AN ANALYSIS OF THE POTENTIAL LIABILITY OF CLASSIFICATION SOCIETIES: DEVELOPING ROLE; CURRENT DISORDER AND FUTURE PROSPECTS

by

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1. INTRODUCTION

'Put simply, the purpose of the classification certificate is not to guarantee safety, but merely to permit Sundance to take advantage of the insurance rates available to a classed vessel'.[1] This alarming statement made concerning the purpose of classification certificates by Judge Pratt in *The Sundancer* raised serious concerns regarding the reliability of classification society certificates. At a time when maritime casualties were escalating; partly due to an ageing maritime fleet,[2] the above remark disconcerted classification societies who were attempting to restore confidence in their reputation which had been seriously impaired by, *inter alia*, the malpractices of some of the smaller, less scrupulous classification societies.

In sharp contrast to the above statement by Judge Pratt, came the declaration by Lord Steyn in *The Nicholas H*[3] that '[t]he role of N.K.K. (a classification society) is therefore to promote safety of life and ships at sea in the public interest'. Clearly there was confusion regarding the actual role performed by classification societies. As a result, a 'Joint Working Group on a Study of Issues *re* Classification Societies'[4] ('CSJWG') was appointed by the 'Comité Maritime International' ('CMI'). In fact, the CSJWG reported that 'one of the sources of difficulty has been that what the Societies do, and how and on whose behalf they do it, is not set forth to the general public in any uniform manner'.[5]

Classification societies have a vital role to play in the maritime industry, especially with an increasing number of responsibilities being delegated to them by flag states,[6] who have neither the expertise nor the financial standing to ensure that vessels flying their flags are in compliance with international conventions.[7] The continued existence of classification societies is likewise essential for the promotion of safety of life and property at sea, as well as to conserve our sensitive environment and marine resources.

At the same time, however, classification societies will have to act responsibly and bear their proportionate share of liability should they conduct their activities in a negligent manner. We owe a responsibility towards our environment and to the many seafarers who risk their lives on substandard ships, to ensure that classification societies are provided with the incentives to

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1 *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F. 3d 1077 at 1084.
2 Lloyds List, Africa Weekly, 4 October 1996 at 3.
3 *Marc Rich and Co. v Bishop Rock Marine Co. Ltd, Bethmarine Co. Ltd and Nippon Kaiji Kyokai* [1995] 2 LI. Rep. 299 at 311.
4 Bimco Bulletin, Vol. 91, No. 2 of 1996 67.
5 *Ibid* at 67.
6 States on whose shipping registers vessels are entered. States which confer their nationality on ships may subject such ships to all their national laws.
7 Such classification societies may, *inter alia*, issue International Load Lines Certificates; Safety of Life at Sea Certificates; and Marine Pollution Certificates on behalf of their flag states.

fulfil their vital roles diligently, without economic pressure by their clients (shipowners) or undue restrictions by flag states.

In this paper, I shall outline the development of classification societies; expand on the various theories of liability against classification societies; analyse relevant cases in different jurisdictions; provide arguments for and against the imposition of liability against societies and finally; contemplate the future prospects for classification societies. As there is no case law as yet in South Africa pertaining to the liability of classification societies, I shall concentrate on the global issues regarding the potential liability of such societies.

This paper relates to classification societies 'specifically' as opposed to marine surveyors 'generally'. Briefly, a classification society surveyor is usually on board a vessel for a shorter period and is engaged specifically to 'inspect' and 'report'; whereas the duties of a marine surveyor entail more than 'simply looking over the situation'.[8] This results in a potential liability for marine surveyors usually broader than that encountered by classification societies. Furthermore, classification societies frequently have a clause in their classification certificates disclaiming liability for negligence, an element often missing from marine surveyor cases.[9] The basic principles of liability relating to both parties, however, remain essentially the same.

2. THE DEVELOPING ROLE OF CLASSIFICATION SOCIETIES[10]

2.1 Original role

Classification societies came into existence during the 17th and 18th centuries out of the needs of marine insurers and shipowners. Shipowners required technical assistance to ensure that their vessels were seaworthy, whilst insurers wanted the guarantee that such vessels were seaworthy.[11] Such insurers wished to calculate realistic premiums, but had to rely on 'hearsay' regarding the condition of vessels which proved extremely unreliable. Coffee houses, bars and inns near ports became the forums where marine insurers gathered their information, which clearly was not conducive to operating a profitable business.

Due to this undesirable state of affairs, and so as to provide marine insurers with reliable information, the first 'classification societies' were founded; namely: Lloyd's Register of Shipping (1760); Bureau Veritas (1828); American Bureau of Shipping (1862) and Det

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[8] Gordon 'The liability of Marine Surveyors and Ship Classification Societies' (1988) Journal of Maritime Law and Commerce 301.

[9] *Ibid* at 305.

[10] See generally Boisson 'Classification Societies and Safety at Sea: Back to the basics to prepare for the future (1994) 18 Marine Policy 363.

[11] Donaldson Lord Donaldson's Inquiry 8 April 1994 at 76.

Norske Veritas (1864).[12] The purpose of the classification societies was to develop and monitor standards of design, construction and maintenance of vessels for shipowners and insurers.[13]

In order to ensure the complete independence of classification societies, the clients of such societies were not shipowners, as is the case today, but marine underwriters themselves. From the information provided by these societies, marine underwriters were in a healthier position to accurately assess their risks. Due to the success of classification societies in this respect, such societies became extremely effective and profitable.

2.2 Changing role

During the latter part of the 19th century, a significant change took place in the function of classification societies. Shipowners desired 'ratings'[14] to be assigned to their vessel's that would be valid for a significant period following a comprehensive survey of their vessels. Consequently, classification societies issued ratings that would be valid for a fixed period of time and, in turn, were paid certain fees for such surveys and certificates.

The erstwhile independence of classification societies was dwindling - the very organisation whose duty it was to ensure that vessels maintained their standards was now being paid by shipowners for such services. This was clearly a system vulnerable to abuse. On the other hand, shipowners required the security provided by such surveys for economic reasons; and classification societies obtained a new source of finance which assisted them in making technological advancements in their field.[15]

Detailed regulations were drawn up by classification societies regarding surveys, such regulations that were used as references in order to determine the safety of vessels. Maritime states commenced regulating matters relating to the safety of sea-transport and delegated many of their responsibilities to classification societies. As such, classification societies elected to sever their ties with marine underwriters and to strengthen their relationship with shipowners.

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[12] *Supra* note 10 at 364-366.
[13] Donaldson *op cit* at 76.
[14] The original term used for 'classification'.
[15] *Supra* note 10 at 369.

2.3 Present-day role

Classification societies are defined as,

> 'organised societies which undertake to arrange inspections and advise on the hull and machinery of a vessel from its initial stages in new building and thereafter. The societies produce a certificate concerning the vessel's seaworthiness in accordance with the trade within which it is intended to, or does work'.[16]

'Classification' does not cover the 'manning' or 'operation' of a particular vessel. Classification societies are predominantly independent, non-profit making organisations and are frequently authorised by flag states to ensure that vessels flying their flags are in compliance with international conventions. 'Periodic surveys' are undertaken by societies so as to maintain a ship's classification, commonly known as 'class'.[17] Information regarding classification is confidential and becomes the property of the shipowner. This 'policy of confidentiality' is criticised in many quarters by those who consider that this 'shroud of secrecy' undermines the efforts of the maritime industry to expose and eradicate substandard ships. This prompted 'Fairplay Editorial'[18] to comment:

> 'Secrecy breeds suspicion, and there has always been too much of it in our industry. There are instances where it is both necessary and justified, but not half as many as some would have us believe. Take the case of class. Is there any good reason why it should not be public knowledge whether a ship is in class or not, and with whom?'

It is not compulsory for a shipowner to enter his ship with a classification society but, without the required certification and classification certificates, he will be unable to provide the 'trading certificates' required by ports-of-call and will likewise be refused insurance cover. He will find it impossible to charter-out his vessel as most charter-parties require that a ship be 'in the highest class' of the classification society in which she is entered.

Due to the weak performances of some of the smaller classification societies that lacked the required resources and expertise, the larger and more established societies founded 'The International Association of Classification Societies' ('IACS'), which internationally represents such societies and demands a high level of expertise from its members. Presently, there are

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[16] Sullivan The Marine Encyclopaedia Dictionary (1980) at 78.

[17] Being 'in class' indicates that a classification society is satisfied that, at the last periodical survey, the vessel complied with the society's rules and regulations. Subject to accidents and poor maintenance, such vessel should be in compliance ('in class') until the following survey.

[18] 7 November 1996 at 3.

eleven members[19] and two associate members in the IACS.[20] Despite the fact that the individual societies draw up their particular rules and regulations pertaining to surveys, the IACS attempts to harmonise the standards amongst such societies. Although it is claimed that standards are consistent amongst such members, only four IACS societies received 'top marks' from the United States Coast Guard with regard to detentions due to Port State Control ('PSC'). Such societies were Det Norske Veritas; Lloyd's Register of Shipping; American Bureau of Shipping; and Nippon Kaiji Kyokai.[21]

A few of the smaller classification societies founded 'The International Federation of Classification Societies' ('IFCS') in 1985. There are many who believe that these societies are substandard. In fact, the United States Coast Guard expresses that its aim is 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')'.[22]

A shipowner is permitted to switch his vessel from one classification society to another. This can be for logistic purposes, but likewise can encourage some unscrupulous shipowners to indulge in what is commonly termed as 'class-hopping'.[23] In fact, it is alleged that over 4 000 ships entered into and out of IACS classification societies between 1995 and 1996.[24] Some shipowners merely wish to have classification certificates to appease charterers and insurers whilst, at the same time, paying the lowest possible price for classification surveys.

With regard to the potential liability of classification societies, Honka[25] avers that liability serves two purposes; namely to restore the damage suffered by an individual and secondly, to prevent similar incidents in the future. Some of the more important functions of classification societies are to provide: 'statutory certification services' (their 'public' role), that stress the safety of life at sea and; 'classification services' (their 'private' role), that emphasise the safety of property.[26] Governments authorise classification societies to ensure that vessels flying their flags are in compliance with the SOLAS Convention,[27] the Load Lines Convention[28] and the MARPOL Convention.[29]

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[19] Namely, American Bureau of Shipping; Bureau Veritas; China Classification Society; Det Norske Veritas; Germanischer Lloyd; Korean Registry of Shipping; Lloyds Register of Shipping; Nippon Kaiji Kyokai; Polski Rejestr Statkow; Registro Italiano Navale; and U.S.S.R. Register of Shipping.

[20] Namely, Deutsche Schiffs - Recision und - Klassifikation and Jogoslavenski Registar Brodova.

[21] Lloyds List 17 May 1996.

[22] Fairplay Solutions February 1997 at 3.

[23] i.e. The practice by some shipowners of switching classification societies should their vessels be refused classification by their current societies due to certain deficiencies not being rectified.

[24] Lloyds List 14 October 1996 at 1.

[25] 'The classification system and its problems with special reference to the liability of classification societies' (1994) 19 Tulane Maritime Law Journal 1 at 2.

[26] *Ibid* at 4.

[27] International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 64.

2.3.1 Reliance placed upon classification societies

Classification societies are relied upon both to 'certify' the safety of ships in accordance with international conventions and to 'classify' ships in accordance with the rules of a particular society. Many parties in the maritime industry rely upon such certification and classification, including the following:

Shipowners require certification in order to comply with international conventions and the national laws of flag states. Despite the fact that flag states have the responsibility of ensuring that vessels flying their flags are in compliance with international conventions, many states wish to have as many vessels on their national registers as possible in order to acquire revenue and to provide employment possibilities for their citizens. Some flag states have been known to 'advertise' their low prices for registration, as well as for their survey and certification work.[30] Such flag states are commonly referred to as 'flag of convenience' states. This is defined as a ship register 'where the flag state does not have the capability of supervising the safety of its ships'.[31] A consequence of these 'flag of convenience' states is that shipowners 'shop' for ship registers that require the lowest standards of enforcement and involve the least expenses. Other flag states simply do not have the desire nor the ability to supervise the certification of the vast numbers of vessels flying their flags. Consequently most, if not all, their survey work is delegated to classification societies. Of concern is that evidence has been shown that states that delegate a large proportion of their survey and certification work to classification societies have a poorer safety record than those that delegate less.[32]

Shipowners are likewise required to classify their vessels in order to provide their **P & I Clubs** with accurate information regarding the condition of their ships, before such Clubs will underwrite a shipowner's civil liability. However, due to a discontentment in classification society standards amongst certain P & I Clubs, Clubs such as 'West of England P & I Association' produced their own survey programmes that were undertaken by their own inspectors. This move was vindicated when inspections of some 'classified' vessels revealed serious deficiencies.[33]

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[28] International Convention on Load Lines, Apr. 5, 1966, 18 U.S.T. 1957.
[29] International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, as amended by Protocol, Feb. 17, 1978, 17 I.L.M. 546.
[30] Donaldson *op cit* at 61.
[31] *Ibid* at 61.
[32] *Ibid* at 66.
[33] *Supra* note 10 at 372.

Shipowners wish their vessels to be classified so as to satisfy **marine insurers**,[34] who require that a ship be 'classed' before underwriting the risks associated with such ship. From 1987, however, 'The International Union of Marine Insurers' ('IUMI') criticised the 'conflict of interest' in the very system of classification itself.[35] They disapproved of the fact that shipowners employed classification societies to provide them with classification certificates and, at the same time, could be required by the societies to spend money to enhance the safety of their ships which may tempt such shipowners to employ other classification societies. Unfortunately, the prospect of losing a client often 'encourages' a society to lower it's standards.

In the aftermath of the loss of 25 bulk carriers in 1990 and 1991, some London insurers entrusted ship inspections to 'The Salvage Association'. The targets of these delegated inspections were primarily older vessels. The dissatisfaction demonstrated by shipowners and classification societies to this move was negated by the statistics published by 'The Salvage Association' in September 1993, that manifested that some 80% of the 200 classified ships surveyed, required extensive repairs.[36] Presently, however, the world-wide 'softening' in marine insurance markets has resulted in fewer ships being surveyed by insurers. It appears that some insurers are willing to take insurance risks 'at face value' due to the difficult market conditions.[37] Tony Nunn, the governmental and international affairs advisor of the IUMI, contends:

> 'In the end, of course, the insurance market does not have to write the risk of a bad vessel, but it is absolutely vital that the underwriter knows the background details and knows if the shipowner is trying to do something to improve matters'[38]

Donaldson[39] opposes the 'trend' of unrealistically high agreed vessel values for insurance purposes which may tempt shipowners to 'allow' their vessels to be lost, as an 'escape route' out of financial difficulties. Marine insurers rely on the certificates provided by classification societies when issuing coverage for vessels. Such certificates permit an insurer to make a reasonable assumption as to the state of a vessel and it's risk, before covering such vessel.[40] This reliance may be demonstrated by referring to the 'express warranty of classification'

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[34] Such as hull and machinery insurers; protection and indemnity insurers; mutual insurers; and cargo insurers.
[35] *Supra* note 10 at 372.
[36] *Ibid* at 373.
[37] Lloyds List 18 September 1996 at 14.
[38] Lloyds List: ILU 110th Anniversary. June 1995 at 18.
[39] *Op cit* at 271.
[40] O'Brien 'The potential liability of classification societies to marine insurers under United States law' (1995) 7 U.S.F. Maritime Law Journal 403 at 404.

contained in most marine insurance policies. The warranty in an 'Institute Hull Clause' stipulates:

> 'This insurance shall terminate automatically upon ... change of classification society of the vessel, or change, suspension, discontinuance, withdrawal or expiring of the class therein'.[41]

The position regarding marine cargo insurers is similar, with their policies ordinarily being subject to a classification clause.[42] Should there be a claim by it's assured, a marine insurer will cover such loss if the insured can produce a valid classification certificate. Such insurer may, however, rely on an 'exclusion' should the vessel have 'fallen out of class'.[43]

O'Brien[44] raises the question whether an insurer may obtain indemnity from a classification society where a valid certificate of classification existed at the time of a loss; and where the proximate cause of the loss was a deficiency which constituted a breach of the classification society's rules. He provides three instances where a right to indemnity from a classification society may arise:

1) a subrogated action by the insurer of a shipowner;

2) a direct action in tort by the insurer of a shipowner in order to circumvent contractual limitations; or

3) a tort action by the cargo insurer where a shipowner has a limited liability below the value of the loss, or where recovery against a shipowner may be put at risk.

