Washington and Lee Law Review

Volume 34 | Issue 4 Article 11

Fall 9-1-1977

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Recommended Citation

Apportioning Maritime Collision Damages: Applying The Rule Of Reliable Transfer, 34 Wash. & Lee L. Rev. 1237 (1977).

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APPORTIONING MARITIME COLLISION DAMAGES: APPLYING THE RULE OF *RELIABLE TRANSFER*

The American rule of divided damages in admiralty collision cases had been applied for 120 years[1] until it was reconsidered by the Supreme Court in *United States v. Reliable Transfer Co.*[2] Prior to that decision, admiralty courts had been obliged to aggregate damages and divide them equally upon finding mutual fault by vessels in a collision.[3] In 1975, the *Reliable Transfer* Court rejected the traditional equal division of damages rule[4] and established a proportional

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[1] The Supreme Court in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 434 (1854), determined that where both parties were at fault in a maritime collision, each was to bear one-half of all damages. *Id.* at 439. *See* The Sapphire, 85 U.S. (18 Wall.) 51, 56 (1873). The divided damages rule became a well-entrenched rule of American admiralty law. *See* H. BAER, ADMIRALTY LAW IN THE SUPREME COURT §§ 9.2-9.6 (2d ed. 1969); J. GRIFFIN, THE AMERICAN LAW OF COLLISION § 245 (1949) [hereinafter cited as GRIFFIN].

[2] 421 U.S. 397 (1975). The Reliable Transfer Company, as owner of the tanker Mary A. Whalen, sued the United States under the Suits in Admiralty Act, 46 U.S.C. §§ 741-60 (1970), and the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970). In December, 1968, the Whalen grounded on a sand bar outside New York harbor. 421 U.S. at 398-99. However, the navigational light ordinarily marking the breakwater was inoperative despite the Coast Guard's obligation to maintain it. 421 U.S. at 399. In an unreported decision, the district court found that the Coast Guard was 25% at fault in failing to maintain the breakwater light, while the vessel was 75% at fault for turning when the captain was uncertain of his position and "made use of nothing except his guesswork judgment." 421 U.S. at 399. Nevertheless, the district court held that each party was required to pay one-half of each vessel's total damages under the established rule of divided damages. *See* note 3 *infra*. The court of appeals affirmed. Reliable Transfer Co. v. United States, 497 F.2d 1036 (2d Cir. 1974). The Supreme Court granted certiorari to consider whether a proportional fault rule should replace the divided damages rule. *See* Goschka, *Goodbye to All That!—The Unlamented Demise of the Divided Damages Rule,* 8 J. MARIT L. & COM. 51 (1976) [hereinafter cited as Goschka]; 16 VA. J. INT'L L. 202 (1975).

[3] Divided damages are computed by aggregating the loss or damage to both vessels and dividing the damages equally between the two vessels, irrespective of the degrees of their fault. Where three or more vessels were at fault, equal division of damages also was appropriate among those vessels. The Eugene F. Moran, 212 U.S. 466 (1909). *See* The Socony No. 123, 78 F.2d 536 (2d Cir. 1935). Where one party was solely at fault, however, that party would bear its own loss as well as the loss of the other vessel. The Clara, 102 U.S. 200 (1880).

[4] 421 U.S. at 410. Justification for the divided damages rule included alleviation of the inequitable common law rule of contributory negligence which required each party to pay its own damages. In addition, the Supreme Court in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 434, 439 (1854), stated that the divided damages rule induced navigational care. The reasons that originally led to the adoption of

fault rule consistent with that observed by virtually every other major maritime nation.[5] The Court held that two or more parties at fault in a collision or stranding[6] are liable for property damages proportionately to the extent of their comparative degrees of fault.[7] In so hold-

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the divided damages rule became "eroded," but the rule continued to exist "by sheer inertia rather than by reason of any intrinsic merit." 421 U.S. at 410. The rule prevailed for two reasons: "first, judicial disaffection with contributory negligence and, second, the experience of the courts with the rule had shown it was easy to apply." Brief for Petitioner at 13-14, United States v. Reliable Transfer Co., 421 U.S. 397 (1975). Thus, the divided damages rule was aptly described as a midway point between a common law contributory negligence rule and a pure comparative negligence rule. Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L. Q. 333, 341 (1932).

[5] 421 U.S. at 403-04. Nearly every maritime nation has ratified or effectively adopted the Brussels Convention on Collision Liability of 1910. Article 4 of the Convention provides for proportional damages determined by degree of fault. For an English translation of the Convention, see 6 KNAUTH'S BENEDICT ON ADMIRALTY 39 (7th ed. A. Knauth & C. Knauth 1969). *See also* Huger, *The Proportional Damage Rule in Collisions at Sea,* 13 CORNELL L. Q. 531 (1928) [hereinafter cited as Huger]; Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention to Achieve International Agreement on Collision Liability, Liens, and Mortgages,* 64 YALE L.J. 878, 890 (1955).

[6] A stranding may be defined as "[t]he drifting, driving, or running aground of a ship on a shore or strand." BLACK'S LAW DICTIONARY 1590 (4th rev. ed. 1968). Collision, on the other hand, is the act of vessels striking together. In its strict sense, collision means the impact of two moving vessels. *Id.* at 330. Collision, in its broad sense, includes allision, the striking of a moving vessel against one that is stationary, and other types of "encounters between vessels, or a vessel and other floating, though non-navigable, objects." *Id.* While the Brussels Convention presumably applies only to maritime collisions, the *Reliable Transfer* rule applies to both collisions and strandings. Comment, *Comparative Negligence Sails in the High Seas: Have the Recovery Rights of Cargo Owners Been Jeopardized?* 7 CALIF. W. INT'L. L.J. 179, 179 n.3 (1977).

The divided damages rule was applied to groundings and strandings, White Oak Transp. Co. v. Boston, Cape Code & N.Y. Canal Co., 258 U.S. 341 (1922), and collisions by vessels with fixed objects. Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874). *See* Pacific Gas & Elec. Co. v. The S.S. Lompoc, 291 F. Supp. 767 (N. D. Cal. 1968) (damages divided where a submerged pipeline, not buried five feet beneath the river bottom as required by statute, was damaged by a ship's anchor). Because ships sometimes collide with piers, wharves, bridges, pilings and other shore structures, Congress extended admiralty jurisdiction in 1948 to all injuries "caused by a vessel. . . notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1970).

[7] 421 U.S. at 411. The *Reliable Transfer* Court recognized the frequent harshness of the divided damages rule. The contrast in potential recovery under the divided damages rule and the proportional fault rule was significant. For example, where vessel *A* was 75% at fault having suffered $300,000 in damages and vessel *B* was 25% at fault and suffered $100,000 in damages, vessel *B* would be required to pay $100,000 to vessel *A* in addition to suffering its own $100,000 in damages under the divided damages rule. *See* note 3 *supra.* Under the proportional fault rule, however, no damages would change hands because the percentages of fault and damage suffered in comparison to total

ing, the *Reliable Transfer* decision eliminated the disparity between American use of the divided damages rule and application of the Brussels Convention proportional fault rule which had encouraged international forum shopping.[8] Nevertheless, the practical problems in administering the proportional fault rule must be resolved by admiralty courts with specific regard to remaining peculiarities of American admiralty law.

In *Reliable Transfer,* the Supreme Court recognized that gross inequities often were occasioned by application of the divided damages rule despite the development of several exceptions to the rule. By requiring the two parties to pay one-half of the total damages to both vessels, the rule of divided damages achieved just results only when both vessels were equally at fault or degrees of fault could not reasonably be determined.[9] In all other cases, the *Reliable Transfer* Court indicated that the results were presumably unfair to the party less at fault.[10] In view of the acknowledged inequities of the rule, the Court explained that historical justifications for divided damages had been eroded; the rule was no longer necessary to induce navigational care and to alleviate the inequity of the common law rule of contributory negligence requiring each party to bear its own damages.[11]

The *Reliable Transfer* Court further noted that certain legal presumptions which had been developed to complement the rule of divided damages often precipitated unfair judgments through misapplication or lack of uniform application.[12] The doctrine of error *in extremis*[13] and the "major-minor" fault rule[14] recognized that under certain circumstances the equal division of damages was unjust. These presumptions,[15] however, only minimized the inequities of the

damages are equal. Nevertheless, the proportional fault rule is inapplicable where one vessel is solely at fault. Cliff, Jr., Inc. v. M. V. Captain Will, 526 F.2d 345, *reh. denied,* 529 F.2d 1169 (5th Cir. 1976) (rehearing denied because finding of sole fault precluded application of proportional fault rule).

[8] 421 U.S. at 403-04. Generally, vessels at greater fault would seek a United States forum so that they would be liable for a maximum of only one-half of the aggregate damages. *See* note 3 *supra;* Huger, *supra* note 5, at 531; Franck, *Collisions at Sea in Relation to International Maritime Law,* 12 L.Q. Rev. 260, 261-63 (1896).

[9] 421 U.S. at 405. *See, e.g.,* National Bulk Carriers, Inc. v. United States, 183 F.2d 405 (2d Cir.) (Hand, J., dissenting), *cert. denied,* 340 U.S. 865 (1950).

[10] 421 U.S. at 405.

[11] *See* note 4 *supra.*

[12] 421 U.S. at 405-06.

[13] *See* text accompanying notes 51-59 *infra.*

[14] *See* text accompanying notes 24-30 *infra.*

[15] A presumption is an assumption of one fact which the law requires the trier of fact to make because of the existence of another fact. The assumption is compelled

divided damages rule. In addition, the *Pennsylvania* rule[16] served to relieve a party of sole liability for a collision by inculpating a vessel that had violated a navigational statute. Three other principles, "inscrutable fault,"[17] "inevitable accident,"[18] and "last clear chance,"[19] aided courts in determining whether application of the divided damages rule was appropriate. While the *Reliable Transfer* Court criticized application of the major-minor fault rule and the *Pennsylvania* rule in the divided damages context, the Court did not consider the prospective use of these and similar presumptions under the new proportional fault rule. Admiralty courts now must ascertain whether these presumptions and principles are applicable under comparative fault theory and develop suitable methods for computing degrees of fault between parties to a collision.

