

The Liability of Classification Societies

"Put simply, the purpose of the classification certificate is not to guarantee safety, but merely to permit Sundance to take advantage of the insurance rates available to a classed vessel"

The Sundancer (7 F.301 1077)
per George C Pratt, Circuit Judge

An examination of the international approach to the liability of classification societies for the consequences of their having surveyed and certified a vessel that is subsequently lost through structural failure or sold to a purchaser who has placed reliance on class certification.

Decisions of foreign courts are analysed and the situation of class in relation to the *Erika* and the *Prestige* is alluded to. The paper concludes with the CMI's attempts to mediate a solution.

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Introduction

The ever-changing and increasingly important role which classification societies play in the certification of vessels and in setting industry standards for ship safety, construction and maintenance and the understanding of that function, are issues which are inextricably linked to the question of whether, as a matter of law and of policy, classification societies should be held liable where they survey and certify vessels that are subsequently lost due to structural failure.

I believe that an analysis of the relevant foreign jurisprudence, attitudes and reactions to recent maritime incidents and the views and initiatives of classification societies, governments and international organizations, reveals that the, whilst class cannot be said to be guaranteeing safety at sea, it cannot be accepted that its role is simply to enable shipowners to take advantage of favourable insurance rates¹. That said, the question of class' potential liability comes sharply into focus and must, I believe, be recognized in principle on both legal and policy grounds – subject to appropriate and reasonable limitation. This conclusion has important implications for the liability position of Rina and ABS in respect of the sinking of the Erika and Prestige respectively – leaving them particularly vulnerable where no international limitation regime currently exists for their protection.

Classification societies: their role and function

“A classification society sets standards for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the classification society's rules and regulations, national laws and international conventions”². They are non – profit organizations that develop and publish rules and technical standards for the design, construction and evaluation of vessels³. Flag States may authorize classification societies to inspect ships on their registries and to issue the relevant statutory certificates on their behalf⁴.

Both government administrations and private interests (such as shipowners and insurers) employ classification societies. As such they perform both public functions, under statutory authority as delegates of government, and private functions, as ship surveyors⁵.

A vessel can simply not operate without being certified by a classification society, since classification is an absolute prerequisite for ship registration and insurance cover⁶. Neither charterers nor cargo interests will utilize

¹ As stated by Pratt, Circuit Judge in *Sundance Cruises Corp v American Bureau of Shipping (The Sundancer)* (7F.301 1077), Second Circuit

² per, Walker, Circuit Judge in *Carbotrade S.P.A v Bureau Veritas and anr* [31.10.1996], United States Court of Appeals for the Second Circuit, which description is approved by Peter D. Clark in his article “An American Admiralty Law Viewpoint on the Changing Role of Classification Societies”, *SeaLaw Vol 1* published at <http://www.navlaw.com/articles/class.htm>

³ European Maritime Safety Agency, “Assessment of Classification Societies”, published at www.emsa.eu.int

⁴ Ibid, and see also European Maritime Safety Agency, “Glossary: Classification Societies”, published at www.emsa.eu.int

⁵ Bertrand Courtois, “Exposing Class Liability”, *The Maritime Advocate* (April 2003) published at <http://www.maritimeadvocate.com>; Although this is generally accepted, Cane argues that this statement is too simple and that it may be that, as a matter of English Law, that none of the functions performed by classification societies is public – Cane, “The Liability of Classification Societies” *L.M.C.L.Q.* (1994), p363 at p364.

⁶ Clark, “Ship Classification isn't Insurance Policy, Appeals Court Rules”, *Sea Law Vol 3* (Aug 1991) published at <http://www.navlaw.com>

vessels that are not in class and registered⁷. Certification is thus essential to shipowners, who must ensure that their vessels maintain the appropriate safety and seaworthiness standards as set by the classification societies own rules, as well as by national laws and international conventions, in order for their vessels to remain in class, and consequently, remain insured.

Classification certificates are “widely relied upon by all sectors of the maritime industry as an indication that a vessel is reasonably fit for its intended use⁸”. Flag States can and very often do authorize classification societies to inspect and carry out statutory certification duties of the ships on their register⁹. Port States rely on classification societies to confirm that a vessel is in class before allowing a vessel to pass into their waters¹⁰. Charterers, shipowners and P & I clubs rely on them to confirm that a vessel complies with international conventions and safety standards¹¹. Since classification societies also perform surveying and damage investigation, they are also involved with insurers, owners and charterers in carrying out these functions¹². Cargo owners and potential purchasers may also rely on class certificates and surveys when deciding to use or buy a particular ship¹³.

Initially, the emergence of classification societies was due to the need to give the insurance market some reassurance as to the seaworthiness of vessels sought to be insured¹⁴. Governments subsequently employed them for similar purposes to ensure compliance with international conventions such as MARPOL, SOLAS and Load Lines¹⁵. Governments which are parties to these conventions delegate statutory responsibilities to designated classification societies, which carry out these functions in their capacity as a Recognised Organisation (as defined by the International Maritime Organisation Assembly Resolutions A.73(18) and A789(19))¹⁶. As such they are an important component of the international maritime safety and pollution prevention regimes¹⁷.

