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Admiralty--Divided Damages Rules Replaced by Proportionate Fault in Maritime Collision or Standing Cases

Margaret Leslie Cooper

NOTES

ADMIRALTY—DIVIDED DAMAGES RULE REPLACED BY PROPORTIONATE FAULT IN MARITIME COLLISION OR STRANDING CASES

In *United States v. Reliable Transfer Co.*,[1] the Supreme Court of the United States was presented with the issue of the continued validity of the rule of equally divided damages in admiralty.[2] The Court rejected the rule and adopted a proportional fault rule for property damage in maritime collision or stranding cases.[3] It was held that when two or more parties have contributed by their fault to cause a maritime collision or stranding, liability for damage resulting therefrom shall be allocated proportionately to the comparative degree of fault of each party, except in cases where it is not possible to fairly measure the comparative degrees of fault or where each party was equally at fault, wherein liability is to be allocated equally.[4]

Respondent, Reliable Transfer Company, was the owner of a coastal tanker, the MARY A. WHALEN. The WHALEN was involved in a stranding accident when it ran aground on a sandbar in an attempt to avoid collision with a breakwater. The breakwater was ordinarily marked with a flashing light maintained by the Coast Guard; however, on the night of the stranding, the light was inoperative.

Reliable Transfer brought suit against the United States in federal district court[5] under the Suits in Admiralty Act[6] and the Federal Tort Claims Act,[7] seeking to recover damages caused by the stranding. The district court found that the grounding was caused 75% by the WHALEN and 25% by the failure of the Coast Guard to maintain the breakwater light;[8] however, applying the then well-settled admiralty rule of divided damages, the court held that each party was liable for one-half of the damages.[9] Upon appeal taken by the United States, the Court of Appeals for the Second Circuit affirmed, adhering to the rule.[10]

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1. ___ U.S. ___, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).
2. The rule, simply stated, is that in the event of a collision at sea where two or more parties are at fault, the total sum of the damages shall be divided equally among the parties without regard to the proportionate degree of fault of either party. *Id.* at ___, 95 S.Ct. at 1709, 44 L.Ed.2d at 254.
3. *Id.* at ___, 95 S.Ct. at 1715, 44 L.Ed.2d at 262.
4. *Id.* at ___, 95 S.Ct. at 1715-16, 44 L.Ed.2d at 262.
5. This case was brought in the District Court for the Eastern District of New York; however, the opinion of the court is unreported.
6. 46 U.S.C.A. §741 *et seq.* (Rev. 1975).
7. 28 U.S.C.A. §1346 *et seq.* (Supp. 1975).
8. ___ U.S. at ___, 95 S.Ct. at 1710, 44 L.Ed.2d at 255.
9. *Id.* at ___, 95 S.Ct. at 1710, 44 L.Ed.2d at 255.
10. United States v. Reliable Transfer Co., 497 F.2d 1036 (2d Cir. 1974).

The Government petitioned the Supreme Court for certiorari on the sole issue of whether the admiralty rule of divided damages should be replaced by a rule of damages in proportion to fault.[11] The Court held in the affirmative and vacated the judgment of the district court, remanding for further proceedings consistent with the opinion.[12]

The rule of divided damages stems from the ancient "moiety rule" and dates back to the 12th century Laws of Oleron. Because the Laws of Oleron were known to England and recognized as authority during the 14th century, one presumes that the rule was applied by English admiralty courts during that period. However, the character of the moiety rule as it developed was not founded on a basis of negligence, but rather on the basis of mere "risk sharing," whereby parties involved in collisions shared the cost of the damage regardless of fault. As English common law evolved and concepts of negligence and fault arose, the courts were at a loss in the application of the ancient rule when negligence was proved against one or both ships.[13]

This conflict was finally settled in 1815 when Lord Stowell delivered his now famous dictum in *The WOODROP-SIMS*,[14] wherein he declared the divided damages rule to be controlling law and applicable only in cases where both vessels were at fault. Thus the controversy over the risk-sharing basis of the ancient moiety rule and the fault concepts of modern law was resolved.[15] Lord Stowell's decree was given added strength when cited by the House of Lords in *Hay v. Le Neve*[16] in overruling a Scottish decision which had apportioned damages unequally in a maritime collision case. The rule of divided damages as it is known today became firmly entrenched in English law by 1824.

