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CARGO DAMAGE LIABILITY: AMERICAN ADMIRALTY JURISPRUDENCE *IN EXTREMIS*

A recurring question facing admiralty courts is which of three parties—the cargo carrying vessel, the noncarrying vessel, or the cargo owners—should bear the loss of cargo damage resulting from a both-to-blame maritime accident. A recent Supreme Court decision that dealt with hull damage held that liability is to be allocated in proportion to each party's fault whenever possible. The ideal of proportionate liability is complicated, however, by the carrying vessel's ability to avoid or limit its liability. Thus, either the noncarrying vessel is subject to disproportionate liability or the cargo owner receives an incomplete recovery. Two district courts have addressed the issue of who should bear the loss and have reached contrary conclusions. This Note analyzes both decisions and concludes that neither court reached the most equitable result under the circumstances. To achieve equitable resolutions of such disputes, this Note then proposes a modification of joint and several liability—the current method used by most admiralty courts to assign cargo damage liability. The Note concludes with an examination of imminent statutory changes in this area and argues that the proposed modification of joint and several liability is consistent with such impending changes.

INTRODUCTION

A CONTROVERSY exists as to the proper extent and theoretical underpinnings of cargo damage recovery in "both-to-blame"[1] maritime collisions. The conflict stems largely from a history of piecemeal attempts by Congress[2] and the courts[3] to balance the opposing interests of shipowners and cargo.[4]

Recently, the United States Supreme Court again attempted to

1. In the context of admiralty law, "both-to-blame" refers to the situation in which two or more ships are concurrently negligent. For a discussion of the both-to-blame clause, which contractually allocates liability for cargo damage, see notes 88–94 *infra* and accompanying text.

2. Congress has provided shipowners with various defenses to damage actions by cargo, *see* note 4 *infra*. For example, if a shipowner exercises due diligence to provide a seaworthy ship for the carriage of cargo, the shipowner may be exonerated from liability for damage to cargo resulting from the negligent operation of the ship. This exemption from liability was originally enacted in the Harter Act, Ch. 105, § 3, 27 Stat. 445 (1893) (current version at 46 U.S.C. § 192 (1976), and was substantially reenacted in 1936 in the Carriage of Goods by Sea Act (COGSA), Pub. L. No. 74–521, § 4(2)(a), 49 Stat. 1207 (codified at 46 U.S.C. § 1304(2)(a) (1976)).

In addition, a shipowner may be permitted under certain circumstances to limit its liability to the dollar value of its interest in the vessel at the end of the voyage. The Limitation of Shipowners' Liability Act, 46 U.S.C. § 183(a) (1976).

3. *See* notes 64–74 *infra* and accompanying text.

4. This Note will use the term "cargo" to refer not only to goods carried aboard ship but also to the owner of such goods or that owner's subrogated underwriter.

balance those competing interests. In *United States v. Reliable Transfer Co.*,[5] the Court abrogated the ancient rule of admiralty which required that damages arising from a both-to-blame collision be divided equally among the at-fault parties regardless of relative degrees of fault.[6] In place of "divided damages"[7] the Court adopted a rule of proportionate fault under which liability for damages will be allocated on the basis of comparative fault whenever possible.[8]

The Court expressed three reasons for abandoning the rule of divided damages. First, the reasoning which purported to support the rule was shown to be specious: equal division of damages often failed to produce equitable results, and also did not seem likely to induce care and vigilance in navigation.[9] Second, continued adherence to the rule, which was no longer the prevailing standard among major maritime nations,[10] would not promote the compelling interest of international uniformity in admiralty.[11] Abandonment of the rule, however, with a simultaneous judicial adoption of comparative negligence would serve the salutary purpose of reducing international forum shopping by conforming American law to the rule of comparative fault contained in the Brussels Collision Convention of 1910.[12] Finally, the Court recognized that comparative negligence had long been applied in personal injury suits in admiralty.[13]

The Supreme Court intended the *Reliable Transfer* rule of proportionate fault to facilitate the equitable allocation of responsi-

5. 421 U.S. 397 (1975).

6. *Id.* at 410–11.

7. The rule of "divided damages" required the equal division of property damages among all parties guilty of fault, regardless of respective levels of fault. The rule was incorporated into American law by the Supreme Court's decision in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855). For an example of the actual application of the rule, see note 64 *infra*.

8. 421 U.S. at 411.

9. *Id.* at 402–03.

10. *Id.* at 403–04.

11. Kasanin, *Cargo Rights and Responsibilities in Collision Cases*, 51 TUL. L. REV. 880, 893 (1977).

12. International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, signed at Brussels, September 23, 1910, *reprinted in* 8 BRITISH SHIPPING LAWS, N. SINGH, INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING 1337 (2d ed. 1973) [hereinafter cited as Brussels Collision Convention]. *See* 421 U.S. at 403–04.

13. 421 U.S. at 407.

bility for hull damage due to collisions and allisions.[14] The adoption of the rule did not, however, resolve the question regarding the manner in which proportionate fault affected the rights of *cargo* or other third parties suffering damage in a both-to-blame collision.[15] The language of the Court's holding, however, is broad enough to encompass cargo damages:

> 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.[16]

The fundamental question which remains and which will be addressed by this Note is whether this proportionate fault rule compels the modification or abolition of joint and several liability.[17]

The importance of this issue is underscored by a consideration of the impact of shipowners' defenses on damage claims. In a typical situation, where the owner of the carrying vessel has exercised due diligence in providing a seaworthy vessel, it is entitled to invoke the immunity provisions of the Carriage of Goods by Sea Act (COGSA).[18] Cargo then has no cause of action against the carrier, but can seek recovery from any other at-fault party. Under the prevailing American rule of joint and several liability, cargo would be able to recover a judgment for one hundred percent of its damages from an at-fault party.[19]

A primary justification for holding one vessel liable for one hundred percent of cargo damage caused by two or more vessels is the availability of an action for contribution.[20] Thus, even if a noncarrier were initially found liable for all damage to cargo, lia-

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14. *See* text accompanying note 17 *infra*.

An allision is defined as "[t]he running of one vessel into or against another, as distinguished from a collision, *i.e.*, the running of two vessels against each other." BLACK'S LAW DICTIONARY 100 (rev. 4th ed. 1968).

15. *See* Healy & Koster, Reliable Transfer Company v. United States: *Proportional Fault Rule*, 7 J. MAR. L. & COM. 293, 298 (1975).

16. 421 U.S. at 411 (emphasis added).

17. *See* notes 160–72 *infra* and accompanying text.

18. COGSA §§ 4(2)(a)–4(2)(q), 46 U.S.C. §§ 1304(2)(a)–1304(2)(q) (1976).

19. American collision law does not impute the fault of carrier to cargo. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 945 (2d ed. 1975). It is thus more favorable to cargo than the law of nations adhering to the Brussels Collision Convention. *See* note 12 *supra* and accompanying text.

20. The Chattahoochee, 173 U.S. 540 (1899). For a full discussion of this case and its

bility ultimately could be apportioned according to fault in an action for contribution.

In response to an action for contribution, however, the carrier can petition the court to limit its liability[21] to the value of the ship after the collision plus any outstanding freight.[22] Moreover, if the carrying vessel were completely destroyed in the collision, the owner could limit the dollar amount of liability to the amount of carriage fees yet to be paid. Almost inevitably, this amount will be less than the dollar amount of the carrier's proportionate fault. Consequently, a portion of the noncarrier's claim for contribution will remain unsatisfied. This example demonstrates that if carrier is able to avoid or limit liability, disproportionate liability is imposed upon noncarrier in direct contradiction to *Reliable Transfer*.

It is likely that this contradiction will be resolved in the foreseeable future. On March 30, 1978, the United Nations Convention on the Carriage of Goods by Sea adopted a new text known as the "Hamburg Rules."[23] This Convention, if ratified by the United States Senate, would eliminate carriers' exemption from liability to cargo for damage arising from negligent navigation.[24] Cargo would thus no longer be limited to an action against noncarrier. In addition, on May 4, 1979, the Maritime Law Association of the United States published a proposal for new legislation which radically alters the nature of shipowners' limitation of liability.[25] In place of the arbitrary limitation to the value of the vessel and freight, the proposed legislation relates the level of limitation to the size of the vessel. The larger the vessel, the greater dollar amount the owner would be required to pay into a "fund"[26]

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effect upon the operation of the Harter Act exemption from liability to cargo for damage due to negligent navigation, *see* notes 71–74 *infra* and accompanying text.

