In the

Supreme Court of the United States

UNION OIL COMPANY OF CALIFORNIA,

Appellant,

v.

THE TUGBOAT SAN JACINTO, et al.,

Appellees.

No. 71-900

Washington, D. C.
October 17, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 71-900
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Washington, D. C.,

Tuesday, October 17, 1972

The above-entitled matter came on for argument at 11:47 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United State
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KENNETH E. ROBERTS, ESQ., 12th Floor Standard Plaza, Portland, Oregon 97204, for Appellant

ERSKINE B. WOOD, ESQ., 1505 Standard Plaza, Portland, Oregon, 97204, for Appellees.

C O N T E N T S

* * *

Afternoon Session begins at page 11.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-900, Union Oil Company against the Tugboat Company.

Mr. Roberts, you may proceed.

ORAL ARGUMENT OF KENNETH E. ROBERTS, ESQ.,

ON BEHALF OF THE APPELLANT

MR. ROBERTS: Mr. Chief Justice, and may it please this Honorable Court:

This case involves a collision that occured on Christmas Eve in 1967, 24th of December 1967, at about 8:30, p.m. on the Columbia River, which flows, as you know, between the States of Oregon and Washington.

My client, Union Oil Company, was the bayable charter of the tanker, SANTA MARIA. The SANTA MARIA was approximately 550 feet long, and she had a gross tonnage of about 11,000. She was loaded with 17,000 gallons of petroleum products, and was inbound from the Pacific Coast to Portland, Oregon. She is an American flag vessel.

At Astoria, Oregon, she took aboard a Columbia River pilot, Mr. McDonald Kabels, who has been going to sea on the Columbia River as a tugboat man, and so forth, since 1928. This was his 3,550th ship as a pilot on the Columbia River. He had also piloted the SANTA MARIA, he testified, about eleven or twelve times.

He proceeded inbound from Astoria to Portland. This is a winding course that takes a number of hours. Some fog was experiences near the town or the inlet of Skimockaway, which is on the Washington side of the Columbia River, but pretty close to its mouth.

The chief mate of the vessel was Mr. Essland, and he testified that you always find a little fog at Skimockaway at that time of the year.

The vessel proceeded on, mainly on a full bell, but for maneuvering speed in the river, which is about 11 to 12 knots.

There was a vessel that was inbound called the TEAKWOOD under the command of Captain Falth,who was also a Columbia River pilot.

The pilots at that time were communicating with one another by a walky-talky machine, and they conversed about the traffic on the river and the conditions, and so forth.

Captain Kabels, through this walky-talky communication, was aware that there was a tugging barge bound downstream on the Columbia River from Rainier, Oregon.

Now this tug was the SAN JACINTO owned and operated --

Q What was the current of the river, about? Do you know?

MR. ROBERTS: Just about a knot, I think, according to the -- and downstream, as I recollect from the evidence.

But I don't think it had any significance as far as the collision was concerned.

The SAN JACINTO was owned and operated by Star and Crescent, had a completely inexperienced crew aboard. None of the men had any papers, as such. The master, I think, it was either his first or second trip. And towed by the SAN JACINTO was this big barge called the OLIVER J. OLSON, III, which was fully loaded with lumber above the deck about two or three tiers high, and the lumber had been loaded at Rainier.

Now, the tugboat was towing on a 250 cable. The barge, I think, was about 300 -- 250 to 300 -- feet in length.

Now, downstream at the same time or about this time, was Captain Olson, another Columbia River pilot who was piloting the PACIFIC TELSTAR. He was also in communication with Captain Kabels on the SANTA MARIA by walky-talky and he advised that he had passed the tug and barge. He also advised there was a little, what they call, toolie fog, at this time.

Now, this is fog that kind of hangs down towards the water, and it was mainly on the Washington side. It was patchy. The pilots all had testified it had not impeded the traffic on the river, as demonstrated by the evidence in any way, and that it was to be expected at this time of the year.

The toolie fog, I think, the best way to describe it if you have a fairly large vessel you probably can see the top of the mast, but you could not see the hull, and it was all -- or patchy parts of it -- were all over on the Washington side of the river.

Now, I think it important to visualize the scene of this particular chasm. This is a narrow channel and one of the exhibits which was introduced into the evidence shows the channel itself.

This is just a blowup of the Coast and Geodetic Survey chart, and the accident occurred right here at buouy No. 70.

De Griegs Channel, right at the scene of the collision, is 500 feet wide. The actual river at this point which is maneuverable, at least as far as big vessels are concerned, or vessels with a large draft -- and, by the way, the SANTA MARIR was drawing 31 feet at the stern -- is about 800 feet wide, although going from the Oregon to the Washington shore or over to Wallace Island is about 1500 feet, but of that amount there is over 800 feet that is a shoal, just to the north side, there, of Wallace island.

Now, there is no doubt in my opinion that the evidence clearly demonstrates that the pilots all knew about the tug and barge. Captain Kabels had seen her visually and he had seen her on radar. The other pilots had seen the

tug and barge visually and on radar.

Now, at or about this Cooper Point and Waterford area, which are two lights on the Washington side of the river, there was some of this toolie fog, and there was a patch --

Q How do you spell toolie?

MR. ROBERTS: T-o-o-l-i-e. That's phonetically. I never heard it before but this is what the natives were saying, it was toolie fog.

The tugboat was navigating by following the trees on the bank of the Washington side of the river, and you will note on the exhibit, the chart that I have shown that the river turns a little and the pilots navigate on range lights and on courses at this particular point on the entire length of the Columbia River.

Q Does the record show the frequency of tankers of this size, draft and length?

MR. ROBERTS: Nothing at all in the record.

