

LIABILITY OF CLASSIFICATION SOCIETIES
FROM THE PERSPECTIVE OF UNITED STATES LAW

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I. INTRODUCTION

Classification societies perform a vital role within the maritime community. They set the standards for the design, construction and maintenance of vessels. Through scientific research and by gathering empirical data over decades they have developed rules and standards that, if followed, will produce a vessel that is seaworthy and fit for its intended service over its useful life of 20 years or more. Classification societies serve as the unofficial policemen for the maritime world, using independent verification processes to ensure that seaworthy vessels are in service. Over the years the maritime industry has grown to depend heavily on classification societies. Indeed, the smooth and efficient working of maritime commerce depends heavily upon the efforts of classification societies. As vessels become more complex, as the demands for prompt and efficient service grow and as the pressure of operating vessels as economically as possible mount, the role of classification societies becomes all the more critical. When classification societies do their job, classed vessels usually are seaworthy and catastrophic losses rarely occur. When a classification society fails to perform its mission, disaster looms around the corner.

The shipowner ultimately is responsible for the seaworthiness of its vessel. Shipowning companies, however, are managed by human beings, and mortal men make errors. In most instances, the shipowner can and does respond when its failure to make its vessel seaworthy causes a loss. Two factors, however, occasionally intervene to prevent an injured party from being made whole by a negligent shipowner. One is legal in origin — a shipowner by statute is allowed to limit its liability to the value of the vessel and pending freight under the Limitation of Liability Act. 46 U.S.C. §§ 181 *et seq.* The second is practical — the ship often is the shipowner's sole asset and may be lost

or have a value less than the injured party's loss, and the shipowner's liability insurer frequently is immune from suit.¹ As a consequence, injured parties must look to other sources. A logical candidate is the ship's classification society which was intricately involved in the process of trying to ensure that the vessel was seaworthy.

Whether a classification society can be held liable to a shipowner and/or third parties is an unresolved and always hotly contested issue. This paper will focus on that issue from the perspective of the United States legal system. In doing so, the classification process itself will be examined and discussed. The significance and impact of classification will be explored. Then the potential liability of the classification society to shipowners and third parties will be considered.

II. THE CLASSIFICATION PROCESS

A classification society is an independent legal entity, usually assuming the corporate form, that establishes basic minimum standards for the design, construction and maintenance of the principal hull and machinery components of vessels. They are hired and paid for by the owner of the vessels that are classified. The certificates of class, which are issued by classification societies, are relied upon by all sectors of the marine industry as assurance that the classed vessel is likely to be reasonably fit for its intended use.

The more prominent classification societies are the American Bureau of Shipping which is based in the United States, Lloyds in the United Kingdom, Germanischer Lloyd in Germany, Det

¹ Shipowners usually insure their legal liabilities with P&I Clubs whose rules (the marine insurance equivalent of land-based general insuring terms and conditions) seek to establish an indemnification method of insurance through a "pay-and-pay" insuring clause that obligates the Club to respond for an insured loss only if the entered shipowner first has sustained *and* paid to the injured claimant an insured loss. The English courts have concluded that these clauses are enforceable and immunize P&I Clubs, whose rules are governed by English law, from liability to third parties.

Norshe Veritas in Norway, Nippon (NKK) in Japan, Bureau Veritas in France, Registro Italiano Navale (RINA) in Italy and Polski Rejester Statkow (PRS) in Poland. In order to enhance public confidence in classification societies the International Association of Classification Societies (IACS) was formed. IACS prescribes certain minimum requirements for classification, the purpose of which is to ensure to the extent practicable that a shipowner gains no economic advantage in terms of requirements for seaworthiness by enrolling in one classification society as opposed to another. In other words, the IACS standards are designed to prevent classification society shopping.²

A classification society composes and publishes a set of rules and standards setting forth the minimum requirements and criteria to be followed for the design and construction of vessels. A vessel owner seeking to enroll its vessel in a particular classification society must satisfy the classification society that the vessel has been designed, constructed and maintained in accordance with those rules. The classification society's technical staff, which is composed of naval architects and marine engineers, formulates these rules with the advice of various committees. In developing the rules, the classification society's staff relies upon prudent marine engineering principles, theoretical research and experience. The latter consideration cannot be underestimated in importance because the dynamic forces to which ocean-going vessels while plying ocean routes are subjected often are unpredictable and defy pure mathematical calculation. As a consequence, empirical data gained from experience coupled with the prudent implementation of safety factors are utilized by the classification society to formulate rules that are designed to establish the minimum criteria for seaworthiness. The proposed rules, which are developed by the classification society's staff, are

² Currently, 50 organizations hold themselves out as classification societies. The standards of only 11 qualify for membership in the IACS. "The Classification Society in the Year 2000", THE MARINE LOG (April 1997) at p. 80.

referred to committees that have been formed by the classification society from the private sector. These committees are comprised of naval architects, marine engineers, shipbuilders, engine builders, equipment manufacturers, steel makers, ship operators and other technical and scientific personnel associated with the maritime industry. The various committees submit their suggested modifications, and the classification society staff ultimately decides upon the ultimate wording and format of the applicable rules.

The finalized version of the rules and standards are published in multi-volumed book form and made available to the public.³ These rules are extensive, comprehensive and diverse in content and substance. The purpose of a classification society's rules is to ensure that a vessel is designed, built and maintained in accordance with those rules and standards. The rules apply not only to the hull of a vessel but also to its machinery.⁴ The rules and standards relating to the construction of steel vessels delve into virtually every aspect of the vessel's hull. They deal with material, fabrication and workmanship. Virtually every aspect of the hull is the subject of specific rules and standards. For instance, the rules address the construction of keels, stems, rudders, steering gears, bottom structure, frames, beams, watertight bulkheads, centerline divisions, shellplating, decks, superstructures, bulwarks and ventilators.⁵ The rules and standards relating to the construction and classification of machinery are equally diverse. These rules address all of the major pieces of

³ For instance, the ABS has published a multivolume set of rules entitled *RULES FOR BUILDING AND CLASSING STEEL VESSELS* (1997 ed.).

⁴ Part 1 of the ABS rules is entitled "Classification, Testing and Surveys." Part 2 is entitled "Materials and Welding." Part 3 is entitled "Hull Construction and Equipment." Part 4 is entitled "Machinery Equipment and Systems."

⁵ *ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS*, Part 3, Sections 1-24.

machinery such as boilers, turbines, gears, main engines, auxiliary engines, electrical plants, pumps and piping systems, propellers, fire extinguishing systems and automation systems.⁶

The rules focus on design and fabrication considerations. Typically, a classification society creates an extensive set of rules relating to the longitudinal strength of the vessel, setting forth the minimum requirements in that regard.⁷ Vessels with large hatch openings also may be subject to specific rules relating to torsional strength.⁸ Other rules set forth requirements for the type of welding required. These rules require that the vessel plans delineate the welding to be implemented in the principal parts of the vessel's structure. Other rules establish procedures for the manner in which the welding process itself shall be performed.⁹

All of these rules are based on engineering principles, mathematical formulations and long-term experience. The latter factor is perhaps one of the more distinguishing characteristics of a classification society because the classification society stands in the unique position of having historically and currently monitored the performance of thousands of vessels over decades, gaining in the process considerable insight into the behavioral characteristics of vessels at sea. This in turn presents the classification society with the opportunity to correlate theory with practice and predictions with actual performance. The classification society therefore has a vast body of

⁶ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS, Part 4, Sections 1-11; GERMANISCHER LLOYD RULES FOR THE CLASSIFICATION AND CONSTRUCTION OF SEAGOING STEEL VESSELS (1986 ed.), Chapter 3..

⁷ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS, Part 3, Section 6; GERMANISCHER LLOYD RULES, Chapter 2, Section 5.

⁸GERMANISCHER LLOYD RULES, Chapter 2, Section 5.F.

⁹ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS, Part 2, Section 3; GERMANISCHER LLOYD RULES, Chapter 2, Section 19 and Chapter 7A.

cumulative data, knowledge and experience that simply is not directly available to the individual members of the shipping industry.

If a shipowner elects to have its vessel built under the auspices of classification society survey,¹⁰ the designer must submit the proposed vessel plans to the classification society.¹¹ The plans are then reviewed by the classification society's technical staff to ensure that they conform to the rules.¹² If any discrepancies are detected, the plan-review surveyor will note those on the plans so that the shipyard can make the requisite changes. Classification society surveyors periodically are in attendance during construction to ensure that the shipyard is building the vessel in accordance with the plans and is following the required classification society standards. They conduct a battery of tests and treats including tank, bulkhead and rudder tightness testing; hydrostatic, air and hose testing; anchor windlass trials, bilge system trials and steering trials.¹³ Once the vessel has been built to the satisfaction of the classification society's surveyors, the appropriate hull and machinery certificates of classification are issued and ultimately delivered to the shipowner.

¹⁰ A shipowner is not necessarily obliged to have its vessel built under the supervision of a classification society. Most classification society rules accord a shipowner this option. See _____. If, however, the vessel is not built under the supervision of a particular classification society, that vessel, before being allowed to be enrolled in a particular classification society's rolls, must be subjected to much of the same plan and design analysis to which it would have been subjected had it been built under the supervision of that classification society.

