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David R. Owen

J. Marks Moore III

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# COMPARATIVE NEGLIGENCE IN MARITIME PERSONAL INJURY CASES

David R. Owen\* & J. Marks Moore, III\*\*

## INTRODUCTION

For more than thirty years,<sup>1</sup> the controversy concerning comparative negligence has raged in the state courts, legislatures, and law reviews. Thirty-eight states, including all but six of the "saltwater" and Great Lakes states,<sup>2</sup> have adopted comparative negligence in one of its several forms by court decision<sup>3</sup> or by statute.<sup>4</sup> The Uniform Comparative Fault Act<sup>5</sup> (UCFA) has been drafted by a committee of experts and approved by the National Conference of Commissioners on Uniform State Laws; yet, it has not been adopted in any jurisdiction. The legal literature has been modified slightly,<sup>6</sup> but the commentators appear unanimous in their approval of comparative negligence in its "pure" form.<sup>7</sup>

In admiralty, the movement toward comparative negligence started at an early date in the form of equal division of damages in collision cases.<sup>8</sup> In 1890, the United States Supreme Court abolished every vestige of the common law bar of contributory negligence in maritime personal injury cases.<sup>9</sup> In 1920, Congress effectively

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\* Member, Maryland Bar. Past President, The Maritime Law Association of the United States.

\*\* Member, Maryland Bar.

1. See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

2. Alabama, Delaware, Maryland, North Carolina, South Carolina, and Virginia.

3. Alaska, California, Florida, Illinois, Michigan, New Mexico and West Virginia. The most recent examples are Illinois, *Alvis v. Rybar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), and New Mexico, *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

4. Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. The most recent examples are Louisiana, LA. CIV. CODE art. 2323 (effective 1980), and Washington, WASH. REV. CODE ANN. § 4.22.005 (Supp. 1980).

5. UNIF. COMP. FAULT ACT, 12 U.L.A. 33 (1979).

6. See Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, 41 MD. L. REV. 300 (1982); Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980).

7. For a discussion of the various forms of comparative negligence, see Digges & Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 MD. L. REV. 276, 278-82 (1982).

8. For all practical purposes, this would be the Laws of Oleron, originating about 1150 A.D. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.3, 1975 A.M.C. 541, 545 n.3 (1975). The doctrine of equal division of damages in collision cases was adopted by the Supreme Court in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

9. *The Max Morris v. Curry*, 137 U.S. 1 (1890).

established pure comparative negligence as the rule for seamen's personal injury and death cases in suits against employers and for all cases of wrongful death on the high seas.<sup>10</sup> In 1975, the Supreme Court adopted the rule of comparative negligence in collision and stranding cases.<sup>11</sup> The cumulative effect of these judicial and statutory decisions has been to make admiralty a "pure" comparative negligence jurisdiction in connection with every type of maritime tort. Admiralty courts have been reasonably successful in reconciling common law concepts with the doctrine of comparative negligence. By comparison, the state courts and legislatures generally have fallen far short of constructing a complete doctrine. Apparently, the only attempt to construct a coherent statutory scheme has been the UCFA, which is for all practical purposes a "restatement" of the law of comparative negligence. This article will examine various elements of the doctrine of comparative negligence in maritime personal injury and death situations, as well as the reconciliation of this doctrine with such common law concepts as assumption of risk, last clear chance, and joint and several liability.

#### APPORTIONMENT BETWEEN NEGLIGENT PLAINTIFFS AND NEGLIGENT DEFENDANTS

In 1908, Congress passed the Federal Employers' Liability Act (FELA).<sup>12</sup> The FELA, which was applicable to interstate railroads, provided recovery for injury or death "resulting in whole or in part from the negligence" of the carrier.<sup>13</sup> The FELA incorporated the doctrine of comparative negligence in section 53, which provided that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."<sup>14</sup> The legislative history of the FELA cites sparse statutory precedent and no judicial precedents, but refers to this principle as "ideal justice, against which no fair argument can be made."<sup>15</sup> This type of comparative negligence is termed "pure comparative negligence."<sup>16</sup>

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10. The Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688 (1976); Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 (1976). The Jones Act incorporates the Federal Employers' Liability Act of 1908, which provides for comparative negligence. See *infra* notes 13-14 and accompanying text.

11. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975).

12. 45 U.S.C. §§ 51-60 (1976).

13. *Id.* § 51.

14. *Id.* § 53.

15. H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2, at 4 (1908).

16. There are at least four forms of "modified comparative negligence," none of which has existed in admiralty since the divided damages rule was abolished by *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975). See Digges & Klein, *supra* note 7, at 278-82.

Subsequently, Congress passed the Merchant Marine Act of 1920, often referred to as the Jones Act.<sup>17</sup> The Jones Act incorporated the provisions of the FELA, making it applicable to seamen in suits against their employers for negligence. Although the Jones Act makes no specific reference to comparative negligence, the FELA rule is so clear and simple that courts have had little or no problem in its practical application.

In the jurisprudence, the doctrine of comparative negligence in maritime personal injury cases was developed gradually by the lower federal courts following *The Max Morris v. Curry*,<sup>18</sup> in which the Supreme Court declined to address the question of apportionment of damages and held only that contributory negligence was not a bar to recovery. In *The Lackawanna*,<sup>19</sup> the United States District Court for the Southern District of New York became the first court to apportion fault on a percentage basis in a maritime personal injury case. The plaintiff passenger, although negligent, was awarded one-third of his damages, the court citing *The Max Morris* without discussion.<sup>20</sup> In *The Alcazar*,<sup>21</sup> although a property damage case, the court referred to *The Max Morris* and the FELA as indicating that "the doctrine of comparative negligence" applied in noncollision cases.<sup>22</sup> In *Grimberg v. Admiral Oriental S.S. Line*,<sup>23</sup> where a plaintiff seaman sued his employer under the Jones Act, the court referred to *The Max Morris*, the FELA, and the Jones Act as abolishing contributory negligence and providing for comparative negligence. More recently, in *Ahlgren v. Red Star Towing & Transportation Co.*,<sup>24</sup> the Second Circuit applied the doctrine of comparative negligence to a linehandler, noting that lower courts had "filled the gap" left by *The Max Morris*. The court further commented that a status or statutory relationship with the defendant was not a necessary condition of apportionment.<sup>25</sup> The Supreme Court has never decided a personal injury case man-

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17. 46 U.S.C. § 688 (1976).

