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Admiralty’s In Extremis Doctrine: What Can be Learned from the Restatement (Third) of Torts Approach?

Craig H. Allen*

I

INTRODUCTION

The in extremis doctrine has been part of maritime collision law in the U.S. for more than one hundred and sixty years. One would expect that a century and a half would provide ample time for mariners and admiralty practitioners and judges to master the doctrine. Alas, some of the professional nautical commentary and even an occasional collision case suggest that the doctrine is often misunderstood or misapplied. A fair number of admiralty writers fail to understand that the in extremis doctrine is not a single “in extremis rule,” but rather several rules, all of which are related to the existence of a somewhat poorly defined “in extremis situation.” Some practitioners and mariners also appear to believe the in extremis “rule” has been fully codified into the present Collision Regulations (either in Rule 2(b) or 17(b) or perhaps both) obviating recourse to the general maritime law cases. Alternatively, some believe that the addition of Rule 17(a)(ii) and its allowance for a permissive maneuver by the stand-on vessel before the situation has become in extremis, has rendered, or at least should render, the in extremis doctrine a relic of the former, less enlightened, collision regime. This article examines each of these propositions. In doing so, the article

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1Before Rule 17(a)(ii) was added to the 1972 COLREGS, the stand-on vessel was required by Rule 21 of the predecessor rules to hold course and speed until it was in extremis or some other “special circumstance” permitted a departure from the requirement to stand-on. Under such circumstances, anxious stand-on vessels could reasonably be expected to be liberal in finding that a situation qualifies as one in extremis. With the advent of Rule 17(a)(ii), they need not wait that long, and need no longer favor the liberal interpretation.
draws on the framework for negligence cases established by the recently released Third Restatement of Torts.

Following a collision between two commercial trucks on the highway, attorneys preparing the case might well look to the Restatement of Torts to assess the respective faults of the parties. Among the Restatement sections they might find relevant are those that address the general duty of care, the role of custom, the distinct standard of care that applies to persons (like professional truck drivers) who possess specialized knowledge or skills, the standard of care for a person confronted with a sudden emergency and the role of statutes and the negligence per se rule, together with the rule addressing when compliance with the statutory standard is excused.

The American Law Institute has taken the multi-volume Restatement (Second) of the Law of Torts, largely drafted in the 1960s, and broken it up into three titles (so far): one addressing liability for physical and emotional harm, another on apportionment of liability and a third for products liability. A fourth title addressing liability for economic harm is in progress. This article will focus on the first of those new titles, the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, published in 2009.

The admiralty bench and bar will find much in the Restatement’s approach that could both validate and clarify the maritime extremis cases. By separating the issue of when the violation of a statute will be excused from the distinct issue of how the advent of a sudden emergency affects the actor’s duty and the expected standard of care, the Restatement’s approach is less likely to conflate the factual predicates for the two. The U.S. Supreme Court’s 1892 decision in *The Blue Jacket* recognized that distinction. The Court found in that case that no special circumstance existed (a question of fact) justifying a departure from the Collision Regulations, but nevertheless applied a lenient standard of care, thus demonstrating early in the extremis doctrine’s development that there are in fact at least two distinct in extremis “rules.”

This article takes the opportunity provided by the recent release of Restatement (Third) of Torts: Physical and Emotional Harm to critically examine admiralty’s in extremis doctrine. More specifically, it asks whether...
the admiralty doctrine would benefit from adopting the approach provided by the new Restatement. Part II of the article provides a brief overview of marine collision law principles, and Part III provides a similar summary of relevant provisions in the Collision Regulations. Part IV then describes the current in extremis doctrine and identifies related or parallel provisions of the Restatement. Part V then suggests reforms to clarify the in extremis doctrine. Finally, Part VI briefly examines some reform proposals.

II
PRINCIPLES OF MARINE COLLISION LAW

Marine collisions may give rise to a variety of legal proceedings. One notorious collision between a passenger vessel and a dredge on the River Thames in 1989, for example, generated administrative, civil, admiralty and criminal actions spanning more than a decade. There is little reason to think that such a tragedy would generate any less litigation activity on this side of the Atlantic. In addition to U.S. Coast Guard and National Transportation Safety Board investigations, potential criminal prosecutions or mariner license suspension or revocation actions, the U.S. response is sure to include a legion of civil claims and responses for personal injuries, property damage, pollution response, removal and restoration and salvage or wreck removal.

A. Fault

Liability in marine collision cases must be grounded in a finding of causative fault. Fault may be found where the officers or crew of a vessel

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6The cases stem from the August 20, 1989, collision between the dredger Bowbelle and the passenger vessel Marchioness, which resulted in the loss of 51 souls —mostly young people who had been attending a party on board. It was the worst disaster on the river since the Bywell Castle incident in 1878. See Marchioness/Bowbelle: A Legal Odyssey, 1 Shipping & Trade Law 1-5 (May 2001). The Report of the Formal Investigation is available from the U.K. Stationery Office (ISBN 011702550X)

7The actions included an investigation by the UK Marine Accident Investigation Branch, a formal investigation under the Merchant Shipping Acts, an Admiralty Court limitation of liability action, two coroner’s inquests, a variety of civil actions, two criminal trials against the owners and master of the Bowbelle, an unsuccessful private prosecution for manslaughter and several appeals. Id.

8See The Clara, 102 U.S. (12 Otto) 200 (1880); The Lepanto, 21 F. 651, 655 (S.D.N.Y. 1884). It is also so stated in the venerable treatises by Grant Gilmore & Charles Black, The Law of Admiralty § 7-3 (2d ed. 1975) and Gustavus H. Robinson, Handbook of Admiralty Law in the United States § 107 (1939) and is no less true today.
violated a statute, certain customs, or where their conduct otherwise fell below the standard of care imposed by the applicable duty. Statutes, the violation of which may give rise to a finding of negligence, include the applicable Collision Regulations, regulations implementing any of a number of international conventions sponsored by the International Maritime Organization or federal marine safety statutes and regulations. As discussed more fully below, a finding of statutory fault may also give rise to a presumption of causation under the Pennsylvania Rule.

B. The Burden of Proof and Presumptions

In most cases, the party asserting a claim against another (whether denominated a claim, cross claim or counterclaim) has the burden of proving each element of its claim or cause of action by a preponderance of the evidence. The failure to carry this burden is occasionally explained in terms of "inscrutable fault" or "inevitable accident." In seeking to prove that the fault of another caused or contributed to a collision in a case presented to a U.S. court, a party may take advantage of one or more presumptions established by the courts. For example, in the U.S. there is a presumption of fault on the part of a moving vessel that collides with a fixed object or an anchored vessel. More controversially, in its decision in The Pennsylvania, the U.S. Supreme Court imposed the following presumption:

when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable

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9Customs that would violate a positive statute or regulation are not enforceable. Occidental & O.S.S. Co. v. Smith, 74 F. 261 (9th Cir. 1896); see also Hal Antillen N.V. v. Mount Ymitos MS, 147 F.3d 447, 1999 AMC 76 (5th Cir. 1998); Zim Israel Nav. Co. v. Special Carriers, Inc. 611 F. Supp. 581, 587, 1986 AMC 2016 (E.D. La. 1985).

10This approach is consistent with the Restatement. See Restatement (Second) of Torts § 285 (1965) (how standard of conduct is determined); Restatement (Third) of Torts: LPEH §§ 3, 7.

11Examples include the Safety of Life at Sea (SOLAS) Convention and the Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

12Most of the applicable statutes are collected in Titles 33 and 46 of the U.S. Code. Implementing regulations are found in Titles 33 and 46 of the Code of Federal Regulations.

13See James F. Young, Evidence Rules and Burden of Proof in Collision Cases, 51 Tul. L. Rev. 988 (1977). On appeal, the question whether the correct standard of care was applied is reviewed de novo. Crescent Towing & Salvage Co., Inc. v. Chios Beauty MV, 610 F.3d 263, 2010 AMC 2946 (5th Cir. 2010). The lower court's factual findings on negligence, causation and comparative fault in a bench trial are reviewed for clear error. Id.; Berg v. Chevron U.S.A., Inc. 759 F.2d 1425, 1986 AMC 360 (9th Cir. 1985).

.presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.\(^{15}\)

The *Pennsylvania* Rule applies wherever a statute or regulation that is “intended to prevent collisions” is violated.\(^{16}\) The rule applies equally in mutual fault cases and can be invoked against the plaintiff or defendant.\(^{17}\) The “could not have been” language limits the presumption to the issue of factual cause, not proximate cause.\(^{18}\) In effect, the burden is shifted as to the causation issue once it is established that the vessel violated the statute or regulation.\(^{19}\) Though such presumptions have been abolished in collision cases by the vast majority of maritime nations who are party to the 1910 Brussels Collision Convention (the U.S. is not\(^{20}\)), presumptions are still commonly relied upon in U.S. courts.\(^{21}\)

\[\text{C. Causation}\]

To impose liability for a collision, the fault committed by a vessel must be a contributory cause of the collision.\(^{22}\) As with common law courts,\(^{23}\) admiralty courts sometimes deal with acts bearing only an attenuated or remote relationship to the injury suffered through either scope of duty or proximate cause analysis. Prominent admiralty no duty or limited duty cases include Justice Holmes’ decision for the Supreme Court in *Robins Dry Dock*\(^{24}\) and

\[^{15}\text{The Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 1998 AMC 1506 (1874).}\]
\[^{16}\text{Id., 86 U.S. at 136.}\]
\[^{17}\text{Otto Candies, Inc. v. M/V Madeline D., 721 F.2d 1034, 1036, 1987 AMC 911 (5th Cir. 1983).}\]
\[^{18}\text{In re Mid-South Towing Co., 418 F.3d 526, 2005 AMC 1894 (5th Cir. 2005). Cases extending the presumption to proximate cause can nevertheless still be found. E.g., Pacific Tow Boat Co. v. States Marine Corp. of Delaware, 276 F.2d 745, 1960 AMC 696 (9th Cir. 1960).}\]
\[^{20}\text{The Supreme Court has observed that the Senate’s principal objections to the 1910 Brussels Collision Convention were poor translation and opposition by U.S. cargo interests, who would lose the benefit of the U.S. innocent cargo rule that allows them to recover their damages in full from the non-carrying vessel. See United States v. Reliable Transfer Co., 421 U.S. 397, 409 n.14, 1975 AMC 541 (1975).}\]
\[^{22}\text{The Farragut, 77 U.S. (10 Wall.) 334 (1870). In admiralty bench trials, the lower court’s findings on factual and proximate causation are reviewed under the clearly erroneous standard. See Bertucci Contracting Corp. v. M/V Antwerpen, 465 F.3d 254, 2006 AMC 2366 (5th Cir. 2006).}\]
\[^{23}\text{The reader may recall, with irrepressible nostalgia, the famous Cardozo-Andrews dichotomy in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).}\]
\[^{24}\text{Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 1928 AMC 61 (1927) (holding that economic losses are not recoverable in tort by one who did not suffer direct physical damage to property or proprietary interest); see also Restatement (Third) of Torts: LPEH § 7 (2010).}\]
the Supreme Court's later decision in *East River S.S. Corp. v. Transamerica Delaval.* Similarly, well known admiralty proximate cause limiting cases include Judge Friendly's decision for the Second Circuit in *Petition of Kinsman Transit Co.*