The vessel, and I think counsel will admit, opposing counsel, it is not unusual for the Columbia River. In fact, they have had a lot bigger vessels and a number of tankers come in on a periodic visit all the time from the refineries in the California area and Washington.

So it is not an unusual vessel by any means. In fact, as I have indicated, Captain Kabels had been on it

eleven or twelve times.

Q Incidentally -- or does the record show what the SANTA MARIA's bearer steerage way is?

MR. ROBERTS: Pardon?

Q Does the record show what the slowest speed the SANTA MARIA must possess in order to maintain --

MR. ROBERTS: There is nothing in the record, although the Chief Mate, Mr. Asplin, testified that as to maneuvering speed in the river full speed ahead was 11 to 12 knots and half speed ahead was about 7 to 8 and show ahead was 5 to 6.

Now, just prior --

Q Wasn't there something in the record that they had difficulty maintaining steerage at 5 or 6 or below?

MR. ROBERTS: The master-- the helmsman had testified, and I think it is on page 73 of the record:

"Q What did you do after the slowdown?

"A The Quartermaster, he said he wasn't steering, so I went back to half speed which is 40 revolutions for steering."

That's in the record.

Q Well, are you by that statement, indicating that half speed is the necessary speed?

MR. ROBERTS: Under these circumstances the -- I think to be perfectly honest and frank about it the record

would indicate that at this draft of 31 feet and fully loaded the vessel would be what they call "smelling the bottom." And it is pretty hard to steer at a low rate of speed.

So my position is that 7 to 8, under these circumstances, was more than justified and reasonable.

Now, there is evidence in the record to the effect that once you are on slow speed and are continuing for any length of time you do maintain steerage weight, but I don't think it was in relation to a vessel in these inland waters. Secondly, I do not believe that that took into consideration the fact that the pilot was changing courses all the time coming up the Columbia River and, therefore, when he was changing course it was necessary that he be on half ahead rather than slow ahead.

Q What is the depth of the channel?

MR. ROBERTS: It is 28 feet dredged, Your Honor, I think, at this particular point, Mr. Justice Stewart.

It is not a very deep river. The Corps of Engineers dredge it at all times and there is some appropriation to widen -- deepen the depths of the Columbia River.

Q It is a tidal river, isn't it?

MR. ROBERTS: No, I don't think the tide comes all the way up, by any means. It is fresh water at Portland and Longview, I believe.

Q What did you say was the depth at the stern?

MR. ROBERTS: She was 31 feet. I think maybe I mistook myself. It was 31 feet, and I think the dredged channel is 36 or 38 feet at this point. That is shown by the dotted line on the chart.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

Will you bear in mind that you have some important legal questions.

(Whereupon, at 12:00 o'clock noon, a luncheon recess was taken.)

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AFTERNOON SESSION - 1:00 o'clock

(Same appearances as heretofore noted.)

MR. CHIEF JUSTICE BURGER: Mr. Roberts, you may continue.

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

MR. CHIEF JUSTICE BURGER: You could win on all the facts of this case and not win if you --

MR. ROBERTS: I will get to the legal issues -- I will clear up the record.

The publications indicate the dredge depth of the channel is from 35 to 40 feet beyond the engineer's like to maintain it.

The issues before this Court arise out of the fact that the trial judge found the tug and barge solely at fault for this collision, and said that the evidence was overwhelming for such a decision.

The case was appealed by the tug and barge to the 9th Circuit on one ground and that was that the barge -- pardon me, the SANTA MARIA going at about 7 knots constituted a violation of the speed in fog rule,which is Rule 16, which requires a vessel to go at a moderate speed when traveling in fog, rain and so forth.

The 9th Circuit, under the ruling in the SILVER PALM, a 9th Circuit decision, interprets the words "moderate

speed in fog" to mean that a vessel apparently must stop within half the distance that you can see ahead. And in this case the 9th Circuit reasoned that the distance was probably about 900 feet, although I don't think there is any evidence in the record to substantiate that, and, therefore, the SANTA MARIA should have stopped within 450 feet and, of course, this is impossible at the speeed of 7 knots that it was traveling.

We take the position on this appeal that this is in conflict with other circuit decisions, 2nd, 4th, 5th, and in particular, with the 5th Circuit's decision in the Hess case, where that rule, Article 16, moderate speed was interpreted to mean taking into consideration all of the circumstances surrounding the location of the collision and the circumstances leading to the collision itself.

In this case, we feel that the evidence justifies an adoption of the rule of the majority of the circuits that moderate speed cannot be interpreted to mean half the distance ahead but that the prior of the facts must determine, based on all of the circumstances then prevailing, as to whether a vessel was or was not going at moderate speed so to come within Rule 16.

In this case, we feel the evidence very clearly showed that in determining that the vessel was going at moderate speed the trial judge, in effect, found that there

was no probability at all of the tug and barge crossing this narrow channel and making a U-turn in the channel itself and that the SANTA MARIA was on her own extreme side of the channel, the fog was patchy. It was a toolie type fog. It wasn't fog all the time on the voyage, and other vessels were navigating the Columbia River at that particular time.

The vessel was in the charge of a very, very experienced Columbia River pilot who had knowledge of the river -- intimate knowledge of the river -- and other pilots had indicated at the time that the fog conditions were such that it didn't prevent vessels navigating the Columbia River.

Q Do you think the rule that your attacking in this case is any different from the Rule of Sight?

MR. ROBERTS: No, I don't think it is. The Rule of Sight, I think, is the same as the half distance rule.

The evidence, Your Honor, indicates in this case that we saw the tug and barge on radar and the third mate on the bridge saw it the whole time in his binocul .

