United States Court of Appeals
For the Eighth Circuit

No. 18-2143

Dakota, Minnesota & Eastern Railroad Corporation and Soo Line Railroad Company d/b/a Canadian Pacific Railway

Plaintiffs - Appellees

v.

Ingram Barge Company

Defendant - Appellant

Appeal from United States District Court for the Northern District of Iowa – Dubuque

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Submitted: January 17, 2019
Filed: March 21, 2019

Before BENTON, MELLOY, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

The M/V Aubrey B. Harwell Jr. (the *Harwell*), a towboat operated by Ingram Barge Company, was pushing empty barges up the Mississippi River when the barges struck the Sabula Railroad Bridge, owned

by Dakota, Minnesota & Eastern Railroad Corporation (DM&E). DM&E sued Ingram for damages. Following a bench trial, the district court entered judgment in favor of DM&E for the full amount sought.[1] Ingram appeals. Because we conclude that the district court committed an error of law, we vacate the judgment and remand for further proceedings.

I

The Secretary of War authorized the construction of the Sabula Railroad Bridge in 1880. To allow river traffic to pass, a portion of the Bridge rotates 90 degrees on a central pivot, producing two 154-foot-wide channels on either side. Protection piers extend north and south from the center of the Bridge; when the Bridge is in its open position, the Bridge's tracks rest above the piers separating the two channels. Northbound traffic ordinarily uses the east channel, and southbound traffic ordinarily uses the west channel. The typical barge arrangement on this portion of the river is approximately 105 feet wide, leaving under 25 feet of clearance on either side. Unsurprisingly, barge operators are sometimes unsuccessful at avoiding contact between their modern-sized tows and the centenarian Bridge. See generally I&M Rail Link, LLC v.

[1] The complaint named Soo Line Railroad Company, DM&E's corporate parent, as an additional plaintiff and included a second claim relating to a September 7, 2015, allision involving a different bridge owned by Soo Line. That claim was dismissed pursuant to the parties' stipulation prior to trial and no allegations remain relevant to Soo Line.

Northstar Nav., Inc., 198 F.3d 1012 (7th Cir. 2000) (discussing a May 5, 1997, allision with the Bridge).

On June 17, 1996, the United States Coast Guard issued an Order to Alter pursuant to the Truman-Hobbs Act, 33 U.S.C. §§ 511 et seq. The Order to Alter declared the Bridge to be an "unreasonable obstruction to the free navigation of the Upper Mississippi River" and directed the then-owner to reconstruct the Bridge to expand the horizontal clearance to at least 300 feet, approximately double its current width. Neither DM&E nor any prior owner of the Bridge took any action to complete such reconstruction.

On April 24, 2015, the *Harwell* was traveling north on the Mississippi River. Hershey Dampier was steering under the supervision of pilot Tommy Hinton. Dampier was on his first trip as a licensed steersman but had traveled under the Bridge many times during his twelve years as a deckhand. He discussed the procedure for passing through the Bridge with Hinton prior to their approach. Because the wind was blowing from east to west, Hinton advised Dampier to keep the barges pointed to the right side of the eastern channel. About 300 or 400 feet from the Bridge, Dampier realized that the barges were too close to the protection pier on the left side. Dampier attempted to correct by steering further to the east but the barges allided with the protection pier, causing damage to the wooden structure and a maintenance platform. Dampier was not disciplined for the incident, and he has since piloted through the Bridge more than a dozen times without incident. DM&E's staff concluded that the

damage to the protection pier required immediate repair to prevent the risk that another allision would damage the tracks and render the Bridge inoperable. Contractors completed the repairs at a cost of $276,860.85. DM&E brought suit against Ingram to recover these repair costs.

Following a bench trial, the district court concluded that no comparative fault could attach to DM&E absent evidence of a breach of a legal duty to expand the Bridge's horizontal clearance, and that the Order to Alter imposed no such duty. It apportioned all of the fault to Ingram and awarded DM&E the full amount of the repair costs plus prejudgment interest.

II

We review findings of a district court's bench trial in admiralty cases, including negligence determinations, under a clearly erroneous standard. In re MO Barge Lines, Inc., 360 F.3d 885, 889 (8th Cir. 2004). We will overturn a factual finding as clearly erroneous "only if it is not supported by substantial evidence in the record, if it is based on an erroneous view of the law, or if we are left with the definite and firm conviction that an error was made." Urban Hotel Dev. Co. v. President Dev. Grp., L.C., 535 F.3d 874, 879 (8th Cir. 2008) (quoting Roemmich v. Eagle Eye Dev., LLC, 526 F.3d 343, 353 (8th Cir. 2008)). "In admiralty as in other contexts, however, we review purely legal determinations de novo." In re Am. Milling Co., 409 F.3d 1005, 1013 (8th Cir. 2005).

As in any negligence case, the plaintiff in a maritime allision suit bears the burden of proof by a preponderance of the evidence. Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 212 (2d Cir. 2009). The plaintiff must prove essentially the same elements as a land-based negligence claim at common law: that the defendant breached a legal duty, causing the injury sustained by the plaintiff. See In re Cooper/T. Smith, 929 F.2d 1073, 1077 (5th Cir. 1991) (per curiam); see also Evergreen Int'l, S.A. v. Norfolk Dredging Co., 531 F.3d 302, 308 (4th Cir. 2008). The duty of care owed by a moving vessel to a stationary object such as a bridge is reasonable care under the circumstances. Fischer v. S/Y NERAIDA, 508 F.3d 586, 593 (11th Cir. 2007). Experience and common sense counsel that a moving vessel does not ordinarily strike a stationary object unless the vessel is mishandled in some way. Am. Milling, 409 F.3d at 1018. As such, the plaintiff in an allision case may invoke the Oregon rule, which creates a rebuttable presumption that a moving vessel breached its duty of care when it allides with a stationary object. Id. at 1012; Union Pac. R.R. Co. v. Kirby Inland Marine, Inc. of Miss., 296 F.3d 671, 673 (8th Cir. 2002); see The Oregon, 158 U.S. 186, 197 (1895). The Oregon presumption satisfies the plaintiff's prima facie case, shifting the burden of proof on issues of duty and breach to the defendant. City of Chicago v. M/V Morgan, 375 F.3d 563, 572–73 (7th Cir. 2004).

To rebut the Oregon presumption, the moving vessel may prove one of three things: that "(1) the moving

vessel used all reasonable care to avoid the [allision] and was therefore without fault, (2) the stationary object was at fault, or (3) the allision occurred because of an 'inevitable accident.' " Am. Milling, 409 F.3d at 1018 (quoting Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790, 795 (5th Cir. 1977)). One method of proving that the stationary object was at fault is through the Pennsylvania rule. See The Pennsylvania, 86 U.S. 125, 136 (1873). Under the Pennsylvania rule, "if there is a violation of a statute or regulation designed to prevent collisions, the burden shifts to the violator to prove that the violation was not a contributing cause of the accident." Am. Milling, 409 F.3d at 1012. "For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a *mandatory duty*; (2) the statute or regulation must involve *marine safety* or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent." Kirby Inland Marine, 296 F.3d at 674.

Ingram attempts to invoke the Pennsylvania rule by relying on the Coast Guard's 1996 Order to Alter. But in Kirby Inland Marine, we concluded that an Order to Alter issued by the Coast Guard cannot trigger the Pennsylvania rule because the Truman-Hobbs Act was not drafted to maintain marine safety, impose a specific duty, or prevent a particular sort of injury. 296 F.3d at 674. Instead, the Truman-Hobbs Act is a funding statute, and an Order to Alter is simply a mechanism the Coast Guard can use to make federal funding

available for bridge reconstruction. Id. at 675. Although bridge alterations may reduce the number of allisions, "this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act." Id. An Order to Alter based on the Coast Guard's finding that a bridge is an "unreasonable obstruction to navigation" is "not a direct comment on the safety of the bridge." Id. In short, a Truman-Hobbs Act finding does not satisfy the requirements of the Pennsylvania rule and therefore does not rebut the Oregon presumption. Id. at 676–78.

Although the Coast Guard's decision to issue an Order to Alter does not automatically rebut the Oregon presumption, it is still relevant to the analysis. The Order to Alter may be introduced as "another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action." Id. at 677. That is, the vessel operator may still attempt to rebut the presumption through evidence of the stationary object's negligence—including the evidence relied upon by the Coast Guard in making its Truman-Hobbs Act finding. See id. at 678 (discussing other evidence of the bridge's obstructive character that may be used to rebut the Oregon presumption, including evidence documented by the Coast Guard in the Order to Alter); I&M Rail Link, 198 F.3d at 1016 ("If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the trier of fact in admiralty. . . .").

Relying on Kirby Inland Marine, the district court correctly concluded that the 1996 Order to Alter does

not, as a matter of law, rebut the Oregon presumption through operation of the Pennsylvania rule. And it correctly admitted the Order to Alter and the supporting Truman-Hobbs Act reports into evidence. It analyzed the evidence supporting the Coast Guard's decision and concluded that it was insufficient to rebut the Oregon presumption. In other words, Ingram was unable to "exonerate itself from liability" because it could not prove that "the allision was the *sole* fault of the bridge." M/V Morgan, 375 F.3d at 574 (emphasis added).

But application of the Oregon rule does not end the analysis. The presumption "merely addresses a party's burden of proof and/or burden of persuasion; it is not a rule of ultimate liability." Id. at 572; accord Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp., 596 F.3d 357, 363 (6th Cir. 2010). Furthermore, it is properly limited to the issues of duty and breach; it does not resolve questions of causation or the percentages of fault assigned to the parties adjudged negligent. Combo Mar., Inc. v. U.S. United Bulk Terminal, LLC, 615 F.3d 599, 605 (5th Cir. 2010). Under maritime law, liability for an allision is apportioned based upon the comparative fault of the parties. Evergreen Int'l, 531 F.3d at 308; see also United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975). In a comparative fault regime, "[t]he plaintiff's negligence reduces the amount of damages that he can collect, but is not a defense to liability." Bhd. Shipping Co. v. St. Paul Fire & Marine Ins. Co., 985 F.2d 323, 325 (7th Cir. 1993). "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he

should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." Restatement (Second) of Torts § 463 (Am. Law Inst. 1965). If the owner of a bridge fails to adhere to the standard of "a reasonable person under like circumstances," and this failure contributes to an allision, the court may reduce the owner's recovery accordingly. S. C. Loveland, Inc. v. E. W. Towing, Inc., 608 F.2d 160, 166 (5th Cir. 1979).

In its comparative fault analysis, the district court concluded that DM&E could not be assigned any share of fault because it had no legal duty to remove or alter the lawfully permitted Bridge. But the owner of a lawful bridge may be found comparatively negligent for an allision even absent an affirmative legal duty to alter the bridge's configuration, as illustrated by the Seventh Circuit's decision in M/V Morgan. In that case, the court examined an allision between a tugboat and a bridge that resulted in damage to the bridge's electrical cabling. 375 F.3d at 570. The court concluded that the tugboat operators had failed to rebut the Oregon presumption and were liable for negligence. Id. at 573–78. Nonetheless, and even though the bridge was in compliance with its permit, the court affirmed the district court's equal apportionment of damages between the parties based on the bridge owner's failure to replace a wooden fender that previously protected the cabling. Id. at 578–79. It follows from M/V Morgan that a negligent bridge owner may face reduced damages from an allision under admiralty's comparative fault

regime, as the Seventh Circuit has held in a previous case dealing with an allision with the Sabula Bridge. See I&M Rail Link, 198 F.3d at 1016 (remanding to the district court to determine whether the Bridge's design "bear[s] some responsibility" for allision). It also follows that a finding of comparative negligence does not necessarily require the bridge owner to have violated a specific legal duty owed to others imposed by statute or regulation. All that is required is a finding that the bridge owner was negligent and that this "negligence . . . contribute[d] to the loss." 1 Admiralty & Mar. Law § 5:7 (6th ed. 2018).

DM&E argues that California v. Sierra Club, 451 U.S. 287 (1981), stands for the proposition that a lawfully permitted bridge's obstruction to navigation cannot constitute negligence. We disagree. Sierra Club simply concluded that Section 10 of the Rivers and Harbors Appropriation Act, which prohibits the creation of any obstruction to navigable waters not authorized by Congress, did not establish a private right of action. See id. at 292–97. This holding does not immunize a bridge from its own comparative fault when an allision occurs. Since Sierra Club, we have held that "the trier of fact should determine whether" a lawful bridge's obstruction to navigation is unreasonable and a contributing cause of an allision, Kirby Inland Marine, 296 F.3d at 676, as has the Seventh Circuit specifically with regard to the Sabula Bridge, I&M Rail Link, 198 F.3d at 1016. If the district court so concludes, it may reduce the bridge owner's recovery based upon the bridge's comparative fault.

DM&E also argues that the district court independently found that the *Harwell*'s crew's negligence was the only "actual cause" of the allision, and that this factual finding was not clearly erroneous. We are dubious that this truly was an independent factual finding. The district court's conclusion that Ingram was solely responsible for the accident came only after it concluded that it could not, as a matter of law, apportion any of the fault to DM&E. And the court acknowledged that the evidence demonstrated that the Bridge "poses a difficult obstacle to barge traffic" due to the narrowness of its channels, which leave "little clearance" for modern barge configurations. It appears that the district court's factual finding apportioning all of the fault to Ingram may not have been divorced from its earlier legal error.[2] A factual finding "based on an erroneous view of the law" will not be upheld, even on review for clear error. Urban Hotel, 535 F.3d at 879. We express no opinion on whether DM&E in fact was comparatively negligent; we leave that assessment to the district court in the first instance.

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[2] DM&E places great weight on the district court's use of the word "[m]oreover" to separate its legal conclusion that it could not apportion fault to DM&E from its factual finding that Ingram's negligence was the sole cause of the allision. We do not parse the language of the district court's opinion with such granularity. See Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979). Read in context, the district court's later factual finding may have resulted from its earlier legal analysis.

In accordance with the above, we vacate the decision of the district court and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2143

Dakota, Minnesota & Eastern Railroad Corporation;
Soo Line Railroad Company, doing business as
Canadian Pacific Railway

Plaintiffs - Appellees

v.

Ingram Barge Company

Defendant - Appellant

Appeal from U.S. District Court for the
Northern District of Iowa – Dubuque
(2:15-cv-01038-LTS)

JUDGMENT

Before BENTON, MELLOY, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the

district court for proceedings consistent with the opinion of this court.

March 21, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, et al., Plaintiffs, vs. INGRAM BARGE COMPANY, Defendant.	No. C15-1038-LTS **ORDER ON PLAINTIFF'S MOTION FOR AWARD OF PREJUDGMENT INTEREST** (Filed May 29, 2018)

I. INTRODUCTION

This case is before me on a motion (Doc. No. 62) by plaintiff Dakota, Minnesota & Eastern Railroad Corporation (DME) for award of prejudgment interest. Defendant Ingram Barge Company (Ingram) filed a resistance (Doc. No. 63) and DME replied (Doc. No. 66). This motion is fully submitted.

II. RELEVANT HISTORY

This case arose from an allision on the Upper Mississippi River that occurred on April 24, 2015. DME commenced this action on December 10, 2015, by filing a complaint (Doc. No. 2) in admiralty against Ingram. Ingram filed an answer (Doc. No. 13) on January 25, 2016, in which it denied liability and raised various defenses, including comparative fault. A bench trial

began on November 29, 2017, and was conducted over a period of three days. After the trial concluded, the parties filed post trial briefs (Doc. Nos. 53, 54, 55). On April 24, 2018, I filed findings of fact, conclusions of law and a ruling in which I found that Ingram was solely responsible for the allision and was liable to DME for all damages that proximately resulted. *See* Doc. No. 59. I concluded that DME was entitled to damages in the amount of $276,860.85, plus interest as allowed by law. *Id*. at 18-19. Judgment (Doc. No. 60) entered the same day. DME now requests that I award prejudgment interest at the rate of 6% per annum from the date of the loss (April 24, 2015). *See* Doc. No. 62 at 2; Doc. No. 62-1 at 4.

III. DISCUSSION

DME argues that prejudgment interest is awardable from the time the claim accrues – which DME contends is the date of the allision – to the date of the judgment. Doc. No. 62-1 at 2. DME relies on the general rule that prejudgment interest should be awarded in maritime collision cases except in limited circumstances. *Id.* at 1. DME also argues that admiralty courts have historically applied a 6% interest rate to prejudgment interest and that same rate should be applied here. *Id.* at 2–3. According to DME, the federal post-judgment rate is inappropriate because it would not fully compensate DME. *Id.* at 3–4.

Ingram contends that prejudgment interest is not awardable because this case involves unliquidated

damages. Doc. No. 63 at 1. Noting that this is not a breach of contract case, Ingram argues that DME's damages were uncertain before judgment and thus are unliquidated, which precludes prejudgment interest. *Id.* at 2. Additionally, Ingram argues that if prejudgment interest is appropriate, the interest rate should be set at the federal statutory rate in 28 U.S.C. § 1961.[1] *Id.* at 4.

A. Availability of prejudgment interest

The general rule in admiralty[2] cases is that prejudgment interest should be awarded except in peculiar or exceptional circumstances. *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995). Such circumstances include bad faith, unreasonable delay in bringing an action or frivolous claims.[3]

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[1] This rate is determined by the "weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System." 28 U.S.C. § 1961.

[2] Federal maritime law applies in this case because the allision occurred on the navigable waters of the United States. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996).

[3] The Seventh Circuit added two additional circumstances to the list of exceptions found in *Cargill*: "the inability to determine liability and the extent of damages eligible for an award of prejudgment interest" and "the mutual fault of the parties." *Cement Div.*, 31 F.3d at 583. *Central Rivers Towing v. City of Beardstown, Ill.*, 750 F.2d 565, 574 (7th Cir. 1984), on the other hand, characterized the uncertainty of liability and extent of damages as "[an]other factor[] relevant to a determination whether exceptional circumstances merit a denial of prejudgment interest." In any event, an argument that a party failed to mitigate damages (Ingram's argument against DME) is not the same as an inability to determine the extent of damages. Even if I found that damages

Cargill, Inc. v. Taylor Towing Serv., Inc., 642 F.2d 239, 242 (8th Cir. 1981); *see also* 2 C.J.S. *Admiralty* § 242. Prejudgment interest is awarded at the discretion of the district court. *ConAgra, Inc. v. Inland River Towing Co.*, 252 F.3d 979, 985 (8th Cir. 2001); *United States v. Peavey Barge Line*, 748 F.2d 395, 401 (7th Cir. 1984). The purpose of awarding prejudgment interest is to ensure the injured party is fully compensated. *City of Milwaukee*, 515 U.S. at 195. However, prejudgment interest is not an absolute right, as it depends on the circumstances of each case. *Id.* at 196.

Ingram relies heavily on the distinction between liquidated and unliquidated damages to argue that prejudgment interest is unavailable.[4] However, in

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were somewhat uncertain, under Eighth Circuit precedent such a finding would not automatically preclude prejudgment interest. Instead, it would be one consideration among a multitude of factors. *See Gen. Facilities, Inc. v. Nat'l Marine Serv. Inc.*, 664 F.2d 672, 675 (8th Cir. 1981) ("[L]ost profits, however, may be less susceptible of exact measurement, or the liability for such indirect losses may be less clear. Consideration of these factors is within the trial court's discretion.").

[4] Many of the cases Ingram relies on apply state law, not federal admiralty law. *See Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373 (8th Cir. 1980) (repudiation of contract case applying Minnesota law); *Hutchinson Utils. Comm'n v. Curtiss-Wright Corp.*, 775 F.2d 231 (8th Cir. 1985) (breach of warranty and misrepresentation case applying Minnesota law); *BLB Aviation S.C., LLC v. Jet Linx Aviation LLC*, 900 F. Supp. 2d 972 (D. Neb. 2012) (breach of aircraft lease, breach of services agreement, misrepresentation and breach of good faith and fair dealing case applying Nebraska law). None of these are applicable here. *See* 2 C.J.S. *Admiralty* § 242 ("The allowance of interest in admiralty proceedings is governed by admiralty law and not by state law."). Other cases Ingram cites, such as *Miller v. Robertson*, 266 U.S. 243

City of Milwaukee the Supreme Court expressly rejected the rule that prejudgment interest cannot be awarded for unliquidated damages.[5] 515 U.S. at 196–98; *see also Valley Line Co. v. Ryan*, 771 F.2d 366, 377 (8th Cir. 1985) (upholding prejudgment interest in admiralty proceedings on unliquidated claims). The Court stated that "[a]ny fixed rule allowing prejudgment interest only on liquidated claims would be difficult, if not impossible, to reconcile with admiralty's traditional presumption." 515 U.S. at 197. The purpose of prejudgment interest is to compensate the injured party, not to punish. *Id.* at 196–97. In the Seventh Circuit's opinion in *City of Milwaukee*, the court concluded that mutual fault was no longer a basis to deny prejudgment interest and awarded prejudgment interest even though the exact amount of the funds due from each party was "not immediately ascertainable and fixed before trial." *Cement Div., Nat'l Gypsum Co. v. City of Milwaukee*, 31 F.3d 581, 585–86. (7th Cir. 1994).

There is no indication here that DME brought this action against Ingram in bad faith or that there was an unreasonable delay in bringing the action. Neither was the claim frivolous, as DME clearly suffered property damage due to the allision and had to repair that damage. DME established that its actual costs of

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(1924), and *United States ex rel. S.J. Casper Co. v. Zelonky*, 209 F. Supp. 305 (E.D. Wis. 1962), are breach of contract cases.

[5] Ingram cites other cases for the liquidated/unliquidated damages distinction that predate *City of Milwaukee*. *See Great Lakes Towing Co. v. Kelley Island Line & Transp. Co.*, 176 F. 492 (6th Cir. 1910); *The Mary B. Curtis*, 250 F. 9 (5th Cir. 1918).

repairs was $276,860.85. The only possible "exceptional circumstance" is Ingram's contention that DME failed to mitigate its damages. I have already rejected this contention. Doc. No. 59 at 18. Moreover, an exceptional circumstance must go beyond a mere disagreement over mitigation of damages. In *City of Milwaukee*, the Supreme Court stated that "the existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits," not an extraordinary circumstance. 515 U.S. at 198. The same is true regarding mitigation of damages. A dispute as to the charges billed by DME's contractors is not a "peculiar or exceptional circumstance" of the same nature as a frivolous claim or unreasonable delay. I find that an award of prejudgment interest is appropriate in this case.

B. Appropriate interest rate

DME argues that I should set the prejudgment interest rate at 6% to fully compensate its loss. Doc. No. 62-1 at 4. DME contends that 6% is the traditional admiralty rate and is comparable to its actual borrowing cost of 6.125%. *Id.* at 2, 4. Ingram argues that the interest rate should be set at the federal post-judgment rate set out in 28 U.S.C. § 1961. Doc. No. 63 at 4. DME responds that the federal post-judgment rate would unfairly benefit Ingram. Doc. No. 62-1 at 3.

Ingram also argues that DME's purported borrowing cost is not appropriate. Ingram notes that DME is basing its purported cost of borrowing on a 100-year

bond issued by DME's parent company, Canadian Pacific (CP), and argues that a century bond naturally requires a higher interest rate. Doc. No. 63 at 4. DME responds that the 100 year term is irrelevant because regardless of the term, CP is paying interest at a 6.125% rate to borrow money. Doc. No. 66 at 5.

Like the decision of whether to award prejudgment interest, the interest rate and the date from which to calculate interest rest in the discretion of the district court.[6] *City of Milwaukee*, 515 U.S. at 196; *Cargill*, 642 F.2d at 241; 1 Thomas J. Schoenbaum, Admiralty & Mar. Law § 5-22 (5th ed. 2011). The purpose of prejudgment interest is to ensure the injured party is fully compensated. *ConAgra*, 252 F.3d at 985. The court should award interest "at a rate generally consistent with the interest rate prevailing at the time repairs were completed because it is during this period that appellee had the use and benefit of the money." *Id.*; *SCNO Barge Lines, Inc. v. Sun Transp. Co.*, 775 F.2d 221, 226 (8th Cir. 1985) (remanding where plaintiff submitted evidence of actual cost of borrowing rate but did not provide evidence of the prevailing rate during the relevant time); *Gen. Facilities, Inc. v. Nat'l Marine Serv., Inc.*, 664 F.2d 672, 674 (8th Cir. 1981) (finding it reasonable that the trial court "relied upon the average prime interest rate during the relevant period").

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[6] The decision must be "supported by a circumstance that has relevance to the issue at hand." *City of Milwaukee*, 515 U.S. at 196.

Keeping in mind that the purpose of prejudgment interest is compensation, not punishment, I cannot simply rely on conclusions reached by other courts in determining the rate of interest that would fully compensate DME. *See Ohio River Co. v. Peavey Co.*, 731 F.2d 547, 550 (8th Cir. 1984). Therefore, while I recognize DME's argument that some courts have used 6% as a common rate in admiralty cases, I find that this past practice is not sufficient to establish the prevailing interest rate at the time repairs were completed.[7]

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[7] DME cites Alan R. Gilbert, Annotation, *Award of Prejudgment Interest in Admiralty Suits*, 34 A.L.R. Fed. 126 §9(a) (2018) to show there is a common prejudgment interest in admiralty. However, that same section cautions that "no safe generalizations can be drawn" and that there is no uniform approach to determining interest rates. *Id.* In fact, just as many courts have used other methods of calculation rather than relying on 6% as a common rate. *See*, *e.g. United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980) (remanding for the district court to calculate interest rates prevailing at the time repairs were completed and at a rate of not less than 8%); *Gator Marine Serv. Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096, 1101 (5th Cir. 1981) (stating admiralty courts may look to actual cost of borrowing, state law or "other reasonable guideposts"); *W. Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984) (finding that the "measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a)" was appropriate); *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745, 753 (5th Cir. 1985) (stating admiralty courts may look to state law "or other reasonable guideposts" to determine interest rates); *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 310 (2d Cir. 1987) (finding it reasonable for the court to calculate the interest rate using an average Treasury Bill rate during the relevant time periods); *Sunderland Marine Mut. Ins. Co., Ltd. v. Weeks Marine Constr. Co.*, 338 F.3d 1276, 1280 (11th Cir. 2003) (stating the prejudgment interest "is the prime rate during the relevant period").

In addition, the article DME submitted with its brief (Doc. No. 62-1 at 5) establishes only that CP obtained *a 100-year loan* at the rate of 6.125%. It does not establish the actual, short-term prevailing interest rates at the time of the repairs, which is the relevant measurement.