¹¹ For example, GERMANISCHER LLOYD RULES, Chapter 2, Section G requires the applicant to submit drawings showing the arrangement and scantlings of various structural members including the midship section, longitudinal section, decks, shell, bulkheads, bottom structure, engine seatings, hatchways, stem, stern port and rudder. These drawings must contain all necessary details on ice strengthening. They must provide details on the structural steels and their grades. The drawings must detail the weld connections of all structural elements.

¹² ABS RULES FOR CLASSING AND BUILDING STEEL VESSELS, Part 1, Section 1/11.9.

¹³ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS, at Part 1, Section 2.

The classification process extends beyond design and construction. It also applies to the maintenance and operation of the vessel. Classification societies set up an elaborate system of post-construction surveys by classification society surveyors. The rules require that any damage to the hull, machinery or equipment that affects or may affect classification¹⁴ must be reported by the shipowner to the classification society and submitted to the latter's surveyor at the first opportunity.¹⁵ In referring to damage that may affect classification, the rules contemplate any damage that affects the minimum requirements of seaworthiness articulated in the rules for the design and construction of the vessel. The rules also require condition surveys at specified intervals in order to ensure that the vessel, as maintained and operated, continues to comply with the minimum criteria for seaworthiness established by the rules and standards. The rules require an annual survey of certain specified parts of the hull and machinery.¹⁶ Additionally, intermediate surveys of saltwater ballast tanks and of tankers may be required.¹⁷ Special periodical surveys of the hull and machinery must take place. The special periodical surveys are more comprehensive in nature and scope than the annual surveys. These must take place every four years, and the rules designate specific aspects of

¹⁴ This concept of "affecting class" can be somewhat elusive and, at least in connection with litigation, can lead to some heated semantical debates. Stripped of its rhetorical veneer, the phrase literally embraces conditions that cause one or more components of the vessel's hull and/or machinery to no longer comply with the society's rules and standards. Inasmuch as those rules and standards prescribe the minimum requirements of seaworthiness, a condition affecting class, as a matter of logic and hardcore reality, necessarily involves the seaworthiness of the vessel.

¹⁵ ABS RULES FOR CLASSING AND BUILDING STEEL VESSELS at Part 1, Sections 1/1.11.1 and 1/3.1.1.

¹⁶ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS at Part 1, Section 1/3.1.3, 1/3.3 and 1/3.9.

¹⁷ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS at Part 1, Section 1/3.1.4 and 1/3.5.

the vessel to be examined at each four-year interval with the nature and extent of the inspection becoming more thorough and comprehensive at each interval to accommodate the inevitable aging process that affects ships much as it does people.¹⁸ The rules usually allow for continuous surveys wherein the specific requirements delineated for the four-year special periodical surveys are carried out in a regular rotation over the course of five years instead of four.¹⁹ The special periodical surveys are extensive. They entail placing the vessel on drydock where the classification society's surveyors then examine numerous components and aspects of the vessel. For example, the rudder is checked, the holds are examined, watertight bulkheads are inspected, tanks are hydrostatically tested and gaugings to determine the thickness of the plating may be required.²⁰

During the course of a classification society survey, the surveyor may detect items of concern. In that case, the surveyor will make recommendations evidenced by visas on the ship's record.²¹ If the problem is severe and poses an immediate threat to the seaworthiness of the vessel, classification may be suspended until the shipowner complies with the surveyor's recommendation or cancelled.²² If the threat presented by the deficiency is less immediate, the surveyor may afford the shipowner

¹⁸ ABS RULES FOR CLASSING AND BUILDING STEEL VESSELS at Part 1, Section 1/3.1.5, 1/3.7 and 1/3.11.

¹⁹ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS at Part 1, Section 1/3.1.6.

²⁰ ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS at Part 1, Section 1/3.7.

²¹ The classification society furnishes each vessel certificates evidencing classification. These documents contain boxes that are filled out by the surveyor to signify compliance with the rules. If a non-complying condition is detected, an exception (called a "visa") is entered on the ship's record.

²² ABS RULES FOR CLASSING AND BUILDING STEEL VESSELS, 1997, Part 1, Section 1/1.2.

a period of time within which to correct the deficiency, upon the expiration of which classification will be withdrawn or suspended unless a further extension is granted or the repair made.

III. THE SIGNIFICANCE AND IMPACT OF CLASSIFICATION UPON THE MARITIME SOCIETY

The very nature and purpose of the classification process is to ensure that classified vessels as designed, built and operated are seaworthy in order to protect the safety of life and property at sea. For that very reason, the issuance of certificates of classification and the entry of a vessel in a classification society's register has profound significance and impact within the maritime industry. Classification societies provide a vital function with respect to the insurability and the marketability of a vessel. Hull, cargo and P&I underwriters generally require classification as a prerequisite to insurability, and the policies often stipulate that the vessel must be in class when and remain in class while it is insured. As noted by L.J. Buglass in his treatise *MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES* at pp. 26-7:

The importance of classification societies to underwriters cannot be overemphasized. Such societies have rules regarding the survey and maintenance of vessels and require periodic drydockings. An underwriter contemplating the insuring of a particular vessel will first look it up in the Classification Society's Register. He will base his premium, at least in part, on the fact that it is fully classed ("A1 at Lloyd's"). As we have seen, the basic American hull policy's Change of Ownership clause provides that if the classification society of the vessel or her class therein be changed, the policy is automatically canceled unless underwriters agree otherwise. Indeed, in the case of older vessels it is often warranted that a vessel must remain "in class" and that if for any reason the Classification Society withdraws her classification, the policy is void.

See also R.H. Brown, *MARINE INSURANCE - CARGO PRACTICES*, vol. 2 at pp. 46-50 (3d ed. 1979) and R. H. Brown, *MARINE INSURANCE - HULL PRACTICE*, vol. 3 at p. 15 (1st ed. 1975).

Indeed, the historical origin of classification societies attests to their interrelationship with the insurance industry. Classification societies initially were formed at the request of hull underwriters as a means of obtaining an independent evaluation of the seaworthiness of the hull and machinery of vessels so that hull underwriters could ascertain whether to extend coverage to a particular vessel. A hull underwriter simply cannot afford the time and expense to independently evaluate each individual vessel's seaworthiness. Of course, a hull underwriter, before deciding whether to ensure a particular vessel, could have its hull and machinery surveyed. Theoretical and practical considerations, however, militate against doing so. On the theoretical plane, the typical condition and valuation survey, which occasionally is performed prior to extending coverage, is of limited value and utility in determining whether a vessel actually is unseaworthy. An ocean-going, commercial vessel is a highly complex piece of machinery that, in a very real sense, is an entity with a life of its own. A condition surveyor simply cannot ascertain the true state of a vessel's condition or analyze its seaworthiness without a more extensive historical perspective of the vessel than is gained by a mere inspection. The surveyor must be familiar with the vessel's design, construction, maintenance history, repair history and damage history in order to truly appreciate the vessel's strengths and weaknesses. A one-time survey simply cannot provide enough information to the surveyor to do so. This latter consideration in turn provides the practical reason why classification societies are needed. Of course, a condition surveyor, if given enough time and an unlimited budget, could thoroughly review the vessel's plans, its design features, shipyard records during construction, classification society survey files, vessel logs, vessel maintenance and repair records and then inspect the vessel from stem to stern. In the process, the surveyor probably could obtain sufficient information to meaningfully evaluate seaworthiness. A shipowner, however, simply does not have

the time for such a study. Time is money; each day the vessel is out of service while being surveyed represents lost revenues. The shipowner simply cannot afford to wait while a survey of this type takes place. By the same token, neither the hull underwriter nor the shipowner (depending upon who must pay for the condition survey) could afford the cost of so extensive a survey for each and every vessel seeking hull insurance. A classification society, however, by virtue of its being involved in the design, construction, maintenance and repair of the vessel, has this vital information at its fingertips. By monitoring all phases of a vessel's life history as they unfold, the classification society has a finger on the vessel's pulse so that, assuming the classification society's rules and standards scrupulously have been adhered to during the classification process, a vessel in class will be seaworthy.²³

P&I insurers and cargo underwriters also depend upon classification societies. P&I Clubs will insure only vessels that are in class, and the continuation of P&I coverage is directly dependent upon the shipowner's maintaining the vessel in class. Withdrawal, suspension, or revocation of class usually will prompt revocation of P&I coverage.

