LIABILITY ON THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE OF PARTIES AND ASSUMPTION OF RISK IN MARITIME RELATED INCIDENTS: AN APPRAISAL**

Abstract

Negligence is a common cause of action in Maritime disputes. It is usually by the passengers aboard the ocean-going vessel or cargo owners, seamen and the shipowners who have suffered damage to their person or property. Contributory Negligence and Assumption of Risk is an idea that naturally allies within the province of the Law of Tort. In other words, both doctrines are the obvious basis of tortious liability. It is the focus of this paper to examine the developments in the law of negligence that have placed these ideas at the centre of tortious liability. The researchers analyse the concepts of both doctrines and also consider the implications of its development for the future of Tort Law. The researchers adopted doctorial research method through the review of primary and secondary sources of materials relevant to the topic. It was discovered that Negligence is a common cause of action in maritime disputes.

Keywords: Negligence, Parties, Contributory Negligence, Assumption of Risk, Maritime.

1. Introduction.

Maritime law as distinct from the Law of the Sea - which governs the use of the seas and oceans – is solely concerned with the body of laws, conventions and treaties that govern maritime business and other nautical matters, such as shipping or offences occurring on open water. Indeed, the law in many ways also govern insurance claims relating to ships and cargo, and facilitates a forum for civil actions between shipowners, seamen and passengers. Maritime Law (which is also known as Admiralty law), in addition, regulates the registration of ships, licensing and inspection, shipping contracts, maritime insurance and the carriage of goods and passengers. Furthermore, under the Nigerian law[1], the maritime activities encompass a comprehensive set of regulations, international conventions and local statutes that regulates areas such as shipping, maritime transportation and navigation, marine pollution, maritime contracts, carriage of goods, marine insurance, maritime liens and mortgages, personal injuries and wrongful death, maritime labour matters, salvage and towage services, collision, pollution and environmental regulations, maritime regulations and compliance, and other crucial aspects of the maritime sector.[2]

Negligence is a common cause of action in maritime disputes. It is usually by the ship owner and the crew of the ship or the cargo owner or another owner of a ship, who have suffered damage to their property. Legislations in several jurisdictions provide the apportionment principle[3], which is the apportionment of damages; i.e., the reduction of the actual damages which the person bringing the claim – which in this case, the Plaintiff – is entitled, when he has been contributory negligent. Again, at common law, the rule is that the plaintiff in a negligent action is barred from recovery when his conduct

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[1]A. Abdulhaleem, "Maritime Law in Nigeria: Key Provisions and Impact on the Maritime Industry," <https://pulse/maritime-law-nigeria-key-provisions-impact-industry-abdulhaleem. > 29th May, 2023; accessed on 24th July, 2024. Admiralty Jurisdiction Act, CAP A5, Laws of the Federation of Nigeria 2004, also the Admiralty Jurisdiction Procedure Rules 2023.

[2]A Abdulhaleem, ibid.

[3] The Court's role is the determination and subsequent apportioning of blame (if any) by examining the evidence submitted before it, with a view to evaluate culpability and to deduce its causative potency.

constituted either contributory negligence or assumption of risk. In admiralty, the movement toward contributory negligence started at an early date in the form of equal division of damages in collision cases. The doctrine grew out of distrust of the court which usually was sympathetic to the plaintiffs in personal injury lawsuits. The policy of not apportioning liability between the parties to the lawsuits (that is charging each with some fraction of the blame) also encouraged the doctrine.[4] Therefore, in an action based on negligence, the contributory negligence of the plaintiff is a common defence. Thus, the widely prevailing theory of this doctrine stands to qualify that: (a) the plaintiff's contributory negligence will affect his recovery in an action for negligence; and (b) it will affect recovery to the extent of being a complete bar to the defendant's liability in an action.[5]

Assumption of risk on the other hand, in comparison with contributory negligence, is a legal defence that is often employed in offshore injury claims, as well as in other dangerous line of work. The employers, boat owners, captains will attempt to make themselves immune to lawsuits by claiming that their employee knew the risks of what the job entails, and thus cannot institute an action when those risk factors resulted in injury. In other words, the employee assumed the risk by accepting or continuing employment with the employer, even after being aware of the employer's negligence.[6] It can further be emphasized that in maritime contracts, this defence hinges on a simple premise: when you signed your employment contract, whether it was for working on a commercial vessel, fishing boat, or jack-up oil rig, you were informed of the general danger of your occupation. When you knowingly began your job, you were assuming the risks inherent to your dangerous line of work. The defence implies that any injury you sustain will be a result of your choices because you knew what you were getting into.[7]

