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New Vistas of Damages in Maritime Personal Injuries

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NEW VISTAS OF DAMAGES IN MARITIME PERSONAL INJURIES

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The first three years of the current decade marked significant changes in the law of maritime personal injury and death damages. In 1980, the United States Supreme Court rendered *American Export Lines, Inc. v. Alvez*,[1] in which the court held that the wife of a longshoreman injured in state waters was entitled to recover for the loss of her husband's society. The next year, the Fifth Circuit Court of Appeals, in *In re Merry Shipping, Inc.*,[2] held that punitive damages were recoverable in a maritime wrongful death action arising in state waters and based upon the general maritime law. In 1982, the Fifth Circuit, in *Culver v. Slater Boat Co.*,[3] ruled that inflation could be considered in ascertaining damage awards for loss of future earnings.

LOSS OF SOCIETY

The Supreme Court, in *Alvez*, followed its wrongful death decisions in holding that the wife of an injured longshoreman could recover for loss of society in an action based upon negligence and unseaworthiness. Thus, a review of the wrongful death decisions will be undertaken herein before the personal injury decisions are analyzed.

Wrongful Death

Traditionally, nonpecuniary damages were not recoverable in maritime wrongful death actions. In 1886, the United States Supreme Court, in *The Harrisburg*,[4] held that the general maritime law did not afford a right of action for wrongful death. To alleviate this harsh rule, Congress, in 1920, passed the Death on the High Seas Act (DOHSA)[5] and the Merchant Marine Act of 1920, commonly known

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1. 446 U.S. 274 (1980). *See generally* Note, *Alvez v. American Export Lines: A Reverse Erie Approach to Maritime Cases*, 46 BROOKLYN L. REV. 321 (1980); Note, *Loss of Consortium in Negligent Injury Under the General Maritime Law: The Unrigging of Igneri—American Export Lines, Inc. v. Alvez*, 5 MAR. LAW. 117 (1980); Note, *Admiralty—Loss of Society Claim Allowed for Wife of a Longshoreman Injured in State Territorial Waters*, 55 TUL. L. REV. 545 (1981). For a further discussion of *Alvez*, see *infra* notes 43-49 and accompanying text.

2. 650 F.2d 622 (5th Cir. 1981). For a further discussion of *Merry Shipping*, see *infra* notes 97-101 and accompanying text.

3. 688 F.2d 280 (5th Cir. 1982) (en banc) (rehearing applied for). For a further discussion of *Culver*, see *infra* notes 118-119 and accompanying text.

4. 119 U.S. 199 (1886). This case subsequently was overruled by Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), discussed in text at notes 9-16, *infra*.

5. 46 U.S.C. §§ 761-768 (1976). Section 761 provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or

as the Jones Act.[6] DOHSA provides representatives of seamen killed on the high seas with a cause of action for their decedent's wrongful death, where such death resulted from unseaworthiness or negligence. The damages recoverable under DOHSA were limited by its terms to pecuniary losses.[7] The Jones Act provides representatives of seamen killed in state waters with a cause of action for their decedent's wrongful death, where such death resulted from the negligence of the employer. Even though the Jones Act does not expressly exclude recovery of nonpecuniary losses, it was judicially construed as excluding such damages in wrongful death actions.[8] In state-water

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default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

See generally 2 A. SANN, S. BELLMAN, B. CHASE, BENEDICT ON ADMIRALTY § 81 (7th ed. 1982 & Supp. 1982) [hereinafter cited as BENEDICT ON ADMIRALTY]; G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-29 (2d ed. 1975).

6. 46 U.S.C. § 688 (1976). The act provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

See generally 2 BENEDICT ON ADMIRALTY, *supra* note 5, §§ 27, 81; G. GILMORE & C. BLACK, *supra* note 5, § 6-20.

7. 46 U.S.C. § 762 (1976) provides:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

8. In Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913), the Supreme Court held that the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (1976), provides for recovery of pecuniary damages only in death actions, even though the Act does not expressly limit the damages recoverable. 227 U.S. at 70. Since the Jones Act expressly makes the FELA applicable in actions brought pursuant to the Jones Act, courts consistently have followed *Vreeland* in Jones Act death cases. *See, e.g.*, Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 526 & n.5 (5th Cir. 1979) (en banc) (the *Vreeland* decision has been adopted uniformly in Jones Act cases); *In re* Risdal & Anderson, Inc., 291 F. Supp. 353, 357 (D. Mass. 1968) (*Vreeland* rule applicable in Jones Act case); *In re* Southern S.S. Co., 135 F. Supp. 258, 359-60 (D. Del. 1955) (same); American Barge Line Co. v. Leatherman's Admin., 306 Ky. 284, 206 S.W.2d 955 (1947) (same).

wrongful death actions based on the general maritime law for unseaworthiness, state wrongful death acts were held applicable.[9] Thus, the recovery of nonpecuniary losses in death actions arising on state waters depended upon the applicable state wrongful death statute. Not surprisingly, these statutes varied from state to state; these state statutes also varied from DOHSA.[10] These and other problems associated with allowing state wrongful death statutes to govern actions arising in state waters were addressed by the United States Supreme Court in *Moragne v. States Marine Lines, Inc.*[11] In *Moragne*, a longshoreman was killed aboard a vessel moored in state waters off the coast of Florida. His widow brought a wrongful death action against the vessel owner, claiming unseaworthiness and negligence. At trial, the federal district court found that the decedent's death was caused solely by the unseaworthiness of the vessel. Since the Florida wrongful death statute and the general maritime law did not provide for a wrongful death action based upon unseaworthiness, both the trial court and the Fifth Circuit denied the widow's claim.[12] Resolving to "assure uniform vindication of federal policies,"[13] the Supreme Court overruled *The Harrisburg*[14] and recognized a general

9. Prior to Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), "the established principle of maritime law [was] that in the absence of a statute there . . . [was] no action for wrongful death." The Tungus v. Skovgaard, 358 U.S. 588, 590 (1959). However, "where death . . . [resulted] from a maritime tort committed on navigable waters within a State whose statutes . . . [gave] a right of action on account of death by wrongful act, the admiralty courts [entertained] . . . a libel *in personam* for the damages sustained by those to whom such a right [was] given." Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921). *See In re* S.S. Helena, 529 F.2d 744 (5th Cir. 1976); Grigsby v. Coastal Marine Serv. of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969).

10. For example, under Louisiana law, the proper elements of damages in actions from wrongful death are not only loss of contributions from the decedent but also loss of society, grief, anguish, loss of love and affection, loss of services, and loss of support. Silverman v. Travelers Co., 277 F.2d 257 (5th Cir. 1960); Roundtree v. Technical Welding & Fabrication Co., 364 So. 2d 1325 (La. App. 4th Cir. 1978). The Louisiana Legislature recently amended Civil Code article 2315 to authorize recovery of damages for loss of consortium. LA. CIV. CODE art. 2315, *as amended by* 1982 La. Acts, No. 202, § 1.

11. 398 U.S. 375 (1970). *See generally* Note, *Wrongful Death at General Maritime Law—The Moragne Decision*, 31 LA. L. REV. 165 (1970); Note, *Admiralty—The General Maritime Law as Embracing a Right of Action for Wrongful Death*, 45 TUL. L. REV. 151 (1970).

12. 398 U.S. at 376-77.

13. *Id.* at 401.

14. *Id.* at 409. The court pointed out certain anomalies as their reason for overruling *The Harrisburg*:

> The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

maritime law cause of action for wrongful death resulting from unseaworthiness.[15] The Court, however, left open the question as to the types of damages recoverable in this new action, leaving this issue to be resolved by the lower courts.[16] After conflicting decisions by the lower courts, the Supreme Court, in *Sea-Land Services, Inc. v. Gaudet*,[17] decided to resolve the damages issue. In *Gaudet*, a longshoreman injured in state waters sued a vessel owner for unseaworthiness and a judgment was rendered in the longshoreman's favor and satisfied by the defendant. Subsequently, the longshoreman died and his wife brought a *Moragne*-type action against the defendant. The district court dismissed the wife's suit on the grounds of res judicata and failure to state a claim upon which relief could be granted. Reversing the trial court, the Fifth Circuit held that *Moragne* provided the wife with a separate cause of action that was not extinguished by the husband's recovery of damages for his personal injuries. After affirming the Fifth Circuit's holding that the wife was entitled to a *Moragne*-type action, the Supreme Court, following a majority of the states, rather than DOHSA or the Jones Act,[18] held that loss of society, as well as loss of support, funeral expenses, and loss of services, was recoverable in a *Moragne* action.[19] The Court reasoned that recovery for nonpecuniary elements, such as loss of society, was "compelled if [the Court was] to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special

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> The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see Kernan v. American Dredging Co., 355 U.S. 426, 430 n. 4 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. The United States argues that since the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three-mile limit, no rational policy supports this distinction in the availability of a remedy.
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> The third, and assertedly the "strangest" anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.