The initial weakness of classification societies as “guardians of ship safety” as identified by Lord Donaldson of Lymington¹⁸ was that they were paid by the shipowners and competed for business. Thus they needed to be less stringent than their competitors to stay in business. This led to the erosion of the standards which the societies applied for certification. There are currently approximately 50 classification societies which provide marine classification services – some of which are recognized within the industry to be of a better quality and standard than others. Lord Donaldson notes that this weakness has to a large extent been cured by the creation of the

⁷ Ibid

⁸ per Jones, Circuit Judge in *Otto Candies, L.L.C v Nippon Kajii Kyokai Corp* [17 Sept 2003], United States Court of Appeals, Fifth Circuit referring to Machale Miller, “Liability of Classification Societies from the Perspective of United States Law”, 22 Tul. Mar. L.J. (1997) p75 at p77 and Hannu Honka, “The Classification System and its Problems with Special Reference to the Liability of Classification Societies”, 19 Tul. Mar. L.J. (1994) p1 at p3; Starer, “Class Reform”, The Maritime Advocate (Aug 2005) published at <http://www.maritimeadvocate.com>

⁹ European Maritime Safety Agency, “Assessment of Classification Societies”, published at www.emsa.eu.int

¹⁰ Starer, “Class Reform”, The Maritime Advocate (Aug 2005) published at <http://www.maritimeadvocate.com>

¹¹ Ibid

¹² Courtois, “Exposing Class Liability”, The Maritime Advocate (April 2003), published at <http://www.maritimeadvocate.com>; Cane, “The Liability of Classification Societies” L.M.C.L.Q. (1994), p363 at p364

¹³ Ibid, Clark, “Ship Classification isn’t Insurance Policy, Appeals Court Rules”, Sea Law Vol 3 (Aug 1991) published at <http://www.navlaw.com>

¹⁴ Lord Donaldson of Lymington, “The ISM Code: the road to discovery?” L.M.C.L.Q. (1998) p526 at p527

¹⁵ Ibid, and Starer, “Class Reform”, The Maritime Advocate (Aug 2005) published at <http://www.maritimeadvocate.com>

¹⁶ IACS, “The New European Maritime Policy – Challenges and Opportunities”, 13 October 2005, published at www.mareforum.com/NewEurMaritPolicy-IACS.pdf

¹⁷ Ibid

¹⁸ “The ISM Code: the road to discovery?”, L.M.C.L.Q. (1998), p526 at 527

International Association of Classification Societies (IACS) which imposes and monitors the quality of its members work¹⁹. Whilst a flaw remains in that not all classification societies need to belong to IACS, the 10 members of IACS (and one associate member) account for the classification of over 90% of world shipping²⁰. Only 12 classification societies are presently recognized by the European Union²¹ (which include the 10 IACS' members).

Liability of Classification Societies: the international approach

As a result of the variety of services which classification societies provide and the increasing reliance and responsibility placed on such services by key roleplayers in the maritime industry, there is a growing trend for those who suffer loss to seek compensation from classification societies²². They are targeted as potential “deep – pocket defendants”²³ by a variety of claimants, particularly where the limitation on shipowner’s liability, or repudiation of claims by insurers, results in there being inadequate compensation made to claimants. Classification societies are seeing their liability being increasingly sought in both civil and common law systems – and since no international convention or regime exists in respect of this issue, there has been no uniform approach in the different jurisdictions where the issue has arisen, as an analysis of decisions of foreign courts reveals²⁴.

Before proceeding to look at the relevant caselaw, it is important to bear in mind that liability may, depending on the facts, be sought either in contract or in delict/tort. In a contractual context, parties are free to exclude or limit their liability by including the necessary contractual provisions, exclusions or indemnities in the contract itself. Well-developed contract law principles in each jurisdiction will thus apply to such contracts, as they apply to any other (bearing in mind that choice of law and exclusive jurisdiction clauses in these contracts may influence the law applied). Difficulties arise more frequently, however, where parties (including third parties with whom no contractual relationship exists) seek to hold classification societies liable in tort for negligence.

USA

The Sundancer

In a definitive judgment by the Court of Appeals in *Sundance Cruises Corp v The American Bureau of Shipping*²⁵, the contractual liability of the American Bureau of Shipping (“ABS”) to the shipowners was considered. Previously, in the cases of *The Great American*²⁶ and the *Amoco Cadiz*²⁷, actions brought by shipowners were dismissed on the basis that the classification society was not guaranteeing the seaworthiness of the vessel and was

¹⁹ Ibid

²⁰ Ibid; IACS, “The New European Maritime Policy – Challenges and Opportunities”, 13 October 2005, published at www.mareforum.com/NewEurMaritPolicy-IACS.pdf

²¹ Commission Decision 2002/221/EC; EMSA, “Assessment of Classification Societies” published at <http://www.esa.eu.int>

²² Courtois, “Exposing Class Liability”, *The Maritime Advocate* (April 2003) published at <http://www.maritimeadvocate.com>

²³ Boisson, “Are classification societies above the law”, *The Maritime Advocate* (Jan 1998) published at <http://www.themaritimeadvocate.com>

²⁴ Op cit, n22

²⁵ 7 F. 3d 1077 (2d Cir.1993)

²⁶ *Great American Insurance Co v Bureau Veritas* 338 F. Supp. 999 (S.D.N.Y. 1972)

²⁷ *In re: Oil Spill by the Amoco Cadiz* 1986 A.M.C. 1945

simply responsible for inspecting the conformity of the vessel with the relevant standards. Consequently, the Court found in both cases that the owners themselves should bear the loss of the vessel, since the owner remains ultimately responsible for the ship's condition.

