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PROOF OF DAMAGES IN MARITIME PERSONAL INJURY CASES: ADJUSTING LEGAL THEORIES TO THE COURTROOM

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Several practical considerations should be made by a plaintiff's attorney when deciding how to submit or present his proof of damages in a maritime personal injury or death case during the course of a trial. In this connection, to understand what has to be proven in the way of damages it is necessary to set forth a brief history of the law applicable to damages.

In the early days the courts refused to recognize a general maritime law wrongful death remedy.¹ In an effort to provide relief from the harsh rule of *The Harrisburg*,² The Jones Act³ and The Death on the High Seas Act⁴ (DOHSA) were passed in 1920. The Jones Act provided a remedy to an injured seaman, and, in cases of death, to his beneficiaries based on negligence against his employer. On the other hand, DOHSA provided a cause of action based on negligence or unseaworthiness arising from deaths on the high seas. The high seas were defined as being beyond a marine league from the shore of any state or the District of Columbia or the territories or dependencies of the United States. A marine league was equivalent to three nautical, marine, or geographical miles, which corresponds to 3.45 statute or English miles. Numerous cases were decided under these two statutes over the years. The next significant development was *Moragne v. States Marine Lines*.⁵ This case overruled *The Harrisburg* and held that the general maritime law did provide a remedy for wrongful death.⁶ The Court left open such issues as to what constitutes damages under the new cause of action and what beneficiaries are entitled to recover these damages. The next important and significant case was *Sea-Land Services, Inc. v. Gaudet*,⁷ in which the Supreme Court held that nonpecuniary damages or losses such as the loss of society and funeral benefits

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1. *The Harrisburg*, 119 U.S. 199 (1886).
2. 119 U.S. 199 (1886).
3. 46 U.S.C. § 688 (1976).
4. 46 U.S.C. §§ 761-68 (1976).
5. 398 U.S. 375 (1970).
6. *Id.* at 409.
7. 414 U.S. 573 (1974).

were recoverable in a *Moragne* type of action.⁸ The *Sea-Land Services, Inc.* decision set forth the elements of damages, and in effect it went beyond DOHSA in granting nonpecuniary damages.⁹

Then came various decisions interpreting the *Moragne* and *Gaudet* decisions. In *Landry v. Two R. Drilling Company*,¹⁰ the fifth circuit held that where a seaman sustained injuries in state territorial waters resulting in his death, based upon a finding of negligence and unseaworthiness, his beneficiaries could recover nonpecuniary damages as set forth in the *Gaudet* decision.¹¹ In *Law v. Sea Drilling Corp.*¹² the fifth circuit, in effect, discarded DOHSA as a remedy by holding that *Gaudet* remedies applied to navigable waters regardless of where the accident occurred, including the high seas.¹³ Thus *Gaudet* damages would be applied to accidents occurring on high seas as well as in state territorial waters.

Various courts throughout the country did not agree with *Law v. Sea Drilling Corp.* The nonpecuniary damages issue came up before the Supreme Court in *Mobil Oil Corp. v. Higginbotham*,¹⁴ an action for damages under DOHSA and the general maritime law. On appeal, the appellate court ruled that some of the decedents were Jones Act seamen.¹⁵ The Supreme Court held that where death occurred on the high seas, the general maritime law did not provide for nonpecuniary damages such as loss of society and that the *Gaudet* damages applied only in territorial waters, while DOHSA applied on the high seas.¹⁶ The Court construed damages under DOHSA as providing only pecuniary damages.

The next decisions on the *Moragne* and *Gaudet* cases after *Higginbotham* were in the fifth circuit. In *Ivy v. Security Barge Lines, Inc.*¹⁷ the court held that in an accident caused by negligence which occurred in state territorial waters resulting in the death of a Jones Act seaman, the beneficiaries could not secure *Gaudet* damages such as loss of society.¹⁸ In that case, although there was a cause of action based on negligence and the general maritime law, the jury only

8. *Id.* at 584.

9. *Id.* at 583-91.

10. 511 F.2d 138 (5th Cir. 1975).

11. *Id.* at 142-43.

12. 523 F. 793 (5th Cir. 1975).

13. *Id.* at 798.

14. 436 U.S. 618 (1978).

15. 545 F.2d 422 (5th Cir. 1977).

16. 436 U.S. at 622-23.

17. 606 F.2d 524 (5th Cir. 1979).