The correlation between the availability of cargo insurance and the classification of the carrying vessel is not as direct as in the case of hull and P&I insurance. Cargo policies usually do not expressly refer to classification or require the cargo owner to warrant that the carrying vessel is in class. Indeed, modern cargo policies usually contain a seaworthiness admitted clause which

²³ Of course, some intervening event occurring after the last survey may have compromised the vessel's seaworthiness. The rules are designed to avoid or minimize any detrimental impact from that development by requiring the owner to promptly report damage affecting class. Of course, an unprincipled or careless owner may refrain from doing so, or the owner's maintenance practices may have faltered so that the condition goes undetected. The classification process cannot protect against those possibilities.

displaces the insured's warranty of seaworthiness that otherwise is implied in cargo policies. The reason for the divergent treatment of classification between cargo underwriters, on one hand, and hull and P&I insurers, on the other, relates to the object of the insurance coverage. The latter types of policies insure the vessel and provide coverage to its owner or charterer; whereas the object of the latter form of insurance is the cargo. Inasmuch as the vessel owner has direct control over whether or not a vessel is maintained in class, imposition by hull and P&I underwriters of a requirement that the vessel be maintained in class is fair and appropriate. A cargo owner, in contrast, has no control over the maintenance and repair of the vessel and usually has no practical means for timely confirming class. As a result, the cargo owner is at the mercy of the shipowner to accurately represent the vessel's seaworthiness and classification status. Cargo underwriters, mindful of the assurance of seaworthiness that the classification process affords and recognizing that unseaworthiness is the principal risk from which a cargo insured seeks protection, do not require seaworthiness or classification warranties. Cargo underwriters, however, have the right to revoke coverage upon reasonable notice. Upon learning that classification has been revoked, cargo underwriters can and do remove coverage for shipments carried on that vessel.²⁴

The very fact that a cargo owner has no practical means for verifying the seaworthiness of the carrying vessel is the foundation for another of the important functions served by classification societies and their classification of vessels. Cargo owners depend upon classification societies to serve as independent appraisers of a vessel's seaworthiness. The objectivity of the classification society and its surveyors, at least theoretically, is assured by the fact that the classification society,

²⁴ This procedure may occur in connection with an open cargo policy. Coverage cannot be revoked once bills of lading have been issued.

in evaluating seaworthiness and the concomitant need for maintenance and repair, is unencumbered by the economic pressures accompanying a shipowner's decision to perform maintenance and repair work on a vessel. Many cargo owners, before entering into a contract of affreightment,²⁵ will require that the vessel be maintained in class, and the charter party frequently will so stipulate and perhaps even specifically designate the name of the classification society in which the vessel is enrolled. On other occasions, cargo owners, before deciding to utilize a particular vessel, will ascertain whether the vessel is maintained in class. To facilitate this process, the classification societies publish an annual register naming each of the vessels which is enrolled in the classification society as being in class. Periodic supplements update the register with respect to the status of a particular vessel's class. The registers are in book form and are available to the public for purchase. Indeed, the purpose of this register is to afford the maritime shipping industry a ready means for ascertaining whether a classification society has determined that a particular vessel is fit for its intended service. If for some reason a cargo owner is concerned over the classification status of a vessel, its representative can ask the classification society for an attestation of class.

Although classification certificates are provided to the shipowner, cargo owners can communicate directly with the classification society by asking for an attestation of class. For the most part, cargo owners, however, do not consult the individual classification society's register, seek an attestation of class or even check the vessel's class certificates. The reason is not indifference, but rather a direct reflection of how well the classification society usually works within the context

²⁵ Typically, this contract is embodied in a voyage charter party. For a discussion of the voyage charter party, see Gilmore & Black, *THE LAW OF ADMIRALTY* (2d ed. 1975) at pp. 197-229. See also Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW*, Vol. 2, § 11-4 at p. 175 (2d ed. 1994).

of the course of dealing of the various members of the maritime industry. As previously mentioned, the classification system was set up to ensure that only seaworthy vessels are accorded hull coverage. Over time, the utility of the classification system worked sufficiently well to provide a significant measure of confidence in the fact that the classification societies were doing their job with the result that all members of the maritime industry collectively relied upon classification societies. Cargo underwriters no longer included warranties of seaworthiness in cargo policies, and one of the predominant reasons for that decision was those underwriters' recognition that the classification process works. Consequently, as the system has evolved, cargo owners do not need to check each individual vessel's classification status because they know that the overwhelming likelihood is that a vessel will not be in service if it is not classified. The system, therefore, has evolved to the point now that classification is an integral part of maritime commerce to such an extent that reliance on classification as a strong indicia of seaworthiness is an everyday happenstance.

The classification process is important to the chartering business. The environment created by the manner in which vessel chartering is conducted is highly volatile. A prospective charterer may need a vessel on a moment's notice. Correspondingly, a vessel suddenly and unexpectedly may become available on the market when a charter is canceled. As a consequence, a chartering broker is required to act quickly and decisively in deciding whether to arrange for the charter of a particular vessel. A chartering broker, when deciding whether or not to fix a charter, usually does not have time to appoint a surveyor to inspect the vessel to ascertain its seaworthiness. Not only would the vessel rarely be accessible at the time a fixture was being contemplated, but an inspection of that sort would consume an inordinate amount of time, thus delaying the fixture to the dissatisfaction and economic harm of both charterer and shipowner.

Nor would it be practical for the chartering broker, before fixing the charter, to have a surveyor board the vessel to verify its classification status by inspecting its certificates and records. Vessels often are on the high seas when the chartering fixture is made. One might think that the solution would be to charter the vessel subject to an inspection of certificates at the port of loading, but that approach also would be impractical and inimical to commerce. A shipowner does not want to divert its vessel hundreds and perhaps even thousands of miles to a loadport only to learn that the charterer's surveyor has decided that the class records and/or appearance of the vessel suggests that the vessel is not fit and should not be chartered. Under that scenario, the shipowner would have wasted precious days of sailing time with attendant loss of revenue. Indeed, the practical realities of the shipping world are precisely what has engendered the formation of classification societies and the role they serve. When the shipowner informs the chartering broker that the vessel is in class, that chartering broker relies upon the classification process to obtain the assurance needed that the vessel is fit for its intended use.

Classification societies, in defending litigation, frequently endeavor to portray their role as far removed from the commercial realm in which the vessels they classify roam. They stress that their client is the shipowner alone and seek to detach themselves from the ship's business and its customers. The classification societies, however, betray themselves. Bureau Veritas, for example, has published an advertisement asking the question: "Classification, but for what purposes?" Bureau Veritas in this advertisement answered: "Classification of the ship ... permits the charterer to select advisedly the ship whom he will entrust with his cargo." Classification societies, therefore, fully appreciate the significance and import of their issuance of classification certificates.

The shipping industry historically has worked on the faith of a person's word and upon people doing what they are supposed to do. A chartering broker, an underwriter, a cargo owner, therefore, fully expects the classification society, as an independent evaluator, to properly perform its role of setting standards and periodically inspecting the vessel to ensure that it has been designed, constructed and maintained in accordance with those standards. This approach assures the free and steady flow of commerce unencumbered by the inordinate delays that necessarily would accompany a need for each underwriter, chartering broker or cargo owner to arrange for each vessel to be inspected before deciding whether to insure, charter or ship cargo aboard the vessel. When the individual participants perform their jobs properly, the system functions well.

The classification process, like any other process or system, is not a perfect one. The classification society's technical staff, in reviewing the vessel's drawings, may fail to detect deviations from the rules. The field surveyors may fail to detect that the shipyard has used improper materials during the fabrication process. The surveyors may not realize that the yard has deviated from the plans. The field surveyors, when performing annual, intermediate or periodical inspections, may fail to detect developing or deteriorating conditions that violate classification society standards. The classification society's branch office may have permitted a vessel owner to defer the periodical special survey of a critical item of machinery when in fact that piece of machinery was woefully unfit, resulting in the breakdown of the machinery. Any of these failures by representatives of the classification society can result in loss of or damage to the classified vessel, its cargo, its officers and crewmembers or the lives or property of third persons. Whenever loss or damage of that nature occurs, the question arises whether the classification society can be held liable to the injured parties.

IV. LIABILITY OF CLASSIFICATION SOCIETIES TO SHIPOWNERS

The courts of the United States have not looked favorably upon suits by vessel owners to recover damages sustained as a result of the failure of a classification society to detect defects and deficiencies that compromise the seaworthiness of the classified vessel to such an extent that it does not comply with the classification society's rules and standards. Few cases address the issue, and only one reported decision ultimately has found a classification society liable to the shipowner. Unfortunately, the jurisprudence dealing with a classification society's potential liability to a shipowner is not a model of clarity.

The seminal decision concerning classification society liability to vessel owners is *Great American Ins. Co. v. Bureau Veritas*, 338 F.Supp. 999 (S.D.N.Y. 1972). In addressing a claim brought by a sunken vessel's subrogated hull insurer, the court was presented with two causes of action — one based upon negligent performance of contracted services and the other upon breach of the implied warranty of workmanlike service. The court dismissed plaintiff's suit on the twofold grounds that the plaintiff had failed to establish that the defendant-classification society had negligently conducted its surveys and that, in any event, the vessel owner had failed to establish a causal connexity between the sinking and the alleged unseaworthy conditions that should have been discovered by the classification society surveyors. The court further found that the plaintiffs had not established that the vessel was unseaworthy upon departure on its fatal voyage. In attempting to establish unseaworthiness at the commencement of the voyage, the plaintiffs invoked the presumption of unseaworthiness arising when a vessel is lost under ordinary sea conditions with no other explanation. The court concluded that this presumption arises only against those who are

responsible for and in control of the vessel.²⁶ Because a classification society does not occupy that status, no presumption of seaworthiness can arise against it. That decision is of profound practical consequence in any suit by a shipowner against a classification society arising out of the sinking of a vessel because the evidence of unseaworthiness quite frequently rests at the bottom of the sea and thus is unavailable.

