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Liability of Marine Surveyors for Loss of Surveyed Vessels: When Someone Other Than the Captain Goes Down with the Ship

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Shipping almost necessarily entails loss and injury to ships, cargo, human life and the environment.[1] As a matter of course, the shipper, carrier and maritime worker will bear some of these costs. In addition, however, today's admiralty courts accommodate a growing number of other parties seeking to avoid the high costs associated with lost life and environmental cleanup.[2] These litigants include marine engineers, shipbuilders, stevedores,[3] towage companies, and marine surveyors and classification societies.[4] This note examines the various theories of malpractice liability advanced against marine surveyors and classification societies in the last few decades.

Part I of this note begins by describing the work of marine surveyors. It then argues that surveying is endemic to the shipping process, and that both the hull and cargo surveyor have important functions in light of business practice and federal regulation of shipping. Part II analyzes several recent cases brought against surveyors on a negligence theory. It organizes this discussion into the classic elements of the negligence action: duty, breach, causation and damage. In so doing, Part II examines defenses often interposed by surveyors in negligence actions. It further

1 G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 485 (2d Ed. 1985) [hereinafter GILMORE & BLACK]. Gilmore & Black say, for instance,

> But ships steam at night, and in all weather, and the combination of their huge momentum and limited braking power makes the averting of collision a matter of constant vigilance and proper and timely action; there is human failure on all points. Crowded harbors and narrow channels remain perilous, and in some cases are growing more so .... [T]he marine collision is still a phenomenon of frequent incidence, and the litigation resulting from it continues to grow.

Id.

2 *See, e.g.*, Bosnor v. Tug L.A. Barrios, 796 F.2d 776 (5th Cir. 1986) (involving seven parties including the cargo owners, the freight forwarded, the tug owner, the tug in rem, the stevedore and the marine surveyor).

3 A "stevedore" is: "One who works at or is responsible for loading and unloading ships in port." WEBSTER'S NEW COLLEGIATE DICTIONARY 1141 (1973).

4 Despite the obscurity of the surveyor to those outside of maritime professions, the courts have recognized the importance of this profession to maintaining safe sea travel. For instance, the court in Young v. Clear Lake Yacht Basin, 337 F. Supp. 1305 (S.D. Tex. 1972), commented that:

> A marine surveyor, particularly one who engages in the burgeoning pleasure boat field where the majority of boat owners are not educated and experienced mariners, performs an indispensable service, often a life-saving service to his clientele. Whether the survey be conducted for insurance purposes or for the purchase or sale of a vessel, this examination may be, in all likelihood, the only one made by an experienced hand. The landlocked public perhaps can rely on workmen to inspect and repair most major household appliances and not be placed in jeopardy of serious injury or death, at least in the majority of instances, in the event that the repairman inspects in a cursory manner or performs substandard work. But reliance by laymen on such skilled professionals as marine surveyors . . . [is] one of which the law must take cognizance in a proper case.

Id. at 1319.

While the *Clear Lake* court did not state what duties it required of surveyors, it did say that, given the social utility of surveyors, courts should not assess liability against them blithely. *Id.*

explains why courts have failed to apply the presumptions of unseaworthiness stemming from the multi-faceted unseaworthiness doctrine,[5] which would otherwise impose liability on surveyors in ship loss cases. Part III then discusses the contractual-warranty theory of liability developed in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[6] The discussion focuses on how the two-pronged holding in *Ryan* was changed by the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act[7] (LHWCA) and by the courts' current reluctance to imply a warranty against non-negligent third parties. It also explains the rationale of the courts in refusing to apply the warranty to marine surveyance cases. Finally, Part IV analyzes the current posture of surveyor malpractice law. It suggests that the federal courts are justified in restricting surveyor liability to the negligence action, despite the difficulty of proving negligence in ship loss cases. However, it recommends that the courts declare and the legislature decree as void provisions in surveyance contracts which disclaim liability for negligence or which require indemnity from the vessel owner. Part IV further recommends that Congress eliminate the incentive to sue surveyors created by the Limited Liability Act.[8] Finally, it recognizes that governmental licensing, testing and training requirements which have played an important role in other professions might aid the marine surveyance profession and shipping in general.

I. Background: Marine Surveyance

In the eyes of the law, a marine surveyor is a professional. In particular, the courts have defined a marine surveyor as a skilled workman whose profession "is to assist the judgment of the master as to his proceedings to repair damage or sell the ship."[9] The survey is designed "to protect [the master] in the fair discharge of his difficult and often critically responsible duty [to make the vessel seaworthy] . . . by giving him the aid of . . . other men of sound judgment."[10] Put more simply, a marine surveyor is a person who inspects ships to determine their seaworthiness.

Surveyors are not required by federal law to be licensed or to have any particular type of training.[11] Nevertheless, most surveyors have some previous experience in naval engineering, waterway navigation or sailing.[12] Once a person enters the surveying profession, though, that person holds himself or herself out as " 'possessing the degree of skill

5 *See infra* note 74.

6 350 U.S. 124 (1956).

7 33 U.S.C. § 901 (1982). *See infra* notes 133-41 and accompanying text.

8 46 U.S.C. §§ 181-189 (1982). *See infra* notes 111-15 and accompanying text.

9 Bradshaw v. Monk, 1952 A.M.C. 53, 54 (Super. Ct. Wash. 1952).

10 *Id.*

11 Telephone interview with John Ferband, Lakes and Eastern Marine Surveyors (October 1988). For instance, Title 46 of the U.S. Code contains no licensing or training requirements for surveyors.

12 J. Ferband, *supra* note 11.

commonly possessed by others in the same employment.' "[13] For this reason, some courts have held that "a marine surveyor will be held to a standard of 'good marine surveying' " and will be liable in the event that the surveyor fails to act in accordance with the reasonable customs of his profession at the locale of the tort.[14]

A. *Hull Surveyance*

Generally, the work of a surveyor falls into two categories: hull surveyance and cargo surveyance.[15] In the broad sense of the term, the "hull surveyor" examines the entire ship and its fixtures and appliances to determine seaworthiness. In the narrow sense of the term, a "hull surveyor" is one who inspects the superstructure of the ship for leaks, worn surfaces and structural weaknesses which could cause leakage or sinking of the vessel.[16] Federal law requires these inspections to determine that a vessel "is of a structure suitable for the service in which it is to be employed."[17] Although these inspections are carried out under the auspices of the Coast Guard,[18] the Coast Guard is permitted by federal statute to rely upon the reports of ship classification societies such as the American Bureau of Shipping in issuing certificates of inspection to vessels.[19] The Coast Guard may also elect to appoint surveyors as its agents in issuing certificates of inspection.[20] The frequency of federally required inspections for vessels varies from once a year to once every three years, depending on the type of vessel.[21]

For commercial reasons, however, shipowners enlist the services of commercial classification societies and ad hoc surveyors more often than required under federal law. Shipbuilders design vessels according to

13 *Bradshaw*, 1952 A.M.C. at 54 (quoting Potter v. Ocean Hill Ins. Co., 19 Fed. Cas. No. 11,335, 1173 (D. Mass. 1837)).

14 *Id. See also* Krohnert v. Yacht Sys. Hawaii, Inc., 4 Haw. App. 190, 644 P.2d 738, 742 (1983).

15 Telephone interview with Captain Greg Dudko, American Marine Surveyors (August 1988).

16 *Id.*

17 46 U.S.C. § 3305(a)(1) (Supp. III 1985). Federal inspection and certification of vessels is required of: "(1) freight vessels. (2) nautical vessels. (3) offshore vessels. (4) passenger vessels. (5) sailing school vessels. (6) seagoing barges. (8) small passenger vessels. (9) steam vessels. (10) tank vessels. (11) fishing processing vessels. (12) fish tender vessels." 46 U.S.C. § 3301 (Supp. III 1985). *See also generally* 46 C.F.R. § 2 (1987) (describing inspection requirements for certification); GILMORE & BLACK, *supra* note 1, at 986-88 (describing extensive federal regulation of vessels and their cargos by the Coast Guard).

18 46 U.S.C § 2104 (Supp. III 1985) provides that the Coast Guard, under the authority of the Department of Transportation, has power to issue certificates of inspection.

19 46 U.S.C. § 3316(a) (Supp. III 1985). The section provides in pertinent part: "In carrying out this part, the Secretary may rely on reports, documents and certificates issued by the American Bureau of Shipping or a similar classification society . . . ." *Id.*

20 46 U.S.C. § 3316(c) (Supp. III 1985).

21 46 U.S.C. § 3307 (Supp. III 1985). This section provides in part that

> each vessel subject to inspection shall undergo an initial inspection for certification before being put into service. After being put into service—
>
> (1) each passenger vessel and nautical school vessel shall be inspected at least once a year;
>
> (2) each small passenger vessel, freight vessel or offshore supply vessel of less than 100 gross tons, and sailing school vessel shall be inspected at least once every three years; and,
>
> (3) any other vessel shall be inspected at least once every two years.

