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Before and After United States v. Reliable Transfer: An Analysis of Maritime Collision Law

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BEFORE AND AFTER *UNITED STATES V. RELIABLE TRANSFER*: AN ANALYSIS OF MARITIME COLLISION LAW

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> *She was a big one, and she was coming in a hurry, too, looking like a black cloud with rows of glow-worms around it; but all of a sudden she bulged out, big and scary, with a long row of wide-open furnace doors shining like red-hot teeth, and her monstrous bows and guards hanging right over us. There was a yell at us, and a jingling of bells to stop the engines, a powow of cussing, and whistling of steam—and as Jim went overboard on one side and I on the other, she came smashing straight through the raft.*†
>
> Mark Twain

Introduction

From its inception, the law governing vessels on navigable waters has tended to accommodate itself to the particular problems that stem from the nature of ships and the needs of the maritime world. Accordingly, the standards of conduct that determine land-based negligence are often revised or held inapplicable to negligence on the water. Fundamental rules of law apply to colliding ships where there is a possibility that fault exists. Since the determination of negligence in collisions has, in the United States, been closely tied to the rule that damages must be equally divided where there is mutual fault, it is necessary to examine the history of damages in collisions to understand the changes occasioned by the Supreme Court's adoption of comparative negligence.

1. Fundamentals of Collision Law

a. Standard of Care

When a collision occurs on navigable waters, liability is predicated upon a finding of fault.[1] It is often determined that a vessel is at fault when it can be shown that it was in violation of one of the applicable rules of navigation which have been developed to ensure safe and orderly traffic on the seas. Originally, the navigation rules

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† M. Twain, The Adventures of Huckleberry Finn 94 (8th printing 1953).

1. G. Gilmore & C. Black, The Law of Admiralty § 72 (2d ed. 1975). *See* The Java, 81 U.S. (14 Wall.) 189 (1871).

were found in the customs and practices of seamen, and it was necessary to establish the existence of a generally accepted rule before showing its applicability to the particular circumstances of the case under consideration.[2] It was not until 1854 that the first unofficial code of regulations was compiled by the London Trinity House.[3] Despite the code's unofficial status, violation of one of these rules, while not conclusive on the issue of negligence, could be introduced as evidence of lack of due care.[4] However, as the shipping industry became more complex, it was apparent that an unofficial code and a body of custom were insufficient to meet the needs of modern navigation.[5]

Accordingly, England adopted a comprehensive set of statutory rules in 1862,[6] and the United States followed suit two years later.[7] In the United States there has been a gradual expansion and development of these rules so that currently there are four sets that apply to different classes of waters within the admiralty jurisdiction of the American courts. The first of these, the International Rules, govern only United States ships on the high seas, but they are identical to rules that have been enacted by other maritime nations.[8] The other three sets of rules control navigation on the inland waters of the United States and include the Great Lake Rules,[9] the Western Rivers Rules,[10] and the Inland Rules.[11] Among the most important of these statutes are those that specify the lights and shapes that a vessel is required to display for identification purposes,[12] the steering and sailing rules which instruct a vessel on the proper procedure when there is a possibility of a collision,[13] and the fog rules which

2. Mattioni, *Incidents of Maritime Collision Law*, 37 Temp. L.Q. 456, 457 (1964).

3. *Id.* The London Trinity House was the English pilotage and navigational authority. *See also* R. Marsden, Collisions at Sea (9th ed. 1934).

4. Mattioni, *supra* note 2, at 458.

5. *Id.*

6. Merchant Shipping Act, 1862, 25 & 26 Vict., c. 63, § 25.

7. Act of Apr. 29, 1864, 13 Stat. 58.

8. 33 U.S.C. §§ 1051-1094 (1970). These Rules include for the first time provisions dealing with radar. *See* Bockrath, *The Law of Radar Navigation—Ahead Slow*, 23 La. B.J. 65 (1975); Healy, *Radar and the New Collision Regulations*, 37 Tul. L. Rev. 621 (1963).

9. 33 U.S.C. §§ 241-295 (1970).

10. 33 U.S.C. §§ 301-356 (1970). These Rules apply to the Mississippi River, its tributaries, the Atchafalaya River, and the Red River of the North.

11. 33 U.S.C. §§ 151-232 (1970). The Inland Rules apply to all other navigable waters, including harbors and the Intracoastal Waterway. *See also* Comment, *Bargeowner Beware: The Expansion of Liability of Barges for Maritime Collisions*, 19 Loy. L. Rev. 449 (1973).

12. *See* Bradshaw v. The Virginia, 176 F.2d 526 (4th Cir.), *cert. denied*, 338 U.S. 892 (1949); The Titan, 23 F. 413 (C.C.S.D.N.Y. 1885); The William J. Riddle, 102 F. Supp. 884 (S.D.N.Y. 1952)(towage lights). *See also* G. Gilmore & C. Black, *supra* note 1, § 78.

13. The steering and sailing rules provide that, in a given situation, one vessel is burdened while the other is privileged. The burdened ship is required to take action to avoid the

contain special provisions for signalling and navigating in the fog.[14]

Unlike other statutes the Rules of Navigation are not couched in legal terms of art. They are explicit, detailed instructions addressed to ships' officers, who are required to comply with them.[15] The rules are mandatory and strictly and literally construed by the courts.[16]

In addition to the statutory Rules of Navigation, there are other federal, state, and local statutes and regulations that may have a bearing on a particular situation if they do not contradict federal law. Thus, the Pilot Rules issued by the Coast Guard contain more detailed provisions than the statutes, and when they are not in conflict with statutory law, they have the effect of statutes. Additionally, local custom is followed where well established and not in conflict with statutory or regulatory procedure. Where statutory rules are silent or leave vacant interstices, the requirements of good seamanship and due care establish the standard of due care.[17]

b. *The* Pennsylvania *Rule*

Proximate causation is an issue in collision cases. However, the traditional requirements of causation that exist in other areas of tort law have been held to be insufficient in maritime collision cases. Where there has been a violation of the Rules of Navigation before a collision, the vessel in violation must prove not only that the violation did not contribute to the collision, but that it could not have contributed to it.[18] The rule takes its name from the case in which it first appeared, *The Pennsylvania,*[19] and was designed to

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collision, while the privileged ship maintains her speed and course. Accordingly, a steam vessel must stay clear of a sailing vessel, which is less easily maneuvered. *See* Postal S.S. Corp. v. El Isleo, 308 U.S. 378 (1940); The Delaware, 161 U.S. 459 (1896); The Britannia, 153 U.S. 130 (1894); Hertz Consolidated Fisheries, 213 F.2d 801 (9th Cir. 1954); G. Gilmore & C. Black, *supra* note 1, § 7-9.

