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Admiralty: Comparative Negligence in Collision Cases

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The majority's conclusion that a solidary surety is a principal obligor seems unfounded. Solidary debtors need only be "obliged for the same thing, so that each may be compelled for the whole."[50] As the earlier jurisprudence realized, this might be accomplished simply by a waiver of discussion and division. This result is suggested not only by the literal terms of article 3045, which equates solidarity with a waiver of discussion, but also by the location of this article within a subdivision of the Louisiana Civil Code dealing only with discussion and division. If the phrase in article 3045 which alludes to the effect of solidarity were intended to have a greater effect, it would hardly be expressed as an exception to an article of such a narrow context. In contrast, the accessory nature of the surety's contract is reiterated within each section of the Louisiana Civil Code dealing with extinction of obligations.[51] To deprive a solidary surety of any more than discussion and division grants no benefit to the creditor that he cannot obtain by simply requiring the party to contract as a principal. It interferes unnecessarily in a situation that might reflect the actual bargain of the parties and allows a creditor to defeat his own obligation through the use of equivocal language. The contract of a solidary surety is accessory by its nature and should remain so even though the surety be solidarily bound. Likewise, he should be benefitted by all other terms of his suretyship contract that are not incompatible with solidarity.

Steve G. Durio

ADMIRALTY: COMPARATIVE NEGLIGENCE IN COLLISION CASES

A negligently navigated tanker ran aground on a breakwater which the Coast Guard had failed to illuminate properly. Although determining that the vessel bore 75% of the blame and the Coast Guard only 25%, the federal district court applied the century-old rule of equally divided damages and ordered the Coast Guard to pay half the vessel's damages. The Second Circuit Court of Appeals affirmed,[1] but on

reaches the same result that would occur should one of the parties be recognized as an accessory.

50. LA. CIV. CODE art. 2091.

51. *See, e.g., id.* arts 2198, 2205, 2211, 3076, 3060-63.

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

certiorari the United States Supreme Court reversed and *held* that all parties in a maritime collision or stranding are liable for resultant property damage in proportion to each one's negligence. Damages will be divided equally only when fault is equal or the relative degrees of negligence are indeterminable. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975).

Dividing damages equally as a means of compensating injury is a device of ancient origin.[2] The Rules of Oleron, a principal source of English maritime law, preserved the doctrine in medieval times.[3] Though the early applications of the "moiety rule" had little to do with concepts of negligence or fault,[4] by the time of its recognition in England courts applied the rule only in cases of mutual fault.[5]

The leading English case is *The Woodrop-Sims*,[6] in which the court outlined in *dictum* the four possibilities for judicial disposition of a collision case. A court might find either no fault,[7] mutual fault, or sole fault on the part of either plaintiff or defendant,[8] but only when both parties were to blame must the damages be "apportioned between them."[9] The House of Lords cited the *dictum* of *The Woodrop-Sims* approvingly in *Hay v. LeNeve*[10] and affirmed equal division of damages by a Scottish court. The principal justification for the division in that case was the extreme difficulty of determining the relative degrees of negligence of the parties; they were "equally culpable."[11] Thus, neither of the principal English cases was

Before affirming, the appellate court noted the Second Circuit's traditional dissatisfaction with the divided damages rule.

2. *Exodus* 9:35: "[A]nd if one man's ox hurt another's, that he die; then they shall sell the live ox and divide the money of it; and the dead ox also they shall divide."

3. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CAL. L. REV. 304, 308 (1957) [hereinafter cited as Staring].

4. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 7 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. *See* Staring at 306.

5. Staring at 308.

6. 165 Eng. Rep. 1422 (1815).

7. Such a determination would commonly result from a collision caused by a storm or another vis major. 165 Eng. Rep. at 1423. A similar notion is expressed in American maritime law by the term "inevitable accident." GILMORE & BLACK at 486. *See* cases in note 50, *infra*.