The Eighth Circuit has approved use of the prime interest rate to establish the prejudgment interest rate.[8] *See Gen. Facilities*, 664 F.2d at 674. I find that this interest rate will most accurately and fully compensate DME for the cost of funds spent to repair the damages caused by the allision. The allision occurred on April 24, 2015, and repairs were completed on May 1, 2015. Doc. No. 96 at 4, 7. From December 2008 to December 2015, the prevailing average prime interest rate was 3.25%. *Prime Rate, 2000-present*, HSH Associates, https://www.hsh.com/indices/prime00s.html (last visited May 18, 2018); *see also Historical Prime Rate: 1983-Present*, JPMorgan Chase & Co., https://www.

[8] The prime rate is "[t]he base rate on corporate loans posted by at least 75% of the nation's 30 largest banks." *Prime Rate, 2000-present*, HSH Associates, https://www.hsh.com/indices/prime00s.html (last visited May 17, 2018). The prime rate is linked to the Federal Funds rate, which determines the post-judgment interest rate under 28 U.S.C. § 1961. *See* Daniel Kurt, *What Is the Relationship Between the Federal Funds, Prime and LIBOR Rates?*, Investopedia, https://www.investopedia.com/articles/investing/060214/what-relationship-between-federal-funds-prime-and-libor-rates.asp (last visited May 17, 2018); *see also What is the Prime Rate, and Does the Federal Reserve Set the Prime Rate?*, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/faqs/credit.12846.htm (Aug. 2, 2013) (explaining the federal interest rate's relationship to the prime rate).

jpmorganchase.com/corporate/About-JPMC/historical-prime-rate.htm (last visited May 17, 2018). The prime rate rose to 3.5% in December 2015. *Id.* Because the prevailing prime rate during nearly the entire calendar year of 2015 was 3.25%, I find that 3.25% is the appropriate prejudgment interest rate for this case.

As noted above, the district court also has discretion to determine the date upon which prejudgment interest begins. *Cargill*, 642 F.2d at 241. Neither party provided much argument as to the appropriate starting date. Generally, when damages consist of the cost of repairs, the interest should be calculated from the time expenditures were actually made. *Fed. Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980); *Mid-Am. Transp. Co., Inc. v. Cargo Carriers, Inc.*, 480 F.2d 1071, 1074 (8th Cir. 1973); *Util. Serv. Corp. v. Hillman Transp. Co.*, 244 F.2d 121, 125 (3d Cir. 1957) (date of expenditure, rather than collision, was appropriate where vessel was damaged but not put out of service). However, if the loss is so extensive that the injured party cannot use the property until repairs are completed then the appropriate date is the date of the allision. *See City of Milwaukee*, 515 U.S. at 195, 195 n.6 (noting cases where interest is calculated from the date of the accident); *Am. S.S. Co. v. Hallett Dock Co.*, No. 09-2628 (MJD/LIB), 2013 WL 3270368 at *1–*2 (D. Minn. June 26, 2013) (finding date of collision was appropriate where plaintiff was immediately prevented from carrying cargo and repairs were immediately undertaken).

Here, while the bridge was closed to rail traffic temporarily on the date of the allision, until an inspection could occur, it was re-opened promptly. There is no evidence that DME was deprived of the use of the bridge while repairs were being made. Thus, I find that May 1, 2015, the date on which the repairs were completed, is the appropriate date from which to award prejudgment interest.

IV. THE MATH

I have calculated a total of 1090 days for the period beginning May 1, 2015, and ending April 24, 2018. Given that the judgment is in the amount of $276,860.85, and I have awarded prejudgment interest at the rate of 3.25% per annum, interest accrued at the rate of $24.65 per day for 1090 days, for a total of $26,868.50. I will award prejudgment interest in that amount.

V. CONCLUSION

For the reasons set forth herein, plaintiff's motion (Doc. No. 62) for award of prejudgment is **granted**. The judgment in this case is hereby **amended** to reflect that plaintiff Dakota, Minnesota & Eastern Railroad Corporation is entitled to recover prejudgment interest in the amount of **$26,868.50**.

IT IS SO ORDERED.

DATED this 29th day of May, 2018.

Leonard T. Strand, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, et al., Plaintiffs, vs. INGRAM BARGE COMPANY, Defendant.	No.15-CV-1038-LTS **AMENDED JUDGMENT** (Filed May 29, 2018)

DECISION BY COURT. This action came before the Court and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Judgment is entered in favor of plaintiff Dakota, Minnesota & Eastern Railroad Corporation and against defendant Ingram Barge Company in the amount of $276,860.85, plus interest as allowed by law. Plaintiff Dakota, Minnesota & Eastern Railroad Corporation is entitled to recover prejudgment interest in the amount of $26,868.50.

DATED this 29th day of May 2018.

Approved as to form by

Leonard T Strand, Chief Judge

Robert L. Phelps, Clerk of Court
United States District Court
Northern District of Iowa

By: Suzanne Carlson,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, et al.,

Plaintiffs,

vs.

INGRAM BARGE COMPANY,

Defendant.

No. 15-1038-LTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RULING

(Filed Apr. 24, 2018)

This civil action came on for a bench trial beginning November 28, 2017, and ending December 1, 2017. The parties have filed post-trial briefs (Doc. Nos. 53, 54, 55). The matter is now fully submitted and ready for decision.

I. PROCEDURAL HISTORY

This case arises from an allision[1] on the Upper Mississippi River that occurred on April 24, 2015. Plaintiff Dakota, Minnesota & Eastern Railroad Corporation (DME) commenced this action on December 10, 2015, by filing a complaint (Doc. No. 2) in admiralty

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[1] An "allision" is an admiralty term for the occurrence of a vessel striking a stationary object, such as a bridge. *See, e.g.*, *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 10 12, 1013 (7th Cir. 2000).

against defendant Ingram Barge Company (Ingram).[2] Ingram filed an answer (Doc. No. 13) on January 25, 2016, in which it denied liability and raised various defenses, including comparative fault.

II. FINDINGS OF FACT

A. The Bridge

As of April 24, 2015, DME owned the Sabula Bridge (the Bridge) and its related structures. The Bridge is a railroad bridge that crosses the Upper Mississippi River near Sabula, Iowa, and Savanna, Illinois. Ingram is in the business of transporting barges on the Upper Mississippi River and elsewhere.

The Bridge dates back to 1880, when its construction was authorized by the Secretary of War. To allow river traffic to pass through the Bridge, a pin-connected swing span rotates 90 degrees. An overhead photograph of the bridge in its closed position is reproduced below:

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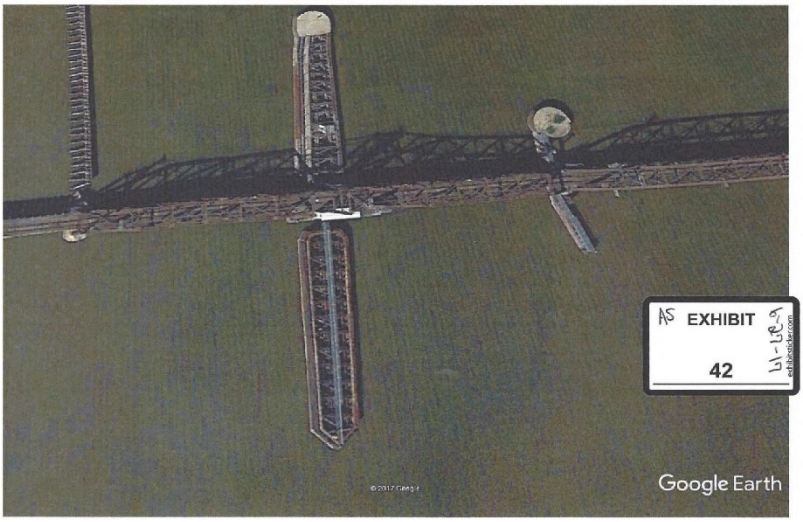
[2] The complaint included a second plaintiff and made allegations concerning a separate allision that occurred on September 7, 2015. However, on January 27, 2016, the parties filed a stipulation (Doc. No. 15) of dismissal concerning the September 7, 2015, allision. This case then proceeded to trial as to only the April 24, 2015, allision, with DME as the sole plaintiff.



See Ex. 52.[3] This photograph is oriented with north at the top. The railroad tracks thus cross over the Bridge in an east-west direction. The piers that extend north and south of the bridge are protection piers that protect the swing span from being impacted by river traffic while the span is in the open position. When the span is open for river traffic, it rests directly above the protection piers.

When the swing span is open, it creates two channels for river traffic. Typically, northbound river traffic uses the east (Illinois-side) channel, while southbound river traffic uses the west (Iowa-side) channel. The east channel is approximately 154 feet wide, while the Mississippi River's shipping channel is 300 feet wide.

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[3] The "Exhibit 42" label on the photo is a deposition exhibit sticker.

The average tow using the Upper Mississippi River consists of 15 barges, powered by a 3200 to 4800 horsepower towboat. Barges in tows are typically arranged five long and three wide, with each barge being approximately 195 feet long by 35 feet wide. Thus, the width of three barges, when arranged side-by-side, is approximately 105 feet. With the Bridge's east channel being 154 feet wide, this leaves under 25 feet of clearance on each side.

On June 17, 1996, the United States Coast Guard issued an Order to Alter the Bridge pursuant to the Truman-Hobbs Act, 33 U.S.C. §§ 511 *et seq*. Ex. EE at 2. The Order to Alter declared the Bridge to be an "unreasonable obstruction to the free navigation of the Upper Mississippi River" and directed the then-owner to reconstruct the Bridge to meet various requirements. *Id*. Among other things, the Order to Alter directed that the Bridge provide a horizontal clearance of at least 300 feet. *Id*. The legal effect and relevance of the Order to Alter will be addressed later in this ruling. It is undisputed that neither DME nor any prior owner of the Bridge took any action to reconstruct the Bridge after the Order to Alter was issued.

B. The Allision

In the early morning hours of April 24, 2015, Ingram was operating the M/V Aubrey B Harwell Jr (the Harwell) while pushing nine empty barges upstream, approaching the Bridge from the south. The barges were configured three barges long and three barges

wide. Thus, the length of the tow without regard to the Harwell was approximately 585 feet and the width was approximately 105 feet. The Harwell was centered aft of the barges as it pushed them upstream. The barges were secured to each other and to the Harwell with standard cabling, which did not fail.

As the Harwell began pushing its tow through the east channel, one or more of the barges struck the Bridge's south protection pier, causing damage to that structure. In addition, a metal grease platform that hung below the south tip of the swing span (as the span was oriented in the open position) also incurred damage. The Harwell then completed its passage through the Bridge channel and continued its upstream course.

Many witnesses testified (either live or via deposition) about the manner in which this incident occurred. The material details are largely undisputed. I find the testimony of Hershey Dampier, who was steering the Harwell at the time of the allision, to be particularly instructive about the incident. Dampier explained that he began working for Ingram in 1999, as a green deckhand. Over the next 12 years, he progressed through various positions including experienced deckhand, senior deckhand, leadman, second mate, first mate and senior mate, which he described as being the highest rank on deck.

In April 2015, Dampier obtained a steersman's license from the United States Coast Guard. The application process for obtaining this license involved training at river school and a test, which Dampier

passed. He explained that a steersman is an apprentice position in which he could steer a vessel while under the pilot's supervision.

On April 24, 2015, Dampier was on his first trip as a licensed steersman and was steering the Harwell under the direction of Tommy Hinton, the Harwell's pilot. The trip had been in progress for somewhere between 10 and 14 days by that time, with Dampier steering at all times while he was on duty. Dampier was familiar with the Bridge, as he had passed through it many times as a deckhand for Ingram. Among other roles, he had sometimes served as a lookout deckhand, posted at the front of the tow and radioing information to the pilot about distance, width, etc. Dampier testified that lookouts are always posted when passing through a bridge.

Dampier testified that Hinton was in the wheelhouse with him during the relevant events and that the two of them discussed the procedures for passing through the Bridge while the Harwell was still about a mile south of the Bridge. Hinton told him that because of the wind, and the small size of the tow (9 barges instead of 15), he should keep the barges pointed to the shore pier on the right, or Illinois, side of the northbound channel. Hinton asked Dampier if he was comfortable steering through the bridge and Dampier said that he was.

Dampier testified that the wind gauge on the Harwell reflected 10 to 15 miles per hour winds at the time of the accident and that the wind was blowing from the

east, or starboard side, pushing the tow to the west. The Harwell was moving at 4.5 to 5 miles per hour. When the tow was 300 or 400 feet from the Bridge, Dampier realized that it was lined up incorrectly. The lookout on the port, or west, side advised him that they were "headed to the bad." Dampier testified that he tried to adjust the tow's position to the starboard side as they proceeded north but that the wind made this difficult. He noted that empty barges are more susceptible to being affected by wind and that they also create a visibility problem for the pilot, as they sit higher on the water.

Dampier did not reduce speed as he attempted to maneuver through the Bridge. He stated that reducing speed would have made things worse, as the wind's effect on the tow's course would have increased. Instead, he continued to steer toward the starboard side in an unsuccessful effort to avoid making contact with the protection pier on his port side. Dampier testified that after making contact with the pier, he was able to bring the tow around to the correct direction and complete the Harwell's passage through the Bridge. When asked why, despite his best efforts, he was unable to avoid hitting the pier, he answered:

> I was off to the bad more than he [the lookout] indicated so it didn't give me enough room or enough time to clear the lower end of the bridge or the turntable to avoid an allision with it, to proceed through.

Unofficial Realtime Transcript, Day 2, p. 138.

Dampier testified that he was not disciplined due to this allision. He ultimately received his pilot's license in April 2017. He acknowledged that the purpose of serving as a steersman was to learn how to be a pilot and that the allision on April 24, 2015, was a learning experience. Among other things, the incident taught him to plan ahead more and to adjust to the wind and the current. Dampier further testified that he has steered as many as 15 barges at a time through the Bridge since April 24, 2015, and has had no problem getting through without making contact. He stated that he feels safe passing through the Bridge now because he knows how to do it.

C. Damages

Jerry Gelwicks, a DME employee who works as the operator (or tender) of the Bridge, was on duty on the morning of April 24, 2015, and witnessed the allision. From his work station in the bridge tender house, located on the swing span, he felt the Bridge lurch from the impact. Gelwicks then radioed the Harwell to advise the pilot that the vessel had caused damage to the Bridge. After making that contact, Gelwicks went to the area of impact with a flashlight to inspect the damage. He noted broken timbers on the south protection pier and also observed damage to the swing span's grease platform. Because it did not appear that the damage to the grease platform would impede the operation of the Bridge, he went back to the bridge tender house and returned the swing span to the closed position. However, under DME's operating procedures, rail

traffic was not allowed on the bridge until it could be fully inspected.

Gelwicks then called the Coast Guard to report the incident. He also notified his immediate supervisor, Bruce Wold, and completed a written incident report (Ex. 44). In his report, Gelwicks stated that at the time of the allision the winds were calm, the temperature was 30 degrees Fahrenheit and the river stage was 11.75. Gelwicks testified that this river stage was not particularly high. The report further noted that the Bridge was opened at 4:50 a.m. and that impact occurred at 4:59 a.m.

Wold testified that he was a Manager of Bridge Maintenance for DME on April 24, 2015, and that he received Gelwicks' call at around 5:00 a.m. on that date. Wold confirmed Gelwicks' testimony that because of the allision, no traffic was permitted to cross the Bridge until an inspection could occur. Wold traveled to the Bridge and arrived by 6:30 a.m., as the sun was rising. He recalled that the winds were calm at that time. He inspected the damage and took various photographs, including Exhibits 128 through 131.

Based on the damage to the grease platform under the swing span, Wold believes the barge that struck the protection pier must have risen up on impact, reaching a high enough level to impact the platform. Also, due to the amount of damage to the protection pier, Wold was concerned that the Bridge was vulnerable to further damage while in the open position. Specifically, he believed that if another vessel made contact with the

damaged protection pier, it could breach that pier and make direct contact with the span itself.[4]

Wold shared his findings and concerns with his supervisor, Daniel Sabatka. Sabatka directed him to make arrangements with two contractors to begin prompt repairs on a time-and-materials basis: JF Brennan (Brennan) for the protection pier and E80 Plus (E80) for the grease platform. Wold made these arrangements, as directed. He testified that Brennan completed its repairs to the protection pier on May 1, 2015, while E80's repairs to the grease platform were completed soon after. DME claims total damages of $276,860.85 as a result of this allision. Nearly all of this total arises from the invoices issued by Brennan and E80, with small, additional amounts consisting of labor and materials provided by DME's parent company, Canadian Pacific Railway (CP).

Additional facts concerning damages and other relevant issues will be addressed in the analysis section of this ruling, as necessary.

III. CONCLUSIONS OF LAW

To prevail on a claim arising from an allision, "the plaintiff has the burden of proving by a preponderance of the evidence that the defendant vessel was negligent and that this negligence was a proximate cause of the

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[4] Wold acknowledged that despite his concerns about the Bridge being vulnerable because of the damage to the protection pier, both channels of river traffic through the Bridge remained open. He testified that this was the Coast Guard's decision.

injury." *Ill. Constructors Corp. v. Logan Transp. Inc.*, 715 F. Supp. 872, 879 (N.D. Ill. 1989). A plaintiff can satisfy this burden, and establish a prima facie case of negligence, by invoking the *Oregon* rule. *Id*. The Oregon rule provides that a moving vessel is presumptively at fault in a collision when the moving vessel hits a stationary object. *The Oregon*, 158 U.S. 186 (1895). Thus, hitting a stationary object raises a presumption of fault on the part of the moving vessel and "the burden of proof is upon [the moving vessel] to exonerate herself from liability." *Id*. at 192–93. The vessel operator can overcome this presumption of fault by proving that it actually was without fault, that the stationary object was at fault or that the collision was inevitable. *See, e.g.*, *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977).

The *Pennsylvania* rule provides one avenue for a vessel operator to demonstrate that the stationary object was at fault. The *Pennsylvania* rule provides that if a party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence and has the burden of proving that its statutory fault was not a contributing cause of the accident. *The Pennsylvania*, 86 U.S. 125, 136 (1873). As the Eighth Circuit Court of Appeals has explained:

> For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a *mandatory duty*; (2) the statute or regulation must involve *marine safety* or navigation; and (3) the injury

> suffered must be of a nature that the statute or regulation was intended to prevent.

Union Pac. R.R. Co. v. Kirby Inland Marine, Inc. of Miss., 296 F.3d 671, 674 (8th Cir. 2002) (citing *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir. 1995)) (emphasis supplied by the Eighth Circuit).

A. An Order to Alter Under the Truman-Hobbs Act Does Not Rebut the Oregon Presumption

In *Union Pacific*, the Eighth Circuit undertook a lengthy analysis of whether the Truman-Hobbs Act, under which the Coast Guard issued the Order to Alter the Bridge, fits within the parameters of the *Pennsylvania* rule:

> We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . ." House Report No. 1447, August 2, 1939, 76th Cong. 1st Sess.
>
> The regulations implementing the Truman-Hobbs Act establish a lengthy administrative procedure for determining whether a bridge is "an unreasonable obstruction to navigation." *See* 33 C.F.R. § 116.01-116.55 (setting out complaint process, preliminary investigation,

detailed investigation, public hearing, and administrative review). Ultimately, the Chief Officer of the Bridge Administration (the "Chief") performs a cost/benefit analysis to determine whether the benefits to navigation exceed the government's cost of altering the bridge. 33 C.F.R. § 116.30. If the benefits exceed the costs, then the Chief recommends that the Coast Guard issue an Order to Alter stating that the bridge unreasonably obstructs navigation. *Id*. Once the Coast Guard concludes that a bridge is an unreasonable obstruction to navigation, the bridge owner must: (1) submit plans and specifications for altering the bridge; (2) solicit and submit bids; and (3) request an Apportionment of Costs which outlines which costs will be borne by bridge owner and the United States government. *See* 33 U.S.C. §§ 514-516; 33 C.F.R. §§ 116.40, 116.45, 116.50.

Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the *Pennsylvania* rule because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

The Truman-Hobbs Act also does not satisfy the other two prerequisites of the *Pennsylvania* rule as it does not impose a specific duty or prevent a specific sort of injury. Once the Coast Guard concludes that a bridge violates § 512, the bridge owner is required only to prepare a plan for altering the bridge. This "duty" is very different from a duty to maintain lights and signals on a bridge or to promptly open a draw. See 33 U.S.C. § 494 (requiring a bridge owner to maintain "such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe" and to promptly open such draw upon reasonable signal for the passage of boats and other water craft). With respect to the latter duties, the application of the *Pennsylvania* rule is justified because a bridge owner greatly increases the risk of allision by failing to promptly open a draw or by neglecting to maintain the bridge's lights. Conversely, a bridge owner's failure to prepare a plan for altering a bridge will delay the funding process, but will not directly increase the risk of allision.

Also, the goal of the Truman-Hobbs Act was to decrease the cost of navigation by using government funds to alter bridges which unreasonably obstruct such navigation. Although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act. To state it another way, the Truman-Hobbs Act was not designed to prevent any specific type of injury. Thus, any

> injury suffered in admiralty is not "of a nature that the [Truman-Hobbs Act] was intended to prevent." *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir. 1995).

296 F.3d at 674-75.

Ingram advances the following interpretation of the Eighth Circuit's holding in *Union Pacific*:

> According to the Eighth Circuit, the Coast Guard's unreasonable obstruction finding and Order to Alter may be used to rebut the presumption of fault on the part of the moving vessel. *Union Pacific Railroad Company v. Kirby*, 296 F.3d 671 at 676-679 (8th Cir. 2002). *Union Pacific* thus inherently holds that an unreasonably narrow bridge can be deemed the *cause* of an allision, *excusing the pilot's fault*. This Court should so rule, based on all the circumstances of this case.

Doc. No. 54 at 5 (emphasis in original). Ingram later reaffirms this interpretation, stating: "*Union Pacific* held that the Coast Guard's Findings and Order can be used to rebut the Oregon presumption." *Id*. at 7.

Ingram's characterization of *Union Pacific*'s holding is misplaced. The court stressed that it was answering one simple, legal question:

> The parties, however, did not ask the district court to consider whether Appellees presented sufficient evidence to rebut the *Oregon* presumption; thus, that question is not currently before this Court. Instead, the parties posed the single legal question of whether a

> Truman-Hobbs Act finding that a bridge is an unreasonable obstruction to navigation renders inapplicable the *Oregon* presumption. We conclude that the answer to that particular question is "no."

296 F.3d at 678 (emphasis added). Because the court made it very clear that it was addressing one precise question, the court did not, as Ingram claims, hold "that the Coast Guard's Findings and Order can be used to rebut the Oregon presumption."

So far as I can tell, Ingram relies on the following sentence in *Union Pacific* to support its interpretation: "Under *I & M Rail Link*, a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action." *Id.* at 677 (emphasis in original). That sentence appears in a portion of the opinion in which the Eighth Circuit discussed the Seventh Circuit's decision in *I & M Rail Link*. The Eighth Circuit addressed *I & M Rail Link* because the defendants in *Union Pacific* invoked that case "to support their position that the Coast Guard's Order to Alter rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner." *Id.* at 667-77.

In rejecting that argument, the Eighth Circuit set forth its understanding of the Seventh Circuit's holding:

> In our view, the *I & M Rail Link* case stands for the proposition that a defendant can

> attempt to *rebut* the *Oregon* presumption by presenting evidence that the Coast Guard labeled the bridge an "unreasonable obstruction to navigation." Under *I & M Rail Link*, a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action.

Id. at 677 (emphasis in original). The Eighth Circuit did not adopt the holding or reasoning of *I & M Rail Link*. Indeed, the court stated: "To the extent that the *I & M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree." *Id*. at 678.

Based on *Union Pacific*, I find that the Order to Alter in this case does not rebut the *Oregon* presumption. Of course, Ingram is free to argue that other evidence in the trial record rebuts the presumption. In *Union Pacific*, the Eighth Circuit noted "longstanding precedent which allows a moving vessel to rebut the *Oregon* presumption by presenting evidence that the bridge was an unreasonable obstruction to navigation." *Id.* at 678 (citing *Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir. 1919)). The court then quoted from the *Wilmington Ry. Bridge Co.* opinion for the proposition that the *Oregon* presumption may be rebutted:

> by proof that the location of the stationary vessel, *the obstruction of navigation by the*

> *bridge*, or other causes had brought the moving vessel into an emergency not to be reasonably foreseen, and that the course taken by the navigator in the emergency was such as might well have been taken by a prudent and skillful navigator.

Id. (quoting *Wilmington Ry. Bridge Co*., 259 F. at 168) (emphasis supplied by the Eighth Circuit). The presumption cannot, however, be rebutted by the Order to Alter.

B. The Other Evidence of Record Does Not Rebut the Oregon Presumption

Ingram appears to argue that even if the Order to Alter, itself, does not rebut the presumption of Ingram's fault, the facts about the Bridge that caused the Coast Guard to issue that Order serve to do so. Thus, for example, Ingram notes that there have been 250 reported allisions at the Bridge since 1972. Doc. No. 54 at 2. Ingram also points out that a three-wide configuration of barges has a total width of 105 feet, while the east-side channel is just 154 feet wide, leaving little clearance. Thus, Ingram states that DME "chose to leave in place a channel span that is unreasonably narrow." *Id*. at 4 (emphasis in original). Ingram argues that this choice requires the apportionment of at least some fault to DME.

Without a doubt, Ingram has demonstrated that this Bridge poses a difficult obstacle to barge traffic, at least as compared to more modern bridges. However,

Ingram has failed to provide any legal basis for imposing fault on DME. A finding of fault must be based on a duty and the breach of that duty. *See, e.g.*, 1 Thomas J. Schoenbaum, Admiralty and Mar. Law § 5-2 (5th Ed. 2011). Ingram has not shown that DME had a legal obligation to remove or alter the Bridge to make passage less challenging. The Truman-Hobbs Act does not impose such a duty:

> Under the Truman-Hobbs Act, a bridge labeled an unreasonable obstruction is still a *lawful* bridge. 33 U.S.C. § 511. In order to obtain funding under the Truman-Hobbs Act, the bridge must be "lawful" and used as a railroad or a public highway. *Id*. To maintain a lawful bridge, bridge owners must abide by the laws and regulations governing bridges. The Clinton Bridge was built in 1907 in accordance with then-current Department of Transportation procedures and it currently complies with the Coast Guard's regulations. Appellees do not assert that Appellant caused this allision through active negligence; instead, they fault the bridge owner for failing to alter the Clinton Bridge to accommodate the ever-increasing size of commercial barges and tows. We will not employ the *Pennsylvania* rule to punish a bridge owner who maintains a lawful bridge, even though the Coast Guard has found such a bridge to be an unreasonable obstruction due to the barge industry's expansion of the size of its commercial vessels.

