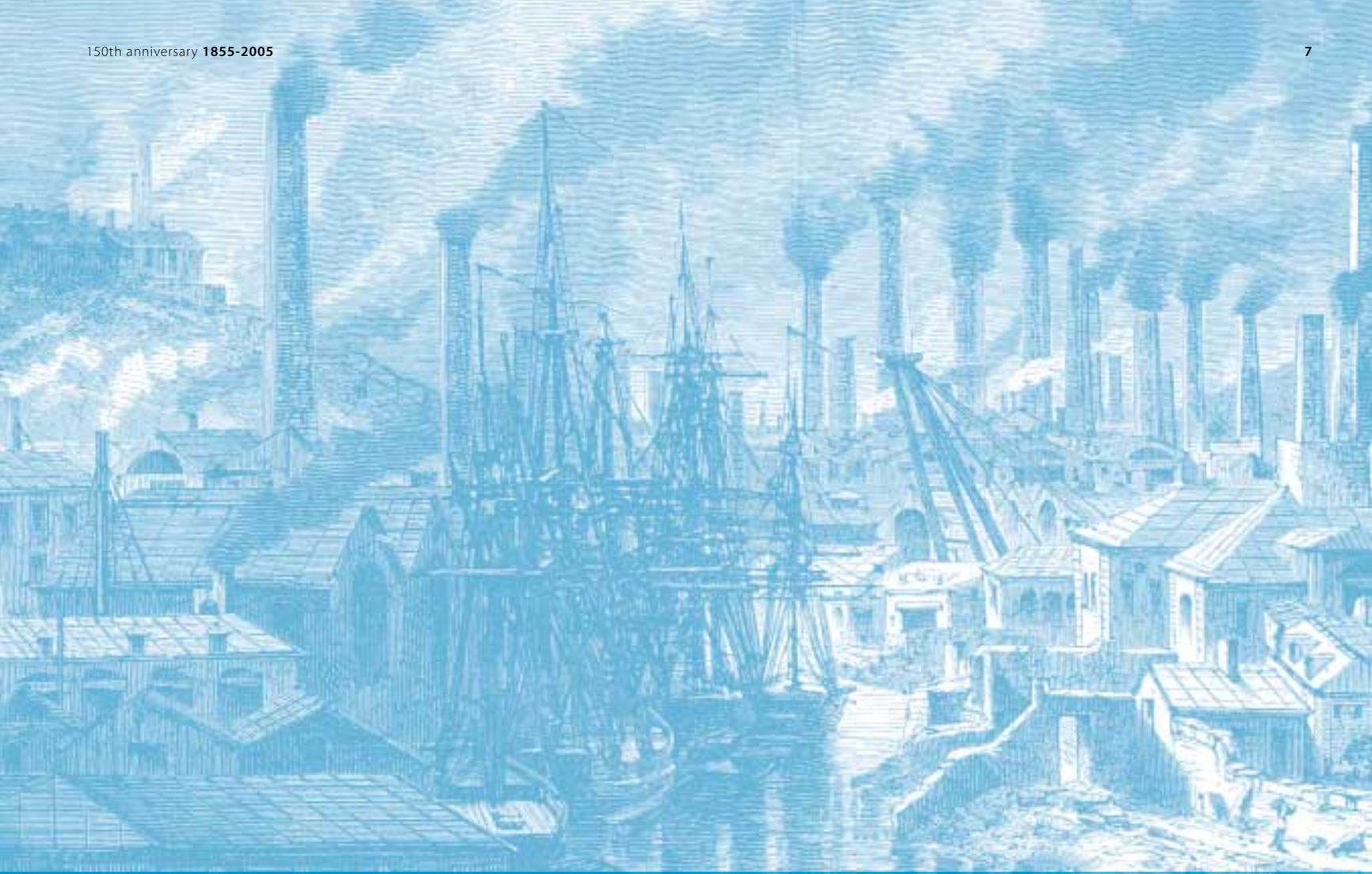


‘It was the best of times, it was the worst of times…’

(Charles Dickens, *A Tale Of Two Cities* 1859)

We are very grateful to Steven Hazelwood of Ince & Co, London, for this fascinating account of the legal environment that created the need for P&I clubs and saw them flourish during the second half of the 19th century. Steven Hazelwood is a Partner with Ince, where he has worked for 25 years. He is the author of *P&I Clubs – Law and Practice* (LLP – Lloyd’s Shipping Law Library), now in its third edition.