14. *See* Union Oil Co. v. The San Jacinto, 409 U.S. 140 (1972); The Umbrig, 166 U.S. 404 (1897); The Martello, 153 U.S. 64 (1894); Anglo-Saxon Petroleum Co. v. United States, 222 F.2d 75 (2d Cir. 1955).

15. G. Gilmore & C. Black, *supra* note 1, § 7-3.

16. *See* The Albert Dumois, 177 U.S. 240 (1899); Belden v. Chase, 150 U.S. 674 (1898); Farwell's Rules of the Nautical Road 198 (4th ed. A. Prunski 1971). Rule 27 lends some flexibility to the Rules in providing that safety may require a departure from a specific rule. "In obeying and construing [these rules] due regard shall be had to all dangers of navigation and collision, and to any special circumstances . . . which may render a departure from [these rules] necessary . . . to avoid immediate danger." 33 U.S.C. § 1089 (1970).

17. G. Gilmore & C. Black, *supra* note 1, § 7-3.

18. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873); G. Gilmore & C. Black, *supra* note 1, § 7-5.

19. 86 U.S. (19 Wall.) 125 (1873).

encourage safe travel on the seas by penalizing any departure from the Rules of Navigation.[20]

The United States Supreme Court in *The Pennsylvania*[21] dealt with a collision between two ships on the high seas during a heavy fog. While the Pennsylvania was proceeding too fast, the other boat, the Mary Troop, was ringing a bell instead of sounding a foghorn as required by the statute. In holding that both ships were responsible for the collision the court stated,

> The liability for damages is upon the ship . . . whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.[22]

The party attempting to invoke the *Pennsylvania* Rule must first establish the negligence of the ship that has violated a statute.[23] Then the *Pennsylvania* Rule will shift the burden of proving causation to the statutory violator who must produce evidence sufficient to overcome the presumption that the violation was the cause of the collision.[24] In recent years there seems to have been a relaxation by some courts of the *Pennsylvania* standard. It has been suggested that the lack of causal relationship between the violation and the loss must only be proved beyond a reasonable doubt,[25] and that the presumption does not demand proof by the violator that "its fault could not, by any stretch of the imagination, have a causal connection to the collision, no matter how speculative, improbable or remote."[26]

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20. Pierro v. Carnegie-Illinois Steel Corp., 186 F.2d 75 (3d Cir. 1950) (penalty aspect of the *Pennsylvania* Rule discussed); The Princess Sophia, 61 F.2d 339 (9th Cir. 1932), *cert. denied*, 288 U.S. 604 (1933). "This burden . . . is frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and therein lies the true penalty imposed upon him." *Id.* at 347. *See also* Note, *The Pennsylvania Rule: Charting a New Course for an Ancient Mariner*, 54 B.U.L. Rev. 78 (1974) [hereinafter cited as *Ancient Mariner*].

21. 86 U.S. (19 Wall.) 125 (1873).

22. *Id.* at 136.

23. *Ancient Mariner, supra* note 20, at 88. *See also* Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

24. Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291 (1917); The Victory and The Plymothian, 168 U.S. 410 (1897); Belden v. Chase, 150 U.S. 674 (1893); The Blue Jacket, 144 U.S. 371 (1892); The Dexter, 90 U.S. (23 Wall.) 69 (1874).

25. *Ancient Mariner, supra* note 20, at 90.

26. Seaboard Tug & Barge, Inc., v. Rederi AB/Disa, 213 F.2d 772, 775 (1954).

Technically the *Pennsylvania* Rule only applies where there has been a statutory violation. For a ship at fault in some other regard, negligence is determined by the usual standards of causation.[27] While the situations which the rule covers would seem to be easily defined, problems have arisen as to whether a rule is statutory or not. Particularly, questions have been posed by Rule 29 of the International Rules of Navigation which provides that:

> Nothing in [these rules] shall exonerate any vessel, . . . 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.[28]

It is arguable that Rule 29 is a statutory requirement of due care that may result in the characterization of all negligence as a statutory fault.[29] With regard to the more specific provisions of the Rule, the courts have been sharply divided in their interpretation. While the Second and Fifth Circuits have held that the failure to keep a proper lookout is a statutory fault,[30] the Fourth Circuit has concluded that the purpose of the Rule was not to make an addition to the statutory Rules of Navigation but to make sure that compliance with the Rules would not excuse a vessel's failure to meet the standards of good seamanship that exist independently of statute.[31]

Although the task of overcoming the *Pennsylvania* Rule may seem to be insurmountable, it has on occasion been accomplished, significantly where the party invoking the rule has been grossly at fault. In *National Bulk Carriers, Inc., v. United States*[32] the Rutgers Victory had a statutory duty to stay out of the way of the Nashbulk. When the vessels were a half mile apart the master of the Nashbulk, concerned because the Rutgers Victory was not changing her course, shifted three points to starboard without giving the whistle signal required by the International Rules of Navigation. A minute before the collision he blew the danger signal, but it was too late to avoid the other ship. The Rutgers Victory, who had no lookout or watch officer, contended that had the whistle been blown before the

27. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873). *See also* G. Gilmore & C. Black, *supra* note 1, § 7-11.

28. 33 U.S.C. § 1091 (1970).

29. G. Gilmore & C. Black, *supra* note 1, § 7-5.

30. The Tempest v. United States, 404 F.2d 870 (4th Cir. 1968); Dwyer Oil Transp. Corp. v. The Edna M. Matton, 255 F.2d 380 (2d Cir. 1958).

31. Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1968).

