The Safe Port/Safe Berth Warranty And Comparative Fault

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I
INTRODUCTION

A typical charter party, whether a voyage or time charter, contains a warranty by which a charterer warrants to the vessel owner that the vessel will be sent to “safe” ports and berths. Sometimes the warranty is stated in language in some detail and sometimes the parties simply recite that the vessel will trade to “safe” ports. With one important exception, the specific safe port language used in the charter is largely inconsequential because case law has generally ascribed a single common definition to the warranty.1 There is one developing issue in safe port case law,2 however, which has added potential confusion to determining whether there has been a breach of the warranty. The particular issue is whether there should be a comparative fault analysis in a safe port case where the facts show the existence of both an unsafe port condition and a lack of good seamanship or whether, instead, such a comparative fault analysis is inconsistent with the established approach to determining breach of the warranty. This article addresses that issue.

II
THE EASTERN CITY AND THE AVOIDANCE PRINCIPLE

The seminal case which defines the scope and meaning of the safe port warranty is the English decision in Leeds Shipping, Ltd. v. Société Francaise

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1 Where the warranty language limits or is deemed to limit the charterer’s obligation to exercising “due diligence” to provide a safe port that will materially lessen the warranty. See Cooke, Young, Taylor, Kimball, Martowski and Lambert, Voyage Charters, (3d ed. 2007) at §§ 5.129.

2 Most, but not all charter party safe port disputes in the United States are subject to arbitration in New York. Most maritime arbitration awards rendered in New York are published by the Society of Maritime Arbitrators, Inc. ("S.M.A.") and are available on LEXIS and Westlaw. These published awards are one important source of charter party safe port case law. The other usual sources are American and English court decisions. All are included in the discussion in this article.
Bunge (The Eastern City). In that case, Lord Justice Sellers of the Court of Appeals said a port will not be safe:

unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship . . .

In other language, Justice Sellers stated:

The safety of the port should be viewed in respect to a vessel properly manned and equipped, and navigated and handled without negligence and in accordance with good seamanship. This may include, where circumstances so require, and if available, the engagement of a pilot or the use of a tug or tugs or, especially if such assistance is not available, consultation with a harbour-master or some other responsible person with knowledge and experience of the port.

It will be noted that these statements require the exercise of good seamanship as a component of the warranty. This component was absent from the definition urged upon the court by the vessel owner in its cited case of The Stork.

Despite a cornucopia of port dangers involving the anchorage in The Eastern City, the Court of Appeals exhaustively reviewed the Master’s actions to determine whether the “stranding of the EASTERN CITY [was] due to the unsafety of the port or to the negligence of the master and crew.” No scope for dividing damages nor making a comparative fault analysis was considered. Ultimately, the court found no negligence on the part of the Master and it therefore affirmed the decision below finding the damage had arisen by reason of the port being unsafe.

The decision has long been cited for the proposition that a claim under the safe berth warranty will not lie where good navigation and seamanship could have “avoided” the incident in question. Stated somewhat differently, under The Eastern City, the warranty is a limited one and no breach of it will exist, even if one or more unsafe conditions exist at the port, so long as those unsafe conditions could be avoided by the exercise of good seamanship. For ease of reference, this will be referred to as the “Avoidance” principle.

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2Id. at 127.
3Id. at 131.
III

RECEPTION OF THE AVOIDANCE PRINCIPLE IN AMERICAN LAW

A. Treatises Adopting the Avoidance Principle

The Eastern City and its Avoidance principle have been widely viewed as the recognized standard for measuring the safe port warranty in the United States. One of the leading treatises, Voyage Charters\(^8\) recognizes \textit{The Eastern City} approach as setting forth the prevailing standard. The authors state in the section dedicated to American law:

As a general rule, it is well settled that a port will be safe for purposes of the safe port clause if, during the relevant period of time, the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship. There is no “black and white” test for determining whether a given port or berth is safe for any given vessel and the issue must always be resolved on a case-by-case basis. Courts or arbitrators are obliged to examine the facts of each case and, assuming a vessel which is properly manned, equipped, managed and navigated, decide whether the port or berth is safe for the chartered ship. Dangers which can be avoided by good seamanship and navigation will not render a port “unsafe.”\(^9\)

Similar recognition is found in the treatise, \textit{Time Charters}\(^10\) where the authors state respecting American law:

10.112 The American and English authorities generally are in agreement that these words constitute an express warranty of safe port by charterer, the components of which are set forth in Leeds Shipping v. Société Francaise Bunge (\textit{The Eastern City}) [1958] 2 Lloyd’s Rep. 127 (see paragraphs 10.3 to 10.4 above). . . .

