NOT WITH A BANG BUT A WHIMPER: COLLISIONS, COMPARATIVE FAULT, AND THE RULE OF THE PENNSYLVANIA

GEORGE RUTHERGLEN*

I. THE RULE AFTER RELIABLE TRANSFER ........... 736
II. NEGLIGENCE PER SE AND COMPARATIVE FAULT . 740
III. CONCLUSION: IS THE RULE WORTH OVER-RULING? ......................... 747

Throughout this century, the rule of The Pennsylvania 1 has created an idiosyncratic presumption in American admiralty law that has complicated the litigation of collision cases.2 The rule of The Pennsylvania both shifts and increases the burden of proof on the issue of causation.3 In a famous passage from the case for which the rule is named, the Supreme Court framed the rule in these terms:

[When], as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the statute.4

This presumption imposed liability on a vessel that violated a rule of navigation when there was no evidence on the issue of causation or when the evidence was that another vessel was principally at fault in causing the collision.5

* John Allan Love Professor and John V. Ray Research Professor, University of Virginia School of Law. I would like to thank Pam Karlan, Saul Levmore, Glen Robinson, and Bill Stuntz, who read an earlier draft of this article, and Matthew Greiner and Greg Miller, who did research into the case law.
4. Id.
5. See infra notes 7-9 and accompanying text.

733
The rule of *The Pennsylvania* had an especially harsh effect when it operated in combination with the doctrine of divided damages. The doctrine of divided damages, which lies halfway between contributory and comparative negligence, apportioned damages equally between vessels when more than one vessel was at fault in a collision. With the doctrine of divided damages, the rule of *The Pennsylvania* imposed half the liability for a collision on the vessel that violated a rule of navigation, even if the collision occurred largely as a result of the other vessel's fault. This harsh consequence was frequently criticized and led to doctrinal innovations that attempted to minimize its effects, including unacknowledged weakening of the presumption of causation in the rule itself.

With the rejection of divided damages and the adoption of a regime of comparative fault in *United States v. Reliable Transfer Co.*, the worst excesses of the rule of *The Pennsylvania* were eliminated. After *Reliable Transfer*, the rule no longer operated to impose half the liability on a party that was less than half at fault. A vessel that violates a rule of navigation is now liable only in proportion to its fault. *Reliable Transfer* also made American admiralty law more consistent with the maritime law of other nations and with general American tort law. In 1910, the International Convention for Unification of Certain Rules of Law Respecting Collisions Between Vessels adopted the doctrine of comparative fault, and by 1982, forty states had done

6. GILMORE & BLACK, supra note 2, § 7.4. at 492.
7. Id.
9. See supra notes 2-5 and accompanying text.
11. Id. at 411.
12. See id. at 409-11.
likewise. 14

The rule of The Pennsylvania still survives, however, as an anomaly in American tort law and in the maritime law of seafaring nations. 15 It remains a presumption on the issue of causation, which determines whether a vessel can be held liable for any damages at all. Similar presumptions on this issue are found nowhere else in tort law or in maritime law. Indeed, the 1910 International Convention goes further and explicitly abrogates all presumptions on the issue of fault. 16 Nevertheless, in the figurative language of Judge John R. Brown, "This rule still floats, in the wake of U.S. v. Reliable Transfer, which only overruled The PENNSYLVANIA on the point of allocating comparative fault." 17 Other federal judges have uniformly reached the same conclusion, 18 although one court and a few commentators have suggested that the rule should now be reconsidered. 19

The argument against preserving the rule is that it can no longer function, after Reliable Transfer, as a clear rule that imposes all, half, or none of the liability on one of the parties. Even before Reliable Transfer, a variety of exceptions mitigated the harsh effects of the rule. 20 After Reliable Transfer, the all-