32. 183 F.2d 405 (2d Cir. 1950), *cert. denied*, 340 U.S. 865 (1951). *See, e.g.*, Pennsylvania R.R. v. Steamship Marie Leonhardt, 202 F. Supp. 368 (E.D. Pa. 1901).

change in course, her crew might have been alerted. Rejecting this argument, the court held that the requirement of the change in course signal was not merely to alert another ship and that to hold otherwise would in effect be putting a premium on the gross negligence of the Rutgers Victory.[33] A similar result has been reached where a drilling platform's lights could only be seen 4.4 miles rather than the five miles required by the Coast Guard Regulations. In that case it was held that the colliding vessel, which was equipped with radar, should have discovered the platform even if it had no lights.[34]

Where it has been determined that the statutory fault was not causally connected to the collision, the courts have achieved results similar to those reached through application of the major-minor fault doctrine.[35] With application of either rule, the harshness of the divided damages rule has been avoided where the fault of one vessel is disproportionately greater.[36]

c. *In Extremis*

Despite the requirement that the Rules of Navigation be strictly complied with, there is one situation where a vessel in violation of a rule will not be held accountable. There will be no liability when a vessel, through no fault of its own, is in danger of an imminent collision and, in response to the danger, violates the rules or standards of good seamanship.[37] Under these circumstances a successful defense of *in extremis* will relieve the ship from liability entirely. The defense was first outlined in *The Bywell Castle*.[38] The Princess Alice and the Bywell Castle were on a parallel course until the Princess Alice came across the bows of the Bywell Castle at a distance of 100 to 400 yards. The Bywell Castle then made a "wrong" maneuver. In relieving the Bywell Castle of liability, the court stated,

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33. National Bulk Carriers, Inc., v. United States, 183 F.2d 405, 409 (2d Cir. 1950).

34. Continental Oil Co. v. Glenville, 210 F. Supp. 865 (S.D. Tex. 1962).

35. G. Gilmore & C. Black, *supra* note 1, § 7-5. *See also Ancient Mariner, supra* note 20, at 88.

36. National Bulk Carriers, Inc., v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (L. Hand, C.J., dissenting).

37. Where a vessel is faced with an emergency not of her own creation, she need not act with the standard of care required in a normal situation. While contributory negligence reduces the damages in admiralty, *in extremis* will relieve the ship from liability entirely. Mole & Wilson, *A Study of Comparative Negligence*, 17 Cornell L.Q. 333, 352 (1932). *See, e.g.*, The Stifinder, 275 F. 271 (2d Cir. 1921)(overruled on other grounds by American Tobacco Co. v. The Katingo Hadjipatera, 211 F.2d 606 (2d Cir. 1954)); The Blue Jacket, 144 U.S. 371 (1892); The Nacoochee, 137 U.S. 330 (1890).

38. [1878] 4 P.D. 219 (C.A.).

> [A] ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. . . . [I]f in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected.[39]

An assertion of *in extremis* can only be made by a vessel that did not originally contribute to the dangerous situation.[40] To claim the defense, it is necessary that the danger be imminent and that the faulty maneuver be closely connected in time to the emergency.[41] Whether the time that has elapsed between the wrong maneuver and the danger is too long is determined on a case by case basis.[42] Further, a vessel that is aware of a danger and waits too long to act will not be able to avail itself of the defense.[43]

The determination of whether a sufficient danger exists to invoke *in extremis* must also be determined on a case by case basis. The defense has been equated with the concept of "emergency" and shares some of its imprecision.[44] It has been suggested that a certain amount of vagueness is essential if unwarranted strictness on the basis of hindsight is to avoided.[45]

d. Inscrutable Fault and Inevitable Accident

In addition to *in extremis,* there are two other defenses which will relieve a vessel of responsibility for loss resulting from a collision. The first of these defenses is known as inscrutable fault.[46] A case of inscrutable fault exists when the nature of the occurrence is

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39. *Id.* at 223.

40. Wilson v. Pacific Mail S.S. Co., 276 U.S. 454 (1928); Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

41. City of Paris, 76 U.S. (9 Wall.) 634 (1869). *See* H. Baer, Admiralty Law of the Supreme Court § 9-4 (2d ed. 1969).

42. *See, e.g.,* United States v. M/V Wuerttemberg, 330 F.2d 498 (4th Cir. 1964).

43. *Id.*

44. G. Gilmore & C. Black, *supra* note 1, § 7-3 at 491. Arkansas has adopted the following definition of emergency:

> A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation.

Arkansas Model Jury Instructions, Civil 2d, 614 (1974). *See* Johnson v. Nelson, 242 Ark. 10, 411 S.W.2d 661 (1967).

45. G. Gilmore & C. Black, *supra* note 1, § 7-3 at 491 n.38.

46. *Id.* § 7-2; The Grace Girdler, 74 U.S. (7 Wall.) 196 (1868).

clear but the court is unable to decide exactly what act or omission constituted fault.[47] Where liability is predicated upon fault, as it is in collision cases, it must follow that where proof of fault fails, there can be no allocation of blame.[48] While an early series of American cases required that the damages be divided where there was inscrutable fault,[49] it now appears to be settled that each party must bear its own loss.[50] Because the Rules of Navigation are comprehensive and because one party is often aided by a presumption of fault, it is a relatively rare case that will be decided on the basis of inscrutable fault.[51] Usually a court is able to find a violation of the rules and determine fault accordingly.

The second situation in which no fault will be found is that of inevitable accident. Simply put, when a collision is the result of an act of God or occurs despite the taking of all proper precautions, the accident is considered to be inevitable.[52] Like the defense of inscrutable fault, the defense of inevitable accident is the obvious corollary of the requirement that liability must be based upon fault. Where due care has been exercised or an act of God has intervened, it cannot properly be said that either party is to blame. If the defense is to apply, the precautions taken to avoid a mishap must be reasonable under the circumstances as they are known or are reasonably to be anticipated.[53] Accordingly, where a houseboat broke loose during Hurricane Betsy and caused damage in the area, the court concluded that the damage was the result of an act of God, since the houseboat had been properly secured and the storm was unusually violent.[54] However, on another occasion a holding of inevita-

47. The Breeze, 4 F. Cas. 52 (C.C.S.D.N.Y. 1872) (No. 1829). *See also* Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304, 318 (1957).

48. G. Gilmore & C. Black, *supra* note 1, § 7-2.

49. The Kallisto, 14 F. Cas. 95 (E.D. Va. 1877) (No. 7600); The Tracy J. Bronson, 24 F. Cas. 119 (N.D.N.Y. 1869) (No. 14,131). It has been suggested that since collisions do not often occur without fault it is fairer to divide the damages in cases of inscrutable fault. Staring, *supra* note 47, at 320.

50. The Jumna, 149 F. 171 (2d Cir. 1906); The Worthington & Davis, 19 F. 836 (E.D. Mich. 1883); The Banner, 225 F. 433 (S.D. Ala. 1915). The Brussels Collision Convention of 1910 abolishes the rule of division in cases of inscrutable fault in article 2. For an English translation see 6 Benedict on Admiralty 39-42 (7th ed. A. Knauth & C. Knauth 1969) [hereinfter cited as Benedict].

