In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v. No. 74-363

RELIABLE TRANSFER CO., INC.,

Respondent.

Washington, D. C.
March 19, 1975

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UNITED STATES, Petitioner,	
v.	No. 74-363
RELIABLE TRANSFER CO., IN., Respondent.	

Washington, D. C.,

Wednesday, March 19, 1975.

The above-entitled matter came on for argument at 2:19 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

JOHN R. RUPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner, [pro hac vice].

COPAL MINTZ, ESQ., Krisel, Bech & Halberg, 55 Liberty Street, New York, New York 10005; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in United States against Reliable Transfer, 74-363.

Mr. Rupp, you may proceed.

ORAL ARGUMENT OF JOHN P. RUPP, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition for certiorari to review a decision of the Court of Appeals for the Second Circuit.

The sole question presented by the petition was whether the admiralty rule applied in mutual-fault collision cases of dividing damages equally should be replaced by a rule apportioning damages in proportion to fault.

The facts necessary to provide a context for consideration of this question are few, and are rather fully set forth in the government's brief on the merits.

Briefly, on the evening of December 23rd, 1968, respondent's tanker, the MARY A. WHALEN, left Constable Hook, New Jersey, in heavy winds and high seas bound for Island Park, Ne York, with a load of fuel oil.

During the course of the passage, the vessel became stranded to the west of an inoperative breakwater light on a promontory known as Rockaway Point.

After a trial that lasted for several days, the district court held that although the Coast Guard had been at fault in failing to complete repairs on the breakwater light earlier, the fault of the captain and crew of the MARY A. WHALEN, respondent's vessel, had been far more egregious.

Specifically, the court found that the stranding was due 25 percent to the negligence of the Coast Guard, to the fault of the Coast Guard, and 75 percent to the negligence of the captain and crew of the WHALEN.

Despite the fact that the court found the respective faults of the parties to have been disparate, and after having observed that while a division of damages in proportion to fault might be more equitable in this case, the court, nevertheless, applied the divided damages rule, or ordered that a damage hearing be held in which the divided damages rule would be applied.

The Court of Appeals affirmed, stating that so far as negligence was concerned, the vessel's claim that it was not at fault borders on the frivolous and, with respect to remedy, that it was powerless to divide the damages other than equally, even though it recognized the force of the argument that in a case of this sort an unequal proportional division of damages would be more equitable.

Although respondent chose not to file a cross-petition in this case, it nonetheless sought, in its opposition

to the government's petition for certiorari, and in its brief on the merits to raise an issue entirely separate from the issue of divided damages, with respect to which the government petitioned.

That issue is whether the courts below correctly apportioned fault between the parties.

In its brief in opposition, the thrust of the arguments made by respondent were that -- were to the effect that this case is an inappropriate vehicle for reconsideration by this Court of the divided-damages rule.

In its brief on the merits, the argument appears to be that the courts below, the factual findings of the courts below found by the district court and affirmed by the Court of Appeals, were incorrect. They are seeking a de novo reweighing of those findings by this Court ultimately for a vacating of the judge below and a remand to the court with instructions to direct an increase in the judgment in its favor.

The contention that respondent need not cross-petition on an issue such as this, I think the cases of this Court relatively clearly answer.

The general rule was perhaps most clearly stated, I think, in Lang vs. Green, and the holding in that case has been approved and extended, to some extent, in a number of recent cases, including this Court's recent decision in ITT vs. Continental Baking.

I should note additionally, since there appears to be a misapprehension on this point, on the part of respondent, that the present case is very much unlike Union Oil Company vs. The SAN JACINTO, the case which this Court took a couple of years ago to consider the continuing vitality of the divided-damages rule.

In that case, petitioner both petitioned, presented the question of whether the finding of fault below was proper; and, secondly, so far as the respective negligence of the parties was concerned, the dispute there involved the dispute over a question of law, and not an issue of fact which is involved in this case.

Unlike the situation with which this Court was presented in the SAN JACINTO, then, this case presents in clear and uncomplicated form the continuing vitality of the divided-damages rule.

In our brief on the merits we attempted to set out in some detail the historical antecedents of the divided-damages rule. As noted there, the rule can be traced with some assurance to rules of admiralty which once prevailed in England and France and in most other major maritime nations. Originally, the rule was primarily -- or rather exclusively a risk-sharing device.

In the middle of the Sixteenth Century, however, with the development of negligence concepts, particularly in

English jurisprudence, the rationale of the rule began to undergo a continuing process of erosion, a process which, I would suggest, has continued to this day.