16. International Convention, supra note 13, art. 6, at 51; Tetley, supra note 8, at 136; see Ishihaki Kisen Co. v. United States, 510 F.2d 875, 882-83 (9th Cir. 1975).
18. E.g., Florida East Coast Ry. v. Revilo Corp., 637 F.2d 1060, 1066-67 (5th Cir. Unit B Feb. 1981); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1160 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979); see Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T RICH DUKE, 947 F.2d 83, 86 (3d Cir. 1991) (applying rule only to determine whether one party was at fault or not); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1555 (11th Cir. 1987) (same), cert. denied, 486 U.S. 1033 (1988); First Nat'l Bank v. Material Serv. Corp., 597 F.2d 1110, 1119 (7th Cir. 1979) (remanding for comparison of fault after finding one party in violation of rules of navigation and other party negligent); Owen & Whitman, supra note 15, at 449-55; Peck, supra note 8, at 98-101.
20. See supra note 8 and accompanying text.
or-nothing operation of the rule is inconsistent with the questions of degree necessarily involved in determining comparative fault. At best, the rule allows a court to make a threshold determination that a party is or is not liable; at worst, it confuses the already complex issue of causation by imposing a rigid rule on widely varying facts. As a presumption of law, it is both broader and less flexible than the doctrine of negligence per se. Both The Pennsylvania rule and the doctrine of negligence per se establish presumptions based on the violation of statutory duties of care, but the rule of The Pennsylvania concerns causation, while negligence per se concerns fault alone.21 Everything worthwhile accomplished by the rule of The Pennsylvania can be achieved more effectively with the narrower and more flexible doctrine of negligence per se.22

This Article adds its voice to the criticism of the rule of The Pennsylvania. Part I examines the decisions that have applied the rule after Reliable Transfer to determine what, if any, difference the rule makes. Part II examines the justification for the rule as a presumption on the issue of causation and how this presumption compares to the doctrine of negligence per se. This Article concludes that the rule of The Pennsylvania should be abandoned in favor of the ordinary rule of negligence per se, which has, at most, an indirect and variable effect on the issue of causation.

I. THE RULE AFTER RELIABLE TRANSFER

As Judge Brown states, the most likely use of the rule of The Pennsylvania after Reliable Transfer is on the threshold issue of liability: to determine if one or both vessels involved in a collision are liable for any part of the loss. If only one vessel is found liable, then all of the loss falls on it. If both vessels are found liable, either under the rule of The Pennsylvania or according to the ordinary standards of negligence and causation, then the court must proceed to an analysis of comparative fault. At this second stage, many cases have held that the rule of The Pennsylvania is entirely irrelevant. They have found that it functions only to determine the existence of liability, not as a factor in determining comparative fault.23

21. See infra notes 48-50 and accompanying text.
22. See infra notes 58-64 and accompanying text.
23. See Florida East Coast Ry. v. Revilo Corp., 637 F.2d 1060, 1066-67 (5th Cir. Unit B Feb. 1981); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1160 (2d Cir.
An example of a decision dismissing the importance of the Pennsylvania rule is Pennzoil Producing Co. v. Offshore Express, Inc. The only distinctive feature of Pennzoil is that it arose from an allision, in which a vessel ran into a stationary gas pipeline, instead of from a collision between two moving vessels. The Fifth Circuit nevertheless properly extended the rule of The Pennsylvania to the pipeline because the pipeline company had violated a regulation prohibiting obstructions of navigable waterways. The pipeline had not remained buried beneath the bed of the canal where the accident occurred because the banks and the channel of the canal, which was located in a Louisiana marsh, had changed over the years. The pipeline company therefore violated regulations of the Army Corps of Engineers and the court held the company liable under the rule of The Pennsylvania. The court refused, however, to hold the company fully liable for the allision because the rule of The Pennsylvania had no bearing on the issue of comparative fault once the threshold of liability had been crossed.