Q Well, anyway, you think the -- do you think the rule the other circuits are applying is a different rule than is applied in the 9th Circuit?

MR. ROBERTS: I do.

Q And the other circuits then are not applying the Rule of S ght?

MR. ROBERTS: No, they are applying the rule of reasonable speed under all of the circumstances.

Q How about your opponents contention that the Rule of Sight was approved by this Court in The Umbria?

MR. ROBERTS: I don't think the Court said that in The Umbria. That's the point. We take the position that the 9th Circuit in The Silver Palm misconstrued.

The Umbria is a very interesting factual case. In that case, you had the contention of speed on the part of the one vessel, but the outcome of that case was that The Umbria was held solely at fault even though there was speed in that case because --

Q What about the standard they applied in judging liability? Was it the Rule of Sight or no?

MR. ROBERTS: In The Umbria case, I don't think it was the Rule of Sight. At least I don't read it that way, Your Honor.

We are of the opinion that The Silver Palm, in effect, caught in straight jackets the pilot and the man conducting the vessel. He has to take out a slide rule, in effect.

Under these circumstances, the vessel -- the tug and barge disappear into the fog. It is just a small patch of fog, and suddenly the barge and the tug make a U-turn directly in front of the tanker in this narrow channel.

The only way, in my opinion, the facts show that this particular incident could have been avoided was for the vessel to have anchored at any sign of fog whatsoever. And I really believe that the decisions of the other circuits where they take into consideration all of the circumstances in determining reasonable or moderate speed.

Now, Judge Wright in the 9th Circuit just went on speed alone in reversing and holding mutual fault in this case. And the history of the Rule 16 and the way it has been interpreted by other circuits is to the effect that you cannot just say such and such a speed is not moderate. You have got to take into consideration all of the circumstances of prevailing at or at the time of the collision.

Also, in this case, where the evidence is that the tugboat -- that the barge and tug came out of the fog and the SANTA MARIA could actually see ahead a mile and a half to two miles, where do the distances run from? Do they run from the edge of the fogbank or do they run from immediately ahead of the vessel?

Judge Wright says from the edge of the fogbank.

I feel that under these circumstances the master is put into a straight-jacket. The pilot, under these circumstances, had no alternative. He has no judgment to exercise or discretion to exercise. As soon as he sees anything like fog or reduced visibility he must anchor the

vessel.

I don't think this is a reasonable inference to be taken from that particular language in Rule 16.

Obviously, if this case had gone up in the 5th Circuit, it would have been affirmed, in my opinion, based on the Hess Voyager case, and their interpretation of Rule 16.

Q What you are saying, really, is that in all of the circumstances shown here, the master and the pilot of the tanker have virtually an absolute right to assume that there wasn't going to be a U-turn by this tugboat and its tow.

MR. ROBERTS: That's exactly what I am saying, Mr. Chief Justice. It -- the analogy -- it sounds maybe not too good an analogy -- you are driving down the highway at a reasonable rate of speed and somebody turns in front of you.

The Court in the Maritime case says that we have the right to rely that this vessel, the tug and barge, will obey the law and not make this abrupt U-turn.

Q But in the analogy you give if the automobile not engaged in any turn is going 60 miles an hour in a 30 mile zone, where would you be?

MR. ROBERTS: Then there is under automobile law a prima-facie case of negligence per se, but under these circumstances, I think, where you take into consideration the steerage-way of the vessel, the testimony of the helmsmen,

and also the quartermaster and the pilot, I think, and the visibility that was prevailing, other vessels traversing this Columbia River, under all these circumstances 6 to 7 knots is not sufficient to show fault on the part of the SANTA MARIA.

I just think that the mathematical rule of half the distance ahead is just unworkable; in fact, in any sort of a speed situation case, you are going to have fault on the part of the other vessel because he can't come along under the Pennsylvania rule and show that speed could not possibly have had anything to do with it.

It just seems to be inequitable and the justice of the situation, in my opinion, cries out for some remedy to avoid the consequences of this 9th Circuit Silver Palm half a head distance rule.

Now if the Court gets to the question that was raised secondly in this case as to the division of damages, again, Judge Wright in reversing said this is mutual fault and therefore both vessels share the damage on a 50-50 basis.

Q Did you raise this second question in the Court of Appeals?

MR. ROBERTS: No, there was no reason to raise it, Mr. Justice Potter. We won the case in the trial and we never anticipated it. So you have raised it for the first time.

Q I suppose you anticipated the possibility of a reversal and I just wondered if you said -- and if the judgment is reversed, in any event, the 50-50 rule should not be applied.

Until that rule is changed by this Court, the Court of Appeals would not have listened to that argument.

MR. ROBERTS: No, they would not have listened to the argument, in my opinion. We feel that this 50-50 mutual fault is an anachronism; under present authorities, we are the only nation in the world, that I know of, that actually adheres to it.

I feel that is a very, very unfair rule, as demonstrated by the facts in this case. Even Judge Wright, in his opinion, finding mutual fault, said that the fault of the tug and barge was flagrant and it was shocking to some extent.

I would say that this case very aptly demonstrates the inequities of the mutual fault doctrine. There seems to be no doubt that most of the shipping industry, the lawyers, the maritime law association, Congress, to some extent, or at least some of the Committees of Congress, feel that the rule should be changed, and that the vessel should be charged proportionately with its degree of fault.

Q Where do we stand -- or let me put the question another way. Do we stand in the same posture here

as failure of Congress to alter legislation when they have failed to adopt the Brussels Convention?

MR. ROBERTS: No, I don't think so. The mutual fault doctrine, as I understand it, and read the cases, came out of the Catherine Dickenson case. It is a judge made law and if it is a judge made law and the judges and members of this Court can very easeily change it.

