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Collisions

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Collisions

JOSEPH C. SWEENEY*

I INTRODUCTION

An admiralty student who envisions Supreme Court review of important maritime issues must be fantasizing or living in the past. In contrast to 1816, when admiralty and maritime cases made up 25% of the Court's docket,¹ today they account for less than one percent.² Moreover, the Supreme Court's frequent denial of certiorari in cases raising important maritime issues (other than the longshore statute) means that courts of appeal will continue to determine the law for the various circuits, despite the apparent demand of the Constitution for uniformity.³ Nevertheless, I offer the

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¹I C. Warren, *The Supreme Court in United States History* 454 (1926) (noting that of 400 cases decided from 1800 to 1816, 25% involved admiralty and shipping (war, neutrality, prize, embargo, and non-intercourse); another 25% involved practice or procedure; 2.7% involved slavery; 2.5% involved citizenship issues; and 1.5% raised federal constitutional questions).

²Hughes, *An Introduction: Principles and Pragmatism*, 21 Tul. Mar. L.J. 1, 5 (1996), cited in Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. Mar. L. & Com. 275, 276 (1998) (concluding that maritime cases make up .045% of the total federal docket).

³There are two constitutional sources of admiralty uniformity: Article I, § 8 ("To regulate Commerce with foreign nations and among the several States. . .") and Article III, § 2 ("The judicial power shall extend to . . . all Cases of Admiralty and Maritime Jurisdiction. . .").

Under Article I, the line of cases beginning with *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), and *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), a broad, all-encompassing federal power was loosed to contend with observed state police powers under the Tenth Amendment, see *The License Cases*, 46 U.S. (5 How.) 504 (1847), and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), under the Court's "selective exclusiveness" doctrine. Federal control of state economic regulations must today meet the "tests" of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), a 5-4 decision imperilled by decisions like *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996), and *Printz v. United States*, 521 U.S. 898 (1997). For modern maritime cases on federal preemption, see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978), and *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 1960 AMC 1549 (1960). See generally Epstein, *The Proper Scope of the Commerce Clause*, 73 Va. L. Rev. 1387 (1987).

Article III became a potent source for overriding state law in favor of the uniformity of the general maritime law in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917). (Arguably

following short list of issues that I believe need Supreme Court review: uniformity of maritime tort,⁴ abolition of *The Pennsylvania Rule*,⁵ and fault as the sole determinant of liability.⁶

II UNIFORMITY OF MARITIME TORT

The academic community, unlike the admiralty bar, is currently entangled in a debate on the sources of admiralty jurisdiction and the substantive law of the admiralty courts because of the suggestion by Professor William R. Casto⁷ that the 18th century framers' vision of "admiralty and maritime jurisdiction"⁸ was limited to public law (prize, piracy, and smuggling) rather than the private law of torts and contracts. The dramatic corollary of this suggestion is that the source of private admiralty law must be *state* common law.⁹ The consequence of state law sources is a refutation of the mandatory uniformity of substantive admiralty law¹⁰ and the toleration of state common law¹¹ and statutory law¹² in a federal court sitting in admiralty. In other words, "local law" is no longer an exception to the rule for application of the uniform general maritime law but the rule itself.¹³

The problem case, never overruled, is *Belden v. Chase*,¹⁴ a collision of two steam-driven vessels on navigable waters (the Hudson River—beyond

"uniformity" was a desperate effort to find rationale in a 5-4 decision for striking down workers' compensation legislation following *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917), workers' compensation that had survived attack based on substantive due process.) The *Jensen* case was reinforced by *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 1942 AMC 1645 (1942), *Kermarec v. Cie. Generale Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959), and *Kossick v. United Fruit Co.*, 365 U.S. 731, 1961 AMC 833 (1961), but questioned in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973).

⁴See *infra* notes 7-38 and accompanying text.

⁵See *infra* notes 39-57 and accompanying text.

⁶See *infra* notes 58-75 and accompanying text.