The *Reliable Transfer* Court also left for future examination by admiralty courts the effect of the comparative fault rule on cargo interests.[20] Despite establishing a proportional fault rule to which most major maritime nations adhere, United States admiralty courts continue to apply the principle of joint and several liability among vessels at fault to allow full recovery by innocent cargo owners from non-carrying vessels.[21] Non-carriers, in turn, may seek equal contribution from carriers at fault. International maritime collision law, however, permits innocent cargo owners to obtain proportional recovery from each vessel according to its fault and without provision for carrier contribution.[22] Therefore, international choice of forum remains an important factor for cargo interests seeking to litigate inno-

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because human experience justifies it on logical grounds, because it is a procedural convenience, or because it furthers a result deemed socially desirable. Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906 (1931). However, one commentator has noted that "presumption" has been used in eight different senses by the courts. Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195, 196-207 (1953). The major-minor fault "rule", *see* text accompanying notes 24-30 *infra,* is not really a rule, but a presumption. California v. The Italian M.S. Ilice, 534 F.2d 836, 839 (9th Cir. 1976); 35 MD. L. REV. 714, 720 (1976). In addition, the *Pennsylvania* "rule", *see* text accompanying notes 31-50 *infra,* and the "rule" of error *in extremis, see* text accompanying notes 51-59 *infra,* are more accurately described as presumptions.

[16] *See* text accompanying notes 31-50 *infra.*

[17] *See* text accompanying notes 96-98 *infra.*

[18] *See* text accompanying note 99 *infra.*

[19] *See* text accompanying notes 90-95 *infra.*

[20] No cargo claims were involved in United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

[21] *See* text accompanying notes 134-45 *infra.*

[22] *See* text accompanying notes 134-51 *infra.*

cent cargo loss.[23]

Three presumptions were developed in American admiralty law to complement the rule of divided damages. The major-minor fault rule was applied where a collision was caused by the gross and inexcusable fault of one vessel while the fault of the other vessel was merely technical and did not contribute significantly to the cause of the collision.[24] Where one vessel was grossly negligent, courts tended to resolve all doubts in favor of the comparatively innocent vessel by finding non-contributing fault[25] or disregarding slight fault.[26] In such cases, the vessel guilty of gross error was held liable for the entire loss to both vessels.[27] Only clear proof of substantial contributing fault could rebut the presumption in favor of the more innocent vessel.[28] Unfortunately, uniform application of the rule was precluded by the vagueness of admiralty court guidelines[29] for its use, thereby rendering the rule unreliable.[30]

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[23] *Id.*

[24] The rule was enunciated in The City of New York, 147 U.S. 72, 85 (1893):

> Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.

Upon establishing that one vessel was grossly at fault, the major-minor fault rule created an evidentiary problem of sufficiency of proof. Damages would not be divided without proof of the other vessel's substantial contributing fault. *See* The Victory & The Plymothian, 168 U.S. 410, 423 (1897); Compania de Maderas de Caibarien v. The Queenston Heights, 220 F.2d 120 (5th Cir. 1955). The major-minor fault rule was properly applied as an evidentiary presumption under the divided damages rule. *See* 35 Md. L. Rev. 714, 720 (1976).

[25] *See, e.g.,* The Oregon, 158 U.S. 186, 204 (1895); The Cornell 15 F.2d 375 (2d Cir. 1926).

[26] *See, e.g.,* The Great Republic, 90 U.S. (23 Wall.) 20, 35 (1875); Theothilatos v. Martin Marine Transp. Co., 127 F.2d 1016 (4th Cir. 1942). *See generally* Griffin, *supra* note 1, at § 224.

[27] *See, e.g.,* The Victory & The Plymothian, 168 U.S. 410, 423 (1897).

[28] The Oregon, 158 U.S. 186, 197 (1895). Where one vessel is clearly at fault, "it is not unreasonable to require that she should make the fault of the other equally clear." *Id.* at 204.

[29] Although the major-minor fault rule was clearly stated in *The City of New York*, *see* note 24 *supra*, the term "minor" is susceptible of varying definitions; application of the term is contingent upon each court's judgment as to the range of degrees of fault which might appropriately be termed "minor."

[30] *Compare* Compania de Maderas de Caibarien v. The Queenston Heights, 220 F.2d 120 (5th Cir. 1955) *with* The Atlas, 93 U.S. 302 (1876); Tide Water Assoc. Oil Co. v. The Syosset, 203 F.2d 264 (3d Cir. 1953); *and* National Bulk Carriers, Inc. v. United

Another presumption, the rule of *The Pennsylvania,*[31] frequently was employed in determining the liability of parties involved in a collision.[32] To invoke the *Pennsylvania* rule, a party first had to establish that the other party violated a navigational regulation intended both to prevent the type of loss actually suffered, and to protect the party who suffered the loss.[33] As a legal consequence of statutory violation, courts employing the rule inferred that violation of a statute indicated a disregard for a standard of correct action.[34] The *Pennsylvania* rule thus functioned as a presumption that violation of statutes or regulations intended to prevent collisions[35] constituted fault[36] by the violator and was prima facie evidence that the violation contributed to the cause of the mishap.[37] The *Pennsylvania* rule shifted the burden of proof[38] concerning the causal relationship from

States, 183 F.2d 405, 410 (2d Cir.) (Hand, J., dissenting), *cert. denied,* 340 U.S. 865 (1950). *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 7-4 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

[31] 86 U.S. (19 Wall.) 125 (1873). After the collision of the Pennsylvania and the Mary Troop, the Supreme Court found that the Pennsylvania was more at fault for operating at an excessive speed in heavy fog. *Id.* at 133-35. The violation by the Mary Troop was ringing a bell, which indicated that a vessel was stationary, instead of sounding a foghorn as required by statute when a vessel was underway. *Id.* at 135-36. The Mary Troop, nevertheless, was held liable for one-half of the total damages. *See generally* Zapf, *The Growth of the Pennsylvania Rule: A Study of Causation in Maritime Law,* 7 J. MARIT. L. & COM. 521 (1976) [hereinafter cited as Zapf].

[32] The *Pennsylvania* rule also was applied in cases involving collisions between vessels and stationary objects. *See, e.g.,* Complaint of Wasson, 495 F.2d 571, 580 (7th Cir.), *cert. denied,* 419 U.S. 844 (1974). *See* note 6 *supra.*

[33] Note, *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner,* 54 BOSTON U.L. REV. 78, 79 (1974). Fault on the part of a vessel involved in a collision also may result from failure to exercise due care without, in fact, violating any navigational statutes. *See* GILMORE & BLACK, *supra* note 30, at § 7-5.

[34] The concept of "fault" presupposes a standard of correct action. Navigational rules codify this standard. *Id.* at § 7-4. *See* note 35 *infra.*

[35] Most cases invoking the *Pennsylvania* rule have concerned violations of one of four sets of statutory navigational rules: International Rules of Navigation, 33 U.S.C. §§ 1051-94 (1970); the Great Lakes Rules, 33 U.S.C. §§ 241-95 (1970); the Western Rivers Rules, 33 U.S.C. §§ 301-56 (1970); and the Inland Rules, 33 U.S.C. §§ 151-232 (1970). *See* GILMORE & BLACK, *supra* note 30, at §§ 7-3 and 7-7 through 7-13. Other statutes have also been held to come within the ambit of the *Pennsylvania* rule. These include federal, state, and local enactments, as well as proven customs and regulations not inconsistent with the Rules of Navigation. *Id.* at §§ 7-3, 7-13.

[36] "Fault" is a conclusion that there is legal significance to the physical event of collision. *See* The Java, 81 U.S. (14 Wall.) 189, 198-99 (1872); GILMORE & BLACK, *supra* note 30, at §§ 7-2 to 7-4 (2d ed. 1975).

[37] 35 MD. L. REV. 714, 721 (1976). *See* GRIFFIN, *supra* note 1, at § 25.

[38] The term "burden of proof" is ambivalent because it includes two separate burdens of proof: the burden of producing evidence of a particular fact in issue and

the party seeking to impose liability for negligence to the statutory violator. The rule required the vessel in statutory violation to show beyond all reasonable doubt that the violation could not have caused the collision.[39] Thus, the presumption was rebuttable only by proof that a violation was not just unlikely to have been a cause of the collision, but rather, that it could not have caused the collision.[40] When this burden was not discharged, both vessels were deemed at fault and were liable for equally divided damages.[41] Therefore, both the preliminary presumption of fault occasioned by a regulatory violation and the presumption of causation[42] were significant to the ultimate effect of establishing mutual fault in collisions under the *Pennsylvania* rule.

While the *Pennsylvania* rule was designed to promote diligent observance of navigational rules,[43] it also punished harshly violators

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the burden of persuading the trier of fact that the alleged fact is true. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. E. Cleary, 1972); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE Ch. 9 (1898). While much disagreement exists among commentators, some have stated that the violator must meet both burdens. *E.g.*, Zapf, *supra* note 31, at 525; Note, *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner*, 54 BOSTON U.L. REV. 78, 80 (1974). *See* GILMORE & BLACK, *supra* note 30, at § 7-5, 404. Other commentators argue that the only effect of the *Pennsylvania* rule's presumption is to subject the violator to the burden of going forward with evidence to overcome the inference that the violation was a contributing cause of the collision. *E.g.*, GRIFFIN, *supra* note 1, at § 25. *See* The Aakre, 122 F.2d 469, 474 (2d Cir.), *cert. denied*, 314 U.S. 690 (1941) (mere production of evidence sufficient, leaving burden on plaintiff to prove proximate cause).

