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All Bark and No Bite: A Modern Evidentiary Argument for the Retirement of the Age-old Pennsylvania Rule

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ALL BARK AND NO BITE: A MODERN EVIDENTIARY ARGUMENT FOR THE RETIREMENT OF THE AGE-OLD *PENNSYLVANIA* RULE

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INTRODUCTION

In 1873, the Supreme Court created a new "drastic and unusual presumption"[1] and made it applicable in cases of marine collision. The presumption, now popularly known as the *Pennsylvania* Rule,[2] allows a proponent of the Rule to place the burden of proof upon an opposing party, when the proponent shows that the opponent was in violation of a statute or regulation designed to prevent marine collisions. This shift of the burden of proof not only encompasses the shift in the burden of production traditional to most presumptions, but also includes a shift of, as well as an increase in, the burden of persuasion. Thus, the alleged statutory violator in a marine collision, the opponent of the *Pennsylvania* Rule, must show that her violation *could not have been* a cause of the collision.[3]

In an era when shipwrecks often meant few survivors, the *Pennsylvania* Rule served an important pragmatic function. The Rule's vitality was justified in that it (1) made for convenient adjudication; (2) allocated the burden of production equitably upon the party who was, in fact, guilty of a statutory infraction; and (3) upheld the proper policy motivations of deterring rule violations and preserving maritime safety.[4] The Rule's effectiveness as a deterrent was particularly understandable when combined with the Divided Damages Rule, which apportioned fault on a none, half, or all basis.[5] In this regard, the *Pennsylvania* Rule was also often criticized as being harsh and unfair,[6] as the perpetrator of a minor statutory infraction was, nevertheless, at risk of being forced to bear at least half, if not all, of the loss should that party fail to rebut the *Pennsylvania* Rule's unique presumption.

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1. Wills v. Amerada Hess Corp., 379 F.3d 32, 42 (2d Cir. 2004) (referring to the rule announced in The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873)).

2. *See infra* Part I.A.

3. *See The Pennsylvania*, 86 U.S. (19 Wall.) at 136.

4. *See* FLEMING JAMES, JR., CIVIL PROCEDURE § 7.9 (1965), *reprinted in* EVIDENCE: CASES AND MATERIALS 758-62 (Jon R. Waltz & Roger C. Park eds., updated 10th ed. 2005). *See also infra* notes 187-90 and accompanying text.

5. *See* The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1854) (enunciating the Divided Damages Rule).

6. *See* William L. Peck, *The* Pennsylvania *Rule Since* Reliable Transfer, 15 J. MAR. L. & COM. 95, 96 (1984).

All of this was changed when the Supreme Court, in 1975, overruled the Divided Damages Rule in favor of a regime of comparative fault.[7] Today, it is said that the *Pennsylvania* Rule's presumption may happily coexist within such a regime.[8] Nevertheless, this Note contends that despite the *Pennsylvania* Rule's capability of coexisting within a regime of comparative fault, the Rule *should not* coexist within such a regime, especially in light of modern technology and recent case law. Part I.A of this Note examines a brief history of the *Pennsylvania* Rule and the exact 1873 Supreme Court formulation of the Rule. Part I.B digs a little deeper into understanding the Rule and explains why the Rule may be best characterized as an "extra-strength" Morgan presumption.[9] Part I.C takes the Part I.B understanding of the *Pennsylvania* Rule and examines its interaction with both the Divided Damages Rule and the post-1975 regime of comparative fault. In total, Part I of this Note explains the basis for much of the debate surrounding the *Pennsylvania* Rule and how the Rule was expected to function in the post-1975 era of comparative fault.

Part II of this Note takes a case study approach to analyzing how modern courts have dealt with the *Pennsylvania* Rule in light of comparative fault. In particular, Part II notes that judicial avoidance of the Rule's "drastic and unusual presumption"[10] still occurs in many district and circuit courts. In Part II.A, two traditional methods of avoiding the Rule's presumption are outlined. Part II.B.1 shows how some modern courts have tried to avoid the Rule by simply refusing to find a statutory infraction. Part II.B.2 shows how other modern courts have imposed an elevated trigger for the imposition of the *Pennsylvania* Rule by would-be proponents. Part II.B.3 shows how several courts have realized the "substantive" nature of the presumption and have acted accordingly with regard to analyzing the Rule within an international context. Part II.B.4 concludes by giving examples of occasions when the *Pennsylvania*

7. *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975). *See also infra* notes 62-67 and accompanying text.

8. *See* Peck, *supra* note 6, at 101-02. *See also infra* notes 68-73 and accompanying text.

9. *See infra* Part I.B.

10. *See supra* note 1 and accompanying text.

Rule is either cancelled out by two litigants imposing it on each other, or simply ignored and not applied by the courts.

Part III of this Note uses the understanding derived from Parts I and II and explains why the *Pennsylvania* Rule is no more favored by the courts today than it was in the past. By examining the Rule in light of the three driving justifications behind the imposition of presumptions in general, and by keeping in mind that the Rule is much more forceful than an average presumption, Part III argues that the *Pennsylvania* Rule should be discarded in light of modern circumstances.

Ultimately, this Note argues that the effectiveness of the *Pennsylvania* Rule has been muted by comparative fault and that the Rule is no longer needed in light of modern technological advancements for determining causative fault. By examining a good sampling of recent case law from across the circuits, this Note's argument is subtly bolstered by modern courts, which have found a number of unique ways to avoid the Rule. This Note indicates that the Rule's presumption is indeed drastic and unprecedented and that it functions more as a substantive rule of law than as a mere procedural rule of evidence. In essence, this Note asserts that it is now no longer efficient, purposeful, or equitable to retain the *Pennsylvania* Rule.[11]

I. THE *PENNSYLVANIA* RULE EXPLAINED

A. Birth of the Rule

Among students of maritime law, the age-old, judge-made *Pennsylvania* Rule needs no introduction.[12] Nevertheless, the logical rationale espoused by the Rule did not originate with the

11. Most recently, a July 2007 Second Circuit opinion stated that the *Pennsylvania* Rule is widely criticized and "appears to be, today, rejected by all maritime states other than the United States." *In re* Otal Invs. Ltd., 494 F.3d 40, 50 (2d Cir. 2007). Judge Peter W. Hall went on to note that scholars have pushed for the Rule's abrogation, "either by the Supreme Court or by an act of Congress." *Id.* (quoting REGINALD G. MARSDEN, COLLISIONS AT SEA 53 (13th ed. 2003)).

12. Indeed, the *Pennsylvania* Rule has become one of the most frequently cited maritime decisions of the Supreme Court. *See* Michael Ben-Jacob, Note, *The* Pennsylvania *Rule: Murky Waters Revisited*, 19 CARDOZO L. REV. 1779, 1783-84 (1998).

Supreme Court's landmark decision in 1873 of the same name.[13] In an 1847 opinion arising from the collision of two steamboats on the Mississippi River north of New Orleans,[14] the Supreme Court foreshadowed the *Pennsylvania* Rule when it stated: "[I]f ... neglect ... of the law shall be proved to exist when injury shall occur to persons or property, it would throw upon the ... steamboat by whom the law has been disregarded the burden of proof, to show that the injury done was not the consequence of it."[15] Similarly, when a yacht and a schooner collided on New York City's East River in 1863,[16] the Supreme Court's 1868 opinion echoed: "Where fault is shown on the part of the damaging vessel, it is incumbent on her to show that such fault had in no degree the relation of cause and effect to the accident."[17] Then, in 1871, the Supreme Court's opinion regarding an 1865 collision between a brig and a steamer off the coast of New Jersey[18] proclaimed: "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."[19]

Two years later, in 1873, the Supreme Court issued what is now known as the *Pennsylvania* Rule in its popular form.[20] The case arose from a collision between the British bark *Mary Troop* and the British steamer *Pennsylvania*.[21] The June 1869 collision occurred at ten o'clock in the morning in a dense fog on the high seas, approximately 200 miles from Sandy Hook, New Jersey.[22] Despite the fact that the *Mary Troop* was moving at only one mile per hour as the *Pennsylvania* bore down on her at seven knots per hour,[23] the evidence showed that the *Mary Troop* sounded only a bell, even though she was under a statutory obligation to sound a foghorn

13. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873).
14. Waring v. Clarke, 46 U.S. (5 How.) 441, 442-43 (1847).
15. *Id.* at 465.
16. The Grace Girdler, 74 U.S. (7 Wall.) 196, 196 (1868).
17. *Id.* at 203 (citing *Waring*, 46 U.S. (5 How.) at 465).
18. The Ariadne, 80 U.S. (13 Wall.) 475, 475 (1871).
19. *Id.* at 479 (citations omitted).
20. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873).
21. *Id.* at 126-27.
22. *Id.* at 126.
23. *Id.* at 127. Seven knots per hour is just slightly faster than eight miles per hour.

while underway in fog.[24] Thus, when the district court condemned the *Pennsylvania* for the entire loss and the circuit court affirmed,[25] the Supreme Court reversed and issued the formulation now renowned as the *Pennsylvania* Rule:

> [W]hen ... a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship of showing not merely that her fault *might not have been* one of the causes, or that it *probably was not*, but that it *could not have been*.[26]

B. Characterization as an "Extra-strength" Morgan Presumption

The *Pennsylvania* Rule contains portions that are clearly understood and portions that have been heavily debated. Generally, commentators agree that the Rule is applicable only when there is a violation of a statute intended to prevent collisions and injuries, the types of which have actually occurred as a result of the statutory violation.[27] Stated more clearly, the Rule applies when the following criteria are met: "(1) proof by a preponderance of the evidence of [a] violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve marine safety or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent."[28]

Hence, an example formulation may be examined. First, assume that a collision occurs between vessel *A* and vessel *B* in fog. Further, assume a statute exists stating that vessels "shall sound a foghorn in order to prevent marine collisions in fog." Now, assume that vessel *B* did not sound a foghorn. Thus, the *Pennsylvania* Rule

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24. *Id.* at 126-28.

