

# Why Cover the Wreck of a Sunken Ship?

Hugo Tiberg

*The Estonia accident was a traumatic experience for Sweden. The most disastrous occidental ferry accident in modern times occurred close to Swedish waters and caused the death of more than five hundred Swedish citizens. Although the ferry was Estonian, it was operated in conjunction with Swedish interests, and the press kept referring to the Swedish co-operator as the party responsible for the wreck. The Swedish government also took immediate control of the inquiries after the accident and took a number of decisions evincing its strong concern in the matter. One such decision was the much criticized one of covering up the wreck with concrete.*

## **A Trusty Milch-cow**

The vessel was delivered in the autumn of 1979 from the Mayer shipyard in Papenburg in West Germany. She was commissioned for the Åbo-Stockholm line under the name of *Viking Sally*.

In the design of the vessel there was embodied, inside the openable bow (the bow visor), a car-ramp which at sea would be raised to serve as a watertight bulkhead as required by applicable rules. Under these rules vessels must have such a bulkhead at a certain distance from the stem, primarily to prevent water from entering in the event of a collision from forward. The ramp closes against a ledge in a recess on the vessel and can withstand great pressure from forward.

On *Viking Sally* like on many other ferries the interspace prescribed from the stem to the raised ramp had been somewhat reduced for the purpose of saving space for the car deck. This was considered acceptable since the reason for the interspace requirement was to secure a deformation zone in front of the bulkhead, which on these ferries was satisfied by the presence of a large underwater bulb forward of the stem proper. This design was permitted for vessels in protected waters which would sail no further than 20 miles from land, i.e. such traffic as *Viking Sally* was originally intended for. But this divergence from ordinary rules was to be notified the international maritime organization IMCO

(now IMO) and should have appeared on a special certificate, both of which requirements are said to have been unfulfilled on *Estonia*. Yet the vessel was approved by the Finnish Maritime Administration and the classification society Bureau Veritas which inspected the vessel on behalf of the Administration.<sup>1</sup>

The vessel plied without problems in the service of the Viking Line for about ten years on its intended trade, until the autumn of 1989. *Viking Sally* became known as the Viking Line's milch cow, having carried more passengers on this line than any other vessel.

In the autumn of 1989 the owner group suffered economical difficulties, and *Viking Sally* was taken over by the competitor Silja under the name of *Silja Star*. She was later moved to Silja's Umeå-Vasa line and operated in those rather exposed waters under the name of *Vasa King* until 1993, when she was bought by Nordström & Thulin (N&T) for a new line between Stockholm and Tallin. She was there given the name *Estonia*.

### **Estonian Operator**

N&T soon found that the vessel could not be operated profitably with a Swedish crew. Against the protests of the Swedish seamen's union they decided to reorganize the activity to be carried on under Estonian flag with an Estonian crew. But as the Estonian ship register was not yet completely organized and could not offer mortgaging of the vessel, it was found necessary to obtain formal registration in a country which allowed double registry and sailing under the flag of the foreign register. A country allowing this was Cyprus, and a Cypriot company was founded called Estline Marine Company Ltd., half owned by N&T and half by state-owned Estonian Shipping Co. (ESCO). The Cypriot company owned *Estonia* from 1993 but let the vessel on bareboat charter to ESCO's daughter company E-Liine (E-Line), which was the vessel's operator, responsible for the running of the vessel as well as for marketing and the issuing of tickets on the Estonian side. However, technical management appears to have been entrusted to ESCO under a management agreement and by ESCO, under a sub-agreement, to N&T. The Swedish marketing and ticketing was entrusted to N&T-owned Estline AB.

Under this complicated owner- and managership the vessel was employed until her loss in September 1994. The vessel was maintained and inspected from the Estonian side, but since the Estonian ship inspection was not completely organized, Swedish expertise assisted in the training of inspectors. The vessel's crew were Estonian, having a background mainly in the previous Soviet merchant marine.