At the time that the title words were penned, the Industrial Revolution was going full steam ahead. Traditional local cottage industries were giving way to factory mass manufacturing. This was an age of scientific, technological and geographical discovery and development. The Industrial Revolution brought forth the best of innovations and the worst of innovations; and it provided the raw materials out of which the modern shipowners’ P&I clubs were forged.

Before the mid-19th century, shipowners had little need of protection and indemnity insurance. Those brave seafarers who went to sea in small wooden boats were activated by the lure of the sea rather than agitated by the laws of the sea; buffeted and battered by the elements rather than by enactments. Those halcyon days ended with the industrial, social and legal upheavals of the 19th century. Amid the industrialisation, there was also an emerging social conscience as evidenced by the polemics of the writer Charles Dickens and others. As the new factories were mass producing new machinery, the legislature and the courts were mass producing new laws.

Sail was giving way to steam, wood to steel, individual owners were becoming corporations. Foreign trade was vigorous. The increasing size, complexity and values of ships and their cargoes accounted for a corresponding increase in the potential liabilities faced by shipowners.

The Marine Insurance Act of 1745 prohibited shipowners from insuring their ships for sums in excess of their value. This did not create any problems while a shipowner’s liabilities were essentially limited to the value of his vessel. However, after the Marine Insurance Act, there followed a rapid increase in both the size and the scope of the owners’ liabilities, going well beyond the values of such vessels.

In 1836, Lord Chief Justice Denmam decided in *De Vaux v Salvador* that, under the old SG policy, Lloyd’s hull underwriters were not liable for claims arising from damage done to another ship in consequence of a collision. The eventual response from the traditional marine market was grudgingly to offer cover under what became known as the Running Down Clause (RDC), but for only three-fourths of such liabilities and expenses and leaving completely uncovered liability in respect of loss of life, personal injury and damage to fixed and floating objects. Such cover was, due to the

statute of 1745, limited to the value of the insured vessel, leaving owners of small, low value vessels to fund excess liabilities in the event of striking larger and higher value vessels.

With liability for loss of life thus left uninsured, there followed in 1846 one of Lord Campbell's Acts (the Fatal Accidents Act of 1846) which widened the scope for such liabilities by enabling dependants to claim damages for the death of relatives caused by negligence. Until this Act, English law had proceeded with the impeccable logic that in order to commence a legal action it was necessary for the claimant to be alive – dead people could not sue. Such a rule meant that it was cheaper to injure mortally than to maim. After the Fatal Accidents Act, families could sue in respect of fatal injuries not only to ship crew members but also to others and this was at a time when British ships were full of emigrants to Australia and the New World.

One year after Lord Campbell's Act, a statute was enacted which allowed harbour and dock authorities to recover for damage done to docks and port works without proof of fault or negligence (the Harbours Docks and Piers Clauses Act 1847); a liability excluded from the indemnity provided under the RDC.

In an attempt to alleviate the burden upon British shipowners, a Limitation of Liability statute was enacted in 1854, but this Act assumed that all ships were worth £15 per ton, whereas many were worth less. As a result, shipowners still found themselves facing claims in excess of the values of their own vessels and for which no insurance was available.

This was the year that Dickens published *Hard Times*, a critique of Victorian England in which utilitarianism and a 'factory mentality' sought to turn men into machines; those very machines, of course, that were causing death and personal injuries in factories, on roads, on rail and at sea. The litigation that inevitably followed these accidents was largely responsible for developing the tort of negligence and the concept of vicarious liability. Parliament, for its part, reacted with social legislation.

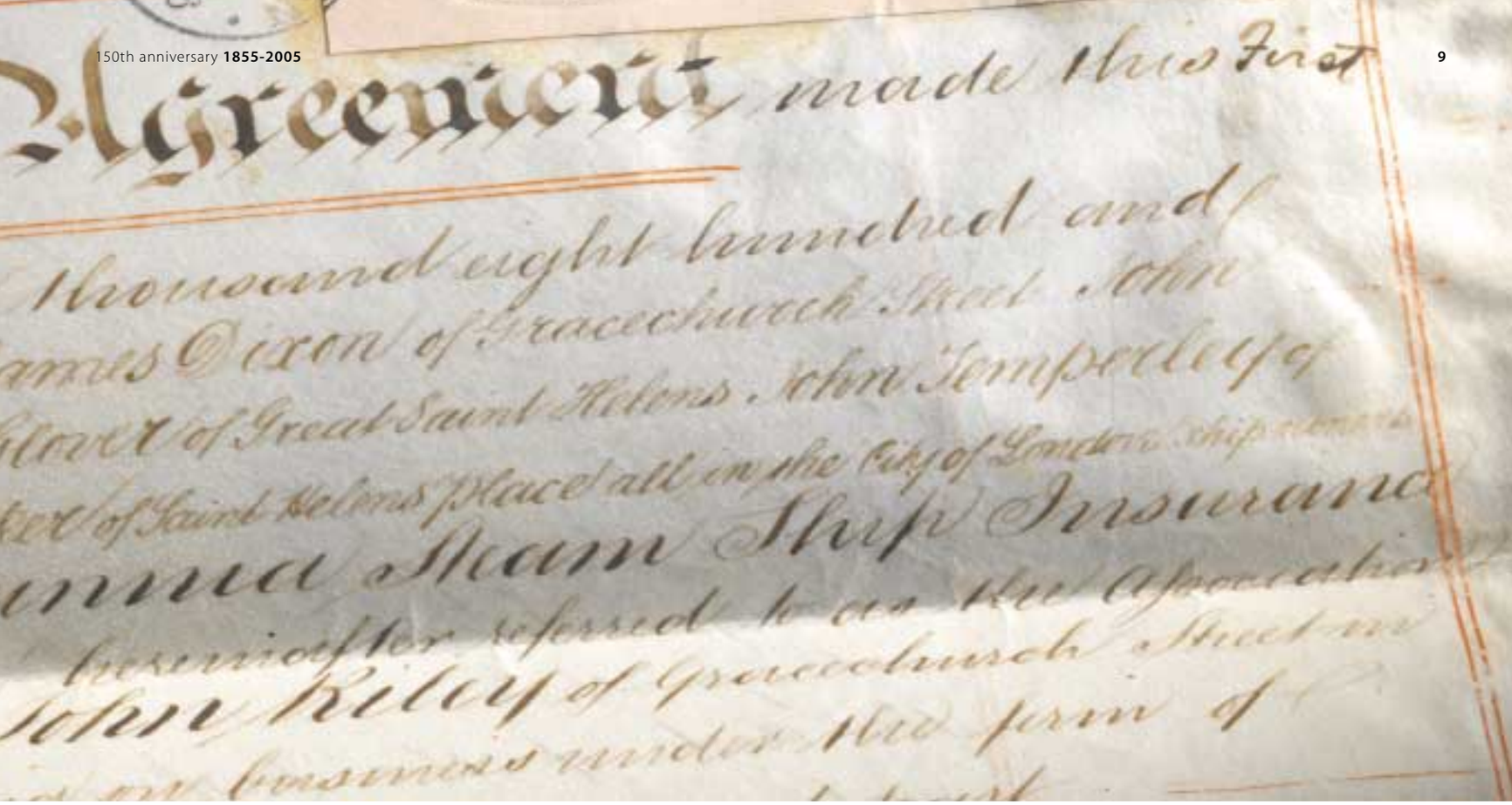
For example, the Employers Liability Act of 1880 destroyed, in certain cases, the employers' defence of common employment and marked the first of a line of statutes providing for payment by employers (which was eventually extended to shipowners) to workmen (eventually to include seamen) for injuries suffered in the course of their employment. As further evidence of an expanding social conscience, in 1897 and 1906 came Workmen's Compensation Acts providing for employers (shipowners) to pay compensation to injured employees (crew).

This new legislation and the early developments in the law of negligence were not specifically directed towards shipowners but aimed at the increasing number of deaths and personal injuries sustained in operating the new machinery in heavy industry and in the construction and running of the expanding railways. Shipowners became caught up in these developments, being employers of men and vicariously liable for the acts of their crews.

Threatened by potentially enormous liabilities and a largely unresponsive insurance market, the shipowners of the mid-19th century sought shelter in groups for mutual support. Their forefathers of a century earlier had done the same in the face of an inadequate hull insurance market. In the coastal towns of England and in London, shipowners had taken matters into their own hands and formed local friendly hull clubs to mutually insure their hull risks.

At that time, these hull clubs were actually entering a period of decline. However, they provided a ready framework for mutual support, and the system suggested itself to the troubled shipowner of the 19th century as being the most effective and economical means of protecting himself from liabilities that were otherwise uninsurable. Old hull clubs were thus converted into 'protecting clubs'.

Some historians of marine insurance would have us believe that the origins of the protection clubs is to be found in the decision in *De Vaux v Salvador* and in the refusal of the proprietary market to cover four-fourths of collision liabilities. In fact, a number of the old hull



clubs were already mutually insuring full collision liabilities as part of their hull cover even before this court ruling and before the formation of the first protection club. They were doing so only up to the value of the insured vessel and with dubious legality (the legality of liability insurance was raised by the Solicitor General in *Delanoy v Robson* (1814) and by Lloyd's underwriters upon the introduction of the RDC). The uncovered one-fourth collision liability was one of the liabilities covered by the new protecting clubs – but what really moved shipowners to convert hull clubs into protecting clubs was the excess liabilities above the value of available insurance in respect of all liabilities. It was this extra or excess amount, together with liabilities for loss of life and personal injury, that really inspired shipowners to form the early protecting clubs.

Protecting (or protection) clubs not only drew their inspiration and many of their practices from the hull clubs, the hull clubs were the ancestors of the protection clubs. The family link can be traced through Mr Peter Tindall, a shipowner and insurance broker, and his cousin and brother-in-law, John Riley, who managed a number of hull clubs established between 1849 and 1876. The partnership of Peter Tindall, Riley and Co formed the first protection club which commenced operations in London on 1 May 1855 – the same day as the Merchant Shipping Act 1854 (allowing limitation of liability for the first time in the case of death) became effective. This was the forerunner of the Britannia Steam Ship Insurance Association. From an early call-sheet, it seems that the Club paid its first loss of life claim in 1870.

Cargo claims were not a serious concern to the 19th-century shipowner. Simple bills of lading containing exemption clauses provided a bias in favour of carriers of cargoes against shippers and receivers. How things have changed! Indeed, the earliest copy of Britannia's Rules to have survived, dated 1866, indicates that the cargo risk was covered by the Club. Then, in 1870, a vessel called the *Westenhope* was lost off the coast of South Africa. The vessel was loaded with a cargo bound for Cape Town, but proceeded instead to Port Elizabeth, thereby committing a deviation. The ship and cargo were lost due to what would have been an excluded peril. In consequence of the deviation, the court decided that the shipowner was not protected by the exceptions in the contract of carriage and found the owner liable for the full value of the cargo. Shortly after this occurrence another vessel, the *Emily*, was lost – together with her cargo – consequent upon stranding, and the cargo owners recovered their full losses from the shipowner on the ground that this was a loss, not by the excluded risk of perils of the seas, but by negligent navigation which was not an excluded peril at that time. A further consequence of these decisions seems to have been that the claims were not covered by the shipowners' liability insurers either.

Shocked by the implications of these events, shipowners suggested to their protection clubs the creation of an indemnity class designed to cover them against such cargo liabilities. A new class was created and in the case of Tindall, Riley's Club, indemnity cover was added to shipowners' protection from 1886. So it was that the 'P' was joined by the 'I'.

It was the changes in the law in the 19th century that brought the P&I Clubs into being and the subsequent growth and development of the clubs has largely been shaped by developments in the law. As the liabilities to which shipowners are exposed have continued to increase in scope and size, so have the P&I Clubs grown and developed to protect and indemnify their members.