A second aspect of Pennzoil reveals how the rule operates in practice after Reliable Transfer: it often applies equally to both parties. The vessel that allided with the pipeline was held liable, because it was proceeding “at a speed greater than was prudent under the circumstances,” which was any speed at all given the complete lack of visibility. The lack of visibility caused the vessel to wander from the usual channel in the canal and to hit the exposed pipeline. Proceeding in these circumstances violated a rule of navigation, Inland Rule 6: “Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.” In this case, as in many others, the rule of The

1978); see also Cliffs-Neddrill Turnkey Int'l-Oranjestad v. M/T Rich Duke, 947 F.2d 83, 86 (3d Cir. 1991); supra note 18 and accompanying text.

24. 943 F.2d 1465 (5th Cir. 1991).
25. Id. at 1467.
26. Id. at 1472.
27. Id. at 1467-68.
28. Id. at 1468.
29. Id. at 1472.
30. Id.
31. Id. at 1470 (quoting Pennzoil Producing Co. v. Offshore Express, Inc., 735 F. Supp. 195, 197 (E.D. La. 1990)).
32. Id.
Pennsylvania applies to both parties. It fails to confer any net advantage on either party because both parties have violated rules of navigation. Because both parties are required to meet the onerous burden of disproving causation, the burden on each party cancels the other out in determining relative fault. Nor does the rule assist in determining how blameworthy their conduct is, because that depends on the rule that each party has violated and the mitigating or aggravating circumstances of each case.

Pennzoil is an even more typical case in yet another respect. The rule of The Pennsylvania was applied to violations of very general rules of navigation, which allow a court to ratify a result that could be reached simply by applying ordinary standards of negligence and causation. Both the Inland Navigational Rules ("Inland Rules") and the International Regulations for Preventing Collisions at Sea, or Colregs as they are commonly known, contain general requirements of safe seamanship—often in exactly the same terms. Inland Rule 6 is simply the verbatim counterpart of Colregs rule 6. Other provisions in both the Inland Rules and in the Colregs are framed in equally broad terms, such as rule 7(a), which requires the use of "all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists," and rule 8(a), which requires that "action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship." Other rules are of still greater generality, such as rule 5, which

34. E.g., Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 822-23, 825-26 (9th Cir. 1988) (holding that one vessel violated Coast Guard regulation and the other violated Colregs); Parker Towing Co. v. Yazoo River Towing, Inc., 794 F.2d 591, 594 (11th Cir. 1986) (affirming trial court's finding that both vessels caused collision); Allied Chem. Corp. v. Hess Tankship Corp., 661 F.2d 1044, 1053-54, 1057 (5th Cir. Unit A Nov. 1981) (holding that both vessels violated Inland Rules); In re G & G Shipping Co., 767 F. Supp. 398, 404-11 (D.P.R. 1991); see also Cliffs-Neddrl Dr Ill-Turnkey Intl-Oranjestad v. M/V RICH DUKE, 947 F.2d 83, 91 (3d Cir. 1991) (remanding for trial on the issue of whether both parties were liable based on violations of Colregs); Board of Comm'rs v. M/V Farmsum, 574 F.2d 289, 294-97 (5th Cir. 1978) (affirming district court finding that one vessel violated Inland Rules and reversing finding that second vessel at fault).


requires posting of lookouts,\textsuperscript{39} and rule 7(b), which requires proper use of radar.\textsuperscript{40} The most general rule of all is rule 2(a), which provides that the rules do not exonerate "the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."\textsuperscript{41} Many cases have applied the rule of \textit{The Pennsylvania} to violations of these general rules of navigation.\textsuperscript{42} Given the existence of such general rules, it is a rare collision indeed in which neither party has violated a rule of navigation.

