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Admiralty Law- Supreme Court Sinks Divided Damages Rule

Admiralty Law—SUPREME COURT SINKS DIVIDED DAMAGES RULE—*United States v. Reliable Transfer Co.*, 95 S. Ct. 1708 (1975).

The rule of divided damages in admiralty law, established by the Supreme Court in 1855 in *The Schooner Catharine v. Dickinson*,[1] requires that if both parties are at fault each must bear one-half of the total damages, regardless of his degree of fault.[2] The rule was developed in response to the harsh common law rule of contributory negligence which allowed no recovery and left the parties to pay their own damages.[3] The divided damages rule was acknowledged by the Supreme Court as valid as late as 1963,[4] and it was not until 1972 that the Court signaled its intention to reconsider the rule.[5] All other maritime nations had abandoned the divided damages rule in favor of a proportionate damage rule,[6] and American courts had

1. 58 U.S. (17 How.) 434 (1855). For historical development and application of the rule in the United States see Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304, 310-21 (1957); Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1928).

2. At the time of *The Catharine*, English law was well settled on the divided damages rule. Lord Stowell enunciated the rule in The Woodrop-Sims, 2 Dods. 83, 165 Eng. Rep. 1422 (1815) (dictum). The House of Lords affirmed the rule by overturning a Scottish court which had divided the damages unequally in Hay v. LeNeve, 2 Shaw's Scot. App. Cas. 395 (1824). For earlier historical development see Staring, *supra* note 1, at 305-10.

The next two Supreme Court cases on the subject after *The Catharine* were affirmed with no further comment on the equal division rule. Chamberlain v. Ward, 62 U.S. (21 How.) 162 (1858); Goslee v. Shute, 59 U.S. (18 How.) 390 (1855). The mathematical application of the rule was stated by Justice Strong in The Sapphire, 85 U.S. (18 Wall.) 51, 56 (1873): "[W]here both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. . . . If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault." The rule was similarly described in The North Star, 106 U.S. 17, 18 (1882).

3. For example, the inequity of the common law rule is evident in the situation where both ships are equally to blame for the collision, and one ship is destroyed while the other is slightly damaged. The rule operated even more harshly if the more damaged ship had only slight fault.

4. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 603 (1963).

5. In Union Oil Co. v. The San Jacinto, 409 U.S. 140, 141 (1972), the Court granted certiorari but found one of the ships faultless, and therefore did not reach the issue of divided damages.

6. All other maritime nations adhere to Article 4 of the Brussels Convention on Collision Liability which states, in part:

> 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.

From text printed in 6 A. KNAUTH & C. KNAUTH, KNAUTH'S BENEDICT ON ADMIRALTY 39 (7th rev. ed. 1969). For a list of the countries which are signatories of the Convention see *id.* at 38-39.

been voicing their dislike of the equal division rule for almost half a century.[7] Generally, the courts complained that the application of the divided damages rule created inequity in any situation where both ships were to blame and fault was clearly not equal.[8] The result was particularly unfair where the vessel with slight fault was hardly damaged and had to make payment to a grossly negligent ship with heavy damage.[9]

The inequity of the divided damages rule was magnified in many situations by the application of the Pennsylvania Rule,[10] which created a presumption that violation of a maritime regulation designed to prevent collisions was a contributory cause of the accident. Thus, the burden was placed on a ship to show that the statutory breach could not have been a cause of the collision.[11] This extremely high burden of proof, "beyond all doubt,"[12] made it almost impossible to avoid the divided damages rule in such a case.[13] Unwilling to disturb the divided damages rule due to the Supreme Court's strict adherence to it and in order to alleviate the harshness resulting from the Pennsylvania Rule, courts have developed rules for two special situations. First, the gross fault or major-minor fault rule places the burden on an extremely negligent ship (whose sole actions could account for the accident) to prove that the other ship was also at fault in contributing to the collision.[14] Second, the doctrine of error *in extremis* is

7. The Third Circuit Court of Appeals held in The Margaret, 30 F.2d 923 (3d Cir. 1929), that the respective faults of two steamships which had collided were 75%/25% and ordered a like division of damages. However, on rehearing, the Court of Appeals reviewed the line of cases since *The Catharine* and decided that it was constrained to divide the damages equally according to the Supreme Court's undeviating pronouncements.

