Apportionment of Damages in Collisions at Sea

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Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol50/iss4/5

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APPORTIONMENT OF DAMAGES
IN COLLISIONS AT SEA

The United States Supreme Court recently in *United States v. Reliable Transfer Co.* abrogated the longstanding equal division of damages rule in cases of mutual-fault collisions at sea and adopted the apportionment of damages rule by which damages are awarded on the basis of the relative fault of each vessel. Equal division of damages has been criticized by courts and commentators for its unfairness in cases where the contributory fault of the respective vessels is considerably unequal. Recognizing the unfairness of the rule, courts have avoided its arbitrary application by developing several exceptions to the rule.

Although the equal division of damages rule was judicially created, the courts demonstrated reluctance to initiate a change and the United States Supreme Court, until recently, declined to review the doctrine.

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1. 95 S. Ct. 1708 (1975).
2. Judge Learned Hand, dissenting in National Bulk Carriers, Inc. v. United States, 183 F.2d 405, 410 (2d Cir. 1950), denounced the rule vehemently:

   I do not mean that I should divide the damages equally, if I were free to divide them proportionately to the relative fault of the vessels. An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. Indeed the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits. Nevertheless, so long as our antiquated doctrine prevails, I think that we should apply it unflinchingly, and in the case at bar I would divide the damages.

   The “sop” to which Judge Hand refers is the major-minor fault rule, see Part I-C-1 infra, which prompted the majority in *National Bulk Carriers* to ignore the relatively minor fault of the one vessel on the grounds that the fault of the other vessel was glaring. *See also Dwyer Oil Transfer Co. v. The Edna M. Matton*, 255 F.2d 380 (2d Cir. 1958).


3. These doctrines are discussed in Part I-C infra.
Legislative proposals for change were considered on two occasions by congressional committees, but were not presented on the floor.

The Supreme Court has on several occasions considered arguments for adoption of the apportionment of damages rule. In *Weyerhauser Steamship Co. v. United States*, however, the Court declined to alter the equal division of damages rule which has "for more than 100 years. . . governed. . . the correlative rights and duties of two shipowners which have been involved in a collision in which both were at fault." In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, the Court, in deciding whether the rule of contribution between joint maritime tortfeasors should be applied in noncollision cases, held that "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution to this problem should await congressional action." The Court surprised the maritime bar by granting certiorari in *Union Oil Co. v. The San Jacinto* to consider the validity of the equal division of damages rule. But the Court avoided the issue by creating a new "escape doctrine" and found one vessel free from fault. *San Jacinto* dealt what was believed to be a mortal blow to any hope that the Court might adopt the apportionment of damages rule, a blow which appeared all the more conclusive two weeks later when the Court denied certiorari in *The Flying Foam v. Iron Ore Transport Co.* The latter case provided a better vehicle for review of the equal division of damages rule than *San Jacinto* because the fault of both vessels was conceded; the only issue was whether damages must be divided equally in cases of unequal fault.

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4. *See* notes 65-68 and accompanying text *infra*.
6. *Id.* at 603.
8. *Id.* at 284-85. Commentators interpreted *Halcyon* as ending hopes that the Court would change its own rule without action by Congress. *See, e.g.*, GILMORE & BLACK, supra note 2, at 531.
9. The Court strongly indicated in *Flood v. Kuhn*, 407 U.S. 258 (1972), that it would not review its own rules after years of acquiescence to those rules by Congress. *Flood* involved an antitrust action brought to test the legality of professional baseball's reserve clause.
10. 409 U.S. 140 (1972); *see* note 50 and accompanying text *infra*.
11. *See* Part I-C-2 *infra*. The avoidance of the issue after the surprising grant of certiorari can probably be attributed to changes in the Court's membership after the grant of certiorari.

The Supreme Court has never ruled that, in cases of unequal fault, damages must be
Apportionment of Damages

It was against this backdrop that the Court granted certiorari to review the issue in *Reliable Transfer*.\(^\text{13}\) Although the case involved the stranding of a vessel rather than collision, the validity of the equal division of damages rule in a case of unequal fault was presented, and Justice Stewart, writing for an unanimous court, stated:\(^\text{14}\)

We hold 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.

This comment will consider the problems which must be faced by the courts and the bar in establishing standards for apportionment of blame and will evaluate the effects of the new rule on other rules and doctrines of substantive maritime law. Although the Court's decision in *Reliable Transfer* abrogates the equal division of damages rule, it leaves undisturbed several anomalous doctrines developed in response to the rule.

\(^{\text{13}}\) 419 U.S. 1018 (1974). The Court of Appeals for the Second Circuit affirmed an equal division of damages between the United States and the owner of the tanker Mary A. Whalen even though the trial court found the grounding of the tanker was caused 25 percent by the negligence of the Coast Guard for its failure to properly maintain a breakwater light and 75 percent by the negligence of the tanker in making a U-turn in a dangerous channel when its master knew the breakwater light was not working. *Reliable Transfer Co. v. United States*, 497 F.2d 1036 (2d Cir. 1974). The validity of the equal division rule was the basis of the only question certified for review. 43 U.S.L.W. 3288 (1974).

\(^{\text{14}}\) 95 S. Ct. at 1715.
I. THE EQUAL DIVISION OF DAMAGES RULE

A. History of the Rule

The equal division of damages rule had mention in codes dated as early as the 12th century. The English courts first applied the rule in 1647, and equally divided damages in all cases of unintentional collision through the 18th century. Application of the rule was restricted by Sir William Scott, later Lord Stowell, in 1815 to those cases of collision caused by the fault of both ships. Lord Stowell's famous dictum divided collisions into four classes: (1) those involving solely the negligence of the defendant vessel, in which case the defendant must make good damages suffered by the plaintiff; (2) those involving negligence of the plaintiff vessel only, in which case the plaintiff vessel bears its own loss; (3) those caused by fault on the part of both ships, in which case the total damages are to be divided equally, the vessel suffering the least damage to indemnify the other vessel for one-half the difference between their respective damages; and (4) collisions occurring without fault of either ship, in which case Lord Stowell would have overruled the precedents that division of damages applied to collisions without fault and to cases where it was impossible to establish the cause, in favor of a rule whereby the owner of each vessel in such cases must bear its own loss.

Lord Stowell's four cases were referred to in dictum by the United States Supreme Court in 1843. American courts, however, equivocated on division of damages in cases of mutual fault until 1854 when

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The early codes arbitrarily provided for assignment of damages in specified situations, categorizing liability by the circumstances of collision rather than by inquiring into "fault" of the vessels. Generally, they equally divided damages in some situations, assessed one vessel for all damages in others and denied remedy to either vessel in the remaining cases. See generally MARSDEN, supra at 95-97.