8. In *The Woodrop-Sims* the judge submitted the question of causation to the Trinity Masters, who in turn determined that the Woodrop-Sims bore the entire fault for the collision. 165 Eng. Rep. at 1424.

9. *Id.* at 1423.

10. 2 Shaw Scotch App. 395 (1824).

11. *Id.* at 404.

imperative authority for the equal division of damages in cases of mutual but unequal fault.

The United States Supreme Court, applying what it found to be "the well-settled rule in the English admiralty," adopted the concept of divided damages in 1854.[12] In conjunction with two subsequent decisions on causation and allocation of fault, the doctrine of divided damages has governed American collision litigation ever since. The first of these decisions established the "Pennsylvania" rule, requiring a party found guilty of violating a safety regulation to demonstrate that such violation could not have been a cause of the accident or be held for at least half the total damages, if not the entire amount.[13] A second doctrine, the "major-minor" rule, sometimes worked to mitigate the harsh results caused by equal division of damages in cases of unequal fault.[14] As formulated by the Supreme Court in 1893,[15] the major-minor principle raised a presumption against a party whose gross negligence was clearly established; merely showing slight negligence on the part of the other party would not suffice to grant an apportionment of damages.[16] When the

12. The Schooner Catherine v. Dickinson, 58 U.S. 170, 177 (1854).

13. The Pennsylvania, 86 U.S. 125 (1874). The rule creates an enormously heavy burden of proof and explains the much greater importance attached to statutory violations in maritime collisions than to violations of comparable statutes in land torts. *See, e.g.*, Esso Standard Oil Co. v. The President Garfield, 279 F.2d 540 (2d Cir. 1960); American Export Lines, Inc. v. Dredge Admiral, 254 F. Supp. 1 (S.D.N.Y. 1966).

14. GILMORE & BLACK at 492.

15. The City of New York, 147 U.S. 72 (1893). The substantial justice of the major-minor doctrine "in cases where the faults are egregiously unequal" was recognized much earlier in *Ralston v. The State Rights*, 20 Fed. Cas. 210 (No. 11,540) (E.D. Pa. 1836).

16. Modern decisions indicate that the party against whom the major-minor principle is applied will be required to prove the other's negligence by "clear and convincing" evidence. United States v. S.S. Soya Atlantic, 330 F.2d 732 (4th Cir. 1964); A/S Skaugaas (I.M. Skaugen) v. T/T P.W. Thirtle, 227 F. Supp. 281 (D. Md. 1964), *aff'd sub nom.* Dredge Cartegena v. T/T P.W. Thirtle, 345 F.2d 275 (4th Cir. 1964), *cert. denied* 382 U.S. 918 (1965); Esso Standard Oil Co. v. Oil Screw Tug Maluco I, 212 F. Supp. 449 (E.D. Va. 1963). Analytically, it has never been clear whether the principle creates a strong presumption against the grossly negligent vessel or a finding of no fault on the part of the "minor" offending vessel. One authority observes: "In such cases, the courts have sometimes announced their intention to resolve all doubts in favor of the comparatively innocent vessel, shutting their eyes to what might under other circumstances have been regarded as fault, or have found that, in view of the grossness of the fault of one vessel, the minor error of the other cannot be said to be a contributory cause of the disaster." GILMORE & BLACK at 492.

rule was applied, its operation thus forced a party greatly at fault to bear all the damages of a collision. But the criteria for the application of the major-minor principle were "vague and unreliable";[17] this problem recurred in the less frequently used doctrines of last clear chance,[18] inevitable accident,[19] and inscrutable fault.[20]

The Brussels Convention of 1910 replaced the rule of divided damages with a judicial determination of relative degrees of fault.[21] Proportional damages thus became the law of almost every major maritime nation.[22] Although England adopted the rule immediately,[23] the United States never ratified the Convention.[24] The principal opposition arose from shippers, who feared the effects of the agreement on their right to indemnity for cargo lost at sea.[25]

Happily, the question should now be moot. *See* text at note 46, *infra*.