Shipowners are usually required to show **charterers** that their vessels are in the 'highest class' of the society in which they are entered. Many charterers, particularly the large oil companies, commenced performing their own inspections in the wake of various ecological disasters such as the infamous 'Exxon Valdez' pollution. The results of their findings were astonishing. 'Shell Oil Company' determined that 20% of the classified oil fleet was substandard with respect to cargo-worthiness.[45] 'BP Oil Company' found the ratio to be 30%, whilst 'Mobil Oil Company' established it to be 35%.[46]

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[41] *Ibid* at 404 citing Hudson and Allen The Institute Clauses Handbook (1986) 88.
[42] *Ibid* at 405 citing Brown and Nebitt Marine Insurance Cargo Practice (1985) 53.
[43] This may be due to the failure by a shipowner to advise his classification society of a change in ownership, flag, or as a result of a significant modification to a vessel, or where such vessel is damaged.
[44] *Op cit* at 405.
[45] *Supra* note 10 at 374 citing Shell International Marine. 'A study of standards in the oil tanker industry' (May 1992).
[46] *Ibid* at 374 citing Lloyds List 2 February 1993.

Shipowners depend on financial assistance from **banking institutions** that, in turn, wish to determine the 'security' of ships they contemplate financing. This is all the more important in jurisdictions such as South Africa, where the 'mortgagee' (the bank) is poorly 'ranked' in comparison with other creditors when it requires payment out of the 'fund' following the sale of a vessel.[47] Due to the different standards prevailing amongst classification societies, banks internationally wish to promote transparency by having the condition of ships publicised.[48] This is clearly impeded by the 'principle of confidentiality' between classification societies and shipowners.

Finally, shipowners have a responsibility towards their **seafarers** to ensure that the vessels wherein they work are safe and provide adequate living conditions. Tragically seafarers, without whom no ship could ply the world's trade, are often the parties most overlooked when determining the safety of ships. It is inconceivable that economic prosperity has taken precedence over the safety of lives at sea. Seafarers are frequently in a poor bargaining position and will rarely reject employment opportunities due to the apparent unseaworthiness of a vessel. Seafarers have the right to assume that the vessels wherein they are employed are classified, and that such classification certificates are not merely 'rubber stamps'.

3. THEORIES OF LIABILITY AGAINST CLASSIFICATION SOCIETIES

3.1 Contractual liability

Whilst a classification society performs its duties, parties such as shipbuilders, shipowners, cargo-owners and marine insurers may attempt to hold it liable. The New York Federal Court asserted in *The Continental Insurance Co. v. Daewoo Shipbuilding*[49] that the duties of classification societies were governed by the contract entered into between the parties. These duties included taking care in re-examining drawings and in surveying construction work before issuing certificates that the vessel conformed to the rules of the classification society. In *The Great American Insurance Co. v Bureau Veritas*[50] *('The Great American')*, two duties of classification societies arising from surveying and classifying vessels were recognised:

> 'The first duty, as already discussed, is to survey and classify vessels in accordance with rules and standards established and promulgated by the society for that purpose. The second duty of a classification society is that of due care in detection of defects in the ships it surveys and the corollary of notification thereof to the owner and charterer'.[51]

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[47] S11 of the S.A. Admiralty Jurisdiction Regulation Act no. 105 of 1983, as amended.
[48] *Supra*, note 10 at 374.
[49] USDC, New York, 18th July 1988. 86 - Civ 8255 (RLC).
[50] 338 F. Supp. 999 (S.D.N.Y. 1972).
[51] *Ibid* at 1001.

In *The Gulf Tampa Drydock Company v. Germanischer Lloyd,*[52] where a vessel suffered damage as a result of an accident, the court declared:

> 'A classification society owes certain duties to a shipowner. Those duties include the determination that a ship conforms to certain standards of seaworthiness set by the society ... An additional classification society duty is inspection of damaged ships to determine whether they continue to meet class standards, and if not, what must be undertaken to bring the ship back up to class standards'.[53]

One of the most recent analyses of classification society liability in contract was undertaken in *The Sundancer.*[54] In this case, there was an agreement between the plaintiff shipowner and the defendant classification society that the society would provide classification and safety certificates. After the sinking of the vessel, the shipowner alleged that his loss had resulted from a breach of the classification society's duty and, as such, claimed for breach of contract as the classification society had failed to detect a defect in the vessel. Initially, the classification society relied on an 'exclusion clause' in the contract whereby all liability on its part was excluded. The court rejected this defence, however, as such exclusion clause was deemed to be so extension that it breached 'public policy'.

The classification society further relied on a doctrine advanced in *The East River Steamship Corporation v Trans-America Delaval, Inc., ('The East River Steamship')*[55] which removed the shipowner's right to claim in tort. In this latter case, the Supreme Court formulated the doctrine that 'a manufacturer in a commercial relationship has no duty under negligence or strict-liability theory to prevent a product injuring itself'.[56] The court in *The Sundancer*[57] stated that *The East River Steamship*-doctrine would solely apply in cases where parties were of 'roughly equal' bargaining power. The court in *The Sundancer* maintained, however, that such doctrine would only be utilised to prevent an action in tort where a loss was purely economical, but not in cases of non-economical loss such as injury or death.[58]

O'Brien[59] believes the current status of U.S.A. law to be that a subrogated shipowner insurer (likewise a shipowner in whose shoes the insurer stands) seeking indemnity from a classification society for pure economic loss, will be 'estopped' from pursuing an action in tort; whereas in personal injury or death cases, such party will not be 'estopped' from pursuing an action either in contract or in tort. He further maintains that, where a subrogated shipowner

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[52] 634 F. 2d 874 (1981).
[53] *Ibid* at 875.
[54] *Sundance Cruises Corp. v The American Bureau of Shipping* 799 F. Supp. 363.
[55] 476 U.S. 858, 1986 AMC 2027 (1986).
[56] *Ibid* at 871.
[57] *Supra* note 54 at 384.
[58] *Ibid.*
[59] *Op cit* at 408.

insurer wishes to proceed in contract, he will be bound by the agreement between the parties, such agreement which may have strict limitations.

A classification society which negligently classifies a vessel may possibly be held to be in breach of contract. Should such breach be proven, however, a shipowner will have the additional burden of proving that his damages were 'foreseeable' in the light of the classification society's failure to classify his vessel in accordance with its rules.[60]

A classification society may exclude its contractual liability by relying on 'exclusion clauses'.[61] Classification societies may likewise make provision for 'indemnity clauses', in order to protect themselves against third-party claims. Boisson[62] states that, in France, classification societies may limit their liability in contract unless they have been guilty of 'wilful misrepresentation' or 'gross negligence'. He submits that the position in the U.K. is that exemption clauses are acceptable should they be reasonable, and that the U.K. 'Unfair Contract Term Act' limits the effect of such clauses to purely material damages.[63]

In the U.S.A. case, *The Amoco Cadiz*,[64] the court expresses doubt as to 'whether the broad exculpatory clause contained within the certificates issued by a classification society is legally enforceable'.[65] The court in *The Great American*[66] asserts that a clause by a classification society in a contract which 'declines any responsibility for errors of judgement, mistakes or negligence which may be committed by technical or administrative staff or by its agents' is overbroad and unenforceable, being contrary to public policy.

McCormack[67] maintains that courts should not impose different terms and conditions on contracts than those voluntarily agreed to between parties of equal bargaining power, and argues further that 'disclaimers' should be upheld. On the other hand, Beck[68] believes that courts should declare disclaimers of liability, favouring negligent surveyors, to be void. He supports this view by reporting that the U.S.A. Supreme Court has held such waivers

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[60] *Ibid.*
[61] Sometimes referred to as 'release' clauses, 'hold-harmless' clauses or 'exemption clauses'.
[62] Boisson 'Classification Society Liability: Maritime Law principles. Must they be requisitioned?' (1994) CMI YEARBOOK 235 at 238.
[63] *Ibid.*
[64] *In re Oil Spill by the 'Amoco Cadiz'*, 1986 AMC 1945, 1951-1952.
[65] *Ibid* at 1952.
[66] *Op cit* at 1010 no. 6.
[67] 'Warranties and Disclaimers' (1988) 62 Tulane Law Review 549 at 581.
[68] 'Liability of Marine Surveyors for loss of surveyed vessels: When someone other than the Captain goes down with the Ship' (1989) 64 Notre Dame Law Review 246 at 269 citing *Bisso v Inland Waterways Corp.*, 349 U.S. 85 (1955).

ineffectual in towage contracts, as being contrary to public policy. Starer[69] likewise submits that classification societies should not be permitted to make use of disclaimers of liability, as the public trust their findings to a high degree.

It is possible for a classification society to avoid liability should a shipowner not comply with his obligation to inform the society of any incidents which could affect his vessel's 'class'. A shipowner also has the contractual duty to exercise 'due diligence' to make his vessel seaworthy according to the Hague, Hague-Visby and Hamburg Rules, such responsibility which may not be delegated to a third-party.[70]

3.2 Liability arising from the Implied Warranty of Workmanlike Performance

It may be possible for a shipowner or shipbuilder suing a classification society in contract to claim that the society breached an 'implied warranty of workmanlike performance'. This claim differs from a negligence action in that it creates contractual relief for damages, even where a classification society is not negligent. This warranty is referred to as the 'Ryan-doctrine' which was borne out of *Ryan Stevedoring Company v Pan-Atlantic Steamship Corporation ('Ryan Stevedoring')*.[71] This case involved a stevedore company which was contracted to load rolls of pulpboard on board a vessel. A stevedore failed to immobilise the loaded rolls and, when another stevedore from the same company attempted to unload the rolls, the cargo moved and seriously injured the luckless stevedore. In *The Sundancer*,[72] the 'Ryan-doctrine' was expressed as follows:

> "Simply put, Ryan (and its progeny) stand for the proposition that although a shipowner has a non-delegable duty of seaworthiness, under certain specific and limited circumstances it can share its absolute liability. Thus, 'a contractual right to indemnification is implied if there are *unique special factors* (my emphasis) demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility for the Plaintiff's safety".

The court concluded that the stevedoring company should bear the costs of its own (employee's) negligence. Should a subrogated shipowner insurer (likewise a shipowner) wish to obtain an indemnity from a classification society on the basis of the 'Ryan-doctrine', it would have to establish that 'unique special factors' existed in its relationship with such classification

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[69] 'The role of classification societies - US perspective'. (1993) Paper delivered at the International Bar Association, Section on Business Law, Hong Kong 1-8.

[70] *The Riverstone Meat Co. Pty. Ltd. v Lancashire Shipping Co. Ltd. ('The Muncaster Castle'.)* [1961] 1 All E.R. 495.

[71] 350 US 124, 133-134, 1956 AMC 9 (1955)

[72] *Supra* note 54 at 384-385 citing *Maritime Overseas v N.E. Pet. Indus.*, 706 F. 2d 349, 353 (Ist Cir. 1983).

society.[73] The court in *Ryan Stevedoring* contended that the stevedore company's 'warranty of workmanlike service' to stow the pulp rolls properly and safely was comparable to a manufacturer's warranty of the soundness of its manufactured product.[74]

The applicability of the 'Ryan-doctrine' to classification societies is thoroughly discussed in *The Great American*[75] where the court comments that "it is not difficult to make out at least a colourable argument for the applicability of 'Ryan' to classification societies in general ..." The court recognises a duty of 'due care' on the part of classification societies but refuses to elevate this duty to the status of a warranty.[76] The court in *The Great American*[77] provides three arguments against the applicability of the 'Ryan-doctrine' to classification societies:

Firstly, it contends that the burden of ensuring the seaworthiness of a vessel rests with the shipowner. Furthermore, whilst a shipowner may have little control over the activities of a classification society on board his vessel; such societies rarely, if ever, create hazards or defects by their functions and activities.[78]

Secondly, the court argues that *Ryan Stevedoring* observes that the 'implied warranty' is comparable to the manufacturer's warranty of the soundness of its manufactured product.[79] Consequently, the comparison requires that a classification society must produce a 'product'. A stevedore creates a 'product' of stowed cargo, whereas the activities of a classification society never create a 'condition' on board a vessel which resemble a 'product'. A classification society cannot create a 'condition' on a vessel; it can merely recommend that the shipowner or charterer does so.[80]

Thirdly, the court acknowledges that the application of the 'Ryan-doctrine' will result in the warranty covering any unseaworthy condition which may arise on board a surveyed vessel which will result in classification societies being the absolute guarantors of the vessels they survey.[81]

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[73] Beck *op cit* at 409.
[74] *Op cit* at 133-134.
[75] *Op cit* at 1014.
[76] *Ibid* at 1012.
[77] *Ibid* at 1015.
[78] *Ibid.*
[79] *Ibid* citing *Ryan Stevedoring op cit* at 134.
[80] *Ibid* at 1015.
[81] *Ibid.*

Subsequent hull survey cases have rejected the application of the 'Ryan-doctrine' to contracts involving shipowners and classification societies. In *The Amoco Cadiz*,[82] the court refused to apply such doctrine against a classification society. In this case involving one of the largest oil spills in history, The American Bureau of Shipping classification society contended that the shipowner was in the best position to avert the loss; and that public policy dictated that liability costs should be awarded against shipowners and not classification societies, due to the need to create a strong 'merchant marine'.

Staring[83] depicts the Ryan-warranty as;

> 'an endangered species of snake which courts do not kill but do not want to handle. The obligation which it has expressed is imminently sensible as a duty of some degree, but it is difficult to say why it should ever have been a warranty'.

3.3 Tort liability

The majority of cases in which recovery is sought from classification societies rely on tort, with third-parties claiming to have suffered damage due to classification society negligence. These third-parties include insurers; P & I Clubs; charterers; purchasers of vessels; and victims or their dependants, following an accident involving a classified ship. Gordon[84] maintains that one of the primary reasons that classification society negligence is pleaded is due to the fact that societies are frequently included in litigation for a contribution as 'third-party defendants'.