16. Huger, supra note 2, at 535.


19. The Louisville, 42 U.S. (1 How.) 89 (1843). The Supreme Court, in dictum of its own, adopted Lord Stowell's dictum in cases of "inscrutable fault," cases in which neither vessel can prove the fault of the other, stating: "Where there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has
Apportionment of Damages

the Supreme Court applied the rule in *The Schooner Catharine v. Dickinson:* 20

[T]he question . . . has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts . . . is to divide the loss . . . . This seems now to be the well-settled rule in the English admiralty . . . . Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation.

B. Its Substance and Application

The Supreme Court explained the mechanics of the equal division of damages rule in *The Sapphire:* 21

[W]here both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. But this rule is applicable only where it appears that both vessels have been injured. If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault.

The inequitable effect of equal division of damages in cases of unequal fault was augmented by *The Pennsylvania,* in which the Court held: 22

fallen." Lockwood v. The Grace Girdler, 74 U.S. (7 Wall.) 196, 203 (1869). The legal importance of this dictum has not been tested, and several courts have limited its application to cases where the collision might reasonably have occurred without fault of either vessel, dividing damages equally where it was reasonably certain that one or more vessels was at fault though neither could sustain the burden of proving the fault of the other. See, e.g., The Comet, 6 Fed. Cas. 195, 199 (N.D.N.Y. 1870), rev'd on other grounds, 6 Fed. Cas. 200 (C.C.N.D.N.Y. 1872). *Contra,* The Jumna, 149 F. 171 (2d Cir. 1906); The Banner, 225 F. 433 (S.D. Ala. 1915).

20. 58 U.S. (17 How.) 170, 177 (1854). The Court earlier applied the dictum in cases of inevitable accidents, those occurring without negligence or fault of either party, placing on each party its own loss. Stainback v. Rae, 55 U.S. (14 How.) 532 (1853).


22. 86 U.S. (19 Wall.) 125, 136 (1873). The heavy burden of proving that a statutory fault could not have contributed to the collision has been met in relatively few cases. Most of the successful arguments have involved violations of Rule 29 of the International Rules of the Road, 33 U.S.C. § 1091 (1970) (which requires the keeping of a proper lookout), where it was shown that a proper lookout could not have prevented the collision since information that could have been provided by a lookout was otherwise obtained. See J. GRIFFIN, THE AMERICAN LAW OF COLLISION § 203 (1949) [hereinafter cited as GRIFFIN].

The vitality of the rule of The Pennsylvania may be threatened by the "reasonable expectancy rule" developed in Union Oil Co. v. The San Jacinto, 409 U.S. 140 (1972), discussed in Part I-C-2 infra.
When . . . 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 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 [its] fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

The Pennsylvania Rule, i.e., that a ship in violation of a statutory duty is presumed to be a cause of the disaster, renders a vessel otherwise free of fault liable for one-half of the total damages because it committed a relatively minor violation of one of the International Rules of the Road (International Rules),23 irrespective of the degree of culpability. Because of the complexity of the International Rules and the necessary vagueness of the General Prudential Rule24 and the Rule of Good Seamanship,25 a statutory violation on the part of both vessels can be alleged in good faith in nearly every collision.

To illustrate the mechanics of the equal division of damages rule and its potential inequities, assume two vessels, A and B, approaching on intersecting courses on the open seas. By international convention, A is obligated to yield right of way to B,26 and B is required to hold its course and speed until it is apparent that the action of A alone would not be sufficient to avoid collision.27 The navigators of A are inatten-


In obeying and construing sections 1061 to 1094 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger.

25. Rule 29, id. § 1091, incorporates good seamanship:

Nothing in sections 1061 to 1094 of this title 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.

For similar rules for the Great Lakes, Inland Waters and Western Rivers, see id. §§ 292, 293, 212, 221, 350, 351.

26. See Rule 19, id. § 1081.

27. See Rule 21, id. § 1083.
Apportionment of Damages

tive and fail to observe the presence of \( B \). \( B \) properly holds course and speed until it is apparent that \( A \) is taking no action and finally \( B \) alters its course to keep free of \( A \). Shortly thereafter, the watch officer of \( A \) becomes aware of \( B \)'s presence and, in the excitement and confusion of the emergency, orders an ill-conceived maneuver which frustrates the actions of \( B \). The ensuing collision results in minor damage to \( B \), but causes costly damage to \( A \). The fault of \( A \) is obvious, but \( B \) failed to signal its course change with proper whistle signals\(^{28}\) and it is alleged that such signal might have shaken the officers of \( A \) from their reveries in time to have permitted the exercise of better judgment.

\( B \)'s repairs cost \$100,000, and \( A \)'s \$3,000,000. Cargo owners, in separate actions, obtain judgments against \( A \) for cargo aboard \( B \) which suffered \$2,000,000 damage. In an action against \( B \), under the apportionment of damages rule applicable in most maritime nations, \( A \) must prove that the technical fault of \( B \) contributed to the collision or \( A \) is liable for all losses. If \( A \) can sustain such proof, \( A \) and \( B \) will each be liable in proportion to their fault, \( e.g. \), 90 percent and 10 percent respectfully. \( B \) then would be liable to \( A \) for 10 percent of \$3,-100,000, or \$310,000, less its own cost of repairs (\$100,000), and, by international convention,\(^{29}\) would enjoy benefits of contractual exculpation from liability for damages to its own cargo. \( A \) would bear a loss of \$4,390,000, including liability for 90 percent of the damage to cargo aboard \( B \). Under the former American rule of equal division of damages, however, each vessel would be assessed one-half of the total loss of \$5,100,000, or \$2,550,000 each. \( B \) would be liable to \( A \) in the amount of \$2,550,000, less \( B \)'s cost of repairs (\$100,000) even though \( A \) was much more at fault.

American courts, legislators and commentators,\(^{30}\) objecting to the inequity of the equal division of damages rule in cases of unequal fault, have argued for adoption of the more equitable apportionment of damages rule. In 1939, a subcommittee of the Senate Committee on Foreign Relations found that “the change which would be brought about by the [adoption of the apportionment of damages rule] is ob-

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28. See Rule 28, id. § 1090.
30. See GILMORE & BLACK, supra note 2, at 529–30. See also Jackson, supra note 2, at 266–72.
viously an equitable one and preferable to the present arbitrary American rule." The Second Circuit Court of Appeals in *Algren v. Red Star Towing & Transportation Co.*, stated:

The admiralty rule of evenly-divided damages in cases of injury to property—although a highly desirable departure from the "harsh" common-law doctrine which denies all relief to one suing for negligence if guilty of contributory negligence—has frequently received criticism as unfair. On that ground, virtually every country but ours has abandoned it.

