Marquette Law Review

Volume 46
Issue 4 *Spring 1963*

Article 11

Apportionment of Damages According to Fault

Stephen F. Schreiter

obtaining a divorce, wherever granted, is void if a party resides and intends to continue to reside in this state.[21]

ROBERT H. BICHLER

Admiralty: Apportionment of Damages According to Fault—Libelant's steamship, the Torondoc, while navigating the Chicago River, collided with a bridge owned and operated by the City of Chicago. The Federal District Court found that the acts of both parties were proximate causes of the collision and apportioned one-third of the negligence and damages to the City of Chicago and two-thirds to the libelant. The facts constituting libelant's fault include: (1) inability of the ship to stop because of excessive speed and (2) libelant's employment of a ship's master who was inexperienced in maneuvering a large vessel down a river spanned by a number of independent bridges closely spaced. The facts constituting fault on the part of the City of Chicago include (1) negligent maintenance of the electrical control system of the bridge (span failed to open properly) (2) the bridgetender's failure to show a red lantern when the span would not operate. *N. M. Patterson & Sons, Ltd. v. City of Chicago.*[1]

After judgment both parties appeared and moved for amendment of the damages on grounds that the court was bound by a settled rule of maritime law to divide damages equally in the case of a collision arising from mutual fault. Overruling the motion, the court summed up its reasons saying:

> In view of the fact that our Supreme Court has never ordered equal division of damages in any case where the findings were specific that the respective degrees of contributing fault were unequal, this court is free in this case to apportion damages unequally, based upon the specific unequal degrees of contributing fault of which it has found each party to have been guilty. It has always been the policy of the Supreme Court that a court of admiralty has the discretion, flexibility and duty to do the complete justice inherent in the historical role of the maritime court.[2]

The court attempted to distinguish the original United States Supreme Court decision on the subject of apportionment of damages, *The Catherine,*[3] on the grounds that that case did not purport to govern collisions occuring under other than "usual" circumstances. Thus, in *The Catherine,* the United States Supreme Court said:

> The question we believe has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide

[21] WIS. STAT. §245.04 (1) (1961).
[1] 209 F. Supp. 576 (N.D.Ill., E.D. 1962).
[2] *Id.* at 591.
[3] 58 U.S. (17 How.) 170 (1854).

> the loss. . . . This seems now to be the well-settled rule in the English Admiralty. . . . Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides, in the navigation.[4]

With respect to this language the court in the Patterson case said:

> Indeed the quoted language seems to give express license to apply some other principle of division where the circumstances are other than those "usually" attending such disasters. In the context of the opinion, one could hardly conceive circumstances other than "usual" to be anything but a case where disparity exists in the degrees of fault and the court is able to determine such respective degrees.[5]

In a later case, *The Atlas*,[6] the Supreme Court reaffirmed the rule and cited three English decisions[7] which allegedly traced the development of the rule. The Federal District Court disagrees with the Supreme Court interpretation of these cases, claiming that the court obtained an all encompassing rule from cases which are much more restricted in their decisions.

Thus, in the Patterson case, the Federal District Court seeks to overrule a well settled principle of maritime law, namely that

> . . . [W]here there is concurring negligence, the general rule in admiralty is that the damages shall be equally divided. In other words, that each party at fault must bear one half of the loss.[8]

Historically this rule has had an irregular growth. It first appeared in the Laws of Oleron, a code of maritime law attributed to the twelfth century. At first the rule was applied only to accidental collisions or those to which the masters swore that they did not do the damage "wittingly." In the English Admiralty there is no record earlier than the seventeenth century of loss by collision having been divided.[9]

---

[4] *Supra* note 3, at 177.

[5] *Supra* note 1, at 584.

[6] 93 U.S. 302, 319 (1876) The rule is stated ". . . [I]n a case where there is mutual fault . . . the rule is that the combined amount of the loss shall be equally apportioned between the offending vessels."

[7] Hay v. La Neve, 2 Shaw H. of L. 395 (1824) is distinguished in that it applies to a situation where the respective degrees of negligence could not be or were difficult of determination. Vaux v. Sheffer, 8 Moore P.C.C. 87, 14 Eng. Rep. 30 (1852) and the Lindea 4 Jur. N.S. 147, 166 Eng. Rep. 1149 (1857) are distinguished on the grounds that although they hold for equal division of damages, they do not prohibit a different result where unequal degrees of fault could be ascertained.

[8] Annot. 25 A.L.R. 1556 (1923). See also 24 R.C.L. 1242 (1919) and 2 AM. JUR. 2d *Admiralty* §187 (1962).

[9] 4 BRITISH SHIPPING LAWS 102 (11th ed. 1961). This is a revision of MARSDEN, COLLISIONS AT SEA. See also 11 SELDEN SOCIETY LXXXIII (1897) and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1927).