[39] *The Pennsylvania*, 86 U.S. (19 Wall) at 136. A number of cases suggested a modification of the harsh *Pennsylvania* rule, providing that a ship seeking to escape the rule need not show that its fault could not "by any stretch of the imagination," have contributed causally to the accident. China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 782 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967). *Accord*, Seaboard Tug & Barge, Inc. v. Rederi AB/Disa, 213 F.2d 772, 775 (1st Cir. 1954). The Fourth Circuit has circumvented the rule by utilizing such tort doctrines as "passive action" and "last clear chance". *See, e.g.*, Tempest v. United States, 404 F.2d 870, 872 (4th Cir. 1968); text accompanying notes 90-95 *infra*. In addition, many circuits have been reluctant to find the burden unsatisfied when the non-violator's fault has been gross, indicating an unwillingness to apply the divided damages rule. *See* GILMORE & BLACK, *supra* note 30, at § 7-5; text accompanying notes 47-50 *infra*.

[40] The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873). The word "could" may have been employed regrettably in the rule's requirement that the statutory violation could not have caused the collision since a violation almost always could have "some" possible, albeit remote, relation to the accident. GRIFFIN, *supra* note 1, at § 201.

[41] *See, e.g.*, The Martello, 153 U.S. 64 (1894); Richelieu & Ont. Navig. Co. v. Boston Marine Ins. Co., 136 U.S. 408 (1890).

[42] The *Pennsylvania* rule is usually referred to as a presumption of causation. *See, e.g.*, Zapf, *supra* note 31, at 521. *But see* text accompanying notes 32-36 *supra*.

[43] *See, e.g.*, GILMORE & BLACK, *supra* note 30, at § 7-5.

involved in a collision. Application of the rule to minor infractions of navigational rules often resulted in equal liability under the divided damages rule.[44] The *Pennsylvania* rule promoted safety by requiring strict adherence to navigational statutes,[45] but also penalized statutory violators with an extreme burden of proof.[46]

In some cases, the practical effect of the *Pennsylvania* rule was related to the major-minor fault rule. After a collision, a vessel that had violated a statute could try to exculpate itself from liability under the major-minor fault rule.[47] In seeking to overcome the strong *Pennsylvania* rule's presumption of contributing fault, a party may have argued that fault occasioned by statutory violation could not have been a contributing cause of the collision where the other vessel had been grossly at fault.[48] In a limited number of cases, the party proven to have been a statutory violator had been able to discharge the heavy *Pennsylvania* burden of proof of causation by showing that the loss would have occurred regardless of its violation.[49] Thus, the major-minor fault rule could serve to ameliorate strict application of the *Pennsylvania* rule.[50]

In addition to the *Pennsylvania* rule and the major-minor fault rule, federal courts employed the error *in extremis* rule to avoid division of damages where a vessel had been threatened with imminent peril through no fault of its own.[51] Any fault attributable to the en-

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[44] *See* note 40 *supra*.

[45] *See* Note, *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner*, 54 BOSTON U.L. REV. 78, 81 (1974).

[46] The Princess Sophia, 61 F.2d 339 (9th Cir. 1932), *cert. denied*, 288 U.S. 604 (1933).

[47] The major-minor fault rule is restricted in scope by the *Pennsylvania* rule, which requires strict adherence to Rules of Navigation, *see* note 36 *supra*, and prevents courts from easily discounting the seriousness of any violation. *See* GILMORE & BLACK, *supra* note 30, at § 7-5.

[48] The major-minor fault rule encompasses both statutory fault and fault caused by lack of due care. Where a party's allegedly minor fault was statutory, that party might request the court to apply the major-minor fault rule.

[49] *See, e.g.*, Compania de Maderas de Caibarien v. The Queenston Heights, 220 F.2d 120 (5th Cir. 1955); Seaboard Tug & Barge, Inc. v. Rederi AB/Disa, 213 F.2d 772 (1st Cir. 1954).

[50] GILMORE & BLACK, *supra* note 30, at § 7-5; 35 MD. L. REV. 714, 723 (1976). The practical operation of the *Pennsylvania* rule, insofar as it elicited proof rebutting its presumptions, was correlated to the major-minor fault rule. However, some cases indicate that application of the major-minor fault rule was limited to cases involving violations of ordinary duties rather than breaches of statutory requirements. *See, e.g.*, Diesel Tanker F. A. Verdon, Inc. v. Stakeboat No. 2, 340 F.2d 465, 468 (2d Cir. 1965); O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp., 259 F.2d 11, 22 (5th Cir. 1958).

[51] The general principle was stated in The Propeller Genesee Chief, 53 U.S. (12

dangered vessel, whether a statutory violation or breach of a navigational standard of care, was presumed not to have contributed to the collision because of exigent circumstances.[52] The rule was based on the inference that a gravely threatened vessel could not always be expected to exercise due care.[53] However, the rule of error *in extremis* could be invoked only after demonstrating that the vessel taking evasive action could not have contributed to the danger which gave rise to the collision.[54] Furthermore, the error must have been made upon confrontation of a complex crisis by the navigator, precluding an opportunity to exercise proper judgment.[55] Finally, the error must have been due, not to the gross negligence or incompetence of the navigator, but to the sudden peril that prevented correct action.[56]

Under the error *in extremis* rule, fault normally attributable to a statutory violation might be vitiated by the emergency of a seemingly unavoidable collision because a finding of negligence would require that reasonable opportunity for a decision and the exercise of due care existed.[57] Therefore, application of the rule of error *in extremis* acted partially to rebut the presumption of contributing fault under the *Pennsylvania* rule.[58] When danger of a probable collision was precipitated by the gross fault of another vessel, the error *in extremis* rule provided that an honest error in judgment was not to be imputed as fault to the vessel placed in grave danger. Thus, the rule excusing error *in extremis* may be regarded as one manifestation of the major-minor fault rule:[59] the fault of the vessel causing the calamity was found to eclipse the fault of the other vessel seeking to escape the danger.

How.) 233, 245 (1852). *See* Wilson v. Pacific Mail S.S. Co., 276 U.S. 454 (1928); The Nacoochee, 137 U.S. 330, 340 (1890).

[52] *See* GRIFFIN, *supra* note 1, at § 233.

[53] *Id.*

[54] *See, e.g.,* The Elizabeth Jones, 112 U.S. 514, 523 (1884); The Paris, 37 F.2d 734 (S.D.N.Y.), *aff'd mem.,* 44 F.2d 1018 (2d Cir.), *cert. denied,* 283 U.S. 833 (1930).

[55] If the decision by the endangered vessel was a difficult and doubtful one, much greater leniency was granted to that vessel. GRIFFIN, *supra* note 1, at § 235. However, where the obvious alternative to a collision was to reverse the engines, failure to do so many have constituted fault. Southern Pac. Co. v. United States, 72 F.2d 212 (2d Cir. 1934).

[56] When substantial time preceding a collision was sufficient to permit proper action, a wrong maneuver was not an error *in extremis. See, e.g.,* A.H. Bull S.S. Co. v. United States, 34 F.2d 614, 616 (2d Cir. 1929); The Lake Calvenia, 2 F.2d 416, 417 (4th Cir. 1924).

[57] GRIFFIN, *supra* note 1, at § 233.

[58] *See, e.g.,* Belden v. Chase, 150 U.S. 674 (1893); The Maggie J. Smith, 123 U.S. 349 (1887).

[59] GRIFFIN, *supra* note 1, at § 224, 505.

While the *Pennsylvania* rule, the major-minor fault rule and the error *in extremis* rule all had well-reasoned bases and provided sound justification for modifying the divided damages rule, the *Reliable Transfer* decision and the proportional fault rule have undermined their continuing validity. However, the specific holding of *Reliable Transfer* in abrogating the divided damages rule did not directly abolish any of these rules.[60] Whether the nature of proportional damages will allow the use of the rules even as permissible evidentiary inferences depends on their utility in establishing the existence and degrees of fault.[61]

The Supreme Court in *Reliable Transfer* implied that resort to the major-minor fault rule was no longer necessary.[62] Comparatively insignificant negligence by a vessel which was previously ignored under the major-minor fault rule might now subject that same vessel to some proportion of liability.[63] Thus, in *Getty Oil Co. v. S. S. Ponce De Leon*,[64] the Second Circuit held that slight fault should not be overlooked by application of the *Reliable Transfer* rule, and that precedents which invoked the major-minor fault rule were no longer consistent with the purposes of the proportional fault rule.[65] Because a vessel now pays its proportional share of damages, however small, justification no longer exists for courts to disregard slight fault where the fault is causally linked to the mishap.[66] In addition, one district court in *Harris v. Newman*[67] implied that the major-minor fault rule

[60] *See* 421 U.S. at 410-11.

[61] A "presumption" and an "inference" are not synonymous. A presumption is a deduction that the law requires a trier of fact to make, while an inference is a deduction the trier may or may not make, according to his own conclusions. Thus, a presumption is mandatory; an inference is permissible. BLACK'S LAW DICTIONARY 917-18 (4th rev. ed. 1968). *See* note 15 *supra*.

[62] *See* 421 U.S. at 406-07. The *Reliable Transfer* Court implied that the major-minor fault rule is too "crude" for further use. *Id.* at 407. The Court stated: "[t]his escape valve . . . simply replaced one unfairness with another. That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Id.* at 406. *See* Goschka, *supra* note 2, at 66; 35 MD. L. REV. 714, 723 (1976); 16 VA. J. INT'L. L. 202 (1975).

[63] Linehan v. United States Lines, Inc., 417 F. Supp. 678, 689 n.17 (D. Del. 1976); Getty Oil Co. v. S.S. Ponce De Leon, 409 F. Supp. 909, 916 (S.D.N.Y. 1976); *aff'd*, 555 F.2d 328, 335 (2d Cir. 1977).

[64] 555 F.2d 328 (2d Cir. 1977), *aff'g*, 409 F. Supp. 909 (S.D.N.Y. 1976).

[65] 555 F.2d at 335.