Violations of the Collision Regulations, which are expressly designed to prevent collisions, are one of the most commonly cited bases for invoking the Pennsylvania rule. A party guilty of violating the Collision Regulations may attempt to rebut the presumption of causation by proving that the rule violation "could not have been" a cause of the collision. For example, the party might attempt to show that the collision would have occurred regardless of the violation. Alternatively, the party in violation may invoke the "excused violation" prong of the in extremis doctrine (discussed in Section IV). This second alternative in effect admits the violation, but argues that it should be excused under the circumstances. The excused violation prong of the in extremis doctrine should not be confused with the approach of a few courts that have excused prior negligence on that ground that it was a "condition but not a cause." Thus, where vessel A committed a fault, but vessel B could have avoided the collision, vessel A's negligence might be held to have been a "condition but not a cause" of the collision. Finally, a party in violation of a Collision Regulation might attempt to show that subsequent negligence by another party was a superseding cause of the casualty.

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2476 U.S. 858, 1986 AMC 2027 (1986) (holding, in a case involving an express written warranty, that there is no admiralty tort claim in product liability where the product damages only itself).


23The Socony No. 19, 29 F.2d 20, 1928 AMC 1862 (2d Cir. 1928) (L. Hand, J.) ("By this we only mean that the results of the fault were apparent to the Socony in season, and that she could have avoided them, had she been properly attentive"). The court's explanation suggests that the prior negligent act was a factual cause, but the court was willing to excuse it, perhaps to avoid the harsh consequences of the divided damages rule that was applicable at the time. See Richard H. Brown Jr., Admiralty Law Institute: Symposium on American Law of Collision, General Principles of Liability, 51 Tul. L. Rev. 820, 830 (1977).

25To the surprise of many, and in a case of questionable trial court procedure and fact-finding, the U.S. Supreme Court, in *Exxon Co., U.S.A. v. Sopec, Inc.*, 517 U.S. 830, 1996 AMC 1817 (1996), reaffirmed the viability of the doctrine of superseding cause in admiralty. The Sopec decision and approach is not entirely consistent with the position in Restatement (Third) of Torts: LPEH § 34. It provides that:

When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

It is submitted that the risk created by the defendants in that case were exactly those that came to pass after the vessel broke loose from the mooring. For contrary or modified views on this subject see Christlieb, Note: Why Superseding Cause Analysis Should be Abandoned, 72 Tex. L. Rev. 161 (1993).
D. Allocation of Damages is Based on Comparative Fault

In 1975, the U.S. Supreme Court abandoned the former rule of “divided damages,” and adopted the rule of comparative fault, thus bringing the U.S. into line with other nations that adhered to the 1910 Brussels Collision Convention. The Court declared in that decision that:

when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Theoretically, in a both-to-blame case today, the court could assess up to ninety-nine percent of the fault to one ship, leaving the other to bear one percent of the damages. Under the former divided damages rule, the party who was only one percent at fault would bear half of the damages, unless the court held that its fault was “minor.”

III

THE NAUTICAL RULES OF THE ROAD

It is often said that the Collision Regulations—the rules for preventing collisions at sea—were written for mariners, not judges and attorneys. It

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3The divided damages rules dated back to the Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1855). Under the divided damages rules, where both vessels were guilty of causative fault (i.e., “both-to-blame”), the damages sustained were divided equally, regardless of the degree of fault. The seminal opinion on this point in England was Lord Stowell’s dictum in The Woodrop-Sims, 165 Eng. Rep. 1422, 2 Dods. 83 (1815). That dictum was confirmed by the House of Lords in 1824. Hay v. LeNeve, 2 Shaw’s Rep. 395 (1824). It remained the rule in England until it adopted the 1910 Brussels Collision Convention.

3Article 4 of the 1910 Collision Convention provides that “If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of faults respectively committed. Brussels Collision Convention, supra note 21, art. 4.


3Even a mere one percent fault allocation can have drastic consequences where liability among joint tortfeasors is joint and several. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 1979 AMC 1167 (1979). Joint and several liability was rejected by the 1910 Brussels Collision Convention. See Brussels Collision Convention, supra note 21, art. 4.

3One distinguished admiralty judge writing near the turn of the last century observed that “It is a curious circumstance that the ordinary sailor, even though he has reached the position of master, is skeptical as to the propriety of following any rule made by landsmen. The practical sailor assumes that he is better qualified than the lawmaker to say what shall be done in a given case of danger.” Alfred C. Coxe, Admiralty Law, 8 Colum. L. Rev. 172, 180-81 (1908).
would probably be more accurate to say the rules were primarily drafted by mariners and for mariners; however, the drafters certainly understood that they would also be used by judges and attorneys to conduct the inevitable adjustments and mariner license hearings should a collision occur.37 As one distinguished American proctor reminds us, most collision cases are settled by the attorneys for the parties,38 and settlement is facilitated by rules that permit the attorneys, mediators, insurers and average adjusters to predict the expected values of the liabilities should the case go to trial.

A. General principles

The principal rules for collision avoidance (the "Collision Regulations") are found in the 1972 Collision Regulations (COLREGS)39 and the U.S. Inland Rules of the Road.40 The COLREGS apply on the high seas and on other waters lying seaward of the demarcation lines established in 33 C.F.R. part 80. The Inland Rules apply inside the demarcation lines and on the U.S. side of the Great Lakes.

As vessels approach each other so as to create a risk of collision, the Collision Regulations generally require one or both vessels to maneuver. Which vessel maneuvers, and the choice of whether to change course or speed depends on the vessels' relative positions and approach angles, and may be influenced by the nature of the vessels' employment, degree of maneuverability and whether the vessels are in sight of one another or navigating in a narrow channel or a designated traffic separation scheme. The Collision Regulations (both International and Inland) are divided into five parts. Part A sets out the "general" rules. It includes Rule 1 on applicability of the rules, Rule 2, containing the so-called good seamanship and special circumstances rules, and Rule 3, which provides relevant definitions.

37A licensed or documented mariner may face suspension or revocation of his license or document for negligence, misconduct or violation of certain marine safety laws and regulations. See 46 U.S.C. § 7703 (2006). The in extremis doctrine may find application in these actions.
Part B sets out the steering and Sailing Rules. Part B is subdivided into three sections. Section I of Part B governs conduct of vessels in any condition of visibility. It includes rules prescribing the requirements for look-out (Rule 5), safe speed (Rule 6), determining risk of collision (Rule 7) and action to avoid collision (Rule 8), together with two location-specific rules for navigation and collision avoidance in narrow channels (Rule 9) and designated traffic separation schemes (Rule 10).

Section II of Part B contains the rules relating to the navigation of vessels in sight of one another. They include the rules governing the approach of two sailing vessels (Rule 12), power-driven vessels meeting head-on (Rule 14), overtaking vessels and vessels being overtaken (Rule 13) and vessels meeting on crossing courses (Rules 15-17). Section II also governs maneuvering priorities among vessels of different types and degrees of maneuverability, such as vessels engaged in fishing and those restricted in their ability to maneuver or unable to maneuver (Rule 18).

Section III governs the conduct of vessels in restricted visibility. Rule 19, the only rule in Section III, displaces the rules in Section II of Part B (Rules 12-18) when the vessels are not in sight when navigating in or near an area of restricted visibility. It must be recalled, however, that the rules in Section I of Part B (Rules 5-10) also apply in restricted visibility.

Part C of Section II concerns lights and day shapes (Rules 20-31) and Part D governs sound and light signals (Rules 32-37). Part E (Rule 38) sets out the rule for certain “grandfathering” exemptions to the rules concerning lights and sound-signal appliances of vessels.

B. Rule 2

Rule 2, which carries the caption “responsibility,” serves as a reminder that the statutory Collision Regulations are neither a perfect nor a complete prescription for collision avoidance. Rule 2(a), widely known as the “rule of good seamanship,” is largely drawn from Rule 29 of the 1960 International Regulations for Preventing Collisions at Sea.\(^4\) In its present version, Rule 2 provides that:

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these

\(^4\)That rule, now superseded, provided that:

Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.\

Evidence relevant to those latter issues is typically provided by expert witnesses knowledgeable in the precautions required by the "ordinary practice" of seamen (in the U.S.) or by nautical assessors (in the U.K.).

COLREGS Rule 2(b), sometimes called "the rule of special circumstances" (or general prudential rule), is nearly identical to Rule 27 of the 1960 International Regulations for Preventing Collisions at Sea. It now provides that:

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

Rule 2(b) generally parallels the general maritime law rule that has developed over the years.

It is important not to read too much into Rule 2(b) and its provision for departure from the rules. It is a too-common misconception that the Collision Regulations cease to apply as soon as "risk of collision" exists. A

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Interestingly, the U.S. Supreme Court has distinguished exoneration from liability. In The Blue Jacket, the Court explained:

The provision of article 24 of the act of March 3, 1885, is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision...

The Blue Jacket, 144 U.S. 371, 390, 2005 AMC 878 (1892).


"The Charles H. Sells, 89 F.2d 631 (2d Cir. 1937) (Learned Hand, J.) (referring to proof of "a proper display of nautical skill"); Portland Pipeline Corp. v. The Barcelona, 1982 AMC 2725 (D. Me. 1982) (negligence is the failure to conform to the standard of prudence ordinarily exercised by seamen).

"That rule, now superseded, provided that:

In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including limitations of the craft involved, which may render a departure from the above Rules necessary in order to avoid immediate danger Rule 27 appeared in Part D of the 1960 rules with the other "Steering and Sailing Rules," casting some doubt on whether it applied to rules not in Part D. Any such doubts have now been erased. In commenting on the wording and placement of Rule 2(b) Congress noted: "as worded in the 72 Colregs and here, the General Prudential Rule [i.e., Rule 2(b)] has been rewritten to leave no doubt that it applies to the entire body of these rules." Committee on Merchant Marine and Fisheries, Report to Accompany H.R. 6242, 96th Cong. 2d Sess. (Comm. Print, Aug. 1, 1980), at 15.