21. Section 183(a) of the Limitation of Shipowners' Liability Act limits the carrier's liability to the dollar value of the owner's interest in the vessel at the end of the voyage. 46 U.S.C. § 183(a) (1976).

22. Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 120 (1871). The term "freight" refers to the fee charged for the carriage of goods, not the cargo itself.

23. United Nations Convention on the Carriage of Goods by Sea, U.N. Doc. A/CONF. 89/13 (1978), *reprinted in* THE MARITIME L.A. OF THE U.S., Doc. No. 613 6824–47 (1978) [hereinafter cited as the Hamburg Rules]. As of April 30, 1979, 27 nations, including the United States, had signed the Convention. Basnayake, *Introduction: Origins of the 1978 Hamburg Rules*, 27 AM. J. COMP. L. 353, 355 (1979).

24. Hamburg Rules, *supra* note 23, art. 5 ¶ 1, at 6827.

25. *Report of the Joint Committee of the Comite Maritime International and Limitation of Liability*, *reprinted in* THE MARITIME L.A. OF THE U.S., Doc. No. 619 (May 4, 1979) [hereinafter cited as Proposed Limitation Act].

26. The limitation of liability "fund" statutorily determines the maximum dollar amount of a shipowner's liability for a particular occurrence. *Id.* § 6, at 7077–78.

out of which damage claims could be satisfied.

Until such time as Congress enacts new legislation to govern cargo damage allocation, the admiralty courts must fulfill their obligation to act as an interstitial rule-making institution.[27] The Supreme Court sanctioned this approach in *Reliable Transfer* when it recognized its traditional authority and duty to exercise broad powers of equity to fashion rules governing maritime affairs.[28] The Court's decision and reasoning further indicate a broad conception of its power to reject longstanding rules in response to a felt need for reform.

The immediate issue faced by the admiralty courts is whether cargo or noncarrier should bear the risk of an incomplete recovery for cargo damage. As a practical matter, the answer depends upon *when* liability is apportioned. If apportionment occurs as an initial step in cargo's action for damages, cargo may recover only a proportionate amount of damages from each defendant. In such a case, cargo bears the risk of carrier limiting its liability. On the other hand, if apportionment of liability takes place in a subsequent action among defendants for contribution,[29] cargo will be able to recover one hundred percent of its damages from any one defendant. This scheme places the risk of carrier's limitation of liability on noncarrier.

The issue of who should bear the risk of an incomplete cargo recovery has been addressed by two federal district courts since *Reliable Transfer*.[30] In *Complaint of Flota Mercante Grancolombiana, S.A.* (Flota),[31] the District Court for the Southern District of

27. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) (Blackmun, J., dissenting).

28. 421 U.S. at 409.

29. One commentator notes that the authorities who have addressed the issue support the position that liabiliy in *Reliable Transfer* refers to "ultimate" liability after contribution. Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 804 (1977). While *Reliable Transfer* is clearly open to the interpretation that joint and several liability remains viable in the context of comparative negligence, this Note argues to the contrary. Joint and several liability is inherently inconsistent with comparative negligence and thus, the admiralty courts should exercise their equitable powers to prevent the injustice which may be visited upon the noncarrying vessel by holding it jointly and severally liable for all damages to cargo. *See* notes 113–117 *infra* and accompanying text.

30. The Second Circuit also considered cargo damage allocation in light of *Reliable Transfer*, but in a case which did not involve a collision. Vana Trading Co. v. S.S. "Mette Skou", 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977). The court imposed a very strict burden of proof upon the shipowner: it required the shipowner to prove the precise level of change attributable to causes excepted by COGSA or answer for 100% of cargo's damage. *Id.* at 105. See notes 181–82 *supra* and accompanying text.

31. 440 F. Supp. 704 (S.D.N.Y. 1977).

New York narrowly read the proportionate fault rule and held that the carrier and noncarrier involved in a collision were liable as joint tortfeasors. Since the carrier had limited its liability, the court held the noncarrying vessel liable for one hundred percent of cargo's damage.[32] The District Court for the Eastern District of Louisiana reached the opposite conclusion in *Alamo Chemical Transportation Co. v. M/V Overseas Valdes (Alamo)*.[33] The court liberally interpreted the proportionate fault rule of *Reliable Transfer* and limited cargo to a several recovery against each tortfeasor.[34] In rejecting joint and several liability, the *Alamo* court assumed that cargo damages were divisible under the proportionate fault rule, and that causation and liability were separately assignable to each defendant.[35]

The district courts in *Flota* and *Alamo* reached contrary conclusions as to whether *Reliable Transfer* implicitly abolished joint and several liability for cargo damage. It is evident that this conflict is a result of the inconsistent policy goals of the present shipowner defenses[36] and the rule of proportionate fault.[37] This Note argues, however, that the conflict can be resolved. Admiralty courts can (and should) exercise their broad equitable powers[38] to establish new rules of liability which do not place the burden of an incomplete recovery on noncarrier.[39]

This Note suggests one such new rule which modifies, but does not abolish, joint and several liability.[40] It is suggested here that noncarrier should be liable to the extent of its own fault, plus any part of carrier's liability recoverable by contribution. To place this rule in context, the Note first examines the historical development of cargo damage liability. Next, it argues that the *Flota* and *Alamo* decisions did not properly reconcile joint and several liabilty with *Reliable Transfer*.[41] The Note then suggests general guidelines for fashioning new rules of liability which will effectu-

32. *Id.* at 725.

33. 469 F. Supp. 203 (E.D. La. 1979).

34. *Id.* at 215.

35. *Id.* The court's "assumptions" are supported by the Supreme Court's statement in *Reliable Transfer* that damages should be divided equally only in those rare instances when it is impossible to ascertain relative degrees of fault. 421 U.S. at 411.

36. *See* notes 60–73 and accompanying text.

37. *See* notes 5–16 *supra* and accompanying text.

38. *See* notes 165–66 *infra* and accompanying text.

39. *See* notes 167–69 *infra* and accompanying text.

40. *See* note 170 *infra* and accompanying text.

41. *See* notes 96–148 *infra* and accompanying text.

ate proportionate fault,[42] in addition to proposing its own modification of joint and several liability.[43] Finally, the Note concludes with a discussion of new statutory developments which will impact directly on cargo damage claims.[44]

I. THE HISTORY OF CARGO DAMAGE LIABILITY

The difficulty of applying the *Reliable Transfer* rule of proportionate fault to cargo damage claims cannot be fully appreciated without an examination of the history of American admiralty jurisprudence. At various times, Congress,[45] the courts,[46] and shipowners[47] have sought to balance the rights and liabilities of parties to ocean carriage. The resulting patchwork of conflicting rules and policy goals is the context within which *Reliable Transfer* must be interpreted.

At common law, the ocean carrier was liable as an insurer of cargo.[48] Thus, even if two vessels were at fault in a collision, cargo could recover one hundred percent of its damage from the carrier. After the United States recognized the rule of divided damages in 1855,[49] cargo had an action for fifty percent of its damages against both negligent vessels, regardless of their actual levels of fault. By 1876, cargo gained the advantage of asserting joint and several liability, whereby one vessel could be held liable for one hundred percent of damages though not one hundred percent at fault.[50] In *The Milan*,[51] the Engligh High Court of Admiralty held that cargo damage, like hull damage, must be divided into moieties regardless of fault.[52] Thus, cargo recovered only half of its damages from the noncarrying vessel. This denial of

42. *See* notes 164–69 *infra* and accompanying text.

43. *See* notes 170–73 *infra* and accompanying text.

44. *See* notes 173–95 *infra* and accompanying text.

45. *See* note 2 *supra* and accompanying text.

46. *See* text accompanying notes 66–73 *infra*.

47. *See* notes 88–94 *infra* and accompanying text.

48. Kasanin, *supra* note 11, at 882.

49. The divided damages rule, dating back to at least the year 1150 with the Laws of Oleron, was incorporated into American law by the Supreme Court in the Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855). *See* United States v. Reliable Transfer Co., 421 U.S. 397 n.3 (1975).

50. *See* notes 67–68 *infra* and accompanying text. This rule continues to be followed by American Admiralty courts today. *See generally* Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CAL. L. REV. 304 (1957).

51. 167 Eng. Rep. 167 (Adm. 1861).