51. J. Lucas, Cases on Admiralty 745 (1969).

52. *See, e.g.*, Stainback v. Rae, 55 U.S. (14 How.) 532 (1852); Dunton v. Allan S.S. Co., 119 F. 590 (3d Cir. 1903), *cert. denied*, 192 U.S. 606 (1904); The Sea King, 14 F.2d 684 (S.D.N.Y. 1926), *modified on rehearing*, 29 F.2d 5 (2d Cir. 1928).

53. Swenson v. The Argonaut, 204 F.2d 636 (3d Cir. 1953); Massman-Drake v. Towboat M/V Hugh C. Blaske, 289 F. Supp. 700 (E.D. La. 1968).

54. Twery v. Houseboat Jilly's Yen, 267 F. Supp. 722 (S.D. Fla. 1967). A heavy burden

ble accident was reversed when the appellate court found that a barge that had broken loose during a hurricane should have been moved before the arrival of the storm.[55]

Inevitable accident is often regarded as an affirmative defense. However, two commentators have claimed that in reality it is a rebuttal of a presumption of fault.[56] Thus, in *The Rose Standish,*[57] where a vessel under a duty to reverse her engines could not do so because of valve failure that occurred notwithstanding proper maintenance, there was a presumption of fault triggered by the failure to reverse which shifted the burden of proof to the Rose Standish. This presumption was rebutted by proof of careful maintenance and evidence that the valves were inoperable. The court found that the collision was due to inevitable accident, and each party was required to bear its own loss.[58] Therefore, if this analysis is accepted, the defense turns out to be nothing more than the inability of either party to sustain its burden of proving the other's fault.[59]

2. *Damages*

a. *History*

Inextricably tied to a determination of liability and an application of rules is the concept of divided damages that existed in the United States until 1975. This approach was taken as early as the eleventh century in the Rolls of Oleron.[60] While the concept of negligence had not been clearly developed at that time, Article 15 of the Rolls of Oleron provided that damages should be halved when a ship coming from the high seas collided with a ship at anchor and the

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is placed on a vessel to show that the breaking loose of a vessel is the result of inevitable accident. General Pub. Warehouse Co. v. Queen Line, Ltd., 177 F. Supp. 916 (E.D. Pa. 1959).

55. Boudoin v. J. Ray McDermott & Co., 281 F.2d 81 (5th Cir. 1960).

56. G. Gilmore & C. Black, *supra* note 1, § 7-2 at 487. Judge Learned Hand approached inevitable accident in the following manner: "Strictly, it is no defense at all, but a true presumption; that is to say, a duty laid upon him to supply proof which casts him if he fails." Cranberry Creek Coal Co. v. Red Star Towing & Transp. Co., 33 F.2d 272, 274 (2d Cir. 1929), *cert. denied,* 280 U.S. 596 (1929). *Contra,* Mole & Wilson, *supra* note 37, at 351-52. *See* The Anna C. Minch, 271 F. 192 (2d Cir. 1921).

57. 26 F.2d 480 (D. Mass. 1928). *See also* Giamona v. Mineo, 125 F. Supp. 354 (N.D. Cal. 1954).

58. The Brussels Collision Convention art. 4 follows this rule. 6 Benedict, *supra* note 50, at 39.

59. G. Gilmore & C. Black, *supra* note 1, § 7-2.

60. Oleron was an island off the west coast of France. The Prud'hommes of the Commune had jurisdiction of maritime matters which was exercised according to the usages and customs of merchants and mariners. Turk, *Comparative Negligence on the March,* 28 Chi.-Kent L. Rev. 189, 220 (1950). For a brief history of early maritime law, *see* H. Baer, *supra* note 41, § 9-1.

masters and mariners of the ship underway could swear that the accident occurred without their fault or intent.[61] In the fourteenth century the Grand Coutumier d'Oleron went a step further in ruling that where two ships were at anchor and one negligently broke loose and collided with the other, the negligent ship was required to bear the loss.[62] Based on logic and the foregoing rules, the next step was the conclusion that the damages should be halved where both sides were at fault.[63]

While a tradition of apportioning damages based on the degree of fault developed in the Mediterranean ports, and later in Italy and France,[64] the Rolls of Oleron and later compilations adopted the rule of divided damages and were of primary influence in northern France, Flanders, and the Low Countries.[65] As early as the fourteenth century, England recognized the Rolls as authoritative. Despite British acceptance of the Rolls, for nearly two hundred years English courts awarded either full damages or none at all.[66] However, early in the seventeenth century, about the same time that the concept of negligence came into prominence, English decisions dividing loss made their appearance.[67] Throughout the eighteenth century, the admiralty courts continued to favor equal division and in 1815, in *The Woodrop-Sims,*[68] the court in dictum delineated the situations in which divided damages would or would not apply. Lord Stowell defined four kinds of collisions at sea: (1) where the collision was caused by the fault of the defendant ship; (2) where it was caused by the fault of the plaintiff ship; (3) where it was the result of mutual fault; (4) where it occurred without the fault of either ship. It was said that the loss should be divided only in the third situation, where the collision was caused by the fault of both ships.[69]

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61. Turk, *supra* note 60, at 221.

62. The significant judgments of the Maritime Court of Oleron were compiled in this work in 1344 A.D. *Id.* n.80.

63. *Id.* at 221-22.

64. The Consulato del Mare, dating from 1340 and compiled by the Prud'hommes of Barcelona, provided that damages were to be set in accordance with the opinions of the experts. It has been suggested that this was the birth of the doctrine of comparative negligence. *Id.* at 223.

65. The Rolls were also embodied in the Sea Laws of Wisby. Wisby was an important commercial center on the Island of Cohland. *Id.* at 224.

66. *Id.* at 226.

67. Mole & Wilson, *supra* note 37, at 342.

68. 165 Eng. Rep. 1422 (1815). In an earlier case, despite the express finding that the fault of one ship was greater than the fault of the other, damages were equally divided. The Petersfield and The Judith Randolph, *sub. nom.* Widman v. Blakes, Miscell. Bundles, Ser. III, No. 18 (1789); *see* Turk, *supra* note 60, at 227 n.21.

69. 165 Eng. Rep. 1423, 1424 (1815).

