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CIRCUIT OVER TROUBLED WATERS: NINTH CIRCUIT COMPARATIVE FAULT PRINCIPLES IN SEAMEN'S PERSONAL INJURY ACTIONS

Orland S. Seballos*

Abstract: Maritime personal injury actions employ the comparative fault doctrine, under which damages are allocated between mutually negligent parties according to their proportionate fault. This Comment focuses on recurring issues Ninth Circuit courts have faced in this area: apportioning liability in cases of violations by seamen's employers of Occupational Safety and Health Act (OSHA) regulations, and determining whether to include both causation and fault in making the apportionment. This Comment argues that the Ninth Circuit should adopt rules consistent with the pronounced congressional and U.S. Supreme Court policies of achieving uniformity in domestic and international admiralty and providing liberal recovery for seamen.

Judicial application of the common law tort doctrine of comparative fault to maritime actions is well-established.[1] The doctrine provides for apportionment of damages among mutually negligent parties in proportion to their respective fault in causing injury or loss.[2] Comparative fault is intended to temper the harsh results of the contributory negligence system, which precludes any recovery by plaintiffs who are even minimally at fault.[3] Courts apply the doctrine of comparative fault in every maritime tort action, and admiralty is considered a "pure" comparative negligence jurisdiction.[4]

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1. *See* Lewis v. Timco, Inc., 716 F.2d 1425, 1427–28 (5th Cir. 1983) (noting that comparative fault applies to unseaworthiness cases, actions under Jones Act, Death on High Seas Act, and Longshore and Harbor Workers' Compensation Act); *see also* United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (abolishing divided damages rule in collision cases and replacing it with comparative fault).

2. *See* Edward S. Digges, Jr. & Robert Dale Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 Md. L. Rev. 276, 278 (1982). The terms "comparative fault" and "comparative negligence" are used interchangeably. *Id.* This Comment focuses on situations in which both seamen and their employers are at fault.

3. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 429 (1939). A plaintiff even one percent at fault is barred from recovery under the common law contributory negligence rule. Henry Woods, *Comparative Fault* § 1:3, at 7 (1978).

4. David R. Owen & J. Marks Moore III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 943 (1983); *see also* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 500 n.70 (2d ed. 1975) ("The admiralty rule in personal injury cases is, in effect, one of comparative negligence.").

Uniformity, which has always been an underlying concern in admiralty, is necessary to facilitate maritime commerce and to apply consistent remedies.[5] Presently, forty-six states have incorporated the doctrine of comparative fault either by judicial decision or statute.[6] Despite the persistent call for uniformity, different maritime courts have interpreted the doctrine's many aspects in varied ways.

Courts have applied the doctrine of comparative fault inconsistently in maritime actions where both the plaintiff and the defendant are negligent and responsible for the damages suffered by the plaintiff.[7] Although the U.S. Supreme Court has held that comparative fault applies in all maritime tort actions,[8] the Court largely has left the interpretation and application of facets of the doctrine to appellate and lower courts.

This Comment examines two rules the Ninth Circuit has applied when allocating risk between a negligent seaman[9] and a negligent defendant employer in a maritime personal injury action.[10] The first rule is the

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Comparative fault exists in two forms: pure and modified. *See* Digges & Klein, *supra* note 2, at 279–81. Pure comparative fault jurisdictions permit a negligent plaintiff to recover even if his negligence exceeds that of the defendant. *Id.* Modified comparative negligence jurisdictions enable a negligent plaintiff to recover, provided that the plaintiff's negligence is not equal to or greater than that of the defendant; otherwise, no recovery is permitted. *Id.*

5. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401–02 (1970) ("[U]niformity . . . give[s] effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'") (citation omitted).

6. Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996) (citing Brief for Respondent Hawaiian Independent Refinery, Inc. [HIRI] at 28 & n.31, *Sofec* (No. 95-129)). These states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Tennessee, Utah, Vermont, West Virginia, Washington, Wisconsin, and Wyoming. Respondent HIRI's Brief at app. A, *Sofec* (No. 95-129), *available in* 1996 WL 53643.

7. Owen & Moore, *supra* note 4, at 942 ("[T]he state courts and legislatures generally have fallen far short of constructing a complete doctrine [of comparative fault].").

8. *See Sofec*, 517 U.S. at 836–37.

9. "Seamen," as used in this Comment, refers to both male and female maritime workers who have satisfied the test for seaman status that the U.S. Supreme Court has formulated: "First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its . . . mission . . . . Second . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in . . . duration and its nature." Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540 (1997).

10. The Ninth Circuit continues to be among the circuits having a high number of admiralty suits litigated. In 1997, the American Maritime Cases (A.M.C.) Reporter published 60 cases from this circuit, more than any other circuit that year.

Ninth Circuit's narrow interpretation of "safety statutes," which, when violated by the seaman's employer, preclude the employer from raising the defense of the seaman's contributory negligence. The second rule, followed by some courts in the Ninth Circuit, compares solely the fault of the parties and ignores the causative impact of such fault when allocating damages. This Comment argues that the Ninth Circuit's restrictive interpretation of "safety statutes" fails to give seamen the protection Congress intended. The Comment further argues that the approach favored by lower courts in the Ninth Circuit—comparing fault alone in their comparative fault analysis without considering proximate cause—fails to meet the U.S. Supreme Court's goal of promoting international uniformity in maritime law. Part I briefly reviews the historical background of the comparative fault doctrine in maritime personal injury actions. Parts II and III identify and analyze noteworthy comparative fault issues that the Ninth Circuit has faced. Part IV concludes that the Ninth Circuit should adopt rules regarding these issues consistent with the pronounced objectives of Congress and the U.S. Supreme Court.

I. HISTORICAL BACKGROUND

The doctrine of comparative fault gradually appeared in the maritime personal injury action context following the U.S. Supreme Court's decision in *The Max Morris v. Curry.*[11] The Supreme Court held that the plaintiff longshoreman's contributory negligence did not bar his recovery against the vessel for the negligence of its officers.[12] Prior to this holding, lower courts were divided on the question of whether a plaintiff could recover for an injury caused by his own negligence when the vessel was also at fault.[13] The Court refused to decide, however, whether damages should be divided equally between the parties pursuant to the divided damages rule[14] or awarded in proportion to damages sustained

11. 137 U.S. 1 (1890); Owen & Moore, *supra* note 4, at 943.

12. *The Max Morris*, 137 U.S. at 15.

13. *Compare, e.g.*, The Explorer, 20 F. 135, 140 (E.D. La. 1884) (invoking court's discretion in granting damages to negligent plaintiff on basis of justice and equity), *with* Peterson v. The Chandos, 4 F. 645, 649 (D. Or. 1880) (holding that negligent plaintiff cannot recover).

14. The "divided damages" rule in collision cases, which provides that damages should be equally divided between the parties at fault irrespective of their degree of culpability, was enunciated in *The Schooner Catharine v. Dickinson*, 58 U.S. 170 (1854), and later overruled by *United States v. Reliable Transfer*, 421 U.S. 397 (1975). *See infra* notes 22–24 and accompanying text.

respectively by them.[15] Nevertheless, admiralty courts have cited repeatedly *The Max Morris* for the proposition that comparative fault is the applicable rule for maritime personal injury actions.[16]

In 1920, Congress enacted the Merchant Marine Act, commonly referred to as the Jones Act,[17] which governs seamen's personal injury claims against their employers based on negligence. The Jones Act explicitly incorporates the provisions of the 1908 Federal Employers' Liability Act (FELA),[18] which applies to railroad workers.[19] While the Jones Act makes no specific reference to comparative negligence, FELA provides that "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[20] Assumption of risk by the employee is likewise unavailable as a defense and should not be considered in apportionment of damages.[21] The Jones Act's incorporation of the FELA provision mandates the application of the comparative fault doctrine in seamen's personal injury actions based on negligence.