52. *Id.* at 176. *See* Owen, *supra* note 29, for a thorough treatment of the history of collision law. The author traces the development of collision law from ancient times to the present in both England and the United States.

joint and several liability for property damage was incorporated into the Brussels Collision Convention of 1910[53] and continued in an altered state in English admiralty law after the Maritime Conventions Act of 1911.[54]

In the years following the American Civil War, the safety, volume, and speed of ocean carriage increased.[55] In order to reduce the liability otherwise imposed upon the carrier, shipowners wrote exculpatory clauses into bills of lading.[56] Although the carrier could not contract out of such fundamental duties as that of furnishing a seaworthy vessel,[57] shipowners did exploit their then superior economic position to exact increasingly burdensome exculpatory clauses from cargo shippers.[58] Congress and the Supreme Court both responded to this by balancing in seemingly inconsistent ways the rights and obligations of the parties to ocean carriage.[59]

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53. *See* note 12 *supra*.

54. Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c.57, §§ 1–10. There is an important difference between the 1910 Collision Convention and the Maritime Conventions Act which carried it into effect. The Convention retains joint and several liability for personal injury or death actions but excludes it for property damage claims. Art. 4, Brussels Collision Convention, *supra* note 12, at 1338. The Maritime Conventions Act, however, is more favorable to those suffering property damage. While cargo would not have a joint and several claim against any of the at-fault vessels, if a vessel is itself free of fault and is damaged due to the combined fault of two other vessels, the innocent ship would be entitled to a joint and several judgment against either of the two other vessels. Brandon, *Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 TUL. L. REV. 1025, 1033 (1977). *See also* Owen, *supra* note 29.

55. A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 119 (4th ed. 1953).

56. The bill of lading may serve as a receipt for cargo received on board, as a contract of carriage, or as a negotiable document of title. *Id.* at 120.

57. During most of the nineteenth century, the clauses which exempted carrier from liability for damage to cargo were subject to an "overriding obligation" to furnish a seaworthy vessel. Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 (1859); G. GILMORE & C. BLACK, *supra* note 19, at 140. The Harter Act of 1893 altered the obligation to one of exercising due diligence to provide a seaworthy vessel. *See* Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519, 525 (1973).

58. The exculpatory clauses written into bills of lading by shipowners became so extensive that they essentially constituted adhesion contracts. Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 722 (2d Cir. 1963), *cert. denied*, 375 U.S. 942 (1963).

59. G. GILMORE & C. BLACK, *supra* note 19, at 142–43; *see* notes 56–74 *infra* and accompanying text.

A. *Legislative and Judicial Attempts to Balance the Opposing Interests of Shipowner and Cargo*

The Harter Act,[60] enacted in 1893, relieved carriers of their insurers' liability, but precluded them from avoiding certain obligations to cargo. The errors and events for which shipowners were not to be held liable were set out explicitly,[61] and any further limitation of liability was prohibited.[62] Notably, an exemption from liability was provided for negligent operation of the ship,[63] even though the Supreme Court had previously ruled that clauses

60. Ch. 105, §§ 1–8, 27 Stat. 445 (1893) (current version at 46 U.S.C. §§ 190–196 (1976)).

61. 46 U.S.C. § 192 (1976). The exculpatory provision currently in force is set out in § 4(2) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1304(2) (1976):

> (2) 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;
>
> (b) Fire, unless caused by the actual fault or privity of the carrier;
>
> (c) Perils, dangers, and accidents of the sea or other navigable waters;
>
> (d) Act of God;
>
> (e) Act of war;
>
> (f) Act of public enemies;
>
> (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
>
> (h) Quarantine restrictions;
>
> (i) Act or omission of the shipper or owner of the goods, his agent or representative;
>
> (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
>
> (k) Riots and civil commotions;
>
> (l) Saving or attempting to save life or property at sea;
>
> (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
>
> (n) Insufficiency of packing;
>
> (o) Insufficiency or inadequacy of marks;
>
> (p) Latent defects not discoverable by due diligence; and
>
> (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

See also, United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 245 (1952). (Frankfurter, J., dissenting).

62. Harter Act § 1, 46 U.S.C. § 190 (1976); COGSA § 3(8), 46 U.S.C. § 1303(8) (1976). One observer notes: "The shipowner was specifically exonerated from all liability caused by negligence in the navigation and management of the vessel, providing the vessel was seaworthy. However, the shipowner could not further insulate himself from liability for loss or damage to the cargo; such stipulations were declared null and void." Note, *Admiralty—Contribution for Concurrent Causation in Cargo Cases*, 52 TUL. L. REV. 856, 858 (1978).

63. Harter Act § 3, 46 U.S.C. § 192 (1976), COGSA § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

to that effect in bills of lading were unlawful.[64]

Although the Harter Act removed cargo's right to recover damages from the carrier in the vast majority of collision cases, it did not explicitly define the new scope of cargo's recovery. The relevant exemption provision did not resolve the issue as it merely stated that "neither the vessel, her owner or owners, shall become or be held responsible for damage or loss resulting from faults or errors in navigation. . . ."[65] This language is subject to two possible interpretations with respect to cargo damage. Congress either intended that cargo itself bear the amount of loss proportional to the fault of the carrier as determined by the divided damages rule, or it intended to allow a joint and several recovery against any negligent party except carrier. The legislative history narrows the choice as it indicates that the exemption provision was designed to operate for the benefit of the shipowner at the expense of cargo.[66]

If joint and several liability is the proper interpretation, cargo has suffered little detriment by the provision; its only loss is of one of its possible sources of recovery. On the other hand, any advantage to carrier will be purely a function of chance. For example, if cargo aboard two negligent vessels is damaged in equal degree, neither shipowner will enjoy a net savings if joint and several liability survives in the context of the Harter Act. Rather, carrier benefits only when the damage sustained by its cargo exceeds that sustained by the other vessel's cargo. Moreover, this interpretation of the Harter Act creates a further anomalous result. If carrier is wholly at fault, cargo recovers nothing. If, however, as is far more likely, both vessels are at fault, cargo can recover one hundred percent of its damages from noncarrier.

Legislative efforts to balance the risks between carrier, noncarrier, and cargo were accompanied by Supreme Court decisions attempting to do the same. In 1855, the Court adopted the rule of divided damages in *The Schooner Catharine v. Dickinson*.[67] This decision multiplied the number of defendants to whom cargo

64. Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889).

65. Harter Act § 3, 46 U.S.C. § 192 (1976).

66. G. GILMORE & C. BLACK, *supra* note 19, at 142–43.

67. 58 U.S. (17 How.) 170 (1855). If two vessels are involved in a collision, the rule of divided damages requires the vessel which suffers less damage to pay to the more severely damaged vessel one half of the difference in the amount of damage respectively suffered, resulting in an equalization of damages. For example, if a collision between ships *A* and *B* results in damages amounting to $100,000 for *A* and $200,000 for *B*, ship *A* would be obliged to pay $50,000 to *B* in order to equalize damages at $150,000 each.

could turn for recovery of damage as each of the vessels involved became liable for an equal part of the damages.[68] Although the adoption of the rule of divided damages did not require a concomitant acceptance of joint and several liability, the Court held in 1876 that if cargo were unable to recover damages from one vessel, it had an action for one hundred percent of damages from the other.[69] Later that year, the Court recognized the unconditional right of cargo to recover a joint and several judgment from any at-fault noncarrying vessel.[70]

Shipowners were naturally adverse to paying one hundred percent of the damages to cargo carried aboard another vessel. Thus, six years after passage of the Harter Act, the Supreme Court granted shipowners relief from the operation of a statute which was purportedly enacted for their benefit. The Court held in *The Chattahoochee*[71] that the amount paid by a shipowner in satisfaction of a cargo damage claim could be included in that vessel's calculation of damage in a subsequent action for contribution.[72] By including the amount paid in satisfaction of cargo damage, noncarrier had an opportunity to recoup part of that amount from carrier; thus, the risk of damage to cargo aboard the carrying vessel was no longer borne solely by noncarrier.[73] The rule of *Chatta-*

68. Under the rule of divided damages all parties guilty of fault share equally in the damages arising from a collision. Thus, cargo damage is not compensated by carrier alone as insurer, but is apportioned equally among the at-fault parties.

69. The Alabama and the Game-cock, 92 U.S. 695 (1876).

70. The Atlas, 93 U.S. 302 (1876). Notably, The Atlas greatly expanded the rights of cargo by allowing it to proceed against any available defendant without first establishing the inability of other potential defendants to answer a judgment. *Id.* at 319. The Court stated:

> 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 from the wrong-doers, and they may pursue their remedy *in personam*, either at common law or in the admiralty, against the wrong-doers or any one or more of them, whether they elect to proceed at law or in the admiralty courts.