In 1937, 26 of 28 federal court judges polled by the United States Shipping Board favored adoption of the apportion of damages rule in place of the equal division of damages rule. Nonetheless, the equal division of damages rule continued to prevail in the United States. American courts, concerned with the unfairness and inflexibility of the rule in cases of unequal fault, developed various doctrines to avoid its arbitrary application.

C. The Escape Doctrines

1. The major-minor fault doctrine

The equal division of damages rule assessed an equal proportion of the total damages to each vessel at fault in causing the collision. If fault of either vessel was alleged and proven, generally for such vessel to escape liability it had the burden of proving that its fault did not contribute to the collision. But where the degree of the negligence of one vessel was "gross" in relation to the negligence of the other, some courts required the grossly-at-fault vessel to prove that the negligence of the other vessel also contributed to the collision.

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32. 214 F.2d 618, 620–21 (2d Cir. 1954). See also N.M. Patterson & Sons. Ltd. v. City of Chicago, 209 F. Supp. 576 (N.D. Ill. 1962), rev’d on other grounds, 324 F.2d 254 (7th Cir. 1963) (normal product of the equal division of damages rule has been “manifest injustice”).


34. See, e.g., *The Victory & The Plymothian*, 168 U.S. 410 (1897); Carr v. Hermosa Amusement Corp., Ltd., 137 F.2d 983 (9th Cir. 1943); *The Newburgh*, 130 F. 321 (2d Cir. 1904). In *The Victory*, the Court held:

As between these vessels, the fault of the Victory being obvious and inexcusable.
Apportionment of Damages

fault" rule was developed by the Supreme Court in *The Great Republic* as a doctrine excusing the minor offender if the negligence of the other vessel alone was sufficient to cause the collision. The rule was restated as a negative presumption in *The City of New York*:

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

Lower courts have applied the doctrine both as a rule of negative presumption and as a means of excusing minor fault where the fault of the other vessel is gross, but there has been little agreement as to the legal standards to be applied. Where the lesser negligence was in violation of a statutory duty, however, the presumption favoring the less culpable vessel did not overcome the presumption of causation established by *The Pennsylvania*, that a vessel in violation of statutory duty at the time of the collision caused the collision. In such cases each vessel is deemed equally liable. Frequently, each vessel in a collision technically violated statutory duties; hence, the possible application of the major-minor fault rule made the outcome of cases involving greatly unequal fault uncertain.

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168 U.S. at 423.
35. 90 U.S. (23 Wall.) 20 (1874).
This omission [to give a whistle signal] was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think, under the circumstances, the Cleona should share the consequences of this collision with the Republic.

Id. at 35.
36. 147 U.S. 72, 85 (1893).
37. See, e.g., Compania de Maderas v. The Queenston Heights, 220 F.2d 120 (5th Cir. 1955); General Seafoods Corp. v. J.S. Packard Dredging Co., 120 F.2d 117 (1st Cir. 1941); Pure Oil Co. v. Jack Neilson, Inc., 135 F. Supp. 786 (E.D. La. 1955), aff'd 233 F.2d 790 (5th Cir. 1956).
40. See, e.g., Partenreederei M.S. Bernd Leonhardt v. United States, 393 F.2d 756
2. The reasonable expectancy exception

In *Union Oil Co. v. The San Jacinto*, the tugboat San Jacinto and the tanker Santa Maria were headed in opposite directions on opposite sides of a 500-foot-wide river channel. The San Jacinto emerged from a fogbank located on its side of the channel while making a totally unexpected U-turn; the tug captain had mistakenly anticipated an imminent collision. The San Jacinto successfully completed its U-turn but the Santa Maria was unable to stop before the barge in tow crashed into the port bow of the Santa Maria. The trial court found the San Jacinto and its barge totally at fault. The Ninth Circuit Court of Appeals reversed, finding that the Santa Maria had violated a statutory rule of the road and had not overcome the *Pennsylvania Rule*’s presumption of fault. The court directed the district court to determine the amount of damage sustained by the barge and assess damages according to the equal division of damages rule.

Although it granted certiorari in *San Jacinto* principally to review the claim that the equal division of damages rule should be abandoned, the Supreme Court instead developed another exception to the rule: the reasonable expectancy exception. The Court found that although the tanker Santa Maria may have violated the rule that every vessel in fog must proceed at a "moderate speed," it was not at fault in causing the collision if a reasonable navigator would not have anticipated that another vessel would be on an intersecting course.

![Image](https://via.placeholder.com/150)

(4th Cir. 1968). See also Avondale Marine Ways, Inc. v. The Crescent Cities, 184 F. Supp. 773, 775 (E.D. La.), aff'd per curiam 287 F.2d 889 (5th Cir. 1960) ("Application of the major–minor fault rule has become a popular pastime in this circuit so that proof of mutual fault does not automatically lead to divided damages.").

41. 409 U.S. 140 (1972).
43. 451 F.2d 1369 (9th Cir. 1972).
44. See note 50 infra.

> "Moderate speed" has been judicially defined as speed such as "would enable [a ship] to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." The Nacoochee. 137 U.S. 330, 339 (1890). See also Griffin, supra note 22, at 225.

46. The majority opinion interpreted the half-distance rule as requiring a reasonable expectation of danger:

Implicit in the rule, however, is the assumption that vessels can reasonably be ex-
Apportionment of Damages

Court had previously developed a well-recognized interpretation of the phrase "moderate speed." This interpretation, commonly referred to as the "half-distance" rule, provides that a reasonable speed for a vessel is "such as would enable her [the vessel] to stop within half the distance separating the ships when they first sight each other."\textsuperscript{47} The Court concluded that the half-distance definition of moderate speed should be given effect only if the "danger against which that rule was designed to protect," \textit{i.e.}, the presence of vessels whose positions are not ascertained, is related to the collision. In \textit{San Jacinto}, although there was patchy fog, the Santa Maria was able to determine both visually and by radar that the river was clear of traffic but for the tug and its tow, the positions and course of which were ascertained.\textsuperscript{48}

The Court's decision in \textit{San Jacinto} appears to contradict or at least ignore the presumption of liability of a vessel in violation of a statutory duty established in \textit{The Pennsylvania} and relied on by the Ninth Circuit court in \textit{San Jacinto}. The apparent conflict between the two cases can be resolved, however. The statutory moderate-speed-in-fog rule is designed to protect against collisions in fog, as is the judicially developed half-distance rule. The Court's opinion in \textit{San Jacinto} can be regarded as finding that, under the circumstances, the speed of the Santa Maria was "moderate," although it was in violation of the judicially imposed half-distance rule. In such circumstances, the \textit{Pennsylvania} Rule is not applicable.

