

The 20-year¹ fight to learn the truth about the MV Derbyshire



MV Derbyshire © Crown Copyright

“The Derbyshire was the largest British built and owned ship to be lost at sea. The subsequent enquiry blamed Typhoon ‘Orchid’ but the families of the victims and the Trade Union believed that a design fault caused the ship to break in half before an SOS could be sent..... They based their belief on the fact that cracks had been found at Frame 65 in five similar bulk carriers built by Swan Hunter and cited the fate of the ill fated Kowloon Bridge, formerly the English Bridge, which broke her back after drifting ashore in Eire. If it could be proved that the Derbyshire was lost due to a design weakness rather than an ‘Act of God’ then a claim for compensation, estimated at £60,000,000, could be lodged.” <http://www.red-duster.co.uk/BIBBY16.htm>

Synopsis

In their long fight to find the truth about the loss, in 1980, of the OBO Derbyshire and her crew, the Derbyshire Families Association (DFA) had to compete against a number of adversaries whose interests would not have been best served if the cause of the loss had been found to be linked to faults in the construction of the vessel. Specifically, they have had to battle against powerful adversaries: two successive governments and the maritime establishment, all of whom would have been disadvantaged by a finding that negligence on the shipbuilders’ part was a causal factor in the Derbyshire tragedy.

Such a finding would have exposed British Shipbuilders (a wholly state-owned corporation) to hostile and costly litigation². It would have also created a precedent in

¹ The fight ended in 2000 following the publication of the final report of the Re-opened Formal Investigation (RFI) into the loss of MV Derbyshire.

terms of compensation claims that would have inconvenienced the maritime establishment.

The 2000 Re-opened³ Formal Investigation into the loss the MV Derbyshire provided the arena for the final showdown in this case, and the outcome from that fight was spelled out in the RFI's final report, published in November of that year.

In this unequal fight the outcome had been both pre-determined and inevitable

Justice Colman's final report attached no blame to the shipbuilders, the Classification society, the owners, the crew or the Government, and found, instead, that it was the international regulations for ship strength and construction, in force at the time the vessel was built, that had been deficient.

i.e. Although the RFI experts concluded that the vessel had not been structurally fit to operate in extreme weather conditions, they also determined that, at the time of build, the vessel had complied with all of the relevant regulations in force at that time, thereby exonerating the shipbuilders from blame.

Discussion

It has long been known that the procedures and processes of public inquiries within the UK do not always lead to a satisfactory outcome. Inquiries often provide a useful platform from which the opposing interests of the various parties may be legally promoted, challenged, defended or defeated.

It is also worrying to note that in a process that is designed to root out the truth, the adversarial⁴ nature of that process is such that it will only tend towards the truth, if the adversaries are evenly matched in court and if the inquiry itself is conducted and presided over in a wholly fair and just manner. If this is not the case, then it is unlikely that the truth will emerge at the end of the inquiry.

It is apparent that the conclusions arrived at by Justice Colman, although generally sound, were drafted with an eye to their potential for subsequent litigation. This may be easily seen when we look at the product liability legislation (for meaning and legal defences see Annex 1) and then read the court's answers to the limited and obviously leading questions that had been drawn up, before the start of the court hearings, by a supposedly impartial authority (see Annex 2).

² MV Derbyshire RFI

“Mr. Loyden : To ask the Secretary of State for Trade and Industry what indemnification was provided against litigation arising out of the loss of MV Derbyshire ; when the indemnity was agreed; and if he will make a statement.

Mr. Douglas Hogg [holding answer 6 July 1990]: Under the terms of an indemnity given at the time of the privatisation of Swan Hunter Shipbuilders in January 1986, British Shipbuilders assumed responsibility for all claims made against Swan Hunter in relation to all vessels delivered prior to the sale of the yard. I do not intend to make a statement at this time.”

³ Following on from the original Formal Investigation in 1989, which was inconclusive

⁴ 2. PARLIAMENTARY SELECT COMMITTEE REPORT:

“Government by Inquiry: First Report of Session 2004–05, Conclusions and recommendations: We recommend that the procedures followed by inquiries in the last ten years should be reviewed. In particular there should be a re-evaluation of how to ensure fairness within the inquisitorial process while minimizing the adversarial, legalistic element of inquiries.”

Also, in a paper⁵ presented by Charles Macdonald QC, Counsel to the DETR during the RFI the following points were made:

“It will be appreciated that in many formal investigations (though not the **Derbyshire RFI**⁶) parties are fighting **shadow litigation**, and have a covert interest in establishing that breaches of legal duty took place, such as would have to be established in litigation in order to recover damages. If future formal investigations do not entail such findings, they will be less apt for use as a **dry run for litigation**. This is probably desirable.”

It is suggested that the views expressed by Lord Justice Clark, in the Thames safety inquiry following the Marchioness disaster, laid down a simple set of guiding principles, which our Judiciary would do well to follow:

5.3 There are therefore two purposes of a public inquiry, namely ascertaining the facts and learning lessons for the future. [...] The public (and especially the survivors and the relatives and friends of those who lost their lives) has a legitimate interest in learning the truth of what happened, without anything being swept under the carpet.

