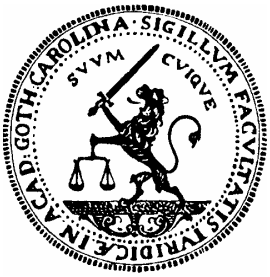

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Questions on The Liability of Classification Societies. Responsibility or recovery?

Master thesis
20 points

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Contents

Summary

The main question raised is if it is possible to hold a classification society liable, if performing their surveys in an unacceptable matter, and on which grounds. The question is effected by the specific rules and regulations concerning safety at sea, as well as general contract and tort law. After a presentation of the liability theories that possibly could be used as a reason for a liability, the problems and possibilities are exemplified with four cases, two American and two British. The main problem that a cargo or ship owner has faced until recent years is the unwillingness of the industry and outmost the courts to recognise a liability on the classification industry. This has been mainly based on maritime law specific arguments, often referred to as “policy grounds” in the cases.

It is clear that we see a introduction of more general contract and tort law considerations, and in the two more recent cases a liability also has been recognised against a classification society for work done in an unacceptable matter, in personal injury, as well as economic loss.
If the responsibilities of a classification society after an accident are not made clearer and the parties suffering harm (economic or personal) for relying on a negligent classification statement, never can recover, it will be the end of the classification system as we know it today.
The classification industry can bear a liability wider than today’s, but only in conjunction with clearer and more harmonised rules on how to approve new designs or control the existing ones, in-between the societies. Nobody wants a collapse of the existing system, as little as unhealthy competition from substandard classification societies, who are willing to certify anything, that at least at the moment of classification is floating.

Abbreviations

ABS	American Bureau of Shipping
BSMA	Belgian Ships Master Association
CAA	Civil Aviation Authority
CMI	Comité Maritime International
EC	European Community
EMSA	European Maritime Safety Agency
ESP	Enhanced Survey Program
EU	European Union
IACS	International Association of Classification Societies
IFCS	International Federation of Classification Societies
IMO	International Maritime Organisation
IMS	International Management Safety Code
LAN	Lloyds Register of Shipping, American Bureau of Shipping and Det Norske Veritas
M/V	Motor Vessel
NKK	Nippon Kaiji Kyokai Corporation
PFA	Popular Flying Association
PSC	Port State Control
Q.B.	Queen's Bench
RINA	Registri Italiano Navale
SDR	Special Drawing Right
SOLAS	Safety Of Life At Sea
TOCA	Transfer Of Class Agreement

1 Introduction

It is the author's intention to describe and examine the possible responsibilities of a classification society. The classification society is just one of the many actors concerned with safety at sea. The possible responsibilities have to be put in context to what they do and for whom they do it. It is clear that "safety at sea is highly dependent on attitudes and practical measures not possible to bring into a legal system".[1] It is also accepted that shipping involves a certain element of risk, which we never will be able to legislate or control.

" 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 societies rules and regulations, national laws, and international conventions. If a vessel passes inspection, the classification society either issues a certificate attesting to the vessels conformity with the applicable rules, regulations, laws and conventions, ordendorses an existing certificate with a visa reflecting the survey. If the vessel fails to pass the inspection, the classification society either does not issue the certificate or withdraws the existing certificate."[2]

"The Classification certificate issued by a classification society is not a certificate of seaworthiness. There is usually a misunderstanding by the public that the classification society is responsible to make sure that a ship is seaworthy."[3]

The above and that the non-delegable duty of assuring a vessels seaworthiness is the responsibility of the owner[4], are questions hardly challenged.

Nevertheless we have to differ the responsibility to furnish a seaworthy ship as a whole, and the responsibilities for a single player like the classification society towards the people that place trust in their work. This paper is not intended to justify a shift of the responsibility of seaworthiness from owners to classification societies, as this seems to be the most common argument against a clear regime on the subject of liability. The responsibility of assuring the seaworthiness is and will be with the owner. But as a part of his responsibility he employs a classification society to assure towards himself and others that his or her fleet is in compliance with rules and regulations. First to ensure the compliance to regulations and standards when building the ship, later to ensure that the maintenance is made correct and in case of

[1] Honka 2, p.352
[2] Carbontrade-case, the Second Circuit Court of Appeals at New York gives their opinion on the traditional role of a classification society.
[3] Harrison. J, (9) p.513
[4] According to IMO

an accident or incident to ensure that the ship did not suffer damage or has been properly repaired. Classification societies have and will play an important role if not one of the most important, in the work towards safer transportation at sea. The greater part of the classification societies is also performing their work in a satisfying way. Nevertheless have we in the recent years seen accidents[5], in which the responsibility and prudence of the classification industry were heavily questioned and criticised. To impose a liability on a classification society serves two purposes; to restore the damage suffered by an individual and to prevent similar incidents in the future.[6]

Are we back where we started in the shipping industry? The people in need of information about the state of a ship, have they today a better point of view than hundred years ago? Do they still need to rely on information that in some cases can vary a lot from the real situation and give them the wrong grounds for a decision which can be if not other, at least costly?

1.1 Purpose

The purpose of this thesis is to describe and examine the possible liabilities of a classification society, If they ought to be liable and if so under which theories. The role of the classification society is not very clear and in recent years we have seen a development in the courts (in matter of responsibilities after an accident), that have given us an even more split picture of their responsibilities. We will examine this and look into which preventive legal measures and adjustments after an accident that is reasonable to consider concerning the work of classification societies.
The different theories of liability will be explained and discussed. The legal situation and the case law will be examined and discussed as well as alternative means of safeguarding a high level of performance from the classification societies.
This thesis has the ambition to put the result of different liability theories and limitation regimes in their relation to an improved safety at sea. The situation will be presented in a historical, present day and in a future perspective.

1.2 Method, material and limitations

In order to fulfil the purpose I have consulted mainly the existing case law, comments on the cases, articles, international conventions and to some extent the basics of international contract law.

[5] Sundancer, Nicholas h, Estonia, Erika and prestige se later this paper
[6] Honka 1, p. 620

Due to the international nature of shipping and the traditional importance of the Anglo/American courts in maritime law, it is nevertheless the author's intention to give a "world wide" picture of the liability problems concerning classification.

The thesis will mainly focus on the problems associated with the limitations of liability that exist today and to some extent how this effects the safety at sea work. The rules concerning under which jurisdiction a conflict would be settled is mainly left out, the reason is that most contracts do regulate this and it would not be possible to satisfyingly do so in this limited work.

The questions will be dealt with mainly from an economic-loss, point of view, but is nevertheless with ease to apply in a case of personal injury. This paper as told before is not intended to justify a shift of the responsibilities of furnishing a seaworthy ship from the owner to anybody else. It will not deal with the possibilities to recover after an accident in a criminal case or damages caused by a wilful act.

1.3 Outline

This paper starts with a historical part that summarises the development of the classification industry over the years. Following a presentation of the different theories of liability, their origin and in which cases they could be applied.
A deeper discussion is made about contractual and tortuous liability regimes. The liability teories are exemplified with cases, both in tort and contract as well as in favor and against a liability.

An argumentation is made on the subject of a clearer liability regime for the societies. The legal situation is commented, mostly in the view of international conventions, although the latest EU legislation is briefly commented.

The final part is concerned with the work of unifying rules and regulations within the maritime field. The part also discusses the future of the safety at sea work and the possible need of regulations.

2 The classification society over the years

2.1 Historic role

In the 17th and 18th century the classification societies came into existence out of the need for insurers to get information about a ship, to better be able to calculate realistic premiums for the insurance of it and its cargo, or if to insure it at all. Ship-owners needed help to ensure the technical seaworthiness and the insurers the guarantee that seaworthiness was present on the ships. Earlier the parts had to rely on hear-says and rumours in bars and inns near ports to establish an opinion about a ship's condition. One of the most famous forum for marine-insurers to meet was "Lloyds" a small coffee-house in Lombart Street. Where Edward Lloyd distributed bulletins or ship's lists, giving brief information on ships likely to be offered for insurance. The information was in lack of any organised form of surveys a bit sketchy. Ship owners were here able to meet wealthy people able to underwrite the economic risks involved in maritime trade.

This was a situation hard to maintain as the shipping started to boom. When the owners and insurers got less known for each other, the need of accurate information got even bigger. Lloyd's coffee-house, which by now was a marketplace for insurance, founded the first "classification society" namely; Lloyds Register of Shipping in (1760). In the form of a committee of surveyors that put all their findings under the year into a book being Lloyd's Register Book. Here you could find details about the ownership, the master, characteristics and condition – the information was of course depending much on the standard of the surveyor, but even if differing a great deal, a good help. Bureau Veritas (1828), American Bureau of Shipping (1862) and Det Norske Veritas (1864) followed Lloyd's. By-now the business for the classification society had the purpose of controlling the ways of construction and maintenance of the vessels on behalf of the insurers.[7]

The clients were not the owners of the classed vessels as today, but the persons underwriting the risks themselves. The underwriters (insurers) were with the help from the societies in a better situation to estimate the risks involved with a certain vessel. The societies became hugely successful and profitable due to their independence.

2.2 Developing role

[7] Durr, 2.1 p.6

As the shipping and therefore insurance and need of classification surveys increased enormously due to the industrialisation, a change in the work of the classification societies was seen. Ship owners were now interested in fixed "ratings" to be assigned to their vessels with a validation of a certain time. It started with a classification of the condition of the hull and equipment on an annual basis. The hull was classified A, E, I, O or U, according to the excellence of its construction and continuing soundness. Equipment was classified G, M, or B (good, middle or bad). A ship classified AG was as good as it could be, while UB was a red light. G, M or B was later changed to 1, 2 or 3.[8] And A1 as we still know means first or highest class. The owners were able to present the ratings to insurers and cargo owners whenever demanded and did not have to undertake a survey every time they needed to prove the state of the ship. In return for surveying the vessels and issuing a certificate the classification society were like before paid, but now by the owner and not by the insurer.

This was of course a system in which the classification society became less independent. The before from the owner at least economic independent classification society, was now being paid by him to survey and control, if his ship maintained the standards for the rating he wanted to obtain. The ship owner needed the security that a classed ship meant but merely for economic reasons.

To protect the system and keep the trust in marine surveys, detailed regulations and references were created by the classification societies regarding how to survey a ship or how to determine the safety of a vessel. The regulations and references for iron ship are one of the first appearing in 1855. Maritime states began to regulate safety at sea and transport matters[9]. They delegated some of the matters of control to the classification societies and as a result, the societies strengthened their bands with the ship owners.

2.3 Present-day role

Today's classification societies do not assign different "classifications" any more, today a ship is either "in" or "out" of "class". Classification societies have many functions in addition to their original task of assisting insurers. One of their main tasks is to assist authorities concerned with matters of seaworthiness[10]. The principle was that the authorities should take care of the "public interest", and the classification society should have the responsibility for the protection of "material interests" connected with the operation of a vessel. In practice these two functions are not as defined and tend to overlap. It is an advantage for both crew and for example insurers, if

[8] IACS, Why is it called "Classification" ?, p.1
[9] The first Safety of Life at Sea rules started to develop after the Titanic accident, but was never brought into force due to the outbreak of World War 1.
[10] See below their "public role"

a vessel is less of a fire hazard[11]. It is the trust and acceptance by the authorities of the findings by the societies (adoption of class rules or acceptance of certificates) along with the trust and acceptance of certificates by the "market" that makes the modern classification system work. Legally they are authorised by IMO[12] but their work is highly dependent on the trust that they can maintain from us.