By the first quarter of the Nineteenth Century, application of the rule was restricted to cases in England, to cases of sole fault, and was expressly inapplicable pursuant to the decision of the House of Lords in Hay vs. LeNeve, inapplicable to cases of sole fault, to cases of inevitable accident, and to cases of inscrutable fault. Inevitable accident, that is those cases of collisions resulting from such things as acts of God; and inscrutable fault, where fault could not be -- precise locus of fault could not be determined.

The first case decided by this Court applying the divided-damages rule, that is, the first case in which the issue was squarely presented for decision was the SCHOONER CATHARINE, which was decided by this Court in 1854.

From the opinion in that case and in subsequent cases, it's relatively clear that the rule was adopted by this Court for at least three reltively distinct reasons. First, because of the assumed difficulty of courts in apportioning damages other than equal in mutual-fault collision cases; secondly, because it was hoped that the rule would induce a greater degree of care in navigation; and, finally, because of this Court's abhorrence in applying a doctrine of -- a bar of contributory negligence in cases of this sort.

We submit that none of these considerations carries much weight today, but the latter rationale is particularly instructive. That is, that the divided damages rule represents an improvement over the common law bar of contributory negligence.

This Court's refusal to import into admiralty law the common law principle of contributory negligence is a reflection of this Court's inherent power, often affirmed, to give or withhold damages in admiralty cases upon enlarged principles of equity.

Perhaps nowhere in admiralty law has this principle been more uniformly followed than in cases involving personal injury or death. Even before this Court's decision in the MAX MORRIS, in 1890, lower courts were apportioning damages in collision -- in accidents subject to admiralty law, accidents involving personal injury proportionally.

The Court in the MAX MORRIS, did not specifically address that issue or did not decide that issue, although decision in that case speeded that development. Over time the remedy of proportional damages has become co-terminus with th substantive rights of people to maintain causes of action in admiralty, personal injury and death.

That development has been specifically approved by Congress, of course, in the Jones Act -- implemented by Congress in the Jones Act and the Death on the High Seas Act,

as well as others.

So far as property damage is concerned, however, a number of commentators, notably among them Gilmore and Black, have suggested that it is far from clear that replacing a bar of contributory negligence in mutual-fault collision cases represents an improvement over the bar of contributory negligence.

The capacity of the rule to produce inequitable results is, I think, amply demonstrated by the facts of the present case.

The government in this case was found to have been 25 percent at fault, because of its failure to repair Rockaway Point breakwater light more speedily.

Yet, under the divided-damages rule, it is liable for fifty percent of the total damages suffered in the stranding of the WHALEN.

Under the doctrine of contributory negligence, the government would be immune from any liability in this case, even though it was found to have been 25 percent at fault.

In the first case under the divided-damages rule the windfall is in the favor of respondent.

QUESTION: Was there any damage to the light or was it just to the tanker?

MR. RUPP: I think there was no damage to the light. I think all of the damage in the case, occasioned by the

stranding, was caused to the vessel and its cargo.

In the one case, the windfall is 25 percent in respondent's favor. If a contributory negligence doctrine were applied in this area, the windfall would be 25 percent in the government's favor.

The gap between what is equitable in cases of this sort and the result produced by application of the divided-damages rule, I think becomes clearest in cases which involve statutory fault. And the doctrine of statutory fault, of course, emanates from this Court's decision in THE PENNSYLVANIA.

The rule of THE PENNSYLVANIA is that the party to a collision guilty of a statory violation must prove not merely that its fault might not have been one of the causes of the collision or that it probably was not, but that it could not have been.

This is a burden seldom carried in practice. With the result that parties guilty of simply a technical violation often find themselves condemned to pay fifty percent of the damage by virtue of the joint operation of the rule of The PENNSYLVANIA and the divided-damages rule.

Not surprisingly, the number of such cases of widely disparate fault covered by the divided-damages rule has increased in rough proportion to the proliferation of rules of navigation.

Presently there are four sets of rules of navigation

provided by federal statute: the International rules, the Great Lakes rules, the Inland rules, and the Western river rules.

As well as three sets of pilot rules, regulations issued by the Coast Guard and State and local statutes and regulations.

At pages 17 and 18 of our brief we sketch the procedures generally applicable to admiralty cases involving collisions, procedures which I think put in some perspective the scope and the intensity of the criticism that over time has been directed at application of the divided-damages rule in mutual-fault collisions.