Id.

plans and specifications of classification societies,[22] as well as regulations enforced by the Coast Guard.[23] Upon completion of the vessel, the ship is surveyed to insure the seaworthiness of the hull and compliance with various safety standards. The ship is later surveyed on a periodic basis by the classification society to determine whether it still complies with classification society standards.[24] Periodic surveys completed by owners, and required by federal law, function not only to "certify the [continued] soundness and seaworthiness of vessels,"[25] but also are a "prerequisite to registry of marine registration and of procurement of insurance upon them and their operations."[26] Moreover, ad hoc surveyors are often needed to insure a ship prior to a voyage, to sell the ship, to investigate the cause of marine accidents, and to determine that repairs to the ship are properly made.[27]

Exact surveying standards vary according to the type of vessel surveyed. Because of the greater consequences of capsize for vessels carrying passengers or dangerous chemicals, federal law and classification society standards for these types of vessels are more rigorous.[28] In general, federal laws and regulations guiding surveyors dictate standards for "(1) [the] design, construction, alteration, repair and operation of [the vessel], including superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery and accommodations for passengers and crew . . . ; (2) lifesaving equipment . . . ; [and] (3) firefighting equipment."[29] In addition, classification societies and other surveyors help assure the seaworthiness of a vessel by their own experience and through specific rules governing hull surveys.[30] Such annual survey

22 *See, e.g.*, AMERICAN BUREAU OF SHIPPING, RULES FOR BUILDING AND CLASSING STEEL VESSELS § 3.1 (1987 & 1988 Supp.) [hereinafter ABS RULES] (describing materials to be used in construction of steel vessels). This function of classification societies has been the subject of litigation. *See, e.g.*, Shipping Corp. of India v. American Bureau of Shipping, 603 F. Supp. 801 (S.D.N.Y. 1985) (involving an alleged failure of the A.B.S. properly to oversee the construction of Yugoslavian vessels to be used as "Ore-Bulk-Oil Vessels").

23 *See* L. KENDALL, THE BUSINESS OF SHIPPING 352-55 (1986).

24 *See, e.g.*, ABS RULES, *supra* note 22, at § 45.1. The ABS RULES for steel vessels in salt water service, for example, require a vessel owner to inspect the hull every year, machinery and electric installation every year, and fire tube boilers during their fourth and sixth year. Other types of inspections are done pursuant to special non-annual surveys. *Id.* at §§ 45.1, 45.19.

25 46 U.S.C. § 7501 (Supp. III 1985) (stating the purpose of the related certification requirement). Indeed, the purpose of steamship inspection law was divined in Pacific Shrimp Co. v. United States Dep't of Transp., 375 F. Supp. 1036, 1042 (W.D. Wash. 1974), as "the promotion of seagoing safety." Furthermore, the courts ought to "liberally construe" the statutes to promote this purpose. *Id.*

26 *Shipping Corp.*, 603 F. Supp. at 803.

27 G. Dudko, *supra* note 15.

28 *See, e.g.*, 46 U.S.C. § 3703 (Supp. III 1985) (permitting the Secretary of the Department of Transportation to establish special regulations pertaining to the carriage of dangerous cargos). *See also* 46 C.F.R. §§ 146.02-.12 (1987) (requiring a master to inspect military explosives carried as cargo); 46 C.F.R. §§ 150-153 (1987) (regarding special regulations for stowage of dangerous bulk cargos).

29 46 U.S.C. § 3306 (Supp. III 1985) (specifying the Department of Transportation's (Coast Guard's) authority to promulgate safety standards).

30 ABS RULES, *supra* note 22, at § 45.1. Section 45.1 requires, as part of an annual survey, inspection of:

a. Protection of Openings . . . .
b. Freeing ports together with bars, shutters and hinges.

rules, together with special and ad hoc surveys, serve to assure the seaworthiness of the surveyed vessels.

B. *Cargo Surveyance*

In addition to the hull surveyor, carriers rely upon cargo surveyors to insure the safety of ships at the time of carriage. Prior to a voyage, cargo surveyors determine whether stevedores have properly loaded and packaged the ship's cargo.[31] To assure compliance with federal law, the surveyor must determine that the ship is properly equipped to carry the cargo, and that the proper precautions have been taken concerning dangerous chemicals such as liquid gas and explosives.[32] In practice, the cargo surveyor will also weigh the cargo before and after voyage. He or she also will check for spoilage, and, if spoilage occurs, investigate the cause.[33] Since the cargo surveyor inspects the vessel just prior to carriage, he or she will also often check machinery, boilers and safety features such as life boats and safety equipment.[34] Like the hull surveys, the cargo surveys are necessitated by the marine insurance industry and requirements of shippers.[35]

II. Surveyors' Liability for Negligent Surveys

According to Prosser and Keeton, the negligence cause of action first arose out of the "liability of those who professed to be competent in

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c. Protection of the crew: guard rails, lifelines, gangways, and deck houses accommodating crew.
d. Verification of loading guidance and stability data as applicable. Loading instruments accepted for classification are to be confirmed in working order by use of the approved check conditions and so reported upon.
e. Verification that no alterations have been made to the hull or superstructures which would affect the calculation determining the position of load lines.
f. Anchoring and mooring equipment. . . .
g. Confirmation that no significant changes have been made to the arrangement of structural fire protection and confirmation of the operation of manual and/or automatic fire doors, if fitted.
h. Structural areas of the hull particularly susceptible to corrosion, including spaces used for salt-water ballast, as accessible. Thickness gauging may be required.
i. For vessels engaged in the dry bulk cargo trade, at each Annual Survey after Special Survey No.3, holds and 'tween deck spaces.
j. [Special rules for tankers]

Id.

The ABS rules illustrate the function of classification societies in setting standards for vessels. *See, e.g.*, Gulf Tampa Drydock Co. v. Germanisher Lloyds, 634 F.2d 874, 875 n.1 (5th Cir. 1981), wherein a classification society was defined as "an organization that (1) sets standards for the quality, integrity and seaworthiness of ocean-going vessels; and (2) after inspecting a vessel, classifies it as conforming to those standards."

31 *See, e.g.*, Skibs A/S Gyfle v. Hyman-Michaels Co., 438 F.2d 803 (6th Cir.), *cert. denied*, 404 U.S. 831 (1971).

32 46 U.S.C. § 3703 (Supp. III 1985). This section permits the Secretary of Transportation to promulgate regulations governing the stowage of dangerous cargos. Moreover, 46 C.F.R. §§ 150-51, promulgated pursuant to the statute, sets elaborate requirements for compatibility and storage of dangerous chemicals, and 46 C.F.R. § 151.04 requires inspection and certification of certain vessels carrying these cargos. Finally, 46 C.F.R. § 146 contains rules covering stowage of military explosives.

33 G. Dudko, *supra* note 15.

34 *Id.*

35 *Id.*

certain public callings."[36] Namely, "[a] carrier, an innkeeper, a blacksmith, or a surgeon was regarded as holding oneself out to the public as one in whom confidence might be reposed, and . . . as assuming an obligation to give proper service, for the breach of which . . . he might be liable."[37] Like the carrier discussed by Prosser and Keeton, the surveyor engages in a "public profession"; he or she holds himself or herself out to the public as capable to render an important social service. For this reason, and for want of another viable theory of liability, most cases discussing surveyor malpractice center on the negligence cause of action.

Given Prosser and Keeton's textbook definition of the negligence action, in order for a surveyor to be liable to a carrier, the carrier must prove by a preponderance of the evidence that: (1) the surveyor owed a duty to conform to a standard of conduct for the protection of the carrier; (2) the surveyor failed to conform to the standard of conduct for the protection of the carrier; (3) there exists a reasonably close causal connection between the conduct of the surveyor and the resulting injury of the carrier; and, (4) the carrier's injury consists of some actual loss or damage.[38] Each of these elements is significant, and as to each the defendant may interpose defenses. The existence of these defenses and the fact that in ship loss cases the cause of loss is often unknown make the plaintiff's case difficult. The following discussion organizes surveyors malpractice cases under the elements of the negligence cause of action.

A. *The Surveyor's Duty of Due Care*

Textbook wisdom dictates that negligence standards are defined with respect to Judge Learned Hand's famous formula—namely, a negligent act is one for which the cost of avoiding the injury multiplied by the possibility of the injury is less than the cost of the injury.[39] Nevertheless, whether a court is likely to find a professional liable in a malpractice case is more likely to depend on particular facts about the profession, past court rulings and common sense than on Learned Hand's calculus.

1. Definition of the Surveyor's Duties

Bradshaw v. Monk,[40] a comparatively early surveyor malpractice case, underscores one aspect of the marine surveyor's professional obligations. In *Bradshaw*, a purchaser of a leaky yacht sued a surveyor for failing to discover the yacht's need of repair at the time of purchase. Finding in the favor of the purchaser, the *Bradshaw* court observed that the stan-

36 W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 161 (5th Ed. 1984) [hereinafter PROSSER & KEETON].

37 *Id.*

38 *Id.* at 164-65 (defining elements of negligence cause of action). *See, e.g.*, Great Am. Ins. Co. v. Bureau Veritas, 338 F. Supp. 999 (S.D.N.Y. 1972) (applying standards to a marine surveyor case), *aff'd*, 478 F.2d 235 (2d Cir. 1973).