More often than not, many scholars in the various fields of law, have viewed that the affirmative defence to negligence that is similar to contributory negligence is the doctrine of assumption of the risk. This article tends to appraise the tenets of both contributory negligence and the assumption of risk both in domestic and international jurisprudence, and in essence, also appreciate the dissimilarities between them as the courts tend to distinguish between the two doctrines of assumption of the risk and contributory negligence. Indeed, questions and inquiries have been made in determining whether an aspect of assumption of risk and contributory negligence should remain distinct doctrines. It has been suggested whether such assumption of risk has a meaning independent of contributory negligence.[8]Where it has no independent application, it should be characterized as a special form of contributory negligence and be governed by comparative negligence statute in the same manner as contributory negligence; i.e., the defence would only reduce damages and would not completely bar the recovery.

The paper will appraise the liability on the doctrine of contributory negligence of parties and assumption of risk in maritime related incidents.

[4]Editorial Board, Minn. L. Rev., "Contributory Negligence and Assumption of Risk--The Case for Their Merger" (1971). Minnesota Law Review. 2996. https://scholarship.law.umn.edu/mlr/2996> accessed on 24th July, 2024.
[5]Editorial Board, Minn. L. Rev., p. 53.
[6]Arnold & Itkin, "What is Assumption of Risk," https://www.offshoreinjuryfirm.com/blog/maritime-law/what-is-assumption-of-risk-/> accessed 25th July, 2024.
[7]Ibid.
[8] Editorial Board, Minn. L. Rev; ibid.

2. The *All-or-Nothing* Rule versus the *Proportionate-Damages* Rule: Concept and Overview

In the field of Tort Law, the plaintiff can recover against a negligent defendant by proving that: - a) the defendant owed a duty to the plaintiff; b) the defendant breached that duty to the plaintiff; and, c) the plaintiff suffered harm due to the defendant's breach.[9] Negligence under the Law of Tort basically means the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff.[10] Similarly, it can broadly be described as the omission to do something which a reasonable man would do or something which a reasonable man would not do.[11] Contributory Negligence as an important category of the doctrine of negligence is simply ignorance of both parties involved.[12] It is also a good defence available to the defendant in negligence cases which prevents the plaintiff to get compensation, as long as the defendant can prove that the plaintiff has a great fault in his injury. In other words, contributory negligence is basically negligence of the plaintiff himself which combines with the defendant's negligence in bringing about the injury of the plaintiff.[13]Whereas, it all points to one singular fact; that the defendant is liable for the damage or injury caused to the plaintiff, but the plaintiff on the other hand, aggravated the situation by not taking steps to avoid the damage or injury through reasonable care.

The burden of proving contributory negligence lies on the defendant. In order to get a defence of contributory negligence, the defendant must prove that the plaintiff is responsible as him, and ignored due diligence which would have avoided such consequences arising from the negligence of the defendant. This practice does not exonerate the defendant completely; surely, he will still be held liable in negligence even though the plaintiff contributed also in the causing of the damage by his own negligence. However, the role of the plaintiff will be taken into account so as to divide the amount to be paid by the parties proportionately with each one's blame worthiness and thereby reducing the claim of the plaintiff.[14] The position of this doctrine under the common law gives the defendant in the case of contributory negligence complete freedom. The yardstick for determining liability was connected to the rule of causation, which was to determine if the defendant's act was the sole cause of the accident or injury or not. If it is, then he was held liable for the consequences, but if there is an interfering cause, for instance the conduct of the plaintiff himself leading to ultimate results that follows, then the defendant is not liable for the consequences.[15] Thus, the '*all or nothing*' rule.

