of the Proposal defines an organisation, to mean;

*“a legal entity, its subsidiaries and any other entities under its control, which jointly or separately carry out tasks falling under the scope of this Directive, a Classification Society or other private body carrying out safety assessment work for an administration;”*

#### 4.8.4.1.4 Control system of the recognised organisation

The Commission recognised that there are inherent risks caused by Classification Societies acting in a dual capacity. This accumulation of tasks allows a lack of cross-checks in the control system of the recognised organisation to exist. There are a number of reasons for this development. Firstly, there is no mutual recognition of class rules amongst recognised organisations.<sup>1154</sup> Secondly, the inherent conflict with the nature of the classification process that arises from the fact that Classification Societies are in full control of both the rules of substance and the inspection methods which they apply<sup>1155</sup> Thirdly, that through carrying out the dual function<sup>1156</sup> through out the ships life the Classification Society will issue both statutory certificates and class certificates. Consequently, it is envisaged that there is a high possibility that class certificates will go unchecked, even when international statutory certificates are issued.<sup>1157</sup> Therefore any defects may affect a large number of ships before being detected.

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<sup>1152</sup> Proposed art. 17(2).

<sup>1153</sup> The corporate structure of Classification Societies has been discussed above.

<sup>1154</sup> This was identified to be particularly problematic in respect of marine equipment. The Commission did however acknowledge that there was increasing convergence amongst the main recognised organisation. COM(2005) at 587.

<sup>1155</sup> This is discussed further in Chapter 1.

<sup>1156</sup> Ibid.

<sup>1157</sup> COM(2005) 587.

Two solutions were proposed by the Commission. The first was the introduction of cross-checks. This would require the separation of tasks which has many recognised advantages.<sup>1158</sup> However the disadvantage would be that it could only apply to ships flying the flag of member states. An alternative would be to separate statutory tasks from classification task<sup>1159</sup> was met with fierce resistance by both recognised organisations and member states. An alternative solution proposed is the strengthening of existing control mechanism within an appropriate framework. This would improve the quality and effectiveness of services and inspections for all recognised organisations regardless of flags.<sup>1160</sup> Critics of separation of task preferred greater use being made of vertical audits.

The EESC was concerned with the dual role of Classification Societies. It believes that greater distinction should be made between the statutory functions and the classification functions.<sup>1161</sup> This could be achieved by for example assigning these functions to two different inspectors in the same organisation or to different organisations.<sup>1162</sup> To avoid a conflicts of interest and encourage best practice it is further suggested that that a compendium of good practice for this purpose should be drawn up through negotiations between member states and societies and societies themselves.<sup>1163</sup>

It is submitted that the EU's concern with the dual role of Classification Societies and the strengthening of the control system in terms of the directive, has lead to the private function of classification and the standards by which this is preformed to be influenced. Therefore the Proposal is encroaching on the private sphere. This is another reason why the Proposal and Directive 94/57/EC must be discussed in this study that is primarily concerned with the private functions of Classification Societies.

#### 4.8.4.1.5 Creation of 'joint body'

For purpose of improving the systems for the monitoring of recognised organisation the proposed art. 21 aims to establish a joint body set up by the recognised organisations.<sup>1164</sup> This joint body is to be independent of the recognised organisations. Further, it must have all the necessary resources in order for it carry out its duties effectively.

The body must be able to carry out these tasks in-depth and on a continuous basis, and be in a position to propose both individual and collective measures in order to improve the quality of the recognised organisations' work. These task include the undertaking of; a continuous quality management system

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<sup>1158</sup> for example the conflict that the current system allows to exist and the nature of the classification process and problems resulting from the dual role of Classification Societies would be resolved.

<sup>1159</sup> This proposal was contained in a staff working papers used by the Commission when it approached representatives of member states and the shipping industry in February of 2005.

<sup>1160</sup> The writer suggests that there would similar improvements in the quality and effectiveness of services and inspections, that are preformed in accordance with the private functions of a Classification Society.

<sup>1161</sup> This is discussed above.

<sup>1162</sup> COM(2005) 587 final Official Journal c 318, 23/12/2006 195 at 198 par 4.2.2.

<sup>1163</sup> *Ibid.*

<sup>1164</sup> The Committee of the Regions in its Opinion of the Committee of the Regions on the 3rd Maritime Safety Package Official Journal C 229, 22/09/2006 p. 38 at 47 para. 5.2 and para 5.3 concurred this suggestion.

assessment,<sup>1165</sup> a quality system certification,<sup>1166</sup> the issuing of binding interpretations of internationally recognised quality standards with a particular focus and appreciation of the specific features of the nature and obligations of recognised organisations,<sup>1167</sup> and the adoption of collective and individual recommendations for the improvement of recognised organisation's rules, process and internal control mechanism.<sup>1168</sup>

The Commission viewed this joint body as the mechanism that would facilitate cooperation between the recognised organisations for the following purposes. It would ensure that technical regulations (class rules) are compatible and secondly, that these regulations and international conventions are capable of being interpreted and applied in a uniform manner. It was held that this needed to be achieved in order for the system to work because it will provide a common basis for evaluation and instruments which will enable the necessary corrective measures to be taken with the objective of achieving a uniform level of safety within the Community. Further compatibility between the technical regulations would lead to the mutual recognition of class certificates.<sup>1169</sup> Further, this joint body thought to be also necessary in order to create incentives for the Member States to play a more active role in the development of rules and regulations (currently optional)<sup>1170</sup> and in technical cooperation (compatibility between regulations, interpretation of international conventions).<sup>1171</sup>

The concern with the regulation of the private function of classification is patently clear by the creation of this joint body. The writer suggests that the effect of this Joint Body on IACS is going to be interesting. Indeed there is going to be a duplication of activities because both these bodies appear to have the same objectives. Further, the dominant factions of both will be comprised of the same participants, namely the large Classification Societies who have a monopoly in the market. The envisaged joint body is an indication that the EU has not seen the efforts of IACS as being sufficient to foster the necessary degree of uniformity in standard of the services of Classification Societies.

#### **4.9 The articulation of minimum standards of quality for Classification Societies**

The creation of a standard, be it for the mere purposes of recognition or a level by which a society is expected to operate presupposes that if the standard is not complied with that a sanction, be it the withdrawal of recognition or the imposition of liability, will ensue. The articulation of minimum a standard is a legal yardstick by which a Society's conduct can be adjudicated and gives content to the duty of care.<sup>1172</sup> A direct benefit of creating a standard, which is readily evident in practice, is that uniform application would prevent the practice of 'class

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<sup>1165</sup> Proposed art. 21 (1)a.

<sup>1166</sup> Proposed art. 21 (1)b.

<sup>1167</sup> Proposed art. 21 (1)c.