18. 137 U.S. 1, 14-15 (1890). A longshoreman employed by a stevedore was engaged in loading coal aboard a vessel and fell through an unguarded opening in the after-end lower bridge rail. The trial court found, as a matter of fact, that the longshoreman's injuries resulted partly from his own negligence and partly from the negligence of the officers of the vessel. The Supreme Court affirmed, declining to determine whether the decree should have been for exactly one-half of the damages sustained or, in the court's discretion, for a greater or lesser proportion of such damages.

19. 151 F. 499 (S.D.N.Y. 1907).

20. *Id.* at 501.

21. 227 F. 633 (E.D.N.C. 1915).

22. *Id.* at 663.

23. 300 F. 619, 1924 A.M.C. 1241 (W.D. Wash. 1924).

24. 214 F.2d 618, 1954 A.M.C. 1504 (2d Cir. 1954).

25. 214 F.2d at 621-22, 1954 A.M.C. at 1507-09.

dating the application of comparative negligence; the Court has merely recited its existence.<sup>26</sup>

*Covered Employee<sup>27</sup> Under the Longshoremen's Act versus "Vessel"*<sup>28</sup>

Although there is no mention of comparative negligence in the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act),<sup>29</sup> it was the subject of discussion in 1972 by the Senate and House committees considering the proposed amendments to the Act. The House Report states: "[T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury."<sup>30</sup>

In an action under section 905(b) of the Longshoremen's Act,<sup>31</sup> the doctrine of comparative negligence applies.<sup>32</sup> A complex skein of rights

26. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629, 1959 A.M.C. 597 (1959) (invitee); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09, 1954 A.M.C. 1, 6 (1953) (longshoreman); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429, 1939 A.M.C. 1, 5-6 (1939) (seaman); *The Arizona v. Anelich*, 298 U.S. 110, 122, 1936 A.M.C. 627, 633 (1936) (seaman).

27. See 33 U.S.C. § 902(3) (1976). For ease of reference all covered employees will be described as "longshoremen," although they may actually be shipyard workers or other harbor workers.

28. *Id.* § 902(21).

29. 33 U.S.C. §§ 901-950 (1976).

30. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 6, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4705. See also *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 1954 A.M.C. 1, 6-7 (1953); Stover & Plaetzer, *Comparative Negligence and the Harbor Worker's Act—History, Examination, Diagnosis and Treatment*, 63 MARQ. L. REV. 349, 349-445 (1980). Section 905(b), in its entirety, was added to the Longshoremen's Act as part of the 1972 amendments.

31. 33 U.S.C. § 905(b). Under the Longshoremen's Act, a longshoreman injured in the course and scope of his employment is entitled to receive immediate compensation from his employer. He may sue the employer if compensation is not forthcoming. In addition to receiving compensation under the Act, the longshoreman may proceed against any negligent third party who may have been responsible for his injuries. The most frequent third party is, of course, the vessel on which the longshoreman was working. Until Congress amended the Longshoremen's Act in 1972, the longshoreman could bring a third-party action against the vessel based on unseaworthiness, negligence, or the vessel owner's breach of his duty to provide the longshoreman with a safe place to work. The vessel owner, in turn, could seek indemnity from the longshoreman's stevedore-employer based either on a theory of breach of the employer's implied warranty of workmanlike performance or on a contractual indemnity provision. In 1972, Congress amended the Longshoremen's Act with the purpose of increasing benefits to longshoremen and decreasing the number of third-party actions. To this latter end, section 905(b) was added to the Act. Section 905(b) limited the longshoreman's remedy against the vessel to a cause of action based on negligence and eliminated any right of the vessel owner to proceed against the stevedore-employer.

32. The statutory rule of comparative negligence does not apply, however, to a

and liabilities, however, is inherent in the longshoreman-employer-shipowner relationship, as discussed by the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique*.<sup>33</sup> The *Edmonds* Court held in effect that comparative negligence is compatible with joint and several liability; therefore, it held that any negligence of the defendant third party would be sufficient to base judgment against it for the full amount of damages not attributable to the plaintiff's own negligence.<sup>34</sup> Any negligence of the employer is disregarded where the defendant third party is guilty of some negligence, even if as slight as one percent.

Furthermore, the shipowner cannot seek recovery against a negligent stevedore-employer either directly through contribution or indirectly through reduction of the employer's compensation lien, since the employer's liability is limited by the Longshoremen's Act to compensation.<sup>35</sup> Although as a matter of law the 1972 amendments preclude apportionment of the employer's lien,<sup>36</sup> the resulting inequities are so egregious that Congress should never have countenanced them. In addition, although the idea that a court can apportion the negligence of a nonparty (the employer) was not argued before the Supreme Court, the theory is implicit in the majority opinion and is the conceptual basis for the dissent.

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section 905(b) action involving an accident on land, even though the plaintiff longshoreman is engaged in maritime employment and the situs of the accident is maritime for purposes of the Longshoremen's Act. In that situation, state law governs. *Holland v. Sea-Land Serv., Inc.*, 655 F.2d 556, 1981 A.M.C. 2474 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Parker v. South La. Contractors, Inc.*, 537 F.2d 113, 1976 A.M.C. 2201 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

33. 443 U.S. 256, 1979 A.M.C. 1167 (1979). See *Stover & Plaetzer*, *supra* note 30, for a discussion of almost every facet of the employee-shipowner-employer relationship under section 905(b) and *Edmonds*.

34. 433 U.S. at 263, 271, 1979 A.M.C. at 1172-73, 1179. Plaintiff longshoreman, employed by a stevedore, was injured while unloading cargo from defendant's vessel. He received compensation from his stevedore-employer under the Longshoremen's Act. Plaintiff then brought an action against the vessel owner under section 905(b) of the Act. A jury found plaintiff 10% responsible for his injuries, the shipowner 20% responsible, and the stevedore-employer, through the negligence of plaintiff's co-worker, 70% responsible. The trial court reduced plaintiff's recovery by 10% but refused to reduce further the award against the vessel owner in proportion to the fault of the stevedore-employer. The Fourth Circuit, en banc, reversed. 577 F.2d 1153 (4th Cir. 1978). The Supreme Court reversed by a 5-3 vote, reinstating the finding of the trial court.

35. 443 U.S. at 261, 1979 A.M.C. at 1170-71.

36. Even before the 1972 amendments to the Longshoremen's Act, the Supreme Court held that the shipowner could not obtain contribution from a concurrently negligent tortfeasor-employer. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952). In *Hawn*, the Court further found that the shipowner is not entitled to have the damages against it reduced by the amount of the employer's compensation payments. 346 U.S. at 411-12, 1954 A.M.C. at 8-9.