25. *Id.* at 129.

26. *Id.* at 136 (emphasis added).

27. Ben-Jacob, *supra* note 12, at 1786-87 (citing Folkstone Mar., Ltd. v. CSX Corp., 64 F.3d 1037 (7th Cir. 1995) (finding that failure of bridge operator to adhere to Army Corps of Engineers' regulations caused collision), and United States v. Nassau Marine Corp., 778 F.2d 1111 (5th Cir. 1985) (finding that failure to remove wreck pursuant to wreck statute caused second vessel to strike wreckage and sink)).

28. *Id.* at 1787 (citations omitted).

states that once *B* is shown to have not sounded a foghorn by a preponderance of the evidence in violation of the statute, the burden is upon *B* to show that *B*'s failure to sound the foghorn "not merely ... *might not have been* one of the causes [of the collision], or that it *probably was not* [one of the causes of the collision], but that it *could not have been* [one of the causes of the collision]."[29]

This "*might not have been ... probably was not ... could not have been*" language is puzzling. Clearly, the *Pennsylvania* Rule is a presumption of causation.[30] As stated by the Supreme Court, the *Pennsylvania* Rule utilizes the term "fault" as synonymous with the notion of a "statutory breach" and presupposes that such a fault already has been proved,[31] ostensibly by a preponderance of the evidence.[32] Once this fault is shown, the *Pennsylvania* Rule then imposes upon the violator the burden of proving that the fault *could not have been* one of the causes of the collision.[33] Thus, in our example, once *B*'s statutory fault has been shown by a preponderance of the evidence by *A*, the Rule operates to place the burden upon *B* of showing that *B*'s fault *could not have been* one of the causes of the collision between *A* and *B*.

Akin to most other presumptions, some courts have held that the presumption of the *Pennsylvania* Rule is a rule of evidence that does not affect the substantive rights of the parties, but merely shifts the burden of proof as to causation.[34] Other courts, in contrast, have held that the Rule is much more than a matter of procedure. In *Ishizaki Kisen Co. v. United States*,[35] the Ninth Circuit stated: "[T]he Pennsylvania Rule is more akin to substantive law than to rules of procedure concerned primarily with judicial administration."[36] The *Kisen* court explained: "The shift in burden resulting from application of the Pennsylvania Rule is two-fold. Not only must

29. *The Pennsylvania*, 86 U.S. (19 Wall.) at 136 (emphasis added).

30. *See* NICHOLAS J. HEALY & JOSEPH C. SWEENEY, THE LAW OF MARINE COLLISION 46 (1998).

31. *See The Pennsylvania*, 86 U.S. (19 Wall.) at 136 ("In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.").

32. *See* Ben-Jacob, *supra* note 12, at 1787 (citations omitted).

33. *See* HEALY & SWEENEY, *supra* note 30, at 46.

34. *See* Garner v. Cities Serv. Tankers Corp., 456 F.2d 476, 480 (5th Cir. 1972) (citing Green v. Crow, 243 F.2d 401, 403 (5th Cir. 1957)).

35. 510 F.2d 875 (9th Cir. 1975).

36. *Id.* at 881.

the violator meet the burden of producing evidence to counter the presumption of causation, but he must also persuade the trier of fact that his explanation should be adopted."[37] In this debate, even the most knowledgeable commentators can disagree.[38]

This Note does not purport to solve, definitively, the debate over whether the *Pennsylvania* Rule is best classified as a matter of procedure or as a matter of substantive law.[39] Nevertheless, this Note does contend that, in function, the *Pennsylvania* Rule is most closely related to what is popularly known as a Morgan presumption. The majority of presumptions are known as Thayer presumptions, which shift only the burden of production to the presumption's opponent.[40] The opponent must then "meet the shifted burden of producing evidence, but ... does not bear the ultimate burden of convincing the trier of fact of the nonexistence of the presumed fact."[41] This type of "bursting bubble" presumption is the kind embraced by the Federal Rules of Evidence and is meant to disappear once the opponent produces the sufficient rebuttal evidence.[42] With Thayer presumptions, the ultimate burden of persuasion remains with the proponent of the presumption.[43] In contrast, a Morgan presumption shifts

37. *Id.* at 880 (quoting Warren B. Daly, Jr., Note, *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner*, 54 B.U. L. REV. 78, 81 (1974)).

38. *Compare* 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 12-3, at 769 (4th ed. 2004) (stating that the *Pennsylvania* Rule is a presumption of causation, a matter of evidence and procedure, but not a substantive rule of law), *with* HEALY & SWEENEY, *supra* note 30, at 53 (stating that the *Pennsylvania* Rule is a rule of substantive law).

39. There are complex conflicts of law issues involved in this debate which are beyond the scope of this Note. Part II.B.3 does note, however, that both the Ninth Circuit and, most recently, the Second Circuit have considered the *Pennsylvania* Rule to be a matter of substantive law, at least with regard to the Rule's impotency when a United States forum is obliged to apply foreign substantive law. For the purposes of this Note, it is sufficient to highlight that, pedagogically correct or not, the conclusions of the Second and Ninth Circuits attest to the severity of the *Pennsylvania* Rule's presumption. For a recent view of the conflicts of law analysis inherent in this "procedural or substantive" debate, see Francesca Morris, *The* Pennsylvania *Rule: No Longer the Rule?*, 32 TUL. MAR. L.J. 131 (Winter 2007).

40. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 3.4, at 65 (3d ed. 1996).

41. *Id.*

42. 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 139 n.1 (6th ed. 1994) (noting that Thayer "bursting bubble" presumptions are the type adopted in Federal Rule of Evidence 301).

43. *See* 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 301.02[2] (Joseph M. McLaughlin ed., 2d ed. 2007).

the burden of persuasion to the presumption's opponent.[44] The opponent must then not only produce evidence in opposition to the presumption, but also convince the trier of fact that the nonexistence of the presumed fact is more probable than its existence.[45]

Clearly, the *Pennsylvania* Rule cannot be a typical Thayer presumption insofar as it also shifts the burden of persuasion onto the Rule's opponent. Nevertheless, the *Pennsylvania* Rule, though akin to a Morgan presumption, is also somewhat more than just a normal Morgan presumption. A straightforward Morgan presumption simply functions to force the opponent of the presumption to convince the trier of fact that the presumed fact's nonexistence is more probable than its existence.[46] This language evidently tracks the "preponderance of the evidence" standard of proof applicable to civil actions in general. But, the *Pennsylvania* Rule forces the opponent of the Rule to show that said opponent's "fault ... *could not have been*" one of the causes of the collision.[47] The burden of persuasion thus placed on the Rule's opponent is simply a higher bar.

This characterization of the *Pennsylvania* Rule as an "extra-strength" Morgan presumption clarifies the reason why the debate rages as to whether the Rule is a matter of procedure or a matter of substantive law. Thayer presumptions, as embraced by the Federal Rules of Evidence, are certainly procedural rules of evidence.[48] Morgan presumptions, however, have considerably greater effect.[49] And, at the opposite end of the spectrum, irrefutable presumptions are simply misnomers: not presumptions at all, but substantive rules of law.[50] The problem arises when one attempts to fit the *Pennsylvania* Rule somewhere between a typical Morgan presumption and an irrefutable presumption. The 1873 wording of the Rule seems to explicitly reject the idea that the Rule's opponent may overcome his burden of persuasion by a mere "preponderance of the

44. *See* LILLY, *supra* note 40, at 65.
45. *See id.*
46. *See id.*
47. *See* The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873).
48. *See* WEINSTEIN & BERGER, *supra* note 43, §§ 301.02[1]-.02[2].
49. *See* LILLY, *supra* note 40, at 66.
50. *See* WEINSTEIN & BERGER, *supra* note 43, § 301.02[1].

evidence" standard, typical of most civil actions.[51] Thus, the farther the "*could not have*" language of the *Pennsylvania* Rule moves the burden of persuasion away from the typical "preponderance of the evidence" standard of proof,[52] the closer the Rule comes to becoming a substantive rule of law. Therefore, the *Pennsylvania* Rule's presumption of causation has been characterized as a "drastic and unusual presumption."[53]

The burden of proof which is needed to refute the *Pennsylvania* Rule's presumption is certainly "strict, but ... not insurmountable."[54] Within just the Ninth Circuit, courts have, at different times, understood the "*could not have*" language of the *Pennsylvania* Rule as imposing either the criminal "beyond a reasonable doubt" standard of proof, or the in-between "clear and convincing" standard of proof upon the Rule's opponent.[55] Thus, one commentator has lamented that "[i]t may perhaps be regretted that the word 'could' was employed in the statement of the rule in the *Pennsylvania*,"[56] because this phrasing has encouraged courts to speculate as to whether a statutory fault might have had any possible connection to the collision.[57]

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51. *The Pennsylvania*, 86 U.S. (19 Wall.) at 136 ("In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."). Clearly, a showing by the Rule's opponent that his "fault" *probably was not* a cause of the collision is insufficient to overcome the *Pennsylvania* Rule's presumption.

52. Moving away from the "preponderance of the evidence" standard of proof means, of course, moving closer to the notion that the *Pennsylvania* Rule's presumption is irrefutable. Certainly, that is not to say the Rule's presumption is, in fact, irrefutable. This Note merely places the *Pennsylvania* Rule's burden of persuasion on the Rule's opponent as somewhat higher than a "more likely than not" or "preponderance of the evidence" standard, but lower than a presumption that cannot be refuted.

