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APPORTIONMENT OF FAULT IN BOTH-TO-BLAME COLLISION CASES

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Because under *United States* v. *Reliable Transfer Co., Inc.,* decided May 19, 1975, 421 U.S. 397, 1975 A.M.C. 541, United States Courts sitting in Admiralty are now empowered to apply the rule of proportional fault, which has been applied in most of the rest of the maritime world for many years, there has been considerable interest in ascertaining how the rule has been applied in other jurisdictions in the past.

The precise holding of *Reliable Transfer* is as follows:

> "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, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault." (421 U.S. 397, 411; 1975 AMC 541, 552.)

So now we are in a new era: we are looking at degrees of fault in a way that we have not done before. As to possible bases for apportionment of fault in collision cases, I would just like to suggest two

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bases, and then will discuss what has happened in other jurisdictions and what has happened in the United States before and since *Reliable Transfer*.

Should allocation of fault be with respect to the seriousness of the faults or with respect to causation of the incident?

Do ten minor violations of the Rules of the Road equal one major violation?

I think it interesting to look at how fault has been apportioned in jurisdictions where that has been the rule for many years.

A. Scandinavia

Frode Ringdal, Esq., a very well-known maritime lawyer of Oslo, Norway, wrote an article in Norwegian entitled "Judicial Evaluation of Fault in Maritime Collision Cases", dealing with the Courts of Norway, Sweden and Denmark, which was published in *Arkiv for Sjorett,* Volume 12, page 377 (1975). This part of my comments, with his permission, is based on that article.

Between 1928 and 1972, a period of 45 years, 207 maritime collision cases were decided in the courts of Norway, Sweden and Denmark. 140 of these cases involved collisions between moving vessels. 67 involved collisions with something other than a moving vessel. Obviously this is a very small fraction of the total of the navigational mishaps in Scandinavia: for example, in 1970 there had been 140 cases of this type reported to the maritime authorities in Norway alone. Norway and Sweden and Denmark are just like all other jurisdictions—most of these cases are settled.

Most supposedly informed persons consider the following propositions to be true in jurisdictions where proportionate fault has been the rule:

(a) In collisions involving two moving vessels it is almost impossible for one vessel to be exonerated.

(b) A violation of a navigational rule is never excused.

(c) Courts in proportionate fault jurisdictions do not recognize the theory of inevitable collision.

(d) Where fault can be apportioned, as it now can be with us under *Reliable Transfer,* fine nuances in the sliding scale of division of damages often occur.

(e) In collisions with a moored vessel or a pier the moving vessel is always at fault.

According to Mr. Ringdal, every one of those statements is *false* insofar as Scandinavia is concerned.

1. *Sole Fault or Exoneration.*

Of the 207 reported cases 107 resulted in sole fault.

Of the 140 cases involving collisions between two moving vessels 64 resulted in sole fault.

Of the 67 cases involving collision with something other than a moving vessel 24 resulted in the moving vessel being exonerated.

2. *Inevitable Accident.*

The Scandinavian courts found "inevitable accident" in 6 of the 207 reported cases, but found no fault or "inscrutable fault" in an additional 15 cases, a total of 21 cases or about 10% of the total reported cases.

3. *Both to Blame Cases.*

Most common apportionments are:

50-50	34 cases	16.5%
75-25	18 cases	8.5%
⅔-⅓	14 cases	7 %

Other apportionments:

90-10	3 cases
84-16	2 cases
80-20	2 cases
60-40	2 cases
"Other Divisions"	4 cases

Mr. Ringdal pointed out that most of the cases of sole fault are older cases, the modern tendency in Scandinavia being to find some fault on both vessels, with a tendency toward equalization of the fault, despite the proportionate fault doctrine. In cases where no one was found at fault, eight were held to be due to Act of God, six were due to undiscoverable defects, and the balance involved failure of proof.

In two out of the three 90/10 apportionments and one out of the two 80/20 cases the "holding on" vessel was assessed the lower degree of fault because of slow reaction of the navigators and the balance because of poor lookout. Mr. Ringdal pointed out that these finer adjustments are of an older day, before World War II, and that in recent years finer adjustments have practically disappeared, perhaps due to adoption by Scandinavian courts of a type of major-minor fault philosophy. Also, some faults which were once given a relatively small percentage (e.g. lookout) are now considered serious enough to give a substantial degree of fault. Further, Scandinavian courts appear to recognize that some vessels, for example, supertankers, are hampered, or as the new rules call it, "constrained by their draught", and that other vessels which might have a "privilege" or right of way must take this into consideration. There appears to be a growing requirement for "privileged" vessels to take action to avoid a collision hazard created by the burdened vessel. Failure to take such avoiding action has increasingly resulted in part liability.

B. The United Kingdom

In the past 65 years since 1911 (when the Brussels Convention was adopted), there appear to have been 368 reported cases, of which more than half occurred prior to 1943. 343 of the 368 cases were analyzed, with the following results:

1. *Sole Fault or Exoneration.*

Of the 343 cases analyzed 180 resulted in sole fault, 14 resulted in no fault.

2. *Both to Blame Cases*

Total both to blame cases—149

Most common apportionments:

50-50	64 cases
⅔-⅓	33 cases
75-25	15 cases
60-40	13 cases
80-20	8 cases
85-15	2 cases
90-10	1 case
"Other Divisions"	13 cases

It is interesting that in the United Kingdom there appear to have been no "finer" division than one 90-10 case, and in Scandinavia there likewise was no "finer" division than 90-10 (and only 3 of these). No case in the United Kingdom or Scandinavia appears to have resulted in a 70-30 apportionment.