[66] One circuit has suggested that the major-minor fault rule is, in effect, a rebuttable presumption that the minor fault was not a cause of the collision. California v. The Italian M.S. Ilice, 534 F.2d 836, 840 (9th Cir. 1976). *But see* text accompanying notes 24-30 *supra*.

[67] 404 F. Supp. 947 (S.D. Miss. 1975).

was not a necessary aid in finding that the gross negligence of one vessel was the sole and proximate cause of the collision.[68] However, the Ninth Circuit in *California v. The Italian M. S. Ilice*[69] has suggested that the rule may help to establish whether the "major" party has been the exclusive cause of the collision and is solely at fault, or whether the "minor" party has been one of the proximate causes of the collision and should be held to some degree of liability.[70] Therefore, the major-minor fault rule should not be applied to discount the contributing fault of a vessel under *Reliable Transfer*. Nevertheless, the rule may be employed by admiralty courts as an evidentiary inference with respect to the preliminary question of whether the comparatively insignificant fault contributed causally to the collision.

Because the *Reliable Transfer* Court did not expressly abolish the *Pennsylvania* rule,[71] a number of courts have assumed that it is still applicable and suitable for encouraging compliance with navigational statutes.[72] While the Supreme Court in *The Pennsylvania* intended to promote more diligent observance of statutes,[73] the practical effect of the rule in determining causation and fault under divided damages principles ultimately dictated the allocation of liability between parties.[74] Because of the manner in which the proportional fault rule

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[68] *Id.* at 952-53. The *Harris* court may have blurred the distinction between sole fault and major-minor fault. The court applied the rule of The City of New York, 147 U.S. 72, 85 (1893), which stated the major-minor fault rule, *see* note 24 *supra*, to conclude that one vessel did nothing that actively contributed to the collision. 404 F. Supp. at 952-53. At the same time, the *Harris* court stated that discussion of the major-minor fault rule was unnecessary because one vessel was the sole and proximate cause of the collision. *Id.* at 953.

[69] 534 F.2d 836 (9th Cir. 1976).

[70] *Id.* at 840. The suggestion has been made that the major-minor fault rule may be helpful for determining both the existence and degree of fault. 21 LOYOLA L. REV. 790, 792 (1975). However, other commentators have recognized its obsolescence. *E.g.*, 36 LA. L. REV. 288, 295 (1975); 35 MD. L. REV. 714, 723-24 (1976); 7 TEX. TECH. L. REV. 113, 118 (1975).

[71] *See* 421 U.S. at 410-11. The *Reliable Transfer* Court did criticize the *Pennsylvania* rule as it related to the divided damages rule. *Id.* at 405-06. *Accord*, Three Rivers Rock Co. v. M/V Martin, 401 F. Supp. 15, 18 (E.D. Mo. 1975) (acknowledging continued existence of rule).

[72] *See, e.g.*, Crown Zellerbach Corp. v. Willamette-Western Corp., 519 F.2d 1327, 1329 (9th Cir. 1975); Jones v. Texaco Panama, Inc., 428 F. Supp. 1333, 1336 (E.D. La. 1977); Guidry v. LeBeouf Bros. Towing Co., 398 F. Supp. 952, 959 (E.D. La. 1975).

[73] 86 U.S. (19 Wall.) 125, 136 (1873) ("Such a rule is necessary to enforce obedience to the mandate of the statute").

[74] *See* text accompanying notes 31-50 *supra*.

disposes of the crucial issues of causation and liability,[75] the practical effect of the *Pennsylvania* rule in determining causation and fault need not survive *Reliable Transfer.*[76] Moreover, the *Pennsylvania* rule does not necessarily remain unchanged after the *Reliable Transfer* decision merely because it promoted the still desirable goal of adherence to regulations.[77]

While the *Pennsylvania* rule may be helpful in determining the existence and degree of fault in allocating proportional fault,[78] the heavy burden of persuasion which the rule imposes on the statutory violator may interfere with a court's exercise of judgment. The Ninth Circuit, in *Ishizaki Kisen Co. v. United States,*[79] declared that utilization of the rule in a proportional fault context would complicate adjudication of collision liability because of difficulty in comparing the effect of a statutory violation to the non-statutory fault of the other party.[80] In addition, where both parties have violated safety statutes, determination of their comparative fault would necessitate weighing the relative importance of each statute against all others.[81] Where statutory violations are found to be of equal gravity, application of the *Pennsylvania* rule could compel the very division of damages which the *Reliable Transfer* Court disfavored.[82]

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[75] *See* text accompanying notes 105-18 *infra.* Under the proportional fault rule, negligence must contribute to the cause of the collision. *Id.*

[76] Ishizaki Kisen Co. v. United States, 510 F.2d 875, 880-81 (9th Cir. 1975) (effect of rule in disposing of crucial issues of causation and liability renders it akin to substantive law).

[77] Adherence to regulations is still a desirable goal because compliance with navigational rules induces navigational care. *See* note 34 *supra.*

[78] *E.g.,* 21 LOYOLA L. REV. 790, 797 (1975). *But see* 11 TEX. INT'L L. J. 159, 163 (1976) (stating that the rule is obsolete).

[79] 510 F.2d 875 (9th Cir. 1975). *See Ninth Circuit Survey-Admiralty-Collision,* 6 GOLDEN GATE U.L. REV. 348, 353 (1976).

[80] 510 F.2d at 880. The *Ishizaki* court concluded that the applicable Japanese law had abolished legal presumptions of fault, thereby precluding application of the *Pennsylvania* rule, *id.* at 882-83, and that Japan apportions fault between parties instead of dividing damages. *Id.* at 878. At the time of the Ninth Circuit's decision in *Ishizaki,* substantive law in the United States still required a division of damages in collisions involving mutual fault while Japan, as a signatory to the Brussels Convention, applied a rule of comparative negligence. *Id.* at 880.

Commentators have noted that "[t]here is not entire consistency in the qualification of duties as 'statutory' and 'non-statutory'." GILMORE & BLACK, *supra* note 30, at § 7-5, 497. For example, Rule 29, International Rules of Navigation, 33 U.S.C. §§ 1051-94 (1970), contains broad language which might be read to mandate "due care". Such an interpretation would make all negligence "statutory fault."

[81] *Ninth Circuit Survey-Admiralty-Collision,* 6 GOLDEN GATE U.L. REV. 348, 352 (1976).

[82] *Id.* at 352 n.84. Where both parties have violated safety statutes, the

The rule of error *in extremis* often was related in practical effect to both the major-minor fault rule and the *Pennsylvania* rule.[83] Arguably, the rule no longer should be retained after the *Reliable Transfer* decision because it may be illogical to admit that an error has been committed by a vessel and then ignore the fault attributable to the party who has violated a statute or breached a duty of care.[84] In addition, the error *in extremis* presumption suffers from the same vagueness that plagued the major-minor rule.[85] However, an error by a vessel avoiding an imminent collision is not necessarily inculpatory fault, either because the error was the inevitable consequence of the situation[86] or because the initial negligence was the proximate cause of the error.[87] Thus, continued application of the error *in extremis* rule could aid in determining the actual existence of fault. While even slight fault by a vessel contributing to a collision should not be ignored under the proportional fault rule,[88] another possible application

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Pennsylvania rule might compel divided damages where neither party has discharged its burden under the rule. *Id.* Alternatively, admiralty courts might rule that the burden on each party under the rule cancels the other's burden. The *Pennsylvania* rule would not aid the court in either alternative. *Id.*

The *Pennsylvania* rule may be viable as a presumption against a party that its statutory violation contributed to the causation of an accident. *See* 36 LA. L. REV. 288, 294 (1975). However, the proportional fault rule provides that statutory fault causally linked to the collision is a factor to be weighed in apportioning degrees of fault. *See* text accompanying notes 119-22 *infra*. Therefore, the *Pennsylvania* rule, viewed in this way, is not particularly helpful to the courts. The *Pennsylvania* presumption may impose the burden of proof on a vessel to prove that violation of a statute was only one contributing cause of a collision rather than its sole cause. 16 VA. J. INT'L L. 202, 213 (1975).

Although the Supreme Court based the *Pennsylvania* decision partially upon a similar law in England, the English Maritime Conventions Act of 1911 abolished statutory presumptions of fault. *See* 4 R. MARSDEN, BRITISH SHIPPING LAWS, COLLISIONS AT SEA 633 (11th ed. 1961). The effect of the Maritime Conventions Act of 1911 was that each party must prove the allegations which he makes against another, whether the negligence alleged to have caused damage concerns breach of regulations or breach of duty. *See* The Heranger, [1921] Lloyd's List L.R. 375. American courts might similarly abolish the *Pennsylvania* rule. *See* Goschka, *supra* note 2, at 66; 10 SUFFOLK U.L. REV. 116, 125 (1975).

[83] *See* text accompanying notes 57-59 *supra*.

[84] 11 TEX. INT'L L.J. 159, 163 (1976) (*in extremis* is a relic of the past). *See* text accompanying notes 62-66 *supra*. *But see* Mole & Wilson, *A Study of Comparative Negligence,* 17 Cornell L.Q. 333, 352 (1932) (application of the error *in extremis* rule should be the same under either the proportional fault rule or divided damages rule). The Supreme Court did not mention the rule of error *in extremis* in *Reliable Transfer.*

[85] GILMORE & BLACK, *supra* note 30, at § 7-3, 491. *See* note 30 *supra*.

[86] 50 TULANE L. REV. 148, 152 n.35 (1975).

[87] Goschka, *supra* note 2, at 51. *See* 13 HOUS. L. REV. 175, 185 (1975).