The decision of the Kings Bench in the case of *Butterfield v. Forrester*[16]paved the way for the evolvement of the contributory negligence. As a result of the case above, contributory negligence under the British legal system became a defence that could be relied upon in tortious claims by defendants. The defendant in the case, who was making repairs to his house, wrongfully obstructed a highway by putting a pole across it. The plaintiff, Butterfield who was riding his horse violently in twilight on the road, collided against the pole and was thrown down and injured. Butterfield sued Forrester for damages. Had he been careful he could have observed the obstruction from a distance of 100 yards and

[9] The landmark case of *Donoghue v Stevenson* (1932) AC 562.
[10]Cornell Law School, "Contributory Negligence," Legal Information Institute, 2022 <https://www.law.cornell.edu/wex/contributory_negligence>accessed on 26th July, 2024.
[11]Ibid.
[12]Ibid.
[13]G Kodilinye, O Aluko, *Nigerian Law of Torts*, (Ibadan; Spectrum Law Publishing 1999), p. 85. But the essence of contributory negligence is not that the plaintiff's carelessness was necessarily a cause of the accident, but rather it contributed to his damage.
[14] "The Tort of Negligence Under Nigerian Law," <https://studylib.net/doc/25810266/111the-tort-of-negligence-under-nigeria-law> accessed on 26th July, 2024.
[15]The Tort of Negligence under Nigerian Law.
[16](1809)103 E.R 926

could have thus avoided the accident. Lord Ellenborough, C. J, concurring with Bayley J and on delivering the ruling on contributory negligence said; 'a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right.'

According to the above proposition the plaintiff's slight negligence deprived him of any relief as his negligence contributed to the damage complained of. The consequence resulting in the case made the defence of contributory negligence a complete ban to an action for damages irrespective of how little the fault the claimant was at in the accident. This decision made in the landmark case shaped the justice system of some various jurisdictions that followed the contributory negligence principle. In essence, the plaintiff, who is at all negligent cannot recover even if he established the above elements of proving negligence under a tortious claim, for the purposes of contributory negligence, and again, the degree of the plaintiff's or defendant's respective negligence is irrelevant. The advantage of this all or nothing rule is that it does not require the courts to accurately determine the degree of blame each party shares for the harm.[17] This fundamental Common Law jurisprudence was adopted by Nigerian law, in the same way and magnitude in the case of *Josephine Okoli v. Okolo Nwagu*.[18] The deceased alighted from a bus, walked on the kerb beside the bus onto the front of the bus and as he was crossing what was a busy road, at a short distance from the bus, a lorry coming along, from the direction leading to the back of the bus collided with him and dragged him a short distance before the lorry stopped. He died as a result of the injury. The appellant, the widow of the deceased claimed damages on behalf of herself and the adopted son of the deceased. The trial judge dismissed the case.On appeal, it was held that, the respondent driver could not have averted the collision as there was not sufficient separation of time, place and space for him to do so. Ademola CJF who read the leading judgment concluded that it was the deceased own negligence that caused the accident.

The rigid application of this doctrine resulted in injustice and harsh and unequal treatment to the plaintiff whose contribution to the wrong was less but whose suffering was substantial. As a result, the doctrine was modified by eventually introducing the doctrine of Constructive Last Opportunity.[19]This was in order to lessen the hardships of the plaintiff and its effect was that the plaintiff could recover in spite of his negligence if it could be found out that the defendant and not the plaintiff, had the last opportunity to avoid the accident.[20] Moreover, this application of the constructive last opportunity did no better than its predecessor, the last opportunity rule, but rather, compounded the problem created by the doctrine of last opportunity instead of offering any useful solution to it. Presently, the last opportunity doctrine and its hybrid of constructive last opportunity have ceased to be recognised and applied, by reason of the coming into force of the Contributory Negligence Act.[21]

The concept of contributory negligence according to The Law Reform (Contributory Negligence) Act, 1945, points out that: -

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim shall not be defeated by reason of the fault

[17]Cornell Law School.
[18](1960)5 F.S.C p. 16
[19]It is noteworthy that the "Constructive Last Opportunity" rule (which modified the 'Last Opportunity' rule) and was adopted in the decided case of *British Columbia Electric Corporation v Loach* (1916)1 A.C 719, was raised and relied upon by the appellant as a defence. However, the court rejected it and dismissed the appeal.
[20]IP Enemo, *The Law of Tort*, (1st Edition, Chenglo Publishing 2007), p. 90; The Tort of Negligence Under Nigerian Law; also, *Davies v Mann* (1842)10 M&W 546.
[21]Law Reform (Contributory Negligence) Act 1945 (8 & 9 Geo. 6. C. 28)

> of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage.[22]