<sup>1168</sup> Proposed art. 21 (1)d.

<sup>1169</sup> art 20 (1)

<sup>1170</sup> Section B: Specific Minimum Criteria para9 of Annex.

<sup>1171</sup>

<sup>1172</sup> Mandaraka-Sheppard *op cit*

hopping.<sup>1173</sup> This would reduce the possibility of a ship-owner gaining economic advantage from this practice.<sup>1174</sup> The writer suggests that the articulation of minimum standards of quality for Classification Societies by international organisations such as the IMO, the CMI and the European Union is supportive of the recognition of imposing an additional duty to have adequate rules and standards on societies.<sup>1175</sup> It is in this context that a brief comparative analysis of the various international bodies formulated standards of quality is undertaken. Directive 94/57 EC

The criteria that an organisation must comply with in order to be recognised is set out in section A and the Specific Minimum Criteria in section B of the Annex to the Directive 94/57 EC. When perusing this annexure it becomes evident that these provisions relating to articulation of minimum standards of Classification Society are far more extensive and detailed than those contained in the Principle of Conduct. All matters that are dealt with in the Principle of Conduct are canvassed more thoroughly in the Directive 94/57 EC. These criteria are given merit because only recognised organisations<sup>1176</sup> may be entrusted with the delegated functions by the member state.<sup>1177</sup>

The Proposal places more focus on qualitative criteria rather than quantitative criteria. Therefore recognition (limited) will not be dependent on size but rather solely on the quality of the organisations performance in terms of safety and environmental protection. The Proposal further intends to simplify the recognition criteria by making it more legible and user friendly by filling in lacunas and amending those provision that have caused difficulty when applied in practice.<sup>1178 1179</sup> Further it was held that the Community should be able to ensure that recognised organisations apply the same strict standards to ships flying the flag of a third country as to ships flying the flags of the member states because both frequent the EU waters. Therefore the recognition criteria of the Proposal make no distinction according to flag. This is to ensure a uniform standard among the recognised organisations. Additional requirements of legal personality<sup>1180</sup> and certification of the accounts of recognised organisations have been set by the Proposal. This was required for two reasons, firstly to ensure the financial independence of the recognised organisations and, secondly to assist in the implementation and reform of the envisaged system of penalties.

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<sup>1173</sup> As discussed above.

<sup>1174</sup> Miller *op cit* n 125 at 77.

<sup>1175</sup> See the discussion of arguments of imposing additional duties on Classification Societies in chapter 2.

<sup>1176</sup> Art. 2 (f) defines 'recognised organisation' to mean an organisation recognised in conformity with Art. 4. Art.

<sup>1177</sup> Art. 3(2).

<sup>1178</sup> Specific attention has been given to the following aspects. Clear confirmation of the number of inspectors required in proportion to the fleet being classed has been given. However it does not specify a predetermined threshold before granting of recognition. Further the use of non-dedicated inspectors is severely restricted to only exceptional circumstances. These would be when world wide coverage is sought, then inspectors from other recognised organisations may be used.

<sup>1179</sup> The Commission is of the view that the unstable employment situation of these inspectors means that the independence and quality of their work is not sufficiently guaranteed despite the basic and further training given by the recognised organisations.

<sup>1180</sup> Art 2.e of the Proposal defines an 'organisation' as a legal entity. Section A.1: General Minimum Criteria expressly states that a recognised organisation must have legal personality.

#### 4.10 Obligations of ‘Recognised Organisations’

Once an organisation has met the minimum standards, a number of obligations are imposed on it as a recognised organisation. In terms of art. 15(1) a<sup>1181</sup> recognised organisation is obliged to consult with each other periodically with a view to maintain equivalence in their technical standards and the implementation thereof.<sup>1182</sup> Further it must provide the Commission with periodic reports of fundamental progress in standards.<sup>1183</sup> Art 15(2) obliges the recognised organisation to cooperate with port state control administrations when a ship of their class is concerned.<sup>1184</sup>

Particular duties are imposed when class is transferred. This is an attempt to prevent “class hopping.”<sup>1185</sup> The recognised organisation is obliged to provide all relevant information to the administration<sup>1186</sup> that relates to their classed fleet, changes, transfers, suspension and withdrawals of class irrespective of the flag of the vessel.<sup>1187</sup> Further, the recognised organisation must undertake to not issue certificate to a ship which has been declassified or is changing class for safety reasons before giving the competent administration of the flag state the opportunity to give its opinion as to whether a full inspection is necessary.<sup>1188</sup>

In cases of transfer of class art. 15 (5)<sup>1189</sup> obliges the ‘losing organisation’ to inform the ‘gaining organisation’ of all overdue surveys and recommendations, conditions of class, operating conditions or restrictions issued against the relevant ship. Only after these requirements have been met is the ‘gaining organisation’ permitted to issue the relevant certificate. The dates and place at which the requirements are to be met must be made known by the ‘gaining organisation’ Further, upon transfer the ‘losing organisation’ must hand over a complete history

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<sup>1181</sup> The equivalent provision in the Proposal is art. 20 (1) which reads, “*The recognised organisations shall consult with each other periodically with a view to maintaining equivalence of their technical standards rules and regulations and the implementation thereof. They shall cooperate with each other with a view to achieving consistent interpretation of the international conventions, without prejudice to the powers of the flag States. Recognised organisations shall agree on the conditions under which they will mutually recognise their respective class certificates based on equivalent standards, taking particularly into account marine equipment bearing the wheel mark in accordance with Directive 96/98/EC[12]. i in line with the provisions of IMO Resolution A.847(20) on guidelines to assist flag States in the implementation of IMO instruments. They shall provide the Commission with periodic reports on fundamental progress in standards and mutual recognition .*”

<sup>1182</sup> This must be done in accordance with the provisions of the IMO resolution A.847 (20) Guidelines to Assist Flag States in the Implementation of IMO Instruments.

<sup>1183</sup> Art 20 of The Proposal places an even greater burden on recognised organised when transferring of class. The recognised organisations shall establish and implement appropriate common requirements concerning cases of transfer of class where special precautions are necessary. Those cases shall as a minimum include the transfer of class of ships of fifteen years of age or over and the transfer from a non-recognised organisation to a recognised organisation.

<sup>1184</sup> This is repeated in art. 20 (2).of the Proposal

<sup>1185</sup> This is discussed above.

<sup>1186</sup> This information must also be communicated to the Sirenac information system for port State control inspections.

<sup>1187</sup> Art. 15 (3). The equivalent provision in the Proposal is art. 20 (3). Further, this information must be published on the website of the recognised organisation. However this is only if the recognised organisation actually has a website.

<sup>1188</sup> Art. 15 (4). The equivalent provision in the Proposal is art. 20 (4) The writer is unsure of how the competency of an administration of a flag state is to be assessed for purposes of this provision. Nevertheless if an administration is deemed to be ‘incompetent’ it is still uncertain whether this obligation would have to be complied with.