In *The Sundancer*, a shipowner sued a classification society, alleging that after its vessel was inspected by the society the ship sank due to structural defects. The *Sundancer* sank soon after having been certified by ABS. The owners claimed that, if ABS had not been negligent, certain defects in her bulkheads and piping, which had caused her to sink, would have been detected by ABS and the vessel would not have been classed (and so would not have sailed) until they had been corrected²⁸.

The district court held that, as regards statutory certification, ABS had been nominated under the relevant Bahamian legislation and so enjoyed statutory immunity from suit in respect of the bona fide provision of these certificates. As regards the certificate provided for insurance purposes, the district court dismissed the shipowner's claim for lack of proof that he was damaged by the societies purported errors. The Shipowners appealed, and the Second Circuit affirmed the lower courts decision that a shipowner is not entitled to rely on a classification certificate as a guarantee that the vessel is soundly constructed.

The appeals court noted the great disparity between the fees charged by ABS (\$85,000) and the damages claimed by the owners (\$264 million²⁹) and concluded that this showed that ABS could not have intended to assume the risk of the loss of the vessel, and that the ship classification industry could not continue to exist under such terms³⁰. The Court also held, in line with the decisions in *The Great American* and the *Amoco Cadiz*, that the shipowner, and not the classification society, is ultimately responsible for and in control of the activities aboard ship. The shipowner has a non-delegable duty to furnish a seaworthy ship. The main purpose of the classification certificate, as stated by Pratt, Circuit Judge, was merely to enable the shipowners to take advantage of insurance rates available to a classed vessel.

It is clear that a factor which weighed heavily in the mind of the Court in reaching its decision was (also as identified by Cane³¹) that it was the claimant itself, the shipowner, who was in a primary sense responsible for "the creation of the unsafe state of the vessel, whereas the most that could be said of ABS was that it had failed to detect the lack of seaworthiness."³²

The same policy considerations and reasoning cannot apply to third parties who place reliance, to their detriment, on a classification certificate, and this distinction was recognized in the appeals court judgment in *The Sundancer*

²⁸ Cane, "The Liability of Classification Societies" *L.M.C.L.Q.* (1994), p363 at p363-364; Clark, "Ship Classification isn't insurance policy, Appeal Court Rules" *Sea Law Volume 3* (Aug 1991) published at <http://www.navlaw.com>

²⁹ Made up of \$64 million compensatory and \$200 million punitive damages

³⁰ Although Cane points out quite correctly that this is a weak argument since, "in a world where liability insurance is pervasive there is no justification for a general proposition that a professional fee which is only a small fraction of the amount at stake in the transaction shows that the professional cannot have intended to assume the risk of liability commensurate with the amount at stake", "The Liability of Classification Societies" *L.M.C.L.Q.* (1994), p363 at p368

³¹ Cane, "The Liability of Classification Societies" *L.M.C.L.Q.* (1994), p363 at p366

³² *Ibid*

³³. In the cases in which third parties have sought to hold classification societies liable in tort for negligent misrepresentation, the recent approach of the US Courts appears to be less favourable to classification societies than the case of *The Sundancer* would suggest, although many of these cases brought against classification societies ultimately fail on the facts, due to difficulties in proving causation³⁴.

Otto Candies

“We hold that general maritime law cautiously recognizes the tort of negligent misrepresentation as applied to classification societies and that on the specific facts presented in this case, NKK owed a legal duty to Otto Candies. Finding no error in the district court’s judgment, we affirm”

The above finding in the U.S. appeals court case of *Otto Candies L.L.C v Nippon Kaiji Kyokai Corporation (NKK)*³⁵ in my view, marks an important recognition, however cautious and limited, by the US of the liability of classification societies based on the tort of negligent misrepresentation.

In this case the sellers (Diamond) of a vessel called “The Speeder” engaged the services of NKK to re-classify it. The reclassification of “The Speeder” by NKK was a condition of the purchase of the vessel by Otto Candies. In January 2000, NKK issued a class certificate to Diamond indicating that “The Speeder” was certified within class with no outstanding recommendations or deficiencies. Otto Candies thereafter completed the purchase of the vessel. “The Speeder” was then surveyed by ABS in order for Otto Candies to transfer her classification from NKK to ABS. The ABS surveyor, however, found a number of deficiencies that required repair before ABS would classify “The Speeder”. After effecting over \$325,000 in repairs to the vessel, Otto Candies filed suit against NKK to recover the repair costs. The basis of their claim was the tort of negligent misrepresentation.

After reviewing some of the U.S caselaw on the liability of classification societies³⁶, the court held that in principle, general maritime law recognizes the tort of negligent misrepresentation as applied to classification societies but emphasized that such a claim should be strictly and carefully limited.

In this regard, the Court acknowledged that the societies’ surveys and certification systems were essential to maintaining the safety of maritime commerce, yet their activities should not derogate from shipowners non delegable duty to maintain a seaworthy vessel. The Court stated that the imposition of undue liability on classification societies could be harmful in several ways which it proceeded to identify, and for this reason needed to be carefully limited:

³³ Cane, “The Liability of Classification Societies” L.M.C.L.Q (1994), p363 at p370, *Otto Candies L.L.C v NKK* [17September 2003], United States Court of Appeals for the Fifth Circuit, at p8

³⁴ Clark, “An American Admiralty Law Viewpoint on the changing role of Classification Societies”, *Sea Law Vol 1*, published at <http://www.navlaw.com/articles/class.htm>

³⁵ [17September 2003], United States Court of Appeals for the Fifth Circuit

³⁶ Including *The Sundancer* and *Somerelf v ABS* 720 F. Suppl 441 (D.N.J. 1989)

- (1) It could deter classification societies from performing work on old or damaged vessels that most need their advice;
- (2) It could diminish an owners sense of responsibility for vessel safety even as it complicates liability determinations.
- (3) Broader imposition of liability upon classification societies would increase their risk management costs and these costs would ultimately be passed on to their clients.
- (4) It is doubtful whether such risk-spreading is cost efficient in an industry with well developed legal duties and insurance requirements.