For the tort to be in the nature of contributory negligence, there must be a proximate cause of actual injury and if the accident could have been avoided if the individual took action as that of a prudent individual, then he will not be able to claim this defence.[23] As it stands now under the Nigeran law, the effect is that a successful plea of contributory negligence would result in the apportionment of blame between the parties and consequently an apportionment of liability.[24] There are however, no statutory provisions that specifically set out principles for the courts to follow in the apportionment fault or assessing the damages recoverable where there has been successful plea of the defence of contributory negligence. Case laws suggest that it is within the ambit of the court's discretionary powers which must be exercised judicially and judiciously in line with the evidence led before the court.[25]

It is however, worth acknowledging of the fact that many jurisdictions, including most States in Nigeria, have gone further in limiting the application of contributing negligence, even to some extent, eliminating the doctrine altogether in favour of the more liberal Comparative Negligence. Under the comparative negligence, the negligent plaintiff can recover against a negligent defendant for the defendant's share of the blame. Comparative negligence is used to assign fault or blame in a claim by determining how much fault lies between the defendant and the plaintiff. With comparative negligence, the fault is assigned and damages awarded proportionately based on the degrees of determined negligence. Where contributory negligence reduces the amount of compensation a plaintiff receives, comparative negligence looks to assign financial responsibility in proportion to each party's level of involvement in causing the incident. Most States in the United States of America have adopted the comparative negligence over the contributory negligence either by statute or judicial decisions.[26]

3. The Assumption of Risk Doctrine of Tortious Liability.

This doctrine fundamentally concerns the first element of negligence: Duty.[27]Assumption of risk refers to a legal doctrine under which an individual is barred from recovering damages for an injury sustained when he or she voluntarily exposed him or herself to a known danger.[28] In other words, it prohibits a plaintiff seeking damages on the basis that the plaintiff knew of a hazardous condition and willingly exposed him or herself to it.[29]In addition, this doctrine (which is also known as *volenti non fit injuria*)

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[22]Ibid; Section1(1)

[23]Law Sikho, "Contributory Negligence Where a Person Does Not Wear Safety Gear," March 4, 2021, https://blog.ipleaders.in/contributory-negligence-where-a-person-does-not-wear-safety-gear/ accessed on 26th July, 2024.

[24] S Agada, C Unaegbunam, "At a Glance: Liability for Domestic Carriage of Passengers in Nigeria,"No. 21, 2022 <https://www.lexology.com/library/detail.aspx?g=5596c23e-a97a-4f86-b185-c254124b9001>, accessed on 26th July, 2024.

[25]S Agada, C Unaegbunam; ibid.

[26] Editorial Board, Minn. L. Rev; p. 55. Actually, in 1890, the U.S Supreme Court abolished every vestige of the Common Law bar of contributory negligence in maritime injury cases. In 1920, Congress effectively established the pure Comparative Negligence as the rule of seamen's personal injury and death cases in suits against employers and for cases of wrongful death on the high seas. Further, in 1975, the Supreme Court adopted the comparative negligence principle in collision and stranding cases.

[27]" Personal Injury, 'What Does Assumption of Risk Mean'," August 17, 2023 <https://www.shreveportlawyer.com/blog/what-does-assumption-of-risk-mean/>, accessed on 27th July, 2024.

[28]*Justia*, "Assumption of Risk in Personal Lawsuits,"< justia.com/injury/negligence-theory/assumption-of-risk/> October, 2023; accessed on 27th July, 2024.

[29]Ibid.

put in another way, is an action taken by the plaintiff that consequently relieves the defendant of liabilities.[30] It becomes tenable based on the risky action taken or about to be taken by the plaintiff. In addition, the assumption of risk principle gives a legal recognition to the principle that a person who is willing to incur a potentially dangerous situation cannot later complain of injuries that arise out of that brassiness.[31]

The law has thus, determined that certain activities come with innate risks, thereby cementing this defence which holds that people who choose to do certain dangerous activities cannot turn and hold others liable when they are injured as a result of those activities, especially if they knew of the risk of harm and assumed the risk by doing the activity anyway.[32]Therefore, plaintiff on the one hand, who voluntarily participate in these activities and become injured as a result cannot sue based on the negligence theory; and again this affirmative defence on the other hand, may be available to the defendant especially in personal injury lawsuits.[33]In fact, the defendant under this doctrine is claiming that the plaintiff knew the risk but took the chance of being injured anyway; and in invoking the defence of assumption of risk, the defendant must prove that: -

i. The Plaintiff had actual knowledge of the risk involved, i.e., aware that there was risk of the same sort of injury that he, the plaintiff actually suffered; and
ii. The Plaintiff voluntarily took on that dangerous adventure (i.e., assumed/accepted the risk) either expressly or impliedly through agreement or implied by words or by conduct.

