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# THE DAMAGE AWARD IN A MARITIME PERSONAL INJURY CASE

Joseph D. Jamail\*

We all know that damages are what a plaintiff seeks as pecuniary compensation for a tortious act. This paper will attempt to delineate the elements of those damages in maritime personal injury and wrongful death cases, their calculation, and the interest payable on an award. This pursuit will require forays into the total lack of uniformity that pervades maritime personal injury litigation.

## PERSONAL INJURY

### *General Maritime Law/Jones Act*

Admiralty jurisdiction includes tort actions for personal injuries to seamen, passengers, and probably to all others while aboard a vessel on navigable waters (the jurisdiction in personal injury cases is partly statutory).<sup>1</sup> Prior to the enactment of the Jones Act in 1920<sup>2</sup> a seaman had no remedy against a shipowner (beyond maintenance and cure and wages during the continuing voyage) for injuries caused by the *negligence* of the ship's officers or crew. However, a right to indemnity existed, resulting from a shipowner's failure to maintain the vessel in a *seaworthy* condition.<sup>3</sup>

The Jones Act is restricted to "seamen" in all present day manifestations,<sup>4</sup> which include a hairdresser on a luxury liner.<sup>5</sup> All others who are victims of a maritime tort may sue in admiralty or outside admiralty under the savings to suitors clause.<sup>6</sup> The liability basis for passengers is negligence.<sup>7</sup>

In *Panama R. Co. v. Johnson*,<sup>8</sup> the Supreme Court concluded that by enacting the Jones Act Congress meant to leave the prestatutory

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1. G. Gilmore & C. Black, *The Law of Admiralty* § 1-10 (2d ed. 1975).

2. 46 U.S.C. § 688 (1975).

3. 1B Benedict on Admiralty § 2 (7th ed. 1983); *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903).

4. See 1 M. Norris, *The Law of Seamen* §§ 9-27 (3d ed. 1970 & Supp. 1983).

5. *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973).

6. G. Gilmore & C. Black, *supra* note 1, § 6-21, at 328.

7. *Id.* § 1-10, at 22.

8. 264 U.S. 375, 44 S. Ct. 391 (1924).

*unseaworthiness* remedy intact and merely add a remedy not previously available for injuries resulting from *negligence*. In effect, the Jones Act simply incorporated into maritime law the provisions of the Federal Employees Liability Act (FELA).<sup>9</sup> Today, a Jones Act count and an unseaworthiness count, "Siamese Twins," are usually pled in the same case,<sup>10</sup> although each is a separate cause of action.<sup>11</sup> A third count, also a separate cause of action, the ancient remedy of seamen known as maintenance and cure, may also be asserted.<sup>12</sup>

### *Damages Recoverable*

"General maritime law incorporates the general law of torts when not inconsistent with the law of admiralty."<sup>13</sup>

Judge Rubin, while on the trial bench, charged the jury that the following elements of damages were recoverable in a maritime personal injury case:<sup>14</sup>

"(1) Physical pain and suffering, including physical disability, impairment, and inconvenience and the effect of plaintiff's injuries upon the normal pursuits and pleasures of life;

(2) Mental anguish and anxiety including humiliation, shame and embarrassment, worry and concern, and feelings of economic insecurity caused by disability;

(3) Income lost in the past;

(4) Impairment of earning capacity or ability in the future, including impairment of normal progress in the plaintiff's earning capacity."

Medical expenses incurred in the past and to be incurred in the future, together with other economic loss are also recoverable<sup>15</sup> (*i.e.*, the reasonable value or expense of hospitalization, medical and nursing

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9. 45 U.S.C. §§ 51-60 (1972).

10. G. Gilmore & C. Black, *supra* note 1, § 6-38, at 383; Form 15, Official Forms to Fed. R. Civ. P.; Pattern Jury Instructions, Civil Cases, U.S. Fifth Circuit District Judges Association 57 (1983).

11. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S. Ct. 600 (1927).

12. *2 M. Norris*, *supra* note 4, § 557.

13. *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 977 (5th Cir. 1978).

14. 1B *Bededict on Admiralty*, *supra* note 3, § 32, at 3-276. See Pattern Jury Instructions, *supra* note 10, Instructions 2A & 2B; *Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir.), cert. denied, 385 U.S. 897 (1966).

15. *Downing*, 359 F.2d at 347; *Saleeby v. Kingsway Tankers, Inc.*, 531 F. Supp. 879, 883 (S.D.N.Y. 1981).

care and treatment necessarily or reasonably obtained by the plaintiff in the past or soon to be obtained in the future).<sup>16</sup>

The collateral source rule is applied to an award for personal injuries. Thus the award is not reduced by payments from sources totally independent of the wrongdoer, such as pensions and social security benefits.<sup>17</sup>

Since the Supreme Court's decision in *Norfolk & Western Railway Co. v. Liepelt*,<sup>18</sup> the courts usually award lost earnings, past and future, net of taxes.<sup>19</sup>

### *Maintenance and Cure*

In addition to damages for unseaworthiness and negligence, a seaman<sup>20</sup> is entitled to recover for maintenance and cure, and this separate cause of action may be joined with a Jones Act cause of action and one for unseaworthiness.<sup>21</sup> The remedy goes back to medieval sea codes but appears to have been first recognized in this country in 1823 by Justice Strong in *Harden v. Gordon*.<sup>22</sup> The doctrine is based partly on much quoted humanitarian grounds to protect seamen, who were said to usually be "poor and friendless" and apt to acquire habits of overindulgence, carelessness and improvidence. Today, the "poor seaman" has, for the most part, entrusted his rights as an employee to union collective bargaining.

The obligation of the shipowner to provide maintenance and cure for seamen who become ill or who are injured during their period of service is an implied contractual obligation imposed by the general maritime law as one annexed to the employment.<sup>23</sup> "Cure" is care, including nursing and medical attention, beyond as fair a time after the voyage as may be reasonably expected from such care and attention.<sup>24</sup> "Maintenance" is the cost expended or the liability incurred by the ill or injured seaman for his board and lodging on shore, comparable to that to which he is entitled shipboard.<sup>25</sup>

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16. Pattern Jury Instructions, *supra* note 10, at 136.

17. *A.H. Bull S.S. Co. v. Ligon*, 285 F.2d 936, 937 (5th Cir. 1960).

18. 444 U.S. 490, 100 S. Ct. 755 (1980).

19. See *infra* text accompanying notes 147-162.

20. Actually, all persons who are members of the ship's company (not passengers) are entitled to maintenance and cure when ill or injured in the vessel's service and without culpable misconduct on their part. 2 M. Norris, *supra* note 4, § 553, at 34.

21. *Id.* § 557, at 48.

22. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

23. 2 M. Norris, *supra* note 4, § 547, at 25.

24. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 530, 58 S. Ct. 651, 653, 654 (1938).

25. *Id.* at 528, 58 S. Ct. at 653.

"Maintenance and cure" was originally provided at minimum expense by the federal government's Marine Hospital Service and was later furnished free of charge by U.S. Public Health Service Hospitals.<sup>26</sup> Recovery by suit was limited to expenses not available from those services.<sup>27</sup> This inquiry is no longer problematical since the 1981 amendment to the statute authorizing seamen to recover free medical treatment at United States government hospitals has been repealed.<sup>28</sup> Nevertheless, the maritime law still imposes on the shipowner the obligation of maintenance and cure.

Where the seaman is a member of a union (as most are), and a collective bargaining agreement is in force, the courts have generally adhered to the compensation for maintenance and cure provided for in the union contract.<sup>29</sup> On the other hand, one court has held that a union and shipowners have no right to enforce a collective bargaining agreement that provides a seaman with payments that are inadequate to meet his maintenance needs.<sup>30</sup>

#### *Remedy of Spouse of Seaman Who Suffered Non-Fatal Injuries*

In *Sea-land Services, Inc. v. Gaudet*,<sup>31</sup> the Supreme Court held that under the non-statutory maritime death action shaped in *Moragne v. States Marine Lines, Inc.*,<sup>32</sup> the widow of a longshoreman who died as a result of injuries received aboard a vessel in state territorial waters could recover damages for the loss of her husband's "society." In *American Export Lines, Inc. v. Alvez*,<sup>33</sup> the Supreme Court extended this remedy to non-fatal injuries by permitting a spouse to recover damages for loss of "society" in the case of a harbor worker injured aboard a vessel in state territorial waters.

The Fifth Circuit, in *Cruz v. Hendy International Co.*,<sup>34</sup> held that the general maritime law of unseaworthiness includes the right of the spouse of a living seaman to recover for loss of "society" when the injury occurs in state territorial waters. The spouse may join in the injured seaman's suit or assert her claim in a separate suit. In *dicta* the court suggested that this right to recover for loss of society due to

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26. 2 M. Norris, *supra* note 4, §§ 590, 591, at 130.

27. *Id.* §§ 595, 596, at 134.

28. *Id.* § 590, at 66 (Supp. 1983).

29. *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 782 (E.D. La. 1982); *Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620 (S.D. Tex. 1983).

30. *Rutherford v. Sea-Land Serv.*, 575 F. Supp. 1365, 1373 (N.D. Cal. 1983).

31. 414 U.S. 573, 94 S. Ct. 806 (1974).

32. 398 U.S. 375, 90 S. Ct. 1772 (1970).

33. 446 U.S. 274, 100 S. Ct. 1673 (1980).

34. 638 F.2d 719, 725 (5th Cir. 1981).

personal injury would also be available when the injury took place on the high seas.<sup>35</sup>

The recovery of the spouse exists under the maritime law of unseaworthiness,<sup>36</sup> but is not available under the Jones Act and does not embrace the "loss of consortium" as that term is understood at common law. Recovery is limited to the pecuniary "loss of society" defined in *Gaudet* and *Alvez*:<sup>37</sup> "[t]he term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."<sup>38</sup>

No recovery is allowed for emotional response to wrongful death, mental anguish, grief, bereavement, anxiety, distress, or mental pain and suffering. Furthermore, because it is recovered in the injured spouse's suit, no award is made to the spouse for home nursing services or services that would have been provided to the marital partnership.

A child has no right of action for loss of parental consortium resulting from personal injury to the parent under the Jones Act or apparently under any other law.<sup>39</sup>

#### *Outer Continental Shelf Lands Act*

The application of the Outer Continental Shelf Lands Act (OCSLA)<sup>40</sup> to maritime torts is extremely narrow in that it is restricted to artificial islands and structures erected on the shelf which are more than three miles from the coast of this country.<sup>41</sup> Admiralty principles are eschewed; personal injuries suffered on those artificial islands are governed by the laws of the adjacent state *that are not inconsistent with federal law*.<sup>42</sup>

One writer has suggested that because of the adoption of state law, a fixed platform worker's substantive rights against third parties are governed by state law, irrespective of the platform's location on the offshore waters of the United States.<sup>43</sup> The Supreme Court in *Rodrigue*

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35. *Id.* at 725.

36. *Bacon v. Bunting*, 534 F. Supp. 412, 416 (D. Md. 1982), suggests that a loss of society claim will lie whenever the injured spouse has a maritime claim *either* under an unseaworthy or negligence theory.

37. *Cruz*, 63 F.2d at 726.

38. *Gaudet*, 414 U.S. at 585, 94 S. Ct. at 815.

39. *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 479 (5th Cir. 1984); Annot., 11 A.L.R. 4th 549 (1982).

40. 43 U.S.C. §§ 1331-1356 (1983).

41. Texas and Florida are exceptions to the three mile rule, as the territorial waters of these states extend 10.4 miles from the coast. *United States v. Louisiana*, 363 U.S. 1, 84, 129, 80 S. Ct. 961, 1007, 1030 (1960).

42. 43 U.S.C. § 1333(a)(2)(A) (1983); Annot., 30 A.L.R. Fed. 535, §§ 5a, 6 (1976).

43. Schill, *Available Forums and Recoverable Damages in Offshore Personal Injury Litigation in the Fifth Circuit: A Review and an Analysis*, 16 Hous. L. Rev. 1, 8 (1978).

*v. Aetna Casualty Co.*<sup>44</sup> and *Chevron Oil Company v. Huson*<sup>45</sup> clearly implied that the law of the adjoining state, which is adopted as federal law, provided *all* facets of the remedies provided by state law.

The snag in OCSLA cases is that the state law not be "inconsistent" with federal law. That problem arose in *Gulf Offshore Co. v. Mobil Oil Corp.*<sup>46</sup> The Supreme Court, after holding that state and federal courts had concurrent jurisdiction in OCSLA cases, remanded the case to the Fourteenth Texas Court of Civil Appeals in Houston to determine whether the federal common law rule enunciated in *Liepell*, requiring that FELA juries be instructed as to the non-taxability of personal injury awards, applied to an OCSLA personal injury action based on the law of Louisiana, the state adjacent to the fixed platform on which the injury occurred.