The opinion is open to criticism on at least three grounds. First, it can be argued that the half-distance rule is designed to protect against unanticipated course changes of vessels, as it is not uncommon that vessels may veer due to mechanical failure or error of the helmsperson, or to avoid an obstruction not known to the other vessel. In this case, the San Jacinto veered across the path of the Santa Maria due to the error of the former's navigator;\textsuperscript{49} the Court could have found that the half-distance rule was designed to protect against collision resulting from such an event.

Second, the opinion invites arguments that many alleged violations of a statutory duty are merely violations of a judicially developed rule expected to be traveling on intersecting courses. If, on the facts of the case, it is totally unrealistic to anticipate the possibility that a vessel will travel on a particular heading that will intersect the course of another ship, the reason for the rule is rather clearly not present.

\textsuperscript{47} U.S. at 145.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 143.
definition of the statute in issue. Many of the rules of the road are necessarily vague and generalized, and take on meaning only through judicial interpretation. On the basis of San Jacinto, application of the Pennsylvania Rule can be challenged in many collision cases.

Finally, it is clear from the Court's opinion that it is reluctant to equally divide damages in cases of substantially unequal fault and therefore fashioned the reasonable expectancy exception in San Jacinto. By doing so, the Court avoided deciding whether the equal division of damages rule should be abandoned. Rather than graft yet another exception onto the rule, the Court should have reconsidered the rule and adopted the apportionment of damages rule in its place as was finally done in Reliable Transfer. Remand to apportion damages according to the degrees of causal fault of each vessel would have then been in order.

3. The error in extremis rule

Under the error in extremis rule, a vessel free from fault until a collision is imminent may be held blameless although it erred in the evasive action taken:

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 . . . . And if an error was committed in such circumstances it was not fault.

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50. Justice Rehnquist, writing for the majority, stated:
We granted certiorari principally to consider petitioner's request that we abandon the divided-damages rule. The orderly disposition of issues presented by the petition for certiorari, however, requires that we address ourselves to the issue of liability before reaching the question of damages. Since in so doing we conclude that the Court of Appeals was wrong in holding the Santa Maria liable at all, we do not reach the issue of damages.

Id. at 141.

Justice Stewart, the sole dissenter, would have found that the Santa Maria had violated the half-distance of visibility rule for vessels in fog (see, e.g., The Nacoochee, 137 U.S. 330 (1899)) and "would have reached the question which we granted certiorari in this case to consider—the continued validity of the divided-damages rule." 409 U.S. at 150.

Apportionment of Damages

Although affirmative action in an in extremis situation is required by statute, courts have been reluctant to impose a high standard of care in such a situation, finding that the duty is satisfied when any reasonable affirmative action, even if ill-advised, is taken. The Pennsylvania Rule has only limited application to in extremis situations, as International Rule of the Road 27 requires departures from the steering and sailing rules when necessary to avoid immediate danger. But when violations of the rules requiring whistle signals to indicate changes of course are alleged, the Pennsylvania Rule places the burden on the vessel in violation to prove that its statutory breach could not have contributed to the collision even though the vessel is in extremis.

4. The last clear chance doctrine

The last clear chance doctrine, designed to overcome the rule that contributory negligence bars recovery, is applied when a vessel involved in a collision was put in a perilous position as a result of its own negligence, but a collision could have been averted by the exercise of ordinary care on the part of the other vessel. The doctrine has been limited in admiralty to cases where the first vessel’s negli-

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52. 33 U.S.C. §1083 (1970);
Where by any of sections 1061 to 1094 of this title one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter 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 (see section 1089 and 1091 of this title).
54. See note 22 and accompanying text supra.
57. See text accompanying note 22 supra.
In truth there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?
The last clear chance doctrine is fully developed in Note, Last Clear Chance in Admiralty, 10 West. Res. L. Rev. 286 (1959). The rule had its origins in Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842). In that case, the plaintiff negligently permitted his hobbled donkey to wander onto the highway. The defendant approaching in his carriage at an excessive rate of speed was found to have been negligent in not avoiding collision with the donkey after he had observed its helpless condition.
gence has ceased and the vessel is passively helpless at the time of the collision. The later fault of the other vessel must be the immediate and predominating cause of the collision.59

Judicial development of the last clear chance doctrine and the other escape doctrines indicate the courts’ recognition that the equal division of damages is too harsh and does not produce equitable results. But rather than develop more, and perpetuate the current exceptions to the rule, the courts should have long ago abandoned the rule and its escape doctrines and adopted the more equitable apportionment of damages rule. Abandonment of the equal division of damages rule eliminates any need or justification for application of the escape doctrines.60

II. APPORTIONMENT OF DAMAGES: THE BRUSSELS CONVENTION OF 1910

At the turn of the century, the equal division of damages rule created such concern throughout the shipping world that representatives from most maritime nations convened at the Brussels Convention of 1910 (Brussels Convention) to review it.61 Article 4 of the rules pro-

59. GRIFFIN, supra note 22, at 491. Some courts have held the doctrine of last clear chance inapplicable in admiralty. See, e.g., The Norman B. Ream, 252 F. 409 (7th Cir. 1918); Williamson v. The Carolina, 158 F. Supp. 417 (E.D.N.C. 1958). Others have applied the doctrine to exonerate the wrongdoer. See Cooper. The Last Clear Chance Doctrine is Applicable in Admiralty, 5 N.Y.L.F. 278 (1959); 58 Mich. L. Rev. 276 (1959).

For a discussion of the reasons underlying the use of the doctrine in admiralty, see Cenac Towing Co. v. Richmond, 265 F.2d 466 (5th Cir. 1959).

60. See Part IV-B infra; James, Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704 (1938). Since Britain’s adoption of an apportionment of damages rule, British courts have been disinclined to apply the doctrine in admiralty cases. For example, in Boy Andrew v. St. Rognvald, [1948] A.C. 140, 149 (1947), it was held that the doctrine of last clear chance applies only if the negligence of the first wrongdoer “created a static condition where nothing that he could do when collision threatened would have avoided the result” and found that the negligence of the first wrongdoer did in fact contribute to the collision. The Fifth Circuit Court of Appeals reached a similar result in Cenac Towing Co. v. Richmond, 265 F.2d 466 (5th Cir. 1959), finding that, although the last clear chance doctrine exists in admiralty, it cannot be applied where the negligence of both parties continues to the moment of collision.


For an excellent history of the Convention, see French, A New Law for the Seas, 42 L.Q. Rev. 25 (1926). See also Telsey, English Apportionment of Blame in Collisions at Sea, 15 Tul. L. Rev. 567 (1941).
Apportionment of Damages

posed by the Brussels Convention delineates a comparative negligence doctrine:\(^6\)

If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.

Virtually all other maritime nations,\(^6\) including England in 1911,\(^6\) have abolished the equal division of damages rule and adopted the substance of the Brussels Convention rules.