Hay v. LeNeve[70] confirmed the *Woodrop-Sims* dictum, holding that where mutual fault was involved, the division should be equal and the degree of fault was to be disregarded. In the Judicature Act of 1873 the divided damages rule became statutory.[71] However, by the end of the nineteenth century the leading maritime nations on the continent had adopted proportional division or comparative negligence in collision cases. This was to be the approach taken by the Brussels Collision Convention of 1910, and in 1911 England followed suit in the English Maritime Convention Act.[72]

The history of divided damages in the United States paralleled that of England until the latter switched to proportional division. After the English decision of *Hay v. LeNeve,*[73] the lower federal courts tended to follow the analysis of collisions found in that case, and they divided the damages where there was mutual fault.[74] The United States Supreme Court did not rule on the issue until 1855 in *The Schooner Catharine v. Dickinson,*[75] where the Court held that "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."[76] Soon thereafter, one court remarked that divided damages was the settled rule of law.[77] Further, the rule was not limited to a collision between two ships but was extended to collisions between vessels and fixed objects, such as piers and bridges,[78] and to damages attributable to personal injuries and loss of life arising out of a collision.[79] Although representatives of the United States signed

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70. 2 Shaw's Rep. 395 (1824).

71. Turk, *supra* note 60, at 229.

72. 6 Benedict, *supra* note 50, at 38-39.

73. 2 Shaw's Rep. 395 (1824).

74. The Bay State, 2 F. Cas. 1091 (S.D.N.Y. 1848) (No. 1148); The Scioto, 21 F. Cas. 774 (D. Maine 1847) (No. 12,508); The Rival, 20 F. Cas. 845 (D. Mass. 1846) (No. 11,867).

75. 58 U.S. (17 How.) 170 (1855).

76. *Id.* at 177-78.

77. The Maria Martin, 79 U.S. (12 Wall.) 31 (1871). By the end of the nineteenth century some lower federal courts were apportioning damages according to fault. *E.g.*, The Chattahoochee, 74 F. 899 (1st Cir. 1896); The Victory, 68 F. 395 (4th Cir. 1895); The Mary Ida, 20 F. 741 (S.D. Ala. 1884). In The Max Morris, 137 U.S. 1, 15 (1890), which is not a collision case, the Supreme Court intimated that the question of equal division was still open. However, this intimation was never followed.

78. Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1875).

79. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963). In this case a government employee aboard a United States ship was injured in a collision between the ship he was on and another ship. He received compensation from the government under the Federal Employees' Compensation Act, which was his exclusive remedy against the government. He also sued the owner of the other ship and recovered damages. In a suit between the United States and the other ship's owner, the court divided damages, including one half of the amount recovered by the employee.

the Brussels Convention of 1910, the United States failed to adopt the Convention's proposals, and divided damages continued to be the rule in the United States until 1975.[80]

b. Formula

The formula for the equal division of damages was succinctly stated in *The North Star*:[81]

> [A]ccording to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties.[82]

Where more than two vessels were at fault, each was required to bear an equal share of the total loss.[83] The seeming simplicity of the equal division was somewhat complicated where only one ship was being sued. In *The Sapphire* it was contended that the court should have inquired into the losses of the other vessel that was party to the suit in order to compute the damages properly. The Supreme Court rejected this argument and insisted that the decree could only be for half the damages actually suffered and that the court could not consider loss to a vessel that was not actually before the court.[85]

c. Major-Minor Fault

While the divided damages rule had the advantage of being easily applied by the courts, it often worked an unnecessary hardship on a vessel that was guilty of only a minor fault in comparison to the transgressions of the other vessel.[86] Thus, in the situation where *A* sustained damages of $100,000, *B*'s losses equalled $500,000, and there was a determination that *A* was 10% at fault and

80. One reason the United States did not adopt the Convention was because of opposition to its cargo provisions. H. Baer, *supra* note 41, § 18-9 at 414. For a discussion of the relationship between damages and cargo, *see* Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Cornell L.Q. 531 (1928); Staring, *supra* note 47, at 325-26; Waesche, *Cargo's Rights in Collision Cases*, 45 Tul. L. Rev. 781 (1971).

81. 106 U.S. 17 (1882). For a thorough discussion of the mechanics of divided damages, *see* Huger, *supra* note 80, at 540.

82. The North Star, 106 U.S. 17, 22 (1882).

83. The Socony No. 123, 78 F.2d 536 (2d Cir. 1935); The Penoles, 3 F.2d 761 (2d Cir. 1924).

84. 85 U.S. (18 Wall.) 51 (1874).

85. *Id.*

86. Healy & Koster, *Reliable Transfer Co. v. United States: Proportional Fault Rule*, 7 J. Mar. L. & Com. 293, 296 (1975).

B was 90% at fault, *A* would nonetheless have to pay *B* $200,000, leaving each party with a net loss of $300,000. To alleviate the harshness of this result, the courts devised a method known as the major-minor fault doctrine, which allowed them to overlook a minor error when the other vessel had been grossly negligent. This limitation on the divided damages rule was first outlined by the Supreme Court in *The City of New York,*[87] which involved a collision on a foggy night between a bark and a steamship. Not only was the steamship going too fast, but also she failed to take the proper precautions when the proximity of the sailing vessel became known to her. Although she heard the foghorn of the bark, she did not slow down; neither did she stop or reverse until the sound was located. In relieving the bark of liability the Court stated,

> 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.[88]

Since the burden of proof is on each vessel to establish the fault of the other,[89] where fault of one is inexcusable, the evidence needed to prove the fault of the other must be clear and convincing if a case for division is to be made.[90] Generally the major-minor fault doctrine has been expressed in one of three ways: (1) doubt will be resolved in favor of minor offenders; (2) slight fault is held not to be a contributing factor; (3) slight fault is totally disregarded.[91]

Clearly, the concept of major-minor fault provided some relief from the automatic division of damages where any fault could be shown. Nonetheless, it was often criticized as "vague and unreliable" by those who favored proportional division.[92] Too often, the divided damages rule was applied when the fault of one vessel was

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87. 147 U.S. 72 (1893).

88. *Id.* at 85. *See also* The Oregon, 158 U.S. 186 (1895).