An illustrative case as to how the courts in the United Kingdom have dealt with collision cases is THE STATUE OF LIBERTY, House of Lords 1971, Vol. II, Lloyds Law Reports, page 277, indicating the rationale of English courts, which I suspect that our courts will use in apportioning fault. In his opinion Lord Reed said that one must consider both the causative potency and blameworthiness of the faults. He found it hard to assess "causative potency" in terms of percentages, but the result in that case was one of the few 85/15 cases in the United Kingdom.

C. The United States (applying foreign law)

1. Before *Reliable Tranfer.*

a. *The Mandu,* 114 F.2d 361 (2 Cir. 1940), 1940 AMC 1150, cert. denied 311 US 715 (Brazilian waters) 80-20.

b. *American Steamship Co.* v. *Interlake Steamship Co.,* 194 F.2d 25 (6 Cir. 1952), 1952 AMC 741, cert. denied 344 U.S. 822 (Canadian waters) 50-50.

c. *Lady Nelson Ltd. and Canadian National (West Indies) Steamships, Ltd.* v. *Creole Petroleum Corp. etc.,* 224 F.2d 591 (2 Cir. 1955), 1955 AMC 1679, cert. denied 350 US 935, but see opinion in 286 F.2d 684 (2 Cir. 1961) 1961 AMC 289 (Trinidad waters) 50-50.

d. *John R. H. McDonald* v. *M/V Betty K II,* 1958 AMC 523 (SD Fla. 1958) (High Seas, both vessels of British Registry) Sole fault.

e. *Partenreederei* "WALLSCHIFF" v. SS PIONEER, 164 F. Supp. 421, 1958 AMC 2511 (ED Mich. 1958), aff'd 287 F.2d 886, 1961 AMC 660 (6 Cir. 1961) cert. denied 368 U.S. 825 (Canadian waters) 95-5.

f. *Norman McKeel* v. *Michael F. Schroeder and the American Oil Screw Mandy,* 215 F. Supp. 756 (ND Calif. 1963), 1963 AMC 1099 [Note: This case is a maverick. The trial judge divided the damages 75-25 in a well-reasoned opinion in a case involving a high seas collision of two U.S. vessels, with full knowledge that he was trying to "change the course of the stars" (1963 AMC 1105). Other District Judges who tried to do so in this respect were reversed on appeal. This case was not appealed.] 75-25.

g. *U.S.A.* v. *M/S Hoyanger and Westfal-Larsen & Co. A/S,* 265 F.2d 730 (WD Wash. 1967), 1967 AMC 1047 (Canadian waters) 60-40.

h. *China Union Lines, Ltd.* v. *States Steamship Company,* 378 F.2d 356 (9 Cir. 1967), 1967 AMC 1725, cert. denied 389 US 953 (Viet Nam waters) 50-50.

i. *Hawaii—Santa Fe Pioneer* (Eugene Underwood, sole arbitrator) 1968 AMC 602 (Japanese waters) ⅔-⅓.

j. *Surinam Transport Co.* v. *M.V. Erich Schroder, etc.,* 1970 AMC 414 (ED La. 1969) (Surinam waters) 75-25.

k. *Labrador Steamship Co., Ltd.* v. *M.V. Egle,* 1971 AMC 2344 (ND Ohio, Western Division 1971) (Canadian waters) 95-5.

l. *Ishizaki Kisen Co.* v. *U.SA.,* 510 F.2d 875 (9 Cir. 1975), 1975 AMC 287 (Japanese waters) 75-25

In tabular form, the distribution of apportionment cases is as follows:

95-5	2 cases
80-20	1 case
75-25	3 cases
⅔-⅓	1 case
60-40	1 case
50-50	3 cases
Sole Fault	1 case

2. Since *Reliable Transfer**

Sole Fault	4 cases
90-10	1 case
80-20	3 cases
65-35	3 cases
60-40	1 case
50-50	1 case

CONCLUSION

The dilemma—and opportunities—presented to the bench and bar by the Supreme Court in *Reliable Transfer* were colorfully expressed by Judge Alvin B. Rubin of the Eastern District of Louisiana in *"In the Matter of the Complaint of Sincere Navigation Corporation as owner of* SS HELENA", decided September 8, 1976, 1976 AMC 2013 (not officially reported) which involved a collision between that vessel and WHITE ALDER:

> "It is profitless to attempt to weigh fault against fault as if each shortcoming could be measured in some sort of scale. Both vessels were at fault and actively so. The errors of neither were minor. Each vessel committed acts that contributed to

* As of October 28, 1976. Because the number of cases relying on *Reliable Transfer* is increasing so rapidly any citation list would be out of date almost immediately. "Shepardizing" 421 U.S. 397 is the only solution!

the collision. No single act of either can be completely disentangled. But the WHITE ALDER's unexplained sheer into the course of the HELENA was the fateful and final act of negligence.

However, the fault does not appear to have been equal. I conclude that the WHITE ALDER's faults were more than half again as responsible as the HELENA's, but not as great as twice as much.

I, therefore, assess their respective blame as 65% due to the WHITE ALDER's faults and 35% due to the HELENA's."

It will be interesting to note the extent to which United States Courts look to other jurisdictions for assistance in ascertaining the bases for apportionment of fault.