

LIABILITY OF CLASSIFICATION SOCIETIES: THE DEBATE CONTINUES

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In May 2003, I commented on the case of Attorney General v Carter CA72/07 in which the Court of Appeal grappled with the potential liability of a surveyor or his or her employer, where the negligent discharge of the duties of the statutory surveyor results in economic loss to a vessel owner or third party. I suggested (somewhat circumspectly) that there is an international trend towards holding Classification Societies liable for negligent survey work or the negligent discharge of their other tasks. I advanced the proposition, that the existing protections contained in the New Zealand Maritime Transport Act (MTA), read with the judgement in Carter was sufficient to protect surveyors and SSM companies from the spectre of liability, but if international trends were to be followed liability may be a reality sometime in the future.

This is clearly a touchy issue with Class and SSM companies, and lest I be accused of propagating legal heresy, it is certainly appropriate, to place the domestic debate in its international context. The international maritime community has been concerned of the apparent lack of accountability of Classification Societies for the consequences of inefficient or negligent certification. In a sense, the Classification Society has a “quasi-public function” and to this extent it can be argued that it has a duty to the world at large. This is perhaps more so, where the Classification Society acts on behalf of a flag state administration. On the other hand Classification Societies play a vital and indispensable role in international shipping. The courts of Belgium and France have allowed claims made by third parties against Classification Societies found to be negligent in the discharge of their functions in surveying and certifying sub-standard ships. The courts of the United States and England have taken the contrary view and have generally absolved Societies from any liability to the world at large. New Zealand is in the latter camp.

The recent *Prestige* casualty, off the Galician Coast in 2003 provides a useful case study for the debate.

On 13 November 2002, 5 miles off the northern coast of Galicia, Spain, the *Prestige*, carrying 70,000 tonnes of oil leftovers, sprang a leak in one of its tanks. After a week of bureaucratic bumbling the vessel was towed further to sea, broke in two and sank. The scale of the damage caused by the emission of oil from the vessel has been likened to the *Exon Valdez* disaster. The *Prestige* was built to the ABS (American Bureau of Shipping) Class standards in 1976 and had remained in Class with ABS throughout its working life. The vessel was within its survey cycle, and the last annual survey of the vessel, was conducted some six months prior to the casualty. In May 2003, the Spanish Government commenced action against ABS, in Houston, Texas claiming an amount of US\$700 million in damages against ABS.

It has been widely suggested that the action against ABS was brought to divert attention from Spain’s own negligence in the conduct of the salvage operation. In addition, Spain announced its intention to seek a withdrawal of the European Union’s recognition of ABS as an approved Classification Society within the EU, which prompted an outraged reaction by ABS. ABS, in its turn has instituted legal action against the Spanish Government, seeking recovery for any claims made against ABS for damages arising out of the *Prestige* casualty.

ABS has claimed that the extensive pollution that had occurred following the sinking was directly attributable to, the Spanish Government’s failure to properly activate and implement an effective oil spill contingency plan as required by Spanish law. ABS has vehemently denied any fault in the

casualty and counterclaimed (in Spain) that the Spanish decision to deny the vessel access to a closer refuge was a clear violation of its legal duty and the Spanish Government acted “recklessly, negligently and grossly negligently” in its response to the casualty. It is notable that a recently released draft of the European Parliamentary Transport Committee report on the casualty has levelled serious accusations against the Spanish Government for its response to the casualty.

Thus, what we have is a classic battle of a third party (Spain), seeking to recover its damages from a notional “deep pocket” defendant (ABS), in the USA. Broadships have been fired across the Atlantic and who will remain afloat at the end of the battle? It is the writer’s view that the Spanish Government will be unsuccessful in its claims against ABS. Why so?

Responsibility for the maintenance and repair of a Class vessel rests solely upon the ship owner. The facts show that the vessel had been regularly and periodically surveyed, within its mandatory survey cycles. It is a ship owner or operator that has the day to day control of the vessel and knowledge of its condition and a Class surveyor normally attends a vessel only once in a 12-month period and can only comment on the condition of the vessel at that time. At the time of inspection the vessel was inspected utilising internationally recognised criteria, and passed. I must emphasise further, that it is the owner’s duty to report to Class as to any serious deficiencies or defects as they arise. This was not done by the owners of the vessel. Thus, there is no apparent negligence on the part of Class, and an abundance of evidence pointing towards the negligent actions of Spain. Hardly a good basis for an action in tort! I would suggest therefor that it is very unlikely that ABS will be found to be liable

In the UK, the judgments in the “*Sundancer*” and the “*Nicholas H*” have absolved Classification Societies from liability. However a joint working group, constituted in 1992 upon the initiative of the Comite Maritime International (CMI) reported that the escalating frequency of claims against Classification Societies and the outcome of the decision in the “*Elodie II*” (Belgium) confirms the “widely held view that each lawsuit brings closer the day when the Society will be sued successfully in a major case”. This gloomy prophesy was partly confirmed in September 2003, when the U S Court of Appeals, found Nippon Kaiji Kyoki (NKK) a respected Classification Society, liable to pay a company for negligent misrepresentation, based on statements made in the vessel Classification survey. The basis upon which liability was founded was the tort of negligent misrepresentation.

It must be said though, that whilst the case allowed recovery against a Classification Society for negligent misrepresentation, the Court was at pains to emphasise that such claims must be limited by their facts. This Court stated that a Classification Society will not normally be liable for negligent misrepresentation “*absent actual knowledge*” by the Classification Society that the certificate or survey report has been provided for the guidance and benefit of the party. On the facts of that case, NKK was found to be liable. The comment of the Court however, is on all fours with the judgment in Carter.

Having described the potential liabilities, what shields could Classification Societies, SSM and related companies raise? IACS (International Association of Classification Societies) have argued in the CMI (Comite Maritime International) working group, that they should be able to avail themselves of some method of limiting their liability. If vessel owners can do so, under the Limitation Convention, so too (and even more so) should Classification Societies be able to do the same. There has been no unanimity as to the basis upon which Class Societies should be able to limit their liabilities, however there would seem to be movement towards an international convention regularising this position.

Should Class and SSM companies in New Zealand be complacent? I would suggest that complacency would be misplaced. The NKK decision in the US would appear to be a blip in the united front presented by the United States and British judiciaries and must be viewed as a warning for what is to come. The Belgian and French decisions should cause a collective frowning of the Class brow. Happily, the New Zealand courts in Carter followed the general trend in the United States and Britain and for the immediate future, Class and SSM companies can draw some

comfort from the present stance of the courts, and hopefully, should the tide begin to flow in the opposite direction, international regulation of the position through a convention or some similar instrument may have regulated their position and provide them with well balanced defences to these actions.

As a matter of practice however I would suggest that circumspection and care should be taken by surveyors in drafting contemporaneous notes on the vessel's condition at the time of survey, lest they prove to contradict the statements in their reports. In the writer's experience, this may be a handy peg to hang an action upon.

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