The idea is that the plaintiff has assumed the risk, and the defendant does not owe any legal duty to the plaintiff. Thus, the duty element of negligence claim would not be met and the plaintiff cannot recover for the injuries caused either by risk inherent in the situation or dangers created by the defendant's negligence.[34]In view of the above conditions, it is apposite to state that the principle of assumption of risk can be invoke expressly or impliedly by the plaintiff, and must be on his own volition. It must be expressly stated in the sense that a written agreement such as a signed waiver or contract, though sometimes such statement could be made verbally. Furthermore, the implied assumption of risk, as the name implies, is not written or stated out loud (not spoken or communicated by either party but assumed to be known by all). It is prosaic the plaintiff acted in a way that reflected an understanding of the risk and a willingness to take anyway; for instance, in the case of areas or places with clearly posted signs like 'danger' or 'enter at your own risk', 'cars parked at your risk', or again, 'no swimming without a lifeguard.'[35] Specifically, the implied assumption of risk exists when the plaintiff undertakes conduct with a full understanding of the possible harm to him or herself and consents to the risk under these circumstances.[36]

[30]TJD McDuffey, "Assumption of Risk Defence,"<https://www.findlaw.com/injury/accident-injury-law/assumption-of-risk-defense.html> accessed on 27th July, 2024.
[31]MJ Toddy, "Assumption of Risk Merged with Contributory Negligence: *Anderson v Ceccardi*," <https://core.ac.uk/download/pdf/159558603.pdf> accessed on 27th July, 2024.
[32]TJD. McDuffey; ibid.
[33] It is noteworthy to point out that most jurisdictions, specifically in the United States, this doctrine was formerly an affirmative defence available to the defendant but has since been subsumed by both contributory and comparative negligence.
[34]Justia; ibid, an inherent risk is one that is integral to the activity or a risk that cannot be reduced or minimized without changing the basic nature of the activity.
[35]Justia; ibid.
[36]Though there is a general consensus among scholars that this type (Implied) of assumption or risk is more difficult for the defendant to prove and generally require examining the facts and circumstances surrounding a particular situation.

The exceptions to this rule which the courts depend on for their judicial classification is not upon proof of the existence of some particular fact but upon proof of the attainment of some degree.[37] Moreover, the courts are called upon to determine the foreseeability of the injury based on the activity. Thus, burden of proving assumption of risk lies on the defendant and he is responsible for showing that the danger was obvious or apparent, or that the conduct was inherently dangerous. If the defendant can successfully negate the duty of element of negligence claim with the defence of assumption of risk, the plaintiff cannot prove their negligent case. It should be borne in mind that no civil lawsuit is the same as another, so the circumstances surrounding the injury can change the type of assumption of risk involved.[38]

Assumption of risk comes in different forms, including as already discussed above, Express and Implied, as well as Primary and Secondary assumption of risk.[39] We shall herein consider the latter two forms of assumption of risk.

3.1 Primary Assumption of Risk.

This aspect of assumption of risk essentially involves any situation in which someone engages in a dangerous activity when he or she knows that no one else is responsible for their safety.[40] In essence, the primary assumption of risk relates to the initial issue of whether the defendant was negligent at all; i.e., whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not therefore, an affirmative defence.[41]Besides, it may arise when the defendant owes no duty of care to the plaintiff or when the defendant does not breach the duty that was owed. Whether it is phrased in terms of no duty or primary assumption of risk, this conduct continues to act as a complete bar to the plaintiff's recovery despite the introduction of a system of comparative fault. Therefore, since the defendant is by definition not negligent, comparative fault analysis is unnecessary.[42]

3.2 Secondary Assumption of Risk.

This type of assumption of risk occurs when a person is engaged in risky activities but someone else had a responsibility to protect them from injury and failed to do so. In some jurisdictions that employ the comparative fault standard, secondary assumption of risk is often used to help assign a percentage of blame to both the negligent party and the injured party that were involved in the accident.[43]