Union Pacific, 296 F.3d at 676 (emphasis in original). Ingram has not demonstrated that as of April 24, 2015, the size of the channel or the configuration of the Bridge violated any "laws and regulations governing bridges." Nor has Ingram identified any other legal basis under which DME had a duty to remove or alter the Bridge.

Apportioning fault to DME for the configuration of the Bridge, absent a showing that DME had a legal duty to change that configuration, would be contrary to the Supreme Court's holding that "in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions" in a navigable river. *California v. Sierra Club*, 451 U.S. 287, 295 (1981) (discussing *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, (1888)). Given that Ingram is in the business of moving barges up and down the Mississippi River, I understand its frustration with antiquated bridges that require slow and skillful passage. However, because DME has no legal duty to remove or alter the Bridge to make barge traffic more efficient, DME cannot be assessed with any share of fault simply because the Bridge does not meet modern standards.

Moreover, the evidence presented at trial as to how this particular allision occurred demonstrates that negligence on the part of the Harwell's crew was the actual cause of the incident. I give great weight to the testimony of Hershey Dampier, the licensed steersman who was steering the Harwell when it struck the Bridge. At the time of the incident, Dampier was on his

first trip as a licensed steersman and was steering the Harwell under the direction of pilot Tommy Hinton.

Dampier testified that because of the wind speed and direction, along with the small size of the tow, Hinton told him to keep the barges pointed to the shore pier on the Illinois side of the northbound channel. When the tow was 300 or 400 feet from the Bridge, Dampier realized that it was lined up incorrectly. The lookout on the port, or west, side advised him that they were "headed to the bad." Dampier testified that he steered toward the starboard side in an unsuccessful effort to avoid making contact with the protection pier on his port side. He further testified that after making contact with the pier, he was able to bring the tow around to the correct direction and complete the Harwell's passage through the Bridge. As noted above, when asked why he was unable to avoid hitting the pier, Dampier answered:

> I was off to the bad more than he [the lookout] indicated so it didn't give me enough room or enough time to clear the lower end of the bridge or the turntable to avoid an allision with it, to proceed through.

Unofficial Realtime Transcript, Day 2, p. 138.

Dampier agreed that the purpose of serving as a steersman was to learn how to be a pilot and that the allision on April 24, 2015, was a learning experience. Among other things, the incident taught him to plan ahead more and to adjust to the wind and the current. Dampier testified that he has steered as many as 15

barges at a time through the Bridge since April 24, 2015, and has had no problem getting through without making contact. He stated that he feels safe passing through the Bridge now because he knows how to do it.

Based largely on Dampier's testimony, which I find to be entirely credible, I conclude that this allision was caused by a combination of (a) Dampier's inexperience, (b) Hinton's failure to provide adequate supervision (and/or to assume control when the situation began to deteriorate) and (c) the lookout's failure to adequately communicate the degree to which the Harwell was off to the bad.[5] Ingram is solely responsible for the allision and, therefore, is liable to DME for all damages that proximately resulted.

C. DME has Proved that it Incurred Reasonable Damages in the Amount of $276,860.85 as a Proximate Result of the Allision.

DME has established that its actual costs of repairs was $276,860.85. The issue is whether this figure should be reduced on grounds that DME failed to mitigate its damages. Failure to mitigate is an affirmative defense, for which Ingram bears the burden of proof.

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[5] I note that the testimony of other Harwell crew members, submitted in the form of deposition transcripts, supports Dampier's version of the relevant events. In addition, while DME presented expert testimony through William Beacom on the issue of Ingram's fault, in light of the *Oregon* presumption and Dampier's testimony, I find that Beacom's expert testimony to be largely unnecessary.

See, e.g., *Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 74, 79 (D.C. Cir. 2015). Ingram must show both (1) that DME's conduct was unreasonable and (2) that the unreasonable conduct aggravated the harm. *GIC Servs., L.L. C. v. Freightplus USA, Inc.*, 866 F.3d 649, 661 (5th Cir. 2017).

Ingram relies primarily on the opinions of its expert witness, Mike Baxter. At the outset, I note that Baxter was a poor witness and find that his testimony is entitled to little weight. Instead of being an objective expert, he was argumentative to the point of being warned (by me) to stop giving speeches in response to questions on cross-examination. Moreover, his testimony was unpersuasive on the merits. His opinions were largely in the form of personal beliefs and, as I will explain further below, his (few) specific complaints about DME's repair efforts are not persuasive.

Baxter asserted that Brennan (1) improperly charged DME for removing and reinstalling rock (or "rip rap") around the protection pier and (2) charged excessive rates for equipment that was larger than necessary for the project. The total of the alleged overcharges for these two items is $76,007.29.[6] With regard

[6] Baxter provided an alternative, convoluted analysis through which he compared Brennan's work in 2015 to a project that occurred in 2008, ultimately concluding – based on a board feet of wood pricing formula – that Brennan's charges in 2015 were $83,505.42 higher than they should have been. As it turns out, however, over $76,000 of this alleged overcharge relates to the two specific items listed above: rip rap and equipment charges. I agree with DME that Baxter's "board feet of wood" analysis was both unhelpful and unpersuasive.

to rip rap, Brennan employees Zach Pontzer and Mike Binsfeld testified that the existing rip rap was in the way of installing new piles and therefore had to be removed to allow piles to be driven into the river bed. The rip rap then had to be re-installed in the cell after the piles were driven. This process required labor and the use of equipment, both of which were charged to DME. Pontzer and Binsfeld testified that the costs were fair and reasonable, as did DME's witness Sabatka. The record reflects that Binsfeld and Sabatka are civil engineers with substantial experience in projects of this nature. I find that Ingram has failed to prove that Brennan's charges to DME for the removal and replacement of rip rap were excessive or unreasonable.

As for Brennan's equipment charges, there is no dispute that Brennan deployed equipment that was larger than what the job required. However, DME has demonstrated that the larger equipment was appropriately used because (1) it was readily available and (2) the project required prompt completion. The first point is established through the testimony of Sabatka, Pontzer and Binsfeld, all of whom explained that Brennan had the larger equipment nearby, and ready to deploy, when it was contacted by DME.

As for the second point, DME made a judgment that time was of the essence due to the extensive damage to the protection pier that resulted from the Harwell's allision. Gelwicks, the bridge tender, testified that he checked the gear wedges after the allision, as those are the mechanisms that attach the swing span to the rest of the Bridge. Gelwicks was concerned that

if the gear wedges were damaged, the Bridge could not be secured in a closed position and, thus, would not be available for rail traffic.

Sabatka and Wold testified that in light of the damage to the protection pier, if another allision occurred while the swing span was open, the pier would be unable to perform its function of protecting the swing span – and particularly the gear wedges – from being impacted. Thus, until such time as the protection pier was repaired, the Bridge was at risk of being damaged and, therefore, being unavailable for rail traffic.

Under these circumstances, I find that DME acted reasonably in determining that repairs should be made as quickly as possible. I further find that in light of this determination, it was not unreasonable for Brennan to deploy the closest available equipment, even if that equipment was larger than what the job required. As such, I conclude that Ingram has failed to prove that Brennan's charges to DME for the equipment used for this project were unreasonable.

More generally, Baxter complained that DME's decision to retain contractors Brennan and E80 on a time-and-materials basis as opposed to selecting contractors through a competitive bidding process resulted in unreasonable charges. Even if this criticism might have some merit, Ingram has provided no evidence as to how a competitive bidding process would have changed the final repair costs. For example, were other qualified contractors ready, willing and able to bid on the project and, if selected, to ramp up and

complete the work on a tight schedule? If so, what would their bids have been?

I have already concluded that DME established the need for prompt repairs due to the risk that another allision could have caused damage to the swing span. Thus, while Ingram is correct that DME could have proceeded with a competitive bidding process, Ingram has not shown that it was unreasonable for DME to proceed in an expedited manner, as it did. Nor has Ingram shown that DME's chosen method of retaining contractors aggravated the harm.

Ingram raises other arguments concerning mitigation of damages, including an argument that DME acted unreasonably by failing to construct a concrete bullnose on the south protection pier when DME reconstructed that pier in 2014. I have considered all of Ingram's arguments and find them to be unavailing. DME has proved damages in the amount of $276,860.85 and Ingram has failed to prove that DME acted unreasonably in failing to mitigate its damages.

IV. CONCLUSION AND RULING

For the reasons set forth herein, **judgment shall enter** in favor of plaintiff Dakota, Minnesota & Eastern Railroad Corporation and against defendant Ingram Barge Company in the amount of **$276,860.85**, plus interest as allowed by law. The costs of this action shall be taxed against the defendant.

IT IS SO ORDERED.

DATED this 24th day of April, 2018.

Leonard T. Strand,
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, et al., Plaintiffs, vs. INGRAM BARGE COMPANY, Defendant.	No. 15-CV-1038-LTS **JUDGMENT** (Filed Apr. 24, 2018)

DECISION BY COURT. This action came before the Court and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Judgment is entered in favor of plaintiff Dakota, Minnesota & Eastern Railroad Corporation and against defendant Ingram Barge Company in the amount of $276,860.85, plus interest as allowed by law. The costs of this action shall be taxed against the defendant.

DATED this 24th day of April 2018.

Approved as to form by

Leonard T. Strand,
Chief Judge

Robert L. Phelps, Clerk
of Court United States
District Court
Northern District of Iowa

By: Suzanne Carlson,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2143

Dakota, Minnesota & Eastern Railroad Corporation and Soo Line Railroad Company, doing business as Canadian Pacific Railway

Appellees

v.

Ingram Barge Company

Appellant

Appeal from U.S. District Court for the Northern District of Iowa – Dubuque
(2:15-cv-01038-LTS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 30, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

U.S.C.A. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

33 U.S.C.A. § 401

§ 401. Construction of bridges, causeways, dams or dikes generally; exemptions

Effective: February 8, 2016

It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of the department in which the Coast Guard is operating, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Secretary of the department in which the Coast Guard is operating or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of the department in which the Coast Guard is operating or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of the department

in which the Coast Guard is operating or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

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33 U.S.C.A. § 403

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has

been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

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33 U.S.C.A. § 403a

§ 403a. Creation or continuance of obstruction of navigable waters

The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court [district court] exercising jurisdiction in any district in which

such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

8 S.Ct. 811
Supreme Court of the United States

WILLAMETTE IRON BRIDGE CO.
v.
HATCH *et al.*[1]
March 19, 1888.

Attorneys and Law Firms

Rufus Mallory and *John Mullan*, for appellants.

J. N. Dolph, for appellees.

Opinion

BRADLEY, J.

This is a bill of review filed by the appellants, a corporation of Oregon, to obtain the reversal of a decree made by the court below against them in favor of Hatch and Lownsdale, the appellees. The case is, shortly, this: On the 18th of October, 1878, the legislature of Oregon passed an act entitled 'An act to authorize the construction of a bridge on the Willamette river, between the city of Portland and the city of East Portland, in Multnomah county, state of Oregon;' by which it was enacted as follows, to-wit: 'Be it enacted,' etc., 'that it shall be lawful for the Portland Bridge Company, a corporation duly incorporated under and in conformity with the laws of the state of Oregon, or its assigns, and that said corporation or its assigns be

[1] Reversing 19 Fed. Rep. 347.

and are hereby authorized and empowered to construct, build, maintain, use, or cause to be constructed, built, and maintained or used, a bridge across the Willamette river, between Portland and East Portland, in Multnomah county, state of Oregon, for any and all purposes of travel or commerce; said bridge to be erected at any time within six years after the passage and approval of this act, at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation or its assigns, on or above Morrison street of said city of Portland and M street of said city of East Portland; the same to be deemed a lawful structure: provided, that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear in width of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge: and provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland.' In the month of July, 1880, the appellants, the Willamette Iron Bridge Company, claiming to be assignees of the Portland Bridge Company, and to act under and by authority of said law, began the construction of a bridge across the Willamette river, from the foot of Morrison street, in the city of Portland, and proceeded in the work so far as to erect piers on the bed of the river, with a draw-pier in the channel, on which a pivot-draw was to be placed, with

a clear psssage-way on each side, when open, of 100 feet in width, – or, as the appellants allege, 105 feet in width. On the 3d of January, 1881, while the appellants were thus engaged in erecting the bridge, Hatch and Lownsdale filed a bill in the circuit court of the United States for an injunction to restrain the appellants from further proceeding with the work, and to compel them to abate and remove the structures already placed in the river. This bill described the complainants therein as citizens of the United States, residing at Portland, in the state of Oregon, and the defendants as a corporation organized under the laws of that state, having its office and principal place of business at Portland, and alleged that the Willamette river is a known public river of the United States, situate within the state of Oregon, navigated by licensed and enrolled and registered sea-going vessels engaged with commerce with foreign nations and with other states, upon the ocean, and by way of the Columbia river, – also a known public and navigable river of the United States, – from its confluence with the Columbia river to the docks and wharves of the port of Portland, and that, up to and beyond the wharves and warehouses of the complainants, Hatch and Lownsdale, it is within the ebb and flow of the ocean tides. That, by the act of congress of February 14, 1859, admitting the state of Oregon into the Union, it is declared 'that all the navigable waters of said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.' 11 St. 383. That congress has established a port of entry at the city of Portland,

on the Willamette river, and has required vessels which navigate it to be enrolled and licensed, etc., and has frequently directed the improvement of the navigation of the said river, and appropriated money for that purpose; and by an act approved February 2, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon said river, and to prevent obstruction to the navigation of the same, and in said act declared: 'But until the secretary of war approves the plan and location of said bridge, and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced.' The complainants further stated that Lownsdale was the owner and Hatch the lessee of a certain wharf and warehouses in Portland, situated about 750 feet above the proposed bridge, heretofore accessible to and used by sea-going vessels and others; and that Hatch is the owner of a steam tow-boat, used for towing vessels up and down the river to and from the said wharves and warehouses and others in the city; that vessels of 2,000 tons have been in the habit of navigating the river for a mile above the site of the proposed bridge; and that the said river ought to remain free and unobstructed. But they charge that the bridge and piers will be a serious obstruction to this commerce; that the passage-ways will not be sufficient for sea-going vessels, with their tugs; that the bridge is being constructed diagonally, and not at right angles, to the current of the river; that it will arrest and pile up the floating ice and timber in high stages of water in such a way as to obstruct the passage of vessels; and

in various other particulars stated in the bill it is charged that the bridge will be a serious obstruction to the navigation of the river. The complainants contended that the act of the legislature authorizing the bridge contravenes the laws of the United States declaring the river free, and was not passed with the consent of congress, and was a wrongful assumption of power on the part of the state; and alleged that the pretended assignment by the Portland Bridge Company to the defendants, the Willamette Iron Bridge Company, was not in good faith and was not authorized by the directors of the former; and stated various other matters of alleged irregularity and illegality on the part of the Portland Company and the defendants. They also stated that the bridge was not being constructed in conformity with the requirements of the state law; that, by reason of its diagonal position across the river, the thread of the current formed an acute angle with the line of the bridge, and that the draws do not afford more than 87 feet of a passage-way for the passage of vessels; and that vessels will be unable to pass through said bridge for at least four months of the busiest shipping season of the year. The defendants in that case, the Willamette Iron Bridge Company, filed an answer in which they admitted that they were building the bridge, and claimed to do so as assignees in good faith of the Portland Bridge Company, under and by virtue of the act of the legislature before mentioned, but denied the allegations of the bill with regard to the injurious effects of the bridge upon the navigation of the river, and averred that they were complying in every respect with the state law. The cause being put at issue,

and proofs being taken, on the 22d of October, 1881, a decree was made in favor of the complainants for a perpetual injunction against the building of the bridge, and for an abatement of the portion already built. The decision of the case was placed principally on the ground that the bridge would be, and that the piers were, an obstruction to the navigation of the river, contrary to the act of congress passed in 1859, admitting Oregon into the Union, and declaring 'that all the navigable waters of the said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor;' and that, without the consent of congress, a state law was not sufficient authority for the erection of such a structure; and, even if it was, the bridge did not conform to the requirements of the state law. See *Hatch* v. *Bridge Co.*, 7 Sawy. 127, 141, 6 Fed. Rep. 326, 780.[2] The defendants took an appeal, which was not prosecuted; but after the decision of this court in the case of *Escanada Co.* v. *Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185, they filed the present bill of review for the reversal of the decree. The reasons assigned for a reversal are, among others, that the court erred in holding and decreeing as follows, to-wit: (1) That the bridge, where and as being constructed, was a serious obstruction to the navigation of the Willamette river, contrary to the act of congress of February 14, 1859, admitting the state of Oregon into the Union, which declares that all the navigable waters of the state shall be common highways,

[2] See, also, 27 Fed. Rep. 673.

and forever free to all citizens of the United States; (2) that the said court, under section 1 of the act of March 3, 1875, giving it jurisdiction of a suit arising under an act of congress, has authority to restrain parties from violating said act by obstructing the navigation of any of said waters, at the suit of any one injured thereby; (3) that the proposed bridge is and will be a nuisance and serious impediment to the navigation of said river; (4) that the legislature of the state of Oregon has not the power to say absolutely that a bridge may be built with only a draw of 100 feet; (5) that the Willamette Iron Bridge Company, as the assignee of the Portland Bridge Company, was not authorized by the act of the legislative assembly of Oregon to construct the said bridge, because it would be a violation of the said act of congress of February 14, 1859, admitting the state of Oregon into the Union, and was and is, therefore, void; (6) that the defendant should be perpetually enjoined from constructing or proceeding with the construction of the said bridge; and (7) that the defendant should be required to abate and remove out of said river all piers, foundations, etc., which it has placed or constructed therein. This bill was demurred to, and the court affirmed the decree in the original suit and dismissed the bill of review. *Bridge Co.* v. *Hatch*, 9 Sawy. 643, 19 Fed. Rep. 347. The present appeal is taken from this decree.

On a pure bill of review, like the one in this case, nothing will avail for a reversal of the decree but errors of law apparent on the record. *Whiting* v. *Bank*, 13 Pet. 6; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95

U. S. 99; *Thompson* v. *Maxwell*, Id. 397; *Beard* v. *Burts*, Id. 434; *Shelton* v. *Van Kleeck*, 106 U. S. 532, 1 Sup. Ct. Rep. 491; *Nickle* v. *Stuart*, 111 U. S. 776, 4 Sup. Ct. Rep. 700. Does any such error appear in the present case? The court below has decided in the negative. We are called upon to determine whether that decision was correct. It must be assumed that the questions of fact at issue between the parties were decided correctly by the court upon its view of the law applicable to the case. But the important question is, was its view of the law correct? The parties in the cause, both plaintiffs and defendants, were citizens of the state of Oregon. The court, therefore, must necessarily have held, – as we know from its opinion that it did hold, – that the case was one arising under the constitution or laws of the United States. The *gravamen* of the bill was the obstruction of the navigation of the Willamette river by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the state legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of congress, which assent the court held was necessary in view of that provision in the act of congress admitting Oregon as a state, which has been referred to. The court held that this provision of the act was tantamount to a declaration that the navigation of the Willamette river should not be obstructed or interfered with, and that any such obstruction or interference, without the consent of congress, whether by state sanction or not, was a violation of the act of congress; and

that the obstruction complained of was in violation of said act; and this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette river at Portland was a violation of said act of congress. If it was not, if it could not be, if the act did not apply to obstructions of this kind, then the case did not arise under the constitution or laws of the United States, unless under some other law referred to in the bill.

The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are

citizens of different states, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson* v. *Creek Co.*, 2 Pet. 245; *Pollard's Lessee* v. *Hagan*, 3 How. 229; *Passaic Bridge Cases*, 3 Wall. 782; *Gilman* v. *Philadelphia*, Id. 724; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185; *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; *Hamilton* v. *Railroad*, 119 U. S. 280, 7 Sup. Ct. Rep. 206; *Huse* v. *Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313; *Sands* v. *Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. Rep. 113; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 700, 2 Sup. Ct. Rep. 732. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question. not a federal one. The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence.

But, as we have stated, the court below held that the act of congress of 1859 was a law which prohibited any obstructions or impediments to the navigation of the public rivers of Oregon, including that of the Willamette river. Was it such an act? Did it have such effect? The clause in question had its origin in the

fourth article of the compact contained in the ordinance of the old congress for the government of the territory north-west of the Ohio, adopted July 13, 1787; in which it was, among other things, declared that 'the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 St. 52. This court has held that when any new state was admitted into the Union from the northwest territory, the ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original states. On the admission of any such new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of *Pollard's Lessee* v. *Hagan, supra; Permoli* v. *First Municipality*, 3 How. 589; *Escanaba Co.* v. *Chicago; Cardwell* v. *Bridge Co.; Huse* v. *Glover, – qua supra*. In admitting some of the new states, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the state was carved out of the territory northwest of the Ohio, or not; and it has been supposed that in this new form of enactment it might be regarded as a regulation of commerce, which congress has the right to impose. *Pollard's Lessee* v. *Hagan*, 3 How. 212,230. Conceding this to be the correct view, the question then arises, what is its fair construction? What regulation of commerce does it affect? Does it

prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other states the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction.

It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the state legislature itself, in a state where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of congress. But it is well settled that the legislatures of such states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states, in reference to which no such clause exists. It was so held in *Pound* v. *Turck*, 95 U. S. 459, in reference to a dam in the Chippewa river, in Wisconsin; in *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; in reference to a bridge without a draw, erected on the American river, in California, which prevented steam-boats from going above it; and in *Hamilton* v. *Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206, relating to railroad bridges in Louisiana, – in all which cases the clause in question was in force in the states where they arose, and in none of them was said clause held to restrain in any degree the full power of the state to make, or cause to be made, the erections referred to, which must have been more or less obstructions and impediments to the navigation of

the streams on which they were placed. In *Cardwell* v. *Bridge Co.*, the two alternate constructions of the clause above suggested were brought to the attention of the court, and, on consideration, it was held as follows: 'Upon mature and careful consideration which we have given in this case to the language of the clause in the act admitting California, we are of opinion that, if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public.' In *Hamilton Railroad Co.* it was said: 'Until congress intervenes in such cases, and exercises its authority, the power of the state is plenary. When the state provides for the form and character of the structure, its directions will control, except as against the action of congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation;' and in the same case the construction given to the clause in question in *Cardwell* v. *Bridge Co.* was reiterated, namely, that it was intended to prevent any discrimination against citizens of other states in the use of navigable streams, and any tax or toll for their use. In *Huse* v. *Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313, where a portion of the Illinois river had been improved by the

state of Illinois, by the erection of locks in the river, and a toll was charged for passing through the same, it was held that this was no encroachment upon the power of congress to regulate commerce, and that, while the ordinance of 1787 was no longer in force in Illinois, yet, if it were, the construction given to the clause in the *Cardwell Case* was approved, and the following observation was made: 'As thus construed the clause would prevent any exclusive use of the navigable waters of the state, – a possible farming out of the privilege of navigating them to particular individuals, classes, or corporations, or by vessels of a particular character.' It was also held that the exaction of tolls for passage through the locks, as a compensation for the use of the artificial facilities constructed, was not an impost upon the navigation of the stream. The same views are held in the recent case of *Sands* v. *Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. Rep. 113.

It seems clear, therefore, that according to the construction given by this court to the clause in the act of congress relied upon by the court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce. It is to be remembered that in its original form the clause embraced carrying places between the rivers as well as the rivers themselves; and it cannot be supposed that those carrying places were intended to be always kept up as such. No. doubt that at the present time some of them are covered by populous towns, or occupied in some other way incompatible with their original use; and such a diversion of their use, in the progress of

society, cannot but have been contemplated. What the people of the old states wished to secure was the free use of the streams and carrying places in the northwest territory, as fully as it might be enjoyed by the inhabitants of that territory themselves, without any impost or discriminating burden. The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until congress acts, the states have the plenary power supposed, yet, when congress chooses to act, it is not concluded by anything that the states, or that individuals, by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of congress over the whole subject-matter, that the consent of congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but in many, perhaps the majority, of cases, its assent only is asked, and the primary

authority is sought at the hands of the state. With regard to this very river, the Willamette, three acts of congress have been passed in relation to the construction of bridges thereon, to-wit, one approved February 2, 1870, which gave consent to the corporation of the city of Portland to erect a bridge from Portland to the east bank of the river, not obstructing, impairing, or injuriously modifying its navigation, and first submitting the plans to the secretary of war; another, approved on the 22d of June, 1874, which authorized the county commissioners of Marion county, or said commissioners jointly with those of Polk county, to build a bridge across said river at Salem; a third act, approved June 23, 1874, which authorized the Oregon & California Railroad Company, alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across said river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw abutment, and so constructed as not to impede the navigation of the river, and allow the free passage of vessels through the bridge. These acts are special in their character, and do not involve the assumption by congress of general police power over the river.

The argument of the appellees, that congress must be deemed to have assumed police power over the Willamette river in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which

they relate. Of course, any interference with the operations, constructions, or improvements made by the general government, or any violation of a port law enacted by congress, would be an offense against the laws and authority of the United States, and an action or suit brought in consequence thereof would be one arising under the laws of the United States; but no such violation or interference is shown by the allegations of the bill in the original suit in this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland had been created a port of entry. In the case of *Escanaba Co.* v. *Chicago*, it was said: 'As to the appropriations made by congress, no money has been expended on the improvement of the Chicago river above the first bridge from the lake, known as 'Rush-Street Bridge.' No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges.' 107 U. S. 690, 2 Sup. Ct. Rep. 195. In the present case there is no allegation, if such an allegation would be material, that any improvements in the navigation of the Willamette river have been made by the government at any point above the site of the proposed bridge.