The Texas court<sup>47</sup> held that OCSLA made the state law cause of action for personal injuries *applicable* federal law, therefore the issue of whether or not a non-taxability instruction should be given was governed by the law of Louisiana. The Supreme Court denied an application for certiorari. The Fifth Circuit has since concluded that the Texas court reached the result required by *Rodrigue* and *Huson*.<sup>48</sup>

The distinction between workers on floating and fixed platforms on the shelf is incongruous if not absurd, but the distinction remains a feature of offshore personal injury jurisprudence.<sup>49</sup> The fixed platform worker is limited to a claim against his *employer* for compensation under the Longshoremen's and Harbor Workers Compensation Act (LHWCA) when the injury occurs on the outer continental shelf and outside the territorial waters of the adjoining state; if the injury occurs within a state's territorial waters, he must look to that state's compensation benefits for recovery.<sup>50</sup> A non-seaman platform worker's exclusive remedy is LHWCA.<sup>51</sup>

### *Longshoremen's and Harbor Workers' Compensation Act*

Since the late nineteenth century, as a result of a series of Supreme Court decisions, longshoremen and harbor workers have been entitled

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44. 395 U.S. 352, 84 S. Ct. 1835 (1969).

45. 404 U.S. 97, 92 S. Ct. 349 (1971).

46. 453 U.S. 473, 101 S. Ct. 2870 (1981).

47. *Gulf Offshore Co. v. Mobil Oil Corp.*, 628 S.W.2d 171 (Tex. Civ. App. 1982), cert. denied, 103 S. Ct. 259 (1982).

48. *Olsen v. Shell Oil Co.*, 708 F.2d 976, 983 (5th Cir. 1983), cert. denied, 104 S. Ct. 715 (1984).

49. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 992 (1977).

50. Schill, *supra* note 43, at 7-8.

51. *Musial v. A & A Boats, Inc.*, 696 F.2d 1149, 1154 (5th Cir. 1983).

to bring suits in admiralty against shipowners for damages caused by their negligence.<sup>52</sup> Employees in maritime employment, including longshoremen or other persons engaged in longshoring operations, may now recover damages for personal injuries by statutory action against the vessel for negligence under the LHWCA.<sup>53</sup>

Section 5 of the Act, as amended in 1972, recognizes a federal cause of action for negligence in third party actions by longshoremen against shipowners. But Congress' desire for a uniform federal negligence remedy for such workers has not been entirely successful in practice, mainly because of the failure of Congress to specify the precise standard of care owed by shipowners to longshoremen.<sup>54</sup> The lower courts wrestled with various formulae until finally the Supreme Court set forth its own views in *Scindia Steam Navigation Co. v. De Los Santos*.<sup>55</sup> However, the Court failed to completely address the range of potential problems, and the lower courts are again bearing the burden of achieving the desired national uniformity.

Damages recoverable by a longshoreman or a harbor worker in a third party action under the Act are compensatory and awarded in accordance with the loss the plaintiff has suffered as a result of the defendant's negligence—nature and extent of the injuries, wages lost, medical expenses, and pain and suffering.<sup>56</sup> An injured harbor worker's spouse can recover for loss of society.<sup>57</sup>

### *Suits Against the Government*

The United States has enacted two waiver statutes that permit it to be sued for maritime torts: the Suits in Admiralty Act of 1920<sup>58</sup> and the Public Vessels Act of 1925.<sup>59</sup> With the 1960 amendment to the Suits in Admiralty Act, it seems clear that the coverage of that Act includes all maritime tort claims against the United States where the plaintiff would have an action in admiralty were the defendant a private person rather than the government.<sup>60</sup> Actually, the judicial trend has long been to read the two Acts together in order to channel maritime claims

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52. 1A Benedict on Admiralty, *supra* note 3, § 91.

53. 33 U.S.C. §§ 902(3), 905(b) (1982).

54. 1A Benedict on Admiralty, *supra* note 3, § 91.

55. 451 U.S. 156, 101 S. Ct. 1615 (1981).

56. *Roselli v. Hellenic Lines, Ltd.*, 524 F. Supp. 2, 4 (S.D.N.Y. 1980); *Doca v. Marina Mercante Nicaraguense, S.A.*, 474 F. Supp. 751, 758 (S.D.N.Y. 1979).

57. *Doca*, 474 F. Supp. at 758.

58. 46 U.S.C. § 742 (1983).

59. *Id.* § 781.

60. *McCormick v. United States*, 680 F.2d 345, 349 (5th Cir. 1982).



against the government to the admiralty side of the district courts.<sup>61</sup> Both acts authorize suits for personal injuries.<sup>62</sup>

### *Punitive Damages*<sup>63</sup>

In 1981, the Fifth Circuit held in a wrongful death case that punitive damages are recoverable under general maritime law upon a showing of willful and wanton misconduct by the shipowner.<sup>64</sup> It thus followed previous case law in both wrongful death and personal injury cases.<sup>65</sup>

The courts, under the general maritime law, have allowed the award of punitive damages in cases of willful and wrongful denial of a seaman's maintenance and cure.<sup>66</sup> They have denied punitive damages in a case of retaliatory discharge of a seaman.<sup>67</sup>

The question of whether the Jones Act alone would authorize the award of punitive damages has not been decided by the Supreme Court, and there is a conflict of authority in the lower courts on this point.<sup>68</sup> The Fifth Circuit in *In re Merry Shipping*<sup>69</sup> left open the question of whether punitive damages may be recovered under the Jones Act.

### *Retaliatory Discharge*

Retaliatory discharge is a relatively new maritime tort, first recognized in an opinion by Judge Rubin in the case of an at will seaman fired in retaliation for his having filed a Jones Act personal injury claim against his employer.<sup>70</sup> The principal reason for the court's decision was inequity, predicated mainly on the traditional protective attitude of the admiralty courts toward seamen. The claim may be joined with the seaman's personal injury action under the Jones Act and unseaworthiness and may be tried by a jury.

The employer's retaliatory discharge is classified as an intentional tort entitling the seaman to recover compensatory damages (including the expenses of finding new employment), lost earnings while seeking

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61. G. Gilmore & C. Black, *supra* note 1, § 11-11.

62. *American Stevedores v. Portello*, 330 U.S. 446, 452, 67 S. Ct. 847, 850-51 (1947).

63. See generally Faris, Symposium: Maritime Personal Injury—New Vistas of Damages in Maritime Personal Injuries, 43 La. L. Rev. 913, 925-31. (1983).

64. *In re Merry Shipping*, 650 F.2d 622 (5th Cir. 1981).

65. *Id.* at 624 n.9.

66. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620 (S.D. Tex. 1983); *Harper v. Zapata Offshore Co.*, 563 F. Supp. 576 (E.D. La. 1983).

67. *Smith v. Atlas Offshore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. 1981); Annot., 62 A.L.R. Fed. 790 (1983).

68. Annot., 10 A.L.R. Fed. 524, 536 (1983).

69. 650 F.2d at 627.