53. Wills v. Amerada Hess Corp., 379 F.3d 32, 42 (2d Cir. 2004) (citation omitted).

54. Superior Constr. Co. v. Brock, 445 F.3d 1334, 1344 (11th Cir. 2006) (citation omitted).

55. *Compare* Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 749 (9th Cir. 1960), *and* State S.S. Co. v. Permanente S.S. Corp., 231 F.2d 82, 86-87 (9th Cir. 1956) (both finding that the "*could not have*" language of the *Pennsylvania* Rule imposes a "beyond a reasonable doubt" standard of proof upon the Rule's opponent), *with* Churchill v. F/V Fjord, 857 F.2d 571, 577 (9th Cir. 1988), *and* Trinidad Corp. v. Steamship Keiyoh Maru, 845 F.2d 818, 825 (9th Cir. 1988) (both finding that the "*could not have*" language of the *Pennsylvania* Rule imposes a "clear and convincing" standard of proof upon the Rule's opponent).

56. JOHN WHEELER GRIFFIN, THE AMERICAN LAW OF COLLISION § 201, at 472 (1949).

57. *See id.*

C. The Impact of Reliable Transfer

In 1854, the Supreme Court enunciated the Divided Damages Rule,[58] which then applied to cases of marine collision for over one hundred years. The opinion was with regard to an April 1853 collision between two schooners near Squam Beach, New Jersey.[59] Finding that both schooners had been at some fault, the Supreme Court held that the damages should be equally divided, without regard to the two schooners' comparative degrees of fault.[60]

Since 1873 and prior to 1975, the combined operation of the *Pennsylvania* Rule's drastic presumption and the Divided Damages Rule resulted in much criticism. Under both rules, "a vessel committing a relatively minor statutory violation was made to bear half the damages resulting from a collision if she could not disprove causation"[61] by showing that the statutory violation *could not have been* a cause of the collision.

This potential for injustice may be illustrated by returning to the hypothetical collision between vessels *A* and *B* in fog. After assuming that *B* violated the statute, let it be additionally assumed that *A* made an unannounced and last-second turn and collided with *B*, because *A* did not see *B* in the fog. Here, equity might demand that *A* bear the majority, if not all, of the loss because, without *A*'s ill-conceived change of course, no collision would have occurred. Nevertheless, under the Divided Damages Rule, *B* would still be held responsible for half the loss if *B* is unable to overcome the *Pennsylvania* Rule's presumption, placed upon *B* by *A*. Once *A* shows by a preponderance of the evidence that *B* did not sound a foghorn in violation of the existing statute, the *Pennsylvania* Rule forces *B* to show that *B*'s statutory violation *could not have been* a cause of the collision. Fair or not, should *B* fail to meet the burden, the loss is split equally between *A* and *B*.

Eventually, just as tort law moved away from the rule of contributory negligence toward the rule of comparative negligence, American maritime jurisprudence abandoned the Divided Damages Rule in

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58. *See* The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1854).

59. *Id.* at 171.

60. *Id.* at 177-78 ("[W]e think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation.").

61. Peck, *supra* note 6, at 96.

favor of a rule of comparative fault. The landmark 1975 opinion of *United States v. Reliable Transfer Co.*[62] arose from the December 1968 grounding of the coastal tanker *Mary A. Whalen* on a sandbar off Rockaway Point outside New York Harbor.[63] The district court, despite finding that only 25 percent of the blame for the grounding was attributable to the Coast Guard for failing to maintain a breakwater light, while the remaining 75 percent of the blame was attributable to the *Whalen*, nevertheless applied the Divided Damages Rule and apportioned half the loss to each party.[64] When the Second Circuit affirmed,[65] the Supreme Court vacated the judgment after noting that the "rule of divided damages in admiralty has continued to prevail in this county by sheer inertia rather than by reason of any intrinsic merit."[66] With strong language, the Supreme Court ushered into the maritime realm the rule of comparative fault:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice.... We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.[67]

In embracing comparative fault, the Supreme Court was, at least in part, motivated by the potential unfairness of applying the *Pennsylvania* Rule in conjunction with the Divided Damages Rule.[68]

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62. 421 U.S. 397 (1975).

63. *Id.* at 398.

64. *Id.* at 399-400.

65. *Id.* at 400 (citing Reliable Transfer Co. v. United States, 497 F.2d 1036 (2d Cir. 1974)).

66. *Id.* at 410-11.

67. *Id.* at 405, 411; *see also infra* text accompanying note 205.

68. The Court noted that:

> [T]he potential unfairness of the division is magnified by the application of the [*Pennsylvania*] [R]ule ... whereby a ship's relatively minor statutory violation will require her to bear half the collision damage unless she can satisfy the heavy burden of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not have been*."

Reliable Transfer, 421 U.S. at 405-06 (quoting The Pennsylvania, 86 U.S. (19 Wall.) 125, 136

Based on this logic, courts, in the immediate aftermath of the *Reliable Transfer* decision, began to question whether *Reliable Transfer* abrogated the *Pennsylvania* Rule.[69] But, the great weight of the case law in a number of circuits shows that the *Pennsylvania* Rule is still alive and well, happily coexisting within the framework of a regime of comparative fault.[70] The best explanation of how the *Pennsylvania* Rule operates in conjunction with the comparative fault doctrine of *Reliable Transfer* lies in the understanding of *Reliable Transfer* as only a matter of how to assess liability, whereas the *Pennsylvania* Rule addresses the issue of evidentiary presumptions or burdens.[71]

Let us return to the hypothetical collision between vessels *A* and *B* in fog. Since both *B*'s statutory violation in failing to sound a foghorn and *A*'s sudden, ill-conceived change of course may have "caused" the collision, *Reliable Transfer* might allow us to assume that a court may conclude that *B*'s violation should make *B* 25 percent liable for the resulting damages, whereas *A*'s sharp turn should make *A* 75 percent liable for the resulting damages. This apportionment of damages, however, would only be true to the

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(1873)).

69. Peck, *supra* note 6, at 97.

70. *See, e.g.*, Orange Beach Water, Sewer & Fire Prot. Auth. v. M/V Alva, 680 F.2d 1374, 1383 (11th Cir. 1982); Candies Towing Co. v. M/V B & C Eserman, 673 F.2d 91, 95 (5th Cir. 1982); Allied Chem. Corp. v. Hess Tankship Co., 661 F.2d 1044, 1052 (5th Cir. 1981) ("[The *Pennsylvania*] [R]ule still floats, in the wake of ... [*Reliable Transfer*] ... which only overruled *The Pennsylvania* on the point of allocating comparative fault."); Atl. Mut. Ins. Co. v. ABC Ins. Co., 645 F.2d 528, 531 (5th Cir. 1981) (noting that the *Pennsylvania* Rule enjoys continued vitality in collision cases); First Nat'l Bank of Chi. v. Material Serv. Corp., 597 F.2d 1110, 1119 (7th Cir. 1979); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1160 (2d Cir. 1978) (noting that the *Pennsylvania* "[R]ule's vitality and force were not in any degree affected by ... [*Reliable Transfer*] ... which overruled *The Pennsylvania* only in so far as it abolished the ... [Divided Damages Rule] and substituted a new rule requiring liability for collision damage to be allocated proportionately to the comparative degree of fault"); Feeder Line Towing Serv., Inc. v. Toledo, P. & W. R.R. Co., 539 F.2d 1107, 1110-11 (7th Cir. 1976).

71. *See* Peck, *supra* note 6, at 101. Note that the term "fault" is not always uniformly used. In the *Pennsylvania* Rule, the "fault" is presupposed. *See supra* note 31 and accompanying text. Hence, the Rule utilizes the term "fault" to mean a simple statutory breach. In contrast, *Reliable Transfer* utilizes the term "fault" to mean "causative fault." *See* HEALY & SWEENEY, *supra* note 30, at 53 (stating that *Reliable Transfer* permits apportionment of damages in accordance with the degree of causative fault chargeable to each of the colliding vessels). Sensibly, only "fault" that is "causative" of the resultant damages deserves apportionment of liability. Thus, *Reliable Transfer* provides for an equitable apportionment of liability with regard to the vessels' comparative "causative fault." In contrast, the *Pennsylvania* Rule functions as a presumption of causation, once a statutory violation is found.

extent that both *B*'s violation and *A*'s sharp turn were causative of the collision. If we assume that *B* has no trouble in showing that *A*'s sharp turn was causative of the collision, all that remains is to determine whether *B*'s failure to sound a foghorn was also a cause of the collision. Once *A* shows *B*'s statutory violation, the *Pennsylvania* Rule places the burden upon *B* to show that *B*'s statutory violation *could not have been* a cause of the collision. If *B* meets the *Pennsylvania* Rule's burden, *A* would be found 100 percent liable for all damages arising from the incident. If *B* fails to meet the Rule's burden, *B* would be apportioned only 25 percent of the damages, with *A* still being liable for the remaining 75 percent. No longer would *B*'s failure to meet the *Pennsylvania* Rule's burden result in *B* being apportioned at least half the loss.

Thus, many commentators have argued that *Reliable Transfer* eliminated the essential source of the harsh results produced under the earlier co-application of the *Pennsylvania* Rule with the Divided Damages Rule.[72] In looking toward the future, one commentator in 1984 confidently stated:

> [T]he courts today are both less likely to ignore or misstate the *Pennsylvania* Rule and less likely to ignore or understate the significance of the facts to which the rule might be applied. As a result, the *Pennsylvania* Rule may well be healthier today than it has been in many years.[73]

II. A HISTORY OF AVOIDANCE

A. Traditional Techniques

Because application of both the *Pennsylvania* Rule and the Divided Damages Rule often resulted in harsh, inequitable results, courts—prior to *Reliable Transfer* in 1975—utilized two other doctrines of American maritime law to circumvent the problem. First, the doctrine of error in extremis holds that when a vessel

72. *See* Peck, *supra* note 6, at 102; *see also* Richard H. Brown, Jr., *General Principles of Liability*, 51 TUL. L. REV. 820, 836 (1977) ("[T]he adoption of proportionate fault should argue for the retention of the [*Pennsylvania*] [R]ule rather than its abolition, because the harsh possibility of a vessel being held fifty percent to blame for a 'minor' statutory fault has been eliminated.").