It follows that the rule of \textit{The Pennsylvania} is almost always available to bolster any weak case on the issue of causation. But if it is almost always applicable, by the same token, it is hardly ever necessary. Most often it functions just as an added factor that is always present and that can always be invoked to justify whatever result the court might reach on other grounds. In \textit{Pennzoil}, for instance, the presumption of causation was hardly necessary to find that the collision between the vessel and the pipeline resulted from both the pipeline company's failure to keep the pipeline buried and the vessel's failure to wait for visibility on the canal to improve.\textsuperscript{43} Even if the rule applies to only one of the vessels in a collision, it simply invites the court to assess the seriousness of that party's fault. Not surprisingly, when one party has been far more at fault than another, the courts have found either that the rule does not apply to a "technical" violation of a rule of navigation or that the offender has carried its burden of proving that the violation could not have caused the collision.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{39} Colregs rule 5; cf. 33 U.S.C. § 2005 (1988) (same language).
\item \textsuperscript{40} Colregs rule 7(a); cf. 33 U.S.C. § 2007(a) (1988) (same language).
\item \textsuperscript{41} Colregs rule 2(a); cf. 33 U.S.C. § 2002(a) (1988) (same language).
\item \textsuperscript{42} \textit{E.g.}, Cliffs-Neddrl In't-Oranjestad v. M/T Rich Duke, 947 F.2d 83, 86-90 (3d Cir. 1991) (failure to post lookout and have proper lights); Allied Chem. Corp. v. Hess Tankship Co., 661 F.2d 1044, 1053, 1057 (5th Cir. Unit A Nov. 1981) (failure to post lookout and properly use radar, among other rule violations); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1159-60 (2d. Cir. 1978) (failure to post lookout), \textit{cert. denied}, 440 U.S. 959 (1979); First Nat'l Bank v. Material Serv. Corp., 544 F.2d 911, 917-18 (7th Cir. 1976) (failure to comply with Great Lakes Rules on lookout, lights, and sound signals); \textit{In re G & G Shipping Co.}, 767 F. Supp. 398, 406 (D.P.R. 1991) (failure to comply with Colregs rules 2, 5, 7, 8, 14).
\item \textsuperscript{43} Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1469-71 (5th Cir. 1991); \textit{accord In re G & G Shipping Co.}, 767 F. Supp. at 405 ("[A]pplication of the Pennsylvania Rule is not determinative of the outcome in this case."); \textit{see Tug Ocean Prince, Inc.}, 584 F.2d at 1159-60 (relying on both the undisputed facts and the rule of \textit{The Pennsylvania}).
\item \textsuperscript{44} Churchill v. \textit{THE F/V FJORD}, 892 F.2d 763, 769-70 (9th Cir. 1988), \textit{cert. denied},
\end{itemize}
There is no need, of course, for courts to rely on the rule of The Pennsylvania in order to engage in this assessment of comparative fault. It is at this very point that The Pennsylvania has been limited by Reliable Transfer. As the Fifth Circuit recognized in Pennzoil, an assessment of comparative fault must be based on all the facts of the case, not on a simple count of how many rules of navigation each vessel has violated.45 Different rules of navigation figure more or less prominently in assessing fault in different circumstances. The rule of The Pennsylvania, by treating all rules of navigation as if they were of equal importance, obscures the way in which the rules differ in their general significance and as applied to the facts of each case. It also increases the risk that a judgment which should be made on the facts of each case will instead be influenced by the rigid presumption of The Pennsylvania. Courts cannot determine comparative fault without relying on rules of navigation, but they can appeal to these rules without relying on The Pennsylvania.

II. NEGLIGENCE PER SE AND COMPARATIVE FAULT

If the rule of The Pennsylvania is superfluous, why do courts nevertheless persist in relying on it? The most obvious answers are precedent and tradition, principles whose force is never to be underestimated in admiralty. With the authority of established precedent and tradition, attorneys use the rule to emphasize the fault of the opposing party and judges use the rule as an obvious source of liability. For the advocate, the rule functions as a rhetorical device for shifting liability onto another party. For the court, the rule provides a seemingly simple means of analyzing the often complicated facts leading up to a collision. And for appellate courts, an error in applying the rule sometimes allows them to reverse a district court’s decision without holding its findings of fact clearly erroneous.46 Unfortu-
nately, all of these tendencies distract the courts from an accurate assessment of causation and comparative fault, unnecessarily complicate the law in collision cases, and increase the risk of error.