[88] *See* text accompanying notes 62-70 *supra*.

of error *in extremis* rule might sustain its viability. The rule may be retained as a permissible inference that the exigent circumstances of an inevitable collision may diminish to some lesser proportion the degree of fault attributable to a navigator whose error was the result of improper judgment in an emergency.[89]

In addition to the three legal presumptions, the major-minor fault rule, the *Pennsylvania* rule, and the rule of error *in extremis*, the doctrine of last clear chance complemented the rule of divided damages. The doctrine of last clear chance has been applied selectively[90] in admiralty collision cases to relieve a claimant from liability where the claimant's minimal negligence in creating a dangerous situation was known to the other party; rather than avoiding collision, the ensuing negligence of the other party led to the damage.[91] Like the major-minor fault presumption, the doctrine of last clear chance was applied in a limited number of cases to require the party whose fault was gross to shoulder the entire burden of collision damages.[92] Because of disparate application of the doctrine[93] and its similarity to

[89] The English admiralty courts still apply the rule of error *in extremis* in a proportional fault context. *See, e.g.,* The Testbank [1941] 70 Lloyd's List L.R. 270, 276, (Langton, J.); The Court of Appeal varied the proportions of blame to account for the error. [1942] 72 Lloyd's List L.R. 6.

[90] The applicability of the last clear chance doctrine in admiralty cases has always been uncertain. Cenac Towing Co. v. Richmond, 265 F.2d 466, 470-72 (5th Cir. 1969). *Compare* The Perserverance, 63 F.2d 788, 790 (2d Cir.) *cert. denied,* 289 U.S. 744 (1933); *and* The El Monte, 252 F. 59, 63-64 (5th Cir. 1918); *with* The Norman B. Ream, 252 F. 409, 414 (7th Cir. 1918). Because recovery in maritime collision cases is not defeated by contributory negligence, admiralty courts have been less willing than other courts to find that the doctrine of last clear chance applies. GILMORE & BLACK, *supra* note 30, at § 7-5, 494. *See* GRIFFIN, *supra* note 1, at § 215 (doctrine not to be applied unless definite line of cleavage exists between the final fault and prior negligence).

[91] *In re* Kinsman Transit Co., 338 F.2d 708, 720 (2d Cir. 1964), *cert. denied,* 380 U.S. 944 (1965).

[92] *See, e.g.,* Crawford v. Indian Towing Co., 240 F.2d 308, 311-12 (5th Cir.), *cert. denied,* 353 U.S. 958 (1957) (damage attributed entirely to gross fault of one vessel); The Sanday, 122 F.2d 325 (2d Cir. 1941) (per curiam), (sole liability, minor fault of tug was immaterial).

[93] *See* Manhattan Lighterage Corp. v. United States, 103 F. Supp. 274, 278 (S.D.N.Y. 1951). Some courts require that the defendant must actually have been aware of the danger to have had the last clear chance to avoid the accident while other courts require only that the defendant should have discovered the chance to avoid the collision in the exercise of reasonable care. *Id.* In one line of cases, courts loosely referred to the doctrine when the earlier negligent act by one party was simply not a proximate cause of the collision. *See* Crawford v. Indian Towing Co., 240 F.2d 308, 311 (5th Cir. 1955); The Perseverance, 63 F.2d 788, 790 (2d Cir. 1933), (fault must be a "cause", not a "condition" of the collision).

the now abrogated major-minor fault rule,[94] the comparative negligence rule of *Reliable Transfer* renders the doctrine obsolete.[95]

Two principles, "inscrutable fault" and "inevitable accident," were left unexamined by the *Reliable Transfer* Court although they traditionally have been employed in collision cases. Inscrutable fault has been defined as a situation where evidence of the mishap is so conflicting that it is impossible to determine what direct acts caused the collision or to specify any particular fault.[96] Under such circumstances, neither party has discharged its burden of proof,[97] and no negligence can be found. In those rare instances where the doctrine can be applied, each vessel bears its own damages because the right to damages is based solely upon negligence causing or contributing to a collision.[98] Liability for fault also is denied in a situation of inevitable accident, where the collision could not be prevented under the existing circumstances by the exercise of ordinary care, caution, and maritime skill by both vessels.[99]

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[94] *E.g.*, Williamson v. The Carolina, 158 F. Supp. 417, 423 (E.D.N.C. 1958). In *Williamson*, the court noted that admiralty cases tacitly or expressly recognizing the last clear chance doctrine might have applied the major-minor fault rule and achieved the same result. *Id. See* text accompanying notes 24-30 *supra.*

[95] 36 LA. L. REV. 288, 295 (1975). However, in S.C. Loveland, Inc. v. East West Towing, Inc., 415 F. Supp. 596, 606-07 (S.D. Fla. 1976), the court found that the doctrine of last clear chance was inapplicable to the circumstances of the case, implying its continuing validity in post-*Reliable Transfer* cases.

[96] *See, e.g.*, The Jumna, 149 F. 171, 173 (2d Cir. 1906). The *Jumna* court indicated that the phrase "inevitable accident" has a comprehensive meaning which includes inscrutable fault. In early cases of inscrutable fault in the United States the damages were divided precisely as in cases where both vessels were at fault. *E.g.*, The Worthington & Davis, 19 F. 836 (E.D. Mich. 1883). At the time of the *Jumna* decision, a preponderance of authority held that there could be no recovery absent affirmative evidence of fault. The Clara, 102 U.S. 200 (1880); The Grace Girdler, 74 U.S. (7 Wall.) 196, 203 (1869).

[97] *See* The Jumna, 149 F. 171, 173 (2d Cir. 1906); 36 LA. L. REV. 288, 296 (1975).

[98] Wilson Marine Transit Co. v. Pennsylvania-Ont. Transp. Co., 191 F. Supp. 210, 219 (N.D. Ohio 1960). ("end result of each party's being required to pay its own loss is in accord and harmonizes with the Court's concept of justice under the evidence and law in this case"). The principle of inscrutable fault apparently has fallen into disuse because modern navigation rules and communication equipment aid courts in establishing fault on the part of a vessel. *See* Cities Service Oil Co. v. M/V Melvin H. Baker, 260 F. Supp. 244 (E.D. Pa. 1966). In *Cities Service*, counsel were invited to comment upon the possible application of the inscrutable fault doctrine to the case because of the significant amount of conflicting evidence. Nevertheless, the court weighed the uncontradicted facts of record with the assumptions, disputed pre-collision data, and conclusions of experts on both sides to find one vessel solely at fault. *Id.* at 246-47.

[99] *See, e.g.*, The Morning Light, 69 U.S. (2 Wall.) 550, 560 (1864); Atkins v. Lorentzen, 328 F.2d 66, 69 (5th Cir. 1964). *See also* GILMORE & BLACK, *supra* note 30, at § 7-2.

The *Reliable Transfer* proviso to divide damages when it is impossible to determine fairly the comparative degrees of fault[100] may apply to cases of inscrutable fault and inevitable accident. However, this corollary to the proportional fault rule presumably applies to those situations where there is concurrent but unassessable fault on the part of both vessels.[101] In order to divide damages equally under *Reliable Transfer,* negligence by both parties must be presupposed.[102] In contrast, inevitable accident and inscrutable fault characterize collisions where fault is unattributable to the parties.[103] In such situations, no recovery was previously available. Denying any award of division of damages in the absence of attributable fault, under principles of inscrutable fault and inevitable accident, does not necessarily conflict with awards under *Reliable Transfer.* Therefore, the *Reliable Transfer* decision should not be interpreted to require damage recovery, even equally divided damages, in collision cases involving inscrutable fault and inevitable accident where fault cannot be determined.[104]

While federal courts and commentators are uncertain about the continuing validity of the *Pennsylvania,*[105] major-minor fault,[106] and error *in extremis* rules,[107] the courts have exhibited little apparent difficulty in applying the *Reliable Transfer* rule to compute the proportions of fault assignable to the respective parties of a collision.[108]

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[100] 421 U.S. at 407. "When it is impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution." *Id.*

[101] *Id.*

[102] There is a tenuous distinction between concurrent but unassessable negligence and a finding that fault is unattributable to the parties. 36 LA. L. REV. 288, 296 n.51 (1975).

[103] *See* text accompanying notes 96-99 *supra.*

[104] *See* 36 LA. L. REV. 288, 296 n.51 (1975).

[105] *Compare* Three Rivers Rock Co. v. M/V Martin, 401 F. Supp. 15, 18 (E.D. Mo. 1975) (no collision, but dictum that defendant would not be liable because plaintiff had not discharged *Pennsylvania* burden of proof regarding violation of the Wreck Act, 33 U.S.C. § 409 (1970)); *and* Guidry v. LeBeouf Bros. Towing Co., 398 F. Supp. 952, 959-60 (E.D. La. 1975) (vessel operating without horn contributed to collision under *Pennsylvania* rule); *and* Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 398 F. Supp. 1094, 1106 (E.D. La. 1975); *with* Crown Zellerbach Corp. v. Willamette-Western Corp., 519 F.2d 1327, 1329 n.3 (9th Cir. 1975) (trial court's failure to apply the *Pennsylvania* rule was not error because statutory violator's negligence had been considered in apportioning fault among defendants).

[106] *See, e.g.,* Getty Oil Co. v. S.S. Ponce De Leon, 409 F. Supp. 909, 917 (S.D.N.Y. 1976), *aff'd,* 555 F.2d 328 (2d Cir. 1977) (major-minor rule obsolete). *Cf.,* Harris v. Newman, 404 F. Supp. 947, 952-53 (S.D. Miss. 1975). *(See* note 68 *supra.)*

[107] *See, e.g.,* 11 TEX. INT'L L.J. 159, 163 (1976); 16 VA. J. INT'L L. 202, 210 (1975).

[108] *See, e.g.,* Houston Barge Line, Inc. v. American Commercial Lines, 416 F.

The proportional fault rule requires that each vessel be liable for property damage[109] according to its degree of fault unless the propor-

Supp. 417, 425 (N.D. Miss. 1976) (evidence established that negligence of one pilot was twice as great in quantity and quality as other pilot); Creole Shipping Ltd. v. Diamandis Pateras Ltd., 410 F. Supp. 313 (S.D. Ala. 1976) (injury to plaintiff's negligently moored vessel as a result of suction of defendant's vessel negligently operated at excessive speed; fault apportioned two-thirds to defendant, one-third to plaintiff); Seely v. Red Star Towing & Transp. Co., 396 F. Supp. 129 (S.D.N.Y. 1975) (owner of tugboat that collided with unmarked sunken wreck was entitled to damages from wreck owner less 25% because tugboat captain frequently had seen flashing light on sunken boat and was negligent in failing to use searchlights to look for wreck).