Legislation proposing ratification of the Brussels Convention and adoption of its rules has twice been introduced in Congress.\(^6\) Despite favorable reports from the subcommittees, neither proposal was submitted to either house of Congress. The failure of ratification efforts in 1939 has been attributed to opposition from cargo insurers who feared loss of favorable treatment under the Chattahoochee Rule,\(^6\) the disruptive influence of the events leading to World War II and a poor translation of the Brussels Convention document which resulted in misunderstanding regarding the Brussels Convention’s effect.\(^6\)

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\(^6\)Z. Article 4 also provides that:

[II]n respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear.

It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.

\(^6\)United States v. Reliable Transfer Co., 95 S. Ct. 1708 (1975). For a list of signatory and adhering nations, see id. at 1712 n.7.

\(^6\)Id.

\(^6\)For an account of the forces which successfully opposed ratification by the United States, see Comment, The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages, 64 YALE L.J. 878 (1955).

\(^6\)See Part IV-C supra.

1962 legislation proposing adoption of the Brussels Convention was tied to an unpopular proposal to adopt the 1957 Brussels Convention relating to the limitation of liability of owners of seagoing vessels. The legislation was not presented to the Senate. 68

III. STANDARDS FOR APPORTIONMENT OF BLAME: THE ENGLISH EXPERIENCE

The difficulty of assigning relative degrees of fault to vessels is frequently cited as a disadvantage of the apportionment of damages rule. 69 Apportionment of damages, however, is not unfamiliar to American admiralty courts. The bulk of maritime litigation involves personal injuries and death, damages for which are apportioned according to degrees of fault. 70 American courts also have apportioned damages under conflict of laws rules in cases of collisions which occurred in the territorial waters, or involved vessels, of nations which adhere to the apportionment of damages rule. 71 Moreover, American courts may draw upon the English experience in collision cases to help in anticipating the problems and standards to be considered in determining the "niceties" of fault.

A. English Standards for Apportionment of Damages

English courts often find either vessel wholly liable or divide dam-


Commentators have long expressed a preference for the doctrine of comparative negligence over the more easily applied but often inequitable rule of equal division of damages.

"The only objection [to doing so] that really has any plausibility is the one based on the difficulty of assigning degrees of fault in exact percentages. The answer is . . . that judges would simply approximate as best they could, as is done every day in other cases in matters of amounts of damages, degrees of disability, etc. An attempt at a division on the basis of the degree of fault would at least not be foredoomed to go badly wrong in a large number of cases, as is the present rule."

70. See Staring, supra note 67, at 340.

71. See, e.g., The Mandu, 114 F.2d 361 (2d Cir. 1940). See also Fitzpatrick v. International Ry., 169 N.E. 112 (N.Y. 1929) (damages apportioned in accordance with conflict-of-laws rules in a nonmaritime case).
Apportionment of Damages

ages equally;\(^{72}\) the latter outcome results from a proviso of Article 4 of the Brussels Convention which requires equal apportionment of liability when it is not possible to establish different degrees of fault.\(^{73}\) No clear formula has emerged from the English collision cases for determining whether different degrees of fault exist, and, if so, in what proportion liability should be assigned.

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72. See, e.g., Telsey, supra note 61, at 567. Of 64 collision cases reported in Lloyd's Law Reports, 1964-1973 inclusive, damages were apportioned in the following manner: one ship wholly liable, 20 cases; 4/5—1/5 liability, 3 cases; 3/4—1/4 liability, 4 cases; 7/10—3/10 liability, 2 cases; 2/3—1/3 liability, 10 cases; 3/5—2/5 liability, 11 cases; 1/2—1/3—1/6 liability, 1 case; equal liability, 13 cases. Huger reports that in 314 collision cases reported in Lloyds List Law Reports for the years 1922-1927 inclusive, damages were apportioned as follows: one ship wholly liable, 247 cases; 4/5—1/5 liability, 1 case; 3/5—2/5 liability, 13 cases; 2/3—1/3 liability, 13 cases; equal liability, 40 cases. Huger, supra note 2, at 547.

Comparison of these two surveys reveals two trends. First, the number of collision cases tried has decreased substantially over the years, most likely due to the practicing bar's increased ability to predict results of litigation so that more out-of-court settlements are reached. The second trend correlates with the first: in both surveys, a large percentage of cases tried resulted in a decision of sole fault or liability, reflecting the election of one party to try the case rather than accept a realistically low settlement. The sharp decline of sole fault decisions suggests reluctance to gamble the expenses of litigation against better known odds.

73. See note 62 and accompanying text supra. The meaning of the proviso is left unclear by conflicting decisions of the English courts. In The British Aviator, [1965] 1 Lloyd's List L.R. 271, 277 (C.A.), the court stated:

[In] plain language what the proviso means is that, whatever the ground may be for attributing different degrees of fault, it must be a ground which is proved by cogent evidence, and if that is not so, then the old Admiralty rule of equal division continues to prevail.

But unequal apportionment is required if, on the evidence presented, it is apparent that the fault of the vessels was unequal, even though the precise degree of fault is not proven:

Now that section [Art. 4], as I read it, is mandatory. It does not say that the liability shall be apportioned equally unless different degrees of fault are shown. It is the other way round. It says that the Court must apportion the liability in proportion to the degree in which each vessel was at fault unless it is impossible to do so.


When I look again now at that section I observe . . . a perfectly clear indication that the primary task of the Court is to apportion liability according to fault. This is followed by the proviso that if the Court finds it not possible to apportion different degrees of fault, the Court is to declare an equal distribution of fault. It is, therefore, as a matter of construction, a condition precedent to a declaration that liability be apportioned equally that the Court has found it impossible to establish different degrees of fault . . . [T] hat is not the same thing as saying that where different degrees of fault cannot be established, then the liability should be equal.

The Lucile Bloomfield, [1967] 1 Lloyd's Rep. 341, 351 (C.A.). Thus, it is not necessary that the exact degree of fault of the respective vessels be demonstrated, but the court must not apportion damages equally when it appears from the evidence that the fault was substantially unequal.

Justice Stewart anticipated this problem in United States v. Reliable Transfer Co., 95 S. Ct. 1708 (1975), and makes it clear 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." Id. at 1715–16.
1. "Causation" or "degree of culpability"

Adoption of the apportionment of damages rule in the United States raises the question whether liability should be apportioned on a basis of "causation" of damages or on "degree of culpability." Unfortunately, the earlier English cases are not enlightening. The opinion of Lord Shaw in *The Clara Camus* indicated that the apportionment of "cause" is the same as apportionment of negligence, explaining that the greater the carelessness, the more causal significance it has. Lord Shaw's explanation is inconsistent, however, with the court's statement in *The Peter Benoit*: "The Aurrera might have been more to blame at the outset [the "degree of culpability" theory], but the Peter Benoit was more to blame at the end [the "causation" theory]." In that case a judgment assessing four-fifths of the damages against the Aurrera was modified to render each vessel liable for one-half the damages.