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<sup>1</sup> See MV *Estonia*, *Partial Report on Technical Questions* by the Joint Inquiry Commission, April 1995, p. 19 f.

## The Foundering

In the evening of the 27th September 1994 the Viking Line's *Mariella* was heading a strong westerly gale at twelve knots on her way from Helsinki towards Stockholm. The master found the pounding of the vessel hard and ordered easing down of the speed. A few miles further south the smaller *Estonia* was passing ahead on a parallel course at nearly fifteen knots. Soon after one o'clock she sent out distress signals. She had developed a heavy list and needed assistance. *Mariella* and her sister vessel *Isabella* immediately turned towards the scene of the coming disaster.

They could see lights from *Estonia* before she sank. But when they arrived there were only debris, liferafts and struggling people in the cold autumn water. Eight hundred and fifty four persons were drowned, and only one hundred and thirty seven could be saved.

What had happened is generally agreed in main traits but disputed in details.<sup>2</sup> The top of the vessel's bow, the bow visor raisable to admit the lowered car ramp, had been torn off. When erect, *Estonia's* car ramp extended above deck level, and the visor's deck part had a groove housing this top of the ramp when the visor was in a closed position. But if such a visor comes lose in its top part, the groove will tend to tear it off from the ledge to which it is locked by weaker means. This apparently happened, and the ramp was pulled ajar so as to admit large quantities of water on the car deck. The water rose to such heights that the vessel became unstable and thereafter capsized. Thus it seems not to have been the irregularity concerning the space between the bow and the ramp that caused the disaster but a design detail without any direct connection with the ramp's location.<sup>3</sup>

## Ample Compensation

There immediately arose confusion as to who might be liable to pay compensation to the many victims of the accident or their families. The Swedish press regularly described N&T or Estline AB as the "operator" ("rederi") which should be liable. But all the enterprises involved had a common liability insurance, P&I insurance, with the Norwegian P&I Club Skuld, applicable for any liability that might be incurred on the carrier side, irrespective of where it

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<sup>2</sup> See *Final report of the International Accident Committee, Tallinn 1997*. While the Committee's conclusions regarding the events leading to the accident has been questioned in detail and completely rejected by some, its assumptions regarding the actual cause of the sinking is the most generally accepted, and sabotage theories which have been suggested – lately also by the building yard - have few followers.

<sup>3</sup> See sketches in the Partial Report (above). The Report remarks, on pp. 19 and 30, that the "upper extension of the collision bulkhead" (i.e. the ramp, which extended above the car deck level) was not according to SOLAS 60 and on p. 30 that a proper extension up to weather deck would have considerably increased the vessel's possibilities of surviving the loss of the bow visor, although the fateful visor groove itself was not contrary to any rules. It seems agreed among experts that the ramp was very strong against outside pressure and if not torn off by the visor would have withstood the force of the waves.

might fall. At an early stage Skuld declared that they would cover the liability that might arise, calculated per Swedish, not Estonian law.

Liability in shipping operations is limited under the Swedish Maritime Code, like in other countries, both per person or unit of goods and as a total amount that may not be exceeded (global limit). In practice the limitation as applicable at the time of the accident cut off any individual claims higher than about a million Swedish crowns per passenger, and the owner's or operator's total liability for the over 850 victims was limited to the order of 260 million crowns.<sup>4</sup>

But the limitation does not include litigation costs,<sup>5</sup> and Skuld foresaw that litigation against the several thousand dependants with prospective claims might rise to high amounts. They therefore entered into discussion with representatives of the victims and arrived at a settlement proposal for a generous compensation far in excess of the victims' rights under the Maritime Code and in reality also in excess of what victims are usually awarded in accidents ashore. These ample compensations have today been mostly paid, except some for the crew and some in doubtful cases which require further investigation. The victims and dependents have thus on the whole received the full or overfull measure of that which can be expected after an accident under Swedish law.