Classification does not cover the manning or operation of a ship[13]. It is important to keep in mind that classification is not compulsory to a ship owner, but he will meet a suspicious market without the "trading certificates" required by the ports of call. He could be refused insurance cover. He will have a hard time to charter out the vessel since most charter parties require a vessel to be in "highest class". But bare in mind that it will always be possible for a less scrupulous ship-owner not to keep his ships "in class", since he might just have to pay higher premiums for insurance and settle for less in the charter party (Compared to an owner of a ship that sails up to the highest of class.). If we could make it more difficult and expensive for him, than for the owner who operates a safe ship in the "highest class", it would be an effective way to avoid this behaviour.

This fact of course gives us a playground for likewise less scrupulous classification societies, who work for them who see a certificate only as something necessary to obtain "trade certificates" and not as a sign of a safe ship. Here is where societies that lacks experiences and resources to inspect a vessel in a proper way, find their market. Due to this, some of the "stronger" classification societies founded "The international association of classification societies" IACS in 1968, who works on an international level to demand a high level of performance from its members. IACS draws up lines for harmonising the individual rules and regulations regarding surveys, making it harder for ship owners to seek the classification society who for example has the "softest" rules on an aspect that interests them. IACS had 2002 over 95 % of the worlds tonnage classified by its members.
Some of the smaller classification societies created "The International Federation of Classification societies", IFCS in 1985 as an answer to IACS. There are opinions that these societies are substandard and the United States Coast Guard states as an aim "to drive owners away from using the poorest performing societies and into the safe arms of members of the International Association of Classification Societies (IACS)". Worth to mention is that although IACS claims that the standard are consistent amongst its members only four out of the total of eleven IACS members got the top marks from The United States Cost Guard with regards to detentions due to Port State

[11] Falkanger, Bull, Brauset, p. 74
[12] International Maritime Organisation, working under UN see. 9, the legal situation
[13] Except for certifying the compliance with the ISM-code (International Safety Management Code), which relates to the responsibility of the owners duty to create an organisational safety system.

Control. (PSC)[14]. And that the infamous ships Estonia, Erika and Prestige as well as Sundancer and Nicholas H all were classified by members of IACS.

Another issue worth explaining is the fact that a ship owner is permitted to change from one Classification Society to another for his vessel. This could be necessary for example for logistic reasons, but it can also encourage ship owners to go for the "highest class in the lowest society", when the existing society demands repairs. Normally known as "class-hopping".

Their double role: Last to be explained in a modern perspective is the dual role of a Classification Society as a provider of "statutory certification services" (**their public role**) that increases safety at sea (of life) and to provide "Classification services" (**their private role**) that increases the safety of property. Governments delegate a great part of their responsibility to the classification societies to ensure that vessels flying their flag are in accordance to the SOLAS Convention[15], The Load Lines Convention[16] and the MARPOL[17] Convention, in addition to their original role of assisting the ship owner. A total of over 100 states within IMO has authorised IACS members to verify regulatory compliance by the vessels flying their flags.

3. Who places trust in them?

Classification societies have a split role in their work[18]. They certify the ships in accordance with international conventions and classify the ships in accordance to their own rules. The classification societies are paid by the owner and act upon his request, but it is not only he who takes an interest in their findings. One of the main purposes of their certificates is to be used by the owner to gain trust from a multitude of "third parties". Here are some of the main purposes that a classification society is and can be used for:

–They are the representatives for the interests of the public and public authorities in regard to safety at sea and environmental protection.
-They have a duty of confidence towards the client in matters that can harm his interests[19]
-They are controlling that the owner gets the ship he ordered from the shipyard. That it will "sail up to class"[20].

[14] PSC, is a initiative from IMO (se below) with the aim to control ships as they visit ports, an answer to the failure of flag states to effectively control the fleets flying their flags.
[15] See SOLAS, Convention for the Safety of Life at Sea, 1974
[16] See Load Lines, International convention on Load lines, 1966
[17] See Marpol Convention for the prevention of Pollution from Ships, 1973 and its Protocol, 1978
[18] See. 2.3 Present day role above
[19] Jahnke, Ulrich p. 111
[20] For ex. That it will have the loading capacity specified or that it later will be able to maintain the speed specified in the contract.

–They have through certificates to prove that the ship is fit to insure, register and trade, towards insurers[21], cargo owners, port authorities, flag states and others (ex. crew and passengers)
–They shall make sure that the shipyard's interests are taken care of (in relation towards its own workers and suppliers, the shipyard often are in control of which class the ship later will sail under, they are the extended arm of the constructor.)[22]

The survey and certificate is a vital piece of information about a ship's condition at a specific time. The contract between a ship owner and anybody in the group of people above, normally has a clause concerning the class of the vessel. And if the reality does not correspond to the class mentioned in the contract or the minimum standards of a class certificate, a contractual dispute could result[23]. The importance of classification is seen in most contracts. For example the warranty in a clause about hull insurance tells us: "This insurance shall terminate automatically upon…. change of classification society of the vessel, or change, suspension, discontinuance, withdrawal or expiring of the class therein". A ship owner that gets his certificates withdrawn is most likely to meet a multitude of claims for being in breach of contract, no matter how safe the vessel might be. And on the contrary a ship owner that succeeds to maintain an unsafe ship in class is home safe in the question of expressed warranty clauses in the contracts.
A cargo owner indirectly puts trust into the fact that most vessels are in class and on the implied warranty of seaworthiness that the ship owner has given. A charter or cargo owner can point to the fact that the charter-party usually includes a clause stating in which class the ship is. It is necessary to keep this in mind when the discussion about reliance is made in our cases below. This gives us a picture of the difficulties for a third party when he has to determine the sea- or cargo worthiness of a vessel, it is not possible to do it in other ways than to just make sure it carries all certificates necessary for the voyage intended. It can not be pointed out clearly enough that third parties do take the certificates as a sign of quality shipping, and do not refer to them as something only necessary for an owner to obtain insurance at a fair price. As Honka puts it in respect to the reliance of surveyors: "As the surveyor should understand reliance, it would be easy to establish that cargo on board – any cargo, not only specified cargo known to be on board at the time of the survey – would also be affected, thereby making any potential damage on board foreseeable."[24] This is if a surveyor does not think that a cargo-owner puts any reliance on his findings.
Class certificates and classification society's estimates are important as evidence of seaworthiness[25], for registration and for obtaining trade certificates from the Flag State.

[21] P&I Clubs and Marine insurers.
[22] And until the owner has taken delivery of the ship, it is the yard that is the client of the classification society.
[23] Honka 1, p. 621
[24] Honka 1, p. 645 not. 268
[25] See. Navigation Castro riva, SA v. M/S Nordholm

4. Liability theories:

When it comes to impose a possible liability on a classification society for not performing as expected or demanded, a claim can be brought against them in contract or tort. The basis of liability does not differ much if the liability is brought in tort or contract[26]. In common law emphasis is made on the distinction between them, but other legal systems do not. In most legal systems however, there is some kind of distinction. Normally for third parties in tort claims an important factor is foreseeability and proximate cause and a court might also view a classification society's conduct in a stricter sense if it exists a contract in the case[27].
There normally is a contractual relationship between the society and the ship owner (but not always). If there is a contract, and the claim is made as a breach of contract, there is also normally an exemption clause of liability formulated by the society.[28] Also the existence of release clauses protects the classification society from claims made by the contracting party and indemnity clauses from claims made by third parties. If a claim is made by a party without a contractual relation directly with the classification society, but one with the ship owner or carrier, he is normally bringing the claim in tort or through subrogation. For example, an insurer that compensated the ship owner might want to seek compensation or it might be a cargo owner that makes a claim directly towards the classification society, for the loss of his goods. It could be an advantage for him to do so because the society may not be able to limit its liability in the same way as a ship owner or carrier[29].

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[26] Cane, p. 374
[27] Honka 1, p. 637
[28] See. CMI, Model contractual clauses, Annex B part 1 p.3 between societies and governments. - 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 1, (classification society) and its employees and agents shall e 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 in question.
Part 2 p. 7 (Classification Society) shall be liable only for claims arising out of the performance of services pursuant to these Rules if such claims arise out of an act or omission: (a) attributed to (Classification Society) or its employees, agents or other person acting on behalf of (Classification Society), when such act or omission violates the standard of resonable care; or (b) by any employee of (Classification Society) unless acting outside the terms or scope of his employment; or (c) by any agent or other person acting on behalf of (Classification Society), unless such act or omission exceeds the authority granted by (Classification Society) to such agent or such other person. p. 8 Without prejudice to clause 7 above, in respect of any claim arising out of the performance of services pursuant to these Rules, (Classification Society) shall not be liable for any indirect losses. P. 9 Any liability of (Classification Society) for a claim arising out of the performance of a service pursuant to these Rules shall be subject to limitation as follows: (a) The limit of liability of (Classification Society) in respect of a single claim shall be the amount of the fee for the service giving rise to the liability multiplied by 10 or 3,000,000 units of account (SDR, authors comment), whichever is the greater amount. (b) When more than one service has given rise to liability, the service for which the highest fee was charged shall be the service upon which calculation of the limit of liability is based.
[29] Honka 1 p. 626

4.1. Contractual liability

Shipbuilders, cargo-owners, ship owners, their insurers or anybody in the group of people that places trust in the work of classification societies might try to hold it liable when not performing as expected. The duties of a classification society are governed by the contract entered into between the parties[30]. In the case "Great American"[31] two duties were established for a classification society when surveying and classifying a vessel. First: "…is to survey and classify a vessel in accordance with rules and standards established and promulgated by the society for that purpose. Secondly a duty for the classification society of due care in detection of defects in the ship that it surveys and the corollary[32] of notification thereof to the owner and charterer."
Even though there exist a limitation or exemption-clause in the contract between the ship owner and the classification society, there could exist cases where the society may be held responsible even for amounts greater than agreed. It could be that standards set by societies are unacceptable, the way they conduct the surveys could cause damage or that they don't applicate existing rules[33].

4.2. Implied Warranty of Workmanlike Performance

While suing a classification society in contract, a ship owner or constructor might claim a breach of a "implied warranty of workmanlike performance", out of a warranty first seen in the case Ryan Stevedoring Company v. Pan-Atlantic S.S. Corporation (hereafter Ryan Stevedoring). The case involved a stevedoring company that was loading cargo on board a vessel. One of their stevedores failed to secure the cargo in a proper way and upon unloading, it seriously injured another stevedore working for the same company. The injured stevedore filed a claim and recovered from the ship owner due to his "non-delegable duty of providing a seaworthy vessel" (which includes a duty to furnish a safe vessel). But the court found that the Stevedore Company should be responsible and bear the costs of its own employee's negligence. The ship owner requested indemnity from the Stevedore Company and got it. The court found that the Stevedore Company had given the ship owners a warranty of workmanlike performance to stow the cargo in a safe way and the unsafe securing of the cargo was a breach of that warranty. The court held the work performed by the Stevedore Company comparable to a "product". And the responsibilities for them to be in the direction of the warranty that are expected by a manufacturer for his products.