Even in admiralty, precedent has its limits, as the rejection of the doctrine of divided damages in Reliable Transfer illustrates.47 The continued popularity of the rule of The Pennsylvania is also attributable to its similarity to the doctrine of negligence per se. The presumption of causation under The Pennsylvania rule is easily confused with the more common presumption of negligence that arises under the doctrine of negligence per se when a party violates a statutory standard of care.48 The ordinary doctrine of negligence per se creates an irrebuttable presumption of negligence from violation of the rules of navigation49; the rule of The Pennsylvania adds only a rebuttable presumption of causation. Yet it is precisely in this respect that The Pennsylvania rule is unnecessary. The opinion in The Pennsylvania justified the presumption of causation by emphasizing the importance of the rules of navigation.50 What recent cases have failed to note is that a presumption on the issue of causation adds little to the usual incentives to comply with rules of navigation. Courts do not need to rely on The Pennsylvania on either issue, especially under a regime of comparative fault. The doctrine of negligence per se is sufficient to give the rules of navigation the prominent role they deserve in resolving both issues.

As we have seen, the courts have uniformly limited the rule of The Pennsylvania to the threshold issue of whether a party is liable.51 By its own terms, the rule is limited even further to the issue of causation alone.52 Wholly apart from Reliable Transfer,53 the rule does not contribute anything to resolving the issue

---

47. See supra notes 10-14 and accompanying text.
48. The rule itself may have originated with this mistake. The opinion in The Pennsylvania relied heavily on an English statute that created a presumption only on the issue of fault. THE PENNSYLVANIA v. Troop, 86 U.S. (19 Wall.) 125, 135 (1874); Tetley, supra note 8, at 130-32.
49. See KEETON ET AL., supra note 14, § 36, at 229-30.
51. See supra note 15 and accompanying text.
53. See supra notes 10-11 and accompanying text.
of negligence, preliminary or comparative. That issue can be resolved entirely by relying on negligence per se. Thus, in *Pennzoil*, the pipeline company's failure to completely bury the pipeline established negligence;\(^{54}\) the rule of *The Pennsylvania* only added a presumption of causation.\(^{55}\) Because the regulation was designed to protect vessels from the risk of obstructions to navigation, negligence could be found simply from the fact that the company violated the regulation. The rules of navigation generally meet the prerequisites for finding negligence per se in collision cases: those harmed by the collision are within the class of persons protected by the rules and they are protected by the rules from the risk of collision.\(^{56}\)

What holds true of the preliminary finding of negligence also holds true with respect to a finding of comparative fault. In most formulations, the issue of comparative fault requires only a comparison of the parties' wrongful conduct. After the threshold of liability has been crossed, there is no need to examine causation. In *Reliable Transfer*, for instance, the Court distinguished the issue of comparative fault from the preliminary issue of causation, stating:

> 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.\(^{57}\)

This formulation is consistent with Prosser's view that fault admits of matters of degree but causation does not. Causation is simply all or nothing.\(^{58}\) Either a party's wrongful conduct contributed to the occurrence of an accident or it did not. Causa-

---

55. Id. at 1473.
56. Keeton et al., supra note 14, § 36, at 222-27; see Mathes v. Clipper Fleet, Inc., 774 F.2d 980, 983 (9th Cir. 1985) (concluding that "the negligence per se rule is inapplicable for the same reasons that the Pennsylvania rule is inapplicable").
57. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975); accord Gele v. Wilson, 616 F.2d 146, 148 (5th Cir. 1980) (allocating liability according to parties' fault, "not according to their degree of causation").
tion in this sense is only relevant to the preliminary issue of whether a party should be held liable at all.