In the United States during the colonial period and early post-Revolution days, there was much confusion as to the applicability of the rule.[17] It was not until 1854 in *The Schooner CATHARINE v. Dickinson*[18] that the United States Supreme Court was first squarely presented with the question of accepting or rejecting the rule in cases of mutual fault in collisions at sea. In this suit over the damages resulting from a collision between two schooners, the Court determined that both parties had been

11. United States v. Reliable Transfer Co., ___ U.S. ___, 95 S.Ct. 491, 42 L.Ed.2d 291 (1974), *cert. granted*.

12. ___ U.S. at ___, 95 S.Ct. at 1716, 44 L.Ed.2d at 262 (1975).

13. *See* Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304, 305-08 (1957).

14. 2 Dods. 83, 165 Eng. Rep. 1422 (Adm. 1815).

15. For a detailed history of the origins of the divided damages rule, see Staring, *supra* note 13 and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORN. L. Q. 531 (1928).

16. 2 Shaw Scotch App. 395 (1824).

17. *See* Staring, *supra* note 13.

18. 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1854).

negligent.[19] A problem remained as to the manner in which damages were to be allocated.

> The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. [Citation omitted.]
>
> This seems now to be the well-settled rule in English admiralty. [Citations omitted.]
>
> Under circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and best tending to induce care and vigilance on both sides, in the navigation.[20]

The Schooner CATHARINE decision, adopting the divided damages rule, has been firmly adhered to by the American courts for over 120 years.[21]

As to the practice of other nations regarding liability for damage resulting from maritime collisions, the Brussels Collision Liability Convention of 1910[22] produced a uniform rule to which most of the world adheres.[23] In the Convention, the rule of divided damages was rejected and replaced by a proportional damages, or comparative negligence, rule. The proportional damage rule states that liability for damage shall be determined in proportion to the comparative degrees of fault in cases of collision at sea resulting from mutual negligence by more than one party. Until *Reliable Transfer*, America was the only major maritime nation which did not subscribe to a proportional damage rule with regard to maritime collisions.

The divided damages rule has great potential for producing harsh results. A strict application of the rule can result in a party having to bear one-half of the liability for damage, where their relatively minor negligence

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19. *Id.* at 177, 15 L.Ed. at 235.

20. *Id.* at 177-78, 15 L.Ed. at 235.

21. The cases which reaffirmed *The Schooner* CATHARINE are far too numerous to cite; however, a few chosen at random are: Union Oil Co. of California v. The SAN JACINTO, 409 U.S. 140, 93 S.Ct. 368, 34 L.Ed.2d 365 (1972); Weyerhauser S.S. Co. v. United States, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1 (1963); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952); The CHATTAHOOCHEE, 173 U.S. 540, 19 S.Ct. 491, 43 L.Ed. 801 (1898); The NORTH STAR, 106 U.S. 17, 1 S.Ct. 41, 27 L.Ed. 91 (1882).

22. As translated in 6 A. KNAUTH, BENEDICT ON ADMIRALTY 39 (7th ed. 1969), the pertinent section of the Convention reads as follows:

> ARTICLE 1. Where a collision occurs between seagoing vessels and vessels of inland navigation the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place. . . .
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> . . . .
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> ARTICLE 4. 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.

23. For a list of the countries which have adopted the Convention see 6 A. KNAUTH, BENEDICT ON ADMIRALTY 38-39 (7th ed. 1969).

contributed in some slight manner to a collision. For example, in *The PENNSYLVANIA*,[24] the Court applied the divided damages rule to a collision case where one ship's minor statutory violation had contributed only slightly to the collision. In arriving at this decision, the Court announced a new rule regarding maritime collisions involving statutory violations.

> But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. *In such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.* Such a rule is necessary to enforce obedience to . . . the statute.[25]

Therefore, the rule in *The PENNSYLVANIA* shifts the plaintiff's burden of proof of causation to the defendant to show that no causal connection could have existed—a burden nearly impossible to sustain. Thus the dangers of the divided damages rule are compounded. In the great majority of cases, the rule in *The PENNSYLVANIA* has been strictly applied.[26]

The Supreme Court soon recognized the inequities of the divided damages rule and derived what is known as the "major-minor" fault doctrine.[27] This doctrine holds that where a collision results primarily from the negligence of one vessel, and there is great disparity of fault, the court may excuse the fault of the minor offender.[28] Thereby, the grossly negligent vessel may be deemed to be solely at fault. The doctrine to some degree has avoided the application of the divided damages rule, but it has not entirely mitigated the harsh results so often found in mutual fault cases. When the disparity in fault is not extreme and when the rule in *The PENNSYLVANIA* is applied to establish fault, the "major-minor" fault doctrine is apparently not applicable.[29] Moreover, the doctrine has been criticized for replacing one injustice with another. It is no less inequitable that a more negligent vessel be required to shoulder all of the cost under

24. The PENNSYLVANIA, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873).

25. *Id.* at 136, 22 L.Ed. at 131 (emphasis added).

26. *See* Jackson, *The Archaic Rule of Dividing Damages in Marine Collisions*, 19 ALA. L. REV. 263, 268-69 (1967). For an in-depth discussion of cases which have applied the rule in *The* PENNSYLVANIA, see 4 A. KNAUTH, BENEDICT ON ADMIRALTY 263-67 (6th ed. 1949, Supp. 1972).

27. The "major-minor" fault doctrine finds its basis as far back as 1874 in The GREAT REPUBLIC, 90 U.S. (Wall.) 20, 23 L.Ed. 55 (1874). However, the doctrine was clearly accepted by the Court in 1893 in The CITY OF NEW YORK, 147 U.S. 72, 13 S.Ct. 211, 37 L.Ed. 84 (1893). *See also* The VICTORY, 168 U.S. 410, 18 S.Ct. 149, 41 L.Ed. 519 (1897); The UMBRIA, 166 U.S. 404, 17 S.Ct. 610, 41 L.Ed. 1053 (1897); The LUDVIG-HOLBERG, 157 U.S. 60, 157 S.Ct. 477, 39 L.Ed. 620 (1895); The OREGON, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1894).

28. The CITY OF NEW YORK, 147 U.S. 72, 85, 13 S.Ct. 211, 216, 37 L.Ed. 84 (1893).

29. *See* Jackson, *supra* note 26 at 270.

the "major-minor" fault doctrine than a less negligent vessel be required to shoulder one-half of the damages under the rule in *The PENNSYLVANIA*.[30]

In 1922 the rule of divided damages in collision cases was expanded by the Supreme Court to non-collision situations which involve stranding or grounding of vessels. In the case of *White Oak Transportation Co. v. Boston, Cape Cod & N.Y. Canal Co.*,[31] a vessel was grounded as a result of negligent navigation on the part of the ship's crew combined with the canal company's misrepresentations concerning the depth of the water. The Court held that the ship and the canal company were to divide their respective damages.[32] This firmly entrenched the application of the divided damages rule to cases involving grounding or stranding.

America's adherence to the divided damages rule and the resulting injustices has been the subject of criticism for many years.[33] The lower federal courts have, for the most part, applied the rule grudgingly, harshly criticizing it for its absurd and inequitable results, yet feeling incapable of avoiding the rule until Congress or the Supreme Court sanctioned a departure therefrom.[34] It seems anomalous that Congress should adopt a comparative negligence rule for determining damages in wrongful death[35]

30. *See* Tank Barge HYGRADE, INC. v. The Tug GATCO NEW JERSEY, 250 F.2d 485 (3rd Cir. 1957). The rule has further been criticized as being inadequate and a "constant temptation to courts to avoid a decision on the merits." National Bulk Carriers, Inc. v. United States, 183 F.2d 405, 410 (2d Cir. 1950), *cert. denied*, 340 U.S. 865 (1950) (dissenting opinion).

31. 258 U.S. 341, 42 S.Ct. 338, 66 L.Ed. 649 (1922). *See also* Atlee v. Northwestern Union Packet Co., 88 U.S. (21 Wall.) 389, 22 L.Ed. 619 (1874).

32. 258 U.S. at 343, 42 S.Ct. at 339, 66 L.Ed. at 653.

33. *See* G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY 528-31 (2d ed. 1975); Donovan and Ray, *Mutual Fault-Half Damage Rule—A Critical Analysis*, 41 INS. COUN. J. 395 (1974); Allbritton, *Division of Damages in Admiralty—A Rising Tide of Confusion*, 2 J. MARITIME L. & COMM. 322 (1971); Jackson, *supra* note 26; Staring, *supra* note 13; Mole and Wilson, *A Study of Comparative Negligence*, 17 CORN. L. Q. 333 (1932); *and* Huger, *supra* note 15.

34. *See* Tank Barge HYGRADE, INC. v. The Tug GATCO NEW JERSEY, 250 F.2d 485 (3d Cir. 1957); Adams v. Construction Aggregates Corp., 237 F.2d 884 (2d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957); Marine Fuel Transfer Corp. v. The RUTH, 231 F.2d 319 (2d Cir. 1956).

The Court of Appeals for the Second Circuit has been a great critic of the rule. As was stated by the late Judge Learned Hand in his dissent in National Bulk Carriers, Inc. v. United States, 183 F.2d 405 (2d Cir. 1950), *cert. denied*, 340 U.S. 865 (1950):

> An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. Indeed, the ["major-minor"] doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits. Nevertheless, so long as our antiquated doctrine prevails, I think we should apply it unflinchingly, and in the case at bar I would divide the damages.
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> 183 F.2d at 410 (dissenting opinion).

35. *See* Death on The High Seas Act, 46 U.S.C.A. §761 *et seq.* (Rev. 1975).

and personal injury cases[36] in maritime and yet not for collision or stranding damage. Despite a strong favorable contingency,[37] ratification of the Brussels Collision Convention has failed. However, opposition to the Convention has not been attributed to the proportional damage rule as applied to ship damage, but rather to the rule as applied to damage to cargo, baggage, and property of the crew, in that it would eliminate the American rule of joint and several liability of vessels for cargo damage.[38]

The Supreme Court, however, has had an opportunity to re-examine the divided damages rule on several occasions in recent times. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[39] the Court, in considering the expansion of the rule of divided damages to non-collision cases, reaffirmed the rule as applied to property damage in collision situations. However, the Court did not discuss the relative merits of the rule nor was the Court presented with the question of its propriety in present-day application.

In *Weyerhauser S.S. Co. v. United States,*[40] the Court held that the scope of the divided damages rule in mutual fault collisions remained unaffected by the limited liability provisions of the Federal Employees' Compensation Act, thus reaffirming the rule. Again, the Court did not discuss the validity of the basis of the rule in its present application.

In the 1972 case, *Union Oil Co. of California v. The SAN JACINTO,*[41] the Court was asked to reject the divided damages rule in maritime collision cases; however, the court circumvented the issue by concluding that one of the vessels was not a contributing cause to the collision.[42]

Thus, in *Reliable Transfer* the Court finally found itself squarely facing the issue of the continuing validity of the rule. In adopting the proportional fault rule, the Court re-examined the underpinnings of the divided damages rule and appraised the propriety of applying it today. The Court found that when the rule was first adopted in *The Schooner CATHARINE*, there had existed valid reasons for its application.

> The rule was adopted because it was then the prevailing rule in England, because it had become the majority rule in the lower federal courts, and because it seemed "most just and equitable, and . . . best [tended] to induce care and vigilence on both sides, in the navigation."[43]

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36. *See* the Jones Act, 46 U.S.C.A. §688 *et seq.* (Rev. 1975), which incorporates by reference the comparative negligence rule of the Federal Employer's Liability Act, 45 U.S.C.A. §51 *et. seq.* (Rev. 1972).

37. *See* 4 A. KNAUTH, BENEDICT ON ADMIRALTY 262 (6th ed. 1949, Supp. 1972) *and* Jackson, *supra* note 26 at 273.

38. *See* 4 A. KNAUTH, BENEDICT ON ADMIRALTY, 262-69 (6th ed. 1949, Supp. 1972) *and* Donovan, *supra* note 33.

39. 342 U.S. 282, 284, 72 S.Ct. 277, 279, 96 L.Ed. 318, 319-20 (1952).

40. 372 U.S. 597, 604, 83 S.Ct. 926, 930, 10 L.Ed.2d 1, 7 (1963).

41. 409 U.S. 140, 141, 93 S.Ct. 368, 370, 34 L.Ed.2d 365, 368 (1972).

42. *Id.* at 146, 93 S.Ct. at 372, 34 L.Ed.2d at 371.

43. ___ U.S. at ___, 95 S.Ct. at 1711, 44 L.Ed.2d at 257, *quoting from* The Schooner

However, the Court found that this underlying rationale no longer justified the rule's continued existence. The Court noted that virtually all the world's major maritime nations, including Great Britain, had adopted the comparative negligence rule set out in the Brussels Convention. This left the United States practically alone in its adherence to the divided damages rule, resulting in the encouragement of transoceanic forum shopping.[44] Further, the Court found that the lower federal courts no longer reveled in its application, but rather "they have more recently followed it only grudgingly, terming it 'unfair,' 'illogical,' 'arbitrary . . . archaic and frequently unjust.' "[45] With these factors noted, the Court determined that the original adherence by the judiciary to the rule should no longer be considered a valid reason for maintaining it.

The Court's most severe criticism of the rule was in terms of justice and equity.

> 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.[46]

The Court also noted that the greatest potential unfairness is exemplified by the application of the rule of *The PENNSYLVANIA*.[47] Furthermore, the Court's one escape-valve from the harshness of the rule—the "major-minor" fault doctrine—simply displaces one inequity by another.[48]

In response to the assertion that the rule of divided damages is justified because it promotes out-of-court settlements and that comparative degrees of negligence are difficult to determine, the Court pointed out that the "major-minor" fault doctrine induces the less negligent party to litigate, and that every other major maritime nation has been able to apply a rule of comparative negligence without serious difficulties.[49] Also, when it is not possible to determine comparative degrees of fault, then the damages may be divided.[50]

Overall, through a lengthy and extensive examination of the underlying

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CATHARINE v. Dickinson, 58 U.S. (17 How.) 170, 177-78, 15 L.Ed. 233, 235 (1854).

44. *Id.* at ___, 95 S.Ct. at 1712, 44 L.Ed. 2d at 258.

45. *Id.* at ___, 95 S.Ct. at 1712, 44 L.Ed.2d at 258, *quoting from* Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618, 620 (2d Cir. 1954); Marine Fuel Transfer Corp. v. The RUTH, 231 F.2d 319, 321 (2d Cir. 1956); *and* Tank Barge HYGRADE, INC. v. The GATCO NEW JERSEY, 250 F.2d 485, 488 (3d Cir. 1957), respectively (footnotes omitted).

46. ___ U.S. at ___, 95 S.Ct. at 1713, 44 L.Ed.2d at 259 (footnotes omitted).

47. *Id.* at ___, 95 S.Ct. at 1713, 44 L.Ed.2d at 259.

48. *Id.* at ___, 95 S.Ct. at 1713, 44 L.Ed.2d at 259.

49. *Id.* at ___, 95 S.Ct. at 1714, 44 L.Ed.2d at 260.

50. *Id.* at ___, 95 S.Ct. at 1714, 44 L.Ed.2d at 260.

rationale, both past and present, of the divided damages rule, the Court concluded that its existence was no longer justified and that the judiciary should shoulder the responsibility for fashioning a more equitable doctrine in regard to maritime collision.

> 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. . . . [W]orldwide experience has taught that that goal [of a just and equitable allocation of damages] can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible.[51]

While it is true that the rule of divided damages in maritime has long been subjected to severe criticism by both the judiciary and by legal scholars,[52] neither the Supreme Court nor Congress had up until now seen fit to sanction a change. The Court's opinion in *Reliable Transfer*, in light of Congress' failure to act, is commendable. It is an excellent analysis of the underpinnings of the rule; well-thought-out, completely realistic, and to the point. The Court examined the rule within a contextual framework of justice and equity. Using a paradigmatic approach and examining the flaws in the relationship existing between factual situations and a long established maritime law, the Court discarded one rule and replaced it with another. Such pragmatism and intrinsic rationality should be applauded. The decision is a step in updating an antiquated rule that is no longer justified and demonstrates the judicial role in shaping the course of maritime and admiralty law in the United States.

As to the consequences of adopting a comparative negligence rule in admiralty, one need only examine the effect in other jurisdictions; every other major maritime nation has adopted the rule with fair results.[53] More-

51. *Id.* at ___, 95 S.Ct. at 1715, 44 L.Ed.2d at 262.

52. *See* notes 33 *and* 34 *supra* and accompanying text.

53. Mole and Wilson point out the relative lack of problems that comparative negligence has caused in other countries:

> As to the imposition of too great a burden on our judges, the experience of other countries applying the rule of proportionate damages shows strongly that no difficulty has been encountered on this point. The Maritime Conventions Act of 1911 [which incorporated the proportionate damage rule of the Brussels Convention of 1910] in England has provided . . . that where it is difficult or impossible to allocate degrees of blame on both ships . . . the rule of division of loss would not be altered, and that each wrongdoer should bear one-half of the total loss. But in the majority of cases it is possible to find blame greater on one side than on the other, and in such cases it is only fair that there should be an apportioning of the loss. . . .
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> Mole and Wilson, *supra* note 33 at 349.

See also Huger, note 15 *supra* at 547-58 for a statistical study of the effect of an adaptation of a comparative negligence rule.

over, Congress has long sanctioned a comparative negligence rule for wrongful death[54] and personal injury[55] cases in maritime. More difficulty is foreseeable in the matter of proof and additional litigation of cases; however, this consequence is certainly preferable to the inequities heretofore suffered as a result of the divided damages rule. As was stated by the Court in *Reliable Transfer*, "[c]ongestion in the courts cannot justify a legal rule that produced unjust results in litigation simply to encourage speedy out-of-court accommodations."[56]

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54. The Jones Act, 46 U.S.C.A. §688 *et seq.* (Rev. 1975).
55. Death on The High Seas Act, 46 U.S.C.A. §766 *et seq.* (Rev. 1975).
56. ___ U.S. at ___, 95 S.Ct. at 1714, 44 L.Ed.2d at 261.