[109] A potential problem in the application of *Reliable Transfer* was raised by the Court's use of the term "property damage." Under the divided damages rule, personal injury awards were included in the total measure of damages to be allocated between the colliding vessels. Nutt v. Loomis Hydraulic Testing Co., 552 F.2d 1126, 1134 n.26 (5th Cir. 1977). Thus, the term property damage in the *Reliable Transfer* holding does not foreclose application of the proportional fault rule when personal injury awards in maritime collision cases are at issue. *Id. See* Winter v. Eon Productions, Ltd., 433 F. Supp. 742 (E.D. La. 1976).

Liability for "property damage" under *Reliable Transfer* may encourage courts to apply the proportional fault rule for recovery of cargo damage or loss in both collision and non-collision cases. *See* Vana Trading Skou Co. v. S.S. Mette Skow, 556 F.2d 100 (2d Cir. 1977). In *Vana Trading,* an admiralty cargo suit for damage to shipment of yams was brought by the consignee against the time charterer, who impleaded the vessel owner and stevedore. While the district court allocated damages pursuant to certain agreements by the parties, the district court noted in dictum that *Reliable Transfer* may apply to cargo loss situations. 415 F. Supp. 884, 888 (S.D.N.Y. 1976). However, the Second Circuit refused to apply the doctrine of proportionate fault to the cargo loss situation on appeal. 556 F.2d 100 (2d Cir. 1977). The court reasoned that while the time charterer could prove that damage to the cargo was in part caused by inadequate packaging, the time charterer was unable to prove the amount of damage attributable to such packaging. Thus, the Second Circuit found that the time charterer was liable for the full amount of damages under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1970), in accordance with the rule established in Schnell v. The Vallescura, 293 U.S. 296 (1934).

Prior to *Reliable Transfer,* the Supreme Court declared that it had never expressly applied the equal division of damage rule in any non-collision case. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284 (1952). However, the *Reliable Transfer* decision may answer the previously disputed question of how contribution between joint tortfeasors will be computed and whether contribution should be allowed by equal or proportional division of damages. *See* 7 TEX. TECH. L. REV. 113, 118 n.60 (1975). In *Halcyon,* the Court held that there could be no contribution between joint tortfeasors in a non-collision case. However, the party against whom contribution was sought, the plaintiff's employer, was immune from liability because the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-05 (1970), *as amended,* 33 U.S.C. §§ 902-48a (Supp. V. 1975), was interpreted as providing the plaintiff's only right to compensation. *But see* Brkaric v. Star Iron & Steel Co., 409 F. Supp. 516, 522-23 (E.D. N.Y. 1976).

The Court in Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974),

tions of fault cannot be ascertained.[110] Courts have recognized that the comparative measure of fault is mandatory[111] and that the proviso for equally divided damages where degrees of fault cannot be isolated is merely a necessary corollary to the *Reliable Transfer* rule.[112]

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apparently limited *Halcyon* to its facts and allowed contribution between joint tortfeasors in a non-collision maritime action for personal injuries in the absence of immunities imposed by statute. The *Cooper* Court did not resolve how contribution was to be computed, stating: "[W]e have no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties." 417 U.S. at 108 n.3

After the Supreme Court's decision in *Reliable Transfer*, the Third Circuit held that there was no reason why the proportional fault rule should not apply in non-collision maritime cases involving joint tortfeasor contribution. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 44 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 785 (1976). In an action arising under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-05 (1970), *as amended*, 33 U.S.C. §§ 902-48a (Supp V. 1975), the Fourth Circuit in Edmonds v. Compagnie General Transatlantique, 558 F.2d 186 (4th Cir. 1977) held that both *Cooper* and *Reliable* indicate that "a judgment against a vessel by a longshoreman . . . where both the vessel and the stevedore are negligent, should be limited to a sum equal to that part of the whole measured by its own fault . . . plus any valid lien the stevedore may have on the recovery by the longshoreman, but of course not to exceed the whole amount of the possible award against the vessel. . . ." *Id.* at 193-94.

Another court has applied the *Reliable Transfer* rule in a non-collision case where an action was filed for loss arising out of a fire against a marine contractor who furnished the ship with defective equipment. Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 402 F. Supp. 1187 (W.D. Wash. 1975).

[110] 421 U.S. at 411. *Accord*, Art. 4, Brussels Convention on Collision Liability of 1910. *See* note 5 *supra*. One commentator has considered the possibility that this provision allowing equally divided damages in the *Reliable Transfer* rule might become a loophole to the mandatory application of the rule. Goschka, *supra* note 2, at 71. However, the proviso is merely a necessary corollary to the proportional fault rule, and application of the comparative measure in American admiralty courts should be no different than that of the signatories of the Brussels Convention. *Id.* Moreover, the construction of the loophole by the Court in the proportional fault rule would be unlikely since the language of *Reliable Transfer* clearly indicates that damages are to be equally divided if and only if the degrees of fault cannot be measured. 421 U.S. at 411. The mandatory language does not preclude equal division of damages where the fault actually is equal between the parties. *See* Bunge Corp. v. M/V Furness Bridge, 396 F. Supp. 852 (E.D. La. 1975). In addition, the rule of comparative negligence may have no application where one vessel's sole fault requires the negligent vessel to bear the whole loss for both vessels. *See* Toney v. United States, 397 F. Supp. 307, 312 (M.D. La. 1975).

[111] *See, e.g.*, California v. The Italian M.S. Ilice, 534 F.2d 836, 841 (9th Cir. 1976) (Ninth Circuit would not assume that trial court had literally meant fault was equal in its pre-*Reliable Transfer* findings; case remanded with directions to determine comparative fault).

[112] *See* note 100 *supra*.

In the *Reliable Transfer* case, respondent argued that the divided damages rule should be retained because the proportional fault rule would cause extreme difficulty in assigning relative degrees of fault.[113] Notwithstanding that argument, the Court adopted the proportional fault rule and acknowledged that those countries that have adopted the proportional fault rule of the Brussels Convention have had no particular problems of application. The Court further noted that "in our own admiralty law a rule of comparative negligence has long been applied with no untoward difficulties in personal injury actions."[114] However, the *Reliable Transfer* Court did provide for the possibility that the fault of all parties may not be distinguishable.[115] In such cases, damages are divided equally.[116]

The *Reliable Transfer* Court would not concede that the proportional fault rule would cause extreme difficulty in assigning relative degrees of fault, presumably because negligence principles provide for proper apportionment. Since fault can be distinguished from causation in a limited number of collision cases,[117] courts must acknowledge that the process of assigning relative degrees of fault does not involve allocation of the factors of physical causation.[118] Instead, courts must assign comparative degrees of fault as the term has been traditionally understood in maritime law.[119] Nevertheless, one party's

[113] Brief for Respondent at 16-17, United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

[114] 421 U.S. at 407. The *Reliable Transfer* Court stated that "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." *Id.* Nevertheless, the Court did not concede that serious problems of application would result: "Every other major maritime nation has evidently been able to apply a rule of comparative negligence without serious problems. . . ." *Id., citing* Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 346 (1932).

[115] 421 U.S. at 411. Where fault is genuinely equal on the part of each vessel, *e.g.,* Bunge Corp. v. M/V Furness Bridge, 396 F. Supp. 852 (E.D. La. 1975), or where both parties are at fault but their respective degrees of fault cannot be distinguished, total damages are to be divided equally between the vessels. 421 U.S. at 411. Where fault cannot be ascertained on the part of either vessel, each vessel presumably will bear its own damages. *See* text accompanying notes 100-04 *supra.* A vessel solely at fault still bears all of the damages of both vessels. *E.g.,* Harris v. Newman, 404 F. Supp. 947 (S.D. Miss. 1975).

[116] *Id. See* note 3 *supra.*

[117] *See* GILMORE & BLACK, *supra* note 30, at §§ 7-2 through § 7-5.

[118] W. PROSSER & J. WADE, CASES & MATERIALS ON TORTS 533 n.11 (3d ed. 1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 276 (1974). *See* Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 402 F. Supp. 1187, 1188 (W.D. Wash 1975) ("Culpability, not causation, is the standard by which damages are assessed in comparative negligence cases.") *See also* Alaska Packers Ass'n v. O/S East Point, 421 F. Supp. 48, 52 (W.D. Wash. 1976).

[119] *See* GILMORE & BLACK, *supra* note 30, at §§ 7-2, 7-3.

fault is not subject to apportionment unless it in part caused the damage.[120] Courts apparently have recognized that, upon evaluating relative fault in collisions, damages should not be assessed by comparing the number of individual acts, omissions or violations committed by each party.[121] Rather, the consequential seriousness of each party's fault should be weighed. In comparing degrees of fault, however, courts must measure not moral blameworthiness, but negligence.[122]

In applying the rule of *Reliable Transfer,* judges continue to act as triers of both fact and law,[123] exercising the discretion and judgment demanded by their office.[124] Furthermore, both the divided damages rule and the proportional fault rule demand the same investigation and evaluation of evidence.[125] Thus, the focus of admiralty

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[120] The court cannot take into consideration fault which have not contributed to the collision. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 275 (1974). English cases applying the proportional fault rule are in substantial agreement. *See, e.g.,* The Peter Benoit, 84 L.J.P. 87, 31 Times L.R. 277 (1915), (Pickford & Bankes, L.JJ); The Karamea, 9 Lloyd's List L.R. 375, 376 (1921).