⁷See Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates*, 37 *Am. J. Legal Hist.* 117 (1993) [hereinafter cited as Casto I]. Cf. Guttoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 *J. Mar. L. & Com.* 361 (1999), and Casto, *Additional Light on the Origins of Federal Admiralty Jurisdiction*, 31 *J. Mar. L. & Com.* 143 (2000).

⁸The identical phrase, "Admiralty and Maritime Jurisdiction," is found in Article III, § 2 of the 1787 Constitution and § 9 of the First Judiciary Act, Act of Sept. 24, 1789, Ch. 20, 1 Stat. 76. "Jurisdiction" is capitalized in the Constitution but spelled with a small "j" in the statute.

⁹Casto I, *supra* note 7, at 122.

¹⁰See *supra* note 3. See also G. Gilmore & C. Black, *The Law of Admiralty* 49 (2d ed. 1975).

¹¹*American Dredging Co. v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994).

¹²*Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996).

¹³See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973).

¹⁴150 U.S. 674 (1893), cited by Justice Holmes in his dissent to *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 1996 AMC 2076 (1917).

the ebb and flow of the tide), a jurisdiction apparently claimed for federal admiralty law in 1851 by Chief Justice Taney in *The Genesee Chief v. Fitzhugh*.¹⁵ In *Belden*, the Supreme Court clearly approved the common law defense of contributory negligence in a vessel collision case tried in a state court. As will be shown, this decision must be either overruled or explained away.

The action began and ended in the courts of the State of New York; four jury trials were required to put it to rest.¹⁶ In between the third and fourth trials, the case went to the United States Supreme Court on a writ of error to the New York State Court of Appeals. While the case has continued validity interpreting the “special circumstances” rule of the then Inland Rules,¹⁷ it has become “notorious” because the Supreme Court applied the common law rule of “no recovery due to contributory negligence” to a collision on navigable waters.¹⁸

The pleasure yacht *Yosemite*, 182 feet in length, was steaming upstream on the east side of the Hudson River, about 90 miles north of New York City; the steamboat *Charlotte Vanderbilt*, 207 feet in length, was steaming downstream on the west side of the river.¹⁹ Because the *Yosemite* and the *Charlotte* were about to pass head to head, the *Yosemite* gave a one short blast whistle signal for a port to port passing, answered by the *Charlotte* with a one short blast whistle. The *Charlotte*, however, then began to cross from the west side to the east side of the river, during which maneuver she gave the two blast signal for a starboard passing, which was not answered by the *Yosemite*. Thus, while heading east the *Charlotte* crossed directly in front of the on-coming *Yosemite* and was struck on the starboard side at right angles with such violent force that the bow of the *Charlotte* separated and both parts of the ship sank instantly. The collision and sinking occurred at about 9:00 p.m. on July 14, 1882.²⁰

The action at law in the New York state court was initiated by the executors for the owner of the sunken *Charlotte*, alleging faulty navigation of the *Yosemite* in failing to comply with the *Charlotte*'s announced two whistle intention for a starboard passing together with the absence of white

¹⁵53 U.S. (12 How.) 443, 1999 AMC 2092 (1851), an 8–1 decision with a dissent by Justice Daniel.

¹⁶The proceedings are reported at *Chase v. Belden*, 34 Hun. 571 (N.Y. Sup. Ct. 1884), rev'd, 9 N.E. 852 (N.Y. 1887), and *Chase v. Belden*, 1 N.Y.S. 48 (Sup. Ct. 1888), aff'd, 22 N.E. 963 (N.Y. 1889), rev'd, 150 U.S. 674 (1893).

¹⁷See Rule 24 (“In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger.”).

¹⁸150 U.S. at 691 (citing *Atlee v. Packet Co.*, 88 (21 Wall.) 389 (1874)).

¹⁹*Id.* at 676.

²⁰*Id.* at 676–79.

range lights as required by federal law.²¹ The *Yosemite* defended on the basis of the *Charlotte*'s failure to comply with the agreed method of passing by going to starboard and failure to slow and sound a danger signal.²² The *Yosemite* admitted fault in the absence of the two white range lights.