As to the making of Portland a port of entry, the observations of Mr. Justice GRIER in the *Passaic Bridge Cases*, 3 Wall. 782, 793, App., are very apposite. Those cases were decided in September, 1857, by

dismissing the bills which were filed for injunctions against the erection of a railroad bridge across the Passaic river at Newark, New Jersey, and a plank-road bridge across the same river below Newark. The decrees were affirmed here by an equally divided court, in December term, 1861. It being urged, among other things, that Newark was a port of entry, and that the erection of these bridges, though under the authority of the state legislature, was in conflict with the act of congress establishing the port, Mr. Justice GRIER said: 'Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals, – to land as well as water? Assuming the right (which I neither affirm or deny) of congress to regulate bridges over navigable rivers below ports of entry, yet, not having done so, the courts cannot assume to themselves such a power. There is no act of congress or rule of law which courts could apply to such a case.' These views were adhered to by the same judge in the subsequent case of *Gilman* v. *Philadelphia*. The bridge which was the subject of controversy in that case was within the limits of the port of Philadelphia, which, by the act of 1799, included the city of Philadelphia, and by that of 1834 was extended northerly to Gunner's run. See 3 Wall. 718. That case arose soon after the *Passaic Bridge Cases*, and, so far as interference with navigation was concerned, was identical in character with them; and

Mr. Justice GRIER, upon the same grounds taken and asserted by him in those cases, without delivering an additional opinion, dismissed the bill. The decree was affirmed in this court in December term, 1865, by a vote of seven justices to three, Justices CLIFFORD, WAYNE, and DAVIS dissenting; so that Justice GRIER'S views were finally affirmed by a decided majority of the court.

It is urged that in the *Wheeling Bridge Case*, 13 How. 518, this court decided the bridge there complained of to be a nuisance, and decreed its prostration, or such increased elevation as to permit the tall chimneys of the Pittsburgh steamers to pass under it at high water. But in that case this court had original jurisdiction in consequence of a state being a party; and the complainant, the state of Pennsylvania, was entitled to invoke, and the court had power to apply, any law applicable to the case, whether state law, federal law, or international law. The bridge had been authorized by the legislature of Virginia, whose jurisdiction extended across the whole river Ohio. But Virginia, in consenting to the erection of Kentucky into a state, had entered into a compact with regard to the free navigation of the Ohio,[3] confirmed by the act of congress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was; and the bridge, so constructed, injuriously affected a supra-riparian state (Pennsylvania) bordering on the river, contrary to

[3] See Mr. Stanton's argument, 13 How. 523; 1 Bioren's Laws U. S. p. 675, art. 7.

international law. Mr. Justice GRIER, in the *Passaic Bridge Cases*, disposes of the *Wheeling Bridge Case* as follows: 'This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these question: Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the states, was declared to be 'free and common to all the citizens of the United States?' If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the state of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the constitution, were held at the mercy or caprice of every or any of the states to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent

hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all state legislation in such cases as unconstitutional and void.' 'It is evident, from this statement,' continues Justice GRIER, 'that the supreme court, in denying the right of Virginia to exercise this absolute control over the Ohio river, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact, or by constitutional law, to obstruct the commerce or a supra-riparian state, had before them questions not involved in these cases, [the *Passaic Bridge Cases*,] and which cannot affect their decision. The Passaic river, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state. It is no highway to other states; no commerce passes thereon from states below the bridge to states above.' 3 Wall. 792. This exposition of the *Wheeling Bridge Case*, by one who had taken a decided part in its discussion and determination, effectually disposes of it as a precedent for the jurisdiction of the circuit courts of the United States in matters pertaining to bridges erected over navigable rivers, at least those erected over rivers whose course is wholly within a single state. The Willamette river is one of that description.

On the whole, our opinion is that the original suit in this case was not a suit arising under any law of the United States; and since, on such ground alone, the court below could have had jurisdiction of it, it follows that the decree on the bill of review must be reversed, and the record remanded, with instructions to reverse the decree in the original suit, and to dismiss the bill filed therein, without prejudice to any other proceeding which may be taken in relation to the erection of said bridge, not inconsistent with this opinion.

18 F.2d 18
Circuit Court of Appeals, Fifth Circuit.

TEXAS & P. RY. CO.
v.
ANGOLA TRANSFER CO.[1]

No. 4885.
March 29, 1927.

Attorneys and Law Firms

Philip S. Gidiere, of New Orleans, La. (Spencer, Gidiere, Phelps & Dunbar, of New Orleans, La., on the brief), for appellant.

John D. Grace, M. A. Grace, and Edwin H. Grace, all of New Orleans, La., for appellee.

Before WALKER, BRYAN, and FOSTER, Circuit Judges.

Opinion

FOSTER, Circuit Judge.

This is an appeal from a judgment awarding damages for the sinking of the steamboat Wm. Edenborn, owned by appellee, alleged to have been caused by the improper construction of a bridge over Old river, a branch of Red river, in Louisiana, owned by appellant, with which the said vessel collided. The material facts are these:

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[1] Rehearing denied May 23, 1927.

On May 5, 1912, at about 8:30 a.m., the Edenborn, with a barge loaded with a cut of railroad cars, made fast to her port side, approached the bridge from the west. The Edenborn and the barge together were about 72 feet wide, and the bridge span opening is 163 feet, giving a margin of 91 feet for passing. The Edenborn, however, went through at an angle and came in contact with the south pier of the bridge. This pier consists of two metal cylinders, 8 feet in diameter, placed close together, filled with concrete, and having steel caps three-fourths of an inch thick, extending over the sides about 4 1/2 to 6 inches. It is shown that this construction, including the caps, is customary. At ordinary mean water these caps are about 15 feet above the surface of the river, but on the day of the accident the river was at the highest stage ever known. It had been rising at about 3 inches a day, and the water covered the caps 3 to 6 inches. The Edenborn rubbed along the edge of one of the caps, with the result that a slit was cut in her side, through which water entered her hull, causing her to sink and become a total loss.

The bridge was built by authority of Congress (Act March 3, 1901 (32 Stat. 1089)), was completed in 1903, and it is conclusively proven that it was constructed according to plans and specifications approved by the Secretary of War. In January, 1910, as the result of a public hearing in which libelant participated, respondent was required to build a guide wall 300 feet long at an angle from the south pier towards the Mississippi river on the east and to remove some obstructions from the north draw. No changes were required to be made

to the bridge piers, or any other part of the structure, and guide walls were not required to the west. The guide wall ordered was built out 300 feet, but was not completed until some time after the accident; but that fact did not contribute to the sinking of the boat, as she approached from the west. After this guide wall was completed, the bridge was inspected by United States engineers and the structure was finally approved by the Secretary of War.

When in service, the Edenborn passed through the draw several times a day in each direction, and her captain, who was also the pilot, had been on her for nine months before the accident. He testifies the current was running through the draw at an angle of 45 degrees towards the east on that day at 3 to 3 1/2 miles per hour. There is other testimony from three witnesses, who made a test, that the current ran straight through the draw at 2 miles per hour.

It is contended by appellee (1) that the construction of the bridge was initially improper, because of the projecting metal caps, and that in view of that condition a smooth bulkhead should have been built across the pier, to fend a vessel off from the cylinders in the event she should rub along the face of the pier in passing through the draw; and (2) that, in the absence of a permanent protecting bulkhead, because of the submergence of the cylinders and their caps, it was the duty of respondent to place some sort of temporary fender around the caps to serve the same purpose. Both of these theories found favor with the District Court.

We are constrained to disagree with the District Court. Regarding the first contention, it is enough to say that the bridge was built by authority of Congress, according to plans and specifications approved by the Secretary of War. This afforded complete protection to appellant. It is immaterial that the final approval came after the accident, as the bridge was a lawful structure, as much before as after official approval. So. Pac. Co. v. Olympian Dredging Co., 260 U.S. 205, 43 S.Ct. 26, 67 L.Ed. 213.

On the second contention, conceding arguendo that changed conditions might require protective measures, we do not think such an accident as occurred was reasonably to be anticipated, so as to require steps to be taken to prevent it. It would have been hardly possible to afford adequate protection against the sharp edges of the caps without driving piling, even if that were practicable, considering the great depth of water at the time. The superstructure of the bridge marked the opening with sufficient accuracy, and any one possessing common sense would have known that the ends of the spans rested on piers at the time under water. The situation had existed for only a day or two at most, and, as the water was then at the highest level ever known, it was probable that it would fall within a short time. There was as much danger to vessels from collision with the piers themselves as from rubbing along the caps. Undoubtedly the passage was dangerous, but the Edenborn knew the conditions and had safely made it a number of times. There was nothing to put appellant on notice that an accident was likely to

happen. We think appellant was entitled to rely upon boats passing through the draw navigating carefully and keeping in the middle of the stream, or at least avoiding contact with the piers.

The judgment appealed from is reversed, and the libel is dismissed.

Reversed.

101 S.Ct. 1775
Supreme Court of the United States

State of CALIFORNIA et al., Petitioners,
v.
SIERRA CLUB et al.
KERN COUNTY WATER AGENCY et al., Petitioners,
v.
SIERRA CLUB et al.

Nos. 79–1252, 79–1502.
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Argued Jan. 21, 1981.
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Decided April 28, 1981.

Attorneys and Law Firms

Roderick E. Walston, San Francisco, Cal., for petitioners.

Elinor H. Stillman, Washington, D. C., for the Federal respondents.

John B. Clark, San Francisco, for respondents Sierra Club, et al.

Opinion

Justice WHITE delivered the opinion of the Court.

Under review here is a decision of the Court of Appeals for the Ninth Circuit holding that private parties may sue under the Rivers and Harbors Appropriation Act of 1899 to enforce § 10 of that Act. An environmental organization and two private citizens (hereafter

respondents),[1] seek to enjoin the construction and operation of water diversion facilities which are part of the California Water Project (CWP). They rely upon § 10 of the Act, which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . ."[2] Since the Act does not explicitly create a private enforcement mechanism, the initial question presented by these consolidated cases is

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[1] The Sierra Club is a nonprofit California corporation; Hank Schramm is a commercial fisherman active in the San Francisco Bay and Pacific Ocean; and William Dixon is a Sacramento-San Joaquin Delta landowner. See 400 F.Supp. 610, 619 (N.D.Cal.1975).

[2] Section 10 of the Rivers and Harbors Appropriation Act of 1899 provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 30 Stat. 1151, 33 U.S.C. § 403.

whether such a private right of action can be implied on behalf of those allegedly injured by a claimed violation of § 10. Petitioner State of California also asks us to decide whether the Act requires permits for the state water allocation projects involved in these cases.

I

The California Water Project consists of a series of water storage and transportation facilities designed primarily to transport water from the relatively moist climate of northern California to the more arid central and southern portions of the State. The water which will be used by the CWP is initially stored behind dams on the Sacramento River and, as needed, released into the Sacramento-San Joaquin Delta. The CWP then diverts a quantity of this water from the Delta and directs it into canals and aqueducts which will carry it south. The project has both federal and state components. The federal component, the Central Valley Project, is designed in part to provide a constant source of water for irrigation to the Central Valley of California. Water for this project is diverted from the Delta by the Tracy Pumping Plant into the 115-mile Delta-Mendota Canal which transports the water to the Mendota Pool in California's Central Valley. The State Water Project supplies water to both central and southern California by way of the California Aqueduct. Water for this project is drawn from the Delta by the Delta Pumping Plant and deposited in the northern terminus of the California Aqueduct, through which it flows to its destinations in central and southern California.

Under the present system the quality of water captured in the north and released into the Delta may be degraded by intruding salt waters from the Pacific Ocean. As a consequence the water which is diverted from the Delta to the Delta-Mendota Canal or the California Aqueduct is potentially of a lesser quality than is the water which is transported to the Delta from storage facilities in the north and from there deposited in the Delta. The State of California has proposed the construction of a 42-mile Peripheral Canal along the eastern edge of the Delta area, which would avoid any mixing of the water from the north with the saline water of the Delta. Instead of depositing water in the Delta, the canal would carry high quality water directly to the Tracy and Delta Pumping Plants.

Respondents commenced the present action in 1971 in the United States District Court for the Northern District of California. *Sierra Club v. Morton*, 400 F.Supp. 610 (1975). Named as defendants were the various federal and state officials who administered the agencies responsible for overseeing the operation, construction, and regulation of the CWP facilities in question.[3] Petitioner water agencies, which had contracted with the State for water from the Delta and which had incurred extensive financial obligations in

[3] The federal defendants were the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, the Chief of Engineers of the Army Corps of Engineers, and the Division Engineer of the Corps' South Pacific Division. The state defendants were the Secretary for Resources and the Director of the Department of Water Resources. 400 F.Supp., at 620.

reliance thereon, were permitted to intervene.[4] The respondents alleged that present and proposed diversions of water from the Delta degraded the quality of Delta water, and that such diversion violated § 10 of the Rivers and Harbors Appropriation Act of 1899. They sought to enjoin further operation or construction of water diversion facilities until the consent of the Army Corps of Engineers was obtained as required by the Act.

The District Court concluded that respondents could avail themselves of a "private cause of action" to enforce § 10 of the Act, and ruled on the merits that approval of the Corps of Engineers was required by § 10 for the Tracy and Delta Pumping Plants and the Peripheral Canal. *Sierra Club v. Morton, supra*. The Court of Appeals for the Ninth Circuit agreed that a private cause of action to enforce the Act existed. *Sierra Club v. Andrus*, 610 F.2d 581 (1979). It reversed the District Court as to the Tracy Pumping Plant, however, ruling that Congress has consented to its construction and operation.[5] We granted petitions for

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[4] According to affidavits filed in 1974 in support of motions to intervene, Kern County Water Agency has contracted to purchase up to 1,153,000 acre-feet annually, which is resold primarily to agricultural users. The Metropolitan Water District of Southern California has contracted to purchase up to 2,011,500 acre-feet annually to serve the water needs of an area of some 4,900 square miles with 10 million inhabitants. The Tulare Lake Basin Water Storage District and the Santa Clara Valley Water District have contracted to purchase lesser amounts. See App. 99a–112a.

[5] Judge Tang wrote separately to explain why the conclusion that the Tracy Pumping Plant had been authorized by Congress

certiorari filed by the water agencies and the State of California. 449 U.S. 818, 101 S.Ct. 68, 66 L.Ed.2d 2019 (1980).

II

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), outlined a "preferred approach for determining whether a private right of action should be implied from a federal statute. . . ." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 26, 100 S.Ct. 242, 250, 62 L.Ed.2d 146 (1979) (WHITE, J., dissenting); see *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). This approach listed four factors thought to be relevant to the inquiry:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S., at 78, 95 S.Ct., at 2087.

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did not conflict with the Ninth Circuit's recent decision in *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742 (1979). 610 F.2d, at 607.

Combined, these four factors present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action, see *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 771–772, 101 S.Ct. 1451, 1461–1462, 67 L.Ed.2d 662 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis, supra*, 444 U.S., at 23–24, 100 S.Ct., at 249; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 575–576, 99 S.Ct. 2479, 2485, 2489, 61 L.Ed.2d 82 (1979); but the four factors specified in *Cort* remain the "criteria through which this intent could be discerned." *Davis v. Passman*, 442 U.S. 228, 241, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis, supra*, 444 U.S., at 27, 100 S.Ct., at 250 (WHITE, J., dissenting).

Under *Cort*, the initial consideration is whether the plaintiff is a member of a class for " 'whose *especial* benefit the statute was enacted.' " *Cort v. Ash, supra*, 422 U.S., at 78, 80–82, 95 S.Ct., at 2087, 2089; see *Touche Ross & Co. v. Redington, supra*, 442 U.S., at 569–570, 99 S.Ct., at 2485–2486; *Cannon v. University of Chicago, supra*, 441 U.S., at 689–694, 99 S.Ct., at 1953–1956. Without analyzing either the language or legislative history of the Act, the Court of Appeals here concluded that the Act was designed for the especial benefit of private parties who may suffer "special injury" caused by an unauthorized obstruction to a navigable waterway. It was apparently reasoned that since Congress enacted a statute that forbids such

obstructions in navigable waters, any person who would be "especially harmed" by an unauthorized obstruction was an especial beneficiary of the Act. But such a definition of "especial" beneficiary makes this factor meaningless. Under this view, a victim of any crime would be deemed an especial beneficiary of the criminal statute's proscription. *Cort* did not adopt such a broad-gauge approach. *Cort v. Ash, supra*, 422 U.S., at 80–82, 95 S.Ct., at 2089. The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries. See *Cannon, supra*, 441 U.S., at 690–693, n. 13, 99 S.Ct., at 1954–1956, n. 13.

In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action. "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX [of the Education Amendments of 1972] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Cannon v. University of Chicago, supra*, 441 U.S., at 690–693, 99 S.Ct., at 1954–1956; see also *Touche Ross & Co. v. Redington, supra*, 442 U.S., at 569, 99 S.Ct., at 2485;

Cort v. Ash, supra, 422 U.S., at 80–82, 95 S.Ct., at 2089. Section 10 of the Rivers and Harbors Appropriation Act is the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons.

Neither the Court of Appeals nor respondents have identified anything in the legislative history suggesting that § 10 was created for the especial benefit of a particular class. On the contrary, the legislative history supports the view that the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. In part, the Act was passed in response to this Court's decision in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888). There the Court held that there was no federal common law "which prohibits obstructions and nuisances in navigable rivers." *Id.*, at 8, 8 S.Ct., at 814. Although *Willamette* involved private parties, the clear implication of the Court's opinion was that in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions. The Act was intended to enable the Secretary of War to take such action.[6] See

[6] In addition, § 12 of the Act, 33 U.S.C. § 406, provides criminal penalties for violations of the provisions of various sections of the Act, including the provisions of § 10; and, § 17 of the Act, 33 U.S.C. § 413, provides that "[t]he Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of [§ 10]." The creation of one explicit mode of enforcement is not

21 Cong.Rec. 8603, 8605, and 8607 (1890); see also *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 663–664, 93 S.Ct. 1804, 1811, 36 L.Ed.2d 567 (1973); *United States v. Standard Oil Co.*, 384 U.S. 224, 227–229, 86 S.Ct. 1427, 1428–1429, 16 L.Ed.2d 492 (1966); *United States v. Republic Steel Corp.*, 362 U.S. 482, 485–488, 499–500, 80 S.Ct. 884, 886–888, 894, 4 L.Ed.2d 903 (1960). Congress was not concerned with the rights of individuals.

It is not surprising, therefore, that there is no "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Cort v. Ash*, 422 U.S., at 78, 82–84, 95 S.Ct., at 2087, 2089–2090; *Touche Ross & Co. v. Redington*, 442 U.S., at 571, 99 S.Ct., at 2486; *Cannon v. University of Chicago*, 441 U.S., at 694–703, 99 S.Ct., at 1956–1961. The Court of Appeals recognized as much: "The legislative history of the Rivers and Harbors Act of 1899 does not reflect a congressional intent either to afford a private remedy or to deny one." 610 F.2d, at 588. This silence on the remedy question serves to confirm that in enacting the Act, Congress was concerned not with private rights

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dispositive of congressional intent with respect to other complementary remedies. See *Cort v. Ash*, 422 U.S. 66, 82–83, n. 14, 95 S.Ct. 2080, 2089–2090, n. 14, 45 L.Ed.2d 26 (1975); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 29, n. 6, 100 S.Ct. 242, 252, n. 6, 62 L.Ed.2d 146 (1979) (WHITE, J., dissenting). However, here, considering the clear focus of the legislative history on the need to enable the Government to respond to obstructions in navigable waterways, the creation of this enforcement mechanism and the absence of the remedy sought by respondents, certainly reinforces the view that Congress was not concerned with private rights or remedies in designing this legislation.

but with the Federal Government's ability to respond to obstructions on navigable waterways.[7]

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[7] Respondents suggest that the legislative history of the Act must be read in light of the historical context during which the measure was being considered. See *Cannon v. University of Chicago*, 441 U.S. 677, 698–699, 99 S.Ct. 1946, 1958, 60 L.Ed.2d 560 (1979). That context, they argue, included a general awareness that the obstruction of any navigable stream could have been addressed through the common law of nuisance and that this private remedy had been recognized at one time as federal in nature. Furthermore, they argue that the contemporary legal climate recognized that the abrogation of this federal remedy in cases such as *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888), did not undermine the accepted view that the enactment of any federal prohibition of obstructions on navigable streams would resurrect the federal private right of action. Congressional silence as to private remedies should be interpreted, therefore, as acquiescing in the accepted view.

> For both of these positions respondents rely heavily upon *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 14 L.Ed. 249 (1852). There, the State of Pennsylvania sought equitable relief from the construction of a bridge across the Ohio River. The Court took the case under its original jurisdiction, a State being the plaintiff, and, having done so, held that it was empowered to consider all issues presented by the parties, state as well as federal. Respondents suggest that the *Wheeling* Court held that federal courts were regularly available to entertain actions for nuisance brought by private parties with respect to obstructions on navigable rivers. But nothing in the opinion supports that view. The discussion in that case of the common law of nuisance is based on the Court's position that it was entitled to consider state as well as federal issues in the cause before it. Indeed, that the opinion did not establish a general federal law of nuisance with respect to navigable waterways was a point reiterated in *Willamette, supra*, 125 U.S., at 15–17, 8 S.Ct., at

818–819. In short, although there may have been a common-law nuisance cause of action for obstructions of navigable waterways, *Wheeling Bridge* did not federalize that law. Respondents have cited no decision by this Court that did.

Equally unavailing is respondents' assertion that *Wheeling Bridge* stands for the broad proposition that if Congress legislated in this area, any prohibition of obstructions would automatically support a private right of action. This position is extrapolated from discussions of the law of nuisance in both *Wheeling Bridge, supra*, at 604–607 and the subsequent *Gilman v. Philadelphia*, 3 Wall. 713, 722–724, 18 L.Ed. 96 (1866). In both cases the Court merely expressed agreement with the proposition that a court of equity could enjoin a public nuisance in a case brought by a private person who had sustained specific injury. Whether a congressional enactment prohibiting obstructions would automatically give rise to a private right of action was not an issue raised or discussed in either case.

The most that may be legitimately concluded as to legislative understanding of the law preceding the enactment of this statute is that Congress was aware that the Supreme Court had held that there was no federal law which empowered anyone to contest obstructions to navigable rivers. See 21 Cong.Rec. 8604–8607 (1890). We cannot assume from legislative silence on private rights of action, that Congress anticipated that a general regulatory prohibition of obstructions to navigable streams would provide an automatic basis for a private remedy in the nature of common-law nuisance. The Rivers and Harbors Appropriation Act of 1899 was no doubt in part a legislative response to the *Willamette* decision. But there is nothing to suggest that that response was intended to do anything more than empower the Federal Government to respond to obstructions in navigable rivers. The broad view supported by respondents is without support.

As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn., Inc. v. Coutu*, 450 U.S., at 771–772, 101 S.Ct., at 1462; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S., at 23–24, 100 S.Ct., at 249; *Touche Ross & Co. v. Redington, supra*, 442 U.S., at 575–576, 99 S.Ct., at 2489. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. Here consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather that it was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War. Nor is there any evidence that Congress anticipated that there would be a private remedy. This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest. These factors are only of relevance if the first two factors give indication of congressional intent to create the remedy. *Touche Ross & Co. v. Redington, supra*, at 574–576, 99 S.Ct., at 2488–2489. There being no such indication, the judgment of the Court of Appeals must be reversed.

III

Petitioner the State of California urges that we reach the merits of these cases—whether permits are required for the state water allocation projects—regardless of our disposition of the private cause-of-action issue. This we decline to do. Our ruling that there is no private cause of action permitting respondents to commence this action disposes of the cases: we cannot consider the merits of a claim which Congress has not authorized respondents to raise.

The judgment of the Court of Appeals is accordingly reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

In 1888 this Court reversed a decree enjoining the construction of a bridge over a navigable river. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed.2d 629. The Court's opinion in that case did not question the right of the private parties to seek relief in a federal court; rather, the Court held that no federal rule of law prohibited the obstruction of the navigable waterway.[1] Congress responded to the

[1] The *Willamette* Court explained the issue presented as follows:

> "The gravamen of the bill was, the obstruction of the navigation of the Willamette River by the defendants, by the erection of the bridge which they were engaged

Willamette case in the Rivers and Harbors Act of 1890 by creating a federal prohibition of such obstructions absent a permit from the Secretary of War. 26 Stat. 426, 454. At the time the statute was enacted, I believe the lawyers in Congress simply assumed that private parties in a position comparable to that of the litigants in the *Willamette* case would have a remedy for any injury suffered by reason of a violation of the new federal statute.[2] For at that time the implication of private

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> in building. The defendants pleaded the authority of the state legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of Congress, which assent the court held was necessary in view of that provision in the act of Congress admitting Oregon as a State, which has been referred to. The court held that this provision of the act was tantamount to a declaration that the navigation of the Willamette River should not be obstructed or interfered with; and that any such obstruction or interference, without the consent of Congress, whether by state sanction or not, was a violation of the act of Congress; and that the obstruction complained of was in violation of said act. And this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette River at Portland was a violation of said act or Congress. If it was not, if it could not be, if the act did not apply to obstructions of this kind, then the case did not arise under the constitution or laws of the United States, unless under some other law referred to in the bill." 125 U.S., at 7–8, 8 S.Ct., at 814.

[2] The then-current edition of Cooley's treatise on the Law of Torts 790 (2d ed. 1888) described the common-law remedy for breach of a statutory duty in this way:

> "[W]hen the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the

causes of action was a well-known practice at common law and in American courts.[3] Therefore, in my view, the Members of Congress merely assumed that the federal courts would follow the ancient maxim "*ubi jus, ibi remedium*" and imply a private right of action. See *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40, 36 S.Ct. 482, 484, 60 L.Ed. 874.[4] Accordingly, if I were

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> common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none."

A few years earlier this Court quoted with approval an opinion by Judge Cooley in support of its holding that a railroad's breach of a statutory duty to fence its right-of-way gave an injured party an implied damages remedy. See *Hayes v. Michigan Central R. Co.*, 111 U.S. 228, 240, 4 S.Ct. 369, 374, 28 L.Ed. 410.

[3] See *Anonymous*, 6 Mod. 27, 87 Eng.Rep. 791 (1703) (per Holt, C. J.); 2 E. Coke, Institutes on the Laws of England 55 (6th ed. 1681); 3 W. Blackstone, Commentaries *23, *51, *109, *123; 1 Comyns' Digest 433–445 (1822); *Couch v. Steel*, 3 El. & Bl. 402, 118 Eng.Rep. 1193 (1854). In Comyns' Digest, at 442, the rule was broadly stated:

> "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law."

[4] As Justice Frankfurter stated in dissent in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 261–262, 71 S.Ct. 692, 700, 95 L.Ed. 912:

> "Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co. v. Brotherhood of Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Deckert v. Independence Shares*

writing on a clean slate, I would hold that an implied remedy is available to respondents under this statute.