Turning to the merits of the case, the Court held that Otto Candies satisfied the requirements for the tort of negligent misrepresentation in the circumstances. The Court found on the facts that NKK was aware at the time it re-classified “The Speeder” that its certification was directly related to the sale of the Speeder to Otto Candies, and that the certification would be used to guide its decision to buy the vessel. The Court went on to affirm the district court’s decision that NKK was liable to Otto Candies for negligent misrepresentation because its certification that “The Speeder” was free of recommendations and deficiencies did not comply with NKK’s own standards and rules in this regard and NKK had known that Otto Candies would rely on its certificate in deciding to purchase the vessel.

UNITED KINGDOM

The Morning Watch³⁷

In this matter a yacht, *The Morning Watch* was found to have certain defects which rendered her unseaworthy, despite possessing a classification certificate at the time of her sale to the plaintiff purchaser. The purchaser instituted action against the Lloyds Register of Shipping for economic loss suffered as a result of relying on the negligent misstatements of the classification society and alleged that it had failed to observe its duty of care which it owed to the purchaser.

The Court re-iterated the requirements in order to establish whether a duty of care exists in English Law, namely;

- (1) where it is reasonably foreseeable to defendant that the plaintiff will rely upon his statement;
- (2) where there exists the necessary proximity between the purchaser’s purely economic loss and the role played by the classification society;
- (3) that it is fair, just and reasonable in the circumstances to impose a duty of care on the defendant.

On application to the facts of the matter, the court found that the plaintiff had failed to prove a sufficient relationship of proximity in the instant case, holding that “ the primary purpose of the classification system is, as

³⁷ *Mariola Marine Corp v Lloyd Register of Shipping* (30.01.1990) Q.B. (Comm. Court)

Lloyd's Rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved...in shipping"³⁸

The Nicholas H³⁹

This case is currently the leading English authority on cases involving the liability of classification societies in tort for negligence. The majority judgment of Lord Steyn gives a well-reasoned exposition of the legal and policy issues which militate against imposing liability on classification societies in relation to third parties.

Cargo-owners brought a claim against the classification society (N.K.K) as a result of the loss of their cargo which was aboard *The Nicholas H*, a vessel in class with N.K.K. Temporary repairs were done to the vessel in San Juan, upon which the N.K.K. surveyor issued a report, recommending that the vessel continue on her intended voyage, but that the temporary repairs be examined at the earliest opportunity after the discharge of her cargo. He further recommended that the vessel be retained in class, subject to this condition. The vessel then set sail, but the temporary repairs cracked and the vessel sank with all of its cargo. The cargo-owners instituted action against N.K.K for the balance of their alleged loss (having settled their claim against the shipowner for \$500,000.00⁴⁰), being a sum of \$5.5 million.

Lord Steyn began by noting that "owners have apparently never successfully sued a classification society in England or elsewhere for breach of a contractual or tortious duty in and about the performance of their contractual engagement for the survey of a damaged vessel."⁴¹ The Court then analysed the plaintiff's argument that, as this was a case of physical damage to property and not one for pure economic loss⁴², the requirement to establish whether a duty of care existed was simply that of reasonable foreseeability. The Court held that it was settled law that, irrespective of the nature of the harm done to plaintiff, the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness were all relevant to the issue.

The court then examined certain factors which could militate against a recognition of a duty of care in particular, the court noted the following aspects:

Firstly, that the shipowner was primarily responsible for the vessel sailing in a seaworthy condition; the role of N.K.K. was a subsidiary one and carelessness of the surveyor did not involve the direct infliction of physical damage;

³⁸ Ibid; and as noted by Durr, "An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder and Future Prospects" Graduate publications (1996) published at <http://www.uctshipplaw.com/theses/durr.htm>

³⁹ *Marc Rich & Co.A.G. v Bishop Rock Marine Co Ltd (The Nicholas H)* [1995] 2 Lloyd's Rep. 2999 (H.L) affrmg[1994] 1 Lloyd's Rep 492, rvrsrg [1992] 2 Lloyd's Rep. 481 (Hirst, J.)

⁴⁰ which, as noted by Lord Steyn, was the extent of the shipowner's liability having regard to the tonnage limitation applicable to the vessel.

⁴¹ *Marc Rich & Co.A.G. v Bishop Rock Marine Co Ltd (The Nicholas H)* [1995] 2 Lloyd's Rep. 2999 (H.L) at p310

⁴² Although Cane argues that, as a result of their having been a total loss of cargo, the claim may in fact have been one of pure economic loss cf Cane, "The Liability of Classification Societies" L.M.C.L.Q (1994), p363 at p371

Secondly, that there was no contract between the cargo-owners and the classification society and it was not even suggested that the cargo-owners were aware that N.K.K had been brought in to survey the vessel. The cargo owners simply relied on the shipowners to keep the vessel seaworthy and to look after the cargo;

Thirdly, if a duty of care was held to exist the potential exposure of classification societies to claims by cargo-owners would be large. That exposure would lead to an increase in the cost to classification societies of obtaining appropriate liability risks insurance, which costs they will in all likelihood seek to pass on to owners. A recognition of a duty of care would disturb the balance created by the Hague Rules, the Hague-Visby Rules as well as by the tonnage limitation provisions by enabling cargo-owners to recover in tort against a peripheral party to the prejudice of shipowners under the existing system. The international trade system tended to militate against a claim in tort put forward by cargo-owners against classification societies.