Id. at 395-96.

15. *Id.* at 409.

16. *Id.* at 408.

17. 414 U.S. 573 (1974). *See generally* G. GILMORE & C. BLACK, *supra* note 5, §§ 6-32 to 6-33; Comment, *Charting the Waters After Moragne: Sea-Land Services, Inc. v. Gaudet*, 26 BAYLOR L. REV. 566 (1974); Comment, *Admiralty Law—General Maritime Wrongful Death Action—Personal Injury Recovery Does Not Bar Wrongful Death Action—Sea-Land Services v. Gaudet*, 20 N.Y.L.F. 831 (1975).

18. 414 U.S. at 586-88 & n.21.

19. *Id.* at 584.

solicitude' for those who [were] injured within its jurisdiction."[20] The Court also explained that its decision comported with "recent trends" in the maritime law.[21] The Supreme Court, in *Gaudet*, distinguished loss of society from other nonpecuniary damages by its definition:

> Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death. The difference between the two is well expressed as follows:
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> "When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one."[22]

The Court further explained that when the tort victim sues during his lifetime, as in *Gaudet*, he also represents his dependent's interest. In such a case, if a wrongful death action is brought subsequent to the tort victim's death, collateral estoppel precludes the representatives from recovering damages which the decedent could have received in his action. The representatives' damages, therefore, are limited to their own losses, such as loss of society, loss of services, and funeral expenses.[23] The *Gaudet* decision was written broadly, and the Court did not expressly limit its rationale to the particular facts of the case, that is, a wrongful death action arising in state waters. Thus, confusion arose as to whether *Gaudet*-type damages were limited to actions arising within state waters or whether such damages supplemented DOHSA in actions arising on the high seas.[24]

To resolve these questions, the Supreme Court granted certiorari in *Mobil Oil Corp. v. Higginbotham*,[25] a wrongful death case arising on the high seas. In *Higginbotham*, the Court held that when death occurs on the high seas, the damages recoverable are limited to those prescribed in DOHSA. Recognizing that its decision created a conflict between actions arising in state waters and actions arising on

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20. *Id.* at 588.

21. *Id.* at 587.

22. *Id.* at 585 n.17 (quoting S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3.45 at 222-23 (1966)).

23. 414 U.S. at 591-95.

24. *Compare* Barbe v. Drummond, 507 F.2d 794, 802 (1st Cir. 1974) (*Moragne* and *Gaudet* limited to inland waters) *with* Law v. Sea Drilling Corp., 510 F.2d 242, 250 (5th Cir. 1975), *aff'd on rehearing*, 523 F.2d 793 (5th Cir. 1975) (*Moragne* and *Gaudet* not limited to inland waters). *See generally* Note, *Maritime Wrongful Death and Survival Actions: A Moragne for All Waters*, 22 LOY. L. REV. 646 (1976).

25. 436 U.S. 618 (1978). *See generally* Maraist, *Maritime Wrongful Death—Higginbotham Reverses Trend and Creates New Questions*, 39 LA. L. REV. 81 (1978).

the high seas, the Court concluded that the need for uniformity could not override the express provisions of DOHSA.[26]

Higginbotham settled the question as to whether *Gaudet*-type damages are recoverable for wrongful death actions arising upon the high seas, but the decision raised questions regarding the types of damages recoverable in wrongful death actions arising in state waters. The first such question is whether nonpecuniary damages are recoverable in a wrongful death action based solely upon the Jones Act, and the second such question is whether nonpecuniary damages are recoverable in a wrongful death action based upon the Jones Act and unseaworthiness. The question of whether nonpecuniary damages are recoverable in a wrongful death action arising on state waters and based solely upon the Jones Act was addressed by the Fifth Circuit in *Ivy v. Security Barge Lines, Inc.*[27] In *Ivy*, the decedent's father's claim for loss of society was based solely on the Jones Act, since the jury found the defendant negligent but found the vessel on which the decedent worked seaworthy. Refusing to depart from prior jurisprudence denying the recovery of nonpecuniary damages in Jones Act wrongful death cases, the Fifth Circuit, sitting en banc, held that nonpecuniary damages are not recoverable in a death claim based solely upon the Jones Act.[28] The question of whether nonpecuniary damages are recoverable in a wrongful death claim based upon the Jones Act and unseaworthiness was addressed by the Fifth Circuit in *Hlodan v. Ohio Barge Line, Inc.*[29] and *Smith v. Ithaca Corp.*,[30] soon after the en banc *Ivy* decision. At the outset of both of these decisions, the court noted that the issue already had been decided by the Fifth Circuit in a pre-*Higginbotham* case, *Landry v. Two R. Drilling Co.*[31] In *Landry*, the court held that "where . . . there is liability under both a Jones Act claim and a general maritime claim for unseaworthiness . . . *Gaudet* damages . . . [are] proper."[32] Concluding that the *Landry* rationale had not been affected by *Higginbotham* or *Ivy*, the court in both *Hlodan* and *Smith* held that *Gaudet*-type damages are recoverable in actions based upon the Jones Act and unseaworthiness.[33]

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26. 436 U.S. at 624.

27. 606 F.2d 524 (5th Cir. 1979) (en banc). *See generally* Sipple, *Admiralty*, 31 MERCER L. REV. 825, 826 (1980).

28. 606 F.2d at 529.

29. 611 F.2d 71 (5th Cir. 1980).

30. 612 F.2d 215 (5th Cir. 1980). These cases were decided almost simultaneously by two different panels of the Fifth Circuit. In a footnote at the end of the *Smith* opinion, the court noted that its decision was in accord with *Hlodan*. 612 F.2d at 266*.

31. 511 F.2d 138 (5th Cir. 1975).

32. *Id.* at 143.

33. *Smith*, 612 F.2d at 226; *Hlodan*, 611 F.2d at 74-75. *See generally* Note, *Admiralty—Loss of Society Recovery Allowed in Addition to Jones Act Pecuniary Recovery for Wrongful Death*, 55 TUL. L. REV. 1284 (1981).

Interestingly, in *Smith* the decedent's death resulted from injuries occurring in state waters as well as on the high seas. The *Smith* court concluded that the burden was on the defendant to segregate the losses occurring on the high seas from the losses occurring in state waters. Since the defendant was unable to carry this burden, the plaintiff recovered *Gaudet*-type damages for all of his injuries.[34]

Personal Injury

Prior to 1920, seamen were afforded a right of action for injuries caused by the unseaworthiness of a vessel,[35] but they were not afforded a right of action for injuries arising from the negligence of the master or crew of the vessel.[36] In 1920, Congress enacted the Jones Act,[37] which provided seamen with a right of action for injuries resulting from the negligence of the owner, master, or crew of a vessel.

The Jones Act, although silent on the matter, was construed judicially as excluding recovery for loss of consortium,[38] but the courts divided on whether such damages were compensable under the general maritime law. The Second Circuit, in *dicta*, in *Savage v. New York, N. & H. S.S. Co.*,[39] suggested against recovery for loss of consortium, and the Third Circuit, in *New York & Long Branch Steamboat Co. v. Johnson*,[40] allowed recovery for loss of consortium in personal injury actions. In 1962, the Second Circuit, in *Igneri v. Companie de Transports Oceaniques*,[41] a personal injury case, concluded that loss of consortium was not compensable under the general maritime law because the maritime law on the subject was unsettled and the weight of state authority was against it.

As recently as 1976, the Fifth Circuit, in *Christofferson v. Halliburton Co.*,[42] a personal injury case based on the general maritime law

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34. 612 F.2d at 226.

35. The Osceola, 189 U.S. 158, 175 (1903). *See generally* 1B A. SANN, S. BELLMAN, N. GOLDEN, B. CHASE, BENEDICT ON ADMIRALTY § 2 (7th ed. 1982 & Supp. 1982); G. GILMORE & C. BLACK, *supra* note 5, § 6-20 (1975).