At the third trial, the jury gave a verdict for the plaintiff (the *Charlotte*) for the value of the sunken vessel (\$27,668), which was affirmed by the Supreme Court General Term and the Court of Appeals without an opinion for the majority but with a dissent.²³ The United States Supreme Court reversed in an opinion by Chief Justice Fuller,²⁴ with a concurrence by Justice Brown, the Court's admiralty expert.²⁵

At the outset, the Chief Justice described the case as "a maritime tort committed upon navigable waters and within the admiralty jurisdiction;"²⁶ however, because of the plaintiff's choice of a common law remedy in state court, the state's common law defense of contributory negligence was held applicable and used to deny the plaintiff all recovery (as opposed to the equal division of damages rule applicable in admiralty).²⁷ Because of the plaintiff's admission that it had not used running lights, the plaintiff had to prove that the defendant's negligence (i.e., the failure to carry the two white range lights) was the *sole* cause of the injury. Virtually the entire opinion deals with the facts of the collision; discussion of earlier case law is minimal.

The Supreme Court concluded that the *Yosemite* was *not* required to carry the range lights as an enrolled coasting vessel that also enjoyed the foreign travel status of a registered vessel, but was exempt from the range light requirement as a pleasure yacht designed as a model of naval architecture.²⁸ Thus, the defendant *Yosemite* was not negligent. Furthermore, the plaintiff could not meet the burden of proof of *The Pennsylvania*²⁹ that its negligence did not and could not have contributed to the disaster. Reversal was required because the trial judge's general negligence instruction "disposed of a federal right" without the correct instructions as to the obligatory nature of the federal statute.³⁰ Justice Brown was compelled to write a concurrence denying recovery to the *Charlotte* because of her contributory negligence,

²¹Id. at 678.

²²Id.

²³22 N.E. 963 (N.Y. 1889).

²⁴150 U.S. at 690.

²⁵Id. at 703.

²⁶Id. at 691.

²⁷Id. (citing *The Max Morris v. Curry*, 137 U.S. 1 (1890)).

²⁸Id. at 697 (citing Act of Aug. 7, 1848, 9 Stat. 274, c. 141).

²⁹86 U.S. (19 Wall.) 125 (1874).

³⁰150 U.S. at 703.

but could not accept the Chief Justice's interpretation that range lights were not required.³¹

Belden v. Chase remains an anomaly. It is not part of the series of cases denominated as "maritime but local" where a state statute is applied instead of a conflicting federal rule, such as *Yamaha Motor Corp., U.S.A. v. Calhoun*,³² *International Paper Co. v. Ouellette*,³³ and *Huron Portland Cement Co. v. City of Detroit*.³⁴ Rather, it belongs with such collision decisions as *Foremost Insurance Co. v. Richardson*³⁵ and such tort cases as *Garrett v. Moore-McCormack Co.*³⁶ and *Kermarec v. Cie. Generale Trans-atlantique*.³⁷ As such, a clean and clear overruling of *Belden v. Chase* is needed to "tidy" up admiralty tort jurisdiction.³⁸

III

ABOLITION OF THE PENNSYLVANIA RULE

Under this 1874 rule, applicable to both-to-blame collisions at a time when the damages of colliding vessels were equally divided, a vessel that has committed a statutory fault is faced with the difficult burden of proving that the fault not only did not cause the collision, but could not have caused the collision.³⁹ The Supreme Court thereby created a presumption of causation.⁴⁰

The Court cited no authority, and provided no rationale, for the rule. The only case cited was an English case, *The Fenham*,⁴¹ recently decided by the Privy Council, to the effect that a vessel navigating without running lights

³¹Id. at 704–05.

³²516 U.S. 199, 1996 AMC 305 (1996).

³³479 U.S. 481 (1987).

³⁴362 U.S. 440, 1960 AMC 1549 (1960).

³⁵457 U.S. 668, 1982 AMC 2253 (1982).

³⁶317 U.S. 239, 1942 AMC 1645 (1942).

