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Marine Surveyor Liability

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Marine surveyors are customarily hired for two different purposes. They determine the nature, cause and extent of a marine loss, otherwise known as a "damage survey." They also determine the condition and valuation of a vessel as required for insurance, financing or towing, otherwise known as a "C & V" survey. Some surveyors sub-specialize in different types of casualties and different types of vessels, for example, tugs and barges, cargo ships, fishing vessels or private pleasure craft. Still other marine surveyors specialize in cargo stowage and securing and/or damage.

When performing a damage survey, marine surveyors are usually retained by a vessel owner or cargo owner or their insurer. After surveying the damaged property, they issue a report reflecting the damage found and, if repairable, recommendations for repairing the damage or mitigating the loss. Although they examine damaged property, marine surveyors are not insurance adjusters and usually have no knowledge of any insurance coverage that might apply. When performing a C & V survey, the marine surveyor makes a thorough inspection of a vessel and issues a report reflecting deficiencies noted, recommendations for correcting the deficiencies, and replacement and market values for vessel.

The Basis of Liability

Some courts have held a warranty of workmanlike service is implied in marine surveying contracts just as it is implied in other maritime contracts such as towing contracts or ship repair contracts. Breach of that warranty has led to the imposition of liability on marine surveyors when the breach proximately caused a loss. Other courts have held the implied warranty inapplicable and used a negligence standard to determine liability. In either case, a finding of liability can lead to potentially devastating financial consequences for marine surveyors because often they do not have professional liability insurance.

In determining whether a surveyor breached the implied warranty or was negligent, courts consider what the surveyor was retained to do and whether the surveyor performed in a reasonable manner. A hull surveyor has been held to have two duties that must be performed with due care:

- 1) surveying the vessel in accordance with the applicable rules and regulations and
- 2) detecting defects in the vessel and notifying the vessel owner about them.

A marine surveyor is not, however, the guarantor of the seaworthiness of a vessel and a certificate of seaworthiness from a marine surveyor is not conclusive as to the seaworthiness of a vessel.

Marine Surveyor Held Liable

Surveyors have been held liable for their negligence or breach of the implied warranty under various circumstances. *In Riverway Co. v. Trumbull River Services, Inc.*, 674 F.2d 1146 (7th Cir. 1982), Riverway tendered a loaded barge, **RW-381**, to Trumbull, a fleeting service. The **RW-381** was made fast by steel cable to another barge in Trumbull's fleet, the **MWT-122**. The **MWT-122** took on water and became submerged, imperiling the **RW-381**. Trumbull denied any responsibility for the **RW-381**. Riverway hired a marine surveying company to inspect the **RW-381** and do what was necessary to prevent the **RW-381** from sinking. The surveyor went to the site and determined the **RW-381** was not in imminent danger of sinking. He decided to take no action until the following day and rejected the offer of Trumbull's employee to cut the steel cable holding the **RW-381** to the submerged **MWT-122**. The surveyor did not report his findings to Riverway that night. The following day, the **RW-381** sank.



The district court held the marine surveying company one-third at fault for the **RW-381's** sinking because it was hired to conduct an inspection and take appropriate remedial action but failed to do so. The remaining fault was allocated to Trumbull. That finding was upheld on appeal although one judge on the appellate panel believed the surveying company should have been held one half, not one third, at fault.

In *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776 (5th Cir. 1986), a surveying company, World Marine Associates, was hired by a freight forwarder to attend the loading of steel pipe onto a barge and perform a loading and securing survey. At the time of loading, World Marine advised the freight forwarder that the barge's trim and list were "undesirable" but did not recommend any corrective action before the commencement of the tow. Instead, it reported the cargo was properly loaded, stowed and secured for the intended voyage. After the tow commenced, the barge was in a collision with another barge, which resulted in the breakage of some of the securing bands around the pipe. The barge also experienced several days of heavy weather after which the stanchions securing the pipe broke and most of the pipe was lost overboard.

The trial court did not allocate any fault to World Marine even though it found the list and trim of the barge contributed to the casualty. The appellate court disagreed and remanded the case to the district court for the assessment of some fault against World Marine.

In *Royal Embassy of Saudi Arabia and Ins. Co. of N. Am. v. SS IOANNIS MARTINOS*, 1986 AMC 772 (E.D. N.C. 1984), a cargo insurer declined to insure cargoes carried to Saudi Arabia on vessels chartered by Transamerican Steamship Corporation unless The Salvage Association approved the loading, stowage, and securing of the cargo. The insurer also required Transamerican to pay the surveyor's fees. A surveyor from The Salvage Association attended the loading of cargo on the SS Ioannis Martinos and made loading and securing recommendations, which were carried out. The surveyor issued a report, which concluded "the proposed voyage did not present any circumstances beyond those which might normally be accepted by underwriters."

During the voyage, cargo loaded on three hatch covers was lost overboard in anticipated weather conditions. Royal paid for the cargo losses and sued the vessel interests which filed a cross complaint against, among others, The Salvage Association. The court denied The Salvage Association's motion for summary judgment reasoning the evidence showed The Salvage Association did more than merely observe and report but became actively involved in the stowage and thus owed a duty of workmanlike service. It found breach of that duty created an unseaworthy condition on the vessel. Moreover, the court held The Salvage Association could be liable to charterer Transamerican, a third party with which it was not in direct contractual privity.

Marine Surveyor Held Not Liable

There are many cases in which a marine surveyor has been sued but found not liable. In *Young v. Clear Lake Yacht Basin, Inc.*, 1972 AMC 2329 (S.D. Tex. 1972), a marine surveyor surveyed a yacht for insurance purposes. A repair yard was retained by the yacht owner to make the repairs recommended by the surveyor. The surveyor later certified the repairs had been satisfactorily completed. Approximately one month later, an explosion and fire aboard the yacht caused a personal injury to one of the yacht owners. The explosion and fire were caused by leaking fuel, which was ignited when the yacht owner pulled the switch to activate the electric blower and bilge pump. The court held the surveyor not liable because even if he were



negligent in failing to detect the leak or certifying the repairs, there was no evidence his actions proximately caused the loss. Instead, the loss was caused by the negligence of the yacht owner in turning on an electrical switch when he smelled fuel. Further, the court recognized the surveyor was retained to do an insurance survey, which involved a less rigorous examination than a pre-purchase survey.

In *Miller-Schmidt v. Gastech, Inc.*, 1990 AMC 41 (5th Cir. 1989) a marine surveyor was held not liable for the deaths of two workers on a drilling rig when they were overcome by fumes in a compartment. The appellate court agreed with the trial court that the surveyor's inspection focused on the structural integrity of the drilling rig and not on atmospheric testing aboard the rig.

Exculpatory and Limitation Clauses

Like other maritime contractors, marine surveyors routinely put provisions in their reports purporting to exculpate themselves from liability or to limit their liability, often to the amount of the survey fee. Some courts have recognized the enforceability of such provisions and others have held them void as against public policy. The analysis is similar to that undertaken by the courts when considering exculpatory clauses in other types of maritime contracts, that is, whether the exculpatory language was conspicuous and whether the surveyor's client expressly agreed to it. A course of dealing between the parties may not be sufficient to establish the requisite agreement.

Marine surveyors are needed by vessel and cargo owners and their insurers to assist with damage, condition and valuation issues. They are required to perform their work in a reasonable manner and if their failure to do so causes damage, they may be held liable.