As we indicated there, while the inequity of the divided damages rule is often shielded to some extent from public scrutiny, there has been an increasing and substantial amount of public criticism, particularly in recent years, concerning application of the rule.

Indeed, our research in this case has not turned up a single commentator who has approved continued application of the divided-damages rule, and I hasten to add that does not mean there are none; I simply haven't found one.

Perhaps the most telling criticism of the rule, and the principal reason that the government is here today requesting that it be abrogated in favor of a proportional-fault rule, is that the United States today stands alone among the major

maritime nations of the world in applying a divided-damages rule in mutual-fault collision cases.

This fact, I think, is significant for several reasons:

First, it provides rather conclusive support from the view -- for the view, rather, that there is a readily available and workable alternative to the rule of divided damages; namely, the proportional-fault rule.

Second, the isolated maintenance of the divided-damage rule in this country has the inevitable effect of encouraging transoceanic forum shopping, a point which is made, I think most clearly, in Gilmore and Black's treatise.

Third, the fact that the United States alone applies a rule of divided damages introduces into international maritime commerce a good deal of unpredictability, and I think an unnecessary amount of unpredictability.

This Court, we submit, has already recognized the -- implicitly recognized the unfairness of the divided-damages rule, at least in the most extreme cases of disparate fault, by creationg of a so-called major-minor fault exception.

The major-minor fault rule stems from this Court's decision in THE CITY OF NEW YORK and THE UMBRIA. The rule was stated in THE CITY OF NEW YORK as follows:

"Where fault on the part of one vessel is ... of itself, sufficient to account for the disaster ... any reason-

able doubt with regard to the propriety of the conduct of such other vessel should be resolved in the other vessel's favor."

As noted at pages 24 and 25 of our brief, the major-minor fault rule has proven extremely difficult to apply in practice.

One of the problems of the rule is that it encourages courts to avoid a full and fair consideration of cases on its merits, in cases where the fault is obviously disparate.

More importantly, I think, however, is the fact that the major-minor fault rule itself involves an inequity; that is, it absolves parties from fault even though -- excuse me -- it absolves parties from liability, from paying damages, even though found to have been at fault.

The rule is, I think, then, to that extent, but a variation of the contributory negligence doctrine.

QUESTION: Well, doesn't the divided-damages rule at least make it easier to settle these cases, so there's less judicial time taken up with trying to figure out whether he was 65 percent at fault or 35 percent at fault?

MR. RUPP: That was a point which was discussed at some length, I recall, in the briefs filed in THE SAN JACINTO. I think that's not the case.

If a party is involved in a collision in which his fault is minor, and the lion's share of the damage occurs to the other vessel, there is every motivation not to settle.

Because not to settle both gives the relatively less negligent party a shot at the major-minor fault rule, and also stays the day at which there is going to have to be a substantial payment to the more negligent, relatively greater damaged vessel.

I think the best -- the most that can be said is that whether damages would be encouraged or discouraged, relatively, by moving to a proportional fault rule, is speculative.

I can conceive -- and I gave you an example of a case in which the opposite would be the case. My opponent, I am sure, can suggest an equal number of cases in which the divided-damages rule would encourage settlement.

But I think that -- my own view is that this Court ought not to approve a rule which encourages settlements which are unfair, which is something that the divided-damages rule does; that is, if --

QUESTION: When you say unfair, you mean unfair because of the rule?

MR. RUPP: That's right. That's right.

Now, while the court need not necessarily reach the issue in this case, we would suggest that the major-minor fault rule is itself badly in need of reconsideration. If the rule of proportional fault is adopted, as we suggested, I see little residual need left for the major-minor fault rule.

And that rule has masqueraded under various other names as well; it's called "glozing" in some courts; other courts analyze fault in terms of their active or passive characteristics in cases in which the fault is obviously disparate.

The opportunity to move away from the major-minor fault rule, I think represents a major advantage of a proportional fault rule, and people like Black and Gilmore and Judge Friendly in the Second Circuit agree.

It is important that it be clearly understood that the government is not, in this case, asking the Court to do Congress's work, and to ratify the Brussels Convention of 1912.

It is true that part of the explanation for the failure of the Convention to be ratified is the fact that various of its provisions have been opposed by specific interest groups.

That opposition has not, however, been directed at the proportional fault rule, which appears in paragraph 1 of Article IV of the Convention. It has instead been directed at other provisions of the Convention which are severable.