³⁷358 U.S. 625, 1959 AMC 597 (1959).

³⁸Tidy rules on jurisdiction were scorned by Justice Marshall in his opinions in *Foremost*, supra note 35, and *Sisson v. Ruby*, 497 U.S. 358, 1990 AMC 1801 (1990).

³⁹Specifically, the case holds:

But when, as in this case, a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable assumption 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*.

The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1874) (emphasis added).

⁴⁰"The burden rests upon the ship of showing . . . that it could not have been [one of the causes]." Id. at 136. See Zapf, *The Growth of the Pennsylvania Rule: A Study of Causation in Maritime Law*, 7 J. Mar. L. & Com. 521 (1976).

⁴¹[1870] L.R. 3 P.C. 212, 23 Law Times 329.

will be held in fault unless she proves that the absence of lights did not cause the collision.

A possible explanation for *The Pennsylvania Rule* is the timing of the decision. Fast steel ships using steam power, no longer responding to the intricacies of winds and currents, were becoming more plentiful and were causing more serious damages when they collided. Statutory rules to prevent collisions had been adopted, first in Great Britain in 1863,⁴² then in France the same year,⁴³ and then in the United States in 1864.⁴⁴ In 1872, these foreign regulations were held by the Supreme Court to be part of the international law of the sea.⁴⁵ A short time earlier, the Court had established the *in rem* liability of vessels under the conn of compulsory pilots;⁴⁶ announced *The Louisiana Rule*,⁴⁷ which presumes fault when a moving vessel strikes a non-moving vessel; and created the rule of joint and several liability (so that innocent claimants could collect their entire damages in collision from the non-carrying vessel).⁴⁸ Thus, in a 10-year period a new regime for statutory collision liability had been created that required a rule to prevent slick evasions;⁴⁹ such was presumably achieved by *The Pennsylvania Rule*.

The Pennsylvania Rule has been severely criticized over the years, but appellate courts continue to adhere to it when directly confronted by it.⁵⁰ Nevertheless, the admiralty bar eventually learned to avoid *The Pennsylvania Rule* by arguing non-contributory fault.⁵¹

Because *The Pennsylvania Rule* certainly contemplated the rule of equal division of damages in both-to-blame collisions, even if it was not based

⁴²The Merchant Shipping Act of 1862, 25 & 26 Vict., c. 63, authorized the Board of Trade to issue its Sea Regulations in 1863, compiling and expanding various partial regulations required by Parliament since 1846. See Owen, *The Origins and Development of Marine Collision Law*, 51 Tul. L. Rev. 759, 783 (1977).

⁴³*Id.* at 784.

⁴⁴Act of Apr. 29, 1864, Ch. 69, 13 Stat. 58. See Owen, *supra* note 42, at 786.

⁴⁵*The Scotia*, 81 U.S. (14 Wall.) 170 (1872).

⁴⁶*The China*, 74 U.S. (7 Wall.) 53 (1868).

⁴⁷70 U.S. (3 Wall.) 164 (1867).

⁴⁸*The Washington and The Gregory*, 76 U.S. (9 Wall.) 513 (1870) (personal injury). See also *The Alabama and The Gamecock*, 92 U.S. (2 Otto) 695 (1876), and *The Atlas*, 93 U.S. (3 Otto) 302 (1876).

⁴⁹The equal division of damages between vessels in both-to-blame collisions had been established (without benefit of statutory rules of the road) in *The Schooner Catherine v. Dickinson*, 58 U.S. (7 How.) 170 (1855), described by Justice Nelson as "the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation." *Id.* at 178. That case was overruled as "palpably unfair," "unnecessarily crude," and "inequitable" in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405, 407, 1975 AMC 541 (1975).

⁵⁰Tetley, *The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?*, 13 J. Mar. L. & Com. 127 (1982).