Boisson[85] states that the French system of tort is based upon article 1382 of the 'French Civil Code' which stipulates that anyone who commits an injury is responsible for providing compensation. He believes this to be unduly strict on classification societies during the sale of a vessel, where the purchaser relies on the accuracy of information provided by such society to its client, the seller. He avers that a classification society may be held liable even should the seller have acted fraudulently and there have been an exclusion clause in the contract, such clause not being applicable towards third-parties. He maintains that a classification society's sole defence may be to rely on the theory of the 'contractual whole', out of which its obligations towards third-parties will be assessed by referring to previous contractual commitments.[86]

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[82] *Op cit* at 1947.
[83] 'Meeting out Misfortunes: How the Courts are allocating the costs of maritime injury in the Eighties' (1985) 45 L.A. Law Review 907 at 915.
[84] *Op cit* at 303.
[85] *Supra* note 62 at 243.
[86] *Ibid.*

In the U.K., tort liability is primarily based on the 'duty of care' of persons under certain circumstances.[87] In *The Morning Watch*,[88] the conditions under which classification societies were to maintain a duty of care were stipulated by the court. In this case, the motor yacht 'Morning Watch' was sold in 1985 whilst possessing a valid certificate of classification. Thereafter it was found to have some grave defects, including corrosion, which rendered it unseaworthy. The purchaser sued Lloyd's Register classification society for economic loss suffered as a result of relying on misstatements negligently made, on the ground that the society had failed to observe its duty of care. In the Queen's Bench, Judge Phillips asserted that:

> '[A] duty of care will only arise where i) it is reasonably foreseeable to the defendant that the plaintiff is liable to rely upon his statement; ii) there is the necessary proximity between the plaintiff and the defendant; iii) it is just and reasonable in all the circumstances to impose a duty of care on the part of the defendant to the plaintiff'.[89]

The court held that there was an insufficient degree of proximity between the purchaser's purely economic loss and the role played by the classification society. The court acknowledged the plaintiff's submission that the classification society maintained a system of classification whereby parties other than owners of classified vessels relied on the fact that vessels were maintained 'in class'.[90] However, the court declared:

> '[T]he primary purpose of the classification system is, as Lloyd's Rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved, in one role or another, in shipping'.[91]

As the survey had not been undertaken for the sole benefit of the purchaser and; as such purchaser was not present when the survey had been requested and; as he was merely one of an indeterminate class of persons who may have relied on the survey, the court held that the purchaser had failed to establish that the classification society owed him a duty of care when the classification certificate was issued.[92]

In the recent case of *The Nicholas H*,[93] the issues of 'foreseeability' and 'proximity' were considered in relation to a classification society. In the Queen's Bench, the court determined that 'foreseeability' alone would be sufficient to give rise to a duty of care where the harm

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[87] *Ibid* at 244.
[88] *Mariola Marine Corporation v Lloyd's Register of Shipping*. Q.B. (Com. Ct.) 15 Feb 1990, 547 at 549.
[89] *Ibid* at 556.
[90] *Ibid* at 559.
[91] *Ibid.*
[92] *Ibid* at 561.
[93] *Marc Rich and Co. v Bishop Rock Marine Co.*, 2 Lloyds Rep. 481 (1992), 1 Lloyd's Rep. 492 (1994)

suffered was physical.[94] This decision was reversed, however, in the Court of Appeal[95] which held that the relationship between the cargo-owners and the classification society was too remote and that it would not be fair, just nor reasonable to impose a duty of care on the classification society. The court based this decision upon policy grounds and did not wish to interfere with what it perceived to be the intricate and carefully regulated international code constituted by the Hague and Hague-Visby Rules.[96]

O'Brien[97] explains that a subrogated shipowner insurer (likewise a shipowner) will have the onerous burden of establishing that an unreported or undetected defect by a classification society was the proximate cause of a loss; and would have to overcome the policy-based fears protecting classification societies. He comments that several factors contribute to a casualty and, should a vessel be lost or damaged, it may be impossible to prove that a 'defect' was the 'sole proximate cause' of the injury.

As noted previously, the U.S.A court in *The Great American*[98] stipulated that a classification society obligated itself to perform two duties with due care whilst surveying and classifying a vessel:

> 'The first duty, as already discussed, is to survey and classify vessels in accordance with the rules and standards established and promulgated by the society for that purpose. The second duty of a classification society is that of due care in detection of defects in the ships it surveys and the corollary of notification thereof to the owner and charterer'.

The District Court[99] in *The Great American* held that the defendant's failure to report irregularities with regard to the vessel's traverse bulkhead was not 'apparently' negligent and, even should such omission have been negligent, the plaintiff was unable to prove a 'casual connection' between such failure and the vessel's sinking.[100]

With regard to the first duty owed by a classification society, the court noted a potentially insuperable bar to any recovery for a breach of such duty, namely the long-standing policy that a shipowner had a non-delegable duty to maintain a seaworthy vessel. As such, a vessel owner may never utilise a ship survey nor classification as the basis of a 'due diligence' defence that he has made his vessel seaworthy.[101] Should such defence be permitted, the

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[94] *Ibid* at 498.
[95] *Supra* note 3 at 300.
[96] *Ibid.*
[97] *Op cit* at 413.
[98] *Op cit* at 1012.
[99] *Ibid* at 1011.
[100] *Ibid* at 1006.
[101] Article III (1) of the Hague Rules as amended by the Brussels Protocol of 1968.

accountability of shipowners for the seaworthiness of their vessels would disappear, being contrary to public policy.[102]

The court believed that the second duty owed by a classification society provided a sounder basis for tort liability.[103] O'Brien[104] submits that a subrogated shipowner insurer (likewise a shipowner) would have to prove that a defect within the scope of a classification society's rules was detected and not reported, or not detected at all. Furthermore, such party would have to prove that it was reasonably foreseeable that the failure to detect or report the defect would cause such loss, and that it was the 'proximate cause' of such loss. O'Brien[105] maintains that, should a defect be proven, it will generally follow that such defect is within the classification society's all-encompassing rules. He submits that the test of foreseeability will be that of the 'reasonable surveyor'. As the majority of marine surveyors are master mariners, he believes that such surveyors are aware of the probable consequences of defects in vessels.[106]

Starer[107] is of the opinion that the court in *The Great American* exposed its unsound reasoning. As the vessel was 'lost', he avers that the court absolved the classification society from liability by utilising the old liability 'escape-route' of 'no body - no crime ...' He contends that the court held that there was no causal *nexus* between the classification society's negligence and the loss of the vessel, despite the fact that such society had surveyed and certified the vessel *immediately* prior to her last voyage.[108] Starer formulates a pattern manifested by the court:

Firstly, it recognised the existence of a duty of care by the classification society; secondly, it expressed concern that classification societies might become the ultimate insurers of the vessels they surveyed, motivated by policy fears and; thirdly, it avoided imposing liability by using the aforementioned 'escape-route' of a lack of a causal *nexus*, virtually impossible to prove following the loss of the vessel.[109]

Nevertheless, Beck[110] maintains that the rule in *The Great American* is significant in that it recognises the surveyor's professional duty to discover and warn regarding defects in a vessel.

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[102] *The Great American op cit* at 1012.
[103] *Ibid.*
[104] *Op cit* at 412 citing *Steamship Mutual Underwriting Association v. Bureau Veritus ('Steamship Mutual')*, 380 F. Supp. 482, 492-493, 1973 AMC 2184 (E.D. La. 1973).
[105] *Ibid* at 412.
[106] *Ibid.*
[107] 'Liability, is it just around the corner? An advocate's view of a classification society and its duty. (1994) CMI YEARBOOK 259 at 260.
[108] *Ibid.*
[109] *Ibid.*
[110] *Op cit* at 252.

He submits that this weakens the argument employed by classification societies that they do not determine the seaworthiness of ships, but merely classify such vessels.[111]

It is extremely difficult to ascertain whether, in fact, a duty of care has been breached by a classification society. If a ship is lost at sea, often the evidence of any negligence by a surveyor will be lost with such vessel. In *The Great American,*[112] experts speculated that the reason for the vessel's sinking was due to the collapse of traverse bulkheads,[113] but this could not be proven as the Captain's logbook had been mysteriously lost before the crew were rescued. This motivated Beck[114] to comment:

> 'Cases such as the Great American ... illustrate a disturbing pattern in loss of ship cases: namely, the combination of a lack of physical evidence, conflicting opinions of experts and questions of intervening cause absolve surveyors from liability almost *ab initio*'.

Due to this problem of proof, some plaintiffs have submitted that, utilising 'the unseaworthiness doctrine', courts should 'presume' that a surveyor was negligent and that his negligence caused the damage to a vessel, unless such surveyor could prove 'due diligence' on his part.[115] The court in *The Great American* asserted that '[g]enerally, where a vessel is lost under ordinary conditions with no other explanation, the law presumes that she was unseaworthy'.[116] Subsequently, carriers and shippers have maintained that this presumption should apply against marine surveyors when classified vessels are lost in fair weather.

Furthermore, in *In re Marine Sulpher Transportation Corporation,*[117] it was argued that the presumption of unseaworthiness should apply against marine contractors that had been responsible for the safety of a lost vessel. In the New York court,[118] this presumption was held to apply against a 'designer-converter' of a commercial vessel. This was reversed, however, by the Second Circuit court,[119] which held that the unseaworthiness presumption would not apply as the duty to provide the crew with a seaworthy vessel was not the responsibility of the shipbuilder, such party which had no control over the vessel after her leaving the shipbuilding yard. As a result of this decision, courts have subsequently held that the unseaworthiness presumption does not apply against land-based marine surveyors.[120]

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111 *Ibid* referring to *Gulf Tampa,* 634 F. 2d at 878 citing *The Great American op cit.*
112 *Op cit* at 1006-1007.
113 A 'bulkhead' is a vertical partition which separates the compartments of a ship.
114 *Op cit* at 254.
115 *The Great American op cit* at 1008-1009 and *Steamship Mutual op cit* at 492-493.
116 *Op cit* at 1008.
117 312 F. Supp 1081, 1098 (S.D.N.Y. 1970), rev'd, 460 F. 2d 89 (2d Cir.), cert denied, 409 U.S. 982 (1972).
118 *Ibid at* 312 F. Supp 1081, 1098 (S.D.N.Y. 1970).
119 *Op cit,* 460 F. 2d 89 (2d Cir).
120 *The Great American op cit* at 1002 and *Steamship Mutual op cit* at 493.

In *The Steamship Mutual,*[121] the difficult burden of proving that an undetected defect was the proximate cause of a loss was demonstrated. A vessel, shortly after being classified, was lost as a result of a defect. Although the court held that the classification society had acted negligently, it contended that the plaintiff had failed to prove that such society's negligence was the proximate cause of the loss.[122] O'Brien[123] reasons that it may not be impossible for a subrogated shipowner insurer (likewise a shipowner), who has access to ship maintenance documentation and witnesses, to establish the element of proximity. However, he believes it will be extremely practically difficult for a cargo insurer to establish a causal *nexus* due to a lack of access to information. Surveyors have frequently been absolved from liability due to plaintiffs' difficulties in proving the element of proximity. Beck[124] contends that the difficulties with regard to the proving of proximity are due to various factors:

Firstly, he maintains that the consequences of an improper survey are often unforeseeable.[125] In *The Wagon Mound I,*[126] it is stipulated that a party's liability depends on 'whether the damage is of such a kind as a reasonable man should have foreseen'.[127] In this case, shipbuilders sued a shipowner when his freighter discharged oil into a port, subsequently igniting and damaging a shipbuilder's wharf.

Secondly, he reasons that the loss of a vessel is commonly a result of 'an act of God', which would be a question of 'fact'.[128] Should there be speculation that a storm caused or contributed to the loss of a vessel, a surveyor would not be held liable even should concrete evidence be provided that the vessel's damage was due to the surveyor's negligence.[129]

Thirdly, a shipowner's failure to repair a 'known' defect may constitute an 'intervening cause'.[130] As a shipowner has the non-delegable duty of making his vessel seaworthy, courts aver that a shipowner's failure to prevent a loss constitutes an intervening cause.[131] In *The Amoco Cadiz,*[132] the plaintiff marine surveyors sought a partial summary judgement to absolve themselves from liability as they alleged that the shipowner's conduct with regard to the vessel's damage constituted an intervening cause. This application was refused, however, by

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[121] *Op cit.*
[122] *Ibid* at 491.
[123] *Op cit* at 414.
[124] *Op cit* at 256.
[125] *Ibid.*
[126] *Overseas Tankship (U.K.) v Morts Dock and Engineering Co.* 1961 App. Cas. 388 (P.C. 1961).
[127] *Ibid* at 426.
[128] Beck *op cit* at 257.
[129] *Ibid* at 258.
[130] *Ibid.*
[131] *Ibid.*
[132] *Op cit.*

the court which stated:

> '[It] cannot be said at this point ... that [the shipowner's] failure to perform certain maintenance on [the ship] and to rectify those problems about which it had knowledge superseded the other facts ... Consequently, the ABS is not entitled to summary judgement on this basis'.[133]

3.4 Liability as a result of Negligent Misrepresentation

It may be possible for parties to sue classification societies for the tortious action of 'negligent misrepresentation'. In *The Sundancer*,[134] a shipowner sued his classification society for negligent misrepresentation. The District Court devised a four-part test[135] which a plaintiff would have to satisfy in order to succeed in a claim of negligent misrepresentation:

The plaintiff would have to establish that (1) the defendant, at the plaintiff's request, provided information for its direction; (2) such defendant failed to use reasonable care in so doing; (3) such defendant knew that the plaintiff would rely on the information for specific purposes; and (4) the plaintiff suffered economic loss as it relied on such information.

The District Court held that the second, third and fourth elements had been established, but stated that there was no evidence concerning the first requirement that the insurer had requested the classification society to provide it with any information for its guidance.[136] O'Brien[137] maintains that a subrogated shipowner insurer should have no difficulty in establishing the first requirement, as such insurer takes the place of the shipowner who has requested a classification society to conduct a survey of his vessel. He believes, however, that an insurer suing 'directly' may not satisfy the first requirement as it could be argued that the classification was requested by the insurer due to its requirement that classification be a pre-requisite to coverage.[138] He further avers that a subrogated shipowner insurer (likewise a shipowner) may not succeed with the fourth requirement as it militated against the non-delegable duty of the shipowner to provide a seaworthy vessel.[139] On the other hand, an insurer suing directly may succeed should it overcome the first requirement that a classification society must provide a certificate at an insurer's request and for its guidance.[140]

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[133] *Ibid* at 1955.
[134] *Supra* note 54.
[135] *Ibid* at 381.
[136] *Ibid.*
[137] *Op cit* at 414.
[138] *Ibid* at 414-415.
[139] *Ibid* at 415.
[140] *Ibid.*

3.5 Liability acting on behalf of Administrations

Boisson considers that a classification society may find itself liable in several ways[141] whilst fulfilling its statutory function of applying national and international regulations on behalf of state administrations:

Firstly, this applies to states that delegate their powers to classification societies to perform surveys and inspections of vessels flying their flags. This will fall under the state's 'administrative liability' even though the 'public service' is provided by a 'private entity', a classification society. Secondly, 'civil liability' may be invoked against classification societies by their clients and third-parties should faults be committed whilst performing a statutory service. Certain legislative immunities may, however, be provided by flag states in these circumstances. Thirdly, a classification society surveyor may be charged before criminal jurisdictions should his negligence amount to a criminal offence. This will result in personal liability, which will not be covered by insurance.

With regard to Boisson's first scenario of 'administrative liability';[142] for a long period, the legal relationships between flag states and classification societies were regulated very loosely by states that simply bestowed upon certain classification societies the authority to carry out their duties. During the 1980's, agreements were concluded between flag states and classification societies defining their legal relationships.[143] These agreements have evolved in order to prevent any disagreement between the parties and to stipulate the maximum amounts for which classification societies could be held liable.[144] The 'International Maritime Organisation' ('IMO')[145] has provided guidelines for the authorisation of organisations acting on behalf of state administrations. The Commission of European Communities has likewise submitted a draft directive on common rules and standards for ship inspections and survey organisation.[146] This directive does not, however, contain any clauses pertaining to liability.

With regard to Boisson's second scenario involving 'civil liability', classification societies are provided with some legal protection by flag states. Legislative immunity prevents legal proceedings against a flag state and its agents (such as classification societies) before the courts of foreign states. The Bahamas, for instance, stipulates that a government appointee (an authorised classification surveyor) is immunised from liability for issuing statutory certificates

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141 *Supra* note 62 at 247.
142 *Ibid* at 248.
143 *Ibid.*
144 *Ibid.*
145 Resolution A. 739 of 4 November 1993.
146 *Supra* note 62 at 248-249.

'in good faith'.[147] In *The Sundancer*,[148] the court determined that classification societies were entitled to legislative immunity. It held that 'Bahamian law' applied to the classification and certification contract as solely the flag state, the Bahamas, provided a 'stable connection' in order to determine the law of the contract. Honka[149] aptly criticises this decision by stating:

> 'It seems a strange policy to provide extensive legislative protection to those civil servants and governmental appointees with responsibility for protecting life and property at sea without giving a court the option to decide whether liability exists'.