17. GILMORE & BLACK at 493.

18. The purpose of this doctrine has been described as "to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could easily have overcome." Petition of Kinsman Transit Co., 338 F.2d 708, 720 (2d Cir. 1964).

19. GILMORE & BLACK at 486.

20. One court explained the inscrutable fault doctrine in this way: "We are unable upon the testimony before us to specify any particular fault, to put our finger upon any act or omission and assert that to it the accident was attributable. Fault may exist, but we are unable to discover it; it is inscrutable." The Jumna, 149 F. 171, 173 (2d Cir. 1906).

21. The treaty and the convention appear in full at 6 E.C. BENEDICT, BENEDICT ON ADMIRALTY 39-42 (A. Knauth 7th ed. 1950). *See* Huger, *The Proportional Damage Rule in Collisions at Sea*, 12 CORNELL L.Q. 531 (1928) [hereinafter cited as Huger].

22. In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 404 n.7, the Court lists the thirty-eight nations which now adhere to the Brussels Convention.

23. MARITIME CONVENTIONS ACT, 1 & 2 Geo. 5, c. 57, § 1 (1911).

24. The only significant attempt at Congressional ratification was made in the late 1930's. Despite strong support by Secretary of State Hull, the proposal died in committee. *See* Comment, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 YALE L.J. 878 (1955).

25. The Brussels Convention also contained an agreement on ocean bills of lading which was based upon the Harter Act, 46 USC §§ 190-95 (1958). Like the American statute, it denied cargo the right to recover from its carrier for losses caused by negligent navigation. But the international agreement required the noncarrying vessel to respond in damages to cargo only in proportion to its fault for the collision. Thus, in every mutual fault collision caused by negligent navigation, the Brussels Convention would deny cargo recovery

Congress's apparent satisfaction with the rule of divided damages was not matched in all quarters of the judiciary. Some courts grumbled at being required by precedent to apply the rule;[26] others simply refused to follow it.[27] In 1973, the Supreme Court intimated that the rule of divided damages had fallen into disfavor by granting writs to reconsider it, but the issue was not reached because the Court found sole fault.[28]

In the instant case,[29] Justice Stewart began by examining the policy considerations underlying the anachronistic divided damages rule. The Court had originally adopted the doctrine in 1854 as the standard "best tending to induce care and vigilance on both sides."[30] Conceding the value of such a goal, the Court noted that the comparative negligence rule of the Brussels Convention also punishes wrongdoing, and thus should have equivalent deterrent effect.[31] The crucial problem with the rule of divided damages, though, was not its ineffectiveness in inducing cautious navigation, but its frequently inequitable results. The Court reasoned that such a solomonic approach to justice held great potential for unfair-

for the percentage of its damages which could be attributed to the carrier's fault. American shipping interests had earlier circumvented the effect of the Harter Act by recovering their entire loss from the noncarrying tortfeasor, who was allowed to calculate such payments into the total amount of damages to be divided. The Chattahoochee, 173 U.S. 540 (1899). The anomalous result was to render the carrier liable for half the cargo damage in cases of mutual fault, but to absolve the carrier totally when it admitted sole fault. *See* Huger at 545. Reluctance to relinquish this curious advantage explains in large measure cargo's opposition to American adoption of the Convention.

26. Eastern S.S. Co. v. International Harvester, 189 F.2d 472 (6th Cir. 1951); National Bulk Carriers v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (L. Hand, J., dissenting); Luckenbach S.S. Co. v. United States, 157 F.2d 250 (2d Cir. 1940).

27. McKeel v. Schroeder, 215 F. Supp. 756 (N.D. Cal. 1963); N.M. Patterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576 (N.D. Ill. 1962), *reversed* 324 F.2d 254 (7th Cir. 1963).