73. *See* Peck, *supra* note 6, at 102.

meets a sudden emergency situation negligently created by another vessel, and the former vessel takes a mistaken action in reaction to the danger, said former vessel shall be exonerated from all liability should a casualty occur in the process.[74] Hence, when the Fifth Circuit first dealt with the intersection between the *Pennsylvania* Rule and the doctrine of error in extremis in *Green v. Crow*,[75] it held that an action in extremis, even though technically a statutory violation, is not characterized as a "fault" and, therefore, the *Pennsylvania* Rule could not apply because, as a matter of law, no statutory fault occurred.[76] Second, the Major-Minor Fault Rule states that, if a vessel is found guilty of gross negligence in a collision, the *Pennsylvania* Rule will not automatically apply, even if the grossly negligent vessel can show by a preponderance of the evidence that the latter vessel was in violation of a statute designed to prevent collisions.[77]

B. Modern Circumventions

If it is true that *Reliable Transfer* made the *Pennsylvania* Rule less harsh, more equitable, and therefore more viable,[78] then modern courts should have little to no reason for wishing to circumvent the *Pennsylvania* Rule. But, as a sampling of case law from across various circuit courts from the past fifteen years shows, courts remain as creative as ever in devising methods of *not* applying the *Pennsylvania* Rule. In the remaining portions of Part II, this Note identifies several methods by which modern courts

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74. *See, e.g.*, The Nacoochee, 137 U.S. 330, 340 (1890); Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 461 (1851); Bucolo, Inc. v. S/V Jaguar, 428 F.2d 394, 396 (1st Cir. 1970); Nat'l Bulk Carriers v. United States, 183 F.2d 405, 408 (2d Cir. 1950). Nevertheless, "no emergency will excuse the absence of all clear thinking; after all, men, charged with responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril." Cuba Distilling Co. v. Grace Line, Inc., 143 F.2d 499, 499 (2d Cir. 1944).

75. 243 F.2d 401 (5th Cir. 1957).

76. *Id.* at 402-04. For a discussion of the dual usages of the term "fault," see *supra* note 71.

77. *See* Alexandre v. Machan, 147 U.S. 72, 85 (1893); *see also* GRANT GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY § 7-4, at 492-93 (2d ed. 1975).

78. *See supra* notes 72-73 and accompanying text.

have "weaseled" their way out of applying the *Pennsylvania* Rule's "drastic and unusual presumption"[79] upon a litigating party.

1. Not Finding a Statutory Violation

The *Pennsylvania* Rule is applicable only when a plaintiff shows that a defendant was "in actual violation of a statutory rule intended to prevent collisions."[80] Yet, the Rule does not further define just what is a "violation of a statutory rule intended to prevent collisions."[81] Thus, some courts have gone out of their way to find that no statutory violation of a rule intended to prevent collisions has occurred. In so doing, the *Pennsylvania* Rule is simply not triggered and need not be considered.

In a 1997 opinion arising from a March 1991 collision in the narrow Malacca Strait between the commercial fishing vessel *Hui Kuo No. 16* and the civilian-crewed United States Navy oiler *Ponchatoula*, the Second Circuit rejected the fishing vessel's contention that the *Ponchatoula* was in violation of three statutory provisions at the time of the collision.[82] Looking at the three statutory provisions, COLREGs 6, 7, and 8,[83] the Second Circuit affirmed the district court's decision and held that the *Ponchatoula* did not violate the three COLREGs.[84] With regard to COLREG 6, concerning safe speed, the court held that the *Ponchatoula*'s speed of 18 knots was not excessive under the circumstances, despite the fact that the two vessels were in a narrow and densely traveled strait, that other vessels were in the vicinity, and that at 18 knots, it could take up to ten minutes for the *Ponchatoula* to reduce speed.[85] In addressing COLREG 7, regarding effective use of RADAR equipment, the court held that the *Ponchatoula*'s use of "alternative methods" of "equivalent systematic observation" was

79. Wills v. Amerada Hess Corp., 379 F.3d 32, 42 (2d Cir. 2004) (citation omitted).

80. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873).

81. *Id.*

82. Ching Sheng Fishery Co. v. United States, 124 F.3d 152, 153, 158 (2d Cir. 1997).

83. *See* INT'L MAR. ORG., CONVENTION ON THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA 6-8 (Oct. 20, 1972). Popularly known simply as "COLREGs" or collision regulations, these are the "rules of the road" with regard to vessel navigation on the high seas.

84. *Ching Sheng Fishery*, 124 F.3d at 158-62.

85. *Id.* at 153-59.

sufficient to meet the provision's mandates.[86] Finally, the court addressed COLREG 8, which requires the taking of timely action to avoid collision, by holding that the *Ponchatoula*'s eventual speed reduction and evasive action to starboard was not "too little too late," notwithstanding the fact that her master knew that proper speed reduction from 18 knots would have taken over ten minutes.[87] Accordingly, the Second Circuit refused to apply the *Pennsylvania* Rule to the *Ponchatoula*.[88]

Another illustrative example of a court's refusal to find a statutory violation is *In re J.W. Westcott Co.*,[89] a 2002 opinion from the Eastern District of Michigan regarding the October 2001 capsizing and sinking of the *J.W. Westcott II* on the Detroit River in which two crew members were killed.[90] In a motion for summary judgment, the *J.W. Westcott II*, a vessel which delivered "mail, packages, and pilots to commercial vessels on the Detroit River," alleged that a statutory violation on the part of the Norwegian gasoline tanker *M/V Sidsel Knutsen* played a role in causing the casualty.[91] Because the tanker was a foreign vessel navigating in the waters of the Great Lakes, she was subject to the Great Lakes Pilotage Act (GLPA) of 1960,[92] which demanded that "each foreign vessel shall engage a United States or Canadian registered pilot for the route being navigated who shall ... in waters of the Great Lakes ... direct the navigation of the vessel subject to the customary authority of the master."[93] Because the incident occurred while Captain Hull, a Canadian registered pilot, was not on the bridge of the tanker,[94] the *J.W. Westcott II* maintained that the *Pennsylvania* Rule should be applied upon the *Sidsel Knutsen* due to her violation of the GLPA.[95] Nevertheless, upon analysis of the legislative history behind the GLPA, the district court held that Captain Hull, in

86. *Id.* at 159-60.

87. *Id.* at 160-62.

88. *Id.* at 162.

89. 257 F. Supp. 2d 891 (E.D. Mich. 2002).

90. *Id.* at 892. On occasion, the *Pennsylvania* Rule has been pressed to apply to various non-collision and non-maritime situations. *See infra* note 105, and text accompanying note 119. *See generally* Ben-Jacob, *supra* note 12, at 1807-09.

91. *J.W. Westcott*, 257 F. Supp. 2d at 892-93.

92. *See* 46 U.S.C. §§ 9301-08 (2000).

93. *Id.* § 9302(a)(1)(A).

94. *J.W. Westcott*, 257 F. Supp. 2d at 892-93.

95. *Id.* at 893.

instructing another captain on the proper course of the *Sidsel Knutsen* prior to going below deck for less than two minutes, did not fail to "direct the navigation of the vessel" within the meaning of the statute.[96] Conveniently, the district court thus managed to side-step the fact that the incident occurred while neither a United States nor Canadian registered pilot was at the helm. Such "direction" of another pilot, reasoned the district court, did not amount to a violation of the GLPA and thus, there was no per se negligence under the *Pennsylvania* Rule on the part of the *Sidsel Knutsen*.[97]

2. The "Causal Connection" Requirement

Despite the argument that, pursuant to the *Pennsylvania* Rule, "the burden of proof on the issue of causation [shifts] once a claimant has established that a vessel has violated a statute or regulation,"[98] courts have also held that "a plaintiff must establish a nexus between a regulatory violation and his or her injuries as a condition to invocation of the Pennsylvania Rule."[99] This need for a "causal connection" or "nexus" prior to successful invocation of the *Pennsylvania* Rule presents another method by which courts may avoid application of the Rule's presumption. By imposing this bar upon would-be proponents of the *Pennsylvania* Rule, some courts may be viewed as having imposed a de facto "evidence sufficient to support a finding" standard upon such plaintiffs, forcing them to "make some showing that the statutory violation may have had some relation to the accident."[100]

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96. *Id.* at 894-95.

97. *Id.* In so finding, the district court held that summary judgment against Captain Hull was inappropriate. *Id.* Incidentally, the district court's mischaracterization of the *Pennsylvania* Rule as a rule of "per se negligence" is interesting, though not germane to the holding in the case.