The *Great American* decision ventured beyond pure factual findings, uttering some legal pronouncements that have influenced subsequent decisions and greatly impaired a shipowner's rights against a classification society. The *Great American* court, in determining the duties owed by a classification society to its clientele, observed that by undertaking to survey and classify a vessel, a classification society assumes two duties: (1) to survey and classify vessels in accordance with the society's rules and standards and (2) to exercise due care in detecting defects while surveying vessels and promptly notifying the owner. The court concluded that breach of the first duty should not be a basis for recovery. The court predicated that conclusion upon two considerations: (1) a rule of law recognizing a cause of action against a classification society on this first basis would undermine the well-conceived, traditional doctrine imposing upon the shipowner a non-delegable duty to exercise due diligence to maintain its vessel in a seaworthy condition. If such a cause of action were recognized, in the court's words, "the accountability of owners for the seaworthiness of their vessels

²⁶ The *Great American* court in relying upon *In re Marine Sulfur Transport Corp.*, 312 F.Supp. 1081 (S.D.N.Y. 1970), noted that this presumption also extends to the designer of a vessel in conjunction with a products liability claim. That decision subsequently has been overruled. See *MARINE SULPHUR QUEEN*, 460 F.2d 89, *cert. denied*, 409 U.S. 982 (1972). In any event, restricting the presumption of unseaworthiness to those responsible for and in control of the vessel is of dubious propriety.

for all practical purposes would evaporate.”²⁷ The court foresaw that fashioning the remedy advocated by the subrogated hull insurer would produce the undesirable effect of placing “ the ultimate responsibility for seaworthiness on an organization [the classification society] which has contact with the vessel for only brief annual periods, whereas the owner, who is always ‘present’ in respect to his vessel, would elude liability in many cases.”²⁸ That cause of action, in the court’s view, would make the classification society an absolute insurer of any vessel it surveyed, and liability of that nature and extent is not commensurate with the control a classification society has over the vessel nor is it in accord with the intent of the parties as evidenced by the fees charged or the services performed. The court was less concerned over the impact of recognizing a cause of action based upon the second duty, namely, that of using due care in detecting defects and notifying the owner. The court concluded that the classification society should be charged with the duty of detecting all discoverable defects in the vessel encountered during the survey and of notifying the owner thereof.

The *Great American* decision is fraught with faulty reasoning. In the first place, the court’s formulation on the twofold duty of a classification society is too restrictive in scope. The first duty identified by the court reflects only one facet of a classification society’s function. On a far more fundamental level, the classification society first must formulate sound rules that, if adhered to, will produce a seaworthy vessel. Should a classification society devise an inadequate rule or standard, liability just as readily should be imposed as when the classification society fails to survey a vessel in accordance with its rules. In the second place, the classification society should be held accountable if it discovers a serious defect posing an imminent danger and nevertheless fails to take

²⁷ 338 F.Supp. at 1012.

²⁸ 338 F.Supp. at 1012.

measures that will remove the vessel from service. Most classification societies have a provision in their rules that allows the classification society to suspend or revoke class whenever the shipowner has failed to comply with the rules and standards.²⁹ Although a classification society's doing so goes to ensure that the vessel, as a consequence, will no longer remain in service, that action vastly complicates a shipowner's ability to utilize that vessel. Most hull and P&I insurers impose, as a condition precedent to coverage, the requirement that the vessel remain in class throughout the term of the policy.³⁰ Moreover, some countries require a vessel to provide copies of current classification certificates as a condition to entering port.

The *Great American* decision also misconprehends the impact of a rule of law holding a classification society liable. Contrary to the court's perception, such a holding most assuredly would not undermine the shipowner's obligation to make the vessel seaworthy. A consideration of the basic principles of law relating to that obligation will expose the flaw in the court's analysis. Under general maritime law, the Harter Act and the Carriage of Goods by Sea Act, a shipowner, when acting as a carrier, has certain obligations with respect to the seaworthiness of the vessel.³¹ This duty

²⁹ For instance, the ABS reserves the right to terminate or suspend class. ABS RULES FOR CLASSING AND BUILDING STEEL VESSELS, Part 1, Section 1/1.2.

³⁰ See, e.g. Rule 5(k) of the RULES OF THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED.

³¹ Under general maritime law, the carrier impliedly owes an absolute obligation to provide a seaworthy vessel. *The CALEDONIA*, 157 U.S. 124, 15 S. Ct. 537 (1895). By inserting a properly-worded clause in the contract of carriage the shipowner may reduce this absolute obligation to one of due diligence. The Harter Act accords the shipowner a similar privilege. 46 U.S.C. § 190. See *The Carib Prince*, 170 U.S. 655, 18 S. Ct. 753 (1898), holding that the Harter Act is merely permissive in that regard allowing the carrier to insert an appropriate provision to that effect in the contract of carriage but that the Harter Act is not self-operative. In contrast, COGSA automatically reduces the absolute warranty of seaworthiness to one of due diligence. 46 U.S.C. §§ 1301 (1) and 1304 (1).

is a non-delegable one in the context of a contract of carriage.³² Some courts have wrestled with the issue of whether the existence of the shipowner-carrier's non-delegable duty to use due diligence to make the vessel seaworthy precludes the imposition of liability on a classification society for its negligence in failing to ensure that the vessel is seaworthy. See *Great American Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972), *aff'd* 478 F. 2d 235 (2d Cir. 1973). That line of reasoning is faulty inasmuch as it fails to recognize that allowing an injured third party to recover from both the shipowner and the classification society when the negligent acts of both conjoin to produce a common harm is merely an application of the commonplace tort law doctrine of joint and several liability.³³ The phrase "due diligence" is the equivalent of "reasonable care." *The Southwark*, 191 U.S. 1 24 S. Ct. 1 (1903). A lack of due diligence, therefore, is negligence. Simply because the shipowner-carrier has a non-delegable duty to refrain from negligent conduct with respect to furnishing a seaworthy vessel does not compel any deviation from the normal rule of tort that two parties at fault are joint tortfeasors, each of which is responsible for the loss.³⁴ The mere fact that the shipowner-carrier's duty is non-delegable does not render the classification society's acts or omissions any less negligent. In short, no conceptual basis exists for insulating a negligent

³² The non-delegability doctrine is not unique to the law of maritime carriage. As a general rule, the obligor has a non-delegable duty to perform any contractual duty. RESTATEMENT OF THE LAW 2d CONTRACTS § 318.

³³ The commission of a tort requires the existence of a duty owed by the tortfeasor to the injured party. An obligation undertaken in a contract can be the source of a tort duty. Indeed, the shipowner-carrier's failure to exercise due diligence to make the vessel seaworthy is the basis for a tort. See *The Floridian*, ___ F. 2d ___ (5th Cir. 19 ___).

³⁴ *The Atlas*, 93 U.S.303 (1876).

classification society from liability merely because the shipowner also is guilty of negligence with respect to the seaworthiness of the vessel.

Nor is the fear that finding a classification society to be a joint tortfeasor would discourage shipowners from taking proper and effective measures to furnish a seaworthy vessel, as expressed in the *Great American* decision, persuasive as a basis for concluding that a negligent classification society should be immunized from liability to third parties. If that were so, then every case involving two parties at fault should choose one or the other to be solely liable because finding them both jointly and severally liable might encourage one of the parties to commit torts in the future. That reasoning, quite obviously, is specious. The fact that any negligent party is held at fault for its proportionate share of fault³⁵ is alone an adequate deterrent to that type of careless behavior in the future.

One final point warrants consideration before leaving the *Great American* decision. The court, in addressing the issue of whether the classification society had negligently performed its surveys, raises a point which has considerable bearing upon a shipowner's ability to recover from a classification society. The court noted that regardless of whether the classification society had violated its own rules, the fact remained that the owner was fully informed of the defects. In permitting the vessel to sail, notwithstanding that knowledge, the shipowner simply took a calculated risk. The losses emanating from that risk should not then be visited upon a third party like the classification society. This reasoning is sound, but it raises the interesting question of what result

³⁵ The doctrine of comparative fault articulated in *U.S. v. Reliable Transfer Co.*, 421 U.S. 397 95 S. Ct. 1708 (1975), should apply to occasions when both the shipowner and the classification society jointly are attributable with negligent conduct producing an unseaworthy condition that causes damage to a third party.

should be reached when the shipowner does not know of the defect. The proper resolution of that legal issue, it would seem, depends upon the shipowner's reasonable expectations and the explanation for its lack of knowledge. If with the classification society's knowledge the shipowner consciously relied upon the classification society to perform certain vessel-surveying and/or performance-monitoring tasks that the shipowner otherwise would have performed, the shipowner's detrimental reliance unquestionably should spawn a viable cause of action against the classification society. The court in a little-recognized opinion so found in *The AMOCO CADIZ*, 1986 A.M.C., 1945 (N.D. Ill.), which is discussed below.

The next decision to address a classification society's liability to the shipowner and/or its subrogated insurers is *Steamship Mutual Underwriting Association, Ltd. v. Bureau Veritas*, 380 F.Supp. 482 (E.D. La. 1973). The sunken vessel's P&I insurer sought to recover from the vessel's classification society amounts paid in settlement of cargo claims arising out of the vessel's sinking. Recovery was based upon the alleged negligence of the classification society in failing to detect unseaworthy conditions while performing classification surveys. Without discussing whether a shipowner or its P&I insurer has a cause of action based in negligence for negligent survey and failure to adhere to its own rules, the court concluded that the classification society had negligently inspected the vessel and had breached its own rules. The court, however, determined that the plaintiff had failed to establish the requisite causal connection between that negligence and the sinking. The court followed the *Great American* case concluding that a presumption of unseaworthiness was not available against the classification society. The import of this decision is implicitly to recognize a cause of action against the classification society.