28. Union Oil Co. v. The San Jacinto, 409 U.S. 140 (1973). Significant developments were apparently expected by the Fourth Circuit, which remanded a case with a suggestion that further proceedings be stayed until the Supreme Court announced its opinion in *Reliable*. Harbor Towing Corp. v. S.S. Calmar, 507 F.2d 720 (4th Cir. 1972).

29. The decision was unanimous.

30. The Schooner Catherine v. Dickinson, 58 U.S. 170, 178 (1854).

31. United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975). Though the Court did not delve into the question, it is apparent that the deterrent effect of either rule is somewhat buffered by omnipresent collision insurance.

ness to parties only slightly at fault.[32] The potential was exacerbated by the Pennsylvania rule, which could parlay a mere technical regulatory violation into an equal share of enormous liability.[33] Likewise, the Court regarded the major-minor fault doctrine as an ineffective mitigating factor: not only did its imprecise nature render it "inherently unreliable,"[34] but its operation was equally unfair to the party beset by it as was the rule of equal division to the slightly negligent party.[35]

The Court next dealt with objections raised by critics of the comparative negligence system. Pointing to the experience of every other major shipping nation and the history of American maritime personal injury litigation, the Court denied that determination of comparative degrees of negligence is prohibitively difficult.[36] In response to the suggestion that equal division of damages promoted out-of-court settlements, the Court cited statistics demonstrating that over ninety per cent of suits for maritime personal injuries, based on comparative negligence, are settled before trial.[37] The Court also observed that to claim that a legal rule keeps parties out of

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32. *Id.* at 405.

33. *Id.* at 405-06.

34. *Id.* at 406.

35. "That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Id.* at —.

36. *Id.* at —. The Court has established a rule of "pure" comparative negligence in *Reliable.* Although the Mary A. Whalen, the tanker owned by Reliable Transfer, was found to bear 75% of the blame, it was allowed to collect 25% of its damages from the Coast Guard. The "pure" form of comparative negligence has gained much doctrinal support over its two competing versions, known as the "Wisconsin modified" and the "New Hampshire modified" rules. The first system denies any recovery to parties whose fault is greater than 50%, the second bars recovery if the party's fault is 50% or greater. *See, e.g.*, Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present, and Future,* 41 TENN. L. REV. 423 (1974). There is no reason to suppose that set-off principles, long applied in collision cases, will not continue in force. *Compare In re* Tug Management Corp., 330 F. Supp. 486 (E.D. Pa. 1971) *with* United States v. Motor Ship Hoyanger, 265 F. Supp. 730 (W.D. Wash. 1967).

37. United States v. Reliable Transfer Co., 421 U.S. 397, 408 n.13 (1975). The old rule of divided damages offered a positive incentive to a grossly negligent party to refrain from settling. If that party could avoid application of the major-minor principle, it might well receive an equal apportionment of damages rather than its fair share. The uncertain requirements for application of the principle made settlements most difficult in such circumstances.

court is scant justification, especially when its application often leads to unjust results.[38] Finally, the Court declined to wait any longer for Congressional action on the matter. Citing as an example its creation of a maritime wrongful death action,[39] the Court noted its traditional role as a leader in the formulation of admiralty remedies.[40]

Abrogation of the rule of equal division of damages is long overdue. By bringing American law into conformity with that of competing maritime nations, *Reliable* fulfills a traditional goal of admiralty policy.[41] The uniformity should bring an end to forum-shopping among nations, a previously widespread practice in collision litigation.[42]

The necessity for more precise determination of degrees of negligence under a comparative approach should have an important effect on several of the judicial rules previously applied in collision cases. The closest question is whether the Pennsylvania rule survives the decision in *Reliable.* Arguably, the rule's blunt determination of the existence or absence of fault is of no aid in measuring comparative degrees of negligence. Under the old version of divided damages, the pertinent inquiry was limited to whether a particular vessel should bear half the loss, the entire loss, or escape liability altogether. The heavyhanded effect of the Pennsylvania rule was well suited for such a purpose, but a more finely calibrated instrument is needed for measuring comparative degrees of negligence.[43] The better view, however, would regard the Pennsylvania rule as unaffected by *Reliable.* Its original purpose was to promote compliance with navigational regulations,[44] and there is no reason to abandon that goal now, with

38. *Id.*

39. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

40. United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975).

41. GILMORE & BLACK at 45.

42. *Id.* at 529.