98. Cont'l Grain Co. v. P.R. Mar. Shipping Auth., 972 F.2d 426, 436 (1st Cir. 1992).

99. Minott *ex rel.* Minott v. Smith, No. CIV. 03-10-PH, 2003 WL 22078070, at *12 (D. Me. Sept. 5, 2003).

100. *In re* Complaint of Nautilus Motor Tanker Co., 85 F.3d 105, 115 (3d Cir. 1996) ("Indeed, a contrary rule, such as is urged upon us ... would result in a presumption of liability following any statutory violation no matter how remote or inconsequential such a violation may have been to the subsequent accident. Neither precedent nor logic compels such a drastic result."); *see, e.g.*, Am. River Trans. Co. v. Kavo Kaliakra SS, 148 F.3d 446, 450 (5th Cir. 1998) ("This court has stressed that the Pennsylvania Rule is a rule regarding the burden of proof, not a rule of ultimate liability. As we have explained, the Supreme Court in *The Pennsylvania*

In a 2003 opinion from the District of Maine[101] and its subsequent appeal, which resulted in a 2004 opinion from the First Circuit,[102] the widow plaintiff alleged that the shipowner defendant was responsible for the wrongful death of her husband, the then-captain of the defendant's fishing vessel that was lost at sea on a fishing trip.[103] Attempting to invoke the *Pennsylvania* Rule, the widow asserted that, at the time of the incident, the vessel was in violation of four different Coast Guard regulations.[104] Although the shipowner did not dispute the widow's argument that the *Pennsylvania* Rule "has been extended beyond the confines of ship collisions to other safety-related maritime contexts,"[105] he did dispute "whether proof of violation of a Coast Guard regulation, without more, suffices to trigger application of the [*Pennsylvania*] [R]ule."[106] In response, the district court emphatically declared that a factfinder "could not, except on the basis of sheer speculation, conclude that any of the cited violations bore any relation whatsoever to [the incident]. [Plaintiff's allegation] is too insubstantial a foundation for invocation of the burden-shifting *Pennsylvania* Rule."[107]

On appeal, the First Circuit swiftly affirmed the district court's decision and re-emphasized the logic that necessitated a preliminary showing of causation by the plaintiff prior to application of the *Pennsylvania* Rule.[108] The circuit court reasoned that it would be imprudent and "a departure from the limited and cautious manner in which the courts ... have traditionally invoked this powerful rule"[109] to speculate as to a scenario in which the burden-shifting

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'did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable, or remote.'" (internal citations omitted)); Assoc. Dredging Co. v. Cont'l Marine Towing Co., 617 F. Supp. 961, 968 (E.D. La. 1985) ("Although the rule of *The Pennsylvania* imposes a strenuous burden, it does not negate the clear requirement of causation. While the defendants are guilty of a statutory violation, the violation did not have anything to do with the capsizing ...." (internal citations omitted)).

101. *Minott*, 2003 WL 22078070.

102. Poulis-Minott v. Smith, 388 F.3d 354 (1st Cir. 2004).

103. *Minott*, 2003 WL 22078070, at **2-9.

104. *Id.* at *10.

105. *Id.* at *11 (citations omitted).

106. *Id.*

107. *Id.* at *13.

108. Poulis-Minott v. Smith, 388 F.3d 354, 364-65 (1st Cir. 2004).

109. *Id.* at 365.

Pennsylvania Rule should be applied.[110] Powerfully, the circuit court admonished:

> Assuming *arguendo* that the [v]essel was indeed in violation of these regulations, ... the violation or "fault" must have contributed to the casualty, at least in some degree.... [A] plaintiff must establish a relationship between the regulatory violation and the injury in order to invoke the *Pennsylvania* Rule....
>
> Here we have a casualty for which it is virtually impossible to identify the cause.... Any number of hypotheses can be constructed as to what occurred on the [vessel] the night it was lost. In some of these scenarios, the statutory violations might be relevant, whereas in others, they would have had nothing to do with the casualty.
>
> To be sure, the *Pennsylvania* Rule authorizes some degree of speculation as to the causes of the accident, but it does not authorize the degree of speculation urged by the plaintiff here.[111]

Another example of a court imposing a "causal connection" requirement upon a would-be proponent of the Rule is found in a 2005 opinion from the Eastern District of Louisiana, in which the claimants attempted to invoke the *Pennsylvania* Rule upon the *M/V Mr. Jason* by alleging that the vessel violated several statutes in causing the claimants harm by wave wash and suction.[112] First, the district court found that the *Mr. Jason* had no properly licensed master or captain on board at the time of the accident, in violation of 46 U.S.C.A. § 8904(a).[113] Next, the district court found that the *Mr. Jason* was being operated without proper navigational charts of the Intracoastal Waterway area in violation of 33 C.F.R. § 164.30.[114] Finally, the district court found that the *Mr. Jason*

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110. *Id.* ("[W]e are reluctant to impose a penalty for a statutory violation with no known relation to the loss.").

111. *Id.* at 364-65 (citations omitted).

112. *In re* Quality Marine Serv., Inc., No. CIV.A.04-217, 2005 WL 1155854, at **3-4 (E.D. La. May 9, 2005).

113. *Id.* at *3 (citing 46 U.S.C.A. § 8904(a) (2004)); *see also* 46 U.S.C. § 8904(a) (2000).

114. *Quality Marine Serv.*, 2005 WL 1155854, at **3-4; *see* 33 C.F.R. § 164.30 (2006).

violated 33 U.S.C.A. § 2034(c)(1) when it did not sound its horn to give notice that it would attempt to pass.[115]

Noticeably, when applying the *Pennsylvania* Rule, the district court made it clear that only the first two statutory violations involved violations of statutes that "were intended to prevent the kind of injury that allegedly occurred."[116] Dealing with the violation of 33 U.S.C.A. § 2034(c)(1), the district court expressly found that the particular violation at issue did not justify the application of the *Pennsylvania* Rule insofar as "[i]t would stretch the bounds of reason ... to conclude that a law requiring notice of an overtaking was intended, even tangentially, to prevent injury caused by wave wash and suction."[117] Nevertheless, given the established relevance of the first two statutory violations, the district court applied the *Pennsylvania* Rule to the case, imposing the burden upon the *Mr. Jason* to show that its two statutory violations *could not have been* a cause of the damages suffered by the claimants.[118] In its careful differentiation of the third statutory violation, however, the district court essentially maintained that the *Pennsylvania* Rule does not give a claimant carte blanche to over-speculate as to whether the defendant's alleged statutory violations caused the damages suffered by the claimant.

Despite the notion that the *Pennsylvania* Rule may be utilized in other non-marine or non-collision contexts,[119] courts have also used the "causal connection" limitation to curb extension of the Rule into too many other contexts. In *Wills v. Amerada Hess Corp.*,[120] a widow plaintiff filed a complaint under the Jones Act[121]—on behalf of her

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115. *Quality Marine Serv.*, 2005 WL 1155854, at *4 (citing to 33 U.S.C.A. § 2034(c)(1) (2004)); *see also* 33 U.S.C. § 2034(c)(1) (2000).

116. *Quality Marine Serv.*, 2005 WL 1155854, at *4.

117. *Id.*

118. *Id.* at **4-5.

119. *See supra* notes 90, 105 and accompanying text.

120. No. 98 CIV. 7126 (RPP), 2002 WL 140542 (S.D.N.Y. Jan. 31, 2002). This opinion and order from the Southern District of New York in response to the defendant's motion in limine and motion for summary judgment should be differentiated from the opinion of the Second Circuit previously cited in this Note. *See supra* notes 1, 53, 79.

121. The Jones Act is really several pieces of legislation. First, the Act restricts the carriage of goods between U.S. ports to U.S. flagged vessels built in the United States. *See* 46 U.S.C. § 12101 (2000). The Jones Act also allows injured sailors and the next of kin of deceased sailors to obtain damages from their employers for the negligence of the shipowner, the captain, or fellow members of the crew. *See* 46 U.S.C. § 30104 (2000) ("A seaman injured in

late husband—against the defendants for wrongful death as a result of exposure to toxic chemicals while working on the defendants' vessels.[122] In the context of an otherwise unrelated motion *in limine*, the district court examined the widow's reliance on the *Pennsylvania* Rule when the widow alleged statutory violations on the part of the defendants.[123] In acting similarly to the District of Maine and the First Circuit,[124] the Southern District of New York voiced serious doubt as to the applicability of the *Pennsylvania* Rule in cases of wrongful death under the Jones Act[125] and noted the lack of a "causal connection" between the injury and any alleged statutory violations by the defendants.[126] Though the *Amerada* court stopped short of explicitly stating that the *Pennsylvania* Rule does not apply in all Jones Act cases, other earlier courts have held in such a manner.[127]

3. The Rule and the Brussels Collision Convention of 1910

Due to the confusion as to whether the *Pennsylvania* Rule is a procedural rule of evidence or a substantive rule of law,[128] invocation of the Rule in an international setting presents a particularly thorny problem when an American forum is obligated to apply foreign substantive law. More specifically, the Brussels Collision

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the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.").

122. *Amerada*, 2002 WL 140542, at *1.

123. *Id.* at **15-17.

124. *See supra* notes 101-11 and accompanying text.

125. *Amerada*, 2002 WL 140542, at *16 ("Accordingly, the reliance of the *Seaboard* court on *The Pennsylvania* does not support reliance on *The Pennsylvania* in a wrongful death claim, the situation in this case." (citing *In re* Seaboard Shipping Corp., 449 F.2d 132 (2d Cir. 1971))); *id.* ("*The Pennsylvania* ... should not be extended 'beyond the chosen area of ship collisions to embrace Jones Act cases.'" (quoting Wilkins v. Am. Exp. Isbrandtsen Lines, Inc., 446 F.2d 480, 486 (2d Cir. 1971))).

126. *Id.* at **16-17 ("[The] [p]laintiff must show evidence of a causal connection between [the] [d]efendants' alleged violation of Coast Guard regulations and the [p]laintiff's injury.").

127. *See, e.g.*, Mawari v. Interocean Ugland Mgmt. Corp., No. CIV.A.98-4779, 1999 WL 820454, at *1 (E.D. Pa. Oct. 1, 1999) (noting that the *Pennsylvania* Rule does not apply in a Jones Act case in the Third Circuit).

128. *See supra* Parts I.B-C.