39 Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1944); United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). However, scholars do not agree as to the usefulness of this formula, or what standard to employ in negligence cases. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, in M. KUPERBERG & C. BEITZ, LAW, ECONOMICS AND PHILOSOPHY 154 (1983).

40 1952 A.M.C. 53 (Super. Ct. Wash. 1952).

dard of care for a surveyor is dependent on local custom in marine surveyance.[41] The court relied on the general principle in admiralty malpractice cases that "ordinary care is that degree of skill which reasonably may be expected of one in the given circumstances . . . . It is that degree of skill that prudent men in the business in hand would be likely to exercise under the same circumstances."[42] Such a principle applies with special force to land-based maritime contractors who are required by the courts to perform in a workmanlike manner.[43]

Bradshaw's reference to professional custom is similar to general malpractice doctrine in medicine, law, and accounting.[44] Later cases, though, have focused specifically on the duties of marine surveyors and classification societies. For instance, the often cited case of *Great American Insurance Co. v. Bureau Veritas*[45] defines the duties of a classification society as: "1. . . . to survey and classify vessels in accordance with rules and standards established and promulgated by the society for that purpose . . . [and] 2. to [use] due care in detection of defects in the ship it surveys and the corollary of notification thereof to the owner and charterer."[46] In *Great American*, though, neither the District Court nor the Second Circuit Court of Appeals found the classification society negligent. Rather, the District Court observed first that the defendant's failure to report "waviness of the transverse bulkhead"[47] was not clearly negligent;[48] and, even to the extent that the defendant might be negligent, the plaintiff insurance company could not recover because it failed to prove a causal connection with the vessel's eventual sinking.[49] Nevertheless, the rule of *Great American* is significant in its recognition of the surveyor's professional duty to discover and warn concerning defects in a vessel. Such recognition undermines the argument sometimes made by classification societies that such societies classify vessels, but do not determine their seaworthiness.[50] Later case law has faithfully adhered to the *Great American* definition.[51]

41 *Id.*

42 Pan-American Petroleum Transp. Co. v. Robins Dry Dock & Repair Co., 281 F. 97, 108 (2d Cir.), *cert. denied*, 259 U.S. 586 (1922).

43 Todd Shipyards Corp. v. Turbine Serv., Inc., 467 F. Supp. 1257 (E.D. La. 1978), *modified*, 674 F.2d 401 (5th Cir.), *cert. denied*, 459 U.S. 1036 (1982). Therein, the court said, "I find that one who enters into a maritime contract for repairs or other services impliedly agrees to perform in a diligent and workmanlike manner. This obligation does not require that there be privity between the party who owes the obligation and the one to whom it is owed." *Id.* at 1295.

44 PROSSER & KEETON, *supra* note 36, at 185-88.

45 338 F. Supp. 999 (S.D.N.Y. 1972).

46 *Id.* at 1011-12.

47 *Id.* at 1013.

48 *Id.* at 1011.

49 *Id.* at 1006.

50 *See, e.g.*, Gulf Tampa Drydock v. Germanisher Lloyds, 634 F.2d 874, 878 (5th Cir. 1981). There, the defendant contended that "as a classification society, it owed no relevant duty to the shipowner, and thus could not be liable." *Id.*

51 *See Gulf Tampa*, 634 F.2d at 878 (citing *Great American*, 338 F. Supp. 999 (S.D.N.Y. 1972)); Krohnert v. Yacht Sys. Hawaii, Inc., 4 Haw. App. 190, 664 P.2d 738 (1983) (holding surveyor liable for failure to discover dry rot on ship's hull).

2. Variation by Agreement

While surveyors' duties are dictated in part by federal law and professional customs, courts have held that the parties to a surveyance contract may modify their duties by agreement. This is not surprising since the surveyor's task in any particular assignment may vary greatly. In *Riverway Co. v. Trumbull River Services, Inc.*,[52] the court found the defendant surveyance company liable for failing to exercise due care to prevent the sinking of a towed barge.[53] The case involved a third-party claim against a surveying firm, Cairo Marine Industries, which promised under its contract with the towage company to "take charge of the situation, inspect [Barge] RW-381, determine what needed to be done, and do whatever needed to be done . . . to keep RW-381 from sinking."[54] Despite the fact that "marine surveyors sent to a scene of distress do not possess the authority or ability to take remedial action," the court found that Cairo was negligent in failing to save the barge.[55]

In contrast to the upward adjustment of duties in *Riverway*, surveyors more often claim that their duties have been adjusted downward by provisions in surveyance contracts that either disclaim liability or seek indemnity from the carrier. For instance, in the recent case of *Bosnor v. Tug L.A. Barrios*,[56] a surveyor, World Marine Association, argued that it owed no duty to the owner of the surveyed vessel.[57] The surveyor relied on a pro forma statement in its report:

> The surveyor agrees to use best efforts in behalf of those for whom the survey is made; however, this report is issued subject to the conditions that it is understood and agreed that neither the office nor any surveyor thereof will have any liability for any inaccuracy, errors or omissions, whether due to negligence or otherwise, in excess of the actual charge made for this survey, and that use of this report shall be construed to be an acceptance of the foregoing.[58]

Nevertheless, the court in *Bosnor* looked askance upon this provision and held that the defendant had not proven that the plaintiffs agreed to the limiting language.[59] Other cases involving maritime service contracts have upheld these limitation clauses.[60] For instance, in the case of *Alcoa Steamship Co. v. Charles Ferran Co.*,[61] a court upheld a clause limiting a repairman's liability for negligence to $300,000. It did so because a widespread industry practice demonstrated Alcoa's knowledge of the contract term,[62] and enforcement would not severely threaten public pol-

52 674 F.2d 1146 (7th Cir. 1982).
53 *Id.* at 1152-53.
54 *Id.* at 1152.
55 *Id.* at 1153.
56 796 F.2d 776 (5th Cir. 1986).
57 Brief for Appellee World Marine Ass'n, Inc. at 13-16, *Bosnor*, 796 F.2d 776 (5th Cir. 1986) (No. 84-2212).
58 *Bosnor*, 796 F.2d at 781 n.3.
59 *Id.* at 781.
60 *See, e.g., infra* note 61. *See also supra* note 57.
61 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).
62 *Id.* at 55.

icy.[63] Nevertheless, even courts allowing waivers and indemnity will declare clauses limiting liability for gross negligence invalid as opposed to public policy.[64]

B. *Breach of the Duty of Due Care*

1. Proving Negligence

Although one may appeal to professional custom, federal law, classification society rules and contractual agreements as sources of surveyors' duties, often it is difficult if not impossible to determine whether any duty was breached. When a ship is lost at sea the evidence of any misfeasance by the surveyor may be lost with the ship. The case of *Great American Insurance Co. v. Bureau Veritas*[65] is once again exemplary. In that case, the vessel *Tradeways II* was enroute from Antwerp to the Great Lakes when it flooded and sank.[66] Although some experts later suspected that the cause of loss was the collapse of the transverse bulkheads,[67] they could not confirm this theory since the captain's log had been suspiciously lost overboard before the crew's rescue.[68]

A year later, the loss of the *Pensacola* in *Steamship Mutual Underwriting Association v. Bureau Veritas*[69] presented the same scenario. In that case, the carrier's insurance company argued that the classification society was negligent in its failure to check corrosion on the ship's hull. The court could not completely resolve the issue because of the loss of the ship. The court said:

> [T]he plaintiff has not shown what caused the vessel to sink. True, the vessel is gone and plaintiff cannot inspect it to determine the exact cause. Nevertheless, as we have said, plaintiff has failed to show that the sinking was caused by some defect which was discoverable by a completely adequate survey.[70]

Cases such as *Great American* and *Steamship Mutual* illustrate a disturbing pattern in loss of ship cases: namely, the combination of a lack of physical evidence, conflicting opinions of experts and questions of intervening cause absolve surveyors from liability almost *ab initio*.

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63 *Id.* In so doing, the court distinguished Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), which prevented a towage company from disclaiming liability for negligence. The distinction depended in part on the fact that at the time *Bisso* was decided a small number of companies had almost monopolistic control of the towage industry.

64 Todd Shipyards Corp. v. Turbine Serv., Inc., 467 F. Supp. 1257, 1298 (E.D. La. 1978), *modified*, 674 F.2d 401 (5th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

65 338 F. Supp. 999 (S.D.N.Y. 1972).

66 *Id.* at 1001-02.

67 A "bulkhead" is "an upright partition separating compartments; esp.: such a partition separating compartments on a ship." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 293 (1976).

68 338 F. Supp. at 1006-07.

69 380 F. Supp. 482 (E.D. La. 1973).

70 *Id.* at 492.