⁵¹*China Union Lines, Ltd. v. A.O. Anderson & Co.*, 364 F.2d 769, 1966 AMC 1653 (5th Cir. 1966), cert. denied, 386 U.S. 933 (1967); *The Aakre*, 122 F.2d 469, 1941 AMC 1263 (2d Cir.), cert. denied, 314 U.S. 690 (1941); *The Mabel*, 35 F.2d 731, 1929 AMC 1688 (2d Cir. 1929).

thereon, it should have been overruled when the equal division rule was abolished and the proportional fault rule adopted. Unfortunately, it was not.⁵²

The Court has not considered a case dealing with a presumption of causation in the 25 years since *Reliable Transfer*. Obviously, the Court that created *The Pennsylvania Rule* should overrule it. Nevertheless, one way of removing the rule would be for Congress to enact the provisions of the time-tested language of the 1910 Brussels Collision Convention,⁵³ excluding, however, the provision for several rather than joint and several liability.⁵⁴ Such legislation, following the suggestion of the Ninth Circuit in *Ishizaki Kisen Co. v. United States*,⁵⁵ wherein Judge Sneed referred to Article VI of the Convention,⁵⁶ which prohibits legal presumptions (whether created by legislatures or courts), would repeal *The Pennsylvania Rule*.⁵⁷

IV PERCENTAGES OF FAULT AS THE SOLE DETERMINANT OF LIABILITY

The Supreme Court's use of the word "fault" in *Reliable Transfer*⁵⁸ seems to make it clear that only degrees of culpability are to be compared in assessing percentages of fault.⁵⁹ Nevertheless, some American courts have

⁵²*Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1978 AMC 1786 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979). See also Peck, *The Pennsylvania Rule Since Reliable Transfer*, 15 J. Mar. L. & Com. 95 (1984).

⁵³International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Brussels, Sept. 23, 1910, 212 Consol. Treaty Ser. 178, reprinted at 6 Benedict on Admiralty Doc. 3-2 (7th rev. ed. 1999). The convention came into force with 10 ratifications on March 1, 1913.

⁵⁴Art. IV, second paragraph. See *infra* note 67.

⁵⁵510 F.2d 875, 1975 AMC 287 (9th Cir. 1975).

⁵⁶Collision Convention, *supra* note 53, at Art. VI, second paragraph ("Il n'ya point de présomptions légales de faute quant à la responsabilité de l'abordage." [There shall be no legal presumptions of fault in regard to liability for collision.]).

⁵⁷"We believe that Article 6 is addressed to presumptions such as the Pennsylvania Rule without regard to whether they rest on judicial or legislative authority. Consistency in the interpretation of Article 6 requires this result because such presumptions in some nations may be contained in statutes while in others in the opinions and judgments of courts." 510 F.2d at 882.

⁵⁸*United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).

⁵⁹According to the Court:

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.

Id. at 411 (emphasis added).

been persuaded to follow the English rule whereby degrees of *causation* and culpability are compared in determining percentages of fault.⁶⁰

The language of *Reliable Transfer* certainly is in accordance with the text of the 1910 Collision Convention; accordingly, American collision law needs a clear statement that only degrees of culpability are to be compared in assessing fault.

The development of the proportional fault rule and the development of a non-governmental international organization to unify and develop maritime law are bound together.⁶¹ While the law of general average⁶² was one of the first projects of the International Law Association (ILA),⁶³ maritime lawyers became concerned about the differences between the substantive rules of collision liability in Europe.⁶⁴ In 1889, the United States convened a diplomatic conference dealing with a number of maritime problems, including the rules of the road and a proposal for a permanent maritime organization.⁶⁵ Maritime practitioners, however, favored an industry-based organization that would arrive at practical rather than theoretical solutions.

Their organization would unify maritime law by multilateral treaties, rather than the Washington Conference method of draft legislation, intended to be uniform but subject to the vagaries of individual legislatures. The resulting permanent organization, the Comité Maritime International (CMI),

⁶⁰See, e.g., *Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co.*, 565 F.2d 1129, 1978 AMC 2315 (9th Cir. 1977); *In re Seiriki Kisen Kaisha*, 629 F. Supp. 1374, 1986 AMC 913 (S.D.N.Y. 1986); *Afran Transport Co. v. S/T Maria Venizelos*, 450 F. Supp. 621 (E.D. Pa. 1978); *S/S Helena*, 1976 AMC 2013 (E.D. La. 1976). Cf. *Gele v. Wilson*, 616 F.2d 146, 1981 AMC 462 (5th Cir. 1980).