70. *Smith*, 653 F.2d at 1063.

employment, lost future earnings if the new job pays less than the old, and mental anguish.<sup>71</sup>

In *Roberie v. Gulf Oil Corp.*,<sup>72</sup> the court held that a roustabout on a fixed offshore platform was a "maritime worker;" he therefore had a retaliatory discharge claim, a maritime tort.

#### WRONGFUL DEATH

##### *Background*

Admiralty jurisdiction encompasses tort actions for the wrongful death of seamen, passengers, and others who perish on navigable waters.

In 1920, Congress passed two separate statutes creating maritime wrongful death remedies: the Jones Act<sup>73</sup> and the Death on the High Seas Act (DOHSA).<sup>74</sup> One commentator, often cited, has said that "DOHSA and the Jones Act, enacted almost simultaneously, were hopelessly inconsistent with each other, both as to the nature of the wrongful death recovery and as to the classes of beneficiaries entitled to recover."<sup>75</sup>

In 1886, in *The Harrisburg*,<sup>76</sup> the Supreme Court had held that there was no cause of action under the general maritime law for wrongful death. In part, DOHSA provided a remedy, but this remedy was only applicable to death "caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state."<sup>77</sup>

In 1970, the Supreme Court in *Moragne v. States Marine Lines, Inc.*,<sup>78</sup> overruled *The Harrisburg* and judicially created a federal general maritime law cause of action for wrongful death occurring on navigable waters within the territorial limits of a state. *The Moragne* remedy, applicable in territorial waters, precludes recognition in admiralty of state wrongful death statutes.<sup>79</sup>

When a death occurs on the high seas, DOHSA is the exclusive wrongful death claim for actions brought in admiralty based on unseaworthiness,<sup>80</sup> with the possible exception of claims that may be joined under state survival statutes.<sup>81</sup>

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71. *Id.* at 1064.

72. 545 F. Supp. 298 (W.D. La. 1982).

73. 46 U.S.C. § 688 (1983).

74. *Id.* § 761.

75. G. Gilmore & C. Black, *supra* note 1, § 6-29.

76. 119 U.S. 199, 7 S. Ct. 140 (1886).

77. 46 U.S.C. § 761 (1983).

78. 398 U.S. 375, 90 S. Ct. 1772 (1970).

79. *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S.S. Helena*, 529 F.2d 744, 753 (5th Cir. 1976).

80. *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982).

81. *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), cert. dismissed *sub nom* *Warren v. Serody*, 434 U.S. 801, 98 S. Ct. 28 (1977); *Dennis v. Central Gulf Steamship*

The Jones Act provides "a remedy for negligence anywhere on the water."<sup>82</sup> The Jones Act also incorporates a survival statute, § 9 of FELA (the Federal Employers Liability Act),<sup>83</sup> and allows a cause of action for the conscious pain and suffering that the deceased endured prior to death.<sup>84</sup> A Jones Act personal injury claim is distinct and separate from a DOHSA wrongful death claim. Thus, a seaman injured on the high seas may settle his personal injury claim against the vessel, die, and his widow may then sue under DOHSA for his wrongful death based on a claim of unseaworthiness of the vessel.<sup>85</sup>

The seaman's estate may also have a survival claim under applicable state survival statutes.<sup>86</sup> This could be significant in raising damages because under some state survival statutes a decedent's estate may recover more than the limited pecuniary losses of the survivors under their wrongful death claims.<sup>87</sup> For example, in *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*,<sup>88</sup> the decedent was a 20-year-old single woman whose wrongful death beneficiaries could only recover pecuniary damages of \$2,840.14 under DOHSA, but under the Pennsylvania survival statute the administrator of her estate recovered \$118,369.00. DOHSA does not preempt the use of state survival statutes to supplement the remedies for passengers and other non-seafarers killed on the high seas, therefore, claims under DOHSA and state survival actions may be joined in one action.<sup>89</sup>

Wrongful death claims may also be brought against the United States under the Suits in Admiralty Act<sup>90</sup> and the Public Vessels Act.<sup>91</sup> Where applicable, these statutes constitute the exclusive remedy for wrongful

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Corp., 453 F.2d 137 (5th Cir. 1972); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971). Note that these cases precede the United States Supreme Court's holding in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010 (1978), which includes the word "survival" in its enumeration of the issues exclusively covered by DOHSA. See also Smith, *A Maritime Survival Remedy: Is There Life After Higginbotham?*, 6 *Maritime Law* 185 (1981); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277 (W.D. Pa. 1983), where the court held that survival actions under state law or the general maritime law were not preempted by DOHSA, and the *Dugas* line of cases was not overruled by *Higginbotham*.

82. *Bodden*, 681 F.2d at 333.

83. 45 U.S.C. § 59 (1983).

84. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308 (1964); *Deal v. A.P. Bell Fish Co.*, 728 F.2d 717 (5th Cir. 1984).

85. 681 F.2d at 331-33.

86. *Gillespie v. United States Steel*, 379 U.S. at 157, 85 S. Ct. at 313.

87. *Id.*

88. 573 F. Supp. 1277 (W.D. Pa. 1983).

89. *Id.* at 1286.

90. 46 U.S.C. § 742 (1983).

91. *Id.* § 742.

death claims arising from all maritime torts against the United States.<sup>92</sup>

Third party claims by survivors of workers covered by the LHWCA include wrongful death actions.<sup>93</sup> Since the 1972 amendments to this act, such suits are based solely on "negligence."<sup>94</sup>

Section 905(b) states that "the remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." It has been suggested that this "negligence remedy" should be conceptualized as "statutory" in origin and character and therefore not as derived from the general maritime law.<sup>95</sup>

Finally, suits for wrongful death may be maintained by survivors of fixed platform workers covered by the terms of OCSLA under the law of the adjacent state as surrogate federal law.<sup>96</sup>

#### *Elements of Damages for Wrongful Deaths on Navigable Waters: Damages Recoverable*

##### *Lost financial contributions the decedent would have made to the beneficiaries*

The beneficiaries of a deceased seaman have a *Jones Act* claim to recover the "reasonable likelihood of [financial] contributions" that they would have received from the decedent.<sup>97</sup> Under the *Moragne* general maritime wrongful death scheme, this element of damages is recoverable as a part of the loss of support sustained by the decedent's dependents. "Support includes all the financial contributions that the decedent would have made to his dependents had he lived."<sup>98</sup>

This element of damages is likewise recoverable under DOHSA, and the measure of recovery is the actual pecuniary benefits that the decedent's beneficiaries could reasonably have expected to receive from the continued life of the decedent.<sup>99</sup>

State survival actions may also provide recovery for losses to the estate of the decedent, including the loss of future earnings of the decedent.<sup>100</sup>

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92. *McCormick*, 680 F.2d at 349; *Kelly v. United States*, 531 F.2d 1144 (2d Cir. 1976).