In Toney v. United States, 397 F. Supp. 307 (M.D. La. 1975), the court concluded that because the defendants committed no acts of negligence that in any way contributed to the collision, the rule of comparative fault was inapplicable. Nevertheless, the defendants had been technically at "fault" for violating statutes requiring anchor lights and a bell for fog. *Id.* at 311. In addition, the court found that even if the defendants' barge had been anchored in an unsafe position, the improper anchorage played no part in the collision. *Id.* at 312.

[121] *See, e.g.,* Linehan v. United States Lines, Inc., 417 F. Supp. 678 (D. Del. 1976) (vessel at less fault had actually violated more regulations).

[122] V. SCHWARTZ, COMPARATIVE NEGLIGENCE 276 (1974). Dean Schwartz points out in an example that a drunken party to a collision ought not to be condemned solely upon moral criteria, but that his actions should be assessed by legal standards of negligence. *Id.*

[123] Historically, English courts followed the civil law to which maritime law is closely related, thereby establishing the American practice of trying admiralty cases without a jury. GILMORE & BLACK, *supra* note 30, at § 1-4.

[124] Houston Barge Line, Inc. v. American Commercial Lines, 416 F. Supp. 417, 424 (N.D. Miss. 1976); Franck, *Collisions at Sea in Relation to International Maritime Law,* 12 L.Q. REV. 260, 263-64 (1896).

Admiralty courts, however, are not bound by the common law rules of evidence. The Denny, 127 F.2d 404, 408 (3d Cir. 1942). Admiralty courts historically have faced problems of proof resulting from geographic distance from the event. Consequently, these courts have adopted rules of evidence which are not as restrictive as the common law rules, especially in relation to the admissibility of documents customarily used in trade. Stein Hall & Co. v. S.S. Concordia Viking, 494 F.2d 287, 292 n.5 (2d Cir. 1974).

[125] Guidry v. LeBeouf Bros. Towing Co., 398 F. Supp. 952 (E.D. La. 1975). Because *Reliable Transfer* was decided subsequent to the trial in *Guidry,* the parties were given the opportunity to reopen the case for further evidence, or to file additional briefs concerning the effect of *Reliable Transfer* on the litigation. *Id.* at 953 n.61. Neverthe-

court examination of collisions will not differ substantially from the methods of proof employed under the divided damages rule.

Nevertheless, appellate review of trial court apportionment of fault in post-*Reliable Transfer* cases might cause some confusion. In admiralty practice, an appellate court generally accepts the determinations of the district court based on the evidentiary findings of that court, unless those findings are clearly against the preponderance of evidence or are clearly erroneous.[126] Although trial court findings of fact are not conclusive, a heavy burden rests upon the party who seeks to overturn them.[127] Consistent with this admiralty practice, the Seventh Circuit, in *Feeder Line Towing Service, Inc. v. Toledo Peoria & Western Railroad*,[128] and the Second Circuit, in *Getty Oil v. S.S. Ponce de Leon*,[129] have held that the apportionment of the amount of negligence attributable to each party is subject to the clearly erroneous rule. Thus, the mere fact that the appellate court may disagree

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less, the parties felt that the presentation of additional evidence was not necessary. *Id.*

While English courts have had nautical assessors to assist them in admiralty cases, expert witnesses may aid American admiralty courts in their examination of evidence. *See* Goschka, *supra* note 2, at 69. Comparative fault proof methods include the use of many available materials including weather reports, topographical and hydrographical charts, tide tables, local regulations, vessel descriptions, ship documents, personnel testimony and much more. *See* 7 TEX. TECH. L. REV. 113, 117 (1975), *citing* Williams, *Conduct of Marine Collision Investigations Involving Naval Vessels or Property*, 20 JAG J. 111 (1966).

[126] McAllister v. United States, 348 U.S. 19, 20 (1954); Glenview Park Dist. v. Melhus, 540 F.2d 1321, 1323 (7th Cir. 1976) (review of trial court finding of no negligence in admiralty wrongful death proceeding); Solomon v. Warren, 540 F.2d 777, 784 (5th Cir. 1976) (review of trial court finding of negligence under Death on the High Seas Act, 46 U.S.C. § 761-68 (1970)). Norfolk Shipbldg. & Drydock Corp. v. M/Y LaBelle Simone, 537 F.2d 1201, 1203 (4th Cir. 1976) (review of district court findings on contract invoices). Respondent in *Reliable Transfer* assumed that the "clearly erroneous" rule would apply to apportionment if the proportional fault rule was adopted by the Court. Brief for Respondent at 17, United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

[127] *Id.* A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[128] 539 F.2d 1107 (7th Cir. 1976). In *Feeder Line*, the Seventh Circuit held that the scope of review of comparative fault apportionment upon appeal is the same as that exercised under Rule 52(a), FED. R. CIV. P. In accordance with that rule, the appellate court may not set aside the trial court's findings of fact unless "clearly erroneous." *Id.* *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 96 at 479 (3d ed. 1976) [hereinafter cited as WRIGHT].

[129] 555 F.2d 328 (2d Cir. 1977).

with the allocation of fault will not be sufficient to set it aside unless it is clearly erroneous.[130]

The clearly erroneous standard of review applies only to questions of fact and not to questions of law.[131] In addition, some courts have held that the standard is inapplicable to mixed questions of law and fact.[132] The Supreme Court, however, has held that the test applies to a finding of negligence in admiralty cases[133] even though a determination of negligence involves the application of a principle of law to the facts of the case.[134] While appellate review of apportionment may cause confusion in American courts, English courts have refused to deem significant any distinctions among questions of law, fact, or mixed questions of both, and have permitted appellate courts to revise apportionment only in very exceptional cases.[135] American courts similary should restrict appellate review of damage apportionment and permit revision only where the trial court has made an error of law or has abused its discretion.[136]

Despite the adoption of the proportional fault rule, American admiralty law still does not conform to international maritime law

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[130] *Id.* at 335. *But cf.* Complaint of B.F.T. No. Two Corp., 433 F. Supp. 854, 875-76 (E.D. Pa. 1977) (comparative fault listed as a conclusion of law).

[131] WRIGHT, *supra* note 128, at § 96, 481.

[132] *E.g.,* Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir.), *cert. denied,* 414 U.S. 944 (1973); University Hills, Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970).

[133] McAllister v. United States, 348 U.S. 19, 20 (1954). Two circuits have refused to apply the "clearly erroneous" test to findings of negligence. *See* Tucker v. Calmar S.S. Corp., 457 F.2d 440 (4th Cir. 1972); Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, 776-78 (2d Cir.) *cert. denied,* 385 U.S. 835 (1966). *But see In re* Seaboard Shipping Corp., 449 F.2d 132, 136 (2d Cir.), *cert. denied,* 406 U.S. 949 (1971).

[134] WRIGHT, *supra* note 128, at § 96, 481.

[135] *See, e.g.,* The Karamea, 9 Lloyd's List L.R. 375, 376 (1921). In *The Karamea,* the House of Lords stated that apportionment is "different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice of discretion, as to which there may well be differences of opinion by different minds." *Id. See* 4 R. MARSDEN, BRITISH SHIPPING LAWS, COLLISIONS AT SEA 153-54 (11th ed. 1970).

[136] The Supreme Court has held that the "clearly erroneous" test should apply whenever the finding is based upon the "fact-finding tribunal's experience with the mainsprings of human conduct." Commissioner v. Duberstein, 363 U.S. 278, 289 (1960). If the appellate courts are uniform in their defense of the lower courts' damage allocation, except in situations of gross abuse of discretion, fewer appeals may be prosecuted. Goschka, *supra* note 21, at 69. However, neither a greater number of appeals nor the existence of more divergence of view is foreseeable under a proportional fault rule. Huger, *supra* note 5, at 547-48.

with regard to recovery by innocent cargo owners.[137] In the United States, innocent cargo may recover from non-carrying vessels and the principle of joint and several liability is applied among vessels at fault. The Harter Act[138] and the Carriage of Goods by Sea Act

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[137] The suit in *Reliable Transfer* involved only damage to the vessel, Mary A. Whalen. 421 U.S. at 398.

In addition to recovery for cargo damage, the towing situation often creates distinct legal problems in collision cases. *See generally* A. PARKS, LAW OF TUG, TOW AND PILOTAGE (1971). Tug and tow are considered together as one unit in the application of collision rules. *See* GRIFFIN, *supra* note 1, at 411-12; GILMORE & BLACK, *supra* note 30, at § 7-14. Courts apply the concept of "dominant mind" to impose sole liability upon the tug when that vessel is in sole charge of the navigation. Cushing v. John Fraser, 62 U.S. (21 How.) 184 (1859). The corollary principle is that if the tow is the dominant mind, the tug is not liable for damages when the tug has obeyed the orders of the tow and has not negligently executed orders or contributed to a dangerous situation. *E.g.*, Old Time Molasses Co. v. United States, 31 F.2d 963 (5th Cir. 1929). Even when the tug is the dominant mind, the tow may be liable for breach of such duties as keeping a proper lookout, having sufficient and seaworthy towing equipment, carrying proper lights, and proper steering. GRIFFIN, *supra* note 1, at § 182. The refusal of courts to impute the negligence of the tug to the tow has another important consequence. Where the tow itself is damaged through the fault of the tug and a third vessel, the tow can recover from them both as joint tortfeasors. The Alabama, 92 U.S. 695 (1876). However, the *Reliable Transfer* decision may answer the previously disputed question of how contribution between joint tortfeasors will be computed and whether contribution should be allowed by equal or proportional division of damages. *See* note 109 *supra*.