He contends further that '[a] purely national immunity system seriously infringes on the convention-based, mandatory, protective safety-at-sea-network and its basic aims'.[150] Honka argues that, in international disputes, the applicability of legislative immunity should derive from 'conflict of law' rules should such immunity not come out of 'customary international law'.[151] Accordingly, the law of the state in which the immunity legislation predominates, should apply. He asserts, however, that the principle of 'ordre public'[152] could negate this legislative protection as it could be argued that legislative immunity was in conflict with the public policy in the state of jurisdiction and, therefore, invalid.[153]

In *The Scandinavian Star*[154] a car ferry, subsequent to being converted from a cruise vessel, caught fire in 1990 leaving 159 dead and many injured. The plaintiffs argued that the classification society surveyor, in carrying out surveys for classification and statutory certificates, had failed to report deficiencies which contributed to the rapid spread of the fire. Their claim was, *inter alia*, dismissed on the grounds of legislative immunity. Bahamian law, the law of the flag, was held to govern the dispute, such law which afforded immunity to its authorised classification societies.

A consequence of Boisson's third scenario of 'criminal liability'[155] is that a classification society surveyor may be charged with criminal liability even though he acts on behalf of the authorities of a state. Boisson comments that, although this sanction is seldom invoked, surveyors in France have been held criminally liable following a fatal accident involving a surveyed vessel.[156] He submits that, following the guilty decision relating to the sinking of the dredger, 'The Cap

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147 S 278 of the Bahamian Merchant Shipping Act of 1976.
148 *Supra* note 54 at 391-392.
149 *Op cit* at 18.
150 *Ibid.*
151 *Ibid.*
152 Acts contrary to public policy; *Ibid* at 19.
153 *Ibid* at 19.
154 *Humberto Argondona v Lloyd's Register of Shipping; Supra* note 62 at 249.
155 *Supra* note 62 at 250.
156 *Ibid;* Based on article 221-226 of the French Penal Code which punishes those guilty of manslaughter through negligence, error or a failure to observe rules.

de La Hague', French criminal judges have been unconcerned at holding classification societies criminally liable.[157]

In a very recent case[158] involving a criminal charge against the oldest U.K. classification society, Lloyd's Register, such society admitted liability for failing to ensure the safety of the public under s 3(1) of the U.K. Health and Safety Act of 1974. In this case, employees of Lloyd's Register were charged with 'gross negligence' for failing to survey a passenger walkway properly, which subsequently collapsed killing 6 people and injuring 7 others. In some quarters, this case is seen as a long-awaited decision where a classification society is held liable for certifying an object, which subsequently is held to be unsafe.[159]

4. SIGNIFICANT CASE LAW OF VARIOUS JURISDICTIONS

4.1 U.S.A.

4.1.1 *The Sundancer*[160]

4.1.1.1 Facts

In this case, the contractual liability of a classification society, the American Bureau of Shipping, ('ABS') was considered in relation to its clients ('Sundance'), the owners of 'The Sundancer'.

Sundance (plaintiff) converted a passenger ferry into a luxury passenger cruise vessel and employed ABS (defendant) to provide survey certificates for insurance purposes and the legislative safety certificate required by the flag state, the Bahamas. Very shortly after being inspected and certified by ABS, the vessel ran aground off the coast of British Columbia and tore a hole in her hull. Although the evacuation procedure was successful, some of the roughly 500 passengers sustained personal injuries, with many suffering from emotional shock. Sundance sued ABS due to its failure to detect the absence of valves in the vessel's 'grey-water piping system' (a 'SOLAS' violation) and the presence of two holes in a bulkhead, which Sundance alleged had led to the vessel's sinking. Sundance argued that neither violation had been reported by ABS[161] and that such vessel should have kept afloat despite the flooding of two of her thirteen watertight compartments.

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[157] *Ibid* at 250.
[158] The already infamous *Ramsgate Trial*; Lloyds List 1 March 1997 at 1.
[159] Fairplay Editorial 6 March 1997 at 4.
[160] *Sundance Cruises Corp. v. American Bureau of Shipping*, 799 F.Supp. 363, 1992 AMC 2946 (S.D.N.Y. 1992), aff'd, 7 F. 3d 1077, 1994 AMC 1(2d Cir. 1993), cert. denied, 114 S. Ct. 1399 (1994).
[161] *Supra* note 1 at 1080.

Sundance contended that, should ABS not have been negligent, the defects which caused the vessel to sink would have been discovered and reported. Accordingly, such defects would have to have been rectified before 'The Sundancer' would have been classified and she would not have sailed on her fateful voyage. Sundance sought compensatory damages in excess of US $64 000 000 and punitive damages of US $200 000 000.

The Second Circuit United States Court of Appeals[162] held that Sundance's claim against the ABS should fail. The court asserted that Bahamian law immunised ABS for its 'good faith' conduct in issuing the statutory safety certificate[163] and, regarding the issuance of the classification certificate, it determined that Sundance had not provided any proof that it had suffered damage due to the granting of such certificate.[164]

4.1.1.2 An analysis of the applicable courts' reasons

Sundance accepted responsibility for the ship's sinking, but averred that such vessel would not have sunk but for ABS's negligence, gross negligence, negligent misrepresentation, breach of contract and breach of the 'Ryan' implied warranty of workmanlike performance in issuing the statutory safety certificates for the vessel.[165]

The District Court held that the law of 'The Sundancer's' 'flag', Bahamian law, protected ABS with immunity for its actions in issuing the SOLAS and Load Lines certificate on behalf of the Bahamian government.[166] It declared that no evidence had been provided that ABS had been 'grossly negligent' and, furthermore, Sundance could not prove 'negligent misrepresentation' as there was not 'a scintilla of evidence ... that plaintiff had asked defendant to provide it with any information for its guidance'.[167] The court likewise submitted that no 'Ryan' implied warranty existed with regard to ship inspections.[168]

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[162] *Supra* note 1 at 1085.
[163] *Ibid* at 1083.
[164] *Ibid* at 1084.
[165] *Ibid* at 1080; See *Ryan Stevedoring op cit.*
[166] *Supra* note 54 at 392.
[167] *Ibid* at 382.
[168] *Ibid* at 385-386.

The chief reasons provided by the U.S. Court of Appeals[169] in dismissing Sundance's claim were the following:

1) The court determined that Sundance had failed to demonstrate that it had suffered 'damage' flowing out of the issuance of the classification certificate by ABS.[170]

2) It also asserted that a shipowner was not entitled to rely on a classification certificate as a guarantee that his vessel was soundly constructed.[171] Cane[172] concedes that the liability of a classification society should not be 'strict', but should be for 'negligence'.[173] In *The Sundancer*, however, Cane pertinently points out that negligence on the part of the classification society was 'assumed' for the purposes of the action against them, and did not have to be proven.[174]

3) The court further maintained that the disparity between the fees charged by ABS (US $85 000) and the damages claimed by Sundance demonstrated that the classification society could not have intended to assume the risk of loss of the vessel.[175] The court concluded that Sundance could not hold ABS liable for an amount which was 700 times that of the fee for the classification contract.[176] Cane[177] views this as a weak argument.[178] He contends that this does not take into account the fact that the classification society may have been covered by liability insurance and, as such, the disparity between the amounts may be misleading. He pursuasively argues that the fee charged may well have made allowance for the premium of the appropriate liability insurance.[179]

On the other hand, it may be argued by classification societies that insurers may see them as a classic case of 'bad insurance risk' due to their potentially great exposure.[180] Accordingly, insurance premiums may be greatly increased, such costs which will be handed over by societies to shipowners who are already insured. Cane deems it undesirable to have 'double insurance' against the same loss and maintains that it could be argued that insurance cover should be taken out by the party who could do so more efficiently, being the shipowner.[181]

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169 *Supra* note 54.
170 *Ibid* at 1084.
171 *Ibid.*
172 'The liability of classification societies' (1994) Lloyd's Maritime and Commercial Law Quarterly 363.
173 *Ibid* at 367.
174 *Ibid.*
175 *Supra* note 1 at 1084.
176 *Ibid* at 1085.
177 *Op cit.*
178 *Ibid* at 368.
179 *Ibid.*
180 Beck *op cit* at 268.
181 *Op cit* at 368.

The decision in *The Sundancer* was based on an unwillingness to disturb what the court believed to be settled patterns of risk-sharing amongst commercial parties. Cane[182] retorts by arguing that the manner in which parties of roughly equal bargaining strength distribute the risk of transactions amongst themselves should not be tampered with. Should a classification society believe that the distribution of risks in a contract are unequal, it could attempt to negotiate an immunity with the shipowner. Starer[183] likewise maintains that 'basic contractual law principles provide that courts *should not* and *may not* (my emphasis) question the adequacy of consideration'.

4) The court found it significant that Sundance, as shipowner, was ultimately responsible for and in control of the activities on board 'The Sundancer'. It held that Sundance had full responsibility for the conversion, repairs and maintenance of the vessel. This ongoing responsibility was supplemented by the owner's non-delegable duty to provide a seaworthy vessel.[184] ABS could not be deemed to have acquired Sundance's duties by inspecting the vessel and issuing a classification certificate. Starer[185] disagrees that finding classification societies liable negates or lessens this duty. He reasons that shipowners employ classification societies for their expertise in order to advise such owners as to how they may comply with their duty to provide seaworthy vessels.[186] Owners simply do not have the technical knowledge to ascertain whether their vessels are seaworthy or not. The certificates provided by classification societies are intended to assure the shipowner that he has complied with his non-delegable duty to provide a seaworthy vessel. Starer aptly questions why a shipowner should be held liable for a negligent survey performed by a creditable company (a classification society) which he has both paid for and relied upon.[187]

5) The court further declared that ABS was entitled to rely on the immunity provided by the flag state, the Bahamas.[188] Starer questions this finding as the Bahamian Statute had, until then, not been interpreted in any Bahamian judgement; nor had it been raised as a defence by ABS; nor dealt with during the five years of discovery![189]

6) The court proceeded to make the aggravating statement that the purpose of a classification certificate was not to guarantee safety, but merely to permit Sundance to take advantage of the insurance rates available to a classified vessel.[190] This statement motivated 'Lloyds List' to

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[182] *Ibid* at 368-369.
[183] *Supra* note 107 at 262.
[184] *Supra* note 1 at 1084; See also *The Great American op cit.*
[185] *Supra* note 107 at 262.
[186] *Ibid.*
[187] *Ibid.*
[188] *Supra* note 1 at 1083.
[189] *Supra* note 107 at 261.
[190] *Supra* note 1 at 1084.

remark: 'At the time, one insurer, perhaps with a modicum of understatement, described this as a serious denigration of the value of class certificates'.[191] Cane likewise believes this statement by the court to be inappropriate as, the very reason why classified vessels obtain low premiums, is due to the fact that insurers rely on the authenticity of classification certificates.[192] Should insurers believe otherwise, they would utilise their own surveyors or adjust their insurance premiums accordingly. Starer[193] alleges that 'arcane policy', rather than a proper application of legal theory, is behind the courts' reluctance to impose liability on classification societies, even though such societies have a recognised duty to exercise due care whilst performing their services.

4.1.2 *The Happy Sprite* And *The Jolly Sprite*[194]

This case is important in demonstrating that, where services provided by classification societies involve such a high degree of expertise that shipowners rely upon such services, and third-parties consequently act upon the reliance by such shipowners, a duty of care should be recognised with regard to such classification societies.

ABS, the defendant, was held negligent 'in tort' for issuing certificates to the vessels 'The Happy Sprite' and 'The Jolly Sprite' , such certificates which understated their Suez Canal tonnage measurements by some 24%. The shipowners had paid US $200 000 in settlement to the time charterers of the vessels, 'Somerelf', who had suffered loss subsequent to relying on the incorrect measurements when entering into voyage charter arrangements with third-parties. Accordingly the shipowners, as plaintiffs, proceeded with an action for indemnification against ABS.

The Suez Canal authorities had authorised ABS to issue their tonnage certificates,[195] such society which was chosen by the shipbuilders and shipowners due to its efficiency and reliability. A certain Mr Boyle from ABS failed to detect an error in the Suez Canal tonnage computation, which omitted the tonnage of the water ballast tanks from the underdeck tonnage. Mr Boyle conceded that his mistake in computing the incorrect underdeck tonnage was a 'human error'.[196]

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[191] 23 January 1997 at 5.
[192] *Op cit* at 369.
[193] *Supra* note 107 at 259.
[194] *Somerelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*, Civil no. 86. 4615, U.N.D.C. District of New Jersey, 1989 A.M.C. 2330, September 1, 1989; reported in Lexis-Nexis, 1989 American Maritime Cases, 2nd item of level 1 at 2.
[195] Which would determine the amount a vessel would have to pay the Suez Canal Authorities to pass through the Suez Canal.
[196] *Op cit* at 5.

The court held that ABS had failed to exercise 'reasonable care' in preparing the certificates. The court[197] substantiated this by asserting:

> 'Calculation of vessel tonnages, including Suez Canal tonnages, requires training and expertise beyond that possessed by a vessel owner or manager's employees. Vessel owners, as well as authorising national governments and agencies themselves, rely upon experts in the field, like ABS, to calculate and certify vessel tonnages, including Suez Canal tonnages ... ABS understood that the Suez Canal special tonnage certificates ... could be used for the benefit of other parties in the maritime industry with an obvious need to rely on such certificates; specifically, time charterers and voyage charterers, as well as owners'.[198]

The court granted the shipowners tort-based indemnity from ABS in this case as no provision had been made for contractual indemnity.[199] It noted that the purpose of such indemnity was to shift the burden of compensating the victim of a tort to the party who was chiefly responsible for such tort; in this instance ABS.[200] The court was satisfied that ABS had, in fact, committed the tort of 'negligent misrepresentation'.[201] All of the elements of the negligent misrepresentation tort were proven at the trial; namely:[202]

1) ABS provided the plaintiffs with false information;

2) ABS did not exercise reasonable care in gathering such information;

3) The plaintiffs relied on the incorrect information in a transaction which ABS knew such information could influence; and

4) Consequently, the plaintiffs suffered monetary loss.

A duty of care was held to extend to everybody who would forseeably rely on the tonnage certificate; in this case the voyage charterers.[203] The basis of the court's decision was that ABS had held itself out to the industry to be an expert, and that the industry had reasonably relied on such party for that objective.[204] As ABS had issued the tonnage certificate without a 'disclaimer' for negligence, the court entered judgement in favour of the shipowners for US $200 000, with costs.

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[197] *Ibid* at 6.
[198] *Ibid.*
[199] *Ibid* at 12.
[200] *Ibid* at 13.
[201] *Ibid.*
[202] *Ibid* at 14.
[203] *Ibid* at 6.
[204] *Ibid.*

Surprisingly, this decision has not received much attention in subsequent cases dealing with actions in tort against classification societies for negligent misrepresentation. It was, however, cited as authority by the plaintiff in *The Sundancer*[205] in order to hold ABS liable for negligent misrepresentation.[206] The court in *The Sundancer* dismissed this authority by asserting that the shipowners had not utilised ABS for the 'doing of anything', but merely to calculate the tonnage of their two vessels in order to correctly ascertain the fees payable for transit through the Suez Canal.[207] Such court maintained:[208]

> "In the case now before us, plaintiff had not asked for 'guidance' of any sort but simply for certificates that would entitle it to procure insurance and operate its vessel."

Sundance confronted this view by the court by alleging that the tonnage calculations had been required with regard to ABS's issuance of certificates under 'The International Convention on Tonnage', but to no avail.[209]

4.2 U.K.

4.2.1 *The Nicholas H*[210]

4.2.1.1 Facts

The Nicholas H[211] was a classic example of a case regarding the potential liability of classification societies in relation to third-parties. This case was viewed as a victory in many quarters by classification societies, with Lord Steyn proclaiming in the House of Lords:[212]

> 'Owners have apparently never successfully sued a classification society in England or elsewhere for breach of a contractual or tortious duty in and about the performance of their contractual engagement for a survey of a damaged vessel'.