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10.146 A port or berth will not be unsafe if the dangers are avoidable by good navigation and seamanship on the part of the master. The test is whether in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the port or berth.\(^11\)

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\(^8\)Cooke, Young, Taylor, Kimball, Martowski and Lambert, \textit{Voyage Charters}, (3d ed. 2007).
\(^9\)Emphasis added, \textit{Voyage Charters} at § 5.137.
\(^11\)\textit{Time Charters} at §10.112 and §10.146.
This approach is supported by American arbitration awards and court cases, as discussed below. As also discussed below, there is no persuasive American authority that adopts a comparative fault approach to the safe port warranty.

B. American Arbitration Awards — the Avoidance Principle and Comparative Fault

1. Arbitration Awards Adopting the Avoidance Principle

The Avoidance principle has been cited as the governing safe berth standard in numerous American arbitration awards. The leading examples of this are discussed below.

In *The M/S Mozart Festival*\(^{12}\) the vessel suffered damage when berthing in high winds without tug assistance, which was not available. The panel majority in that case noted that berthing in these conditions was a “touchy proposition.”\(^{13}\) Nevertheless, the panel found that “the unberthing procedure could have been accomplished without incident if it was done in a seaman-like manner.”\(^{14}\) Because of this, the panel concluded there was a lack of good seamanship and hence found no breach of the safe port warranty.

Similarly, in *The S.S. Maryland Trader*\(^{15}\) the panel noted that “the shallows existing in the vicinity of the southern extremity of the berth . . . did not render the berthing easy. The absence of tug boats should have made the Master more cautious.” Nevertheless, the panel ruled that the Master should have approached the berth at a safe enough speed to avoid the accident or should have simply refused to berth and concluded “[c]onsequently, the accident was not unavoidable, nor was the berth unsafe.”\(^{16}\)

In *The M/V Chesapeake Bay*\(^{17}\) a buoy was missing at the entrance channel to the port of Marsaxlokk, Malta and there was a severe rain squall when the vessel arrived. The vessel grounded when it attempted to enter the port in these conditions. Despite the missing buoy, the majority concluded that the grounding was not the result of breach of the safe port warranty, stating:

In summary, the Chesapeake Bay would not have stranded had the Master exercised ordinary navigational skills and good seamanship. If the Master had

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\(^{12}\)S.M.A. No. 2393 (Nichols, Berg and Winer; 2000).
\(^{13}\)Id. at 14. Page references to the S.M.A. awards are taken from the S.M.A. published service.
\(^{14}\)Id. at 13-14.
\(^{15}\)S.M.A. No. 849 (Sauer, Zubrod and Stam; 1974).
\(^{16}\)Id. at 11.
\(^{17}\)S.M.A. No. 3677 (Arnold, Berg and Szostak; 2001).
made proper use of the facilities available to him on this modern container vessel, he would have come to the realization that the East Cardinal Buoy was not in place. This conclusion was achievable using ordinary navigational skills. He need not have attempted port entry when he did. He was not in danger at the time and he could have waited a short time for the weather front and squalls to pass. 18

In *The M/V Aurora* 19 the panel specifically found that “the ice conditions at Gros Cacouna were severe enough to render the port unsafe when the Aurora called there in January 1997, and in fact, the panel concludes from the evidence presented that the port was unsafe at those relevant times.” 20 The panel nevertheless ruled that the damage to the propeller was due to the “negligence on the part of the vessel’s crew, and not because the port was unsafe.” 21

In *The M/V Star B* 22 the vessel grounded when entering the port of Boca Chica, Dominican Republic. The majority specifically found that the port was unsafe, stating: “Clearly, there is sufficient evidence to support Owner’s contention that there were deficiencies in the entrance buoys, the range markers, the charts and navigation guides as well as with the pilot so as to render Boca Chica unsafe on November 29, 1999.” 23 The Panel nevertheless concluded: “[h]owever, there is also sufficient evidence to support Charterer’s argument that the grounding could have been averted by the exercise of good seamanship.” 24 On this basis, it found no breach of the safe port warranty.