Cargo interests, for example, have vigorously opposed the elimination in paragraph 2 of Article IV of the Convention of joint and several liability in the event of a collision; contending, I think with some justification, that such a change in their substantive right to recover should be affected, if at all, by the legislative process rather than

by treaty ratification.

A number of other groups have opposed Article VI, which eliminates the legal presumptions of fault.

Congress's failure to replace the divided-damages rule with a proportional fault rule, in the face of the amost unanimous support for that course, evidenced during the hearings on the Brussels Convention, simply means, we would suggest, that the responsibility for the rule has remained where it began: with this Court.

As this Court stated in a not dissimilar context in Moragne vs. States Lines, we do not think that Congress's failure to take action on the pending bill or to pass a similar measure over the years, as the law of deaths on territorial waters became more incongrous, provides guidance for the course that we should take in this case.

To conclude that Congress, by not legislating on this subject, has in effect foreclosed by negative legislation, as it were, reconsideration of prior judicial doctrine would be to disregard the fact that Congress has already left in this Court the responsibility for fashioning the controlling rules of admiralty law.

I think that applies with equal force here.

We are satisfied, moreover, that there are no impediments to adoption of the proportional fault rule by this Court in this case. Although the rule of divided damages

has been applied in this country for over a hundred years, it has become increasingly anomalous over time. And the reasons originally invoked in support of it have become increasingly unpersuasive, I would suggest.

It seems a little late to argue, for example, that courts will prove incapable of applying a doctrine of comparative negligence. The contrary has proven to have been the case in all other places in the world, where the proportional fault rule has been adopted by treaty, or by judicial decisions, and courts in this country have long become accustomed to applying proportional fault rules as well.

And it has proven capable of doing so more particularly in admiralty, where personal injuries have been involved.

If mathematical certitude is not possible, Gilmore and Black are, nevertheless, surely correct in suggesting that the porportional fault rule would at least not be designed to go wrong in as many cases as the divided-damages rule.

It bears repeating in addition, I think, that we are not asking in this case for the abrogation of the divided-damages -- of divided damages, or a fifty-fifty division of damages; in cases where the locus of fault, the precise locus of fault or the percentage of contribution of fault cannot be determined, or in cases in which fault is relatively equally borne by both parties.

QUESTION: Well, I suppose all we could decide in this case, if we followed your suggestion, is that 75/25 fault means 75/25 division of damages.

MR. RUPP: That's right. That's the --

QUESTION: We wouldn't write a statute, I suppose.

MR. RUPP: No, that's right, and that's precisely what we're asking for.

To the extent that it's contended that the divided-damages rule is more likely to induce care in navigation than a proportional fault rule, which was one of the principal motivations for the decision in the SCHOONER CATHARINE, I would suggest that the contention, at this point at least, runs directly counter to logic and experience.

The divided-damages rule lumps the egregiously negligent with the party guilty of only minor fault. The result is to make the degree of respective fault irrelevant, is to remove any inducement to the practice of greater and greater degrees of care.

Finally, I should like to address myself briefly to another point discussed at some length in the merits briefs in the SAN JACINTO case, but not touched upon to this point by respondent in this case.

That is, that for this Court at this point to adopt a proportional fault rule would be inconsistent with the policies expressed by Congress in the Harter Act and the

Carriage of Goods by Sea Act.

I think that that argument fails for several reasons.

One is that the only problem in that respect, if it is a problem and we contend that it is not, stems from this Court's decision in THE CHATTAHOOCHEE in 1899. The Harter Act was passed in 1893.

The Harter Act generally, with a number of exceptions, relieves from direct suit the carrying vessel for damage to cargo.

In THE CHATTAHOOCHEE, this Court decided that Congress did not mean by the Harter Act to affect the relationship between one vessel and another, or, in a case of this sort, between the United STates and the carrying veseel.

And I think the same result -- I think that decision was correct, and the Court has, I should point out, reached the same result in cases arising under the Workers and Longshoremen's Compensation Act in Armidalty, as well as under other statutes, Workmen's Compensation type statutes. There is no evidence in the legislative history of either the Harter Act or the Carriage of Goods by Sea Act that Congress meant to remove from this Court its historical discretion to enforce rules which go to remedy in admiralty.

I see no inconsistency with the Harter Act, and the course that the government is asking this Court to take in this case.

QUESTION: Well, does overruling THE HARRISBURG automatically mean that, in addition to overruling the divided-damages -- equal division of damages rule in cases of mutual fault, does it also mean imposing the rule of proportional damages, or division of damages in accordance with fault? Or would -- the alternative is, I suppose, to say well just ordinary rules of contributory negligence would apply.