More recent English decisions may provide guidance to American courts; they suggest that both culpability and causation should be considered.

2. Statutory violations

Under an apportionment of damages rule, parties may claim that violations of one or more statutes by one vessel are outweighed by statutory violations of the other. For example, it may be argued that liability should be apportioned 75 percent to a vessel violating three statutes and 25 percent to a vessel violating only one; or, that there is a hierarchy of statutes and that violation of one should be assigned a higher degree of fault than violation of another. American
Apportionment of Damages

courts may find instructive the English courts’ resistance to these attacks on the International Rules of the Road, finding equal liability in cases involving substantial statutory violations on the part of both vessels.78 In later English cases, however, the courts have apportioned damages unequally although both vessels violated one or more International Rules, based on findings that the fault of one vessel had a greater causal relationship to the collision than that of the other.79

In view of the policy of the Brussels Convention that liability should be apportioned if it is possible to do so,80 equal fault should not be assigned merely because both vessels have committed a statutory violation: “Matters of this kind cannot be determined by any mathematical formula.”81 Although violation of one rule should be regarded as equally “blameworthy” as violation of another, to accomplish substantive justice courts must have the flexibility to evaluate the causative potency of such fault in apportioning liability.82

B. The Use of Nautical Assessors or Special Masters

Recognizing that special expertise may be required for proper adjudication of degrees of fault in seamanship, England uses nautical assessors to assist the Court of Appeal and the House of Lords in admiralty cases in understanding the factual circumstances of a collision.83 A trial court may also call on an assessor to determine facts relative to navigation and seamanship and evaluate the respective degrees of fault, although the court is not bound by such advice.84 The assessors are drawn from the ranks of naval officers, merchant vessel masters

78. See, e.g., The Kaiser Wilhelm II, 31 L.T.R. 615, 624–25 (C.A. 1915), in which Lord Bankes stated:

[T]he fault of each vessel being the breach of a statutory regulation so important to be observed in the interests of navigation generally, it is not possible to establish different degrees of fault.

See also Bilbaino v. Defender, 6 Lloyd’s List L.R. 392 (Adm. 1921).

79. See, e.g., The Anneliese, [1970] 1 Lloyd’s Rep. 355 (C.A.), in which both vessels admitted violation of Rule 16 by failing to reduce speed upon entering a fog bank. On appeal, however, liability was apportioned 2/3 and 1/3 upon a finding that the ill-advised course change of one vessel was the most culpable and causative fault on either side.

80. See note 73 supra.


82. For a discussion of apportioning damages considering both “blameworthiness” and “causative potency,” see note 76 supra.

83. See Marsden, supra note 15, at 279–80 & n.70.

84. See, e.g., The Llanover, 78 Lloyd’s List L.R. 461, 469 (C.A. 1945). Matters of navigation and seamanship are considered part of the special province of nautical assessors; testimony of other expert witnesses on such matters is generally not permitted. Marsden, supra note 15, at 274.
and Elder Brothers of the Corporation of Trinity House (a pilots' association).

An American court sitting in admiralty may, in difficult cases requiring nautical expertise, call to its aid experienced mariners. But such experts are called only as witnesses; they have no function in assessing the relative fault of the vessels involved. Because of the large number of judges who may hear admiralty cases, it is desirable that the use of experts with functions similar to the English nautical assessors be encouraged in American courts. Their use would promote judicial economy by determining complicated issues in a more efficient proceeding and serve to ensure a measure of uniformity in decisions.

American practice presently permits courts of admiralty to delegate their factfinding functions to special trial masters or commissioners, but only upon showing that some exceptional condition requires it. It is submitted that, under an apportionment of damages rule, the need for uniformity in assessment of relative liability in collision cases presents an exceptional condition which justifies liberal use of masters or commissioners to determine the issues of relative liability.

C. Appellate Review of Apportionment

Early English courts held that the trial judge's findings of relative degrees of blame is a conclusion of fact, reviewable by the Court of Appeals in the same manner as any other finding of fact by a trial

85. See, e.g., The Hypodame, 73 U.S. (6 Wall.) 216, 224 (1867). See Fed. R. Evid. 614(a), 28 U.S.C. (Supp. 1975): "The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."


87. Fed. R. Civ. P. 53. A finding of the special master in American courts upon questions of fact depending on conflicting testimony or the credibility of a witness is not disturbed unless clearly erroneous. NLRB v. Standard Trouser Co., 162 F.2d 1012 (4th Cir. 1947); The Paquete Habana, 175 U.S. 677 (1899). Nonetheless, it is necessary for the judge to review the transcript of the proceedings to determine if error has been made and, if objection to the report has been made, the judge should determine whether the master's report should be accepted, rejected wholly or partly modified, recommitted with instructions or whether further evidence should be received by the court. D.M.W. Contracting Co., Inc. v. Stolz, 158 F.2d 405 (D.C. Cir. 1946). The court must accept the master's findings if the report shows that he or she has performed the duties conscientiously, discussed the facts clearly and applied the proper rules of law. Rundell v. Box, 89 F. Supp. 166 (D. Colo. 1948).
judge. In *British Fame v. MacGreagor*, the House of Lords reversed the Court of Appeals decision altering the apportionment of damages, and held that "the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less [sic] has sufficient reason to alter the allocation of the trial judge." Lord Wright reasoned that such an apportionment is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.

Viscount Simone suggested that alteration in apportionment might be appropriate in exceptional cases if the trial judge had misapprehended a vital fact bearing on the matter, or there was some error in law, but otherwise apportionment of damages is to be considered a question of judicial discretion.

Limited appellate review of assessment of damages is desirable given the adoption of the apportionment of damages rule in the United States. The lower courts, especially if they use special masters, would develop consistency and expertise in determining the relative degrees of fault and in applying standards of apportionment. Limited review is desirable to assure finality of initial judgments and encourage out of court settlement.

IV. THE EFFECT OF APPORTIONMENT OF DAMAGES ON OTHER RULES OF MARITIME LAW

In the interests of international uniformity of law, it would have been desirable for Congress to adopt the Brussels Convention of 1910 in its entirety, rather than for the Supreme Court to adopt the apportionment of damages rule without consideration of the remaining dis-

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89. [1943] 1 All E.R. 33 (H.L.). See 59 L.Q. Rev. 102 (1943), which suggests that *British Fame* "may prove to be the most important case decided by the House of Lords during the past year."
90. [1943] 1 All E.R. at 34.
91. Id. at 35.
92. Id. at 34.
crepancies between American law and that of the rest of the maritime world. The Court's Reliable Transfer decision leaves the validity of the Pennsylvania Rule and the various escape doctrines in doubt, and does not affect the anomalous doctrine of The Chattahoochee. It also raises the question of its retroactive effect on mutual fault collisions occurring before the date of the decision.