In *The M/V Bahama Spirit* 25 the panel recited the definition from *The Eastern City* and then said:

So, even if we had concluded the charter contained a safe berth provision, which we have not, Martin Marietta would still not be liable for the grounding because whatever dangers existed within the Theodore Turning Basin could have been averted by the exercise of good navigation and seamanship. 26

In the *New Navigation* 27 after reciting the definition from *The Eastern City*, the panel said:

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18 Id. at 13.
19 S.M.A. No. 3609 (Fox, Nelson and Busch; 2000).
20 Id. at 2833.
21 Id.
22 S.M.A. No. 3813 (Arnold, Fox and Ring; 2003).
23 Id. at 3715.
24 Id.
25 S.M.A. No. 3849 (Berg, Wiswell and Martowski; 2004).
26 Id. at 3910.
27 S.M.A. No. 4151 (Arnold, Berg and Martin; 2010).
We should first acknowledge the obvious and that is that buoy 183.6 was off station at the time of the grounding. It was approximately 1,100 meters down river from its charted position. That being said, the question is whether this defect and the dangers attendant to it could have been averted by the exercise of good seamanship and prudent navigation. The panel unanimously concludes that the grounding could have been avoided if the Vessel’s bridge team had followed the practice of ordinary good seamanship and sound navigation procedures.28

Numerous other awards have denied claims for breach of the warranty on the grounds that good seamanship was lacking.29

2. Awards and Dissents Adopting a “Comparative Fault” Approach

In contrast to the foregoing awards, there are several dissenting opinions and one 2-1 majority opinion eschewing the Avoidance principle in favor of a comparative fault approach in cases where there is both an unsafe port condition and a lack of good seamanship.

In The Star B, supra, the dissenting arbitrator wrote:

The facts of this case are what they are, the port of Boca Chica was unsafe and the actions or lack thereof by the Master speak for themselves, as expressed in the unanimous finding by this panel. However, I disagree with the conclusion reached by the majority and the award rendered because it fails to reflect that a contributing cause of the grounding was a breach of the charter party warranties of a safe berth and safe port.

Having concluded that both parties were in breach of their contractual obligations, the question now arises as to what effect these conditions have upon the liability of the parties. Charterer has argued that because the grounding could have been averted by the exercise of prudent seamanship, damages should not be divided. Owner, on the other hand, contends that where an unsafe port condition combines with the Master’s negligence to cause damage, liability can be apportioned between the parties based on their relative degrees of fault.

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If one has concluded that both parties were at fault, one cannot automatically and totally absolve one party from all liability because the other party was irresponsible or imprudent. If you are wrong by having committed a breach,
then you are liable; the degree of which is to be determined by the trier of facts. If one finds both parties at fault, then it becomes a question of degree, whether it is 1/99 or 50/50, but there has to be a degree or percentage of liability. To hold otherwise would ignore one’s own finding of fault on both sides.30

Similar dissents are found (by the same arbitrator) in The Chesapeake Bay31 and The Mah Bulakul.32

More recently, in the case of The Westwood Anette33 the panel dealt with a case involving a vessel which, while deberthing at Squamish, British Columbia, drifted into a mooring dolphin, its hull was punctured in the area of the bunker tanks and fuel oil escaped causing pollution damage. There were issues of both unsafe port conditions and negligent navigation. In particular, there were criticisms of the Master and pilot in deberthing the vessel in 25-30 knot diurnal winds without making any calculation for the effect of the wind and with a weaker complement of tugs than normal, and criticism concerning the fender pile arrangement on the mooring dolphin which, when crushed by the vessel, led to a metal protrusion which punctured the vessel’s hull. The majority, in a 2-1 decision, applied a comparative fault approach and divided damages 50/50 between the owner and the charterer. In doing so, it rejected application of The Eastern City approach and its Avoidance principle in part based on the following reasoning:

the exculpatory rationale of The Eastern City is essentially an expression of the general rule or concept of proximate causation being necessary for liability to attach that should not be applied without regard to the particular facts and circumstances of the given situation.34