Convention of 1910, of which the United States is not a signatory,[129] contains an Article 6, which states that "[t]here shall be no legal presumptions of fault in regard to liability for collision."[130] Few courts have wrestled with the problem of what becomes of the *Pennsylvania* Rule when substantive international law, namely the Brussels Collision Convention of 1910, is applicable to litigation in an American forum. In 1975, the Ninth Circuit became one of the first to address this problem in *Ishizaki Kisen Co. v. United States*.[131]

On the morning of December 21, 1967, a collision occurred in Kure Harbor, Japan, between the Japanese hydrofoil *Kinsei-Go* and the United States Army vessel *J-3793*.[132] Although international law dictated that it was the duty of the *Kinsei-Go* to alter course,[133] that mandate was modified by Japanese Port Regulations, which stated that non-miscellaneous vessels, such as the *J-3793*, must fly their call signs while in Kure Harbor and that miscellaneous vessels must give way to non-miscellaneous vessels.[134] As the *J-3793* was not flying her call sign,[135] the *Kinsei-Go* argued, the *Pennsylvania* Rule should operate to place the burden upon the *J-3793* to show that the call sign violation *could not have been* a cause of the collision.[136] In applying Article 6 of the Brussels Collision Convention of 1910, the Ninth Circuit held that, although not intended to make inoperative all presumptions, Article 6 does void application of the *Pennsylvania* Rule in that the *Pennsylvania* Rule "establishes an almost insurmountable burden of proof that virtually insures that some liability will be imposed upon the ship that is charged with such a burden. It strains reason to insist that it is not a legal presumption of fault 'in regard to liability for collision.'"[137]

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129. *See* Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Sept. 23, 1910, *reprinted in* 6 ERASTUS C. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 3-7 (Arnold Whitman Knauth ed., 6th ed. 1941) [hereinafter Convention].

130. *Id.* at 5.

131. 510 F.2d 875 (9th Cir. 1975).

132. *Id.* at 877.

133. *Id.* at 878 n.2.

134. *Id.* at 878.

135. *Id.*

136. *Id.* at 878-79.

137. *Id.* at 883. Although there is some debate as to whether a proper translation of Article 6 voids presumptions put into place by both statutes and judge-made rules, Judge Sneed of the Ninth Circuit held that the judge-made nature of the *Pennsylvania* Rule was not sufficient

Herein lies a tricky problem. At first, it may seem illogical to conclude that Article 6 of the Brussels Collision Convention of 1910, which voids "presumptions of fault,"[138] should be interpreted also to void application of the *Pennsylvania* Rule, which is a presumption of causation.[139] The understanding lies in the fact that, like the *Reliable Transfer* court, the Brussels Collision Convention of 1910 utilized the term "fault" in Article 6 also to mean "causative fault,"[140] distinct from the *Pennsylvania* Rule's use of the word "fault" as meaning a mere presupposed statutory breach, without the additional consideration of causation.[141] The Rule itself then operates upon the presupposed breach in the form of a presumption of causation. Thus, *Reliable Transfer* held that liability should be apportioned with regard to the parties' comparative "causative fault,"[142] whereas Article 6 insists that such "causative fault" should not be presumed.[143]

Since the *Pennsylvania* Rule's drastic presumption of causation operates on a presupposed "fault," to the extent that it may arguably impose the same burden of proof on the Rule's opponent as society imposes on a criminal prosecutor,[144] the Rule is most appropriately regarded as not being reconcilable with Article 6.[145] Logically, there is certainly little difference between a presumption of "causative fault," and a presumption that a "fault" was "causative," for concern is only with "'fault' which includes blameworthiness as well as

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to save it from being rendered inoperative by Article 6. *Id.* at 882 ("We believe that Article 6 is addressed to presumptions such as the *Pennsylvania* Rule without regard to whether they rest on judicial or legislative authority.").

138. *See* Convention, *supra* note 129, at 5.

139. *See* HEALY & SWEENEY, *supra* note 30, at 46.

140. *See supra* note 71 and accompanying text; *see also* HEALY & SWEENEY, *supra* note 30, at 52 (noting that "fault" in the Brussels Collision Convention of 1910 has been interpreted as a term of art meaning "causative fault").

141. *See supra* notes 31, 71 and accompanying text.

142. *See* HEALY & SWEENEY, *supra* note 30, at 52-53.

143. *See* Convention, *supra* note 129, at 5.

144. *See supra* notes 51-57 and accompanying text.

145. *See generally* HEALY & SWEENEY, *supra* note 30, at 49-53 (arguing that the *Pennsylvania* Rule is a substantive rule of law and a legal presumption of "fault," as that term is used in the Brussels Collision Convention of 1910, which abolishes such presumptions). Note that one of the main reasons why the United States did not sign the Convention was the inclusion of Article 6, which was interpreted as addressing presumptions such as the presumption of causation under the *Pennsylvania* Rule. *See id.* at 49 (citing S. EXEC. REP. NO. 75-4 (1938)).

causation. And no true apportionment [of liability] can be reached unless both factors are borne in mind."[146]

Thus, when litigation regarding Article 6 and the *Pennsylvania* Rule surfaced again as a result of a 2002 collision in the English Channel between the *M/V Kariba* and the *M/V Tricolor*, the Southern District of New York denied the *Kariba*'s attempt to invoke the *Pennsylvania* Rule upon a third vessel, the *M/V Clary*.[147] In so doing, Judge Baer of the Southern District of New York echoed the *Kisen* court's interpretation of the interaction between the *Pennsylvania* Rule and Article 6 of the Brussels Collision Convention of 1910, stating:

> The [*Kisen*] Court found that the *Pennsylvania* Rule is substantive and not a procedural rule of the forum because it is a rule designed to affect the decision of the issue rather than simply "regulate the conduct of the trial." In other words, it is outcome determinative—it is possible, but not likely, that the vessel guilty of a statutory violation will be able to establish that the violation could not reasonably be held to have been a proximate cause of the collision. As a substantive rule, the [*Kisen*] Court held, it should not be applied to a case simply because it is a law of the forum. When applied to the facts here, I agree with this reasoning. Put another way, the *Pennsylvania* Rule is not appropriate in this action.[148]

On appeal, Judge Hall of the Second Circuit roundly applauded the district court's analysis of the Rule and affirmed it to be substantive and, thus, not applicable to situations involving the Brussels Collision Convention of 1910.[149] Judge Hall noted the outcome-determinative nature of the *Pennsylvania* Rule and found it to be far more than a device that merely regulates conduct at

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146. *Id.* at 52 (citing Henry V. Brandon, *Apportionment of Liability in British Courts Under the Maritime Convention Act of 1911*, 51 TUL. L. REV. 1025 (1977) (citations omitted) (noting that the Maritime Convention Act of 1911 implemented the 1910 Brussels Collision Convention in Britain)).

147. *In re* Otal Invs. Ltd. (*Otal II*), 2006 A.M.C. 106 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 494 F.3d 40 (2d Cir. 2007); *In re* Otal Invs. Ltd. (*Otal I*), 2005 A.M.C. 2461 (S.D.N.Y. 2005), *aff'd*, 494 F.3d 40 (2d Cir. 2007).

148. *Otal I*, 2005 A.M.C. at 2464 (internal citations omitted).

149. *In re Otal*, 494 F.3d at 50-51 ("We agree the rule in *The Pennsylvania* is not a mere procedural rule; it is, instead, substantive.").

trial.[150] To be even more clear, Judge Hall then went on to dismiss potentially contradictory prior case law in the Second Circuit as "obiter dicta."[151]

4. Mutual Application and Non-application

As noted above, the coexistence of the *Pennsylvania* Rule with the comparative fault doctrine of *Reliable Transfer* has made for fairer adjudication of marine collisions.[152] Ironically, this modern inability for proponents of the *Pennsylvania* Rule to defer "at least half the loss" to another party has also made the Rule lose much of its original bite.[153] In particular, as is often the case, when both parties to a collision may show by a preponderance of the evidence that the other party was in violation of a statute meant to prevent collisions, the parties may invoke the Rule upon each other simultaneously.[154] In such a situation, mutual invocation of the *Pennsylvania* Rule is akin to the nonexistence of the Rule altogether, as "the burden on each party cancels the other out."[155]

In *Inland River Towing, Inc. v. American Commercial Barge Line Co.*,[156] the *M/V Floyd Goodman* and the *M/V Robert Greene* collided on the Lower Mississippi River in 1995 and each alleged that the other was in violation of one or more of the Inland Navigation Rules.[157] When the district court found that neither party had proven that their violations *could not have been* one of the causes of the collision, liability for the damages sustained was allocated according to the comparative fault doctrine of *Reliable Transfer*.[158] The district court then held that 70 percent of the loss should be apportioned to the plaintiff *Floyd Goodman*, while the defendant

150. *Id.* at 51 (noting that the *Pennsylvania* Rule "does not serve simply to determine who moves forward with the evidence, or to narrowly regulate the conduct at trial. To the contrary, the [R]ule ... is so significant as to substantially 'affect the decision of the issue' of liability in a collision.").

151. *Id.* at 51.

152. *See supra* notes 72-73 and accompanying text.

153. *See* George Rutherglen, *Not With a Bang but a Whimper: Collisions, Comparative Fault, and the Rule of* The Pennsylvania, 67 TUL. L. REV. 733, 733-36 (1993).

154. *See id.* at 737-38.

155. *Id.* at 736, 738.

156. 143 F. Supp. 2d 646 (N.D. Miss. 2000).

157. *Id.* at 647-50; *see also* Inland Navigational Rules, 33 U.S.C. §§ 2001-38 (2000).

158. *Inland River Towing*, 143 F. Supp. 2d at 649.

Robert Greene should be apportioned only 30 percent of the loss.[159] Thus, despite the plaintiff's successful invocation of the *Pennsylvania* Rule upon the defendant, the plaintiff, nevertheless, emerged from the litigation with the short end of the stick, because the defendant's successful invocation of the *Pennsylvania* Rule upon the plaintiff cancelled out any advantage the plaintiff might have had otherwise.

Another interesting case study is the Eleventh Circuit's 2006 ruling in *Superior Construction Co. v. Brock*,[160] which involved the December 2001 allision[161] between Brock's pleasure boat and Superior's stationary barge.[162] Roughly three and a half hours after the allision, Brock's blood alcohol level was still 0.112, which exceeded the legal limit of 0.08 set forth under applicable statutes.[163] On the other hand, Brock alleged that Superior violated 33 U.S.C.A. § 409, a statute intended to prevent allisions caused by obstructing navigation.[164] To further complicate matters, the *Oregon* Rule,[165] a general rule applicable to all allisions, states that the "presumption of fault for the allision lies against the moving vessel."[166] In dealing with the question of the intersection between the *Oregon* Rule and the *Pennsylvania* Rule, the Eleventh Circuit stated:

> The general rule is that the presumption of fault for the allision lies against the moving vessel [(i.e., the *Oregon* Rule)]. This burden of proof shifts, however, to the stationary vessel when the stationary vessel is in violation of a statutory rule intended to prevent accidents [(i.e., the *Pennsylvania* Rule)]. The stationary vessel then bears the burden of proof in showing that its statutory violation could not have been a contributory cause of the allision. In short, the burden of proof initially rests with the moving vessel under the *Oregon* Rule. If the moving vessel can

159. *Id.* at 651.