As very definitely demonstrated in the Hawn versus Pope and Talbot where this Court said contributory negligence was not a bar in a Maritime Court situation,where this Court in Moragne case said that there is a course of action in England waters to wrongful death based on unseaworthiness, there is no statutory prohibition in any way preventing this Court from changing that archaic rule of mutual fault under the circumstances or in the circumstances of any maritime collision, as we have demonstrated by the terms of our brief.

Q We had a case here last spring involving an Erie Railroad Company where we were asked to overrule the Halcyon Lines case, which, I think, was equally a judge made law, and, as I recall, we declined to do it. How do you feel your basic proposal differs from that made by the petitioners there?

MR. ROBERTS: I am familiar with that particular case. That was a maritime personal injury case, arising out of the maritime personal injury case, and it was indemnity by

one side against the other after the original judgments had been paid off.

In that particular case, it was the merits of the case in chief that supported the action for indemnity compared -- principles were applied.

The longshoremen or the railroad worker working on the barge in that case, if he was contributorially negligent or if he was negligent, his damages were reduced to the degree of his negligence, comparative negligence.

And in this case, we have original parties. This is not a case for indemnity. That is the only way I can distinguish this particular case, Mr. Justice Rehnquist.

The Atlantic Railroad case certainly, and in all maritime cases that I know of, the Jones Act, the Longshoremen and Harbor Workers Act cases, and so forth, comparative negligence is being applied by this Court and by other courts, States and Federal, in determining degree of fault in the personal injury deal.

The only difference that we are asking you to do at this time is to make it uniform and apply it in a property damage case.

That's all we've got here.

Q How does the share equally work now. If the barge suffers $10,000 worth of damage and the tanker $50,000, the barge pays $25,000 of your damage and you pay $5,000?

MR. ROBERTS: That's exactly.

And I think that type of a situation leads to litigation,because you get a situation and, I think, lawyers when they get amongst themselves in litigation tend to be fair with one another and can be determined based upon the facts the relative degrees of fault of their two vessels.

However, where you have a situation in which you have one 90% at fault and another vessel maybe only 10% at fault, and maybe it was a statutory fault and there is nothing to do with contributory of proximate case, elements in the case in any way.

Then the other lawyer is going to ask for mutual fault all the time, whereas if we had a comparative fault doctrine, and again, on that hypothetical, maybe they would settle the case on the basis of 85% 15 of even 80-20. No one is outraged by that type of negotiation and settlement.

I think it is very, very proper that that type of settlement can go on, but I think it cannot go on in this particular field where you have this archaic,outmoded, doctrine of mutual fault, and I don't see any reason at all from the legislative, political or social purpose , why the United States is the only maritime nation that adopts this particular mutual fault.

Q What were the relative damages to the barges?

MR. ROBERTS: They were fairly equal in this case.

The barge was the only one that sustained collision damages because the tugboat had made the U-turn and the tanker sustained damage on its port bow,and the starboard side mid-ship the barge sustained damages.

There was a little more, I believe, damage on the barge itself which would mean that the vessel might find the SANTA MARIA,under the mutual fault doctrine,to be more than the other side, and that is what is so, I think, unfortunate about such a doctrine.

There is also some indication that it leads to forum shopping. That is where you get in inland waters a vessel in collision with another, they will try and get it in the State's Court for the simple reason that the Court would basically apply the law of the forum or the United States which is the mutual fault doctrine and everything was aplit down the middle, 50-50.

Also, from a human nature viewpoint, I think this type of a doctrine tends to make the trial judge take the easy way out, in all sincerety. Instead of really looki at all the facts, as Judge Kilkenny did in this case, and made his own opinion and adopted it as his findings, there i some inclination to say, "Well, under the mutual fault doctrine, all I had better do is find a little," and that is the end of the case.

I believe that the doctrine is not useable any more and that this Court should overrule it.

Thank you very much.

Q Mr. Roberts, does the absence of any briefs here by insurance companies indicate that they are quite content with the existing rule?

MR. ROBERTS: I don't think that does. The -- It is not all insurance companies. Some of these vessels, as the Court knows, have very large deductibles on collision liabilities and things of this nature, and I don't think the absence of anyone from industry or from the Maritime Law Association, Congressional Records which we have cited in our brief would certainly indicate that the great majority of people concerned in this field would like the proportionate follow through.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Roberts.

ORAL ARGUMENT OF ERSKINE B. WOOD., ESQ.,

ON BEHALF OF THE APPELLEES

MR. WOOD: Mr. Chief Justice, and may it please the Court:

We have the two points to argue here, first one being the rule of navigation.

I agree with Mr. Roberts. I think there is no difference. We are just applying different labels to the same

rule that we call the half distance rule or the Rule of Sight.

That rule was really first evolved by the decisions of this Court in the Nacoochee and The Umbria and the Chattahoochee.

The rule laid down was that in a fog or restricted visibility the ship should proceed at such a speed as would enable her to stop in time to avoid collision with another vessel which she sees emerge from the fog.

Q Does that mean that it must come to a complete stop as it approaches a fogbank? Literally, it might, might it not?

MR. WOOD: No, because it would depend on the extent of visibility in the fog.

If he is about to enter a fogbank, you can still see some distance in the fog. I mean the line of the fogbank is not a solid curtain. You should certainly slow down to that speed as you approach that fog.

Q Some fogs are pretty dense.

MR. WOOD: They are pretty dense and then you have got to go pretty slowly.

Q Isn't the record here that these were patches?

MR. WOOD: It was patchy fog, but the tug and its tow for a time were completely sealed from the view of

the tanker.