Although *The Max Morris* and the Jones Act already established the doctrine of comparative fault in personal injury actions, general

15. *The Max Morris*, 137 U.S. at 15.

16. Owen & Moore, *supra* note 4, at 943; *see, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953) (citing *The Max Morris* for rule allowing consideration of contributory negligence in mitigating damages); American Stevedores, Inc. v. Porello, 330 U.S. 446, 458 (1947) ("Comparative negligence is not unknown to our maritime law." (citing *The Max Morris*)); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 429 (1939) (citing rule in *The Max Morris* that seaman's contributory negligence is not bar to recovery but only ground for mitigating damages); N.M. Patterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576, 590 (N.D. Ill. 1962) (citing *The Max Morris* in apportioning damages based upon unequal degrees of contributory fault of parties); Webster v. Davis, 109 F. Supp. 149, 153 (S.D. Cal. 1952) (citing *The Max Morris* in holding that admiralty courts have consistently diminished damages to extent of contributory negligence).

17. Merchant Marine Act, ch. 250, 41 Stat. 988 (1920) (codified as amended at 46 U.S.C. app. § 688 (1994)). The Jones Act's application is limited to "seamen," and only those who satisfy the definition of this term can avail themselves of the remedies provided by the FELA-Jones Act scheme. *See supra* note 9. Personal injury remedies of maritime workers other than seamen are governed separately by other laws and are beyond the scope of this Comment. *See infra* note 130.

18. Federal Employers Liability Act, ch. 149, 35 Stat. 64 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (1994)).

19. The Jones Act provides that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. app. § 688(a).

20. 45 U.S.C. § 53.

21. 45 U.S.C. § 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 . . . no employee shall be held to have assumed the risks of his employment in any case . . . .").

recognition of the doctrine's applicability to all maritime tort actions did not occur until seventy-five years later. In *United States v. Reliable Transfer Co.*, the Court discarded the centuries-old rule of equal division of damages in collision cases and replaced it with the principle of comparative fault.[22] In doing so, the Court noted that major maritime countries have moved toward the comparative fault regime.[23] *Reliable Transfer* was limited to collision; yet, courts and admiralty scholars have cited the case to support the proposition that comparative fault applies to maritime torts in general.[24] Admiralty courts have adopted the comparative fault rule even in strict liability actions such as unseaworthiness[25] and strict products liability[26] where the defendant's liability is not predicated on fault.

II. THE NINTH CIRCUIT'S LIMITED VIEW OF "SAFETY STATUTES" AND ITS FAULT-ONLY APPROACH TO COMPARATIVE FAULT

The rule of comparative fault mandates that damages be allocated between mutually negligent parties according to their proportionate fault. As the rule of comparative fault continues to evolve, many facets of the doctrine remain subject to academic discussion and debate. Practical application of the rule has proved difficult, and the courts' struggles are reflected in their varying interpretations. Two comparative fault issues that have been the focus of judicial scrutiny in the Ninth Circuit are: (1) the effect of an employer's violation of safety statutes or regulations on the allocation of damages in a Jones Act action, and (2) the comparison of both parties' fault and the causal connection between the fault and the

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22. 421 U.S. 397, 411 (1975). However, equal division of damages is still applicable when "it is not possible fairly to measure the comparative degree of their fault." *Id.*

23. *Id.* at 403–04 n.7.

24. *See, e.g.*, Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 3-4, at 110 n.1 (2d ed. 1994) ("In maritime tort cases where more than one party is responsible for an occurrence, liability for damages is allocated among the parties proportionately according to the degree of their fault.") (citing *Reliable Transfer*); *see also* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 272 n.30 (1979) (citing *Reliable Transfer* in applying comparative fault in personal injury action under Longshore & Harbor Workers' Compensation Act); Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1138 (9th Cir. 1977) (applying comparative fault rule in *Reliable Transfer* to strict products liability action).

25. *See infra* notes 124–25 and accompanying text.

26. *See, e.g.*, Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983) (applying comparative fault doctrine in strict products liability action).

injury in making the apportionment. The Ninth Circuit's prevailing rule provides for a form of strict liability in a Jones Act action only when the employer violates a Coast Guard regulation. Furthermore, most courts in the Ninth Circuit tend to compare only the parties' fault in allocating damages instead of comparing both fault and causation.

A. *Violation of Safety Statutes or Regulations by the Employer Results in Strict Liability*

1. *The Common Law Rule*

Seamen invoking the negligence-based Jones Act remedy must show that the employer was at fault, which may consist of either a breach of the common law duty of care or a duty imposed by statute.[27] Courts generally recognize that an employer has a common law duty to exercise reasonable care to provide a safe workplace.[28] Statutes and regulations imposing specific duties may create additional employer duties.[29]

In a majority of jurisdictions, a defendant's violation of a safety statute or regulation that results in damage to another constitutes negligence per se on the part of the defendant and relieves the plaintiff of establishing duty and breach.[30] The plaintiff must establish merely that the breached statute or regulation seeks to prevent the kind of harm that occurred and that the statute was designed to protect the class of persons to which the plaintiff belongs.[31] The U.S. Supreme Court, however, has eliminated these requirements in maritime personal injury actions for policy reasons.[32]

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27. Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958).

28. *See, e.g.*, Bailey v. Central Vermont Ry., 319 U.S. 350, 352 (1943) ("At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain.") (citation omitted).

29. *See, e.g.*, *Kernan*, 355 U.S. at 431 (noting enactment of workmen compensation statutes to bear the "'human overhead' of doing business").

30. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 36, at 229–30 (5th ed. 1984).

31. "[T]he violation of the enactment will not be negligence unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the others." *Restatement (Second) of Torts* § 286 cmt. on clauses (c) and (d) (1965).

32. *See infra* Part II.A.2.

2. *The U.S. Supreme Court's Modification of the Common Law Rule*

In *Kernan v. American Dredging Co.*, the U.S. Supreme Court relaxed the common law requirement that the violated statute or regulation must have been promulgated to prevent the very harm that took place.[33] In that case, a seaman died in a fire caused by a lamp that was placed only three feet above the water on the tugboat's deck.[34] The placement of the lamp was in violation of a U.S. Coast Guard regulation requiring the lamp to be placed at least eight feet from the water's surface.[35] The purpose of the regulation was not to avoid fires, but to prevent collision by ensuring that navigational lights were visible to other vessels.[36] The seaman's representative brought suit under the Jones Act.[37] The issue on appeal was whether the violation of a Coast Guard regulations imposed negligence per se liability under FELA's section 51.[38]

The Court found that the link between the purpose of the statute and the cause of the injury is irrelevant in actions brought under the Jones Act, provided that the employer's fault caused the injury in whole or in part.[39] FELA section 51 provides, in relevant part, that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."[40] Before *Kernan*, courts had interpreted FELA's section 51 to impose such liability only in cases based on violations of the Safety Appliance Act and the Boiler Inspection Act.[41] The *Kernan* Court, however, focused on Congress's intent to liberalize recovery for seamen and held that the mere violation of a Coast Guard regulation was sufficient to find liability under the Jones Act.[42]

33. 355 U.S. 426.

