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Howard E. Davis Jr.

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DIVIDED DAMAGES—THE ALBATROSS OF THE MODERN MARINER

HOWARD E. DAVIS, Jr.

In 1854 the Supreme Court of the United States issued its historic opinion in *The Schooner Catharine v. Dickinson.*[1] The litigation concerned an off-shore collision between two schooners—the *Catharine* and the *San Luis*—in which there was a significant disparity in the amount of fault attributable to each ship. The Court, taking cognizance of the settled English rule[2] and the prevailing practice of dividing damages,[3] decided that the rule for collision cases in the United States would be to divide the damages equally between the culpable ships.[4] Justice Nelson, speaking for the majority, felt that such a departure from the common law principle[5] was necessary to provide just and equitable results in admiralty litigation as well as to insure the utmost vigilance and care in maritime navigation.[6]

1. 58 U.S. (17 How.) 170 (1854).
2. The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170, 177 (1854). The English rule was developed as we know it today—divided damages among two wrongdoing vessels regardless of degree of culpability—in the decision promulgated by the House of Lords in Hay v. Le Neve, 2 Shaw 395, 400 (H.L. 1824), *cited in* N.M. Paterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576, 585 (N.D. Ill. 1962), *rev'd*, 324 F.2d 254 (7th Cir. 1963).
3. *Id.* at 177.
4. *Id.* at 177-78.
5. W. PROSSER, THE LAW OF TORTS § 65 (4th ed. 1971). At common law a plaintiff was denied recovery from a negligent defendant because plaintiff's own action, as a contributing cause to the injury suffered, disabled his claim for recovery. *See also* Belden v. Chase, 150 U.S. 674, 691 (1893).
6. The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170, 177-78 (1854). The English admiralty had adopted the principle of equal division of damages in order to avoid the harsh realities of the common law doctrine of contributory negligence. Hay v. Le Neve, 2 Shaw 395, 400 (H.L. 1824). The rule itself was found in the early maritime codes of the twelfth century but its application was restricted to accidental or "unwitting" collisions. Donovan and Ray, *Mutual Fault—Half-Damages Rule—A Critical Analysis*, 41 INS. COUN. J. 359, 402 (1974). The Maritime Codes of the Mediterranean City States provided for the division of damages in cases of inscrutable fault or inevitable accident. Comment, *Divided Damages*, 6 N.Y.U.L. REV. 15, 23 (1928). With the exception of a few minor modifications the rule of divided damages has changed little in the succeeding years since Hay v. Le Neve, 2 Shaw 395 (H.L. 1824). As cultural descendants and recent members of the British Empire, it was not illogical or unlikely that the United States should adopt the policies of the world's then most influential maritime-mercantile power. Several federal district courts had adopted the rule soon after its promulgation in England. The Scioto, Fed. Cas. # 12,508 (D. Me. 1847); The Rival, Fed. Cas. # 11,867 (D. Mass. 1846).

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The divided damages rule holds that where both vessels involved in a collision are at fault then each party is responsible for one-half of the total damages regardless of its respective degree of blame.[7] Thus, the least injured party must pay to the more severely damaged a portion of his damages.[8] In essence the rule contains the same defect as the doctrine of contributory negligence—no provision is made for consideraton of the degree of fault of the parties.[9] The divided damages rule can have more somber consequences for a shipowner whose vessel is slightly at fault in a collision: he may be required to absorb not only his own loss but half the difference in the loss suffered by a grossly negligent vessel.[10] A shocking example of what could occur under the divided damages rule is illustrated in a hypothetical situation:

> A small pleasure craft is operating on Long Island Sound without a proper navigational light. It is involved in a collision with an oil tanker which is operating at an excessive speed, without a proper lookout and which executes an illegal navigational maneuver. The pleasure craft is sunk with a total loss of $10,000. The tanker, whose steering mechanism is damaged, is destroyed on a breakwater with a loss of $10,000,000.

The divided damages rule would apportion the losses equally despite the minimal negligence by the pleasure craft, and the pleasure craft would be obliged to contribute one-half the difference or $4,995,000.[11] The divided damages rule was well-intended,[12] but the results often have been less equitable than those which would have occurred at common law.

The Supreme Court was not totally unmindful of the consequences which might follow a literal interpretation and strict adherence to the

7. The Sapphire, 85 U.S. (18 Wall.) 51, 56 (1873).

8. G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY § 7-4 (1957).

9. *See* "The Atlas," 93 U.S. 302, 313 (1876).

10. Where the least negligent party suffers no loss his liability will be fixed at half the loss suffered by the more negligent party. The Sapphire, 85 U.S. (18 Wall.) 51, 67 (1873).

11. This figure is arrived at by deducting the lesser amount from the greater amount and dividing the difference. The Sapphire, 85 U.S. (18 Wall.) 51, 56 (1873). A convenient way to calculate is to hold each party liable for half the other's damage and strike a balance. G. GILMORE AND C. BLACK, LAW OF ADMIRALTY § 7-20 (1957). Thus in the hypothetical each party is liable for $5,005,000 requiring the pleasure craft to reimburse the tanker for $4,095,000.

12. Donovan and Ray, *Mutual Fault—Half-Damages Rule—A Critical Analysis*, 41 INS. COUN. J. 395, 402 (1974). Besides the equitable consideration of avoiding the harshness of comparative negligence, the House of Lords was motivated by a practical consideration in that they felt apportioning specific degrees of negligence would be an impossible task. Hay v. Le Neve, 2 Shaw 395, 400 (H.L. 1824).