A. The Rule of The Pennsylvania

Consistent with the goal of worldwide uniformity of law, Article 6 of the Brussels Convention abolishes all legal presumptions of the signatory nations.93 This goal of uniformity recommends abrogation of the Pennsylvania Rule as a substantive rule of law.94 Under the apportionment of damages rule, courts will continue to consider statutory violations and their role in causing a collision. Statutory violations will thus be relevant in apportioning damages, but they will no longer create a substantive presumption of sole liability. At most, the Pennsylvania Rule will retain a procedural effect: When a statutory breach on the part of one vessel is proved, the burden shifts to that vessel to prove that its negligence was not the sole cause of the collision; it must establish its relative degree of fault.

B. The Escape Doctrines

Apportionment of damages according to degree of fault eliminates the need for doctrines developed to ameliorate the harsh results of the equal division of damages rule. The "major-minor fault" rule has no application where damages are apportioned according to degree of fault. The "reasonable expectancy" exception will lose its status as a rule and operate merely as another factor to be considered in determining the degree of fault.95 Similarly, the "error in extremis" rule should become another ingredient on the issue of negligence, and

93. Paragraph 2 of Article 6 states: "There shall be no legal presumptions of fault in regard to liability for collision." United States Translation, supra note 61, at 853.
94. For discussion of the Pennsylvania Rule, see Part I-B supra.
95. The reasonable expectancy exception might also still have some procedural application as a defense to the Pennsylvania Rule. The Court's recent decision in Union Oil Co. v. The San Jacinto, 409 U.S. 140 (1972), suggests that in a reasonable expectancy situation, a vessel may comply with statutory obligations, yet violate the general judicial interpretation of that obligation. In such a case, the Pennsylvania Rule is not applicable. See Part I-C-2 supra.
Apportionment of Damages

should not be used as a substantive "escape device." Finally, adoption of the apportionment of damages rule should remove any temptation to strain the last clear chance doctrine to avoid an inequitable result.

C. The Rule of The Chattahoochee

Under the American rules of liability, each vessel in a mutual fault collision is jointly and severally liable, with right of contribution, for damages incurred by innocent third parties. Thus, the owner of cargo that is damaged in such a collision can recover full damages from the non-carrying vessel, and the latter is then entitled, under the equal division of damages rule, to contribution from the carrying vessel for one-half the damages. This indirect liability of cargo carrying vessels to cargo owners was upheld in The Chattahoochee even though it circumvents the right of the carrying vessel to disclaim liability for errors in navigation and management of the vessel, as permitted by the Harter Act and the Carriage of Goods by Sea Act (COGSA).

Adherence to the Brussels Convention rules would eliminate the Chattahoochee Rule since Article 4 abrogates joint and several lia-

96. The English law retains a similar rule: When one vessel by a wrongful act suddenly puts another in extremis, the evasive action of the latter need not meet the general standard of competency. See, e.g., The Bywell Castle, [1878] 4 P.D. 219 (C.A.); The Bretagne, 7 Lloyd's List L.R. 127 (Adm. 1921). In the same situation, some courts have held simply that a mere mistake in judgment by the other vessel is held not to have caused the collision. See, e.g., The Nor, 30 L.T.R. (n.s.) 576 (P.C. 1874); The Fagerstrand, 33 Lloyd's List L.R. 67 (Adm. 1929).


98. 173 U.S. 540 (1899).

To avoid application of the Chattahoochee Rule, it has been to the carrying ship's pecuniary advantage in cases where damages to its own cargo amount to more than 50 percent of the total damages to argue that the other vessel was not at fault in causing the collision; with no mutual fault, the Rule does not apply and the carrying ship and owner escape liability to cargo owners under the Harter Act and COGSA.

Compare Article 4 of the Brussels Convention, quoted in text accompanying note 62 supra.


If the owner of any vessel . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . .

ability to third parties for cargo damage.  

The direct liability of the carrying vessel to cargo owners would remain limited by the provisions of the Harter Act and COGSA. Although the Chattahoochee Rule is applied by American courts to vessels irrespective of their nationality, a much higher percentage of American vessels are subject to actions in United States courts than are vessels of foreign registry because American flag vessels are more likely to be involved in collisions in the territorial waters of the United States due to the geography of their operations, and are exposed to actions in the admiralty courts of the United States in the case of collision on the high seas. The United States shipowner is at a disadvantage, as cargo underwriters may bring subrogated actions against American shipowners in United States courts when it is to the underwriters' advantage, whereas a foreign shipowner is less frequently subject to application of the American law.

Although it discriminates against American flag shipowners, the Chattahoochee Rule has not provided a corresponding benefit to the shippers of cargo. No reduction of rates of cargo insurance is made for shipment in American bottoms. That the American exporters do

101. See text accompanying note 62 supra. Article 4 recognized joint and several liability of the respective vessels, with recourse, but expressly recognized the effect of contractual limitations of liability of the carrying vessel. See note 62 supra. See text accompanying note 29 supra for an example of computation of damages under the Brussels Convention. Under the new American rule, the noncarrying vessel will be liable for 100% of cargo damages, but can seek contribution from the carrying vessel for the latter's proportional share of such liability.

102. See notes 99-100 supra.

103. American courts do not apply the Chattahoochee Rule in collisions where both vessels are registered under the flags of nations adhering to the Brussels Convention and the collision occurs outside the territorial waters of the United States. Cf. Ishizaki Kisen Co., Ltd. v. United States, 510 F.2d 875 (9th Cir. 1975), in which the choice of law rules of American admiralty courts were discussed. The court appears to have rejected a strict "locality rule" to determine which substantive rules should apply and, with respect to whether the Pennsylvania Rule should apply, chose the law of the nation which had "the most significant relationship to the occurrence and the parties." Id. at 879. In a collision on the high seas, the nations of the flags of the vessels would have the only substantial relationship to the occurrence and the parties. The "most significant relationship" rule is the subject of RESTATEMENT (SECOND) CONFICT OF LAWS § 145 (1971).

104. Most American flagships call frequently at American ports and are subject to actions in rem wherever they may be found. American shipowners are subject to the personal jurisdiction of United States courts and actions can be commenced against them in personam whenever application of American substantive law appears advantageous.