The vessel, 'The Nicholas H', loaded cargo in Peru and Chile for carriage to Italy and the U.S.S.R. in early 1986. During her voyage, the vessel deviated to Puerto Rico due to a crack in her hull. Further cracks started developing whilst at anchor and the vessel's classification society, Nippon Kaiji Kyokai ('NKK'), was engaged to survey her. The surveyor, a certain Mr

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[205] *Supra* note 54.
[206] *Ibid* at 377.
[207] *Ibid.*
[208] *Ibid.*
[209] *Ibid.*
[210] *Marc Rich and Co. v Bishop Rock Marine Co.*, [1992] 2 Lloyd's Rep. 481 (Q.B.); [1994] 1 Lloyds Rep. 492 (C.A.); [1995] 2 Lloyd's Rep. 299 (H.L.)
[211] *Ibid.*
[212] *Supra* note 3 at 310.

Ducat, discovered significant cracks in the shell-plating of the vessel. As such, he recommended immediate, permanent repairs which were possible at such port, but which would have been costly as the vessel would have had to discharge and thereafter reload her cargo.

After temporary repairs were effected to the vessel, Mr Ducat issued a 'second report' wherein he recommended that such vessel proceed on her intended voyage to the discharge port, where the temporary repairs could further be assessed. He recommended that the vessel be retained as 'classed' subject to this further assessment taking place. The day following her departure from Puerto Rico, 'The Nicholas H' reported that her temporary welding had cracked and, following the rescue of her crew, she sank in the Atlantic Ocean with the loss of all her cargo.

The cargo-owners agreed to a settlement figure of US $500 000 with the shipowner, being the upper-limit of the shipowner's liability according to the Hague Rules.[213] Such cargo-owners ('the plaintiffs') subsequently sued N.K.K. ('the defendant') in tort for the balance of their loss, being US $5.5 million, with interest.[214] The cargo-owners argued that the surveyor had negligently approved the temporary repairs and, had such approval not been granted, the vessel would not have sailed and thus the cargo would not have been lost.[215]

The question raised in this case was whether a classification society could be held liable in tort to cargo-owners who suffered a loss due to the society's negligence in issuing a classification certificate.[216] In the Queen's Bench Division,[217] Mr Justice Hirst held that the classification society owed a duty of care to the cargo-owners. This decision was reversed in the Court of Appeal,[218] which reversal was affirmed in the House of Lords.[219] Lord Lloyd of Berwick was the sole dissenting opinion in the House of Lords hearing.

The preliminary issue ordered for trial was whether, on the facts pleaded, the classification society owed a duty of care to the cargo-owners which could give rise to a liability in damages.[220] The plaintiffs alleged that, in order to establish a duty of care, they merely had to

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213 *Supra* note 3 at 299.
214 *Ibid.*
215 *Ibid* at 303.
216 *Ibid* at 310.
217 [1992] 2 Lloyd's Rep. 481 (Q.B.).
218 [1994], 1 Lloyd's Rep. 492 (C.A.).
219 *Supra* note 3.
220 *Supra* note 217 at 481.

prove:[221]

'(i) foreseeability that lack of care might result in harm and (ii) ownership or an appropriate possessory 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 i.e. (iii) proximity and (iv) that it would be fair, just and reasonable on the facts of the case to impose a duty of care'.

4.2.1.2 An analysis of the majority judgement of the House of Lords

Lord Steyn concludes for the House of Lords that the claim by the cargo-owners should fail.[222] In making this decision he submits that, '[i]n England no classification society, engaged by owners to perform a survey, has ever been held liable to cargo-owners on the ground of a careless conduct of any survey.'[223] He further declares that a classification society would not be responsible to the cargo-owners in tort, even should such society be negligent in declaring a ship seaworthy. This would be the case even where, following a survey, a vessel promptly sails and sinks! Such society may only be responsible towards the shipowner with whom it has a contract.

Lord Steyn rejects the submission by the cargo-owners that, where a plaintiff has a proprietary or possessory interest in cases of physical damage to property, the only requirement it is required to fulfil is proof of 'reasonable foreseeability'.[224] He maintains that it is 'settled law' that, over and above the elements of foreseeability and proximity; considerations of fairness, justice and reasonableness are likewise relevant to all cases irrespective of the nature of harm suffered by the plaintiff.[225] Tetley[226] criticises this approach by the House of Lords:

> 'This requisite was added to tort law by the House of Lords in questions of economic loss without physical damage, in order to avoid opening the floodgates to multitudes of claims'.

Tetley further argues that this was a new departure as many common-law jurisdictions, including Canada, have not adopted this requirement even with respect to economic loss.[227]

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[221] *Ibid.*
[222] *Supra* note 3 at 317.
[223] *Ibid* at 310.
[224] *Ibid* at 312.
[225] *Ibid.*
[226] Fairplay Editorial 28 March 1996 at 14.
[227] *Ibid.*

Lord Steyn asserts that the shipowners were primarily responsible for their vessel sailing in a seaworthy condition, with the role of the classification society surveyor being a subsidiary one.[228] It was held by the House of Lords that there had been no contact whatsoever between the cargo-owners and the classification society, with the cargo-owners merely relying on the shipowners to keep their vessel seaworthy and to take care of the cargo.[229] Lord Steyn supports the view of Lord Justice Saville in the Court of Appeal, who maintained that it counted against the cargo-owners that no evidence had been provided that they were even aware that the classification society had been summoned to survey the vessel.[230] Cane[231] contends that what actually concerned Lord Justice Saville was that he believed that the primary responsibility for the safety of the cargo rested with the shipowners, and not with the classification society.

Cane maintains that one should not enquire as to whether a plaintiff's loss 'is' due to his reliance on the conduct of a classification society, but that it should be value judgement as to whether a classification society 'ought' to be liable to a plaintiff.[232] He concedes, however, that in terms of promoting economic efficiency in the connected markets of the carriage of goods by sea and ship classification, there were some good arguments in favour of the Court of Appeal's decision, such decision which was upheld by the House of Lords.[233]

With regard to the issue of proximity, Lord Steyn concurs with the finding of the Court of Appeal that there was an insufficient relationship of proximity between the cargo-owners and the classification society.[234] France[235] believes that the test for proximity was satisfied in this case. He argues that the risk to the cargo would have been reduced had the vessel not sailed until further repairs were effected.[236] He elaborates:[237]

> 'If a duty of care to cargo in these circumstances had ultimately been affirmed, can anyone doubt that classification societies would be encouraged to improve their internal procedures aimed at preventing vessels from sailing in similar circumstances without a more thorough condition assessment or to devise procedures to ensure immediate support and authority to beleaguered, on-site surveyors?'

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[228] *Supra* note 3 at 314.
[229] *Ibid.*
[230] *Ibid.*
[231] *Op cit* at 370.
[232] *Ibid.*
[233] *Ibid* at 376.
[234] *Supra* note 3 at 314.
[235] 'Classification Societies: their liability - An American lawyer's point of view in light of recent judgements' (1996) 2 The International Journal of Shipping Law 67.
[236] *Ibid* at 71.
[237] *Ibid.*

Lord Steyn is concerned that, should a duty of care be held to exist in this case, the potential exposure of classification societies to claims by cargo-owners would be vast and would enable cargo-owners to disturb the balance created by the Hague, Hague-Visby and tonnage limitation provisions.[238] This would allow cargo-owners, in effect, to recover in tort from a 'peripheral' party (classification societies).[239] The court was reluctant to interfere with this universally accepted system of law, which placed the primary duty of care on the shipowner and not on the classification society which was foreign to the contract of carriage and which could not benefit from the limitation of liability provisions.

Lord Steyn reasons that the recognition of a duty of care will expose classification societies to large claims, resulting in increased insurance costs for societies.[240] He claims that the higher costs or liabilities would ultimately be passed back to the shipowner.[241] France questions this viewpoint by the House of Lords.[242] He contends that, should 'The Nicholas H' have been unseaworthy when she departed from Puerto Rico, and her owners were a party to such unseaworthiness, such shipowners would then not be entitled to limit their liability and the cargo 'interests' would be able to recover in full, or in accordance with the customary freight unit limitation provisions in the Hague Rules.[243] He maintains that, should there have been no assets besides the vessel, the P&I Club rule which requires its members to pay before being indemnified would have resulted in the risk of loss in reality falling on the cargo-insurers; which was contrary to the liability scheme under 'The Convention on Limitation of Liability for Maritime Claims'.[244]

France continues that, should the shipowners have been a party to the unseaworthiness of the vessel, such owners' P&I Club insurers would have had a defence to their liability under the P&I Club rules; which was likewise contrary to the liability scheme.[245] He sympathises with cargo-underwriters who, he believes, have the least control over classification society neglect.[246] Cane[247] likewise considers the argument by the House of Lords regarding increased insurance costs to be unsound. He questions why the allocation of risks as between

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238 *Supra* note 3 at 315.
239 *Ibid.*
240 *Ibid.*
241 *Ibid.*
242 *Op cit* at 68.
243 *Ibid.*
244 *Ibid* at 68-69; Of 1976.
245 *Ibid* at 69.
246 *Ibid.*
247 *Op cit* at 373.

shipowners and cargo-owners should be enforced as between cargo-owners and classification societies.[248] He asserts:[249]

> 'It seems to me *prima facie* undesirable and unfair that, while shipowners can incur liability to cargo-owners for failure to provide a seaworthy ship, classification societies bear no legal responsibility in tort for losses suffered by cargo-owners as a result of negligent failure by them to detect that a ship is unseaworthy'.

He concedes, however, that classification societies will be forced to buy liability insurance should they not be able to pursuade shipowners to agree to an indemnity.[250] He maintains that, should classification societies be immune from non-contractual liability, they could function without insurance for third-party losses and could leave such parties to insure themselves with regard to losses that they could not recover from shipowners.[251]

Lord Steyn proclaims that an important factor in *The Nicholas H* is that classification societies act 'for the collective welfare' and perform a role which would be fulfilled by flag states in their absence.[252] He is concerned that classification societies may adopt a more 'defensive position' should they become the alternate target of cargo-owners in liability claims.[253] France[254] retorts:

> "If the concern for a more 'defensive' role means that classification surveyors will not permit vessels like the 'Nicholas H' to sail, then 'defensive' appears to be exactly what the industry wants".

4.2.1.3 The dissenting judgement of Lord Lloyd

In the House of Lords, Lord Lloyd acquiesces with the decision by Mr Justice Hirst in the Queen's Bench that there had been a very close degree of proximity between the classification surveyor and the cargo-owners.[255] Consequently, there was a duty of care on the classification society. The surveyor, as Lord Lloyd aptly states, 'must have been *persuaded* (my emphasis) to change his mind with regard to his initial decision that permanent repairs be effected'.[256] He

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[248] *Ibid.*
[249] *Ibid* at 374.
[250] *Ibid* at 375.
[251] *Ibid.*
[252] *Supra* note 3 at 316.
[253] *Ibid.*
[254] *Op cit* at 72.
[255] *Supra* note 3 at 303.
[256] *Ibid* at 302.

quotes Mr Justice Hirst, who speculated:

> '[T]he sanction imposed by his first report rendered it highly probable that the shipowner would not sail (as, in fact, occurred) in view of the dire effects that this would have on his insurance and on other common commercial arrangements such as a ship mortgage'.[257]

Lord Lloyd continues by submitting that the withdrawal of the sanction would have had the opposite effect.[258] He then considers the absence of any means by the classification society of limiting its liability in tort. As no generalised duty of care is imposed upon classification societies, but merely a decision based on the specific facts of the case, he does not consider that holding the classification society liable would lead to a 'floodgate' of claims against classification societies in general.[259] In his opinion, the test of 'proximity' would operate as an adequate safeguard against such undesirable consequences.[260]

Lord Lloyd criticises Lord Justice Saville's statement in the Court of Appeal that the bill of lading contract, under which the cargo was carried, incorporated the Hague Rules and that it would therefore not be fair, just nor reasonable to impose an identical duty on a classification society to that imposed on a shipowner 'but without any of the balancing factors which are internationally recognised and accepted'.[261] He does not believe that the issues surrounding the Hague Rules bear much relevance to the issue of liability in this case. He reasons that the cargo could, for instance, have been carried by charter-party which would consequently have excluded the applicability of the Hague Rules.[262] He elaborates:

> 'It would make nonsense of the law if a surveyor in a position of Mr Ducat owed a duty of care towards cargo if the contract of carriage were contained in a charter-party, which does not incorporate the Hague Rules, but not if it were contained in a bill of lading which does'.[263]

He disputes Lord Justice Saville's view in the Queen's Bench that the relationship between the surveyor and the cargo-owners was not sufficiently close to support a duty of care, as such cargo-owners were not even aware that the surveyor had been summoned and therefore could not have relied on anything that the surveyor did, or did not do.[264] Lord Lloyd employs the example of 'general average' to justify his viewpoint. He notes that a ship and her cargo are

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[257] *Supra* note 217 at 499.
[258] *Supra* note 3 at 303.
[259] *Ibid.*
[260] *Ibid.*
[261] *Ibid* at 304.
[262] *Ibid.*
[263] *Ibid.*.
[264] *Ibid* at 306.

regarded as participating in a 'joint venture' and, had 'The Nicholas H's' repairs been successful in Puerto Rico and the voyage successfully completed, the cargo-owners would have had to contribute to the cost of the temporary repairs under 'The York-Antwerp Rules'.[265] Therefore, when the surveyor was utilised, he was acting as much in the interests of the cargo-owners as the vessel owners.

Lord Lloyd dismisses the argument that it was not fair, just nor reasonable that classification societies should have an unlimited liability in tort, as opposed to shipowners who were entitled to limit their liability.[266] He refers to a similar argument raised in *The Tojo Maru*[267] where it was held that salvors were not entitled to limit their liability. As Lord Reid[268] commented in this case:

> 'I am bound to say that I have some sympathy with the respondents [the salvors] on the issue of limitation of liability. But a Court must go by the provisions which have been agreed and enacted. If the special position of salvors was unforeseen, then we must avoid alteration of those provisions if those concerned see fit to make some alterations'.

Subsequently, some four years later, the limitation provisions were extended to cover salvors.

Lord Lloyd disputes the relevance of the allegation that classification societies are 'charitable non-profit making organisations, promoting the collective welfare and fulfilling a 'public role' as he submits that remedies in the law of tort are not discretionary.[269] He cites the example of hospitals that are likewise charitable non-profit organisations, but that still owe a duty of care to their patients.[270] He contests the allegation that classification societies would not be able to survive financially should they be held liable in similar claims. He contends that the American Bureau of Shipping, a non-profit making classification society, had a 'nett' income of £11 million in 1990 on operating revenues of £122 million, being a very healthy financial position.[271]

He asserts that no evidence was submitted that, to enforce liability on classification societies, would result in an extra layer of insurance being imposed.[272] He elaborates by pointing out that courts have 'traditionally' regarded the availability of insurance as irrelevant to the question as to whether a duty of care should be imposed on a particular party.[273] He submits that the

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[265] *Ibid* at 307; Such Rules which are frequently utilised to cover 'general average'.
[266] *Ibid* at 308.
[267] [1971] 1 Lloyds Rep. 341; [1972] A.C. 242.
[268] *Ibid* at 348.
[269] *Supra* note 3 at 308.
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*
[273] *Ibid.*

chief consideration should be that the cargo-owners suffered physical damage to their cargo, such damage which was caused by the classification surveyor's negligence and for which the classification society was responsible.[274] Consequently, Lord Lloyd would have permitted the appeal and restored the order in the Queen's Bench.[275] He concludes by speculating:

> 'More generally, I suspect that a decision in favour of the cargo-owners would be welcomed by members of the shipping community at large, who are increasingly concerned by the proliferation of sub-standard classification societies'.[276]

4.2.2 The Ramsgate Trial

In a major development, Lloyd's Register classification society admitted criminal liability for its role in the collapse of a passenger ferry walkway at the UK port of Ramsgate in September 1994 during which 6 people were killed and 7 injured.[277] Lloyd's Register pleaded guilty to the charge that it had failed to ensure the safety of the public under the UK Health and Safety Act.[278] This was the first criminal offence in the society's 237-year history. Lloyd's Register was ordered to pay a penalty of £500 000, with costs of £252 000.[279] Having one of the oldest, largest and most prestigious classification societies admitting liability could result in serious repercussions for other classification societies who are examining their liability exposure. The port of Ramsgate and two Swedish construction companies that were involved in the design and construction of the walkway, were likewise found guilty of failing to ensure the safety of the public.