93. 33 U.S.C. § 933 (1983).

94. *G. Gilmore & C. Black*, supra note 1, § 6-33, at 371 (1975).

95. *Id.* § 6-62, at 471.

96. *Rodrigue*, 395 U.S. 352, 84 S. Ct. 1835 (1969).

97. *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489, 494 (5th Cir. 1962).

98. *Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974).

99. *Solomon*, 540 F.2d at 786.

100. *Id.* at 790.

*Conscious pain and suffering endured by the decedent*

This element of damage, although not pecuniary, may be recovered under the survival provisions of the *Jones Act*.<sup>101</sup> Eyewitness evidence of a deceased's conscious pain and suffering before his death is not necessary to support an award of such damages.<sup>102</sup> This evidentiary burden becomes important in the case of drowning deaths where, quite often, there are no witnesses to the events preceding death. In such cases, there must be evidence to support a reasonable inference of consciousness.<sup>103</sup>

Such evidence has been effectively supplied through expert medical testimony of a forensic pathologist as to the cause of death and probable length of consciousness, coupled with a psychiatrist/neurologist's description of the severe emotional strain and anguish that a drowning person experiences before death.<sup>104</sup>

DOHSA does not provide recovery for the conscious pain and suffering of the decedent.<sup>105</sup> However, the Act does not preclude a personal representative from alleging such a cause of action in pendent claims under applicable state survival statutes.<sup>106</sup> The general maritime law allows the personal representative of an estate to seek damages for the deceased's pain and suffering prior to death.<sup>107</sup> Damages for conscious pain and suffering are also allowed in death actions brought under the Public Vessels Act and Suits in Admiralty Act.<sup>108</sup>

*Loss of society*

"Society" was defined by the Supreme Court in *Sea-Land Services, Inc. v. Gaudet* as including "love, affection, care, attention, companionship, comfort, and protection."<sup>109</sup> Judge Rubin added the elements of "solace" and "sexual relations."<sup>110</sup> Under the general maritime law,

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101. *Gillespie*, 379 U.S. at 157, 85 S. Ct. at 313; *Deal*, 728 F.2d at 718.

102. *Deal*, 728 F.2d at 718; *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 748 (9th Cir. 1980).

103. *Deal*, 626 F.2d at 750.

104. *Cook v. Ross Island*, 626 F.2d at 752.

105. *Solomon*, 540 F.2d at 792; *Law v. Sea Drilling Corp.*, 510 F.2d 242, 248 (5th Cir. 1975).

106. *Higginbotham*, 436 U.S. at 625, 98 S. Ct. at 2015; *Solomon*, 540 F.2d at 792-93.

107. *Supra* note 69; *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F.2d 903 (8th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972).

108. *Curry v. United States*, 338 F. Supp. 1219 (N.D. Cal. 1971); *Abbott v. United States*, 207 F. Supp. 468 (S.D.N.Y. 1962).

109. *Gaudet*, 414 U.S. at 585, 94 S. Ct. at 815.

110. *Cruz*, 638 F.2d at 722.

loss of society is recoverable for wrongful death occurring inside territorial waters.<sup>111</sup> Loss of society is not authorized under either DOHSA<sup>112</sup> or the Jones Act.<sup>113</sup>

*A child's loss of nurture, guidance, training, and education*

Under a general maritime law (*Moragne*) cause of action for wrongful death, the loss of nurture and guidance to children is an element of damage.<sup>114</sup> This element of damage is treated as a pecuniary loss under DOHSA and is recoverable.<sup>115</sup> Likewise, it is a proper element of damages under the Jones Act.<sup>116</sup>

*Loss of services*

The loss of services the decedent would have rendered to his beneficiaries is an element of damages that is recoverable under the Jones Act,<sup>117</sup> DOHSA,<sup>118</sup> and the general maritime law.<sup>119</sup>

*Grief*

Grief, bereavement, or mental anguish of the survivors is not compensable under either the Jones Act,<sup>120</sup> DOHSA,<sup>121</sup> or general maritime law.<sup>122</sup>

*Loss of inheritance*

Under the general maritime law cause of action for wrongful death, if a survivor can establish his own reasonable expectation of an inheritance of money from the decedent, this becomes a recoverable element

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111. *Gaudet*, 414 U.S. at 585, 94 S. Ct. at 814.

112. *Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010 (1978).

113. *Beltia v. Sidney Torres Marine Transport, Inc.*, 701 F.2d 491 (5th Cir. 1983); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980); *Christofferson v. Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976).

114. Annot., 18 A.L.R. Fed. 184 § 11 (1974).

115. *Id.*; *Solomon*, 540 F.2d at 788; Annot., 16 A.L.R. Fed. 696 § 9 (1973).

116. *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 593 n.9(a) (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962).

117. *Ivy*, 606 F.2d at 525.

118. *Solomon*, 540 F.2d at 786.

119. *Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974).

120. *Cook v. Ross Island*, 626 F.2d at 748; *Thompson v. Offshore Co.*, 440 F. Supp. 752, 765 (S.D. Tex. 1977).

121. *Id.*

122. *Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974); *In re S.S. Helena*, 529 F.2d 744 (5th Cir. 1976).

of damages.<sup>123</sup> The same rule of recoverability of an expected inheritance applies to suits under DOHSA.<sup>124</sup>

#### *Medical expenses of the decedent*

It is clear that a seaman's claim for maintenance and cure, being contractual, survives to his estate, and may be recovered under the general rule that claims sounding in contract survive the death either of the obligor or obligee.<sup>125</sup>

#### *Funeral expenses*

Under general maritime law, this element of damage is recoverable, at least where the decedent's dependents have either paid for the funeral or are liable for its payment.<sup>126</sup> The Supreme Court in *Mobil Oil Corp. v. Higginbotham*, noted that funeral expenses may be treated as pecuniary losses recoverable under DOHSA or under the general maritime law.<sup>127</sup>

Under the Jones Act, the funeral expenses are recoverable if, and only if, the widow, under state law is legally obligated to pay them.<sup>128</sup>

#### *Punitive damages*

A scholarly analysis of the Fifth Circuit case of *In re Merry Shipping, Inc.*,<sup>129</sup> concluded that punitive damages may not be recoverable in wrongful death actions arising on the high seas or in actions based solely on the Jones Act. However, punitive damages should be recoverable in wrongful death actions based upon both the Jones Act and the general maritime law for unseaworthiness. Punitive damages may be recoverable in wrongful death actions arising in state waters and based upon the general maritime law.<sup>130</sup>

### CALCULATION OF DAMAGES

The reduction to present value of future pecuniary losses arising

123. Complaint of Cambria S.S. Co., 505 F.2d 517, 522-523 (6th Cir. 1974), cert. denied *sub nom.* Gordon v. Dahl, 420 U.S. 975 (1975); *Thompson v. Offshore Co.*, 440 F. Supp. at 762.