In comparison with the primary assumption of risk, the secondary assumption of risk occurs when the plaintiff voluntarily encounters a known risk of harm created by the defendant's negligence; and since the defendant's negligence has been established, then secondary assumption of risk therefore is an affirmative defence.[44] The issue on the one hand, is whether the courts should deny recovery to the plaintiff who has acted reasonably solely because the plaintiff voluntarily incurred a known risk. To the courts, the central issue should be the plaintiff's exercise of reasonable care.[45] While there are policy inconsistencies to the effect that the plaintiff is in effect punished for acting in a manner that the law

[37]*Bolton v Stone.*
[38]" Personal Injury, 'What Does Assumption of Risk Mean.''
[39]Some jurisdictions classify the Primary and Secondary assumption of risk as part of the Implied assumption of risk.
[40]" Personal Injury, 'What Does Assumption of Risk Mean' ibid.
[41]MJ Toddy; (n.30), this not being an affirmative defence basically describes a situation in which the defendant breached no duty to the plaintiff and therefore was not negligent.
[42]MJ Toddy, ibid.
[43]Ibid.
[44]Ibid.
[45]Ibid.

encourages, the reasoning being when one acts knowingly, it is immaterial whether he acts reasonably. Other policies hold that assumption of risk should not bar a reasonable plaintiff from recovery.[46]

On the other hand, what should be considered whereby the plaintiff voluntarily but unreasonably decides to proceed in the face of a known risk created by the defendant's negligent conduct. Once again, we broach the problem stated above over the debate on the unreasonable assumption risk which revolves around whether such doctrine is necessary in light of its similarity to contributory negligence.[47] Some scholars argue that secondary unreasonable assumption of risk has no meaning independent from contributory negligence and therefore should be abrogated or merged to avoid unnecessary confusion.[48] In contrast, some have viewed that although assumption of risk and contributory negligence may at times overlap and coincide, they are conceptually different. Courts that have retained assumption of risk as a complete bar to recovery despite the adoption of comparative negligence have noted that there are three (3) primary differences between assumption of risk and contributory negligence;

i. Assumption of risk concerns knowledge of the danger and voluntary acquiescence in it, but contributory negligence is simply an unknowing and unsuspecting departure from the standard of reasonable care.
ii. Assumption of risk is judged by a subjective standard based upon what the plaintiff actually knew; contributory negligence on the other hand employs an objective reasonable standard.[49]
iii. Assumption of risk is based upon the plaintiff's venturousness but contributory negligence is based upon reasonableness. These opposing positions differ only with respect to the weight of culpability a jurisdiction gives to the plaintiff's knowledge of the risk.[50]

In summary, it is established that the plaintiff's voluntary acceptance of a known risk should be considered in determining responsibility for a resulting harm. Applying the assumption of risk principle under comparative fault situations, will remove the sting of the all-or-nothing common law rule and will focus attention upon key elements that comprise the assumption of risk doctrine.[51]

4. **The Causative Potency and Blameworthiness Attached to Incidents in Navigable Waters**

There is an infinite variety of circumstances in which can lead to ships at the mercy of perils of the sea, causing anything from superficial scraping to total loss, due to the risks and hazards that associate with navigation in open waters. Under Maritime Law, incidents associated with this specialized area of law are defined as shipwreck, collision or stranding of the ship, explosion or fire in the ship or defects in the ship. These occurrences come squarely within the ambit of the ship and its equipment, machinery, which cause the ship to move or manoeuvre;[52] and the element of human fallibility will always exist and remain the prime cause of incidents in navigable waters. Therefore, it is the ship owner's solemn responsibility to exercise reasonable care aboard his vessel to prevent injury, illness or damage. Any failure or breach of this duty that results in harm being done to their crew is considered to be negligence under maritime law. The rule in force under admiralty jurisdiction is to apportion the loss upon

[46]Ibid.
[47]MJ Toddy (n.30); p 3.
[48]MJ Toddy; ibid.
[49]*Owens v Brimmell* (1977) Q.B 859.
[50]*Harrison v British Railways Board* (1981)3 All E.R 679.
[51]MJ Toddy; (n.30).
[52]C Hill, *Maritime Law*, (6th Edition; MPG Books) p. 456.

proportion to the degree of fault or the loss at first equally and later, according to the provisions of the Maritime Convention of 1911.[53]

There must be proved negligence causing or at least contributory to the collision. The judge's role these days in determining the apportionment of blame is to examine the evidence with a view to; evaluate culpability, and to deduce its causative potency.[54] Again, the accurate proportioning of blame in a specific percentage becomes the more crucial to determine fairly and equitably the greater total of claim value.[55] One distinction which must frequently be drawn is between a fault occasioned by a positive fault of commission and a fault of omission.[56]