34. *Id.* at 427.

35. *Id.* at 428.

36. *Id.*

37. *Id.* at 431.

38. *Id.* at 430–31.

39. *Id.* at 438–39. The Court held that "the basis of liability is a violation of a statutory duty without regard to whether the injury flowing from the violation was the injury the statute sought to guard against." *Id.* at 438.

40. 45 U.S.C. § 51 (1994).

41. *Kernan*, 355 U.S. at 444 (Harlan, J., dissenting).

42. *Id.* at 431–32.

Deciding an action under the FELA-Jones Act scheme requires a two-step process: (1) finding the basis of liability, and (2) calculating the amount of damages to which the seaman is entitled.[43] A finding of negligence per se liability by the employer under section 51 does not end the matter because the courts, pursuant to section 53, must compare the employer's fault with the seaman's to determine the amount of damages the seaman can recover. While section 51 defines the basis of defendants' liability for violation of safety statutes or regulations, section 53 instructs how damages should be allocated when the plaintiff is contributorily negligent and the employer violates a safety statute or regulation. Section 53 states in part:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee; *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death.[44]

Thus, section 53 provides an instance when the doctrine of comparative fault would not apply.

Kernan answered the first part of the inquiry—whether the employer's violation of safety statutes or regulations, including Coast Guard regulations, results in negligence per se liability under section 51 as long as the violation caused the injury.[45] By modifying the common law requirement, the Court reduced seamen's burden in establishing employer liability when the employer's negligence consists of a violation of a statute or regulation that proximately caused the injury. It left open the question, however, of what constitutes a "statute enacted for the safety of the employees,"[46] a violation of which amounts to a form of strict liability under FELA section 53.

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43. *See* 45 U.S.C. §§ 51, 53 (1994).

44. 45 U.S.C. § 53.

45. *Kernan*, 355 U.S. at 438.

46. *See supra* language of 45 U.S.C. § 53 in text accompanying note 44.

3. *Disagreement on the Interpretation of Section 53*

Courts that have interpreted what constitutes a "statute enacted for the safety of employees" under section 53 of FELA have arrived at different results. The Ninth Circuit has refused to consider Occupational Safety and Health Act (OSHA)[47] regulations as safety statutes within the contemplation of FELA's section 53 in cases involving seamen. In contrast, the First and Fourth Circuits, in non-maritime cases, treat non-compliance of OSHA regulations as violation of safety rules, resulting in a form of strict liability under section 53.

a. *The Ninth Circuit's Restrictive Interpretation of FELA Section 53*

In allocating damages between a seaman and the seaman's employer when both are guilty of negligence in producing the seaman's injury, the Ninth Circuit has read FELA section 53 restrictively. Specifically, the Ninth Circuit has eschewed the form of strict liability mandated by this provision when the employer's negligence consisted of violating a regulation promulgated pursuant to OSHA. The Ninth Circuit finds support for such an interpretation in the language of OSHA itself.

The Ninth Circuit anchors its exclusion of OSHA regulations from the ambit of section 53 on OSHA's preemption provision.[48] OSHA authorizes the Secretary of Labor to set mandatory occupational standards to assure safe and healthy working conditions for industry workers.[49] However, section 653(b)(1) of OSHA exempts the statute's application where other federal and qualified state agencies have promulgated rules governing the working conditions of particular groups of employees.[50] Because of this provision, some courts, including the Ninth Circuit, have questioned OSHA's applicability when the employees' working condition does not fall under the Secretary of Labor's domain.[51]

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47. 29 U.S.C. §§ 651–678 (1994).

48. *See, e.g.*, Kopczynski v. The Jacqueline, 742 F.2d 555, 558–59 (1984).

49. *See* 29 U.S.C. § 654(b).

50. "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1).

51. *See, e.g.*, Pratico v. Portland Terminal Co., 783 F.2d 255, 262 (1st Cir. 1985) (discussing district court's basis for denial of plaintiff's injury instruction on negligence and contributory

In *Kopczynski v. The Jacqueline*, the Ninth Circuit held that in cases involving seamen, OSHA regulations are not the kind of statutes or regulations contemplated by FELA section 53.[52] This frustrated the seaman's attempt for total recovery of the damages he suffered despite his own contributory negligence.[53] *Kopczynski* involved an employer's violation of an OSHA regulation governing the use of ladders for access to vessels.[54] The Ninth Circuit faced the question of whether such violation precludes consideration of the seaman's contributory negligence in his Jones Act action.[55] The court, however, refused to resolve the issue.[56] In so doing, the court noted OSHA's preemption language.[57] The court recognized that the Coast Guard is the lead agency charged with regulating the working conditions of seamen like the *Kopczynski* plaintiff.[58] OSHA regulations, the court rationalized, are therefore inapplicable to the case even though no Coast Guard regulation governs the use of ladders.[59] Because one cannot violate statutes or regulations that do not apply to him or her, the employer in *Kopczynski* did not violate OSHA. Consequently, the seaman's employer was not subject to FELA section 53 strict liability. Thus, the Ninth Circuit implied that only violations of Coast Guard regulations trigger application of section 53 strict liability in seamen's Jones Act actions.

Subsequently, in *Fuszek v. Royal King Fisheries, Inc.*, the Ninth Circuit held that an employer's violation of a Coast Guard regulation prevents the court from reducing the seaman's damages.[60] This case involved a Coast Guard regulation requiring all exposed machinery on board a vessel to have suitable hand covers.[61] The Ninth Circuit found

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negligence); *Kopczynski*, 742 F.2d at 558–59 (9th Cir. 1984) (holding that seamen cannot invoke employer's OSHA violation because OSHA was not enacted for seamen's benefit).

52. *Kopczynski*, 742 F.2d at 558–59.

53. *Id.* at 557.

54. *Id.*

55. *Id.* at 557–58.

56. *Id.* at 558.

57. *Id.* at 558–59.

58. *Id.* at 559.

59. Although the court did not explicitly find that no existing Coast Guard regulation governed the use of ladders to access vessels, a perusal of Coast Guard regulations reveals that no such regulation covers this type of situation.

60. 98 F.3d 514 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1334 (1997).

61. 46 C.F.R. § 28.215(b) (1995) provides, in relevant part, that "[s]uitable hand covers . . . must be installed in way of machinery which can cause injury to personnel."

the employer fully liable and refused to reduce the negligent seaman's damages.[62] The appellate court distinguished *Fuszek*'s facts from *Kopczynski* by stating that the *Kopczynski* plaintiff could have recovered in full had the employer's negligence stemmed from a violation of a Coast Guard regulation.[63] Thus, the Ninth Circuit read the language in FELA section 53, precluding consideration of the seaman's contributory negligence when the employer had violated a "statute enacted for the safety of employees," as applying to Coast Guard regulations only.

b. Other Circuits' Broad Reading of FELA Section 53

Other circuits that have addressed the interplay between FELA section 53 and OSHA in a non-maritime context have reached results contrary to the Ninth Circuit. In doing so, these circuits looked to both the language of FELA and the legislative intent behind FELA and OSHA.