In dividing damages, the majority found that “Westwood’s [the charterer’s] and Gearbulk’s [the owner’s] faults were all proximate causes of the casualty.”35

3. The Oceanic First

The arbitration award in The Oceanic First36 presented an unusual fact pattern when compared to the typical safe berth case. In that case the owner and charterer had entered into a long term charter for a vessel. In February,

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30 The Star B dissent, supra, note 22 from dissent at 1-2 and 4.
31 Note 17, supra.
32 S.M.A. No. 1173 (Arnold, Berg and Tsagaris; 1977).
33 S.M.A. No. 4189 (Berg, Martowski and Sheinbaum; 2012).
34 Id. at 37.
35 Id.
1969 the vessel had called at Nigata, Japan. The Master issued a protest concluding that that port “is not an absolutely safe port.” The particular problem was that the breakwater was insufficient to protect against heavy surf coming from the west which led to vessels ranging against the pier in the inner harbor. During the period at issue, the port was in the process of building the breakwater wall higher to address this. Following the Master’s protest, the vessel then called at Nigata on eight further occasions. On the eighth occasion, the vessel ranged against the pier in heavy surf causing damage to the vessel. A claim was made for breach of the safe port warranty. The panel, after reciting The Eastern City rule, then said:

Upon the occasion of the vessel’s ninth call at Nigata both Owners and Seatankers had about one full year’s experience at the Port and Berth with this vessel. Both knew or should have known the conditions which could reasonably be encountered during a given call. Both chose to disregard the February 1969 protest from the vessel about continued calls. Both were guilty of taking a calculated risk which failed. Owner’s right to rely upon the safe port, safe berth warranties of the Contract does not extend to their ignoring obvious unsafe and dangerous conditions that in all probability could exist. Likewise, the giving of such a warranty is an assurance that these obvious unsafe and dangerous conditions don’t and won’t exist.

The panel went on to list 6 different risks that both owner and charterer had knowingly run. It then concluded that both parties were jointly at fault and divided damages on a 50/50 basis citing, as authority for dividing damage, the collision case of United States v. Reliable Transfer Co.

The Oceanic First seems to be a rare type of safe berth case where both the owner and charterer were privy to all of the navigational risks in question and where, despite this knowledge, they both chose to proceed despite such risks.

C. American Court Cases – the Avoidance Principle and “Divided Damages”

1. Court Cases Recognizing the Avoidance Principle

Venore Transportation Co. v. Oswego Shipping Corp., is a decision of the Court of Appeals for the Second Circuit which recognizes the Avoidance principle. The issue in that case was whether there was a breach of safe port

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37 Id. at 3.
38 Id. at 8.
40 408 F.2d 469 (2d Cir. 1974).
warranty involving the port of Salvador, Brazil. The vessel had berthed at a berth where only one of the usual two fenders was in place to hold the vessel off the berth. At the time of the berthing the Master had been assured that the second pontoon would soon be forthcoming. It was not and, after berthing, heavy weather suddenly arose, the vessel ranged against the pier and was damaged. The owner sued the charterer under the safe berth warranty claiming the berth was unsafe due to lack of the second fender. The charterer urged that the Master had been negligent in a variety of respects and was barred from recovering under the warranty for that reason. The Court of Appeals said “The first question which we address is whether there was intervening negligence on the part of the ship’s Master, Captain Edelheit, relieving the charterers of liability.” Although The Eastern City was not specifically cited, this aptly states the Avoidance principle.

Further application of the Avoidance principle is found in the decision in Cook Inlet Pipe Line Co. v. American Trading and Production Corp. In that case, the District Court for the Southern District of New York denied a claim of safe berth under the charter because of negligent seamanship, stating:

The malfunction of the after fender posed no hazard; furthermore, its status was known to the master of the vessel. See Finding No. 9. Thus, there has been no breach of the safe berth clause. The negligent act of the vessel caused the collision [with the fender] which in turn caused damage to the vessel. Therefore the third party action under the safe berth clause is inapplicable.

