UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JAMES R. HAUSMAN, *Plaintiff,* v. HOLLAND AMERICA LINE- USA, *et al*. *Defendants*.	CASE NO. 13cv00937 BJR **MEMORANDUM OPINION & ORDER**

I. INTRODUCTION & BACKGROUND

Plaintiff, James R. Hausman, filed this negligence action against Holland America Line-U.S.A., a cruise company, and other related corporate entities (collectively, Defendants or "HAL Defendants"). Plaintiff alleges that on November 26, 2011, while traveling as a passenger on Defendants' cruise ship *MS AMSTERDAM*, an automatic sliding glass door struck his head, causing a serious injury. In its Answer, Defendants asserted as their fifth affirmative defense that Plaintiff's damages, "if any, were proximately caused, in whole or in part, by the negligence of third parties not named in this lawsuit." Answer at 5. During discovery, Defendants named as potentially liable third parties, the manufacturer of the door, a company called Ditec, and the company that installed it, New Technology Marine Service & Supply (also known as

Centraltechnica). Def.'s Opp'n at 9; Pl.'s Mot. at 3. Discovery has closed and trial is scheduled to begin June 29, 2015.

This matter now comes before the Court upon consideration of Plaintiff's motion for partial summary judgment. Plaintiff argues that Defendants have not described any negligent conduct by either the installer or manufacturer, or identified any evidence or facts that would support such negligence. Pl.'s Mot. at 5. Plaintiff insists that HAL had control of the *MS Amsterdam*, including its doors, and had the ability to adjust the sensitivity settings for the sensors on the doors. Plaintiff alleges that HAL acted negligently in keeping the doors set to "low" sensitivity setting despite the company's knowledge of "numerous prior injuries." *Id.* at 6.

In its opposition, Defendants maintain that there is no evidence that the doors and sensors themselves were defective either as manufactured or designed. Def.'s Opp'n at 12; *see also id.* at 2 ("[ ] HAL does not believe that it, the manufacturer or the installer negligently and proximately caused Plaintiff's injuries . . . ."). Nevertheless, Defendants assert that **if** Plaintiff proves that the low sensitivity setting on the doors was unsafe and caused his injury, then Washington law entitles Defendants to make an "empty chair" defense. Specifically, Defendants intend to argue that New Technology and Ditec are responsible for the low sensitivity setting on the doors since New Technology set the door's sensors to low during installation and Ditec designed and manufactured the doors with the low sensitivity setting. Def.'s Opp'n at 2-5. Defendants claim it can show that HAL's personnel did not adjust or modify the doors or the settings between the time of their installation and Plaintiff's incident. Def.'s Opp'n at 3.

Plaintiff replies by noting that admiralty law, not Washington law, controls this case, and, therefore, joint and several liability applies. Plaintiff acknowledges that Defendants could "attempt to shift fault to third-parties . . . if it could allege and prove that HAL itself bore no

fault." Pl.'s Reply at 8. However, Plaintiff maintains that Defendants have not produced sufficient evidence from which a reasonable juror could draw such a conclusion. To the extent that Defendants aim to allocate a *portion* of the blame on the manufacturer and installer (instead of exclusive blame), Plaintiff insists that the Court should not allow this under joint and several liability. *Id.*

II. ANALYSIS

A. Choice of Law

Federal admiralty jurisdiction is appropriate when the tort claims satisfies "conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). In considering whether a case falls within admiralty jurisdiction, the court first considers whether the tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water. Here, the location element is clearly met as Plaintiff's alleged injury occurred while cruising.

Next, "[t]he connection element hinges on 'whether the incident has a potentially disruptive impact on maritime commerce" and "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.'" *Dominique v. Holland America Line, N.V., et al.*, 2013 U.S. Dist. LEXIS 139888, at *3 (W.D. Wash. Sept. 27, 2013) (quoting *Wallis v. Princess Cruises, Inc.*, 306 F.3d 840 (9th Cir. 2002)). The Ninth Circuit has found that the connection element is satisfied when a cruise line is accused of tortious conduct by a paying cruise passenger. *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 840-41 (9th Cir. 2002) ("A cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity.").