<sup>1189</sup> The equivalent provision in the Proposal is art. 20 (5).

file of the vessel.<sup>1190</sup> Further, in accordance with the emphasis of continuous monitoring, the recognised organised organisation is obliged to make available the results of its quality system management review to the Committee<sup>1191</sup> on an annual basis.<sup>1192</sup>

#### 4.11 The relationship between the Flag State & Classification Societies

In article 6 of Directive 57/94 reference is made to a “working relationship”. The purpose of this relationship is to render recognised organisation a servant of the delegating state. Therefore it would be entitled to the protection and defenses afforded by law to employees of the state.<sup>1193</sup> The law of towage also determines the relationship between tow and tug to be one of employment, therefore this is not a foreign concept to maritime law. However it is submitted that it is a somewhat cumbersome approach when applied to recognised organizations. Firstly, there are a number of requirements that would normally need to be present before the employment relationship would come into existence, which are not being considered for the purposes of the Directive. Secondly the employment relationship has far reaching consequences. Finally there are more appropriate and convenient legal concepts such as agency and mandate that could govern this relationship which also utilize the Doctrine of vicarious liability.<sup>1194</sup> For example clause two of the Model Contractual Clauses formulated by the CMI reads,

“In carrying out the duties and responsibilities specified in Annex I, whether pursuant to applicable international agreements, conventions, national legislation, or this agreement, [Classification Society] *acts solely as the agent of* [Administrator], under whose authority or upon whose behalf it performs such work”

Therefore the doctrine of agency is clearly embedded in The Model Contractual Clauses which requires Clause two to be included in the authorising agreements between the Societies and flag states. It is submitted that this is a more appropriate legal principle. This convoluted relationship is set to continue to be used in the Proposal.

#### 4.12 The liability regime of Directive 94/57 /EC

The scope of Directive 94/57 EC is limited. It only governs the relationship between member states of the European Union that are flag states which delegate their statutory functions to recognised organizations. Even though the distinction between privately and publicly owned organisations has not been expressly stated it has been suggested that due to the emphasis on independence in the Directive, that it would only be applicable to recognised organisations that are private. Further the Directive does not require membership of (IACS) for the application of the respective liability regimes.

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<sup>1190</sup> Art. 15 (5).

<sup>1191</sup> As set up under Art. 7.

<sup>1192</sup> Art 11 (4).

<sup>1193</sup> Puilido Begines *op cit* n 11 at 515.

<sup>1194</sup> *Ibid.*

Article 6 of Directive 94/57/EC sets out a liability regime in which the state can be compensated by the recognised organisation in the event that the former is held liable as a result of the fault of the latter either judicially or arbitration.<sup>1195</sup> The effect thereof is the “channeling of liability” for faults in the performance of the delegated public duties<sup>1196</sup>. Article 6 of Directive 57/94/EC is retained in article 8 of the Proposal.

Article 6.2 (b) requires the following provisions relating to financial liability to be included in the instruments governing the working relationship between national administrations and recognised organisations:

*(i) if liability arising out of any incident is finally and definitely imposed on the administration by a Court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property or personal injury or death, which is proved in that Court of law to have been caused by a wilful act or omission or gross negligence of the recognised organisation, its bodies, employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said loss, damage, injury or death is, as decided by that Court, caused by the recognised organisation;*

*(ii) if liability arising out of any incident is finally and definitely imposed on the administration by a Court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for personal injury or death, which is proved in that Court of law to have been caused by any negligent or reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said personal injury or death is, as decided by that Court, caused by the recognised organisation; the Member States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 4 million;*

*(iii) if liability arising out of any incident is finally and definitely imposed on the administration by a Court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property, which is proved in that Court of law to have been caused by any negligent or reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation, to the extent that the said loss or damage is, as decided by that Court, caused by the recognised organisation; the Member*

<sup>1195</sup> COM (2006) 588 final on the control of recognised organisations by the Commission and the impact of the civil liability in accordance with Directive 94/57/EC at 12.

<sup>1196</sup> Puilido Begines *op cit* n 19 at 522.

*States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 2 million;*

The following requirements for the imposition of liability are set by art. 6(2) b. *Firstly*; there must be an arbitral or judicial process that adjudicates upon the matter in order to determine an award for damages. The result of which must be a non-appealable ruling that is enforceable against the national administration of the state. *Secondly*; the damage must have been caused by the conduct of the recognised organisation for which the national administration of the state was vicariously liable for. Therefore the issue of the recognised organization's liability must be proven. The extent of the recognised organization's liability is limited to what the Court adjudicated it to be. Further, in order for the state to claim against the liable recognised organisation it need not have made actual payment to the claimant, the existence of the obligation to compensate the claimant is sufficient.<sup>1197</sup>

The introduction of a liability regime for recognised organisations was one of the main objectives of the amendments contained in Directive 105/2001. Most participants in the debate of the imposition of liability on Classification Societies have readily acknowledged the need for the limitation of liability of Classification Societies should liability indeed be imposed.<sup>1198</sup> This was acknowledged by the so-called Gothenburg Group which comprised of some of the EU flag administrations and some recognised organisations whose work formed the basis of the Commission's proposal<sup>1199</sup>.

#### **4.12.1 The mechanism for liability of Directive 94/57/EC**

The mechanism of the liability regime of Directive 94/57/EC is convoluted. It requires the 'working-relationship'<sup>1200</sup> to be contained in a "*formalised written and non-discriminatory agreement or equivalent legal arrangements setting out the specific duties and functions assumed by the organisation.*" This authorising agreement must at least include, *inter alia*, provisions concerning financial liability.<sup>1201</sup> Therefore, the state's right to indemnification is not established by the Directive. Instead, the state is duty bound to obtain the guarantee of indemnification through the terms of the authorising agreement. Further these contractual provisions relate not directly to liability but are rather concerned with the financial liability to the same effect.<sup>1202</sup>

Therefore the Directive regulates the liabilities between these parties by regulating the provisions of their contract. The mechanism used is inefficient. This renders the Directive unable to regulate the relationship between the national administration of the state and the Classification Society directly. Further, it leaves the issue of liability to be dependent on domestic law if the authorising agreement

<sup>1197</sup> Puilido Begines *op cit* n 19 at 522.

<sup>1198</sup> The need for a limitation was recognised in the CMI initiative. Further the absence of any limitations to the possible liability of Classification Societies, especially when a comparison was drawn between the position of a ship owner, has been used by the Courts as a factor that mitigated against the imposition of liability on societies.

<sup>1199</sup> COM(2000) 142 final.

<sup>1200</sup> This is discussed further above.