Other examples where courts have determined whether breach of the safe port warranty or, instead, negligent navigation, caused the damage include Crisp v. United States & Australasia S.S. Co., The Halo, The Sabrina, and The President Arthur. Despite the arguable presence of both an unsafe port condition and imprudent navigation in these cases, they do not apply or discuss a comparative fault analysis.

41 Emphasis added. 498 F.2d at 471.
42 The court agreed with the trial court’s decision that the Master had not been negligent.
44 Id. at 165.
45 124 F. 748 (S.D.N.Y. 1903).
47 1957 A.M.C. 691 (D. Canal Zone 1957).
48 1968 A.M.C. 830 (N.D. Cal. 1961). This case is an example of a subset of cases holding that in order for improper seamanship to be found, the course followed by the Master “must entail an unreasonable risk” amounting to “an intervening act of negligence.” Id. at 833–4. Irrespective of the language used as the test for negligent seamanship, all such cases indicate that when negligent seamanship (or a lack of good seamanship) is found, there is no breach of the warranty.
2. Court Cases Adopting the “Divided Damage” Approach

Next to consider are two cases which later were relied on in a third case where, in that third case, the court “divided” damages in a safe port warranty case involving both breach of the safe port warranty and negligent navigation.

In the case of *Nassau Sand & Gravel Co. v. Red Star Towing & Transportation Co.*,49 the court dealt with the issue of whether a tug had liability for negligent towage for having left the barge it had towed at a berth other than the intended berth. Towage law is quite distinct from charter party law and has been described as “a unique blend of contract and tort.”50 The specific issue in that case was whether the barge had itself acted negligently in remaining at the berth and what effect, if any, this contributory negligence might have with respect to its claim against the tug for negligent towage. The court considered the barge’s actions against the backdrop of towage cases involving the duty of a barge to sound for low water. Based on certain cited cases, the court said:

We have held that if he [the bargee or owner of the barge] is assured that the berth is safe, and acts upon that assurance, he need not sound . . . If he is so assured, but does not accept the assurance, and sounds, but sounds ineffectively, the damages will be divided . . . If he has no assurance beyond the mere fact that he is given the berth, he must sound . . . .51

In that case, the court found: “Here the barge had no assurance as to the berth, and did not sound or otherwise seek to ascertain what the bottom was.”52 The court concluded that the tug had been negligent in leaving the barge at an unsafe berth and the barge had been negligent in not fulfilling its duty to sound (both duties arising under towage law) and therefore this “was a case of concurring negligence and that the damage must be divided.”53 Significantly, this case did not involve a charter party safe port or berth warranty. Instead, it involved questions of negligence and contributory negligence in tort and all of the cases it cited involved either claims in negligence by barges against tow boats under towage law or related actions in tort against wharfingers.54

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49 62 F.2d 356 (2d Cir. 1932).
51 Id. at 356.
52 Id.
53 Id. at 357.
54 The Eastchester, 20 F.2d 357 (2d Cir. 1927); The Bleakley No. 76, 54 F.2d 530 (2d Cir. 1931); The B.B. No. 21, 54 F.2d 532 (2d Cir. 1931); Hirsch Lumber Co. v. C. Oltaviano & Co., 18 F.2d 952 (2d Cir. 1927); The Dave & Mose, 49 F. 389 (S.D.N.Y. 1892) aff’d Fahy v. N.Y., 61 F. 336 (2d Cir. 1893); Sinram & Pennsylvania R. Co., 61 F.2d 767 (2d Cir. 1932). Damages were divided only in The Dave & Mose.
Nassau Sand & Gravel was then cited in Cities Service Transp. Co. v. Gulf Refining Co., a case which did involve a charter party safe port warranty. In that case the charterer’s port captain had “pointed out the place where she [the vessel] should lie and land and the master took his word for it and did not sound.” The vessel grounded and the vessel owner claimed against the charterer for damages for breach of the warranty. The issue raised was whether it was imprudent seamanship for the Master not to have sounded. The court made a factual determination of this by using an ‘analogy’ from the towage case of Nassau Sand & Gravel discussed above. It said:

The question is of the master’s supposed fault in not sounding. We think the situation is analogous to that of a bargee who accepts a berth pointed out to him – a matter which we have often considered. We adhere to the rule so laid out in Nassau Sand & Gravel Co. v. Red Star T. & T. Co. (C.C.A.) 62 F. (2d) 356, which we repeat as the parties and the judge seem to have overlooked the case. If the barge or master has received express assurance that the berth is fair and relies upon it, he is not at fault.