18. *Id.* at 529.

found that the defendant was negligent.¹⁹ The next natural question to be resolved was whether the beneficiaries of a Jones Act seaman who died in state territorial waters as a result of an accident based on the general maritime law, as opposed to negligence under the Jones Act, could claim nonpecuniary damages under the *Gaudet* doctrine. The decisions in *Hlodan v. Ohio Barge Lines, Inc.*²⁰ and *Smith v. Ithaca Corp.*²¹ held that they could. The next issue resolved by the Supreme Court was whether the general maritime law provided for a loss of consortium as damages. In *American Export Lines, Inc. v. Alvez*,²² the Supreme Court held that the maritime law did provide for wife's claim of loss of consortium.²³ In that particular case the plaintiff who sustained non-fatal injuries in state territorial waters was a longshoreman. His wife claimed loss of consortium under the *Gaudet* doctrine. The Court stated that the wife was entitled to damages for loss of consortium in injuries occurring in state territorial waters.²⁴

The most recent Supreme Court decision involved a question of whether a jury should be instructed in a Federal Employer's Liability Act (FELA) case that the defendant could diminish the plaintiff's claim by having the jury consider the decedent's net earnings as damages after deduction of income taxes he would have paid and the fact that the award was not taxable; the question was answered in the affirmative in *Norfolk & Western Railway Co. v. Liepelt*.²⁵

In view of the limitations imposed by the *Higginbotham* decision on accidents occurring on the high seas, it is necessary that all elements of damages are presented in order to get the maximum recovery. This writer will now attempt to set forth the various elements of damages that a trial attorney in a maritime injury and death case should present.

ELEMENTS OF DAMAGES

In attempting to evaluate the elements of damages in maritime personal injury and death cases, an attorney should consider the following factors which will demonstrate pecuniary losses on behalf of clients: (1) loss of support and earnings; (2) loss of services; (3) loss of nurture and guidance; (4) loss of fringe benefits; (5) loss of funeral

19. *Id.* at 525.

20. 611 F.2d 71 (5th Cir. 1980).

21. 612 F.2d 215 (5th Cir. 1980).

22. 100 S. Ct. 1673 (1980).

23. *Id.* at 1674.

24. *Id.*

25. 100 S. Ct. 755 (1980).

expenses; (6) loss of prospective inheritance; (7) loss of society and consortium; (8) award of prejudgment interest; (9) loss of food and lodging; (10) pain and suffering; (11) punitive damages; (12) present value against inflation; and (13) use of an economist.

The aforesaid are major factors which trial attorneys should take into consideration when presenting damages. These factors will be discussed in maritime personal injury and death cases. Unfortunately, too many times these elements are denied by the courts not because they are invalid, but because the attorney has failed to present to the court adequate proof and has failed to make an extensive investigation. Therefore, it is important to perform a proper investigation.

Loss of Support and Earning Capacity

Loss of support and earning capacity are intertwined and will be discussed together. *Petition of Risdal & Anderson, Inc.*²⁶ set forth certain guidelines concerning loss of support and earning capacity which are: (1) actual earning; (2) future earning; (3) health; (4) diligence and work habits; (5) prospect of advancement; (6) economic conditions of industry; (7) life expectancy; and (8) work expectancy.

Using these guidelines in preparation for trial, a detailed, thorough, and complete investigation and analysis should be made with respect to their application to the client. The facts, statistics, and data should be assembled immediately. The use of an economist should be made to evaluate the data and to present it to the court and jury. Courts accept the use of an economist as an expert witness in trials. Economists can substantiate many of the aforementioned items which some courts have described as tenuous or speculative. One of the most crucial elements of damages for the injured or deceased is the earnings record. There is no question about this being a proper element of damages. It is most important to secure employment records, income tax returns, W-2 forms, social security records, or employment personnel records.

The next important aspect to ascertain is the future earning capacity of the client or the decedent. This can be done by acquiring and analyzing the rates of wage increases that the unions representing the worker have acquired over a past number of years. There are other sources of wage increases in the various industries. The economist can then project a percentage increase which can be used as the basis for calculating future earning capacity and losses. In ad-

26. 291 F. Supp. 353 (D. Mass. 1968).

dition to this, one can acquire by testimony from the employer the ability, competence, esteem, and probability of advancement of the client. Another factor that should be taken into consideration is health and work habits. This can be secured from employment and medical records. The economic condition of the industry should be characterized as to whether it is a growing one and if there is room for advancement. This can readily be done by the economist by drawing from governmental and non-governmental sources. This type of information is acceptable as evidence.²⁷

The work and life expectancy of the individual should be presented. The emphasis should be placed on the average expectancy of the individual concerned. This can be acquired not only statistically from public and private sources, but also from the personal employment and medical records for the individual concerned. Additional assistance can now be secured from the federal Age Discrimination in Employment Act, which prevents employers, except under certain conditions, from forcing a worker to retire before seventy years of age. One should attempt to show that the worker was conscientious and diligent and that he would have continued to work as long as he was able and capable. Testimony should be introduced as to the employee's diligence and work habits. Lost earnings to the present are taken at full value and not discounted. Future earnings will be discussed later.

With respect to the wife and children, it is not necessary for them to prove dependency in a case of death.²⁸ However, parents and other next of kin do have to demonstrate their dependence upon the decedent.

If one will gather carefully the evidence using the procedures suggested herein, the full loss of support and wages will be readily demonstrated to the court and jury.