MR. RUPP: Well, of course, this Court could do that. This Court could replace the divided-damages rule with the doctrine of contributory negligence in admiralty.

QUESTION: Well, just overruling the -- overruling THE HARRISBURG would get you to the --

MR. RUPP: THE SCHOONER CATHARINE.

QUESTION: I mean -- that's right.

MR. RUPP: Yes. No, that's right. Simply overruling THE SCHOONER CATHARINE --

QUESTION: That's what I meant.

MR. RUPP: -- would not get us where we feel we should be in this case.

QUESTION: Yes, and the --

MR. RUPP: The Court would have to affirm -- would have to reverse the decision of the Court of Appeals and direct that judgment be entered for damages in proportion to the degree of fault found.

QUESTION: Except that the law of admiralty generally,

in personal injury and death cases, has been one of --

MR. RUPP: Of proportioning fault.

QUESTION: -- of proportioning the fault.

MR. RUPP: Yes, that's right.

QUESTION: So that the law of contributory negligence is unknown to the law of admiralty.

MR. RUPP: Yes, that is correct. Yes, it is.

QUESTION: To the extent there's any difference, in any event, you would like this Court to say that the rule henceforth shall be that which was agreed upon in the Convention of 1912, not yet ratified by the Congress -- by the Senate.

MR. RUPP: That's right. Essentially what we're asking you to do --

QUESTION: You want to put us on a parity with the other major maritime nations.

QUESTION: Right.

MR. RUPP: That is correct. We are asking that this Court move away from the rule of divided damages in light of the movement of the rest of the world and the problems which that has occasioned, not --

QUESTION: Specifically to take the rule as it's now stated in the 1912 Convention, --

MR. RUPP: Yes, that's right.

QUESTION: -- in that section you gave us; is that it?

MR. RUPP: Yes. The first paragraph of Article IV.

QUESTION: So, in fashioning some new rule, we should draw on relevant sources, and that's one of them?

QUESTION: Unh-hunh.

MR. RUPP: Yes, that is correct.

QUESTION: Plus the rest of the American admiralty law.

MR. RUPP: Yes, that is right. And I want to emphasize that point.

Congress has approved of the -- the Court has led the way in the area of personal injuries, in enforcing proportional fault, and apportioning damages in proportion to fault.

There are no circumstances which make it more appropriate or inappropriate for this Court to act in this case, other than the fact that the rest of the world has already done it. Which we suggest makes it all the more justifiable.

QUESTION: Mr. Rupp, --

MR. RUPP: Yes, Your Honor?

QUESTION: -- the government in the courts below relied also on the doctrine of last clear chance. I take it you're not pressing that issue here?

MR. RUPP: No, we are not. We did not petition on the issue of the parties' respective fault. In part because

we felt it wasn't a matter for cert relief; and consequently I don't press it here.

QUESTION: There's a good deal of equity in it, though, isn't there?

MR. RUPP: There may well be, yes.

QUESTION: Mr. Rupp, I couldn't hear Mr. Justice Powell's question, and I hope this isn't repetative.

Is the government's position here consistent, in your estimation, with the trend toward no-fault insurance?

MR. RUPP: Well, I'm not as conversant on no-fault insurance as I might be. I think probably not.

We're not here concerned about the speediest, most expeditious resolution of these disputes, although, in my answer to Mr. Justice Rehnquist, I think there's no reason to believe that the approval by this Court of a proportional fault rule would lead to any less expedition.

The rule which we're asking the Court to adopt here is consistent with the normal rules of negligence, negligence particularly as applied in the area of personal injury in admiralty law.

QUESTION: I notice there are no amicus briefs filed. Does this indicate, in your view, that the insurance industry is not very concerned about the present state of affairs?

MR. RUPP: It does, indeed.

I think that's particularly so, given the fact that

two years ago this Court gave very clear indication that it was prepared to consider, again on the merits, the vitality of the divided-damages rule.

In THE SAN JACINTO you got no merits briefs from insurance companies or any other group. I think that that's explicable because, if one reads the hearings which have been held on the Brussels Convention, it's apparent that no one opposes this. You've gotten no amicus briefs here, and I think again it suggests that there is no real opposition, other than the party standing to lose first by application of a proportional fault rule.

QUESTION: And I supposed you'd say, or no real support.

MR. RUPP: No real support for --?