### **Further Claims**

But every one was not satisfied. Some wanted not only money but an admission of guilt from the "operator", for which purpose they have sued N&T and Estline. Other victims sought and are still seeking for other sources of compensation besides the cover from the owner insurance which they have already received. This group particularly hopes for further amounts from the Mayer yard and the classification society Bureau Veritas. The plan is to show that the ship had some kind of defect of design which might involve the yard in liability, or that the irregularity concerning the space between bow and car ramp or some other defect might allow a claim against the classification society. Time bar against the yard is as late as thirty years from delivery under German law, and as for the classification society it was thought to have a continuous liability for having allowed a faulty state to continue through periodical inspections.

The yard has however assumed that the damage depended on bad maintenance in respect of one of the hinges that attached the bow visor to the deck or of the locks securing the visor to the ledge in the vessel. The bow visor

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<sup>4</sup> There is a limitation in the Maritime Code chapter 15 section 21 (MC 15:21) of 175,000 SDR per passenger and a total ceiling (global limitation) in MC 9:5 of 25 million SDR for the entire vessel, which in October 1997 would correspond to SEK 1.814 million and 259.125 million respectively. However, at the time of the accident the amount per passenger was only 100,000 SDR, being raised to the new limit a few days later by the coming into force of the new Maritime Code on the 1st October 1994. The crew are not included under the individual passenger limitation and are entitled to share in a separate limitation amount which raises the shipowner's total liability above the total passenger figure; this is relatively modest and will not be considered here.

<sup>5</sup> This is expressly stated only with regard to the global limitation, MC 9:3 item 6, but it is taken to apply equally to the individual limitation.

has been salvaged, and there are said to be indications on it supporting the allegations, and there exists an adventitious photograph exhibiting the starboard hinge shortly before the disaster said to show it to have been very badly welded and to have lost most of the substance of the pin.<sup>6</sup> If the question were to come up, the yard wants to have access to the wreck to prove its own innocence.

Finally, there exists a small group of claimants who have not participated in the agreement with Skuld. These victims allege that there has been gross negligence on the part of several of the parties on the shipowner side and that these parties are therefore liable without limitation. The parties sought to be held are E-Line as operators, Estline as contracting carriers on the Swedish side, ESCO as contracting technical managers of the vessel and Nordström & Thulin as acting technical managers.

All these parties on both sides have or have had an interest in securing evidence from the sunken vessel. Many of them have been looking forward to the report of the international investigation committee, with members from Estonia, Finland and Sweden, but the committee appeared to have difficulty agreeing on a common statement and repeatedly postponed its final report before it was finally published in 1997.<sup>7</sup> Many of the parties involved seem to distrust the report, however, and would prefer to make their own investigations.

## Covering the Wreck

Soon after the disaster the Swedish prime minister Ingvar Carlsson as well as the opposition leader Carl Bildt stated that the wreck or the bodies must be salvaged “at any price“. After an investigation by the Swedish Maritime Administration the promise was apparently found to have been premature. Salvaging of the wreck from its depth of ninety meters was not practicable, at any rate, and the cost of such an operation would be astronomical.

In that situation the Swedish government appointed an ethical council, which recommended not to salvage the vessel or any bodies from it. In agreement with the Finnish and Estonian governments it was decided that a special law should be enacted consecrating the wreck and surrounding area as a graveyard, and a prohibition of diving or otherwise staying in the area was issued in all three countries.<sup>8</sup>

It was however realised that, since the vessel had sunk on international water, such a prohibition could have effect against persons subject to Swedish, Finnish or Estonian jurisdiction but could not apply against others.<sup>9</sup> In fact survivors

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<sup>6</sup> These pictures, which have been reproduced in the press, do not appear in the official partial report.

<sup>7</sup> *Final report of the Estonia Accident Committee*, Tallinn 1997.

<sup>8</sup> In Sweden Act (1995:732) on Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia, already prepared when agreement was reached with the Finnish and Estonian governments 23 February 1995. Since then the agreement has been acceded to also by Denmark.