Thus, this negligence action satisfies both the location and connection requirements and should be analyzed under admiralty law and not Washington state law. This is the case notwithstanding that Plaintiff filed this suit as a diversity action. *See e.g.*, *Dominique*, 2013 U.S. Dist. LEXIS 139888, at *3 ("While Plaintiff is correct that usually this Court would apply the law of the forum state in cases founded on diversity jurisdiction, if the case sounds in admiralty the Court must apply federal admiralty law.").

B. "Empty Chair" Defense

1. Proximate Cause

As an initial matter, the Court finds that Defendants are entitled to argue that an "empty chair" is the *sole* responsible party for Plaintiff's injury. *See McDermott, Inc. v. Amclyde*, 114 S. Ct. 1461, 1470 (1994) ("[A] defendant will often argue the 'empty chair' in the hope of convincing the jury that the settling party was exclusively responsible for the damage."). The right to make an "empty chair" defense stems from a defendant's right to refute any claims that its actions were the proximate cause of the plaintiff's injury. In other words, a defendant in a tort action may argue that it could not have caused the tortious act because a third party was exclusively responsible. *See Guerin v. Winston Industries, Inc.*, 316 F.3d 879, 884 (9th Cir. 2002) (finding that district court erred in excluding evidence of third party fault because, even if the affirmative defense of third party liability defense was unavailable, such evidence "would still have been admissible to negate an essential element of the plaintiff's case—proximate cause"). Accordingly, the Court will allow Defendants' to argue that the manufacturer and/or installer were solely responsible for the door's condition, as this goes to causation.[1]

[1] Plaintiff argues that the manufacturer and installer of the doors cannot be solely responsible for the injury because Defendants are ultimately responsible for the maintenance of the *MS Amsterdam* and must be held accountable for the sensitivity settings on its doors. Pl.'s Reply at 11 (arguing that "HAL

2. Allocation of Fault on Verdict Form

A very different issue is whether Defendants are entitled to submit to the jury a verdict form that would require them to apportion fault among the non-parties as well as the Defendants. Understandably, Defendants are in favor of proceeding in this fashion as this would potentially reduce any damages that would be assessed against them. However, the Court finds that neither the admiralty cases cited by Defendants – *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) and *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) – nor the equities of this case command such a result.

In *Reliable Transfer Co., Inc.* the Supreme Court held 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 . . . ." 421 U.S. at 411. The Ninth Circuit extended the holding of *Reliable Transfer Co., Inc*. so that the proportionate fault approach applied not only to property damages but also to personal injuries that arose from maritime collisions. *See Lundquist v. United States*, 1997 U.S. App. LEXIS 16204, at *14 (9th Cir. June 27, 1997). The Ninth Circuit noted that

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was not free to ignore conditions on its ship, even if they were created by a third party"); *id*. at 12 ("If the doors were unsafe, HAL's inaction confirms its own negligence."). Defendants respond by pointing out that Plaintiff's own expert opined that "the interior automatic door and sensors for the doors on the *Amsterdam* where [Plaintiff] was struck were improperly installed and adjusted on November 26, 2011." Def.'s Opp'n at 3. Defendants also argue that it is "undisputed that New Technology Marine Service & Supply set the sensors when they were installed and there is no evidence HAL adjusted them afterwards." *Id.* It is Defendants' contention that "[t]he 'low' sensitivity setting is a control option built into the manufactured product; if the 'low' setting constitutes negligent use or operation of the door, then HAL rightfully contend that the fault lies, in whole or in part, with the manufacturer who built the device in that way and/or those installing and setting the controls." *Id.* at 3-4.