The Fourth Circuit in *Southern Railway Co. v. Occupational Safety & Health Review Commission* interpreted OSHA's preemption provision as applying only in instances when another federal agency has actually exercised its authority in that particular situation.[64] The employer in that case was a railway company charged with violating OSHA standards promulgated by the Secretary of Labor.[65] Questioning its liability, the employer reasoned that, under the language of section 653(b)(1), and because only the Secretary of Transportation possesses jurisdiction over the working conditions of railway employees, the employer was not bound by OSHA regulations.[66] The court looked at both the language of the statute and its legislative history and rejected the employer's argument. It noted that Congress had rejected earlier OSHA legislation versions providing that the mere existence of statutory authority in another federal agency was sufficient to invoke the exemption.[67] During the House debate, however, it became apparent that the actual exercise of authority, rather than its mere existence, was the event contemplated to trigger OSHA's preemption.[68] Additionally, the court noted that the Act's

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62. *Fuszek*, 98 F.3d at 515.

63. *Id.* at 517.

64. 539 F.2d 335, 336 (4th Cir. 1976).

65. *Id.*

66. *Id.*

67. *Id.* at 336–37 (citation omitted).

68. *Id.* at 337.

declared purpose was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[69] Based on the Act's history and the policy behind its enactment, the Fourth Circuit concluded that OSHA regulations apply absent the governing agency's active exercise of authority.[70]

Likewise, in *Pratico v. Portland Terminal Co.* the First Circuit held that an employer's violation of an OSHA regulation renders the employee's negligence irrelevant in computing damages.[71] *Pratico* involved a railroad employee who claimed injury as a result of his employer's use of equipment in violation of OSHA regulations. The trial court found the plaintiff eighty percent contributorily negligent and reduced the damages he recovered in accordance with this finding.[72] The plaintiff appealed, claiming entitlement to the full amount of damages awarded under section 53 of FELA.[73] The question was whether OSHA regulations qualify as a statute enacted for employees' safety, which, when violated by the employer, renders the employee's negligence irrelevant in determining the amount of damages under section 53. In answering the question in the affirmative, the First Circuit initially looked to the congressional record to determine how section 53 should be construed.[74] Finding nothing in the record to indicate to the contrary, the court concluded that Congress must have intended that the statute's plain meaning be given effect.[75] Relying on the U.S. Supreme Court's reading of FELA in *Kernan*, the court stressed that nothing clearly indicated that Congress sought to limit the coverage or definition of statutes and regulations "enacted for the safety of employees."[76] Without

69. *Id.* at 338 (citing 29 U.S.C. § 651(b) (1972)).

70. *Id.* at 336–38.

71. 783 F.2d 255, 267–68 (1st Cir. 1985).

72. *Id.* at 257.

73. *Id.*

74. *Id.* at 267.

75. *Id.* at 267–68. An examination of the congressional record on the passage of FELA shows only one statement referring to section 53: "The proviso in section [53] is to the effect that contributory negligence shall not be charged to the employee, if he is injured or killed by reason of the violation, by the employer, of any statute enacted for the safety of the employees." H.R. Rep. No. 60-1380, at 6 (1908).

76. *Pratico*, 783 F.2d at 267.

such clear indication, the First Circuit refused to indulge in judicial legislation.[77]

The First Circuit then addressed other courts' limited reading of section 53. Prior to *Kernan*, many courts had restricted a finding of negligence per se liability to violations of statutes and regulations already existing at the time of FELA's enactment, namely the Safety Appliance Act and the Boiler Inspection Act.[78] In holding such restrictive reading of section 53 erroneous, the court reasoned that safety statutes other than the Safety Appliance Act and the Boiler Inspection Act have been found to be within the contemplation of this provision.[79] The U.S. Supreme Court has held that other federal laws, like the Hours of Service Act, also fall within the contemplation of section 53.[80] The First Circuit noted that, although Congress enacted the Boiler Inspection Act three years after FELA's enactment, there was no question that a violation of this Act triggered the application of section 53.[81] Thus, Congress could not have intended to limit safety statutes under section 53 to particular statutes in existence at the time of FELA's enactment.[82]

77. *Id.* ("Without a clear indication from the legislative history that Congress meant anything other than what the statute plainly says, *i.e.*, that the violation of *any* safety statute shall have this effect, we see no reason to assume that the application of the proviso is in any way limited.").

78. *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 189 (1949) (holding that railway employees suffering injuries in consequence of violation of safety regulations promulgated under either Safety Appliance Act or Boiler Inspection Act could maintain action under FELA without reference to law of negligence); *accord* Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430 (1949) (holding that once violation of Safety Appliance Act is established, only causal relation is at issue); O'Donnell v. Elgin, 338 U.S. 384 (1949) (same).

79. *Pratico*, 783 F.2d at 267.

80. *Id.*

81. *Id.*

82. *Id.* In a 1998 case, *Elliott v. S.D. Warren Co.*, the First Circuit again faced the issue of an employer's negligence per se liability when an OSHA violation is involved. 134 F.3d 1 (1st Cir. 1998). The court held that the violation constitutes "a mere evidence of negligence" and not negligence per se. *Id.* at 5. The court, however, distinguished this case from *Pratico* on the ground that this latter case involved a cause of action that arose under state common law, while *Pratico* dealt with a claim under FELA. *Id.* at 4–5. Moreover, in *Elliott*, unlike in *Pratico*, there was no allegation of plaintiff's contributory negligence. Thus, *Pratico* continues to be the authority in the First Circuit.

Although *Southern Railway* and *Pratico* are non-maritime cases, they remain relevant in discerning the relationship between FELA-Jones Act and OSHA regulations. *See supra* notes 17–21 and accompanying text (discussing Jones Act's incorporation of FELA provisions). This is especially true in cases involving seamen when only OSHA regulations apply.

4. *Administrative Attempts to Delineate Authority*

In an attempt to clear the confusion and overlap between the Coast Guard and the Department of Labor's jurisdiction over seamen's working conditions, the two agencies signed a Memorandum of Understanding in 1983.[83] This attempt, however, does not adequately address the question of OSHA's applicability in instances involving seamen when no Coast Guard regulation governs.

Pursuant to the 1983 Memorandum, in 1996 the Department of Labor issued OSHA Instruction CPL 2-1.20[84] to clarify further the jurisdictional conflict between the Coast Guard and the Department of Labor. The labor department emphasized that in accordance with OSHA's preemption provision, the Coast Guard exercises statutory authority to provide and enforce statutes and regulations affecting the safety and health of seamen on board "inspected" vessels.[85] OSHA regulations continue to regulate working conditions on "uninspected" vessels (other than commercial fishing vessels) that are not otherwise covered by Coast Guard standards.[86] Moreover, OSHA standards remain enforceable on inspected vessels for maritime workers *other than seamen* when no specific Coast Guard regulations apply.[87] The instructions, however, fail to clarify what standards are applicable to *seamen* on inspected vessels if the hazard is not specifically subject to a particular Coast Guard regulation, leaving no clear rule to govern this situation.

Courts continue to grapple with the issue of allocating damages between negligent plaintiffs and defendants as a result of the U.S. Supreme Court's failure to define when the defendant's negligence consists of violation of a statute or regulation under a FELA cause of action. Circuits disagree on the correct relationship between OSHA regulations and FELA under these circumstances. In the maritime context, questions persist about what rules apply to seamen when no

83. *See* 48 Fed. Reg. 11,365–66 (1983).