In that case the court therefore made a factual finding, by analogy, based on the law of towage, that there was no imprudent seamanship in the Master not having sounded. It therefore found the safe port warranty was applicable. The result in that case is therefore entirely consistent with the Avoidance principle since there was a lack of improper seamanship and recovery was allowed for breach of the safe port warranty. It is therefore not authority that a court should divide damages under a comparative fault analysis in a case involving a charter party safe port warranty.

The final case in the sequence under discussion is the case of Ore Carriers of Liberia, Inc. v. Navigen Co. where, for what appears to be the first time, a court divided damages in a charter party safe port warranty case. As in the arbitral award of The Oceanic First, the facts in Ore Carriers show that both the owner and charterer were well aware of the navigational risks in question and both chose to assume those risks. In Ore Carriers the vessel

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55 79 F.2d 521 (2d Cir. 1935).
56 Id. at 521.
57 Id. Emphasis added.
59 In the earlier case of Constantine & Pickering S.S. Co. v. West Indies S.S. Co., 199 F. 964 (S.D.N.Y. 1912) the court allowed recovery of “half damages.” In doing so, however, it referred to the rule that “even a tort-feasor may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the person wronged, in failing to take steps to lessen certain or even probable damages.” Id. at 967-8; emphasis added. In that case, the master and mate were aware that the vessel was aground but did nothing for 7 days. While not entirely clear, it appears that the damage was therefore reduced on the basis that the vessel should have taken action after the initial grounding and hence there was later negligence, as opposed to concurrent negligence. In all events, there is no reference in that case to any prior safe port cases where damages had been divided on the basis of comparative fault.
had entered the Black River en route to the port of Lorain, Ohio despite knowing that tugs might not be available at a critical juncture. Both the owner and the charterer conceded that it was hazardous to attempt to navigate the Black River without tug assistance. At the relevant time, in addition to two pilots, the owner had its vice president on board the vessel and the charterer had its marine superintendent on board. Both parties were therefore particularly well aware of all the relevant navigational circumstances and risks. The trial court also noted “the proof shows that the defendant undertook to obtain tugs to assist the vessel in navigating the Black River at the berth.” It also found that the Master and pilot “knew of the danger going up the river without tug assistance.” It then concluded

Thus we have the warranties of the defendants as to the safety of the port and berth, and actions of the owner with knowledge of the facts.

The trial court then “divided” the damages 50/50 without further discussion. The Court of Appeals affirmed the decision, also without extended discussion.

What is especially noteworthy about this case for the present purposes is that both the trial court and the Court of Appeals in Ore Carriers relied on cases that had either not involved a contractual safe port warranty or had not divided damages. The first case relied on was Cities Service v. Gulf Refining discussed above. As noted that case had not divided damages nor had it found that the Master had been negligent. It had only referred to the “bargee” sounding rule from the Nassau Sand & Gravel case ‘by analogy’ and, as indicated, Nassau Sand & Gravel was a negligence case decided under towage law and none of the decisions it had relied on had involved a charter party safe port warranty.

The second case relied on in Ore Carriers was Paragon Oil Co. v. Republic Tankers, S.A. That case had also not divided damages nor had it used a comparative fault analysis. Instead, in Paragon Oil the court held that the Master of the tanker Greenpoint was not negligent when he had been induced to proceed to the berth on assurances that the barge in the berth would be immediately vacating the berth. When the barge was not timely removed from the berth, the Greenpoint grounded in a falling tide at a time when it “could no longer be ordered to turn around and anchor in deep water.” That case is also entirely consistent with the Avoidance principle since it found the Master was not negligent and there was a breach of the

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61 Id. at 73.
62 Id.
63 310 F.2d 169 (2d Cir. 1962).
64 Id. at 172.
warranty. Again, damages were not divided and there was no consideration of a comparative fault analysis.