36. The Osceola, 189 U.S. 158, 175 (1903).

37. Pub. L. No. 66-261, 41 Stat. 988, 1007 (codified at 46 U.S.C. § 688 (1976)).

38. See note 6, *supra*.

39. 185 F. 778, 781 (2d Cir. 1911).

40. 195 F. 740 (3d Cir. 1912).

41. 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964). *See generally* Note, *Torts—Admiralty—Right of Wife of Longshoreman to Recover for Loss of Consortium*, 30 BROOKLYN L. REV. 379 (1964).

42. 534 F.2d 1147 (5th Cir. 1976). *Christofferson* was later overruled in Cruz v. Hendy Int'l Co., 638 F.2d 719 (5th Cir. 1981). See text at note 50, *infra*. *See generally* Note, *Admiralty—Loss of Consortium—The Wife of An Injured Seaman Has No Cause of Action in Admiralty for Loss of Consortium Caused by A Negligently Inflicted Non-fatal Injury to Her Husband*, 11 GA. L. REV. 210 (1976).

for unseaworthiness, followed *Igneri* and ruled that a wife could not recover for loss of consortium. The court rejected the argument that *Gaudet* governed the case, reasoning that since *Gaudet* was a wrongful death case, it had no effect in the personal injury context. The court also rejected the argument that *Igneri* was no longer viable since thirty-seven states, as opposed to eleven states when *Igneri* was decided, allowed recovery for loss of consortium. Quoting from a passage in *Igneri* providing that an admiralty court would follow a uniform or near uniform common law rule in the absence of a maritime rule, the court reasoned that *Igneri* was still good law since the law from thirty-seven states did not constitute a uniform or near uniform common law rule. As illustrated by *Christofferson*, a debate arose over whether *Igneri* or *Gaudet* was controlling in personal injury actions based on the general maritime law. Resolving to settle this issue, the Supreme Court granted certiorari in *American Export Lines, Inc. v. Alvez*.[43] Alvez, a longshoreman, was injured while working on board a vessel moored in state waters. Subsequently, he filed suit alleging negligence and unseaworthiness, and he later amended his complaint, adding his wife's claim for loss of society.[44]

After reviewing *Igneri*,[45] the Supreme Court concluded that it was sound when it was decided but subsequent events had altered its rationale. The Court found that after *Igneri* was decided in 1962, *Gaudet* had recognized a general maritime law cause of action for loss of a spouse's society in a wrongful death action arising in state waters. Finding no rational reason to distinguish between wrongful death and personal injury actions,[46] the Court concluded that "*Gaudet* provides the conclusive decisional recognition of a right to recover for loss of society" in personal injury actions based on the general maritime law and arising in state waters.[47] The Court then noted that forty-one states and the District of Columbia allowed recovery for loss of society,[48] as opposed to only eleven states when *Igneri* was decided.

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43. 446 U.S. 274 (1980). *See generally* Note, *Admiralty—Loss of Society Claim Allowed for Wife of a Longshoreman Injured in State Territoral Waters*, 55 TUL. L. REV. 545 (1981).

44. 446 U.S. at 276. Before reaching the merits of the case, the Court first had to decide "whether this case fell within the Court's statutory jurisdiction to review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had' [under 28 U.S.C. § 1257]." 446 U.S. at 277. The Court concluded that it did have jurisdiction. 446 U.S. at 277-79. Justices Marshall, Stewart, and Rehnquist dissented from this decision as to jurisdiction and did not express an opinion upon the merits. *Id.* at 286-90.

45. For a discussion of *Igneri*, see *supra* note 41 and accompanying text.

46. In a footnote, the Court observed that the Fifth Circuit, in *Christofferson*, erroneously had limited *Gaudet* to the wrongful death context. 446 U.S. at 281 n.8.

47. *Id.* at 280-81.

48. *Id.* at 284 & n.11.

Such an overwhelming majority, according to the Court, translated "into maritime law by the *Igneri* analysis."[49] The court concluded that its decision comported with the notion that seamen and their dependents were entitled to special solicitude. Although *Alvez* is the latest word from the Supreme Court on a spouse's right to recover damages for loss of society in maritime personal injury actions, the Fifth Circuit has addressed the issue in a slightly different setting from that in *Alvez*. In *Cruz v. Hendy International Co.*,[50] the wife of a seaman injured in state waters brought suit for loss of society under the Jones Act and general maritime law after a judgment had been rendered in her husband's favor and satisfied by the defendant. The trial court dismissed the suit, and a panel of the Fifth Circuit upheld the dismissal on the authority of *Christofferson*.[51] While the petition for rehearing en banc was pending, *Alvez* was rendered. *Cruz* was then remanded to the original panel to be reconsidered in light of *Alvez*.

After reviewing the wrongful death decisions and *Alvez*, the court concluded that *Alvez* was not limited to its facts. Noting the Supreme Court's statement in *Alvez* that there was no distinction between personal injury and death actions, the shipowner argued that Jones Act precedent and DOHSA, by its terms, precluded recovery for loss of society claims based on the general maritime law. However, the Supreme Court also had observed in *Alvez* that DOHSA and the Jones Act did not provide analogous support on this issue because both statutes were drafted hastily and provided no guidance as to whether loss of society was recoverable under the general maritime law.[52] The Fifth Circuit agreed that DOHSA and the Jones Act did not provide analogical support on the issue, and further noted, in *dicta*, that the preclusive effect of DOHSA did not extend beyond the statute's ambit and that a Jones Act death claim, when joined with a general maritime law claim, did not preclude recovery for loss of society.[53]

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49. *Id.* at 285. In *Higginbotham*, the Court held that the damages recoverable in wrongful death actions arising on the high seas are limited to those prescribed in DOHSA. 436 U.S. at 623-24. See note 7, *supra*.

50. 638 F.2d 719 (5th Cir. 1981).

51. See *supra* note 42 and accompanying text.

52. 446 U.S. at 283-84. In making this observation, the Court noted that the Jones Act did not expressly limit recovery to pecuniary losses but it had been judicially interpreted as doing so. *Id.* at 283. The Supreme Court, however, apparently considers the question of whether the Jones Act bars recovery of nonpecuniary damages open. While discussing this question, the Court stated "assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of . . . [FELA] which was incorporated into the Jones Act." *Id.*

53. 638 F.2d at 725. *See also* Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71 (5th Cir. 1980) (*Gaudet*-type damages recoverable in wrongful death action based on general

In light of the foregoing considerations, the Fifth Circuit held that Cruz's wife was entitled to recover for the loss of her husband's society. Citing *Gaudet*, the court concluded that there was "no more reason to distinguish between the types of workers whose rights [stemmed] from that same integral jurisprudence."[54] The *Cruz* court also found no reason to distinguish between injuries occurring on the high seas and injuries occurring in state waters, stating that *Alvez* on its facts drew no line at the marine league. Thus, the court concluded that the general maritime law afforded the spouses of seamen or nonseamen entitled to the warranty of seaworthiness recovery for loss of society resulting from the injury of their spouses on the high seas or in the state waters.[55]

The court warned, however, that the result in *Cruz* would have been different if Mrs. Cruz's claim had been based solely on the Jones Act. Citing *Ivy v. Security Barge Lines, Inc.*,[56] the court stated that loss of society was not compensable in claims for negligence based *solely* on the Jones Act.[57] However, according to the *Cruz* court, a Jones Act claim, when coupled with a general maritime law claim, would not preclude recovery for loss of society. Thus, Mrs. Cruz was allowed to recover for the loss of her husband's society as her claim was based on *both* the general maritime law and the Jones Act.

In light of the husband's previous recovery, the *Cruz* court, following the *Gaudet* guidelines,[58] allowed only the wife's claim for loss of society, which was defined generally as "love, companionship, affection, society, sexual relations, comfort and solace." The court, by limiting the damages to these elements, reasoned that there would be no double recovery against a defendant.

Alvez and *Cruz* apparently have settled in the Fifth Circuit the issue of when loss of society damages are recoverable in maritime personal injury actions arising in state waters. Whenever a maritime personal injury claim is based solely on the Jones Act, the spouse will not be entitled to recover loss of society damages. However, when a personal injury claim is based on both the Jones Act and the general maritime law the spouse apparently will be entitled to recover loss of society damages.

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maritime law and Jones Act); Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980) (same). For discussion of these cases, see *supra* notes 29-34 and accompanying text.

54. 638 F.2d at 724.

55. *Id.* at 725.