Following the *Steamship Mutual* decision of 1973, a 13-year period of quietus ensued in which no notable decision addressing classification society liability appeared. The *AMOCO CADIZ, supra*, raised the issue, again implicitly recognizing a cause of action under appropriate circumstances. There the court concluded that a vessel owner does not have an implied contractual right of indemnity under *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956), against a classification society.

The issue resurfaced in 1989 when the court decided *Somarelf v. American Bureau of Shipping*, 704 F.Supp. 59 (D.N.J. 1989). In that case the classification society had been asked to measure vessels and issue a Suez Canal special tonnage certificate. ABS inaccurately measured the vessel as a result of which the time charterer of the vessel was required to pay to the Suez Canal additional charges which the charterers had not collected from its subcharterers. The time charterer sought indemnification from the shipowner who in turn sought indemnification from the classification society. The owner predicated its claim upon contractual and tort rights of indemnity. The contractual indemnity claim was based upon the implied warranty of workmanlike performance fashioned in *Ryan Stevedoring Co. v. Pan-Atlantic Corp., supra*. The *Somarelf* court concluded that the owner had no contractual right of indemnity noting that *Ryan* and the cases extending its doctrine have based contractual indemnity upon an implied warranty of workmanlike service that arises only in the presence of a special relationship between the shipowner and the prospective indemnitee of such a nature that the indemnitor has taken control of the ship in connection with matters involving the safety and the prevention of maritime accidents. The court found that the classification society's services in preparing a tonnage certificate did not concern the safety or prevention of accidents or otherwise compromise the safety of the vessels. Accordingly, the court found the absence of the

special relationship upon which *Ryan* and its progeny are predicated. In resolving the issue on this basis, the court implicitly recognized or at least suggested that, under appropriate circumstances and notwithstanding the holding in *The AMOCO CADIZ*, a shipowner should have a *Ryan* indemnity claim.³⁶

The *Somarelf* court concluded that the shipowner may be entitled to indemnification from the classification society based upon tort. Relying upon decisions finding that a claim for negligent misrepresentation exists under general maritime law, the *Somarelf* court decided that the vessel owner would be entitled to tort indemnity in the event that it could show negligent misrepresentation on the part of the classification society. The court, relying on Section 552 of the RESTATEMENT 2ND OF THE LAW OF TORTS which deals with information negligently supplied for the guidance of others, delineated four prerequisites that the shipowner must establish in order to recover: (1) The defendant in the course of its business must have supplied false information for the plaintiff's guidance in a business transaction; (2) the defendant must have failed to exercise reasonable care in gathering the information; (3) the plaintiff must have relied on that information when the defendant knew the information would influence the plaintiff; and (4) the plaintiff must have suffered resultant pecuniary loss. When the matter subsequently was tried, the court found that the vessel owner had satisfied all of these elements and rendered judgment in favor of the shipowner against the classification society.

³⁶ The viability of a contract claim, of course, depends upon the damages contemplated by the parties when entering into the contract in accordance with the basic rule of damages governing contract actions as articulated in the seminal decision of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). The disparity between the rates charged by classification societies and the amount of the liabilities sought to be imposed upon them has led some courts to conclude that the parties did not intend an indemnity claim. See text, *infra*.

The latest decision to consider a classification society's liability to a shipowner is *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993). The Second Circuit Court of Appeals basically sounded the death knell for suits by vessel owners and their subrogated insurers against classification societies. The owner of a luxury cruise ship, which sank due to progressive flooding after striking an underwater obstruction, filed suit against the classification society that had issued loadline, SOLAS and classification certificates to the vessel and its owners. The owner predicated recovery upon five theories: (1) negligence, (2) gross negligence, (3) negligent misrepresentation, (4) breach of contract, and (5) breach of the *Ryan* implied warranty of workmanlike performance in issuing the relevant certificates. The court dismissed the claims based upon issuance of the loadline and safety certificates on the ground that the classification society had done so as an agency of the government of the Bahamas whose laws conferred immunity upon companies, like the classification society, that were performing services on behalf of the Bahamian government. The court also dismissed the claims that were predicated upon the issuance of classification certificates. The court cut through all five causes of action holding that the shipowner is not damaged by the classification society's errors in issuing a classification certificate because a shipowner is not entitled to rely on the certificate as a guarantee that the vessel is soundly constructed. Without a great deal of analysis and discussion, the court based its result upon two considerations: (1) The shipowner ultimately is responsible for and in control of the activities of the vessel, and the shipowner has a non-delegable duty to furnish a seaworthy vessel. The court felt that the classification society does not assume those obligation by agreeing to inspect the vessel and issue a classification certificate. (2) The disparity between the fee charged by ABS for its services and the

damages sought by the owner indicates that the parties did not intend to impose liability of this magnitude upon the classification society.

The equities of the case and the presence of a contractual relationship between the shipowner and the classification society figured prominently in the *Sundance Cruises* decision. The court's focus upon the equities of the case is demonstrated in its concluding pronouncement:

Sundance [the owner] may not create a condition of unseaworthiness, exercise all control over the reconstruction and servicing of the vessel and then burden the classification society with liability that is several hundred times that of the fee for the classification contract.³⁷

The contractual relationship of the parties figured prominently as evidenced by the court's reliance on comment (f) to Section 351 of the RESTATEMENT 2D OF CONTRACTS. Section 351 of the Restatement deals with the limitations of foreseeability upon recoverable damages, and comment (f) points out that the interests of justice do not always require that a party breaching a contract must pay damages for all of the foreseeable losses that have been incurred. The comment notes that "[t]here are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party." The comment then notes that one such circumstance occurs when there is extreme disparity between the loss and the price charged by the breaching party.

In some respects *Sundance Cruises* represents a classic example of good facts making bad law. When a shipowner is presented with unseaworthy conditions arising from its own poor maintenance practices and procedures that border upon the egregious, it is a simple matter to

³⁷ 7 F.3d at 1085.

exonerate the classification society. But extreme facts of this nature do not warrant widesweeping legal pronouncements that as a matter of law virtually preclude classification society liability under less compelling, less egregious facts. Perhaps the *Sundance Cruiser* court should have tempered its holding and accompanying remarks so as to limit its holding of non-liability to similarly egregious facts. Doing so would leave open for future consideration the propriety of permitting the shipowning client to recover from the classification society when the shipowner was not as actively involved in the negligence giving rise to the unseaworthy condition that precipitated the shipowner's loss.³⁸

The *Sundance Cruises* court's concern over the disparity between the fee the classification society charges and the resultant exposure, although relevant and understandable, is perhaps overwrought. A survey fee typically cost several thousand dollars; and, over the life of a ship, fees paid to the classification society runs into the hundreds of thousands. Disparity between price and liability has never presented much of an impediment in a products liability case where, for example, the cost of a product like a lawnmower may be quite low but the damage award for severing a foot due to a design defect can be quite high. Classification societies should not be afforded any more favorable treatment than the manufacturer of a product.

V. CLASSIFICATION SOCIETY LIABILITY TO THIRD PARTIES

³⁸ For example, at one of the periodical surveys the ABS performs selective audiogauging to measure the vessel's plate thickness. Many shipowners, with full justification, rely upon the classification society to perform this highly important study that is designed to assist in the evaluation of how a particular vessel is aging. If the classification society negligently conducts the survey, the shipowner should have a valid cause of action for ensuing losses based upon its justifiable reliance. Indeed, shipowners frequently rely upon its classification society to inspect the vessel to ensure its seaworthiness. See *Fireman's Fund Ins. Co. v. Vignes*, 794 F. 2d 1552 (5th Cir. 1987).

The ability of a shipowner, as client, to recover from a classification society is difficult, but what of third parties such as cargo owners, charterers, stevedores, dock owners, even crewmembers? Whether classification societies are liable for injuries to third parties arising out of unseaworthy conditions in classified vessels is an issue that has not been extensively litigated. Indeed, until only recently no reported decision specifically has addressed whether injured parties, as a matter of law, have a cause of action against a classification society or whether, under the particular facts of the case, any such duty has been breached. Over the past 20 years, classification societies have been named as defendants in damage suits brought by third parties, but with one exception those cases were resolved by settlements out of court.³⁹ The one exception is *Psarianos v. Standard Marine, Ltd.*, No. B-84-298-CA on the docket of the United States District Court for the Eastern District of Texas. There a jury found a classification society liable to crewmembers and survivors of deceased crewmembers of a vessel that sank as the result of unseaworthy conditions of which the classification society knew or should have known.⁴⁰

³⁹ For instance, suit was brought against Germanischer Lloyd in connection with the sinking of the TUXPAN. Trial of that suit was deferred pending the outcome of the plaintiffs' claims against the shipowner. In that latter litigation, the shipowner was found liable for failing to exercise due diligence to maintain the TUXPAN in a seaworthy condition prior to the commencement of the voyage and was found liable. See *In re Tecomar S.A.*, 765 F.Supp. 1150. The plaintiffs in that case were cargo owners who sustained substantial losses, and their recovery against the shipowner was restricted by the \$500 per package limitation afforded under the Carriage of Goods by Sea Act. The cargo claimants sought to recover from Germanischer Lloyd the difference between their actual losses and the package limit. Following resolution of the suit against the ocean carrier, Germanischer Lloyd settled with the cargo claimants for a substantial sum.