2. Application of the Unseaworthiness Doctrine

Because of the problem of proof, plaintiffs in ship loss cases have argued that pursuant to "the unseaworthiness doctrine"[71] the courts should presume that the defendant surveyor was negligent and that the negligence caused the injury, absent proof of due diligence by the surveyor.[72] Any discussion of "the unseaworthiness doctrine" is likely to evoke confusion because the term is associated with several distinct maritime law principles. The term "unseaworthiness" is associated with such court-made rules as the warranty of seaworthiness in marine insurance[73] and the unseaworthiness remedy in marine personal injury cases.[74] In the context of negligence cases against surveyors, though, "the unseaworthiness doctrine" refers to a maritime presumption "that a vessel lost under normal conditions, with fair weather and calm seas . . . was unseaworthy in the absence of proof that she was improperly handled."[75] In such a case, "the owner of a [vessel] is responsible for its unseaworthiness and warrants [the vessel] is '. . . sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage.' "[76] However, the courts allow a vessel owner to rebut this presumption by showing that the surveyor exercised "due diligence to make the [ship] seaworthy before she broke ground and put to sea, or that it was entitled to limitation of liability."[77]

71 *See infra* note 74.

72 *See Great American*, 338 F. Supp. at 1008-09; *Steamship Mutual*, 380 F. Supp. at 492-93.

73 In this field, insured vessel owners are held to the "highest degree of good faith." GILMORE & BLACK, *supra* note 1, at 62. Thus, in order to recover for loss of a vessel, the vessel owners must have acted diligently to prevent the loss, and in fact warrant that the vessel was seaworthy at the beginning of its voyage. *Id.* The policy defense, though, is now seldom raised by underwriters provided that a vessel owner acted carefully to make the vessel seaworthy. *Id.* at 65-66. Thus, Gilmore and Black conclude that "[t]he stern requirement . . . doubtless had a wholesome effect on the discipline of the shipping industry in early, less well-policed days; . . . It is questionable, however, whether the present conditions fully justify the continuance of the stringent warranty." *Id.*

74 "The unseaworthiness doctrine" as it applies to maritime personal injury is a remedy against a vessel owner for injury to seamen caused by the unseaworthiness of the vessel. It, even more so than the Jones Act, 46 U.S.C. § 688 (1982), is "the principal vehicle for personal injury recoveries." GILMORE & BLACK, *supra* note 1, at 383. This doctrine traces its old and obscure roots to the Laws of Oleron (1150 A.D.), the Laws of Hanse Townes (1597), and the Maine Ordinances of Louis XIV (1681). Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543 (1960). Its American inception, though, occurred in The Osceola, 189 U.S. 158 (1902), wherein the Court held that "the vessel and her owner are, both by English and American Law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *Id.* at 175. Courts interpreted this fatal phrase to mean that a shipowner is liable if "without regard to negligence the vessel was unseaworthy . . . and that if thus unseaworthy . . . one of the crew received damage as a direct result thereof." Carlisle Packing Co. v. Sanding, 259 U.S. 255, 259 (1922).

No court has extended this doctrine to hold non-vessel owners strictly liable for injuries caused by unseaworthy conditions. Such an extension is unlikely given the courts' current perception that the doctrine should not be further extended. GILMORE & BLACK, *supra* note 1, at 403-04.

75 South Seas, Inc. v. Moran Towing & Transp. Co., 360 F.2d 1002, 1005 (2d Cir. 1966).

76 *Id.* at 1005 (quoting The Edmund Levy, 128 F. 683, 684 (2d Cir. 1904)).

77 Federazione Italiana Dei Corsorzi Agarari v. Mandazk Compagnia de Vapores, 388 F.2d 434, 436 (2d Cir.), *cert. denied*, 393 U.S. 828 (1968). These exceptions coincide with exceptions to liability under the Carriage of Goods on the Seas Act, 46 U.S.C. §§ 1300-1315 (1982) [hereinafter COGSA]. COGSA prevents vessel owners from disclaiming liability for loss of goods on a bill of lading where the loss is caused by a lack of due diligence to make the vessel seaworthy. Specifically, 46 U.S.C. § 1304 provides exceptions where the carrier proves that the loss was caused by an "Act of God" or a condition "not discoverable by due diligence." Relating to both COGSA and the presumptions of

Given the effect of this presumption in loss of ship cases, carriers and shippers have argued that it ought to apply against surveyors when surveyed vessels sink in fair weather. For instance, the District Court for the Southern District of New York in *In re Marine Sulfur Transportation Corp.*[78] applied the presumption of unseaworthiness against marine contractors responsible for the safety of a lost vessel. In particular, the New York court held that the presumption operated against a designer-convertor (Bethlehem Steel) of a commercial vessel.[79] However, this result was soon reversed by the Second Circuit. In its opinion, the Second Circuit distinguished between personal injury claimants and cargo claimants.[80] The Second Circuit further decided that neither the unseaworthiness remedy for personal injury or unseaworthiness presumptions would apply since

> [t]he duty of providing the crew with a seaworthy ship runs only to the owner, and the shipbuilder neither employs the crew nor can he control what happens to the ship once she leaves the yard. Therefore, traditional tort concepts apply to the claim against Bethlehem and, contrary to the trial court's conclusion, neither justice nor logic compel the application against it of the permissible inference rule from the unseaworthiness doctrine.[81]

Courts in marine surveyor cases have subsequently relied on both the precedential value and rationale used by the *Marine Sulphur* court in holding that these presumptions do not apply against land based contractors such as surveyors.[82]

C. *Reasonably Close Causal Connection*

Some surveyor malpractice cases have also declined to find surveyors liable because of the inability of the plaintiffs to prove the element of proximate cause, or "a reasonably close causal connection," as Prosser and Keeton define it.[83] This difficulty in showing proximate cause consists of several related problems including: (1) the consequences of an improper survey are sometimes unforeseeable; (2) the loss of a vessel is often attributed to a *force majeure*; and (3) the vessel owner's failure to repair a known defect may constitute an intervening cause. Overall, such case law demonstrates the strength of common law defenses in negligence actions against surveyors.

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unseaworthiness, Gilmore & Black have written that "[u]nder the pre-statutory law the shipper made out his prima facie case by proving loss or damage to the goods while they were in the hands of the public carrier. The Harter Act [and COGSA] effected no change. If the carrier wanted to establish an exemption, he had to take up the burden and bring the loss within an exception established by law or by contract." GILMORE & BLACK, *supra* note 1, at 183.

78 312 F. Supp 1081, 1098 (S.D.N.Y. 1970), *rev'd*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972).

79 *Id.* at 1101.

80 *Id.*

81 460 F.2d at 101.

82 *Great American*, 338 F. Supp. 999, 1002 (S.D.N.Y. 1972); *Steamship Mutual*, 380 F. Supp. 482, 493 (E.D. La. 1973).

83 PROSSER & KEETON, *supra* note 36, at 263.

1. Unforeseeable Consequences

Although a surveyor is chargeable with the foreseeable consequences of his or her negligence, the courts will also hold a surveyor liable where foreseeable factors combine to produce a Rube Goldberg type effect.[84] The celebrated Commonwealth case of *Overseas Tankship (U.K.) v. Morts Dock & Engineering Co.*[85] (*Wagon Mound I*) illustrates the application of the principle to maritime law. *Wagon Mound I* involved shipbuilders who sued a vessel owner when its freighter discharged oil into the Port of Sidney; the oil ignited, destroying the plaintiffs' wharf. The court refused to adopt the position brandished in *In re Arbitration between Polemis and Furness, Withy & Co.*[86] (*Polemis*), and instead held that a person's liability depends on "whether the damage is of such a kind as a reasonable man should have foreseen."[87]

In this country, a similar proximate cause requirement was applied to surveyors in *Skibs A/S Gyfle v. Hyman-Michaels Co.*[88] The Sixth Circuit in *Skibs* decided that a defendant cargo surveyor was not liable for the loss of cargo (steel turnings) when the turnings were damaged as a result of avoidable but unforeseeable spontaneous combustion.[89] *Skibs* was technically a contractual-warranty case and the decision was based on the fact that the damages were not foreseeable as required by section 330 of the Restatement of Contracts.[90] Subsequent courts have nonetheless relied upon *Skibs* as a tort precedent because of the use of tort liability language in the district court's opinion and because of the general recognition that the case was a negligence action dressed in contract clothing.[91]

2. Acts of God

When the loss of a vessel occurs during a voyage, questions of fact will arise as to whether a storm or other act of God caused the loss. Both the *Great American* and *Steamship Mutual* courts considered whether storm conditions during the voyage caused or contributed to the ship's demise.[92] *W.F. Magann Corp. v. Tug Delilah*[93] provides another illustration.

84 One classic statement of this general principle is Cardozo's opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Cardozo explains the concept of proximate cause in terms of an invasion of a legally protected interest of the plaintiff. Thus, the defendant in *Palsgraf* was not liable since the defendant's mishandling the package did not create an unreasonable probability of invasion of the plaintiff's bodily security. *Id.*

85 1961 App. Cas. 388 (P. C. 1961). Prosser notes that this case has been followed in many American jurisdictions. PROSSER & KEETON, *supra* note 36, at 296-97.

86 [1921] 3 K.B. 560, 569 (C. A. 1921) (opinion of L.J. Bankes). *Polemis* became renowned for the proposition that "when it has been once determined that there is evidence of negligence, the person guilty of it is liable for its consequences, whether he could have foreseen them or not." *Id.*

87 *Wagon Mound I*, 1961 App. Cas. at 426.

88 438 F.2d 803 (6th Cir. 1971).

89 *Id.* at 807-08.