4.1 Contributory Negligence and Determining Fault in Matters on Maritime Incidents

The issue on matters for determination by the court in which the defence of contributory negligence was invoked in Maritime disputes almost always revolves around collision. Historically, a case established that where one party had created a negligent situation which was fixed and established and another party had later also been negligent and as a result of the latter's negligence, loss or damage had been caused, then provided that the latter person had the opportunity to avoid the loss or damage being caused, he (i.e. the latter party) was solely to blame.[57] Presently the courts in circumventing this rule have evolved two simple rules for matters of incidents involving ships, to wit; if the negligence of both parties to the litigation continues right up to the moment of the incident, for instance a collision – each party is to blame for the collision which is the result of the continued negligence of both. Again, if the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not have otherwise made, then both are to blame.[58]

The English case of *Eurymedon* (1938) P 41, CA, tends to show how to 'pieces' of vessel negligence resulting in collision between same vessels, even though they could be separately identified as independent acts of negligence, should be regarded as inter-related acts jointly contributing to the resulting collision. The vessel *Corstar* was anchored in the River Thames in a position of danger at night, properly lit but nevertheless forming an obstruction. The *Eurymedon*, proceeding up river, struck her. The court found both negligent. The negligence of the *Corstar*, though to some extent in a fixed situation, was inextricably bound up with the subsequent negligence of the *Eurymedon* in failing to identify the lights and to make consequent action to avoid the danger. Both vessels had contributed to the resulting accident and their negligence was too inter-related to separate and free the one from blame altogether. The court further held that unless the one party had actually observed and is or should have been fully and clearly aware of the earlier act of negligence of the other party and has ample opportunity to avoid it, the *Davies* v *Mann*[59] decision of last opportunity creating sole fault should not hold. According to the English jurist, Lord Pearce, it is axiomatic that a person who embarks on a deliberate act of negligence should in general bear greater degree of fault than one who fails to cope deliberately with the resulting crisis which is thrust upon him. Between the extremes in which a man is either wholly excused for a foolish act done in the "*agony of the moment*" as aresult of another's negligence or is

[53]Maritime Conventions Act, 1911, (1 & 2 Geo. 5.) CHAPTER 57, s.1 - which provides the Rules as to division of loss.
[54]C Hill; ibid, p. 307
[55]Ibid.
[56]Ibid.
[57]The 'Last Opportunity Rule;' *Davies* v *Mann* (1842)10 M & W 546.
[58]A MacMurchy, "Contributory Negligence-Should the Rule in Admiralty and Civil Law be Adopted," <https://cbr.cba.org › cbr › article › >accessed on 30th July, 2024.
[59]Supra.

wholly to blame because he had plenty of opportunity to avoid it, lies a wide area where his proportion of fault in failing to react properly to a crisis thrust upon him by another must be assessed as a question of degree.[60]

4.2 Assumption of Risk Principle and the Adherence to Sanctions Regimes in Maritime

In admiralty, it is presumed that the doctrine of assumption of risk cannot be a defence. If the plaintiff assumes the risk, the plaintiff's fault will be apportioned and his recovery will be reduced under the comparative fault principles.[61] Historically, if by the Master's order or command, any of the ship's company or seamen be in the service of the ship and thereby happen to be wounded or otherwise hurt, they shall be cured and provided for at the costs and charges of the same ship. But if the sailor was injured through his own misconduct, he was obliged to bear the expense of his cure and might possibly be discharged.[62]