[30] The Continental Insurance Co. v. Daewoo Shipbuilding
[31] The Great American Insurance Co. v. Bureau Veritas
[32] Something that results from something else.
[33] Honka 1 p. 629

The Ryan-doctrine is discussed in the case The Great American[34] with its applicability to classification societies. The court comments: "It is not difficult to make at least a colourable argument for the applicability of "Ryan" to classification societies in general…". The court finds at least a "due care" on the part of classification societies, but is not willing to recognise this duty as a warranty. For the following reasons:
-The burden of ensuring the seaworthiness of a vessel is with the owner.
-A classification society does not create a hazard or defect on a vessel.
-The implied warranty is comparable to the warranty of a manufacturer of the soundness of its product. It would require that the work of a classification society could be considered as a product.
-The court found that if a warranty were found, a classification society would warrant any unseaworthy condition that may arise aboard and finally become the insurer of the seaworthiness of the vessel.

4.3. Tort liability:

A tort claim is normally based on a "duty of care" of persons in certain situations. In tort cases, a claimant has to prove that a classification society had a duty to behave to: their usual standards of conduct for his protection, a breach of that duty, causation, foreseeability and damages. It can be hard to prove the causation. When a vessel sinks without explanation a presumption of unseaworthiness is normally put against the ship owner but to put the same presumption against a classification society may be hard due to their limited contact with the ship[35].
In U.K. a case against a classification society: The morning Watch[36] where the motor yatch "Morning Watch" was sold with a valid certificate. After the sale it was found to have some grave defects that rendered it unseaworthy. The purchaser sued the classification society (Lloyd's) for economic loss due to relying on misstatements made, on the ground of a break of the duty of care by the society. The court held that there was an insufficient degree of proximity between the economic loss of the purchaser and the limited role played by the society. It was also unclear if a classification society could owe a duty of care towards the purchaser, since he was "merely one of an indeterminate class of persons that may have relied on the survey." The survey was not undertaken for his sole benefit. In the case The Nicholas H and Otto v. NKK below, the issues of foreseability and proximity are considered in full.

Can a liability occur on the same time in tort and contract? In an international perspective only the French legal system prohibits it through the doctrine of "non cumuli". In the German civil code such a doctrine does not exist and in the U.K. and Commonwealth it has been accepted through a series of cases to make a claim in both tort and contract. A plaintiff whose

[34] The Great American Insurance Company v. Bureau Veritas

[35] Clark, p.2 "The Case Law"
[36] The Morning Watch Q.B. Com, ct 15 Feb 1990, 547

normal remedy lies in contract has been successful in a tort action against a different defendant[37]. The fact that all ingredients for a contract are present does not prevent a tort duty.

4.4. Negligent misrepresentation:

In the case The Sundancer the court found that a four-part test has to be fulfilled to be able to successfully make a claim under the tortuous action "negligent misrepresentation". More about it below in 5.4, but in short, a plaintiff has to establish: 1. That the information was provided for his direction and upon his request. 2. The defendant failed to use reasonable care in doing so. 3. The defendant knew that the plaintiff would rely on the information and 4. That he did suffer an economic loss in doing so.
In a very recent case from the U.S Court of appeals, Otto Candies v. NKK, the court found the classification society NKK liable to the plaintiff for negligent misrepresentation, based on statements made in a vessel's classification survey. Facts: Otto (The purchaser) and Diamond (The owner of the vessel) entered into a memorandum of agreement of the purchase of a high-speed coastal passenger vessel named "Speeder" in December 1999. As a condition of sale in the memorandum NKK was required to restore the classification free from recommendations[38]. In January 2000 NKK issued a Class Maintenance Certificate that stated the vessel to be in class with no outstanding deficiencies. With the conditions of the memorandum satisfied Otto paid and the Speeder eventually arrived at a shipyard in Mobile, Alabama. At the yard Otto arranged for a survey by American Bureau of Shipping so that the classification could be transferred from NKK to ABS. The ABS surveyor however found numerous deficiencies that needed repair before ABS could issue the certificates. In response to this, Otto repaired the Speeder at a cost of $ 328,096.43. And after completed repairs ABS issued an interim class certificate. Otto filed a claim against NKK to recover the repair costs on the base of the tort, negligent misrepresentation.

In order to be able to bring a claim under negligent misrepresentation Otto had to show that NKK provided the class certificates to Diamond with the knowledge that they would be passed on to Otto for its guidance to determine weather to purchase the vessel or not. The court of appeal agreed with the district court that, on given facts; NKK actually knew at the time of the re-classification that the findings of the surveyor were to be important to Otto when deciding if to purchase the vessel or not.
While stating that Otto was entitled to bring its negligent misrepresentation claim due to the influence, that the result of the classification had on his decision to purchase the vessel. The court made very clear that: "any implication that classification societies can be liable for negligent misrepresentation to parties, including without limitation: seamen,

[37] Law of Contract, p.26
[38] The certificates had elapsed, since Diamond had taken the ferry out of traffic one-year before the sale.

longshoremen, passengers, cargo owners, and charterer that may rely upon a survey or class certificate, **absent actual knowledge** by the classification society that the certificate or survey report was being provided for the guidance and benefit of the party."[39].
NKK was liable to Otto because the NKK certification that had proved the vessel free of recommendations and deficiencies did not comply with NKK'' standards and rules for classification. The rules and standards of NKK would require the deficiencies in the vessel, to be identified and reported during the process of the survey. The court found and specifically noted that they had found NKK liable under its own rules and not as claimed by NKK for the vessel's failure to satisfy ABS standards after being shipped to the U.S.[40]

It is now clear that, a classification society can be held responsible by a third party, but only if they had known that the certification was to influence a decision by him. This case is nevertheless a very clear one; an interesting point is what would be the outcome, if Otto had stayed with NKK and the deficiencies were never discovered. The vessel sank on her first U.S. voyage with personal injuries and economic loss following. Lots like the circumstances in The Sundancer. Could the owners then recover? Or is the "new" certificate and survey (with Otto and not Diamond as part of contract with NKK) not a certificate "for the guidance of the party"? Another possible scenario is if a insurer suing a classification society would be able to recover on the same grounds as in Otto, since in most cases the classification of a vessel is a direct requirement for coverage of the insurance and made for that purpose.

4.5. Acting on behalf of Administrations:

A classification society that performs a survey or inspection as a statutory function of a flag state, in accordance to national and international regulations could find itself liable in several ways.
When acting on behalf of a flag state the liability may fall under the states administrative liability, as the classification society is performing a "public service" as discussed above under their "public role". It might be possible to invoke a civil liability by their clients or third parties if faults are committed performing a statutory service. A legislative immunity may be provided by the flag states under certain circumstances[41].

When the societies are acting on behalf of administrations[42] the question arises if they should have the right to global limitation[43]. We would presume

[39] Otto v. NKK, p. 13
[40] Otto v. NKK, p.15 not 5
[41] The Bahamian Law immunises a governmental appointee (a classification society, as in the "Sundancer") from liability as long as the statutory certificates are issued "in good faith".
[42] They're "public role"
[43] A system of global limitation developed when the

that classification societies do not automatically have this right[44] and The International convention on Limitation of Liability for Marine claims of 1976 does not tell us who specifically could be entitled to a global limitation.
In the case "Sundancer" below ABS was entitled to the same immunity as the Bahamian government in case of their role as "public authority". This has to be judged from case to case depending on the immunity statues of the state that the society is issuing the certificates on behalf of. To define the term "public authority" is not always free from difficulties.

The liability is fundamentally based on the reliance that an individual citizen would put on "bodies acting for the collective welfare". There would be serious disturbance if national immunity makes it impossible to try before a court a possible break of an international rule or convention. Honka criticises the decision in The Sundancer that classification societies are entitled to the legislative immunity that a flag state recognises towards governmental appointees. "It seems a strange policy to provide extensive legislative protection to these civil servants and governmental appointees with responsibility for protecting life and property at sea without giving a court the opinion to decide whether a liability exists."[45] He continues and discusses the possibility that a legislative immunity conflicts with the basic values of the legal system in the country of jurisdiction and the principle of "ordre public". But for a court to take a action or position towards a foreign government on which behalf a classification society has exercised public authority under internationally unified rules, is as Honka puts it, more a question for governments and diplomats than courts[46].

However, in the U.K. case Perrett v. Collins from 1998, that concerned the liability of a private body performing delegated statutory functions on behalf of a public authority, it was held that such body under certain circumstances could be held liable. The case is thoroughly explained later in this paper and the question is also considered in The Sundancer below, we will leave it here for now.

5. Liability in contract

We will look at a specific case in which the contractual liability of a classification society was considered in relation to its clients and how far a classification society can limit its liability.

5.1. The Sundancer[47].

[44] Honka 1 p. 627
[45] Honka 1 p 634
[46] Honka 1 p. 634-635
[47] Generally Sundancer p. 799, F Supp 363, 1992 AMC 2946

Facts, The M/V Sundancer (ex Svea Corona) was originally a car/passenger ferry, which in January 1984 was bought by a Panamanian company with Swedish and Finnish interests. The ferry was converted into a luxury cruiser. Most of the work was done in Sweden and then she left for Miami with the new name and owners, and then sailed on to Vancouver. Under the voyages conversation work continued. The owners[48] sought to register the vessel under Bahamian flag; the Bahamian Merchant Shipping Act requires that Bahamian flag ships can prove their compliance to several international safety conventions, which Bahamas has ratified. They needed[49] a safety certificate representing the ship's compliance with the 1974 Convention on the Safety of Life at Sea hereafter only called SOLAS and a certificate showing compliance with the Load Line Convention and finally, but not applicable here, a tonnage certificate. Sundance also needed a classification certificate, a document as mentioned before showing the vessel's compliance with the classification society's own rules.[50] ABS and Sundance entered on March 5, 1984 an agreement called "Request for Classification Survey and Agreement" by that agreement ABS was engaged to inspect the vessels compliance with the class-rules of ABS and to perform regulatory checks on behalf of the Bahamian government. Classification of a vessel means that the classification society (ABS) has found that the vessel is structurally and mechanically fit for a particular use or service in accordance with the rules and standards of the society that the owner wants the ship to sail under.

Surveyors from ABS were on site "during some portions"[51] of the conversation work in Sweden. ABS was provided with plans of the vessel, although no plans for the "grey-water" system[52], this is of interest later. The inspections of the vessel took place in Sweden and onboard during its voyages as the work was completed.