90 *Id.*

91 *Steamship Mutual*, 380 F. Supp. 482, 493-94 (E.D. La. 1983). *See also* W.F. Magann Corp. v. Tug Delilah, 434 F. Supp. 517 (E.D. Va. 1977); Dillingham Tug v. Collier Carbon & Chem. Corp., 707 F.2d 1086 (9th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

92 *Great American*, 338 F. Supp. 999 (S.D.N.Y. 1972); *Steamship Mutual*, 380 F. Supp. 482 (E.D. La. 1973).

93 434 F. Supp. 517 (E.D. Va. 1977).

Magann involved a marine surveyor hired to fit and approve the towing of a barge. The barge subsequently capsized when it flooded and the towing crane collapsed. Despite the fact that the plaintiffs introduced strong evidence that the capsize was due to the surveyor's failure to secure hatch covers on the barge and to secure the crane properly, the court found for the defendant. It reasoned that since there was "speculation that the capsize was caused by a large wake . . . the evidence [did] not show by a preponderance what did cause the Barge JK-14 to capsize."[94]

3. Superseding Causes

Because a vessel owner has a legal duty to make the ship seaworthy, courts have held that a vessel owner's intervening failure to prevent the loss is an intervening cause. This argument was one factor in the court's decision in *Great American Insurance Co. v. Bureau Veritas*.[95] Therein, the court said that

> this potential bar stems from the long-standing policy or rule that the owner of a ship has a non-delegable duty to maintain a seaworthy vessel . . . . [R]egardless of whether the defendants acted in violation of rules or not, the fact remains that the owners and charterers were fully informed of the defects. With knowledge and opportunity to remedy the defects, [they] . . . "took a calculated risk and lost."[96]

Similar arguments prevailed in the cases of *Young v. Clear Lake Yacht*[97] and *In re Amoco Cadiz*.[98] *Young* concerned a surveyor who was hired to survey a yacht after repairs. Following the survey, the yacht was destroyed by fire caused by defective machinery. The *Young* court absolved the surveyor due to the intervening use of the owner.[99] "[T]he use for pleasure to which the vessel was put by the Young brother," the court wrote, "plus a total lack of proof in a careful record as to causal facts linking this marine surveyor to the casualty compel this court to find no liability against the defendant."[100] The court in *In re Oil Spill of the Amoco Cadiz Off the Coast of Brittany, France*[101] heard a similar argument in that dispute over apportioning oil cleanup costs caused by a collision. Therein, the plaintiff marine surveyor sought a partial summary judgment absolving it of liability because the shipowner's (Amoco's) conduct "was a superseding cause of the damage."[102] The court, however, held that it "cannot be said at this point . . . that [the carrier's] failure to per-

94 *Id.* at 523.
95 338 F. Supp 999 (S.D.N.Y. 1972).
96 *Id.* at 1011 (quoting Skibs A/S Gylfe v. Hyman-Michaels Co., 304 F. Supp. 1204, 1220 (E.D. Mich. 1969), *aff'd*, 438 F.2d 803 (6th Cir. 1971)).
97 337 F. Supp. 1305 (S.D. Tex. 1972).
98 1986 A.M.C. 1945 (N.D. Ill. 1986).
99 *Young*, 337 F. Supp. at 1319.
100 *Id.*
101 1986 A.M.C. 1945 (N.D. Ill. 1986).
102 Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment at 28, *Amoco Cadiz*, 1986 A.M.C. 1945 (N.D. Ill. 1986) (MDL No. 376). Specifically, the American Bureau of Shipping's memorandum argued that "the deficiencies in the vessel's steering gear system were well known to the owner and operator of the vessel, Amoco, who for economic reasons of its own elected to ignore them. Thus, any possible chain of causation between the alleged negligence of the ABS and the injury to the claimants was broken." *Id.* at 28-29. *See also* Magee v. Bayou Teche, 548 F.

form certain maintenance on [the vessel] and to rectify those problems about which it had knowledge superceded the other facts . . . . Consequently, the ABS is not entitled to summary judgment on this basis."[103]

D. *Damages*

1. Cargo and Vessel Loss

The final and most perfunctory of the elements of negligence is actual damage. While the existence of some damage is seldom in dispute, the amount of damages, the method of calculation, and the proper theory for their recovery is often debated.[104] Since the items of damage in a surveyance case are peculiar to admiralty law,[105] they deserve attention here. Principally, suits against surveyors involve loss of cargo, loss of vessels, loss or injury of seamen and cleanup costs of marine pollution. Special statutes and case law principles have developed in these areas which fix the liability of vessel owners to injured parties.

In the case of cargo loss, the Harter Act[106] and the Carriage of Goods on the Seas Act[107] (COGSA), which were born out of international conventions, limit the ability of a vessel owner to disclaim liability on a bill of lading.[108] Section 3 of COGSA provides that a carrier cannot disclaim liability for failing to exercise due diligence to: "(a) Make the ship seaworthy. (b) Properly man, equip and supply the ship. (c) Make the holds, refrigerating and cooling chambers, and all the other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation."[109]

Vessel loss is to a lesser extent governed by statute. When a vessel is lost, the cost is divided between parties based on negligence law and admiralty principles of indemnity and contribution. These disputes often

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Supp. 270 (E.D. La. 1982) (excusing a marine chemist who inspected and certified cargo tanks because of the intervening negligence of the vessel owner).

103 *Amoco Cadiz*, 1986 A.M.C. at 1955.

104 *See, e.g.*, PROSSER & KEETON, *supra* note 36, at 345-55, discussing how to apportion losses among multiple tortfeasors.

105 *See* GILMORE & BLACK, *supra* note 1, at 22, who conclude that land-based contractors are within the scope of the courts' admiralty jurisdiction. As the following discussion makes clear, several federal maritime statutes pertain to them as well.

106 46 U.S.C. § 190 (1982).

107 46 U.S.C. § 1300 (1982).

108 A "bill of lading" is defined by the Uniform Commercial Code § 1-201(6) as "a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill." U.C.C. § 1-201(6) (1976). The system of issuing a negotiable bill of lading issued by a sea carrier to the shipper of goods is centuries old. *See* C.F. Powers, BILLS OF LADING 1-4 (1966). The bill of lading functions as an acknowledgment by the carrier that it has received goods for shipment, as a contract for carriage and as a means for financing and selling the goods with respect to third parties. GILMORE & BLACK, *supra* note 1, at 93. Throughout the last century, draftsmen of ocean bills began to include endorsements that disclaimed liability for acts of God, perils and then even their own negligence. *Id.* To deal with this trend, Congress passed the Harter Act of 1893, 27 Stat. 445, which prohibited carriers from disclaiming liability for negligence in contracts for national carriage. The terms of the Harter Act were embodied in a set of rules agreed upon by representatives of maritime nations meeting at the Hague between 1921 and 1924 (the "Hague Rules"). This convention invited nations to adopt the Hague Rules as the law governing international shipping. *Id.* at 143. The United States subsequently adopted COGSA, 49 Stat. 1207 (1936), which affirms the Hague Rules. *Id.*

109 46 U.S.C. § 1303 (1982).

involve collisions which implicate not only federal statutes, but maritime collision rules and local customs.[110]

Limitation of liability, which is another aspect of vessel loss, has an even greater, albeit indirect, effect on the liability of surveyors. The Limited Liability Act[111] allows a shipowner to limit his or her liability for a maritime accident to the value of his or her ship after the accident. Because the limitation is measured after the accident, it may limit the shipowner's liability to "a few strippings from a wreck" or to nothing at all.[112] This rule of law was created in the nineteenth century to encourage the growth of shipping.[113] Since then, the courts and legislature have "cooled" to the limitation principle and enacted substantial amendments and exceptions to the rule.[114] Nevertheless, inasmuch as the law persists, it motivates tort victims of maritime accidents to sue parties other than shipowners in ship loss cases.[115]

2. Death and Personal Injury Losses

Injury and death of maritime workers is one of the most complex areas of maritime law due to the presence of conflicting state and federal remedies. In some cases, recovery is allowed under several federal statutes, state workers' compensation and wrongful death laws, and maritime case law doctrines. Important federal legislation includes: the Jones Act,[116] which allows a seaman or his or her legal beneficiary to sue for injury or death caused by negligence; the Death on the High Seas Act,[117] which allows a seaman's beneficiaries to sue for death caused by negligence outside of coastal waters; and the Longshoremen's and Harbor Workers' Compensation Act,[118] which provides compensation regardless of fault to land based workers injured in maritime service. In addition, the practitioner should note that the case law doctrines of "maintenance and cure"[119] and "unseaworthiness"[120] provide remedies for injured sailors in certain cases.

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110 *See* T. SCHOENBAUM & A.N. YIANNOPOULOS, CASES AND MATERIALS ON ADMIRALTY AND MARITIME LAW 297 (1984). Although such collision cases are based on admiralty principles of collision, the courts may determine fault by consulting statutory rules of navigation, local navigation statutes, proven local custom and requirements of good seamanship. GILMORE & BLACK, *supra* note 1, at 489.

111 9 Stat. 635 (1851) (codified at 46 U.S.C. §§ 181-189 (1982)).

112 GILMORE & BLACK, *supra* note 1, at 818.

113 *Id.* at 818-19.