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rule in *The Catharine v. Dickinson.*[13] The *Pennsylvania*[14] involved a collision between a sailing bark and a large steamer in dense fog off the coast of New Jersey. Both vessels were in normally heavily-trafficked shipping lanes. The steamer was traveling at an excessive speed and failed to stop on time to avoid collision. The only fault attributable to the bark, which was making only one knot, was that it sounded a bell instead of the statutorily required fog horn, even though evidence tended to show that the bell could be heard for a greater distance than the fog horn. The Court, realizing that holding the bark liable under such circumstances might contribute to an inequitable result, allowed the first exception to the divided damages rule—a ship technically or slightly at fault can avoid liability by proving that his breach or omission *in no way* contributed to the accident.[15] Mr. Justice Strong reemphasized the strictness of this burden, stating that the Court would not engage in speculation in a violator's behalf and that the standard of proof was a contribution in "no degree."[16] Thus the rule of *The Pennsylvania* did little to alleviate the disquieting implications of the divided damages rule.[17]

The *Martello*[18] illustrates the harshness of the divided damages rule and the onerous burden of the *Pennsylvania* exception. That case involved the sinking of the American barkentine *Freda A. Wiley* in a collision with the British steamship *Martello* in a dense fog. The *Martello* was found to be primarily responsible for traveling at an excessive speed under the prevailing conditions and acting too late to avoid the collision. The *Wiley*, however, was equipped with a tin fog horn that had to be blown by a crew member rather than the mechanical device required by statute. The Court held that every admiralty statutory violation creates a presumption that it was a contributing cause to the accident.[19] As a result, the *Wiley* was not able to satisfy the oppressive

13. 58 U.S. (17 How.) 170 (1854).
14. 86 U.S. (19 Wall.) 125 (1873).
15. *Id.* at 136. A ship seeking to avail itself of the "protection" of the *Pennsylvania* rule must sustain the burden "of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* at 136.
16. *Id.* at 137-38.
17. *See* Daly, *The Pennsylvania Rule: Charting a New Course for an Ancient Mariner*, 54 B.U.L. REV. 78, 88 (1974). The various rules of navigation were enacted to insure waterways free of collision and exact the strictest compliance. Admiralty courts habitually look with disfavor upon the claims of a technically negligent vessel that her omission could not have contributed in any way to the collision. Relatively few are successful in sustaining this burden.
18. 153 U.S. 64 (1894).
19. *Id.* at 74. Justice Strong in writing for the majority in *The Pennsylvania* em-

burden of exculpation required by *The Pennsylvania*,[20] a burden inconsistent with the flexible and equitable principles upon which admiralty law is based.[21]

Although the Supreme Court has remained implacable in enforcing the *Pennsylvania* rule, inroads have been made against its harshness in the lower federal courts. These advances have not been attained by changing the basic tenets of the rule. Rather, it seems that some courts have to some extent relaxed the rigid requirements to successfully sustain the "no possible contribution test" of *The Pennsylvania*. For example, the Court of Appeals for the First Circuit in *Seaboard Tug & Barge, Inc. v. Rederi*,[22] considered a case involving a collision between the motor ship *Lia* and a tug which was on the wrong side of a ship channel. The tug company argued that the district court had erred in finding that the *Lia* had satisfied her burden of proof under the *Pennsylvania* rule even after finding that the *Lia* had not adhered to statutory requirements.[23] The First Circuit preferred to utilize a standard of "reasonable probabilities,"[24] finding that the accident would have taken place regardless of whether the *Lia* had followed the statutory mandate.[25]

In *Permanente Steamship Corp v. The Colorado*[26] the district court for the Northern District of California seemed not so much to alter the stringent requirements of the *Pennsylvania* rule as to adopt a more liberal attitude in determining what factual components successfully meet the "no possible contribution" burden. Although both ships involved

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phasized that this presumption of contribution will arise every time a ship is in statutory violation of a rule of navigation. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873).

20. The Martello, 153 U.S. 64, 77 (1893).

21. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 17 (1827); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 54 (1826). Both these cases are illustrative of the necessary flexibility and discretion inherent in the admiralty courts to facilitate the rendering of just and equitable decisions.

22. 213 F.2d 772 (1st Cir. 1954).

23. Seaboard Tug & Barge, Inc. v. The Lia, 113 F. Supp. 793, 796 (D. Mass. 1953), *aff'd sub nom.*, Seaboard Tug & Barge, Inc. v. Rederi, 213 F.2d 772, 774 (1st Cir. 1954).

24. Seaboard Tug & Barge, Inc. v. Rederi, 213 F.2d 772, 775 (1st Cir. 1954). The First Circuit Court of Appeals felt that the rule of the *Pennsylvania* was not to be so inflexible and rigid as to impose upon a vessel guilty of statutory fault "the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote." Rather the Court of Appeals felt its determination could be based on whether the violation could reasonably be found a contributing cause to the collision. *Id.* at 775.

25. *Id.* at 776.