Mr Justice Clarke expressed that Lloyd's Register, or rather its employees, were guilty of 'gross negligence' in failing to inspect a passenger ferry walkway adequately.[280] He further contended that, either Lloyd's Register's quality assurance systems had been inadequate, or the people responsible for their operation had failed, or both.[281] On the other hand, Mr Justice Clarke acknowledged the important function which such society performed in the international community.[282] He found it significant that the society was regarded as a charity; had spent £17,5 million in 1996 on research, development and training; and that it had undertaken to amend its rules and procedures accordingly in the wake of the Ramsgate tragedy.[283]

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[274] *Ibid* at 309.
[275] *Ibid.*
[276] *Ibid.*
[277] Lloyds List 1 March 1997 at 1.
[278] Section 3 (1) of 1974.
[279] *Supra* note 277.
[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*

It is significant that Mr Justice Clarke believed that the port of Ramsgate, although it should have been aware of the potential risks, bore the lesser share of responsibility (likewise liability) due to its reliance on the expertise of, *inter alia*, the classification society.[284] Consequently, one may liken the position of the port of Ramsgate to that of a shipowner, which could result in increased liability claims against classification societies for negligence in conducting ship surveys. In a statement, Lloyd's Register deeply regretted the deaths and injuries suffered and declared:

> 'Having considered the matter very carefully, [Lloyd's Register] has decided to enter a plea of guilty to the charge that, on this occasion, it did not comply fully with all of its respective classification rules'.[285]

The society faces potentially large claims by injured passengers and relatives of those killed in the misfortune. Chris Hobbs, a partner in the law firm 'Norton Rose', considers that Lloyd's Register's plea of guilty raises compelling questions as all other recent cases have absolved classification societies from liability towards third-parties.[286] 'Lloyd's List' comments with regard to the above case:

> 'Class societies have become imbued with the aura of invincibility. Seemingly immune to legal accountability, they have inspired antagonism amongst the maritime community ... but the concept of class invincibility has been heavily dented'.[287]

This case brings home the reality that classification societies may be susceptible to unlimited liability claims from third-parties. Lloyd's Register maintains that it carries limited insurance cover for claims involving professional negligence, but that such insurance was costly and scarce. It was furthermore impossible to insure against every possible event.[288] Lloyd's Register, however, should be applauded for its response to this tragedy. 'Fairplay Editorial' expresses:[289]

> 'A company can often be judged by the way it behaves when a mistake is made. [Lloyd's Register] has handled the matter with dignity and decency. It immediately accepted it was at fault and has carried out research which it believes has identified what went wrong'.

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[284] *Ibid.*
[285] Lloyds List 24 January 1997 at 1.
[286] *Ibid* at 5.
[287] *Ibid.*
[288] *Ibid.*
[289] 6 March 1997 at 4.

4.3 France

4.3.1 *The Elodie II*[290]

A French purchaser of a small vessel sued a classification society in tort for faults committed during various surveys of the vessel. During the latter part of 1988, Bureau Veritas classification society conducted a special survey of the vessel and provided the relevant certificates. The future purchaser of the vessel requested that a surveyor from Bureau Veritas survey the vessel, such survey which was undertaken during the latter part of 1990 and the corresponding certificates were provided. After the French authorities had inspected such vessel, they withdrew its navigation license due to various defects which had clearly existed for several years.

The 'Elodie II' was 'scrapped' after it was discovered that its required overhaul would be too costly. Bureau Veritas was subsequently sued for damages, financial injury and faults committed in maintenance of the vessel's classification during the special survey in 1988; a survey carried out in 1989 following a collision; and the pre-sale survey of 1990. Despite the fact that the vessel's 'class' had been suspended before its sale, the court held that this would not affect the position of the purchaser.

The court concluded that the vessel's defects had existed for several years and had never been detected by Bureau Veritas. It was held that the vessel's classification had been incorrectly given and that the classification society would have to provide compensation for the 'direct harm' suffered by the purchaser. This decision was appealed against by both parties. On appeal, however, the judgement by the Nanterre Commercial Court was upheld *in toto*. This case provides support for the viewpoint that, in certain circumstances, negligent classification societies *can* and *must* be held liable in tort.

4.4 Belgium

4.4.1 *The Spero*[291]

This Belgium case involved the careless classification by a classification society of a river barge which sank after a corroded input water pipe leaked. 'The Spero' was built in 1952 and was bought by a certain Mr Van Laken in 1982. Certain repairs were effected to the barge and, in May 1986, the vessel was classified as 'Class 1' by its classification society, which would have

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[290] *M/V Elodie II*, Tribunal de Commerce de Nanterre, 26 Juin 1992, Revue Scapel 1992, 109, D.M.F. 1994, 19; See *Supra* note 62 at 245.

[291] See Antwerp Court of Appeal (4e Ch) 14 February 1995.

been valid until 30 June 1988. 'The Spero' sank on 5 January 1987 with its owner claiming that it had collided with a sharp object. This contention was rejected by the court as it appeared that a corroded input water pipe was the cause of its sinking. It appeared that, even before loading, such vessel was unseaworthy. The barge had taken a few hours to sink andthe court was of the opinion that, should the normal safety measures have been taken by its skipper to keep it afloat, the sinking could have been prevented. It was argued that a water-pump could have been utilised to prevent such barge from flooding.

It was held that the barge-owner could not shelter behind the classification work done by 'Unitas' classification society and that the classification of the barge was insufficient proof that the barge-owner had taken all the necessary measures to make his vessel seaworthy. It was further held that, by classifying the barge, the classification society did not execute that part of the barge-owner's contractual obligation 'to carry'. Therefore, the classification society would be regarded as a normal third-party towards the cargo interests. The court averred that a classification society had a general duty of due care to everyone who could be affected by its classification, including parties to whom it was not contracted, such as cargo-owners. Should it have been careless in its classification, it could be liable to injured parties. From an 'expert report', it appeared that the classification society was not justified in granting 'Class 1' status to the barge. It was held that, during the last survey on 7 May 1986, too little attention had been paid to the water input pipe which, at that stage, must have been heavily corroded.

The issuing of the 'Class 1' certificate was deemed to be a professional fault and was seen as a breach of the general duty of care on the part of the classification society. It was held that the fault committed by the classification society had a 'causal connection' with the damage suffered by the vessel and that the granting of the classification certificate had kept the barge operational. It was held that the fact that a classification certificate was not regarded as absolute proof of the seaworthiness of a vessel did not protect the classification society from liability due to the careless classification survey on its part.

The court concluded that, had the barge-owner taken the necessary measures of control and prevention, the sinking of 'The Spero' could have been avoided. As the fault of both the barge-owner and the classification society contributed to the same damages, the court held that they were both 'jointly and severally liable' for such damages. This case provides support for the assertion that negligent classification societies may be held liable towards third-parties in tort, in particular cargo-owners.

5. ARGUMENTS DISFAVOURING LIABILITY AGAINST CLASSIFICATION SOCIETIES

5.1 The shipowner's non-delegable duty to provide a seaworthy vessel

In *The Great American*[292] the court stated that the civil responsibility for the welfare of a vessel and those on board, had always been the responsibility of the shipowner and not his classification society. The court argued that, consequently, a shipowner could not make a favourable survey or classification the basis of a 'due diligence' defence.[293] It was contended that, were favourable surveys and classifications permitted to operate as defences to the shipowner's duty to provide a seaworthy vessel, the accountability of shipowners for the seaworthiness of their vessel would disappear.[294] In many cases, should these defences be permitted, injured seamen and shippers of damaged goods would be left with inadequate remedies as it could be extremely difficult to obtain full compensation in these instances. The court in *The Sundancer*[295] confirmed that there was a non-delegable duty on a shipowner to provide a seaworthy vessel for the purposes of transportation by sea. The shipowner likewise has the responsibility of ensuring that his vessel is in compliance with national legislation and international conventions.

5.2 The classification society's brief contact with a vessel

In *The Great American*[296] the court contended that the recognition of liability against classification societies would have the undesirable effect of placing the ultimate responsibility for the seaworthiness of vessels on organisations that had contact with vessels for brief annual periods, as opposed to shipowners who were permanently in contact with their vessels. The court further asserted that a classification society was unable to 'rectify' defects, merely being able to 'observe' and 'report' the result of its inspection to the shipowner or his representative.[297]

Furthermore, Hare[298] maintains that the very system of classification is in need of change as it does not provide surveyors with sufficient opportunity to properly survey vessels. He

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[292] *Op cit* at 1012.
[293] *Ibid*; Article III (1) of the Hague-Visby Rules.
[294] *Ibid* at 1012.
[295] *Supra* note 1.
[296] *Op cit* at 1012.
[297] *Ibid* at 1015.
[298] 'Flag, Coastal and Port State Central: Closing the net on unseaworthy ships and their unscrupulous owners' (1994) 16 Sea Changes 57.

amplifies this by questioning:

> '[C]an one surveyor, however competent, thoroughly inspect the vast hidden reaches of an ageing OBO, under pressure from owners and charterers and often at the risk of being buried under a relentless rising tide of bulk cargo being disgorged into the very spaces he is trying to inspect?'[299]

Germanischer Lloyd classification society maintains that its surveyors are frequently told on board vessels that no time was scheduled for repairs in vessels' charterparties.[300] Such society contends that measures to ensure a ship's safety should not be sacrificed due to time constraints. 'Lloyds List' insists that it is important to take the huge size, complexity and enormity of a ship into account when considering holding classification societies liable for negligent surveys.[301]

5.3 The classification society as absolute insurer of the vessels it surveys?

In *The Great American*[302] the court declared that the recognition of a right of action against classification societies would have the effect of making such societies the absolute insurers of any vessels they surveyed and certified. It argued:

> 'Not only is the liability not commensurate with the amount of control that a classification society has over a vessel; it is also not in accord with the intent of the parties, the fees charged or the services performed'.[303]

Although Lord Lloyd in *The Nicholas H*[304] did not consider these fears to be legitimate, as noted previously Beck[305] maintains that these concerns are genuine in the light of surveyors' fears of greater liability insurance and litigation costs. He believes that insurance premiums could be increased as, due to their limited number and potentially great exposure to maritime losses, classification societies could be viewed as a case of 'bad insurance risk' should they not be protected by national legislation nor receive favour from the courts.[306]

The court in *The Great American*[307] contends that, should classification societies effectively be made the absolute insurers of the vessels they survey, insurance companies could be putting

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[299] *Ibid* at 63.
[300] Lloyds List 28 September 1996 at 7.
[301] 5 March 1997 at 5.
[302] *Op cit* at 1012.
[303] *Ibid.*
[304] *Supra* note 3 at 308-309.
[305] *Op cit* at 269.
[306] *Ibid.*
[307] *Op cit* at 1012.

themselves out of business, such result which they surely did not intend bringing about. Honka[308] maintains that, should classification societies be held liable, they would merely protect themselves through insurance coverage. In fact, many societies already have such coverage for liability. He alleges that such fault-based liability would generate the need for 'double-insurance', which would entail increased premiums so as to cover the additional administrative costs.[309] Although Honka[310] maintains that it would be inappropriate to exclude classification society liability completely in order to place the risk elsewhere, he speculates that holding classification societies strictly liable to avoid the need for insurance elsewhere would result in the 'financial collapse' of the classification system.

5.4 A return to credibility?

Due to the loss of credibility in classification societies, the IACS was formed to improve the standards and reputation of societies. Presently, IACS members classify approximately 90% of the world's fleet.[311] More stringent rules by the IACS have restored confidence in classification societies, and the threat of suspension from classification by such societies for the 'over-running' of condition and annual vessel surveys is a warning presently taken seriously by shipowners.[312] The IACS implemented a mandatory quality certification system for all its members which aspires to improve the standard of shipping.[313] In 1993, the European Community ('EC') introduced a 'Proposal for a Council Directive on Common Rules, and Standards for Ship Inspection and Survey Organisations' (the 'Proposal'),[314] which has since been approved ('the Directive').[315] The Directive stipulates that solely governmentally recognised classification societies are permitted to operate within the EC.[316] The effect of this is that, should a classification society be recognised in one EC state, other EC members 'should not' refuse to recognise vessel classifications by these societies. Consequently, there is uniformity amongst shipping standards in EC states, with only well-known classification societies being recognised by the EC member states.[317]

'The Transfer of Class Agreement' ('TOCA') was introduced by the IACS, which aims to prevent 'class-hopping' by those shipowners who are either unwilling or unable to conform to

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[308] *Op cit* at 34.
[309] *Ibid.*
[310] *Ibid* at 35.
[311] Lloyds List 12 June 1996 at 1.
[312] Fairplay Editorial 8 August 1996 at 43.
[313] International Standards Organisation, 1987, Res. 9001 ('ISO').
[314] COM (93), 218 Final, 1993 O.J. (C 167).
[315] Council Directive, 1994 O.J. (C 319) 20.
[316] Honka *op cit* at 7.
[317] *Ibid* at 8.

the requirements by IACS societies.[318] In fact, three of the largest classification societies; namely: Lloyd's Register, American Bureau of Shipping and Det Norske Veritas declared their intention to withhold recognition from any ships whose classification surveys were overdue, and would likewise not accept ships onto their registers that had failed to abide by the recommendations of other classification societies.[319] This approach has since been adopted by the remaining IACS members.[320]

There has been an increasing number of vessels dropping out of the IACS and subsequently not being accepted by other IACS classification societies, that is allegedly eliminating substandard vessels.[321] The Salvage Association, in fact, commented in 1996 on a general improvement in the quality of vessels inspected.[322] It believed that efforts by classification societies and Port State Control to contain 'structural deficiencies' in vessels were having a positive effect. It has been claimed that none of 1995's vessel losses could be attributed to a failure in a vessel's structure.[323]

'Fairplay Editorial'[324] alleges that the condition of the world's fleet appears better than first believed. One explanation is that the highest levels of repair activity and scrapping of vessels took place between 1991 and 1994, out of which some of the world's ageing and deteriorating fleet disappeared. Furthermore, The Enhanced Survey Programme ('ESP') was made a statutory requirement in July 1995.[325] Since the introduction of ESP more than three years ago, it is alleged that no vessels have been found to be lost due to structural failure, which is said to be a tremendous achievement.[326]

As a result, classification societies argued that it was unnecessary to hold them liable as sufficient measures and controls were in place to assure their 'due diligence' in classifying and certifying vessels.

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[318] Fairplay Editorial 20 February 1997 at 16.
[319] Sea Views. Vol. 5 No. 5, May 1995 at 12.
[320] The IRI Report, February 1996, Vol. 7, No. 1 at 2.
[321] Fairplay Editorial 5 September 1996 at 32.
[322] Lloyds List 6 August 1996 at 5.
[323] Sea Views, Vol. 6, No. 4, April 1996 at 25.
[324] 4 January 1996 at 35.
[325] ESP is an intensified survey programme for tankers. This Programme was proposed by tanker owners following the IMO proposal that vessels aged over 17 years should be automatically phased out.
[326] *Supra* note 321.

6. ARGUMENTS FAVOURING LIABILITY AGAINST CLASSIFICATION SOCIETIES

6.1 Shipowners as clients of classification societies

France[327] asserts that '[t]he truth today is that the employers of class are the very segment of the industry which class was originally established to assess'. Hare[328] likewise comments on this relationship:

> 'And there is a potentially unhealthy relationship between the classification societies, the registers for which they survey and the shipowner: it is usually the shipowner who indirectly at least pays the bill of the surveyor who is to decree if a ship is seaworthy or not.'