An opposing view, adopted by the Uniform Comparative Fault Act,\(^{59}\) is that comparative fault inevitably involves an assessment of comparative causation.\(^{60}\) This view finds some support in the admiralty cases.\(^{61}\) It also may accurately describe what courts actually do when they apply a standard of comparative negligence. Causation is not easily confined to the threshold issue of whether a party is liable. The degree to which a party's wrongdoing contributed to a loss may be as important as the degree to which his conduct was wrong.

In ordinary language, "fault" can refer either to the wrongfulness of an action or to responsibility for a loss. One can properly say either "It was not my fault, I did nothing wrong." Or "It was not my fault. The accident was caused by someone else." In tort law, the difference between these two views of comparative fault might be resolved by distinguishing between two senses of cause: cause-in-fact, which addresses the empirical issue of whether a party's wrongful conduct was necessary for the loss to occur, and proximate cause, which addresses the further issue of whether a party, as a matter of policy, should be held liable for losses caused in the first sense.\(^{62}\) Cause-in-fact is an all-or-nothing issue that does not admit of comparisons or matters of degree; either a party's action figures in the causal explanation of an event or it does not.\(^{63}\) Proximate cause, on the other hand, is influenced by questions of legal policy that make it susceptible to judgments of degree,\(^{64}\) just like any other evaluation of conduct.

No matter how this thorny issue of defining comparative fault is resolved, it does not support continued adherence to the rule of The Pennsylvania. The rule operates in an all-or-nothing fashion, like the concept of cause-in-fact. If it applies at all, it

---


\(^{61}\) See Owen & Whitman, supra note 15, at 476-83.


\(^{63}\) Keeton et al., supra note 14, § 67, at 474.

\(^{64}\) Id.
should apply only to the threshold issue of causation, where cause-in-fact plays a role, and not to a comparison of fault. On the latter issue, a more flexible standard of causation, like proximate cause, is needed to make judgments of degree. Such judgments of degree, to the extent that they depend on a party's violation of a rule of navigation, can be based entirely on the legal policies underlying the rules themselves. In this respect, an analysis of proximate cause depends entirely on an analysis of negligence per se. Thus, if comparative causation had been at issue in *Pennzoil*, the court could have looked to the importance of the rule against obstructing navigable waterways to determine how much the exposed pipeline contributed to the accident.65 Likewise, the court could have looked at the vessel's violation of the rule requiring it to proceed at a safe speed to determine the vessel's causal contribution to the accident.66 Both lines of analysis, of course, closely resemble questions of how wrongful each party's conduct was. Whether or not the causal analysis should be framed solely in those terms, it is plain that it is a question of degree, like comparative fault, to which the rule of *The Pennsylvania* has nothing to contribute.

The rule might be decisive in only one narrowly defined class of cases: When a party has violated a rule of navigation but there is little evidence that the violation caused the collision. In theory, in this kind of case, the threshold of liability can be crossed only if the rule of *The Pennsylvania* supports a finding of causation that cannot otherwise be inferred from the evidence. Even so, the rule can result in substantial liability only if that party bears a significant proportion of the fault for the accident. It is in precisely these cases, however, that a finding of negligence per se is likely to influence a finding of causation, even in the absence of the rule of *The Pennsylvania*. An egregious violation of an important rule of navigation is likely to lead a court to find a causal connection between the violation and an ensuing accident. A minor violation of a less important rule, on the other hand, is likely to lead a court to find no causal connection at all.

Having searched the cases applying the rule after *Reliable Transfer*, I have been unable to find a case in which the rule

---

65. The court did emphasize the pipeline owner's fault in not checking that the pipeline was completely buried in the bed of the canal. *Pennzoil* Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1468-69 (5th Cir. 1991).
66. *See id.* at 1470.
leads the court to a correct decision that it could not have reached more easily on other grounds. Although a violation of a rule of navigation usually increases the probability of a collision, when it does not, courts usually find that the violator has carried its burden of rebutting causation. In these cases, the rule of *The Pennsylvania* simply takes the court on an unnecessary detour, causing the court to first apply the presumption and then to find that it has been rebutted. The danger in such cases, of course, is that the court might take the first step but not the second and reach an incorrect decision. A few decisions of the district courts have been reversed for precisely this reason.