26. 129 F. Supp. 65 (N.D. Cal. 1955), *vacated sub nom.*, State S.S. Co. v. Permanente S.S. Corp., 231 F. Supp. 82 (9th Cir. 1956).

failed to sound their whistles as required by statute, the district court felt that the obvious cause of the accident was the *Colorado's* unlawful crossing of the *Silverbow's* bow. The Court, persuaded more by justice than *stare decisis,* ruled that the failure to sound whistles had no connection with the collision.[27] This type of a "lip-service" decision may reach an equitable decision in a single case but does not provide the stability on which future litigants may rely. The subsequent reversal by the Court of Appeals for the Ninth Circuit is demonstrative of the tenuous value of such a decision. This is further evidenced by the ruling of the Second Circuit in the *Diesel Tanker F.A. Verdon, Inc., v. Stakeboat No. 2.*[28] The tanker *F.A. Verdon* was under way in New York Harbor when she collided with the stakeboat. The lower court awarded full damages to the stakeboat after determining that the tanker had been traveling at an excessive speed, her lightened condition had caused her prow to raise, she had no lookout on her bow and, though her radar was on, her captain did not make use of it. There was also conflicting testimony as to whether the stakeboat had displayed a white lantern which was required by statute.[29] The trial judge felt that no determination as to the existence of the light could be made.[30] In reversing the decision the Second Circuit stated that the stakeboat must prove that it was impossible for her conduct to have contributed to the accident.[31] Having failed to prove the existence of the light, she failed to sustain her burden and was required to bear half of the total damages,[32] even though there was no determinative evidence that the stakeboat had not complied with statute. The *Pennsylvania* rule, however, burdens a party, whose sins are admittedly "venial,"[33] with the

27. *See* Judge Mathes' opinion in reversing the district court for the Northern District of California in State S.S. Co. v. Permanente S.S. Corp., 231 F.2d 82 (9th Cir. 1956).

28. 340 F.2d 465 (2d Cir. 1965). The Second Circuit has taken a particularly liberal stance in its admiralty decisions. *See* Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618 (2d Cir. 1954); National Bulk Carriers, Inc. v. United States, 183 F.2d 405 (2d Cir.), *cert. denied sub nom.,* Gulf Oil Corp. v. The John A. Brown, 337 U.S. 919 (1949); The City of Chattanooga, 79 F.2d 23 (2d Cir. 1935).

29. 33 U.S.C. § 180 (1970), *as amended,* 33 U.S.C. § 180(a) (Supp. 1975):

> A vessel under one hundred and fifty feet in length when at anchor shall carry forward where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear uniform, and unbroken light visible all around the horizon at a distance of one mile . . . .

30. Diesel Tanker F.A. Verdon, Inc. v. Stakeboat No. 2, 340 F.2d 465, 467 (2d Cir. 1965).

31. *Id.* at 468.

32. *Id.* at 468-69.

33. Diesel Tanker F.A. Verdon, Inc. v. Stakeboat No. 2, 340 F.2d 465, 467 (2d Cir. 1965).

requirement of affirmatively proving compliance with the statutory provision.[34]

A more structured attempt to avoid the harshness of the divided damages rule occurred with the evolution of the "major-minor fault" doctrine.[35] In selected instances, courts have closed their eyes to the transgressions of the comparatively innocent party and resolved all doubts in his favor.[36] There are no reliable guidelines for the time and circumstances in which courts should utilize this mitigating doctrine; therefore, its value as an equitable tool is restricted.[37]

The genesis of the "major-minor fault" doctrine was the case of *The Great Republic*.[38] The *Great Republic* collided with the *Cleona* at a point on the Mississippi River half a mile wide. The *Cleona* failed to signal at the required time. *The Great Republic*, a larger and much faster ship, was traveling at an excessive speed; was attempting to pass at a dangerous point without giving the proper signal; was totally mismanaged by her master and had the last clear chance to avoid the imminent peril. Under the earlier decisions of *The Catharine*[39] and *The Pennsylvania*,[40] the *Cleona* would have been liable though the activities of the *Great Republic* made her a relatively minor contributor to the collision. The majority felt that though the *Cleona* was at fault, her fault bore "so little proportion to the many faults of the *Republic*, that we do not think, under the circumstances, the *Cleona* should share the consequences of this collision with the *Republic*."[41] If the "major-minor fault" doctrine were applied with some degree of uniformity, this would go far in quieting the many criticisms of the divided-damages rule. Unfortunately, this has not been the case. Just two years after *The Great Republic*, the Supreme Court held that once it was established that both parties were at fault, either by proof or presumption, an inquiry into the amount of damages was immaterial, since the damages must be equally divided: application of the divided damages rule was mandatory not discretionary.[42] Thus, without distinguishing *The*

34. *Id.* at 468-69.

35. The foundation for this doctrine was established in The Great Republic, 90 U.S. (23 Wall.) 20 (1874).

36. The Victory & The Plymothian, 268 U.S. 410, 423 (1897); The Oregon, 158 U.S. 186 (1894).

37. *See* G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY § 7-4 (1957).

38. 90 U.S. (23 Wall.) 20 (1874).

39. 58 U.S. (17 How.) 170 (1854).

40. 86 U.S. (19 Wall.) 125 (1873).

41. The Great Republic, 90 U.S. (23 Wall.) 20, 35 (1874).

42. The Atlas, 93 U.S. 302, 313 (1876).

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Great Republic, the Supreme Court thrust the "major-minor fault" doctrine into legal limbo.

Some 20 years after *The Great Republic*,[43] the Court resurrected the "major-minor fault" doctrine.[44] A collision occurred off the New Jersey coast between the British barque *Helen* and the American steamship *City of New York*. The gross negligence of the steamship was obvious. She was traveling at an excessive speed and failed to stop until she had located a known danger in fog. The fault of the *Helen* was merely a change in course just prior to the collision. The Supreme Court upheld the Circuit Court for the Southern District of New York holding the steamship alone responsible.[45]

The principles of the "major-minor fault" doctrine seem to conflict with the precepts of the *Pennsylvania* rule. The both have, on occasion, given relief to a ship which would ordinarily have been victimized by the harshness of the divided damages rule,[46] but their main contribution to the forum of admiralty jurisprudence has been one of confusion.