ABS issued, acting on behalf of the Bahamian government a 5-month provisional Load Line certificate and a SOLAS passenger ship safety certificate to the vessel on June 14, 1984. The SOLAS certificate represented the compliance with the watertight integrity required by the SOLAS Convention. ABS also issued a provisional classification certificate representing the compliance with the society's rules on the watertight integrity of vessels.[53]

On June 29, 1984 the Sundancer ran aground of the coast of British Columbia. The contact with the rock made a hole in the hull but initially only flooded two of her thirteen watertight compartments, a situation in which she normally would have stayed afloat. But the flooding of additional

[48] Sundance Cruises, Inc., here after only Sundance
[49] As with almost all of the worlds shipping registers.
[50] The Sundancer p.2 part 4
[51] The Sundancer, how much is "during some portions" authors note
[52] The Sundancer, the grey-water system is the piping that takes care of the water from the ship's showers and sinks.
[53] The Sundancer, p.4

compartments due to a passage through two holes in bulkhead 124 and through the unvalved grey-water system was too much. The Sundancer eventually sank at a nearby pier, some passengers and crewmembers were injured but no lives lost.
The ship was declared a constructive total loss[54].

The owners: Made a claim against the classification society alleging that ”defects compromising the vessel’s watertight integrity” caused the sinking. The owner held that: the absence of valves in the grey-water system was a SOLAS violation. The two holes in bulkhead 124 were a violation of both SOLAS and ABS own class rules, neither of the violations had been reported by ABS[55]. The owners sought compensation for damages of $ 60 million and punitive damages of $ 200 million. The courts agreed that the reason of the sinking was ”defects compromising the vessel’s watertight integrity”[56]. The owners held that Sundancer would not have sunk but for ABS´s negligence, gross negligence, negligent misrepresentation, breach of contract and breach of the RYAN[57] which implied warranty of workmanlike performance in issuing relevant certificates.

The Sundancer involves a complicated discussion about which law applies to the case, finally the court decided it to be the law of the flag of the ship, Bahamian. We will leave it here and simply discuss it in the scoop of the Bahamian Immunity Statute. This is frequently the case in shipping when the parties are from different legal backgrounds; therefore the discussion of the problems will be in the scoop of systems and legal principles of international law. Questions might be raised in matter of criminal law, but this will not be taken up here.

The case involves the difficulties in the double role of the classification society[58].

5.2. The public role:

Since the Bahamian law allows an immunity[59] upon its agents and, the issuance of the SOLAS and the Loadline certificates are done on behalf of the Bahamian government by ABS, the question was raised if ABS was

[54] The first of the total of 3 in her life until she encountered the final one, as an engine-room fire while at a shipyard ended her career. But her engines still sail the oceans in another ship.
[55] Honka 1, p.630 and Sundance p.3 part 4
[56] The Sundancer p.3 court of appeals
[57] Above, Ryan Stevedoring Co. V. Pan-Atlantic SS Corp., 350 U.S. 124 (156)
[58] See also above, The double role of the classification society
[59] Ex. ”Every officer appointed under this Act, and every person appointed or authorised under this Act for any purpose of the Act, shall have immunity from suit in respect of anything done by him in good faith or admitted to be done in good faith in the exercise or performance, or in the purported exercise or performance, of any power, authority or duty conferred or imposed on him under this Act.” Bahamian Merchant Shipping Act of 1976 $ 279 (the ”Act”)

such an agent and could benefit from the immunity.[60] ABS was one out of the six classification societies authorised to perform surveys on behalf of the Bahamian government. In this case there also exists a letter from the Bahamian Deputy Director of Maritime Affairs in which he confirms his understanding that ABS is to undertake SOLAS and Load Line surveys of the Sundancer on behalf of the Bahamian government. This cleared all doubts on whose behalf the certificates where issued. Now the question was if ABS was such a ”person”[61].
The district court in first instance held them not to be such a ”person”.[62] The court of appeals disagreed. They refer to section 3[63] that ”person” includes a corporation unless the context requires otherwise. Not to take more space with this, we leave it with the knowledge that under their ”public role” it is almost certain that a classification society can take advantage of the immunity that is guaranteed to other governmental bodies.

5.3. The private role:

The contract included several exemption clauses[64] between the parties. The release clause as formulated by ABS stated: “Neither the Bureau nor any of its Committees and employees will under any circumstances whatever, be responsible or liable in any respect for any act or omission, whether negligent or otherwise, of its Surveyors, agents, employees, officers or Committees, nor for any inaccuracy or omission in the Record or any other publication of the Bureau, or in any report, certificate or other document issued by the Bureau, its Surveyors, agents, employees or Committees.”[65] This and the indemnity clause were according to the court expressed in a clear way, but nevertheless they might violate public policy. But in this case the court found that in the question about the classification certificate the plaintiffs did not bring up anything that could prove that they suffered damage from ABS´s issuance of the classification certificate. With other words: It was not proved that it was because ABS didn’t notice the absence of valves in the grey water system that the Sundancer sank.

5.4. The court argued;

Sundance may not create a condition of unseaworthiness, exercise all control over the reconstruction and servicing of the vessel and then burden a classification society with a liability that is seven hundred times that of the fee for the classification contract. They did not test the legality of the exemption clauses. They just concluded that since the clause was hidden

[60] The Sundancer p. 6 section B
[61] Section 3 of the Interpretation and General Clauses ACT of the Bahamas defines ”person” to include ”any public body and any body of persons, corporate or unincorporate”, ”unless the context otherwise requires”.
[62] The Sundancer p. 6, en fin.
[63] Bahamian Merchant Shipping Act, section 3
[64] Clauses that are designed to exclude or limit liabilities that otherwise would be his. Both release and indemnity.
[65] The American Bureau of Shipping Rule 1.25, Honka 1, p. 631

behind several references, there had to be put forward more information about the intentions of the parties for the court to be able to argue about the validity. But since Sundance did not provide any evidence that it was ”in any way damaged by possible errors in issuing that particular certificate”[66]. The court decided that although ABS did not have any immunity for issuing the classification certificates, in this case Sundancer failed to prove any damage from ABS in issuing the classification certificates.
Their view is that a ship owner can not rely on or see a classification certificate, as a guarantee towards him that his vessel is safe and soundly constructed. The court held this to be the sole responsibility of the owner. The case shows that the issuance of certificates of compliance with the classification society's own rules and regimes required for the insurance and operation of the ship is not a warranty of the seaworthiness towards the contracting party (the owner in this case) by the classification society.[67] The court expressed its opinion that the purpose of the contract between the ship owner and ABS, was only to obtain the certificate necessary for operating the ship and not to point out existing defects to the owners. The court also noted that the great difference between the fee paid and damages sought, proved that the classification society "had no intention of guaranteeing the vessel's seaworthiness or becoming the ship owners insurer."

5.5. Tort and The Ryan Doctrine:

The ship owners had relied on the Ryan doctrine. Courts have referred to the Ryan doctrine when they found that despite the non-delegable duty by the owner to provide a seaworthy vessel, in some cases the liability could be shared. The key elements in applying the Ryan doctrine are expertise, control, supervision, and ability to prevent accidents. If this is established, the non-delegable duty could be put aside and liability shared. Here the court found that since the classification society only inspected and certified the vessel, and in difference of "Ryan" it did not create the defects on the vessel leading to the sinking, the services provided by a classification society differs from those provided by the stevedore in this. The Ryan doctrine did not apply in this case.
.

5.6. Conclusion:

Even if one of the defects causing the sinking was present for over twelve years and another for at least four, the owners of The Sundancer did not succeed with their claims. The tort claims in Sundancer were unsuccessful due to the court not finding ABS guilty of any gross negligence. The negligent misrepresentation claim was rejected because it was not proved that the owners requested any information for their guidance, only to fulfil the requests of certificates to operate the vessel. Classification societies are not seen as an insurer against accidents. Class and safety certificates are not

[66] The Sundancer p. 3 part. 4 in fine
[67] The Sundancer p. 799

seen as warranties of seaworthiness. If we want to establish liability, it has to be done on other legal grounds. It is not clear if the claim would have succeeded on a different theory of contractual liability. What is clear is that a ship owner can not transfer his non-delegable duty to provide a seaworthy vessel just by referring to the contract with the classification society. He might have been able to prove negligence, but had to prove that he intended to use the certificates and class estimates as guidance about the condition of the vessel towards even himself.
The status of third persons bringing claims directly against a classification society is an interesting and difficult question. The fact that the claim is brought directly against the classification society shouldn't put the ship owner in a better situation (read: the society and not he is responsible) than if the claim was brought directly against him. Honka argues that here the real discussion has to be about a shared liability,[68] since the owner shouldn't be vicariously liable for the actions of the classification society either.

6. Liability in tort

The Nicholas H[69] were before Otto v. NKK the authority in tort cases, the classification society was held not to owe a duty of care towards third parties. The case is important for the discussion of the different attitudes on tort law that come forward. It is a case that more reflects the reality for the different actors in the marine trade. Not always will a third party be able to prove his reliance on the certificates as clear as in Otto v. NKK.

6.1. The "Nicholas H".

Facts: The vessel Nicholas H was loaded with the plaintiffs cargo of lead on the 29 of January 1986 in Peru and with lead and zinc also property of the plaintiff in Chile, on the 6 of February to be carried to Italy and the USSR. During the journey on the 20 of February cracks began to emerge in the hull and the vessel deviated from her journey to Europe and anchored off San Juan, Puerto Rico. There further cracks developed. The classification society (N.K.K[70]) entered to survey the vessel at anchor[71]. The conclusion of the surveyor on the 25 of Feb. was that the vessel should proceed to the nearest available repair facilities and be repaired as recommended[72]. This repairs recommended were of permanent art and facilities were available locally, but included a full discharge and then load of the cargo due to the necessity of dry docking the vessel.

[68] Honka 1. p.638
[69] Marc rich & co. A.G. and others v. Bishop rock marine co. Ltd. Bethmarine co. Ltd. and Nippon Kaiji Kyokai Lloyds law report (1995) vol.2 p. 299
[70] Nippon Kaiji Kyokai, Japan, member of IACS
[71] The Nicholas H, part 4, p. 299
[72] Repairs too outer side shell plating and frames and internal bulkhead to cargo hold. P. 299, The Nicolas H, Lloyds law report part 4, (1995)

The vessel entered the repair yard in San Juan and some temporary repairs were made since the owners did not want to discharge and then again load the cargo. On the 12 of march the surveyor of N.K.K issued a second report and recommended that the vessel could proceed on her intended voyage to the discharge port (Italy) where further examination of temporary repairs could be done and dealt with, as necessary after discharging the present cargo. He recommended the vessel to be retained as classed subject to above condition[73]. On the 2 of march while at sea, the welding of the temporary repairs cracked, further repairs were attempted but unsuccessful and the vessel sank on the 9 of march with all its cargo, although fortunately no lives were lost.

The ship owner was entitled to limit his liability at $ 500 000 towards the cargo owners. The owners of the cargo went towards the classification society and filed a tort claim for the balance of the loss, about $ 5,5 m.[74]

The cargo owners argued that the classification society owed them a duty of care and that the sinking of the vessel and the loss of the cargo was a break of such a duty.
The preliminary issue for the court was if the classification society owed them such a duty of care that could give rise to a liability in damages.
The cargo owners held that all they had to do to establish a duty of care was to prove: 1. Foreseeable that a lack of care might result in harm. 2. Ownership or an appropriate possessor's interest in the property physically damaged or lost; and that there was no need to make good the additional criteria which applied in cases of economic loss.[75]

The defendants (NKK) argued that in cases involving both economic loss and physical damage, all four criteria would need to be fulfilled.