⁴⁰ An unrelated issue addressed by the court is reported in *Psarianos v. Standard Marine, Ltd.*, 728 F.Supp. 438 (E.D. Tex. 1989).

The Second Circuit in its *Sundance Cruises* decision of 1993 intimated that an injured third party relying on a classification certificate may have a cause of action.⁴¹ In 1995 the issue finally was addressed in two decisions decided within one day of one another. *Cargill Inc. v. Bureau Veritas*, 902 F.Supp. 49 (S.D.N.Y. 1995), and *Carbotrade S.p.A. v. Bureau Veritas*, 901 F.Supp. 737 (S.D.N.Y. 1995), both found that indeed an injured third party as a matter of law has a cause of action against a classification society, but both cases concluded that the plaintiffs had failed to establish the injured party's reliance upon the classification certificates so that they were not entitled to recovery. Although neither decision expounded upon the theoretical legal underpinnings forming the basis for the cause of action, both decisions recognized that the claim was based upon the tort of negligent misrepresentation.⁴² The conclusion in the *Cargill* and *Carbotrade* decisions that an injured third party has a cause of action based upon negligent misrepresentation is undoubtedly a correct evaluation. Accordingly, an examination of the tort of negligent misrepresentation insofar as it relates to the duties and functions of a classification society and the interrelationship of cargo owners, charterers, crewmembers, stevedores, dock owners and other third parties with the shipowner and the classification society is warranted.

1. Classification Society Liability to Third Parties Is Based Upon the Tort of Negligent Misrepresentation

⁴¹ As previously mentioned, *Sundance Cruises* held that a shipowner has no cause of action against a classification society. In so holding, however, the Second Circuit noted that a claim of that sort "must be distinguished from a suit brought by an injured third party who relied on the classification or safety certificates." 7 F.3d at 1084.

⁴² The court in the *Cargill* matter at oral argument regarded the matter as one of first impression.

Throughout the years, classification societies, upon being named as defendants in third party damage actions, vigorously have contested liability urging that no court had ever determined that such a cause of action existed. That consideration has prompted the impression that the issue of classification society liability to third parties is one of first impression. Perhaps the issue is a first impression if framed as follows:

Whether voyage charterers and/or cargo owners have a cause of action against a classification society based upon the latter's maintaining the vessel in class and thus representing its fitness when, in fact, the vessel is not fit and the charterers and cargo owners have chartered the vessel based upon the shipowner's untruthful representation that the vessel was registered with the classification society and was in class.

Until the *Cargill* and *Carbotrade* decisions, that narrow, specific issue had not been resolved. The issue, when cast in those terms, is perhaps overly-particularized and too narrowly stated with undue emphasis on factual considerations. Instead, the issue can and should be stated in broader conceptual terms as follows:

Whether a party (the classification society), who undertakes to gather information, assess it and make representations of suitability and who then imparts that information to its customer (the shipowner) knowing that the customer intends to supply that information to a third party (cargo owners, charterers), who, in turn, will make business judgments based upon the first party's representations, is liable to that third party for damages resulting from the third party's reliance upon those representations.

Framed in this fashion the issue focuses upon the underlying gravamen of the classification society's alleged offense. When viewed in that perspective, it becomes readily evident that an injured third party, in seeking recovery from a classification society, essentially is alleging the long-known and well-established tort of negligent misrepresentation. Indeed, that tort is so well-recognized that the RESTATEMENT 2D OF THE LAW OF TORTS allocates specific sections to it. Section 311 of the

RESTATEMENT addresses the cause of action for negligent misrepresentation when physical damage is involved, and Section 552 focuses upon instances when only pecuniary loss is at stake. Section 552 sets more rigorous standards than Section 311 because the American Law Institute recognized that the class of potential plaintiffs suffering pecuniary loss without concomitant physical damage can be quite broad so that some limitation was appropriate. Those two sections of the Restatement warrant examination.

Section 311(1) provides:

One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

- (a) to the other, or
- (b) to such third persons as the actor should expect to be put in peril by the action taken.

Section 331, therefore, creates a cause of action for negligent misrepresentation involving risk of physical harm when the following prerequisites are present:

3. The defendant must negligently provide false information;
4. The recipient of that information must have taken action as the result of relying on that information;
5. Physical harm must result from that action; and
6. The injured third person must be one whom the defendant knows or should expect to be imperiled by the negligent misrepresentation.

Section 311(2) prescribes the standard for determining whether the defendant was negligent in its misrepresentation:

Such negligence may consist of failure to exercise reasonable care:

- a. in ascertaining the accuracy of the information, or
- b. in the manner in which it is communicated.

Section 552 of the RESTATEMENT imposes liability upon professional organizations for negligently supplying information for the guidance of others resulting in pecuniary loss. Section 552(1) provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Section 552(2) then defines the class of persons entitled to assert a cause of action for negligent misrepresentation and, in doing so, provides:

[T]he liability stated in Subsection (1) is limited to loss suffered
(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Section 522, therefore, creates a cause of action for negligent misrepresentation causing pecuniary loss when the following prerequisites are met:

1. The defendant is engaged in a business wherein he supplies information for the guidance of others in their business transactions;
2. The defendant in the course of that business supplies false information;
3. The defendant fails to exercise reasonable care or competence in obtaining the information;
4. The plaintiff is one to whom the defendant intended to supply the information or one whom the defendant “knows that the recipient intends to supply it”; and
5. The plaintiff justifiably relies upon the information supplied by the defendant.

The general maritime law, which governs virtually all third party injury claims against classification societies, recognizes the tort of negligent misrepresentation as formulated in the Restatement. In *Coastal (Bermuda) Ltd. v. E.W. Sabolt & Co.*, 826 F.2d 424 (5th Cir. 1987), the court held the purchaser of fuel oil has a cause of action based upon negligent misrepresentation against an independent surveyor who issued an analysis of the purchased commodity at the request of the seller. In so holding, the court relied on Section 552 of the Restatement. Similarly, in *Royal Embassy v. Ioannis Martinos*, 1986 A.M.C. 769 (E.D.N.C. 1984), the court accorded a shipowner a cause of action against the cargo underwriter's surveyor who allegedly failed to use due care in the detection of defects in the surveyed vessel, citing Section 552 of the Restatement. In *Somarelf v. American Bureau of Shipping*, *supra*, the court determined that a shipowner had a cause of action against a classification society for negligent misrepresentation based upon the issuance of an erroneous certificate of measurement. The *Somarelf* court rejected the defendant's argument that general maritime law does not recognize a cause of action for negligent misrepresentation by a classification society and, in so doing, specifically relied upon the *Coastal (Bermuda), Ltd.* and *Royal Embassy* decisions.

Resort to the RESTATEMENT 2D OF THE LAW OF TORTS in determining whether a cause of action exists against a classification society is particularly appropriate. The very purpose served by federal admiralty jurisdiction — the uniformity of general maritime law⁴³ — strongly militates in favor of the application of the Restatement's approach to the tort of negligent misrepresentation. The Restatement by its very nature promotes the uniformity sought to be achieved by admiralty jurisdiction, thus injecting certainty into commercial transactions and promoting commerce free of

⁴³ BENEDICT ON ADMIRALTY (1997) at § 105, p. 7-11.

local constraints.⁴⁴ Indeed, federal courts of the United States, in the exercise of their admiralty jurisdiction, repeatedly have embraced the Restatement as a reliable and trusted source for formulating general maritime law in the absence of any clearly-articulated jurisprudential rule. *E.g.*, *Doxsee Sea Clam Co. v. Brown*, 13 F.2d 550 (2d Cir. 1994); *Texport Oil Co. v. M/V AMOLT NTOS*, 11 F.3d 361 (2d Cir. 1993). Accordingly, it is appropriate for a court in applying and formulating general maritime law pursuant to its admiralty jurisdiction to adhere to the Restatement. The efficacy of a third party injury claim against a classification society therefore should be analyzed in accordance with the strictures and prerequisites of sections 311 and 552 of the Restatement.