114 *Id.* at 821, 834-47.

115 Interview with Dean William McLean, Notre Dame Law School (October 1988).

116 46 U.S.C. § 688 (1982). *See also* H. BAER, THE ADMIRALTY LAW OF THE SUPREME COURT § 1-9 (3d ed. 1979).

117 46 U.S.C. §§ 761-68 (1982). *See also* H. BAER, *supra* note 116, at 79; GILMORE & BLACK, *supra* note 1, at 360.

118 33 U.S.C. § 901 (1982). *See also* Staring, *Meting Out Misfortune: How the Courts are Allotting the Costs of Maritime Injury in the Eighties*, 45 LA. L. REV. 907 (1985).

119 The maritime doctrine of "maintenance and cure" entitles a seaman who falls ill during his or her service to a ship to medical treatment, a living allowance and wages until recovery. *See* H. BAER, *supra* note 116, at §§ 1-1, 1-2.

120 *See supra* note 74.

3. Environmental Cleanup Costs

Environmental cleanup damages are governed by another maze of federal statutes, common law principles and international agreements. For example, the well known case of *United States v. Oswego Barge Co.*[121] illustrates multiple claims brought under a modern pollution control statute (the Federal Water Pollution Control Act),[122] a nineteenth century federal statute (the River and Harbors Act)[123] and the federal common law of nuisance.[124] The claims in *Oswego* amounted to almost nine million dollars in oil cleanup costs.[125]

4. Division of Losses

Each of the above categories represent losses which a marine surveyor's negligence may cause. However, surveyors are often not sued directly, but as third parties for either indemnity or contribution. Although indemnity has become less important since the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, contribution has become more significant.[126] Contribution became a more equitable device for dividing these costs after the Supreme Court's decision in *United States v. Reliable Transfer Co.*[127] Prior to this 1975 opinion, property damage in a collision case was equally divided between joint tortfeasors regardless of their degree of fault.[128] In recognition of the academic criticism the rule generated, the Court in *Reliable Transfer* observed that "[t]he courts of every modern nation except ours have long abandoned that rule, and now assess damages in such cases on the basis of proportional fault when such an allocation can reasonably be made."[129] Thus, despite the force of *stare decisis*, the Court abandoned the divided damage rule and replaced it with proportional fault. Legal commentators, as well as practitioners, have since welcomed the change.[130]

III. The Contractual-Warranty Theory in Surveyor Malpractice Cases

One alternative to a negligence approach to liability for surveyors is a contractual-warranty theory which approximates the liability of manu-

121 664 F.2d 327 (2d Cir. 1981). *See generally* Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Cleanup Costs*, 93 HARV. L. REV. 1761 (1980).

122 33 U.S.C. § 1321 (1982).

123 33 U.S.C. § 407 (1982).

124 *See generally* Burgess v. M/V Tomano, 370 F. Supp. 247 (D. Me. 1973); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

125 *Oswego*, 664 F.2d at 327-28.

126 *See* Staring, *supra* note 118, at 926. "Contract indemnity . . . appears to have a somewhat unsteady existence . . . [but] [t]he spirit of contribution is in full vigor, and it makes itself felt everywhere, usually at the expense of indemnity." *Id.*

127 421 U.S. 397 (1975).

128 GILMORE & BLACK, *supra* note 1, at 528.

129 *Reliable Transfer*, 421 U.S. at 397-98.

130 H. BAER, *supra* note 116, at 315. Professor Baer writes: "Whether one chooses to call the action of the Court a 'confession of error' or 'judicial usurpation of the legislative function of Congress,' the inequity of the equal division rule in litigation between parties both at fault has been eliminated and the United States now finds itself in accord with the majority of the maritime nations of the world." *Id.* (footnotes omitted).

facturers for injuries caused by the defective design of a product. Indeed, the Supreme Court, perhaps inadvertently, created such a cause of action for parties injured by a breach of a land-based contractor's warranty of workmanlike performance in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[131] Despite the fact that surveyors are land-based marine contractors, as are stevedores, most federal courts have refused to apply the warranty to surveyors. The courts' lack of receptivity is perhaps best explained in terms of the history and logic of the *Ryan* decision.

A. *The* Ryan *Decision*

Ryan involved a stevedore company that contracted to load the *Canton Victory* owned by the Pan-Atlantic Steamship Corporation.[132] The cargo consisted of rolls of pulpboard; the stevedore loaded the rolls, but failed to immobilize them through the use of a bottom tier of wedges called dunnage. Later, when an employee of the same stevedore company tried to unload the rolls, the cargo moved and severely injured the employee. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act[133] (LHWCA), Ryan's insurer immediately paid the employee. The employee and the insurer then sued the vessel owner alleging that it had failed to make the ship seaworthy and therefore was liable pursuant to *Seas Shipping Co. v. Sieracki*.[134] When the company obtained a judgment against the shipowner, the owner then attempted to obtain indemnity from Ryan. When faced with these multiple claims, the Supreme Court parsed the issues on appeal as: "[first], whether the [LHWCA] precludes a shipowner from asserting such a liability, and [second] . . . whether the liability exists where a contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operations and the longshoremen's injuries are caused by the contractor's unsafe stowage of the ship's cargo."[135] The Court "answered the first question in the negative and the second in the affirmative."[136] Thus, the Court reached the intuitive result that the stevedoring company should bear the costs of its own negligence.

B. *1972 Amendments to the LHWCA*

In 1972, Congress moved to end the litigious tangle of *Ryan*-type cases, which required non-negligent vessel owners to sue negligent stevedores to recover monies the vessel owners had paid to injured employees of the stevedores. Congress did so by adding subsection 5(b) to the LHWCA.[137] This amendment had two effects: first, it nullified the

131 350 U.S. 124 (1956).
132 *Id.* at 125-26.
133 33 U.S.C. § 901 (1982).
134 328 U.S. 85 (1946).
135 *Ryan*, 350 U.S. at 125.
136 *Id.*
137 33 U.S.C. § 904(b) (1982). It reads in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly . . . . If such person was employed by the vessel to provide stevedoring services, no such action

Sieracki decision by providing that "the liability of the vessel . . . shall not be based upon the warranty of seaworthiness."[138] This eliminated the perverse result of *Sieracki* that an innocent carrier might be liable to the employee of a negligent stevedoring company.[139] Freed of this burden, the legislature could and did restrict the ability of a negligent vessel owner to sue the employer for indemnity. It thereby superseded the first aspect of the holding in *Ryan*.[140] Nevertheless, prior to the 1972 amendments, the second aspect of *Ryan*, the *Ryan* warranty, had developed a life of its own as a theory of liability in marine service cases. Courts and commentators have agreed that the 1972 amendments to the LHWCA left the *Ryan* warranty intact.[141]

C. *The Warranty of Workmanlike Performance*

In *Ryan*, the Supreme Court said that the stevedoring contract "includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation . . . [includes] petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."[142] With these words, the Court inaugurated what has become the "implied warranty of workmanlike performance." While some have argued that the *Ryan* warranty perished with the 1972 amendments,[143] courts have generally continued to recognize the warranty, and in some cases have extended it.[144] This remedy differs markedly from the negligence remedy in that it purports to create contractual relief for loss which applies even when a marine service contractor acts without fault.

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shall be permitted if the injury was caused by the negligence of persons in providing services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in shipbuilding or repair services to the vessel. The liabilities of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Id.

138 *Id. See also* GILMORE & BLACK, *supra* note 1, at 449.

139 Gilmore and Black note that the unseaworthiness doctrine has had less appeal to the courts recently. Specifically, they criticized the extension of this doctrine by *Sieracki*:

> From the mid-1950's on the volume of litigation of this type . . . seemed to increase year by year almost in geometric proportion. Counsel representing shipowners and employers . . . deplored, on grounds of conscience, the system which enriched their law firms. The already overburdened district courts were, unquestionably, sadly strained by the *Sieracki* spawned flood of litigation.

GILMORE & BLACK, *supra* note 1, at 411.

140 GILMORE & BLACK, *supra* note 1, at 449.

141 Staring, *supra* note 118, at 914-15; Salter Marine, Inc. v. Conti Carriers & Terminals, 677 F.2d 388 (4th Cir. 1982).

142 *Ryan*, 350 U.S. at 133-34.

143 *See* Gator Marine Serv. Towing, Inc. v. J. Roy McDermitt & Co., 651 F.2d 1096, 1100 (5th Cir. 1981).

144 Todd Shipyards Corp. v. Turbine Serv., Inc., 487 F. Supp. 1257, 1295 (E.D. La. 1978) (recognizing that the *Ryan* warranty is not limited to personal injury cases and did not require proof of a contractual duty of indemnity). *See also* Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252 (2d Cir.) (applying *Ryan* warranty to towage contracts), *cert. denied*, 423 U.S. 838 (1975). *But cf.* Avondale Shipyards Inc. v. Vessel Thomas E. Cuffe, 434 F. Supp. 920 (E.D. La. 1977) (refusing to extend warranty to contract to design ship).