In a footnote in *Edmonds*, the Supreme Court noted, "In many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of lack of causation."<sup>37</sup> The meaning of this dictum is unclear. It seems to confuse fault with causation; *i.e.*, a finding of a "small percentage of the total negligence" might add up to a finding of "lack of causation." This language sounds dangerously like the illogical "major-minor" fault rule that supposedly disappeared with *United States v. Reliable Transfer Co.*<sup>38</sup> Quite naturally, shipowners' counsel, frustrated by *Edmonds*, have cited this footnote on the chance that the Supreme Court has left them a ray of light.<sup>39</sup> Under the Longshoremen's Act, where the employer is proceeding as the statutory assignee or "subrogee"<sup>40</sup> under section 933 or is merely seeking reimbursement of its compensation lien,<sup>41</sup> any negligence of the employee will be imputed to the employer or its insurance carrier.<sup>42</sup> In an action by a negligent employer against a negligent shipowner outside section 933, comparative negligence applies.<sup>43</sup>

### *Wrongful Death*

The first situation to be examined under wrongful death is that of a seaman's beneficiaries suing his employer for negligence. In such a case, the beneficiaries' sole remedy is under the Jones Act,<sup>44</sup> therefore, comparative negligence is applicable.

In other wrongful death situations not involving seamen, a distinction must be drawn between deaths occurring on the high seas and

37. 443 U.S. at 265 n.15, 1979 A.M.C. at 1174 n.15.

38. 421 U.S. 397, 406-07, 1975 A.M.C. 541, 548-49 (1975). See *Getty Oil Co. v. Steamship Ponce De Leon*, 555 F.2d 328, 1977 A.M.C. 711 (2d Cir. 1977).

39. See *Di Rago v. American Export Lines, Inc.*, 636 F.2d 860, 864-65, 1982 A.M.C. 26, 31-32 (3d Cir. 1981); *Bednarek v. Thore Shipping, A.B.*, 1982 A.M.C. 240, 243 (D. Md. 1981).

40. Although the statute describes the legal relationship as one of "assignment," the Supreme Court has interpreted it as one of "subrogation." *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 1969 A.M.C. 745 (1969). Apparently this is a distinction without a difference.

41. *Mitchell v. The Etna*, 138 F.2d 37, 1943 A.M.C. 1126 (3d Cir. 1943).

42. See *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 414 n.14, 1969 A.M.C. at 752 n.14 (1969). *But cf.* *I.T.O. Corp. of Baltimore v. Asperula Shipping Co., Ltd.*, 1982 A.M.C. 2803 (D. Md. 1981) (*Burnside* did not survive the 1972 Amendments.)

43. This conclusion follows logically from the premise established in *Burnside* that the stevedore-employer has a "direct" (not simply derivative) cause of action against the shipowner, although in that particular case the employer was deemed faultless. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 418, 1969 A.M.C. at 755 (1969).

44. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 1965 A.M.C. 1 (1964).

deaths occurring in local waters. Deaths on the high seas are governed by the Death on the High Seas Act (DOHSA).<sup>45</sup> The DOHSA, enacted in 1920, provides for recovery for death resulting from "wrongful act, neglect, or default."<sup>46</sup> Section 766 of the DOHSA incorporates the doctrine of comparative negligence: "In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly."<sup>47</sup>

Where a death occurs in local waters, a cause of action for wrongful death exists under the general maritime law. This general maritime law wrongful death action was created by the Supreme Court in *Moragne v. States Marine Lines, Inc.*,<sup>48</sup> impliedly overruling prior Supreme Court cases which invoked local death acts and their common law contributory negligence bars.<sup>49</sup> The Fifth Circuit has determined that comparative negligence applies to wrongful death actions in local waters even if contributory negligence is a bar under state law.<sup>50</sup>

#### *Actions Against the United States*

Actions against the United States may be brought under the Suits in Admiralty Act,<sup>51</sup> the Public Vessels Act,<sup>52</sup> the Federal Tort Claims Act,<sup>53</sup> or any combination of the three. These statutes do not prescribe any rule regarding the plaintiff's negligence. Applicable rules of general maritime law and statutes, including comparative negligence, therefore should apply.<sup>54</sup>

#### APPORTIONMENT BETWEEN NEGLIGENT PLAINTIFFS AND DEFENDANTS LIABLE WITHOUT NEGLIGENCE

The doctrine of comparative negligence may be invoked in two

45. 46 U.S.C. §§ 761-768 (1976).

46. *Id.* § 761.

47. *Id.* § 766.

48. 398 U.S. 375, 1970 A.M.C. 967 (1970).

49. See *Hess v. United States*, 361 U.S. 314, 1960 A.M.C. 527 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588, 1959 A.M.C. 813 (1959).

50. *Hornsby v. Fish Meal Co.*, 431 F.2d 865, 1970 A.M.C. 1841 (5th Cir. 1970). See generally *Edelman, Recovery for Wrongful Death Under General Maritime Law*, 55 TUL. L. REV. 1123 (1981).

51. 46 U.S.C. §§ 741-752 (1976).

52. 46 U.S.C. §§ 781-790 (1976).

53. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

54. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975) (Suits in Admiralty Act and Federal Tort Claims Act); *Maurer v. United States*, 668 F.2d 98, 1982 A.M.C. 884 (2d Cir. 1981) (Public Vessels Act).



situations in which a negligent plaintiff sues a defendant liable without negligence: unseaworthiness and products liability. Unseaworthiness is "a species of liability without fault . . . a form of absolute duty."<sup>55</sup> Although strictly speaking, "comparative negligence" therefore should not be applicable in actions by seamen against their employers for unseaworthiness, this conceptual problem has never bothered the admiralty courts in applying the rule. A seaman's damages are always mitigated in proportion to his contributory negligence, even in an unseaworthiness case.<sup>56</sup>

The rights of seamen and others against third parties have been litigated primarily in the area of products liability.<sup>57</sup> Specifically, the concept of strict liability in tort has raised the same conceptual problem as did the application of comparative negligence in unseaworthiness cases. Here, the admiralty courts have had more trouble, largely because of their hesitancy simply in recognizing strict tort liability. It is sufficient to date the appearance of strict tort liability in admiralty from the 1945 appellate decision in *Sieracki v. Seas Shipping Co.*<sup>58</sup> Although not sounding in negligence, strict liability is now well established as a cause of action in tort to which the contractual defenses of a breach of warranty case are not applicable.<sup>59</sup> The doc-

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55. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 1946 A.M.C. 698, 704 (1946) (citations omitted).