Some guidelines have been established by the various federal district courts. The Third Circuit has held that *The Pennsylvania* rule is inapplicable when the comparatively blameless party is guilty only of a statutory breach.[47] The Second Circuit has held the "major-minor fault" doctrine inappropriate in like circumstances.[48] The only apparent certainty surrounding these two modifications of the divided damages rule is that neither of them are appropriate when the technical or minimal fault involves the breach of a statute. With the abundance of regulatory controls in the field of navigation,[49] it is hard to imagine a situation when either rule can be invoked with any degree of certainty.

A third situation which allows avoidance of the liability imposed by the divided damages rule occurs in those circumstances characterized

43. 90 U.S. (23 Wall.) 20 (1874).
44. The City of New York, 147 U.S. 72 (1893).
45. The City of New York, 35 F. 604, 612 (C.C.S.D.N.Y. 1888), *aff'd*, 147 U.S. 72, 90 (1893).
46. *See* The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873); The Great Republic, 90 U.S. (23 Wall.) 20 (1874).
47. Tidewater Oil Co. v. The Syosset, 203 F.2d 264, 267 (3d Cir. 1953).
48. Diesel Tanker F.A. Verdon, Inc. v. Stakeboat No. 2, 340 F.2d 465, 468 (2d Cir. 1965).
49. For instance, rules governing navigation of harbors, rivers and inland waters are specified in 33 U.S.C. §§ 151-232 (1970). Rules for navigation on the Great Lakes are set out in 33 U.S.C. §§ 241-295 (1970) and their counterpart for the rivers emptying into the Gulf of Mexico are found at 33 U.S.C. §§ 301-356 (1970).

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as *in extremis.* This doctrine relieves a master from adhering to the rules of the maritime road in order to avoid imminent peril.[50] To qualify for such an exemption a ship must be placed in a situation where, through no fault of her own, collision is inevitable.[51] In addition, the peril must be such as to have arisen so suddenly that the actions of the master were reasonable evasive measures.[52] The Supreme Court has left no doubt that such exceptions to the general rules of navigation are acceptable only where failure to do so will surely result in a collision.[53] The regulations are more than advisory and require strict compliance;[54] discretion on the part of the master is seldom tolerated.[55] The *in extremis* doctrine is more clearly defined than either the *Pennsylvania* rule or the "major-minor fault" concept, but its worth in mitigating the grave inequities of the divided damages rule is dubious. Although the court will not subject the master to the retroactive test of whether his action was the most judicious alternative available,[56] once the master varies from navigational directives, he acquires a burden of proving no fault on his part up to the time of his statutory departure.[57]

There has been a continuing agitation for change on both the judicial and legislative level.[58] The federal district court for the Western District of Pennsylvania, for example, has stated that there is no fixed rule for the division of damages, but that damages could be apportioned according to the particular facts of each case.[59] The validity of this bold nonconformity was not tested, however, since the court was unable to ascertain the respective degrees of fault and consequently divided the damages equally.[60] The Court of Appeals for the Third Circuit tem-

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50. Belden v. Chase, 150 U.S. 674, 698 (1893).
51. The Johnson, 76 U.S. (9 Wall.) 146, 153 (1869).
52. *See* Tide Water Associated Oil Co. v. The Syosset, 203 F.2d 264, 268 (3d Cir. 1953).
53. The Albert Dumois, 177 U.S. 240, 249-50 (1900).
54. Belden v. Chase, 150 U.S. 674. 698 (1893).
55. *Id.* at 698.
56. Wilson v. Pacific Mail S.S. Co., 276 U.S. 454, 462 (1927).
57. The Johnson, 76 U.S. (9 Wall.) 146, 153 (1869).
58. The federal district court for the Southern District of Alabama has likewise felt disenchantment with the equal division rule but, like so many other courts, has felt constrained to apply this archaic rule. St. Louis S.F. Ry. v. M/VD Mark, 243 F. Supp. 689. 693 (S.D. Ala. 1965). In addition, Tank Barge Hygrade v. The Gatco New Jersey, 250 F.2d 485 (3d Cir. 1957); Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618 (2d Cir. 1954); and The City of Chattanooga, 79 F.2d 23 (2d Cir. 1935) all decry the inequities of the divided damages rule.

The American Bar Association has also advocated congressional legislation abandoning the divided damages rule. 48 A.B.A.J. 366 (1962).

59. Hudson v. Pittsburgh Plate Glass Co., 263 F. 730, 733 (W.D. Pa. 1911).
60. *Id.* at 733.

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porarily seized the initiative in this area when confronted with *The Margaret.*[61] The trial court found that both the *Margaret* and the *Merchant* were negligent in causing the collision and applied the divided damages rule.[62] The circuit court, however, attributed 75 percent of the cause of the collision to the *Merchant* and 25 percent to the *Margaret*[63] and entered an appropriately apportioned decree for damages.[64] On rehearing, however, the court conformed its holding to the rule established by the Supreme Court.[65] In yielding to these "authoritative pronouncements"[66] the Third Circuit proclaimed that it had the power to order the apportionment, but that it would nevertheless follow the equal division rule.[67] The Second Circuit, on the other hand, has expressed also its disenchantment with the divided damages rule but has felt powerless to adhere to any other.[68]

Learned Hand objected to the inequities of the divided damages rule and also to the confusion resulting from attempts to avoid its harshness.[69] In *Oriental Trading & Transportation Co. v. Gulf Oil Corp.*,[70] Judge Hand took an enlightened position, referring to the "major-minor fault" concept as an "unconscious compensation for the resistance of the bar and the underwriters to the apportionment of liability" and lamented the fact that admiralty collision law was still shackled by such a "vestigial relic" as the equal damages rule.[71] Hand vigorously dissented in *National Bulk Carriers, Inc. v. United States*,[72] on the basis that an