Id. This Note argues that passage of the Harter Act implicitly overruled the holding of The Atlas that cargo had an unqualified right to a full recovery for damage. *See* notes 64–66 *supra* and accompanying text.

71. 173 U.S. 540 (1899).

72. *Id.* at 555. *The Chattahoochee* granted noncarrier an action for contribution for cargo damage which would be combined with its action for division of hull damage.

73. Under the standard operation of the divided damages rule, carrier and noncarrier equalize hull damage by dividing the difference between respective damages sustained. *See* note 66 *supra*. The Court's decision in *Chattahoochee* indirectly extended this rule's application to cargo damage and thus expanded the scope of carrier's liability. Thus, carrier shares in the payment for its own cargo's damage if the amount of hull damage to the noncarrying vessel combined with the dollar amount paid by noncarrier to cargo exceeds the total hull damage of carrier. For example, if ship *A* suffers hull damage of $100,000, its

hoochee thus indirectly exposed carrier to liability for damage to its cargo although the carrier had been exempted from such liability by the Harter Act.[74]

B. *Unsuccessful Attempts to Avoid the Result of* The Chattahoochee

An international conference[75] and a contractual provision known as the both-to-blame clause[76] presented two distinct opportunities for avoiding the *Chattahoochee* result. Neither succeeded, however, in extracting the rule from American admiralty law.

The Brussels Collision Convention, signed in 1910 by The Third International Diplomatic Conference on Maritime Law,[77] would have replaced the *Chattahoochee* rule with a rule of proportionate fault. Article 4 of the Convention provides in part:

> If two or more vessels are in fault the liabiliy of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.
>
> The damages caused, either to the vessels or to their cargoes . . . are borne by the vessels in fault in the above proportions. . . .[78]

The Convention expresses the principle that cargo must participate in collision damage liability to the extent of carrier's proportionate fault.[79] This principle has been accepted by all major maritime nations[80] except the United States, which clings tenaciously to the notion that the "innocent" nature of cargo justifies

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cargo is damaged to the extent of $100,000, and ship *B* also has damages of $100,000, *B* will pay *A's* cargo $100,000. *B* thus has incurred total damages of $200,000, and now has an action against *A* for $50,000, which in this case represents cargo damage liability for which *A* was exempted by the Harter Act.

74. The proportionate fault rule of *Reliable Transfer* alters the operation of the rule of *Chattahoochee* only by limiting noncarrier's contribution claim to an amount in proportion to carrier's fault rather than for 50% regardless of fault.

75. *See* notes 77–85 *infra* and accompanying text.

76. *See* notes 88–94 *infra* and accompanying text.

77. Donovan & Ray, *Mutual Fault-Half Damage Rule—A Critical Analysis*, 41 INS. COUNSEL J. 395 (1974).

78. Brussels Collision Convention, *supra* note 12, at 1338.

79. Notably, the language of the second paragraph specifically supports the result reached by the court in Alamo Chem. Transp. Co. v. M/V Overseas Valdes, 469 F. Supp. 203 (E.D. La. 1979), which applied the proportionate fault rule of *Reliable Transfer* to a cargo damage claim. *See* notes 126–44 *infra* and accompanying text.

80. England, however, follows a slightly different rule. *See* note 49 *supra*.

its one hundred percent recovery of damages.[81]

The Brussels Convention was quickly ratified by most maritime nations.[82] It was not submitted to the United States Senate until 1937, however, and after bitter opposition by cargo interests was withdrawn by the President in 1947.[83] Notwithstanding its withdrawal from the Senate, the Convention was favored by Secretary of State Cordell Hull and the Senate Foreign Relations Committee.[84] The Committee's report concluded that ratification would change American law in two significant respects: the rule of divided damages would be replaced by a rule of proportionate fault and *The Chattahoochee* would be overruled so that proportionate fault would apply to cargo damage claims without joint liability.[85] Although *Reliable Transfer* accomplished the first and most important change, cargo's right of recovery for damage remains at odds with the law of other maritime nations. This inconsistency promotes forum shopping as cargo interests seek to have their claims adjudicated in the United States.[86]

Shipowners not suject to the Brussels Convention found their own way to avoid the *Chattahoochee* rule. In an individual effort to avoid one hundred percent liability for damage to another vessel's cargo, they added contractual provisions known as "both-to-blame" clauses[87] to bills of lading. If a collision occurred with the

81. A. KNAUTH, *supra* note 55, at 210–11 (4th ed. 1953). The Supreme Court's holding in *Reliable Transfer* may be a shift away from this traditional view. The language used by the Court in establishing the proportionate fault rule resembles closely the language in the first paragraph of Article Four of the Convention. 421 U.S. 397, 411 (1975).

82. *See, e.g.*, Brandon, *supra* note 54. Most nations, but not the United States, supported the concept of proportionate fault before the signing of the Brussels Collision Convention. For an interesting and informative record of international commentary on proportionate fault and liability for cargo damage, see INTERNATIONAL MARITIME COMM., LONDON CONFERENCE 1899 ON THE LAW OF COLLISIONS AT SEA AND SHIPOWNER'S LIABILITY (1899). *See also* 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 (1955).

83. *See* Owen, *supra* note 29, at 221.

84. SENATE COMM. ON FOREIGN RELATIONS, MARITIME COLLISION CONVENTION, EX. REP. NO. 4, 76th Cong. 1st Sess. (1939), *reprinted in* 1939 American Maritime Cases [A.M.C.] 1051.

85. *Id.*, 1939 A.M.C. at 1052.

86. Kasanin, *supra* note 11, at 892–94.

87. The standard both-to-blame clause states:

> If the ship comes into collision with another ship as a result of the negligence of the other ship and any 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, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of

clause in effect, cargo could recover one hundred percent of its damages from noncarrier, but then would have an obligation to pay carrier the amount which carrier had paid to noncarrier in satisfaction of the latter's claim for contribution. Because both-to-blame clauses accomplished circuitously the same end as the Brussels Collision Convention, they served the salutary function of conforming American admiralty practice to that of other nations, thereby eliminating one cause of international forum shopping.

Despite this beneficial effect, both-to-blame clauses were ruled unconstitutional by the Supreme Court in 1952.[88] The Court reasoned that it was against public policy to allow carrier to deprive cargo of the fruits of a suit against noncarrier[89] or to stipulate against its own negligence.[90] Justice Frankfurter, in a strong dissent, argued that it was senseless to deny carrier the right to contract out of a liability from which it had been legislatively exempted.[91] In response to the majority's public policy argument, Frankfurter asserted that in the Harter Act, Congress had determined public policy by providing carrier with a statutory exemption from liabiliy for negligence and that the Court was no longer free to reformulate policy to the contrary.[92]

Both the debate over ratification of the Brussels Collision Convention and the controvery produced by the introduction of both-to-blame clauses illustrate the tension which exists between the goals of equating liability with fault and providing "innocent" cargo with a full recovery. For more than a century, this tension has been adjusted by legislative and judicial rules which have often been inconsistent.[93] While these rules have not eased the tension, they have laid the groundwork for a balanced reconciliation of the opposing interests of shipowner and cargo. *Reliable Transfer* is a positive step towards the achievement of that goal

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said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 238 n.5 (1952).

88. *Id.* at 242. Both-to-blame clauses are permissible in *private* contracts of carriage because the bill of lading for such carriage is not a negotiable instrument. American Union Transp., Inc. v. United States, 1976 A.M.C. 1480 (N.D. Cal.).

89. 343 U.S. at 240.

90. *Id.* at 239.

91. *Id.* at 247–48 (Frankfurter, J., dissenting). The exemption from liability to cargo for damage arising from negligent navigation appears in the Harter Act § 3, 46 U.S.C. § 192, and COGSA § 4(2)(a), 46 U.S.C. § 1304(2)(a).

92. 343 U.S. at 245 (Frankfurter, J., dissenting).

93. *See* notes 60–73 *supra* and accompanying text.

insofar as it institutes a rule of proportionate fault. Yet, recent district court decisions indicate that the principles of *Reliable Transfer* have not been applied consistently to cargo damage claims.