56. *See Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429, 1939 A.M.C. 1, 8 (1939); *The Arizona v. Anelich*, 298 U.S. 110, 112, 1936 A.M.C. 627, 630-31 (1936). The same was true of longshoremen until their cause of action for unseaworthiness was abolished by the 1972 amendments. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953).

57. It should be noted that the 1972 amendments to the Longshoremen's Act eliminated a covered employee's cause of action against a "vessel" not only for unseaworthiness but also for all other forms of strict liability. For example, the nondelegable duty of a vessel to provide a longshoreman with a safe place to work was eliminated by the amendments. *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072, 1077, 1979 A.M.C. 1703, 1708 (4th Cir. 1978); *Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030, 1978 A.M.C. 331 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

58. 149 F.2d 98, 99-100, 1945 A.M.C. 407, 412 (3d Cir. 1945), *aff'd*, 328 U.S. 85, 1946 A.M.C. 698 (1946). The trial court found the manufacturer of a shackle which failed, resulting in injuries to the plaintiff longshoreman, liable under a theory of products liability. Although it found the vessel owner not liable under a theory of products liability, the court of appeals determined that the vessel owner was liable for unseaworthiness. The court of appeals further noted that strict liability principles had become so widely accepted as to be construed as part of the general law of torts, maritime as well as common law. 149 F.2d at 99-100, 1945 A.M.C. at 411-12.

59. *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 1974 A.M.C. 1341 (8th Cir. 1972) (Navy pilot, *i.e.*, seaman); *McKee v. Brunswick Corp.*, 354 F.2d 577, 1966 A.M.C. 344 (7th Cir. 1965) (passengers); *Annot.*, 7 A.L.R. FED. 502 (1971). *See Kuffler, Products Liability Afloat*, 1976 LLOYD'S MAR. & COM. L.Q. 33.

trine of comparative negligence, or more accurately, "comparative fault," applies to strict liability in tort.<sup>60</sup>

#### SITUATIONS WHERE COMPARATIVE NEGLIGENCE IS NOT INVOKED

##### *Seaman's Right to Maintenance and Cure*

Where a seaman is guilty of willful misconduct which is the sole cause of his injury or illness, such willful misconduct is a complete bar to his right to recover maintenance and cure. There is no apportionment.<sup>61</sup> Such a situation could occur where a seaman became intoxicated and that intoxication was the sole cause of the accident. On the other hand, a seaman's claim is not barred by his negligence even if it is the sole cause of his illness or injury.<sup>62</sup> However, where a seaman, his employer, and a third-party defendant are all contributorily negligent, there may be apportionment between the employer and the third-party defendant and contribution allowed.<sup>63</sup>

##### *Accidents on Offshore Platforms*

The maritime rule of comparative negligence does not apply to accidents occurring on offshore platforms, wherever located. In *Rodrigue v. Aetna Casualty & Surety Co.*,<sup>64</sup> the Supreme Court held that accidents occurring on offshore platforms were not within federal admiralty jurisdiction. In such situations, state law applies, as deter-

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60. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1978 A.M.C. 2315 (9th Cir. 1977) (property damage); *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969) (seaman). See Edelman, *An Overview of Products Liability Law in a Maritime Context*, 5 MAR. LAW. 159, 171 (1980). In *Pan-Alaska*, a vessel owner *pro hac vice* filed an action against the vessel repairer, the vessel engine manufacturer, and the vessel engine franchised dealer for loss of the vessel because of an engine room fire. The fire was caused by the malfunction of two fuel filters. In reversing the trial court, the Ninth Circuit first noted that the doctrine of strict liability should have been applied to the vessel engine franchised dealer. The court then determined that the vessel owner was contributorily negligent for a number of reasons, mostly as a result of the crew's negligence in failing to prevent and properly fight the fire. Finally, the court stated that contributory negligence was compatible with strict products liability. "It comes down to this: the defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury." 565 F.2d at 1139, 1978 A.M.C. at 2330.

61. *Warren v. United States*, 340 U.S. 523, 1951 A.M.C. 416 (1951); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 1943 A.M.C. 451 (1943). See generally Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046, 1052-54 (1981).

62. *Farrell v. United States*, 336 U.S. 511, 1949 A.M.C. 613 (1949).

63. *Adams v. Texaco, Inc.*, 640 F.2d 618, 1982 A.M.C. 1004 (5th Cir. 1981).

64. 395 U.S. 352, 1969 A.M.C. 1082 (1969).

mined in accordance with normal choice of law rules.<sup>65</sup> The law of a particular state could provide, and indeed is likely to provide, for comparative negligence.<sup>66</sup>

*Longshoreman's or Harbor Worker's Claim for Compensation Under the Longshoremen's Act*

In connection with a workman's compensation claim, there is no apportionment because the negligence of the employee or employer is irrelevant. Compensation is "payable irrespective of fault as a cause for the injury."<sup>67</sup> The claim is barred, however, if the injury was "occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."<sup>68</sup> Contributory negligence is not a defense even where the employee can sue the employer for his failure to secure payment of compensation.<sup>69</sup>

*Successive Accidents*

There is no apportionment between successive accidents. A plaintiff's recovery for damages caused by the defendant cannot be reduced because of a preexisting disability resulting from a previous injury.<sup>70</sup> The defendant takes the plaintiff as he finds him.

#### ASSUMPTION OF RISK

The reconciliation of the common law concept of assumption of risk<sup>71</sup> with the doctrine of comparative negligence in admiralty remains

65. *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 1982 A.M.C. 2053 (5th Cir. 1981) (Louisiana law before the 1979 act which adopted comparative negligence).

66. See *supra* notes 2-4 and accompanying text.

67. 33 U.S.C. § 904(b) (1976).

68. *Id.* § 903(b).

69. *Id.* § 905(a).

70. *Maurer v. United States*, 668 F.2d 98, 1982 A.M.C. 884 (2d Cir. 1981) (different ships, same employer); cf. *Wilkinson v. D/S A/S Den Norska*, 538 F.2d 327, 1976 A.M.C. 2615 (4th Cir. 1976) (different ships, different employers) (unreported in F.2d).

71. At common law, assumption of risk existed where an injured plaintiff was without fault but nevertheless assumed the consequences of his injuries. Prosser has classified three types of assumption of risk situations:

[1.] the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . .

[2.] the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against the risk. . . .

[3.] the plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily to encounter it—as where he has been supplied with a chattel which he knows to be unsafe, and proceeds to use it after he has discovered the danger.