The slate, however, is not clean. Because the problem of ascertaining legislative intent that is not expressed in legislation is often so difficult, the Court has wisely developed rules to guide judges in deciding whether a federal remedy is implicitly a part of a federal statute. In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26, all of my present colleagues subscribed to a unanimous formulation of those rules, and in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560, a majority of the Court joined my attempt to explain the application of those rules in

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Corp., 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs v. United States*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874; *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; cf. *De Lima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041."

that case. The *Cort v. Ash* analysis is therefore a part of our law.[5]

In these cases, I believe the Court correctly concludes that application of the *Cort v. Ash* analysis indicates that no private cause of action is available. I think it is more important to adhere to the analytical approach the Court has adopted than to base my vote on my own opinion about what Congress probably assumed in 1890. Cf. *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 151, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (STEVENS, J., concurring). I therefore join Justice WHITE's opinion for the Court.

Justice REHNQUIST, with whom THE CHIEF JUSTICE, Justice STEWART, and Justice POWELL join, concurring in the judgment.

I agree completely with the conclusion of the Court that in these cases "Congress was not concerned with the rights of individuals" and that "[i]t is not surprising, therefore, that there is no 'indication of legislative

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[5] In a separate concurrence in this case, four Members of the Court have undertaken to explain the legal effect of certain "implied right of action" opinions decided more recently than *Cort v. Ash*. As THE CHIEF JUSTICE, Justice STEWART, Justice REHNQUIST, and I noted in our separate opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 408, n. 1, 98 S.Ct. 2733, 2808, n. 1, 57 L.Ed.2d 750, "it is hardly necessary to state that only a majority can speak for the Court" or give an authoritative explanation of the meaning of its judgments.

intent, explicit or implicit, either to create . . . a [private] remedy or to deny one.'" *Ante*, at 1780.

I also agree with the Court's analysis, *ante*, at 1781, where it says:

> "As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn., Inc. v. Coutu*, 450 U.S., at 771–772 [101 S.Ct., at 1462]; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S., at 23–24 [100 S.Ct., at 249]; *Touche Ross & Co. v. Redington*, [442 U.S.], at 575–576 [99 S.Ct., at 2489]. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

My only difference, and the difference which leads me to write this separate concurrence in the judgment, is that I think the Court's opinion places somewhat more emphasis on *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), than is warranted in light of several more recent "implied right of action" decisions which limit it. These decisions make clear that the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent, see *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–576, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 739–740, 99 S.Ct. 1946, 1979–1980, 60 L.Ed.2d 560 (1979) (POWELL, J., dissenting), that they are not of equal weight,

Transamerica, supra, 444 U.S., at 15, 23–24, 100 S.Ct., at 249; *Touche Ross, supra*, 442 U.S., at 575–576, 99 S.Ct., at 2489 and that in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved. *Transamerica, supra*, 444 U.S., at 24, 100 S.Ct., at 249; *Touche Ross, supra*, 442 U.S., at 575–576, 99 S.Ct., at 2489; *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 148–149, 100 S.Ct. 960, 967–968, 63 L.Ed.2d 267 (1980). Surely it cannot be seriously argued that a mechanical application of the *Cort* analysis lends "predictability" to implied-right-of-action jurisprudence: including today's decision, five of the last six statutory implied-right-of-action cases in which we have reviewed analysis by the Courts of Appeals after *Cort* have resulted in reversal of erroneous Court of Appeals decisions. See *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981); *Transamerica, supra; Touche Ross, supra; Cannon, supra*. Cf. *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750. While this may be predictability of a sort, it is not the sort which the Court in *Cort v. Ash, supra*, or in any other case seeking to afford guidance to statutory construction intended.

But in these cases, I am happy to agree with the Court that there is no implied right of action because "[t]he language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons,"

ante, at 1781, and because there is no "evidence that Congress anticipated that there would be a private remedy." *Ante*, at 1781.

296 F.3d 671
United States Court of Appeals,
Eighth Circuit.

UNION PACIFIC RAILROAD COMPANY, Appellant,
v.
KIRBY INLAND MARINE, INC. OF MISSISSIPPI, a/k/a/ Brent Transportation Company, in personam and the M/V Miss Dixie, its engines, tackle, fixtures and appurtenances, etc., in rem, Appellees.

No. 01-3334.
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Submitted: May 13, 2002.
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Filed: July 11, 2002.
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Rehearing and Rehearing En Banc Denied:
Aug. 15, 2002.

Attorneys and Law Firms

Bruce E. Johnson, argued, Des Moines, IA, for appellant.

Steven B. Belgrade, argued, Chicago, IL (Richard P. Girzadas, on the brief), for appellee.

Before BOWMAN, BYE, Circuit Judges, and NANGLE,[1] Senior District Judge.

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[1] The HONORABLE JOHN F. NANGLE, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

Opinion

NANGLE, Senior District Judge.

Appellant Union Pacific Railroad Company appeals from the district court's conclusions of law and final judgment in the instant case. For the reasons discussed below, we reverse in part and affirm in part the district court's opinion.

I. Background

A. Background Facts

The parties stipulated to the following underlying facts. The Clinton Railroad Bridge (the "Clinton Bridge"), was constructed in 1907. Pursuant to 33 U.S.C. § 401, the construction of the Clinton Bridge was authorized by and constructed in accordance with permits issued by the United States Coast Guard. Appellant is the owner and operator of the Clinton Bridge.

Kirby Inland Marine, Inc. ("Kirby") is the owner and operator of the M/V MISS DIXIE, a river barge towboat in operation on the Mississippi River. On May 5, 1996, the M/V MISS DIXIE and/or its tow allided with the Clinton Bridge causing damage to the bridge and the M/V MISS DIXIE. On October 10, 1999, Appellant filed the instant action alleging the damage to its bridge was caused by the negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Appellees denied that the crew was negligent or that the vessel was unseaworthy and asserted

that Appellant itself was negligent in the construction, design, care and maintenance of the Clinton Bridge.

To prove Appellant's negligence, Appellees proffered a Coast Guard's Order to Alter, issued on February 28, 1996, which found that the Clinton Bridge was "an unreasonable obstruction to navigation." The Order to Alter was issued pursuant to the Truman-Hobbs Act, 33 U.S.C. §§ 511-524, which authorizes the United States Coast Guard to investigate whether a bridge is unreasonably obstructing navigation and to order a bridge owner to alter a bridge which does indeed unreasonably obstruct navigation.

The parties entered into a settlement agreement; however, the agreement was predicated on the district court deciding one specific legal issue: "Does the Truman-Hobbs Act finding that the bridge is 'an unreasonable obstruction to navigation' render inapplicable any presumption that negligence of the barge crew was the cause of an allision between a moving vessel and a stationary bridge." *Union Pac. R.R. Co. v. Kirby Inland Marine et al.*, No. 3-99-CV-80185, slip op. at 1, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) The presumption in question is the longstanding *Oregon* rule which raises a presumption that a vessel's crew was negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895). Under the parties' settlement agreement, if the district court concluded that the *Oregon* rule does apply, then Kirby would pay an agreed amount; alternatively, if the district court concluded that the *Oregon* rule does not apply, then Kirby

would pay a smaller agreed amount. Thus, the primary issue before the district court was whether the Coast Guard's Order to Alter trumps the *Oregon* rule.

B. District Court's decision

Although the district court initially stated that the *Oregon* rule should apply, the district court eliminated the presumption by invoking the *Pennsylvania* rule which is another longstanding admiralty principle. Under the *Pennsylvania* rule, "[w]here any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence . . . and [that party] has the burden of proving that its statutory fault was not a contributing cause of the accident." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 3, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) (citing *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 136, 22 L.Ed. 148 (1873)). The district court concluded that Appellant violated 33 U.S.C. § 512 of the Truman-Hobbs Act which states that "No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. § 512. The district court found that a violation of § 512 is sufficient to invoke the *Pennsylvania* rule and thus "the normal presumption of fault that attaches to the vessel under the *Oregon* rule is shifted back to the structure owner under the *Pennsylvania* rule." *Union Pac.*, at *3.

The district court also concluded that the Coast Guard's Order to Alter was admissible pursuant to

Federal Rules of Evidence 402 and 803(8)(C). *Id.* at 4. Appellant filed a timely notice of appeal and now asserts that the district court erred by concluding that: (1) the *Oregon* rule does not apply to the instant case, and (2) the Order to Alter is admissible.

II. Discussion

A. The *Oregon* Rule

We will first consider whether the district court erred by invoking the *Pennsylvania* rule to trump the *Oregon* rule and shift the burden of persuasion back to Appellant. We review the district court's conclusions of law de novo. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir.2002) (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir.2001)).

For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a *mandatory duty;* (2) the statute or regulation must involve *marine safety* or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent. *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995) (emphasis added). The Truman-Hobbs Act does not satisfy the prerequisites of the *Pennsylvania* rule because it was not drafted: (1) to maintain marine safety; (2) to impose a specific duty; or (3) to prevent a specific sort of injury.

We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . ." House Report No. 1447, August 2, 1939, 76th Cong. 1st Sess.

The regulations implementing the Truman-Hobbs Act establish a lengthy administrative procedure for determining whether a bridge is "an unreasonable obstruction to navigation." *See* 33 C.F.R. § 116.01-116.55 (setting out complaint process, preliminary investigation, detailed investigation, public hearing, and administrative review). Ultimately, the Chief Officer of the Bridge Administration (the "Chief") performs a cost/benefit analysis to determine whether the benefits to navigation exceed the government's cost of altering the bridge. 33 C.F.R. § 116.30. If the benefits exceed the costs, then the Chief recommends that the Coast Guard issue an Order to Alter stating that the bridge unreasonably obstructs navigation. *Id.* Once the Coast Guard concludes that a bridge is an unreasonable obstruction to navigation, the bridge owner must: (1) submit plans and specifications for altering the bridge; (2) solicit and submit bids; and (3) request an Apportionment of Costs which outlines which costs will be borne by bridge owner and the United States government. *See* 33 U.S.C. §§ 514-516; 33 C.F.R. §§ 116.40, 116.45, 116.50.

Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the *Pennsylvania* rule because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

The Truman-Hobbs Act also does not satisfy the other two prerequisites of the *Pennsylvania* rule as it does not impose a specific duty or prevent a specific sort of injury. Once the Coast Guard concludes that a bridge violates § 512, the bridge owner is required only to prepare a plan for altering the bridge. This "duty" is very different from a duty to maintain lights and signals on a bridge or to promptly open a draw. *See* 33 U.S.C. § 494 (requiring a bridge owner to maintain "such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe" and to promptly open such draw upon reasonable signal for the passage of boats and other water craft). With respect to the latter duties, the application of the *Pennsylvania* rule is justified because a bridge owner greatly increases the risk of allision by failing to promptly open a draw or by neglecting to maintain the bridge's lights. Conversely, a bridge owner's failure to prepare a plan for altering a bridge will delay the

funding process, but will not directly increase the risk of allision.

Also, the goal of the Truman-Hobbs Act was to decrease the cost of navigation by using government funds to alter bridges which unreasonably obstruct such navigation. Although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act. To state it another way, the Truman-Hobbs Act was not designed to prevent any specific type of injury. Thus, any injury suffered in admiralty is not "of a nature that the [Truman-Hobbs Act] was intended to prevent." *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995).

In concluding that the district court incorrectly invoked the *Pennsylvania* rule, we further note that the district court did not cite a single case in which a court applied the *Pennsylvania* rule solely because a bridge violated the Truman-Hobbs Act. In *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F.Supp. 167, 172 (E.D.N.Y.1962), the district court applied the *Pennsylvania* rule because the bridge tender violated 33 U.S.C. §§ 494 by failing to promptly open a draw for an approaching ship. In *Folkstone Maritime, Limited v. CSX Corp.*, 64 F.3d 1037, (7th Cir.1995), the court applied the *Pennsylvania* rule because the bridge owner violated 33 U.S.C. § 491 which provides that "it is unlawful for a bridge to deviate from its plans and specifications for its construction . . . unless the modification of the bridge is previously submitted to and approved by the Secretary of Transportation." The

Folkstone court concluded that the bridge owner violated § 491 by failing to abide by the Coast Guard's order to construct a draw which could be raised to 83 degrees. *Folkstone*, 64 F.3d at 1048-49. Unlike the present case, *Nassau* and *Folkstone* involve active negligence on the part of bridge owners.

Although these cases cited § 512, neither court explained how a violation of that particular statute served to invoke *Pennsylvania* rule.[2] Accordingly, we find that the district court did not present any authority to support its conclusion that a violation of the Truman-Hobbs Act invokes the *Pennsylvania* rule.

We will not invoke the *Pennsylvania* rule to punish a bridge owner who controls a lawful bridge. Under the Truman-Hobbs Act, a bridge labeled an unreasonable obstruction is still a *lawful* bridge. 33 U.S.C. § 511. In order to obtain funding under the Truman-Hobbs Act, the bridge must be "lawful" and used as a railroad or a public highway. *Id.* To maintain a lawful bridge, bridge owners must abide by the laws and regulations governing bridges. The Clinton Bridge was built in 1907 in accordance with then-current Department of Transportation procedures and it currently complies with the Coast Guard's regulations. Appellees do not assert that Appellant caused this allision through active negligence; instead, they fault the bridge owner for failing to alter the Clinton Bridge to accommodate the

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[2] The district court also cited *City of Boston v. S.S. Texaco Texas*, 773 F.2d 1396 (1st Cir.1985) to support its application of the *Pennsylvania* rule; however, the *City of Boston* case does not discuss the *Pennsylvania* rule so we will not discuss it here.

ever-increasing size of commercial barges and tows. We will not employ the *Pennsylvania* rule to punish a bridge owner who maintains a lawful bridge, even though the Coast Guard has found such a bridge to be an unreasonable obstruction due to the barge industry's expansion of the size of its commercial vessels.

In sum, we find that the district court should not have relied on a violation of the Truman-Hobbs Act to invoke the *Pennsylvania* rule. Accordingly, the district court erred by concluding that a violation of § 512 invokes the *Pennsylvania* rule and shifts the burden of persuasion back to Appellant. Instead, the district court should have applied the *Oregon* presumption.

We now address Appellees' assertion that we should affirm the district court's judgment because the Coast Guard's declaration that the bridge is an unreasonable obstruction to navigation rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. In order to affirm the district court's judgment, we would have to conclude, as a matter of law, that the Coast Guard's Order to Alter rebuts the *Oregon* presumption. Because we believe the trier of fact should determine whether the *Oregon* presumption is rebutted by the Coast Guard's Order to Alter, we cannot affirm the district court's legal conclusion that the *Oregon* rule does not apply.

Appellees rely on *I & M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir.2000) to support their position that the Coast Guard's Order to Alter rebuts the *Oregon* presumption and shifts the

burden of proof back to the bridge owner. The Seventh Circuit case is strikingly similar to the case at bar as it arose from an allision between a large seagoing vessel and the Sabula Bridge, a century-old railroad bridge. *Id.* at 1013. Ten months prior to the allision, the Coast Guard had issued an Order to Alter finding that the Sabula Bridge was "an unreasonable obstruction to navigation." *Id.* at 1014. The district court applied the *Oregon* presumption and granted summary judgment against the defendant vessel. *Id.* Although the defendant "sought to rebut the *Oregon* presumption by arguing that the Sabula Bridge is an unreasonable obstruction to navigation," the district court decided to ignore the Coast Guard's Order to Alter because it was part of the Truman-Hobbs Act and therefore had no significance in a negligence action. *Id.* The Seventh Circuit disagreed.

Writing for the panel, Judge Easterbrook reversed the district court's grant of summary judgment and remanded the case for trial because the defendant presented sufficient evidence to raise a question of fact on the issue of negligence. Judge Easterbrook noted that the Coast Guard's Order to Alter was not an "unelaborated ukase," but a conclusion based on evidence that: (1) the Sabula Bridge repeatedly is struck; and (2) the bridge's outdated structure does not allow modern-day vessels to navigate easily through the bridge. *Id.* at 1015-16. Ultimately, Judge Easterbrook concluded that:

> If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on

> the cost and accident data, then so may the *trier of fact* in admiralty. . . . Findings in the Coast Guard's report are more than adequate to overcome *The Oregon's* presumption. . . . The trier of fact must give an answer without resort to presumptions. *Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge caused this accident.*

Id. at 1016 (emphasis added) (citations omitted).

Appellees maintain that the *I & M Rail Link* case stands for the proposition that, as a matter of law, the Coast Guard's Order to Alter rebuts the *Oregon* presumption and thus the litigation should proceed on a level playing field. This view seems to be based on the single sentence "The trier of fact must give an answer without resort to presumptions." We, however, interpret the Seventh Circuit's opinion differently.

In our view, the *I & M Rail Link* case stands for the proposition that a defendant can attempt to *rebut* the *Oregon* presumption by presenting evidence that the Coast Guard labeled the bridge an "unreasonable obstruction to navigation." Under *I & M Rail Link*, a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action. *See I & M Rail Link*, 198 F.3d at 1016 ("Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge

cause this accident."). Our interpretation is shared by the lower court which, on remand, tried the case in accordance with the Seventh Circuit's opinion. *See I & M Rail Link v. Northstar Navigation*, No. 98-C-50359, 2001 WL 460028, at *4 (N.D.Ill. April 27, 2001) ("It is true the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the Coast Guard's cost and accident data. . . . *But it did so in the context of explaining its holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon*. . . .") (emphasis added). To the extent that the *I & M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree.

Our interpretation of *I & M Rail Link* is in accordance with longstanding precedent which allows a moving vessel to rebut the *Oregon* presumption by presenting evidence that the bridge was an unreasonable obstruction to navigation. *Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). In *Wilmington Ry. Bridge Co.*, the Fourth Circuit stated that the *Oregon* presumption may be rebutted:

> by proof that the location of the stationary vessel, *the obstruction of navigation by the bridge*, or other causes had brought the moving vessel into an emergency not to be reasonably foreseen, and that the course taken by

> the navigator in the emergency was such as might well have been taken by a prudent and skillful navigator.

Id. (emphasis added).

In its own words, the district court stated that "[t]he single *legal* question they ask this court to answer is: Does the Truman-Hobbs Act finding that the bridge is "an unreasonable obstruction to navigation" render inapplicable any presumption that negligence of the barge crew was the cause of a collision between a moving vessel and a stationary bridge?" *Union Pac.*, No. 3-99-CV-80185 at 1. To state it another way, the district court was considering whether, as a matter of law, a Truman-Hobbs Act finding trumps the *Oregon* presumption. We conclude that a Truman-Hobbs Act finding does not render inapplicable the *Oregon* rule and therefore reverse the district court's conclusion to the contrary in this case.

In remanding we recognize that Appellees have produced evidence regarding the "obstructive character" of the Clinton Bridge. Appellees note that the Coast Guard's Detailed Report: (1) documents more than 300 allisions between the Clinton Bridge and various vessels in a ten year period; (2) emphasizes the fact that the Clinton Bridge is out of date and does not permit the smooth navigation of modern-day commercial vessels; and (3) criticizes the poor position of the Clinton Bridge.[3] The parties, however, did not ask the

[3] We note that the Coast Guard's detailed report was not included in the parties' Stipulated Facts.

district court to consider whether Appellees presented sufficient evidence to rebut the *Oregon* presumption; thus, that question is not currently before this Court. Instead, the parties posed the single legal question of whether a Truman-Hobbs Act finding that a bridge is an unreasonable obstruction to navigation renders inapplicable the *Oregon* presumption. We conclude that the answer to that particular question is "no."

Accordingly, we find that the district court erred by concluding as a matter of law that the *Oregon* presumption does not apply. *See Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). The opinion of the district court is reversed.

B. Federal Rule of Evidence 803(8)(C)

Appellant also asserts that the district court erred by admitting the Coast Guard's Order to Alter into evidence.[4] We review the district court's evidentiary rulings "under the abuse of discretion standard, according the district court substantial deference." *Gagnon v. Sprint Corp.*, 284 F.3d 839, 856 (8th Cir.2002) (citing *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998, 1009 (8th Cir.2002)). In its opinion, the district court specifically stated that "[t]he Coast Guard

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[4] Although Appellant seems to oppose the district court's admission of other documents, we find that the district court's opinion relates only to the February 28, 1996 Order to Alter. *See Union Pac. R.R. Co. v. Kirby Inland Marine et al.*, No. 3-99-CV-80185, judgment (S.D.Iowa Aug. 13, 2001).

findings are admissible under Federal Rules of Evidence 402 and 803(8)(C)." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 4, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001). The court further concluded that the findings are "trustworthy" because "they are based on factual investigation, and they are directly relevant to the issues here." *Id.*

Rule 803(8)(C) of the Federal Rules of Evidence defines the "public records and reports" which are not excludable under the hearsay rule. Rule 803(8)(C) specifically excludes "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988), the Supreme Court specifically concluded that opinions, conclusions, and findings of fact are admissible under Rule 803(8)(C). The Court further stated that "[a]s long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." *Id.*

The party opposing the admission of the report has the burden of proving the report's untrustworthiness. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1304 (5th Cir.1991). When considering whether a report is trustworthy, the court should not consider whether the report is credible, but rather should consider whether the report is reliable. *Id.* at 1306-07. "The Rule 803 trustworthiness requirement, therefore, means that the trial court is to determine primarily

whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon." *Id.* at 1307.

We find that the district court did not abuse its discretion by concluding that the Coast Guard's Order to Alter is admissible pursuant to Rule 803(8)(C). The Coast Guard's investigation into the Clinton Bridge was mandated by law. *See* 33 C.F.R. § 116.10 ("Upon receipt of a written complaint, the District Commander will review the complaint to determine if . . . the complaint is justified and whether a Preliminary Investigation is warranted."). As was discussed above, the Truman-Hobbs Act established a thorough review process to determine whether a bridge should be altered because it is an unreasonable obstruction to navigation. This process includes a preliminary investigation, detailed investigation, public hearing, and an administrative review. *See* 33 C.F.R. §§ 116.01-116.55. The fact that Coast Guard investigators relied on hearsay evidence to reach their conclusions does not mean that the preparation of the report was untrustworthy. *Moss*, 933 F.2d at 1309.

In sum, Appellant has not presented any evidence that the Coast Guard's Order to Alter contained findings and conclusions which were untrustworthy. Accordingly, we conclude that the district court did not abuse its discretion by admitting the document, and we therefore affirm the district court's conclusion to admit the Order to Alter into evidence.

III. Conclusion

For the foregoing reasons, the district court's conclusions of law and final judgment are reversed in part and affirmed in part.

248 F.Supp.2d 759
United States District Court,
N.D. Illinois,
Eastern Division.

CITY OF CHICAGO, an Illinois municipal corporation, Plaintiff,
v.
M/V MORGAN, its engines, boilers, tackle, apparel, furniture, and appurtenances, in rem, Kindra Lake Towing, L.P., an Illinois limited partnership, in personam, and Kindra Lake Towing, Inc., a general partner, in personam, Defendants.

No. 00 C 46.
|
Feb. 26, 2003.

Attorneys and Law Firms

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Daniel Thomas Crowe, Esq., James A. Santucci, Esq., Chilton, Yambert, Porter & Coghlan, Chicago, IL, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KING, District Judge, Sitting by Designation.

I. INTRODUCTION

On April 17, 1998, a barge being pushed by the tugboat *M/V Morgan* allided with the East 95th Street Bridge, which crosses over the Calumet River south of Chicago. The allision damaged eight of ten cables used to transmit power to the bridge and its various needs. The Plaintiff City of Chicago ("Plaintiff" or "City") brought this suit to recover some $625,000 it spent in repairing or replacing the cables.

The Court conducted a non-jury trial of this action on August 8 and 9, 2002. After the close of the trial, the Court took the matter under advisement and, after a period for preparation of trial transcripts, the parties submitted proposed Findings of Fact and Conclusions of Law in November and December of 2002.

The Court has carefully reviewed the evidence and arguments, and has conducted further research as necessary. Pursuant to Fed.R.Civ.P. 52(a), the following constitute the Court's Findings of Fact ("Findings") and Conclusions of Law ("Conclusions"). To the extent any Findings as stated may also be deemed to be Conclusions, they shall also be considered Conclusions. Similarly, to the extent any Conclusions as stated may be deemed to be Findings, they shall be considered Findings. *See In re Lemmons & Company, Inc.*, 742 F.2d 1064, 1070 (7th Cir.1984) ("The labels of fact and law assigned by the trial court are not controlling"); *Benrose Fabrics Corp. v. Rosenstein*, 183 F.2d 355, 357 (7th Cir.1950) (labeling of a finding as one of law as opposed to fact is not determinative of its true nature).

II. FINDINGS OF FACT

A. THE EAST 95TH STREET BRIDGE

1. The East 95th Street in the City of Chicago crosses the Calumet River over a double-leaf trunnion, iron-bascule bridge. APTO3; PX5; T23.[1]

2. The Calumet River is a navigable waterway. APTO2; PX19.

3. The East 95th Street bridge is held in trust by the City of Chicago for the benefit of the public. APTO4.

4. The City of Chicago has maintenance responsibility for the East 95th Street bridge. T22, 24, 251.

5. Masonry walls form the east and west piers of the bridge, which support it and contain the machine houses. The masonry walls are 206 feet apart. APTO6; PX5; PX6.

6. The clear channel under the draw of the East 95th Street bridge is 200 feet because the lattice work

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[1] The Court uses the following designations: APTO___ for the Amended Pre-Trial Order and SAPTO___ for the Supplemental Amended Pre-Trial Order; the blank refers to the relevant paragraph. The City also uses these designations: PX___ for the Plaintiff's Exhibits and DX___ for the Defendants' Exhibits; the blank refers to the relevant exhibit number. (As to the deposition of Robert Bloom, PX20, the parties had stipulated to this exhibit before trial and the court admitted the deposition into evidence.) The designation T____ refers to the trial transcript; the blank refers to the relevant page.

of the bridge's superstructure comes down near the piers. PX13; T30; T106.

7. The maximum navigable channel under the East 95th Street bridge is 204 feet. APTO100.

8. All City bascule bridges use submarine cables. The cables transmit power for bridge motors, gates, bells, and other controls from the bridge tower to the far side of the bridge. T31.

9. The East 95th Street bridge is operated from the bridge tower located on the northeast corner of the bridge. APTO7; PX5; PX6.

10. The bridge is opened and closed through the use of ten submarine electrical cables. The cables run from the bridge tower down a cable slot recessed in the face of the bridge's east pier. APTO8; PX5; T31–32.

11. The submarine cables were originally laid on the Calumet River bottom and may have been covered with mud or became covered with mud silt over time. APTO9; PX2; T31–32.