QUESTION: Your position.

MR. RUPP: Oh, for our position.

Perhaps they were prepared to rely on us.

[Laughter.]

QUESTION: Is there something we should know about the failute of Congress to adopt the Convention?

MR. RUPP: I think not. We attempted to set that out as clearly as we could and in some detail in our brief. There was at -- there was a problem initially at the Convention of a poor translation; that led to a good deal of confusion. We explain to some extent --

QUESTION: But there's nothing in the congressional history that indicates that Congress refused to adopt the divided -- the proportional damages rule?

MR. RUPP: No, there is absolutely not.

QUESTION: That's all I meant.

MR. RUPP: Yes.

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

Mr. Mintz.

ORAL ARGUMENT OF COPAL MINTZ, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think the United States stands alone, as stated by my friend here, because Congress has chosen to retain the rule as is. It's an ample opportunity to either confirm the Brussels Convention or to adopt a statute which would incorporate the rule in respect to divided damages.

QUESTION: You don't think it's just legislative inertia?

MR. MINTZ: I doubt it very much because Congress has been very active in legislating in this area of admiralty. It's adopted any number of statutes, and to assume that Congress has not taken up this out of lethargy seems to me is being unfair to Congress.

Now, I think it's more fair to say that Congress

has decided the rule as is is better than the proposed one.

I would like now to go to my argument. Contrary to the contentions that have been made by my friend, I think the issues here still are: one, is this case an appropriate basis for the reconsideration of the divided-damage rule?

I will elaborate on that in just a minute. In the meantime I want to set forth the other merits -- issues.

Two, is this Court the appropriate forum or body to consider changing the rule, or should it be left to Congress?

And three, are the merits of the rule and of the alternative urged by petitioner, is the latter equitable, more ligical, more practical, and thus more desirable than the present rule?

I must suggest that the government must prevail on each of these issues in order to be entitled to a judgment in its favor from this Court.

Now, on the first issue, there is no finding, really, of 25 percent and 75 percent; that's an adjudication, it's a judgment, so expressed by Judge Dudd. He said, it's difficult to arrive at mathematical determinations and, under all the evidence, I conclude that the 25 and 75 is fair.

QUESTION: Well, you would agree, I take it, that in some cases it's more readily done than in others?

MR. MINTZ: Yes. And in those cases where it's

evident that one is very slightly at fault, then you don't give them a recovery, and you don't hold them liable. I should say don't hold them liable.

But where you come to -- how does one say it's 25, not 30, not 35; 75, not 65? What basis is there to make those determinations, as far as fault is concerned?

Beyond that, I suggest that's irrelevant. Because where you have a situation where, but for the negligence of both, there would be no accidents, that is irrelevant, whether a contribution of one or the other is 25 or 75, or whatever the ratio may be, if he hadn't been at fault there would have been no accident.

Therefore, why should he not share in the damage that is the result of the co-negligence of both parties?

Now, moreover, the government has been guilty of a statutory violation:for over 24 hours it left that light unlit. It knew it. It had notice of it. And under the rules that my friend has cited, this Court has several times decided that where the cause of a disaster or accident is a violation of a statutory duty, that then it bears the entire liability unless it's conclusively demonstrated that it wasn't the sole cause.

Now, so we have here a prima facie case where the sole cause was the government's. Yet Judge Dudd, finding that the accident would not have occurred -- that is the finding

of fact, that the accident would not have occurred, and the damages would not have been sustained if the light had not been not burning.

So we have here a straightforward finding which brings into play the rule that I have just adverted to, and that my friend adverted to, that where the negligence consists of violation of a statutory duty, the violator bears the entire brunt of the damage.

So that here we have a case which, under normal rules, would have resulted -- by application of normal rules, would have resulted in a finding that the government is liable for the entire damage.

And yet we are asked here to -- the Court is asked here to make a determination, nevertheless, that damages dhould remain apportioned, or should be apportioned 75 to the government and -- I mean 25 to the government and 75 to the vessel; which I think is a gross injustice and which I think illustrates that the rule for which the government is now asking, is really an unfair rule.

And I --

QUESTION: You think fifty/fifty is unjust, too, don't you?

MR. MINTZ: In a case like this where the damage -- where the negligence was entirely the government's, or whoever it may be, in such a case, the damage, the entire damage

should be borne by the person who is thus negligent. And that was the determination in several cases by this Court, where they held that violation of a duty cast upon the violator was a complete responsibility for the consequences.