W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 68 at 440 (4th ed. 1971) (emphasis added). Plaintiff's assumption of the risk bars his action. *Id.* at 441.

in a state of disarray. The courts have failed to develop a consistent, logical doctrine for handling assumption of risk. Generally, however, assumption of risk is not a defense and should not be considered in apportionment.

The defense of assumption of risk has been abolished for longshoremen and seamen. The 1972 amendments to the Longshoremen's Act confirmed the abolition of the doctrine of assumption of risk for purposes of section 905(b).<sup>72</sup> The defense of assumption of risk was abolished for seamen by the Supreme Court in *The Arizona v. Anelich*,<sup>73</sup> even before Congress abolished it for railroad workers in 1939. Subsequently, in *Socony-Vacuum Oil Co. v. Smith*,<sup>74</sup> the Supreme Court addressed the novel question of whether assumption of risk was a defense where a seaman's injuries were caused by a defective appliance and the seaman had a chance to avoid the use of the defective appliance by the free choice of a available safe one. In holding that assumption of risk did not bar the plaintiff's action but that negligent choice could be considered in mitigation of damages, the Court stated that "[a]ny rule of assumption of risk in admiralty . . . must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it."<sup>75</sup>

Congress amended the FELA (and thereby the Jones Act) in 1939 by adding the following language to section 54: "[W]here such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case."<sup>76</sup> In *Tiller v. Atlantic Coast Line Railroad Co.*,<sup>77</sup> the Supreme Court relied on the amended language in holding that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment."<sup>78</sup> The Court further stated that cases should "be handled as though no doctrine of assumption of risk had ever existed"<sup>79</sup> and that assumption of risk "must not . . . be allowed

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72. *Davis v. Inca Compania Naviera, S.A.*, 440 F. Supp. 448, 1977 A.M.C. 2433 (W.D. Wash. 1977).

73. 298 U.S. 110, 1936 A.M.C. 627 (1936). The court noted that although "the seaman assumes [risks] normally incident to his perilous calling, . . . the nature of his calling, the rigid discipline to which he is subject, and the practical difficulties of his avoiding exposure to risks of unseaworthiness and defective appliances" render the defense of assumption of risk, as distinguished from contributory negligence, peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances. 298 U.S. at 122-23, 1936 A.M.C. at 633.

74. 305 U.S. 424, 1939 A.M.C. 1 (1939).

75. 305 U.S. at 431, 1939 A.M.C. at 7 (emphasis added).

76. 45 U.S.C. § 54 (1976). The original FELA (1908) had abolished the defense only in actions for violation of the Safety Appliances Act.

77. 318 U.S. 54 (1943).

78. *Id.* at 58 (emphasis added).

79. *Id.* at 64.

recrudescence under any other label in the common law lexicon."<sup>80</sup>

Unfortunately, many of the lower courts, at least in admiralty, have paid insufficient attention to the clear mandate of *Socony-Vacuum* and *Tiller*, and as a result, the cases have proliferated. All too often, the courts seem to start with a subjective determination as to whether the plaintiff's course of conduct is assumption of risk or negligence,<sup>81</sup> rather than following the Supreme Court's intention that the conduct of the parties should be considered only under the principles of comparative negligence.<sup>82</sup> By focusing first on the plaintiff's conduct in accepting a dangerous condition, a court can reintroduce the doctrine of assumption of risk under the label of contributory negligence.<sup>83</sup> If the court feels that the plaintiff should win, it will label his conduct "assumption of risk." If the court feels that the plaintiff should pay for his sins, it will label his conduct "negligence."<sup>84</sup> Thus, legal analysis is reduced to a game of semantics.

One solution to avoid continued shifts in terminology was offered by the Tenth Circuit in *Joyce v. Atlantic Richfield Co.*:<sup>85</sup> "To determine whether [a] plaintiff [is] guilty of contributory negligence we must focus on his actions after he assumed the risk of working . . . since the defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable

80. *Id.* at 67.

81. The Fourth Circuit has stated that continuing to draw "[t]he distinction [between assumption of risk and negligence] is critical." *Sessler v. Allied Towing Corp.*, 538 F.2d 630, 632, 1976 A.M.C. 1801, 1803 (4th Cir. 1976). Gilmore and Black call this distinction "the two heap rule":

When courts are required to sort cases into two heaps without being given a workable formula for distinguishing between the cases which are to go in the assumption of risk heap and those that are to go in the contributory negligence heap, results like those we have been reviewing [from the lower courts] are to be expected. The important thing to bear in mind is that the courts have indeed been maintaining the two heap rule.

G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-27a, at 357 (2d ed. 1975).

82. *Socony-Vacuum*, 305 U.S. at 431, 1939 A.M.C. at 7; *Tiller*, 318 U.S. at 65-68.

83. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 1982 A.M.C. 1823 (10th Cir. 1981); *Byrd v. Reederei*, 638 F.2d 1300 (5th Cir. 1981), *rev'd on other grounds*, 688 F.2d 324 (5th Cir. 1982); *Sessler v. Allied Towing Corp.*, 538 F.2d 630, 1976 A.M.C. 1801 (4th Cir. 1976); *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 1973 A.M.C. 602 (2d Cir.), *cert. denied*, 414 U.S. 822 (1973); *Rivera v. Rederi A/B Nordstjernan*, 456 F.2d 970, 1973 A.M.C. 804 (1st Cir.), *cert. denied*, 409 U.S. 876 (1972). The First, Second, Fourth, Fifth, and Tenth Circuit courts each determined that a district court within their jurisdiction had substantively injected the doctrine of assumption of risk into the issues of the case under the guise of contributory negligence. *See also* *Hall v. American S.S. Co.*, 688 F.2d 1062, 1065-66 (6th Cir. 1982).

84. *See, e.g.*, *Bryant v. Partenreederei-Ernest Russ*, 352 F.2d 614, 1966 A.M.C. 607 (4th Cir. 1965).

85. 651 F.2d 676, 1982 A.M.C. 1823 (10th Cir. 1981).

acceptance of a dangerous condition."<sup>86</sup> The authors would take this analysis one step further by eliminating *any* initial consideration of the assumed risks of working. The plaintiff should be subjected solely to a comparative fault analysis. Any dangers he negligently assumed in the performance of his duties should be calculated as part of his comparative fault. The focus of analysis, therefore, should be on an act or omission that deviates from the conduct of the average reasonable employee similarly situated. Thus, given the peculiar facts of any situation, the dangers an employee assumes in performing his duties are simply examined in light of what the average employee would do. Where the plaintiff's action or failure to act deviates from the conduct of an average reasonable employee, the plaintiff is guilty of contributory negligence, which may be as much as one hundred percent.<sup>87</sup>

Maritime employment is inherently risky; therefore, it follows that there is an element of assumption of risk in most maritime tort cases. A seaman assumes the risk of being thrown against a bulkhead when the ship rolls, but the proper rationale for dismissing his action is that the shipowner was not negligent and the ship was not unseaworthy. On the other hand, if a seaman chooses to use a patently dangerous route when a safe one is available, he is chargeable with negligence.<sup>88</sup> The authors strongly maintain that the term "assumption of risk" should be banned from the courtroom. Any lawyer who uses it should be held in contempt, and any judge who uses it should be summarily reversed. In *Tiller*, the Supreme Court evidenced equally strong feelings, but with no noticeable effect.