<sup>1201</sup> Art. 6 (2) b.

<sup>1202</sup> Puilido Begines *op cit* n 19 at 522.

contains none of the prescribed terms dealing with financial liability of the recognised organisation.<sup>1203</sup>

#### 4.12.2 Grounds for liability of Directive 94/57/EC

The Directive makes incorrect use of language when referring to different degrees of fault. In particular the term “reckless act” is ambiguously and improperly used. Either, both ordinary negligent conduct and minor fault of the Society is excluded or only the latter.<sup>1204</sup> Through selective interpretation either alternative may be argued.

The first scenario arises when a comparison is made between conduct that amounts to ‘gross negligence’<sup>1205</sup> and a ‘reckless act.’<sup>1206</sup> In common-law jurisdictions ‘gross negligence’ denotes the same degree of fault as ‘reckless.’ Should the distinction not be acknowledged when interpreting art. 6(2)b then one can argue that ordinary negligence may be excluded from the Directive<sup>1207</sup>. However this would be an oddity due to the unqualified usage of the word “negligent” as an alternative for a “reckless act” in the same provision. Further, the IMO Model Agreement for the Authorization of Recognised Organisations Acting on Behalf of the Administration<sup>1208</sup> served as an inspiration for the Directive. Therefore the writer concurs that ordinary negligence is not excluded from the terms of an authorising agreement concluded in terms of the Directive.<sup>1209</sup>

An alternative suggestion is that minor faults of Societies are exempt from liability because ‘reckless’ is used as a synonym for ‘negligence’ in art 6(2) b. But this goes against the principles of interpretation which every word in a legislative text must be attributed a meaning. Strict adherence would mean that the term ‘reckless’ may be interpreted to draw a distinction at the lower end of the fault scale, between ordinary negligence and fault attributed to minor mistakes. Therefore Societies would also be liable for minor mistakes. However, it has been suggested that this is merely an academic point and that the distinction was not intended.<sup>1210</sup> It has been suggested that this ambiguity was simply the result of inept drafting, the writer concurs.<sup>1211</sup>

The Commission in the working document has warned that “[o]ne must always bear in mind that every error counts and might one day have disastrous consequences.”<sup>1212</sup> This statement is reflective of the objective of maritime safety and environmental protection of the EU. Therefore an interpretation which brings minor faults within the ambit of art. 6 may be more favourable and in sink with the intention of the EU parliament. Further, since there is no case law dealing with the application of the mechanism in art 6.(2) (b)<sup>1213</sup> This interpretation remains a

<sup>1203</sup> *Ibid.*

<sup>1204</sup> Puilido Begines *op cit* n 19 at 524.

<sup>1205</sup> As used in Art. 6(2)(b)i

<sup>1206</sup> as used in Art. 6(2)(b)ii

<sup>1207</sup> Puilido Begines *op cit* at 525.

<sup>1208</sup> As set out in circular MSC/Circ.788-MEPC/Circ.325

<sup>1209</sup> Puilido Begines *op cit* n 19 at 527.

<sup>1210</sup> *Ibid.*

<sup>1211</sup> *Ibid.*

<sup>1212</sup> COM (2006) 588 final pg 11 at para 3.5

<sup>1213</sup> COM (2006) 588 final pg 13 at para 4.1.3

feasible alternative. The ambiguities contained in art. 6 should be resolved. Unfortunately they have not enjoyed the attention of the EU legislature in The Proposal to date.<sup>1214</sup>

#### 4.12.3 Scope of liability of Directive 94/57/EC

Originally, the Commission, with the assistance of the Gothenburg group, had placed limitation on liability of recognised organisations in respect of losses caused by negligent or reckless conduct of recognised organisation. The maximum amounts that could be obtained by a flag administration were 5 million Euros for personal injury and death and 2.5 million Euros for damages to property.<sup>1215</sup> This proposal was changed in the co-decision procedure, leading to conciliation between the Council and the European Parliament.<sup>1216</sup> The respective amounts were changed and the maximum limits ('ceiling') was changed to minimums ('floors').

As it stands, when a recognised organisation is found to be grossly negligent<sup>1217</sup> then its liability is unlimited. Therefore the administration is entitled to recover in full from the recognised organisation.<sup>1218</sup> In negligence cases, for personal injury or death and damage<sup>1219</sup> to property<sup>1220</sup> the administration can recover up to the maximum as agreed between the flag administration and the recognised organisation. However, this maximum can not be lower than 4 and 2 million € respectively. Therefore the flag administration's right of recovery is subject to the 'cap' of the agreed limitations and the 'floor' of the amounts stipulated in the Directive. The flag administration would have to cover any amounts awarded by the Court that is in excess of this limitation.<sup>1221</sup>

The default position of the liability regime of article 6 is to impose unlimited liability in respect of negligence cases. However, this may be altered through negotiations between the parties. They can agree on any limitation on condition that it is above the stipulated amounts.<sup>1222</sup> If consensus cannot be reached then the flag administrations, the statutory duties cannot be delegated to that recognised organisation. In any case it is permissible for these duties to be performed by the flag state.<sup>1223 1224</sup> The level of liability has been criticised by Classification Societies as the current situation fosters uncertainties.<sup>1225</sup>

#### 4.13 Assessment of Directive 94/57/ EC

Directive 94/57/EC was criticised for being unnecessarily complex which lead to misunderstandings and difficulty in construction. This may have resulted in

<sup>1214</sup> Art 6 of Directive 57/94/EC remains fundamentally unchanged in the Proposal.

<sup>1215</sup> COM (2006) 588 final. Annex: 'Preparatory study regarding the liability regime provided for in article 6.2(b) of Directive 94/57/EC, as amended.' Pg 16. para 2

<sup>1216</sup> *Ibid.*

<sup>1217</sup> Art 6.(2)(b)(i).

<sup>1218</sup> *Op cit* n 12 15 at 17 para2.4.

<sup>1219</sup> Art 6.(2)(b)(ii).

<sup>1220</sup> Art 6.(2)(b)(iii).

<sup>1221</sup> *Op cit* n 1215 at 17 para2.5.

<sup>1222</sup> *Ibid* at para 2.6.

<sup>1223</sup> *Ibid* at para 2.7.

<sup>1224</sup> Art. 14.2

<sup>1225</sup> Puilido Begines *op cit* n 19 at 532.

differences at domestic levels of member states.<sup>1226</sup> The Proposal appears to rectify this. However the Proposal has not done away with terminology and the different degrees of fault that was criticized for being ambiguous and unnecessary.<sup>1227</sup> For example reference is still made to ‘working relationship’. Further criticism was levied against Directive 94/57/EC as it was found to be too flexible which does not encourage the harmonisation of national laws of member states. From the discussion above it appears that this will be rectified in the Proposal. However the best way to view the deficiencies of Directive 94/57/ EC is to understand and appreciate the merits in the new innovations contained in the Proposal in particular, the creation of the joint body and the system of financial penalties.