89. The Victory and The Plymothian, 168 U.S. 410, 423 (1897). *See also* H. Baer, *supra* note 41, § 9-3 at 223.

90. The Victory and The Plymothian, 168 U.S. 410, 423 (1897).

91. J. Griffin, The American Law of Collisions 505 (1949).

92. G. Gilmore & C. Black, *supra* note 1, § 7-4; *see* United States v. Reliable Transfer Co., 421 U.S. 397, 406 (1975)(remanded for allocation of proportional damages); Tidewater Associated Oil Co. v. The Syosset, 203 F.2d 264, 269 (3d Cir. 1953)(equal division of damages). It has also been intimated that damages will not be divided where one vessel could be charged with willful fault. Sturgis v. Clough, 62 U.S. (21 How.) 451 (1859).

out of all proportion to that of the other.[93] No real guidelines could be devised for determining when a given situation was covered by the doctrine, and, of course, its application was almost totally discretionary. The question was also raised as to the fairness of requiring a vessel primarily responsible for the collision to shoulder all the responsibility when the other vessel had contributed to the collision.[94]

The twentieth century saw an ever-increasing barrage of criticism leveled at the divided damages rule. The most obvious complaint was that it was inherently unfair to hold vessels that were at fault in differing degrees equally responsible for damages. Indeed, the rule could be said to be equitable only in comparison to using contributory negligence as a complete bar.[95] While the rule continued to be applied in the federal courts, it was applied reluctantly.[96] Judge Learned Hand described the major-minor fault doctrine as a "sop to Cerberus"[97] and in review of the facts before him stated, "An equal division [of damages] 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."[98]

The rule was also attacked on the grounds that it encouraged transoceanic forum shopping, since the United States was the only major maritime nation that did not adhere to the Brussels Collision Convention of 1910, providing for apportionment of damages based upon degree of fault.[99] The result could vary dramatically depending on the forum. Thus, in a collision between *Ships A* and *B*, where *Ship A* was damaged $100,000 and estimated to be 80% at fault and

93. United States v. Reliable Transfer Co., 421 U.S. 397, 406 (1975); *see* Tank Barge Hygrade, Inc., v. The Gatco New Jersey, 250 F.2d 485 (3d Cir. 1957).

94. Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618 (2d Cir. 1954); Eastern S.S. Co. v. International Harvester Co., 189 F.2d 472 (6th Cir. 1951); The Margaret, 30 F.2d 923 (3d Cir. 1929); *see* Allbritton, *Division of Damages in Admiralty—A Rising Tide of Confusion*, 2 J. Mar. L. & Com. 323 (1971). Of particular significance is the critique of divided damages presented by G. Gilmore & C. Black, *supra* note 1, § 7-20. The Supreme Court in United States v. Reliable Transfer Co., 421 U.S. 397 (1975), accepted much of their criticism.

95. Allbritton, *supra* note 94, at 328; *see* United States v. Reliable Transfer Co., 421 U.S. 397, 405 (1975) (citing G. Gilmore & C. Black, *supra* note 1, § 7-20 at 528).

96. Adams v. Construction Aggregates Corp., 237 F.2d 884, 887 (2d Cir. 1956).

97. National Bulk Carriers, Inc., v. United States, 183 F.2d 405, 410 (2d Cir. 1950).

98. *Id.*

99. *See, e.g.*, G. Gilmore & C. Black, *supra* note 1, § 7-20 at 529; Huger, *supra* note 80, at 532; Mole & Wilson, *supra* note 37, at 346; Staring, *supra* note 47, at 338. Where a collision occurred in Dutch waters and a United States citizen invoked the jurisdiction of a federal district court, it was held that the suit would not be dismissed, despite the fact that litigation was already proceeding in Holland. Isbrandtsen Co. v. Lloyd Brasiliero Patrimonio Nacional, 85 F. Supp. 740 (E.D.N.Y. 1949).

Ship B was damaged $50,000 and estimated to be 20% at fault, *Ship B's* liability to *Ship A* would be $25,000 in the United States. However, in a Collision Convention country *Ship A* would only be liable for $20,000.[100]

d. Proportionate Allocation According to Fault

In *United States v. Reliable Transfer Co.*[101] the Supreme Court indicated that it believed the criticism of the divided damages rule to be well founded and finally determined that proportional division of loss should be applied to maritime collision cases. The Mary A. Whalen, a coastal tanker, had run aground on the sand, in part because it maneuvered improperly and in part because the Coast Guard had failed to maintain a breakwater light. The district court apportioned damages, attributing 25% of the fault to the Coast Guard and 75% to the Whalen. The court of appeals reversed on the basis that it was bound by precedent requiring divided damages.[102]

Examining the policy considerations underlying the divided damages rule, the Supreme Court agreed with the rationale enunciated in *The Schooner Catharine*[103] but concluded that a comparative negligence rule would have encouraged safe navigation as well as equal division.[104] The Court also noted that the United States was virtually alone in its refusal to follow the comparative negligence provisions of the Brussels Collision Convention, a situation that had increased international forum shopping.[105]

The Court's primary objection to the divided damages rule, however, was the inequitable result often achieved through its application, a result that was as inequitable as the use of contributory negligence to bar liability completely.[106] Rejecting the suggestion that comparative negligence was too complex for application, the Court pointed out that experiences of other maritime nations and the history of maritime personal injury suits indicated that the determination of degrees of negligence would not be prohibitively difficult.[107]

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100. G. Gilmore & C. Black, *supra* note 1, § 7-20 at 529.

101. 421 U.S. 397 (1975). The Supreme Court granted certiorari in 1972 to reconsider the question of divided damages, but the issue was not reached as one vessel was held solely at fault. Union Oil Co. v. The San Jacinto, 409 U.S. 140, 141 (1972).

102. Reliable Transfer Co. v. United States, 497 F.2d 1036, 1038 (2d Cir. 1974).

103. 58 U.S. (17 How.) 170, 178 (1855).

104. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975).

105. *Id.* at 404.

106. *Id.* at 405.

107. *Id.* at 407. *See also* Mole & Wilson, *supra* note 37, at 349-50.

Furthermore, the Court refused to wait for Congressional action, justifying its break with precedent by pointing out that it had traditionally led in the formulation of maritime remedies.[108] The *Reliable* holding is in language strikingly similar to the comparative negligence provisions of the Brussels Collision Convention:[109]

> 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.[110]

While the opinion makes it clear that damages are to be apportioned according to degree of fault, several problems are raised by its language. Specifically the Court held that damages are to be apportioned when "the parties have contributed by their fault to cause property damage."[111] A literal reading of this sentence would indicate that apportionment is limited to property damage and may not apply to damages due to loss of life or personal injury. However, since the Court had previously extended the divided damages rule to cases of personal injury and death,[112] it would not be unreasonable to surmise that comparative negligence will now also determine the amount of those damages. Indeed, one lower federal court has already apportioned personal injury damages, finding no insurmountable barrier in *Reliable* or in the history of maritime damages in the United States to such extension.[113] This approach is essential to the

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108. United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975). The Court stated, "Congress has largely left to this court the responsibility for fashioning the controlling rules of admiralty law." *Id.* (citing Fitzgerald v. United States Lines Co., 347 U.S. 16, 20 (1963), in which the Court created a general maritime wrongful death remedy).