The first case which recognizes that damages may be divided is apparently unreported. Below is Marsden's account.

> On May 20, 1789, Sir James Marriot, Judge of the Admiralty Court, in *The Petersfield and The Judith Randolph,* pronounced "that both ships were in fault; that the *Judith Randolph* was most in fault; and decreed that the whole of the damage sustained by the owners of the ship *Petersfield* and her cargo, which was sunk and lost, as well as the £230 damages and expenses given against the ship *Petersfield,* and the costs of the suit here on both sides, be borne equally by the parties in this suit."
> This appears to have been the first case in which the *rusticum judicium*[10] was applied solely upon the ground that both ships were in fault, with an express finding that the fault of one ship was greater than the fault of the other.[11]

Between 1789 and 1824, when the House of Lords handed down *Hal v. La Neve,*[12] Sir Walter Scott pronounced his famous dicta in *The Woodrop-Sims*[13] categorizing the various types of maritime collisions. His second class, is that where both parties are to blame and he states "in such a case, the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them."[14] When the House of Lords modified the judgment in *Hay v. La Neve* from one third - two thirds to one half - one half they approved this dicta and its constant use and citation has given it the force of decision.[15] Most treatises cite *The Woodrop-Sims* or *Hay v. La Neve* as the source of the equally divided damages rule. This writer was unable to find any authors who disagreed with the divided damages rule in that it existed and was grounded on the three cases just discussed. Although it might be possible to distinguish one or more of these foundation cases, the overwhelming weight of authority recognizes them as the source of the rule.

The United States is the only large maritime nation which has not ratified the Brussels Collision Convention of 1910.[16] By the terms of this Convention, damages for mutual fault maritime collisions would be apportioned proportional to the fault of the respective parties. President Truman, in 1948, withdrew this treaty from consideration after it had been repeatedly deferred and postponed for two World Wars and a hoped for unification with other maritime treaties.[17] In

---

[10] 3 KENT'S COMMENTARIES 231 (1844). The term is sometimes defined as a rough and ready justice.
[11] *Supra* note 9, at 102.
[12] *Supra* note 7.
[13] 2 Dods. 83, 165 Eng. Rep. 1422 (1815).
[14] *Ibid.*
[15] Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 343 (1932).
[16] 4 BENEDICT, THE LAW OF AMERICAN ADMIRALTY 262 (6th ed. 1940).
[17] ANONYMOUS, THE DIFFICULT QUEST FOR A UNIFORM MARITIME LAW; Com-

1929 the American Bar Association had disapproved of ratification of the treaty[18] and this disapproval, together with objections of cargo owners who would lose a degree of remedy for damages if cargo were lost in a mutual fault collision, helped prevent ratification. Another cry often raised against ratification concerned Article Six of the treaty which, opponents alleged, would destroy a number of presumptions established in American case law and cause confusion in the American admiralty practice.[19] This argument is refuted by Benedict who claims that the Convention French was inaccurately translated and only meant the abolition of statutory presumptions.[20]

Recently, legislation has been again introduced in the United States to rectify the obvious inequities of the mutual fault damages rule.

> Bills based on the Brussel's Limitation Convention of 1957 and the Brussel's Collision Convention were introduced in both houses of Congress during 1961. . . . The collision bills would substitute the proportionate fault rule for the present equal division of damages rule applicable in "both-to-blame" collisions, and would limit cargo recovery in accordance with the degree of fault on the part of the non-carrying vessel. Both bills have the approval of the American Merchant Marine Institute and the Maritime Law Association of the United States.[21]

The House of Representatives bill, H.R.7911, had received specific American Bar Association approval[22] but apparently received no further congressional consideration after its initial introduction.[23] Senate bill, S.2313, was indefinitely postponed on September 28, 1962 on grounds that discussion would be prolonged and agreement that the bill could be reintroduced at an early date.[24]

As S.555 and H.R.1070 both bills have been reintroduced in the 88th Congress.[25]

If these bills do not become law, it may still be possible for the Supreme Court to change the rule judicially.

> Actually there is no reason why the Supreme Court cannot at this late date "confess error" and adopt the proportional fault rule without Congressional action. The resolution to follow the divided damages rule, taken one hundred years ago rested not on overwhelming authority but on judgment of fact and of fairness which may have been tenable then, but are hardly so

ment, *Failure of the Brussells Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages,* 64 YALE L.J. 878, 890 (1955).

[18] 54 A.B.A. REP. 278, 281 (1929).

[19] *Supra* note 17, at 887.

[20] *Supra* note 16, at 263.

[21] 1961 ANN. SURVEY AM. L. 551.

[22] 48 A.B.A.J. 366 (April, 1962).

[23] 107 CONG. REC. 10725 (daily ed. June 28, 1961).

[24] 108 CONG. REC. 20085 (daily ed. Sept. 28, 1962).

[25] 109 CONG. REC. 119 (daily ed. Jan. 10, 1963) House Bill 109 CONG. REC. 1116 (daily ed. Jan. 28, 1963) Senate Bill.

> today. No "vested rights" in theory or in fact have intervened. The regard for "settled expectation" which is the heart-reason of that modified form of *stare decisis* prevailing in the United States can have no relevance in respect to such a rule; the concept of "settled expectation" would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision. The abrogation of the rule would not, it seems, produce a disharmony with other branches of maritime law, general or statutory.[26]

The only way to approach the Supreme Court and endeavor to have the rule judicially changed is to have an actual case begin in the district courts and be affirmed by one of the circuit courts of appeal. This is the manner in which the admiralty personal injury law developed. Once the circuits are in conflict the Supreme Court will review the question.[27] However obtaining a circuit court affirmance of the district court may pose some difficulties. The second and third circuits have definitely stated that they cannot change the divided damages rule.[28] The sixth circuit approved of a case which they recognized as unjust.

> We are of the opinion that the fault of the Wood was far more serious than fault on the part of the International, and as pointed out in *Luckenbach S.S. Co. v. United States, supra,* it is a case where the Continental rule of comparative negligence would produce a more just result.[29]

Although many cases decided in England after adoption of the Convention proportional damages rule have had damages divided equally,[30] there seems to be little doubt that the divided damages rule wreaks an injustice. In 1896 one writer called it a historical mistake.[31] Solutions presented have almost always been some proportionate damages rule although return to the contributory negligence rule(contributory negligence bars recovery) has been advocated.[32] A number

[26] GILMORE & BLACK, THE LAW OF ADMIRALTY §§7-20 (1957).

[27] Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases,* 45 CALIF. L. REV. 304, 347 (1957).

[28] Oriental Trading & Transport Co. v. Gulf Oil Corp., 173 F. 2d 108, 111 (2nd Cir. 1949). Tank Barge Hygrade v. The Gatco New Jersey, 250 F. 2d 485, 488 (3rd Cir. 1957).

[29] Eastern S. S. Co. v. International Harvester Co. of New Jersey, 189 F. 2d 472, 476 (6th Cir. 1951). The Luckenbach case may be found at 157 F.2d 250 (2d Cir. 1946).

[30] Telsey, *English Apportionment of Blame in Collisions at Sea,* 15 TUL. L. REV. 567 (1941).

[31] Franck, *Collisions at Sea in Relation to International Maritime Law,* 12 L. Q. REV. 260 (1896). See also Scott, *Collisions at Sea Where Both Ships Are in Fault,* 13 L. Q. REV. 17 (1897).

[32] Rheinfrank, *A New Demonstrator to Determine Liability in Admiralty Cases, And a Proposed Rule of Damages to Govern Admiralty Cases,* 11 FED. B. J. 93, 100 (1950). In support of this position the author writes, "In the debates in the English House of Lords in 1911 [before adoption of a proportional damages rule] we find that Lord Gorell is quoted as declaring that: 'The proportional rule endeavors to establish a form of liability that was practically

of doctrines have been developed to mitigate the harshness of the mutual fault rule.[33] Most of these place the collision outside of the scope of the rule while others obviate the rule by allowing the court to overlook small amounts of negligence when there is a great disparity between the negligences of the two parties.[34] Such mitigating doctrines do not attack the real problem however, and it would be preferable to have this country adopt a proportional damage rule. Since establishing such a rule judiciary will be difficult, not because reversal by the Supreme Court will cause undue hardship but rather because of the reticence of the circuits to affirm a district court judgment that is contrary to the general rule. Attempts to jusify such a decision must be strained if they allege to follow the development of the original English rule. Pending legislation appears to be the best route to a just and equitable proportional damages rule.

STEPHEN F. SCHREITER

Gambling: The Element of Chance—In the case of *United States v. Bergland*,[1] the defendants were charged with a violation of title 18 U.S.C. §§ 1084 and 1952,[2] in that; one of the defendants would transmit by radio, from within the Oaklawn Park Race Track at Hot Springs, Arkansas, the results of a particular race to a co-defendant, stationed outside of the track; these results would then be

impossible to apply with any degree of accuracy, and that the older Judges in the Admiralty Division or the Admiralty Court held that no human being could say how much blame was to be attached to each of the vessels involved in a collision.'"

[33] *Supra* note 16, at 268.

[34] Note 20, TUL. L. REV. 585, 586 (1946).

[1] United States v. Bergland, 209 F. Supp. 547 (E.D. Wis. 1962).

[2] 18 U.S.C.A. §1084 (1962) Transmission of Wagering Information; Penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any working event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

§1952 Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion or bickery in violation of the law of the state in which committed or of the United States.