124. *Solomon*, 540 F.2d at 787.

125. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4, 78 S. Ct. 394, 397 n.4 (1958); *Sperbeck v. A.L. Burbank & Co.*, 190 F.2d 449, 450 (2d Cir. 1951).

126. *Gaudet*, 414 U.S. at 591, 94 S. Ct. at 818.

127. 436 U.S. at 624 n.20, 98 S. Ct. at 2014 n.20.

128. *Cities Service Oil Co. v. Launey*, 403 F.2d 537 (5th Cir. 1968); *Moore v. The O/S Fram*, 226 F. Supp. 816 (S.D. Tex. 1963), *aff'd sub nom.* *Wilhelm Seafoods, Inc. v. Moore*, 328 F.2d 868 (5th Cir. 1964).

129. 650 F.2d 622 (5th Cir. 1981).

130. *Faris*, *supra* note 63, at 925.

from a tort which are paid in a lump sum is now settled law.<sup>131</sup> But just how this is done in personal injury cases remains abstruse.

In 1916 in *Cheasapeake & O. Ry. v. Gainey*,<sup>132</sup> the Supreme Court said that the present worth concept was commonly recognized, citing seventeen state and two federal court decisions. But the Court sidestepped laying down "a precise rule or formula" and avoided approving "any of the particular formulae that have been followed in applying the principle; since in this aspect the decisions are not harmonious, and some of them may be subject to question."

The formulae are rendered no less elusive in the latest pronouncement of the Supreme Court on the subject in its 1983 decision in *Jones & Laughlin Steel Corp. v. Pfeifer*.<sup>133</sup> That case involved the reduction to present value of a personal injury award to a longshoreman under Section 905(b) of the LHWCA.<sup>134</sup> The Court actually decided only (1) that it was error to make *mandatory* the formula used by a state court in the state where the accident occurred and (2) that there are several economic methods of discounting, but because Congress in the Act had provided for an award of damages without guidance as to how they were to be calculated, the Court limited itself to suits under Section 905(b).<sup>135</sup> The Court did no more than was necessary to resolve the specific case before it, while noting that "[t]he average accident trial should not be converted into a graduate seminar for economic forecasting."<sup>136</sup>

In *Culver v. Slater Boat Company*<sup>137</sup> (*Culver I*) the Fifth Circuit overruled an old anachronism previously stated in *Johnson v. Penrod Drilling Co.*,<sup>138</sup> which held that neither proof, nor argument, nor jury instruction concerning inflationary factors could be considered or used in maritime, Jones Act, and FELA personal injury and wrongful death actions. The *Penrod* court bottomed this holding mostly on the fact that in 1975 the government proposed to do something about inflation! The antecedents of this case are extensive.

An original November 21, 1972 panel opinion which contained an extensive discussion of the inflation issue was on petition for rehearing abbreviated to the sparse language found in the first *Johnson v. Penrod Drilling Co.* reported case.<sup>139</sup> A Pandora's box had been opened by letting an economist loose in the district courtroom and allowing him

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131. Restatement (Second) of Torts § 913A (1977).

132. 241 U.S. 494, 36 S. Ct. 633 (1916).

133. 103 S. Ct. 2541 (1983).

134. 33 U.S.C. § 905(b) (1983).

135. *Pfeifer*, 103 S. Ct. at 2555.

136. *Id.* at 2555, 2556.

137. 688 F.2d 280 (5th Cir. 1982) (reh'g *en banc*).

138. 510 F.2d 234 (5th Cir.) (reh'g *en banc*), cert. denied, 423 U.S. 839 (1975).

139. 469 F.2d 897, 904-05 (5th Cir. 1973) (as amended on denial of reh'g and reh'g *en banc*).



to project the plaintiff's future earnings.<sup>140</sup> As will be shown, this conglomeration of discounting to present value is really economics and not a legal question.

While the Fifth Circuit was pondering an application for rehearing in *Culver I*, the Supreme Court decided *Pfeifer*. The Fifth Circuit, with nine judges dissenting, then donned academic robes and reconsidered *Culver I* in light of *Pfeifer* by withdrawing *Culver I* except as it overruled *Johnson* and proceeded to substitute *Culver II*.<sup>141</sup> Thirteen judges held that absent a stipulation, fact finders shall determine and apply an appropriate "below market discount rate as the sole method to adjust loss of future earnings awards to present value to account for the effects of inflation." Expert testimony and jury instructions *must* be based on this method, but jurors may be instructed either to return a general damage verdict or to answer special interrogatories concerning their computation of damages.

This economic exercise undoubtedly required much soul searching for Judges Rubin and Frank R. Johnson, Jr., who wrote for the majority. They recognized that no formulae were likely to produce the result that would have been obtained had the plaintiff not been injured, that no one can predict the course of future inflation, and that a survey of the general economic literature for the past several years illustrates "a sorry tale of repeated confusion, contradiction and uncertainty in economic forecasts" since 1850 the science of economics has been "dismal" and is still "conjectural."<sup>142</sup> Yet this economic chaos is now transmuted into law.

One only has to read the opinion in *Pfeifer* to realize that the Court was seeking the solution of an economic problem. The opinion bristles with citations to economic texts and authors.

One distinguished economist, Professor Arthur C. Mead, frankly says that economists use "a jargon that is unknown to others" and that "to provide estimates favorable to a particular individual is constrained almost solely by conscience."<sup>143</sup> This proposal is hard to explain to a jury, but a jury might find even more difficult his explanation of one aspect of the problem as:

$$PV = \frac{W(1 + i)(1 + q)}{(1 + r)}$$

Nevertheless, the bar is faced with the problem, although a petition for writ of certiorari is pending in *Culver II*. (This author's opinion on

140. *Johnson*, 510 F.2d at 237-38.

141. *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) (petition for reh'g *en banc*).

142. *Id.* at 119, 120.

143. Arthur C. Mead, *Calculating Present Value*, 20 *Trial* 16 (July 1984).

how *Culver II* mandates reduction to present value is attached as an annex to this paper.) In the first analysis, the *proof* of loss of future earnings lies with an economist,<sup>144</sup> the use of whom creates an additional expense to litigants.