In England, this same protection was introduced in the Merchant Shipping Act of 1876.[63] The ship owner first became liable to the seaman for injuries resulting from unseaworthiness of the ship, wherein that every contract of service between the ship owner and Master or any seaman employed thereon, whether expressed or implied, carried an implied obligation that all reasonable means shall be used to ensure the seaworthiness of the ship before and during the voyage.[64] In the American jurisdiction, a number of attempts have been made from time to time to persuade Congress to enact an Employer's Compensation Act for seamen but all such efforts had been unsuccessful, the reason being that since seamen have retained their ancient right to maintenance and cure, set out in the terms of agreement in the contract, - a right that does not exist at Common Law -, and have made substantial gains over the years in the way of indemnification for injuries in both statutory enactments and judicial interpretations thereof, it is somewhat difficult to perceive what additional benefits would accrue to them through passage of a federal seaman's compensation law.[65] The historical account of the above American jurisprudence on regulations relating to liability of ship or ship owners for personal injuries sustained by a member of the crew and caused by the negligence of the Master was non-existent until late 1903.[66] However, the rule was conceived through the opinion of Mr. Justice Story, an American jurist in *Harde* v *Gordon*.[67] His position was that admiralty jurisdiction existed over a claim for expenses of care in case of sickness, since in contemplation of law, the right to a cure was a part of the contract for wages. The American jurist further opined that the sickness or other injury may occasion a temporary or permanent disability.[68] But that it is not a ground for indemnity from the owners. They are only liable for expenses necessarily incurred for the cure, and when the cure is completed, at least so far as the

[60]*Miraflores* v *TheAbadesa* (1967)1 Lloyd's Rep. 191. HL. The "Agony of the Moment" principle is basically a good defence to a charge of negligence or contributory negligence in which proof of it can override the general obligation to exercise due care and skill which is expected of a seaman when he finds himself confronted by dangerous situation. The Master in this regard, had no time to think of imminent danger, no time form a deliberate and properly calculated alternative form of action to avoid the critical situation with which he was suddenly confronted.
[61]HM Gray, "Assumption of Risk by Seamen," Vol.14, No.2 <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=5474&context=lawreview, > April, 1940. Accessed on 31st July, 2024.
[62]Ibid.
[63] The current law herein is the Merchant Shipping Act 2007, s.94 (3)(h)
[64]H,M Gray; ibid, p.307.
[65]HM Gray; ibid, p.317.
[66]Ibid, p.318.
[67](1823)11 Fed. Cas. 480
[68]*Reed* v *Canfield* (1832)20 Fed. Cas. 426..

ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages.[69]

5. Conclusion and Recommendations

To put it concisely, in an action or counter-claim for damages brought which is founded upon fault or negligence, if the contributory negligence or fault is found to have been established, the court shall nevertheless, find the entire amount of the damages to which the plaintiff would have been entitled had there been no such contributory negligence or fault. The court shall then determine the degree in which each party was at fault and shall so apportion the total amount of damages found that the plaintiff shall have judgment only for so much thereof as the court deems proportionate to the degree of fault imputable to the defendant. Where upon evidence, it is not practicable to determine the respective degrees of fault, the position of the court is that the defendant shall be liable for one-half of the damages sustained. Moreover, with the evolution of doctrine of comparative negligence in several jurisdictions which serves as a welcome example of the remarkable ability of the courts, exercising jurisdiction in admiralty matters, both domestic and foreign, to adjust to new conditions and to develop new doctrines necessary to ensure justice and due process.[70]

Again, despite the calls for abolition of assumption of risk in some jurisdictions, and for its potential merger into the comparative fault principle, the consensual rationale underlying assumption of risk, as argued, is distinctive, important, and thus, not easily reducible to the paradigm of victim fault. Again, whether a formal defence of assumption of risk should be retained is however, restrictive to one of a limited set of possible answers. But the general consensus is plausible in the purview of; when the victim fully prefers the risk, and; when the victim insists on a relationship with the tortfeasor. But the traditional view that a victim should obtain no recovery if he voluntarily and knowingly elects to confront a risk is excessively broad.

Further, it is evident that the maritime industry and its related commercial chains are seemingly evolving at a dizzying pace. Trade negotiations have become more complex because these contractual chains no longer involve duality of parties but have expanded to include a host of organizations. Thus, the law of negligence which is solely responsible for regulating civil wrong-doings should also evolve in order to ensure that there is adequate recourse for all parties within the modern maritime environment.[71]

[69]HM Gray; ibid. Consequential Damages which otherwise is known as special damages may come in cases of a breach of contract, due to one party's failure to meet a contractual obligation.

[70] Excepting for assumption of risk, though the assumption of risk rule can tend to serve a purpose in a way no other doctrine can address

[71]EC Jiankai, "Negligence in Maritime Disputes Revisited- The Requirement for Ownership or Possessory Title," NUS Centre for Maritime Law Working Paper 21/02 - NUS Law Working Paper 2021/010, <https://law.nus.edu.sg/cml/wp-content/uploads/sites/8/2021/05/CML-WPS-2102.pdf> accessed on 31st July, 2024.