



## “Negligent Ship Survey?”

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The recent judgment in Attorney General v Carter CA 72/07, handed down on 13 March 2003, grappled with a contentious branch of maritime law, namely the liability of a surveyor, or his or her employer, where the negligent discharge of a statutory survey results in economic loss to a vessel owner or third party.

The debate in Carter is a microcosm of a larger debate surrounding the liability of classification societies to act responsibly and to bear their proportionate share of liability should they conduct their activities in a negligent manner. Many flag states internationally devolve their statutory duties for inspection onto third parties and a useful analogy can be drawn between the facts of Carter and the wider debate surrounding the liability of classification societies internationally.

In Carter the (then) Department of Transport and Marine and Industrial Safety Inspection Services Limited, to whom the Ministry’s survey responsibilities were devolved on from 1 June 1994, were sued for issuing certificates (under the precursor to the Maritime Transport Act, the Shipping and Seaman Act 1952) attesting to the condition of a ship *Nivanga*, negligently, which resulted in the Plaintiffs alleging that they had suffered loss. The *Nivanga* must have been, by all accounts, a “rust bucket”, in that it fetched the grand sum of NZ\$500 on a subsequent judicial sale. The Plaintiffs as purchasers of the vessel purportedly relied upon the certificates issued by the Surveyor appointed by Transport and Marine, attesting to the condition of the vessel prior to taking delivery and paying for the vessel. Relying on the Surveyor “passing” the vessel the contract of sale was concluded. They subsequently discovered, when they took delivery of the vessel, that the condition was not as attested to in the certificates issued by the surveyor and contrary to the assertions of the sellers, the previous owner was not the “careful old lady driver” they imagined it to be.

The sellers having evaporated with part of the proceeds, the purchasers then cast about to find a “deep pockets” defendant from whom they could recover their loss. The Department of Transport and Marine and Industrial Safety Inspection Services were the obvious targets. They sued on two general grounds, namely common law negligence and the breach of an alleged statutory duty.

What did the court find?

In the lower Court hearing the High Court struck out the Plaintiffs’ claims for common law negligence on the basis that there was no duty of care, but held that the claims based on a breach of a statutory duty should go to trial. The Court of Appeal was not impressed with the eloquence of the Plaintiffs’ argument and dismissed their claim for a breach of a statutory duty. I will not go into the technicalities of the argument, suffice to highlight that the Court found that the Certificate was issued for a different purpose than that which the Plaintiffs claimed to be entitled to place reliance on. Put differently, the Court found it was not reasonable for the Plaintiffs to rely on the survey Certificates for the “quite different purpose of protecting their economic interests”.

In the common law and statutory context of New Zealand, the Court’s finding is correct. However, in the context of the wider developments regarding the liability of classification societies, vessel owners, statutory bodies and/or their agents seized with the issue of certificates attesting to the safety or construction of vessels, should be wary. The MSA has as its objective the promotion of a safe maritime environment as one of its objectives and is the issue of the final survey certificate. The surveying function is contracted out and it is at this level that potential liability exists.

Classification societies play a number of vital roles in international shipping, including in many cases, the task of flag state surveys. In many cases flag states rely completely on the classification

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society, as the classification society has the depth of knowledge, experience and infrastructure, to discharge the statutory functions that domestic shipping legislation places on flag states.

The trend in the UK and US Courts has been towards finding classification societies liable for the negligent discharge of their functions, to the extent that the International Association of Classification Societies Limited (IACS) recognising their exposure with the result that through various forums in the EU they have sought to limit the financial liability of classification societies to the flag administrations to a "reasonable amount". What the "reasonable amount" is has yet to be settled.

The range of liability is potentially large. It has been recognised that when viewing the potential risk of a flag state administration or class society, the focus of the survey is upon a high value asset which has a potential to incur even higher liabilities. The fees charged by the class society or flag state administration do not reflect the potential harm that may result from the negligent discharge of their functions and, as such, it is important that their liability should be limited.

Carter shows that the existing formulation of the statute (Maritime Transport Act), coupled with the position in common law negligence, was sufficient to protect the surveyors, in this case, from potential liability. It is, however, important to note that this may not always be the case and the particular facts of the case may well shift the liability on to the flag state administration or its agents.

I was involved in a case in South Africa where the South African Merchant Shipping Authority was sanctioned for a failure to adequately review a fishing vessel's stability data after a refit. The vessel subsequently capsized with loss of life and in the marine court of enquiry that followed it was found that the flag state authority had discharged its functions negligently. Civil liability normally follows criminal conviction and the scope for large claims is self-evident.

It is the author's view that Carter reflects the thin edge of the wedge and if international developments in the law are any guide, the position may well change in the future.

**May 2003**

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