Loss of Services

Loss of services of a decedent in the maritime case has long been held an item of pecuniary damages. There is no dispute with respect to this.

When presenting evidence concerning this loss, one should conduct a thorough inquiry as to what kind of work the individual was

27. See *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349 (2d Cir. 1974).

28. See *Civil v. Waterman Steamship Corp.*, 217 F.2d 94 (2d Cir. 1954); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (6th Cir. 1948).

capable of doing, such as painting, plumbing, carpentry, roofing, electrical wiring, lawnmowing, snow shoveling, garbage disposal, automotive repairs, or any other type of work. Once the evidence is produced as to what services were performed, then an economist can be utilized to evaluate monetarily these services. This is most important, particularly with the price of these services constantly increasing. It naturally follows that pecuniary damages will also increase. There are various statistics which establish the value of these types of services. Most maritime workers are skillful and perform handyman types of services. These assorted services should not be overlooked.

Loss of Nurture and Guidance

In proving pecuniary loss, loss of nurture and guidance is another loss that should not be omitted. The courts have held that these are pecuniary losses. The leading case in this area is *Michigan Central Railroad Company v. Vreeland*.²⁹

There are many factors that should be taken into consideration when securing information to support a claim for loss of nurture and guidance. For example, how much shore leave did the decedent spend with the child and the family? Such aspects as care, moral and religious training, advice, attention, guidance, education, help with school, sports, recreation, vacations, outings and other items of this type should be covered. They should not be looked into lightly. These items can be proven by testimony from neighbors, friends, relatives, as well as from the children themselves.

Although the age of majority terminates nurture and guidance, other facts and circumstances may extend this support beyond the age of majority. For example, a child who has the ability and aspirations to continue education to a higher level would be entitled to further nurture and guidance. The child may be disabled or may be suffering from some malignancy, which would require extended medical care and treatment for an indefinite period. This would also enlarge the period.³⁰

Although marital nurture has not been allowed, one should not overlook this claim in view of the recent decisions as a result of the *Gaudet*, *Hlodan*, *Ithaca Corp.*, and *Alvez* cases. These decisions allow for loss of society under the general maritime law in state territorial waters, and therefore, marital nurture could be recoverable in these situations.

29. 227 U.S. 59 (1913).

30. See *Consolidated Mach., Inc. v. Protein Prod. Corp.*, 428 F. Supp. 209 (M.D. Fla. 1976); *Hamilton v. Canal Barge Co., Inc.*, 395 F. Supp. 978 (E.D. La. 1975).

Fringe Benefits

An element of damage which frequently is overlooked is the area of fringe benefits. This element can apply in cases of fatally and non-fatally injured maritime workers. Contributions made by employers to pension, vacation, and welfare plans and social security are really a form of wages and a pecuniary loss. When a maritime worker is injured, either he or his next of kin is deprived of these benefits. These figures are readily available in welfare, pension, and vacation trust agreements and can be proven by the use of these documents with the aid of union officials and administrators of various plans as witnesses.

Funeral Expenses

Until recently there has been a conflict over whether funeral expenses are a proper pecuniary damage. It was held in *Barbe v. Drummond*³¹ that under DOHSA, funeral expenses are not a pecuniary damage. Under the general maritime law, *Dennis v. Central Gulf Steamship Corp.*³² held that such expense was a pecuniary damage. This conflict was put to rest in the *Mobil Oil v. Higginbotham*³³ case, in which it was held that under the Jones Act, DOHSA, or the general maritime law, funeral expenses are recoverable as an item of damage. In the *Gaudet* case,³⁴ the Supreme Court held that funeral expenses were recoverable under the general maritime law. The court in *Higginbotham* evidently based its reasoning on the theory that but for the wrongful death, the decedent would have accumulated an estate large enough to pay for his own funeral and therefore held funeral expenses to be a beneficiary's damage. It is difficult to understand how the court in *Higginbotham* made this distinction as an item of damage, but not loss of services under DOSHA.

Loss of Inheritance

Although allowed, loss of inheritance, as a rule, is not claimed. In order to secure this as an item of damage, one would have to show and establish a pattern of systematic estate building. It should be ascertained whether the decedent maintained savings, investment in real estate, stocks, bonds, and other items of this type. If shown, it is reasonable to conclude that the decedent would have gathered an estate for his personal use at the time of his retire-

31. 507 F.2d 794 (1st Cir. 1974).

32. 453 F.2d 137 (5th Cir. 1972).

33. 436 U.S. 618 (1978).

34. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573 (1974).

ment. Once it is demonstrated that an inheritable estate has been established, then all that must be proven is that his beneficiaries, had the decedent lived, would be the recipients of the estate in the logical sequence of events.³⁵

Loss of Society and Consortium

Loss of society and consortium until recently has been held not to be an item of damage in the maritime case. *Sea-Land Services, Inc. v. Gaudet*³⁶ radically changed this. In *Gaudet*, the plaintiff was the widow of a longshoreman who sustained, in state territorial waters, personal injuries for which he had already sued and recovered damages. Thereafter, he died from the injuries. The widow then sued for wrongful death damages such as loss of society and funeral expenses. The Court held that the widow was entitled to loss of society damages and funeral expenses under the general maritime law.³⁷ The Court defined the term "society" as a broad range of mutual benefits each family member receives from the continued existence of the family unit, including love, affection, care, attention, companionship, comfort, and protection.³⁸ In *Mobil v. Higginbotham*,³⁹ the Supreme Court held that this loss of society was not compensable for maritime injuries on the high seas under either DOHSA or the general maritime law. The *Higginbotham* court made no specific mention of the Jones Act, but by implication its decision may apply to it. The Court limited this loss of society to injuries and deaths occurring in state territorial waters under the general maritime law. *Gaudet* indicated that loss of consortium was part of loss of society.⁴⁰

Although the *Moragne* decision not only did away with an inequitable maritime rule, it also was intended to establish a uniform general maritime law to be applied universally.⁴¹ In *Mobil Oil Corp. v. Higginbotham*, the Court in limiting loss of society has achieved an opposite result. Although there is loss of society for a maritime injury in state territorial waters, there is no such cause of action on the high seas. Therefore, the beneficiaries of a seaman injured in territorial waters can recover these damages, while if the death or injury occurs on the high seas, there is no recovery.

35. See *Soloman v. Warren*, 540 F.2d 777 (5th Cir. 1976); *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962).

36. 414 U.S. 573 (1974).

37. *Id.* at 584.

38. *Id.* at 585.

39. 436 U.S. 618 (1978).

40. 414 U.S. at 622.

41. 398 U.S. at 405-08.

The Court in *Higginbotham* stated that, although the measure of damages may be different in coastal waters than on the high seas, it cannot override the definite meaning of DOHSA as a statute.⁴² In a footnote the Court stated that it remains to be seen whether the difference between awarding loss of society damages under *Gaudet* and denying them under DOHSA has great practical significance.⁴³ It then implied that perhaps this disparity can be reconciled by allowing an award that is primarily symbolic as opposed to a substantial portion of the survivor's recovery.⁴⁴ As indicated previously herein, the courts have allowed loss of services in seaman's injury in state territorial waters pursuant to the general maritime law.⁴⁵ They have not allowed such recovery under the Jones Act in state territorial waters.⁴⁶ Thus, we have come full circle once more, and we have again the lack of uniformity that the *Moragne* decision attempted to alleviate.

With respect to loss of consortium, which is really an aspect of loss of society on the part of the wife, *American Export Lines, Inc. v. Alvez*⁴⁷ held that loss of consortium is allowed for the wife of an injured maritime worker or of a deceased maritime worker who sustained injuries in state territorial waters.⁴⁸ In this particular instance the wife of a non-fatally injured longshoreman sought damages for loss of consortium, and the Court held that she was entitled to it. Therefore, it would naturally follow that in cases of fatally or non-fatally injured maritime claimants, particularly cases in which claims of seamen are brought pursuant to the general maritime law, a claim of loss of consortium, as an element of damages where the injured has sustained injuries in state territorial waters, would be upheld.⁴⁹

Prejudgment Interest

Quite frequently, attorneys fail to request an award for prejudgment interest. There is no question that the admiralty court within its discretion can award prejudgment interest.⁵⁰ In cases brought on

42. 436 U.S. at 624-25.

43. *Id.* at 624-25 n.20.

44. *Id.*

45. See *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980); *Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980).

46. See *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979).

47. 100 S. Ct. 1673 (1980).

48. *Id.* at 1674.

49. See *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980); *Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980).

50. *American Union Transport Co. v. Aquadilla Terminal, Inc.*, 302 F.2d 394 (1st Cir. 1962).

the admiralty side, the power is undisputed; a dispute arises as to whether the court has the discretion to award prejudgment interest involving the Jones Act or unseaworthiness on the law side. The trend has been for the courts to allow this as damage.⁵¹

It is argued that the awarding of prejudgment interest should be made only as a liquidated sum. On the admiralty side, the sum is liquidated by the court, while on the civil side it is not liquidated until the jury renders a verdict. This argument was rejected in *Nye v. A/S D/S Svendborg*.⁵² The federal district court held that it should make no difference whether the case is brought on the admiralty side or the law side in awarding prejudgment interest.⁵³ The *Nye* court held that it is only fair to award prejudgment interest regardless of the side on which the case is brought.

There is some dispute on whether prejudgment interest should be requested when charging the jury⁵⁴ or whether, after the jury renders its verdict, the court should then be requested to award.⁵⁵ Either practice seems acceptable and proper.

The award of prejudgment interest is discretionary with the court, and one should not forget to make such request.