Although *Culver II* speaks only of "loss of future earnings awards," other elements of personal injury damages have been the subject of discounting. Damage awards covering future medical expenses have been discounted,<sup>145</sup> but there is conflict concerning the discounting of an award for pain and suffering.<sup>146</sup>

#### INCOME TAX

Damages received for personal injuries are not subject to federal income tax.<sup>147</sup> The Internal Revenue Service has stated the same about wrongful death awards.<sup>148</sup> Since World War II the courts had been virtually unanimous in the general view that a personal injury award should not be reduced because it is exempt from income tax.<sup>149</sup>

In 1980, the Supreme Court, in *Norfolk & Western Railway Co. v. Liepelt*,<sup>150</sup> a FELA wrongful death case, held that:

(1) Evidence showing the effect of income taxes on the decedent's estimated earnings was admissible; and

(2) The jury should have been instructed that "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

The *Liepelt* rule is now applied to lost future earnings for one who is injured but not killed in a maritime accident.<sup>151</sup>

In *Gulf Offshore Co. v. Mobil Oil Corp.*,<sup>152</sup> the plaintiff attempted to confine *Liepelt* to FELA cases. But the Court, with Justices Blackmun, Brennan and Marshall expressing doubt, held that *Liepelt* "articulated a federal common law rule."<sup>153</sup>

144. For an economist's interpretation of what is involved in *Pfeifer* and *Culver II*, see Wilbratte, *Inflation and Damages in the Fifth Circuit*, 147 Tex. B. J. 638 (1984).

145. *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285, 1286 (5th Cir. 1980). See also *supra* note 131.

146. Discount allowed: 22 Am. Jur. 2d, *Damages* § 108 (1965); *Gretchen v. United States*, 618 F.2d 177 (2d Cir. 1980). Discount not allowed: *St. Louis Southwestern Ry.*, 632 F.2d at 1286.

147. 26 U.S.C. § 104(a)(2) (1983).

148. Rev. Bull. 54-19, 1954-Cumm. Bull. 179.

149. Annot., 62-66 A.L.R.2d Supp. 336; *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 885 n.7 (8th Cir. 1980).

150. 444 U.S. 490, 100 S. Ct. 755 (1980).

151. *Paquette v. Atlanska-Plovidba*, 701 F.2d 746, 748 (8th Cir. 1983).

152. 453 U.S. 473, 101 S. Ct. 2870.

153. *Id.* at 486, 489, 101 S. Ct. at 2880, 2881.

In *Pfeifer*<sup>154</sup> the Court extended *Liepelt's* federal common law pronouncement in reducing lost wages to present value, holding that lost wages would have been diminished by income taxes, and since the damage award is tax free, the wage loss is "after tax wages and benefits."

The *Liepelt* rule has been applied in maritime personal injury cases involving negligence,<sup>155</sup> the LHWCA,<sup>156</sup> unseaworthiness, the Jones Act,<sup>157</sup> negligence under the Death on the High Seas Act, and a state survival statute.<sup>158</sup>

In post-*Liepelt* bench trials, district courts have held that damage awards for past and future lost income, both in maritime personal injury cases and death cases, must exclude federal income taxes, so as to award lost income net of taxes.<sup>159</sup>

In one case, the court held that as damages for pain and suffering are not subject to federal income taxes, no tax deduction should be made for that item of damages.<sup>160</sup> In another<sup>161</sup> the court interpreted *Liepelt* to require the deduction of federal, state and local income tax, and the court further deducted "personal maintenance" over life expectancy consistent with the decedent's age and life style.

The Second Circuit in *Fanetti v. Hellenic Lines, Ltd.*,<sup>162</sup> stated that a defendant confronted with a claim for future lost wages is entitled to have an after tax charge based on *Liepelt* when there is a stipulation or evidence of *future or past taxes*, in which the jury should be instructed that it may assume a future tax amount or tax percentage of wages comparable to past tax years.

#### PRE-JUDGMENT INTEREST<sup>163</sup>

The awarding of all interest in admiralty cases has traditionally been considered a matter for the courts' discretion.<sup>164</sup> At least in the Fifth Circuit, pre-judgment interest, although discretionary, is usually auto-

154. 103 S. Ct. at 2555.

155. See *Paquette*, 701 F.2d 746 (8th Cir. 1983).

156. *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424 (2d Cir. 1982), cert. denied, 103 S. Ct. 3535 (1983); *Rother v. Interstate & Ocean Transport Co.*, 540 F. Supp. 477, 482 (E.D. Pa. 1982); *Roselli*, 524 F. Supp. 2 (S.D.N.Y. 1980).

157. See *Brown v. Penrod Drilling Co.*, 534 F. Supp. 696 (W.D. La. 1982).

158. *Kuntz*, 573 F. Supp. 1277 (W.D. Pa. 1983).

159. See *Roselli*, 524 F. Supp. 2 (S.D.N.Y. 1980); *Rother*, 540 F. Supp. 477 (E.D. Pa. 1982); *Penrod*, 534 F. Supp. 696 (W.D. La. 1982).

160. *Roselli*, 524 F. Supp. 2 (S.D.N.Y. 1980).

161. *Kuntz*, 573 F. Supp. 1277 (W.D. Pa. 1983).

162. *Fanetti*, 678 F.2d 424 (2d Cir. 1982).

163. See generally Annot., 34 A.L.R. Fed. 126 (1977).

164. *The Umbria*, 166 U.S. 404, 17 S. Ct. 610 (1897).

matic in suits in admiralty.<sup>165</sup> Federal statutory law covering interest paid on judgments makes no provision for pre-judgment interest.<sup>166</sup> Thus, in accordance with the customary practice of admiralty courts, the trial judge not only uses his discretion as to pre-judgment interest but also fixes the rate.<sup>167</sup> There seems to be no uniformity in the rate fixed.<sup>168</sup>

In cases tried on the *admiralty* side (no jury), whether personal injury<sup>169</sup> or wrongful death actions under the general maritime law, (*Moragne*)<sup>170</sup> pre-judgment interest (usually from the date of the accident or death to the date of judgment) has been awarded in the discretion of the court.<sup>171</sup> This discretionary rule applies to Jones Act cases in admiralty,<sup>172</sup> but in a Jones Act case tried at law in the Fifth Circuit, no pre-judgment interest is allowed.<sup>173</sup>

In an OCSLA case no pre-judgment interest was allowed in a judgment for a non-seaman based upon the LHWCA.<sup>174</sup> Federal statutory law<sup>175</sup> rather than state law governs interest paid on a personal injury award for injuries suffered on a fixed platform on the outer continental shelf.<sup>176</sup>

The discretionary rule has been applied to *Death on the High Seas Act* cases.<sup>177</sup>

In admiralty, the allowance of pre-judgment interest as against private persons, discussed above, and the allowance of such interest against the United States are distinct.