III. THE APPLICATION OF RELIABLE TRANSFER TO CARGO DAMAGE CLAIMS IN THE DISTRICT COURTS

The precise issue addressed by this Note, whether the proportionate fault rule of *Reliable Transfer* compels the modification or abolition of joint and several liability,[94] has reached the federal district courts twice since *Reliable Transfer*. Although the facts of the cases varied significantly, both courts were required to decide the proper extent of cargo's recovery from noncarrier. The two courts reached contrary conclusions on the issue, and yet, neither result was the most equitable.[95]

A. Flota *and* Alamo: *Imposing Disproportionate Liability?*

The dispute underlying *Complaint of Flota Mercante Grancolombiana, S.A.*[96] arose from a collision involving the *M/V Republica De Colombia* and the *S.S. Transhawaii*. The *Colombia* safely overtook and passed the *Transhawaii*, leaving one-half mile between the two ships. When the *Colombia* was three-quarters of a mile ahead of the *Transhawaii*, a power outage in the wheelhouse of the *Colombia* caused her to lose steerage and sheer off to port across the bow of the *Transhawaii*. The *Transhawaii* failed to take evasive action and struck the *Colombia* amidships, causing extensive damage to the vessel and cargo.[97]

The District Court for the Southern District of New York determined that the *Colombia* was guilty of both negligent navigation and unseaworthiness.[98] While liability does not automatically flow from a finding of unseaworthiness, the *Colombia* was unable to sustain the burden of proof necessary to rebut the presumption that it failed to exercise due diligence to provide

94. *See* notes 16–17 *supra* and accompanying text.

95. *See* notes 97–151 *infra* and accompanying text.

96. 440 F. Supp. 704 (S.D.N.Y. 1977). The action in this case was in the form of a petition for exoneration from or limitation of liability under the Limitation of Shipowners' Liablity Act, 46 U.S.C. § 183 (1976). The claims of cargo owners were consolidated in the same proceeding. 440 F. Supp. at 707.

97. 440 F. Supp. at 713.

98. *Id.* at 718.

a seaworthy vessel.[99] It was thus denied limitation of liability[100] and immunity from suit by cargo.[101] The *Transhawaii* was also found at fault for failing to keep a proper lookout.[102] Since the *Transhawaii* as noncarrier was at fault, the rule of *The Chattahoochee*[103] entitled cargo carried aboard the *Colombia* to seek recovery from the *Transhawaii*. The question then became the extent to which cargo could recover.

To resolve this question, the court first determined the relative fault of the two ships; it found the *Transhawaii* 17.5% at fault and the *Colombia* 82.5% at fault.[104] Next, the court recognized that the *Reliable Transfer* rule of proportionate fault was subject to two possible interpretations:

> One question which the [Supreme Court in *Reliable Transfer*] did not deal with was whether this new proportional damage rule changes the right of innocent cargo owners to obtain a full recovery from the non-carrying vessel. Within the specific context of this case, the Court must decide whether, as before, the Cargo Claimants can recover 100% of their damages from the *Transhawaii*, or whether they are now limited to a recovery of the proportion of fault attributable to the *Transhawaii*.[105]

Having thus narrowed the issue to whether joint and several liability survived *Reliable Transfer*, the *Flota* court avoided a direct resolution of the issue by relying on early cases which estab-

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99. *Id.* at 724. Section 4(1) of COGSA provides: "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." COGSA § 4(1), 46 U.S.C. § 1304(1) (1976).

100. The right to limit liability to the value of the vessesl after the occurrence plus any pending freight is contingent upon the owner's exercising due diligence to provide a seaworthy vessel. Limitation of Shipowners' Liability Act § 1, 46 U.S.C. § 183 (1976).

101. 440 F. Supp. at 724.

102. *Id.* at 716–17.

103. *See* notes 70–73 *supra* and accompanying text.

104. 440 F. Supp. at 726. The proportionate fault rule may revitalize a dispute concerning the respective weight to be given to causative and culpable fault. The court in *Flota* indicated that the negligent seamanship of *Columbia's* Chief Mate (causative fault) in failing to blow five whistles or stop engines after the steering gear malfunctioned was of a "high order." *Id.* at 726. On the other hand, its owner's failure to exercise reasonable prudence in ascertaining the seaworthy condition of the ship (culpable fault) was regarded as only "[a]dditional weight in the scales." *Id.*

One district court has stated that the *Reliable Transfer* mandate of comparative fault requires a comparison of relative culpability rather than relative degrees of physical causation. Afran Transp. Co. v. S/T Marie Venizelos, 450 F. Supp. 621, 636 n.11 (E.D. Pa. 1978).

105. 440 F. Supp. at 725. One author expresses the view that the authorities who have considered the issue support the 100% or "ultimate" liability interpretation. Owen, *supra* note 29, at 804 (citing Vana Trading Co. v. S.S. Mette Skou, 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977)). *See also* Kasanin, *supra* note 11.

lished the right of cargo to recover a joint and several judgment against the noncarrying vessel. Specifically, the court cited *The Atlas*[106] to support its decision that cargo was entitled to a one hundred percent recovery from the *Transhawaii*.[107] In *The Atlas*, the Supreme Court held that cargo damaged in a collision involving two or more vessels was entitled to a joint and several recovery against any of the at-fault vessels.[108] Furthermore, the court reasoned that if the Harter Act raised any doubt as to whether cargo's damage was to be fully compensated, *The Chattahoochee* resolved the doubt in cargo's favor by expressly holding that cargo could recover one hundred percent damages from the noncarrying vessel.[109]

To justfy its decision, the *Flota* court simply stated, without elaboration, that *Chattahoochee* was the "better" rule and that a one hundred percent recovery for cargo was consistent with the principles of *Reliable Transfer*.[110] Moreover, the court reasoned that joint and several liability should be retained because cargo was not at fault[111] and because the Supreme Court had not explicitly overruled prior cases.[112] Without such a directive, the court refused to impute the fault of carrier to cargo.[113]

It is beyond doubt that *Atlas* and *Chattahoochee* authorized a joint and several recovery for cargo. Nevertheless, the *Flota* court's reliance on these cases avoids the question of whether *Reliable Transfer* altered the applicability of joint and several liability to cargo damage cases. Indeed, such reliance illustrates a general tendency of courts to adhere uncritically to existing admiralty rules.

This blind adherence to precedent is inconsistent with the admiralty courts' duty to administer flexible and fair rules.[114] The Supreme Court's holding in *Reliable Transfer* reflects such flexibility, but does not deal specifically with the rule respecting cargo damage.[115] However, the general rule that admiralty courts have

106. 93 U.S. 302 (1876).
107. 440 F. Supp. at 724.
108. 93 U.S. at 317.
109. 440 F. Supp. at 724 (citing The Chattahoochee, 173 U.S. 540 (1899)).
110. 440 F. Supp. at 725.
111. *Id.*
112. *Id.*
113. *Id.*
114. Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1138 (9th Cir. 1977) (citing Pope & Talbot v. Hawn, 346 U.S. 406, 408–09 (1953)).
115. *See* text accompanying notes 14–16 *supra*.

broad equitable powers[116] to fashion flexible rules strongly suggests that the lower federal courts are empowered by *Reliable Transfer* to establish new rules of cargo damage allocation. In this respect, *Reliable Transfer* may, in fact, be a directive to the lower courts to consider alternatives to joint and several liability for cargo damage.

In formulating alternatives,[117] courts should compare the theoretical basis of the divided damages rule with that of the proportionate fault rule. The Supreme Court's discussion of divided damages in *The North Star*[118] made it clear that all damages resulting from a collision were to be "made into one mass."[119] In addition, the Court was not concerned with the degree of fault of the parties. As long as each defendant had contributed in any degree to the "mass" of damages, the liability of each would simply be a function of the total dollar amount of damage divided by the number of tortfeasors.[120] Joint and several liability is consistent with this method of dividing damages because each tortfeasor's liability is dependent *solely* upon the number of negligent parties. The proportionate fault rule, on the other hand, does not arbitrarily divide total damages among the parties. Each party's fault is determined independently of the amount of damages or number of parties involved. The goal is no longer to assure that all damages will be compensated, rather it is to determine the precise level of each party's fault.[121]

The court in *Flota* determined that the *Transhawaii* was 17.5%

116. "A court of admiralty is, as to matters falling within its jurisdiction, a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction." Cates v. United States, 451 F.2d 411, 414 (5th Cir. 1971) (quoting Justice Story's statement in The David Pratt, 7 F. Cas. 22 (D. Me. 1839)). *See* notes 164–67 *infra* and accompanying text for discussion of the role of equity in fashioning a new rule to govern cargo damage claims.

117. *See* notes 160–71 *infra* and accompanying text.

118. 106 U.S. 17 (1882).

119. *Id.* at 21.