"Belden v. Chase, 150 U.S. 674 (1893). The question of whether a given circumstance constitutes a "special circumstance" may give rise to both epistemic uncertainty (factual doubt about the actual circumstances) and linguistic uncertainty (doubt about what the rule means by "special circumstance"). For both reasons, it is important to avoid the "list" approach, by which a list of putative special circumstances is offered as pre-established, without regard to the particular facts of the case."
careful reading of Rule 2(b) reveals that a departure from the rules is only justified when necessary to avoid immediate danger. The rules can and do hold up in most close quarters situations. Indeed, a too soon departure from the rules may be the cause of the collision. In an often cited opinion by the U.S. Court of Appeals for the Fourth Circuit, the court warned:

where two courses are open to a vessel, one to follow prescribed rules and the other to depart from them, duty is imperative to observe the rules and to assume that an approaching vessel will do likewise until after danger has become so manifest as to show there is no proper choice of judgment other than that of departure from the rules... Departure from navigation rules because of special circumstances is only permitted where it is necessary in order to avoid immediate danger, and then only to the extent required to accomplish the object.47

A recent decision from the Court of Appeals for the Ninth Circuit similarly reflects a very strict view on the “necessity” required to depart from the rules under Rule 2(b).48

C. Rules for All Conditions of Visibility

Whether vessels are in sight of one another, or not in sight due to the presence or proximity of restricted visibility, Rules 5 through 10 of the COLREGS and Inland Rules apply. Rule 5 requires all vessels to maintain a proper look-out.49 Rule 6 requires vessels to proceed at a “safe speed” and provides twelve factors (for radar equipped vessels) to consider in determining what speed is safe.50 Rule 7 requires vessels to use all available

4The Piankatank, 87 F.2d 806, 1937 AMC 1 (4th Cir. 1937). Qualifying language in a Collision Regulation such as “if the circumstances of the case admit” and “so far as possible” necessarily means that it will be less likely that a maneuver violated the rule. See, e.g., Alkemon Naviera S.A. v. The Marina L, 633 F.2d 789, 793-94, 1982 AMC 153 (9th Cir. 1980) (construing phrase “if the circumstances of the case admit” to excuse compliance where it would increase the danger of collision).

4Crowley Marine Services, Inc. v. Maritrans, Inc. [Crowley I], 447 F.3d 719, 2006 AMC 1246 (9th Cir. 2006) (holding that special circumstances exception to International Regulations for Preventing Collisions at Sea (COLREGS) applied only when necessary to avoid immediate danger; and the fact that the colliding vessels were operating in concert and pursuant to agreed maneuvers was not special circumstances that allowed departure from the COLREGS). The court’s narrow interpretation of the term “necessity” is somewhat in tension with decisions by other courts finding fault on the part of vessels that failed to take permissive action under Rule 17(a)(ii). The former cases seek to narrowly confine vessels to the rules, while the latter encourage them to depart from the rules. See generally A. N. Cockcroft & J. N. F. Lameijer, A Guide to the Collision Avoidance rules: International Regulations for Preventing Collisions at Sea 8 (6th ed. 2004).

4The term “look-out” (with a hyphen) refers to the activity of looking out. The activity is performed by a member of the crew designated as a “lookout (without the hyphen).

5The U.S. Navigation Safety Regulations provide a complementary test, for vessels over 1600 tons on U.S. navigable waters. See 33 C.F.R. § 164.11(p) (2011).
means to determine if an approaching vessel presents a risk of collision and Rule 8 addresses actions to avoid collisions. Rule 9 prescribes additional rules for vessels in "narrow channels" (which are not defined in the rules) and Rule 10 does the same for waters falling within an officially designated traffic separation scheme.

D. Rules for Vessels in Sight

The rules applicable to vessels in sight are of two kinds: "single action" rules, in which one vessel (the give-way vessel) is instructed to keep out of the way of the other vessel (the stand-on vessel), which is directed to hold its course and speed, and "dual action" rules, which require both vessels to maneuver to avoid collision. Rule 12 (sailing vessels) 13 (overtaking), 15 (crossing) and 18 (the so-called "hierarchy") are single action rules. Rules 16 (action by the stand-on vessel) and Rule 17 (action by the give-way vessel) flesh out the responsibilities in single action rule situations.

By contrast, Rule 14 (vessels meeting head-on) is a dual action rule. Vessels meeting head-on so as to involve risk of collision are both required to maneuver to avoid collision. Accordingly, there is no stand-on or give-way vessel in such situations (assuming the vessels are in the same Rule 18 category). Rule 19, applicable when vessels are not in sight in or near an area of restricted visibility, is essentially a dual action rule as well. It imposes maneuvering obligations on vessels without regard to the angle of approach or the vessel's status under Rule 18. Rules 16 and 17, while they do not apply to all of the approaches in which an in extremis situation might arise, are worth a closer look. They provide:

**Rule 16 - Action by Give-way Vessel**

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

**Rule 17 - Action by Stand-on Vessel**

(i) Where one of two vessels is to keep out of the way of the other shall keep her course and speed.

(ii) The latter vessel may, however, take action to avoid collision by her maneuver alone, as soon as it becomes apparent to her that the vessel

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31The responsibilities "are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain." The Pacific, 62 U.S. (21 How.) 372, 382 (1858).
required to keep out of the way is not taking appropriate action in accordance with these Rules.

(b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.\(^5\)

(c) A power-driven vessel which takes action in a crossing situation in accordance with subparagraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.

(d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.

It will be seen that in those single action cases identified above, where one vessel stands on and the other gives way, the give-way vessel's responsibility is prescribed in Rule 16 and reaffirmed in Rule 17(d). The responsibility of the stand-on vessel is governed by Rule 17, paragraphs (a) – (c). It will also be seen that Rule 17(b) converts what was a single action rule into a dual action rule when collision can no longer be avoided by the give-way vessel acting alone. Of course, the vessels are also governed by the rules in Section I, Part B (Rules 5-10) and those rules applicable to the specific situation (e.g., for overtaking and crossing vessels).

E. Rule for Vessels Not in Sight Due to Restricted Visibility

Rule 19 is the only maneuvering rule addressed specifically to vessels not in sight due to restricted visibility (Rules 5-10 and the rules on lights and sound signals also apply, but they do not prescribe rules for maneuvering). The rule provides:

**Rule 19 - Conduct of Vessels in Restricted Visibility**

(a) This rule applies to vessels not in sight of one another when navigating in or near an area of restricted visibility.\(^5\)

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\(^5\)The relevant portion of the predecessor rule (Rule 21 of the 1960 Collision Regulations) provided that:

> When, from any cause, the latter ["privileged"] vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she also shall take such action as will best aid to avert collision.

\(^5\)In the UK MCA’s interpretation, Rule 19 applies whenever "you cannot see the other vessel visually...regardless of whether your vessel is in or near an area of restricted visibility." See UK Maritime &
(b) Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and condition of restricted visibility. A power-driven vessel shall have her engines ready for immediate maneuver.

(c) Every vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules of Section I of this Part.

(d) A vessel which detects by radar alone the presence of another vessel shall determine if a close-quarters situation is developing and/or risk of collision exists. If so, she shall take avoiding action in ample time, provided that when such action consists of an alteration in course, so far as possible the following shall be avoided:

(i) An alteration of course to port for a vessel forward of the beam, other than for a vessel being overtaken;

(ii) An alteration of course toward a vessel abeam or abaft the beam.

(e) Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close-quarters situation with another vessel forward of her beam, shall reduce her speed to be the minimum at which she can be kept on her course. She shall if necessary take all her way off and in any event navigate with extreme caution until danger of collision is over.

Any action taken under Rule 19 must, of course, also comply with Rule 8, which applies in all conditions of visibility. Conversely, it is worth calling attention to the too common error in trying to import the meeting/overtaking/crossing regime in Rules 12-17 or the so-called vessel hierarchy in Rule 18 into low visibility situations. Those rules apply only when vessels are in sight of one another. There are no stand-on or give-way vessels in restricted visibility.4

Under Rule 19, when either of two approaching vessels detects the other by radar alone (19(d)) or hears the other’s fog signal apparently forward of the beam (Rule 19(e)), action is required without regard to the angle of approach or the vessel’s status under the hierarchy. The admonition to “avoid” turns to port in Rule 19(d)(i) is limited by the chapeau qualifier in Rule 19(d) “so far as possible.” Where the presence of a navigation hazard,
a third vessel or some other special circumstance renders the alternative unsafe, a port turn would not violate the rule (or trigger application of the *Pennsylvania* rule).

IV
THE IN EXTREMIS DOCTRINE

The term "in extremis" is not used or defined in the Collision Regulations. With some circularity, *Black's Law Dictionary* defines it as the condition of being "in extreme circumstances." British courts have at times seized on the more expressive phrase, the "agony of collision." A roughly analogous provision precluding liability for collisions caused by *force majeure* may be found in the 1910 Brussels Collision Convention.

As used here, the in extremis "doctrine" includes the definition of the in extremis situation (i.e., "extreme circumstances," not necessarily limited to an imminent risk of collision) and the rules governing the possible consequences of a situation in extremis. Admiralty courts on both sides of the Atlantic recognized elements of the in extremis doctrine before any part of it was explicitly incorporated into the Collision Regulations. The U.S. Supreme Court's first apparent articulation of the rule (without using the term in extremis) was in its 1851 decision in the *Propeller Genesee Chief v. Fitzhugh*, in which Chief Justice Taney exonerated a sail vessel for what might have been an "injudicious" maneuver, after distinguishing the vessel's "error" from the alleged "fault":

Nor do we deem it material to inquire whether the order of the captain at the moment of collision was judicious or not. He saw the steamboat coming directly upon him; her speed not diminished; nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought; and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy, that the error of a moment might cause her destruction, and endanger the lives of those on

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53 Marsden on Collisions at Sea § 4-11 at 66-67 (Simon Gault, ed. 12th ed. 1998). For a discussion of one Law Lord's views on extending the *Bywell Castle* doctrine to terrestrial traffic collisions, albeit restrictively, see Glasgow City Council v. Sutherland, 1951 S.C. 1 (H.L.) (opinion of Lord Norman).