Fourthly, classification societies act in the public interest; they fulfilled a role which in their absence would be fulfilled by states, and if they became alternative target of cargo-owners they may adopt a more defensive position.

Finally, the Court took into consideration in its overall assessment of the matter, certain policy factors, such as the fact that a recognition of a duty of care could lead to double insurance, more costly and complex litigation, unwillingness by class to survey vessels which most urgently require independent examination and the diversion of their resources from their primary function, namely to save life and ships at sea.

Taking all these factors into account, the court held that the classification society did not owe a duty of care to the cargo-owners on the basis that the recognition of the duty would not fair, just or reasonable⁴³ as against shipowners (who would ultimately have to bear the costs of holding classification societies liable). It would also be unfair, unjust and unreasonable towards classification societies because they act for the collective welfare and would not have the benefit of any limitation provisions. The existing system provided the cargo-owners with protection under the Hague Rules or Hague-Visby Rules and although such protection was limited, any shortfall was readily insurable.

It is clear from the judgment that considerations of fairness, justice and reasonableness were of primary importance in the matter and to a large extent public policy considerations influenced the Court in reaching its decision.

Reeman v DoT⁴⁴

⁴³ The courts held that requirement of reasonable foreseeability had been met and was prepared to assume that a sufficient degree of proximity existed to meet this second requirement

⁴⁴ [1994] Lloyd's Rep Vol 2 pg 648

In this case the English Court of Appeals applied much of the reasoning of the House of Lords in *The Nicholas H* to overturn the lower courts finding that the Department of Transport owed the purchasers of a fishing vessel a duty of care in providing a certificate certifying that the vessel complied with various statutory regulations designed to ensure that she was seaworthy. The surveyor had made a negligent error in the stability calculations of the vessel and issued the certificate. When the DOT later discovered that she did not pass stability tests, they withdrew the certificate, meaning that the vessel could not put to sea and the modifications required to correct the error would involve major expenditure, beyond the purchaser's means.

Whilst being sympathetic to the Reeman's case, the Court held that in performing its regulatory functions under the Merchant Shipping Acts, the DOT performed a similar role to that of classification societies ie they existed for the purpose of further safety at sea rather than for the protection of commercial interests and it would not in those circumstances be fair, just or reasonable to place a duty of care upon the DOT. The Court therefore allowed the appeal for this reason⁴⁵.

AUSTRALIA

Natcraft Pty Ltd & Anor v Det Norske Veritas & Anor (*The Sundancer*)⁴⁶

In this matter the plaintiffs sought to hold D.N.V liable for pure economic loss suffered by them, allegedly as a result of D.N.V's failure to advise them that *The Sundancer*, a catamaran in respect of which they had contracted with a third party to build, had not been built in a manner which would make it fit for approval by the Department of Harbours and Marine ("H & M"). D.N.V. had been appointed by the builders to supervise the construction of the vessel.

The Court considered in some detail both the matters of *The Morning Watch* and *The Sundance* but noted that the reasoning could not be relied upon because of the different approach taken by English Court to the determination of liability for economic loss (namely the three requirements discussed above of foreseeability, proximity and fairness, justice and reasonableness⁴⁷). The Court held *in casu* that there was no duty of care upon D.N.V to warn the plaintiff's that the vessel had not been built in a manner which would make it fit for approval by H & M.

NEW ZEALAND

Carter & Wright v Western Viaduct Marine Ltd and others (*The MV Nivanga*)⁴⁸

The plaintiff purchased the *Nivanga*, a cargo and passenger vessel and subsequently instituted action against, *inter alia* the Ministry of Transport ("MOT") arising out of surveys allegedly undertaken negligently and in breach of applicable statutory standards.

⁴⁵ The Court also found that the requirement of proximity had not been met.

⁴⁶ [2001] QSC 348 (27 September 2001) published at <http://www.austlii.edu.au/cases/qld/QSC/2001>

⁴⁷ In Australian law further requirements of "vulnerability to the loss", "knowledge" and "control" are required to establish liability for pure economic loss in tort.

⁴⁸ [20 March 2002] High Court of New Zealand, Auckland Registry published at <http://www.maritimelaw.orcon.net.nz/0502.html>

The Court applied substantially the same test as that in England for establishing whether a duty of care existed on the MOT to the plaintiffs, and, acknowledging the lack of New Zealand authority in these matters, considered the English decisions of *The Morning Watch*, *The Nicholas H* and *Reeman v DOT* in detail. The Court held that these decisions ought to be followed.

In casu, the Court held that it would be unreasonable to elevate certification that the hull construction and equipment complied with regulation and were satisfactory for use into a general and continuing obligation in negligence to prospective purchasers, charterers, employees, shareholders, directors and financiers. This would expose MOT to liability which is indeterminate as to class, amount and, to a lesser extent time. The certificate did not free the owners from their primary and continuing responsibility to ensure that the ship was seaworthy. The Court also noted that MOT operated in the public interest in providing certification to promote safety at sea. The Court accordingly dismissed the plaintiff's claim based in tort for negligence.