#### **4.14 Examination of the economic impact of the liability regime of Directive 94/57/EC by the Commission**

The Commission examined the economic impact of the new liability regime in accordance with art. 6(5).<sup>1228</sup> Its findings are contained in the report titled the, ‘Commission Working Document on the control of recognised organisations by the Commission and on the impact of civil liability regime in accordance with Directive 94/57/EC -COM(2006) 588 final.’ This report also gave an account of the control of the recognised organisations and the progress made in respect of maritime safety and pollution prevention. In the assessment the Commission noted there to be a broad degree of compliance with Directive 94/57/EC among recognised organisations with some exceptions. The Commission acknowledged the performance of the twelve recognised organisations as being ‘spectacular.’<sup>1229</sup>  
<sup>1230</sup>The Commission concluded that the problem of achieving a satisfactory level of risk is not to be found in the systems or in the current professional standards of recognised organisations. Rather it exists in the control environment of these organisations as whole.<sup>1231</sup>

The Commissions finding on the economic impact of the liability regime of Directive 94/57/EC<sup>1232</sup> is important because it is one of the few occasions which may evidence policy considerations<sup>1233</sup> that deterred the Courts from imposing liability on Classification Societies.<sup>1234</sup>

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<sup>1226</sup> *Ibid.*

<sup>1227</sup> *Ibid.*

<sup>1228</sup> It has been suggested that the examination required in terms of art. 6(5) is an indication that the drafters were insecure about the final result of Directive 94/57/EC. These insecurities may be due to the hasty manner and process in which the Directive 94/57/EC came into operation. Puilido Begines, J.L. “The EU on Classification Societies: scope and liability issues” (2005) 36 J.Mar.L. & Com. 487 at 542.

<sup>1229</sup> COM(2006) 588 final para 3.3.

<sup>1230</sup> The measurements was made in terms of the yearly rate of class-related detentions in the Paris MoU, in the Tokyo MoU and by the US Coast Guard. A more sophisticated system to measure performance is currently in preparation. The new system will include both yearly and multi-annual detention rates. Further other factors such as casualties and flag composition of the respective fleets with be taken into account. COM(2006) 588 final para 3.3.

<sup>1231</sup> COM(2006) 588 final para 3.5.

<sup>1232</sup> The nature and scope of the liability regime of Directive 94/57/EC has been discussed above.

<sup>1233</sup> The policy considerations are discussed in chapter two.

<sup>1234</sup> See Chapters 2 and 3.

#### 4.14.1 Current liability levels of member Flag State

The study<sup>1235</sup> indicated the following trends concerning the implementation of the liability by the member state. Firstly, it has become generally accepted that for gross negligent conduct in terms of art 6.2.(b)(i) unlimited liability is acceptable.<sup>1236</sup> Secondly, that the minimum liability levels set in art. 6.2 (b)(ii) and (iii) have generally become maximum liability levels. This is evident by the majority of member states having set limits at<sup>1237</sup> or slightly higher<sup>1238</sup> than the respective amounts stipulated in art. 6.2 (b)(ii) and (iii).<sup>1239</sup> However other member states have negotiated unlimited liability.<sup>1240</sup>

This study further suggests that the reason why some member states have negotiated unlimited liability for negligence is because in these jurisdictions no protection is afforded to the national administrations against actions by their citizens. In fact many of their Constitutions guarantees a citizens right to fair trial in which damages of this nature can be claimed.<sup>1241</sup> Therefore the recognised organisations would have to determine if there was any national legislation which would allow them to avoid the imposition of unlimited liability. The study could not find any such national legislation, with the exception of Germany.<sup>1242</sup>

#### 4.14.2 Competition

Another concern of recognised organisations is that a barrier to the markets has been created because some recognised organisations have accepted unlimited liability in respect of the cases of negligence in their authorising agreements with member states. However the Commission pointed out that these agreements are concluded between parties of equal bargaining strength and by way of negotiation and that no such discrimination has been evidenced in practice since authorising agreements have been concluded with several recognised organisations.<sup>1243</sup>

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<sup>1235</sup> This is reference to the report from an independent group of researchers of the Institute of Maritime Law of the University of Southampton in respect of a "Study on evaluating the economic impact of the liability regime on parties concerned and consequences for the financial equilibrium of Recognised organisations-Directive 94/57/EC(as amended by Directive 2001/105/EC)

<sup>1236</sup> COM(2006) 588 final para 4.1.1.

<sup>1237</sup> Member States who have done this include: Cyprus, Hungary, Latvia, Lithuania, Poland, Slovenia, Sweden, United Kingdom. COM (2006) 588 final Annex: pg 18 para 3.1.

<sup>1238</sup> Member states who set slightly higher limits of 5/ 2.5 million euros respectively include: Belgium, Denmark, Greece, Malta, Portugal. Norway also has the same limits. Finland, Ireland and the Netherlands have limits of liability of 5/ 2.5 million US dollars. COM (2006) 588 final. Annex: pg 18 para 3.1.

<sup>1239</sup> COM(2006) 588 final para 4.1.2.

<sup>1240</sup> Member States who have done this include: France, Germany, Italy, Luxembourg and Spain ( There is a possibility that the Polish model agreement may also establish unlimited liability. COM (2006) 588 final. Annex: pg 18 para 3.1.

<sup>1241</sup> The study cited section 34 GG of the German Constitution and Art 28 of the Italian Constitution as examples.

<sup>1242</sup> This finding was inconclusive. However it was argued that there may be a constitutional provision which limits the administrations right of recourse against an employee to only those circumstances when an employee's conduct amounts to gross negligence. This would then exclude recovery when the employee is simply negligence. No case has been decided on this issue. However the study noted that all German authorisation agreements have expressly stipulated that the recognised organisation does not qualify as a public employee. COM (2006) 588 final. Annex: 24

<sup>1243</sup> COM(2006) 588 final para 4.2.1

The next concern of recognised organisations was that Directive 94/57/EC may create new rights of recovery.<sup>1244</sup> The organisations alleged that a third party is vested with a statutory right for recovery of economic loss from the relevant national administration. Thereby these parties have an indirect claim against recognised organisations due to the indemnifying provisions of art 6.2 (b).<sup>1245</sup> The writer believes that if ever the saying of, “clutching at straws” were to be used in a legal context this would be it. The Commission has found that there is absolutely no basis for this submission because Directive 94/57/EC does not modify the liability regime of national administrations in anyway.<sup>1246</sup> Nevertheless, recognised organisations reported increasing litigation since the advent of art. 6. Therefore they have suggested that this should be specifically stipulated in the Directive.<sup>1247</sup> However the Commission is concerned about the adverse effects that this may have on an administrations capacity to exercise its right of recourse.<sup>1248</sup> Further recognised organisations suggested that the liability in terms of art 6.2(b)(ii) and (iii) should be capped with limits and that this would be an incentive for them to accept higher limits of liability.<sup>1249</sup>

The Commission concluded that there is no reason to modify the *status quo* in the absence of evidence of the financial stability of recognised organisations. Further it saw no need to insert any new clauses as discussed above. Finally, the Commission noted that it may be too early to draw any firm conclusions about the effects of the liability regime of the Directive 57/94 because it has only been in operation since 22 July 2003.<sup>1250</sup> The writer concurs.