Viewed from a conceptual perspective, claims of injured third parties against classification societies fit the Restatement’s conception of the tort of negligent misrepresentation like a glove. The business activities of a classification society consist of formulating rules pursuant to which seaworthy vessels may be built, reviewing the design plans and drawings of new buildings in order

⁴⁴ The object of the Restatement, as set forth at page vii of the *RESTATEMENT OF THE LAW OF TORTS* (1938), is “to present an orderly statement of the general common law of the United States” insofar as the high volume of decisional law and numerous irreconcilable decisions require a work of this sort to dispel “uncertainty and lack of clarity.” The aim of the American Law Institute in publishing the *RESTATEMENT OF THE LAW OF TORTS* is to supply certainty and clarity, as reflected in the Institute’s forward:

The careful restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. The object of the Institute is accomplished insofar as the legal profession accepts the Restatement as *prima facie* a correct statement of the general law of the United States

The sections of the Restatement express the result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases. The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.

to ensure that the design of the vessels complies with the rules, inspecting construction to ensure that the vessel is built in accordance with those approved plans and surveying the vessel during the course of its work-life in order to ensure that it is being maintained in accordance with the society's rules and standards. The results of these activities are reflected in certificates of class that are carried aboard an enrolled vessel. Representatives of the United States Coast Guard occasionally board vessels to check their classification certificates to ensure that they are current. U.S. Customs authorities require a shipowner to supply the loadline certificate which is issued by the classification society, before a vessel may leave port.⁴⁵ The classification society prepares a register naming each of the vessels enrolled in the society and then publishes that register so that members of the shipping world may refer to it when deciding whether to hire or insure a particular vessel. On a more global level, virtually all commonly-traded vessels in the liner and tramp business are classified vessels, and every one in the shipping industry knows that and relies on that. The classification societies in turn are aware that cargo owners, charterers, chartering brokers, cargo underwriters, hull underwriters and P&I insurers all depend heavily upon a classification society's certification when making the decision to become involved with particular vessels. Indeed, the classification society itself regards its role as that of an independent verification agency. Although classification societies appreciate that the shipowner has the ultimate responsibility for maintaining and repairing the vessel to keep it in class and hence seaworthy, those societies recognize that their job is to set standards and rules that, if met, will produce a vessel that is fit for its intended service. The classification societies further recognize that their role is to serve as an independent policeman to see whether indeed the shipowner is designing, constructing, maintaining and repairing its vessel in accordance with those

⁴⁵ See 46 U.S.C. § 5101 et seq. and 19 C.F.R. §§ 4.60-1.

rules and standards. Classification societies fully expect the shipowner to pass classification status and data to third parties, such as cargo owners, charterers, etc., and the society recognizes that one of its primary purposes and functions is to provide assurance from an independent source to such third parties that a vessel, because maintained in class, is fit.⁴⁶ Indeed, the very purpose of classification societies is to facilitate shipowners' dealings with third parties and to protect third parties who deal with and/or come in contact with their ships. To that end, one of the major classification societies, ABS, declares the corporate mission to be the promotion of safety of the environment, property and life at sea.⁴⁷ Cargo owners, charterers, chartering brokers and insurance companies in turn conduct business on the basis of the fact that a vessel is classified in accordance with the classification process.⁴⁸ They deal only with vessels that are enrolled in a classification society and are maintained in class.

⁴⁶ The president of the American Bureau of Shipping in a recent periodical stated: "At ABS, and I am sure my colleagues will confirm that the same applies within their own organizations, we are very aware of the range of our responsibilities. These encompass not only shipowners but also insurers, bankers, flag states, port states, charterers, seafarers and, particularly when it comes to protection of the environment, the general public." "The Classification Society in the Year 2000," THE MARINE LOG (April 1997) at p. 80.

⁴⁷ The mission of the American Bureau of Shipping is to serve the public interest as well as the needs of our clients by promoting the security of the property and the natural environment primarily through the development and verification of standards for the design, construction and operational maintenance of marine-related facilities. ABS RULES FOR BUILDING AND CLASSING STEEL VESSELS, inside cover.

⁴⁸ The fact that the maritime industry relies heavily upon classification societies is well recognized. For example, in the preface to CLASSIFICATION SOCIETIES (Lloyd's of London Press, Ltd., 1993), the author states, "Classification societies take centre stage when it comes to monitoring the fitness and safety of the vessels which play the world's oceans. Their certificates are relied on by governments, underwriters, charterers, purchasers and others as evidence that the vessels are fit..." Refer also to the advertisement published by Bureau Veritas, *infra* at p. 17.

When, for example, a cargo owner sustains injury as the result of a classification society's failure to enforce its rules and/or adequately review the design of a vessel and/or inadequately inspect a vessel, all of the elements for a cause of action based upon negligent misrepresentation are present. If the resultant damage consists of physical harm, such as damage to cargo, Section 311 of the Restatement comes into play inasmuch as all four of its prerequisites are met:

1. The defendant-classification society has negligently provided false information because by permitting a vessel to remain in class, when in fact that vessel does not meet the classification society's rules and standard and the classification society's representatives knew or should have been aware of that non-compliance, the classification society has negligently conveyed inaccurate information.

2. The shipowner, as recipient of that information, has taken by representing that the vessel is in class in reliance upon the presence of classification certificates aboard the vessel and/or cargo owners entrust their cargo to a vessel without such a representation because they know that the usages and practices of the trade are such that only classified vessels are offered for service.

3. Physical harm results from that action by virtue of the cargo owner's agreeing to ship its cargo upon a vessel that in fact is unseaworthy when that unseaworthy condition, which should have been discovered by the classification society, causes damage to the cargo.

4. The classification society knows that cargo owners rely upon the classification certificate as assurance that the vessel is reasonably fit and that the cargo owner will be imperiled by entrusting its cargo to the unseaworthy vessel.

By the same token, an injury to a third party caused by a classification society's negligently maintaining a vessel in class meets the prerequisites for Section 552:

1. The classification society has engaged in a business wherein the organization has supplied information relating to the seaworthiness of a vessel for the guidance of shipowners, charterers, chartering brokers, cargo owners and insurance companies in their business transactions;
2. The classification society in the course of that business has supplied false information by maintaining the vessel in class thus representing that the vessel is seaworthy when in fact it is not;
3. The classification society has failed to exercise reasonable care or competence in obtaining the information upon which the issuance of a classification certificate was based in or maintaining the certificate in existence inasmuch as representatives of the classification society have failed to properly review plans or drawings and/or have failed to properly survey the vessel;
4. The cargo owner, for example, is one to whom the classification society knows that the shipowner, as the recipient of the classification information, intends to supply it; and
5. The cargo owner, for example, justifiably has relied upon classification status in deciding to ship its cargo aboard the vessel.

All classification societies fully understand the complex interrelationship of the classification process with the entire maritime industry. These societies know that third parties are relying upon that information. As previously mentioned, one classification society has published an advertisement representing that classification exists for the purpose of guiding charterers in deciding to which vessels they should entrust their goods. The president of another unqualifiedly has acknowledged

the reliance placed upon classification societies by all sectors of the marine industry. In summary, the courts should use the Restatement to find a cause of action based upon negligent misrepresentation; and, under the appropriate set of facts, the courts should impose liability upon the classification society.

2. Evaluation of Defenses Asserted by Classification Societies

Classification societies typically set up a broad array of defenses in defending claims of third parties. Among the more notable are the following:

1. The classification society's client is the shipowner so that the absence of privity of contract between the classification society and the third person and the fact that the classification society does not directly supply classification information to third parties bars a cause of action.
2. Permitting a cause of action to lie against a classification society in favor of a third party is tantamount to declaring that the classification society warrants the seaworthiness of the vessel when in fact it does not and further serves to undermine the shipowner's traditional warranty of seaworthiness owed to its customers.
3. Classification society rules contain disclaimers and exculpatory clauses that immunize the classification society from liability to third parties.
4. The third party has not relied upon the classification society's certificates or its representations.
5. The failure of the shipowner to maintain its vessel in a seaworthy condition is a superseding, intervening cause that insulates the classification society from liability.

Each of these defenses warrants consideration.

a. The Absence of Privity

The classification society's direct client indeed is the shipowner. Moreover, the classification society usually has no direct contact with third parties, such as cargo owners. Sections 311 and 552 of the Restatement, however, dispose of the suggestion that a classification society is immune from liability because its representatives have not directly contracted with or supplied classification information to the injured third parties. Section 311 expressly confers a cause of action upon third parties when the party making a representation should expect to put that third party in peril. Section 552 confers a cause of action upon a third party for pecuniary loss when the party making the negligent misrepresentation (the classification society) knows that the recipient (the shipowner) intends to supply it to a third party (for example, a cargo owner) and the classification society either intends to influence the recipient or knows that the recipient will rely upon that information. Neither section makes any reference to privity or to "special relationships" that are tantamount to privity. In short, the citadel of privity has virtually disappeared in this context.⁴⁹ *C.f.*, *Dorking Genetics v. United States*, 76 F.3d 1261 (2d Cir. 1966).

b. The Warranty of Seaworthiness

⁴⁹ The liability *vel non* of companies that provide evaluation to clients knowing that other parties will rely upon those evaluations has evolved considerably over the years. In *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922), the court, speaking through Justice Cardoza, found a public weigher liable to a vendor who relied upon a weight certificate furnished to the vendor when purchasing a commodity. A number of years later, however, in *Ultramarers Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), Justice Cardoza held that an accountant was not liable to a creditor who loaned money to another based upon the accounting firm's negligent misrepresentation of the borrower's financial status, basing that decision upon the absence of privity. The Restatement eliminated the privity requirement; and subsequent decisions have taken a more expansive view, opening the class of plaintiffs to anyone that reasonably could be foreseen to rely upon the information. E.g., *Petrillo v. Bachenberg*, 139 N.J. 472, 655 A. 2d 1354 (1995). See discussion in PROFESSIONAL RESPONSIBILITY — NEGLIGENT MISREPRESENTATION, 26 Seton Hall L. Rev. 130 (1996).