8. *See* Tank Barge Hygrade, Inc. v. The Gatco N.J., 250 F.2d 485, 488 (3d Cir. 1957); *In re* Adams' Petition, 237 F.2d 884, 887 (2d Cir. 1956); Marine Fuel Transfer Corp. v. The Ruth, 231 F.2d 319, 321 (2d Cir. 1956); Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618, 620-21 (2d Cir. 1954); Eastern S.S. Co. v. International Harvester Co., 189 F.2d 472, 476 (6th Cir. 1951); Luckenback S.S. Co. v. United States, 157 F.2d 250, 252 (2d Cir. 1946); Curtis Bay Towing Co. v. The Fairwill, 110 F. Supp. 881, 885 (E.D. Va. 1952).

9. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 528 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]: "This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence . . . ."

10. So named for the case which enunciated this rule: The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873).

11. *Id.* at 136. For a detailed explanation of the development and application of the Pennsylvania Rule see Note, *The Pennsylvania Rule: Charting A New Course For An Ancient Mariner*, 54 BOSTON U.L. REV. 78 (1974).

12. Note, *The Pennsylvania Rule, supra* note 11, at 80.

13. This burden was slightly lessened to proving no causal relationship "beyond a reasonable doubt" and may have been evolving to a standard of "clear and convincing evidence." *Id.* at 80 nn.11 & 12.

14. In The City of New York, 147 U.S. 72, 85 (1892), the Court held:

> Where fault on the part of one vessel is established by uncontradicted testimony, and

also used to prevent inequitable results. Under this doctrine, last minute actions to avoid collisions are judged under a less than normal duty of care; therefore, minor statutory violations in the heat of an emergency do not invoke the "could not have been a cause" burden of the Pennsylvania Rule.[15]

Recently, the Supreme Court in an opinion authored by Justice Potter Stewart finally ended the history of inequity resulting from the application of the divided damages rule.[16] In *United States v. Reliable Transfer Co.*,[17] the Mary A. Whalen, a coastal tanker owned by the Reliable Transfer Company, ran aground at night on a sand bar near New York Harbor.[18] The owners of the *Whalen* brought suit against the United States under

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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.

Accord, The Ludvig Holberg, 157 U.S. 60 (1895); The Great Republic, 90 U.S. (23 Wall.) 20 (1874); Harbor Oil Transp. Co. v. The Plattsburgh Socony, 151 F.2d 708 (2d Cir. 1945); Matton Oil Transfer Corp. v. The Greene, 129 F.2d 618 (2d Cir. 1942) (rule stated but not applicable per facts).

The criticism of this rule is that it replaces one inequity with another. National Bulk Carriers, Inc. v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (L. Hand dissenting); *accord*, Tank Barge Hygrade v. The Gatco N.J., 250 F.2d 485, 488 (3d Cir. 1957).

15. *See* Afran Transp. Co. v. S.S. Transcolorado, 458 F.2d 164, 166-67 (5th Cir. 1972); Union Oil v. Tug Mary Malloy, 414 F.2d 669, 674 (5th Cir. 1969); A.H. Bull S.S. Co. v. United States, 34 F.2d 614, 616 (2d Cir. 1929); The Clara Mattheu, 25 F.2d 123, 124 (D. Mass. 1928); The Havana, 54 F. 411, 416 (D. Conn. 1893). For a further compilation of cases and general reference see 15 C.J.S. *Collision* § 155 (1967, Supp. 1975).