⁶¹Sweeney, *Proportional Fault in Both-to-Blame Collisions*, [1964] *Il Diritto Marittimo* (Special ed., *Studi in Onore di Giorgio Berlingieri*) 549 (discussing the proportionality and joint and several liability rules). See also Chauveau, *L'Unification du Droit Maritime et le C.M.I.*, [1963] *Rev. Trm. de Droit Commercial* 737; Franck, *Les Origines du C.M.I.*, [1933] *Il Diritto Marittimo* (Sp. ed., *Studi in Onore di Francesco Berlingieri*) 215.

⁶²The York-Antwerp Rules on General Average, originally prepared in 1874, have been frequently revised, most recently in 1994. The Rules are incorporated in many maritime industry documents.

⁶³The ILA was founded at Brussels in October 1873, a result of recent wars: the American Civil War (1861-65) and the Franco-Prussian War (1870-71). The ILA conducts studies of international law problems and reports solutions. See Olmstead, *The International Law Association: A Worldwide Organization for Development and Promotion of International Law*, in *The Present State of International Law and Other Essays* (M. Bos ed. 1973).

⁶⁴Franck, *L'Abordage en Droit International*, *J. Droit Int'l Privé* 252 (1895).

⁶⁵The Washington Conference on International Maritime Law, convened by President Benjamin H. Harrison, dealt with many prominent issues of the day: load lines, seaworthiness, compulsory sea lanes, ice in the North Atlantic, uniform system of buoys, wreck reporting, qualifications of sea going officers, and, most importantly, the rules of the road. See *Final Acts and Protocols of Proceedings of the International Maritime Conference*, Oct. 16-Dec. 31, 1899, 51st Cong., 1st Sess., S. Ex. Doc. No. 53 (1890).

The maritime law conference was hardly the first attempt at unifying maritime practice; in 1884, the United States convened the International Meridian Conference in Washington attended by 26 nations that selected the meridian of Greenwich Observatory in England as the prime meridian (GMT).

made up of national maritime law associations, was organized in Brussels, Belgium in June 1897.⁶⁶ The first item on the agenda was the divergent systems of liability for both-to-blame collisions: the French-Belgian system of proportional fault, the English-American system of equal division of damages, and the German-Dutch system denying recovery to both colliding vessels. The solution adopted in 1897 was the rule of proportional fault.⁶⁷ That first report (by Louis Franck of Belgium) had been sent out for comments by the member associations. At the 1898 Antwerp meeting it was approved by the British, French, Belgian, and Dutch associations, but disapproved by the Germans because of the several liability to innocent cargo.⁶⁸

The formula for proportional fault liability in both-to-blame collisions emerged from the CMI's 1899 London Conference.⁶⁹ It has been unchanged essentially since then and is now found in Article IV of the 1910 Brussels Collision Convention,⁷⁰ quoting first the French text, the only authentic treaty language, followed by an English translation used unofficially in the U.S. but based on a translation prepared in 1911 for British ratification by parliamentary action:

S'il y a faute commune, la responsabilité de chacun des navires est proportionnelle à la gravité des fautes respectivement commises; toutefois si, d'après les circonstances la proportion ne peut pas être établie ou si les fautes apparaissent comme équivalentes, la responsabilité est partagée par parts égales. [If two or more vessels are in fault the liability of each shall be in proportion to the degree of 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.]

After the CMI's 1902 Hamburg conference, the organization sought the assistance of a government to convene a diplomatic conference to complete the draft collision treaty. The Belgian government agreed to act as the

⁶⁶CMI Bull. No. 1. See also the sources cited *supra* note 61.