Classification societies unquestionably do not warrant to third parties the seaworthiness of vessels enrolled in the classification society's register or those holding its certificates. The absence of such a warranty, however, is of no moment whatsoever in determining whether a classification society should be liable for negligent misrepresentation. The argument that the classification society does not warrant seaworthiness is simply another facet of the argument that no contractual relationship exists between the third party and the classification society. Sections 311 and 552 of the Restatement do not mention the notion of warranty. This argument, succinctly stated, is a red herring of no legal import.

Classification societies sometimes try to summon a parade of horrors urging that recognition of a cause of action against classification societies in favor of third parties will undermine the shipowner's traditional warranty of seaworthiness. For example, in *Great American Ins. Co. v. Bureau Veritas, supra* at p. 1012, the court observed:

The unstated policy underlying the decisions not to allow surveys and classifications to operate as defenses to the duty of providing a seaworthy ship is clearly to preserve the ancient, absolute responsibility of an owner for the condition of his ship. This is evidenced by the fact that, were such surveys and classifications allowed to constitute a due diligence defense, the accountability of owners for the seaworthiness of their vessels for all practical purposes would evaporate. This, in turn, would have the effect of leaving injured seamen and shippers with no effective remedy in most cases.

In actuality, recognizing a cause of action in favor of third parties for negligent misrepresentation against a shipowner has no adverse affect whatsoever upon the shipowner's traditional warranty of seaworthiness. That obligation is left intact. The shipowner, irrespective of whether or not a third party has a cause of action against a classification society, would remain responsible for breach of its warranty of seaworthiness. Indeed, recognition of a cause of action

against the classification society is a logical progression of and complementary to the shipowner's warranty of seaworthiness. Properly understood, the classification process results in the classification society's serving as an independent evaluator of seaworthiness. If the shipowner fails to provide a seaworthy vessel and the classification society, as the independent evaluator, fails to perceive that failure, both should bear the responsibility — the shipowner for breaching its warranty of seaworthiness; the classification society for its negligent misrepresentation. The fears expressed in the *Great American* decision simply will not materialize. Indeed, not recognizing a cause of action against a classification society often leaves injured seamen and shippers with no effective remedies because many shipowners own a single vessel insured with a British P&I Club. When that vessel sinks with resultant loss of life and cargo, the shipowner escapes unscathed, and, unless some form of direct action is available against the P&I Club, it too is untouched.

c. Exculpatory Clauses Are Unenforceable

The rules of many classification societies try to build a wall between the classification society and the members of the maritime industry relying upon the classification society's services. The rules often provide that the client is the shipowner, that the classification society makes no representation to third parties and/or that the classification society is not responsible for losses sustained by third parties. The courts have not been sympathetic to this argument, viewing clauses of that nature as against public policy. Moreover, the classification society's contention that it has no contractual relationship with third parties undermines its attempt to invoke disclaimer and exculpatory clauses in its rules. The absence of privity prevents those rules from binding third persons.

d. The Reliance Issue

At the heart of an injured third party's claim for damages against a classification society is that third party's detrimental reliance upon the classification society to have done its job properly. That is the issue over which future legal battles concerning a classification society's third-party liability in all likelihood will be pitched. Indeed, as previously mentioned, the only two cases squarely addressing third-party liability, the *Cargill* and *Carbotrade* decisions, turned upon the court's perception that reliance was lacking.

Carbotrade adopted a highly restrictive approach to the reliance issue, thereby favoring the classification society. Relying upon two New York state court cases referred to by the Second Circuit in *dictum* from the *Sundance Cruises* decision, the *Carbotrade* court concluded that "the imposition of liability for negligent misrepresentations ... is only appropriate where there is a relationship approaching privity between the defendant and the third party."⁵⁰ The *Carbotrade* court's dependence upon New York state court decisions, even though referred to in *Sundance Cruises*, was inappropriate. The preferred approach would be to refer to Sections 311 and 552 of the Restatement to develop the elements of a cause of action for negligent misrepresentation. Doing so, as previously mentioned, ensures the uniformity sought by general maritime law; whereas resort to the state law of the forum creates a patchwork quilt of conflicting decisional law. As mentioned above, Sections 311 and 552 do not require a "special relationship" approaching that of privity. The *Carbotrade* court missed the boat in so requiring.

Carbotrade also turned upon the factual determination that the plaintiff had not established reliance upon the defendant's classification of the vessel. The court reached that conclusion by pointing out that the plaintiff had begun loading the vessel before the classification society had

⁵⁰ 901 F.Supp. at 747.

completed its intermediate survey, the visa had expired before loading began and the plaintiff's surveyor when inspecting the vessel learned of the unseaworthy condition yet the plaintiff chose to do nothing. Although the factual considerations cited by the court may have been compelling under the particular circumstances of that case, the presence of those factors in other cases should not necessarily result in a holding of non-reliance in favor of the classification society, depending, of course, upon the factual nuances of the particular case. The commencement of loading prior to completion of the class survey and the expiration of the visa before loading began are not *per se* dispositive nor, in isolation, particularly significant. In many instances, a cargo owner would be unaware of those circumstances. Even if the cargo owner were aware, the cargo owner probably would be justified in concluding that, because the class surveyor was present, adequate attention was being paid to the vessel's seaworthiness. Knowledge on the part of the cargo owner's surveyor of the unseaworthy condition can and should be fatal to recovery from the classification society if that surveyor had no assurance from the class surveyor that the problem would be rectified. The *Carbotrade* decision, however, does not provide any insight into that consideration, and in future cases of this sort, that point will require further consideration.

In the *Cargill* case the court found an absence of reliance based upon the following considerations:

1. The plaintiffs had not consulted the classification register;
2. The plaintiffs hired their own independent surveyor to inspect the ship after the shipowner had completed repairs;
3. Plaintiffs failed to demand an attestation of class to ascertain the vessel's present classification status; and

4. A number of the vessel's certificates had expired immediately prior to the commencement of loading.

For the reasons articulated in analyzing the *Carbotrade* result, these four considerations are not necessarily dispositive. The cargo owners' failure to consult the defendant's register or to obtain an attestation of class is of no legal moment if the classification process and its interrelationship with the maritime industry is correctly understood. As explained earlier, classification is an ongoing process, and cargo owners because of a traditional course of dealings that has extended for decades have come to expect classification societies to perform their function of ensuring that a vessel is in class and to remove the vessel's certificates from the vessel in the event that class is revoked with the result that the vessel effectively no longer can trade. The fact that a classified vessel remains in service, therefore, justifiably entitles a cargo owner to assume that the classification society has ascertained through its independent verification process that the vessel remained seaworthy.

e. Superseding Cause

Classification societies often urge that irrespective of whether they have breached a duty to third parties, they can escape liability on the ground that the shipowner's knowledge of a vessel's deficiencies constitutes intervening, superseding negligence. This argument rarely will prevail because the facts of a given case rarely justify finding that the shipowner's awareness and/or negligence constitutes superseding, intervening negligence.

The subject of superseding cause is addressed in Sections 440-53 of the RESTATEMENT 2D OF TORTS. As set forth in Section 440, a superseding cause is the intervening act of a third person which prevents the initial tortfeasor from being liable for harm to another. Whether an intervening force qualifies as a superseding cause that will relieve the initial tortfeasor of liability for its

negligent conduct is addressed in Section 442 which specifies those considerations which are of importance in determining whether an intervening force constitutes a superseding cause. Section 442 provides:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operations;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

The typical case involving third-party injury, from the shipowner's failure to remedy defects in the ship does not qualify under Section 442 as a superseding cause of harm. The harm brought about by the shipowner's negligence does not differ in kind from that which otherwise would have resulted from the classification society's failures. The shipowner's intervening failure to correct the deficiency often is not extraordinary under the circumstances because quite often the unseaworthy condition arises because the classification society imprudently has extended the time for surveys

and/or the time for repairs. Indeed, the very purpose of classification is to provide an independent evaluation of seaworthiness. The intervening negligence of the shipowner usually does not operate independently of the situation created by the classification society's negligence, because the very role and purpose of the classification society is to identify unseaworthy conditions and require that they be corrected before agreeing to continue the vessel in class.

CONCLUSION

The liability *vel non* of classification societies is a burgeoning issue. Even though the legal framework and concepts already are in place for the recognition of a cause of action against a classification society based upon the tort of negligent misrepresentation, the courts only recently have come to realize that the errors and omissions of a classification society fit squarely into the mold of the negligent misrepresentation. The prerequisites for a cause of action based upon negligent misrepresentation are specific and somewhat narrow. Accordingly, each case necessarily must turn upon its particular facts. Merely because a vessel is unseaworthy does not necessarily mean that a viable claim arises against the classification society. If, however, the classification society has failed to perform its mission and if the injured party has relied upon the classification society as an independent verifier of the vessel's unseaworthy condition, liability should be imposed upon the classification society.

The concern that classification societies cannot bear this financial burden is misguided. Classification societies, even though sometimes denominated non-profit organizations, are profitable ventures often making millions of dollars. Their liability for errors and omissions, like that of any other professional society, can be insured under the appropriate general liability policy. Holding classification societies accountable in the long run will produce the desirable result of promoting the safety of life and property at sea. Indeed, the undeniable reality of human existence is that accountability is an effective means of securing performance. Classification societies should stand on the same footing as any other organization. The end result will be a safer maritime industry.