BELGIUM

The Spero⁴⁹

In this matter, a classification society carelessly classified a vessel which sank due to a leak in a corroded input pipe. The Court held that "a classification society had a general duty of care to everyone who could be affected by its classification, including parties to whom it was not contracted, such as cargo-owners"⁵⁰. The court found that the classification society had committed a professional fault, that this causally related to the loss and held it jointly and severally liable with the owner for the damages suffered.

FRANCE

The Elodie II⁵¹

Courtois notes that "the French Courts are clearly less favourable to classification societies than the US and English Courts"⁵². The case of the *Elodie II* confirms this view. In this case a Bureau Veritas (B.V) was held liable to the purchaser of a ship for having certified it as being in class, despite the existence of a number of defects which had existed for some time and had not been detected by the B.V.

Courtois⁵³ and Siccardi⁵⁴ note that the reason for liability being easier to prove in France – is due to the reliance on Article 1382 of the civil code, which only requires proof that:

⁴⁹ Antwerp Court of Appeal (4e Ch) 14 Febr 1995; and see summary by Durr, "An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder and Future Prospects" Graduate publications (1996), p27 published at <http://www.uctshiplaw.com/theses/durr.htm>

⁵⁰ Durr, "An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder and Future Prospects" Graduate publications (1996), p27 published at <http://www.uctshiplaw.com/theses/durr.htm>

⁵¹ Tribunal de Commerce de Nanterre, 26 June 1992, *Revue Scapel* 1992, D.M.f. 1994, 19 upheld by the Cour d' Appel de Versailles, 21 March 1996

⁵² Courtois, "Exposing Class liability" The Maritime Advocate (April 2003) published at <http://www.themaritimeadvocate.com>

⁵³ Courtois, "Exposing Class liability" The Maritime Advocate (April 2003) published at <http://www.themaritimeadvocate.com>

- (1) The classification society has committed a wrong;
- (2) The claimant has suffered a loss;
- (3) The loss is a consequence of the wrong.

Courtois proceeds to note that in a number of French decisions the basis of liability was held to be gross negligence within the performance of its function, although this is not required to establish liability if based on Article 1382 of the civil code⁵⁵.

ITALY & OTHER CONTINENTAL JURISDICTIONS

The provisions of the Italian Civil Code, art 2043 mirror the provisions of the French civil code in this regard, and similar provisions are to be found in other continental countries, for example art 914 of the Greek Code for Civil Law⁵⁶. In Italy, a classification society was found liable to crew member's relatives where they had lost their lives due to the sinking of a vessel⁵⁷.

CONCLUSION FROM CASE LAW

It appears from the above that, in general, the common law countries tend to favour classification societies, while the civil law systems are more ready to find them liable in tort to third parties. It is clear however that internationally, the law seems to be edging more and more towards acknowledging that, in principle and as a matter of law, there may be nothing preventing a classification from being held liable to third parties, particularly in light of the ever changing and increasing role played by classification societies and the reliance placed on their certificates and surveys by third parties. I believe that the stage is being reached where the question of the liability of classification societies will no longer be a question of "if", but rather of "when" and thereafter, "to what limit?" The legal position is also of particular interest in considering the possible liability of RINA and ABS in relation to the sinking of *the Erika* and *the Prestige*.

The Erika: RINA's liability?

On 12 December 1999 the *Erika*, carrying 30,000 tons of oil broke into two pieces and sank during a storm in the Gulf of Guascogne. Part of the oil escaped and contaminated the French Coast. Proceedings were instituted by the Conseil General de la Vendee against *inter alia* RINA, the society which had classified the vessel.⁵⁸ A number of

⁵⁴ Siccardi, Pollution Liability and Classification societies: Is the System a Fair One?, Piraes Bar Association, 5th International Conference on Maritime Law, 29 Sept – 2 Oct 2004 p331

⁵⁵ Courtois, "Exposing Class liability" *The Maritime Advocate* (April 2003) published at <http://www.themaritimeadvocate.com>

⁵⁶ Siccardi, Pollution Liability and Classification societies: Is the System a Fair One?, Piraes Bar Association, 5th International Conference on Maritime Law, 29 Sept – 2 Oct 2004 p331

⁵⁷ Tribunale di Savona, 29 Oct 1990 (the *Tito Campanella*)

⁵⁸ RINA attempted to pre-empt the matter by commencing proceedings in Italy requesting that it be established that it was under no liability in respect of the incident – the Court held however that it had no jurisdiction to hear the matter in terms of Article IX.1 of the CLC 1992 of Exclusive Jurisdiction (ART IX) published at http://www.comitemaritime.org/jurisp/ju_clc.html

other civil claims have been instituted against *inter alia* RINA⁵⁹. Criminal Charges have also been brought against RINA in France⁶⁰.

The cause of the incident as determined by experts appointed to investigate the matter by the Commercial Court in Dunkirk submitted their report in late November 2005, and concluded that “the fate of the Erika was the inevitable consequence of the serious corrosion of the internal structures of the vessel’s No2 ballast tanks, which resulted in their collapse. The experts stated that the level of corrosion was well beyond acceptable standards for a classification society and contradicted the thickness measurements made of tank internals in 1997 and 1998, which were carried out by the classification society RINA”⁶¹ They further states that Rina would have been able to detect the level of corrosion when undertaking its surveys in 1999⁶².

In light of the approach of the French Courts with regard to the liability of classification societies and the experts findings, it is at least possible that RINA may be found liable in tort to many of the third parties who have instituted action against it. However, the sheer size of the claim, as well as certain causation issues which may make recovery too remote, may militate against such a finding. In theory however, there appears to be no reason why it cannot be held liable in the circumstances.