QUESTION: But you would still want to get off with fifty percent -- you're willing to get off with fifty percent?

MR. MINTZ: No, I'm not. I'm not. We may have to. But that is not our desire. We were cross-appellants in the Court of Appeals.

QUESTION: But you're not cross-appellants here.

QUESTION: You're not a cross-petitioner here.

MR. MINTZ: We couldn't have been a cross-petitioner here, because I don't think, under Rule 19, because -- responsibly petition this Court to consider this case under the determination of the fact of who is more liable than the other. That's a question that arises in normal cases, and this Court takes cases only when there's a rule of law involved, and not when it's an issue of fact.

QUESTION: Mr. Mintz, did I understand you to say that the fault was entirely that of the Coast Guard?

MR. MINTZ: Yes.

QUESTION: But the district judge found to the contrary, didn't he?

MR. MINTZ: No, he didn't.

QUESTION: But he says that --

MR. MINTZ: He's inconsistent. He says: But for the negligence of the government, this accident would not have happened.

That's a finding of fact. The rest is a conclusion of law.

QUESTION: You think this is a conclusion: The fault of the vessel was more egregious than the fault of the Coast Guard?

MR. MINTZ: Yes, I think it is where the basic finding -- evidentiary finding is, that but for the fault of the government this would not have happened.

That's his evidentiary finding.

QUESTION: Where is that?

MR. MINTZ: In his decision.

It's repeated twice. And the Court of Appeals said it's common sense. The Court of Appeals agreed with that determination: that but for the negligence of the government, this case would -- this fault would not have happened.

QUESTION: Well, any time you have a finding of negligence plus proximate cause on the part of two parties to an accident --

QUESTION: That's right.

QUESTION: -- they're both responsible to a degree, aren't they?

MR. MINTZ: Well, what I'm saying, Your Honor, is that where the judge determines that but for the negligence of the government there would have been no accident, then there is no causative negligence on the part of the one who's been hurt.

QUESTION: Well, I just don't follow you on that at all. Surely he could find, with more reason on this record that had it not been for your master's fault there would have been no accident.

MR. MINTZ: No, because the master's fault was occasioned by the absence of the light.

QUESTION: Well, he --

MR. MINTZ: He would not have been -- that's what the finding is; he would not have made the maneuver he did if he had known where he was, and he would have known where he was if he had the light.

If Your Honors will read the decision of Judge Judd, you will find those are his basic findings, and those were confirmed by the Court of Appeals.

QUESTION: But that's kind of a "but for" causation type of thing, that even though it's a fairly minor fault, if he had said "but for the government's fault it wouldn't have happened", even though your man was very far afield from normal care after he acted on his own.

MR. MINTZ: But why was he where he was? Not by

reason of poor navigation, he was where he was becuase he was misled by the absence of the light.

QUESTION: But that "but for" type of causation is a final conclusion that has been rejected in almost every branch of jurisprudence, hasn't it?

MR. MINTZ: Well, I'm not -- I don't know of that at all, and I don't see that if you say that's not a finding of fact, I think the 75 and 25 are not findings of fact, either.

QUESTION: Mr. Mintz, may I read from the Court of Appeals opinion?

"We hold that the court was not clearly erroneous in finding that the negligence of both parties, in the proportion stated, caused the stranding. The vessel's claim that it was not at fault borders on the frivolous."

MR. MINTZ: Yes, I --

QUESTION: And you say that's a finding of the Court that you were right. Is that your position?

MR. MINTZ: No, the Court --

QUESTION: Well, what language do you rely on?

MR. MINTZ: I rely on the findings of Judge Judd that "but for the negligence of the government this accident would not have happened."

QUESTION: And you say the Court of Appeals approved that?

MR. MINTZ: And the Court of Appeals said yes, it's a matter of common sense.

QUESTION: Where does it say that?

Oh, never mind, I'll find it. Like I found this other one.

MR. MINTZ: It's there.

The Court found -- here's the Court of Appeals -- the Court found --

QUESTION: Where are you reading from?

MR. MINTZ: I'm reading from page 4 of my brief --

QUESTION: Oh, well, I'll get the opinion itself.

MR. MINTZ: No, you will find it on page 10 of the Appendix.

QUESTION: Right.

MR. MINTZ: The Court found, as common sense would dictate, that if the breakwater light had been operating, the captain would not have stranded the vessel.

QUESTION: That's in the next paragraph after saying what you said was frivolous.

MR. MINTZ: That's correct. Those again are inconsistent.