12. The Calumet River bed is 25 feet below the water line. PX6; T219.

13. Eight of the ten cables leave the channel bottom within two feet of the western pier face, while the remaining two cables leave the channel bottom four feet from the western pier face. PX3; T219–20.

14. The cables run up the bridge's western pier face in another recessed cable slot. The cables then

enter the machine house controlling the bridge's western leaf. APTO10; PX5; PX6; T31–32.

15. The navigable channel beneath the East 95th Street bridge does not include the slot that is recessed into the western pier in which the cables run. APTO101; PX20 at 57–58.

16. The submarine cables in the cable slot on the western pier of the East 95th Street bridge are outside of the navigable channel. PX20 at 57–58; T272.

B. THE CITY OF CHICAGO'S PROTECTION SYSTEMS

17. It is fairly common for barges and vessels to touch or rub—and in that sense "allide" with—the substructures of bridges. APTO28.

18. When a vessel allides with a bridge in the City of Chicago the damage to the bridge is most often to the superstructure. T30–31.

19. It is more common for a vessel to allide with a bridge through rubbing rather than striking at an acute angle. T213.

20. There was no evidence presented of any specific allision with the East 95th Street bridge before April 17, 1998. T217; T270. There was, however, some indication that vessels had rubbed against parts of the bridge in the past. T228.

21. A dolphin is a pile cluster placed in the waterway just outside of the draw of a bridge. A dolphin

protects the bridge piers and the lower portions of the bridge superstructure. T25; T29–31.

22. There are two timber-pile, steel-clad dolphins located just south of the draw of the East 95th Street bridge, one adjacent to each of the piers. PX6; PX9.

23. Dolphins are the most important structures for protecting the East 95th Street bridge because they protect those areas of the bridge that are most subject to damage by an allision. T29–31; T34.

24. The City protected the submarine cables on the East 95th Street bridge from damage by placing them in a slot recessed into the face of the pier and, for other lengths of the cables, by burying them under the Calumet River bottom. T31–32. Nevertheless, without more, the cables on the face of the pier were somewhat exposed to the river and thus exposed to possible allisions at certain angles. E.g. DX9, Photo. 5; DX13 at P4, EP3–EP7.

25. A fender is typically a wooden rub rail that runs along the face of a substructure of a bridge. APTO17. Fenders are also known as rub rails or timber walers. APTO18; PX20 at 14; T240.

26. A fender is designed to provide a non-sparking and non-tearing surface that will share an impact between a vessel and a bridge. APTO89; PX20 at 18.

27. Fenders primarily serve to protect vessels that come into contact with the bridge piers. T34; T46. In the design of the East 95th Street bridge, however, fenders also provided a horizontal cover over the

perpendicular recessed slot in which the ten electrical cables were placed. In this sense, the fenders had some function in covering the slot and thus protecting the electrical cables. *See*, *e.g.*, DX9, Photo. 5; DX13 at P4, EP3–EP7.

28. Documents in the United States Coast Guard file relative to the East 95th Street bridge depict a fender system on the west pier of the East 95th Street bridge. TR248. For example, a document contained in the United States Coast Guard file entitled "Sketch Showing Clearance of the 95th Street Bridge Over Calumet River," dated December 19, 1958, indicates fenders or timber walers on the west pier covering the cable slot where the submarine cables are located. APTO22.

29. The fender or timber walers on the face of the concrete river piers have existed as a part of the present East 95th Street bridge since it was constructed and opened to vehicular traffic in 1958. DX2, 14, 15, 16, 27; APTO23.

30. By at least 1994 a fender or timber waler covering the cable slot in the west river wall of the East 95th Street bridge had deteriorated and was missing. DX 8, 9, 10; R44, 45.

31. The City retains outside consultants to conduct the required biennial inspections of the 350 bridges located in the City. T36–37.

32. Several previous inspection reports indicated that a fender or fenders were missing over the cable slot on the western pier of the East 95th Street bridge

before the April 17, 1998 allision. DX 8, 9, 10; T44–45. For example, a December 1994 report prepared for the City of Chicago by Collins Engineering stated that "On the West River Pier at the north end, the two timber rub rails/fenders had been damaged by impact for a length of approximately 15 feet. the timbers were essentially crushed, and had up to 50 percent loss of section." DX9, at 4. Similarly, a "1997/1998 Structural Bridge Inspection Project" report by T.Y. Lin International BASCOR Inc., based upon an inspection of July 21, 1997, indicated "The timber rail on the west seawall has collision damage." DX10, at 8.

33. Not all of the reports recommended replacing the missing fender or fenders, and the reports generally characterized the condition of the existing fenders as good to fair. DX8; T23–24; T43–45; T57–58. A December 1994 report recommended replacing the timber fenders. DX9, at 5.

34. If a consultant's inspection report pointed out a bridge deficiency, the City acted on the recommendation depending on the severity of the deficiency. T38.

35. Stan Kaderbek is Deputy Commissioner-Chief Engineer of the City of Chicago Department of Transportation, Bureau of Bridges. Kaderbek admitted that the City had notice that the fenders or timber walers across the cable slot had been missing from the west pier of the East 95th Street bridge since at least December 1994. APTO26, T23,43.

36. According to Kaderbek, replacement of the fenders or timber walers was not a priority. The focus was on dolphins as a method of protection of bridge superstructures. T29–30, 38.

37. Without a fender or timber waler, the cables were exposed to the river. The cables, however, were protected from sideways, i.e., parallel, contact by being placed in a slot. It was nevertheless reasonably foreseeable that the cables could be damaged by a minor allision in the form of the fairly common "rubbing" or "touching." DX 8, 9, 10; R44, 45.

C. THE UNITED STATES COAST GUARD PERMIT FOR THE EAST 95TH STREET BRIDGE

38. Bridges that cross navigable rivers in the United States come under the authority of the United States Coast Guard. APTO11; PX20 at 6–7. Before 1967, bridges that crossed navigable rivers in the United States came under the authority of the United States Army Corps of Engineers. APTO12; PX20 at 24–25.

39. The purpose of the United States Coast Guard authority over bridges is to make sure that they do not impede navigation. APTO13; PX20 at 8.

40. A bridge permit represents the end result of a process that starts with an application to the Coast Guard for construction of a bridge across a United States waterway. APTO15; PX20 at 10.

41. A bridge permit is a one- or two-page document to which is attached a set of 8½–by–11–inch plan and elevation views with a Coast Guard stamp affixed to each page. PX20 at 10–11.

42. Drawings that are typically submitted to the Coast Guard during the permit process are type and size drawings, which are general configuration drawings of the bridge. T58–59.

43. During the bridge permit process, the type of navigation utilizing a waterway will be reviewed and a determination will be made on a case-by-case basis whether a bridge protection system in the form of fenders will be required. PX20 at 19.

44. There is no regulation or United States Coast Guard rule that categorically requires a bridge owner to install a rub rail or fender. T27–28.

45. When the United States Coast Guard took over the bridge permitting program in 1967, the Army Corps of Engineers transferred all bridge files to the Coast Guard. PX20 at 25.

46. The Coast Guard keeps a bridge file for the East 95th Street bridge containing all permit documents and Coast Guard correspondence regarding the bridge. PX20 at 10–11.

48. The Army Corps of Engineers issued a permit for construction of the East 95th Street bridge in 1952–53. APTO90; PX20 at 23.

49. The 1952–53 permit for the East 95th Street bridge does not depict a fender on the western pier of the East 95th Street bridge. APTO90; PX20 at 23.

50. There are no permit documents in the United States Coast Guard file indicating that rub wales or fenders are required on the East 95th Street Bridge. PX20 at 18; PX20 at 47–48; DX23.

51. The correspondence and other documents in the Coast Guard file indicating that the Coast Guard knew that the East 95th Street bridge had wales or fenders on its piers, does not necessarily mean that the Coast Guard had issued a permit allowing or requiring fenders or wales on the piers. Such correspondence and documents merely suggest that the Coast Guard recognized that the bridge, with its fenders or wales, was a legal structure. PX20 at 35; PX20 at 47–50.

52. City of Chicago files contain drawings dated as early as 1953 that depict fenders or rub rails on the piers of the East 95th Street bridge, but there is no evidence that the Army Corps of Engineers or the United States Coast Guard ever reviewed these drawings. T273–74.

53. City of Chicago files contain some other drawings of the East 95th Street bridge from that same time period that do not depict fenders on the piers. DX23; T271.

54. The United States Coast Guard has never issued a permit violation to the City of Chicago for

missing timber fenders on the East 95th Street bridge. APTO97; PX20 at 50–51.

D. THE PRELIMINARY ACTIVITIES OF THE *MORGAN* AND ITS CREW ON APRIL 17, 1998

55. The *Morgan* is a 134–ton tugboat owned by Kindra Lake Towing, L.P. APTO1; T184.

56. James Long was the captain of the *Morgan* on April 17, 1998. Brian Grzybowski was the deck engineer, and John Kindra and Ryan Campbell were the deck hands. PX14; T97; T119–20.

57. Long had been working for Kindra Lake Towing for only 2 ½ months before April 17, 1998. T121.

58. Kindra did not normally work on the *Morgan* or any other vessel. Rather, he worked in the office as a manager. T119–20.

59. Campbell did not normally work on the *Morgan*. Rather, he worked in the office doing personnel management. T120.

60. The *Morgan*'s starboard and port decks each contained a winch. T89.

61. Each winch was approximately four feet high and was bolted to the *Morgan*'s deck. APTO41.

62. Grzybowski did not inspect the winches on the *Morgan*'s deck on April 17, 1998. APTO30.

63. The winches on the *Morgan*'s deck were inspected weekly, but Grzybowski did not know on what day of the week the crew inspected the *Morgan*'s winches, when they were last inspected, or who had last inspected them before April 17, 1998. APTO31–32.

64. Long did not physically inspect the winches or their brake shoes on April 17, 1998 or any other day because that was not part of his routine. Someone else checked the winches and the brake shoes. T118–19.

65. On the morning of April 17, 1998, prior to the allision with the East 95th Street bridge, the *Morgan* moved a barge at the Kindra Lake Towing dock located on the east bank of the Calumet River at approximately East 98th Street in the City of Chicago. APTO33; T95–96.

66. The starboard winch functioned properly when the *Morgan* moved the barge on the Kindra Lake Towing dock. APTO34; T96.

E. THE *MORGAN*'S ARRIVAL AT FEDERAL MARINE DOCK

67. The *Morgan* had been chartered to move four barges north on the Calumet River from the Federal Marine Terminal to the Ceres Trans-Oceanic Service Terminal. APTO35; PX14; T121.

68. The Federal Marine Terminal is located on the east bank of the Calumet River immediately south of the East 95th Street bridge. The Ceres Terminal is

located near the mouth of the Calumet River near Lake Michigan. APTO36; DX30; T96–97.

69. The barges were tied two long and two abreast to the Federal Marine dock. APTO39; PX14; T99.

70. The barges contained coke, and the combined weight of the *Morgan*, the barges, and the coke was approximately 5,000 tons. T121–22.

F. THE CAPTAIN AND THE CREW'S PREPARATION FOR LEAVING THE FEDERAL MARINE DOCK

71. The crew began to face up the *Morgan* with the south end of the barges by extending a single one-and-one-eight-inch loop wire from each of the starboard and port winches located on the *Morgan*'s deck to the furthest outboard cleat on the respective aft starboard and port barges. APTO40; T123.

72. Facing up created three points of connection between the *Morgan* and the barge cluster: (1) the contact between the nose of the *Morgan* and the rear end of the barges; (2) a wire line connection running from the starboard winch to the rear-most starboard cleat on the barge cluster; and (3) a wire line running from the port winch to the rear-most port cleat on the barge cluster. T69.

73. The winches put tension on the lines while the winch brakes maintain the tension on the line when the motor is not powered. T70.

74. By facing up the *Morgan* with the barges, the *Morgan* and the barge cluster turned into a single rigid body. T68; T122–23.

75. A three-point connection was important to permit the *Morgan* to steer the barge cluster. If one of the side connections were lost, the ability to steer in that direction would be lost. T70–71.

76. Two buttons controlled each winch, a green one to draw in the wire, and a red one to release the wire. Releasing the button braked the wire automatically and held it in place. APTO42; T90.

77. Once the starboard and port wires had been cast, Long tightened them by using the buttons on the electric control box located in the pilot house. APTO43.

78. Long did not encounter any problems in drawing in the wires, and the *Morgan* and the barges faced up. APTO44.

G. LEAVING THE FEDERAL MARINE DOCK

79. To leave the Federal Marine dock, Long first kicked the head of the tow (i.e., turned the barges starboard). T103–05; T123. This put strain or tension on the starboard wire. T124–25.

80. Long then backed on the outboard engine and began to back out. As he was swinging the tow into the center of the river, he noticed that the *Morgan* was getting close to the dock, so he gave the tug more room

by putting a foot or two of slack in the starboard wire. T103–05; T123–25.

81. Long put slack in the starboard wire by hitting the button in the pilot house that controlled the starboard winch. T104.

82. Once Long knew that the tug would not touch the dock, he tightened up the starboard wire by using the button on the control panel to face up the *Morgan* with the barges. When Long released the control button for the starboard winch, the brakes failed to hold the wire and it began to pay out. T104–06; T127.

H. THE CAPTAIN AND CREW'S RESPONSE TO THE FAILURE OF THE BRAKE ON THE STARBOARD WINCH

83. When the winch failed to brake the starboard wire, the barges began to fall to port. APTO49.

84. When the brake on the starboard winch failed, the starboard line lost tension and the *Morgan* lost the ability to turn the barge cluster to starboard. T71.

85. Long has no explanation why the brake shoes on the starboard winch failed. T126.

86. On all other occasions the day before this one, the starboard winch had worked properly. T134. At no relevant time did Long think there was a problem with the starboard winch's engine. T134.

87. Long contacted Grzybowski over a portable VHF radio and told him that the starboard winch was paying out and to send someone back to the *Morgan*'s deck. APTO50; T105–06.

88. At about the same time, Long radioed the East 95th Street bridge tender to open the bridge so that the *Morgan*'s coaming would not hit the underside of the bridge. APTO53; T106–07; T135. (At some point, the *Morgan* and the barges were moving towards the East 95th Street Bridge.)

89. Grzybowski was standing at the port bow corner of the foremost barge. After receiving Long's transmission, Grzybowski told Kindra to go back to the deck of the *Morgan*. APTO51.

90. The foremost barge was approximately 100 feet south of the East 95th Street bridge and favoring port when Grzybowski received Long's radio message. APTO52.

91. Grzybowski was in contact with Long by radio. At some point, Grzybowski began a countdown by feet when the port bow corner of the foremost barge was 100 feet from the bridge. APTO59; T158.

92. Long could not remember hearing Grzybowski give a countdown, so Long did not know how many feet the barges were from the East 95th Street bridge pier. APTO60; T136–37.

93. Long also does not remember hearing Grzybowski give a warning that the barges were about to allide with the bridge. T137.

94. After Long contacted Grzybowski by the VHF radio, he put the engines in reverse. T105–06. Putting the engines in reverse slowed the tug and the tow, but the tug and tow continued to move forward because of the momentum they had from leaving the Federal Marine dock. T128; APTO54. By Long's estimate, the barges and tug (or cargo) weighed about 5000 tons. T122.

95. Kindra was at the front of the barge cluster and had to walk the length of the barges—400 feet—and then cross over to the *Morgan* before he could assist Long. T171–72.

96. During the time that Kindra was making his way back to the *Morgan*, the starboard line was still paying out. T183.

97. Kindra could not get to the *Morgan*'s deck from the starboard side because the starboard winch was paying out; therefore, the starboard tow knee was not up. T172.

98. Kindra got to the *Morgan*'s deck by crossing from the port side and then walking over to the starboard winch. According to Kindra, only then did Long begin drawing in the starboard wire and facing up the barges. T173, 184.

99. Long directed Kindra to put a fiber line out from the bitt located in the center of the *Morgan*'s deck to the center of the rear of the tow. Casting the center line by itself did not face up the *Morgan* with the barges. T131–32.

100. Long then brought in the starboard wire and told Kindra to put a dog in the starboard winch to brake the wire; Kindra recalls dogging the winch first, i.e., before the center capstan line was attached. APTO 55; T173. Kindra also recalls dogging the winch before Long brought in the starboard wire. T183. "Dogging the winch" prevents the cable from unwinding. T174–75.

101. Only after the line had been brought in by plugging the switch to bring in the starboard wire and dogging the winch did the *Morgan* and the barges line up one hundred percent. T133. After the winch was dogged, which acted as a brake, the line could be drawn in without it again panning out.

102. The barges, once again, faced up with the *Morgan*, but they were still canted to port. APTO56.

103. By the time the center line had been set and the starboard wire secured with a dog in the winch, the lead barge was going through the draw of the East 95th Street bridge. APTO57.

104. One way to have restored the tension to the starboard line earlier would have been to draw in the starboard line using the motor on the winch. T71–72. That is, even if the brake in the winch did not hold, the line could have been drawn in periodically.

105. If Long had used the motor on the starboard winch to draw in the starboard line, he might have been able to maintain tension on the line by intermittently punching the control button for the winch. T72.

106. Long recalls punching the control button for the winch about three times. T138. He also described his actions in this regard as "continually" or "intermittently" hitting it to get it to come in. T107; T128. The button on the winch is an electrical connection; therefore, once the button is pushed, the motor should almost instantaneously begin to draw in the wire. T72. On the other hand, continually holding down the winch button could blow the breaker. T107.

107. Once the barges had faced up, Long backed on the starboard engine, put the flanking rudder over, and then drove the tug and tow into the center of the river. APTO58; T110.

I. THE ALLISION

108. The port bow corner of the foremost barge allided with the bridge timber waler on the western pier approximately at the center of the draw. APTO61.

109. The barge was moving at about one mile per hour just prior to the contact. T108. It was "creeping" along the timber walers. T152. That is, the forward speed of the Morgan and the tow was down close to nothing immediately before the allision. APTO64.

110. The barge slid down the timber walers and bounced off a little bit. Grzybowski saw the port bow corner of the foremost barge slide into the cable slot where the timber waler was missing. APTO63; T159–60. The barge slid off the existing timber waler and slid

in and past the cables. T153. Several cables were pinched.

111. If the timber waler had been in place across the cable slot, the port bow corner of the barge would have slid along the timber waler and probably would not have contacted the cables. T153–155; DX 27.

112. The barge slid down the timber walers without causing any visible damage to the existing timber walers or the bow structure of the barge. Nor was there any visible damage to the concrete structure of the bridge. T154.

113. The allision was such that Long and Kindra were not aware until later that the barge had hit anything. T110–112, 176.

J. CITY'S IMMEDIATE POST-ALLISION ACTS

114. According to the Bridge Operator's Swing Report for the East 95th Street bridge, the *Morgan* navigated under the East 95th Street bridge at 9:10 a.m. on April 17, 1998. PX8.

115. Following the allision, the bridge operator George Sledge informed his supervisor that the East 95th Street bridge was no longer functioning. APTO67.

116. The Emergency Bridge Report, also completed by Sledge, indicates that the *Morgan* allided with the East 95th Street bridge at 9:10 a.m. on April 17, 1998. At the time of the allision, the bridge's leaves

were in the up position and the roadway gates were down. Sledge wrote in his report: "Morgan hit the sea wall geoing [sic] north with 4 barges on the west side of the bridge." PX7.

117. The Swing Report indicates that no further bridge openings occurred on April 17 after the *Morgan*'s allision. PX8.

118. The allision damage to the cables cut the power for the bridge's motors and brakes, making it impossible to open or close the bridge's west leaf. T32–34.

119. Later on April 17, 1998, electricians from the City of Chicago Department of Transportation, Bureau of Bridges, temporarily rerouted power from the damaged submarine cables to others so that the western leaf of the bridge could be opened and closed. APTO68.

120. Even after these temporary repairs to the cables, the gates and safety devices (including bells) for the East 95th Street bridge did not work. APTO69; T32–34.

121. The warning lights on the superstructure did not work for 1 ½ years following the allision. T56.

122. The City reopened the East 95th Street bridge for vessel traffic on April 18, 1998. APTO70; PX8.

123. The City is unaware of any allisions with the East 95th Street bridge after the April 17, 1998 allision and before the submarine cable repairs. T34.

K. CONSULTANTS' POST-ALLISION BRIDGE REPORTS

124. The City retained T.Y.Lin International Bascor to inspect the damage to the East 95th Street bridge. T.Y.Lin retained its own consultant, Lang & Associates, to inspect the bridge, and Lang conducted its inspection on April 29, 1998. PX4.

125. Lang's inspection revealed minor damage to the submarine cables above the waterline. Electrical testing indicated eight of the ten cables had sustained "extensive damage" below the waterline. PX4.

126. Lang reported that all spare electrical conductors had to be used to raise and lower the bridge leaves. No electrical conductors remained to reconnect indicating lights on the control console in the bridge tender house. Bridge operators raised and lowered the leaves with "almost no indicating lights on the control console to indicate when various life safety procedures [had] been accomplished. . . ." The bridge functions that no longer worked included: stop-and-go signals, bells, pedestrian and traffic gates, span motor brakes, on-off indicators, and the "nearly closed" and "fully closed" indicators. PX4.

127. The City also retained Collins Engineers, Inc. to conduct an underwater inspection of the

western pier of the East 95th Street bridge. Collins conducted its inspection on April 30, 1998. APTO71; PX3.

128. Collins reported "significant impact related damage" to the eight northernmost submarine cables. The submarine cables had sustained "a considerable impact" in a northwesterly direction. Many of the cables were crushed or flattened. The majority of damage was to the sheathing, with fractured steel wires splayed, distorted or absent, cable insulation exposure and damage, and conductive wiring exposure and damage. APTO72; PX3.

129. The cables received widespread damage from the waterline to ten feet below the waterline. The submarine cables were in good condition from ten feet below the waterline to the channel bottom. Only the two southernmost submarine cables escaped damage. APTO72; PX3.

L. REPAIRS AND LIQUIDATED DAMAGES

130. Aldridge Electric, Inc. submitted to the City of Chicago a contract bid of $530,000 for the East 95th Street bridge submarine cables replacement project. The City accepted the bid. APTO73; PX2.

131. Aldridge made permanent repairs to the East 95th Street bridge in late 1999 and early 2000. APTO74.

132. Aldridge Electric replaced the damaged submarine cables with a conduit cable system.

Aldridge ran replacement cables through four, four-inch conduits. Each conduit was sealed to prevent exposure to water. The conduits were then placed around a metallic rod used to weigh down the conduits. The conduits and the rod were then bundled together. PX2.

133. Aldridge Electric placed the replacement cable bundle into a trench dug six feet into the bottom of the Calumet River. After the cable bundle had been laid, the trench was backfilled. Regulations required that the cable bundle, or any other type of replacement cable, including submarine cable, be placed into a trench and backfilled. APTO75; PX 2.

134. Aldridge Electric did not replace the original submarine cables with new submarine cables because of cost. Replacement submarine cables are far more expensive than the materials and methods used to replace the original ones. Had new submarine cables merely been laid on the river bottom, in contrast to the materials and methods used, the additional cost would have been approximately $100,000. PX2.

135. There were $50,745.99 in modifications to the City–Aldridge contract and $16,294.52 in liquidated damages related to EEO/CRO penalties. PX1.

136. The defendants did not introduce any evidence at trial relating to depreciation of the submarine cables.

137. The City's total liquidated damages as a result of the April 17, 1998 allision are indicated in the invoices paid to vendors and contractors listed below:

INVOICE #	AMOUNT PAID	DATE PAID
T.Y.Lin International Bascor (including subcontractor Lang Assoc., Inc.)		
# 97549418	$ 2,369.24 (of $18,128.40 invoice)	8/24/98
# 97543064	$ 1,878.16 (of $19,861.64 invoice)	8/12/98
Subtotal	**$ 4,247.40**	
Collins Engineers, Inc.		
# 97751161	$ 5,881.14	6/30/99
# 97742105	$ 22,032.83	6/27/99
# 97739617	$ 14,157.17	6/14/99
# 97742104	$ 1,295.88	6/17/99
# 97739618	$ 2,454.66	6/14/99
# 97739619	$ 7,869.06	6/14/99
# 97993914	$ 2,738.50	6/27/00
Subtotal	**$ 56,429.24**	
Aldridge Electric, Inc.		
# 97906129	$290,993.80	3/15/00
# 97906130	$105,400.12	3/15/00
# 97906131	$ 21,841.21	3/15/00
# 97927877	$ 95,520.88	4/20/00
# 97927878	$ 906.59	4/20/00
# 98042739	$ 44,702.07	10/18/00

# 98042740	$ 3,958.94	10/18/00
# 98060476	$ 1,127.86	11/27/00
Subtotal	**$564,451.47**	
TOTAL	**$625,128.11**	

SAPTO102; PX1; PX2.

III. CONCLUSIONS OF LAW

1. The Court has federal admiralty and maritime jurisdiction over this matter pursuant to 28 U.S.C. § 1333, as the allision arose out of navigation on the Calumet River. *See*, *e.g.*, *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir.1995).

2. Three admiralty rules of presumption have been raised by the parties. The *Pennsylvania* Rule operates as a presumption of cause against a vessel that violates a statute, while the *Oregon* and *Louisiana* Rules presume a vessel's fault for striking a fixed object. 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 14–3 (2001).

A. The *Pennsylvania* Rule.

3. The *Pennsylvania* Rule provides that:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption 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. Such a rule is necessary to enforce obedience to the mandate of the statute.

The Pennsylvania, 86 U.S. (19 Wall.) 125, 136, 22 L.Ed. 148 (1873), *overruled in part on other grounds, United States v. Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

4. The *Pennsylvania* Rule applies equally to collisions and allisions. *See Folkstone*, 64 F.3d at 1047 (citing *Orange Beach Water, Sewer & Fire Protection Auth. v. M/V Alva*, 680 F.2d 1374, 1381 (11th Cir.1982)).

5. Application of the *Pennsylvania* Rule shifts the burden of proof and the burden of persuasion on causation to the party who violated a legislative mandate. *Id.*

6. In this case, there was inadequate proof that the Defendants violated federal statutes established to prevent allisions, so as to trigger application of the *Pennsylvania* Rule. The *Morgan* had the right to rely on the rule that a vessel has an unfettered right to navigate the full width of a water channel. *Id.* at 1052 (citing *Pennzoil Producing Co. v. Offshore Express Inc.*, 943 F.2d 1465, 1470–71 (5th Cir.1991)).