56. 606 F.2d 524 (5th Cir. 1979). See *supra* notes 27-28 and accompanying text.

57. 638 F.2d at 725. In Bodden v. American Offshore, Inc., 681 F.2d 319 (5th Cir. 1982), the Fifth Circuit, in granting a wife a separate cause of action on a DOHSA claim based on unseaworthiness, awarded *pecuniary* damages only, which is consistent with the Act.

58. See *supra* notes 17-23 and accompanying text.

In addition to traditional seamen, *Alvez* has been extended to cover other persons entitled to causes of action under the maritime law. In *Bacon v. Bunting*,[59] the wife of a passenger injured on board a fishing vessel brought suit against the owner of the vessel for unseaworthiness and negligence under the general maritime law. The court struck the unseaworthiness claim because passengers are not entitled to the warranty of seaworthiness. Noting that the wife's claim in *Alvez* was based on both unseaworthiness and negligence, the *Bacon* court rejected the defendant's argument that *Alvez* was limited to unseaworthiness actions and allowed the wife was entitled to recover for the loss of her husband's society under the general maritime law for negligence.

Bacon has created an anomaly. If a seaman is injured solely because of negligence, his or her spouse will not be able to recover damages for loss of society, whereas the spouse of a passenger injured solely because of negligence will be able to recover damages for loss of society. Traditionally, seamen have been afforded more liberal remedies than nonseamen, as reflected by the fact that seamen are entitled to the warranty of seaworthiness while passengers are not. However, at least in this situation, it is more advantageous to be a nonseaman than a seaman. *Alvez* also has been extended to harbor workers and longshoremen, who are entitled to a negligence action against vessel owners under 33 U.S.C. § 905(b). In *Weiland v. Pyramid Ventures Group*,[60] the United States District Court for the Middle District of Louisiana, citing *Alvez*, awarded the wife of an injured harbor worker $15,000 for the loss of her husband's society. *Alvez* has raised a number of practical problems for the counsel of both plaintiffs and defendants. When handling a settlement, the prudent defense practitioner generally requires the release to be signed by both the claimant and the spouse and the check to be made payable to both parties; however, this requirement is difficult or impossible to meet if the parties are divorced at the time of settlement but were together at the time the cause of action accrued or if the spouses have separated and one spouse cannot be found. If the parties are together and are represented by the same counsel, a question arises as to whether plaintiff's counsel has a conflict of interest in attempting, if he is called upon to do so, to determine the amount of money to be allocated to each party.

Other difficult questions which remain unresolved include determining when the cause of action accrues in a case where the harm occurs before the marriage and results in injury which allegedly causes

59. 534 F. Supp. 412 (D. Md. 1982); *accord* Sweeney v. Car/Puter Int'l Corp., 521 F. Supp. 276 (D.S.C. 1981) (injured spouse entitled to recover for loss of society).

60. 511 F. Supp. 1034 (M.D. La. 1981).

the spouse loss of society and determining when the cause of action ceases in a case where the injury occurs during a marriage which subsequently is terminated by divorce. Further, the procedural aspects of a litigated claim in which the wife does not join are uncertain. For example, in *Overstreet v. Water Vessel "Norkong,"*[61] an injured seaman libeled a vessel in rem and the vessel subsequently was arrested. Later, the owners of the vessel posted a corporate surety bond and the vessel was released. The seaman's wife, individually and as representative of her minor children, then moved to intervene in the seaman's cause, claiming loss of society. Finding the release bond to be a special bond, the court, after reviewing the pertinent authorities, concluded that "[o]nly the plaintiff in the action which prompted the posting of the bond [could] recover against the bond."[62] Thus, the seaman's wife's motion to intervene was denied. The court additionally noted, however, that under *Cruz*, the wife was entitled to a separate cause of action for the loss of her husband's society and Rule 19 of the Federal Rules of Civil Procedure did not require the joinder of the injured seaman in the spouse's action. Accordingly, the court concluded that its denial of the wife's motion for intervention did not preclude an action by the wife against the defendant in personam or the vessel in rem, if jurisdiction could be obtained over either.

Alvez and *Cruz* also raise questions concerning retroactivity, laches, and releases. While at least one court has given *Alvez* retroactive application,[63] another court, applying the three-part test of *Chevron Oil Co. v. Huson*,[64] held that *Alvez* did not apply retroactively.[65]

Laches, an equitable doctrine, is not a mere matter of time like a statute of limitation; it is principally a question of the equity or inequity of permitting a claim to be enforced. A factor to be considered in determining whether laches bars a claim is whether the analogous state statute of limitations has expired. If the analogous statute of limitation has not expired, the burden is upon the defendant to show that he was prejudiced by the plaintiff's delay in bringing the claim. If the analogous statute of limitation has expired, the burden shifts to the plaintiff to show that the defendant has not been prejudiced by the delay. In *Nealy v. Fluor Drilling Services, Inc.*,[66] the plaintiff's husband was injured on August 18, 1975, and his claim eventually was settled on December 26, 1978. Mrs. Nealy filed her action on September 18, 1980, claiming loss of her husband's society. The court

61. 538 F. Supp. 53 (S.D. Miss. 1982).
62. *Id.* at 55.
63. Weiland v. Pyramid Ventures Group, 511 F. Supp. 1034, 1044-45 (M.D. La. 1981).
64. 404 U.S. 97 (1971).
65. Nealy v. Fluor Drilling Servs., Inc., 524 F. Supp. 789, 792-93 (W.D. La. 1981).
66. 524 F. Supp. 789, 794 (W.D. La. 1981).

found that the analogous statute of limitations, the three-year limit of the Jones Act, had expired and that the plaintiffs had not carried their burden of showing lack of prejudice by the delay. Therefore, the court held that laches barred the spouse's loss of society claim.

Laches apparently will apply only to actions arising before October 6, 1980, which is the effective date of 46 U.S.C. § 763(a).[67] This statute provides that "a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued." Thus, in actions arising after October 6, 1980, survivors have only three years to bring *Alvez*-type actions. The effect of releases in the injured spouse's action on the collateral or subsequent uninjured spouse's action also was addressed in *Nealy*. The court noted that the uninjured spouse's claim could not be waived without that spouse's signature. However, if the injured spouse signed an agreement waiving the uninjured spouse's cause of action, the injured spouse would be liable to the defendant for the full amount of any award received by the uninjured spouse.

PUNITIVE DAMAGES

While punitive damages have been available in maritime actions since 1818,[68] it was not until 1981 that the applicability of punitive damages for death cases was recognized by the Fifth Circuit in the case of *In re Merry Shipping, Inc.*[69] In *Merry Shipping*, the court held that under the general maritime law, "punitive damages may be recovered . . . upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions."[70] Since the cases recognizing punitive damages in maritime personal injury and death actions are of recent origin, a review of the history of punitive damages in maritime cases other than personal injury and death is useful.

History

More than a century and a half ago, the United States Supreme Court indicated that exemplary damages could be properly granted in an appropriate admiralty action. In *The Amiable Nancy*,[71] a private, armed American brig, the Scourge, came alongside the Amiable Nancy,

67. 46 U.S.C. § 763(a) (Supp. V 1981).

68. See text at note 73, *infra*.

69. 650 F.2d 622 (5th Cir. 1981). For a detailed discussion of *Merry Shipping*, see *infra* notes 97-101 and accompanying text.

70. *Id.* at 623.

71. 16 U.S. (3 Wheat.) 546 (1818).

a Haitian cargo ship, and took possession of her. The lower court found that the Scourge's marines who boarded the Amiable Nancy found her papers to be in perfect order but nevertheless proceeded to rob and plunder the vessel and her crew, as well as to threaten, abuse, and assault members of the crew.

The owner, master, supercargo, and crew of the Amiable Nancy brought suit against the owners of the Scourge for a variety of damages. The Supreme Court held that the conduct of the crew of the Scourge constituted "a case of gross and wanton outrage, without any just provocation or excuse."[72] Consequently, all proximate compensatory damages proved by the plaintiffs were recoverable from the owners of the Scourge. However, the libelant's claim for punitive damages was denied because the owners of the Scourge were not the perpetrators of the outrage. In so holding, the Supreme Court indicated that punitive damages would be recoverable against the actual malfeasors:

> [I]f this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer . . . . They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.[73]

Although courts continued to recognize the availability of punitive damages in admiralty,[74] punitive damages were not awarded by an admiralty court until 1859. In that year, the United States Circuit Court for the Northern District of California decided *Gallagher v. The Yankee*,[75] in which the plaintiff libeled the captain of the The Yankee in personam for unlawfully deporting the plaintiff to the Sandwich Islands.[76] Finding that the captain acted "in violation 'of a known duty,'

72. *Id.* at 558.