In all other cases, negligence per se is sufficient to resolve any issue of causation, either as a threshold matter or when comparing the parties’ fault. For instance, in *Inland Tugs Co. v. Ohio River Co.*, the Sixth Circuit resolved an otherwise close question on the issue of causation by broadly interpreting a vessel owner’s duty under the Wreck Act to mark a wreck. The owner of the wreck had allowed the Coast Guard to mark it with a buoy, and when the marking buoy had been carried off by the current the owner failed to mark the wreck again. Instead of marking the wreck again, the owner relied on the Coast Guard’s representations that it would do so. As a result of this failure to mark, another vessel ran into the wreck and sank. As an initial matter, it might have been difficult to determine whether the subsequent sinking was caused by the owner’s failure to mark the wreck again, by the Coast Guard’s failure to mark the wreck securely in the first place or to mark the wreck again itself, or by the current that carried the first marking buoy away. The rule of *The Pennsylvania* might have been helpful in resolving this issue of causation, but although the court cited the rule, it was wholly unnecessary to its decision. The court relied instead on a long line of precedent holding that the owner’s duty to mark a wreck was nondelegable and so could

---

67. See supra note 56 and accompanying text.
68. E.g., *In re Magnolia Towing Co.*, 764 F.2d 1134, 1136-38 (5th Cir. 1985); Board of Comm’rs v. *M/V FARMSUM*, 574 F.2d 289, 297-98 (5th Cir. 1978).
69. 709 F.2d 1065 (6th Cir. 1983).
71. *Inland Tugs*, 709 F.2d at 1071.
72. *Id.* at 1069.
73. *Id.*
74. *Id.* at 1069-70.
75. *Id.* at 1071-72.
not be satisfied by relying on the Coast Guard.\textsuperscript{76} That holding on the issue of fault effectively resolved any issue of causation. Failing to mark the wreck made it impossible for the second vessel to avoid it.

In economic terms, the case for the rule of \textit{The Pennsylvania} must rest either on the increased deterrence it brings to bear on violations of rules of navigation or on the procedural costs it saves in litigation. The first purpose was the one asserted by the Court in \textit{The Pennsylvania}.\textsuperscript{77} The purpose must be recast, however, as that of enhancing deterrence beyond the level achieved by the doctrine of negligence per se. This increase depends on the small number of cases in which the rule of \textit{The Pennsylvania} leads to a different result.\textsuperscript{78} Unless the owners and operators of vessels are under a systematic misunderstanding of the rule that is large enough to distort their incentives to comply with the rules of navigation, any increase in deterrence is likely to be minuscule. The owners and operators of American vessels are likely to know of the rules of navigation, but not the technical effect of the rule of \textit{The Pennsylvania} on the issue of causation. And the owners and operators of foreign vessels, of course, are not likely to be aware that the rule even exists because it is unique to American law.\textsuperscript{79}

To the extent that the rule has any effect at all, it is likely to be detrimental. The rule is likely to detract from the fair and effective operation of the doctrine of comparative fault. That doctrine works fairly, as the opinion in \textit{Reliable Transfer} emphasized,\textsuperscript{80} only when liability is allocated in proportion to fault based on the facts of each case. The rule of \textit{The Pennsylvania} is likely to distract the court from that task through its rigid presumption of causation. As a matter of efficiency, a rule of comparative fault leads both parties to take the optimal level of precautions if they are in a position to take similar levels of precaution.\textsuperscript{81} This relative positioning of the parties describes collisions almost exactly. In a collision involving two vessels,