6.2. The court

The court found that 1. The claim against the classification society was a separate cause of action based on different considerations and not dependant of any question of contract[76]. A proximate cause was relevant in criterion in physical damage cases, since it was no direct contact between the plaintiffs and the defendants or between vehicles and equipment under their control. The test of "fair, just and reasonable" would not be needed since it was a case of physical damage. On the facts pleaded, the court found that NKK did owe a duty of care to the plaintiffs that could be capable of giving rise to a liability in damages. But in this case only as the court puts it; "nothing in the judgement should be interpreted as establishing that N.K.K. actually owed Rich a duty of care giving rise to a liability in damages. Since the

[73] The Nicholas H part 4, p.299
[74] The Nicholas H part 4, p.299 en fin
[75] As proximity and that it would be fair, just and reasonable on the facts of the case to impose a duty of care.
[76] Read: The classification society cannot take advantage of the limitations of liability agreed upon by the cargo owners in regard to the ship owners.

assumed facts were in issue and could be determined on a full trail only after all the evidence had been heard"[77]. The court decided the case in a dogmatic framework[78]. The court pointed out that the public policy considerations did not require the use of the fairness and reasonable test. But considering the hard resistance from classification societies against any form of liability, this should have been seen of more importance than the court did.

N.K.K Appealed.

6.3. The court of appeal

The court of appeal reversed the decision on grounds of policy. Since the cargo was carried under a bill of lading and subject to The Hague rules[79]. The Hague rules form according to the court: An internationally recognised code adjusting the rights and duties existing between the ship owner and those shipping goods under bills of lading; the rules create an intricate blend of rights and immunities, responsibilities and liabilities, limitations on the amount of damages recoverable, time bars, evidential provisions, indemnities and liberties all in relation to the carriage of goods under bills of lading; the submission by the plaintiffs would add an identical or virtually identical duty owed by the classification society to that owed by the ship owners but without any of the balancing factors which were internationally recognised and accepted; that would not be a just fair and reasonable proposition.
There did not exist a relationship between the cargo-owners and the classification society, which in the circumstances of this case could support the existence of a duty of care, owed by the latter to the former; it was the ship owners not the society who were in charge of the cargo[80].
The balance of rights and duties between the cargo owners and the ship owners has been set "on a internationally acceptable standard of rights and duties between the principal parties and there was no justice or good reason to alter this"[81]
The House of Lords meant that even if they agreed in majority that there was a sufficient degree of proximity to fulfil the requirement for an existence of a duty of care. Such recognition would be unfair, unjust and unreasonable based on considerations of policy. In the case, we find the two competing considerations of the content of tort-law; the one on Lord Lloyd and the one of Lord Steyn who also the majority in the House of Lords agreed to. I think it will fit here to shortly describe much simplified their point of views as expressed in the case.

[77] The Nicholas H, p. 300 (6)
[78] Honka 1 p. 619
[79] See 9. Hague rules and Hague-Visby rules.
[80] The Nicholas H, p. 300
[81] The Nicholas H, p. 312

Lord Lloyd as dissident adapted the reasoning of the judge in the first instance and wrote: We are not here to extend the law of negligence into a new field. We are not even asked to make an incremental advance. All that is required is a straightforward application of Donoghue v Stevensson…[82]

In physical damage cases, proximity very often goes without saying. Where the facts cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair, just and reasonable. Otherwise, there is a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all, and the retreat from Ann's v Merton will run into a rout.[83]

Lord Lloyd repeated that this case had to be examined on its facts and other cases on theirs, he considered that any contractual limitation of the liability was irrelevant to the tort liability. Tort law provides a general regime of obligations, out of which parties can contract if they choose to do so, but does not operate in the cracks and holes of contract law.[84]
There was a clear and direct causal relationship between the negligence of the N.K.K surveyor and the loss of the freight. He doubted that the ability or inability of N.K.K to buy adequate insurance, was a fact relevant to its liability in tort.[85]

Lord Steyn, whose opinion the case follows, was more worried about the future of the classification-system and was impressed that no claim against a classification society ever succeeded. He treated the claim as one about a duty of care and as one, which was not closely related to the facts in the case. He claimed that in the scenario N.K.K was only a minor actor compared with the responsibilities of the others (mainly the ship owner). The fact that classification societies perform a "public-duty" and by applying a duty of care on them, we will disturb the balance of liabilities created under the 150 years of shipping under bills of lading. We will also open an avalanche of claims since there is no reason (according to Lord Steyn) that it will not extend to annual surveys, docking surveys, boiler surveys and so on. He reasoned that the eventual cost of any liability would finally be borne by the ship owners and cargo-owners.

The different approach from Lord Lloyd is mainly that he considers the case as a relationship between the three parties, the classification society, the ship owner and the cargo owner and not just in the scoop of the injured cargo owner and the injurer, the classification society.[86] This is what mainly and strongest differs Lord Lloyds[87] interactional view contra the risk management view of tort law as told by Lord Steyn. Lord Steyn was

[82] The Nicholas H, p. 309
[83] The Nicholas H, p. 309
[84] Cane, p.434
[85] The Nicholas H, p.308
[86] Cane, p. 435
[87] See also Honka and Cane who shares this view on tort-law

concerned about the potential impact on an ”functioning” system that a duty of care would impose. He concludes: That the recognition of a duty of care would be unfair, unjust and unreasonable as against the ship owners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between ship owners and cargo-owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards the classification society, notably because they act for the collective welfare and unlike ship owners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo-owners, the existing system, provides them with the protection of the Hague rules or The Hague-Visby rules. But that protection is limited under such rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. ”In my judgement the lesser injustice is done by not recognising a duty of care”.[88]
It might lead to reduced availability of classification services and consequent danger to the safety of ship and mariners or to ”defensive classifying” That would increase costs without increasing safety.

All arguments used by Lord Steyn are of course valid, but only if you consider them in his relation. The fact that The Hague or Hague-Visby rules are to consider is more of a coincidence. It would be very likely for a similar transport to be done under a voyage charter-party instead of under a bill of lading. And a transport done under a voyage charter-party does not provide the cargo owners with any protection at all. And in this case the argument that a classification society acts for the collective welfare is less true, since they here (unlike in ”the Sundancer” where they acted upon the flag state)[89] were called in by the ship owner and acted upon his request to maintain his ship in class.

6.4. Conclusion:

If we don’t agree with Lord Steyn, how can we then argue a similar case where the cargo ends up on the bottom of the sea due to an unseaworthy ship? Can you say that the cargo owner should have taken more matter in protecting himself, but then as Cane puts it;[90] protect him from what? To put it in a simplified way, the cargo-owner didn’t know that the ship had suffered damage, or that a surveyor first commanded permanent repairs and then changed his mind and gave a recommendation of the ship being held in class after the temporary repairs. Didn’t he do enough when he made sure that the ship carried all certificates in the first case, or trusted the ship owner not to set sail if the certificates where withdrawn for whatever reason? [91]

[88] The Nicholas H, p.317
[89] See above 2.3. Classification Societies and their public role.
[90] Cane, p. 436
[91] See below 7. in "Arguments for a liability of Classification Societies".

I find the opinion of the judge in the first instance and the one of Lord Lloyd most reasonable. They did not think there were any considerations of policy to be made to justify the criteria of "fair, just and reasonable" if we are to consider this case on policy grounds only and not on the specific characteristics here. Then, it is a bit peculiar that the existence of a "bill of lading" got such an important role in the considerations of what is "fair, just and reasonable". It was not only possible, but as told before, highly common for the transport to be made under a one-way charter-party and therefore not disturbing the "delicate balance" held by the Hague – Visby rules.

7. Arguments for liability of Classification Societies

7.1. Introduction:

The opinion of Lino Vassallo of Malta Maritime Authority who said after the loss of Erika: "I don't see all the need of a reference to a Mediterranean rust bucket. This was a vessel which is very similar to many other vessels." It's probably one of the most straightforward statements in the whole affair; it concludes what everybody knows but hardly talks about. Those ships like Estonia, Erika and Prestige not only are victims of extreme situations, but also ships near the end of their economic lifetimes and only maintained to such a degree that they will comply with the lowest and cheapest standard in the highest class possible. We need to understand that these are ships that nobody wants to be in a better condition than to just fulfil the requirements for the certificates necessary to be able to trade. That is why it is unlikely for a ship owner in this end of the market to spend more money than he is obliged to do through the conventions of safety at sea.

The main problem is not the rules and regulations, as always, they work fine on the paper. And even if the classification societies only are one part of the safety at sea system they are an important one. A part of the problem is what was made clear in the report from RINA[92] concerning the loss of Erika[93] we could count to as many as eight (8), reasons to why Erika[94] was lost. More normal would be one or two. The question has to be made, if a classification society classifying for example Estonia, knowing (factual or not) that she was originally constructed and certified for a route between Sweden and Finland. A route that is mostly protected by islands, but now at 14 years of age and poorly maintained, would trade the route Sweden-Estonia, an unprotected route in the Northern Baltic with commonly heavy seas. Would they have issued the certificates, if they with certainty would risk to be held

[92] Registro Italiano Navale, RINA the classification society of Erika, a long IACS member.
[93] The infamous 37,ooo ton tanker that broke in two and sank of the coast of Brittany in December 1998.
[94] See RINA, 31 march 2000, "internal report" chapter 5.1 Causes of the loss.

liable for not controlling, out-standing repairs or for which type of trade she held her previous certificates?

7.2. The liability issue

The liability issue for classification societies is complex, but some general rules and principles exist. They are not meant to be a total insurer who warrants the seaworthiness or the class of the vessel, neither do they enjoy a total immunity so that they could never be held liable under any circumstances[95]. The author agrees with Cane in this. But as Honka[96] puts it; the liability issue is related to the level of professionalism that is expected from experts and consultants.
The main arguments for imposing a liability wider than today's on the classification societies would include:
- General principles of international contract and tort law.
- Safety and prevention.
- The public reliance on the seaworthiness of the ship and on the classification society.
- The surveyor's possibility to control.

All these arguments come forward in almost all cases involving classification. The industry of classification has so far been extremely unwilling to accept any form of liability and has been able to successfully defend its positions. But the world is changing, if we take the term "ship owner", 30 years ago it was the person that owned a ship. Today the "ship owner" is a term that we need to define to understand. We have to realise that the industry of shipping in many fundamental ways differs from the one when the rules were established.
The system of classification has to change with time if it wants to keep any trust and authority in the certification. Also the very fact that it is the owner of the ship who pays the survey and chooses which society to employ is a less than healthy relationship for an independent result. The classification societies are under a lot of pressure from the shipping-industry, as a result of the lack of uniform rules on the standards of ships[97]. And due to this, they seem willing to compete on these very standards because of the small possibility that they could be held liable.