73. *Id.* at 558-59.

74. In Boston Mfg. Co. v. Fiske, 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1,681), Justice Story, sitting as a Circuit Judge, commented that "[i]n cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it." *Id.* at 957. Sixteen years later, the court in Ralston v. The State Rights, 20 F. Cas. 201 (D.C.E.D. Pa. 1836) (No. 11,540) recognized the availability of punitive damages in collision cases. *Id.* at 208.

75. 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124), *aff'g* 9 F. Cas. 1091 (D.C.N.D. Cal.) (No. 5,196).

76. 30 F. Cas. at 781.

and in wanton contempt and violation of law," the court held the captain liable for punitive damages.[77] As noted in *The Amiable Nancy*, a vessel owner will not be held vicariously liable for the wrongful acts of his crew. For example, in *Pacific Packing & Navigation Co. v. Fielding*,[78] the court apparently assumed that the action of the master of the Valentia in imprisoning the plaintiff, the vessel's purser, while the Valentia was at sea, was properly found by the jury to be unlawful, malicious, and oppressive. However, the award of punitive damages against the vessel owner was reversed on the ground that "no evidence was given tending to show that the defendant corporation ever authorized the master to commit any of the acts complained of, or ever in any manner ratified them."[79] Even where the vessel owner is the wrongdoer, the wrongful conduct must be intentional and malicious to warrant an award of punitive damages. In *The Normannia*,[80] the court recognized the availability of punitive damages for the breach of a maritime contract, but it refused to award punitive damages since the defendant had not intentionally deceived the libelant.[81]

Availability in Maritime Personal Injury and Death Actions

The availability of punitive damages in maritime personal injury and death cases was first recognized in *United States Steel Corp. v. Fuhrman*,[82] popularly known as the Cedarville Case. The defendant, United States Steel Corporation, owned the Bradley Fleet, which plied the Great Lakes. From its Pittsburgh headquarters, the defendant operated a radio network by which it maintained contact with the individual ships. During a heavy fog, one of the fleet, the steamship Cedarville, collided with another vessel. Although she was holed and

77. *Id.* at 785.

78. 136 F. 577 (9th Cir. 1905).

79. *Id.* at 579.

80. 62 F. 469, 480 (S.D.N.Y. 1894); *accord* Crowley v. S.S. Arcadia, 1965 A.M.C. 988 (S.D. Cal. 1964) (punitive damages not awarded for overbooking of passengers absent malicious intent).

81. Two turn of the century cases, The William H. Bailey, 103 F. 799, 800 (D. Conn. 1900), *aff'd mem.*, 111 F. 1006 (2d Cir. 1901) and The Seven Brothers, 170 F. 126 (D.R.I. 1909), illustrate the reluctance of admiralty courts to award punitive damages. While both of these cases involved actions in rem, the *Bailey* court held that punitive damages were not available in maritime in rem actions as a matter of law, whereas the *Seven Brothers* court held that punitive damages were recoverable as a matter of law in maritime in rem actions. However, the *Seven Brothers* court did not award punitive damages since the action in rem was "in effect against the owner of the vessel, who [was] not proved to have had any share in or knowledge of the malicious acts." 170 F. at 127.

82. 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). *See generally* Note, *Punitive Damages in Admiralty*, 1 J. MAR. L. & COMM. 333 (1970).

taking on water quickly, her master ordered her beached instead of abandoned. Before reaching shore, the Cedarville sank and ten of her crew perished. The district court found that all of the crew would have survived if the vessel had been abandoned and the life salvage offer of another vessel had been accepted.

In the district court, the survivors of the deceased crewmembers sought and obtained a judgment of punitive damages under the Jones Act. The punitive damage award was based on two allegations. The first allegation was that the Bradley Fleet officials failed to countermand the master's orders to beach the Cedarville and failed to order him to abandon ship, which probably would have saved the lives of the ten crewmembers. The second allegation was that fleet officials had ordered the ship to proceed full speed ahead in the fog and to deviate from recommended courses published by the United States Coast Guard for ship traffic in the straights of Mackinac, the location of the collision.

The Sixth Circuit Court of Appeals, in reversing the punitive damage award, declared that the district court's findings of fact were clearly erroneous. The appellate court found that the facts did not support the finding that the fleet manager or any other United States Steel official "knew the full extent of the seriousness of the situation or that the beaching attempt was 'certain failure.' "[83] Additionally, the company officials had no obligation under the facts to decide the best course of action and to countermand the master's orders. Moreover, the record did not support a finding that United States Steel, as a general practice, ordered its ships to proceed full ahead in heavy fog. This was not proven to be an authorized practice or procedure. There was insufficient proof that United States Steel authorized the practice of deviating from Coast Guard-recommended compass headings. Although the district court's findings of fact were held to be clearly erroneous, its conclusion of law—"Marine law permits the recovery of punitive damages against a maritime tortfeasor"[84]—was not declared incorrect. The Sixth Circuit's agreement with this general statement of the availability of punitive damages in Jones Act cases was implied in its annunciation of the standard under which punitive damages could be awarded:

> We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident. Punitive

83. 407 F.2d at 1146-47.

84. *In re* Den Norske Amerikalinje A/S, 276 F. Supp. 163, 198 (N.D. Ohio 1967), *rev'd on other grounds sub nom.* 407 F.2d 1143 (6th Cir. 1969).

> damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him.[85]

Since the Jones Act expressly incorporates the Federal Employer's Liability Act (FELA)[86] by reference, Jones Act cases are viewed by some courts as controlling in FELA cases. Notwithstanding this fact, the Sixth Circuit, in *Kozar v. Chesapeake & Ohio Railway Co.*,[87] held that punitive damages were not recoverable in FELA suits, since the United States Supreme Court consistently had limited recovery under the FELA to compensatory damages.[88] The court distinguished *Fuhrman*, stating that it was an admiralty action and, therefore, not controlling in this nonmaritime suit.[89] Thus, in the Sixth Circuit, punitive damages are recoverable under the Jones Act, but not under the FELA.[90] Soon after *Fuhrman*, the Second Circuit, in *In re Marine Sulphur Queen*,[91] acknowledged that punitive damages were recoverable under the general maritime law where the vessel owner was shown to have been "guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct."[92] Although the Marine Sulphur Queen was found to be unseaworthy in that it was defectively designed and broke ground overloaded, the court did not find this fact sufficient to warrant an award of punitive damages against the vessel owner. Recently, the availability of punitive damages in maritime personal injury and death

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85. 407 F.2d at 1148 (citations omitted).

Although overruled by the Sixth Circuit, the district court in *Fuhrman* held that since vessel owners today, unlike in the past, are able to communicate with their masters via radio, they should stand "on the same footing that any corporate employer stands in regard to its responsibility for misdeed of an employee." *In re* Den Norske Amerikalinje A/S, 276 F. Supp. 163, 181 n.7 (N.D. Ohio 1967). The majority common law view is that "the principal may be held liable for punitive damages that are occasioned by the acts of an agent if those acts were committed in furtherance of the interest of the principal and while the agent was acting within the scope of his employment." J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.06 (1981).

86. 45 U.S.C. §§ 51-60 (1976). *See* 1B BENEDICT ON ADMIRALTY, *supra* note 35, §§ 2-1-16 to 2-1-17; G. GILMORE & C. BLACK, *supra* note 5, § 6-26. For a further discussion on the precedential effect of the FELA in Jones Act cases, see *supra* notes 5-7 and accompanying text.

87. 449 F.2d 1238 (6th Cir. 1971). *See generally* Note, *Punitive Damages May be Awarded in an Action Arising Under the Federal Employers' Liability Act*, 71 COLUM. L. REV. 1113 (1971); Note, *Damages—Punitive Damages are Recoverable in Suits Brought Under the Federal Employers' Liability Act*, 24 VAND. L. REV. 631 (1971).

88. 449 F.2d at 1241.

89. *Id.* at 1243.

90. *See* Comment, *Punitive Damages in the Admiralty*, 5 MAR. LAW. 223, 233-34 (1980).

91. 460 F.2d 89 (2d Cir. 1972).