⁶⁷CMI Bull. No. 1, Report at 30 and 60. This preliminary report also preferred the system of several liability (rather than joint and several liability) to limit recovery by innocent cargo to the percentages of fault of each colliding vessel, a result favored in English law (see *The Milan*, 167 Eng. Rep. 167 (Adm. 1861)). This decision was taken before the Maritime Law Association of the United States (organized in 1899) had joined the CMI. Thereafter, American cargo interests were unable to persuade the CMI to alter the rule; as a result, cargo interests consistently lobbied to prevent United States ratification of the treaty, beginning in 1912 when President Taft sent only the salvage convention (the other convention concluded at Brussels in 1910) to the Senate. The opposition of cargo owners and insurers continued in 1937 and 1961, when ratification of the 1910 collision convention was again considered.

⁶⁸CMI Bull. No. 2; CMI Bull. No. 6, at 39.

⁶⁹CMI Bull. No. 4, at 71; CMI Bull. No. 6.

⁷⁰See *supra* note 53.

convening authority. A preliminary conference in Brussels in February 1905 was not attended by the major maritime nations,⁷¹ but a second call for a diplomatic conference to consider both collision and salvage in September 1910 was successful as 26 delegations attended.⁷²

Professor Francesco Berlingieri's study of the record of the Brussels Diplomatic Conference of 1910 notes a colloquy that concerned both degrees of fault and gravity of fault.⁷³ Nevertheless, Dean Ripert of the French delegation advised that once causation had been established in both-to-blame cases there normally should be an equal division of damages.⁷⁴ Despite these somewhat theoretical discussions, the formula "proportionnelle à la gravité des fautes" remained unchanged.

In an English analysis of Article IV,⁷⁵ Justice Brandon has said that causative faults are considered from two angles: first, blameworthiness (i.e., culpability), and, second, the extent to which it contributed to the damage or loss (i.e., causative potency). Examples of causatively potent faults are excessive speed (whether in fog or clear weather) and an improper course alteration that increases the angle of the blow or results in the blow registering in an especially vulnerable area.

Culpability in a greater amount of liability will be placed on the ship that creates danger or difficult navigation in the first place. Thus, the ship that fails to react prudently or correctly will be held to a lesser amount of liability. Different degrees of culpability will also be assessed where the navigational fault is a fault of commission rather than omission.

V

CONCLUSION

This short list of issues may never be resolved by the Supreme Court, but it is this writer's hope that uniformity of treatment will emerge in at least some of the circuits. Problems in the Rules of the Road have not been

⁷¹Conference Internationale de Droit Maritime, 3 vols., Brussels, 1907; Vol. II, Session 12 (1905).

⁷²The delegations in attendance were as follows: Argentina, the Austro-Hungarian Empire, Austria, Belgium, Brazil, Chile, Cuba, Denmark, France, Germany, Great Britain, Greece, Hungary, Italy, Japan, Mexico, the Netherlands, Nicaragua, Norway, Portugal, Romania, Russia, Spain, Sweden, the United States of America, and Venezuela.

⁷³Berlingieri, *Jurisdiction and Choice of Law in Collision Cases and an Overview of the Concept of Fault and Its Apportionment*, 51 Tul. L. Rev. 866, 874 (1977). Professor Berlingieri was then President of the CMI.

⁷⁴*Id.* at 876-78.

⁷⁵Brandon, *Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 Tul. L. Rev. 1025 (1977). (Sir Henry V. Brandon later became Lord Brandon of Oakbrook as Lord of Appeal.) His article cites cases where apportionments of fault by trial judges were reversed and reapportioned by the Court of Appeal and the House of Lords. *Id.* at 1028-38.

considered because resolution of them requires international action by the International Maritime Organization. The 1972 Convention on the International Regulations for Preventing Collisions at Sea has already been amended three times: in 1981, (effective 1983), 1987 (effective 1989), and 1989 (effective 1991) by the swift and easy process of tacit consent, a demonstration that serious problems can be remedied when the will for uniformity is present.