43. In *Ishizaki Kisen Co. v. United States*, 510 F.2d 875 (9th Cir. 1975), the court was required to apply Japanese substantive law in deciding a collision case. Since Japan subscribes to the Brussels Convention, the question of application of an alleged Japanese-Pennsylvania rule was governed by Article 6 of the agreement, which abolished all legal presumptions of fault. The court suggested, though, that one of the principal purposes of the Pennsylvania rule is to simplify adjudication under the divided damages rule, and that it achieved no such simplification when used in conjunction with the Japanese system of comparative negligence. The opinion thus indicates that some courts might be inclined to bury the Pennsylvania rule along with equally divided damages.

44. The Pennsylvania, 86 U.S. 125, 137 (1874).

streams and channels increasingly crowded. Moreover, the Pennsylvania rule should be viewed as a presumption of causation rather than as a device to assess degrees of fault, and is therefore unrelated to *Reliable*'s change in division of damages. In fact, the Pennsylvania rule should lead to more equitable results when coupled with comparative allocation of damages. The rule should still raise a presumption of fault against the party found guilty of a statutory violation, but the court may then apportion damages according to its finding of degrees of negligence. For instance, requiring the Pennsylvania offender to bear ten per cent of the damages would serve both to punish statutory violations and to avoid unfair distribution of damages.

Since parties will now be held only for their relative degrees of fault, the decision in *Reliable* should abrogate those rules which were developed to protect the slightly negligent party from bearing an inequitable share of the damages. Clearly, under this standard the major-minor principle and the doctrine of last clear chance have lost their utility. The former has always been regarded as a somewhat unwieldy escape valve to avoid unfair consequences of the divided damages rule.[45] The new *Reliable* system of comparative negligence should not lead to such untoward results and should therefore not require any equitable assistance. By recognizing the unfairness of requiring a vessel greatly at fault to pay the entire damages of a mutual fault collision, the *Reliable* opinion strongly implied that the major-minor principle is of no further use.[46]

The same considerations indicate that admiralty's last clear chance rule is no longer viable. Its use has always been "sparse and uncertain,"[47] and, like the major-minor principle, it was developed as an equitable device to require the party whose fault is gross to shoulder the entire burden of the collision and thus save the slightly negligent party from an equal share of liability. The comparative negligence rule of *Reliable* renders such accommodations unnecessary. In fact, English courts have not applied the last clear chance doctrine

45. *See, e.g.*, Judge Learned Hand's dissent in *National Bulk Carriers, Inc. v. United States*, 183 F.2d 405, 410 (2d Cir. 1950), in which he characterizes the major-minor doctrine as "a sop to Cerberus."

46. See quote in note 31, *supra*.

47. GILMORE & BLACK at 494 n.47. See also *Board of Comm'rs of the Port of New Orleans v. M/V Agelos Michael*, 390 F. Supp. 1012 (E.D. La. 1974), which questions the very existence of the doctrine of last clear chance in admiralty.

since that country adopted comparative negligence,[48] and American courts should have no further need for it.