7.3. Facts:

The societies are non-profit making organisations, but even as such organisms, they need a clientele to continue to exist. We do see a competition between them. The industry secures us that competition leads to improved standards. But we have seen the opposite the recent years for example, Erika that was transferred from Bureau Veritas to RINA, the ship was in class until June 23 1998 and no structural conditions of class were

[95] Cane, p. 368
[96] Honka 1, p.647
[97] Both concern construction and maintenance.

outstanding[98]. Nevertheless Erika sank only 18 months later. After the accident Nicola Squassafichi, RINA C.E.O. calls for urgent action to improve communication between classification societies[99]. This was nothing new to RINA in February 1997 the bulker ”Leros Strength” sank of the cost of Norway taking the lives of her twenty-polish crew. As with ”Erika” ”Leros Strength” was classified by a member of IACS (ABS[100]) and transferred to another member (RINA) this time only 8 months before she sank. This time the transfer was made because ABS refused a three-month extension of the vessel's certificates due to her condition, the solution to this, was to change society of classification. We have to admit that it definitely looks like there is a competition in regard to how low standard of ships the societies are willing to keep in class.

7.4. Arguments:

The ship owner and his non-delegable duty of providing a seaworthy vessel is a rule as old as the maritime industry. This is a rule that came into existence, more as an assurance towards injured parties that it would exist a ”deep pocket” form which they could claim compensation, since the owner could not hide behind a surveyor or master to avoid responsibility. But as the rules and regulations[101] have become more and more complex, the ship owners are today not in possession of the expertise to perform or control the inspections of their vessels. Even if the owners had the competence to survey their ships themselves they are not allowed doing so. They are in the hand of the classification industry and there is no reason to why they should not be able (after they compensated injured parties) to successfully make a claim against, for example a classification society that negligently approved the vessel as seaworthy. Also the ship owner's responsibility has proved to be a less successful way to ensure the safety at sea, more than to provide a ”deep pocket” and the possible preventive effect of doing so. The ship owner is, as we have seen in our cases, a bad insurer of the safety at sea; he will always comply with the regulations in the most cost-effective way possible. But he can only sail and trade his ships if he has the certificates stipulated to do so, and they are provided by the classification society and ultimately the result of the findings of the surveyor.

The same arguments as in the case of owner responsibility we will meet when looking into the responsibilities of flag states. It has been an opinion that the state whose flag a ship is flying also is the correct and most effective body to ensure that ”their” ships are in compliance with the state's

[98] Damilano, Gianfranco, RINA

[99] ”Eight sister ships of the Erika class were built, under two different class societies, and have been classed by five different IACS classification societies at some time in their lives. All of these ships have suffered structural problems. Three of them, other than Erika, were serious. No information on this history of problems was available to RINA.” Says, Nicola Squassafichi, C.E.O. RINA. Genova 9 February 2000, RINA press release.

[100] ABS-American Bureau of shipping, also the classification society for the recent ”Prestige”

[101] Ex. SOLAS, Load Lines Conventions

regulations in question of design, maintenance and operation. But once again, the lack of expertise in combination with the economic interest in keeping as many ships as possible in "your" register to make good the fees associated, has made it a failure. Almost all states have authorised classification societies to perform their surveys; the failure of the flag state control is that the state can authorise any classification society[102]. This have upset more diligent states and we got Port State Control, a way for more responsible states to survey ships of foreign flags when ever they enter a port under their jurisdiction. It may seem a very successful way to control . Under-performing flag states, which issue certificates on weak grounds, would have no ports to trade their ships in. But because of the complexity of a modern ship and the rules connected with it means that the only way for a port state to control ships on a larger scale is to their "paper compliance"[103]. Only in very severe and obvious cases is it possible for a state to inspect the ship in full, when it visits a port. As classification societies work for flag states[104] they enjoy the same immunity as the state they issue the certificates on behalf of. This is said to ensure their services at a reasonable cost.
It is not possible economically or practically to impose a "higher duty of care" on the flag states. Many of them (read; flag states of convenience) are not capable of monitoring the performances of their classification societies or themselves performing any surveys[105]. We are back with the problem of under-performing societies that cannot be held liable. In the end it is the surveyor of the society who has the power and control to withdraw or refuse to issue a certificate if the qualifications are not fulfilled. When a certificate is already issued, it is hard for a Flag State- or under a Port State Control to actually challenge the certificate with a full audit of the ship.

8. Arguments against a liability for Classification Societies

Classification work is done on assets of very high value, subject to liabilities of even greater value. And it is true that the fees involved do not reflect the size of a possible claim. The society charges the same fee for inspecting a ballast tank on a "safe" coastal cargo-ship as they do to inspect the same item on a oil or chemical tanker that could be exposed to a liability of enormous amounts in case of an accident. But the same could be said about the ship owner, the possible liability does not reflect the fees paid for freight. And he charges the same freight for a kilo of gold as for a kilo of coal. Even in the light of his limitation rights.

[102] Even one with a known "bad record" author comment
[103] Paper Compliance, normally that a vessel carries all certificates demanded, but that the real state of the ship not always is what we would expect from what the certificates tells us.
[104] See 2.3. "Their double role"
[105] Like in Sweden where the control of a passenger ferry is whit in the governmental body "Sjöfartsverket" but the control of other merchant ships is with authorised classification societies.

A classification society does not contribute to the risk other than with the possibility to foresee something that should have been discovered. They do not create a state on the ship; the ship is in the same seaworthy or unseaworthy state before and after the classification. In difference to for example a repair yard.
A high exposure to the risk of being liable might force classification societies to put a limit on their services[106]. Insurance is available to cover the losses in excess of the limitation agreed by the ship-owner towards the classification society. If we shift the responsibility and eliminate the possibility to limit the liability, the effect will only be that the classification society instead of the ship owner will pay the insurance bill and then pass it on to the cost of classification. This will according to the industry[107] result in a parallel insurance by all third parties involved with a ship that could face a liability in case of damage, stevedores, pilots, repair yards and so on. They would be responsible to parallel cover all their activities with insurance. A ship owner will face an increase in the costs of all services on his ship with the costs of their insurance, but only a decrease in his own insurance.
Among all these opinions by the industry against a liability it is hard to see any real benefits of not applying an increased liability, on the classification societies, other than maybe the cost aspect for insurance. But to look further than the relationship between injured and injurer and start considering availability of insurance, its costs or a possible impact on third parties can never give us a working safety at sea system. Then too much trust is put on the "deep pocket" arguments, and we end up with a system primarily for compensating parties after an accident.

9.1. The legal situation

9.1.1. Introduction:

The rules and regulations concerning safety at sea are covered by different rules. The main forum for the safety legislation states in-between is IMO[108]. IMO is an organisation under the United Nations working from London. They are focused on the co-operation between governments to develop technical standards. IMO issues recommendations and legislation that after they have been put into force in the member states, become a part of the international law system. The most important ones are SOLAS[109],

[106] Boisson, p.2
[107] Clark, p.3, "Economics will dictate class standards"
[108] IMO-International Maritime Organisation
[109] SOLAS - 74, contains 13 articles and an annexe of standard technical requirements. Additional IMO recommendations and protocols, well over 300 pages. Ship inspections are carried out to make sure that the requirements are satisfied (pre- delivery or as periodic surveys) if the criteria's is meet a certificate will be issued and valid in all states that has ratified the SOLAS convention. The annexe consists of eight chapters.

MARPOL 73/78[110], COLLREG (collision rules), Load Line[111] and conventions of responsibility for oil pollution.
IMO is also the body that through its member states grants the Classification Societies their right to issue the certificates that a ship owner needs to show his compliance to SOLAS[112], MARPOL and Load Line etc.

9.1.2. Port state control:

IMO does not have any form of controlling police force; it is up to the member-states to make sure that they live up to the rules that they agreed to incorporate in their national maritime laws[113]. Each member-state is also entitled to demand any ship entering their ports to follow the international rules of IMO. There is no SOLAS requirement to carry out controls on foreign vessels. This can be done under the regime of Port State Control (PSC), and some of the west European member-states have created in 1982 the "Paris Memorandum" under which they perform these controls under effective and unified rules[114]. It applies to vessels of any nationality and the target for the Paris memorandum is for each state to control at least 25% of the vessels visiting their ports. The problem is that it turned out to be more of a control of the ship's "paper compliance". Ships are only controlled if their log or papers give a reason or there exist "clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate"[115]. It was meant that the Paris Memorandum would be the way to enforce the legislation, although it has not been very effective so far and none of the members has been able to perform the goal of 25% of the visiting vessels surveyed. It has undergone a recent reorganisation, for more transparency with a web-site that publishes all the findings of its members in a public "blacklist" of all ships with known deficiencies trading our seas. Hopefully it will prove more effective; one of the main problems is the time a ship visits a port. Normally a vessel

[110] The rules of MARPOL can be found in five annexes, with very detailed rules:
1 Regulations for the Prevention of Pollution of Oil.
2 Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk
3 Regulations for the Prevention of Pollution, by Harmful Substances Carried by Sea in Packaged Form, in Freight Containers, Portable Tanks or Road or Rail Tank Wagons
4 Regulations for the Prevention of Pollution by Sewage form Ships
5 Regulations for the Prevention of Pollution by Garbage from Ships
[111] Load Line Convention of 5 April 1966, and protocol 1988. Rules on how cargo is loaded. Mainly that a seaworthy ship can be seen unseaworthy if it is not correctly loaded.
[112] The only convention that specifies classification as a statutory requirement, SOLAS Part a-1, regulation 3-1: "in addition to the requirements contained elsewhere in the present regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognised by the Administration in accordance with the provisions of regulation XI/1, or with applicable national standards of the Administration which provide an equivalent level of safety."
[113] In a severe case it is as always possible to try a breach of international law in the International court of Haag.
[114] See Paris memorandum of Understanding on PSC
[115] Paris Memorandum of understanding on PSC, no. 482 regarding control of foreign vessels.

is not staying long enough for a full audit of the safety systems. It is only in very severe cases that states have the practical possibility to detain a ship (if a port state detains a vessel and later is found without reason it can lead to liability for the public authorities). Detention and withdrawal of certificates are considered as serious matters.

9.1.3. International Rules:

A ship owner has many different rules and regulations that establish his duties, it is necessary to compare his part of the safety at sea work to see where the part of a classification society could be effected by the rules. I will borrow the division into subgroups in priority order from Honka[116].

1.	The technical aspects of the ship (Class own rules)
1.1	Seaworthiness (Load Line, SOLAS etc.)
1.2	Environmental requirements (MARPOL etc.)
1.3	Social requirements (ILO etc.)
1.4	The handling of the ship
1.5	Good seamanship (Collision rules etc.)
1.6	Good owner's practice (=collective behaviour, organisational behaviour (ISM))

The main conventions on safety are traditionally 1.1-1.3 and 1.5. We will find the international regulations mentioned above under the arms of IMO. Even if it does not directly connect with the liability of classification societies it is important to understand exactly where and under which rules in the sometime complex system they do their job. Parallel to IMO are the Rules of EU[117] and the national rules of individual states. Responsible for complying with these rules is the ”operator”[118] while the ”government” of the flag-state is responsible for controlling that he does comply. As mentioned before this is where the delegation to classification societies is done and where they perform their ”public role”[119].