92. *Id.* at 105.

actions was considered by a California court of appeal in *Baptiste v. Superior Court of Los Angeles County*.[93] The plaintiff in that case filed a complaint, seeking damages against his employer under the general maritime law and the Jones Act. Subsequently, the plaintiff amended his complaint, adding a request for punitive damages. The court granted the defendant's motion to strike the amendment requesting punitive damages, finding, as a matter of law, that punitive damages were not recoverable under the general maritime law or the Jones Act. The appellate court reversed the trial court and held that punitive damages were available under the general maritime law of unseaworthiness. In reaching this decision, the court, after reviewing *Fuhrman* and maritime nonpersonal injury and death punitive damages cases, concluded that no admiralty court had denied punitive damages as a matter of law.[94] The court also did not find FELA precedent, particularly *Kozar*, as controlling or persuasive "on the question of whether a Jones Act cause of action automatically [precluded] a recovery of punitive damages."[95] The court explained that a Jones Act claim, when coupled with a general maritime law claim for unseaworthiness, would not preclude an award of nonpecuniary damages. Therefore, the court overturned the trial court's order striking the plaintiff's allegation concerning punitive damages, holding "that plaintiff [was] entitled to present the issue of punitive damages to a jury."[96] Although the court did hold that Baptiste was entitled to a cause of action for punitive damages, it did not decide the standard under which punitive damages could be awarded. The court remanded the case to the trial court to determine whether the defendant's acts warranted an award of punitive damages. The latest case involving the issue of whether punitive damages are recoverable in a seaman's personal injury or death action is *In re Merry Shipping, Inc.*[97] In this case,

93. 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980), *cert. denied*, 449 U.S. 1124 (1981). Baptiste, a seaman, sought $200 million in punitive damages against his corporate employer, Chevron Shipping Company. He contended that the defendant knew that the impermissibly high noise levels on the vessels on which the plaintiff worked would cause permanent hearing loss. Rather than replacing the gears which were causing the noise, the company adopted the "cheapest solution [which was] . . . to provide and enforce use of earphones while in the engine room." 106 Cal. App. 3d at 92, 164 Cal. Rptr. at 791. Despite the defendant's safety measures, Mr. Baptiste suffered a permanent hearing loss. Mr. Baptiste claimed that the defendant acted "willfully, wantonly, intentionally and with reckless disregard," in failing to remedy the dangerous condition. 106 Cal. App. 3d at 93, 164 Cal. Rptr. at 791. (*Baptiste* is also reported at 1980 A.M.C. 1523.)

94. 106 Cal. App. 3d at 100, 164 Cal. Rptr. at 795.

95. 106 Cal. App. 3d at 103, 164 Cal. Rptr. at 797.

96. 106 Cal. App. 3d at 104, 164 Cal. Rptr. at 798.

97. 650 F.2d 622, 623 (5th Cir. 1981). The court did not elaborate upon the facts, apparently because the case was only at the pleading stage. All that is given is that Charles Dyer, a first mate on the defendant's tug, drowned when the tug capsized.

Lillian Dyer sought punitive damages against the defendant, Merry Shipping, under the general maritime law and the Jones Act for her alleged common law husband's death resulting from the sinking of the M/V Royal Lady. The trial court granted the defendant's motion for summary judgment, holding, as a matter of law, that punitive damages were not recoverable under either the Jones Act or the general maritime law. On appeal, after reviewing *In re Marine Sulphur Queen, Fuhrman, Baptiste*, and maritime nonpersonal injury and death cases involving punitive damages,[98] the court concluded, as did the court in *Baptiste*, that the cases did not hold punitive damages "unrecoverable as a matter of law, but rather denied them on the facts." Consequently, the court held that in the Fifth Circuit punitive damages were recoverable, at least under the general maritime law.[99] The court then announced the standard under which punitive damages could be awarded in cases involving an unseaworthiness claim, such as in *Merry Shipping*. Seamen, according to the court, are totally

98. The court reviewed Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973) and Pino v. Protection Maritime Ins. Co., 490 F. Supp 277 (D. Mass. 1980), which are the only cases other than The Yankee v. Gallagher, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124) in which courts have awarded punitive damages in maritime actions. In *Robinson*, the defendant initially refused to pay the plaintiff seaman maintenance and cure and later paid only at irregular intervals. Finding that the Supreme Court's award of attorney's fees in Vaughan v. Atkinson, 369 U.S. 527 (1962) was punitive, the First Circuit held that the defendant's wrongful withholding of maintenance and cure warranted an award of punitive damages. 477 F.2d at 1049-52. *Contra* Kraljic v. Berman Enters., Inc., 575 F.2d 412 (2d Cir. 1978) (the Second Circuit agreed with the First Circuit's conclusion in *Robinson* that the award of attorney's fees in *Vaughan* was punitive in nature, but the Second Circuit concluded that the Supreme Court, in *Vaughan*, only intended for attorney's fees, not punitive damages, to be awarded in such cases). In *Pino v. Protection Maritime Ins. Co.*, the district court initially adjudicated the parties' liability, 454 F. Supp. 210 (D. Mass. 1978), *aff'd in part and remanded in part*, 599 F.2d 10 (1st Cir. 1979), *cert. denied*, 444 U.S. 900 (1979), and it then assessed the plaintiff's damages, 490 F. Supp. 277 (D. Mass. 1980). At the liability hearing, the court held that

> three of the defendants, Ernest A. Enos . . ., Protection Maritime Insurance Company, Limited . . ., and Trans-Atlantic Marine Insurance Company . . ., had tortiously interfered with the employment rights of eight of the plaintiffs by purposely and without privilege demanding higher insurance premiums from the owners of the fishing vessels on which plaintiffs worked.

490 F. Supp. at 278. Later, at the hearing on damages, the court found that the defendant "acted in wanton and intentional disregard of the plaintiffs' employment rights, making this case an especially appropriate one for an award of punitive damages." 490 F. Supp. at 281. *But cf.* Smith v. Atlas Off-Shore Boat Servs., 653 F.2d 1057, 1064 (5th Cir. 1981) ("[i]n striking the balance between the employer's right to have a free hand in the running of his business and the seaman's interest in the unencumbered exercise of his legal rights, we conclude that, while the balance weighs in the seaman's favor on the question of the recognition of the claim for retaliatory discharge, the scales tilt against the imposition of punitive damages").

99. 650 F.2d at 626.

dependent upon the shipowner to provide them with a seaworthy vessel on which to work. Thus, to insure that seamen are not exposed to the perils of unseaworthy vessels, the court held that "[p]unitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel."[100]

The court did not decide the question of whether punitive damages are recoverable in actions based solely on the Jones Act. The court, however, did note that the district court might have been correct in its conclusion that punitive damages were not recoverable under the Jones Act, since the Fifth Circuit previously had held that Congress only intended for pecuniary losses to be recoverable under the Jones Act. The court also noted that FELA precedent, especially *Kozar*, might be dispositive of the issue of recoverability of punitive damages under the Jones Act.

Although the court indicated that punitive damages were not recoverable in claims based solely on the Jones Act, the court, analogizing punitive damages to other nonpecuniary damages recoverable in maritime actions, concluded that a Jones Act claim, when coupled with a general maritime law claim, did not preclude recovery of punitive damages. Therefore, the trial court's ruling was reversed and the case was remanded to determine whether the facts warranted an award of punitive damages.[101] The Fifth Circuit, in *Merry Shipping*, analogized punitive damages to loss of society damages. Such an analogy furnishes a basis for allowing punitive damages awards to be governed by *Cruz, Alvez, Gaudet, Higginbotham*, and *Hlodan*. Thus, under *Higginbotham*, punitive damages may not be recoverable in wrongful death actions arising on the high seas. Likewise, under *Ivy*, punitive damages should not be recoverable in wrongful death actions based solely on the Jones Act. However, under *Hlodan*, punitive damages should be recoverable in wrongful death actions based upon both the Jones Act and the general maritime law for unseaworthiness. Under *Gaudet*, punitive damages may be recoverable in wrongful death actions arising in state waters and based upon the general maritime law. Finally, under *Alvez* and *Cruz*, punitive damages may be recoverable in maritime personal injury cases arising on both the high seas and in state waters, except when the action is based solely on the Jones Act.[102]

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100. *Id.* at 625.

101. *Id.* at 626-27.