Also unanswered is the effect *Reliable* will have on the more rarely invoked rules of inscrutable fault and inevitable accident. Inscrutable fault exists when the court finds a general atmosphere of fault, but is unable to attribute it to either party; it is akin to Justice Cardozo's "negligence in the air."[49] When a collision occurs despite the cautious navigation of both vessels, the court terms it an inevitable accident. The application of either doctrine simply means that neither party has discharged its burden of proof and neither party receives any compensation.[50] Since this amounts to a finding of no negligence, it is unlikely that *Reliable*'s comparative negligence will have any effect on either rule. Like the Pennsylvania rule, neither of these doctrines concerns the allocation of damages, and they should thus emerge unscathed from the decision in *Reliable*.[51]

A potentially serious problem is raised by the Court's decisional language requiring "property damage"[52] to be borne according to comparative negligence. Maritime collisions frequently result in personal injuries,[53] and sometimes in death.[54] Payments of settlements and judgments of such claims are commonly included in the total amount of damages to be divided, along with payments by the noncarrying vessel

48. Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964); MARITIME CONVENTIONS ACT, 1 & 2 Geo. 5, c. 57, § 1 (1911).

49. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 248 N.Y. 339 (1928).

50. The Jumna, 149 F. 171 (2d Cir. 1906). *See also* The Grace Girdler, 74 U.S. 196 (1868).

51. While English and American courts have always dismissed suits upon a finding of inscrutable fault, nineteenth century continental courts required a division of damages in such situations. The Worthington and Davis, 19 F. 836 (E.D. Mich. 1883). Arguably the *Reliable* mandate to divide damages equally when it is impossible to determine fairly the comparative degrees of fault should apply to cases of inscrutable fault, since there is a fine distinction between concurrent but unassessable negligence and a purported finding of negligence unattributable to the parties. It is unlikely, though, that the language of *Reliable* will be taken to grant recovery to both parties in factual circumstances which previously barred recovery by either.

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

53. *E.g.*, Wayerhaeuser Steamship Co. v. United States, 372, 597 (1963); Empire Seafoods, Inc. v. Anderson, 398 F.2d 204 (5th Cir. 1968); Petition of Oskar Tiedemann & Co., 367 F.2d 498 (3d Cir. 1966).

54. *E.g.*, Mendez v. States Marine Lines, Inc., 421 F.2d 851 (3d Cir. 1970); Carr v. Hermosa Amusement Corp., 137 F.2d 983 (9th Cir. 1943), *cert. denied* 321 U.S. 764 (1943).

to shippers for their cargo losses.[55] There is no apparent reason why liability for these damages should not be apportioned between the negligent vessels in the same ratio as liability for property damage. Admittedly, that issue was not before the Court in *Reliable*, since no personal injury claims were involved. The problem is thus one which inheres when the process of rulemaking is undertaken by the judiciary rather than by the legislature. Instead of establishing a comprehensive regulatory scheme, the Court adjudicates only those issues properly before it. Hopefully future decisions will establish that personal injury and death claims are to be borne by the offending vessels in the same proportion as property damage.

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RIGHT TO COUNSEL ON APPEAL AND REVIEW IN LOUISIANA

Federal jurisprudence has established minimal constitutional requirements for providing criminal defendants assistance of counsel in state appellate proceedings. In *Douglas v. California*,[1] the United States Supreme Court relied upon the due process and equal protection clauses of the fourteenth amendment in holding that an indigent defendant has a right to court-appointed counsel to assist in the first appeal of his conviction, stating that to hold otherwise would discriminate between moneyed and indigent defendants in the preparation of their appeals.[2] Distinguishing the need for counsel on first

55. *See* discussion and cases in note 25, *supra*. *Cf.* Hagan v. Department of H'ways, 368 F. Supp. 446 (M.D. La. 1973) (lost profits included in damages to be divided); Savoie v. Apache Towing Co., 282 F. Supp. 876 (E.D. La. 1968) (payments made for maintenance and cure included in total damages). Cargo interests should have little quarrel with the rule in *Reliable*, since it does not include the Brussels Convention's bar to recovery for the percentage of damages caused by the carrier's negligence. Cargo's right to recover its entire loss from the negligent noncarrier should therefore not be affected.

1. 372 U.S. 353 (1963).

2. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for