It is true that the legislation is quiet when it comes to expressing the responsibilities of third parties. It states that it is the owner who has an non-delegable duty to make his ship seaworthy. Nevertheless we see references to the responsibilities of for example, flag-states delegating parts of the certification of ships flying their flags.[120] We have to keep in mind that in the division of rules that the ship-owner has to comply with, on the top three

[116] Honka 2, p.359
[117] With in the European Union the recognition of classification societies is governed by Directive 94/57/EC as now amended by directive 2001/105/EC as a part of the Erika 1 package.
[118] Operator used for; ship owner, bareboat-charterer or who might ”operate” the ship.
[119] See above Chap. 5.1. ”Sundancer”
[120] See Council Directive 94/57/EC of Nov. 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

in priority he is dependant totally on certificates issued by classification societies to prove his compliance.

9.1.4. EU:

The recent legislation by the European Union, the so called Erika 1 and Erika 2 packages are a direct action on the sinking of Erika of the coast of Brittany on the 11 of December 1999.
In short, the Erika 1[121] will make the existing directive on the port state control stronger. As a result, more vessels will be controlled and with an emphasis on harder monitoring the older vessels.
The interesting part for us is the strengthening of the existing Directive on the actions of the Classification societies. The changes in directive 94/57/EC are in the first case, a harmonisation and centralisation of the criteria's that the Classification society is judged upon. The quality requirements for the societies have been raised. Approval to operate in EU will be mandatory and conditional on the performance of the society. The activity will be monitored more strictly. It also contents a system with sanctions if the criteria are not met, for example a temporary cancellation of the authorisation to work within the EU or in severe cases, a definitive withdrawal of the authorisation.

The most "public pleasing" part is the phasing out of single hull tankers. It is from the start an IMO requirement that no single hull tankers should be in use after 2026. This has now been speeded up and the last single hull tanker will be out of service in EU waters by 2015[122].
The ERIKA 2[123] package is containing the practical solutions to the Erika 1. Firstly, the creation of a European Agency of Maritime Safety[124], to monitor the EU maritime rules. Member states will see an increased pressure to harmonise inspection and control procedures. The Agency will support the member state's efforts by collecting information, maintaining a maritime safety database, auditing classification societies and organising more effective port state controls. Secondly, a directive that makes it possible to monitor all traffic in, or passing through EU waters. Ships in EU waters will be demanded to fit an identification system for automatic communication with coastal states. Systems that will record the voyages automatically like the "black boxes" in aeroplanes to facilitate investigation in case of accidents. A system to share information about "high risk cargoes" and a requirement for all maritime members states to establish places for the refuge of ships in distress.
Thirdly, a proposal for the payment of compensation to victims of oil spills. The commission aimed to increase the upper limit to 1 billion Euro from the current 200 million. And a system to assure that the proper penalties are

[121] Energy and transport in Europe Digest. Special edition: The prestige accident. 21 November 2002, p. 3 "Measures already taken"
[122] Mainly after the sinking of Prestige.
[123] See above. P. 6 "The Erika II package"
[124] EMSA now created and provisionally hosted in Brussels until the council decides were it should be located.

imposed on the responsible. This did not end in EU legislation but started an international revision and improvement in the area.

The limitation sums for the liabilities of different levels of negligence are put into legislation. It is first a limitation of liability for the lighter forms of negligence and more or less what most member states already agreed on, but a harmonisation on EU level. In the directive[125] it is talked about a limitation of the liability in the following cases:
-Wilful act or omission or gross negligence – the liability is to the extent that the said loss, damage, injury or death is. In practice no limitation.
-In the case of personal injury or death caused by any negligent or reckless act or omission of the recognised organisation[126] a member state may limit the maximum amount payable to 4 million Euro.
-In case of loss or damage to property caused by negligent act or reckless act or omission, the limitation may be set at 2 million Euro.

The critics against this directive are mainly the same arguments as used by the industry under "arguments against a liability" above[127]. The directive contains a paragraph to be added to Article 6[128] that states that the Commission shall submit a report to the parliament and council evaluating the economic impact of the liability regime provided for this article on the parties concerned. The report shall especially monitor its consequences for the financial equilibrium of recognised organisations. Lots like the considerations of not disturbing the existing system in "The Nicholas H"[129].

9.2. Conclusions:

It is hard to say at this stage if the directive is a sharpening of the responsibilities of the classification societies, or a way to secure the existing system of classification in case of a major ship accident. It seems that the EU has left it to the courts to decide if they are willing to impose a wider liability with the knowledge that it exist an upper limit. At the same time, the public is calmed knowing that some actions are taken. I hope that the legislation will encourage the industry to look into the possible costs of a successful claim against them. And hopefully come to the conclusion that it will gain in the long run on being on the defensive side when looking into and approving new designs or surveying existing ships.

The future work of IMO, CMI and IACS[130] in regard to the rules for classification societies, has to concern the unification of their standards and how they conduct their surveys. It can not go on like today, where a ship owner is able to use one classification society against another. The competition between them has to be with other means than how low

[125] Dir. 2001/105/EC, part 5, (I). Amending Dir. 94/57/EC. Official Journal.
[126] See not. 96
[127] Above 5.0, Arguments against a liability for classification societies.
[128] p. 5, (b) I.19/12, Official Journal 22.1.2002.
[129] Above 3.2 Liability in tort.
[130] The main organisations concerned with rules for classification societies.

standards they will accept not to lose a customer or attract a new one. Considering that everything is done on the expense account of others in case of an accident or catastrophe.

10. The future

It is most likely that our two cases “The Sundancer” and “Nicholas H” above would have had another outcome if they involved personal injury[131]. We will briefly look at a third case: Perrett vs. Collins[132]. The plaintiff was injured when the plane he was flying crashed. There was amongst other defendants, the Popular Flying Association (PFA); which is a private body that undertakes ”delegated statuary functions on behalf of the Civil Aviation Authority (CAA).”[133] Lots like the classification society in ”The Sundancer” and ”The Nicolas H”. The plane could not legally have taken off without a certificate of airworthiness issued by a PFA inspector.[134]

10.1. Facts:

In 1990, first defendant Mr. Collins bought a ”Denney Kit Fox Aircraft Kit” and assembled it himself over two years of time. During this time Mr. Collins discovered that there was an option to upgrade the gearbox to one that was supposed to give better performance than the one originally supplied with the kit and did so. He should also have changed the propeller originally supplied since it would not be compatible with the new type of gearbox but did not do so.

Mr. Collins was a member of the third defendants, PFA. Their inspector was Mr. Usherwood and he inspected the aircraft under various stages during its construction and knew about and approved the change of gearbox.

In Dec. 1992 Mr. Usherwood signed a ”permit to fly” issued by PFA[135].

In Jan. 1993 Mr. Usherwood certified that the aircraft was ”fit to fly” and issued a certificate for fitness to flight, valid for one month. This meant that under the Civil Aviation Act 1992, s.3l, Mr. Collins was authorised to take the aircraft on a test flight with a passenger on board.
On Jan. 18 he did so, the plaintiff was his passenger. The first flight was successful but very short, on the next one they took the plane up to 150 feet. On the descent it went out of control, hit the ground and as a result the plaintiff was injured.

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[131] Weir, p.6-8
[132] Perrett v. Collins and others
[133] Brodie, p.16
[134] According to Civil Aviation Act 1992,
[135] Which stated inter alia: I hereby declare that the aircraft has been overhauled and prepared to my entire satisfaction and that it is in approved condition.

10.2. Claim:

The case was that the plaintiff suffered personal injuries when the aircraft crashed. The crash was caused by the negligence of one or more of the defendants and alleged that the aircraft had a propeller, which did not match the gearbox fitted to the engine of the aircraft.[136]

The second and third defendant denied that they had a duty of care to the plaintiff.

10.3. In Queen's court the judge held that they did owe a duty of care to the plaintiff. The second and third defendant appealed. The first defendant who was piloting the plane when it crashed supported the plaintiff's case.[137]

10.4. In Court of Appeal the defendants sought to deny any responsibility for the injuries suffered by the plaintiff. They held that they didn't owe any duty of care towards the plaintiff on grounds of the reasoning in "The Nicholas H". It was held that the plaintiffs sought to extend the theory of liability in "economic" losses to include personal injuries. Also that the case lacked the criteria of "proximity", "directness" and what is "fair, just and reasonable", referring to the role of Mr. Usherwood and the statutory scheme which he and his company were working under[138].
The court found that "proximity" existed. They argued; "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 over and responsibility for a situation which, if dangerous, will be liable if as a result of his unreasonable lack of care, he causes a situation to exist which does in fact cause the plaintiff injury."[139]
If this proximity exists, it doesn't matter in what form the unreasonable conduct takes, once the defendant becomes involved in the activity that gives rise to the risk, he comes under a duty to act "reasonably" in all respects relevant to that risk.
Later the second and third defendants argued that it was necessary that they "directly" caused the injury to the plaintiff and in addition to that the plaintiff must be able to show them that it was "fair, just and reasonable" for them to be under a liability towards the plaintiff.[140] Lord Justice Hobhouse dismisses the defendants reliance on "The Nicholas H", he argues; In my judgement the decision in Marc Rich does not assist the second and third defendants arguments. He reasons in short; the reasoning was essentially relevant to economic losses and not germane to personal injury. The

[136] Perrett v. Collins p.255
[137] Authors remark; for the reason that if he is held to be at fault, he wishes to be able to recover any damages paid from the second and third defendants.
[138] See 6.1. "The Nicholas H", much like the reasoning on the role of N.K.K. as a subsidiary to the ship owner.
[139] Perrett v. Collins p. 262
[140] A direct reliance on the reasoning in "The Nicholas H"

decision was based on ”Broad policy considerations”[141]. The role of Mr. Usherwood was not a subsidiary one to that of Mr. Collins; Mr. Usherwood had an independent and critical role in the granting of a certificate of fitness for flight for this aircraft, without it, it could not take off. The existence of a duty of care owed by the second and third defendant would not duplicate the liability of Mr. Collins, it was perfectly possible that a situation could occur in which an innocent third party would suffer injuries and not be able to recover from Mr. Collins. A passenger in an aircraft is entitled to assume that it has met the safety requirements and that those controlling have taken proper care. The analogy sought to be drawn between the defendants and N.K.K. is in some justified, but fails in bringing it inside the reasoning in The Nicholas H or to take it out of the established context where public bodies have been held liable for personal injuries caused by their activities. The Nicholas H is not to be regarded as an authority in cases of personal injury[142].

The appeal got dismissed with the reasoning above and the commentary made that the reliance of the appealed on The Nicholas H was ”misconceived”, they owed a duty of care to the plaintiff. This was of course a bit surprising if we look upon our two earlier cases ”The Sundancer” and ”The Nicolas H”. The stance of PFA was rejected and considered a ”A fundamental attack upon the principle of tortuous liability for negligent conduct which had caused foreseeable personal injury to others.” A denial of a duty of care was considered to leave a gap in the law of tort. This would leave for example a passenger on the ground or in the plane that suffered personal injury as a result of the unsafeness of the aeroplane and the careless and unreasonable actions of the defendant outside the law of tort. We see a definitive opening in cases involving personal injury that goes directly against the ”policy”[143] reasoning in ”The Nicholas H”. An interesting question in future cases will be the distinction between physical and economic loss and if a freight owner can argue a physical loss on the grounds of Perrett v. Collins if his goods are carried under a different contract than a bill of lading. It is the nature of the harm and not the precise form of the unreasonable behaviour that will be of more importance.