That was found by the trial Court and the Ninth Circuit --

Q Wouldn't the experienced pilot, knowing the distance, undoubtedly be able to estimate the speed movement of the tug even unseen, would it not?

MR. WOOD: If he could be certain that the tug was going to stay where it was or maintain the same course of speed and not make any turns, that's the difficulty.

Q Why is that not a fair assumption on the record of this case? Isn't that a reasonable assumption?

MR. WOOD: It might be, but you never can be sure what's going to happen when you can't see the vessel. That's why radar is such an imperfection and why we have so many collisions despite radar that the courts have termed the coin "radar assisted collisions" because they see only the spot on the radar and can't tell the course and speed. And it gives a misleading sense of security. As in the ANDREA DORIA-STOCKHOLM case and many others, the ships tend to steer into each other when they think they are steering away from each other.

Q But in this particular case, even if there were no fog, and this tug made that U-turn, what would have happened?

MR. WOOD: If there had been no fog and the SANTA

MARIA could see that tug at all times with the visible eye, and the tug made a U-turn in front of her in such close distance that the SANTA MARIA could not avoid collision, I would think that it would be the tug's fault and not the SANTA MARIA's fault.

Q Probably -- we are dealing in if's -- the tug would not have made the U-turn because I gather from the record there was confusion as to where the SANTA MARIA was. The tug thought the lights were on its starboard bow. I say they had to be on the port bow, didn't they?

MR. WOOD: Not necessarily. There was a slight bend in the channel which further confused --

Q It was the confusion caused by the fog --

MR. WOOD: Caused by the fog --

Q -- that caused the tug to make the turn.

MR. WOOD: The tug in fact was taking in and through this action because of fear of imminent collision.

Q Does the capacity and experience of the tug crew and the master enter into that somewhat?

MR. WOOD: I don't think this really has anything to do with it. We are not contesting fault of the tug. We did in the Trial Court level, but when we got to the Court of Appeals we were only trying for mutual fault, and the sole issue before the Court of Appeals and the sole issue here on this matter of navigation is: was the SANTA MARIA going an

excessive speed when she was going at a speed of 7 to 8 knots. She knew that there was a vessel coming down meeting her some place in that fog which she couldn't see at that time and she was going at such a speed that not only she couldn't stop in half the distance, she couldn't stop in the full distance. Because when she first sighted that it was at right angles to her course.

And, of course, with the tug at right angles to her course, she occupied the whole distance to the point where she first saw it, and she was still going from 4 to 7 knots at the point of collision. She was going way over the speed allowed by the Rule of Sight.

I want to point out the Rule of Sight is a rule of safety. It is a rule that was first announced by this Court and fog, as Gilmore and Black says, fog is the ancient terror of mariners. Probably fog is one of the greatest causes of ship collisions, and speed in fog is one of the greatest causes of ship collisions.

My colleague here would argue that we shouldn't have any standards, that we should leave everything to the judgment of the master.

Q Why should the SANTA MARIA be justified in assuming on a clear day that the tug was going to stay on its side of the river, and, hence, the SANTA MARIA could maintain its speed? And then not be entitled to assume that

if there is in a patch of fog? What is the difference there?

MR. WOOD: Well, you wouldn't say --

Q Would the SANTA MARIA have been negligent at all if on a clear day she maintained her full speed, 12 knots?

MR. WOOD: I think the difference, as Mr. Justice Stewart has pointed out, the very fog itself lends uncertainty to the whole situation. The very fact that there is fog creates uncertainty in the whole situation.

If you have a bright, clear day, and you see the tug coming down, why, of course, you realize that the tug can see you and you are both going to stay on your own side. But when you have fog, you don't know what that tug is likely to do when she suddenly sights you --

Q But is more than likely to assume that tugs don't make U-turn though, isn't it?

MR. WOOD: I don't think you can be certain it won't.

Q This case proves that.

MR. WOOD: One thing has to be learned with a tug different from other ships is that a tug just can't handle the situation by going full astern, because it has its barge coming down behind it and that produced a collision with its own barge.

The tug reacted in extremes because of the confusion

of the fog. I think that the fog creates much greater danger than vessels meeting on a clear day and, therefore, I don't think anyone really has a right to assume anything -- there are certain assumptions you can make, but above all, you've got to keep your speed within what the law of the statute it.

The statute, Article 16, says "moderate speed." Now, as (inaudible) says (inaudible).

Now, the Courts for years have in applying that statute, applied an interpretation that you must go at such speed that you can stop within the Rule of Sight.

Q But if he followed that sight rule to stop the barge would it it, wouldn't it?

MR. WOOD: If the tug followed the rule of sight?

Q Yes. And stopped -- wouldn't the barge hit it?

MR. WOOD: The Rule of Sight does not require coming to a complete stop. The Rule of Sight would require that you slow down enough so that you can stop.

Q If you see something is about to bump into you, you are supposed to stop. That is the purpose of the rule.

MR. WOOD: Well, then, the tug ought to be going pretty slowly.

Q The question is: how is it going to slow down

and keep from running up the rear-end of the tug?

Q In practical fact, it -- the Rule of Sight -- does sometimes, strictly applied, will sometimes require you to stop, because the speed at which the Rule of Sight would require you to go would be to slow to maintain steerage with.

MR. WOOD: That brings us into steerage way.

Q Before you get to steerage way, let me ask you one more thing about the Rule of Sight.

Does the law of admiralty couple with this concept of the Rule of Sight -- some concept of foreseeable risk as you had in Cardozo's opinion in the Powers case of proximate cause, so that you are only liable even you breech into something that might reasonably have been foreseen to result from your breech?