120. *Id.*

121. Notably, the rule of comparative negligence weakens one of the primary reasons for granting plaintiff a joint and several judgment. At common law only a "pure" plaintiff recovered a joint and several judgment, as the rule of contributory negligence prevented a culpable plaintiff from recovering anything. Thus, a joint and several judgment for an "innocent" plaintiff offset the harshness of the contributory negligence rule. *See generally* Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978) (where the court adopted comparative negligence without joint and several liability). Because contributory negligence has never been a bar to recovery in admiralty, "innocent" cargo does not have so compelling an argument for a joint and several judgment as an "innocent" plaintiff in a land-based tort action.

at fault; holding that vessel liable for 100% of cargo damage was thus contrary to the principle of *Reliable Transfer*. The court explicitly admitted that a tension existed between its holding and the proportionate fault rule.[122] Yet, it adhered to the rule of joint and several liability because it did not regard itself as authorized to formulate a new rule which conflicted with *The Chattahoochee* and *The Atlas*.

A number of considerations suggest that the *Flota* court was wrong in its assessment of the narrowness of its role. First, a court sitting in admiralty has broad equitable powers to fashion just and suitable remedies.[123] Second, the conflict between the proportionate fault rule and the joint recovery rule of *The Chattahoochee* provided an appropriate opportunity to invoke that equitable power.[124] Finally, it is not entirely clear that public policy is better served by requiring the noncarrier rather than cargo to bear the risk that one or more of the at-fault parties will fail to respond in damages proportionate to its adjudged level of fault.[125]

The United States District Court for the Eastern District of Louisiana adopted a bolder tack in *Alamo Chemical Transportation Co. v. M/V Overseas Valdes*,[126] which involved a collision between the *M/V Overseas Valdes* and the barge *Sun-Chem 900* in tow of the tug *Hardwork*.[127] Alamo Chemical Transportation Company, owner of the tug, brought an action against the *Overseas Valdes* and the vessel's operator, Maritime Overseas Company.[128] The operator counterclaimed for hull damage to its vessel. The Firestone Tire & Rubber Company, owner of the cargo aboard the barge, intervened through its subrogated underwriter[129] against both vessels and their owners.[130]

122. 440 F. Supp. at 725. The *Flota* court acknowledged that limitation of liability or insolvency of carrier would make a judgment against *Transhawaii* for 100% of cargo damages unfair and contrary to *Reliable Transfer*'s command of liability in proportion to fault. The court declined to respond to the argument, however, as it had denied *Colombia*'s limitation of liability petition. *Id.* at 723.

123. *See* notes 114–16 *supra* and accompanying text.

124. *See* notes 160–66 *infra* and accompanying text.

125. *See* notes 166–69 *infra* and accompanying text.

126. 469 F. Supp. 203 (E.D. La. 1979).

127. *Id.* at 204.

128. *Id.*

129. Clause 13 of the "Barge Charter Party", which is a private contract of carriage (as explained in note 131 *infra*), required a waiver of subrogation by the cargo underwriter. Because Firestone failed to obtain the waiver, the underwriter pursued cargo's claim. *Id.* at 211.

130. *Id.* at 204.

Since the cargo in *Alamo* was carried under a private contract of carriage,[131] neither the bill of lading[132] nor the Carriage of Goods by Sea Act (COGSA) governed the rights and obligations of the parties. Nevertheless, clause 18 of the contract assigned rights and obligations in the same manner as if COGSA governed.[133] Having met the threshold test of exercising due diligence in providing a seaworthy vessel,[134] Alamo Chemical became eligible for a COGSA-type exemption for negligent navigation.[135]

Finding that the private carriage in this case was governed by common carriage rules, the court squarely faced the same issue which the *Flota*[136] court had resolved earlier. The court, however, interpreted *Reliable Transfer* more broadly and reached a different conclusion. It viewed the proportionate fault rule as an authorization from the Supreme Court to create such rules as might be necessary to apply fairly the holding of *Reliable Transfer* to unforeseen factual circumstances. Accordingly, the court held that cargo no longer had an unqualified right to recover full damages from noncarrier, but was limited to a recovery proportionate to noncarrier's fault.[137]

In reaching its holding, the district court relied upon the Supreme Court's language that any "allocation of disparate proportional fault" was "unnecessarily crude and inequitable."[138] Since it found the *Overseas Valdes* (noncarrier) twenty percent at fault,[139] the court reasoned that holding it liable for one hundred percent of cargo's damage would be in "violent contradiction" of *Reliable Transfer*.[140] The court thus implicitly held that *The Atlas*[141] and *The Chattahoochee*[142] did not survive *Reliable Transfer*. To do so presupposed that the aversion to "disparate proportional

131. A contract for carriage, or "affreightment", is "private" when there is only one shipper who secures the entire carrying capacity of the vessel. Chiang, *The Characterization of a Vessel as a Common or Private Carrier*, 48 TUL. L. REV. 299 (1974).

132. The bill of lading was not a negotiable instrument but merely a receipt for storage of the cargo.

133. 469 F. Supp. at 212.

134. *Id.* at 213.

135. COGSA § 4(2)(a), 46 U.S.C. § 1304(2)(a) (1976).

136. *See* notes 96–113 *supra* and accompanying text.

137. 469 F. Supp. at 214.

138. *Id.* (quoting United States v. Reliable Transfer Co., 421 U.S. at 407).

139. *Id.* at 205.

140. *Id.* at 214.

141. 93 U.S. 302 (1876).

142. 173 U.S. 540 (1899).

fault" expressed by the Supreme Court[143] referred to the fault of the vessels involved and not to that of cargo.

The *Alamo* court's abolition of joint and several liability does not avoid disproportionate liability, but merely shifts the risk of it to cargo. The argument may still be made that "innocent" cargo deserves a one hundred percent recovery. Nevertheless, the decision in *Alamo* establishes the rule that shipowners' liability is fixed by fault and that the risk of noncompensation for cargo damage due to exemption from or limitation of liability rests with cargo owners or underwriters. This position depends upon the court's conviction that a shifting of risk will contribute to the attainment of desirable public policy goals.[144]

If the *Alamo* holding were restricted to cases involving valid both-to-blame clauses,[145] it could be regarded as a compatible exception to the joint and several holding of *Flota*. The scope of the *Alamo* decision, however, is not so limited, as the court held that there could never be a joint and several recovery for cargo damage against noncarrier.[146] Although this holding abandons a long-accepted rule and necessarily requires a broad interpretation of the mandate of *Reliable Transfer*, it resolves the anomaly of denying cargo any recovery when carrier is solely at fault, but allowing cargo a one hundred percent recovery if any other party is in any degree at fault. Furthermore, the denial of a joint and several recovery sets aside the incongruity established by *The Chattahoochee* in which the Supreme Court reinstated the liability from which carriers had been exempted by Congress.[147] Finally, the *Alamo* rule provides an incentive for careful seamanship, as cargo owners, knowing that carrier's fault will be imputed to them, will employ the most prudent carrier available.[148]

Despite the arguments supporting an abolition or modification of joint and several liability for cargo damage, and the rule's theo-

143. 421 U.S. at 407.

144. *See* notes 155-61 *infra* and accompanying text.

145. The Barge Charter Party contained a both-to-blame clause which was valid because the carriage was *private*. American Union Transp. v. United States, 1976 A.M.C. 1480.

146. 469 F. Supp. at 215.

147. Harter Act § 3, 46 U.S.C. § 192 (1976). For a history of this Act and subsequent judicial action, see notes 56-74 *supra* and accompanying text.