61. 30 F.2d 923 (3d Cir. 1929).
62. The Margaret, 22 F. Supp. 709, 712 (E.D. Pa. 1927), *aff'd*, 30 F.2d 923 (3d Cir. 1929).
63. 30 F.2d 923, 928 (3d Cir. 1929).
64. *Id.* at 928.
65. *Id.* at 928.
66. *Id.* at 928.
67. *Id.* at 928.
68. The City of Chattanooga, 79 F.2d 23, 24 (2d Cir. 1935). The Steamer *Chattanooga* collided with a tug anchored in a fog. Technically, the tug should not have been there. The negligence of the steamer was so gross that the court felt "that upon any just allocation she ought to bear substantially all the loss." *Id.* at 24. Despite its outraged sense of justice the court felt it had "no alternative but to decree half damages." *Id.* at 24.
69. Oriental Trading & Transp. Co. v. Gulf Oil Corp., 173 F.2d 108, 111 (2d Cir.), *cert. denied*, 337 U.S. 919 (1949).
70. *Id.* at 108.
71. *Id.* at 111.
72. 183 F.2d 405 (2d Cir.), *cert. denied*, 340 U.S. 865 (1950). The facts of the case are illustrative of the gross inequities of the equal damages rule. A collision occurred off the coast of New York between the *Rutgers* and the *Nashbulk*. Though conditions were ideal, the *Rutgers*, operating without a lookout, did not see the *Nashbulk* until just prior to the collision. The only fault attributable to the *Nashbulk* was the failure to give signal prior to executing a right turn. Despite the *Rutgers*' gross fault,

equal division of damages often would be unfair and that such inequities would not be possible "but for our obstinate cleaving to an ancient rule which has been abrogated by nearly all civilized nations."[73]

The Southern District of New York was exposed to the divided damages rule in *In re Adam's Petition.*[74] The court found both ships at fault and—specifically rejecting an equal apportionment—apportioned the damages on an 80 percent/20 percent basis.[75] On rehearing the court gave an open and well-reasoned discussion of all the facets and problems of the divided damages rule.[76] It acknowledged that there was no precise and totally accurate measure of determining fault but felt that the want of precise measurement should not cause denial of the "justice of apportionment."[77] The court also took cognizance of the wide-apread abandonment of its common law counterpart—contributory negligence.[78] It was noted that since admiralty cases are traditionally heard before a judge alone, fear of capricious verdicts provided even less justification for the retention of the divided damages rule.[79] Finally, the court took cognizance of the "judicially formulated maritime rule of proportional damages in personal injury cases,"[80] suggesting that the 50-year experiment of most major maritime powers with the comparative damages rule had not led to international chaos.[81] In

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the *Nashbulk* was burdened by the rule of the *Pennsylvania.* The court, however, declared that the *Nashbulk* had satisfied this burden. It reasoned that the signal was required to give notice and since the *Rutgers* was navigating as one who would not see, failure to give the signal was not a contributory cause. Hand rejected this most artifical and temporary easing of the *Pennsylvania* rule in order to avoid the stern consequences of the divided damages doctrine. *Id.* at 409-10.

73. *Id.* at 410. The Third Circuit has also lamented its powerless position in this regard. Tide Water Associated Oil Co. v. The Syosset, 203 F.2d 264, 269 (3d Cir. 1953).

74. 125 F. Supp. 110 (S.D.N.Y. 1954), *aff'd,* 237 F.2d 884 (2d Cir. 1956), *cert. denied,* 352 U.S. 971 (1957).

75. *Id.* at 112-13.

76. *Id.* at 112.

77. *Id.* at 113.

78. *Id.* at 113.

79. *Id.* at 113.

80. *Id.* at 113.

81. *Id.* at 114. This experiment was the international ratification of the Brussels International Convention of 1910. Article 4 of the Convention provides that:

> If two or more vessels are in fault the liability of each vessel shall be in proportion to the degrees 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 liabiblity shall be apportioned equally.

6 E. BENEDICT, BENEDICT ON ADMIRALTY 39 (7th ed. 1969). Most major maritime powers are now signatories and adherents of the convention. For example, Argentina signed in 1922, Australia in 1930, Belgium in 1913, Brazil in 1913, Canada in 1914, France in 1913, Great Britain in 1913, Japan in 1914, and the U.S.S.R. in 1936. For a com-

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In re Adam's Petition,[82] however, the Southern District of New York indicated that the failure of the Second Circuit to adopt a comparative apportionment rule and the unwillingness of any of the litigants to question the divided damages rule left it no choice but to decree an equal division.[83] Although the court presented a strong and forceful case for the abandonment of the damages rule, it reluctantly concluded that even though apportioned damages should be the rule, there was no choice but to follow the rule of divided damages.[84]

One of the departures from equal apportionment discussed in *Adam's Petition* was the apportionment of damages in maritime personal injury cases.[85] Such a situation was presented to the Court of Appeals for the Second Circuit in *Ahlgren v. Red Star Towing & Transport Co.*[86] The case involved a suit by a scow captain against a towing company for injuries received when the tug, without warning, started into motion and crushed his leg. The captain's leg was hanging over the edge of the scow in violation of maritime law. The court apportioned the damages according to the degree of fault, holding the equal damages rule inapplicable in a personal injury suit based on maritime tort.[87] The availability of apportionment in personal injury suits has also been recognized by the Third Circuit[88] in an opinion bemoaning the court's inability to cure the injustices of the divided damages rule.[89]

A major foundation for the divided damages rule was that it would be impossible for courts to apportion damages accurately.[90] Yet the judiciary has not found the task of apportionment overburdensome in personal injury cases. Congress has legislated apportionment for railroad employees or their representatives who bring suit against the carrier for personal injury or wrongful death.[91] The Jones Act provides similar remedies for seamen injured in the course of their employ-

plete listing of signatory nations see 6 E. BENEDICT, BENEDICT ON ADMIRALTY 38-39 (7th ed. 1969).