The Court finds that such disputes of facts surrounding the issue of proximate causation are best resolved by reasonable jurors after the full presentation of evidence. *See Exxon Co. v. Sofec*, 517 U.S. 830, 840-841 (1996) ("The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review."). Similarly, any evidentiary rulings associated with such factual arguments are also more appropriately determined during trial or at the pretrial conference. The parties are free to renew such arguments in the context of motions *in limine*.

applying a proportionate fault approach in such circumstances would "achieve a fair assessment of damages against each party according to their degrees of fault and [] deter harmful conduct of vessels." *Id.* (quoting *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987)).

Thus, it is not uncommon for courts to ask fact-finders to apply the proportionate fault rule when assessing damages in a maritime tort case. *See e.g., Contango Operators, Inc. v. Weeks Marine, Inc.*, 2015 U.S. App. LEXIS 8857 (5th Cir. Tex. May 28, 2015) (affirming the district court's apportionment of fault); *Celebrity Cruises, Inc. v. Essef Corp.*, 530 F. Supp. 2d 532, 539 (S.D.N.Y. 2008) (explaining that the jury had found the manufacturer of a cruise ship's whirlpool as well as the cruise line liable for injury to the passenger plaintiffs and had allocated responsibility accordingly). Indeed, the Court would not hesitate to apply the proportionate fault rule if the manufacturer and installer were *parties* in this litigation. However, the Court finds that applying the proportionate fault rule to *non-parties* is not sanctioned by the relevant case law and would work to undermine the principle of joint and several liability which is still applicable in admiralty law.

As made clear in *Edmonds v. Compagne Generale Transatlantique*, the Supreme Court's holding in *Reliable Transfer Co., Inc.* did not abrogate the well-established principle of joint and several liability in admiralty law:

> [T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury. Normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor. If both are already before the court – for example, when the plaintiff himself is the concurrent tortfeasor or when the two tortfeasors are suing each other as in a collision case like *Reliable Transfer* – a separate contribution action is unnecessary, and damages are simply allocated accordingly. . . . [However, *Reliable Transfer*] did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both"

443 U.S. 256, 273 n.30 (1979); *see also The Atlas*, 93 U.S. 302, 315 (1876) (adopting joint and several liability for admiralty actions and stating that "[n]othing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss"). Indeed, the Fifth Circuit recently confirmed that "[u]nder general maritime law, joint tortfeasors are jointly and severally liable for the plaintiff's damages," notwithstanding that "[l]iability . . . is to be allocated among the parties proportionately to the comparative degree of their fault." *Contango Operators, Inc. v. Weeks Marine, Inc.*, 2015 U.S. App. LEXIS 8857, at *21 (5th Cir. Tex. May 28, 2015). Thus, *Reliable Transfer Co., Inc.*, does not support the proposition that a jury may generally allocate fault to entities that are not parties to the admiralty action at bar, especially since doing so would essentially circumvent the long-standing principle of joint and several liability in admiralty law.

In some limited cases, the reasoning of which does not apply here, courts have found that the application of the proportionate fault rule to non-parties is consistent with principles of joint and several liability. Specifically, courts have found that an allocation of fault against the non-parties is justified where the non-parties have previously settled with the plaintiff or have had their case voluntarily dismissed. Such decisions align with the reasoning in *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). In *McDermott*, a crane owner brought an admiralty action against the crane manufacturer, crane hook manufacturer and steel sling suppliers, for damages caused when the hook and slings broke. The crane owner settled with the sling suppliers but went to trial with the remaining defendants. The issue before the Supreme Court was "whether the liability of the nonsettling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the

dollar amount of the settlement." 511 U.S. at 204. Ultimately, the *McDermott* Court found that the liability of nonsettling defendants should be calculated using the proportionate approach. *Id.*