16. In United States v. Reliable Transfer Co., 95 S. Ct. 1708, 1715 (1975), Justice Stewart stated:

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in *The Schooner Catharine*—the "just and equitable" allocation of damages. And worldwide experience has taught that that goal can be more nearly realized by a standard that allocates liability for damages according to comparative fault wherever possible.

17. 95 S. Ct. 1708 (1975).

18. As the facts indicate, the *Reliable* case did not involve two ships colliding, but a ship running aground on a sandbar. The divided damages rule applies in cases where a nonvessel party has caused damage as a result of a collision or a grounding, so the analysis of the *Reliable* case is completely applicable to the discussion of maritime damages. *See* White Oak Transp. Co. v. Boston, C.C. & N.Y. Canal Co., 258 U.S. 341 (1922) (steamship ran aground in canal); Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874) (barge struck pier); GILMORE & BLACK, *supra* note 9, at 522-23; Allbritton, *Division of Damages in Admiralty— a Rising Tide of Confusion*, 2 J. MAR. L. & COMM. 323, 328 (1971).

the Suits in Admiralty Act[19] and the Federal Tort Claims Act[20] to recover damages based on the Coast Guard's failure to maintain the breakwater light.[21] The district court found that the ship's grounding was caused 25% by the Coast Guard's failure and 75% by the *Whalen's* errors.[22] Although mindful of the continued criticism of the equal division of damages rule and its inequitable results for the case at bar, the Second Circuit Court of Appeals felt that it should "abstain from attempting to change the law in areas such as this, preferring to leave doctrinal development to the Supreme Court or to await appropriate action by Congress."[23] Therefore the 50/50 division of damages was affirmed, and appeal was taken to the Supreme Court.[24]

In a well-documented opinion, Justice Stewart, speaking for a unanimous Court, reversed the lower court decision and replaced the divided damages rule with a proportionate fault rule.[25] His opinion, rather than extolling the virtues of the proportionate damage rule, centered primarily on the inequities and illogic of the rule of divided damages.[26] The argument presented in *The Catharine* that the divided damages rule is the best rule to induce care and vigilance was not accepted. Justice Stewart stated that the new rule would better accomplish this purpose as the most harmful behavior would be deterred more strongly.[27] Also, the Court noted some merit to the argument justifying the divided damages rule because of the difficulty in determining comparative degrees of negligence.[28] The Court held that this could not justify the use of the divided damages rule in every

19. 46 U.S.C. § 741 *et seq.* (1920).

20. 28 U.S.C.A. § 1346 *et seq.* (1971).

21. 95 S. Ct. at 1710.

22. The court of appeals affirmed the finding of mutual fault in the proportions stated. 497 F.2d 1036 (2d Cir. 1974).

23. *Id.* at 1038.

24. Certiorari was granted, 95 S. Ct. 491 (1974).

25. "[L]iability for [property] damage [in a maritime collision] is to be allocated among the parties proportionately to the comparative degree of their fault . . . ." Justice Stewart explained further that if the comparative degree of fault could not be fairly ascertained, then the damages would still be allocated equally. 95 S. Ct. at 1715-16.

26. Justice Stewart criticized the old rule:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. *Id.* at 1713.

27. *Id.* at 1713 n.11.

28. The Court in The Max Morris, 137 U.S. 1, 12 (1890), suggested this as a basis for the rule.

case of a mutual fault collision[29] because judgment is exercised daily by courts.[30] Justice Stewart concluded that since there were no logical reasons for maintaining the rule of divided damages,[31] it should be replaced by the more equitable rule requiring the allocation of liability in proportion to the comparative degrees of fault.