102. Kreger v. Midstream Transfer, No. 81-960 (E.D. La. March 24, 1982) should be of interest to the insurance practitioner. In *Kreger*, Judge Mitchell held that protection and indemnity insurance covers punitive damages. The judge apparently was applying state law, rather than the general maritime law. This decision has been appealed to the Fifth Circuit. No. 82-3233 (5th Cir. argued Feb. 3, 1983).

INFLATION AND FUTURE DAMAGES

Although the United States Supreme Court has not ruled upon whether future inflation can be considered in determining lost future earnings, the Court has decided the manner in which trial courts are to calculate future damages. In *Chesapeake & Ohio Railway Co. v. Kelly*,[103] an FELA case, the Court held that the sum representing the total future earnings of a plaintiff must be discounted to *present value*, that is, the amount which, if safely invested, would grow to an amount equal to the lost future earnings. The Court reasoned that a "sum of money in hand is worth more than the like sum . . . payable in the future."[104] Although the Court did not detail the discounting process, it did explain that the discount rate should be the interest rate obtainable by an unsophisticated person through safe investment, existing and available at the time and place of the trial.[105] Until the 1970's, most federal courts of appeals reasoned that inflation was too speculative to consider in determining future earnings awards.[106] However, with the continuing presence of inflation in the 1970's, most courts overruled their older decisions, and they now incorporate inflation in some manner. Among the courts which incorporate inflation in their awards, the Second, Third, and Seventh Circuits favor an approach whereby the future earnings are discounted at a rate lower than present interest rates, because the present interest rates take future inflation into account.[107] The Fifth, Sixth, Eighth, and Ninth Circuits favor a method whereby inflation is considered in determining future earnings and then the award is discounted at present interest rates.[108]

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103. 241 U.S. 485 (1916). *See generally* Note, *Future Inflation and Damage Awards*, 35 LA. L. REV. 883 (1975).

104. 241 U.S. at 489.

105. *Id.* at 489-91. In *Kelly*, a state trial court, hearing Kelly's FELA action against his employer, refused to discount the future earnings award to present value, holding that discounting the future award to present value would be too difficult for a jury to determine. After this holding was affirmed by a Kentucky court of appeal, the Supreme Court overruled the lower court and set out the procedure by which lower courts are to discount future earnings to present value. *Id.*

106. Johnson v. Penrod Drilling Co., 510 F.2d 234, 235-36 (5th Cir. 1975); Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972), *aff'g* 321 F. Supp. 1331 (E.D. Pa. 1970); Yodice v. Koninklijke Nederlandsche Stoom. Maat., 471 F.2d 705 (2d Cir. 1972); Sleeman v. Chesapeake & Ohio Ry. Co., 414 F.2d 305, 307-08 (6th Cir. 1969); Furumizo v. United States, 381 F.2d 965 (9th Cir. 1967), *aff'g* 245 F.Supp. 981 (D. Hawaii 1965). *But cf.* Burlington Transp. Co. v. Stoltz, 191 F.2d 915, 918 (10th Cir. 1951) (Utah law).

107. See *infra* notes 114-125 and accompanying text.

108. See *infra* notes 126-131 and accompanying text.

The Traditional Approach

Under the traditional approach, trial courts first determined the future earnings[109] that the plaintiff would have received during the remainder of his or her work-life expectancy. The courts then discounted these future earnings to present value by a conservative, risk-free, long-term interest rate.[110] For example, if a plaintiff going to trial in 1982 would have earned $10,000 in 1992, the amount awarded to the plaintiff would be the amount which, if safely invested in 1982, would grow to $10,000 in 1992. Assuming that the interest rate on safe investments in 1982 is ten percent, the wage to be earned in 1992, $10,000, is discounted by ten percent, yielding $3,800, the present value of the 1992 earnings.

The critics of the traditional method argued that giving the plaintiff the present value of $10,000 in 1982 to compensate for lost earnings of $10,000 in 1992 undercompensated the plaintiff because the purchasing power of $10,000 in 1992, assuming continued inflation, would be less than the purchasing power of $10,000 in 1982.[111] Another criticism of the traditional approach was that defendants were allowed to take advantage of inflation while plaintiffs were not. Interest rates contain a component designed to compensate the lender for the decreased purchasing power of the money loaned. By this adjustment, the lender recaptures the original purchasing power of the loan and makes a profit, which is the real rate of return. Thus, by discounting at current interest rates, it was contended that defendants were allowed to take advantage of inflation in the discounting process. Plaintiffs, however, were not allowed to take advantage of inflation in calculating future damages. The main argument in favor of the traditional approach is that consideration of future inflation is too speculative. The Fifth Circuit, while defending the traditional approach in *Johnson v. Penrod Drilling Co.*,[112] stated that it "cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages." Another argument is that the full interest rate, including the inflation component, is available to the plaintiff, whereas the question of

109. The effect of future inflation is not considered in determining future earnings. Future earnings are based upon what a person with the experience the plaintiff would have had in the future would be making at the present time.

110. Johnson v. Penrod Drilling Co., 510 F.2d 234, 237-41 (5th Cir. 1975). *See generally* Note, *supra* note 103, at 885; Note, *Damages—Future Inflation—Fact of Possible Future Inflation Will Not Be Included in the Calculation of Future Damages*, 7 ST. MARY'S L.J. 432 (1975).

111. Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 458 (3d Cir. 1982); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199-1200 (7th Cir. 1982); Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 38 (2d Cir. 1980).

112. 510 F.2d 234, 236 (5th Cir. 1975).

whether his annual wages will increase with inflation is too speculative to determine. A collateral argument has been made that risk factors in the plaintiff's future earning stream might offset, in whole or in part, inflationary wage increases. A projection of future earnings based on the assumption of a constant annual rate of inflation might cause overcompensation, because a worker's annual earnings often, over a period of years, do not increase parallel to the inflationary increase in the worker's hourly wage. Annual incomes are often cyclical as they reflect the uncertainty or risk in the worker's earnings stream.[113] For this reason, when projecting future wages, probable increases in income, whether due to inflation or otherwise, should be reduced for likely risk before discounting to present value or the rate of discount should be increased for such risk. Variability should be considered in any earnings projection, notwithstanding the consideration of a constant rate of wage inflation.

Discount Rate at Less Than Current Interest Rate

Real Rate of Discount Method

Recognizing the apparent injustice in including inflation in the discount rate but not in calculating future earnings, the Second[114] and Seventh[115] Circuits have favored a method whereby future earnings are not increased for likely inflation but are discounted at the real rate of interest, that is, the component of the interest rate designed to provide the lender with a profit. Since the future inflation rate and the current interest rate minus the real interest rate are presumed to be equal, the plaintiff theoretically is compensated adequately under this approach.

For example, under this theory, if a plaintiff going to trial in 1982 would have earned $10,000 in 1992, this amount would be discounted by the real rate of interest,[116] and the plaintiff would invest the award at current interest rates. The Second Circuit favors this approach because it precludes speculation as to the future rate of inflation and promotes judicial economy, since the impact of inflation on future earnings is not proven at trial.[117]

113. Compare the plaintiff's past annual earnings tax returns with his past hourly wage increases. If the plaintiff's annual earnings were variable, the margin between his increased hourly earnings capacity (wage increase) and his actual earnings represents the risk or uncertainty of the income.

114. Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 34, 39 (2d Cir. 1980).

115. O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982).

116. The historical real rate of interest has been estimated to be between one percent and three percent.

117. Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 (2d Cir. 1980). The Second Circuit indicated that the trial should not turn into a graduate seminar on economic forecasting.

The major criticism of this approach is that in calculating future earnings, it is difficult to segregate increases due to cost of living from increases due to productivity and merit. If cost of living increases are not removed from future earnings, inflation will be considered twice and the defendant will be prejudiced, since discounting at the real rate of interest accounts for inflation.[118] Further, the plaintiff still must prove by a preponderance of the evidence that his annual future loss of income would have increased in accordance with the yearly anticipated rates of inflation. If the plaintiff cannot meet this burden, the discount rate used must be increased appropriately.[119]

The Total Offset Method

Recently, the Third Circuit, in *Pfeifer v. Jones & Laughlin Steel Corp.*,[120] adopted the "total offset" method, commonly known as the Alaska rule. Under this theory, inflation is not considered in calculating future earnings, but the sum representing future earnings is not discounted, because the current interest rate and the future inflation rate are presumed to be equal.[121] The Third Circuit mandated the total offset method because it avoids "the danger of speculating as to the future of inflation."[122] The court also noted that this method promotes judicial economy[123] and makes ultimate awards of future damages more predictable, because the variables of inflation and future interest rates are deleted from the calculation.[124]

One problem with the total offset method is that it erroneously assumes that lenders do not make a profit from their loans. As noted

118. Culver v. Slater Boat Co., 688 F.2d 280, 297-98 (5th Cir. 1982) (en banc), *reh'g applied for*, No. 79-3985.

119. *Id.* at 305-06, *reh'g applied for*, No. 79-3985. In *Culver*, this principle is recognized by the Fifth Circuit. The principle also must not be overlooked when a court adopts the "total offset method," as the plaintiff still must be required to sustain his burden of proof, regardless of any assumptions made about discount rates, inflation rates, or their interrelationship.