\textsuperscript{76} Id. at 1069-71.
\textsuperscript{77} \textit{The Pennsylvania v. Troop}, 86 U.S. (19 Wall.) 125, 136 (1874); \textit{see also} Ishizaki Kisen Co. v. United States, 510 F.2d 875, 879-80 (9th Cir. 1975) (noting that the \textit{Pennsylvania} rule enforces obedience to safety statutes).
\textsuperscript{78} \textit{See supra} text accompanying notes 67-68.
\textsuperscript{79} \textit{See supra} note 15.
\textsuperscript{80} United States v. Reliable Transfer Co., 421 U.S. 377, 404-05 (1975).
each is likely to be able to take similar precautions to avoid the accident. In collisions between vessels and stationary objects, as in *Pennzoil*, the parties take different precautions but the level of care required by each is the same. Vessels must avoid stationary objects and the stationary objects must be clearly marked so that vessels can avoid them, as in *Inland Tugs*. It is for this reason that another presumption in admiralty law—that a moving vessel which strikes a stationary object is at fault—has not been rigidly applied. Instead, this presumption can be rebutted by any reasonable inference drawn from the facts of each case. The rule of *The Pennsylvania* should be abandoned in favor of an equally flexible approach to causation.

The second purpose of the rule, which takes simplicity as a virtue, depends on the rule's actual ability to simplify litigation. As we have seen, its all-or-nothing approach to causation contrasts markedly with the flexible standard of comparative fault. Although *The Pennsylvania* can be reconciled with *Reliable Transfer*, the number of cases that take on this task suggest that it is a source of continuing confusion rather than simplification. The rule of negligence per se is much better understood, especially by judges not acquainted with admiralty law, and much more consistent with the standard of comparative fault. If the question were raised as an initial matter, there would be no case for adopting the rule of *The Pennsylvania* today.

III. CONCLUSION: IS THE RULE WORTH OVERRULING?

Although the rule of *The Pennsylvania* is not worth adopting, it still may not be worth discarding, especially since it does not appear to affect the reported decisions. Few of these decisions succumb to the misleading temptations of the rule. The transition to a law of collision free of the rule might impose costs of its own, principally in taking the Supreme Court's time to overrule the decision. A decision by the Supreme Court is necessary because the lower federal courts are powerless to depart

---

82. See supra text accompanying notes 69-76.
84. See Cliffs-Neddrill, 947 F.2d at 86; American Petrofina, 837 F.2d at 1326.
85. See supra notes 62-68 and accompanying text.
86. See supra notes 47-58 and accompanying text.
from its decisions\textsuperscript{87} and because Congress is not at all likely to act on such an isolated issue of collision law. To be sure, this technical issue of admiralty law does not loom large on the national agenda like issues of abortion, capital punishment, or even taxation of interstate commerce; on the other hand, it is much easier to resolve. The cost of a decision by the Supreme Court cannot be much larger than the cost incurred repeatedly by the federal courts in re-assessing and applying \textit{The Pennsylvania} after \textit{Reliable Transfer}. A single decision on this single aspect of \textit{Reliable Transfer} would take far less time, and would be much simpler, than the series of decisions on maritime wrongful death claims that followed the landmark decision in \textit{Moragne v. States Marine Lines}.\textsuperscript{88} Like claims for wrongful death, collision cases comprise a significant part of the admiralty docket.

A single decision of the Supreme Court would also serve to inform the admiralty bar and the federal judiciary of a change in the law. Because the rule is indigenous to American admiralty law, without any counterparts in ordinary tort law or in the law of other nations, there would be no need to inform lawyers outside the admiralty bar that this anomaly has been eliminated.\textsuperscript{89} It remains one of the peculiarities of American admiralty law that should be eliminated in favor of greater uniformity both nationally and internationally.

The rule of \textit{The Pennsylvania} has been criticized for so long, on so many different grounds, that its overruling is now long overdue. The history of its survival after \textit{Reliable Transfer} provides yet another reason for doing so.


\textsuperscript{89} \textit{See supra} notes 12-15 and accompanying text.