The Prestige: ABS’ liability?

In November 2002, the *Prestige*, heading from the Baltic to Asia with a cargo of Russian oil, began to break up in bad weather in the Bay of Biscay. Upon seeking refuge in a Spanish port, she was instead ordered by the Spanish authorities to be towed out to sea, where she sank in waters approximately 3.5 kilometers deep⁶³. Large amounts of oil from the sunken tanker began polluting the coast of Spain and France. In May 2003, Spain filed a \$5 billion lawsuit at a Federal Court in New York against the American Bureau of Standards (“ABS”) alleging that the classification society’s negligence played a part in the sinking of the *Prestige*⁶⁴. The claim is made up of the estimated clean-up costs as well as the government’s administrative costs in respect of the incident.⁶⁵

IACS conducted an ad hoc audit of ABS survey procedures as they related to the loss of *the Prestige* which focused to a large degree on the adequacy of the ballast tank inspections. IACS noted that ABS did not internally inspect the two ballast tanks that sustained the initial damage that ultimately led to the vessel breaking in two⁶⁶. ABS

⁵⁹ the 1992 Fund convention brought an action in December 2002 in the Civil Court (Tribunal de Grande Instance) in Lorient against them to prevent their recourse action from becoming time-barred. The 1992 Fund has paid out Euro104.6 mill as at 31 Jan 2006 cf. The Directors report at a meeting of the Executive Committee, International Oil Pollution Compensation Fund 1992, Incidents Involving the 1992 Fund: Erika (6 Feb 2006)

⁶⁰ The Directors report at a meeting of the Executive Committee, International Oil Pollution Compensation Fund 1992, Incidents Involving the 1992 Fund: Erika (6 Feb 2006)

⁶¹ Ibid, para 8.3

⁶² Ibid para 8.4

⁶³ James, “Safe Havens sought/Not in my backyard everybody says: When a tanker is in trouble where can it go? Nowhere”, International Herald Tribune (7 March 2003) published at <http://www.ihf.com>

⁶⁴ Lloyd’s List, (May 16 2003), published at www.lloydslist.com

⁶⁵ Ibid

⁶⁶ Lloyd’s list, (Mar 11 2003) published at www.lloydslist.com

however insist that internal inspection of the ballast tanks were not required in this case⁶⁷. ABS also conducted their own investigation and furnished a report thereafter, suggesting that the possible damage sustained by the vessel during lightering operations at St Petersburg may have been a factor in the casualty.⁶⁸

In light of the approach of the U.S. Courts, the value of the claim, the possibility that the damages may be too remote and that there in any event seem to be possible factual problems with causation, it seems unlikely that ABS will be held liable on the facts in tort. From the comments made by the Court in *The Sundancer*, the prevailing attitude is that the shipowner is primarily responsible for the condition of the vessel. However, in principle, a claim may lie against the classification society in tort, although from the remarks made in *Otto Candies*⁶⁹ on the dangers of extending class liability, it is unlikely that the U.S. Courts will make the quantum leap and find the classification society liable, particularly in the face of potential limitless liability.

International consequences of the Erika and The Prestige – and the focus on class liability

The reaction in the international maritime community to these two maritime incidents was pervasive. IACS acted to tighten the safety net for older tanks in a further effort to improve safety at sea. In the main these involved measures aimed at preventing “class-hopping”, strengthening the survey regime, strict compliance with the ISM code and closer co-operation with Port State Control⁷⁰. IACS have also worked to make the rules and standards that apply to its members more uniform through the adoption of common structural rules and on 14 December 2005 unanimously adopted the Common Structural Rules for Tankers and Bulk carriers for implementation on 1st April 2006⁷¹. The European Union (EU) reacted with the creation of the European Maritime Safety Authority (EMSA)⁷² and the implementation of the Council Directive 94/57/EC as amended, On Common Rules and Standards for Ship Inspection and Survey Organizations and for the Relevant Activities of Maritime Administrations⁷³. The EU have also proposed three packages of strict legislative measures, Erika I, II and III packages, which *inter alia* include a directive on strengthening the monitoring of classification societies⁷⁴.

As far as liability is concerned, IACS has stated that the provision of the services of classification societies is threatened by the “existing exposure of classification societies to potentially unlimited liability for errors or omissions on their part that do not amount to gross negligence”⁷⁵. They have requested the Maritime Policy Task

⁶⁷ However ABS have now provided for compulsory internal examination of ballast tanks for such vessels in their rules and obligatory thickness requirements of Robert Somerville, “ABS Submission to the European Parliament: Public hearing on improving safety at sea in response to Prestige Accident”(12 March 2003) published at <http://www.eagle.org/news/press/prestige/euparliament.html>

⁶⁸ Lloyd’s List, (Mar 11 2003), published at www.loydslist.com

⁶⁹ Starer notes that this is the highest court in the US to ever affirm the imposition against a classification society of liability to a third party of Starer, “Classification: Class Reform” *The Maritime Advocate* (Aug 2005) published at <http://www.maritimeadvocate.com>

⁷⁰ Masataka Hidaka, (Chairman of IACS), “The Legacy of the Erika – A Vision for Maritime Safety” *IUMI Liability Workshop*, (Sept 2000)

⁷¹ IACS common structural rules published at <http://www.iacs.org.uk/csr/index.html>

⁷² under Regulation (EC) N° 1406/2002 of 27 June 2002

⁷³ Ibid; IACS, “The New European Maritime Policy – Challenges and Opportunities”, 13 October 2005, published at www.mareforum.com/NewEurMaritPolicy-IACS.pdf

⁷⁴ EMSA, “Glossary: Erika I, II (packages)”, published at <http://www.emsa.eu.int>

⁷⁵ Ibid; IACS, “The New European Maritime Policy – Challenges and Opportunities”, 13 October 2005, published at www.mareforum.com/NewEurMaritPolicy-IACS.pdf

Force of the EU to consider providing them appropriate legal protection, which would not extend to gross negligence⁷⁶.