10.5. Conclusion:

The interesting arguments on the relationship between the individual citizen and bodies that act for ”the collective welfare” is much the same opinion expressed above in accordance to the reliance placed by the public upon classification societies. ”…any reasonably well informed member of the public, although not in possession of the detailed framework, would expect there to be such a regulatory scheme in force to ensure his safety when flying and would rely upon it. Furthermore, a member of the public would expect that a person who is appointed to carry out these functions of

[141] See above, The possible disturbance of laid down rules by The Hague, Visby rules.
[142] See in general: Perrett v. Collins.
[143] See not. No.97.

inspecting aircrafts and issuing permits, would exercise reasonable care in doing so."[144]

After the reasoning in Perrett, it has to be clear that a classification society could be considered to owe a duty of care to third parties, in a case of personal injury under circumstances not unlike those in The Nicholas H[145]. The Question that follows is, could there exist two different rules: one in case of personal injury and one in case of physical damage to property? If we stressed the "individual responsibilities" as a guiding principle there would be just one principle and it would place the importance in a direct and clear casual relationship between the negligent injurer and the one suffering the loss. But if we see the liability just as a matter of compensation for injuries, there could be room for two different rules, one for personal injury and one for physical damage to property.[146] It is more pleasing to think about an increased liability as a tool for individual responsibilities and it has to be our aim. In matter of just compensation it is always possible to insure yourself but from a safety at sea point of view, it will not make much good to us.

It is clear that the, in some aspects sheltered life of public authorities and those who might perform work on their behalf now have come to a change. The public authorities can not rely on their role in comparison with the owner subsidiary or on a release clause when denying liability for a negligently performed safety survey. This is a development in the right direction for the in recent years' deteriorated vision of the responsibilities of bodies that is to control sea and air safety matters.

It might only be a matter of time before a classification society will be held liable in an accident resulting in personal injury. Just imagine the possible claims after "Estonia" if anybody really was interested in the real causes to why she sank. Or if anybody brought a claim against a classification society under the rules of consumer protection, if we can stretch consumer protection into the field of passenger transportation, not at all unthinkable, a bit surprising that it is so far untried. This scenario is frightening from an economic point of view for the industry of classification, and that is why they do much work towards an inclusion of classification societies under the rules of limitation[147].

11. What is done for the future?

[144] Perrett v. Collins. p. 264
[145] Mandaraka, p.512
[146] Cane, p.434-435
[147] They could probably be included already and enjoy the same limitation globally as the ship owner but since the limitation is based on tonnage for a ship owner and the classification society does not think that a tonnage limitation is in relation to the fees charged by them. They prefer a system where the limitation is based on the fee charged by the society for the survey on the vessel that is certified.

IACS has made their TOCA (Transfer of Class Agreement) to stop owners from ”shopping” around for the lowest possible standard of class to avoid or postpone repairs. The main rule is that all recommendations of repairs; late or postponed surveys and interim certificates will follow the ship to the new society. This is followed by a full hull survey by the new society for tankers and bulk carriers of 15 years of age or more, a full hull special survey must be performed by the new society for all ships of 20 years or over. Strengthening of surveys for older ships ESP[148] was introduced in 1993, consisting of more extensive surveys for all ships aged 15 years and over. Another aim is lowering the casualty risk in the scope of general cargo ships (incl. bulk carriers) through an implantation of the ISM code. Co-operation with the Port State Control, a full co-operation between the classification society and the port state controller has been a mandatory condition for a IACS membership. A transparency with the transfer of the class records to the new society is also done.[149] This is also a part of the directive 94/57-EC.

EC have implied a liability on the classification societies working on behalf of the member states, as a part of the Erika 1 package. As discussed above. The problem is the limitation sums; they have to be high enough to keep the societies from cutting the biggest corners. But are low enough for the classification societies to accept them, this is not a way that will improve the safety at sea much.

It is much up to personal preferences when we discuss the possible liability of classification societies, do we believe in the personal responsibility or do we want a system basically for adjusting costs after an accident? If you could be held liable, if you issue a certificate that is not reflecting the real state of the vessel or approve a design that you have reason to believe to be under the minimum level for a seaworthy vessel. I think that we will see a more ”defensive” work done.

The underlying problem is the lack of uniform rules in-between the societies concerning the standards on construction and how they address damages or fatigue. This is what makes it possible to compete on standards. As we have seen in our cases above, this is not only a problem in the lowest end of the classification market. The members of both IACS and the LAN-group[150] are represented in our recent ship casualties. They attend conferences and send out recommendations but as in the case with Derbyshire and Christopher, two bulk carriers who both where constructed and surveyed all their life by Lloyds register, roughly the same size, caught in bad weather, heavy and statically loaded, constructed without a raised forecastle[151]. Both were lost,

[148] Enhanced Survey Programme.
[149] Masataka, 1.1 “Elimination of classhopping”
[150] Consisting of LR, ABS and DNV who co-operate on classification issues parallel to IACS (due to the opinion that some of the societies in IACS are under-performing, the LAN group is considered to be the ”strong three”).
[151] The forecastle normally is raised a good bit above the deck, mainly to avoid the biggest seas to ”break” over the deck of the ship and effect the hatch covers. In an effort to save

Derbyshire with all her 44 crews lost and Christopher with all her 27 crew also lost. The hard to understand part is, that the casualties happened 21 years apart, Christopher on the 22-23 of December 2001, some forty months after the implantation of the ISM-code, whose main object was to prevent more casualties with bulk-carriers. The reason they went down was not issues of seaworthiness that could or should be the future responsibility of the owner. This was badly and carelessly approved and constructed designs of vessels. First by the flag states[152] then the classification societies and IMO.

In 1998 the Belgian Ships Masters Association (BSMA) sent a letter to the IACS to make them aware of the weakness of the hatch covers on bulk carriers (one of the main reasons both Derbyshire and Christopher went down). IACS sent a fax back to confirm that the information in the letter had been distributed to all IACS members. It didn't have much influence in the work of the classification societies, since it didn't prevent The Christopher from sinking three years later.

The industry is unable to regulate itself. Classification societies are not, and are not intended to be regulators. They do not design, manufacture, control (physically), install, operate, manage, own, repair, maintain or derive commercial benefit from the vessels, equipment or installation they survey.[153] But they do survey and issue certificates of compliance in almost all of the issues above. Without their approval of a new design, most likely the Flag State will not take the ship up in their register. Without a SOLAS, MAR POL or Load Lines certificate, the ship owner will not be able to trade or will meet a very suspicious market.

We can sum up the future liabilities for a classification society with the knowledge that the public acceptance for "mass-medial" accidents has never been lower. This in conjunction with the since mid seventies rapidly changing shipping industry in both designs, usage and the ever increasing number of vessels, is most likely to put more trust but also higher demands and more responsibilities on the ones performing the quality control on our fleets.

It defiantly looks like we are moving towards a less protective attitude against not only ship owners and classification societies but against the industry at whole.

12. Conclusion

steel and money the design with lower forecastles got approved in the late seventies and we are still stuck with it.

[152] For who in many cases the Classification societies approves the designs.

[153] Masataka, chapter 3, "Limitation of liability"

Why would we place any importance into the legislation of a delegation of a control if it still were the owner and only the owner who solemnly is the only one ever responsible for the seaworthiness? Why do we then need certificates? Why do we ask an owner to present a certificate instead of only taking his word for his compliance with the rules?

I think that we do put a lot of trust in the work of the classification industry. And I think that the industry itself markets its services as a control and certification of the safety and seaworthiness issues. Classification has a lot to offer us and it would be a shame if it were reduced to only be of importance to obtain a lower premium for the insurance.[154]

Classification is still a matter of control of the seaworthiness and an issuing of a certificate that tells us that a ship is well constructed, free of structural damage or corrosion, has and should be taken serious by the public. To claim that a survey is not to be trusted by anyone, not even the insurer that specifically requests one for issuing cover, is a bank of fog made up by people protecting an industry that hasn't kept up with time. Since the industry of shipping is changing so has class.

I have to repeat the words of Honka as stated in the beginning of this paper, that the safety at sea is widely dependent on attitudes impossible to put into legislation. It is for us to hope that a change in the attitudes is up, first by the legislators, second by the courts. And when the industry realises that it is cheaper not to cut the biggest corners, then we will see a safer fleet trading our oceans.

We now face a critical transition in Europe concerning safety at sea. We will not have any single hull tankers trading our ports after 2015. What will replace them? Well designed, solidly constructed and therefore a bit more costly modern double hull tankers? Probably not, we will se a fleet of double hull tankers designed down to a price, quickly constructed with a superficies in the ballast tanks some 80% bigger than the ones on a single hull tanker[155]. The biggest challenge in this transition is for the Classification Societies. Will they be able to turn away business when an optimistic naval architect approaches them with a brand new way to save lets say 250 tons of steel (out of 35 000) in an design only proved seaworthy in a tank in a laboratory?
We have to focus on the future and how a responsibility for approving an overoptimistic design or a likewise overoptimistically repaired older vessel will effect the liability in case of an accident.
When we talked about harmonising the rules above, it is mostly understood that they are harmonised in the lowest possible way, this is one of the main problems. We need to take the highest demands on a design or inspection of a vessel by an IACS member and imply that as a standard for all. It might

[154] The Sundancer, Judge Pratt, part C, 3
[155] This is the area most likely to be effected by severe corrosion and where the problems with both Erika and Prestige started.

seem that we put too much of the blame on the classification society when something goes wrong. It is true that the real responsibility for the excessive "freedom" of the classification industry to conduct their work in the way they do lies with IMO. The shipping industry needs a set of rules that highlights:

-Design standards
-Construction standards
-Post-delivery responsibilities
-Standards for monitoring the maintenance and repairs

This should be done through international conventions, regulating the work of the classification societies towards more uniformity. But since this might be far away in time, we have to make them understand that if they want to use all of their freedom, they also have to accept a fair bit of responsibility when it eventually goes wrong[156].

Let's hope that history lets us write one more part in the ever-changing role of the classification societies. Let us hope that their future role is not just a way for ship owners to fulfil paper compliance for the access to lower insurance premiums and higher freights, but the responsible and state of the art source of technical competence that the ever more complicated industry needs. I see a future for classification and IACS as the most experienced source of information available, in matter of personal know-how and experience from surveys, damage reports and research and development. As long as they are competing on fees charged and service available and not on how low standards they are willing to approve.

As Hans G. Payer, past IACS Chairman, executive board member of germanischer Lloyd puts it, "for the concept of quality shipping and improved shipping safety in the future, industry has to create commercial incentives"[157]. Does it exist, a stronger commercial incentive than a realistic risk of being held liable when performing your work in an unacceptable manner?

[156] As for the builders of the ships, those are almost never challenged on their work in case of an accident. Protected by the approval of the design by the classification society and their limited warranty on their work (that is less than on a toaster, bought in the European union).
[157] Payer, p.2 "Sub-Standard Ships and the Role of Class"

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