Like the court in *Reliable Transfer Co.*, the *McDermott* Court stressed that its holding did not abrogate the continued application of joint and several liability in admiralty law. *Id.* at 221. In doing so, the *McDermott* Court specified that "the proportionate share rule announced in this opinion applies *when there has been a settlement*. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle." *Id.* at 221 (emphasis added). Therefore, under *McDermott*'s reasoning, courts have held that when a plaintiff decides to settle or dismiss its claims against a tortfeasor, the jury can be asked to allocate fault to that tortfeasor, even when the tortfeasor is not a party in the suit. *See Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316 (3d Cir. 2003) (allowing the jury to allocate fault against two non-parties where the plaintiffs' "recovery against the two [non-parties] has been limited not by outside forces, but by their own decision" to voluntarily dismiss their claims); *Harrison v. Garber Bros., Inc.*, 730 F. Supp. 203, 206 (E.D. La. 1990) (allowing the jury "to determine the relative degrees of fault among [the plaintiff, the defendant, and the non-party who had previously settled with the plaintiff."); *Sigler v. Grace Offshore Co.*, 663 So. 2d 212, (La. Ct. App. 1995) ("For purposes of the proportionate allocation of fault, we discern no distinction between a settlement and a voluntary dismissal. Both are agreements entered into by the plaintiff which serve to limit his recovery as opposed to the outside forces such as insolvency or statutory immunity discussed in *McDermott*.").

Here, Plaintiff has neither settled nor voluntarily dismissed its claims against the manufacturer and installer. While Plaintiff chose to sue only the HAL Defendants, joint and several liability entitles him to do that and still collect the full amount of his damages. *See Sands*

v. Kawasaki Motors Corp., USA, 513 F. App'x 847, 854-855 (11th Cir. 2013) (determining that joint and several liability meant that the plaintiff in a personal injury admiralty action was "permitted to sue [the named defendant] for the full amount of her damages, even though [another individual who was not a party to the litigation] might have contributed to her injuries" and refusing to apply the proportionate fault approach); *see also Lundquist*, 1997 U.S. App. LEXIS 16204, at *18-20 (explaining that joint and several liability would have allowed the plaintiff to sue both tortfeasors and hold either one of them "liable for the entire amount," but because the plaintiff chose instead to settle with one of them, this triggered the *McDermott* rule of proportionate liability).

Meanwhile, Defendants were free throughout this litigation to file third-party actions against the manufacturer and installer, but decided not do so. *See Yachts, Inc. v. Nt'l Marine, Inc.*, 984 F.2d 880, 881 (7th Cir. 1992) ("[I]n an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party."); *Commonwealth Insur. Co. v. American Global Maritime Inc.*, 2001 U.S. Dist. LEXIS 4757, at *18 (E.D. La. 2001) (declining to apportion fault to non-parties and concluding that "[s]hould defendant believe that other parties are responsible and that said parties should be added to these [admiralty] proceedings, there are legal mechanisms to accomplish such a result.").

Moreover, should Defendants be held liable in this action for what they consider is more than their equitable share, they can initiate a contribution action against the manufacturer and installer. *See The Juniata*, 93 U.S. 337, 340 (1876) (stating that "if defendant vessel has any rights against non-party vessel, they must be settled in another proceeding"); *Combo Mar., Inc.*

v. U.S. United Bulk Terminal, LLC, 615 F.3d 599, 602-603 (5th Cir. 2010) ("The right of contribution in admiralty collision claims is of ancient lineage."); *Hunley v. ACE Maritime Corp.*, 927 F.2d 493, 496 (9th Cir. 1991) ("A right to contribution between joint tortfeasors exists under admiralty law."). A contribution action would provide the manufacturer and installer the opportunity to put on their own defense, instead of requiring the jury in the instant case to make liability findings based on HAL Defendants' largely uncontested arguments against the manufacturer and installer.

III. CONCLUSION & ORDER

Therefore, for the above described reasons, the Court determines that HAL Defendants are not entitled to ask the jury to allocate fault to the manufacturer and/or the installer. However, HAL Defendants may argue that the manufacturer and/or installer were solely responsible for Plaintiff's alleged injury. As for the parties' factual disagreements, those will be left up to the jury to decide.

Accordingly, the Court hereby **ORDERS** that Plaintiff's Motion for Partial Summary Judgment is **GRANTED in part** and **DENIED in Part**.

IT IS SO ORDERED.

DATED this 3rd day of June, 2015.

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE