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

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## CASE COMMENTS

**Admiralty Law—RULE OF DIVIDED DAMAGES—LIABILITY FOR DAMAGE NOW TO BE APPORTIONED AMONG THE PARTIES IN PROPORTION TO THE COMPARATIVE DEGREE OF FAULT.**—*United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

On a clear and windy night in December 1968, the tanker *Mary A. Whalen* ran aground off Rockaway Point, New York. The vessel's owner, the Reliable Transfer Company, brought an action against the United States in federal district court, charging that the Coast Guard had negligently failed to maintain a breakwater light at the mouth of Rockaway Inlet, and seeking to recover damages sustained by the *Whalen* in the grounding. The district court found that the stranding was caused 25 percent by the negligence of the Coast Guard and 75 percent by faulty management and navigation of the *Whalen*. The court held, however, that since both parties were negligent, the admiralty rule of divided damages required that each bear half of the loss sustained by the vessel.<sup>1</sup> Following an affirmance of the judgment by the Court of Appeals for the Second Circuit,<sup>2</sup> the United States Supreme Court unanimously reversed, holding, in an opinion by Mr. Justice Stewart, that in cases of maritime collision or stranding the divided damages rule should be replaced by a rule allocating liability for property damage in proportion to the comparative degree of fault of the parties.<sup>3</sup>

The decision ended the 120-year reign of a rule of damages that has often been criticized for producing unjust results<sup>4</sup> and that has been peculiar to United States maritime law for several decades. The United States inherited the rule from the British admiralty courts,<sup>5</sup>

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1. The divided damages rule was established in United States admiralty law in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1854). The rule was applied in cases of collision between two or more vessels where both vessels were at fault. *Id.* at 177. In such cases, "the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder." *The Sapphire*, 85 U.S. (18 Wall.) 51, 56 (1873). *Accord*, *The "Atlas"*, 93 U.S. 302, 313 (1876); *The "North Star"*, 106 U.S. 17, 22 (1822).

United States admiralty courts have also applied the divided damages rule in non-collision cases where the vessel is damaged through the mutual fault of the vessel and a nonvessel party. *White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co.*, 258 U.S. 341 (1922) (grounding in canal); *Atlee v. Packet Co.*, 88 U.S. (21 Wall.) 389 (1874) (barge striking pier).

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

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

4. See notes 9-10 and accompanying text *infra*.

5. The origin of the rule is generally traced to article XIV of the Laws of Oleron (circa A.D. 1150). For a brief history of the rule's development and transfer from Britain

but the United Kingdom repudiated the rule by ratifying the Brussels Collision Liability Convention of 1910.<sup>6</sup> The United States is the only major maritime nation that has failed either to ratify or to adhere to the Convention,<sup>7</sup> a divergence which has resulted in international forum shopping.<sup>8</sup> In recent years the divided damages rule has drawn severe criticism from the lower federal courts<sup>9</sup> and legal commentators.<sup>10</sup> The Court of Appeals for the Second Circuit, and especially Judge Learned Hand, have been frequent critics of the rule; nevertheless, despite minor attempts at rebellion,<sup>11</sup> the courts have felt that,

to the United States, see Sprague, *Divided Damages*, 6 N.Y.U.L. REV. 15 (1928). See also R. MARSDEN, *THE LAW OF COLLISIONS AT SEA* 108-15 (11th ed. K. McGuffie 1961) (4 BRITISH SHIPPING LAWS); Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

6. The text of the Convention may be found at 6 A. KNAUTH & C. KNAUTH, *KNAUTH'S BENEDICT ON ADMIRALTY* 39 (7th ed. rev. 1969). Article 4 of the Convention provides for apportionment of liability for damages according to the degree of fault. It also eliminates joint and several liability of colliding vessels to third persons.

7. The nations which have ratified or adhered to the Convention are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Mexico, Newfoundland, New Zealand, Netherlands, Nicaragua, Norway, Poland, Portugal, Rumania, Sweden, Switzerland, Turkey, U.S.S.R., United Kingdom, Uruguay, and Yugoslavia. Following World War II, Japan and both Germanies rejoined the Convention. See *id.* at 38-39.

8. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 529 (2d ed. 1975). See also Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1928). The adoption of the proportional liability rule will not remedy the forum shopping problem; even though United States courts will now measure liability by the same rule as foreign courts, actual awards will often differ because of differing systems for limitation of liability. See note 25 and accompanying text *infra*. See also *Isbrandtsen Co. v. Lloyd Brasileiro Patrimonio Nacional*, 85 F. Supp. 740 (E.D.N.Y. 1949); G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW* 826 (1939).

9. See, e.g., *Ahlgren v. Red Star Towing & Transp. Co.*, 214 F.2d 618 (2d Cir. 1954); and both the district court and court of appeals opinions in *In re Adams' Petition*, 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). The position which the courts have taken was expressed by Chief Judge Goodrich in *In re Oskar Tiedemann & Co.*, 289 F.2d 237, 241-42 (3d Cir. 1961):

It seems too bad that the Elna should be tarred with the same stick as the Mission in this case. If we had a rule which divided responsibility in proportion to the negligence of the parties, as is the case in many other countries, we could make an equitable adjustment. But our American rule of even division of the damages makes for some hard cases and this is one.

10. See, e.g., G. GILMORE & C. BLACK, *supra* note 8, at 528-31; 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, 903-05 (1955).

11. In *The Margaret*, 30 F.2d 923 (3d Cir.), *cert. denied*, 279 U.S. 862 (1929), the court decreed a 75%-25% division of damages, but reversed itself upon rehearing and reluctantly followed the divided damages rule. Similarly, in *In re Adams' Petition*, 125 F. Supp. 110, 112 (S.D.N.Y. 1954), *aff'd*, 237 F.2d 884 (2d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957), the trial court entered "Conclusions of Law," finding:

2. The Sandcraft was at fault to the extent of 80 per cent.

in Judge Hand's words, "we have no power to divest ourselves of this vestigial relic . . . ." <sup>12</sup> Judge Jerome Frank, a member of the same court, agreed: "[W]e feel obliged to apply that rule until the Supreme Court or Congress instructs us otherwise." <sup>13</sup> Since the decisions in all of the lower federal courts were in harmony with the settled law, the Supreme Court has had few recent occasions to review the rule. <sup>14</sup> Thus "[t]he rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit." <sup>15</sup> Faced with the obviously unjust results produced by the rule, the unanimous opposition to it in the lower courts, and a record which showed that the courts of other nations have successfully applied comparative negligence rules in admiralty, <sup>16</sup> the *Reliable Transfer* Court found little difficulty in overturning the rule.

The decision helps remedy the problem of demonstrably unjust awards, and moves United States admiralty law toward uniformity with the rest of the world. It does not, however, fully achieve that uniformity; hence it does not solve the problem of forum shopping. Furthermore, it creates new problems in the area of recovery for cargo damage. All of these problems result from statutes affecting shipowners' liability.

Every major maritime nation has some form of limitation of liability law. <sup>17</sup> In the United States, the Limitation of Vessel Owner's

3. The *Melrose* was at fault to the extent of 20 per cent.

....

5. Decree accordingly.

Upon reargument, however, the court acquiesced in the Second Circuit's mandate that the divided damages rule be followed. 125 F. Supp. at 115.

12. *Oriental Trading & Transp. Co. v. Gulf Oil Corp.*, 173 F.2d 108, 111 (2d Cir. 1949).

13. *Ahlgren v. Red Star Towing & Transp. Co.*, 214 F.2d 618, 621 (2d Cir. 1954).

14. The Court granted certiorari in *Union Oil Co. v. The San Jacinto*, 409 U.S. 140 (1972), for the purpose of reviewing the divided damages rule. The issue was, however, precluded when the Court determined that only one of the parties was at fault. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 403 n.4 (1975).

15. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410 (1975).

16. See *Mole & Wilson, A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 349-51 (1932). See also Franck, *A New Law for the Seas*, 42 L.Q. REV. 25 (1926); Scott, *Collisions at Sea Where Both Ships Are in Fault*, 13 L.Q. REV. 17 (1897). The *Reliable Transfer* Court also noted that American courts have applied a comparative negligence rule "with no untoward difficulties in personal injury actions." 421 U.S. at 407.

17. The three basic forms of limitation of liability are described in Eyer, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370 (1964):

(1) The German system, which placed no liability on the owners but subjected the ship to an *in rem* action; (2) the French system of *abandon*, under which the owner, although personally liable, could discharge his obligations by releasing the ship and freight to the claimants; and (3) the English system of limiting

Liability Act<sup>18</sup> allows a shipowner to limit his liability for property damage to the value of the vessel at the end of the voyage and pending freight.<sup>19</sup> Thus if a vessel sinks and is a total loss, her liability for property damage may be virtually nonexistent.<sup>20</sup>

The limitation of liability statute was originally enacted to encourage the shipping industry.<sup>21</sup> In recent years it has been critically characterized as a subsidy paid by injured parties rather than by the public treasury.<sup>22</sup> During the 1960's several attempts were made to amend the Limitation of Vessel Owner's Liability Act or to eliminate it altogether.<sup>23</sup> Despite the failure of these attempts, the future of the

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the shipowner's liability to the value of the ship, measured before the infliction of the damage.

*Id.* at 371 (footnotes omitted).

18. 46 U.S.C. §§ 181-96 (1970). Section 183 provides in relevant part:

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

19. Since the principal impact of *Reliable Transfer* is in the area of property damage, this comment will not deal with personal injury and wrongful death claims. For such claims, however, the Limitation of Vessel Owner's Liability Act provides that the limitation fund must contain a minimum of \$60 per ton. See note 18 *supra*.

20. *E.g.*, *In re Baracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968), *modified*, 409 F.2d 1013 (2d Cir. 1969). In the American limitation proceeding following the *Torrey Canyon* disaster, the limitation fund was set at \$50—the value of a salvaged lifeboat. *Id.*

21. G. ROBINSON, *supra* note 8, at 876-79.

22. See, *e.g.*, Mr. Justice Black's opinion in *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 427 (1954). See also G. GILMORE & C. BLACK, *supra* note 8, at 821-24; Eyer, *supra* note 17.

23. For a summary of the congressional action concerning the limitation act, see Address by John F. Gerity, 1968 Annual Meeting of the Association of Average Adjusters of the United States, in PRACTISING LAW INSTITUTE, ADMIRALTY: CURRENT DEVELOPMENTS—1969, at 38-39 (1969). The proposed amendments would have generally enacted the provisions of the 1957 Brussels Convention on the Limitation of the Liability of the Owners of Ships. The text of the 1957 Convention may be found in H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 562 (2d ed. 1969). The Convention requires that a limitation fund be established for claims of property damage and personal injury. The property damage portion of the fund equals approximately \$67 per ton, and the personal injury

limitation act appears dim.<sup>24</sup>

The *Reliable Transfer* decision does not entirely solve the forum shopping problem, since the protections offered by the Limitation of Vessel Owner's Liability Act are not identical to those offered by other nations' laws. The United Kingdom, for example, requires the shipowner to provide a statutory limitation fund for property damage as well as for personal injury, with the limitation fund for personal injury considerably larger than that of the United States.<sup>25</sup> Thus in a case in which the vessel was lost, claimants could collect far greater awards by bringing their suits in a British court; conversely, confining litigation to United States courts would be advantageous to the shipowners.

The most striking problem raised by the *Reliable Transfer* decision concerns the right of cargo owners to recover for damages sustained in both-to-blame collisions and groundings. Important in claims for damage to cargo are the Harter Act<sup>26</sup> and the Carriage of Goods by Sea Act (COGSA).<sup>27</sup> These are not, strictly speaking, limitation statutes, since they operate to relieve shipowners of liability rather than to limit liability.<sup>28</sup> Nonetheless, they greatly restrict the ability of

portion of the fund equals approximately \$140 per ton. If the personal injury portion is insufficient to satisfy all such claims, "the unpaid balance of such claims shall rank ratably with the property claims for payment against the second [property damage] portion of the fund." 1957 Brussels Convention in BAER, *supra*, at 564.

Shipping interests originally opposed the amendments, but reversed their position in 1961, apparently convinced that the alternative to the 1957 Convention would be no limitation of liability at all. Gerity, *supra*, at 37-43. See also G. GILMORE & C. BLACK, *supra* note 8, at 823-24; Eyer, *supra* note 17. For reasons not readily apparent, the amendments failed to pass. Perhaps various interests (cargo, passengers, seamen) felt that the reforms were inadequate and withdrew their support.

24. The authors of a leading admiralty treatise suggest that "[o]ne more large-scale maritime disaster, following which the shipowners petition to limit their liability to a fund of \$50, should suffice to bring the whole structure tumbling down." G. GILMORE & C. BLACK, *supra* note 8, at 823 (footnote omitted). The \$50 fund refers to the *Torrey Canyon* disaster. See note 20 *supra*.

25. The Merchant Shipping Act of 1894 (as amended by Act of 1958), 6 & 7 Eliz. 2, c. 62, reprinted in R. MARSDEN, *supra* note 5, at 135-36, is a statutory version of the 1957 Brussels Convention. See note 23 *supra*. The British limitation fund totals \$207 per ton, of which \$67 is allocated for property damage, compared with the United States limitation fund of \$60 per ton, which is exclusively for personal claims. See note 18 *supra*.

26. 46 U.S.C. §§ 190-96 (1970). See note 28 *infra*.

27. 46 U.S.C. §§ 1300-15 (1970). See note 28 *infra*.

28. G. ROBINSON, *supra* note 8, at 875. The relevant portion of the Harter Act is 46 U.S.C. § 192 (1970), which provides in part:

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall

cargo owners to recover for damages. The statutes provide that if a vessel's owner has exercised due diligence to insure that the vessel is seaworthy at the beginning of the voyage, he is not liable to the owners of cargo carried by the vessel for damages caused by negligence or mismanagement in navigation. COGSA and the Harter Act have not been criticized as severely as the limitation act, perhaps because they regulate primarily commercial, rather than personal, interests,<sup>29</sup> or because the courts have construed them to allow full recovery by innocent cargo interests in the event of groundings or collisions involving *two* negligent parties.<sup>30</sup>

Although the Harter Act and COGSA relieve the vessel from liability to the cargo it carries, United States courts have construed the statutes to allow cargo full recovery for its losses in both-to-blame collisions.<sup>31</sup> Prior to the passage of the Harter Act in 1893, the Supreme Court held that a cargo owner could receive a judgment for his entire loss against either vessel if both were at fault.<sup>32</sup> After the Harter

become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . .

The relevant portion of COGSA is 46 U.S.C. § 1304 (1970), which provides in part:

(1) Unseaworthiness.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . . .

COGSA superseded the Harter Act for the most part. For the purposes of this comment they may be considered identical. For a comparison of the two statutes, see G. GILMORE & C. BLACK, *supra* note 8, at 147-49. COGSA is a statutory version of the Hague Convention of 1924. The British statutory version of the Convention is the Carriage of Goods By Sea Act, 14 & 15 Geo. 5, c. 22 (1924).

29. The purpose of COGSA and the Harter Act is to regulate cargo carriage by regulating the terms of ocean bills of lading. 46 U.S.C. § 1300 (1970). Thus the statutes affect only the relationship between shipper and carrier. The *Chattahoochee*, 173 U.S. 540 (1899).

30. See notes 33-37 and accompanying text *infra*.

31. See generally L. BUGLASS, *MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES* 226-32 (1973).

32. The "Atlas," 93 U.S. 302 (1876); The "Alabama" & The "Game-cock," 92 U.S. 695 (1875). This contrasts with the British rule that was in effect prior to 1911. That rule allowed recovery of no more than 50% of cargo loss from each vessel. Thus, if a

Act eliminated recovery from the carrying ship, the Court held in *The Chattahoochee*<sup>33</sup> that cargo could recover in full from the noncarrying ship; the Court construed the act to affect only the contractual relationship between shipper and carrier, and not cargo's rights against third persons.<sup>34</sup> Furthermore, the Court held the amount of the judgment was to be added to the noncarrying vessel's damages before the division of damages.<sup>35</sup> The colliding vessels were in effect treated as joint tortfeasors with joint and several liability, and with equal contribution.

Shipowners have protested that this rule is contrary to the purpose and intent of the Harter Act and COGSA,<sup>36</sup> and that it creates an anomaly in the law, since the carrying vessel may be held liable for 50 percent of cargo damage if its fault is slight, but may not be held liable at all if it is solely at fault. The courts, reluctant to deny "innocent" cargo its right to recover, have not sympathized with this position.<sup>37</sup>

A strict reading of the *Reliable Transfer* holding<sup>38</sup> would overturn the *Chattahoochee* rule; it would appear that cargo could recover

bill of lading contained an exculpatory clause, the only recovery available was from the noncarrying vessel in the amount of 50% of sustained loss. *The Milan*, 167 Eng. Rep. 167 (1861).

33. 173 U.S. 540 (1899).

34. *Id.* at 555.

35. *Id.* at 551-54.

36. See Comment, *supra* note 10, at 881-82. This frustration of congressional intent was one of the reasons advanced for ratification of the 1910 Brussels Convention. *Id.* at 890 n.64. Cargo interests, however, persuaded the Senate not to ratify the 1910 Convention. G. ROBINSON, *supra* note 8, at 854; Staring, *supra* note 5.

37. In *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952), the Supreme Court invalidated both-to-blame clauses in bills of lading. These clauses required cargo owners to indemnify the carrying vessel for any additional losses resulting from application of the *Chattahoochee* rule. See text accompanying notes 33-35 *supra*.

Petitioner argues that the clause does nothing more than remove an "anomaly" which arises from this Court's construction of the Harter Act. It is said to be "anomalous" to hold a carrier not liable at all if it alone is guilty of negligent navigation but at the same time to hold it indirectly liable for one-half the cargo damages if another ship is jointly negligent with it. Assuming for the moment that all rules of law must be symmetrical, we think it would be "anomalous" to hold that a cargo owner, who has an unquestioned right under the law to recover full damages from a noncarrying vessel, can be compelled to give up a portion of that recovery to his carrier because of a stipulation exacted in a bill of lading. Moreover, there is no indication that either the Harter Act or the Carriage of Goods by Sea Act was designed to alter the long-established rule that the full burden of the losses sustained by both ships in a both-to-blame collision is to be shared equally.

*Id.* at 241-42.

38. "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . . ." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).



only that proportion of the damage attributable to the noncarrying vessel, as the Harter Act and COGSA would prevent cargo from recovering from the carrying vessel.<sup>39</sup> Thus, in replacing the well-settled but unjust divided damages rule, the Court may have eliminated the equally well-settled principle that cargo may recover its full damages in a both-to-blame collision.

Such a construction of the *Reliable Transfer* holding is unlikely, however. Cargo's right to recover is firmly established in the American legal system, and has been frequently articulated and defended by the courts.<sup>40</sup> Moreover, the Supreme Court has consistently held that the Harter Act and COGSA neither operate to defeat cargo's right to recover in a both-to-blame collision,<sup>41</sup> nor authorize provisions in bills of lading which would have that effect.<sup>42</sup> The Court will probably be unwilling to construe the rule of proportional liability to require cargo owners to absorb the loss in both-to-blame collisions.

An alternative is to continue the practice of treating vessels mutually at fault as joint tortfeasors with respect to cargo, allowing cargo to recover from the noncarrying vessel, which in turn may have contribution from the carrying vessel. Rather than continuing the current practice of pro rata contribution, however, *Reliable Transfer* suggests that contribution, as well as liability, would be proportionate to a vessel's degree of fault.<sup>43</sup> Since no cargo or other third party damages obtained in *Reliable Transfer*,<sup>44</sup> the holding need not be read as affecting the right of cargo to full recovery; moreover, full recovery

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39. See note 28 *supra*; Huger, *The Proportional Damage Rule in Collision at Sea*, 13 CORNELL L.Q. 531 (1928). The Huger article assumed that this would be the effect of adopting a comparative negligence rule, although the author also assumed that the adoption would be the result of ratification of the 1910 Brussels Convention: "The Maritime Convention rule will result in giving full and no doubt intended effect to the Harter Act by doing away with the doctrine announced in the *Chatahoochee* [sic] . . . ." *Id.* at 544.

40. "Parties without fault, such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer . . . ." The "*Atlas*," 93 U.S. 302, 319 (1876). See *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952). This is in sharp contrast to judicial attitudes toward the divided damages rule, which was apparently accepted without justification. See, e.g., *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1854).

41. *The Chatahoochee*, 173 U.S. 540 (1899).

42. *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236 (1952). See note 37 *supra*.

43. Thus, if vessels *A* and *B* collide, *A* is 75% at fault and *B* is 25% at fault, and the cargo on vessel *A* is damaged to the extent of \$10,000, the cargo would collect its full measure of damages from vessel *B*. Vessel *B* would then collect \$7500 as contribution from vessel *A*.

44. The suit involved only damage to the *Whalen*. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 398 (1975).

with comparative contribution would indirectly implement the precise terms of the holding.<sup>45</sup>

Comparative contribution is already a part of the tort law of several states.<sup>46</sup> Wisconsin and Maine became comparative contribution jurisdictions<sup>47</sup> following adoption of comparative negligence statutes. In addition, five jurisdictions that do not apply comparative negligence between plaintiff and defendant allow comparative contribution. In 1961 the Supreme Court of Hawaii approved a 65 percent contribution award pursuant to a statute which allows for unequal shares when equal division would be inequitable.<sup>48</sup> A similar rule is followed by Arkansas,<sup>49</sup> Delaware,<sup>50</sup> and South Dakota.<sup>51</sup> The United States Court of Appeals for the Third Circuit has adopted a common law rule of comparative contribution for the Virgin Islands in a context of settle-

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45. See note 38 *supra*.

46. See Annot., 53 A.L.R.3d 184 (1973).

47. *Bielski v. Schulze*, 114 N.W.2d 105 (Wis. 1962); *Packard v. Whitten*, 274 A.2d 169 (Me. 1971). In *Bielski* the court described contribution as an equitable doctrine designed to remedy the problem of one tortfeasor bearing an unjust proportion of a common liability.

If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle. It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent.

114 N.W.2d at 109.

In *Packard*, the Maine court cited *Bielski* with approval, but also noted that the statute which established comparative negligence in Maine had been amended in 1969 and quoted the statute:

"In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant."

274 A.2d at 180, quoting ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1974). The court concluded that the legislature intended to establish comparative contribution. See also Note, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 ME. L. REV. 243 (1972).

48. *Mitchell v. Branch*, 363 P.2d 969 (Hawaii 1961). Hawaii had enacted a version of the Uniform Contribution Among Tortfeasors Act, HAWAII REV. STAT. § 663-12 (1974 Supp.), but still applied the doctrine of contributory negligence in 1961. Hawaii adopted comparative negligence in 1969. HAWAII REV. STAT. § 663-31 (1974 Supp.).

49. *Burks Motors, Inc. v. International Harvester Co.*, 466 S.W.2d 907 (Ark. 1971); ARK. STAT. ANN. §§ 34-1001 to -1009 (1967).

50. DEL. CODE ANN. tit. 10, § 6302 (1974).

51. S.D. COMPILED LAWS ANN. § 15-8-15 (1967).

ment and contribution.<sup>52</sup> Of the comparative negligence states, Florida,<sup>53</sup> Mississippi, Minnesota, Nebraska, Massachusetts, New Hampshire, and Vermont<sup>54</sup> do not have comparative contribution.

The *Chattahoochee* principle of full recovery by innocent third parties and the *Reliable Transfer* principle of proportional responsibility for damages would both be maintained by allowing cargo owners to recover in full from the noncarrying vessel and providing for comparative contribution. Admittedly, such an approach would avoid enforcement of the provisions of COGSA and the Harter Act which relieve shipowners of liability. That is nothing new, however; it is precisely what the courts have been doing since *The Chattahoochee*.<sup>55</sup>

This proposal does nothing to ameliorate the harsh effects of the Limitation of Vessel Owner's Liability Act.<sup>56</sup> Commentators generally agree that the act represents an idea whose time has come—and gone.<sup>57</sup>

52. *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967).

53. Until June 13, 1975, when Florida's version of the Uniform Contribution Among Tortfeasors Act, Fla. Laws 1975, ch. 75-108, § 1 (§ 768.31) took effect, Florida had no contribution among tortfeasors. The Florida Supreme Court indicated in *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975), that it might have overruled the no contribution principle even without the statute, on the basis that prohibiting contribution is inconsistent with the equitable principles of comparative negligence announced in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). The statute provides that contribution shall be on a pro rata basis, and that in determining tortfeasors' shares:

- (a) Their relative degrees of fault shall not be considered;
- (b) If equity requires the collective liability of some as a group shall constitute a single share; and
- (c) Principles of equity applicable to contribution generally shall apply.

Fla. Laws 1975, ch. 75-108, § 1 (§ 768.31(3)).

It is impossible to say whether, absent the statute, the court might have instituted a rule of comparative contribution. In view of the statute's requirement of pro rata shares, however, the court held in *Lincenberg* that a determination of comparative fault among tortfeasors is not necessary. In a specially concurring opinion, Justice Boyd argued that §§ (a) and (c) of § 768.31(3) are in conflict, and that "the two sections considered together would require the relative degrees of fault of joint tortfeasors be considered by the jury and court in fixing liability . . ." *Lincenberg v. Issen*, *supra*, at 394.

54. New Hampshire and Vermont do not apply joint and several liability to tortfeasors. Thus a plaintiff may recover from each defendant only the proportion of damage attributable to that defendant. N.H. REV. STAT. ANN. § 507:7a (Supp. 1973); VT. STAT. ANN. tit. 12, § 1036 (1973).

55. See notes 34-37 and accompanying text *supra*.

56. Consider the following situation: Vessels *A* and *B* collide. *A* is 90% at fault; *B* is 10% at fault. *A* sinks and is a total loss. The owner of cargo carried by *A* sues *B*, recovering \$50,000. Under comparative contribution, *B* is entitled to recover \$45,000 from *A*. Because *A*'s owner may limit his liability to the value of the vessel at the end of the voyage, *B* collects nothing. So far as liability for cargo damage is concerned, *Reliable Transfer* does not remedy all the inequities.

57. See G. GILMORE & C. BLACK, *supra* note 8, at 822: "[T]he Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity Insurance) were available, shows increasing signs of economic obsolescence." See also

Its purposes, as well as that of international uniformity of laws, would be better served by a single statute modeled after the British law,<sup>58</sup> which allows shipowners to limit their liability without entirely depriving claimants of recovery.

It is difficult to justify COGSA and Harter Act provisions abrogating cargo owners' right to recover damages. The chief virtue of those provisions has been the ability of the courts to circumvent them through the rule of *The Chattahoochee*. Statutory reform, of course, requires congressional action. Until it is forthcoming, the courts may only apply the laws to achieve substantial justice whenever possible. *Reliable Transfer*, by replacing the divided damages rule with comparative negligence, helps to facilitate that task. The next step should be comparative contribution.

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**Constitutional Law—DUE PROCESS—POSTJUDGMENT WAGE GARNISHMENT PROCEDURE THAT GIVES DEBTOR NO NOTICE OR OPPORTUNITY TO ASSERT STATUTORY EXEMPTION PRIOR TO GARNISHMENT IS UNCONSTITUTIONAL.—*Brown v. Liberty Loan Corp.*, 392 F. Supp. 1023 (M.D. Fla. 1974).**

On July 13, 1973, a judgment was entered for Liberty Loan Corporation of Duval against Etta Jane Brown and her husband Saul F. Brown. On July 25, 1973, a motion for garnishment after judgment was filed by Liberty Loan and a writ of garnishment was issued by the clerk of the circuit and county courts. The motion for garnishment was made and the writ of garnishment was issued pursuant to sections 77.01 and 77.03 of the Florida Statutes. The writ was served on Etta Brown's employer, Baby's Best Diaper Service, which was required to withhold a portion of her wages. After notice was received from her employer, she filed an affidavit of exemption pursuant to section 222.12, Florida Statutes, stating that she was the head of a family and that the money attached was for personal labor and services. Liberty Loan denied the

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Eyer, note 17 *supra*; Thede, *Statutory Limitations (Other Than Harter and COGSA) of Carrier's Liability to Cargo—Limitation of Liability and the Fire Statute*, 45 TUL. L. REV. 959 (1971).

58. See note 25 *supra*.