Loss of Food and Lodging

When a seaman is employed aboard a vessel, he is provided with food and lodging. This has a monetary value which one should not omit as damages. It has been held that this item is one which can be recovered.⁵⁶

Conscious Pain and Suffering

Conscious pain and suffering is either the suffering endured by an injured maritime claimant while recovering from an injury, or

51. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Williamson v. Western Pac. Dredging Corp.*, 441 F.2d 65 (9th Cir.), *cert. denied*, 404 U.S. 851 (1971); *Parisi v. Lady In Blue, Inc.*, 433 F. Supp. 681 (D. Mass. 1977); *Nye v. A/S D/S Svendborg*, 358 F. Supp. 145 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 376 (2d Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 676 (4th Cir. 1964); *Choest v. A & P Boat Rentals*, 321 F. Supp. 1290 (E.D. La. 1971); *Petition of Mariana Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D.N.Y. 1965), *aff'd with modifications*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 386 U.S. 1005 (1967).

52. 358 F. Supp. 145 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 376 (2d Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

53. 358 F. Supp. at 150.

54. *Parisi v. Lady In Blue, Inc.*, 433 F. Supp. 681 (D. Mass. 1977).

55. *Choest v. A & P Boat Rentals, Inc.*, 321 F. Supp. 1290 (E.D. La. 1971).

56. *Bartholomew v. Universe Tankships, Inc.*, 279 F.2d 911 (2d Cir. 1960); *Curry v. United States*, 338 F. Supp. 1219 (D. Cal. 1971).

the pain and suffering decedent had prior to his death. This is an important element of damage and should be presented in the proper light. If possible, witnesses who observed the pain and suffering should be presented so that a proper description can be demonstrated. Medical witnesses can be used to describe the pain based on their professional experience.

There is no doubt that conscious pain and suffering is recoverable under the Jones Act and the general maritime law. There is some question as to whether conscious pain and suffering is recoverable under DOHSA. In *Barbe v. Drummond*,⁵⁷ the first circuit held that DOHSA excluded recovery for conscious pain and suffering.⁵⁸ However, in the *Barbe* case it was interesting to note that although the claim for conscious pain and suffering was denied under DOHSA, it was granted under the state survival statute.⁵⁹

Punitive Damages

It has long been thought and argued that the maritime law does not provide for punitive damages. A recent decision in a state appellate court in California, *Baptiste v. Superior Court*,⁶⁰ held that the maritime law did provide for punitive damages where the facts indicated a basis for it.⁶¹ The case was remanded to the trial court for trial on this issue. In describing whether a pleading will state a cause of action on the maritime law for punitive damages, the court stated that there must be something more than the mere commission of a tort.⁶² There must be circumstances of aggravation or outrage, such as spite or a malicious, fraudulent, or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton.⁶³ Therefore, it is most important when pleading any cause of action for punitive damages that the attorney set forth with precise detail the facts constituting the cause for punitive damages. Too frequently, this is not done or shown during trial, and that is the reason why the courts have rejected the award of punitive damages. In the *Baptiste* case, there is a detailed analysis and history of the maritime law with respect to punitive damages.⁶⁴

57. 507 F.2d 794 (1st Cir. 1974).

58. *Id.* at 797-99.

59. *Id.* at 799-800.

60. 164 Cal. Rptr. 789 (Cal. Ct. App. 1980).

61. *Id.* at 798.

62. *Id.* at 792.

63. *Id.*

64. *Id.* at 793-98.

It is interesting to note that in *Baptiste* there were causes of action based on negligence under the Jones Act and unseaworthiness.⁶⁵ The court said that the federal maritime law does not preclude the imposition of punitive damages as a matter of law under either of these causes of action.⁶⁶ In the *Baptiste* case the employer knew of unsafe high noise levels in the engine room. Rather than take the necessary steps to correct this condition in a safe and proper manner, the employer took an economic shortcut to save money, since the ships were due to be scrapped or sold.⁶⁷ These facts, the court held, formed the basis for a trial of the issue of whether punitive damages should be awarded.⁶⁸

Present Value Against Inflation

With respect to loss of future earnings, the courts uniformly instruct the jury that it should derive the present value of these by discounting the amount of money claimed to be lost. This means, in simple terms, that the future lost earnings are discounted at a rate so that if the money is presently invested at this rate, over the period of time of lost earnings, it would yield the future lost earnings. This is known as present value and is accepted by the courts. It is most important that, in establishing present value and the discount rate, an economist be used. He should present data to show the proper discount rate. Too frequently, defense attorneys argue that the current high rate of yield should be utilized. However, the economist can compute the average yield over a period of time and thus arrive at a proper discount rate.

Most courts have invariably held through the years that a jury should not be instructed to take into consideration inflation since it is too difficult to evaluate. Plaintiff's attorneys are hoping for a change in the jurisprudence as a result of the Court's decision in *Norfolk and Western Railway Company v. Liepelt*.⁶⁹ As previously noted, the Supreme Court held in this case that it was error to exclude evidence of the income tax payable on the decedent's past and estimated future earnings, and that the jury should also be instructed that the award of damages would not be subjected to income tax.⁷⁰ Although it was requested by the decedent's widow that the jury should be instructed that she would have to pay attorneys'

65. *Id.* at 798.