Federal courts have struggled over when to apply the *Ryan* warranty to other marine contractors.[145] The similarity of stevedores to surveyors, and especially to cargo surveyors, suggests the application of *Ryan*. Perhaps for this reason, the Sixth Circuit in a comparatively early opinion held that a cargo surveyor's contract contained an implied warranty to perform his or her work in a workmanlike manner.[146] Nevertheless, later case law has uniformly rejected the application of *Ryan* to marine surveyors.[147]

Perhaps the most thorough discussion of the warranty issue is found in *Great American Insurance Co. v. Bureau Veritas.*[148] Although the *Great American* court was willing to recognize duties of due care, it balked at raising these duties to the status of a warranty.[149] In so holding, the *Great American* court offered three arguments against applying the warranty to surveyors. First, the court recognized that unlike the stowage of cargo, the seaworthiness of a vessel cannot be fully delegated to a marine service contractor.[150] Along the same vein, the court also noted that "the activities of a classification society aboard ship rarely, if ever, would create hazards or defects by its functions and activities."[151] Second, there exists an

> infirmity in theoretical application of the *Ryan* rationale to this case . . . . In *Ryan*, the Supreme Court recognized that the implied warranty . . . "is comparable to a manufacturer's warranty of soundness of its manufactured product" . . . . That comparison would seem to require a "product" . . . . In cases applying *Ryan*, therefore, the service has involved either building or placing something on board the ship which, by implication at least is comparable to a product.[152]

Third, the court acknowledged that the application of *Ryan* would simply be unjust and financially ruinous to the surveyor in that it would make it "the absolute guarantor of any vessel it surveys."[153]

Later hull surveyance cases and scholarly writing have rejected the application of *Ryan* to surveyors. The case of *In re Amoco Cadiz*, for example, refused to apply *Ryan* to surveyors.[154] The decision centered on one of the largest oil spills in history in which 220,000 tons of crude oil were spilled off the coast of France, creating an oil slick of 600 square miles.[155] Defendants in the suit crossclaimed against the American Bureau of Shipping (ABS) for failure to detect defects in the ship's steering mechanism. The opinion of Judge McGarr in a federal court in Illinois found the *Ryan* doctrine inapplicable since "[u]nlike the situation in *Ryan*, the workmanship which caused the injuries for which Amoco has been found

145 *See supra* note 144.
146 *Skibs A/S Gifle*, 438 F.2d 803 (6th Cir. 1971).
147 *See infra* notes 148-160 and accompanying text.
148 338 F. Supp. 999 (S.D.N.Y. 1972).
149 *Id.* at 1012.
150 *Id.* at 1015.
151 *Id. See also* RESTATEMENT (SECOND) OF TORTS § 324 (1965).
152 338 F. Supp. at 1015 (quoting *Ryan*, 350 U.S. at 134).
153 *Id.*
154 1986 A.M.C. 1945 (N.D. Ill. 1986).
155 H. BAER, *supra* note 116, at § 27-1.

liable was not entrusted solely to [the ABS]. Therefore, this court finds that Amoco is not entitled to indemnity under the doctrine of *Ryan*."[156]

The *Amoco* court apparently rested its decision on the traditional distinction between indemnity and contribution, the former of which is only available to those who had no part in causing the injury.[157] However, in their memoranda of law, ABS lawyers made some additional noteworthy arguments as to why Amoco was not entitled to indemnity. For example, ABS contended that the shipowner, and not the surveyor, is usually in the best position to avoid the loss.[158] ABS also argued that public policy favors assessing costs against carriers and not surveyors due to the national interest in establishing a merchant marine.[159] For such reasons, Professor Staring has described the *Ryan* warranty as "an endangered species of snake which courts do not want to kill but do not want to handle. The obligation which it has expressed is imminently sensible as a duty of some degree, but it is difficult to say why it should ever have been a warranty."[160]

IV. Analysis of Surveyor Liability

It is evident from the above overview of surveyor's liability that the courts have, for the most part, opted in favor of assessing liability based on negligence and against assessing liability on strict liability grounds. Whether this approach is optimal is difficult to tell. The task of assessing surveyors' liability in the final analysis may be as delicate as chartering the course between Scylla and Charybdis. Nevertheless, the courts and legislature should clarify this area of the law and decisively opt for either strict or fault-based liability. They also ought to consider how else they could change the law to promote safe shipping while fairly apportioning losses between parties.

A. *Arguments Favoring Strict Liability*

Both the *Ryan* warranty and the presumptions of unseaworthiness have characteristics of strict liability theories. The application of these doctrines to marine surveyors would produce some positive effects. The *Ryan* warranty is a form of strict liability in that it imposes costs on marine contractors regardless of fault and despite the actual terms of the contract.[161] As such, its growth parallels the growth of strict liability in the products liability field.[162] The presumption of unseaworthiness

156 In re *Amoco Cadiz*, 1986 A.M.C. at 1947.

157 PROSSER & KEETON, *supra* note 36, at 341-42.

158 Plaintiff ABS' Reply Memorandum Supporting its Motion for Partial Summary Judgment and Memorandum in Opposition to Amoco's Motion for Summary Judgment at 17, *Amoco Cadiz*, 1986 A.M.C. 1945 (N.D. Ill. 1986) (MDL No. 376).

159 *Id.* at 20.

160 Staring, *supra* note 118, at 915.

161 *See supra* note 144.

162 *See* Todd Shipyards Corp. v. Turbine Serv., Inc., 467 F. Supp. 1257, 1294 (E.D. La. 1978). The court explained:

> The legal theories of strict liability in tort, applied on land, are gathering adherents in admiralty at an accelerated pace. . . . Section 402A of the Restatement (Second) of Torts is the best and most widely accepted expression of the theory of strict products liability. Under

which coincides with the unseaworthiness remedy is not a remedy itself. Even so, it functions to shift losses to vessel owners in ship loss cases in much the same way that a strict liability theory would shift them.[163] As such, it is comparable to the "enterprise theory" of liability which operates to adjust losses in products liability cases from consumers to possible manufacturers of the product.[164]

One major advantage of a strict liability theory is that it prevents surveyors from escaping liability in ship loss cases, or other cases in which evidence of negligence has been lost. Cases such as *Marine Sulfur*, *Great American* and *Steamship Mutual* present the disturbing scenario of professionals escaping liability only because the evidence of their misfeasance is at the bottom of the sea.[165] While it might be unjust to presume negligence in every case of ship loss, where the ship is lost in calm seas and the ship was surveyed just prior to voyage, the possibility of injustice is minimized.[166] This is especially true where there is some evidence that the surveyor conducted an inadequate survey prior to the voyage.[167] Short of adopting this remedy, the carrier and the shipowner are forced to assume the costs of surveyors' negligence because any possible evidence of negligence is lost.

The imposition of strict liability against surveyors would also better compensate the victims of maritime losses. A significant, if non-traditional, advantage of strict liability theories is that they afford relief to injured parties who otherwise would personally bear the loss. This ra-

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that theory, anyone who sells any product in a defective condition unreasonably dangerous to the user or his property is subject to liability for physical harm if the seller is engaged in the business of selling such a product and it is expected to and does reach the consumer without substantial change in the condition in which it is sold. That rule applies even though a seller has exercised all possible care in the preparation and sale of the product. . . .

Id.

163 *See supra* note 74.

164 PROSSER & KEETON, *supra* note 36, at 712. The authors opine that "[procedural] rules relating to pleadings and burdens of proof as between litigants are rules that have the effect of allocating risks of losses between claimants and defendants just as surely as do rules of substantive law." *Id.* Prosser notes that the importance of proof rules was "catapulted to prominence" by asbestos and diethylstibesterol (D.E.S.) cases. To deal with these cases, courts invented several doctrines which shifted the burden of proving non-causation to the defendants. Such attempts include Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975), in which a New Jersey court held that a surgeon, hospital, and needle manufacturer were all liable for injury sustained when the needle broke "in the absence of exculpatory evidence by a particular defendant." PROSSER & KEETON, *supra* note 36, at 714. The case of Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980), held that a D.E.S. manufacturer was responsible for the share of injuries proportionate to its market share of sales of D.E.S.. Prosser says that the requirements for imposing market share liability are:

> (1) injury or illness occasioned by a fungible product . . . made by all of the defendants joined by the lawsuit; (2) injury or illness due to a defective hazard, with each having been found to have sold the same type of product in a manner that made it unreasonably dangerous; (3) inability to identify the specific manufacturer of the product . . . and (4) joinder of enough of the manufacturers of the fungible product to report a substantial share of the market.

PROSSER & KEETON, *supra* note 36, at 714.

165 *See supra* notes 64-82 and accompanying text.

166 Indeed, this was the rationale for adopting the presumption of unseaworthiness as against shipowners. *See supra* notes 75-77.