Dybeck, the chairman of ICB Shipping in Sweden, argues that banks and insurance companies, not shipowners, should be responsible for employing classification societies to assess the condition of ships[329] as this will ensure the 'objectivity' of classification societies. Lindfelt[330] does not agree that classification societies should again be placed under the control of underwriters, but proposes that such societies be placed under the control of the IMO, with the shipowner still retaining his right to choose a classification society. In fact, a spokesperson for the IACS has warned the industry that, should classification standards deteriorate, the responsibility for surveying vessels may well be taken away from classification societies and transferred to the IMO. Some argue that holding classification societies liable will likewise encourage such societies to be more diligent in their surveys and improve classification society standards.

6.2 A deteriorating condition of ships?

In May 1995, 'Sea Views'[331] commented that the IMO was concerned that their efforts to improve the safety of ships at sea were not paying dividends as the escalating number of maritime accidents suggested that many substandard vessels were trading without adequate maintenance. 'Fairplay Editorial' contended in February 1996 that there was a perception that ship standards were declining.[332] In January 1997, The Institute of London Underwriters reported that merchant shipping losses had, in fact, risen in 1996.[333] The European

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[327] *Op cit* at 71.
[328] *Op cit* at 63.
[329] Lloyds List 12 October 1996.
[330] 'A future for Classification Societies' (1994) CMI YEARBOOK 253 at 254.
[331] Vol. 5, no. 11, Nov. 95 at 26.
[332] 29 February 1996.
[333] Lloyds List 23 January 1997 at 1.

Commission is attempting to confirm reports relating to the existence of 'classification societies of convenience' that offer safe havens to substandard ships that have been dismissed by other societies.[334]

Contrary to what some parties believe, 'Lloyds List'[335] reports that shipping still faces problems with it's ageing fleet. Hare[336] maintains that, although old ships are not necessarily substandard, the 'rule' is that the majority of ship losses involve older vessels. Contrary to the opinion of classification societies, 'Sea Views'[337] is of the view that the majority of vessel founderings are attributable to structural failure. The fact that ship losses cannot be attributed to structural failure can rather be due to a lack of proof than a general improvement in shipping standards. This prompted Dr Helmut Schmen[338] of the World Wide Shipping Group to declare that:

> "[They were] still in a crisis situation in the shipping industry with, for example, too few shipowners with 'the guts' to scrap inefficient, old vessels, ships in many sectors operating at freight rates below operating costs and the use of lower-cost manning being seen as the panacea for many of shipping's ills".

In fact, there have recently been allegations that some classification society surveyors were open to bribery. In one instance a 'trap', posing as a shipowner, received assurance from a classification surveyor that his society, and some of his Eastern European counterparts, could guarantee certificates of seaworthiness for the shipowner's vessels.[339] The imposition of liability against classification societies in general would arguably 'exterminate' these substandard societies.

6.3 Competition between classification societies leading to lowered standards?

Starer[340] contends that the charging of fees for international convention certificates has become 'big business' for classification societies. He is disconcerted that, as money-making entities, classification societies vie with each other for fees from shipowners for the performance of services that entail the enforcement of laws designed to protect life and property at sea. He

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334 Lloyds List 7 February 1997 at 3.
335 2 July 1996 at 5.
336 *Op cit* at 63-64.
337 At 26.
338 Bimco Bulletin, Vol. 91, No. 3, 1996 at 4.
339 Sea Views Vol. 1, January 1996 at 14.
340 *Supra* note 69 at 4.

elaborates:[341]

> 'Somehow the world community has countenanced the emerging of governmental obligations to protect the public from undue risks of harm with market incentives which can blind many to the need for enhancement of the general welfare. This marriage of the *governmental angel* with the *capitalistic devil* (my emphasis) can threaten proper enforcement of the conventions'.

There appears to be a lack of consistency amongst classification societies relating to the enforcement of adequate standards.[342] Lindfelt alleges that there is a great variety even within the IACS regarding the size and quality of service of classification societies.[343] The chairman of ABS, Frank Iarossi, rejects the notion that heightened competition between classification societies carries risks of lowered standards. He insists:[344]

> 'On the contrary. It drives us to innovate, it drives us to improve our systems, and now that we have port states releasing information, it drives us to make sure that we are the best'.

The recent tragedy of the 'Leros Strength', a bulker which sank with her twenty Polish crew off Norway on 8 February 1997, has cast doubt regarding the effectiveness of the TOCA and the standards of certain IACS members.[345] On 12 June 1996, The Registro Italiano Navale, an Italian classification society and member of the IACS, accepted the transfer of the 'Leros Strength' from ABS, another IACS member. As ABS had refused a three-month extension of the vessel's certificates due to her condition, the owner simply changed classification societies, with tragic consequences. This was the classic case scenario which the TOCA was supposed to avert. 'Fairplay Editorial'[346] assert that, '[w]ith the sinking of the *Leros Strength*, it has been shown that the safeguards of class and of the world's maritime authorities have failed at every level.' It proposed that a 'Super IACS' be created involving The American Bureau of Shipping, Nippon Kaiji Kyokai, Det Norske Veritas and Lloyd's Register to 'take IACS by the scruff of the neck and use it to impose a new regime'.[347]

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[341] *Ibid.*
[342] The IRI Report, February 1996, Vol. 7, November 1 at 2.
[343] *Op cit* at 254.
[344] Lloyds List, Africa Weekly, 14 June 1996.
[345] Fairplay Editorial 27 February 1997 at 3.
[346] *Ibid.*
[347] *Ibid* at 4.

6.4 A Shipowner's non-delegable duty to provide a seaworthy vessel?

The terms of the International Safety of Life at Sea ('SOLAS') Convention and the Load-Lines Convention are very complex and shipowners simply do not have the expertise to oversee or conduct such surveys. Consequently, shipowners pay large fees to classification societies to conduct such surveys.

Starer[348] contends that the reason why courts stress the non-delegable duty of a shipowner to provide a seaworthy vessel is so as to ensure that injured parties will have a 'deep pocket' from which to obtain compensation. He questions the reason why, after compensating injured parties, shipowners should be barred from suing commercial entities (classification societies) whose negligence caused their damages.[349]

Starer is of the view that, regarding compliance with international conventions, the shipowner is an ineffective protector of the 'public interest' as he will always attempt to comply with the conventions in the most cost-effective manner. He argues that an entity other than shipowners (namely classification societies) must ensure that convention requirements are met as shipowners do not have the technical resources, nor the economic motivation to do so.[350] Shipowners may be deemed to have the non-delegable duty to provide a seaworthy vessel, but rely very heavily upon classification societies to assist them in fulfilling their obligations.

6.5 The failure of Flag State Control

It is said that the primary responsibility for the safety and operation of ships rests with their flag states and with the classification societies that they sometimes engage.[351] Lord Donaldson asserts:

> 'In an ideal world **Flag States**, whose flags are worn by the world's shipping, would lay down, and enforce upon their own shipowners, standards of design, maintenance and operation which would ensure a very high standard of safety at sea ... the present system of Flag State Control falls well short of this ideal.'[352]

Due to the failure of flag states to fulfil their duties in this regard, many states have resorted to the 'policing' of these standards, commonly known as Port State Control ('PSC'). This relates not only to those vessels flying their flags, but likewise to vessels of other states that enter their

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348 *Supra* note 69 at 6.
349 *Ibid.*
350 *Ibid.*
351 Donaldson *op cit* at xxvi.
352 *Ibid.* at 57.

ports. Whilst PSC has redressed some of the problems resulting from substandard shipping, it is not seen as a substitute for proper flag state control.[353] As classification societies act as agents for flag states, they are entitled to immunity from legal suits where a society acts on behalf of a flag state, and the state provides such immunity. The granting of this immunity is said to maintain the independence of classification societies and to ensure that their services are available at a reasonable cost.[354]

Flag states must resist the temptation to overlook vessel deficiencies in order to attract and retain vessels on their registers. It is clear that flag states fail to properly monitor the extent to which their authorised classification societies are performing their duties effectively. Starer[355] maintains that holding flag states to a 'higher duty of care' is an unrealistic way of protecting the public interest.[356] He argues that many flag states could not be expected to develop the knowledge and administration necessary to monitor the performances of their classification societies.[357] It is likewise beyond the financial means of many 'flag of convenience' states. He concludes by asserting that, 'if societies were exposed to significant civil liability for negligent performance of their services, there would probably be far fewer unsafe vessels'.[358]

7. THE WAY FORWARD

7.1 The initiative by The Comité Maritime International

'A Joint Working Group on a Study of Issues *re* Classification Societies' ('CSJWG') was constituted in 1992 upon the initiative of 'The Comité Maritime International' ('CMI'), an international maritime law association.[359] The issues that were considered were the legal rights, duties and liabilities of classification societies, as well as the relationship between classification societies and shipowners. Representatives from the IACS; 'The International Group of P & I Clubs'; 'The International Chamber of Shipping' ('ICS'); 'The International Chamber of Commerce' ('ICC'), 'The International Association of Dry Cargo Shipowners' ('INTERCARGO') participated in the discussions, with 'The International Maritime Organisation' ('IMO') and 'The International Union of Marine Insurers' ('IUMI') attending as observers.

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353 *Ibid.*
354 Leslie 'Civil Responsibilities of vessel owners and classification societies'. (1994) CMI YEARBOOK 256 at 257.
355 *Supra* note 69.
356 *Ibid* at 7.
357 *Ibid.*
358 *Ibid.*
359 Bimco Bulletin, (1996), Vol. 91, No. 2 67.

The CMI was concerned with the escalating frequency of claims against classification societies as additional 'deep pocket' defendants.[360] It was feared that, consequently, classification societies would have to withdraw some of their services, leading to a deterioration in vessel safety standards. Frank Wiswall,[361] the Chairman of the CSJWG, contends that disastrous results could ensue should classification societies not enjoy limited liability. He explains that, should limited liability not be provided, insurers would apply pressure on classification societies to adapt their operations so as to minimise their exposure to 'danger areas'. As noted earlier, the CSJWG maintains that 'one of the sources of difficulty has been what societies do, and how and on whose behalf they do it, is not set forth to the general public in any uniform manner'.[362] Consequently, the CSJWG drafted 'Principles of Conduct for Classification Societies', setting out the standards that could be employed to measure the conduct of a classification society in a stipulated case. Should it be demonstrated that a classification society adhered to such standards, this would be held as *prima facie* evidence that such society, being implicated in a case of maritime injury, had not acted negligently.[363] The CMI's project is viewed as 'breaking new ground' as it may provide an internationally recognised 'yardstick' to assess classification society performances.[364]

It is generally believed that classification societies should be brought within the ambit of 'The Convention on the Limitation of Liability for Maritime Claims'.[365] The CSJWG views this as a long-term possibility, but maintains that it will take too long to implement in view of the present concerns relating to the potential liability of classification societies.[366] With regard to such liability, however, the CSJWG testifies that:

> 'With regard to the exposure of the Classification Societies to claims both by shipowners *and by third-party plaintiffs* (my emphasis), it is important to note at the outset that there has been no attempt to give the Societies *any immunity from suit* (my emphasis) upon a claim arising out of activities related to the Rules; it is a strongly-held view within the Group that *civil litigation and / or the threat of litigation* (my emphasis) operates as a spur to awareness of the damaging consequences of certain acts or omissions'.[367]

The Group argues that the *service* provided to a vessel, and not a ship's *tonnage*, provides the fairest and most accurate basis upon which to calculate a limitation of liability for classification

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[360] *Ibid.*
[361] Lloyds List 24 January 1997 at 5.
[362] *Supra* note 359.
[363] *Ibid.*
[364] *Supra* note 361.
[365] Of 1976; and the 1996 Protocol.
[366] *Supra* note 359 at 68.
[367] *Ibid.*

societies.[368] This monetary value is measured by utilising the fee payable by a shipowner; and limiting a classification society's liability to a multiple of the fee charged by the society, such multiple which is nominated by the classification society.[369] Lindfelt of 'The Swedish P & I Club' concedes that the only viable solution is that liability should be geared towards the fees charged, but asserts that the amount at risk for classification societies must be 'considerable'.[370] He protests that the liability limit proposed by classification societies is 'ridiculously low' and urges P & I Clubs to resist such limit which is to the disadvantage of shipowners.[371] He provides the example of a shipowner who is found guilty of transgressions caused by the negligence of a classification society. He maintains that such owner will be penalised under the limited liability regime but, when he attempts to recover his loss from the classification society, he will be faced with a party with a lesser liability limit and will suffer loss even though he is not at fault.[372]

Owners and insurers contend that classification society liability should be based upon a vessel's tonnage, as stipulated in the 1976 Convention.[373] Classification societies dismiss this notion, however, by maintaining that the tonnage regime is unacceptable as it does not reflect the amount or type of work undertaken by such societies.[374] It could, for instance, take the same amount of time to inspect and survey a smaller vessel as it could for a larger ship. A proposal to consider a classification society limitation of 50% the amount in the 1996 Protocol[375] was rejected by classification societies that contended that there were vast differences between their responsibilities, and those of shipowners. Shipowners, they allege, still have the duty to provide seaworthy vessels.

A suggested compromise is that the fee-based system be regulated in such a way that a shipowner may increase a classification society's liability to a higher multiple of the fee, should the shipowner be prepared to pay an additional amount. The writer believes that, however, should payment of an 'additional amount' result in a more thorough survey by a classification society, this 'suggestion' should be completely redressed as one should not be permitted to gamble with the safety of lives at sea out of a payment for a ship survey. A seafarer has the right to be guaranteed a completely thorough survey, irrespective of the fees paid to a classification society. Should he not be afforded this right, he may become one of the

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368 *Ibid.*
369 *Ibid.*
370 *Op cit* at 255.
371 *Supra* note 361.
372 *Ibid.*
373 Convention on the Limitation of Liability for Maritime Claims of 1976; and the 1996 Protocol.
374 *Supra* note 361.
375 *Ibid; Supra* note 365.

excessive number of seafarers who lose their lives each year on substandard vessels, owned by substandard shipowners and classified by substandard classification societies.

The reason why classification societies wish to alter the *status quo* is that, although they have recently been seemingly immune to liability, it is generally believed that a society could shortly be sued successfully in a large case, which could result in the society losing its immunity and being vulnerable to unlimited liability claims from third-parties.[376] Societies also face retribution from disgruntled shipowners that are furious that IACS societies originally provided classification to their bulk carriers, such vessels that they now refuse to classify.[377]

In 'The Principles of Conduct for Classification Societies', it is stipulated that classification societies are deemed to stand 'independent of shipowners'.[378] The writer is of the opinion that, in reality, no party is able to stand wholly 'independent' of the party which pays its fees, irrespective of the terms of the agreement between them. Furthermore, in the 'Model Contractual Clauses' between classification societies and governments,[379] it is specified that the 'duties and functions' of classification societies are to be agreed upon between the two parties. We have already noted the failure of flag states to regulate and control the activities of their authorised classification societies, and it is questionable whether the position would be any different in this instance. Legislative immunity provided by their authorising states could likewise absolve classification societies from liability.

James Bell, the IACS permanent secretary, is not optimistic that an international convention will emerge out of the CMI discussions as he does not believe that it is high on the 'priority list' of governments.[380] Another perceived weakness in the CMI initiative is that, although it focuses on the contractual relationships, it does not deal with third-party claims,[381] such claims which are escalating and that enjoy less legal certainty than contractual claims.