148. Several arguments in favor of the abolition of joint and several liability for cargo damage were discussed by a commentator who advocated ratification of the 1910 Brussels Collision Convention by the United States. Ratification would have accomplished virtually the same result as that mandated by *Alamo*. Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1928).

retical basis in *Reliable Transfer*, a recent Supreme Court decision suggests that the Court might sustain the rule of joint and several liability. In *Edmonds v. Compagnie Generale Transatlantique*,[149] the Supreme Court ruled on the liability of a shipowner for injuries sustained by a longshoreman.[150] A jury had found damages of $100,000 and had determined that the plaintiff longshoreman was ten percent at fault; seventy percent of the fault was allocated to his stevedore employer and twenty percent to the shipowner.[151] The Court, which was called upon to determine the extent of the shipowner's liability for damages[152] held that the shipowner was liable for all damages not due to the negligence of the longshoreman.[153]

In holding that the longshoreman was entitled to a joint and several judgment against all negligent parties not statutorily exempt,[154] the Court recognized the tension between its holding and the *Reliable Transfer* rule of proportionate fault.[155] The Court, however, attempted to minimize the conflict with *Reliable Transfer* in two ways. First, it reasoned that the rules governing liability between longshoremen, shipowners, and stevedores had been recently put in delicate balance by Congress,[156] and that this balance should not be disturbed by the abolition of joint and several liability. Second, in a footnote to its opinion,[157] the Court stated that *Reliable Transfer* "did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both."[158]

The Court's reasoning in *Edmonds* should not prevent the modification of joint and several liability with respect to cargo damage by lower federal courts. Cargo's rights, in contrast to longshoremen's, have not recently been put in "delicate balance." Moreover, the command of *Reliable Transfer* that liability must be

149. 443 U.S. 256 (1979).
150. *Id.*
151. *Id.* at 258.
152. *Id.* at 271–73. Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 905–910 (1976), an injured longshoreman does not have an action for damages against his employer, but is entitled to a statutory level of compensation. *Id.* § 905. For a discussion of the history of the amended Act, see [1972] U.S. CODE CONG. & AD. NEWS 4698.
153. 443 U.S. at 271.
154. *See* note 152 *supra*.
155. 443 U.S. at 271–72.
156. *Id.* at 273.
157. *Id.* at 271 n.30.
158. *Id.*

equated with fault should not be modified by dicta in a footnote. Lower courts must exercise their "broad powers of interstitial rulemaking"[159] to maximize cargo's recovery without burdening the noncarrier with disproportionate liability.

B. *Fashioning New Rules to Effect Proportionate Liability*

Under the theory of joint and several liability, any one defendant can be held vicariously liable for the fault of other defendants.[160] It is a theory conceived to assist plaintiffs in recovering full damages and is justified by the availability of an action for contribution against those defendants who, for some reason, do not compensate the plaintiff. A number of considerations, both practical and theoretical, suggest that joint and several liability cannot effectuate the proportionate liability requirement of *Reliable Transfer*.

First, because carrier's limitation of liability[161] often precludes contribution, the longstanding *Chattahoochee* rule of one hundred percent liability of noncarrier cannot be justified adequately by a recital of noncarrier's right to claim contribution from carrier. Second, *Reliable Transfer* dictates that each party should be liable only in proportion to fault. It thus makes little sense to hold a noncarrier vicariously liable for an act which, when committed by the carrier, is not actionable. Third, it is questionable whether cargo damage is indivisible after *Reliable Transfer*. If the injury is divisible and the causation of each part can be separately assigned, joint and several liability would be inappropriate as demonstrated by the court's decision in *Alamo*.[162] When the court determined that the *Overseas Valdes* (noncarrier) was twenty percent at fault,[163] it divided the injury and separately assigned causation.

In fashioning a better rule of cargo damage allocation, a number of guidelines should be observed.[164] Courts must recognize their capacity to apply equitable principles when adjudicating maritime disputes.[165] The nature of this power has been described

159. *Id.* at 276 (Blackmun, J., dissenting).

160. The Atlas, 93 U.S. 302, 319 (1876); RESTATEMENT (SECOND) OF TORTS § 875 (1977).

161. The Limitation of Shipowners' Liability Act, 46 U.S.C. §§ 181–189 (1976).

162. RESTATEMENT (SECOND) OF TORTS §§ 433A(1) & 881 (1977).

163. 469 F. Supp. at 205.

164. *See* notes 117–21 *supra* and accompanying text.

165. Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454 (1935).

as follows:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between public interest and private needs as well as between competing private claims.[166]

Rules designed to meet this ideal should be as simple as possible and yet sophisticated enough to accommodate conflicting judicial and statutory policy and law. Above all, flexibility is important in finding an equitable solution in each case. Inflexible rules such as that of joint and several liability as used by the court in *Flota*[167] or that of proportionate liability only, as used by the court in *Alamo*,[168] will work injustice when applied to cases complicated by the issues of private carriage, immunities, or limitation of liability.

The starting point in seeking a "nice adjustment" of cargo damage liability must be *Reliable Transfer*. Accordingly, the ultimate goal is to achieve a resolution which closely equates liability with fault. Such a resolution must address the fundamental issue of who should bear the loss associated with limitation of liability, insolvency, or nonjoinder of parties. If carrier can limit its liability, the rule of joint and several liability automatically assigns the loss to noncarrier. With respect to the fault of carrier, however, noncarrier is no more blameworthy than cargo.

Alternatively, if the risk is placed on cargo rather than noncarrier, cargo will be more likely to insist on high standards of safety from its carrier. Insurance resources would be more efficiently allocated as cargo would be in a position to assess more accurately the risk structure of the enterprise. Furthermore, cargo will be induced to join all possible defendants in one suit. With all parties present, courts can more readily determine the proportionate fault of each vessel and the extent of their respective limitation funds.[169]

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166. The Hecht Co. v. Bowles, 321 U.S. 321 (1944).

167. 440 F. Supp. 704 (S.D.N.Y. 1977).

168. 469 F. Supp. 203 (E.D. La. 1979).

169. *See* note 32 *supra* and accompanying text. Under the current limitation of liability provisions, 46 U.S.C. §§ 181–189 (1976), the fund would consist of the value of the vessel after the collision plus any outstanding freight. For example: Vessels *A* and *B* are 25% and 75% negligent, respectively. Cargo aboard *A* is damaged to the extent of $200,000. *A*, as carrier, is not liable under COGSA to cargo for 25% of the damages, or $50,000. The court determines that *A*'s limitation of liability fund consists of $25,000: $20,000 for value

To achieve the goal of equating liability with fault, courts should hold the noncarrier liable to the extent of noncarrier's fault plus any part of carrier's liability which will be recoverable by contribution. This application of joint and several liability does not hold noncarrier liable for the fault of carrier, but merely employs noncarrier as a conduit through which cargo may recover damage attributable to carrier.[170]

The facility and logical consistency with which cargo damage liability is allocated is impaired by the current limitaton of liability and immunity provisions. *Reliable Transfer* cannot be readily applied to cargo damage claims while these two aspects of admiralty law continue in their present form. Limitation of liability interferes with the contribution necessary to the fair operation of joint and several liability. The long list of excepted causes of cargo damage in COGSA[171] needlessly confuses liability determination. Both domestically and internationally, pressure is being exerted to change these rules.[172] Thus, in fashioning interstitial rules, courts should be aware that a modification of joint and several liability is justified not only by the holding of *Reliable Transfer* but also by the promise of legislative changes in shipowners' rights.

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of the vessel and $5,000 for value of pending freight. *B* is liable to cargo for 75% of the total damages, or $150,000, and has a limitation of liability fund of $200,000. All parties having been joined, the court enters a decree holding *B* liable to cargo for $175,000. This amount is equal to *B*'s proportionate liability as is covered by *A*'s limitation fund, in this case, $25,000. *A* is then held liable to *B* for $25,000. *B* has thus paid in accordance with *Reliable Transfer* and cargo has suffered a loss due to the partial judgment-proof condition of *A*.

170. The concept of noncarrier acting as a conduit through which damages pass from carrier to cargo is the real basis for The Chattahoochee, *see* notes 70–73 *supra* and accompanying text. While the Supreme Court intended to overcome the impediment to cargo's full recovery imposed by the Harter Act exemptions, the promise of contribution from carrier was empty even then, as carriers had already been granted the right to limit liability. 46 U.S.C. §§ 181–189 (1976). It is inevitable that the limitation of liability rules will be changed so that the limitation fund for property damage will be greatly expanded. When this occurs, joint and several liability will be less objectionable, as noncarrier will have a more realistic possibility of recovering what it pays cargo for carrier's damage.

171. 46 U.S.C. § 1304(2)(a)–(q). *See* note 57 *supra*.

172. Many admiralty practitioners believe that limitation of liability will be significantly changed if not completely abolished. MARITIME L.A. OF THE U.S., DOC. No. 619 at 7087 (dissenting report) (May 4, 1979). The excepted causes in COGSA for the U.S., and in the Hague Rules for other nations, were deemed disruptive and the consensus favored change. *See generally* Hellawell, *Allocation of Risk Between Cargo Owner and Carrier*, 27 AM. J. COMP. L. 357 (1979).

IV. NEW STATUTORY DEVELOPMENTS

In a situation where a carrier has limited, or been completely exonerated from liability for cargo damage, the application of joint and several liability is particularly inequitable, and has therefore been subject to recent criticism worldwide.[173] While change in these statutory rules is inevitable, an interim rule is needed to reconcile them with the proportionate fault rule of *Reliable Transfer*.