105. The owners of foreign flag vessels are, in most cases, foreign corporations not subject to the personal jurisdiction of United States courts; thus, in rem jurisdiction over foreign flag vessels can be avoided by not calling at United States ports.

not utilize the possible advantage afforded by the rule is highly apparent in the fact that they shipped but 5.8 percent of their total exports in American bottoms in 1972.\textsuperscript{107} The Supreme Court should reconsider the \textit{Chattahoochee} Rule; it contravenes the intent of Congress and in no way serves public policy.\textsuperscript{108}

\subsection*{D. Retroactive Effect}

The Supreme Court has in many cases expressed its views as to the retroactive effect of decisions announcing new rules.\textsuperscript{109} The Court has recognized its power to grant or deny retroactive effect to such rules, indicating that the relevant criteria for deciding the issue of retroactivity in a particular case are:\textsuperscript{110} (1) the purpose to be served by a particular new rule; (2) the extent of reliance which has been placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule.

To determine the retroactive effect of the apportionment of damages rule, it is necessary to evaluate each of the three relevant criteria. Various decisions have indicated that in determining the retroactivity of a new rule, the foremost, though not necessarily the controlling, criterion is the purpose of the rule.\textsuperscript{111} The purpose of the apportionment of damages rule is clear: to achieve a more "just and equitable" allocation of damages than is possible under the equal division rule.\textsuperscript{112} It is equally clear that such purpose can best be achieved by applying

\begin{itemize}
  \item \textsuperscript{107} \textit{Statistical Abstract of the United States} 584 (95th ed. 1974). By comparison, in 1950 U.S. flag vessels carried 43.7 percent of imports and 32.5 percent of exports, by tonnage. In 1972, U.S. flag vessels carried only 4.5 percent of imports. \textit{Id.}
  \item \textsuperscript{108} The subcommittee of the Senate Foreign Relations Committee recommended elimination of the anomaly of the \textit{Chattahoochee} Rule to "make the law of the United States uniform with the rest of the world." \textit{Maritime Collisions Convention}, 1939 A.M.C. 1051, 1056. For various reasons, Congress has been reluctant to legislate in this area of judicially imposed admiralty rules. The Supreme Court has indicated that it has responsibility and authority to reconsider its admiralty doctrines; see note 13 and accompanying text \textit{supra}, and should reconsider this antiquated and discriminatory rule.
  \item The Supreme Court recently prepared the way for eliminating the \textit{Chattahoochee} Rule in Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), in which the Court stated that admiralty recognizes the right of contribution between joint tortfeasors except when the tortfeasor against whom contribution is sought is immune from tort liability by statute.
  \item \textsuperscript{109} \textit{See generally Annot.}, 22 L. Ed. 2d 821 (1970).
  \item \textsuperscript{110} \textit{See, e.g.}, \textit{Teahan v. Shott}, 382 U.S. 406 (1966).
  \item \textsuperscript{111} \textit{Desist v. United States}, 394 U.S. 244 (1969).
  \item \textsuperscript{112} \textit{United States v. Reliable Transfer Co.}, 95 S. Ct. 1708 (1975).
\end{itemize}
the rule to all cases of unequal fault, regardless of the date of collision relative to the date of promulgation of the new rule.

The second criterion is of little relevance in evaluating the retroactive effect of the apportionment rule. It would be difficult for a party to allege in good faith or successfully argue that it became involved in a collision only because of reliance on the equal division of damages rule and that retroactive application of the new rule would defeat such reliance.

Assuming the first two criteria suggest retroactive application of the new rule, it must be decided to which cases such application is appropriate: those not yet to trial; those in which a judgment has been rendered but is appealable; and those in which judgment has become final. Application of the new rule will have no substantial effect on administration of justice as far as cases which have not yet gone to trial, regardless of the date of collision, except for the possible increase in the number of cases which may be litigated.\(^\text{113}\) The rule should not have application to cases in which judgment has become final, \(i.e.,\) those no longer subject to ordinary methods of review. The Supreme Court has indicated that retroactivity as to final judgments will be recognized only if the overruling decision is deemed so significant or fundamental as to defeat the purposes underlying the doctrine of res judicata.\(^\text{114}\) The Court's decision in \textit{Reliable Transfer} clearly is not so significant or fundamental.

The remaining question is the effect of the new rule on cases which had been tried but had not yet become final at the time of the Court's decision in \textit{Reliable Transfer}. Because counsel have not presented a case of apportionment, it will be necessary to retry the cases on this issue. Nonetheless, the burden of retrying these cases should be minimal and the new rule should be applied.

V. CONCLUSION

Judicial adoption of the apportionment of damages rule is a large step toward insuring substantive justice in maritime collisions caused

\(^{113}\) Justice Stewart expressed the opinion that the apportionment rule would reduce litigation on the rationale that previously a party only slightly at fault had incentive to litigate the controversy in hope of being absolved of all responsibility under the major-minor fault rule and added that, even if such were not the case, "\textit{[C]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.}" \textit{Id.} at 1714.

by mutual but unequal fault. It eliminates the largest inconsistency between the collision law of the United States and the rest of the maritime world. Elimination of the inequities of the equal division of damages rule and of the uncertain doctrines now used by courts to ameliorate its harshness is a proper role for the Supreme Court. But *United States v. Reliable Transfer Co.* did not present opportunity for review of the *Chattahoochee* or the *Pennsylvania* Rules, doctrines which must be changed to secure the uniformity of laws necessary for well-ordered international commerce. Because of the judicial adoption of the apportionment rule of damages, it is doubtful that Congress will find it necessary to adopt the Brussels Convention of 1910 or otherwise review these anomalous doctrines. Thus, the Court should be receptive to other opportunities to bring American admiralty law into step with the rest of the world.

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115. In the interests of uniformity of law and predictability of results, Congress should also consider adoption of a statute of limitations which conforms to that of other maritime nations. No statute of limitations presently applies to traditional admiralty actions; American courts apply the doctrine of laches to bar recovery in cases involving unreasonable delay in commencing the action if the defendant can demonstrate prejudice by such delay. See, e.g., Gardner v. Panama R.R., 342 U.S. 29, 30 (1951).

Article 7 of the Convention provides that actions for damages due to collision must be commenced within two years after the date of damage, provided that a court may, in accordance with its rules, extend the period to such extent and on such terms as it deems fit, and that the signatory nations may legislatively extend the period as necessary to provide plaintiff a reasonable opportunity to arrest the defendant vessel within the jurisdiction of the court. See United States Translation, *supra* note 61. Adoption of a rigid statute of limitations without such a proviso would contravene the general equitable principles of the traditional laches rule. See Gardner v. Panama R.R., *supra*.

If Congress fails to adopt a statute of limitations, the goal of uniformity may be served by a judicially developed presumption of inexcusable delay and prejudice to the defendant after two years. That period could be derived from the period deemed reasonable by the general maritime law of the world.

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