66. *Id.* at 794-97.

67. *Id.* at 791.

68. *Id.* at 798.

69. 100 S. Ct. 755 (1980).

70. *Id.* at 759.

fees on recovery, this instruction was denied.⁷¹ The Court, however, made an interesting statement with respect to what can be estimated and predicted:

But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life.⁷²

It is obvious that the Court is saying that inflation no longer is speculative and can be predicted. It is equally obvious that the Court is saying that an economist can give testimony with respect to inflation. Therefore, it would follow that a request to charge the jury with respect to inflation is proper. Inflation would then set off any discount rate on future earnings. A simple charge of this nature in *Petition M/V Elaine Jones*⁷³ was found acceptable. The jury was charged that decreasing purchasing power of the dollar is a proper element for consideration in determining the amount of the award.⁷⁴ This charge is another way of saying inflation is a factor that should be taken into consideration by the jury.

Economist

The courts are accepting the use of an economist.⁷⁵ Further importance has been given to the use of an economist and similar experts in *Norfolk and Western Railway Company v. Liepelt*,⁷⁶ as indicated in the quotation above.

The problem that many trial attorneys incur with the use of an economist is that proper preparation is not made. If one prepares the economist to have all the necessary and relevant data and material upon which to base his recommendations and conclusions, this information will be admitted into evidence. If the proper foundation is not level, naturally it follows that the data, information, and opinions will not be admitted.

71. *Id.* at 758.

72. *Id.*

73. 480 F.2d 11 (5th Cir. 1973).

74. *Id.* at 28-29.

75. See *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349 (2d Cir. 1974); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971).

76. 100 S. Ct. 755 (1980).

SOLUTION

The *Higginbotham* case⁷⁷ has severely limited damages when the accident occurred on the high seas. Loss of society is not permitted; only pecuniary damages are permitted. Of course, the easiest solution to this problem would be to have Congress enact legislation to provide specifically that loss of society, including consortium, is a recoverable damage in all maritime cases. Therefore, efforts should be made to secure the enactment of appropriate legislation. One of the most difficult situations for a plaintiff's attorney is to explain to the parents of a seaman who died in an accident that they are not entitled to be compensated for love, affection, care, attention, companionship, and protection. The loss of these is a damage for which there should be compensation.

As long as the law is not amended, attorneys should attempt to distinguish the *Higginbotham* decision. Although the Court in *Higginbotham* held that some of the deceased persons were Jones Act seamen,⁷⁸ it decided the case pursuant to DOHSA and the general maritime law.⁷⁹ As noted, it did not render any decision specifically with respect to the Jones Act.⁸⁰ DOHSA specifically uses the term "pecuniary loss."⁸¹ On the other hand, the Jones Act⁸² and FELA⁸³ do not use the term "pecuniary loss."

In determining damages under the Jones Act, it can be argued logically that the Jones Act, though fashioned after FELA, does not necessarily have to adopt the FELA decisions with respect to pecuniary damages which exclude loss of society. Therefore, one can argue and claim that the Jones Act does not preclude loss of society as a damage.

This was recognized in *Ivy v. Security Barge Lines, Inc.*,⁸⁴ when the dissenting judge, Chief Judge John Brown, stated as follows:

To be sure, FELA case law has often provided a persuasive starting point for analyzing Jones Act claims. But in general "The admiralty has led not followed." The seaman is thought to be thought to be subject to greater risks for inconveniences than the railroad worker. Accordingly, the Jones Act has frequently

77. 436 U.S. 618 (1978).

78. *Id.*

79. *Id.* at 624-26.

80. *Id.* at 621 n.11.

81. 46 U.S.C. § 762 (1976).

82. 46 U.S.C. § 688 (1976).

83. 45 U.S.C. §§ 51-60 (1976).

84. 606 F.2d 524 (5th Cir. 1979).

granted relief where the FELA has not. Thus the employer's defense of assumption of risk of the shipowner's negligence was eliminated in Jones Act cases, while the FELA continued to permit this defense. And in *Cox v. Roth*, 1955, 348 U.S. 207, 75 Sup. Ct., 242, 99 L. ed. 260, 1955 AMC 942, the court went beyond the FELA to allow a Jones Act recovery against the estate of deceased employer.⁸⁵

The court in *Baptiste*⁸⁶ accepted the same reasoning with respect to awarding punitive damages. It held that decisions under the FELA are persuasive authority in litigation involving seamen and the Jones Act, but are not binding.⁸⁷ The *Baptiste* court indicated that there are differences between the two types of damages. It further stated that the Jones Act is regarded primarily as an addition to a larger body of federal maritime law, when other precedents under the FELA would in some manner limit the liability imposed upon a defendant shipowner.⁸⁸ Another example is the situation when, in setting aside a release under FELA, the claimant has the burden, while under the maritime law the employer has the burden.⁸⁹