#### 4.15 Conclusion

The approach of the EU in devising the Erika packages was certainly ambitious. But it was an emotional response to two catastrophic maritime disasters. Some commentators from the onset identified this as a weakness of the initiative. Such a response is usually not subject to extensive consultation, research and consideration. In the end the outcome is just too abrasive in nature. This seems to have been the case in particular, in respect of the Erika III package. As it stands, the Erika III package is years behind schedule<sup>1251</sup> Indeed as the incidents of the Erika and the Prestige fades from the memories of those who were so emotional in their response there is a real threat that the Erika III package may go nowhere.

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<sup>1244</sup> The particular part of art 6 that raised concern was, “...if liability arising out of any incident is finally and definitely imposed on the administration by a Court of law...the administration shall be entitled to financial compensation from the recognised organisation...”.

<sup>1245</sup> COM(2006) 588 final para 4.2.2.

<sup>1246</sup> The liability regime of national regimes is discussed in chapter 4.

<sup>1247</sup> Some member states have been persuaded to include these clauses in their authorisation agreement. (E.g. Denmark, Latvia and the Netherlands)

<sup>1248</sup> COM(2006) 588 final para 4.2.2.

<sup>1249</sup> COM(2006) 588 final para 4.2.3.

<sup>1250</sup> Further the provisions have not been utilized in practice.

<sup>1251</sup> Unknown author. “D-day looms for maritime safety law, warns Le Bret” Lloyds List published 26 March 2008.

## CHAPTER 5: Rational for the formation of a liability regime for Classification Societies

### 5.1 Introduction

The ‘class crisis’ has resulted in the loss of public confidence in the service of Classification Societies. Indeed the public has begun to view the system of self governance within the maritime industry, particularly in relation to Classification Societies as being insufficient to protect its interests in safe maritime transport and environmental protection. In order for societies to remain a viable alternative to other regulatory systems, its institutional failures must be addressed within a reasonable time.<sup>1252</sup> Therefore, future initiatives like that undertaken by the CMI must not fail due to lack of consensus.

The challenge of formulating minimum standards of quality and adequate monitoring of Classification Societies services must be identified as a matter of urgency in order to ensure maritime transport safety<sup>1253</sup>. It has been suggested that this challenge is more capable of being undertaken directly when a Classification Society acts under delegated authority of a flag state. Besides private contracting between the Classification Society and ship-owners, the only other way minimum standards of quality could be directly applied and monitored in the private arena would be through efforts of self-regulation of Classification Societies such as those undertaken by IACS. Some argue that the allocation of risk in respect to the private function should come from commercial participants in the market as opposed to state intervention in these private markets.<sup>1254</sup> Others argue that societies would be better monitored through initiative of port states.<sup>1255</sup> The writer concurs with the later view but the fundamental question remains; is the private function of classification acceptable to ensure ship safety? This must be answered by first initially determining whether the private function and the public function should actually be governed by a single as opposed to different rules of law.<sup>1256</sup> This question deserves global attention and must be answered on a global basis.<sup>1257</sup>

### 5.2 Is there general consensus for imposing liability?

This question can arguably be answered in the negative. Common and civil law jurisdictions continue to approach the question of whether liability should be imposed on Classification Societies differently. Further, an answer in the negative can be drawn from the various proposals contained in the Erika III package, the silence of the IMO and the failure of the CMI initiative. The focus of the EU and the IMO seems to be restricted to the regulation of the liability regime of only recognised organizations acting under delegated authority of flag states. The silence in respect of imposing liability of the Classification Societies for the performance of its private functions is deafening. Due to these recent developments it is not obvious that the international community is not content with the current channeling of liability towards ship-owners in respect of that function. Therefore, the question of

<sup>1252</sup> Furger *op cit* n 1 at 462.

<sup>1253</sup> Puilido Begines *op cit* n 19 at 494.

<sup>1254</sup> Kroger *op cit* n 6 at 189..

<sup>1255</sup> Puilido Begines *op cit* at 494.

<sup>1256</sup> Ibid.

<sup>1257</sup> Honka *op cit* n 77 at 6.

imposing liability on Classification Societies in respect of the performance of their private function is by no means settled. The flip side of the coin is that the IMO's and EU's efforts at establishing liability regimes for recognised organizations is indicative of a general consensus and trend in imposing liability in respect of the performance of statutory functions. The optimist may see this later initiative as having a possible spill over effect to the discussion of liability in respect of the private function. Nevertheless there are valid and rational arguments that favour the imposition of liability on classifications societies.<sup>1258</sup>

### 5.3 Rational for limitation of liability

The principle argument for not imposing a limit on a Classification Society's liability is simple and yet decisive; the burden of unlimited liability would ensure safer maritime transport and greater environmental protection. Some supporters in favour of imposing unlimited liability on Classification Societies also argue that ship-owners limited liability afforded in terms of , *inter alia*, the LLMC and the Hague Visby Rules should be removed. This is because the rational for this limitation has deceased in modern times.<sup>1259</sup> The issue of limitation of ship-owners liability is beyond the scope of this work. Suffice to say that the writer deems the protection afforded to ship-owners to be necessary.

Classification society's arguments for the limitation of liability are predominantly those economic-policy factors discussed in chapter 3 .Societies bellow concerns that range from financial collapse, substantial increase in premiums, the risk of uninsurability and hefty fee increments. However many of these allegations are not supported by evidence.<sup>1260</sup> But there are legitimate concerns that Classification Societies could not bear the burden of the full responsibility for their fault.<sup>1261</sup> Their services expose them to high risks. This is due to *inter alia*, the high value of the object (the vessel) to which the services relate and the magnitude of damages caused by oil pollution accidents.<sup>1262</sup> Further, the shear workload of societies which include hundreds of surveys and inspections to be preformed on an annual basis and the number of third parties that rely on certificates issued multiplies the exposure to risk.<sup>1263</sup> Against this potential exposure, Classification Societies charge fees based on the services performed and not on the value of the assets surveyed or the tonnage.<sup>1264</sup> Within these commercial realities, one must take cognisance that unlimited liability does not guarantee full compensation. Insolvency of a Classification Society can be detrimental to a victims claim.