And Judge Judd said: If the breakwater light had been flashing, the captain would doubtless have been able to change his course in time to avoid stranding.

QUESTION: What was he talking about there?

The last clear-chance doctrine is what he was talking about. Which is not here.

MR. MINTZ: Well, I don't know what he's talking about, the last clear chance --

QUESTION: Well, if you go further down in the paragraph you'll see it.

"We refuse to apply here the doctrine of last clear chance, which has been given only limited application in admiralty."

QUESTION: Isn't there some internal inconsistency in Judge Judd's findings and statements?

MR. MINTZ: Is there inconsistency?

QUESTION: Yes, internal inconsistency.

MR. MINTZ: I think there is.

QUESTION: Yes.

MR. MINTZ: I think there is.

QUESTION: That complicates things, doesn't it?

MR. MINTZ: It does, sir. It does, sir.

I'm glad Your Honor feels that there is an inconsistency. That's been my argument all along. That you can't put the two together, and justify both of them.

And for the Court of Appeals to have said that we bordered on the frivolous in arguing that, I'd like to say, if I may, on attending recently a session of the Court of Appeals, where, on application for parole after conviction,

pending appeal, the argument was always made, the trial judge said that was a frivolous appeal, and one of the Justices replied, or answered: Well, he remembers that when he was a district judge he regarded many applications for bail as being frivolous, but now that he's on the Court of Appeals he has a different view of that.

So I think that applies to the statement that borders on the frivolous, when we have a situation of the kind Your Honor has just pointed to.

Now, assuming that we have here a split liability case or split fault case, the question then is: Should this Court reconsider the rule?

Now, this has been a rule of this Court since 1843, it has been mentioned and repeatedly discussed and repeatedly sustained in a number of cases, and I can read them off:

Catharine vs. Dickinson, 17 How. in 1843; the NORTH STAR in 1882; the MAX MORRIS in 1890; the CHATTAHOOCHEE in 1899; the EUGENE MORAN in 1909; White Oak Transportation, in 1922; Weyerhauser in 1963, and just recently, a few years ago, Cooper Stevedoring vs. Hopske in 1974, where, in an opinion by Justice Marshall, there was express approval of the rule, although you did make a footnote that you're not called upon to reconsider it because there was no finding that had to be reviewed -- something to that effect.

And we also have the factor that we had the

Brussels Convention, it had been submitted to the Congress for ratification, Congress failed -- has failed continually. There has been no preface for Congress to go ahead.

And for this Court to undertake to refashion the rule which has been in existence for so many years, and has been repeatedly taken into account, it seems to me is rather inappropriate.

I suggest that this is really legislation and not adjudication, and that it's more properly in the area of Congress than the area of the Judiciary.

To be sure, there have been many commentators who have found fault with the rule, including among them very eminent jurists; but that, in and of itself, is not sufficient because there is always disagreement among lawyers and among judges on various phases of the law; and that doesn't mean that the Courts refashion the rules.

I am not suggesting that the Court is without power to do so, I am suggesting that in the circumstnaces of this case, where there has been -- where the history is as it is, it would be inappropriate for this Court to undertake to do the work which Congress should do and which has refused to do, indicating that it's quite content to let the rule stay as it is.

Now, on the merits of the rule, I think I indicated to some extent my thinking on the subject. I think that where

an accident is the result of co-negligence on two parties or three parties, whatever it may be, in a situation where, but for the negligence of both, there would have been no accident, it is immaterial, it's irrelevant as to how much fault, in what proportion the parties were at fault. Because the accident would not have happened if both had not been at faults, and both having been at fault it's fair and just that the damages should be borne equally, rather than attempting to say, well, you were only 10 percent negligent, so we are going to hold you liable for 10 percent of the consequences.

When, but for the ten percent, there would not have been the accident.

And then again we have this practical problem: how do you assess fault on a mathematical basis? When the conduct is not in the mathematical area.

It's easier to say some party was negligent or not negligent. But it's not easy to say they were at fault to a certain extent.

And I rest on that, and more importantly I rest on the proposition that it is immaterial consideration that if I contribute to somebody's damage and I did that to a substantial degree, that I am wrongly liable for the whole damage; but if the other fellow was also damaged -- liable, it's perfectly fair for me to pay half of his damagesand for him to pay half of my damages, where the accident would not

otherwise have happened.

I think I've covered the substance of my argument, and will not detain this Court any longer.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:08 o'clock, p.m., the case in the above-entitled matter was submitted.]

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