*Vaughan v. Atkinson*⁹⁰ is a further illustration in which the Court held that a seaman is entitled to recover the cost of reasonable attorneys' fees when the shipowner arbitrarily refuses to pay him his maintenance.⁹¹

In addition, another approach that should be taken is the same type as taken in the *Moragne* case,⁹² namely that it is time for a change. The basis on which it is claimed that the Jones Act does not provide nonpecuniary damages for death on the high seas is a FELA case, *Michigan Central Railroad Company v. Vreeland*.⁹³ The *Vreeland* court denied loss of society as nonpecuniary damages under the FELA. In *Vreeland*, the Court commented with respect to pecuniary damages as follows:

The pecuniary loss is not dependent upon any legal liability of

85. 606 F.2d at 531 (Brown, J., dissenting).

86. *Baptiste v. Superior Court*, 164 Cal. Rptr. 789 (Cal. Ct. App. 1980).

87. *Id.* at 797-98.

88. *Id.* at 798.

89. *See, e.g., Cullen v. Pennsylvania R.S. Co.*, 332 U.S. 625 (1948); *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 249 (1942); *Kelcey v. Tankers Co.*, 217 F.2d 541 (2d Cir. 1954); *Harmon v. United States*, 59 F.2d 372 (5th Cir. 1932).

90. 369 U.S. 527 (1962).

91. *Id.* at 530-31.

92. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

93. 227 U.S. 59 (1913).

the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. . . .⁹⁴

It further stated with respect to pecuniary damages:

A pecuniary loss of damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, *Railway Accident Law*, § 401.⁹⁵

It is obvious from the aforesaid that it is time for a change. The Court in *Michigan Central Railroad Co. v. Vreeland* was saying, in essence, that loss of society cannot be evaluated with any specificity. A great deal of change has occurred since then, as evidenced by the recent holding of the Supreme Court in *Norfolk and Western Railway Company*.⁹⁶ In 1913, statistical information was not maintained as it is today. The reasons set forth in *Michigan Central Railroad Company v. Vreeland* for denying nonpecuniary damages are obsolete and no longer valid and should be put to rest like *The Harrisburg*.

94. *Id.* at 70.

95. *Id.* at 71.

96. *Norfolk and Western Ry. Co. v. Liepelt*, 100 S. Ct. 755 (1980).

APPENDICES

- APPENDIX A: LOSS OF SUPPORT, WAGES AND DEPENDENCY
- APPENDIX B: LOSS OF SERVICES
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APPENDIX A: LOSS OF SUPPORT, WAGES AND DEPENDENCY

Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Civil v. Waterman Steamship Corp., 217 F.2d 94 (2d Cir. 1954); Cleveland Tankers v. Tierney, 169 F.2d 622 (6th Cir. 1948); Consolidated Mach. Inc. v. Protein Products Corp., 428 F. Supp. 209 (M.D. Fla. 1976); Hamilton v. Canal Barge Co., Inc., 395 F. Supp. 978 (D.C. La. 1975); Nye v. A/S D/S Svendborg, 358 F. Supp. 145 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 376 (2d Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972); Curry v. United States, 338 F. Supp. 1219 (N.D. Cal. 1971); Petition of Risdal & Andersen, Inc., 291 F. Supp. 353 (D. Mass. 1968); Petition of Marina Mercante Nicaraguense, S.A. 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); The City of Rome, 48 F. Supp. 333 (S.D.N.Y. 1930).

APPENDIX B: LOSS OF SERVICES

Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71 (5th Cir. 1980); Curry v. United States, 338 F. Supp. 1219 (N.D. Cal. 1971); Petition of Marina Mercante, S.A., 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

APPENDIX C: LOSS OF NURTURE AND GUIDANCE

Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976); Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969),

cert. denied, 396 U.S. 1033 (1970); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Mascuilli v. United States*, 343 F. Supp. 439 (E.D. Pa. 1972); *Petition of Risdal & Andersen, Inc.*, 291 F. Supp. 353 (D. Mass. 1968).

APPENDIX D: LOSS OF FRINGE BENEFITS

Sweeney v. American Steamship Co., 491 F.2d 1085 (6th Cir. 1974); *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970); *Consolidated Mach., Inc. v. Protein Products Corp.*, 428 F. Supp. 209 (M.D. Fla. 1976); *Mungin v. Calmar S.S. Corp.*, 342 F. Supp. 479 (D. Md. 1972); *Curry v. United States*, 338 F. Supp. 1219 (N.D. Cal. 1971); *Cruz v. American Export Isbrandtsen Lines, Inc.*, 310 F. Supp. 1364 (S.D.N.Y. 1970); *Petition of Marina Mercante, S.A.*, 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

APPENDIX E: FUNERAL EXPENSES

Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972); *Nye v. A/S D/S Svendborg*, 358 F. Supp. 145 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 376 (2d Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); *Mascuilli v. United States*, 343 F. Supp. 439 (E.D. Pa. 1972).