All these arguments against the imposition of liability are, at the root, dependent on whether a Classification Society can insure an unlimited risk of exposure.<sup>1265</sup> At present there is no insurance company that offers cover to the

<sup>1258</sup> This is discussed in Chapter 2 and Chapter 3.

<sup>1259</sup> Beck *op cit* n 102 at 270.

<sup>1260</sup> The Report of the Commission in terms of Art. 6.5 of Directive 94/57/EC has found that the liability regime of Art.6 has not resulted in the financial instability of recognised organisations.

<sup>1261</sup> Puidido Begines *op cit* n 19 at 540.

<sup>1262</sup> Examples of this potential liability can be seen from the *Erika* and *Prestige* incidents.

<sup>1263</sup> Skou *op cit* n 994 at 182.

<sup>1264</sup> *Ibid* at 181.

<sup>1265</sup> Lagoni *op cit* n 93 at 305.

extent of unlimited liability for oil pollution.<sup>1266</sup> When confronted with this issue the Commission of the EU concluded that it was “obvious that insurance cover must always have a limit. Moreover insurance cover should be proportionate to the actual risks incurred.”<sup>1267</sup> Further, due to the different standards and number of Classification Societies, it is highly unlikely that societies would reach consensus, pull their resources together and accept to share the risk of exposure amongst themselves in a structure similar to that of P&I Clubs.<sup>1268</sup> In any case, even the reinsurance that a P&I based structure would require would be limited.<sup>1269</sup>

Classification Societies further argue that unlimited liability will result in substantial increase in the cost of classification services because of the ‘extra layer’ of insurance created thereby. The extra costs would no doubt be passed onto ship-owners. Presumably, the ship-owner will follow suit and pass these costs on and members of the public will who would bear the ultimate burden of increased transportation costs. The writer submits that the public has a greater interest in a safer maritime transport system because lives of seaman, marine life and the protection of the environment is at stake. This is a far greater concern than higher transport costs. Put simply, current transport costs are too low! If premiums for societies insurance cover need to be increased in order to ensure the sustainability of an effective maritime classification industry then so be it.<sup>1270</sup>

It is worth mentioning that the only evidence of the repercussion of imposing unlimited liability on the insurability of Societies is the classification industry’s response to the EU Directive 94/57/EC. The Commission found nothing to indicate that the financial stability of recognised organizations (Classification Societies) had been adversely affected by the introduction of unlimited liability in terms of art. 6.2 (b).<sup>1271</sup> Further the Commission noted that none of the recognised organisations had actually increased their insurance coverage in response to the introduction of the liability of Directive 57/94/EC despite the fact that premiums increased three-fold as insurers and re-insurers re-evaluated the risks involved.<sup>1272</sup> However, the Commission conceded that the current insurance coverage was sufficient.<sup>1273</sup> It is submitted that the findings of the Commission are significant and should not be overlooked on account of the limited scope of Directive 57/94/EC and subsequent amendments. From the Commission’s observations it is clear that the adverse effects of unlimited liability on the insurability of Classification Societies risk have been exaggerated.

The importance and influence of classification services must not be undermined. Societies do not merely render an administrative service in which a technical opinion is given.<sup>1274</sup> These entities do more; they give guidance that is

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<sup>1266</sup> *Ibid* at 306.

<sup>1267</sup> COM (2006) 588 final para 4.2.1

<sup>1268</sup> Lagoni *op cit* n 93 at 306.

<sup>1269</sup> *Ibid*.

<sup>1270</sup> The Report of the Commission in terms of art. 6.5 of Directive 94/57/EC has found that the liability regime of art.6 has not resulted in the increase of the fees charged by Classification Societies.

<sup>1271</sup> COM (2006) 588 final para 4.2.

<sup>1272</sup> *Ibid*. para 4.2.1. Further the industry practice is to make insurance arrangements on an aggregate basis with a total liability cap rather than a “per incident” cap. COM(2006) 588 final. Annex 25

<sup>1273</sup> The Study noted that recognised organisations have professional indemnity cover spanning between 10 and 100 million dollars for both statutory and general services. COM (2006) 588 final. Annex 25

<sup>1274</sup> Honka *op cit* n 77 at 33

based on their reservoir of knowledge that has been collected over the past hundred years. This is even more so when societies act under delegated authority.<sup>1275</sup> The difference in jurisprudence in respect of the imposition of liability leads to uncertainty and frustrates international efforts that seek to establish a common level of liability exposure that would apply to all societies across the board.<sup>1276</sup> If an international solution is not found then national legislatures might take up the task which defeats the benefits and objectives of uniformity.<sup>1277</sup>

The writer suggests that an inference can be drawn from the efforts of the CMI initiative that classifications will more readily accept being bound to standards of conduct and waive immunity if their exposure to liability to claims made by their customers and third parties is limited. Furthermore, it has been suggested that a Classification Society's reputation is more of a motivating factor for high-quality performance than increased exposure to liability. This is because the markets trust and confidence is of paramount importance for a society to maintain and increase its client base.<sup>1278</sup> The writer concurs.

The question of whether a Classification Society falls within the ambit of the CLC has been discussed above. Whether this question is answered in the affirmative or negative, the CLC and similar conventions are not in favour of imposing unlimited liability. The CLS and the HNS which use channelling provisions and makes provision for effective compensation that is financed by a broad base of contributors. This structure indicates that the drafters did not intend leaving loop-wholes which would leave a Classification Society, a significant participant in the maritime industry exposed to unlimited liability.<sup>1279</sup> If one views Societies as falling within the ambit of this convention it is obvious that it would be nonsensical for societies to be protected in most instances by limited liability except for in those which exposed them to the greatest levels of liability, namely, oil pollution. This would undermine the CLS, HNS and similarly worded conventions.

In the end a balance needs to be achieved between the extreme position of holding a Classification Society liable as 'warrantor of seaworthiness' and from affording the protection of 'blanket immunity'.<sup>1280</sup>

#### **5.4 The manner in which liability should be imposed**

From this discussion it is clearly evident that Classification Societies act on a global basis and have been subject to a number of jurisdictions and diverse legal systems in which their liability towards both their customers and third parties has been adjudicated upon. It is suggested that the least problematic solution to class liability is to have the issue determined in an instrument such as international convention.<sup>1281</sup> The best approach would be to simply bring Classification Societies

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<sup>1275</sup> Puilido Begines *op cit* n 19 at 541.

<sup>1276</sup> Skou *op cit* n 994 at 183.

<sup>1277</sup> Kroger *op cit* n 6 at 189.

<sup>1278</sup> Skou *op cit* n 994 at 182.

<sup>1279</sup> Lagoni *op cit* n 93 at 307.