7. Similarly, there was inadequate proof that Plaintiff, the City of Chicago, was in violation of a permit (thus entitling the Defendants to presumptions

under the *Pennsylvania*) in failing to maintain the timber walers on the face of the East 95th Street bridge.

B. The *Oregon* and *Louisiana* Rules.

8. The *Oregon* Rule provides that a vessel under power that strikes a fixed object is presumptively at fault. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895). The corollary *Louisiana* Rule provides that a drifting vessel that strikes a fixed object is also presumptively at fault. The *Louisiana*, 70 U.S. (3 Wall.) 164, 173, 18 L.Ed. 85 (1865).

9. It is irrelevant in this case whether the *Morgan* was under power or was drifting before and at the time of the allision with the East 95th Street bridge since the two rules address both possibilities. Thus, the Court will refer simply to the *Oregon* rule in the balance of these Findings and Conclusion.

10. The *Oregon* rule operates against the ship as well as all parties, including the captain and the crew, participating in the management of the vessel at the time of the allision. *See*, *e.g.*, *Wardell v. Department of Transportation*, 884 F.2d 510, 513 (9th Cir.1989).

10. The presumptive fault of the moving or drifting vessel derives from the common sense observation that vessels do not allide with fixed objects during the normal course of maritime navigation unless the vessel is mishandled in some way. *Folkstone Maritime*, 64 F.3d at 1050 (quoting *Wardell*, 884 F.2d at 512).

11. The *Oregon* rule shifts both the burden of proof and the burden of persuasion to the vessel, which bears the risk of non-persuasion. *See Folkstone Maritime*, 64 F.3d at 1050. The party against whom the presumption of fault operates bears a burden of disproving it, not merely coming forward with countervailing evidence. *Delta Transload, Inc. v. M/V "Navios Commander"*, 818 F.2d 445, 449 (5th Cir.1987).

12. The moving vessel may rebut the presumption by demonstrating, by a preponderance of the evidence, (1) that the allision was the fault of the stationary object, (2) that the moving vessel acted with reasonable care, or (3) that the allision was an unavoidable accident. *Id.* (citations omitted). *See also Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 503 (5th Cir.1994). The last exception has also been stated as a defense of "inevitable accident." *See American Petrofina Pipeline Co. v. M/V Shoko Maru*, 837 F.2d 1324 (5th Cir.1988).

13. In this case, the Defendants failed to rebut the *Oregon* presumption of fault in any of the three exceptions.

14. The defendants failed to rebut the presumption of fault of the *Oregon* Rule by proving either that the bridge or the submarine cables obstructed the *Morgan*'s navigation.

15. As to the bridge, the defendants failed to prove that the East 95th Street bridge, as constructed and maintained, obstructed maritime navigation in general or the *Morgan*'s navigation in particular.

16. Further, the East 95th Street bridge had not become an obstruction to navigation since the time of its construction either through the lack of maintenance or because of changes in the nature of maritime traffic.

17. The Defendants also failed to rebut the presumption of fault of the *Oregon* Rule by proving that the allision was an unavoidable or inevitable accident. The evidence introduced at trial established that the allision was avoidable.

18. A vessel that asserts the unavoidable-accident defense has a heavy burden. *See Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir.1977) (quoting *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724, 726 (5th Cir.1967)). "Such vessels 'must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required.'" *Id.* Indeed, "cases of inevitable accident are so rare as to be virtually non-existent." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 14–2, at 284 (2001).

> The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be either that, in

> spite of the testimony of the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur.

Bunge Corp., 558 F.2d at 795 (quoting *Patterson Oil Terminals v. The Port Covington*, 109 F.Supp. 953, 954 (E.D.Pa.1952)).

19. The proof a vessel must introduce to succeed in arguing the unavoidable-accident exception must establish that the vessel took all reasonable precautions under the circumstances known or reasonably anticipated, *see Petition of United States*, 425 F.2d 991, 995 (5th Cir.1970), and that the captain and crew used reasonable nautical skill. *See The Charles H. Sells*, 89 F.2d 631, 633 (2d Cir.1937). "To rebut the presumption of fault, the moving vessel must show that *it was not in her power* to prevent the damages by adopting *any* practical precautions." *Galveston Cty. Nav. Dist. No. 1 v. Hopson Towing Co.*, 877 F.Supp. 363, 369 (S.D.Tex. 1995) (citing cases) (emphasis added).

20. The evidence failed to establish by a preponderance of the evidence that the *Morgan* or her crew could not have prevented the allision with the East 95th Street Bridge. In particular, the actions and time taken to secure the barges after the starboard winch brake failed appear to have been major factors in causing the allision. No one disputes that the brake on the winch was defective or did not work as it was supposed to work. This alone indicates fault on the part of the vessel. Under the *Oregon*, the Defendants are

presumed at fault, and they have not proven that they were not negligent. The defendants provided no explanation of why the starboard winch brake failed to meet the evidentiary burden necessary to rebut their presumption of fault.

21. Although Captain Long testified that he plugged the control box to keep the barges faced up with the *Morgan* while waiting for Kindra to return to the *Morgan*'s deck, his actions in plugging it "three times" were insufficient to restore tension to the starboard line. The attempt to face up the barges by running a fiber or cloth line between the center capstan on the *Morgan* and the center cleat on the aft barge was an inefficient way to correct the problem of the barges canting to port. T73. First, casting a center line delayed drawing in the starboard line which could have been achieved while the crew was walking back to the *Morgan*'s deck. Second, the leverage would have been greater if the barges had been pulled in from the starboard side using the winch and face wire rather than pulling from the center bitt with a nylon line. T73–74.

22. Although the Court does not necessarily find specific acts of negligence on the part of the Defendants, the Court need not do so. Rather, the Defendants have not demonstrated by a preponderance of evidence that they were *not* at fault under the standards necessary to rebut the presumption under the *Oregon* rule.

C. COMPARATIVE NEGLIGENCE—PROXIMATE CAUSE OF PLAINTIFF'S DAMAGES

23. Although the Court thus finds the Defendants liable for causing the allision, this does not end the inquiry. The Court also finds that the City was negligent (although not in violation of a permit) in its maintenance of the timberwalers over the cable slot. Specifically, if the timberwalers had been properly maintained, the damages to the cables would likely have been mitigated or avoided. The City had several years of notice of the deficiency and breached a duty to maintain the walers in a reasonable fashion. It was reasonably forseeable, given the configuration of the cable slot and its exposure to the water, that a vessel or perhaps large debris, could strike the cables without the timberwaler. The City's negligence was a proximate cause of the *damages* from the allision.

24. The Court disagrees with the City's position that it cannot have some contributory responsibility because its negligence was not a cause of the allision itself. *See American River Transp. Co. v. KAVO KALIAKRA SS*, 148 F.3d 446, 450 (5th Cir.1998). It is true that the *Morgan* would have allided with the East 95th Street Bridge (although perhaps not with the cables) regardless of the missing timberwalers. The Court here, however, is now concerned with the City's damages. The relevant question is "what is the proximate cause of the *damages* to the cables?" In this regard, "comparative negligence" applies. *See United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 411, 95 S.Ct.

1708, 44 L.Ed.2d 251 (1975) ("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"); *see also Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323 (7th Cir.1993) ("The rule in admiralty, when property damage results from a collision between . . . ship and shore, is comparative negligence. . . . The plaintiff's negligence reduces the amount of damages that he can collect, but is not a defense to liability."). The Supreme Court has made clear that doctrines of proximate cause continue to apply in admiralty even after *Reliable Transfer. See Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996) ("There is nothing internally inconsistent in a system that apportions damages based upon comparative fault only among tortfeasors whose actions were proximate causes of an injury.")

25. That is, the inquiry in the present case under the *Reliable Transfer* rule is the cause of the damages. Some confusion arises in the meaning of "fault" in *Reliable Transfer*, 421 U.S. at 411, 95 S.Ct. 1708. Is the "fault" that is to be apportioned or compared culpability only or causation as well? *See*, *e.g.*, *Exxon*, 517 U.S. at 837 n. 2, 116 S.Ct. 1813 (recognizing an academic dialogue between a system of allocating damages based upon comparative culpability, on the one hand, and both comparative culpability and proximate cause, on the other) (citing sources). The Court concludes that

the *Reliable Transfer* rule includes apportioning causation as well as culpability. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5–4, at 181 (2001) ("apportionment of liability is ordinarily made on the basis of comparative fault, but relative aspects of causation may also be considered especially where there is a reasonable basis for determining the contribution of each cause to a single harm"); *cf. Pan–Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir.1977) ("When we find that the 'fault' of each party will be compared, what we mean by 'fault' is that party's blameworthy conduct which contributes to the proximate cause of the loss or injury").[2] Maybe it is most often the case that a party whose negligence was not cause of a collision or an allision (as with the City's negligent maintenance of the fendering here) is also not a proximate cause of damages. But, as applied in the present case, the Court cannot overlook the City's independent negligence in causing its own damages. The negligence was an independent, though not superceding,[3] cause of the damages to the cables.

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[2] "In any event, whether we use the term comparative fault, contributory negligence, comparative causation, or even comparative blameworthiness, we are merely beating around the semantical bush seeking to achieve an equitable method of allocating the responsibility for an injury or loss. It comes down to this: the defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury." *Pan–Alaska*, 565 F.2d at 1139.

[3] It might be said that the City's negligence *completely* caused its damages—i.e., if the City were not negligent in maintaining its fendering, the cables would not have been damaged

26. The Court therefore disagrees with the City's position that it, and its bridge, was merely an "eggshell skull" plaintiff, i.e., that the negligently-maintained fendering was merely a condition and not a cause of the allision.[4] Even a thin-skulled bicycle-rider could be contributorily-negligent for failure to wear a helmet. *See Nunez v. Schneider Nat'l Carriers, Inc.*, 217 F.Supp.2d 562, 570 (D.N.J.2002) (concluding that

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even if the *Morgan* negligently allided with the bridge. The Court, however, finds that such negligence was not a superceding cause so as to cut-off Defendants' liability completely because such a superceding cause would need to be "extraordinary" negligence. *See Exxon v. Sofec*, 54 F.3d 570, 574 (9th Cir.1995), *aff'd*, 517 U.S. 830, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996). Here, the City was negligent, but not extraordinarily negligent.

[4] *See In re Tug Helen B. Moran*, 560 F.2d 527 (2d Cir.1977). In disapproving the "cause" versus "condition" distinction, the Second Circuit commented:

> If the defendant spills gasoline about the premises, he creates a "condition;" but his act may be culpable because of the danger of fire. When a spark ignites the gasoline, the condition has done quite as much to bring about the fire as the spark; and since that is the very risk which the defendant has created, he will not escape responsibility. . . . "Cause" and "condition" still find occasional mention in the decisions; but the distinction is now almost entirely discredited. So far as it has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes. But even in such cases, it is not the distinction between "cause" and "condition" which is important, but the nature of the risk and the character of the intervening cause.

Id. at 528 n. 3 (*citing* W. Prosser, *The Law of Torts* 247–48 (4th ed.1971)).

decedent's failure to wear a helmet is admissible to prove decedent's comparative negligence in order to reduce damages). Similarly, a weak-boned driver could be contributorily-negligent in failing to wear a seat belt. *See*, *e.g.*, *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357, 370 (1988) ("the relevant inquiry is not whether the failure to use a seat belt contributed to the cause of the accident but whether the nonuse of a seat belt contributed to the plaintiff's injuries"). In this regard, *Waterson* recognized a theoretical distinction between straight comparative negligence and avoidable consequences, *id.* (citing cases), but concluded that "comparative negligence contemplates the inclusion of all relevant factors in arriving at appropriate damages awards." *Id.* These cases, although from an analogous context, are nothing more than an application of the Restatement (Second) of Torts, § 465. Section 465 provides in pertinent part:

Causal Relation Between Harm and Plaintiff's Negligence

> (1) The plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it.
>
> (2) The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others.

Comment c to section 465 is particularly applicable. It provides:

> c. . . . [T]he rules stated in § 433 A as to the apportionment of harm to different causes are applicable in cases of contributory negligence. Where the harm is single and indivisible, it is not apportioned between the plaintiff and the defendant, in the absence of a statute providing for such division of the damages upon an arbitrary basis. Where, however, there are distinct harms, or a reasonable basis is found for the division of a single harm, the damages may be apportioned, and the plaintiff may be barred only from recovery for so much of the harm as is attributed to his own negligence. Such apportionment is commonly made, under the damages rule as to avoidable consequences, where the plaintiff suffers an original injury, and his negligence consists in failure to exercise reasonable care to prevent further harm to himself. See § 918. The apportionment may, however, be made in other cases, as where, for example, the plaintiff has contributed to the pollution of a stream, along with one or more defendants.
>
> *Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues.* There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation. (Emphasis added.)

27. Although the Court does not specifically apply an "avoidable consequences" theory here, the Court notes that, to the extent the theory was limited to *post*-accident negligence,[5] the Restatement (Third) of Torts regarding "comparative responsibility" abolishes such a distinction. *See* Restatement (Third) Torts, § 3 (2000) (Ameliorative Doctrines for Defining Plaintiff's Negligence Abolished). Comment b of the reporter's notes to section 3 explains in part as follows: "Conduct that causes an accident may be more serious than conduct that merely affects the extent of an injury. This section merely provides that a plaintiff's *pre-accident* negligence that aggravates the injury is not categorically removed from consideration." *Id.* at 40 (emphasis in original). The Court applies the same rationale here in answer to any suggestion that a plaintiff's own negligence is only relevant if it occurs after the accident. *See*, *e.g.*, *Hutchins v. Schwartz*, 724 P.2d 1194, 1199 (Alaska 1986) ("when the plaintiff's pre-injury conduct does not cause the accident but aggravates the ensuing damages, then damage reduction is 'the better view unless we are to place an entirely artificial emphasis upon the moment of impact, and the pure mechanics of causation.' ") (*quoting Foley v. City of West Allis*, 113 Wis.2d 475, 335 N.W.2d 824, 830 (1983) (*quoting* Prosser, *Law of Torts* § 65, at 423–24 (4th ed.1971))).

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[5] *See*, *e.g.*, *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474–75 (5th Cir.1991) (indicating that the doctrine of avoidable consequences is limited to post-injury negligence).

28. A slightly different analytical approach to the meaning of *Reliable Transfer* is to apply the Restatement (Second) of Torts, § 433A.[6] In short, if damages for an injury can be divided by causation, then they may be apportioned appropriately. *See also* Restatement (Third) Torts, § 26 (2000) (Apportionment of Liability When Damages Can be Divided by Causation). Doing so leads to the same conclusion as applying section 465.

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[6] Section 433A provides:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Comment a provides:

> a. The rules stated in this Section apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing the harm, as stated in §§ 431 and 433. They apply where each of the causes in question consists of the tortious conduct of a person; and it is immaterial whether all or any of such persons are joined as defendants in the particular action. The rules stated apply also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff. The rules stated apply also where one of the causes in question is the conduct of the plaintiff himself, whether it be negligent or innocent.

29. The Court therefore finds that the City's own negligence in improperly maintaining the timberwalers over the cable slot was also a proximate cause of its damages. The Court apportions the loss 50% to the City and 50% to the Defendants. Any damages incurred by the City shall be cut in half.

IV. DAMAGES, INTEREST, AND COSTS

A. The City Is Owed Its Liquidated Damages.

30. Admiralty's new-for-old rule does not apply in this case. *See* 2 *Admiralty and Maritime Law* at § 14–6 & n. 25.

31. For the new-for-old rule to apply and reduce the City's compensable damages, the defendants would have had to have introduced evidence that the submarine cables had depreciated in value before the allision. *See id.* The defendants, however, presented no evidence that the submarine cables had depreciated in value before the allision.

32. The new-for-old rule also does not apply because the City did not replace the damaged submarine cables with new submarine cables. Rather, Aldridge Electric replaced the submarine cables with a conduit system, saving the City approximately $100,000. PX2.

33. The defendants' failure to introduce any evidence that the submarine cables had depreciated in value before the allision means that the City must be compensated in full for its $625,128.11 loss (prior to reducing the damages by half for the City's own

negligence). *See id.; see also City of New Orleans v. American Commercial Lines, Inc.*, 662 F.2d 1121, 1124 (5th Cir.1981).

B. The City Is Also Owed Pre-Judgment Interest Beginning On The Allision Date.

34. Prejudgment interest on a monetary award for an admiralty tort is calculated from the allision date to the judgment date. *See City of Milwaukee v. Cement Division, Nat'l Gypsum Co.*, 515 U.S. 189, 195, 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995).

35. Prejudgment interest should be calculated at the prime rate, compounded annually, because that calculation of prejudgment interest fully compensates the injured party. *See Cement Div., Nat'l Gypsum Co. v. City of Milwaukee*, 144 F.3d 1111, 1115 (7th Cir.1998)..

36. Consequently, this court should calculate prejudgment interest for the City at the prime rate, compounded annually, beginning with the April 17, 1998 allision date and ending with the judgment date. *Id.*

C. The City Is Owed Its Costs.

37. The City is entitled to its costs and the City may file the appropriate bill of costs pursuant to Local Rule 54.1.

V. CONCLUSION

For the foregoing reasons, the Defendants are liable to the Plaintiff City of Chicago for $312,564.05 (50% of $625,128.11), plus applicable pre-judgment interest and costs. The City is granted 30 days leave to file a submission with appropriate substantiation of the amount of pre-judgment interest, as well as a bill of costs.

IT IS SO ORDERED.

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375 F.3d 563
United States Court of Appeals,
Seventh Circuit.

CITY OF CHICAGO, Plaintiff-Appellee,
v.
M/V MORGAN, Kindra Lake Towing, L.P., and
Kindra Lake Towing, Inc., Defendants-Appellants.

No. 03-1789.
|
Argued Nov. 5, 2003.
|
Decided July 9, 2004.

Attorneys and Law Firms

Myriam Zreczny (Argued), Office of the Corporation Counsel, Appeals Division, Chicago, IL, for Plaintiff-Appellee.

Gary T. Sacks (Argued), Goldstein & Price, St. Louis, MO, for Defendants-Appellants.

Before FLAUM, Chief Judge, and BAUER and WILLIAMS, Circuit Judges.

Opinion

WILLIAMS, Circuit Judge.

The M/V Morgan, a tugboat pushing four barges, allided[1] with the 95th Street Bridge in Chicago, Illinois.

[1] An allision occurs when a vessel strikes a stationary object. 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 14-2 (2d ed.1994).

The impact disabled the bridge, severing eight of its ten electrical cables. A suit by the City followed. The district court, applying the *Oregon* presumption of fault against a moving vessel which strikes a stationary object, *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895), found the M/V Morgan presumptively at fault based on its negligent reaction to a mechanical failure but also held the City partially liable for the allision for failing to adequately protect the electrical cables. The court determined that the parties were equally liable and apportioned damages accordingly. The M/V Morgan appeals, arguing that the district court erred in its application of the *Oregon* rule and its apportionment of damages. We find that the *Oregon* rule applies, the M/V Morgan failed to exonerate itself from liability, and the record supports the district court's decision to apportion damages equally. Therefore, we affirm.

I. BACKGROUND

On April 17, 1998, the M/V Morgan,[2] a 134-ton tugboat, was pushing four barges, weighing approximately 5,000 tons, down the Calumet River in Chicago, Illinois, from the Federal Marine Terminal to the Ceres Trans-Oceanic Service Terminal, a trip which required passing under the 95th Street Bridge. During its voyage, the M/V Morgan's starboard winch[3] brake failed

[2] The M/V Morgan is owned by Kindra Lake Towing, L.P. References to the M/V Morgan encompass all relevant defendants.

[3] A winch is a mechanical device used for drawing in and loosening a line.

causing its crew to lose control of the vessel and strike the western pier face of the 95th Street Bridge. The foremost barge struck the bridge at an acute angle such that it entered a recessed slot which housed the cables.

The 95th Street Bridge is managed and maintained by the City of Chicago in trust for the general public. The bridge uses submarine electrical cables to control its mechanical functions. The electrical cables run from the eastern pier face of the bridge, 25 feet below the waterline, to its western pier face. From its western pier face, the cables travel above ground into a machine house, from which the bridge operator controls the opening and closing of the bridge. Though the full distance from the eastern to the western side of the bridge is 206 feet, the navigable waterway spans only 200 feet and the portion of the bridge which houses the electrical cables on the western pier face is outside of the navigable channel. To protect the superstructure of the bridge from common allisions, horizontal rubbing, or incidental contact with vessels, the City installed protective dolphins[4] and fenders[5] along the sides of the bridge. The City attempted to protect the submarine cables by placing them in a recessed slot; however, the cables remained exposed to river debris or vessels moving at certain angles. Prior to 1994, the recessed slot

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[4] A dolphin is a pile cluster, here composed of wood and steel, placed near the draw of the bridge which protects the bridge's most vulnerable areas including its underwater substructure.

[5] The fender system is comprised of long planks of wood, placed along the face of the substructure of the bridge.

was also covered by a wooden fender.[6] However, upon the deterioration of the fender, the City chose not to replace it.[7]

The M/V Morgan's crew included James Long, serving as Captain, Brian Grzybowski, the deck engineer, and John Kindra and Ryan Campbell, serving as deck hands. The crew was inexperienced with the M/V Morgan. Captain Long began his employ with Kindra Inc. two and one half months prior to the accident, while Kindra and Campbell had primarily served in an administrative capacity as office staff.

The four barges were tied two long and two abreast, forming a square. The M/V Morgan was positioned behind the barges, which allowed it to push the barges forward. The barges and the boat were connected at three points. First, the nose of the boat abutted the two rear barges at the center point of the boat. This connection was maintained solely through contact rather than by an independent line. The second point of connection was a line which ran from the winch

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[6] The United States Coast Guard files for the 95th Street Bridge indicate that its original design plans from December 19, 1958, contained fender-covers for the recessed slot. However, the permit issued for the construction of the bridge did not include a fender system.

[7] A December 1994 report, prepared by one of the City's outside consultants, recommended replacing the fender system. However, the City's Deputy Commissioner Chief Engineer of the Department of Transportation, Bureau of Bridges, Stan Kaderbek, deemed replacement of the fender over the recessed slot a low priority and focused on the dolphin system as the bridge's primary protective measure.

located on the starboard (right) deck of the vessel to the starboard cleat[8] on the rear-most barge. Lastly, another line ran from the winch located on the port (left) deck of the vessel to the port cleat on the rear-most barge. The two winches on the M/V Morgan were approximately four feet high and controlled electrically.[9] When the winch lines are taut, the M/V Morgan and barges form a single body, and the vessel is deemed "facing up." Winches control the degree of tension on the lines and in turn control the steering of the unit. Winch brakes also maintain the tension on the line when the vessel's motor is not powered. Thus, if the starboard winch line is released, the vessel turns left and if the port winch line is released, the vessel turns right.

To depart from the Federal Marine dock that morning, Captain Long directed the crew to tighten the winch lines, start the vessel's motor and draw in the starboard winch line to move the vessel right and away from the dock. Captain Long then put the boat in reverse and slowly began to back out of the dock. As the vessel proceeded, he noticed that the rear of the M/V Morgan was too close to the dock. In response, he put more slack in the starboard winch line to force the rear of the vessel to move away from the dock. After achieving a safe distance from the dock and down the river, Captain Long tightened the starboard winch line using

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[8] A cleat is a two-horned fitting used to secure a line.

[9] The winch controls are located in the pilot house. Two buttons control each winch. A green button drew in the line and a red button released the line and also held it automatically in place.

the green button on the control panel to face up the M/V Morgan. However, when he released the green button controlling the starboard winch line, the starboard winch brakes failed and the line began paying out (unwinding). This caused the vessel to turn to port (left). The starboard winch brake failure also meant that the Captain lost the ability to steer the vessel to starboard (right).

Captain Long responded to this unexpected mechanical failure by contacting Grzybowski by radio and asking him to send someone to the deck of the M/V Morgan to stop the paying out of the starboard winch line. To reduce the forward momentum of the vessel, Captain Long put the engines in reverse. He also radioed the bridge and asked that it be opened to prevent the vessel's coaming[10] from striking the underside of the bridge. At this time, the vessel was approximately 100 feet south of the bridge and favoring port (gliding left).

Kindra responded to Grzybowski's request, although he had to travel over 400 feet from the front end of the barges, across the vessel, to the starboard winch. Captain Long directed Kindra, by radio, to dog the starboard winch, which prevents the winch line from unwinding, and also to put out a fiber line from the center of the vessel to the center of the barges. The fiber line alone would not have caused the M/V Morgan to line up, but, both measures caused the vessel and

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[10] The coaming is a raised frame around the deck of the vessel used to keep out water.

the barges to properly face up. By this time, the lead barges were passing under the draw of the bridge.

While moving at approximately one mile per hour, the barge made contact with the bridge. It slid down the fenders located on the western pier face and into the recessed slot which housed the electrical wires without causing any visible damage to the fenders it impacted or to the barge itself. The impact was so slight that neither Long nor Kindra were aware that the barge had made contact with the bridge. Even at this slow speed, however, the vessel's angular impact damaged the bridge by severing the electrical cables. The damage was extensive, requiring replacement of the eight cables which cost the City of Chicago $625,128.11.

The district court conducted a two-day bench trial, during which the M/V Morgan presented evidence that the starboard winch functioned properly on the morning of April 17 prior to the accident and that winches were inspected weekly. However, Grzybowski, the deck engineer, was not able to identify which day of the week was designated for inspection, the last day the winches were actually inspected, or which member of the crew inspected the winches on the day of the accident. In addition, the Captain admitted that he did not inspect the winches as he did not consider that a necessary part of his routine. The court then rendered a written decision listing several findings of fact which this court will accept absent clear error. *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1046 (7th

Cir.1995). Specifically, the trial court found the following:

> 17. It is fairly common for barges and vessels to touch or rub—and in that sense "allide" with—the substructures of bridges.
>
> 18. When a vessel allides with a bridge in the City of Chicago the damage to the bridge is most often to the superstructure.
>
> 19. It is more common for a vessel to allide with a bridge through rubbing rather than striking at an acute angle.
>
> 20. There was no evidence presented of any specific allision with the East 95 Street bridge before April 17, 1998.
>
> 37. Without a fender or timber waler, the cables were exposed to the river. The cables, however, were protected from sideways, i.e., parallel, contact by being placed in a slot. It was nevertheless reasonably foreseeable that the cables could be damaged by a minor allision in the form of the fairly common "rubbing" or "touching."
>
> 85. Long has no explanation why the brake shoes on the starboard winch failed.
>
> 104. One way to have restored tension to the starboard line earlier would have been to draw in the starboard line using the motor on the winch. That is, even if the brake in the winch did not hold, the line could have been drawn in periodically.