160. 445 F.3d 1334 (11th Cir. 2006).

161. A collision is impact between two moving objects. An allision is impact between a moving object and a stationary object. *See id.* at 1336 n.1 (citing BLACK'S LAW DICTIONARY 75 (7th ed. 1999)).

162. *Id.* at 1336.

163. *Id.* at 1338 & n.6; *see generally* 33 C.F.R. § 95.020 (2007); FLA. STAT. § 327.35 (2001).

164. *Brock*, 445 F.3d at 1340; *see also* 33 U.S.C. § 409 (2000).

165. *See* The Oregon, 158 U.S. 186, 192-93 (1895).

166. *Brock*, 445 F.3d at 1340 (quoting Sunderland Marine Mut. Ins. Co. v. Weeks Marine Constr. Co., 338 F.3d 1276, 1279 (11th Cir. 2003) (referencing the *Oregon* Rule)).

> establish the stationary vessel violated a statutory rule intended to prevent allisions, however, then the *Pennsylvania* Rule shifts the burden to the stationary vessel.[167]

Subsequently, in dealing with the various statutory infractions of the two parties, the Eleventh Circuit found that the district court had enough evidence to conclude that Superior's statutory infraction was the sole cause of the allision.[168] The circuit court, in dealing with the application of the *Pennsylvania* Rule on Brock's moving vessel, upheld the district court's finding that, despite legal intoxication in contravention of various statutes, Brock satisfied his burden of showing that his legal intoxication "*could not have been* a cause of the allision."[169] The Eleventh Circuit stated that "[t]his appeal involve[d] one of the rare cases where a district court had ample evidence with which to determine a boat driver's legal intoxication could not have been a cause of the allision."[170] As part of the appeal, Superior argued that the district court applied the wrong standard of proof by repeatedly stating that Brock's legal intoxication "'*was not* a cause of the allision,' rather than stating that Brock's legal intoxication '*could not have been* a cause of the allision.'"[171] Nevertheless, the circuit court held that the phrase "could not have been" is not a "talismanic phrase district courts must recite to correctly apply the *Pennsylvania* Rule,"[172] and that the burden of the rule "is strict, but ... not insurmountable."[173] Under such circumstances, in comparing Brock's non-causative drunkenness with Superior's severely causative statutory violation, the result hardly could have been any different, even if the *Pennsylvania* Rule were not applied to either party.

Once the "cancellation effect" was applied by the *Inland River Towing* court,[174] it was as if the *Pennsylvania* Rule was never applied at all, as liability was apportioned according to *Reliable Transfer*. With this phenomenon in mind, one court recently saw fit

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167. *Id.* (citations omitted).
168. *Id.* at 1343.
169. *Id.* at 1345-46 (emphasis added).
170. *Id.* at 1345.
171. *Id.* at 1343 n.17.
172. *Id.*
173. *Id.* at 1344 (citation omitted).
174. *See supra* notes 156-59 and accompanying text.

to dispense with the application of the *Pennsylvania* Rule altogether, at least when things get a little too complicated. In *Crowley American Transport, Inc. v. Double Eagle Marine, Inc.*,[175] the Southern District of Alabama was confronted with a collision between two towing parties.[176] In March 1999 near Mobile, Alabama, the barge *Massachusetts* was being towed into Mobile Harbor by the tugboat *Roland Falgout* with assistance by three other tugboats, the *Alabama*, the *Mardi Gras*, and the *Big Bear*.[177] With the onset of fog, all four tugboat captains received information that the barge *Crowley 407*, towed by the tugboat *Choctaw Eagle* and assisted by the tugboat *Ervin Cooper*, was coming up from behind in the river.[178] Upon arrival at the dock, the swift current, fog, and darkness made the docking procedure difficult for the *Massachusetts* and the four accompanying tugboats.[179] With the *Crowley 407*, the *Choctaw Eagle*, and the *Ervin Cooper* attempting to pass on the port side and the *Massachusetts* drifting out of control, a collision occurred between the *Massachusetts* and both the *Crowley 407* and the *Ervin Cooper*.[180]

The facts required the district court to sort through many details with regard to the relative faults of the various parties involved. Had the *Pennsylvania* Rule been applied by any or all of the parties upon each other, the confusion certainly would have multiplied. Hence, the district court made the following ruling with regard to the applicability of the *Pennsylvania* Rule to the case at hand:

> This Court ... need not specifically decide in this case whether it need apply the ... "*Pennsylvania* Rule," inasmuch as there is sufficient fault to be spread among the actions or omissions of the *Roland Falgout*, *Massachusetts* and *Choctaw Eagle* and "even without a specific, demonstrable violation of the [Inland Navigation] Rules, liability can be imposed where negligence is found."[181]

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175. 208 F. Supp. 2d 1250 (S.D. Ala. 2002).
176. *Id.* at 1254-60.
177. *Id.* at 1254-55.
178. *Id.* at 1255.
179. *Id.* at 1255-58.
180. *Id.*
181. *Id.* at 1264-65 (quoting Movible Offshore, Inc. v. The M/V Wilken A. Falgout, 471 F.2d 268, 274 (5th Cir. 1973), and Cole v. Sabine Towing & Transp. Co., 432 F. Supp. 144, 145 (S.D.

In so holding, the district court implied that, in this case, application of the *Pennsylvania* Rule was not necessary and, moreover, might create further confusion in light of an already complex situation. Accordingly, with the facts at hand and without resorting to the *Pennsylvania* Rule, the district court applied the comparative fault doctrine of *Reliable Transfer* and held that the *Roland Falgout* was 80 percent responsible for the collision, the *Massachusetts* 10 percent responsible, and the *Choctaw Eagle* also 10 percent responsible.[182] In this manner, the apportionment of the various vessels' comparative fault was accomplished without the *Pennsylvania* Rule, which may or may not have been applicable to any or all of the vessels involved.

III. THE CASE AGAINST THE *PENNSYLVANIA* RULE

Numerous commentators have maintained that the *Pennsylvania* Rule should, and does, enjoy continued vitality today, in the post-*Reliable Transfer* era, by asserting that it is now less draconian and more equitable.[183] Nevertheless, an investigation of modern case law from across the federal circuits shows that courts are just as likely today to circumvent the new "fairness" of the *Pennsylvania* Rule[184] as they were in the past to circumvent the traditional "unfairness" of the Rule.[185] This Note proposes an explanation for this puzzle. This Note does not contend that the *Pennsylvania* Rule cannot coexist with the comparative fault regime imposed by *Reliable Transfer*. Moreover, this Note supports the contention that operation of the *Pennsylvania* Rule is made fairer and more equitable by a regime of comparative fault, as opposed to the Rule's former cooperation with the Divided Damages Rule.[186] But this Note does argue that just as comparative fault made the *Pennsylvania* Rule more equitable, it also made the Rule more impotent. By reevaluating the driving principles behind the *Pennsylvania* Rule, and presumptions in general, in light of modern advances, this Note

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Ala. 1977)).

182. *Id.* at 1267-68.

183. *See, e.g.*, Peck, *supra* note 6, at 102; Ben-Jacob, *supra* note 12, at 1812-21.

184. *See supra* Part II.B.

185. *See supra* Part II.A.

186. *See supra* notes 67-68 and accompanying text.

opines that the *Pennsylvania* Rule in its modern form is outdated, ineffective, and should be retired.

Typically, three major arguments exist to legitimize the utilization of presumptions as a general proposition. They may be characterized as reasons of convenience, fairness, and policy.[187] First, for the sake of both efficiency and economy, what is likely to be true may be presumed to be true in the absence of any evidence pointing to an opposite conclusion.[188] Next, it is both logical and fair to put the burden of producing evidence upon the party who has better access to the evidence.[189] Finally, it is presumably good for the sake of deterrence and enforcement of adherence to marine safety statutes and regulations to place the burden upon the alleged statutory violator.[190] Nevertheless, analysis of these three motivations confirms that the *Pennsylvania* Rule is no longer viable. This Note contends that the Rule was, in fact, better at satisfying the three reasons mentioned above before *Reliable Transfer* and the onset of modern developments than it is today.

Sobering is the realization that all pursuit of convenience comes at a price. In a popular example, that which is shown to have been properly addressed, stamped, and mailed by the sender is presumed to have been received by the addressee.[191] With regard to this presumption, the price is relatively low as it is extremely likely that the shown fact, proper mailing by the sender, ultimately concludes in the presumed fact, proper receipt by the receiver.[192] There is no such strong connection between shown fact and presumed fact with regard to the *Pennsylvania* Rule's presumption of causation. Of the multitudes of statutes and regulations that currently exist with the intention of preventing marine collisions,[193] the violation of any one

187. *See* JAMES, JR., *supra* note 4, at 758-62.

188. *See id.*

189. *See id.*

190. *Id.*; *see also* Ben-Jacob, *supra* note 12, at 1818 ("The purpose of the [*Pennsylvania*] [R]ule is grounded in deterrence." (citation omitted)).

191. *See* JAMES, JR., *supra* note 4, at 760-61. This is the ever-popular "mailbox rule."

192. *See, e.g.*, U.S. POSTAL SERV., ANNUAL REPORT 54 (2005), *available at* http://www.usps.com/history/anrpt05/usps_ar05.pdf (indicating delivery of 98,071 million units of first-class mail in 2005).