109. Article 4 of the Brussels Collision Convention reads as follows:

> 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.

6 Benedict, *supra* note 50, at 39.

110. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975).

111. *Id.*

112. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 600 (1963); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284 (1952).

113. Guidry v. LeBeouf Bros. Towing Co., 398 F. Supp. 952 (E.D. La. 1975). The court stated, "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each as well as personal injury and property damage inflicted on innocent third parties." *Id.* at 961 (quoting Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284 (1952)).

development of a uniform system for determining damages in maritime collision cases.

The second problem raised by *Reliable* is the extent to which the Court intended to adopt the Brussels Collision Convention's comparative negligence provisions. The Court refers to the convention in connection with forum shopping, noting that England and nearly all other major maritime nations adhere to its provisions.[114] The similarity between the language in the opinion and that of the Brussels Convention is also significant, particularly considering that the Court went beyond the facts presented to it in so holding. In *Reliable* there was no question of equal fault or inability to measure comparative degrees of fault fairly.[115] Yet the Court adopted the rule of the Brussels Convention that, in such cases, the damages are to be equally divided.[116] It is also of interest to note that the Court decided to abandon equal division of damages in a case that would not be covered by the Brussels Convention, since the convention only applies to *collisions* between vessels,[117] and *Reliable* involved property damage arising out of a *stranding*.[118] Since the Court apparently went out of its way to bring United States maritime law into compliance with the Brussels Convention, piecemeal judicial adoption of other Convention provisions may be forthcoming.

e. *Collision Law After* Reliable Transfer

Now that damages in collision cases are determined through comparative negligence, what will be the fate of those rules of law that existed under a divided damages system?[119] Clearly, the major-minor fault doctrine will not be needed under comparative negligence, as it was specifically designed to alleviate the injustices of the divided damages rule.[120] The incompatibility of major-minor fault

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114. United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975).

115. *Id.* at 411.

116. *Id.* The relevant language from article 4 is quoted in note 109 *supra*.

117. 6 Benedict, *supra* note 50, at 37. The Brussels Collision Convention is an "International Convention for the unification of certain rules to govern the liability of vessels when *collisions occur between them* . . . ." *Id.* (emphasis added).

118. United States v. Reliable Transfer Co., 421 U.S. 397, 399 (1975).

119. Note, *Admiralty: Comparative Negligence in Collision Cases*, 36 La. L. Rev. 288, 294 (1975); Note, *Admiralty—Apportionment of Property Damages Arising from Maritime Collision or Stranding—Supreme Court Abandons the Divided Damages Rule*, 50 Tul. L. Rev. 148, 152-53 (1975) [hereinafter cited as *Apportionment of Property Damages*]; Note, *Admiralty, Damages in Maritime Collision or Stranding*, 8 Va. J. Int'l L. 881 (1975). *See also Ancient Mariner*, *supra* note 20, at 88.

120. United States v. Reliable Transfer Co., 421 U.S. 397, 406 (1975). The Court stated, "The Court has long implicitly recognized the patent harshness of an equal division of damages in the face of disparate blame by applying the 'major-minor' fault doctrine to find a grossly negligent party solely at fault." *Id.*

and comparative negligence was noted by the Second Circuit in *Getty Oil Co. v. S.S. Ponce de Leon,*[121] and the doctrine was there rejected.

With regard to the *Pennsylvania* Rule, it has been argued that it should survive the switch to proportional division because its purpose is to promote safety in navigation by demanding strict compliance with the rules. Nonetheless, as the Court in *Reliable* noted, comparative negligence in itself should act as a sufficient deterrent of careless conduct.[122] The question then becomes one of determining whether such a rule serves any useful purpose under a system of comparative fault. The Ninth Circuit, in deciding that the *Pennsylvania* Rule should not be used against a Japanese vessel covered by the Brussels Convention, concluded that the rule was justified where damages were equally divided because it simplified the adjudication of collision cases.[123] However, no such purpose was found to be served by its use in conjunction with comparative negligence:

> To utilize the Pennsylvania Rule in conjunction with the Japanese system does nothing to simplify adjudication and, because of the difficulty in comparing the failure to discharge a frequently impossible burden with the fault of a different character of the other party to a collision, may frustrate the ends of the Japanese system by necessitating the resort to the arbitrary result that an equal division of damages provides.[124]

Additionally, it should be noted that the *Pennsylvania* Rule, unlike other presumptions, does more than shift the burden of going forward with the evidence to the party in violation of the statute. It essentially shifts the burden of proving causation from the party

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121. 555 F.2d 328, 333 (2d Cir. 1977).

122. United States v. Reliable Transfer Co., 421 U.S. 397, 405 (1975). The Court stated,

> It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divided damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.

Id. n.11.

123. Ishizaki Kisen Co. v. United States, 510 F.2d 875, 879-80 (9th Cir. 1975). Of cases subsequent to United States v. Reliable Transfer Co., 421 U.S. 397 (1975), that have been governed by comparative negligence, all have applied the *Pennsylvania* Rule without questioning its validity under a system of comparative fault. Alaska Packers Ass'n v. O/S East Point, 421 F. Supp. 48, 52-53 (W.D. Wash. 1976); Linehan v. United States Lines, Inc., 417 F. Supp. 678, 693 (D. Del. 1976); Alamo Chemical Transp. Co. v. M/V Overseas Valdes, 398 F. Supp. 1094, 1106 (E.D. La. 1975).

124. Ishizaki Kisen Co. v. United States, 510 F.2d 875, 880 (9th Cir. 1975).

alleging negligence to the party who has violated the statute. Under a system of comparative negligence, the more satisfactory approach is to treat the violation of a statute as a fault to compare with the negligence of the other party. Whether or not the violation caused the collision should be determined by applying ordinary rules of causation and the emphasis in porportional division should be placed on the degree of fault rather than causal relationships.