The third cited case added by the Court of Appeals decision in Ore Carriers was a “see also” cite to Park S.S. Co. v. Cities Service Oil Co.65 That case had also made no finding of vessel negligence and is consistent with the Avoidance principle. In Park S.S. Co. the charter party contained a warranty that the “vessel shall load and discharge at any safe berth or wharf . . . which shall be designated and procured by the charterer.”66 The charterer designated that the vessel should lighter at anchorage in Hingham Bay and the pilot selected the exact spot to anchor. The selected anchorage was not safe because it was not a good holding ground for an anchor and the vessel was damaged. The Court of Appeals, reversing the decision below, found that the pilot had acted as the charterer’s “borrowed servant” in selecting the anchorage and therefore found the charterer had breached the safe port warranty and hence the charterer was held solely liable. That case also did not divide damages nor make a comparative fault analysis.

Ore Carriers is therefore striking in that, without any meaningful discussion, it reached its result of dividing damages in a case involving a safe berth warranty where none of the cases (and their progeny) cited by the trial court and the Court of Appeals had done this. Ore Carriers did not discuss the Avoidance principle and, as noted, the same court in Venore Transportation, a case decided several years after Ore Carriers, specifically recognized the continued viability of the Avoidance principle.

IV
DISCUSSION—THE EASTERN CITY/AVOIDANCE APPROACH VERSUS COMPARATIVE FAULT

What then is the state of the Avoidance principle in light of the above cases, especially The Oceanic First, Ore Carriers and The Westwood Anette, and has (or should) the comparative fault approach replaced (or should it replace) the Avoidance principle in a case involving a charter party safe port warranty where there is both an unsafe port condition and negligent navigation?

First, it is submitted that The Oceanic First, Ore Carriers and The Westwood Anette have not supplanted the Avoidance principle but, instead, stand only as a very limited, special rule or exception in those rare cases where both the owner and the charterer have intimate knowledge of the navigational risks and mutually agree to proceed despite those risks. In a sense, these are cases where the obligation of proper seamanship has been waived by both the

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65 188 F. 2d 804 (2d Cir. 1951) cert. denied 342 U.S. 802 (1951).
66 Id. at 805.
owner and the charterer due to their mutual intimate knowledge of the seamanship dangers and risks in question and mutual acceptance of those dangers and risks.

As the above discussion from The Oceanic First shows, both the owner and the charterer were entirely aware of the precise navigational risks involved in that case but deliberately chose to disregard them. Similarly, in Ore Carriers both the owner and the charterer each had representatives on the spot who specifically recognized the danger of proceeding without tugs and each jointly agreed to nevertheless proceed despite that specifically recognized risk. Hence, in each of these cases both the owner and the charterer had full knowledge of the risks involved and both agreed to accept those risks. In these unique circumstances, it seems sensible for the panel and court not to have applied the usual safe port analysis where the trier of fact seeks to determine whether unsafe navigation or an unsafe port condition was the dominant cause of the incident. Indeed, dividing the damages in these cases seems entirely sensible because of the mutual knowledge and acceptance of the risks involved. Understood in this light, these cases provide neither justifiable rationale nor precedent for rejection of the Avoidance principle, nor for a general adoption of a comparative fault analysis in a charter party safe port case.

The majority opinion in The Westwood Anette arguably falls into this same category as The Oceanic First and Ore Carriers inasmuch as the majority decision states: “The Majority considers the application of The Eastern City exculpatory rationale inappropriate to the extremely unusual facts of the present case.”67 That case provides a cautionary tale, however, for two reasons. First, as indicated, it describes The Eastern City as a “general rule or concept of proximate causation.”68 Proximate cause and comparative fault are tort concepts. The Eastern City did not address proximate cause nor utilize a comparative fault analysis. It simply defined the scope and meaning of the safe port warranty. Second, the charterer’s knowledge and acceptance of the particular navigational risks involved in The Westwood Anette seem not to have met the same high level as existed in The Oceanic First and Ore Carriers and the majority opinion in the Westwood Anette is therefore subject to question as a proper exception to The Eastern City under The Oceanic First and Ore Carriers and the analysis therein.69