84. OSHA Instruction CPL 2-1.20 (Nov. 8, 1996).

85. OSHA Instruction CPL 2-1.20(L), at 8. "Inspected vessel" is defined as a vessel subject to inspection by the U.S. Coast Guard under 46 U.S.C. § 3301 and issued a Certificate of Inspection (COI) by the Coast Guard. OSHA Instruction CPL 2-1.20(H)(10), at 5.

86. OSHA Instruction CPL 2-1.20(R), at 14. "Uninspected vessel" means a vessel that is not subject to inspection under 46 U.S.C. § 3301 and not a recreational vessel under 46 U.S.C. § 2101(43). OSHA Instruction CPL 2-1.20(H)(13), at 5. An "uninspected vessel" is subject to limited Coast Guard inspection in specific areas. *Id.*

87. OSHA Instruction CPL 2-1.20(L)(2).

Coast Guard, but only OSHA, regulations are in place. This is so despite administrative attempts to develop a coherent rule.

B. *Comparison of Degree of Culpability and Proximate Causation*

1. *Two Approaches to Comparing "Fault"*

The phrase "comparative fault" raises the question of what must be compared. In *United States v. Reliable Transfer*, the U.S. Supreme Court held that liability will be apportioned among the parties in proportion to their degree of fault.[88] However, the Court did not define the word "fault" and left the lower courts to address the issue.

The ongoing debate in general tort law regarding the factors to be analyzed in a comparative fault system[89] has carried over to maritime personal injury actions. Commentators and scholars have advanced two approaches to implement the Court's instructions in apportioning liability. The first approach compares the degree of the respective parties' culpable conduct.[90] Under this approach, the factfinder's task is to allocate a larger percentage of fault, or culpability, to the party whose conduct is found to be more blameworthy.[91] The second approach, known as the British rule, compares the parties' conduct as well as the conduct's causative effect.[92] Thus, one examines each party's culpable conduct, and also the extent to which such conduct caused the injury.[93]

Consider the following hypothetical. Vessel V was forced to dock at one end of the pier to undergo emergency repairs that were expected to last for not more than twelve hours. The malfunctioning of the vessel

88. 421 U.S. 397, 411 (1975).

89. *See generally* Woods, *supra* note 3.

90. David R. Owen & M. Hamilton Whitman, Jr., *Fifteen Years Under Reliable Transfer: 1975–1990 Developments in American Maritime Law in Light of the Rule of Comparative Fault*, 22 J. Mar. L. & Com. 445, 476–77 (1991).

91. *Id.* at 476. A party whose conduct is more blameworthy must also be a cause in fact of the damage. *Id.*

92. *Id.* at 477.

93. *Id.* There are two types of causation: cause-in-fact ("[t]hat particular cause which produces an event and without which the injury would not have occurred") and proximate cause ("[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred"). *Black's Law Dictionary* 221, 1225 (6th ed. 1990). Cause-in-fact is considered an absolute concept and therefore incapable of apportionment. Keeton et al., *supra* note 30, § 67, at 474. Proximate causation is compared for purposes of comparative fault. *Id.*

was not caused by the crew of the vessel and did not exist when the vessel was thoroughly inspected before undertaking the voyage. A vessel that had been burning for three hours was at the other end of the pier. S, the seaman who was to repair V, was required by the nature of her work to wear protective gear. A sudden shift of wind cause the fire to spread quickly in V's direction and V eventually caught fire. At the time of the accident, S was not wearing her protective gear despite repeated warnings to do so. S suffered burns and sued her employer, E, claiming negligence for docking the vessel at the burning pier. It was established that S's injuries could have been prevented if she had been wearing her protective gear. Using the fault or culpability alone analysis, S's recovery (assuming she could recover at all) would be greatly diminished by her own failure to protect herself. Looking at both fault and causation, however, may yield a different result. Under this approach, the court will determine whether E's negligence in docking at the burning pier was a proximate cause of S's injury. If E's negligence is a proximate cause of S's damage, the court will then weigh the causative impact of E's negligence in exposing the vessel to harm against S's own negligence in failing to protect herself, and apportion damages accordingly. The court may find that although S is guilty of contributory fault, the injury could have been prevented had E docked somewhere else. Thus, under the second approach, S has a better chance of recovering and obtaining a substantial award.

2. *The Ninth Circuit's Bias Toward the "Fault Alone" Approach*

Ninth Circuit district courts favor the "culpability alone" analysis. This approach was employed by the district court in *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*,[94] the first case to address the issue after the *Reliable Transfer* decision. In *Pan-Alaska*, the court stated that damages in comparative negligence cases are assessed based on the standard of culpability, not causation.[95]

94. 402 F. Supp. 1187 (W.D. Wash. 1975), *vacated on other grounds*, 565 F.2d 1129 (9th Cir. 1977).

95. *Id.* at 1188. In so ruling, the court relied on Dean Schwartz's statement in his treatise, *Comparative Negligence*, that the "line of inquiry under comparative negligence does not focus on physical causation; rather, it considers and weighs culpability." *Id.* The court erroneously claimed that the Court cited this treatise in *Reliable Transfer.* Owen & Whitman, *supra* note 90, at 478–79. The same court reiterated this interpretation of *Reliable Transfer* in *Alaska Packers Ass'n v. O/S East Point*, 421 F. Supp. 48, 53 (W.D. Wash. 1976).

On appeal, however, the Ninth Circuit vacated the district court's decision in *Pan-Alaska*.[96] The appellate court held that the term "comparative causation" is probably a more accurate term than "comparative fault" because mere fault without causation will not subject a party to liability.[97] It then concluded that the choice of the precise term is not as important as reaching the ultimate objective of equitably allocating responsibility for loss or injury.[98]

Thus, although the Ninth Circuit seems to recognize the importance of comparing causation, it has stopped short of requiring an approach that compares both fault and causation.[99] To date, the Ninth Circuit has failed to articulate a clear rule that outlines the factors lower courts must consider when allocating fault in the maritime context. The Ninth Circuit's language in *Pan-Alaska* notwithstanding, cases subsequently decided by lower courts appear to favor comparing culpability only.[100]

III. THE NINTH CIRCUIT SHOULD ADOPT PRINCIPLES CONSISTENT WITH JUDICIAL AND LEGISLATIVE POLICIES

In applying the principle of comparative fault in seamen's personal injury actions, Ninth Circuit courts have adopted rules that do not advance legislative and judicial policies. The Ninth Circuit's refusal to extend full protection to seamen when their employers have violated OSHA rather than Coast Guard regulations defeats congressional intent of liberalizing recovery under the FELA-Jones Act statutes.[101] Likewise, the Ninth Circuit courts' preferred approach of solely comparing the parties conduct, instead of both the conduct and its causative effects, is unrealistic and in conflict with the approach that has been adopted by another historically acknowledged maritime power, Great Britain.[102]

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96. Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977).

97. *Id.* at 1139.

98. *Id.*

99. Owen & Whitman, *supra* note 90, at 479 (noting that despite Ninth Circuit's apparent recognition of comparative causation in *Pan-Alaska*, Ninth Circuit courts still appear to favor apportionment of culpability alone in later cases).

100. *See, e.g.*, Port of Seattle v. M/V Saturn, 562 F. Supp. 70, 74 (W.D. Wash. 1983) (holding that culpability, not degree of causation, is basis for apportioning liability); *Alaska Packers*, 421 F. Supp. at 53 (same).