MR. WOOD: Well, this touches on this. I think, as a matter of common sense, that radar -- now we don't apply the rule of sight in mid-ocean, where you have no radar indication of another ship any other place.

I do not push this Rule of Sight to the extreme that in the middle of the ocean, where you have an effective radar and you are sure that there are no other vessels in the area, in the vicinity at all, that you have to at all times hold down to a rule of sight speed.

I am trying to answer Mr. Justice Rehnquist's question. When you are in harbor waters, inland waters, in a

channel, such as the Willamette River, there you are expected to meet other vessels and your radar has already told you that you are meeting other approaching vessels.

Therefore, you are required to go with the Rule of Sight, and the very vessels that you are meeting are within the protection of that duty to go that moderate speed.

I think very much so, particularly because of the fog which creates a cloud and uncertainty over the entire navigation. That's the very reason for the Rule of Sight.

Q Would it be unreasonable to say here, from the point of view of those experienced (inaudible) that whereas a collision on a port-to-port passing might have been anticipated in a fog, a collision of the type that took place here couldn't have been anticipated at all?

MR. WOOD: I think it would be a little unreasonable to say it couldn't be anticipated at all. Bear in mind the ships are meeting at a bend in the channel so that with first sighting -- when the tug first sighted the lights of the ship they were dead ahead, and you might have an election of which way to go, I think it is going to be dangerous to try to end this Rule of Sight to make it non-applicable in fog situations where the other vessels hidden in the fog to say well, we had a right to assume that she would stay on her own side, or something. I think you are leading to hazards.

Bear in mind that this is a rule of safety, and we are talking about a rule that may affect life. I mean we are talking about a rule where ships may be carrying passengers and we may not have just a little collision like this. You have life and death at stake in here, in these cases.

I think that's the reason the Court has quite uniformly been quite strict on this Rule of Sight.

Now, it just amazes me that counsel says the Ninth Circuit is the only one to adhere to the Rule of Sight.

Gilmore and Black say a rule of thumb often applied. That is that the vessel could come to a dead stop in half the distance.

Judge Leonard Hand calls it a rule that everybody knows in the Anglo-Saxon Petroleum Company case. The Second Circuit has applied it over and over again.

Judge Leonard Hand says" lthough Article 16 only requires a vessel in fog to go at moderate speed, as everybody knows, the Courts have imposed a gloss upon this that the 'moderate speed is that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide.'"

Q Have the other Courts -- are there some Courts that do not follow it?

MR. WOOD: I would like to talk about that.

Q I think we denied certiorari in that case a couple years ago.

MR. WOOD: Hess Shipping allowed an exception of (inaudible). That's all it did.

The Fifth Circuit recognizes the Rule of Sight. There was a unanimous decision written by Judge John Brown, an experienced admiralty practicioner, and that was the Antinuous case, Finlayson-Forssa v. Pan-Atlantic, and I cited these cases in the Brief. There the Fifth Circuit said: "...the Antinuous had to demonstrate that ... she could stop before she traversed one-half the distance she could see."

That was the rule in the Fifth Circuit.

Hess Shipping came along and you had a very large tanker going at only 5 knots, not 7 or 8, and the testimony was that she couldn't possibly have gone any slower without being a hazard to navigation.

It ended up a 7 to 7 decision and you denied certiorari and the exception allowed was steerageway, that she couldn't have slowed down any more.

Q But she could have dropped her anchor.

MR. WOOD: She could have dropped her anchor.

Q Which the strict application of the Rule of Sight would have required, wouldn't it?

MR. WOOD: Under some decisions, yes.

I think the Pennsylvania, an early decision of this Court so said.

In Hess Shipping, as I say, the -- I think it is recognized as an allowance of an exception of bear steerageway.

The petitioner cannot escape under that umbrella in this case. They were going well in excess of bear steerageway.

The SANTA MARIA had three basic speeds, full, half and slow, and as the Court of Appeals opinion said, she didn't show that she couldn't have gone slower.

And my brief, on page 23, specifically covers this and quotes the testimony that her helmsman, the very man steering the ship, who had 22 years of experience, said it steered good and steered just as well at slow speed as at half and full.

"Q Is it more difficult to hold an exact course when you are going at slow speed?

"A I don't find it so, no. If you give it enough wheel, she will hold her course real good."

And, later on, "Q Does it make any difference whether you are going full speed, half speed or slow speed and fully loaded?

"A Not if you give it enough wheel, it doesn't make any difference ..."

Q At 5 knots, would this collision have been avoided?

MR. WOOD: I think so.

Q At 7, it ran the full distance between them? Is there any evidence on that?

MR. WOOD: Of course, the burden is on her under the Pennsylvania Rule, but they pretty nearly missed, and there is quite a difference in momentum between 5 and 7.

I am not an expert on ballistics or momentum, but it seems to me there is something about rate-time-speed, and so forth, and I think it goes up pretty rapidly. I think at 5 knots, you can come to a slower speed or reduced speed a lot quicker than you can at 7 or 8 knots.

And I think at 5 knots, if she had gone to full astern immediately, she would have checked her headway enough so that the barge would have swung clear.

In any event, the burden is on her to establish that under the Pennsylvania Rule, because she has committed a statutory violation. It is her business to show not only that her fault did not cause a collision, but could not have caused the collision.

Q Mr. Wood, do any of these cases treat the Rule of Sight as a presumption, shifting the burden of proof perhaps, and then leaving it to the Court to determine from the evidence whether or not the presumption has been

overruled or outweighed by the evidence in a particular case?

MR. WOOD: Yes, Mr. Justice Powell, I think that's perhaps another way of stating the Pennsylvania Rule that when she violates the Rule of Sight she is considered to have committed a statutory violation.