193. *See, e.g.*, *supra* notes 83, 157 and accompanying text (addressing the COLREGs and Inland Navigational Rules); *see generally supra* Part II.B (highlighting case law addressing a variety of alleged statutory and regulatory breaches).

given statute or regulation is certainly not "extremely likely" to result in a collision or casualty.

In addition, as the cases have shown, not every collision has, as a causative factor, a particular statutory or regulatory violation that existed at the time.[194] This lack of a "strong connection" with regard to causation between a particular violation and a collision is the exact reason why many courts have refused to apply the *Pennsylvania* Rule in cases where the Rule's proponent could not even produce evidence sufficient to support a finding of a "causal connection" between the alleged violation and the collision.[195] Simply put, the rate of error, or the price to be paid for the convenience of the *Pennsylvania* Rule, is far too high to be acceptable under modern standards.

In terms of fairness, it indeed seems fair, when faced with a lack of producible evidence, to put the burden of producing exonerating evidence upon the statutory violator. Simply, if all that may be shown in the collision between *A* and *B* is that *B* violated a statute designed to prevent collisions, and neither *A* nor *B* can proffer more as to the incident's cause, the *Pennsylvania* Rule's presumption serves to presume that *B* was at fault, unless *B* can indicate otherwise. Such a presumption may have certainly been wise in past centuries, as commentators are quick to point out that "[u]nlike on land, it is rare to have a disinterested witness to a maritime collision or stranding. Therefore ... the [*Pennsylvania*] [R]ule can provide a convenient mechanism for courts to simplify the adjudication of collision cases."[196] Yet, with the *Pennsylvania* Rule, adjudication has certainly not been simplified in recent years to the point that it may be simpler at times to not apply the Rule at all.[197]

Clearly, in modern times, there is not a dearth of unbiased evidence regarding the causes of a collision, because technology has stepped in to provide such evidence.[198] With the prevalent, often

194. *See supra* Part II.B.

195. *See supra* Part II.B.2.

196. Ben-Jacob, *supra* note 12, at 1821 (citations omitted).

197. *See supra* notes 174-82 and accompanying text.

198. *See, e.g.*, *In re* Otal Invs. Ltd. (*Otal II*), 2006 A.M.C. 106, 109-10 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 494 F.3d 40 (2d Cir. 2007) (relying in large part on evidence and data recorded by ship navigation systems and shore-based RADAR systems); *see also* Paige Hess, Note, *Applying* The Pennsylvania *Rule–Circumstances to Consider in Allisions:* American River Transportation Co. v. M/V Kavo Kaliakra, 24 TUL. MAR. L.J. 343, 352 n.102 (1999) ("For

mandatory, use of devices and technology such as RADAR, Automatic Identification Systems (AIS), Electronic Chart Display and Information Systems (ECDIS), Long Range Identification and Tracking systems (LRIT), and Voyage Data Recorders (VDR), a vessel's every move is monitored and recorded.[199] Additionally, shore-based Vessel Traffic Services (VTS)[200] and the establishment of Traffic Separation Schemes (TSS)[201] in heavily trafficked areas further serve to monitor shipping lanes, assist in navigation, and reduce the number of collisions. Gone are the days when either no one lived to tell the tale of a collision or adjudication could only rely on a contest of "he said, she said."[202]

As for the third reason of pursuing good social policy, it cannot be argued that deterring breaches of statutes and regulations and attaining maritime safety objectives are not good social policies. Nevertheless, the *Pennsylvania* Rule is not a conduit through which such noble objectives may be properly met. The issue of deterrence was, logically, more properly addressed by the *Pennsylvania* Rule prior to *Reliable Transfer*. In a world of divided damages, a vessel had more incentive not to violate statutes meant to avoid collisions, because, upon a statutory violation and the subsequent invocation

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example, onboard electronic logs and the availability of satellite photographs make it significantly easier to reconstruct an accident as it happened without turning to presumptions. In short, a scalpel can now be used to achieve a fair result whereas mallets have previously been employed by the courts.").

199. *See* IMO and the Safety of Navigation, http://www.imo.org/Safety/mainframe.asp?topic_id=278 (last visited Mar. 29, 2008) (supplying hyperlinks to explanations of the usage of such systems as AIS, ECDIS, LRIT, and VDR).

200. *See id.* (also providing a link to information about VTS).

201. Traffic Separation Schemes, established by the International Maritime Organization (IMO), have made many of the world's most congested waterways safer. *See* INT'L MAR. ORG., FOCUS ON IMO: IMO AND THE SAFETY OF NAVIGATION 8-10 (1998), *available at* http://www.imo.org/includes/blast_bindoc.asp?doc_id=537&format=PDF.

202. In an interesting concurring opinion, Judge Newman of the Second Circuit wrote at length with regard to the marvels of modern maritime technology in 2007. *In re* Otal Invs. Ltd., 494 F.3d 40, 64-67 (2d Cir. 2007) (Newman, J., concurring). Specifically, while discussing the wonders of such technology as a fine potential source of evidence for post-collision adjudication, Judge Newman lamented the minimal use of that very same technology for collision avoidance. *Id.* at 65-67 (discussing Automatic Radar Plotting Aids (ARPA), which calculate Closest Point Approach (CPA), shore-based RADAR, VHF radios, AIS, Global Position Systems (GPS), and VDR, but admonishing that "in the 21st century, ... we can do better at reducing the risk of ship collisions"). Problems of under-utilization aside, this Note contends that modern technology is fully capable of supplying good post-collision evidence, a dearth of which originally justified, at least in part, the existence of the *Pennsylvania* Rule.

of the *Pennsylvania* Rule, the vessel would be hard-pressed to avoid either half or the entire loss being imposed upon her.[203] After the institution of a comparative fault regime, the same vessel opposing the invocation of the *Pennsylvania* Rule upon her by another vessel would only have to risk liability up to her own degree of comparative, causative fault in the fight with regard to the element of causation.[204] Thus, just as the Rule became more fair, it also became less of a deterrent, one of the very reasons justifying the Rule's existence in the first place.

Conceptually, the move from divided damages to comparative fault was the Supreme Court's recognition that, by 1975, a sledgehammer was no longer needed with regard to apportioning liability equitably and with acceptable precision.[205] And yet, the sledgehammer of the *Pennsylvania* Rule still exists today with regard to the element of causation. But with equitable apportioning of liability as the ultimate goal and just adjudication of the element of causation as a means to that end, it is nonsensical to retain the evidentiary sledgehammer with regard to the latter, having done away with it with regard to the former.[206] And when that sledgehammer is admittedly difficult to use, in light of the pointlessness of its further use, courts may simply not use it altogether. Insofar as deterrence is still necessary and maritime safety is still a primary concern, punishment of statutory violators in a criminal setting is well within the powers of the legislature and the authority of the courts in admiralty.[207] To the extent that such action has already been taken with the purpose of deterring pollution on the high seas, the same logic should be applied in order to deter actions causative of collisions.

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203. *See supra* Part I.C.

204. *See supra* Part I.C.

205. *See supra* notes 67-68 and accompanying text. The reference to Solomon "splitting the baby" is well appreciated. 1 *Kings* 3:16-28.

206. *See* Hess, *supra* note 198, at 352 n.102.

207. *See, e.g.*, NICHOLAS J. HEALY, DAVID J. SHARPE & DAVID B. SHARPE, CASES AND MATERIALS ON ADMIRALTY 67 (4th ed. 2006) (discussing a new line of anti-pollution laws, such as the Oil Pollution Act of 1990 (OPA '90), which impose strict criminal liability upon offenders); HEALY & SWEENEY, *supra* note 30, at 460-62 (discussing penal proceedings in collision cases). For more on OPA '90, see 33 U.S.C. § 1319(c) (2000). *See also* Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (2000); Refuse Act of 1899, 33 U.S.C. § 407 (2000).

The *Pennsylvania* Rule's presumption no longer effectively serves any of the three above-listed justifications for presumptions. And yet, one must remember that the Rule is not just a presumption, but a "drastic and unusual presumption," which this Note has described as an "extra-strength" Morgan presumption.[208] If not already fairly describable as a substantive rule of law, the Rule is about as close as a "presumption" can come to being irrefutable. The Rule is certainly far closer in scale to an irrefutable presumption than the clearly procedural device of a typical Thayer "bursting bubble" presumption.[209] In the end, despite the fact that the *Pennsylvania* Rule *may* enjoy continued vitality today, the position that the Rule *should* enjoy such continued vitality is indefensible.

CONCLUSION

The *Pennsylvania* Rule is no more a darling of the courts and no less "drastic and unusual" today than it was in years past. The Rule is still as close as a "non-irrefutable presumption" can get to a substantive rule of law, if it is not fairly describable as a substantive rule of law already. Arguably, despite being less equitable when used in conjunction with the Divided Damages Rule before 1975, the post-*Reliable Transfer* utilization of the *Pennsylvania* Rule is, in fact, less effective and less purposeful than before. Nevertheless, the Rule remains shrouded in debate and is more trouble than it is worth to apply today. For this reason, a study of modern case law from various federal circuits indicates that the Rule's presumption is dodged and avoided by the courts under numerous circumstances with the assistance of various techniques. When analyzed against a modern backdrop with the original justifications for not just the Rule, but for all presumptions in general, the understanding is clear that the *Pennsylvania* Rule has outlived its usefulness. The continued vitality of a rule of law cannot be justified by inertia alone. Just as we have traded in the sledgehammer for the scalpel with regard to apportionment of liability in marine collisions, it is now time to officially retire the sledgehammer that is the *Pennsylvania*

208. *See supra* Part I.B.

209. *See supra* Parts I.B-C; *see also supra* Part II.B.3 (discussing why two courts have held that the Rule is substantive enough to warrant non-application in light of Article 6 of the Brussels Collision Convention of 1910).

Rule with regard to causation. Clearly, many courts have already unofficially done so.

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