#### LAST CLEAR CHANCE

The concept of last clear chance developed in the common law as an antidote to contributory negligence when the latter was a total bar to recovery.<sup>89</sup> It has never been fully accepted in admiralty, partly as the result of greater emphasis upon cause-in-fact.<sup>90</sup> In addition, last clear chance has been used to circumvent the iniquitable rule

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86. 651 F.2d at 682-83, 1982 A.M.C. at 1829 (citing *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257-58, 1973 A.M.C. 602, 605 (2d Cir. 1973), *cert. denied*, 414 U.S. 822 (1974)).

87. See *Manning v. M/V Sea Road*, 358 F.2d 615, 1966 A.M.C. 591 (5th Cir. 1965).

88. *Palermo v. Luckenbach S.S. Co.*, 355 U.S. 20, 1957 A.M.C. 2275 (1957) (per curiam); cf. *Smith v. United States*, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964).

89. At common law, the doctrine of last clear chance holds that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's contributory negligence is not a proximate cause of the result. W. PROSSER, *supra* note 71, § 66. The doctrine developed as a modification of the strict rule of contributory negligence.

90. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 1982 A.M.C. 1823 (10th Cir. 1981) (approving *Spinks*); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); G. GILMORE & C. BLACK, *supra* note 81, § 7-5.

of divided damages. As such, the doctrine of last clear chance should not survive *Reliable Transfer*.<sup>91</sup> Because it undermines the very objective of comparative negligence—the allocation of damages based on comparative fault—last clear chance is incompatible with comparative negligence.<sup>92</sup> Any contributory fault of a defendant in ignoring his last clear chance to avoid injuring a plaintiff should merely be considered in the apportionment.<sup>93</sup>

#### METHODS OF APPORTIONMENT AMONG TORTFEASORS

##### *Contribution and Tort Indemnity*

Contribution and tort indemnity are two methods of allocating loss among defendant tortfeasors. Contribution is a method of distributing loss by requiring one tortfeasor to pay part of the damages awarded to another. This principle is part of the general maritime law and is not dependent upon statutes such as the Uniform Contribution Among Tortfeasors Act.<sup>94</sup> Before the Supreme Court's decision in *Reliable Transfer*, contribution was made on a *pro rata* basis. Three months after that decision, the Third Circuit applied the *Reliable Transfer* comparative fault approach to the situation of a defendant seeking contribution from a co-defendant in a personal injury case.<sup>95</sup> Contribution based on comparative degrees of fault is the established rule today.<sup>96</sup>

Indemnity is an all-or-nothing remedy that shifts the entire loss from one tortfeasor to another. Tort indemnity envisions a comparison of the fault of each defendant tortfeasor in relation to the injured party. Before *Reliable Transfer*, a passively (secondarily) negligent tortfeasor could recover full indemnity from the actively (primarily) negligent tortfeasor.<sup>97</sup> The Fifth and Eighth Circuits recently have

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91. See Dale, *Apportionment of Liability in the Aftermath of Reliable*, 1978 SOUTHEAST ADMIRALTY LAW INSTITUTE (Program Materials); Note, *Admiralty: Comparative Negligence in Collision Cases*, 36 LA. L. REV. 288 (1975).

92. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 7.3 at 140 (1974 & Supp. 1981); Comment, *Comparative Negligence in the United States—The Advent of its Adoption in Louisiana*, 51 TUL. L. REV. 1217, 1227-29 (1977).

93. *Hanover Ins. Co. v. Puerto Rico Lighterage Co.*, 553 F.2d 728, 1977 A.M.C. 850 (1st Cir. 1977); *Cenac Towing Co. v. Richmond*, 265 F.2d 466, 1960 A.M.C. 1221 (5th Cir. 1959). Under section 1(a) of the Uniform Comparative Fault Act, last clear chance is a factor in the apportionment. 12 U.L.A. 34 (1977).

94. See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 1974 A.M.C. 537 (1974).

95. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 1975 A.M.C. 2527 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

96. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1980 A.M.C. 288 (5th Cir. 1979).

97. *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 1969 A.M.C. 767 (5th Cir. 1969).

held that this remedy is still available.<sup>98</sup> The better reasoned cases, however, hold that the rationale of *Reliable Transfer* "is strongly at odds" with that of tort indemnity. "[T]he preferable approach would be to apply the comparative fault principles endorsed in *Reliable Transfer*."<sup>99</sup>

#### *Apportionment of Fault Against Absentee Tortfeasors*

Apportionment of fault where all tortfeasors are not in court may occur when one tortfeasor is not subject to process in the jurisdiction, is bankrupt, or is a Longshoremen's Act employer. The issue raised is whether the court can nevertheless assess the fault of such a "phantom defendant." The courts have assessed such fault routinely and without discussion, but they, of course, have been unable to enter judgment against the absentee tortfeasor.<sup>100</sup> In *Ebanks v. Great Lakes Dredge & Dock Co.*,<sup>101</sup> however, the Eleventh Circuit has recently refused to apportion against an absentee tortfeasor even though he was a third-party defendant.

Another frequent instance of the absentee tortfeasor occurs when one tortfeasor has settled with the plaintiff and is given a release or covenant not to sue, with the plaintiff going to trial against the nonsettlor. Before *Reliable Transfer*, the defendant generally was entitled to a credit for the amount paid by the settlor. In the wake of *Reliable Transfer*, the prevailing approach now is to apportion the fault of the defendant and the settlor and to allow a credit sufficient to charge the defendant with his proportion of the fault.<sup>102</sup>

#### JOINT AND SEVERAL LIABILITY

##### *Reliable Transfer* did not change the long-established admiralty

98. *Culver v. Slater Boat Co.*, 644 F.2d 460, 465-66 (1981), *rev'd en banc on other grounds*, 688 F.2d 280 (5th Cir. 1982); *E.I. DuPont de Nemours & Co. v. Riverway Harbor Serv. St. Louis, Inc.*, 639 F.2d 404 (8th Cir. 1981) (property damage).

99. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 130, 1980 A.M.C. 833, 851 (3d Cir. 1979). See *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982); Gorman, *Indemnity and Contribution Under Maritime Law*, 55 TUL. L. REV. 1165, 1196 (1981). Cf. *Culver v. Slater Boat Co.*, 644 F.2d 460, 465-66 (1981), *rev'd en banc on other grounds*, 688 F.2d 280 (5th Cir. 1982). In *Loose*, the Fifth Circuit found it "difficult to see the need for the active-passive indemnification rule in a comparative fault system" that "not only eliminates the doctrine of contributory negligence but also apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none." 670 F.2d at 501-02 (footnotes omitted).

100. *E.g.*, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 1979 A.M.C. 1167 (1979).

101. 688 F.2d 716 (11th Cir. 1982). Cf. UNIF. COMP. FAULT ACT § 2(a), 12 U.L.A. 36 (1977) (apportionment allowed as to third-party defendants and persons released).

102. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1980 A.M.C. 288 (5th Cir. 1979); *Doyle v. United States*, 441 F.Supp. 701 (D.S.C. 1977). Cf. *Wheeler v. Bonnin*, 47 Or. App. 645, 615 P.2d 355, 1982 A.M.C. 1739 (1980).



rule that tortfeasors are jointly and severally liable<sup>103</sup> for full damages without apportionment.<sup>104</sup> Under article 4 of the Brussels Collision Convention of 1910,<sup>105</sup> in force almost everywhere except the United States, both vessels in mutual fault collisions are jointly and severally liable for personal injury or death.

#### PROCEDURE IN APPORTIONMENT

In the apportionment of fault under the comparative negligence doctrine, should the court compare causation or culpability? Theoretically, causation is an absolute, not apportionable by degrees unless there are distinct harms.<sup>106</sup> Prosser has commented that "once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution."<sup>107</sup> On the other hand, Wade has commented that "[i]n any event, consideration needs to be given not only to the measure of culpability but also to the relative closeness of the causal relation between the actor's conduct and the injury."<sup>108</sup> In *Reliable Transfer*, the Supreme Court did not decide the instant question but merely restated the obvious proposition that faults to be compared must have contributed to the damages.<sup>109</sup> Fault in the abstract must be disregarded.<sup>110</sup> Each fault must have a causal connection.<sup>111</sup> Two decisions by the same lower federal court have held that liability is apportioned by culpability, not by degree of causation.<sup>112</sup> The earlier of these decisions was reversed by the Ninth Circuit in *Pan-Alaska Fisheries, Inc. v. Marine Construc-*

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103. The concept of joint and several liability holds that an injured plaintiff may institute action against any one or all of the contributorily negligent tortfeasors. In such a case, liability is joint in the sense that all the tortfeasors are responsible for the injury, and several, in the sense that each tortfeasor may be held fully liable for the plaintiff's injury. See W. PROSSER, *supra* note 71, § 46.

104. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. at 260, 1979 A.M.C. at 1169-70 (technically a covered employer is not a "tortfeasor" and the liability is not "joint"); *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302 (1876).

105. Unification of Certain Rules of Law With Respect to Collision Between Vessels, Sept. 23, 1910, in 4 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 181.

106. RESTATEMENT (SECOND) OF TORTS § 433A (1965); Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 345-49 (1980).

107. PROSSER, *supra* note 1, at 481 (footnote omitted).

108. Wade, *supra* note 6, at 341.

109. 421 U.S. at 411, 1975 A.M.C. at 552.

110. *Board of Comm'rs v. M/V Farmsum*, 574 F.2d 289 (5th Cir. 1978).

111. *Inter-Cities Navigation Corp. v. United States*, 608 F.2d 1079, 1980 A.M.C. 2831 (5th Cir. 1979).

112. *Alaska Packers Ass'n v. O/S East Point*, 421 F. Supp. 48, 1976 A.M.C. 2228 (W.D. Wash. 1976); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 402 F. Supp. 1187 (W.D. Wash. 1975), *rev'd*, 565 F.2d 1129 (9th Cir. 1977).

*tion & Design Co.*<sup>113</sup> The court discussed the "semantical" problem at some length and favorably referred to the term "comparative causation."<sup>114</sup> Subsequently, in *Hosei Kaiun Shoji Co. v. Tug Seaspan Monarch*, another federal district court handed down the Solomonic judgment that both causation and culpability must be present.<sup>115</sup>

The importance of causal connection was emphasized in *The S.S. Helena*.<sup>116</sup> In that case, Judge Alvin B. Rubin assigned sixty-five percent to the fault that was "the immediate cause of the collision."<sup>117</sup> However, it seems implicit in his decision that he weighed both causation and culpability:

It is profitless to attempt to weigh fault against fault as if each shortcoming could be measured in some sort of scale. Both vessels were at fault and actively so. The errors of neither were minor. Each vessel committed acts that contributed to the collision. No single act of either can be completely disentangled. But the *White Alder's* unexplained sheer into the course of the *Helena* was the fateful and final act of negligence.<sup>118</sup>

A district judge in the Fifth Circuit has been even more specific: "In calculating the degree of fault, the court must consider, under basic common law tort principles, the *blameworthiness of each vessel* and the *extent to which the vessel contributed to the accident.*"<sup>119</sup> The United States District Court for the Southern District of New York has said the same thing in different words: "The apportionment of fault in the proportions chosen is not simply a mechanical computation based on counting of errors, although such an account is a factor to be considered. More importantly, the chosen apportionment reflects this court's considered judgment as to the *quality and gravity* of each party's negligence."<sup>120</sup>

The procedure in the English Admiralty is well established. Both "blameworthiness" and "causative potency" are weighed.<sup>121</sup> The English procedure has been approved in the United States.<sup>122</sup> Furthermore,

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113. 565 F.2d 1129, 1978 A.M.C. 2315 (9th Cir. 1977).

114. 565 F.2d at 1139, 1978 A.M.C. at 2330.

115. 1981 A.M.C. 2162 (D. Or. 1980).

116. 1976 A.M.C. 2013 (E.D. La. 1976).

117. *Id.* at 2021.

118. *Id.* at 2021-22.

119. *Southern Pac. Transp. Co. v. Tug Captain Vick*, 443 F. Supp. 722, 732 n.1, 1979 A.M.C. 1404, 1417 n.1 (E.D. La. 1977) (emphasis added).