> 105. If Long had used the motor on the starboard winch to draw in the starboard line, he might have been able to maintain tension on the line by intermittently punching the control button for the winch.
>
> 106. Long recalls punching the control button for the winch about three times. He also described his actions in this regard as "continually" or "intermittently" hitting it to get it to come in. The button on the winch is an electrical connection; therefore, once the button is pushed, the motor should almost instantaneously begin to draw in the wire. On the other hand, continually holding down the winch button could blow the breaker.
>
> 111. If the timber waler had been in place across the cable slot, the port bow corner of the barge would have slid along the timber waler and probably would not have contacted the cables.

City of Chicago v. M/V Morgan, 248 F.Supp.2d 759, 763-69 (N.D.Ill.2003) (internal citations omitted). Applying pure comparative fault principles, the district court found that both parties were responsible for the damage and apportioned fault equally between them.

II. ANALYSIS

The M/V Morgan makes several arguments on appeal. First, defendants contend that the *Oregon* presumption is unnecessary and inapplicable because the facts of the case are apparent and the accident was an

"expected" and "minor" allision. Second, defendants assert that even if we find the application of the presumption appropriate, we should deem it rebutted and exonerate the vessel from liability. Defendants seek exoneration based on the district court's determination that the City's decision not to replace the wooden fender over the recessed slot was a proximate cause of the allision. They also maintain they were without fault as they contend that the allision was an "inevitable accident." Finally, defendants take issue with the district court's apportionment of liability between the parties, arguing that an equal apportionment is not supported by the record and is contrary to this court's cost avoidance doctrine and the general principles of comparative fault.

A. The *Oregon* Rule.

The *Oregon* rule creates a rebuttable presumption of fault against a moving vessel, which under its own power, allides with a stationary object. 158 U.S. at 192-93, 15 S.Ct. 804. As a conclusion of law, we review the district court's decision to apply the *Oregon* rule to the underlying matter de novo. *See Union Pac. R.R. Co. v. Kirby Inland Marine, Inc.*, 296 F.3d 671, 674 (8th Cir.2002) (applying de novo review to determine whether the district court properly applied the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), over the *Oregon* rule).[11] However, we review for

[11] We agree with the district court's determination that whether the M/V Morgan is deemed "drifting" and therefore subject to the *Louisiana* presumption of fault against a vessel which

clear error the district court's factual findings, *Folkstone Maritime, Ltd.*, 64 F.3d at 1046, and apportionment of fault, *Cement Div., Nat'l Gypsum Co. v. City of Milwaukee* (*National Gypsum*), 915 F.2d 1154, 1159 (7th Cir.1990) (citing *McAllister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 99 L.Ed. 20 (1954)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). Furthermore, when sitting in admiralty, we treat a district court's findings of negligence as factual determinations also reviewed for clear error. *Folkstone Maritime, Ltd.*, 64 F.3d at 1046.

In admiralty, "[t]hose in control of the vessel's navigation must bear the greater responsibility for bringing their ship safely into and out of port." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 802 (5th Cir.1977). Applying this logic, the *Oregon* rule is premised on "the common-sense observation that moving vessels do not usually collide with stationary objects unless the vessel is mishandled in some way." *Folkstone Maritime, Ltd.*, 64 F.3d at 1050 (quoting *Wardell*

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drifts into a stationary object, *The Louisiana*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1865), or "under power" and subject to the *Oregon* rule, the analysis remains unchanged. We also agree that the *Pennsylvania* rule, which creates a presumption of fault against a vessel that is found to have violated a statutory rule intended to prevent allisions, does not apply as the City was under no statutory duty to erect and maintain the fender system over the cable slot. *See supra* note 6.

v. Nat'l Transp. Safety Bd., 884 F.2d 510, 512 (9th Cir.1989)). This presumption merely addresses a party's burden of proof and/or burden of persuasion; it is not a rule of ultimate liability. *Folkstone Maritime, Ltd.*, 64 F.3d at 1050. Generally, presumptions "are designed to fill a factual vacuum," and if the facts of a case are apparent, the need for a presumption is eviscerated. *Rodi Yachts, Inc. v. Nat'l Marine, Inc.*, 984 F.2d 880, 887 (7th Cir.1993).

Liability will not arise unless a party's act or omission is a "substantial" and "material" factor in causing the allision. *American River Trans Co. v. Kavo Kaliakra S.S.*, 148 F.3d 446, 450 (5th Cir.1998). If, however, the vessel's contact with the stationary object is "expected" or "minor," the presumption is not applied unless that contact rises "above a certain minimal level." *See American Petrofina Pipeline Co. v. M/V Shoko Maru*, 837 F.2d 1324, 1326 (5th Cir.1988) (recognizing that slight damage to a fender system during "normal docking" may fall outside the purview of the presumption) (collecting cases); *Manufacturers Rys. Co. v. Riverway Harbor Serv. St. Louis*, 646 F.Supp. 796, 798 (E.D.Mo.1986) (same).

Application of the *Oregon* presumption does not supplant the general negligence determination which requires a plaintiff to prove the elements of duty, breach, causation and injury by a preponderance of the evidence; rather, it merely satisfies the plaintiff's *prima facie* case. *Bunge Corp.*, 558 F.2d at 798; *Brown and Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724, 726 (5th Cir.1967). Once fault is

presumed the defendant may come forward with evidence to rebut the presumption, *The Oregon*, 158 U.S. at 192-93, 15 S.Ct. 804, by showing that: (1) the allision was actually the fault of the stationary object; (2) the moving vessel acted with reasonable care; or (3) the allision was the result of an inevitable accident. *Folkstone Maritime, Ltd.*, 64 F.3d at 1050 (finding *Oregon* presumption rebutted when bridge failed to fully open); *I & M Rail Link, L.L.C. v. Northstar Navigation, Inc.*, 198 F.3d 1012, 1013 (7th Cir.2000) (finding *Oregon* presumption rebutted and remanding for trial when bridge was an unreasonable obstruction to navigation); *Graves v. Lake Michigan Car Ferry Transp. Co.*, 183 F. 378, 380 (7th Cir.1910).

Rebutting the presumption does not necessarily exonerate the vessel from all liability. Under the principles of pure comparative fault, both parties may be found to have contributed to the accident. "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." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975); *Brotherhood Shipping Co., Ltd. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 325 (7th Cir.1993). Therefore, under the comparative fault analysis between a vessel and a stationary object, a vessel

may minimize its liability by providing evidence that the stationary object contributed to the injury it incurred, however, it will be absolved of liability only if the stationary object is deemed the *sole* proximate cause of the injury. *Bunge Corp.*, 558 F.2d at 802 (emphasis added).

B. The *Oregon* presumption applies.

The parties agree that the allision with the 95th Street bridge was the result of the crew of the M/V Morgan losing control of the vessel due to the mechanical failure of the starboard winch. While the "parties have introduced evidence to dispel [some of] the mysteries" of what occurred during the accident, *Rodi Yachts, Inc.*, 984 F.2d at 887, the M/V Morgan has not supplied any reason for the mechanical failure. The vessel asks this court to focus on its reaction once the mechanical failure occurred, however, this does not resolve the question of what caused the starboard winch brake to fail. This lack of an explanation is sufficient to find a "factual vacuum" meriting the application of the presumption. Furthermore, in *Rodi Yachts*, this court reasoned that "as between [a] drifting vessel and stationary object struck by it common sense suggests that the former is more likely to have been at fault than the latter. . . ." *Id.* at 886-87.

Nor was the M/V Morgan's contact with the 95th Street Bridge the type of "expected" and "minor"

contact which occurs during a "normal docking."[12] *See American Petrofina Pipeline Co.*, 837 F.2d at 1326 (arguing for the inapplicability of the *Oregon* presumption where the vessel was properly piloted, the contact made with the fender system occurred during a "normal docking" and was minimal, and the fenders were defective). It is undisputed that the barge contacted the bridge at an angle sharp enough for it to enter the recessed slot which housed the electrical cables. The district court expressly found that common allisions do not occur at acute angles. Thus, the district court's finding suggests that the allision at issue was not a common parallel rubbing which would constitute "expected" contact.

Also, the western pier face of the bridge, which housed the severed cables, is outside the navigable waterway and therefore contact with this portion of the bridge is not "expected" or frequent. Lastly, the district court also correctly found that damage to the bridge was extensive. We recognize that the vessel was moving very slowly when impact was made, however, the speed of the tugboat is not determinative of whether the impact was minor. The contact caused substantial

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[12] We note that the M/V Morgan's contention that the *Oregon* rule should not apply to "expected" or "minor" allisions is in fact a challenge to the district court's factual findings that boats generally do not allide with the structure of a bridge at an acute angle and that the damage caused to the bridge was extensive. Therefore, the standard of review for these determinations is not the de novo standard applied to questions of law, but rather we review these findings to determine whether they are clearly erroneous. *Folkstone Maritime, Ltd.*, 64 F.3d at 1048.

damage, in the amount of $625,128.11, and cannot be characterized as "minor." Therefore, the district court properly applied the *Oregon* presumption of fault to the M/V Morgan.

C. Defendants have failed to rebut the *Oregon* presumption or exonerate themselves from liability.

The M/V Morgan has failed to rebut the *Oregon* presumption or exonerate itself from liability by proving either that (1) the allision was the sole fault of the bridge, (2) it acted reasonably, or (3) the allision was the result of an "inevitable accident." In addition, the *in extremis* doctrine does not aid the M/V Morgan.

1. The allision was not the sole fault of the stationary object.

To prove that the allision was the sole fault of the bridge and exonerate itself from liability, the M/V Morgan asks this court to draw a distinction between what it characterizes as the "actual fault" of the bridge and the "presumed fault" of the vessel.[13] For the purposes

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[13] The M/V Morgan points to the following language in the district court opinion in support of this distinction: "Although the Court does not necessarily find specific acts of negligence on the part of the Defendants, the Court need not do so. Rather, the Defendants have not demonstrated by a preponderance of the evidence that they were *not* at fault under the standards necessary to rebut the presumption under the *Oregon* rule." *M/V Morgan*, 248 F.Supp.2d at 774 (emphasis in original). To support its argument concerning the significance of the City's "actual fault,"

of this analysis, we find no real distinction between "presumed fault" and "actual fault." As discussed above, presumptions are merely tools used by courts to analyze the facts which underlie an allision and address any factual voids in the record. A presumption implicates the burden of production and proof, not the ultimate liability determination. *Folkstone Maritime, Ltd.*, 64 F.3d at 1050.

The district court found that the City's decision not to replace the fender over the recessed slot was not the *sole* cause of the damage to the electrical cables. *See White Stack Towing Corp. v. Hewitt Oil Co.*, 216 F.2d 776, 778-79 (4th Cir.1954) (exonerating vessel of liability when damage to breasting dolphins was solely caused by their negligent construction and vessel was properly piloted during docking). Under a pure comparative fault analysis, "[t]he plaintiff's negligence reduces the amount of damages that he can collect, but it is not a defense to liability." *Brotherhood Shipping Co., Ltd.*, 985 F.2d at 325 (citing *Reliable Transfer Co.*, 421 U.S. at 397, 95 S.Ct. 1708); *Bryant v. Partenreederei-Ernest Russ*, 352 F.2d 614, 615 (4th Cir.1965) (in admiralty "contributory negligence is properly considered in mitigation of damages.").[14]

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defendants seize on the district court's statement that the City's negligence in failing to replace the fender system over the recessed slot "was a proximate cause of the damages from the allision." *Id.* at 775.

[14] The district court also properly rejected defendants' superceding cause argument. "The doctrine of superceding cause is thus applied where the defendant's negligence in fact substantially

The district court's finding that the fender system (or lack thereof) contributed to the accident is supported by the record and therefore was not clearly erroneous. The district court reasoned that while the City placed the cables in a recessed slot to protect them, placing a wooden fender in front of the slot would have likely prevented the accident. Thus, the court determined that while the City took some preventative action, it did not take sufficient action. On the part of the defendants, the court found that the crew's response to the starboard winch brake failure was unreasonable in that it was not able to face up the M/V Morgan and this negligence led to the unusual angular impact. It was therefore proper for the court to decrease the M/V Morgan's percentage of liability in proportion to the plaintiff's relative degree of fault.

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contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 5-3 (4th ed.2004). Here, the City's decision not to replace the wooden fender over the recessed slot was not a superceding cause of the injury to the cables because it did not cut off the M/V Morgan's negligence in failing to face up the vessel after the mechanical failure of the starboard winch. *See Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 837-38, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996) (discussing the continued viability of the superceding cause doctrine after *Reliable Transfer Co.*). The City's decision not to replace the fender could be deemed a superceding cause if, for example, the cables were left completely open, in a navigable waterway, with no protection whatsoever, and the M/V Morgan's contact with the cables was made at a parallel angle. This would amount to the type of "extraordinary" negligence necessary to break the causal nexus and completely shield the defendants from liability. *See id.*

2. The vessel did not react to the mechanical failure in a reasonable manner.

The M/V Morgan's fault is based on the district court's finding that the defendants could have prevented the angular impact by properly facing up the M/V Morgan. Specifically, the district court found that: (1) the M/V Morgan did not respond reasonably to the starboard winch's failure; (2) the crew was inexperienced with the M/V Morgan; (3) the crew was not diligent in its maintenance of the vessel's winches in that they did not inspect the winches that day and could not recall when they were last inspected; (4) Captain Long's decision to cast a center line was unreasonable in that it delayed drawing in the starboard winch line; and (5) Captain Long's decision to plug the control box was ineffective to restore tension to the winch line.[15] The district court was correct that the vessel must bear some of the responsibility for the allision. *See American River Trans. Co.*, 148 F.3d at 450 (finding a drifting vessel liable for alliding with a moored barge based on the vessel's negligent reaction to the mechanical failure of its steering system); *In re American Milling Co.*,

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[15] It is important to note that these facts support a finding of negligence against the defendants absent the presumption. *See* 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 5-2 (4th ed.2004). These facts clearly demonstrate that "the allision could have been prevented by the exercise of due care." *Folkstone Maritime Ltd.*, 64 F.3d at 1046 (citing *The Jumna*, 149 F. 171, 173 (2d Cir.1906)). *See also* Paige Hess, *Applying the Pennsylvania Rule—Circumstances to Consider in Allisions: American River Transportation Co. v. M/V Kavo Kaliakra*, 24 Tul. Mar. L.J. 343, 352 (1999) ("In light of modern day technology and practices, the value of such presumptions has diminished . . . ").

270 F.Supp.2d 1068, 1091 (E.D.Mo.2003) (holding a vessel liable for an allision with a bridge when the vessel failed to prove that a mechanical failure caused the allision as opposed to the captain's navigational errors).

3. The allision was not the result of an "inevitable accident."

The "inevitable accident" doctrine applies when "the cause of the collision was a cause not produced by [the vessel], but a cause of which [the vessel] could not avoid." *The Olympia*, 61 F. 120, 123 (6th Cir.1894). Generally, this doctrine is invoked when an act of God, or *vis major*, causes a vessel to collide with another object or vessel. *The Louisiana*, 70 U.S. at 173; *Frost v. Saluski (The Blue Goddess)*, 199 F.2d 460, 462 (7th Cir.1952). "Unless it appears that both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent the collision, the defense of inevitable accident is inapplicable to the case." *The Clarita*, 90 U.S. (23 Wall.) 1, 13, 23 L.Ed. 146 (1874). Therefore, the defense cannot be "sustained where it appears that the disaster was caused by negligence." *Id.*; *American River Transp. Co., Inc. v. Paragon Marine Serv., Inc.*, 329 F.3d 946, 947 (8th Cir.2003). If applicable, each party is responsible for his respective damages and no liability attaches. *The Continental*, 81 U.S. (14 Wall.) 345, 355, 20 L.Ed. 801 (1872).

The doctrine has been applied to collisions brought about by a vessel's loss of control due to a mechanical

failure, however, the inquiry is whether the defect which caused the malfunction was latent in nature or detectible by the vessel through proper inspection. *See The Olympia*, 61 F. at 122;[16] *Cranberry Creek Coal Co. v. Red Star Towing & Transp. Co.*, 33 F.2d 272, 274 (2d Cir.1929) (finding that vessel failed to rebut presumption of fault by proving "inevitable accident" when it failed to present evidence that mechanical defect was latent or that the vessel was properly maintained and inspected); *The William E. Reed, Hudson River Shipyards Corp. v. Metropolitan Sand & Gravel Corp.*, 104 F.2d 167, 168 (2d Cir.1939) (finding that the vessel failed to establish "inevitable accident" defense as it did not present evidence that broken steering gear was in good condition prior to accident, properly or frequently inspected, or purchased from a reputable manufacturer); *Arkansas River Co. v. CSX Transp.*, 780 F.Supp. 1138, 1142 (W.D.Ky.1991); Meadows and Markulis, *Apportioning Fault in Collision Cases*, 1 U.S.F. Mar. L.J. 1, 21 (1989) (discussing applicability of the inevitable accident doctrine when a collision occurs as a result of a latent defect in properly inspected and maintained vessel machinery).

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[16] "The defendants say 'Our tiller rope broke, and the vessel became unmanageable, and the collision was unavoidable.' That only shows that the breaking of the tiller rope was the cause of the collision. They must go further, and show that the cause was operated to break the tiller rope was unavoidable. The collision was but the result of the cause which produced a broken tiller rope. If that cause is not shown to be unavoidable, how can it be said that the collision was an inevitable accident?" *Id.*

The M/V Morgan failed to prove that the accident was inevitable. The vessel did not put forth any evidence that the defect in the starboard winch was latent or could not be uncovered through proper inspection. In fact, the defendants testified that they did not know when the starboard winch was last inspected or who was responsible for its continued inspection. Most importantly, the district court found that the M/V Morgan could have prevented the accident by properly handling the vessel after the mechanical failure. This finding suggests that the allision was not caused by the failure of the starboard winch, but rather by the subsequent mishandling of the vessel. *See In re American Milling Co.*, 270 F.Supp.2d at 1091 (rejecting the "inevitable accident" defense when captain could have prevented the allision by properly handling vessel after failure of rudders); Meadows and Markulis, *supra* (an inevitable accident is one "which occurs without fault"). Thus, the defendants have not sustained the very heavy burden of proving that the accident was inevitable.

4. The *in extremis* doctrine is inapplicable.

Sometimes confused with the inevitable accident doctrine, the *in extremis* doctrine or "agony of the moment defense" applies when a ship is placed in sudden peril through no fault of its own and is forced to take "evasive maneuvers that may be a violation of a rule." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 14-2 n. 49 (4th ed.2004). *See, e.g.*, *N.M. Paterson & Sons, Ltd. v. City of Chicago*, 324 F.2d 254, 259 (7th

Cir.1963) (applying *in extremis* doctrine to absolve a vessel from liability for striking a bridge when the bridge failed to open and failed to give advance warning to the vessel or tug of its inability to open); *Munroe v. City of Chicago*, 194 F. 936, 939-40 (7th Cir.1912) (same). As explained in *The Blue Jacket*, 144 U.S. 371, 392, 12 S.Ct. 711, 36 L.Ed. 469 (1892) an example of such an occurrence is "where one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind."

The party relying on the *in extremis* doctrine must be completely free from fault prior to the emergency occurrence. *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 6 (1st Cir.1990). "It does not excuse a vessel making a wrong maneuver in extremis where the imminence of the peril was occasioned by the fault or negligence of those in charge of the vessel, or might have been avoided by earlier precautions which it was bound to take." 70 Am.Jur.2d Shipping § 619 (2003). Further, applicability of the doctrine does not prevent a finding of liability, it merely requires courts to judge a captain's reactions more leniently because of the crisis situation. *Grosse Ile Bridge Co. v. American Steamship Co.*, 302 F.3d 616, 625-26 (6th Cir.2002).

Whether to rebut the presumption or argue for its inapplicability, defendants incorrectly attempt to avail themselves of the *in extremis* doctrine equating it to the "inevitable accident" doctrine. Based on the district

court's findings, it is clear that the M/V Morgan was not operating *in extremis*. The dangerous situation was caused by a mechanical failure of the vessel itself; it was not placed in sudden peril by an outside force or party. *Cf. Grosse Ile Bridge Co.*, 302 F.3d at 625-26 (finding *in extremis* applicable where bridge failed to timely open but reasoning that captain's reaction to emergency situation was still negligent even under more lenient standard because his delay in dropping anchor to stop vessel's forward movement was unreasonable); *Puerto Rico Ports Authority*, 897 F.2d at 6-7 (applying *in extremis* doctrine to shield a tug from liability for striking a pier after it was forced to cast off its lines to avoid a collision with a tanker).

Moreover, the district court's finding that the vessel had sufficient time to respond properly to the failure of the starboard winch brake negates the applicability of this doctrine as it was not in "sudden peril" and had sufficient time to prevent the allision. *See* Richard J. Nikas, *Skimming the Surface: A Primer on the Law of Collision*, 9 U.S.F. Mar. L.J. 225, 240 (1996) ("Normally, the law of collision assumes there will be a reasonable opportunity for decision, however, this assumption is abandoned in cases of sudden peril."). Defendants attempt to merge the two doctrines of "inevitable accident" and *in extremis*, however, we find the *in extremis* doctrine inapplicable to accidents caused by mechanical failures.

D. The district court properly apportioned fault equally between the parties.

Defendants attack the district court's finding that both parties were 50% liable as violative of (1) this court's cost avoidance doctrine as set forth in *Rodi Yachts, Inc.*, 984 F.2d at 886-87 and *Nat'l Gypsum Co.*, 915 F.2d at 1159 and (2) the rule of comparative fault in admiralty established by the Court in *Reliable Transfer.* Defendants' first argument takes a far too literal reading of *Rodi Yachts* and *National Gypsum.* In *National Gypsum*, we stated that "the doctrine of comparative fault is generally supposed to be used to assess liability in proportion to the cost of avoiding the entire accident to each side." 915 F.2d at 1159. *A fortiori*, argue the defendants, because the City could have prevented the accident by placing a wooden fender in front of the recessed slot and the cost of such prevention is negligible, the City should be held 100% liable for the damage to the bridge.

We find this analysis irreconcilable with the circumstances of the allision in this action. Taking the defendants' analysis to its logical conclusion, it would be absolved of liability (or at least significantly shielded) regardless of its actions or negligent reaction to a mechanical failure. Defendants acknowledge that the crew lost control of the vessel due to the failure of the starboard winch brake. They were in sole control of the maintenance and inspection of the winch—therefore the City cannot be held responsible for the M/V Morgan's failed machinery or the crew's unreasonable reaction to the equipment failure.

Defendants correctly assert that *National Gypsum* and *Rodi Yachts* involved ships which slipped their moorings and struck stationary objects. However, in *National Gypsum* the vessel was suing the City of Milwaukee arguing that it was negligently assigned to a slip containing hidden dangers, while in *Rodi Yachts* the issue was whether the defendant dock owner's chafed ropes or the defendant barge owner's improper mooring caused the vessel to come loose. The "fault" assessment, i.e., the maintenance of the slip dock or the upkeep/inspection of the ropes used to moor the vessel, involved an analysis of the cost of preventing the vessels from drifting and causing the injuries.[17]

Here, by contrast, the comparative "fault" assessment is bifurcated between the affirmative actions of the M/V Morgan once the mechanical failure occurred and the City's contributory fault for failing to replace the fender system. The cost of avoiding the accident is relevant to the degree of contributory fault on the part of the plaintiff, however, this degree of fault is limited to foreseeable harms. Put another way, a plaintiff is not a soothsayer and is not responsible to prevent every possible harm. Rather, a plaintiff must undertake its own cost benefit analysis and choose between types and degrees of protective measures. *See Brotherhood Shipping Co., Ltd.*, 985 F.2d at 327 ("The cost-justified

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[17] We explained in *Rodi Yachts* that "the sort of accident that happened here can be prevented, or at least the probability of its occurring can be greatly reduced, by regular inspection of the ropes to make sure that they are not chafing, or otherwise fraying, or loosening, or coming untied." 984 F.2d at 884.

level of precaution . . . is thus higher, the likelier the accident that the precaution would have prevented was to occur . . . and the greater the loss that the accident was likely to inflict if it did occur."). And that is exactly what occurred in this case. The City took some preventative measures by placing the cables outside of the navigable waterway in a recessed slot which would protect them from the more typical parallel rubbing or minor contact with the bridge's superstructure. However, the cables did remain exposed to river debris and foreign objects. The district court's decision to hold the City partially liable for the allision for failing to replace the wooden fender over the recessed slot which housed the cables was supported by the evidence. The court recognized that the cost of prevention was minimal and the potential harm to the bridge significant. The court also acknowledged that the allision could have been prevented if the City had taken this further preventative measure. However, the district court also found the M/V Morgan crew's inability to face up the vessel caused an angular impact that was uncommon and unexpected. Thus, we find that the district court properly balanced the M/V Morgan's affirmative actions with the City's omissions and found both parties at fault.

We can quickly dispense with the defendants' second argument as we find that the district court did not clearly err in apportioning damages equally between the parties for the reasons stated above. *Nat'l Gypsum Co.*, 915 F.2d at 1159 (citing *McAllister*, 348 U.S. at 20, 75 S.Ct. 6 and finding clear error where the "district

court apportioned liability based on the amount of property each side had at risk."); *Feeder Line Towing Serv. Inc. v. Toledo, Peoria & Western R.R. Co.*, 539 F.2d 1107, 1111 (7th Cir.1976) (upholding district court's finding that defendant bridge was 65% liable based on its failure to light its protective system and that plaintiff was 35% liable based on the pilot's negligent angular alignment of vessel). Though an equal apportionment of fault is unusual, the *Reliable Transfer* Court explicitly held that if the parties are equally at fault, an equal apportionment is appropriate. 421 U.S. at 411, 95 S.Ct. 1708. The district court found that both parties could have avoided the accident with more prudent behavior. Its decision to hold the City 50% liable for its omission reflects the court's recognition that the City could have prevented this accident cheaply, by simply replacing the wooden fender. This figure also acknowledges the M/V Morgan's liability in failing to face up the vessel. Therefore, we do not find that a "mistake" has been made in this apportionment, *Nat'l Gypsum Co.*, 915 F.2d at 1159, and affirm the district court's determination to apportion fault equally between the parties.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.