<sup>9</sup> The over-all freedom of the seas for all States is expressed in the United Nations Convention of the Law of the Sea 1982 (UNCLOS) art. 87. The sea bottom on which the ship in fact

both from Sweden and other countries engaged German and Swiss divers to search for corpses in the wreck. There was also an apprehension that unrelated divers might go down and steal property from the wreck or otherwise defile the declared sanctuary. To prevent this the Swedish government with the connivance of the wreck owners<sup>10</sup> and the approval of the Finnish and Estonian governments decided that the wreck should be covered with a concrete shield,<sup>11</sup> so that it would not be accessible without great difficulty. The decision was made without consultation with any survivors or their organizations. It was also attempted, apparently without much success, to induce foreign nations to accede to the three-State agreement on consecrating the area and forbidding diving there.

### **International Law Considerations**

The reason for requesting the consent of the Finnish government was related to the site being part of the Finnish continental shelf. Under international law Finland is entitled to utilize the area in the respects indicated in the Law of the Sea Convention of 1982. Under its articles 60 and 56 as referred to by article 80,<sup>12</sup> the coastal State has exclusive rights to erect installations and structures for purposes of exploring and exploiting, conserving and managing natural resources but not for other purposes which are not economic. The purpose of protecting a wreck from sacrilege is not covered, and thus it is not Finland's rights Sweden is exercising in covering up the wreck. Instead, the permission of the Finnish Government was needed, besides for comity reasons, because a piece of the shelf would be covered and that the covering might interfere with the purposes for which Finland has exclusive rights to the shelf.

After the obtaining of Finland's permission, the question of covering the hull became wholly a matter of States' right to the sea or sea bed, i.e. of the exercise of "residual rights" remaining after Finland's continental shelf privileges have been taken account of. For Sweden the situation becomes comparable with what it would be if the wreck had been lying on the bottom of the sea outside the continental shelf of any country (cf the Convention's article 78 subs. 2). This area is regarded as the "common heritage of mankind" (article 136) which may only be used according to the principles of equity and in consideration of the rights of other States (articles 138 and 147) as well as other rights recognized by international law, such as the human rights of individual persons according to the Human Rights Convention.

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settled belonged to the Finnish Continental Shelf, but as we shall see this hardly gives rights which would diminish the access of all States to the wreck.

<sup>10</sup> According to the Swedish Government bill 1994/85:190, the ship's hull insurers had relinquished any claims to the wreck to its owners, Estline Marine Co. Ltd., which in turn had declared that the Government might freely exercise the Company's rights as owners and that it was free to cover the wreck for purposes of preventing looting.

<sup>11</sup> The decision was taken by the Swedish Government alone on the 2 March 1995.

<sup>12</sup> Articles 60 and 56 deal with the Economic zone, which Finland had not at the time declared, but they are incorporated by reference in art. 80 into the Continental Shelf provisions.

Against that background the question of covering the wreck becomes an evaluation in which Sweden must consider whether there are any internationally relevant reasons contrary to Sweden's intentions. Such contrary reasons might be the interest of securing evidence or of salvaging corpses or personal property, if espoused by any foreign country and pursued on behalf of its citizens, or they might be human rights, if supported by the provisions of the Human Rights convention.<sup>13</sup> While it does not seem likely that any State would officially pursue the protection of private persons' interest of securing evidence or salvaging anything from the wreck, a claim for breach of human rights was indeed brought to the European Commission for Human Rights. Its fate will be considered hereafter.<sup>14</sup>

### Why Cover the Wreck?

The organizations of survivors and relatives have questioned whether it is at all permissible for the State to decide on covering of the wreck of *Estonia*. It has been said among other things that the interest of securing evidence from the wreck is so great that a covering up which prevents access to the wreck is a legal scandal.

So far, I find it hard to agree. If strong national interests were to speak for the action decided on, it could hardly be a hindrance that the covering would interfere with some evidence, particularly when the State considers itself to have secured the necessary evidence relevant for the evaluation of the accident. It occurs often in road and railway accidents that priority is given to cleaning up at the scene of the accident so that traffic may get started soon rather than preserving evidence which might be secured if the wrecks were left in the area for a longer period of time. Such, also, has been the Supreme Administrative Court's view of the question.