Rules applying to tug and tow should remain intact after *Reliable Transfer*. *See, e.g.*, Crown Zellerbach Corp. v. Willamette-Western Corp., 519 F.2d 1327, 1330 (9th Cir. 1975). In *Crown Zellerbach*, a post-*Reliable Transfer* case, the court found both the tug and barge at fault in a collision with an overhanging power line because employees on both vessels breached their duty to maintain a lookout for overhead obstructions. *Id.* In S.C. Loveland, Inc. v. East West Towing, Inc. 415 F. Supp. 596 (S.D. Fla. 1976), a tug was liable for the collision of an unmanned barge with a bridge where the barge was under the exclusive custody, care and control of the tug. *Id.* Two other recent cases indicate that fault attributable to tug and tow will be apportioned in accordance with traditional rules and duties. In Barge Poling Bros. No. 23, Inc. v. Skibs A.S. Namset, 429 F. Supp. 1315 (S.D.N.Y. 1977), the court found that the plaintiff barge was free of contributory negligence because its duty to ensure that the proper navigational lights were functioning had been met. *Id.* at 1320. In Dow Chemical Co. v. M/V Gulf Seas, 428 F. Supp. 667 (W.D. La. 1977), *Reliable Transfer* was applicable to a suit by a barge owner against the tug for loss of the barge. The court held that the barge owner's fault with respect to failing to close ballast pumping system valves and failing to instruct the tug crew in the operation of the deballasting system was a contributing cause of the sinking of the barge equal to the tug owner's fault with respect to the inadequacy of crew members. *Id.* at 673.

[138] 46 U.S.C. §§ 190-96 (1970). Sections 1 and 2 of the Harter Act make it unlawful for any bill of lading covering a shipment "from or between ports of the United States and foreign ports" to contain clauses relieving the vessel or her owners from liability "for loss or damage arising from negligence, fault or failure in proper loading, stowage,

(COGSA)[139] provide that if a vessel owner has exercised due diligence to insure that a vessel is seaworthy,[140] he is not liable to the owners of cargo carried by the vessel for damages caused by negligence or vessel mismanagement.[141] Courts have construed these statutes, however, to allow full recovery by innocent cargo owners from the non-carrying vessel in mutual fault collisions;[142] the seaworthy carrier becomes subject to contribution to the non-carrying vessel since the colliding vessels are treated as joint tortfeasors.[143]

Thus, American principles of joint and several liability permit full recovery by cargo owners from the non-carrier if the carrier is insolvent or statutorily exempt from direct liability.[144] The non-carrier's recourse after payment to cargo owners in collision cases is to recover one-half of the cargo damages paid by means of contribution from the carrier.[145] After *Reliable Transfer*, the non-carrier should be allowed

custody, care, or proper delivery" of the cargo, or weakening or lessening the obligation "to properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy. . . ." *Id.* at §§ 190-191.

[139] 46 U.S.C. §§ 1300-15 (1970). COGSA, *id.*, enacted by Congress in 1936, adopts essentially the same provisions of the Harter Act that relieve the carrier from liability to its cargo for the navigational errors of the carrying ship. COGSA also preserves the duties, responsibilities and liabilities of the ship or carrier prior to the time the goods are loaded. *See* A. KNAUTH, OCEAN BILLS OF LADING 168-69 (4th rev. ed. 1953). *See* GILMORE & BLACK, *supra* note 30, at § 3-28. *See also* United States v. Atlantic Mut. Ins. Co., 343 U.S. 236 (1952).

[140] The duty to use due diligence to make a ship seaworthy is a comprehensive duty which includes proper manning, equipping, supplying, and fitness to receive and care for the cargo. Section 2 of the Harter Act, 46 U.S.C. § 191 (1970), prohibits contracting out of this duty. Seaworthiness requires that the vessel not only be structurally sound, but also that it be properly equipped and manned. *See* The Southwark, 191 U.S. 1, 8-9 (1903).

[141] *E.g.*, The Alabama & The Gamecock, 92 U.S. 695 (1875).

[142] *E.g.*, The Chattahoochee, 173 U.S. 540 (1893).

[143] 3 FLA. ST. U.L. REV. 616, 622 (1975).

[144] *E.g.*, The Chattahoochee, 173 U.S. 540 (1899). Shipowners have argued that cargo recovery from non-carriers is contrary to the purpose and intent of the Harter Act and COGSA. *See* Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention to Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 YALE L.J. 878, 881-82 (1957). In addition, supporters of ratification of the Brussels Convention argued that the rule frustrated congressional intent. *Id.* at 890 n.64. However, cargo interests, most notable among supporters of equal division of damages, persuaded Congress not to ratify the Convention. *See generally Hearings on S. 555, S. 556 Before the Senate Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. (1961-62). *See also* Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

[145] *E.g.*, The Chattahoochee, 173 U.S. 540 (1899). The non-carrying vessel, as a joint tortfeasor, is liable for full recovery to the cargo owners. However, the non-

to demand comparative contribution from carriers according to a determination of proportional fault.[146] Both the present practice of contribution and the suggested comparative contribution formula differ from international practice under the Brussels Convention which allows cargo recovery from the non-carrier only to the extent of that vessel's degree of fault.[147] In addition, no principle of joint and several liability is involved and the non-carrier cannot receive contribution from the carrier. Innocent cargo may receive full recovery under the Brussels Convention rule only by recovering from each tortfeasor according to their respective degrees of fault.[148]

Reliable Transfer did not involve an issue of cargo recovery, thus leaving unaffected the right of cargo to full recovery from non-carriers.[149] Furthermore, the *Reliable Transfer* Court did not show any inclination to adopt other rules in the Brussels Convention that may conflict with present American admiralty law.[150] Arguably, the Brussels Convention treatment of innocent cargo conflicts with the basic American legal principle that an innocent cargo owner should not be penalized by denying him full recovery where the cargo is damaged or destroyed by a non-carrying vessel.[151] By limiting the innocent cargo recovery to the non-carrying vessel's degree of fault, innocent cargo may not receive full recovery.[152] In addition, the non-

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carrying vessel may then include the payment of cargo as an item of damages to be divided with the carrier. *Id.*

[146] The *Reliable Transfer* decision may have changed the rule of *The Chattahoochee.* While the owner of cargo will still be entitled to full recovery against the non-carrying vessel, the non-carrying vessel may no longer recoup an arbitrary 50% of the payment from the carrying vessel. Instead, the non-carrying vessel will receive contribution in proportion to the carrying vessel owner's degree of fault. Healy & Koster, *Reliable Transfer Co. v. United States; Proportional Fault Rule,* 7 J. MARIT. L. & COM. 293, 298 (1975). *See* 3 FLA. ST. U.L. REV. 616, 623 (1975). In the latter article, the author suggests that *Reliable Transfer* be applied to cases involving contribution: in a collision where cargo laden Vessel *A* and non-carrying vessel *B* are 75% and 25% at fault, respectively, the cargo would collect the full measure of damages from Vessel *B.* Vessel *B* would then collect 75% of these damages as contribution from *A. Id.* at 623 n.43. However, this suggestion provides little advantage where the carrying vessel is a total loss and its owner has limited his liability to the value of the vessel, *id.* at 625 n.56, pursuant to the Limitation of Vessel Owner's Liability Act. 46 U.S.C. §§ 181-96 (1970).

[147] Reprinted in English, 6 KNAUTH'S BENEDICT ON ADMIRALTY 39 (7th ed. A Krauth & C. Krauth 1969).

[148] *See* Goschka, *supra* note 2, at 68.

[149] *See* note 134 *supra.*

[150] *See* United States v. Reliable Transfer Co., 421 U.S. 397, 409 n.17 (1975).

[151] *See generally* Donovan & Ray, *Mutual Fault—Half Damages Rule: A Critical Analysis,* 41 INS. COUN. J. 395 (1974).

[152] Cargo owners contend that implementation of the Brussels Convention rule for

carrying vessel should bear the burden of obtaining contribution from the other negligent party to the collision rather than requiring innocent cargo to seek recovery from each tortfeasor.[153] Thus, the weight of precedent[154] and apparent policy[155] present forceful arguments for the retention of joint and several liability.

The abrogation of the divided damages rule by the Supreme Court in *Reliable Transfer* was a long awaited change. While the proportional fault rule is consistent with the practice of virtually every other maritime nation, American policies governing innocent cargo's right to full recovery from the non-carrying vessel do not conform to international principles.[156] However, the proportional fault rule might precipitate comparative contribution between vessels in collision cases involving cargo recovery[157] and in non-collision cases involving joint tortfeasor contribution.[158]

Application of the proportional fault rule now eliminates the necessity of the *Pennsylvania,* major-minor fault, and error *in extremis* rules which had developed in a divided damages context.[159] Nevertheless, these rules still may be employed as evidentiary inferences with respect to the preliminary question of whether fault on the part of a vessel contributed causally to the collision, and to the determination of proper degrees of apportionment. In contrast, the principles of inscrutable fault and inevitable accident remain viable alternatives to the proportional fault rule.[160] Because application of these two principles is predicated on the absence of attributable fault, denying any award or division of damages is not inconsistent with *Reliable Transfer.* In comparing degrees of fault, courts must rely upon tradi-

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cargo recovery would increase their insurance premiums. Arguably, cargo owners' insurance premiums might increase to compensate the underwriter for his losses where reduced cargo recoveries are caused by the Convention recovery rule, *see* text accompanying notes 144-45 *supra,* and carrying vessel compliance with the Harter Act, *see* notes 135-36 *supra.* Comment, *Comparative Negligence Sails in the High Seas: Have the Recovery Rights of Cargo Owners Been Jeopardized?,* 7 CALIF. W. INT'L L.J. 179, 196 (1977). *See* Huger, *supra* note 5, at 552.

[153] Goschka, *supra* note 2, at 68.

[154] *See, e.g.,* Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 403 (1935); Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 418 (1932).

[155] *See* notes 148-49 *supra.*

[156] *See* text accompanying notes 134-45 *supra.*

[157] *See* note 143 *supra.*

[158] *See* note 109 *supra.*

[159] *See* text accompanying notes 60-89 *supra.*

[160] *See* text accompanying notes 96-104 *supra.*

tional principles of comparative negligence,[161] thereby ameliorating any extreme difficulty in assigning relative degrees of fault.[162]

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[161] *See* text accompanying notes 117-25 *supra.*

[162] *Id.* The proportional fault rule provides for the equal division of damages where the fault of the parties may not be distinguishable. 421 U.S. at 407.