5.5 **It is not, however, the role of an inquiry to establish civil liability** or to consider whether a crime has been committed. It is not in the public interest that it should do either. The former is the role of the civil courts and may involve many questions of fact and law, which it would not be appropriate to debate at an inquiry. The latter is the role of the police, the CPS and the DPP. **The role of an inquiry is simply to find the facts**, although I recognise that those facts may form the basis of civil liability or indeed of an allegation that a crime has been committed.

11.60 It would, in my opinion, be desirable to remove the **adversarial aspects** of the rules of the various inquiries

Some shortcomings in the outcome of the 2000 RFI

It is unfortunate, but it would appear that Justice Colman allowed the Derbyshire public inquiry process to be exploited, by the Attorney General’s team in a way that did not promote the establishment of fact, but helped them develop a case that was detrimental to the Derbyshire Families Association (*see annexes 1 and 2 - the court’s conclusions and answers to the Attorney General’s questions were crafted in such a way as to enable both British shipbuilders (i.e. the Government) and the Classification Society to make use of the ‘development risks defense’, should any product liability claims arise*).

The court’s conclusions that the vessel’s deck fittings (mushroom ventilators, airpipes and windlass seating) were wholly in accordance with standards applicable at the time the Derbyshire was built - standards which today, having been found deficient over time, are no longer acceptable - **was not proven**.

⁵ Paper titled: “Investigative process: conclusions and recommendations” presented at the Glasgow Marine Fair (23-25 May 2001)

⁶ Mr Macdonald is trying, not very successfully, to maintain the establishment’s position that the Derbyshire inquiry was both fair and impartial, while saying something of interest. The two court hearings that made up the Derbyshire’s formal investigation (the OFI in 1989 and the RFI in 2000) are classic examples of ‘covert shadow litigation’, where the Government’s controls and influence were used to stave off the possibility of litigation against a state-owned organisation.

Moreover, photographic evidence from the underwater survey of the wreck indicates, that these fittings were not wholly in accordance with the standards applicable at the time of build.

(To be continued)

Annex 1

PRODUCTS LIABILITY extracts from a paper by Prof. William Tetley

I. Introduction - definition

Modern products liability usually means, and means in this text, the responsibility of the manufacturer, and of various sellers in the chain of sale, to third parties with whom they have not necessarily contracted, for physical harm (to persons or property, including the property sold) caused by the products they manufacture or distribute. The doctrine has its common law roots in English and American decisions as *Rylands v. Fletcher*, *MacPherson v. Buick Motor Co.* and *Donoghue v. Stevenson* and has emerged even in maritime law as a means of recovery by third parties from manufacturers and distributors for damages caused by their goods after their entry into the stream of commerce.

[...]

The negligence basis of products liability law in England was reaffirmed by the House of Lords in 1990 in *Murphy v. Brentwood District Council*.

"If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well known principles established by *Donoghue v. Stevenson*, [1932] A.C. 562, will be liable in tort for injury to persons or damage to property which the chattel causes."

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Guide to the Consumer Protection Act 1987

Product Liability and Safety Provisions

What does it mean?

1 People injured by defective products may have the right to sue for damages; product liability is the term given to laws affecting those rights.

2 In the past those injured had to prove a manufacturer negligent before they could successfully sue for damages. The Consumer Protection Act 1987 removes the need to prove negligence. A customer can already sue a supplier, without proof of negligence, under the sale of goods law. The Act provides the same rights to anyone injured by a defective product, whether or not the product was sold to them.

[...]

18 What defences are there:

A **producer** or importer **can avoid liability** if he can prove any of six defenses, one of which, the so-called "**development risks defense**" states that:

- **"the state of scientific and technical knowledge at the time he supplied the product was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control."**

Annex 2

Extracts from the report of the RFI Section 16 –answers to the Attorney General’s questions

Note The court’s answers to the RFI questions would enable both the shipbuilder and the Classification Society to make use of the ‘development risks defense’ against any product liability claims that could arise.

16.4 In so far as material to the loss of the “DERBYSHIRE”, was the design of the “DERBYSHIRE” in way of her fore-end (from frame 339 forward – including her hull, bow height, deck, deck openings and fittings) in accordance with the standards applicable at the time she was built?

- Yes

16.5 Is that design satisfactory in the light of what is now known?

- No.

16.7 In so far as material to the loss of the “DERBYSHIRE” was the design of the hatch covers of the “DERBYSHIRE” in accordance with the standards applicable at the time she was built?

- Yes.

16.8 Is that design satisfactory in the light of what is now known?

- No:

16.9 At the time when the vessel was:

- (a) designed; and
- (b) built;

were the regulations and classification society rules for:

- (i) assignment of freeboard;
- (ii) design of her fore-end (from frame 339 forward – including her hull, bow height, deck, deck openings, and fittings); and
- (iii) design of her hatch covers

inadequate in any respect material to the loss in the light of the then current state of knowledge and what ought reasonably then to have been known or anticipated?

- No

16.10 When the “DERBYSHIRE” sailed on her last voyage from Sept-Isle was she in all respects seaworthy for her contemplated voyage to Japan in so far as material to her loss?

[...] She was, however, reasonably believed to be seaworthy by her owners, classification society and officers and crew, given the current state of knowledge in the shipping industry [...]

16.12 (c) Are the present –day classification society rules and instructions to surveyors adequate as regards the quality of design, construction and repairs.

- Yes,