It has also been suggested that the State would have some kind of duty to bring up as many corpses as possible, after salvage of the vessel had been found to be unrealistic. But there is no legal foundation for such a claim, and on mature consideration it seems rather extravagant to suggest that Sweden should have a duty to salvage corpses from a foreign vessel which has sunk in international water.<sup>15</sup>

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<sup>13</sup> Grounds which have been advanced for violation of the Human Rights include: violation of the right of property according to the 1952 additional protocol art. 1, as many of the victims are said to have had valuable property with them; the fair trial requirement in the Convention's art 6, as covering of the wreck would prevent access to necessary evidence; and the freedom of privacy and religion provisions in arts. 8 and 9, involving a right of choice of burial.

<sup>14</sup> See below at note 16.

<sup>15</sup> As the Government pointed out in its brief to application no. 31653/96 to the European Commission (following note), Sweden had no original jurisdiction over the area where the *Estonia* had sunk and has later assumed such jurisdiction in conjunction with Finland only for purposes of the three country Agreement mentioned at note 6.

The matter of breach against the Human Rights Convention has recently been tried by the European Commission,<sup>16</sup> which turned down the claim of certain survivors that the Swedish Government's decision to cover up the wreck would be in breach of a number of rights enumerated in the Convention. Thus an argument that the proposed concrete shield would prevent access to evidence needed by the survivors for the fair trial assured by art. 6 was turned down on the – admittedly insufficient<sup>17</sup> ground that the Government had postponed the work until further notice; a plea of breach against articles 8 and 9 of respect for private life and freedom of religion was rejected because the situation had called for a balancing of diverging interests, in which a certain leeway must be allowed the decision-maker; and an argument of entitlement to property with the deceased according to article 1 of the 1952 additional Protocol was denied on similar grounds.

It appears, then, that the possibilities of pursuing legal remedies against the covering up of the wreck have been practically exhausted. The decision has been held permissible, and it is hard to challenge it legally.<sup>18</sup> But is it on grounds of legal permissibility that a decision affecting the wills and feelings of thousands of survivors should be judged?

The recognition after a series of hard-fought law suits in national and international instances of a right for the Government to stick to its decision does not vouch for the wisdom of that decision. With the leeway allowed for the balancing of interests, the Commission's refusal of admissibility is not even an indication of its fairness. No consultation was made or contact taken with the survivors' organizations, with whom the chosen course of action appears to have little support. Though the course of events may explain the actual decision, it is surprising that it was not taken in consultation with those immediately affected and whom it was intended to favour. After the survivors' organizations had protested the decision,<sup>19</sup> it is decisively astonishing to see that the government clung so hard to it.

It is an ancient custom to let those deceased on shipboard remain buried at sea. The sea itself is the grave of seamen and passengers alike, and this has been accepted through generations without ever a suggestion that sunken ships should be covered up. To the relatives the sea has been a fine grave which they can visit

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<sup>16</sup> Application no. 31653/96 *Bendréus v. Sweden*, 29 Sept. 1997. Besides those mentioned in the text, a plea of no fair trial on the ground that the Supreme Administrative Court's decision not to try the case was denial of justice according to art. 6 was rejected on the ground that the applicants might have turned to the ordinary courts as did other victims.

<sup>17</sup> The applicants had pleaded that the covering would obstruct the International Inquiry Commission's work *and* future litigations, and the European Commission seems to have addressed only the former plea, since the Government had announced postponement until the Inquiry Commission should have achieved its work.

<sup>18</sup> The Commission's argument concerning art. 6 of the Convention – that the Government has postponed implementation of its decision to cover the wreck seems to leave a narrow slit for argument at the time when the Government shall decide to continue with the work, but it will hardly be possible to reach the European Commission with a plea to stop such work until it is completed!

<sup>19</sup> This appeared strongly in a television confrontation between the Minister of Communications and spokesmen for the survivors' organizations.

in all parts of the earth to mourn and honour their deceased. Why should *Estonia* be different?