101. *See* S. Rep. No. 40-60, at 4527 (1908).

102. *See* Afran Transp. Co. v. S/T Maria Venizelos, 450 F. Supp. 621, 636 n.11 (E.D. Pa. 1978) ("In adopting the comparative fault rule, the Supreme Court [in *Reliable Transfer*] noted that it was

The Ninth Circuit should adopt a rule that applies strict liability to an employer's OSHA violations under FELA's section 53 when no Coast Guard regulation applies to the particular condition. This rule is supported by the plain language of FELA, the requirement that different sections of the statute be read together, and the special protection courts and Congress have traditionally extended to seamen. Moreover, an approach that compares both conduct and causation is more pragmatic and promotes uniformity by being in harmony with the British rule.

A. *Violation of OSHA Regulations, Absent Applicable Coast Guard Regulations, Should Create Strict Liability*

While *Kernan* established that an employer's violation of any safety statute or regulation triggers strict liability under section 51 of FELA, it did not reach the question of what constitutes a "statute enacted for the safety of employees" under FELA section 53.[103] The two Ninth Circuit decisions addressing the issue, *Kopczynski* and *Fuszek*, have impliedly limited their section 53 "statute enacted for the safety of employees" definition to regulations promulgated by the Coast Guard.[104] This interpretation excludes regulations adopted pursuant to OSHA even in instances when no Coast Guard regulations apply. Given FELA's language and the special solicitude Congress and the courts have historically extended to seamen, the Ninth Circuit should adopt a broad

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following the lead of the world's other . . . maritime nations and particularly noted the adoption of such a rule by Great Britain in the Maritime Conventions Act [of] 1911 . . . .").

The Brussels Liability Convention of 1910 adopted the doctrine of comparative fault in maritime casualties. International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, art. 4, in 6 *Benedict on Admiralty* 3–11 (7th rev. ed. 1998). The Court in *Reliable Transfer* noted that the countries that have ratified or adhered to the Convention include traditional maritime powers like Great Britain, the Netherlands, France, Germany, Canada, and Japan. United States v. Reliable Transfer Co., 421 U.S. 397, 404 n.7 (1975). The British Maritime Conventions Act of 1911 was enacted to carry into effect the 1910 Convention. Henry V. Brandon, *Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 Tul. L. Rev. 1025, 1026 (1977). The British approach of comparing both fault and causation is reflected in this Act. *Id.* at 1031–32. Some commentators have acknowledged that the British rule is the authoritative interpretation of the 1910 Convention. Owen & Whitman, *supra* note 90, at 477. At least one country that is a signatory to the 1910 Convention has comparative fault rules similar to Britain's. *See* Hawaii-Santa Fe Pioneers Arbitration, 1968 A.M.C. 602, 611 (1968) (Underwood, Arb.) (noting Japan's acknowledgment that Japanese comparative fault rules are similar to Great Britain's).

103. *See supra* Part II.A; *see also* Kernan v. American Dredging Co., 355 U.S. 426, 428 (1958).

104. *See supra* Part II.A; Fuszek v. Royal King Fisheries, Inc., 98 F.3d 514 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 1334 (1997); Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir. 1984).

reading of both the statute and *Kernan* to include OSHA violations as precluding seamen's employers from raising the seamen's contributory fault when no Coast Guard regulations are in place.

1. *Reading* Kernan *Broadly Does Not Violate the Language of FELA*

The starting point in analyzing a case involving statutory construction is the statute's language itself.[105] FELA does not define what a "statute enacted for the safety of the employees" is for the purpose of section 53. The language of the statutory provision is, however, broad enough to encompass statutes such as OSHA. The provision imposes no restrictions on the kind of statute or regulation that triggers section 53's proviso when violated. The only requirements under section 53 are that the violated statute or regulation be enacted for safety purposes and that the violation is a factor in causing the injury.[106] This section should not be interpreted in a way other than the way it is written.[107]

The Ninth Circuit should adopt a reading of section 53 that is faithful to the statute's plain language. The language Congress selected to determine the amount of damages recoverable in cases of this kind is simple and direct, and absent a clear indication from Congress to read it otherwise, section 53 must be interpreted as encompassing violations by the employer of OSHA regulations.[108]

2. *The Ninth Circuit Should Read Sections 51 and 53 Harmoniously*

Different parts of a statute should be construed as harmoniously and consistently as possible to give effect to the overall statutory scheme.[109] *Kernan* is crucial in this regard. Although that case addressed only the issue of employer liability under FELA section 51, the *Kernan* Court's

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105. Diamond v. Diehr, 450 U.S. 175, 182 (1981).

106. *See supra* language of 45 U.S.C. § 53 in text accompanying note 44.

107. Pratico v. Portland Terminal Co., 783 F.2d 255, 267–68 (1st Cir. 1985).

108. Caminetti v. United States, 242 U.S. 470, 485 (1917) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."); *see also* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 278–79 (1977) (holding that courts must reject "theory that nowhere appears in the [statute], that was never mentioned by Congress during the legislative process, that does not comport with Congress's intent, and that restricts . . . a remedial [statute]").

109. *See* Stafford v. Briggs, 444 U.S. 527, 535 (1980); *see also* International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2d Cir. 1938) (construing Longshoremen & Harbor Workers' Compensation Act).

liberal reading of section 51 is significant in determining fault allocation under section 53.

Kernan established the rule that a violation of *any* safety statute or regulation results in negligence per se liability under section 51 regardless of the purpose for which the statute or regulation was enacted.[110] The inclusiveness of this provision should be a guide in determining the kinds of statutes and regulations that would prevent the application of comparative fault under section 53. In ascertaining FELA's objective, the Court looked at section 51 and also examined the statutory scheme in its entirety.[111] Thus, the Court's finding of congressional objective to allow workers easier recovery against their negligent employers is relevant in interpreting all sections of FELA.[112] Sections 51 and 53 should be read together to give the statute a consistent interpretation.

3. *Construing OSHA Regulations as Safety Regulations Supports Special Protection of Seamen*

Seamen have traditionally received the generosity of Congress and the courts. The special protection this class of workers enjoys is reflected in both the congressional intent behind the passage of the FELA-Jones Act scheme, which is to liberalize avenues for seamen's recovery, and the way the courts have fashioned common law remedies in seamen's personal injury actions.

A broad reading of section 53 that considers OSHA regulations in the absence of applicable Coast Guard regulations would give effect to the legislative intent behind the promulgation of the FELA-Jones Act scheme. FELA was Congress's response to what it perceived as the inadequate protection afforded under the common law regime to industry workers.[113] In enacting FELA, Congress envisioned a remedy that would be flexible enough to reflect the industry's increasing responsibility

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110. Kernan v. American Dredging Co., 355 U.S. 426, 438–39 (1958).

111. *Id.* (examining statute as whole in ascertaining its objective).

112. *See infra* Part III.A.3.