120. *Etheridge v. M/V Hellenic Laurel*, 1977 A.M.C. 2453, 2457 (S.D. N.Y. 1977) (emphasis added).

121. *Brandon, Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 TUL. L. REV. 1025, 1031 (1977).

122. *Afran Transp. Co. v. S/T Maria Venizelos*, 450 F. Supp. 621 (E.D. Pa. 1978);

it appears very similar to the apportionment procedure prescribed in section 2(b) of the UCFA: "In determining the percentages of fault, the trier of fact shall consider both the *nature of the conduct* of each party at fault and the *extent of the causal* relation between the conduct and the damages claimed."<sup>123</sup> The above cases, with the exception of *Pan-Alaska Fisheries*, involved collisions. There is no apparent reason why the same procedure could not be followed in a personal injury case, at least one tried before the court. In a jury case, a detailed charge on the two elements of causation and culpability probably would be confusing. It would seem preferable to submit simply the usual interrogatory: "To what extent expressed in terms of percentage did the negligence of the plaintiff (defendant) contribute to the happening of the accident?" Forms of instructions are set forth in the federal practice manuals.<sup>124</sup> On a general verdict, a jury is likely to disregard a plaintiff's negligence.<sup>125</sup> It is therefore essential to use special interrogatories.<sup>126</sup>

The trial court must make specific findings on the parties' proportionate degrees of fault.<sup>127</sup> On appeal, the apportionment is subject to the "clearly erroneous" rule.<sup>128</sup>

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Graveland-Grace McAllister, 1980 A.M.C. 1839 (1980) (R.H. Brown, Arb.); A. PARKS, *THE LAW OF TUG, TOW, AND PILOTAGE* 239-41 (2d ed. 1982).

123. 12 U.L.A. 37 (emphasis added). See text accompanying notes 132-34, *infra*. See the Commissioner's Comment to section 2(b) of the Uniform Comparative Fault Act regarding percentage of fault, 12 U.L.A. 37. See also *Curtis Bay Towing Co. v. The M/V Maryland Clipper*, 599 F.2d 1313, 1979 A.M.C. 2649 (4th Cir. 1979). In that case, the district court found both vessels negligent in contributing to a collision. One vessel was negligent in posting a lookout but ordering the lookout not to call the bridge. The other vessel was negligent in failing to post a lookout. Is the vessel that posted a lookout less culpable than the vessel that did not post a lookout, especially in light of the lookout's orders? Did the posting of the "silent" lookout or the failure to post a lookout at all contribute to the collision? The issue raised by these questions is that of determining the relationship between the conduct and the resulting damage. It is to this end that section 2(b) of the Uniform Comparative Fault Act is addressed.

124. 3 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* §§ 94.18, 94.20, 94.21 & 94.28 (1977 & Supp. 1981); 1B A. SANN, S. BELLMAN, N. GOLDEN, & B. CHOASE, *BENEDICT ON ADMIRALTY* § 25, at 3-124-33 (7th ed. 1982); United States Fifth Circuit District Judges Association, *Pattern Jury Instructions (Civil Cases)* 53, 57, 107 & 115 (West 1980). One form of interrogatory not worthy of emulation asked: "[W]hat *percentage of the cause* of the accident do you attribute to plaintiff's negligence, if any?" *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217, 219 (6th Cir. 1969) (emphasis added).

125. PROSSER, *supra* note 1, at 482-84.

126. *Id.* at 497-503.

127. *Curtis Bay Towing Co. v. M/V Maryland Clipper*, 599 F.2d 1313, 1979 A.M.C. 2649 (4th Cir. 1979).

128. *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982); *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 1982 A.M.C. 153 (9th Cir. 1980).

## FOREIGN AND STATE LAW

The United Kingdom and most of the Canadian provinces, including Quebec, have adopted by statute comparative negligence applicable in maritime cases.<sup>129</sup> Thirty-eight states have adopted some form of comparative negligence. In the Fourth Circuit, only West Virginia has adopted comparative negligence. In the Fifth and Eleventh Circuits, only Alabama has not. Mississippi adopted comparative negligence in 1910;<sup>130</sup> Louisiana adopted comparative negligence in 1980.<sup>131</sup> A great body of jurisprudence and legal literature has been built up in the states, and most of it is readily transferable to the admiralty as a result of *Reliable Transfer*.

Particular mention should be made of the UCFA.<sup>132</sup> This Act was drafted over a five-year period by a distinguished group headed by Professor John W. Wade.<sup>133</sup> Although it has not yet been adopted by any state, this Act is a model for the admiralty courts to follow when a novel question is presented. Such a procedure would be analogous to the resort by admiralty courts to the *Restatements* in order to fill gaps in the maritime law.<sup>134</sup>

## CONCLUSION

We have in comparative negligence a seed planted by the Supreme Court in 1890 in *The Max Morris* and nurtured by the lower federal courts, with the fruit ripened and plucked eighty-five years later in *Reliable Transfer*. During that period, the only *original* contributions by Congress were the passage of the FELA in 1908, brought into the admiralty by the Jones Act in 1920, and the DOHSA.<sup>135</sup> The evolution of the doctrine of comparative negligence is a fine example of the remarkable ability of the admiralty courts, both English and

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129. V. SCHWARTZ, *supra* note 92, § 1.3; Wright, *Recovery for Personal Injury and Death Claims Under the Laws of the United Kingdom*, 55 TUL. L. REV. 1200, 1207-08 (1981).

130. MISS. CODE ANN. § 11-7-15 (1972).

131. LA. CIV. CODE art. 2323.

132. See *supra* note 5 and accompanying text. See also V. SCHWARTZ, *supra* note 92, § 21.4 (1981 Supp.); Wade, *supra* note 6, at 307-17; Pearson, *supra* note 106, at 343 n.4, 364.

133. The Uniform Comparative Fault Act has been extensively commented on by Professor Wade. 13 U.L.A. 33 (Supp. 1982) (Commissioner's notes prepared by Wade); Wade, *supra* note 6, at 299-318; Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978); Wade, *A Uniform Comparative Fault Act—What Should it Provide?*, 10 U. MICH. J.L. REF. 220 (1977).

134. *E.g.*, *Harrison v. Flota Mercante Grancolumbiana, S.A.*, 577 F.2d 968, 1979 A.M.C. 824 (5th Cir. 1978).

135. The 1972 amendments to the Longshoremen's Act more than offset Congress's contribution through the FELA.

American, to adjust to new conditions and to develop new doctrines necessary to insure justice.<sup>136</sup>

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136. Excepting only assumption of risk. See discussion at *supra* notes 71-88 and accompanying text.