Further, it should be noted that the Brussels Convention abolished all legal presumptions of fault in collisions.[125] An early interpretation of the Brussels Convention, as it was submitted to the United States Senate, suggested that the legal presumption provision was inaccurately translated and was intended to apply only to statutory legal presumptions.[126] If such is the case, the *Pennsylvania* Rule would not be eliminated, since it is a judicial presumption.[127] This argument is based on the conclusion that the Brussels Convention, written in French, in effect adopted the civil law definition of a legal presumption which includes only those set forth in statutes.[128] However, it is questionable whether countries signing an international agreement would intend to be bound solely by a civil law definition that could only be determined by resort to sources outside the actual document.[129] In addition, such an approach would result in an inconsistent interpretation of the article governing presumptions, since presumptions in some nations may be contained in statutes, while in others they may be found in judicial decisions.[130]

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125. 6 Benedict, *supra* note 50, at 40: "There shall be no legal presumptions of fault in regard to liability for collision."

126. 4 Benedict on Admiralty 262-69 (6th ed. A. Knauth 1940) [hereinafter cited as Benedict 6th ed.]. Benedict claims that the English translation is too loose and that it should read "statutory presumptions of fault." This stricter reading is required by the definition of "legal presumption" in the Code Napoleon which states that "a legal presumption is one which is affixed by a special statute to certain acts or to certain facts." *Id.* The Supreme Court has noted that the Brussels Collision Convention failed to win Senate approval because, among other things, it was poorly translated. United States v. Reliable Transfer Co., 421 U.S. 397, 409 n.14 (1975).

127. There is only one statutory legal presumption in American collision law. The Stand-by Act provides that a ship that fails to stand by after a collision is presumed to be responsible for the collision. 33 U.S.C. § 367 (1970). Benedict suggests that this is the only presumption that would be abolished by the Brussels Collision Convention. 4 Benedict 6th ed., *supra* note 126, at 264.

128. 4 Benedict 6th ed., *supra* note 126, at 263.

129. The conference was attended by delegations from Belgium, Brazil, Denmark, France, Federal Republic of Germany, Great Britain & Northern Ireland, Greece, Spain, Italy, Monaco, Netherlands, Nicaragua, Norway, Sweden, and Yugoslavia. 6 Benedict, *supra* note 50, at 34.

130. Ishizaki Kisen Co. v. United States, 510 F.2d 875, 882 (9th Cir. 1975).

There may be fewer problems posed by the question of the survival of the *in extremis* defense than those found in relation to the *Pennsylvania* Rule. *In extremis* operates as a complete defense, and it is in essence a denial of fault.[131] Since damages cannot be assessed against a vessel except where fault exists it would seem that *in extremis* would be effective to relieve a vessel of all responsibility,[132] even under a comparative negligence system.

The same reasoning is applicable to a collision that is the result of inevitable accident. A vessel claiming that the collision occurred despite the taking of all reasonable precautions under the circumstances is in reality contending that it was not at fault and did not contribute to the collision.[133] If such were successfully proved, the vessel should not be held responsible in any degree. Accordingly, the Brussels Convention requires that damages be borne by the party who has suffered them where the collision is caused by an act of God or is otherwise accidental.[134]

Damages are not apportioned under the Convention in cases of inscrutable fault in which a determination of fault cannot be made because the evidence is confusing.[135] This situation should also survive the adoption of comparative negligence in the United States. Apportionment cannot occur where the proof is not sufficiently clear as to what act or failure to act caused the collision.[136] This provision should be distinguished from the Supreme Court's holding in *Reliable* that the damages are to be divided when it is not possible to establish the degree of the respective faults. In the former fault

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131. Mole & Wilson, *supra* note 37, at 352.

132. *Id. Contra, Apportionment of Property Damages, supra* note 119, at 152. Arkansas has approved the similar concept of "emergency" as a complete defense to liability under its tort comparative negligence system. Johnson v. Nelson, 242 Ark. 10, 411 S.W.2d 661 (1967). The application of *in extremis* was approved after the switch to comparative fault in Linehan v. United States Lines, Inc., 417 F. Supp. 678, 693 (D. Del. 1976).

133. G. Gilmore & C. Black, *supra* note 1, § 7-2 at 486-87.

134. 6 Benedict, *supra* note 50, at 39. The provision is as follows: "If the collision is accidental, if it is caused by *force majeure*, . . . the damages shall be borne by those who have suffered them." *Id.* For a history of the English Rule 42, *see* The English and Empire Digest §§ 6900-6950 (1965).

135. 6 Benedict, *supra* note 50, at 39: "[I]f the causes of the collision are in doubt, the damages shall be borne by those who have suffered them." *See Apportionment of Property Damages, supra* note 119, at 153.

136. G. Gilmore & C. Black, *supra* note 1, § 7-2 at 486-87; Mole & Wilson, *supra* note 37, at 345. Lord Sumner, in construing the Brussels Convention, stated,

> The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do.

The Peter Benoit, 13 Asp. M.L.C. 203, 208 (1915).

is known to exist, but the exact roles the parties played in causing the collision are unclear because of failure of proof. In the latter, however, the court is able to attribute fault to the parties but unable to make a mathematical determination assigning the amount of fault to the respective vessels involved.

Conclusion

The history of maritime law has seen the development of essentially local regulations into uniform codes that cover diverse situations and ships of all nationalities. With regard to the law of collisions, it is easily seen that a vessel under the flag of the United States is as likely to collide with a French ship as with one from her own country. Accordingly, it is essential that all vessels be governed by the same standards and potential liabilities. The United States Supreme Court has taken an important step toward the requisite uniformity by adopting comparative negligence in this area.[137] At least, as far as damages are concerned, the major maritime nations of the world are basically in accord. If, however, American courts continue to use the *Pennsylvania* Rule because of its admittedly laudable purpose, they will be irrationally clinging to a legal fiction at the expense of much needed uniformity in maritime law. It is to be hoped that the courts will interpret *Reliable* as giving its approval to the approach taken by the Brussels Convention and that they will try to implement its provisions through holdings that are consistent with it.

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137. If the collision results in cargo damage, there will still be a consideration of the forum in which suit should be brought. There will also be a considerable difference for purposes of limitation of liability according to whether the United States Limitation of Liability Act or the 1957 Brussels Limitation of Liability Convention is applied. Healy & Koster, *supra* note 86, at 299-300. *Compare* 46 U.S.C. §§ 181-188 *with* Convention, Limitation of Liability, Oct. 10, 1957. *See also* 6A Benedict, *supra* note 50, at 637.