Although this decision does not appear to conflict with any express or implied will of Congress, it is still subject to the criticism of judicial legislation. Congress has been presented with ample opportunity to pass legislation dealing with the specific area of apportionment of damages, but has decided otherwise.[32] This inaction, when it is observed that legislation has been enacted establishing proportionate fault in maritime personal injury cases,[33] would seem to indicate acquiescence with the status quo—the divided damages rule. One possible answer is that the old rule was judicially created; therefore, it does not seem unreasonable for the Court to change to a better rule, especially if no reliance interests are involved.[34] The decision does not mention removing the joint and several liability of tortfeasors in maritime collision cases. To have done so would have been tantamount to enacting Article 4 of the Brussels Convention on Collision Liability[35] which Congress has refused to do.

The difference in the international and United States liability rules has

29. 95 S. Ct. at 1714.

30. The other maritime nations have been able to administer a comparative fault rule without serious problems. *Id.* Also, comparative negligence is already applied in maritime personal injury cases. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953); Jones Act, 46 U.S.C. § 688 (1920); Death on the High Seas Act, 46 U.S.C. § 766 (1920).

31. "Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." 95 S. Ct. at 1714.

32. Justice Stewart noted that the Court has traditionally had the responsibility of developing flexible and fair rules in maritime law. Congress' failure to ratify the Brussels Convention does not indicate opposition to the proportionate fault rule, but can be traced to other reasons including cargo interest opposition to the elimination of joint and several liability for cargo damage and inadequate translation of the Convention. *Id.* at 1715, 1714-15 n.14; *see* GILMORE & BLACK, *supra* note 9, at 531; Donovan & Ray, *Mutual Fault—Half-Damage Rule—A Critical Analysis*, 41 INS. COUNSEL J. 395, 397 (1974).

33. Jones Act, 46 U.S.C. § 688 (1920).

34. No "vested rights" in theory or fact, have intervened. The regard for "settled expectation" which is the heart-reason of that modified form of *stare decisis* prevailing in the United States can have no relevance in respect to such a rule; the concept of "settled expectation" would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision. The abrogation of the rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory. GILMORE & BLACK, *supra* note 9, at 531.

35. Article 4 of the Brussels Convention, *supra* note 6, provides for proportionate fault division of damages *"without* joint and several liability toward third parties." (emphasis added).

practical consequences in cases where cargo damage[36] is involved or there is damage to innocent third party ships. In these situations, under the proportionate fault rule established in *Reliable*, the inequities of the old equal division of damages rule may still occur. If the ship at great fault is insolvent, the other ship which may have only slight fault will be burdened with the whole bill for damages to the innocent cargo or third party vessels.[37] Apparently, other major maritime nations do not consider this a desirable consequence as they have ratified the Brussels Convention. However, one of the basic tenets of our law is that an innocent victim should be able to collect wholly from any one of the joint tortfeasors.[38] Unless the Supreme Court or Congress desires to change this principle, it would seem best for maritime law to remain consistent with tort law in this respect. The new damages rule adopted by the Court in *Reliable* should achieve this result while maximizing equitable considerations.

J.D.S.

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36. Although the Harter Act, 46 U.S.C. §§ 190-96 (1893), and the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, 1304(2) (1936), exempt the carrying ship from liability due to errors in navigation or maintenance of the vessel, the cargo owner can recover from the noncarrying vessel if it has some degree of fault. Contribution is then allowed from the carrying vessel if there is a "both to blame" situation since cargo is part of the total damages to be divided. Donovan & Ray, *supra* note 32, at 395-97.

37. In some instances, the inequity could be greater than before because the new rule will probably lessen the need for, or even abolish, the major-minor fault rule (developed to lessen the harshness of the old rule). Now, courts will be more likely to acknowledge the small percentage of fault instead of using the major-minor fault rule, since they will not feel that this would subject a ship to the unfairness of 50% damages for slight fault. This will result in joint and several liability to third parties, and the vessel with little fault may wind up paying the whole amount if the other wrongdoer is insolvent.

38. For a discussion of the inequity to innocent cargo owners if joint and several liability were removed see Donovan & Ray, *supra* note 32, at 397.