120. 678 F.2d 453 (3d Cir.), *cert. granted*, 103 S. Ct. 50 (1982).

121. 678 F.2d at 461. The court stated: "The total offset method avoids the danger of speculating as to the future rate of inflation by making . . . a very sensible accommodation: it assumes that in the long run the effects of future inflation and the discount rate will co-vary significantly with the other." *Id.*

122. *Id.*

123. Quoting the Pennsylvania Supreme Court in Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), the Fifth Circuit noted that "[a]n additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judges and juries are not burdened with complicated, time consuming economic testimony." 678 F.2d at 461.

124. Again quoting Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), the court noted that by "eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable." 678 F.2d at 461.

earlier, interest rates include a component to recover the lost purchasing power of the loan, as well as a component for profit, that is, the real rate of interest. A second problem is that the *Pfeifer* court arguably is incorrect in its view that this method eliminates speculation about inflation and discount rates. Even where a court assumes that the annual rate of inflation and discount are equal, before such a method may be employed, the plaintiff, in each case, should be required to prove by a preponderance of the evidence that his future annual earnings will likely increase consistently with the future annual rate of inflation.[125] In other words, if the only evidence presented is one year's earnings or if past tax returns show no annual increases in earnings consistent with past annual inflation, some competent evidence should be required before the total offset method is applied to future income losses. If, in any case, the individual does not establish the likelihood of such increases, a net discount factor must be applied to the extent there is a shortfall.

The Effect of Future Inflation on Future Earnings—The Evidentiary Approaches

Under these methods, courts consider inflation (either directly or indirectly) while determining future earnings and then discount future earnings by the current interest rate. In *Culver v. Slater Boat Co.*,[126] the Fifth Circuit favored a method whereby the trial court considers the plaintiff's own salary in the years prior to the incapacitating event or, in the alternative, considers all the likely increases in wages nationally or in the plaintiff's occupational and geographic area. The increases in income which are considered include increases in cost of living, as well as increases due to merit and productivity. Thus, inflation is considered indirectly in determining future earnings through the consideration of cost of living increases.

The Sixth and Eighth Circuits, like the Fifth Circuit, prefer evidence of an increase in wages, rather than evidence of inflation generally. Recognizing that the "predictive abilities of economists have not advanced so far that they can forecast with any certainty the existence of a rate of inflation for the next thirty years" the Sixth Circuit has allowed the "use of economists and other experts . . . in some cases to show that raises in income . . . would most probably

125. *See* Culver v. Slater Boat Co., 688 F.2d 280, 297 (5th Cir. 1982) (en banc), *reh'g applied for*, No. 79-3985. In *Pfeiffer*, it appears from the record that no adequate past earnings history was evidenced. The plaintiff arguably laid no foundation for the application of a total offset rule, *i.e.*, for assuming that the plaintiff's future annual losses of income would increase fully and constantly at the rate of inflation.

126. 688 F.2d 280, 308-10 (5th Cir. 1982) (en banc), *reh'g applied for*, No. 79-3985.

occur."[127] Similarly, in the Eighth Circuit, consideration of "future wage increases" is permissible.[128]

Although the Ninth Circuit apparently will allow consideration of the impact of inflation generally, rather than just the impact of inflation on wages, it still restricts the introduction of evidence on inflation. In *United States v. English*,[129] the Ninth Circuit held that the jury "in awarding damages [is] to take into account such estimates of future changes in the purchasing power of money as are based on sound and substantial economic evidence, and as can be postulated with some reliability."

The criticisms of the evidentiary approaches are that they do not promote judicial economy and they produce unpredictability in damage awards. Allowing testimony as to future interest rates will result in lengthy adversary proceedings to determine the proper future effect of inflation. Also, since the ability of parties to prove future rates of inflation and their effect on each plaintiff will differ, there inevitably will be varying damage awards for similar casualties. In *Culver*, the Fifth Circuit disagreed with the argument that an evidentiary approach frustrates judicial economy, arguing that an evidentiary approach is simpler and more accurate; for instance, discounting by the real rate of interest, which requires the "more difficult task of breaking down the data into the reasons for the increase, e.g., cost of living or merit increases, is not necessary."[130] The Fifth Circuit also expressly disapproved of the total offset method, because although it might be more expedient, the total offset method favors plaintiffs over defendants.[131] On October 5, 1982, the Supreme Court of the

127. Morvant v. Construction Aggregates Corp., 570 F.2d 626 (6th Cir. 1978). The court stated:

> Yet testimony on the exact income that the decedent would have received through the year 2002 is so speculative, in our view, that it is inadmissible.
>
> We do not hold, however, that the jury may never consider inflation and future increases in income in determining damages. Ideally, the damage award should compensate appellant for the financial loss she will suffer as a result of the death of her husband. If a jury is not permitted to consider decreases in the purchasing power of money, appellant would be woefully damaged if inflation should continue at its present or at any other substantial rate. Some consideration of probabilities is inevitable in any fair award of damages.

Id. at 632.

128. Taenzler v. Burlington Northern, 608 F.2d 796, 801 (8th Cir. 1979).

129. 521 F.2d 63, 75-76 (9th Cir. 1975); *accord* Sauers v. Alaska Barge & Transp., Inc., 600 F.2d 238 (9th Cir. 1980) (maritime case).

130. 688 F.2d at 298.

131. *Id.* at 298. As the Fifth Circuit recognized in *Culver*, the plaintiff should have the opportunity to prove likely noninflationary wage increases. On the other hand, the defendant will want to show that the plaintiff's annual income did not increase at a rate parallel to the rate of inflation, and to that extent, an appropriate discount to present value is necessary or the plaintiff will be overcompensated. *Id.* at 292.

United States granted certiorari in *Pfeifer v. Jones & Laughlin Steel Corp.*;[132] thus the Court may consider the inflation and discount issues. In light of the varying results produced by the total offset method, the real rate of interest method, and the evidentiary approaches,[133] it is hoped that the Supreme Court will adopt one approach so that inflation will be treated uniformly in all actions governed by federal law.

THE EFFECT OF FUTURE INCOME TAXATION ON DAMAGES

Traditionally, courts did not consider the fact that future earnings awards were not subject to taxation, because the prediction of tax consequences was considered too speculative and complex for a jury's deliberation. Recently, however, the United States Supreme Court, in *Norfolk & Western Railway Co. v. Liepelt*,[134] an FELA case, rejected this rationale and held that future income tax consequences should be considered in determining future earnings. An issue corollary to the one presented in *Liepelt* is whether future taxes on income earned by investing the damage award can be considered in determining the damage award. The Ninth Circuit recently addressed this issue in *DeLucca v. United States*[135] and held that the district court properly added to the damage award an amount which would sufficiently compensate for taxes on the income that would be earned by investing the award.

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132. 678 F.2d 453 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 50 (1982).

133. The total offset method and the discount-at-the-real-rate-of-interest method produce varying results, because under the real rate method, future earnings are at least discounted by the real rate of interest. Similarly, the total offset method and the evidentiary approaches produce varying results, because the percent increases in plaintiff's income due to cost of living and the interest component built into interest rates will not always be equal.

134. 444 U.S. 490 (1980). *See generally* Crick, *Taxes, Lost Future Earnings and Unexamined Assumptions*, 34 NATL TAX J. 271 (1981); Comment, *Income Tax Effects On Personal Injury Recoveries*, 30 LA. L. REV. 672, 679 (1970); Comment, *Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt*, 38 WASH. & LEE L. REV. 289 (1981); Note, *Jury Review of Tax Consequences of FELA Damage Awards Now Considered Remote*, 26 LOY. L. REV. 409 (1980).

135. 670 F.2d 843, 844-45 (9th Cir. 1982).