The Recent EC directive 2001/105/CE provides for the liability of a classification society to State Administrations. In the case of willful misconduct or gross negligence there is unlimited liability; limited liability in the case of ordinary negligence being Euro4.000.000 for loss of life, or personal injuries; Euro 2.000.000 for damage to property⁷⁷. The position between class and its clients or third parties directly however remains unsettled.

The Efforts of the Comite Maritime International “CMI”

The CMI, over eight years ago, identified that the provision of a legal regime was necessary in order to permit classification societies from continuing to perform their essential role in ship safety by protecting it and allowing it to limit its liability. The CMI formulated Principles of Conduct of Classification Societies.⁷⁸ The Principles of Conduct emphasise the independent position which classification societies should maintain when performing their duties⁷⁹. Regarding the performance of their duties through contracts with their clients, they are to act using reasonable skill, care and judgment. They are to publish their rules, update them and perform in accordance with them⁸⁰ As far as the quality of their work is concerned, classification societies which adopt the principles are to use suitably qualified persons and maintain compliance with IACS Quality System Certification Scheme (QSCS) or a quality system effectively at least equivalent to this. Further details as to the scope and particulars of their duties are given in the Principles relating to the Standards of Practice and Performance⁸¹.

The CMI also published Model Contractual Clauses for use in Agreements between Classification Societies and Governments and Classification Societies and Shipowners⁸². As recorded in the introduction to the Model Clauses, the good work which has been done by the CMI has to some extent been thwarted by the failure of the relevant shipowner and classification society organizations to agree between themselves on the core issue of limitation⁸³. The clauses which relate to this aspect therefore provide for alternative means of calculating the limitation of liability⁸⁴ - the matter is will therefore ultimately be determined in any particular case by the respective bargaining power of each of the contracting parties.

Boisson⁸⁵ notes that, as a result of the failure to resolve the limit which should be set, (and certainly also as a result of the spectre of unlimited liability which has once again been raised into the spotlight by the *Erika* and *Prestige*

⁷⁶ Ibid

⁷⁷ Siccardi, Pollution Liability and Classification societies: Is the System a Fair One?, Piraes Bar Association, 5th International Conference n Maritime Law, 29 Sept – 2 Oct 2004 p331

⁷⁸ CMI, “Principles of Conduct for Classification Societies” (1998) CMI Handbook, p11-2

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ CMI, “Principles of Conduct for Classification Societies” (1998) CMI Handbook, p11-3

⁸² (1999), CMI Handbook, p11-5

⁸³ Ibid

⁸⁴ Ibid and at p11-8

⁸⁵ Boisson, “Are classification societies above the law”, The Maritime Advocate (Jan 1998) published at <http://www.themaritimeadvocate.com>

incidents) class is now on the defensive. He argues that class has “nothing to be defensive about and that it is quite wrong that a debate has begun which centers on whether class should be limiting its liabilities at all”⁸⁶ He discusses the factors which support the protection of class by imposing limited liability upon it. The fact that class acts in the public interest for the development of the shipping industry, taking on risks necessarily associated with operating at the cutting edge of technology and original research-if the maritime industry wishes class to continue to do so, it must offer it appropriate protection⁸⁷. Furthermore, as noted by Saccardi, if owners, who are primarily responsible for the seaworthiness of their vessel, are entitled in almost all circumstance to limit their liability, it is unfair that classification societies should be treated more strictly⁸⁸.

Conclusion

The policy considerations and factors discussed by the commentators and the courts, in particular in *The Nicholas H* in respect of the liability being imposed on classification societies are still relevant considerations today. It is the potential unlimited liability of classification societies and the disturbance of the international regime and carefully constructed balance of liability between the various interested parties that has caused the common law courts to balk at the idea of imposing liability thus far. However, as the role of classification societies expands and as international demands in respect of safety at sea and pollution increase, there is a recognition, even by classification societies⁸⁹, that those responsible should be held accountable, subject to proportionate and appropriate protection by way of limitation. Classification societies perform an important public function and are deserving of protection. It is unfair in the extreme for role players to place increasing responsibility on classification societies, which operate for the benefit of the shipping industry as a whole, while at the same time leaving them totally exposed to bear unlimited liability in respect of incidents in which they have invariably played a subsidiary role. Their liability is a matter which may ultimately require an international convention in order to ensure legal certainty and a uniform approach to the inquiry⁹⁰. Regrettably whatever reforms may be made in this regard, they may come too late as regards the outcome of the *Erika* and *Prestige* proceedings.

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Saccardi, Pollution Liability and Classification societies: Is the System a Fair One?, Piraes Bar Association, 5th International Conference n Maritime Law, 29 Sept – 2 Oct 2004 p331

⁸⁹ Masataka Hidaka, (Chairman of IACS), “The Legacy of the Erika – A Vision for Maritme Safety” IUMI Liability Workshop. (Sept 2000) at p6

⁹⁰ This is supported by *inter alia* Saccardi, Biosson, IACS and Starer in the articles previously cited in these footnotes

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