82. 125 F. Supp. 110 (S.D.N.Y. 1954), *aff'd*, 237 F.2d 884 (2d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957).

83. *Id.* at 115.

84. *Id.* at 115.

85. *Id.* at 113.

86. 214 F.2d 618 (2d Cir. 1954).

87. *Id.* at 620-21.

88. Tank Barge Hygrade v. The Gatco New Jersey, 250 F.2d 485, 487 (3d Cir. 1957).

89. *Id.* at 488.

90. "The Atlas," 93 U.S. 302, 314 (1876). The difficulty of apportioning damages influenced the House of Lords when they promulgated divided damages as we know it in the Western World. Hay v. Le Neve, 2 Shaw 395, 400 (H.L. 1823).

91. 45 U.S.C. § 53 (1970). (Federal Employees Liability Act).

ment.[92] Additionally, comparative negligence has become the law in over one-third of the states and the trend is gaining momentum.[93] In applying the comparative negligence concept the court or jury is called on to make an apportionment of negligence and award damages accordingly. There is no precise formula for arriving at this determination other than a decision conforming to the facts and evidence adduced at each trial. Under the United States Constitution the federal judiciary was specifically granted power over admiralty matters,[94] though this grant was subsequently modified by the savings clause of the Judiciary Act of 1789.[95] This same act provided for the admiralty court to sit without a jury[96] and this practice has generally continued, although a jury trial may be granted in certain instances on the demand of either party.[97] For over 100 years the federal courts have gained expertise in handling admiralty matters. The field has been pre-empted by statutory regulations which provide certain standards in which maritime conduct is to be evaluated.[98] It seems ludicrous to maintain that federal district court judges are unable to equitably apportion damages in situations similar to those in which juries have performed this task for years.

A case which created a tempest over the issue of divided damages was decided by the federal district court for the Northern District of Illinois in *N.M. Patterson & Sons, Ltd. v. City of Chicago*.[99] A steamship owned by the libelant collided with a drawbridge owned and operated by the city of Chicago. The ship was negligent in failing to adhere to a municipally established speed limit and in entrusting command to an inexperienced master. The city was negligent in failing to open the drawbridge and in failing to check the electrical mechanism of the bridge to ensure it was in a state of good repair. The court's

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92. 46 U.S.C. § 688 (1970).

93. *See, e.g.*, ARK. STAT. ANN. § 27-1730.1 (1962); MISS. CODE ANN. § 11-7-15 (1972); NEV. REV. STAT. ANN. § 25-1151 (1944); TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1975); WIS. STAT. ANN. § 895.045 (Supp. 1974-75). For an extensive listing of comparative negligence states see Comment, *Comparative Negligence in Texas*, 11 HOUS. L. REV. 101, 103 n.19 (1973).

94. U.S. CONST. art. III, § 2; *see* D. ROBERTSON, ADMIRALTY AND FEDERALISM 1 (1970) for a detailed discussion of this specific reservation of power.

95. 1 Stat. 77 (1789). 28 U.S.C. § 1333 (1970) now grants original and exclusive jurisdiction to the federal district courts in in rem admiralty actions. In personam actions may be brought in federal district or state courts.

96. 1 Stat. 77 (1789).

97. 28 U.S.C. § 1873 (1970).

98. *See* statutes cited note 49 *supra*.

99. 209 F. Supp. 576 (N.D. Ill. 1962), *rev'd*, 324 F.2d 254 (7th Cir. 1963).

opinion was that the decision in *The Catharine*[100] ordering an equal division of damages was limited to a situation where the court is unable to determine the respective degrees of fault.[101] In *Patterson,* since a greater degree of the blame could be attributed to the vessel, the court felt that it was not bound to divide the damages equally:[102] admiralty jurisdiction carried with it a degree of flexibility to reach just verdicts where the various degrees of fault were discernible.[103] The district court stated that the Supreme Court had never ordered a division of damages in any case "where the findings were specific that the respective degrees of contributing fault were unequal . . . ."[104]

The Court of Appeals for the Seventh Circuit felt that the district court had misconceived the impact of *The Catharine* decision:[105] that divided damages was to be applied on a finding of "mutual fault" and not just "equal fault."[106] The Seventh Circuit felt that any changes in the rule ought to come from Congress—despite the fact that the rule had evolved from common law originally. The district court's efforts were not in vain, however. They did influence the federal district court for the Northern District of Caliofrnia which refused to subscribe to the divided damages rule,[107] proclaiming that trial courts are free to apportion damages unequally where such inequality can be specifically determined.

If the inequities of the divided damages rule have not been apparent to American jurists, this has not been the case in Great Britain, from whom we inherited the rule, and most other major maritime powers. In 1910 the major maritime powers met at the Brussels Collision Liability Convention to reform and add uniformity to maritime collision law.[108] Article 4 of the Convention provided for the apportionment of damages on the basis of degree of fault.[109] Among the subscribers to the provisions of the Convention are Great Britain, Canada, Mexico, Argentina, Australia, Belgium, Brazil, Denmark, Egypt, France, Germany, Greece, India, Italy, Japan, The Netherlands, New Zealand, Nor-

100. 58 U.S. (17 How.) 170 (1854).
101. N.M. Paterson & Sons, Ltd. v. City of Chicago, 209 F. Supp. 576, 583 (N.D. Ill. 1962), *rev'd,* 324 F.2d 254 (7th Cir. 1963).
102. *Id.* at 583.
103. *Id.* at 586.
104. *Id.* at 591.
105. N.M. Paterson & Sons, Ltd. v. City of Chicago, 324 F.2d 254 (7th Cir. 1963).
106. *Id.* at 257.
107. McKeel v. Schroeder, 215 F. Supp. 756, 759 (N.D. Cal. 1963).
108. 6 E. BENEDICT, BENEDICT ON ADMIRALTY 37-38 (7th ed. 1969).
109. *Id.* at 39.

way, Poland, Portugal, Rumania, Spain, Sweden, Russia, Uruguay and Yugoslavia.[110] The result is that the United States stands alone, among major maritime powers, clinging to the outdated and archaic rule of divided damages.[111] The history of the Brussels Convention in this country is a classic example of legislative inactivity and bureaucratic impasse. The United States was represented at the Convention by a delegation whose official report was submitted to the State Department in February 1911.[112] Nothing substantial was done about the report until April 1937, when President Roosevelt sent the Convention to the Senate for its advice and consent. A subcommittee of the Senate Foreign Relations Committee reported the Convention out of committee with several proposed reservations in 1939.[113] The Convention went unattended on the Senate agenda for the next 8 years; finally, in 1947, President Truman withdrew it from consideration.[114]

One reason for the manner in which the Convention languished and died was the organized and effective opposition of American cargo interest.[115] According to the Convention provisions, an innocent cargo owner may recover from each vessel involved in the collision only to the extent that vessel is deemed negligent.[116] United States case law permits the cargo owner to recover his full loss from either or both parties.[117] Since the Harter Act excludes recovery against the shipowner in certain instances[118] the cargo owner will often seek redress against the non-carrying vessel. This would not be permissible under Article 4 of the Convention. A favorite ploy of the cargo interests in assailing the Convention was to accuse it of being an anti-American tool of foreign shipowners and economic interests,[119] and the fact that two world wars and a period of isolationism occurred during the period in which

110. *Id.* at 38-39.

111. Tank Barge Hygrade v. The Gatco New Jersey, 250 F.2d 485, 488 (3d Cir. 1957).

112. 6 E. BENEDICT, BENEDICT ON ADMIRALTY 38 (7th ed. 1969).

113. Executive Report No. 4, S., 76th Cong., 1st Sess. (1939).

114. 6 E. BENEDICT, BENEDICT ON ADMIRALTY 38 (7th ed. 1969).

115. 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, 881 (1955).

116. Brussels Liability Convention art. 4 (1910) as reported in 6 E. BENEDICT, BENEDICT ON ADMIRALTY 39 (7th ed. 1969) using translation furnished to and utilized by the United States Senate from 1937-1939.

117. The "Alabama" and the "Game-cock," 92 U.S. 695, 697-98 (1875).

118. 46 U.S.C. §§ 190-196 (1970).

119. Comment, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement in Collision Liability, Liens and Mortgages*, 64 YALE L.J. 878, 884 (1955).

the Convention was under consideration lent credence to this type of argument. Even the American Bar Association refused in 1929 to support reform in the field of admiralty collision law.[120] Subsequently the A.B.A.'s position did change in 1962 when it went on record supportint House Bill 7911 which was based on the Brussels Collision Liability Convention of 1910.[121] Congressional interest waned, however, and soon after its introduction the bill died in the House. Its counterpart in the Senate—Bill 2313—was postponed indefinitely because of the prolonged debate it was likely to engender.[122]

The United States now stands as the sole major maritime power to adhere to the divided damages rule.[123] A change is needed to harmonize the practice in the United States with that in the rest of the maritime commercial world. Until such change occurs, admiralty jurisdiction will be afflicted with the abuse of forum shopping as libelants search for a forum which will grant maximum verdicts or protection. Such a result cannot contribute anything but confusion to a field which, because of its international character, requires uniformity.

Even notwithstanding the international implications adherent to the divided damages rule, the history of the rule in this country has been one of unfair judgments and shocking verdicts.[124] Under the rule a grossly negligent vessel is almost sure to be able to avoid at least half the consequences of her actions unless the other party can show flawless conduct on its part. With the widespread and detailed codification of maritime law[125] even the most diligent mariner may inadvertently find himself in violation of a statute and have the burden of the divided damages rule thrust upon him. Such a law not only does

120. 54 A.B.A. REP. 278 (1969). After so many of the great legal minds had deplored this now singularly American formula, the resolution of the Bar in 1929 is most perplexing:

> Be it resolved, By this Association, that as the present maritime law of the United States relative to a division of damages in collision cases has *operated satisfactorily for a long number of years,* no change in such law should be approved by this Association.

Id. at 284 (emphasis added).

121. 48 A.B.A.J. 366 (1962). H.R. Bill 7911 would have abandoned the divided damages rule in favor of an apportionment theory. It received no further consideration after its introduction and was subsequently reintroduced in early 1963 as H.R. 109 but nothing came of it.

122. S. 2313, 87th Cong., 1st Sess. (1962).

123. Anglo-American Grain Co. v. The S/T Mina D'Amico, 169 F. Supp. 908, 910 (E.D. Va. 1959).

124. *See* The Martello, 153 U.S. 64 (1894); The City of Chattanooga, 79 F.2d 23 (2d Cir. 1935) for examples of shocking results under the divided damages rule.

125. *See* statutes cited note 49 *supra*.

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not promote careful navigation, but it also cannot help but engender a certain disrespect for the law among those cognizant of admiralty matters.

The chances of any reform in the divided damages rule through legislative action is remote. Although most Americans would be appalled by the verdicts which often result from an application of the divided damages rule, few are aware of the implications of this aspect of admiralty law. Yet in an era where America imports much of her energy fuel and when her imports far exceed her exports, admiralty law affects every citizen and consumer. Nonetheless, a Congress beset with the problems of inflation, recession, energy independence, and tax reform is not likely to devote much attention to admiralty reform even though the situation has and still demands attention. The times and the bulkiness of the legislative process weigh against any reasonable expectation of reform by legislative fiat.

The alternative for reform lies with the judiciary. The Supreme Court could remedy the problem of the divided damages merely by changing its 120-year old position.[126] The Court created a law which fit the contingencies of 1850 maritime activities, and there is no reason why it could not now revise the law to conform to present realities. As early as 1827 the Court proclaimed that "the award of damages always rests in the sound discretion of the Court, *under all circumstances*.[127]

The situation regarding the United States' adherence to the divided damages rule is at once both comic and pathetic. The lower federal courts object to the inequities of the rule but confess their inability to

126. The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1854). The impetus for change probably will not come from the lower federal courts. To date judicial dissatisfaction with the rule has not reached that "degree of articulateness" which usually presages change. G. GILMORE & C. BLACK, LAW OF ADMIRALTY § 7-20 (1957). The Supreme Court itself has reacted to the inequities of the divided damages rule with its development of the rule of the Pennsylvania and the "major-minor fault" concept. The rule was adopted at a time when it was natural for a fledgling judiciary to look to the established law of Great Britain for guidance. Great Britain has abandoned the divided damages concept. 6 E. BENEDICT, BENEDICT ON ADMIRALTY 37 (1957). It would take a great deal of care and application to properly apportion damages in admiralty cases and the lack of precise measurements would undoubtedly lead to some inaccurate judgments. However, this should not be a deterrent when it is considered that the present system divides the damages in a dogmatic and inequitable manner.

127. The Palmyra, 25 U.S. (12 Wheat.) 1, 17 (1827) (emphasis added). In 1890 the Court held that contributory negligence was not a bar to recovery for personal injury in an admiralty suit. The Max Morris, 137 U.S. 1, 14 (1890). *The Max Morris* is most significant, however, for what it did not expressly say. The Court did not rule that damages must be divided. *Id.* at 15.

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do anything to change it.[128] This situation is even more perplexing considering that it was the lower federal courts which originally adopted the divided damages rule.[129] If divided damages had become the law by legislative enactment then there would be validity to the claims of the lower federal bench that Congressional action is needed to repeal it. Since the rule comes from common law, however, it is subject to judicial revocation.

Until recently the Supreme Court showed no disposition to act. But in 1972 the Court considered the case of *Union Oil Co. v. The San Jacinto*[130] and reversed a decision awarding divided damages in a collision case. The Court found the cause of the collision attributable solely to the tug *San Jacinto.* The majority felt that since only one ship was at fault there was "no occasion to consider how damages should be apportioned were both vessels at fault."[131] The inference was clear that the Court was now ready to consider abandonment of the divided damages rule. Amazingly, nearly 2 years passed before this invitation was accepted. In *Reliable Transfer Co. v. United States*[132] the federal district court had found the *Mary A. Whalen,* Reliable's tanker, guilty of 75 percent of the negligence and the United States Coast Guard 25 percent responsible for the accident which resulted in the *Mary Whalen* becoming stranded on a sand bar.[133] The circuit court equated stranding cases with collision and specifically refused to abandon the divided damages rule.[134] Having granted certiorari, the Supreme Court has an opportunity to move America into the mainstream of international maritime law and to redress the harsh inequities of 210 years of divided damages. By adopting a comparative apportionment of dam-

128. *See, e.g.,* N.M. Paterson & Sons, Ltd. v. City of Chicago, 324 F.2d 254, 257-58 (7th Cir. 1963); Tank Barge Hygrade v. The Gatco New Jersey, 250 F.2d 485, 488 (3d Cir. 1957); Tide Water Associated Oil Co. v. The Syosset, 203 F.2d 264, 268-69 (3d Cir. 1952).

129. The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170, 177 (1854). In the landmark decision Justice Nelson remarked that divided damages was already the law in the district and circuit courts. *Id.* at 177. For examples of *pre-Catharine* cases which applied divided damages *see* The John Henry, 13 Fed. Cas. 684 (D. Me. 1860), The Scioto, 11 Fed. Cas. 774 (D. Me. 1847).

130. 409 U.S. 140 (1972).

131. *Id.* at 147.

132. 53 F.R.D. 24 (E.D.N.Y. 1971), *aff'd,* 497 F.2d 1036 (2d Cir.), *cert. granted,* — U.S. —, 95 S. Ct. 491, — L. Ed. 2d — (1974).

133. Reliable Transfer Co. v. United States, 497 F.2d 1036, 1037 (2d Cir.), *cert. granted,* — U.S. —, 95 S. Ct. 491, — L. Ed. 2d — (1974). The memorandum opinion of the district court gives no facts surrounding its decision but deals merely with a question of discovery extraneous to this topic.

134. *Id.* at 1038.

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ages the Court can insure safer navigation on United States waters by making all mariners fully responsible for their own actions. But the Supreme Court must seize this opportunity and clearly change the law. Timidity and equivocation would indefinitely still the voices on the lower bench and in admiralty practice which have, in a spirit of equity and diligence to duty, advocated change.

Note: After this comment went to press, the Supreme Court abrogated the divided damages rule in a well written opinion which concurs with the reasoning expressed herein. United States v. Reliable Transfer, 43 U.S.L.W. 4610 (U.S. May 19, 1975).—Ed.