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165. *Masters v. Transworld Drilling Co.*, 688 F.2d 1013 (5th Cir. 1982).

166. *Jarvis v. Johnson*, 668 F.2d 740, 741 n.1 (3d Cir. 1982) (saying that legislation for pre-judgment interest was proposed in 1981).

167. *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981); *Independent Bulk Transport, Inc. v. Vessel "Morania Abaco"*, 676 F.2d 23 (2d Cir. 1982).

168. Annot., *supra* note 163, § 9(a).

169. *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 988 (5th Cir. 1978).

170. *In re Metcalf*, 530 F. Supp. 446, 461 (S.D. Tex. 1981); *First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110, 1121 (7th Cir. 1979); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972).

171. Annot., *supra* note 163, §§ 16, 17.

172. *Doucet v. Wheless Drilling Co.*, 467 F.2d 336 (5th Cir. 1972); *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 676, 677 (4th Cir. 1964); *First National Bank*, 597 F.2d at 1118-21 (*dicta*).

173. *Doucet*, 467 F.2d at 340.

174. *Musial*, 696 F.2d at 1154.

175. See *infra* note 185.

176. *Berry v. Sladco, Inc.*, 495 F.2d 523, 528 (5th Cir. 1974); *Aymond v. Texaco, Inc.*, 554 F.2d 206, 212 (5th Cir. 1977); *Ellis v. Chevron U.S.A., Inc.*, 650 F.2d 94, 98 (5th Cir. 1981).

177. Annot., *supra* note 115, § 12.

Pre-judgment interest is banned by statute in cases against the United States brought solely under the Public Vessels Act, absent a contract expressly stipulating for the payment of interest.<sup>178</sup>

The Suits in Admiralty Act provides that a decree for a money judgment against the United States bears interest at the rate of four percent, or at any higher rate stipulated by contract,<sup>179</sup> "interest to run as ordered by the court." It has been held that in suits brought solely under this Act, pre-judgment interest is allowable in the discretion of the court.<sup>180</sup>

On the other hand, if jurisdiction is predicated on *both* Acts, pre-judgment interest has been held not to be recoverable.<sup>181</sup>

There has been considerable judicial confusion in construing the interest provisions of both Acts,<sup>182</sup> but the decision of the Supreme Court in *United States v. United Continental Tuna Corp.*<sup>183</sup> may resolve the matter. There the Court held that suits previously cognizable under the Public Vessels Act, brought under the Suits in Admiralty Act (as amended in 1960) are free of the former's restrictive clause relating to pre-judgment interest.<sup>184</sup>

#### POST-JUDGMENT INTEREST

Post-judgment interest on money judgments is statutory and is calculated from the date of entry of the judgment in the district court.<sup>185</sup> It is based on the yield of 52-week U.S. Treasury bills. The statute applies to judgments rendered in admiralty.<sup>186</sup>

#### ANNEX

##### SOME SUCCINCT CONCLUSIONS ABOUT CULVER II METHODOLOGY

###### I.

"Calculation of damages suffered by a person whose personal injuries will result in extended future disability or by the representatives

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178. 46 U.S.C. § 782 (1983); *Gretchen*, 618 F.2d at 178; *In re Sincere Navigation Corp.*, 447 F. Supp. 672, 675 (E.D. La. 1978). See Annot., *supra* note 163, § 23.

179. 45 U.S.C. § 743 (1983).

180. *Richmond Marine Panama, S.A. v. United States*, 350 F. Supp. 1210, 1221 (S.D.N.Y. 1972).

181. *Curry v. United States*, 338 F. Supp. 1219 (N.D. Cal. 1971); *Firth v. United States*, 554 F.2d 990, 995, 996 n.10 (9th Cir. 1977).

182. Annot., *supra* note 163, at 255.

183. 425 U.S. 164, 96 S. Ct. 1319 (1976).

184. *Id.*

185. 28 U.S.C. § 1961 (1983); Fed. R. App. P., R. 37.

186. *Kotsopoulos v. Asturia Shipping Co.*, 467 F.2d 91, 94 (2d Cir. 1972); *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980).

of a deceased person” involves the following steps to determine “an appropriate below market discount interest rate:”<sup>187</sup>

A. Estimating the loss of work life resulting from injury or death.<sup>188</sup>

B. Calculating the “lost income stream” over the work lifetime:

(1) Determining gross earnings (annual wages) of the injured party at the time of injury *LESS* state and federal income tax and unreimbursed costs, e.g. transportation to work and uniforms,<sup>189</sup> *PLUS fringe benefits*, such as insurance coverage, pension and retirement plans, and profit sharing and in-kind services. The Supreme Court says such fringe benefits are frequently excluded for simplicity.<sup>190</sup>

(2) *Personal and Societal Factors* are *ADDED* if proved. Examples are personal merit and increased experience.<sup>191</sup> *Pfeifer* lists many others.<sup>192</sup>

(3) General price inflation is ignored as a factor in determining the wage increases the worker would have received each year.<sup>193</sup>

C. The *RESULT* should be an estimate of what the lost income stream would have been “as a series of after tax payments, *one in each year of the worker’s expected remaining career.*”<sup>194</sup>

D. *Estimated average market interest rate*, i.e., the rate of return from the best and safest short or long term investments during the worker’s work expectancy, “*computed after considering the effect of income tax on the interest received.*”<sup>195</sup>

E. This market interest rate is then offset by the estimated rate of general future price inflation. This is the discount rate which is applied to the lost stream of earnings. The end result is hopefully “present value.”

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187. *Culver*, 722 F.2d at 117.

188. The same principles apply if the suit involves loss of earnings by a decedent, see *Culver*, 722 F.2d at 117 n.2.

189. In wrongful death cases, the living expenses the worker would have incurred had he continued to work and live are also subtracted, see *Culver*, 722 F.2d at 117 n.3.

190. *Pfeifer*, 103 S. Ct. at 2549.

191. *Culver*, 722 F.2d at 122.

192. *Pfeifer*, 103 S. Ct. at 2549, 2550.

193. *Culver*, 722 F.2d at 118.

194. *Id.* at 117.

195. *Id.* at 117-18, 122.

## II.

The above methodology is the ONLY discount method to be followed in the Fifth Circuit when the parties cannot agree.<sup>196</sup>

## III.

Only evidence as to the "below market interest" rate is admissible.<sup>197</sup>

## IV.

The jury should be instructed as to the weight to be given expert opinion evidence. It may then be permitted to return a single-figure award for damages OR it may answer interrogatories stating *inter alia*, the loss of future earnings for each *year* it makes its award, *and* the discount rate it chooses to apply.<sup>198</sup>

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196. *Id.* at 122.

197. *Id.*

198. *Id.*