54 That convention expressly provides that where a collision is caused by *force majeure*, damages are to be borne by those who suffered them. See Brussels Collision Convention, supra note 21, art. 2. Because collision liability in the U.S. is based on causative fault, the same result should obtain in the U.S. as under the Brussels Convention, assuming *force majeure* was the sole cause of the collision.

board. And if an error was committed under such circumstances it was not a fault.8

The in extremis doctrine was more fully developed in 1858, three years after the Court adopted the divided damages rule.9 The term “in extremis” was apparently used by the Court in this context for the first time in the 1890 case of The Nacoochee.60

A. Elements of an In Extremis Situation

The in extremis situation is at best obliquely described in the 1972 COLREGS and the U.S. Inland Rules. More importantly, the actual consequences of an in extremis situation are only partly codified in those rule sets. Therefore, much of the doctrine still finds its definition and consequences in the general maritime law. The extremis situation is typically said to arise when two vessels have approached so closely that collision can no longer be avoided by one ship acting alone.61 Accordingly, both vessels are required to maneuver. While that simple definition arguably describes the most common in extremis “situation,” it does not contain all of the elements necessary for some of its applications. It is also clear that the doctrine has not been limited to situations where the “extreme circumstance” involved the risk of an imminent collision.62

When vessels involved in a collision are later found by the courts to have been in extremis, a number of effects might follow, depending on the particular circumstances. First, both vessels at risk of collision are generally required to maneuver as necessary to avoid the immediate danger. Second, the courts will recognize that the vessels involved may depart from the rules (i.e., what would otherwise be a rule violation is excused), but only if departure is necessary to avoid immediate danger.63 Finally, in assessing fault for

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8Id. at 461. The Court cited no precedents in reaching this holding.

An error committed by those in charge of a vessel under such circumstances, if the vessel was otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the vessel in that situation would be chargeable with the error, and must answer for the consequences.).

The divided damages rule was adopted in 1855. See supra note 32. In England, the Bywell Castle decision in 1879 is often cited as the fountain of the rule. The Bywell Castle, 4 Prob. Div. 219 (1879) (C.A.).

60The Nacoochee v. Moseley, 137 U.S. 330, 340 (1890) (“Even if it was an error of judgment in the schooner to hold her course, it was not a fault, being an act resolved upon in extremis, a compliance with the statute, and a maneuver produced by the fault of the steamer.”) (citations omitted).

61In his analysis of collision cases, Captain Cahill distinguishes the close quarters situation from the in extremis situation. See Richard A. Cahill, Collisions and their Causes Appendix III (2d ed. 1997).

62Extremis cases involving violent weather conditions are examined in Section IV.F.

63Crowley Marine Services, Inc. v. Maritrans, Inc. [Crowley I], 447 F.3d 719, 2006 AMC 1246 (9th Cir. 2006); see also COLREGS, Rule 2(b).
any collision that nevertheless ensues, the courts may view leniently the actions of a vessel which, by no fault of her own, found herself in extremis. Where, however, a vessel's fault created or contributed to the perilous situation her actions will not be reviewed under that more lenient standard.

B. The In Extremis Excused Violation Rule

The excused violation rule in admiralty takes on an importance beyond a statutory violation under the common law negligence *per se* rule due to the potential application of the *Pennsylvania* rule if a statutory violation is found. Three cautions are in order in applying the excused violation rule. First, the rule must be applied on a rule-by-rule basis. A failure to comply with one rule in the Collision Regulations might be excused, while the violation of another rule might not be. For example, compliance with the look-out rule or safe speed rule will seldom be excused. Second, any examination of whether a vessel's conduct violated a rule must of course begin with the actual text of the rule. A number of rules qualify their application with phrases like "if the circumstances of the case admit." Finally, because liability must be based on causative fault, the question whether violation of a rule is excused is obviated if the violation was not a cause of the collision.

I. What Constitutes a Departure from the Rules?

The first "rule" within the in extremis doctrine to be analyzed is the excused violation rule. At the outset, it is important to note that in cases arising under the single action rules, where Rule 17 applies, that rule includes a specific requirement in 17(b) that is triggered by a definition in the rule that would qualify as an in extremis situation. Where Rule 17(b) applies, there is no need to resort to Rule 2(b) or to determine if the situation constitutes a "special circumstance." The duty of the former stand-on vessel is prescribed by 17(b) and the give-way vessel's obligation is preserved by Rule 17(d). The former stand-on vessel need not ask to be "excused" for departing from the rules: Rule 17(b) directs it to take whatever action will best aid to avoid collision. On the other hand, in taking action under Rule 17(b), the former stand-on vessel might still qualify for the lenient standard of care if it meets the requirements described in the rule. It is important to recognize, however, that merely because Rule 17(b) applies does not mean the vessel will

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4The Bywell Castle, 4 Prob. Div. 219 (1879) (C.A.); The Blue Jacket, 144 U.S. 371, 392, 2005 AMC 878 (1892); see also Herbert R. Baer, Admiralty Law and the Supreme Court § 9-4 at 319-20 (1979).
qualify for the lenient standard of care (see Section IV.B). Moreover, even if it does qualify for the lenient standard of care, it must still be determined whether the actual conduct met that lenient standard.

In situations falling outside the reach of Rule 17, the consequences of an in extremis situation on rule departures must be found elsewhere. Historically, the in extremis situation is included as one of the "special circumstances" under Rule 2(b) or its predecessor rule, which might justify (even require) departure from the rules if necessary to avoid immediate danger. Of course, such generalizations, made without regard to particular facts of the case or the language of Rule 2(b), are neither accurate nor helpful. Some in extremis situations will qualify as special circumstances under Rule 2(b) and some might not. Rule 2(b) departures under special circumstances must be distinguished from the requirement under Rule 17(b) for certain vessels in sight of one another to maneuver as necessary to avoid collision. A mariner complying with Rule 17(b) is not departing from the rules, he is obeying them.

2. When Will a Departure be Excused?

It is commonly said that in cases of imminent peril it is proper for a navigator to disregard regulations as necessary in order to avert disaster. That is only half true. Rule 2(b)—the so-called rule of special circumstances—makes it clear that in "special circumstances" a vessel may depart from the rules only if necessary to avoid collision. The in extremis situation has long been recognized as one of the "special circumstances" under Rule 2(b) and Rule 27 under the prior rules. Of course, it follows that if a departure is necessary to avoid immediate danger, the only prudent course of action is in fact to depart from the rules to the extent necessary. Accordingly, such departures are not merely permissive, they are compulsory. Rule 2(b) generally parallels the general maritime law rule that has developed over the years. In the late 19th century, for example, the Supreme Court held that a vessel may depart from the rules only under "special circumstances."

It is important to not be too liberal in declaring the existence of special circumstances. The central problem facing the mariner in selecting the appropriate collision avoidance action is the absence of what Captain Roger

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6See The Tasmania, 6 Aspinall Mar. L. Cas. 381, 383 (1899) (C.A.) (special circumstances require departure from the rule). Given the court's reliance on the advice of its nautical assessors, the basis for the holding appears to be want of good seamanship under the circumstances. See also The New York, 175 U.S. 187, 205 (1899).
Admiralty's In Extremis Doctrine

Syms\(^{39}\) refers to as "mutual cognition"—understanding not only the conduct required of your vessel, but of the other vessel as well. One recurring danger presented is that of "conflicting action,"\(^{71}\) where one vessel's avoidance maneuver is nullified by an offsetting maneuver by the other vessel.\(^{72}\) To minimize the danger of conflicting action it is crucial, particularly in single action situations, that the give-way vessel be able to rely on the stand-on vessel to maintain her course and speed, in obedience to the rules.\(^{73}\)

It might be asked whether Rule 2(b) (and Rule 17(b)) has fully codified the in extremis rule. It has not. Rule 2(b) only addresses a departure from the Collision Regulations, not departures from other statutes and regulations or the general maritime law. Some regulations have their own rules for excused violations in emergencies, and those provisions likely control to the exclusion of the in extremis rule under the principle of *lex specialis*. For example, the U.S. Navigation Safety Regulations have an "emergency rule" excusing compliance with those regulations when "necessary to avoid endangering persons, property, or the environment."\(^{74}\) Other statutes might not include such clauses. The general extremis rule on excused violations (not Rule 2(b)) may provide the rationale for excusing violations of those other statutes or regulations. Moreover, Rule 2(b) does not purport to codify or even suggest the standard of care applicable to an "innocent" vessel that finds herself in extremis.

C. The In Extremis Emergency Standard of Care Rule

The common understanding is that, under the in extremis doctrine, the decisions of a mariner are to be leniently judged when his vessel is put in sudden peril through no fault of his own.\(^{75}\) How often an approach will reach

\(^{39}\)Roger Syms, Rules for the 21st Century, Seaways 13 (Sep., 1994).

\(^{71}\)See Craig H. Allen, Whatever Became of the Change to COLREGS Rule 8?, Prof. Mariner, Aug. 2007, at 14-15 (discussing amendments to Rule 8 that were intended to reduce the danger of conflicting action).

\(^{72}\)Analyses of vessel collision data reveal that in many cases the vessels involved actually maneuvered their way *into*, rather than *away from*, collision.

\(^{74}\)For an early example of the U.S. Supreme Court allocating fault to a stand-on vessel (the steamer *Beaconsfield*) for stopping immediately before collision, where the collision would have been avoided had she maintained her speed (and a trenchant dissent by Justice Henry Billings Brown), see The Britannia, 153 U.S. 130, 141 (1894). Under the present rules, there seems little doubt that the *Beaconsfield* would have been justified in stopping by Rule 17(a)(ii), and might have been found at fault by some courts for failing to do so.

\(^{75}\)33 C.F.R. § 164.51 (2011).

\(^{76}\)Grosse Ile Bridge Co. v. American S.S. Co., 302 F.3d 616, 2002 AMC 2229 (6th Cir. 2002); Matheny v. Tennessee Valley Authority, 523 F. Supp.2d 697, 2008 AMC 725 (M.D. Tenn.2007) (because the small boat's operator was put in extremis by the defendant's tugboat, through no fault of the operator, the court will not second-guess the operator's skill in avoiding the wake or his decision to try first to outrun the wake.
the extremis situation in the absence of antecedent fault by both vessels is questionable, particularly in the era of STCW and Navigation Safety Regulations. Rule 2(a)'s heightened standard of care applicable to seamen, Rule 7's admonition to resolve any doubts about a risk of collision by assuming that such a risk does exist, and Rule 8's expansive mandates regarding action to avoid collision render the probability of a completely innocent vessel finding herself in extremis remote.

1. Lenient Standard Only Applies in Cases of “Sudden” Emergencies

It has been said that only when an emergency suddenly arises does the in extremis doctrine's lenient standard of care rule apply. Before the protection of the doctrine can be allowed it must appear that there was an imminent danger, since the error of judgment is excusable only if it was committed during such peril. Accordingly, the in extremis standard of care should not be applied to the actions of a mariner who had ample time to avoid the peril. Where the mariner in fact acted slowly and deliberately, she cannot be said to have acted in extremis. It is the actual risk of danger and not merely apprehension of that danger that determines the question whether the error is one in extremis.

Invocation of the lenient standard of care also assumes that the emergency could not reasonably have been foreseen. Accordingly, where a vessel fails to maintain a proper look-out, or to detect and evaluate risk of collision, it should not be heard to say that it later “suddenly” found itself in an in extremis situation solely of another's making.

—and then to turn and face it. The operator acted according to the standard of a reasonable mariner in a crisis situation.

Tide Water Associated Oil Co. v. The Syosset, 203 F.2d 264, 1953 AMC 730 (3d Cir. 1953); National Bulk Carriers v. United States, 183 F.2d 405, 1950 AMC 1293 (2d Cir. 1950).


See Boudoin v. J. Ray McDermott & Co., 281 F.2d 81, 1961 AMC 1457, 1459-61 (5th Cir. 1960) (in extremis standard does not apply to captain who had time to choose a safer berth before hurricane struck).


The Pangussett, 9 F. 109 (S.D.N.Y. 1881).

See, e.g., UK Marine Accident Investigation Branch, Lessons from Marine Accident Reports 1/2001, Safety Digest, at Case 8, Lesson, para. 2 (Jan. 2001) (criticizing M/V Zgorzelec for failing to anticipate and prepare for possible maneuvers by another vessel and concluding that “She should have been prepared for the very real possibility that the Hoo Venture would alter course to port to cross the [TSS] lane at right angles, and create risk of collision”).
2. Vessel Claiming Benefit Must Have Been Free from Prior Fault

To benefit from the lenient standard of care, the vessel must have been “free from fault until the emergency arose.” If a vessel claiming protection under the in extremis doctrine “significantly contributed to the dangerous situation leading to the collision” by the Collision Regulations, she cannot avail herself of the extremis rule. The doctrine does not excuse a vessel from the neglect of any precaution required by the ordinary practice of seamen in the special circumstances of the case or for making a wrong maneuver in extremis where the imminence of the peril was occasioned by the fault or negligence of those in charge of the vessel or might have been avoided by earlier precautions which it was bound to take.

At one time the U.S. Supreme Court limited application of the in extremis lenient standard of care rule to situations in which the other vessel’s fault created the in extremis situation. Later cases have applied the lenient standard of care when the emergency was brought on by other causes, including weather.

3. Conduct in Extremis Found to Have Met the Lenient Standard

Where a navigator, suddenly realizing that a collision is imminent through no fault of her own, in the confusion and excitement of the moment does something which contributes to the collision or omits to do something by which the collision might have been avoided, such an act or omission is ordinarily considered to be in extremis and the ordinary rules of strict accountability do not apply. The effect of the doctrine is that a navigator handling a ship in extremis is not to be held to the exercise of that cool and deliber-
ate judgment which facts developing later indicate would have been the better course. Thus, if the innocent mariner in extremis has two maneuvering options available to her and she chooses the option that is later found to have been the inferior one, she will nevertheless not be held at fault if the option she chose, while not the best of the two, nevertheless met the lenient standard of care.

Under the “emergency” prong of the extremis doctrine, where one ship has by her faulty navigation placed another ship in a position of extreme danger, that other ship will not be held to blame if it has done something wrong and has not been maneuvered with perfect skill and presence of mind.

As the legendary admiralty judge John R. Brown put it, it is a well-established rule that when a ship is in extremis,

\[ \text{the choices of stopping engines or going ahead, going to port rather than starboard, are to be judged not by an armchair admiral, who has hours, days, weeks, months or years to reflect, but in the light of choices suddenly forced on by the neglect of the one now seeking total absolution.} \]

Judge Brown laid to rest a commonly heard dictum that the innocent vessel’s in extremis maneuvers would not be judged at all. They are subject to review, but against a standard appropriate to the situation. The reluctance to second guess the decisions by those on the bridge was perhaps best explained by the Ninth Circuit:

We should not view the situation in retrospective or from the shore, but from the viewpoint of the master on the bridge of the crippled ship, charged with full responsibility for her safety and for the safety of her cargo and crew; and, when viewed in that light, we must not only be able to say that the course pursued was wrong, but we must be further able to say that it was so illy considered and so plainly wrong that a competent navigator would have rejected it, if placed in a like position.

John Wheeler Griffin, in his magisterial treatise on the American Law of Collision, lists the following actions, all of which courts found to meet the

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90 Afran Transport Co. v. The S.S. Transcolorado, 458 F.2d 164, 166-67, 1972 AMC 1149, 1151 (5th Cir. 1962); see also Union Oil Co. of California v. Tug Mary Malloy, 414 F.2d 669, 674, 1969 AMC 2254, 2260 (5th Cir. 1969); The Gulfstar, 136 F.2d 461, 465 (3d Cir. 1943).
91 Union Oil Co. of Calif. v. Luckenbach S.S. Co., Inc. (The Walter Luckenbach), 14 F.2d 100, 103, 1926 AMC 1281 (9th Cir. 1926); see also Todd v. Schneider, 2004 AMC 409 (D.S.C., 2003) (although COLREG Rule 17(a)(i) requires a privileged vessel to keep her course and speed, Rule 17(b) is mandatory and requires taking action in extremis, which the overtaken vessel did not take here); The Mauch Chunk, 154 F. 182 (2d Cir. 1907).
more lenient standard where the innocent vessel was in extremis: turning to port rather than starboard, going full ahead where such speed was necessary to avoid the collision, and failing to reverse engines, where doing so would have caused the ship to swing, thus increasing the danger. A vessel which takes action to minimize the damage when a collision is inevitable will similarly not be criticized.

4. Conduct in Extremis Found to Have Violated Even the Lenient Standard

The applicability of the in extremis doctrine does not prevent a finding of liability, but rather, merely requires the court to judge an otherwise innocent mariner's reactions more leniently because of the emergency. While no specific maneuver is prescribed in the Collision Regulations for vessels in extremis (even under Rule 17(b)), fault will almost surely be found if the vessel failed to take any action at all. Similarly, courts have faulted a vessel's response in extremis where the vessel unreasonably delayed the maneuver. Vessels that behave "unreasonably" seldom escape liability.

Even when in extremis the navigator of a vessel is required to exercise some discretion, and to act with a level head and on judgments wrought of long experience. Courts are unwilling to excuse a maneuver which reflects a complete lack of professional judgment. "Even in extremis... some discretion is demanded; the phrase means no more than that less judgment is required in an emergency than when there is time to consider; it does not exculpate all faults; it is no more than a palliative." If the maneuvering vessel has several options and chooses the one almost certain to cause damage, the vessel may be found at fault if her maneuver does in fact cause the col-

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9John Wheeler Griffin, The American Law of Collision 235 (1949); see also Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 1989 AMC 627 (9th Cir. 1988) exonerating a vessel that turned to port in an attempt to avoid the collision).
10The City of Leeds, [1978] 2 Lloyd's Rep. 346, 356 (Adm.). One could argue that the prudence required by Rule 2(a) (the so-called "rule of good seamanship") demands nothing less.
11City of Chicago v. M/V Morgan, 375 F.3d 563, 2004 AMC 1859 (7th Cir. 2004).
12Marine Services, Inc. v. Maritrans, Inc. [Crowley II], 530 F.3d 1169, 2008 AMC 1922 (9th Cir. 2008) (assigning fault to an overtaken vessel that held her course and speed up to the time of collision).
16A. H. Bull S.S. v. United States, 34 F.2d 614, 616 (2d Cir. 1929) (L. Hand, J.); see also Cliff Jr. v. Captain Will, 529 F.2d 1169, 1976 AMC 48 (5th Cir. 1976) (maneuvers which, in hindsight, may be bound unwise or to have been executed with lack of skill or presence of mind, will generally not be condemned by court).
17A.H. Bull, 34 F.2d at 616.
collision. For example, a panel of the Second Circuit that included Judge Learned Hand remarked after a vessel claiming in extremis turned to starboard, which was manifestly the wrong maneuver:

It is indeed the instinctive response of a master in an emergency to put his rudder hard right; if both ships do so, the chances of collision are apt to be much reduced. But no emergency will excuse the absence of all clear thinking; after all, men, charged with responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril. Part of their equipment for their duties is some ability to think, be the situation ever so sudden and so grave.\(^{1}\)

Thus, even the "lenient" standard of care must be applied against the backdrop of Rule 2(a) and the professional mariner standard of care it embraces. A vessel watchstander, versed in the "ordinary practice of seamen" on a modern vessel equipped with ARPA\(^{2}\) and its "trial maneuvers" function, which allows the operator to almost instantly determine, by manipulating the ARPA, the effect of various course or speed changes on the passing range of other radar contacts, should be held to the standard of a professional mariner who finds herself in extremis.

**D. Rule 17(a)(ii) Maneuver Cases Distinguished**

Rule 17(b) requires a stand-on vessel to take such action as will best avoid collision if she finds herself so close to the other vessel that collision cannot be avoided by the action of the give-way vessel alone. By contrast, Rule 17(a)(ii)—which one of the principal negotiators of the 1972 COLREGS Convention labeled "one of the most significant and difficult changes" made by the 1972 COLREGS\(^{3}\)—permits a stand-on vessel to maneuver to avoid collision when it becomes apparent that the give-way vessel is not taking sufficient action, so long as the maneuver complies with the limitation in Rule 17(c). The situation need not be in extremis for a stand-on vessel to maneuver under Rule 17(a)(ii).

Most mariners and collision law commentators assumed that Rule 17(a)(ii) maneuvers were purely optional. Indeed, the more experienced

\(^{1}\)Cuba Distilling Co. v. Grace Lines, Inc., 143 F.2d 499, 499, 1944 AMC 902 (2d Cir. 1944); see also The Martin Fierro [1974] 2 Lloyd’s Rep. 203, 209 (Adm.).

\(^{2}\)"ARPA" is the common acronym for Automatic Radar Plotting Aid, a computer-driven device integrated into vessel radar systems that enables watchstanders to more quickly assess risk of collision with one or more contacts and evaluate a variety of avoidance maneuvers. See 33 C.F.R. § 164.38 (2011) (establishing the requirement for certain classes of vessels to be fitted with ARPAs).

\(^{3}\)Winford W. Barrow, Consideration of the New International Rules for Preventing Collisions at Sea, 51 Tul. L. Rev. 1182, 1189 (1977).
mariners, who had sailed under the predecessor rules, may well have been
inclined to believe that, because the option was in derogation of the stand-
on vessel’s duty, it should be exercised circumspectly. However, some
courts have faulted the stand-on vessel for failing to take such permissive
action under circumstances where a reasonably prudent mariner would have
done so. They reason that where the rule would permit the stand-on ves-
sel to take avoiding action and a reasonably prudent mariner would have
done so, it is negligence not to maneuver. In effect, the courts’ holdings
on Rule 17(a)(ii) create a “quasi-extremis” maneuvering obligation. Where
the vessel is maneuvering under the permissive provision of Rule 17(a)(ii),
the vessel will be condemned if she turns to port, in violation of Rule
17(c). When, however, the vessels have approached so close as to be in
extremis, the Rule 17(c) prohibition on turns to port does not apply. If Rule
17(a)(ii) maneuvers are now to be treated as an intermediate obligation
between the stand-on obligation under Rule 17(a)(i) and the true extremis
obligation under Rule 17(b), courts should factor in the time constraints on
decision making when examining the applicable standard of care. Finally,
it should be noted that the Pennsylvania rule should not be applied in the
Rule 17(a)(ii) cases, where the rationale for finding fault by the stand-on
vessel is not that it violated Rule 17(a)(ii), but rather that it was negligent to
not maneuver when the rule permitted it. This approach would leave the
burden of proof of negligence and causation on the claimant.

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104See supra notes 81 and 91 and accompanying text (highlighting the importance of mutual cognition
and the danger of conflicting action).
(1896), in which the Court reasoned that the privileged vessel (now called the stand-on vessel):
will not be held in fault for maintaining her course and speed, so long as it is possible for the
other to avoid her by porting; at least in the absence of some distinct indication that she is
about to fail in her duty. If the master of the preferred steamer were at liberty to speculate
upon the possibility, or even the probability, of the approaching steamer failing to do her duty
and keep out of his way, the certainty that the former will hold his course, upon which the lat-
ter has a right to rely, and which it is the very object of the rule to insure, would give place to
doubts on the part of the master of the obligated steamer as to whether he would do so or not,
and produce a timidity and feebleness of action on the part of both, which would bring about
more collisions than it would prevent.
Id. at 469 (citing Belden v. Chase, 150 U.S. 674 (1893)).
106See Rule 2(a) (the “rule of good seamanship”).
108See Barrow, supra note 103, at 1190 (opining that under the new rules the “favoritism” historically
accorded to innocent vessels in extremis “may well extend to the stand-on vessel even when it takes
early action, but probably only when it can be shown that the give-way vessel was not taking action of
any kind.”).
E. Maneuvers to Minimize Damage Distinguished from those to Avoid Collision

Courts have excused maneuvers in extremis that were designed not to prevent collision, but rather to minimize the damage to the vessels.\textsuperscript{109} The decisions are sound. The mariner’s goal is not merely to avoid collision, but rather to minimize the harm caused by the collision. A similar rational underlies the avoidable consequences rule.

F. Maneuvers in Extreme Weather Distinguished

Courts are sometimes urged by the parties to apply elements of the in extremis doctrine to casualties involving actions taken during hurricanes or other extreme weather events. For example, the Fifth Circuit held in such a case that:

where, without prior negligence, a vessel is put in the very center of destructive natural forces and a hard choice between competing courses must immediately be made, the law requires that there be something more than mere mistake of judgment by the master in that decision \textit{in extremis}.\textsuperscript{110}

Not surprisingly, that same court held in another case that its in extremis rule was not applicable where the weather was reasonably foreseeable.\textsuperscript{111} This application of the in extremis lenient standard of care rule shares elements of the \textit{force majeure} doctrine in international law, which may provide a defense to what would otherwise be a breach of international or domestic law where the breach was rendered necessary by \textit{force majeure} or distress.\textsuperscript{112}

G. Cases Involving Non-Causative Fault Distinguished

One court excused the failure to sound whistle signals by a vessel in extremis, finding that the signals would not have served any useful purpose


\textsuperscript{111}Crescent Towing & Salvage Co., Inc. v. Chios Beauty MV, 610 F.3d 263, 2010 AMC 2946 (5th Cir. 2010) (holding that master was negligent in bringing his ship into New Orleans knowing of approach of Hurricane Katrina).

\textsuperscript{112}See U.N. Convention on the Law of the Sea, art. 18, 1982 U.N.T.S. 3, Dec. 10, 1982 (meaning of “passage” includes entry rendered necessary by \textit{force majeure}). \textit{Force majeure} in that context is defined as “An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars). The 1910 Brussels Collision Convention precludes liability where the collision was caused by a \textit{force majeure}.
and therefore could not have been a cause of the collision.\textsuperscript{113} While correct in its holding, that result could have been reached more cleanly through a finding on lack of causation without injecting the in extremis doctrine.

\section*{V}
\textbf{HOW THE IN EXTREMIS CASES MIGHT BE ANALYZED UNDER THE RESTATEMENT}

Without regard to whether relevant sections of the Restatement (Third) of Torts are consistent with the \textit{substantive} law applicable in marine collisions (and this article does not advocate that the Restatement’s substantive articles be adopted), there is much to be gained by examining the Restatement’s explicitly multi-step approach to assessing fault, particularly its clear distinction between the standard of care considerations when an actor is faced with a sudden emergency and the circumstances under which a statutory violation will be excused. By contrast, admiralty cases\textsuperscript{114} sometimes conflate the two inquiries and conclude that an in extremis situation justifies, even requires, a departure from the statutory rules \textit{and} warrants application of a lenient standard of care to one free of antecedent fault without distinguishing the factual predicates for those two distinct conclusions. Under the Restatement approach it would be clear that:

- The circumstances might constitute a sudden emergency, triggering a lenient standard of care, and yet not justify or excuse a departure from the rules.

- The circumstances might justify—even require—a departure from a statutory rule even though neither of the actors qualifies for the lenient standard of care applicable in sudden emergencies. [note, here, that not all circumstances falling within Rule 17(b) or 2(b) of the Collision Regulations will qualify as sudden emergencies, either because the situation did not arise suddenly or because neither vessel was free from antecedent fault].

Before examining the excused violation and sudden emergencies sections of the Restatement, it will be helpful to examine the relevant background principles on negligence in the Restatement.


\textsuperscript{114}It is worth noting that many of the seminal admiralty in extremis cases in U.S. courts involved collisions between sailing vessels and steamships, where the sailing vessel was “privileged” under the collision regulations. How much the courts might have been influenced by the disparity in speed and maneuverability between those vessels, and whether they might have been inclined to favor the more romantic sailing vessels over the industrial age steamships when they shaped the in extremis doctrine has not, to this author’s knowledge, ever been explored.
A. Restatement and the Standard of Care

The Restatement of Torts separately addresses several issues of relevance in collision cases involving in extremis claims. First, it defines negligence as follows:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.\(^5\)

The Restatement next recognizes that the standard of care for actors with specialized knowledge or skill takes into account that specialized knowledge.\(^6\) That specialized standard of care will presumably apply to all professional mariners. The Restatement further recognizes that custom may be evidence of the standard of care; however, compliance with custom will not necessarily meet the duty to exercise reasonable care.\(^7\) Given the express recognition of the customary practice of seamen in Rule 2(a) of the Collision Regulations, the Restatement may provide useful guidance in how that custom should be determined and applied. Finally, the Restatement describes the role statutes and regulations (and treaties) play in determining the standard of care, as well as the consequences of complying with\(^8\) or violating the statute. For example, the Restatement provisions on statutory violations as constituting negligence per se parallel the maritime law concept of statutory fault. It provides:

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and

\(^{117}\)Restatement (Third) of Torts: LPEH § 3.

\(^{116}\)Id. § 12 ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person").

\(^{117}\)Id. § 13 (custom) provides:

(a) An actor's compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.

(b) An actor's departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor's negligence but does not require a finding of negligence.

The seminal case on this point is an admiralty decision by Judge Learned Hand. See The T.J. Hooper, 1174 60 F.2d 737, 1932 AMC 1169 (2d Cir. 1932).

\(^{118}\)Id. § 16 (statutory compliance):

(a) An actor's compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent under § 3 for failing to adopt precautions in addition to those mandated by the statute.

(b) If an actor's adoption of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt that precaution.
It is readily apparent that the Restatement has much in common with Rule 2. Rule 2(a) recognizes, for example, that mere compliance with statutory rules will not shield an actor from liability if a reasonably prudent mariner would have done more. Second, the reference to precautions required by the "ordinary practice of seamen" raises both the expert standard of care and the relevance of custom in negligence determinations.\(^{120}\)

**B. The Restatement Rule on "Excused Violations"**

The Restatement section on excused violations, provides that: An actor's violation of a statute is excused and not negligence if:

(a) the violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation;

(b) the actor exercises reasonable care in attempting to comply with the statute;

(c) the actor neither knows nor should know of the factual circumstances that render the statute applicable;

(d) the actor's violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public; or

(e) the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.\(^{121}\)

\(^{19}\)Id. § 14 (statutory violations as negligence per se).


\(^{20}\)Restatement (Third) of Torts: LPEH § 15 (excused violations). The former rule, Restatement (Second) of Torts § 288A, provided that:

(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when

(a) the violation is reasonable because of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.
Subparagraph (e) of the Restatement rule is of greatest relevance to the in extremis cases. It will be noted, however, that the Restatement rule does not require a showing of necessity, as does Rule 2(b) of the Collision Regulations.\(^\text{122}\) Moreover, the Restatement rule permits, but does not require, the actor to depart from the rule. However, section 16(b) of the Restatement makes it clear that mere compliance with a statute will not shield an actor from a negligence claim if a reasonable person would have departed from the statute.

Ordinarily, violation of an applicable statute like one of the Collision Regulations constitutes statutory fault (roughly similar to negligence per se) and may lead to invocation of the Pennsylvania rule. The historical in extremis doctrine, together with Rules 2(b) and 17(b) when they apply, excuses what would otherwise be a rule violation. The effect is similar to the rule set out in section 15(e) of the Third Restatement, which excuses a violation where the actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.\(^\text{123}\)

The Restatement (Second) of Torts included a similar rule.\(^\text{124}\) It should be noted, however, that the Third Restatement has dropped one of the elements of the rule that were in the Second Restatement. Under the Second Restatement, a violation could be excused if the actor “is confronted by an emergency not due to his own misconduct.”\(^\text{125}\) The Third Restatement drops this as a separate element in section 15 on “excused violations,” referring such issues to section 9, which addresses “unexpected emergencies.”\(^\text{126}\)

C. The Restatement Rule on “Emergency Doctrine”

The Restatement (Third) of Torts sets out the common law rule imposing a less demanding standard of care on one cast unexpectedly into a situation of peril. It provides that:

If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor’s resulting conduct is that of the reasonably careful person.\(^\text{127}\)

\(^\text{122}\) This is an important distinction that must be preserved in the Collision Regulations, where the need for mutual cognition and the dangers of conflicting action are great. Simply put, the Collision Regulations will be more effective if compliance with the rules is maximized by a strict necessity requirement for excused violations. Admittedly, this necessity requirement is now diluted by the provision for permissive maneuvers under Rule 17(a)(ii) and the cases assigning fault for not exercising that option.

\(^\text{123}\) Restatement (Third) of Torts: LPEH § 15.

\(^\text{124}\) Restatement (Second) of Torts § 288A (1965).

\(^\text{125}\) Id. § 288A(d). Other elements have been re-worded.

\(^\text{126}\) Restatement (Third) of Torts: LPEH § 15, cmt. f.

\(^\text{127}\) Id. §9.
The Second Restatement included a similar rule, but used the phrase "sudden" emergency rather than "unexpected" emergency. The Third Restatement also substitutes "rapid response" for "rapid decision," a distinction that could prove important in collision avoidance maneuvering where the "response" time includes the time required to make the decision, the "dead time" between making the decision and implementation of that decision and the fact that when a vessel turns, the initial movement of the center of the ship is normally in a direction opposite to that of the turn.

Like the in extremis cases, the Restatement limits the rule to sudden or unexpected emergencies. A comment to section 9 explains that "[a]n emergency is an event that requires a decision within an extremely short duration and that is sufficiently unusual so that the actor cannot draw on a ready body of personal experience or general community knowledge as to which choice of conduct is best." Admiralty cases involving actions taken in extreme weather, like Exxon Co. U.S.A. v. Sofec, Inc. and the Chios Beauty might qualify for application of this sudden emergency rule in the Restatement, even though the emergency did not involve risk of collision.

It should also be noted that, like the in extremis cases invoking the lenient standard of care in admiralty, the Restatement rule does not completely excuse negligence in sudden emergencies. It simply judges the conduct under a standard appropriate to the emergent circumstances.

VI
REFORM PROPOSALS

Proposals to reform the in extremis doctrine may implicate several related issues in marine collision law, including the Pennsylvania rule, the method for allocating fault and the role of expert witnesses in assessing pre-collision maneuvers. Reform proposals must of course begin with a problem

\[\text{References}\]

Robert M. Slack, Modern Methods of Plotting, 5 Willamette L. J. 415, 417 (1969) (explaining that this is so because the ship's pivot point is about one-third the distance from the bow to the stern, so the aft two-thirds of the vessel swings away from the intended direction).


Crescent Towing & Salvage Co., Inc. v. Chios Beauty MV, 610 F.3d 263, 2010 AMC 2946 (5th Cir. 2010) (master negligent in bringing ship into New Orleans knowing of approach of Hurricane Katrina).
statement. The problem is typically characterized as the difference between the present law, both substantive and procedural, and the desired law. Alternative reform proposals must then be evaluated by the relevant criteria, which include effectiveness of the new rule in meeting relevant policy objectives, administrative and technical feasibility and equity. Additional considerations posed by modern forum shopping practices and choice of law rules applicable in collision cases suggest that uniformity in maritime law must also be a consideration.

A. Reforming the Rules of the Road

Above all else, the purpose of the Collision Regulations is to prevent collisions. That is, their purpose is to govern the primary conduct of individuals (in contrast to their role as secondary rules governing the consequences of that conduct). The empirical research necessary to evaluate the effectiveness of the primary conduct in extremis rules in preventing collisions is beyond the scope of this article. However, even in the absence of an empirical justification, most will agree on principle that any reform proposals must subordinate goals related to secondary consequences, most prominently the liability of the parties, to the need for regulating primary conduct; that is the prevention of collisions.

Mariners must already cope with a good deal of factual and even linguistic uncertainty in construing and applying the Collision Regulations and a multitude of other rules. Any reform should eliminate or mitigate that uncertainty, not add to it. Moreover, in evaluating the merits of any reform proposals, it must be remembered that the starting point, indeed, the dominant force, in marine collision prevention and litigation is a code: the Collision Regulations. One set, the COLREGS, is a widely ratified international convention. The other set, the Inland Rules, are federal regulations, which are now the responsibility of the U.S. Coast Guard and subject to certain statutory constraints, including the Administrative Procedure Act. Courts may be called upon to construe and apply those rules, but they are not free to

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134 Then-Judge (now Justice) Anthony Kennedy highlighted the importance of the COLREGS' status as a treaty in Alkemon Naviera S.A. v. The Marina L, 633 F.2d 789, 793-94, 1982 AMC 153 (9th Cir. 1980).

135 Amendments to the Inland Rules will now be made through the rulemaking procedures set out in the Administrative Procedure Act, 5 U.S.C. § 553.

136 In construing the Collision Regulations, the courts will give deference to the Coast Guard's interpretation. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (courts will give deference to agency's interpretation of a law it is charged with implementing); Sumitomo Shoji
amend or disregard them. That said, it is important to repeat here that nothing in the statutory Collision Regulations requires or even addresses application of the sudden emergency doctrine and the possibility that a "lenient" standard of care will be applied in assessing fault. That particular in extremis rule is a product of the judge-made general maritime law.

B. Revising U.S. Marine Collision Law

Admiralty judges exercising their unique competency to adapt the general maritime law were often the leaders in progressive legal reforms. For example, admiralty courts adopted comparative fault in 1975 and rejected the status-based duty of care owed to visitors in 1959, well ahead of most states. Since 1975, a number of commentators have advocated revisions to U.S. marine collision law. In many cases, the reform proposals were intended to bring U.S. law into line with the broader international regime. In fact, adoption of three of the following four commonly discussed reform proposals (all except abolition of the in extremis doctrine) would bring the U.S. more closely into line with the British system.

1. Eliminate the Pennsylvania Rule Presumption of Causation

Following the U.S. Supreme Court’s 1975 decision in Reliable Transfer to substitute a rule of comparative fault for the former rule of divided damages the admiralty bench and bar scrambled to determine how the new rule would affect some of the traditional “defenses” to liability. The “major-minor fault” and “last clear chance” rules were soon found to be obsolete under Reliable Transfer. Some thought the Pennsylvania rule, innocent cargo

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Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight.).


United States v. Reliable Transfer Co., 421 U.S. 397, 1975 AMC 541 (1975). Admittedly, the Supreme Court’s adoption lagged well behind the move to comparative fault in other states that adopted the 1910 Brussels Collision Convention.


rule and superseding cause rule would similarly fall by the wayside. So far, however, the latter rules have survived the Reliable Transfer decision.

The Pennsylvania rule has clearly survived the adoption of comparative fault by the Supreme Court in Reliable Transfer. Nevertheless, the rule’s detractors outnumber its defenders by several orders of magnitude. It is a product of the time when formal rules were few and salient and there might well have been a common-sense justification for a presumption that when one of those early rules was violated it likely was a cause of the casualty. Today, by contrast, the rules are legion and some are downright picayune.

Were the Pennsylvania rule to be abolished, bringing the U.S. in line with the states-parties to the 1910 Brussels Collision Convention, one “rule” in the in extremis doctrine, while still relevant, would be less critical—the rule on excused violations. Without the looming burden imposed by the Pennsylvania rule, the focus would likely shift from a search for any possible basis for finding statutory fault to a more balanced examination of faults that were demonstrably causative, with the burden of proof being placed on the claimant. In short, if the Pennsylvania rule were eliminated both parties to the litigation—stand-on and give-way—would be required to prove causative fault, as they are under the 1910 Brussels Collision Convention.

2. Eliminate the In Extremis Doctrine?

In contrast to the Pennsylvania rule, which has few defenders, leading commentators have thrown their support behind continued application of the in extremis rules. After noting that a few commentators questioned the continued viability of the in extremis doctrine in light of the 1910 Brussels Collision Convention and the Supreme Court’s adoption of comparative fault in Reliable Transfer, David Owen concluded in 1977 that there is nothing inconsistent between a comparative fault rule and the extremis doc-

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142 See The Atlas, 93 U.S. 302, 315, 1979 AMC 1167 (1876); Allied Chemical Corp. v. Hess Tankship Co. of Delaware, 661 F.2d 1044, 1058, 1982 AMC 1271 (5th Cir. 1981) (affirming the rule’s continued validity). The leading example of forum shopping in an attempt to gain the benefit of the innocent cargo rule is Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 1932 AMC 512 (1932).
145 Some courts seem willing to limit the presumption’s application. See, e.g., MacDonald v. Kahikolu, Ltd, 581 F.3d 970, 974 2009 AMC 2113 (9th Cir. 2009) (“it is not clear that the Pennsylvania Rule applies to cases that do not involve a collision or other “navigational” accident”) (dictum). Ironically, collisions are the one context where the Brussels Convention precludes the use of presumptions.
146 Abolition of the rule might also facilitate early resolution of collision cases through summary judgment. For an example of a summary judgment precluded by the effect of the Pennsylvania rule, see Cliffs-Neddrell Turnkey Int'l-Oranjestad v. The Rick Duke, 947 F.2d 83, 1992 AMC 1 (3d Cir. 1991).
trine.\textsuperscript{147} Much later, no less an authority than the late Nick Healy was convinced that the Court's decision in \textit{Reliable Transfer} did not and should not affect the validity of the in extremis doctrine. In 1999, he wrote:

Unlike "major-minor fault" and "last clear chance," error \textit{in extremis} is not a doctrine invented to soften the sometimes harsh effects of the old "divided damages" rule. Error \textit{in extremis} simply sets a lesser standard of care for an innocent vessel boxed in by the serious faults of another vessel and required to take quick action in an effort to avoid collision. It is submitted that the doctrine is still valid under \textit{Reliable Transfer}.\textsuperscript{148}

Rule 2(b) expressly provides for a departure from the rules when necessary to avoid immediate danger. Thus at least part of the in extremis doctrine is codified in the rules. It is also noteworthy that, even with the near universal adoption of comparative fault, the recently released Third Restatement of Torts preserved both the excused violation rule and unexpected emergency rule. The Restatement thus appears to validate the continuing relevance and validity of the in extremis rules in marine collision law while adopting comparative fault.

3. \textit{Adopt a Broader Comparative Fault Allocation Method}

Under the British legal system,\textsuperscript{149} the Uniform Comparative Fault Act in the U.S.\textsuperscript{150} and the Third Restatement of Torts, comparative fault involves an assessment of the degree of fault and of causation. Restatement (Third) of Torts: Apportionment of Liability includes both the nature of the person's

\textsuperscript{147}David R. Owen, Admiralty Law Institute: Symposium on American Law of Collision, The Origins and Development of Marine Collision Law, 51 Tul. L. Rev. 759, 803-04 (1977). He explained his view on the compatibility of comparative fault and the in extremis doctrine:

To this writer, however, they seem compatible: the sequence of faults becomes merely a factor for a court to consider on a "broad common sense basis" in determining causation, even though the original fault will usually be the proximate cause of the accident. (Id. at 804, citing Brandon, infra note 149, at 1029-30); accord Brown, General Principles of Liability, supra note 137, 51 Tul. L. Rev. at 837 ("The rule was clearly not instituted to ease any 'harsh' effect of the equal division rule, but permits a conclusion that, in certain circumstances, an error does not constitute fault; i.e., there was no negligence."). Brown goes on to add that "As a practical matter, however, it probably will be applied less often in the future."

\textsuperscript{148}Healy, Admiralty Law at the Millennium, supra, at 1792; see also George Rutherglen, Not With a Bang But a Whimper: Collisions, Comparative Fault, and the Rule of the Pennsylvania, 67 Tul. L. Rev. 733 (1993).


conduct and the strength of the causal connection in its factors for assigning responsibility.\textsuperscript{151} It goes on to provide one possible approach to the apportionment of liability when damages can be divided by causation.\textsuperscript{152}

Nicholas Healy, while skeptical of an approach that included causative potency in the comparative fault calculation, highlighted the issue as a "serious" question after \textit{Reliable Transfer}. In 1977 he wrote:

What is perhaps the only serious remaining question of the several created in the wake of \textit{Reliable Transfer} is whether, in apportioning blame in a both-to-blame case, a court should look to the respective degrees of culpability, to the respective degrees of causality, or to both. At the Admiralty Law Institute's Symposium on Collision in 1977, it was made very clear by Sir Henry Brandon, later Lord Brandon of Oakbrook, that under English law both degrees of causality and degrees of culpability are taken into account.\textsuperscript{153}

Nearly twenty years later, the U.S. Supreme Court in \textit{Exxon Co., U.S.A. v. Sofec, Inc.}, appeared to leave open the question whether the pure comparative culpability system or the comparative culpability and causation system was "the appropriate one" in an admiralty case.\textsuperscript{154} In an extensively litigated 2007 decision involving a multiple-vessel collision in the English Channel, the Court of Appeals for the Second Circuit apparently thought the comparative culpability and causation system was the appropriate one, and directed the district court on remand to consider both the relative culpabili-

\textsuperscript{151}\textit{Restatement (Third) of Torts: Apportionment of Liability, supra, § 8 provides:}
Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include:
(a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
(b) the strength of the causal connection between the person's risk-creating conduct and the harm.

\textsuperscript{152}\textit{Restatement (Third) of Torts: Apportionment of Liability, supra, § 26 provides:}
(a) When damages for an injury can be divided by causation, the factfinder first divides them into their indivisible component parts and separately apportions liability for each indivisible component part under Topics 1 through 4.
(b) Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine:
(1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and
(2) the amount of damages separately caused by that conduct.

Otherwise, the damages are indivisible and thus the injury is indivisible. Liability for an indivisible injury is apportioned under Topics 1 through 4.

\textsuperscript{153}\textit{Healy, Admiralty Law at the Millennium, supra at 1793 (internal citations omitted).}

\textsuperscript{154}\textit{517 U.S. 830, 837 n.2, 1996 AMC 1817 (1996) ("We continue to use the term "comparative fault" employed in \textit{Reliable Transfer}, but we do not mean thereby to take a position on which of these systems is the appropriate one, assuming there is in fact a distinction between them.").}
ty of each vessel and the relative extent to which the culpability of each caused the collision.155

If the broader basis of allocating damages were more widely adopted, admiralty courts would be able to more fairly deal with the minimal fault-high causative potency and high fault-minimal causative potency cases and might feel less of a need to preserve specialized rules to enable a vessel to escape the consequences of de minimis violations. The broader basis for allocating damages might also provide the courts with a new opportunity to reexamine and chart the contours of the Supreme Court’s surprising application of the superseding cause doctrine in *Exxon Co., U.S.A. v. Sofec, Inc.*156

4. Make Wider Use of Court-Appointed Expert Witnesses

The Federal Rules of Evidence permit the court to appoint expert witnesses and to require the parties in the case to contribute to the witness’ compensation.157 The advantages presented by the availability of neutral experts chosen by the court instead of the parties in cases involving the standard of care expected of professional mariners has been amply demonstrated in the English admiralty courts, which commonly make use of nautical assessors to advise the court on seamanship and nautical skill questions.158

Whether in mediation, arbitration or litigation, collision avoidance maneuvering options are best analyzed by true navigation and seamanship experts.159 For example, it is generally recognized by professional mariners, and arguably Rule 8(c) of the Collision Regulations, that turns are far more effective (and noticeable to the other vessel) than speed changes and that speed reductions may actually increase the danger of collision.160 Yet courts

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155Otal Investments, Ltd. v. M.V. Clary, 494 F.3d 40, 63 (2d Cir. 2007). The *M/V Tricolor* sank as a result of the collision.


157Fed. R. Evid. 706(a), (b).


159Examples of expert analyses of collision cases can be found in F. J. Buzek & H. M. C. Holdert, Collision Cases: Judgments and Diagrams (1990) and Cahill, Collisions and their Causes, supra; see also Geoffrey W. Gill, Maritime Error Management: Discussing and Remediating Factors Contributory to Casualties (2011).

160As the other vessel’s relative speed increases, the effectiveness of any avoiding action by own ship decreases. See Max H. Carpenter & Wayne M. Waldo, Real Time Method of Radar Plotting 25 (1975) (observing that the experienced officer evaluates vessel speed on the basis of the ratio between own ship’s speed and the other ship’s speed, rather than in absolute terms and that if the other vessel is slower, “then own ship essentially is in command of the situation”); Slack, Modern Methods of Plotting, supra at 431-32 (concluding that courts have placed too much emphasis on excess speed, rather than on poor seamanship and that if a navigator “simply stops his ship, and it is subsequently shown that this action converted a relatively safe passing situation into a collision situation, then she should bear part of the blame”).
almost reflexively condemn vessels for failing to slow or even back in an emergency. Another area where independent experts might prove superior to experts retained by the parties is in assessing the reasonableness of Rule 17(a)(ii) maneuvering decisions by mariners. Some of the recent cases suggest that the court failed to appreciate the complexity of the factors that go into such decisions. For example, a mariner on a stand-on vessel contemplating a Rule 17(a)(ii) or in extremis maneuver must always be mindful of the danger of conflicting action—where one vessel’s collision avoidance maneuver is nullified by an offsetting maneuver by the other vessel. Where the court’s decision is based on the testimony of experts selected, prepared and compensated by the litigating parties, the result, when published, might well cloud the meaning and application of the rule on permissive maneuvers and the standard called for under the ordinary practice of seamen, undermining the value of the Collision Regulations in governing primary conduct. By contrast, decisions guided by the advice of experts on navigation and seamanship selected by the court are more likely to provide a neutral and better reasoned application of the rules, thus better serving the primary purpose of the rules.

VII

CONCLUSION

The Collision Regulations incorporate some aspects of the historical in extremis doctrine in Rules 2(b) and 17(b). The courts are not free to alter those rules. However, in the U.S., most of the in extremis doctrine, including most prominently the excused violation rule and the lenient standard of care rule, continues to be defined by the courts. Because the courts are the

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61 See, e.g., Board of Commissioners v. M/V Farmsum, 574 F.2d 289 (5th Cir. 1978).
62 In evaluating her Rule 17(a)(ii) options, a professional mariner on a stand-on vessel will consider the possible reasons why the give-way vessel has not maneuvered. Possible reasons include: (1) the give-way vessel has not detected you; (2) although it has detected you, it is not using radar plotting or visual bearings to determine if there is risk of collision; (3) although it is using some means to determine risk of collision, the vessel does not believe the situation poses a risk of collision; (4) although recognizing there is a risk of collision, the vessel cannot maneuver because of an internal limitation or an external constraint (like a third vessel or navigation danger); (5) although recognizing risk of collision, it does not interpret the situation the same way as you do (e.g., the other vessel evaluates it as a situation in which you are the give-way vessel); or (6) the vessel recognizes the risk of collision and that it is obligated to take action, but it will not maneuver until it is good and ready. The last possibility clearly raises the risk of conflicting action. One court concluded, albeit less than decisively, that the stand-on vessel’s liability under a doubtful Rule 17(a)(ii) situation might lie in not sounding the warning signal, rather than in her failure to maneuver. See In re Seiniki Kisen Kaisha, 629 F. Supp. 1374, 1380-81, 1986 AMC 913 (S.D.N.Y. 1986) ("we place primary emphasis on [the stand-on vessel’s] failure to give a whistle warning signal rather than its failure to make any specific maneuver").
authors of the general maritime law, those latter rules may be further developed or even abolished by the courts. Nevertheless, both in extremis rules have survived in the U.S., even after adoption of the comparative fault rule in Reliable Transfer, and in the U.K, which has adopted the 1910 Brussels Collision Convention.

This article has sought to demonstrate that the approach adopted by the Third Restatement of Torts—which incorporates similar, though not identical excused violation and emergency standard of care rules—provides a well reasoned and carefully structured guide for future applications of admiralty's in extremis doctrine. By disaggregating the two in extremis rules and highlighting that each rule has distinct and separate elements, the Restatement more effectively ensures that each rule is applied only when appropriate to the circumstances. Although several proposed collision law reforms have considerable merit, and should be pursued in the longer term to better harmonize U.S. collision law with the laws of other maritime states, U.S. collision law and practice would stand to derive immediate benefits from selective incorporation of the Restatement approach.