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67 The Westwood Anette, S.M.A. No. 4189 at 36.
68 Id. at 37.
69 In The Westwood Anette, the charterer was not aware that the larger tug typically used for berthing and unberthing was unavailable. It was not aware of the exact prevailing weather conditions with winds of 25 and gusts of 30 miles per hour blowing the vessel in the direction of the mooring dolphin onto which the vessel drifted during deberthing. The charterer was not aware that the pilot had come up with a special plan...
There are also at least three conceptual difficulties with the notion that a comparative fault analysis has (or should) supplant the Avoidance approach. First, the comparative fault analysis ignores the well-established limited scope and extent of the safe port warranty. In essence, the comparative fault approach redefines the safe port warranty and resets the exposure of the charterer to a higher level. Under the Avoidance approach, a charterer is entitled to rely on the vessel interests exercising good seamanship and, by well-established precedent, the warranty simply does not extend to those cases where that exercise could have avoided the port peril. Under a pure comparative fault approach, that critical limitation is lost or, at the very least, diluted by allowing an owner some measure of recovery despite a lack of proper seamanship which could have averted the peril.

A second related conceptual difficulty is that a comparative fault approach proceeds as if there were no contract terms that need be considered, to wit, the scope and meaning of the safe port warranty. Instead, under this approach, a safe berth claim simply becomes a negligence claim with a tort-based negligence analysis. This is shown in *The Westwood Anette* where the majority stated: “*The Eastern City* is essentially an expression of the general rule or concept of proximate causation.”\(^{70}\) Again, “proximate causation” is a negligence analysis. That analysis is based on the tort concept of “fault” where each party is responsible for its portion of “fault” which “proximately caused” the incident. It is a law designed for events occurring between strangers where, for reasons of public policy, “fault,” as an abstract concept, alone governs the legal relations between them and where contract terms (which might provide one of the parties with a defense to “fault” in a contract setting) have no relevance.

Third, one would expect that any supplanting of a well-accepted approach to determining a contractual safe port claim with an entirely different system of tort based fault (which, in a given case, will lead to an entirely different result) should only come after considered legal discussion. As outlined above, that has not occurred. As indicated, the decision in *Ore Carriers* had no meaningful discussion of comparative fault and the cases it cited and relied on had not previously divided damages in a charter party safe berth claim. Further, the subsequent decision by that same court in *Venore*

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\(^{70}\) Id. at 37.
Transportation shows continued recognition by that court of the Avoidance principle. Ore Carriers, in turn, was the critical judicial authority relied upon by the majority in The Westwood Anette. The Oceanic First relied solely on a collision case to divide damages, again with no discussion. In short, the case law provides neither a persuasive rationale nor precedent supporting a radical adoption of a comparative fault analysis to claims arising under a charter party safe port warranty.

Two further policy points should be added. First, a charterer’s obligations under the safe port warranty have, in the relatively recent past, already increased to the point where the charterer is said to have liability for an unsafe port condition irrespective of fault. Some commentators believe this has already imposed an undue burden on a charterer. One might therefore question a further increase in a charterer’s liability under the safe port warranty without a sound basis and reasoning behind it. Second, under English law, The Eastern City remains the prevailing approach to the warranty. An important division between English and American maritime law respecting safe ports should not be lightly adopted.

V CONCLUSION

It is submitted that the Avoidance principle is a well-established element of American charter party safe port warranty law and it continues to define the parameters of the safe port warranty. Case law indicates that an owner’s duty of safe navigation remains a requirement for recovery under a safe port warranty except in the most compelling circumstances where the facts show mutual knowledge and acceptance by both the owner and charterer of the particular navigational risks involved. Neither persuasive precedent nor rationale exists for rejection of the Avoidance principle in favor of a tort based comparative fault analysis and, in fact, a comparative fault approach is inconsistent with the core safe port principle that no breach of the warranty will lie where good seamanship could have avoided the incident in question.

73 See TIME CHARTERS, supra, at 197.