It puts on her the burden of proving not only that this violation didn't cause the accident but couldn't have caused it, and, therefore, if she fails to prove that, she is held condemned on that ground.

I think it is just another way of stating the Pennsylvania Rule; in other words, its a presumption that she has contributed to the collision, and in this case she didn't put on any evidence that the collision still would have occurred, and really couldn't.

I think this -- I just merely want to say that we have no conflict here with the fact that you consider the circumstances, because, of course, when you are determining whether your speed is such that you can stop in half the distance, all the circumstances come into play, whether you are fully loaded and have more momentum because of your weight or because you are light, whether you have a head wind, whether you have quick reversing engines or slow reversing engines, whether you've got a head wind or a tail wind. All those circumstances come into play, and it doesn't take any sliderule calculation, as my brother would say, any

more than when you are driving a car down a highway in a thick fog. It is probably a pretty prudent thing to do to not go at such speed, but you can't stop within a Rule of Sight because there might be a broken down automobile in the middle of the road ahead of you.

And when you are driving down the highway in a dense fog, why it is probably a pretty prudent thing to not exceed the speed that you can see ahead in the fog. At least I normally try not to go more than that, at least at which I can see lights.

So, I think it is a rule of common sense. I think the Court of Appeals decision on this point, when read carefully, is probably the best brief one could write for upholding the Rule of Sight.

This brings me to the point of damages, and division of damages.

I would just like to very briefly sketch the history of this.

Some 120 years ago, of course, this Court announced that in mutual fault cases damages are divided equally, and that has continued to be the rule.

The same rule is applied in England for years and years and years, and then it was actually made statutory. I did not have all this and didn't put it in the brief,but by the English Judicit Act of 1873, the 50-50 rule was made

statutory.

Then in 1910, we had the Brussels Convention which adopted proportional fault, but also did a lot of other things in governing relations with cargo, and the obligations toward cargo.

Now, we come to the legislative history in the United States,and Brussels Convention was submitted to the Senate in 1937 and it sat here for 10 years, There wasn't much action during the war but it remained here after the war, and after a 10-year period no action was taken on it and it was withdrawn. Then in 1962, in the 87th Congress, they put in Senate Bill 2313 and H.R., in the House, 7911, and those finally died on the floor. They were reported out of committee but died on the floor.

Then, the next year, in 1963 -- I do not include this in my brief, unfortunately. I didn't have all the legislative history research facilities in Portland and I checked this out with the Congressional Library here -- in the 88th Congress, again two bills were introduced, S. 555 and H.R. 1070, but those bills again which provide for proportional fault and to really enact the substance of Brussels, and they never got out of committee, never got out of subcommittee.

Now, so much for past history. This Court, although it was a personal injury case, it reiterated in

Halcyon the rule that in collision cases it is 50-50.

And as recently as 1963, in Weyerhaeuser v. United States, the unanimous decision opinion written by Mr. Justice Potter again refers to the rule, and so we have here a rule which is worked (inaudible)

Now, briefly on the merits of this rule versus proportional fault, contrary to what my colleague says, I am sure that it promotes silence. I think, from my experience --

Q Well, it eliminate one issue from the case, doesn't it?

MR. WOOD: It certainly elminates one issue. I think experienced lawyers sitting across the table will recognize that there is some fault here and some fault there and we settle 50-50.

In my own experience of 30 years I have never tried a major, you know, a big half million, two million dollar collision case.

I have settled many of them. And I don't know one in which I didn't say, "Your ship was a lot more at fault than ours and the other fellow was saying, "Your ship was a lot more at fault."

But when you get all through arguing you have to admit there was some fault on both sides and you settle it 50-50.

Now, the ANDRIA-DORIA-STOCKHOLM, which was one of the major collisions with most money involved, I don't believe it was ever tried in the District Court. It was an ultimate settlement. These cases have uniformly been settled and it is a pretty practical rule because, as my colleague's brief points out, you've got mostly hull insurance companies on both sides of these things and maybe they lose a little here but it evens up in the next case. Maybe in one case they felt they should have come two-thirds, one-third, but in the next case it is the other way, and they all settle 50-50.

Now, for just a moment on the burden that this might place on the Court, not only do I think that if you have a proportional fault rule each side is going to say your ship is going to say, "Your ship is more at fault." "No, yours is more at fault." Or you are going to litigate, but you are going to make the trials much longer because it is going to get to be a game of points.

Now, if I can just prove that you violated the Rule of Sight, you were going too fast in fog, that's all I have to prove, but if we get to proportional fault, I want to prove that he was not keeping a proper lookout on the bow, that he wasn't blowing his danger signals, he wasn't blowing fog signals, they turned port when he should have gone starboard, his radar watch was inadequate, and I am going to try to build up about ten points. And if he

proves a couple of good points against me, I've still got an 80-20.

I think you are going to have your trials get to be a sort of game of points and the trials are going to be a lot longer.

Now, Brussels Convention, very frankly, I favor Brussels Convention in toto. But I don't think -- I think it would be a great mistake to try to adopt one rule of proportional fault, which is kind of a piecemeal adoption of Brussels Convention.

Remember the Brussels Convention also regulates the obligations toward cargo, and this is very important to this case to understand the ship owner's obligation toward cargo, because every major collision case, or almost every one, you have inextricably involved with the cross-liabilities between two ship owners, you have obligations to their cargo.

Q I suppose the Brussels Convention could be recommitted to the Senate, could it not?

MR. WOOD: Could do it tomorrow.

Q Can do it tomorrow?

MR. WOOD: Of course.

Q Any suggestion it may be done?