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376 *Ibid.*
377 *Ibid.*
378 *Supra* note 359 at 68.
379 *Ibid* at 70.
380 *Supra* note 361.
381 *Ibid.*

7.2 The role of Port State Control

Hare[382] contends:

> 'It is in the concept of port state control that the maritime community worldwide has seen a possible solution to the problem of the substandard ship. Not *the* solution, but rather one of the more positive steps which can be taken - and necessary because the prime obligation of the shipowner and his register have been too often neglected'.[383]

Lord Donaldson[384] maintains that the long-term goal should be to improve the standard of flag state control in order to ensure that international rules are complied with. As long as such flag state control is ineffective, Port State Control ('PSC') is viewed as the United Kingdom's first line of defence against the pollution of her coastline.[385] Clarke likewise believes that PSC is not an alternative to flag state control, but rather a means of compelling owners of substandard vessels to either 'scrap' such vessels, or to bring them up to standard.[386] The flag state is still the entity where the prime duty of the enforcement of international conventions rests. However, we have witnessed the failings of flag states to properly enforce international conventions and national legislation. Clarke[387] maintains that some of the complaints regarding the effectiveness of flag state control relate to the role performed by classification societies. He contends that most flag states rely on classification societies to inspect vessels flying their flags, but that not all societies apply their rules with the same strictness. This has resulted in some shipowners leaving 'stricter' classification societies for more 'lenient' ones, with the ensuing lowering of standards. As a result, port states commenced taking steps to protect their coastlines.

There is optimism concerning the potential of PSC, primarily due to the experiences of the 1982 'Paris Memorandum of Understanding on PSC' ('MOU'). The MOU is a regional experiment which provides a strategy for combatting substandard ships, by inspecting a certain percentage of vessels passing through a member state's ports. Each member of the MOU aims to inspect at least 25% of all foreign vessels utilising its ports each year.[388] Although the MOU has only been seen to be a 'conditional' success, it has highlighted the problem of substandard

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382 *Op cit*
383 *Ibid* at 67.
384 *Op cit.*
385 *Ibid* at 135.
386 Clarke 'Port State Control or sub-standard ships: who is to blame? what is the cure? (May 1994) Lloyds Maritime and Commercial Quarterly 202 at 205.
387 *Ibid* at 204.
388 Lloyds List 28 September 1996 at 7.

shipping and has brought about regional co-operation in attempting to root out such substandardness.[389]

Europe has recently launched a stricter era of PSC. Owners of detained vessels shall now be named and held liable for the costs of such inspections.[390] There shall likewise be new priorities for vessel inspections. Ships that visit MOU ports for the first time, or that have been absent from such ports for a year shall be inspected first. According to the old system, surveyors inspected vessels according to the deficiency and detention rates of each particular flag.[391] The MOU publishes its vessel detention statistics and indicates which classification societies are responsible for classifying and certifying detained vessels. However, due to pressure from classification societies, the MOU shall now solely identify classification societies where the failure to report vessel deficiencies is the fault of such societies.[392] The European Commission, together with the IACS, shall shortly draw up far-reaching measures that will make classification societies responsible for their shipowners' safety actions.[393] A spokesman of Det Norske Veritas disclosed to 'Lloyds List':

> 'The European Commission has said it will use port state control detention figures as a measure of the effectiveness of classification societies ... We believe that port state control offers an effective contribution to increasing vessel quality and in increasing pressure on all players to improve'.[394]

With regard to PSC in South Africa, 'Sea Views' reports:

> 'Port state inspections in South Africa are grinding to a halt, a lack of funding, and therefore manpower, is seriously prejudicing the country's ability to police shipping'.[395]

The South African government appointed 'Hermes Consulting' to draft a proposal for the formation of a commercial maritime safety authority as, *inter alia*, the South African Department of Transport was unable to achieve even a 10% inspection rate of vessels utilising South African ports; falling far short of the minimum international requirement of 25%.[396] This unsatisfactory position is primarily due to a shortage of qualified surveyors as a result of the low civil service wages. It is hoped that a South African commercial maritime safety

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[389] Payoyo 'Implementation of international conventions through port state control: an assessment' (1994) 18 Marine Policy 379 at 392.
[390] Fairplay Editorial 4 July 1996 at 18 citing European Union Directive 95/21.
[391] Fairplay Editorial 4 July 1996.
[392] Lloyds List 7 February 1997 at 3.
[393] *Ibid.*
[394] *Ibid.*
[395] 1996, Vol. 6, No. 5 at 17.
[396] Lloyds List 2 July 1996 at 12.

authority will be able to redress this critical situation. South Africa *must* ensure that the new authority succeeds in establishing effective PSC in South Africa. Should it fail, the South African coastline will become the 'dumping- ground' for the world's substandard shipping, due to the non-threat of ship detentions. Proficient PSC in South Africa will likewise function in ensuring that classification societies maintain their standards, failing which substandard societies may have their authorisation terminated by the government.

7.3 The implications of The International Safety Management Code

Statistics demonstrated that 70% to 90% of shipping accidents were caused by 'human error'.[397] It was realised that there was an important 'relationship' between ships and their managements. As such, the 'human element' on both sides had to be of a high standard. 'The International Safety Management Code' ('ISM')[398] was introduced by the 'International Maritime Organisation' ('IMO') to combat this problem. ISM will become effective as part of Chapter IX of the 1974 Safety of Life at Sea Convention ('SOLAS'), such Convention which regulates approximately 96% of the world's merchant tonnage. The mission of the ISM Code is to eradicate all 'human error' from ship management ashore and ship operations afloat. Shipowners shall have to comply with the requirements of ISM by no later than 1 July 1998 for passenger ships, oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high-speed craft of 500 gross tonnage and over; and for the remainder of cargo ships by 1 July 2002.[399] Classification societies may now be required by flag states to inspect the 'whole safety aspect' of an organisation, including separate management arrangements.[400]

Captain Roger Clipsham,[401] the general secretary of 'The International Federation of Shipmasters Association' ('IFSMA'), is concerned that many flag states who have the responsibility of issuing ISM certificates to vessels on their registers delegate their statutory survey work to organisations whose personnel have low levels of qualifications. He insists that solely IACS registered classification societies should be authorised to act on behalf of flag states in this regard. 'The Australian Maritime Safety Authority' ('AMSA') has delegated its initial ISM verification work to classification societies, but insists that it will strictly monitor their performances.[402]

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[397] Bimco Bulletin, Vol. 91, No. 3 of 1996 at 5; 'human error' as opposed to structural or mechanical failure of a vessel.
[398] International Management Code for the Safe Operation of Ships and for Pollution Prevention, November 4, 1993, Res. A 741 (18).
[399] Honka *op cit* at 5.
[400] *Ibid* at 4 - 5.
[401] Lloyds List 29 July 1996.
[402] Fairplay Editorial, LSM, October 1995 at 11.

Captain Joyce, a marine manager at 'The International Chamber of Shipping' ('ICS'), believes that classification societies will be playing a major role in the accreditation of the ISM Code and should strive to maintain sufficient independence between their traditional classification and ISM auditing work.[403] The sub-director of Secnaves, the body responsible for the management of the Panamanian ship register, declares that the ISM Code will provide such body with new 'criterion' with which to assess the suitability of new classification societies, and that they shall have 'a good look' at some of their current societies.[404] Det Norske Veritas reported that, by June 1996, merely two and a half percent of the world's fleet had been ISM Code accredited and, with solely two years before the Code became mandatory, 'alarm bells' were ringing in the industry.[405] It appears that the possibilities of the IMC waiving the ISM requirements beyond July 1998 are remote as it has insisted that no extensions to the deadline shall be provided.[406]

The introduction of the ISM Code substantially increases the risk of liability falling on shipowners and shipmanagers. By introducing formal management systems into ship operations, ISM is likely to provide third-parties with more documentary evidence to prove that shipowners have failed to guarantee the seaworthiness of their vessels.[407]

There is much debate concerning the value of ISM certification. Some parties are concerned by the perceived incompetency of flag states to administer the ISM provisions effectively. Chris Wade, the chief surveyor of Lloyd's Register, is perturbed that flag states have the ultimate responsibility of ensuring that their convention obligations are met, but appear reluctant to do so.[408] Others are troubled that the role of classification societies is becoming 'omnipresent.'[409] Timothy Lietzill, president of 'ABS Marine Service', alleges that the vital flaw of the ISM system is that standards are set by each company, and not by international agreement.[410] He elaborates by pointing out that no standard format is required for safety instructions and manuals. Samuel Cooperman, president of 'Stolt Parcel Tankers' believes that

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[403] Fairplay Editorial, LSM, August 1996 at 42.
[404] Fairplay Editorial, A Supplement to LSM, October 1995 at 7.
[405] Lloyds List 14 June 1996 at 6.
[406] *Ibid.*
[407] *Ibid* at 3.
[408] Lloyds List 24 June 1996 at 5.
[409] Ogg 'IMO's International Safety Management Code (1996) 3 The International Journal of Shipping Law 143 at 151.
[410] Fairplay Editorial 30 May 1996 at 19.

ISM should concentrate on other important issues. He explains:

> 'Instead of focusing only on 'ships of shame' or even 'flag states of shame', far more would be gained by focusing on 'shippers of shame' and 'ports of shame' and 'classification societies of shame'. You would be astonished how fast bad ships would go out of circulation and good ships would flourish in the market'.[411]

The 'human element' is of vital importance in shipping and the writer is of the opinion that classification societies should be held liable for negligence in their ISM accreditation work, which will assist in assuring vigilance on the part of societies in this crucial area.

7.4 Future proposals

The writer concurs with the CSJWG's belief that the threat of civil litigation functions as a motivation to classification societies to operate responsibly and cautiously.[412] Until recently, classification societies have appeared immune against liability for negligence committed by their surveyors. However, the recent outcome of the *Ramsgate Trial* and the *Elodie II* decision confirms the 'widely held [view] that each lawsuit brings closer the day when a society will be sued successfully in a major case.'[413]

The writer believes that surveyors should be provided with sufficient time and opportunity to inspect vessels. This issue should be addressed in the agreements between classification societies and governments. A shipowner or charterer should not be permitted to place pressure on surveyors to 'expedite' their classification and certification duties. At the same time, however, the free-flow of shipping should not be impeded by over-extensive surveys, which could undermine the economic viability of the shipping industry. It is in the world's interest that the shipping industry remain healthy, as the overwhelming majority of the world's trade is effected by these immense vessels, notably being the 'largest man-made moving objects'. The IACS should be commended for its implementation of the TOCA. In the light of the recent 'Leros strength' tragedy, however, such organisation must restore its reputation by tightening up its control and discipline amongst its members.

The limitation of liability regime must be amended to incorporate and protect classification societies. Why should a shipowner, who is said to have the responsibility of providing a seaworthy vessel, be protected financially by a limitation regime, whereas the classification society which he employs to survey his vessel enjoys no such cover? Consequently, many parties sue classification societies because of their unlimited liability exposure. Classification

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411 Fairplay Editorial 14 November 1996 at 37.
412 *Supra* note 359 at 68.
413 *Supra* note 361 at 5.

societies wish to fall under the limitation of liability regime, but correctly maintain that this may not be achieved in the near future.[414] At the same time, however, classification societies do not want their liability to be based on a ship's tonnage, as utilised in 'The Convention on Limitation of Liability for Maritime Claims',[415] as they do not believe that this accurately reflects the amount of work undertaken by societies.[416] The writer is of the opinion that the fairest solution would be to base classification society liability on the fees charged by such societies.

'Disclaimers of liability', exempting classification societies *ab initio* from liability due to their negligence, should be declared void by the courts as being contrary to public policy. In fact, courts refuse such exemption clauses for negligence on bills of lading pursuant to the provisions of the Hague-Visby Rules.[417] It would be unfair to place classification societies in a more favourable position than shipowners with regard to disclaimers of liability. The writer is of the viewpoint that, should the limitation of liability regime be amended to include classification societies, the necessity for disclaimers of liability on the part of societies will disappear.

The CMI initiative relating to the formulation of 'Principles of Conduct for Classification Societies' and 'Model Contractual Clauses'[418] is a positive step. The writer maintains that 'to cut the Gordian knot that, since 1880, has bound classification societies to their shipowner clients'[419] is an unrealistic view and it is furthermore doubtful whether marine insurers would once again be in a position to 'employ' classification societies.

At the same time, however, the amounts for which classification societies may be held liable for their negligence must be adequate and considerable as various parties have 'expressed fears that a limit which is too generous to the societies could have a numbing effect, making them less cautious'.[420]

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414 *Supra* note 359 at 68.
415 Of 1976; and its 1996 Protocol.
416 *Supra* note 361 at 5.
417 The Hague Rules as amended by the Brussels Protocol 1968; Article III (8):
'Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, *shall be null and void and of no effect* (my emphasis). A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability'.
418 *Supra* note 359.
419 *Supra* note 10 at 377.
420 *Supra* note 361.

8. CONCLUSION

Classification societies unquestionably play a vital role in the shipping industry. They are relied upon by many parties, not the least of which are seafarers, and their extinction could be to the detriment of everybody, not only those reliant on shipping for their livelihood. Consequently, courts have been reluctant to hold classification societies liable for negligent surveys, being concerned that the costs of damage may be shifted to 'a relatively minor actor' in the shipping industry which, in turn, could lead to classification societies withdrawing some of their survey services.[421]

On the other hand, however, should classification societies be absolved completely from liability for negligence, the writer contends that this would lead to a relaxation in classification society standards and a deterioration in the seaworthiness of vessels. Although cases such as *The Sundancer*[422] and *The Nicholas H*[423] absolved the classification societies from liability many parties were disillusioned by these verdicts that were viewed as over-favourable towards classification societies.[424] The reason for a vessel's classification certificate is *not* merely to permit a shipowner to take advantage of insurance rates, although being one of the important reasons for such survey. Any belief otherwise would make a mockery of the very system of classification, as well as being insulting towards the role played by classification societies.

There is likewise the very real threat of overage shipping. Many overage ships will be removed from operation due to the worldwide tightening in ship safety requirements. In the interim, however, unscrupulous shipowners will attempt to extract as much 'charter-hire' and 'freight' as possible from these vessels with little concern for the safety of their seafarers or the preservation of the world's coastlines. Flag states, supported by their authorised classification societies, *cannot* and *must not* permit these unseaworthy vessels to continue to ply the world's trade, irrespective of the fees which they may stand to lose. The international community *must* apply pressure on flag states to fulfil their international convention responsibilities, failing which sanctions should be imposed on reneging states.

The Ramsgate Trial[425] and *The Elodie II*[426] decisions appear to indicate a sway of opinion against the apparent immunity of classification societies. The recent sinking of the 'Leros Strength' has likewise exposed weaknesses in the regulation of 'class' transferrals by the IACS. It is unfortunate that the maritime industry only appears to effect policy changes to shipping

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[421] *Supra* note 69.
[422] *Supra* note 159.
[423] *Supra* note 210.
[424] France *op cit.*
[425] *Supra* note 277.
[426] *Supra* note 289.

safety following a shipping tragedy involving a major loss of life. As the issue of 'human rights' becomes more prevalent in various jurisdictions and, as the world becomes 'greener' due to the perceived devastation of our planet, the international community shall have to resolve the current disorder relating to classification society liability in order to, *inter alia,* protect the rights of seafarers and to prevent the denigration of our 'blue planet'.

Ideally, flag states should be held more accountable for the actions of vessels flying their flags. Sadly, many states are solely intent on procuring as many vessels as possible and consequently 'relax' their standards so as to entice vessels onto their registers, irrespective of their condition. Flag states must not be permitted to provide their authorised classification societies with legislative immunity for negligent surveys, as this undermines the very responsibility of such states to ensure the safety of life and property at sea. Although many shipowners act responsibly and commendably, there are regrettably others who merely utilise 'substandard' classification societies for convention and insurance purposes, and are prepared to 'shop' for the least expensive such societies. Such unscrupulous shipowners should not, in these circumstances, be held by courts to have fulfilled their non-delegable duty of providing seaworthy vessels.

It is sincerely hoped that the CMI initiative will succeed in bringing about an international convention from its deliberations. Irrespective of its outcome, however, this initiative has stirred up a welcome general debate regarding the provision of incentives to classification societies to improve the safety of life and property at sea. Governments shall have to, however, become actively involved in this initiative for it to accomplish its ideals. The last word in this paper shall be entrusted to Starer[427] who befittingly sums up this initiative:

'Perhaps the existence of standards and absence of varying degrees of immunity will enable the courts to understand what it is that classification societies are responsible for and to overcome their fear that classification society liability will disturb waters only the courts perceive as tranquil'.

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[427] *Supra* note 107.