167 *See, e.g.*, Steamship Mut. Underwriting Ass'n v. Bureau Veritas, 380 F. Supp. 482, 490-91 (E.D. La. 1973).

tionale was very important to the adoption of "market share" liability in *Sindell v. Abbott Laboratories*.[168] The *Sindell* court said that

> from a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product . . . . "[T]he cost of an injury and the loss of time and health may be an overwhelming misfortune to the person injured, and a needless one, for the risk can be insured by the manufacturer and distributed among the public as a cost of doing business."[169]

Although the carrier is not likely to be in the same sort of impecunity as the consumers involved in *Sindell*, seamen injured or killed due to surveyors' negligence are. The plight of such plaintiffs is especially acute in ship loss cases where limitations of liability rules pose the threat of substantially reducing the shipowner's liability.[170] Which maritime actor eventually bears this cost is a significant social issue, since, as some scholars have maintained, there is no *a priori* reason that victims, instead of tortfeasors, should bear the cost of non-negligently caused injury.[171]

Finally, the adoption of a strict liability theory as applied to surveyors has the potential of making sea travel safer by providing a greater incentive to surveyors to detect unseaworthy conditions. Strict liability theories have already operated to do so in the products liability area.[172] In that context, scholars have argued and courts have agreed that assigning the costs of non-negligent accidents to manufacturers will result in fewer unfortunate accidents in the future.[173] However, this potential advantage deserves more discussion because of its possible effect on shippers' and carriers' liability.[174]

B. *Arguments Disfavoring Strict Liability*

Despite the application of strict liability theories to manufacturers, shipowners and stevedores, the courts have generally refused to apply these theories against surveyors. This is not surprising since the merchant marine and surveyors in particular are statutorily preferred groups. A significant amount of the hull surveying of commercial vessels in the United States is done by the ABS, which has offices in many major

168 26 Cal. 3d 588, 607 P.2d 924 (1980).

169 *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936 (quoting Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944)).

170 Although Congress has enacted the Loss of Life Amendments, 46 U.S.C. § 183 (1982), to ameliorate the Act's harsh effect, shipowners' liability is still much less than that of non-maritime defendants for which the limitation of loss rules do not apply. *See supra* note 112.

171 *See infra* notes 172-73 and accompanying text.

172 *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 937.

173 Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, in M. KUPERBERG & C. BETZ, LAW, ECONOMICS, AND PHILOSOPHY 154, 159 (1983). Calabresi suggests that liability should be borne by the "cheapest cost avoider," which is defined as the person "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs, and to act on that decision once made." *Id.* The term is defined more colloquially as "the party 'an arbitrary initial bearer of accident costs would . . . find it most worthwhile to "bribe" in order to obtain that modification of behavior which would lessen accident costs most.' " *Id.* (quoting G. CALABRESI, THE COST OF ACCIDENTS 135 (1970)).

174 *See infra* notes 178-82 and accompanying text.

cities and foreign countries.[175] The ABS was established as an agency of the United States for the classification of government owned vessels by the Merchant Marine Act of 1920.[176] These same laws recognized the need for strong support facilities such as banking, insurance and classification to enable national defense and foster the growth of American shipping.[177] The ABS, a nonprofit organization, and other for-profit surveyors actually fulfill the policy by providing reports to the Coast Guard and in some cases by acting as the Coast Guard's agent for the certification of vessels.[178]

Assessing strict liability against surveyors would cause unfairness by shifting costs from a relatively major marine actor, the carrier, to a relatively minor one, the surveyor. The common law and admiralty law developed strict liability theories such as unseaworthiness because of the unique position of carriers to prevent accidents by discovering and repairing defects in the condition of the vessel.[179] By comparison, the surveyor's contact with the vessel is isolated and fleeting, and the surveyor does not own the vessel and lacks the ability to repair it.[180] This is especially true where a long period of use intervenes between surveyance and accident.[181] Moreover, these same rationales tend to prove that the carrier and not the surveyor is the party most capable of avoiding losses, and thus the carrier is the appropriate party to assess against on strict liability grounds.[182]

The rationale sometimes used in products liability cases, that courts should impose strict liability in order to spread the costs of accidents, warrants less credence in the context of commercial shipping. The major use of shipping today is for the commercial carriage of goods.[183] Accordingly, the "victim" in shipwrecks or accidents is most likely the shipper or its subrogees. Unlike the consumers in *Sindell*,[184] these plaintiffs are capable of bearing costs of accidents such that they need not be transferred to surveyors. Moreover, seamen and harbor workers are protected by a maze of remedies including the unseaworthiness doctrine and the LHWCA.[185]

Finally, courts' reluctance to impose strict liability on surveyors is justified at least in part by the failure of plaintiffs to assert a viable theory of recovery. The *Ryan* warranty is ill-suited for this purpose because it arose with respect to the loading of cargo, which duty the shipowner may delegate to the stevedore, and which creates a product (the packaged

175 *See* ABS RULES, *supra* note 22, at Appendix J.
176 46 U.S.C. § 25 (1920) (now codified at 46 U.S.C. § 3316 (Supp. III 1985)). The purpose of this legislation was to encourage a strong merchant marine for both national security and to foster the growth of the American maritime industry.
177 *Establishment of an American Merchant Marine: Hearings before the Senate Comm. on Commerce*, 66th Cong., 1st & 2d Sess. 1174, 1194 (1919-20).
178 46 U.S.C. § 3316(a), (c) (Supp. III 1985).
179 *See supra* notes 73-74 and accompanying text.
180 Great Am. Ins. Co. v. Bureau Veritas, 338 F. Supp. 999, 1015 (E.D. La. 1972).
181 *See supra* notes 95-103 and accompanying text.
182 *See supra* note 173.
183 GILMORE & BLACK, *supra* note 1, at 11.
184 *See supra* notes 168-69 and accompanying text.
185 *See supra* notes 116-20 and accompanying text.

cargo) the safety of which may be tested. In contrast, the surveyor's duties are broad and cannot be limited to a discrete product or activity.[186] Because of the breadth of these duties courts have commented that the application of strict liability theories against surveyors would make them virtual insurers of cargo.[187] Concerns over this expansion of liability are legitimate in light of surveyors' fears of increased liability insurance and litigation costs.[188]

C. *Possible Reforms*

Despite some of the advantages of a strict liability approach, the current negligence approach to marine surveyor malpractice is preferable to the alternatives considered by the courts. This is not to say, however, that reform is unnecessary. Courts, but more ideally Congress, could improve this area by declaring or decreeing void disclaimers of liability favoring negligent surveyors. The Supreme Court has already recognized that such waivers are ineffectual in towage cases because they detract from public policy goals.[189] Similarly, courts refuse to honor disclaimers of liability for negligence on bills of lading pursuant to the provisions in COGSA.[190] It seems fair to put the surveyor on parity with the carrier and the towage company in terms of waiver of liability.

Congress should also eliminate the incentive to sue non-traditional defendants in ship loss cases which is created by the limitation of liability rules.[191] These rules were created in an age when shipowners were individuals who could not bear the costs of personal injury suits following ship loss.[192] Today's shipowners are corporations with diversified ownership. To the extent that they need subsidies to operate, they should be directly subsidized by the government and not at the expense of the victims of their own negligence, nor innocent surveyors who as a result of that negligence become trapped in litigation.

Finally, Congress and the Coast Guard ought to investigate governmental regulation as an alternative means of policing the surveyance industry. Laws requiring certain training or seagoing experience of surveyors, or testing and licensing requirements established by the ABS are possible means of governing this diverse industry. Similar laws governing the medical profession have proven more cost effective than private litigation as a means of insuring professional integrity.[193]

186 *Great American*, 338 F. Supp. at 1015.

187 *See, e.g.*, *Great American*, 338 F. Supp. at 1012.

188 G. Dudko, *supra* note 15. This concern over increased insurance premiums is real. Because of their limited number and their potentially great exposure, surveyors, absent legislative or judicial favor, are almost a classic case of a bad insurance risk. *See* C. ELLIOT & E. VAUGHAN, FOUNDATIONS OF RISK MANAGEMENT 13 (1972) (explaining concept of risk in underwriting practice).

189 Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

190 *See supra* notes 106-09 and accompanying text.

191 *See supra* notes 110-15 and accompanying text.

192 W. McLean, *supra* note 115.

193 Jost, *The Necessary and Proper Role of Regulation to Assure the Quality of Health Care*, 25 HOUS. L. REV. 525 (1988).

VI. Conclusion

Marine surveyors play an important and necessary role in the business of shipping. They classify and continuously inspect ships and their cargo. In part because of this important role, American courts have been reluctant to hold surveyors liable for the loss of surveyed vessels. This reluctance is evidenced by the courts' failure to apply the now unfavored warranty of workmanlike performance formulated in *Ryan* or the unseaworthiness doctrines applied to shipowners in personal injury cases. The courts have seen lucidly this far: An extension of *Ryan* or the unseaworthiness doctrine would have the unfortunate consequences of shifting the cost of marine accidents to a relatively minor actor, and perhaps thereby impairing the quality of surveyance. This is not to say, however, that some reforms are not necessary. Congress and the American courts could begin by not allowing surveyors to disclaim liability for negligent surveyance. This would put the surveyor on par with the shipowner who cannot avoid liability for negligence for either personal injury or loss of cargo. Congress should also abolish the Limited Liability Act and thereby eliminate the artificial motivation to sue surveyors in ship loss cases. Finally, Congress should debate the merits of minimal testing, training, and licensing requirements for surveyors as a means of avoiding maritime accidents completely. Such reforms, together with the courts' negligence approach to surveyor liability, would demand responsibility and integrity from all members of the maritime industry.

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