MR. WOOD: There is talk of it from time to time. There is nothing to prevent it. I am sure that if there was

enough interest and enough push in this thing, that if people really wanted the 50-50 rule --

Q People, you mean insurance companies?

MR. WOOD: Insurance companies, steamship owners, cargo people, if they wanted to get a law passed, there would not be any great problem about it.

Q Lawyers would love it, wouldn't they?

MR. WOOD: Sure, I'd love it.

Q This has been more than a half century, now, hasn't it. That's slower than usual on these things.

MR. WOOD: Before Congress, yes, 1937.

Q But 1910 was when the convention took place. Wasn't it first presented right after it was -- agreement was reached?

MR. WOOD: I believe not, Mr. Chief Justice. The first that I have found that it was presented was 1937, which -- although, it was originally adopted in 1910, but I think you have to allow 25 years for it to be adopted by a lot of the other maritime nations and then when it got to be pretty uniformly adopted by the other maritime nations they made the push to have it done here. It never took hold.

I want to explain this matter of cargo. You see, the cargo on the -- it is important to distinguish between the carrying vessel, which carries the cargo,and the non-carrying vessel.

For many years, under Acts of Congress, the Harter Act, and carriage of goods by fiat -- we call it COGSA -- cargo has no right to recover against its own ship, the carrying ship, for negligent navigation, which is involved in collisions.

But cargo has always had the right to recover 100% against the non-carrying vessel. So that's what happens. Cargo gets its 100% of its recovery against the non-carrying vessel and under the 50-50 rule the non-carrying vessel then includes its payment to cargo in its damages and gets 50% back from the carrying vessel.

So, indirectly, the carrying vessel ends up paying 50% of the damage to its own cargo, but no more. They used to try to devise bill of lading clauses to get around that. Back in United States v. Atlantic Mutual, this Court held those bill of lading clauses void as against public policy.

So the law is well settled that the innocent cargo recovers 100% against the non-carrying vessel which, in turn, gets 50% back.

But now, if you were to adopt piecemeal extract out of Brussels Convention a rule of proportional fault, look at the result you would create. Innocent cargo on the carrying vessel -- and let's assume the carrying vessel is 90% to blame and non-carrying vessel 10% -- innocent cargo gets 100% of its damages against that 10% to blame

non-carrying ship. That ship, in turn, under proportional law would get 90% of the damages back from the carrying vessel.

So you have the carrying vessel which Congress, under Harter Act and COGSA, says is not responsible for damage to the cargo due to negligent navigation is being indirectly held for 90% of the damage.

Now this does two things. Number one, it pushes us a lot further than in the laws of other nations. If we are trying to achieve uniformity, let's try to get some uniformity in our maritime law, with England and Japan and Italy and Germany. But here we'd be pushing the thing further from uniformity because here you create situations where cargo would end up as a 90% recovery from its own vessel.

And under the law of other maritime nations, cargo cannot recover from its own vessel. And as for recovery against the non-carrying ship it is not 100% but it is such percentage as that non-carrying vessel is at fault.

Not only do you create havoc with uniformity, but you open the door, at least you create an atmosphere where there is an invitation to collusion.

A ship carrying a valuable cargo, has, say, $1 millio in cargo damage, and say maybe there is only $100,000 scattered damage to the hulls of the two ships, why he -- if he is pretty much in the blame -- is going to come in and

try to admit sole blame, say, "I am 100% at fault, and that other ship is free and clear," and shape the witnesses' testimony that way. Because if she's 100% to blame she doesn't have to pay any cargo damage. The cargo can't recover against the other ship.

Excuse me. Yes, if the carrying vessel is 100% to blame, that presupposes that a non-carrying vessel has no fault. So cargo gets nothing. And so with $1 million cargo damage and ship maybe $100,000 hull damage, why, the ship is going to throw the case, if it can do so gracefully, and escape that $1 million liability even though it might take $100,000 tab.

I think it opens the door to collusion and leads to ridiculous results. As far as the forum shopping, I've never seen any great amount of forum shopping on this. I don't think it exists, and when collusions are on inland waters, of course, they are controlled by the law of the place and forum shopping doesn't do you any good.

I submit that -- in conclusion, I am saying that the rule is a workable rule. We've had it for a number of years. We don't have the reason for change here that you have in Moragne. In Moragne, involving a deck on inland waters, we had utter chaos in the maritime field of substantive right of recovery for death because you relegated the suitor to the State death statute which varies from State

to State and which some places -- you had all kinds of non-uniform results.

We don't have the reason for trying to make new law or change law that you had in Moragne, and in view of the legislative history I think this thing should be straightened out by Congress, and I agree with, I believe it was Mr. Justice Rehnquist here, that absence of briefs amicus here, and the absence of any recent efforts in Congress, shows that everybody is pretty well satisfied with this 50-50 rule. It is a good workable rule.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wood.

Mr. Roberts, we allow you take the floor for a few minutes. If you have anything by way of rebuttal, we will give you three minutes.

REBUTTAL ARGUMENT OF KENNETH E. ROBERTS, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. ROBERTS: Thank you, Mr. Chief Justice.

I just have a couple of remarks.

Under the comparative fault doctrine, Mr. Wood has already said that under the mutual fault doctrine the non-carrying vessel puts -- if it is 10% at fault now, it still gets 50% back from the carrying vessel. It seems to me that if it gets 90% back from the carrying vessel based on comparative fault, that is more equitable and just under all of the circumstances. And I can't see any difference or

validity to his argument between the 50% he gets back and the 90% which he would get back if this Court decided to adopt the comparative fault rule.

That's all I have.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:53 o'clock, p.m., the case was submitted.)