113. The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common law defenses . . . .

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 507–08 (1957) (footnote omitted).

towards its workers.[114] Threats to workers' health and safety that did not previously exist and therefore could not have been contemplated by existing statutes and regulations continue to arise. The U.S. Supreme Court recognized this when it debunked an interpretation of section 51 of FELA that limited a finding of negligence per se to violation of statutes existing at the time of FELA's enactment.[115] As conditions in the workplace change and workers are unceasingly exposed to a multitude of hazards in the performance of their duties, FELA-Jones Act remedies should not remain static but should continue to adapt to changing circumstances.[116]

The Ninth Circuit rule—that seamen cannot benefit from the section 53 proviso when the employer violates OSHA regulations even when OSHA regulations are the only rules that seamen can invoke[117]—thwarts Congress's intent to provide liberal avenues for recovery under the Jones Act. The fact that the Coast Guard has sole authority over seamen[118] should not preclude the application of OSHA's benefit to this class of workers. Coast Guard regulations do not cover the entire field of seamen's working conditions.[119] Preventing OSHA regulations from filling this void contravenes the very essence of section 53. The Coast Guard's failure to regulate a particular working condition should not operate to excuse the employer's violation of another statute or regulation intended to ensure safe working conditions.[120] To give effect to Congress's intent to liberalize recovery, courts should not limit seamen's recovery based on the source of the violated regulation. The critical fact is that the employer failed to provide a reasonably safe

114. *Kernan*, 355 U.S. at 432.

115. *Id.* at 436–39.

116. *Id.* at 432 (holding that instead of detailed statutes codifying common law principles, Congress, in FELA and Jones Act, enacted statutes of most general terms, leaving in large measure duty of fashioning remedies for injured employees to courts).

117. *See* Kopczynski v. The Jacqueline, 742 F.2d 555, 558–59 (1984) (rejecting seaman's contention that court should disregard his contributory negligence in allocating damages when employer violated OSHA regulation, even if no Coast Guard regulation applies to plaintiff's situation).

118. *See* OSHA Instruction CPL 2-1.20 (Nov. 8, 1996) (delineating authority between Coast Guard and Department of Labor over working conditions in vessels).

119. For example, no existing Coast Guard regulations concern the use of ladders to access vessels.

120. Southern Ry. Co. v. Occupational Safety & Health Review Comm'n, 539 F.2d 335, 339 (4th Cir. 1976) (holding that OSHA's preemption by another federal agency should operate only when that federal agency has actually exercised its regulatory authority).

workplace.[121] Therefore, where the Coast Guard has not exercised its rulemaking authority, OSHA violations should trigger section 53 liability for the employer.

Disregarding seamen's contributory negligence in apportioning damages upon proof of an OSHA violation by the employer when no Coast Guard regulations apply is also consistent with the special solicitude that courts have traditionally extended to seamen. Courts regard Jones Act seamen as wards of the admiralty by virtue of the extremely unique perils and hardships that a seaman's life requires.[122] Working long hours in adverse weather conditions, being away from their families for months, and lacking the usual means of recreation have been traditional characteristics of seamen's life.[123] The various remedies available only to seamen in the case of personal injury and death reflect the courts' paternalistic attitude. Liability based on the traditional common law doctrine of unseaworthiness[124] is absolute and does not depend on a showing by the plaintiff of the ship owner's negligence.[125] Strict products liability,[126] which has recently been held as an available remedy in maritime actions, likewise does not require the plaintiff to prove negligence.[127] Under another common law remedy, maintenance and cure,[128] seamen who are contributorily negligent are still entitled to recovery, as long as their fault does not rise to the level of willful misconduct.[129] Except for strict products liability, these remedies are exclusive to seamen and do not extend to other maritime workers such as

121. *Kernan*, 355 U.S. at 438 (declaring that basis for negligence per se liability under FELA is employer's violation of statutory duty to provide safe workplace, regardless of whether resulting injuries were those statute sought to protect).

122. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 377 (1932).

123. In *Seas Shipping Co. v. Sieracki*, the Court recognized that unlike their land-based counterparts, seamen are exposed to "perils of the sea and the risks of unseaworthiness, with little opportunity to avoid those dangers or . . . protect themselves." 328 U.S. 85, 104 (1946).

124. Liability for unseaworthiness lies when the shipowner violates an "implied warranty that the vessel is reasonably fit for its intended purpose." Schoenbaum, *supra* note 24, § 3-9, at 143.

125. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960).

126. An action for strict products liability requires the plaintiff to prove that: (1) the defendant sold or manufactured the product, (2) the product was unreasonably dangerous or was in a defective condition when it left the defendant's control, and (3) the defect resulted in injury to the plaintiff. *Restatement (Second) of Torts* § 402A (1965).

127. *See* East River S.S. Corp. v. TransAmerica DeLaval, Inc., 476 U.S. 858, 865 (1986).

128. "Maintenance" is defined as the seamen's right to food and lodging if they become ill while serving, whereas "cure" refers to the right to medical services that injured or sick seamen need. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938).

129. Schoenbaum, *supra* note 24, § 4-31, at 297.

the longshoremen and harbor-workers.[130] Thus, seamen, compared to other maritime workers, have the most far-reaching rights.[131]

The Supreme Court has periodically reaffirmed this idea of special protection for seamen in its maritime decisions. Early cases recognized that seamen have to endure the harshness of long voyages and perils of the sea to earn their keep.[132] Unlike their land-based counterparts who may have wider options, seamen have no choice but to endure unsafe working conditions while at sea.[133] The Court has also ruled that the seamen's burden of proving causation in a Jones Act suit is "featherweight"—less than what is required in ordinary tort actions.[134] Accordingly, the Court has liberally construed remedial legislation such as the Jones Act to enlarge, rather than narrow, the protection it provides.[135] In allocating fault under section 53 of FELA in maritime personal injury actions, the Ninth Circuit should thus give due consideration to the special treatment that seamen have always enjoyed.

130. The remedies available to longshoremen and harbor workers are spelled out in the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901–950 (1994).

131. Jones Act, unseaworthiness, and maintenance and cure remedies are exclusive to seamen (*see supra* note 9 for who qualifies as "seamen") and do not extend to other maritime workers. *See* Desper v. Starve Rock Ferry Co., 342 U.S. 187, 190 (1952) (refusing to extend Jones Act remedy to maritime worker not satisfying "seaman" status at time of death); Normille v. Maritime Co. of the Phil., 643 F.2d 1380, 1382–83 (9th Cir. 1981) (holding unseaworthiness cause of action unavailable to longshore and harbor workers subject to LHWCA); 1B *Benedict on Admiralty* § 44, at 4-10 (7th rev. ed. 1998) ("[A]nyone classified as a Jones Act seaman can bring an action for maintenance and cure . . . .") (citations omitted).

132. *See, e.g.*, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431–32 (1939); Calmar Steamship Corp. v. Taylor, 303 U.S. 525, 528 (1938); The Arizona v. Anelich, 298 U.S. 110, 122–23 (1936).

133. Although early courts' characterization of seamen's plight as lacking adequate protection and having limited freedom of choice when confronted with unfavorable working conditions (in contrast to land-based employees) may not necessarily hold true in present times, modern court decisions continue to echo the special policy. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 354–55 (1995) (tracing development of heightened legal protection given to seamen who, "by the peculiarity of their lives [are] liable to sudden sickness from change of climate, exposure to perils, and exhausting labour"); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 354 (1991) (stating that "[t]raditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected'") (quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)); Wink v. Rowan Drilling Co., 611 F.2d 98, 100 (5th Cir. 1980) (subjecting releases or settlements involving seamen's rights to careful scrutiny because seamen are wards of admiralty).

134. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957) (relying on Court's previous interpretation of FELA in Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957)).

135. *The Arizona*, 298 U.S. at 123.