Limitation of shipowners' liability was introduced by statute in the United States in 1851.[174] This enactment, which limited liabilty to the value of the owner's interest in the vessel and pending freight at the end of the voyage,[175] remains unchanged today.[176] This generally low limit frustrates recovery by cargo in its action for damages and precludes noncarrier from successfully pursuing a contribution action against carrier. In 1957, an international convention adopted a resolution which established a larger limitation fund out of which property damage judgments could be satisfied.[177] This convention has not been ratified by the United States.[178]

In 1976, the Convention on Limitation of Liability for Maritime Claims drafted a proposal for new rules.[179] These rules were eventually submitted to the Maritime Law Association for consideration as a new Shipowners' Limitation of Liability Act.[180] This proposed legislation would repeal the current Act[181] and replace it with a new formula for establishing a limitation fund. The new formula will relate the amount of the fund to the size of the carrying vessel.[182]

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173. *See id.*

174. Act of Mar. 3, 1851, 9 Stat. 635 (current version at 46 U.S.C. §§ 181–189 (1976)).

175. Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 122 (1871).

176. *See* 46 U.S.C. § 183(a) (1976).

177. The Brussels Limitation of Liability Convention, *reprinted in* 1957 A.M.C. 1972–80.

178. Volk & Cobbs, *Limitation of Liability*, 51 TUL. L. REV. 953, 984 (1977).

179. The Convention on Limitation of Liability for Maritime Claims, *reprinted in* MARITIME L.A. OF THE U.S., Doc. No. 619, at 7100–15 (May 4, 1979).

180. The proposed legislation was submitted by the Joint Committee on the Comite Maritime Internationale and on Limitation of Liability. *Id.* at 7075.

181. 46 U.S.C. §§ 181–189 (1976).

182. The new formula for computing the limitation fund will provide for a larger dollar amount for a larger vessel:

Vessel tonnage less than 500—$500,000.
For each ton between 501 and 30,000—$200.
For each ton between 30,001 and 70,000—$150.
For each ton in excess of 70,000—$100.

Today, a 200,000-ton tanker destroyed by a collision and fire might limit its liability to several hundred thousand dollars. Assume further that the crude oil which it carried had a value of approximately $50,000,000. Under current law noncarrier would be liable for the difference. The proposed limitation formula considered by the Maritime Law Association, would in this instance provide a fund of $25,400,000.[183] Under this Note's proposed rule,[184] noncarrier would pay its proportionate part of the $50,000,000 damage plus up to $25,400,000 of carrier's fault. If any amount remained, as would be the case if carrier's fault exceeded 25.4/50 of the total, this portion of the damage would be borne by cargo. Thus, the new limitation statute provides for an equitable division of cargo damages and, when applied in conjunction with this Note's modification of joint and several liability, would closely approach the ideal of *Reliable Transfer*.[185]

Paralleling the pressure for change of limitation rules is a similar movement with respect to the basic liability rules of ocean carriage. The goal of this movement is to align maritime tort rules with liability rules in other contexts.[186] A recent United Nations conference[187] drafted an Act, the Hamburg Rules, that would, if adopted, establish a new liability standard. Article 5(1) of the Hamburg Rules provides:

> The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[188]

This standard abolishes the immunities of COGSA. Furthermore,

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See Proposed Limitation Act § 6(1)(b) *supra* Note 25.

183. Proposed Limitation Act § 6, *supra* note 25.

184. *See* text accompanying note 170 *supra*.

185. One problem with the new limitation provision, which could be solved by the use of insurance, is that the limitation amounts are not expressed in dollars but in "units of account." Article 8 of the 1976 Convention on Limitation of Liability for Maritime Claims defines the "unit of account" as the Special Drawing Right of the International Monetary Fund. MARITIME L.A. OF THE U.S., Doc. No. 619 at 7104 (May 4, 1979). The SDR is the same as the Poincaré franc or 65.5 mg. gold. Rein, *International Variations on Concepts of Limitation of Liability*, 53 TUL. L. REV. 1259, 1266 (1979). Although this system is subject to fluctuating gold prices, it furthers uniformity as no one currency is the standard of valuation.

186. *See* Hellawell, *supra* note 172, at 359.

187. The Hamburg Rules, *supra* note 23.

188. *Id.* at 6827.

because the carrier is presumed at fault, the problem of *The Chattahoochee* will not arise. It is not clear what precise standard of care would be required to avoid liability, although it may prove to be the same standard that is used to determine whether damage has been caused by the excepted cause of "perils of the sea."[189] That is, the shipowner would not be liable for the fortuitous action of the sea forcible enough to overcome a seaworthy vessel and the conscientious efforts of good seamanship.[190]

Article 5(7) of the Hamburg Rules addresses the problem of cargo damage arising from multiple tortfeasors:

> Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery attributable thereto.[191]

This language imposes a heavy burden upon the carrier[192] as it requires carrier to pay one hundred percent of cargo's damage unless it can prove the level of fault attributable to other causes. Carrier was unable to sustain this burden of proof in *Vana Trading Co. v. S.S. Mette Skou*[193] and thus was held liable for one hundred percent of the liability for damage to a cargo of yams.[194]

This stringent burden is counterproductive to the goal of proportionate fault because it threatens carrier with liability for all damage to cargo even when it is clear that some proportion of the damage was due to another cause. Moreover, it is contrary to the burden of proof applied in other contexts. For example, when considering a claim for hull damage courts apportion liability after the parties have met the burden of going forward with some evidence of another's fault.[195] With respect to cargo damage, the Hamburg Rules do not reach a satisfactory middle ground; the

189. 46 U.S.C. § 1304(2)(c) (1976).

190. Chiswick Prod. Ltd. v. S.S. Stolt Avance, 387 F.2d 645, 645–46 (5th Cir. 1968); G. GILMORE & C. BLACK, *supra* note 19, at 162.

191. MARITIME L.A. OF THE U.S., Doc. No. 613 at 6828.

192. One commentator believes that the burden placed upon the carrier by the Hamburg Rules may be a prod to safety and efficient use of insurance. *See* Hellawell, *supra* note 172, at 366–67.

193. 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977). *See also* The Vallescura, 293 U.S. 296 (1934).

194. Liability was assigned because the shipowner was able to prove the precise level of fault attributable to the excepted cause of insufficient packing, 46 U.S.C. § 1304(2)(n) (1976), and that attributable to the nonexcepted cause of failure to provide space which was fit for the carriage and preservation of cargo, *id.* § 1303(1)(c).

195. G. GILMORE & C. BLACK, *supra* note 19 at 486.

risk is merely shifted from noncarrier to carrier. Thus, if the Hamburg Rules are adopted by the United States, the burden of proof in Article 5(7) should be interpreted to mean that carrier has the burden of producing evidence only as to the extent of its own fault. Such an interpretation avoids an assignment of disproportionate fault when the carrier is not able to *prove* the precise level of its fault. A more equitable result will be obtained if the court is required to make a proportionate allocation of liability based on evidence regarding fault, or, in rare cases when no evidence is available, allocate liability equally.

V. CONCLUSION

In *Reliable Transfer*, the Supreme Court ruled that liability must be equated with fault *whenever possible*.[196] The present framework of statutory and judicial law prevents an easy application of this rule to cargo damage cases. Nevertheless, this Note asserts that the lower federal courts are duty-bound to reconcile *Reliable Transfer* with existing law in specific factual situations as they arise. The Note proposes a reconciliation which modifies joint and several liability so that the risk associated with carrier's avoidance or limitation of liability is shifted from noncarrier to cargo. Such a shift is justified to induce cargo to select responsible carriers, to facilitate the efficient use of insurance, and to allocate liability in accord with the proportionate fault rule of *Reliable Transfer*.[197]

Until Congress enacts new statutes which clearly establish the rights and obligations of parties to ocean carriage, courts should avoid the use of inflexible rules to settle cargo damage claims. Rather, risk of loss should be assigned as equity and the facts of each case compel. The rule proposed by this Note is one model for courts to follow in the pursuit of this goal.

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196. 421 U.S. at 411. (emphasis added)

197. This shift is also arguably justified by *Reliable Transfer* if its holding is interpreted, as this Note argues, to have implicitly altered the assumption that "innocent" cargo damaged in a maritime collision is entitled to a full recovery. *See* notes 160–72 *supra* and accompanying text.