APPENDIX F: LOSS OF PROSPECTIVE INHERITANCE

Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976); *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

APPENDIX G: LOSS OF SOCIETY

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); *Sea-land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913); *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980); *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979); *Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975); *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

APPENDIX H: LOSS OF CONSORTIUM

American Export Lines, Inc. v. Alvez, 100 S. Ct. 1673 (1980); Christofferson v. Halliburton, Co., 534 F.2d 1147 (5th Cir. 1976); Skidmore v. Grueninger, 506 F.2d 716, (5th Cir. 1975); Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1969); First National Bank in Greenwich v. National Airlines, Inc., 288 F.2d 621 (2d Cir. 1961); Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir. 1934); New York & Long Branch Steamboat Co. v. Johnson, 195 F. 740 (3d Cir. 1912); Westcott v. McAllister Bros., Inc., 463 F. Supp. 1039 (S.D.N.Y. 1978); Hubschman v. Antilles Airboats, 440 F. Supp. 828 (D. V.I. 1977); Giglio v. Farrell Lines, Inc., 424 F. Supp. 927 (S.D.N.Y. 1977); Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669 (Cal. 1974).

APPENDIX I: PRE-JUDGMENT INTEREST

Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973); Doucet v. Wheless Drilling Co., 467 F.2d 336 (5th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir. 1972); Williamson v. Western Pac. Dredging Corp., 441 F.2d 65 (9th Cir.), *cert. denied*, 404 U.S. 851 (1971); Stanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958 (5th Cir. 1969); Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964); Gardner v. National Bulk Carriers, Inc., 333 F.2d 676, (4th Cir. 1964); Petition of City of New York, 332 F.2d 1006 (2d Cir. 1964); Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961); National Airlines Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959); Sabine Towing Co. v. Brennan, 85 F.2d 478 (5th Cir. 1936); Cortes v. Baltimore Insular Line, 66 F.2d 526 (2d Cir. 1933); Chicago M., St. P. & P.R. Co. v. Busby, 41 F.2d 617 (9th Cir. 1930); Parisi v. Lady in Blue, Inc., 433 F. Supp. 681 (D. Mass. 1977); Nye v. A/S D/S Svendborg, 358 F. Supp. 145 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 376 (2d Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); Chouest v. A & P Boat Rentals, Inc., 321 F. Supp. 1290 (E.D. La. 1971); Trexler v. Tug Raven, 290 F. Supp. 429 (E.D. Va. 1968), *reversed*, 419 F.2d 536 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

APPENDIX J: LOSS OF FOOD AND LODGING

Bartholomew v. Universe Tankships, Inc., 279 F.2d 911 (2d Cir. 1960); Curry v. United States, 338 F. Supp. 1219 (N.D. Cal. 1971).

APPENDIX K: CONSCIOUS PAIN AND SUFFERING

St. Louis & Iron Mtn. Ry. v. Craft, 237 U.S. 648 (1915); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Miliski v. Long Island R.R. Co., 499 F.2d 1169 (2d Cir. 1974); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir. 1972); Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961); Cleveland Tankers v. Tierney, 169 F.2d 622 (6th Cir. 1948); The Culberson, 61 F.2d 194 (3d Cir. 1932); Curry v. United States, 338 F. Supp. 1219 (N.D. Cal. 1971); Brown v. Anderson-Nichols & Co., 203 F. Supp. 489 (D. Mass. 1962).

APPENDIX L: PUNITIVE DAMAGES

Vaughan v. Atkinson, 369 U.S. 527 (1962); Baptiste v. Superior Court, 164 Cal. Rptr. 789 (Cal. Ct. App. 1980).

APPENDIX M: PRESENT VALUE

Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71 (5th Cir. 1980); Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975); Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965), *cert. denied*, 382 U.S. 878 (1965); Seaboard Air Line R.R. Co. v. Connor, 261 F.2d 656 (4th Cir. 1958); Consolidated Mach. Inc. v. Protein Products Corp., 428 F. Supp. 209 (M.D. Fla. 1976); The City of Rome, 48 F. Supp. 333 (S.D.N.Y. 1930).

APPENDIX N: INFLATION

Norfolk & Western Ry. Co. v. Liepelt, 100 S. Ct. 755 (1980); Petition of Canal Barge Co., Inc., 480 F.2d 11 (5th Cir. 1973), *modified*, 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 423 U.S. 840 (1975); Petition of Marina Nicaraguense, S.A., 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); Curry v. United States, 338 F. Supp. 1219 (N.D. Cal. 1971); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971); Brinegar v. San Ore Constr. Co., 302 F. Supp. 630 (E.D. Ark. 1969).

APPENDIX O: ECONOMIST

Perry v. Allegheny Airlines Inc., 489 F.2d 1349 (2d Cir. 1974); Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971).