The fear of profanation seems exaggerated and misdirected. Surely the location of a wreck in seventy to ninety metres deep water protects it better than any grave ashore. Diving to such depths is costly, dangerous and highly unpleasant. Why should it be done to desecrate the peace of the dead on this particular vessel? Possible visitors would have other errands. There would be those who wish to retrieve the bodies of their dear ones. Allowing them to make whatever exertions they wish to bring their relatives ashore for a land burial while others could accept the sea tradition would certainly strike balance of conflicting interest. There might also be some who hope to secure evidence of the accident from the bow of the vessel. The survivors' organizations have sued for and supported such investigations, which would surely not be more disturbing to the peace of those interred in the vessel than the enormous task of erecting a concrete mausoleum around their lonely tomb!

Economic arguments may sound harsh upon the death of so many humans but have a definite role in the balancing of different interests. Over two hundred and forty million crowns of Sweden's decrepit budget were expended on this project which no really interested party wanted, not counting the costly lawsuits and threatening diplomatic entanglements. When the protests of the survivors' organizations began to be heard it must still have been possible for the State to redeem the cover-up contract with the intended builder for much less than the full contract sum. But the Government stuck to its plans until a stage when the costs had already become substantially irrevocable. At this stage it finally allowed a respite pending the publication of the long-delayed report of the Joint International Accident Commission. When at long last the Commission's report appeared and protests about the covering did not subside, the Government appointed an Analyse Group which would listen to and express the views of the survivors' organization, which group ended up with the recommendation that either the vessel or the bodies from it should be salvaged.<sup>20</sup> At this stage (late 1998) no new start had been made to complete the shield above the vessel, and the Government is currently involved in a dispute with the contractor concerning damages for breach of the contract.

As a result of the analysis group's report, the focus of attention has shifted back to the salvage alternative. A proposal by the Swedish Government whether the Estonian and Finnish governments might consider renegotiating the agreement with a view to possible salvage of the wreck or bodies from it has met with a firm denial from both quarters. Unilateral action on Sweden's part is out of the question, as Sweden – normally quite pedantic in its fulfilment of international obligations – is not only internationally bound as a party to the international sanctuary agreement but was indeed its initiator and has been taking steps to extend it to other countries. At the time of writing, the Government has advertised its forthcoming decision on the salvage question. In view of the seemingly adamant position of the other contracting parties, it does not seem to have much choice.

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<sup>20</sup> SOU 1999:48, 21 st april 1999.

In a recent television hearing in anticipation of the Government's final decision, it was said that the development of underwater technology is now so swift that low-cost diving to *Estonia* will soon be a realistic possibility and that the prospect of people collecting and selling souvenirs from *Estonia* is quite imminent.<sup>21</sup> If this should come true it might rekindle the discussion of resuming erection of a shield around *Estonia*. But this perspective seems an improperly narrow. Measures prompted by a general development should be general in character and not limited to one accident alone. One possible reaction to such a scenario might be a general convention on protection of wrecks or areas where the bodies of drowned persons have come to rest.

The amount spent and remaining to be spent on covering the hull of *Estonia* is of the same order as the total compensation granted the victims by the P & I insurer. Could the money not have come to greater benefit for those affected? Suppose the amount expended or even that remaining for final achievement of the covering plan were directed to measures for the avoidance of future disasters of the *Estonia* calibre, would that not be a monument more worthy of those eight hundred and fifty victims than a concrete shield cutting their remains off from the rest of the world? Would we not all, confronted with such a choice in time for sober reflexion, prefer to have left our contribution to a better safety for future travellers than have our remains interred under an enormous shield of anonymous concrete? Then at least our deaths would not have been wholly in vain. And our victimized bodies would rest in the peace which the sea can offer better than any grave ashore.

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<sup>21</sup> Claes-Göran Wetterholm, author of three books on the sinking of the *Titanic*, at television hearing in Channel 2 on January 7th 1999.