Given FELA's straightforward language and the desirability of interpreting different sections of statutes consistently, the Ninth Circuit should consider the employer's violation of OSHA regulations, when no Coast Guard regulations apply, to preclude such employers from raising the seamen's contributory negligence as a defense to diminish recovery. The preferential treatment that Congress and the courts have traditionally given to seamen also supports this interpretation of FELA.

B. *Comparing Fault and Proximate Causation*

Deciding which factors to compare—fault and causation or fault alone—in a comparative fault scheme remains a thorny problem among the courts. Ninth Circuit courts apparently favor an approach that compares fault alone.[136] Adopting a rule that compares not only the parties' culpable conduct but also causation would advance the goal of international uniformity, which the U.S. Supreme Court addressed in *Reliable Transfer*.[137] Moreover, in most cases, facts underlying the fault and causation queries are so intertwined that asking the jury to consider one but not the other presents a formidable task.[138]

1. *Comparing Both Fault and Proximate Causation Will Advance the Objective of International Uniformity*

Reliable Transfer was the U.S. Supreme Court's attempt to keep American maritime law consistent with the law of England, which has traditionally been the world's other maritime power.[139] The Court noted that England has abandoned the "divided damages" rule[140] and adopted the Brussels Liability Convention of 1910, which provides for apportionment of damages according to the degree of fault if the facts so require.[141] The Court lamented that among the world's leading maritime

136. *See supra* Part II.B.2.

137. United States v. Reliable Transfer Co., 421 U.S. 397, 403–04 (1975).

138. Afran Transp. Co. v. S/T Maria Venizelos, 450 F. Supp. 621, 636 n.11 (noting direct relationship between degree of culpability and degree of causation); Owen & Whitman, *supra* note 90, at 481 ("In most cases it may make little difference which factors are considered, because the degree of culpability will have a direct relationship to the degree of causation.") (citing *Afran Transp.*, 450 F. Supp. at 636–37).

139. *Reliable Transfer*, 421 U.S. at 403–04.

140. *See supra* note 14 and accompanying text.

141. *Reliable Transfer*, 421 U.S. at 403.

nations, the United States was virtually alone in diverging from the Convention's rule of proportional fault.[142] The Court pointed out that the divergence resulted in the undesirable practice of transoceanic forum shopping.[143] The desire for international uniformity was one of the compelling reasons why American maritime law is now a pure comparative fault regime.[144]

In applying the Brussels Convention, English courts have adopted an interpretation of the comparative fault rule that compares both culpability and causation.[145] The *Reliable Transfer* Court emphatically noted that all major maritime nations except the U.S. have adhered to the proportional fault rule of the Convention.[146] Given the English courts' interpretation of the comparative fault rule as requiring a dual analysis of fault and causation, and the U.S. courts' concern for uniformity, it is reasonable that the U.S. Supreme Court would have adopted the same interpretation had the issue been brought squarely before it.[147]

2. *The Close Link Between Culpable Conduct and Proximate Causation Calls for Their Joint Analysis*

In many cases, questions of causation and fault are inseparable.[148] The Uniform Comparative Fault Act (UCFA),[149] adopted by two states and invoked by many courts,[150] recognizes this. Section 2(b) of the UCFA provides: "In determining the percentage of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the

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142. *Id.*

143. *Id.*

144. *Id.* at 403–04.

145. Brandon, *supra* note 102, at 1031.

146. *Reliable Transfer*, 421 U.S. at 403–04, 404 n.7. These countries are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Poland, Portugal, Romania, Sweden, Switzerland, Turkey, the former U.S.S.R., Uruguay, and Yugoslavia. *Id.*

147. The question of weighing both culpability and causation was not before the Supreme Court because of the shipowner's failure to file a cross-petition. *Id.* at 401 n.2.

148. *See, e.g.*, Afran Transp. Co. v. S/T Maria Venizelos, 450 F. Supp. 621, 636 n.11 (E.D. Pa. 1978) ("[T]he degree of culpability will often have a direct relationship to the degree of causation.").

149. Unif. Comp. Fault Act §§ 1–11, 12 U.L.A. 123 (1977).

150. Owen & Whitman, *supra* note 90, at 481 n.190. The Uniform Comparative Fault Act has been adopted in Iowa and Washington. *See* Iowa Code Ann. §§ 668.1–668.16 (West 1989); Wash. Rev. Code §§ 4.22.005–.925 (1998).

extent of the causal relation between the conduct and the damages claimed."[151] The UCFA Comment to this section explains that degrees of fault and proximate causation are invariably mixed.[152] At least one court has noted the difficulty of analyzing relative culpability in the abstract without also looking at how that culpability affected the plaintiff's ultimate injury.[153] That same court acknowledged that the degree of culpability will often have a direct impact on the degree of causation.[154] In the recent case of *Exxon Co. v. Sofec, Inc.*, the U.S. Supreme Court declined to rule on which approach is better but hinted that there may be no actual difference between fault and causation in this regard.[155] Comparing proximate causation is therefore inescapable from a practical point of view.[156] Laying down a rule that includes a proximate causation comparison merely formalizes what actually occurs in practice.

The Ninth Circuit should endorse an approach that compares both the parties' culpable conduct and causation in comparative fault analysis. Adherence to the English formula for apportionment would be a starting point for international uniformity and is a more realistic and practical way of apportioning damages between parties who are both at fault.

IV. CONCLUSION

When injury or death occurs, seamen or their representatives have several actions available to them to recover against the persons liable for such injury or death. The two rules that the Ninth Circuit has developed in this area do not comport with the legislative and judicial intent of both

151. Unif. Comp. Fault Act § 2, 12 U.L.A. 135.

152. Unif. Comp. Fault Act § 2 cmt., 12 U.L.A. 137.

153. *See Afran Transp.*, 450 F. Supp. at 636 n.11.

154. *Id.*

155. 517 U.S. 830 (1996). The Court noted:

> Some commentators have suggested that there may be a distinction between a system allocating damages on the basis of comparative culpability, and a system allocating damages on the basis of both comparative culpability and the degree to which fault proximately or foreseeably contributed to an injury. We continue to use the term "comparative fault" employed in *Reliable Transfer*, but we do not mean thereby to take a position on which of these systems is the appropriate one, assuming that there is in fact a distinction between them.

Id. at 837 n.2 (internal citations omitted).

156. Owen & Whitman, *supra* note 90, at 481–82. This is especially true in those remedies based on unseaworthiness and strict products liability where defendant's fault is not an issue and courts have no choice but to compare proximate causation.

providing liberal remedies for seamen and fostering international uniformity.

The Ninth Circuit's refusal to disregard the seaman's contributory negligence when the seaman's employer has violated an OSHA regulation, even in the absence of an applicable Coast Guard regulation, is misguided. The Ninth Circuit should follow the other circuits that have held that an employer who has violated OSHA regulations is precluded from raising the worker's contributory negligence to mitigate the employer's damages under FELA. This will advance Congress's objectives of enlarging remedies available to seamen and holding the industry responsible for providing safe working conditions.

The Ninth Circuit should adopt a rule comparing the parties' fault and causation. Given that facts relevant to the issues of both fault and causation are closely interwoven, this rule is more realistic. Furthermore, the adoption of such a rule would put U.S. law in accord with that of many other nations, including England. This would discourage transoceanic forum shopping and advance the U.S. Supreme Court's objective of achieving international uniformity in maritime law.