<sup>1280</sup> Puilido Begines *op cit* n 19 at 540.

<sup>1281</sup> The problem with international conventions is that they usually mean that the 'lowest common denominator' is adopted in a process that often involves complex political negotiations with prolong an already cumbersome process.

within the scope of the International Convention on Limitation of Liability for Maritime Claims (LLMC) as was done for salvors subsequently to the House of Lords decision in *The Tojo Maru*.<sup>1282</sup> Alternatively, a separate international convention that deals specifically with the liability of Classification Society's liability may be drafted as a protocol on the liability of Classification Societies to the LLMC. But this may be problematic since the LLMC has not been ratified by all countries in which liability may be imposed and on many occasions, it has been enacted into domestic legislation and not ratified.<sup>1283</sup> In addition a more liberal interpretation could be given to existing conventions, such as the CLC, so that Societies are brought within the ambit of these conventions protection.

It is suggested that liability in the instrument should not be based on strict liability but rather set out a degree of fault that is based on negligence. The standard therefore is the duty of care that can be expected from a professional organisation. The instrument should be broadly based on the Principles of Conduct of the CMI initiative. At the same time it should seek to embody many of the dynamic points of reform contained in the proposal for a new directive as discussed above. In addition it has been suggested that the classification societies liability must be adjudicated upon on a case-by-case basis as this will prevent the unfair situation of the Societies becoming 'deep pocket litigants'<sup>1284</sup>. The writer concurs.

#### 5.4.1 Scope of the envisaged international instrument

At this point two issues deserve attention. The first is, whether the public and private function of a Classification Society should be separated. Due to the competitive environment in which Classification Societies operate it is arguable that the public and private functions performed by Classification Societies are not compatible. This incompatibility arises from the fact that the dual role causes Societies to increasing liable to an array of divergent claimants. The public function requires state intervention by its very nature. This detracts from industry participants from seeking a private solution which would arguably be more suitable for a competitive market.<sup>1285</sup> This potential incompatibility leads one to question whether these two distinct functions should be performed by the same organisation or rather assigned to two different bodies.<sup>1286</sup> The essential issue is whether in a competitive environment one of these functions should be sacrificed in order to ensure the independence and credibility of Classification Societies.<sup>1287</sup> The writer acknowledges the difficulties created by the dual role of Classification Societies but does not consider that it warrants the dissolution of Classification Societies or separation of services. Such is simply impractical and counter productive and will not assist in achieving safer maritime transport or greater environmental protection.

The second is whether the international instrument should cover the liability of Classification Societies towards both their clients and third parties, or only the latter. Many commentators are of the opinion that the relationship between a Society and its clients is sufficiently protected by relatively equal bargaining

<sup>1282</sup> [1971] 1 Lloyd's Rep. 341; [1972] A.C. 242

<sup>1283</sup> Lagoni *op cit* n 93 at 307.

<sup>1284</sup> Lagoni *op cit* n 93 at 317.

<sup>1285</sup> Kroger *op cit* n 6 at 189.

<sup>1286</sup> Puilido Begines *op cit* n 19 at 494.

<sup>1287</sup> *Ibid.*

powers, contractual clauses or sufficiently determined by domestic laws.<sup>1288</sup> An example would be ‘The East River Doctrine.’ The writer disagrees. The effects of indiscriminate use of exculpatory clauses can be detrimental to the public’s interest in a safer maritime transport system. Further the fact that the effect of these clauses may possibly affect the relationship between a Society and third party is a cause for concern that can be best addressed by regulation. The writer approves of the approach adopted by the CMI and given effect to in the Principle of Conduct and draft Model Contractual Clauses. Therefore should an instrument be created it should be broadly based on this framework in this context.

#### 5.4.2 Level of Limitation

The level and mechanism of liability of Classification Societies is a contentious issue.<sup>1289</sup> It has been suggested that if a ‘reasonable level’ is to be achieved two primary objectives must be met. The first objective is that the relevant level must be such that a Society is able to obtain commercial insurance<sup>1290</sup> and not merely technical insurance.<sup>1291</sup> The costs of the latter are higher and are generally viewed as being commercially unsustainable.<sup>1292</sup> The second objective is that the level of liability should not be such that a Classification Society is viewed as a ‘deep pocket litigant’ which attracts claimants who would accordingly seek an ‘alternative remedy’ against the Society.<sup>1293</sup> The writer concurs. From this discussion it is patently evident that a reasonable level of limitation of a Classification Society’s liability is that level which is equal to that of the ship-owner. This would give rise to a fair situation which would encourage, in particular the English Courts, to impose liability on Classification Societies. The writer does not support the view that Classification Society’s liability should be less than that of the ship-owner for the simply reason that it would be counterproductive to turn the ship-owner into a ‘deep pocket litigant’ in respect of a Society’s liability.<sup>1294</sup>

By equating the level of a classification society’s liability to that of the ship-owner, the problems that have been encountered in determining a suitable mechanism by which liability could be determined are overcome. This is because the pertinent question is ‘what would the ship owner be liable for?’ Therefore, the tonnage of the vessel will be the mechanism by which Classification Society’s liability is determined since this is what a ship-owner’s liability is determined by. If both parties liability are not determined by a common factor then the objectives of a reasonable level of limitation cannot be achieved.<sup>1295</sup> Therefore the limitations as

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<sup>1288</sup> Lagoni *op cit* n 93 at 317.

<sup>1289</sup> This issue has been identified as the main culprit for the initiative of the CMI. It was also a source of contention between the Gothenburg Group and the Commission in the drafting of Directive 57/94EC. The level of liability imposed on recognised organisation by Member states of the European Union to this day is uneven.

<sup>1290</sup> ‘Commercial insurance’ is defined as insurance which the insured can reasonably afford and include in the price of their services or products. Lagoni (2007) *op cit* n 93 at 324.

<sup>1291</sup> ‘Technical insurance’ is the maximum amount which is theoretically insurable and for which the insurance markets offer protection. *Ibid.*

<sup>1292</sup> *Ibid.*

<sup>1293</sup> *Ibid* at 325.

<sup>1294</sup> *Ibid.*, suggests that it would be reasonable if Classification Societies liability were less than that of ship-owners.

<sup>1295</sup> It is therefore suggested that it is in the best interest of Classification Societies to forsake their earlier stance on this matter. In the discussions of the CSJWG of the CMI Classification Societies objected to the use of the tonnage mechanism because the size of the ship was irrelevant for the purposes of the societies services. Instead

set out in The Hague Visby Rules and the LLMC should suffice. Indeed this is what Lord Lloyd for whom the writer has the greatest respect, in *The Nicholas H* implied when he placed Classification Societies in the same position to that of the salvor. His suggestion is the simplest and most practical solution to the issue of Classification Societies' liability.