# McINNES COOPER & ROBERTSON

MEMORANDUM

To: Patricia Brennan

From: Wylie Spicer

Date: March 21, 1990 File No.

Re: Marshall Compensation Inquiry
File: P-793

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Could you please get me a copy of Ley v. Hamilton (1935), 153 L.T. 384 (H.L.).

Thank you.

I attended at Dal law library to obtain the above however the librarian + I could not find the above as cited. L.T. is Law Times however the case was not in Vol 153 at 384.

I attach the decision I found in the Law Times (1935) at p 98, Vol. 180 + I also attach the House of Lords notes on the case found in the Solicitors Journal.

I hope this is what you require, if not please let me know.

Thanks

Wylie

### Ley v. Hamilton.

(Lords Atkin, Tomlin, Thankerton, Macmillan and Wright.—July 24.)

*Defamation—Libel contained in letters—Privilege claimed—No plea of justification—Confidential report from defendant's sister—Duty to communicate information—Point not taken at trial—Power of Court of Appeal to deal with it—Excessive damages—Verdict set aside—New trial ordered.*

Appeal from the decision of the Court of Appeal (Greer and Maugham, L.JJ.; Scrutton, L.J. dissenting) (reported 151 L. T. Rep. 360). The plaintiff, who since 1928 had been engaged in business in this country, alleged that the defendant had published letters on the 15th Aug., 1932, and on the 27th Aug., 1932, which libelled him in connection with a business enterprise in which the plaintiff and defendant were jointly interested and he claimed damages. The defendant pleaded that the words complained of, which concerned a confidential report which the defendant had received from Australia, had been published on privileged occasions without malice towards the plaintiff and under a sense of duty in the honest belief that they were true. In the action, which was tried before the Lord Chief Justice and a special jury, the jury found that the plaintiff and the defendant were not jointly interested in the business enterprise on the 15th Aug., 1932, and on the 27th Aug., 1932, and further that the defendant was not actuated by malice on the second occasion and they awarded £5000 damages. The defendant appealed on the ground that the damages were excessive and that the verdict was against the weight of evidence, and by an amendment which he asked for on the hearing of the appeal he contended that the Lord Chief Justice was wrong in holding that the occasion of the publication on the 15th Aug. was not privileged and that he should have decided as a matter of law that it was privileged. The Court of Appeal (Greer and Maugham, L.JJ.; Scrutton, L.J. dissenting) allowed the appeal and ordered a new trial upon the grounds (1) that as the points raised by the amendment to the notice of appeal were not covered by the notice without amendment, the amendment ought to be allowed, so as to leave no doubt on the record what the point was to which the court was directing its attention, and that on the facts proved and on the findings of the jury the contentions raised in the amendment were such that the appeal ought to be allowed, and (2) that the verdict for £5000 damages could not be described as fair and reasonable compensation for the damage the plaintiff had suffered. The Court of Appeal should interfere if it took the view that the punishment was out of all proportion to the offence. The plaintiff appealed.

Held, (1) that the two occasions were not privileged, and (2) that the amount of damages, substantial as it was, was well within the reasonable limits of a jury's discretion in such matters. Appeal allowed.

[Counsel: for the appellant, Sir *Stafford Cripps*, K.C. and *Valentine Holmes*; for the respondent, *T. J. O'Connor*, K.C. and *Theobald Mathew*. Solicitors: for the appellant, *Cardew Smith* and *Ross*; for the respondent, *Alfred E. Johnson*.]

### Bedwas Navigation Colliery Company (1921) Limited v. South Wales Coal Mines Scheme Executive Board.

(Lords Atkin, Tomlin, Thankerton, Macmillan and Wright.—July 24.)

*Mine—Coal—District coal mine scheme—Excess over quota—Contract before the 11th Dec., 1929—Excess solely occasioned by performance of contract—Reasonably necessary for performance of—Coal Mines Act, 1930 (20 & 21 Geo. 5, c. 34), s. 4, sub-ss. (1) and (2).*

Appeal from the decision of the Court of Appeal (Scrutton, Greer and Maugham, L.JJ.) (reported 151 L. T. Rep. 420; (1934) W. N. 149). By a contract made before the 11th Dec., 1929, a colliery company agreed to supply to a distillation company small coal for fifteen years at the rate of 750 tons a should intervene. By sect. 4, sub-sect. (1), of the Coal Mines Act, 1930, such a contract was not to be void or unenforceable by reason that it could not be performed without contravening the provisions of the scheme "unless the terms of the contract otherwise provide," and by sub-sect. (2) "Where the output of a coal mine exceeds during any period the quota of that mine for that period, the owner of the mine shall not be liable to any penalty under any district scheme . . . if it is adjudged . . . (*a*) that the excess was solely occasioned by the performance of contracts made before the 11th Dec., 1929; and (*b*) that the excess was reasonably necessary for the performance of those contracts." The colliery company during a quarter produced an excess of 11,608 tons over their quota, and for this the Executive Board imposed upon them a penalty. The colliery company referred the matter to an arbitrator, claiming that the excess, except as to 611 tons, was solely occasioned by the performance of the contract with the distillation company, and was reasonably necessary for the fulfilment of that contract. The arbitrator set out these facts in his award, and the contentions of the parties, and awarded that under the contract the colliery company were under no necessity to produce in excess of their quota, as the provisions for enforcing a quota constituted "restriction of output," and the production of the excess was not reasonably necessary for the performance of the contract. Accordingly, the production of the excess over the quota was not justified. The Court of Appeal held that there was no error of law shown on the face of the award. The question of reasonable necessity was a question of degree and of fact. On the issue whether the excess was solely occasioned by the performance of the contract, apart from the question of the 611 tons, by sect. 4, sub-sect. (1), of the Act of 1930 the contract was not to be void or unenforceable by reason that it could not be performed without contravening the provisions of the scheme "unless the terms of the contract otherwise provide," and by clause 10 of the contract the vendor was not to be held liable for failure to deliver coal if restrictions of output should intervene. The colliery company could, without liability to the distillation company, produce only the quantity necessary to comply with the quota. The colliery company appealed.

Held, that the expression in sect. 4, sub-sects. (2), (6), of the Coal Mines Act, 1930, that "the excess was solely occasioned by" did not mean "necessarily caused by." It probably meant that the excess was raised with the sole object of performing the contract, but if the colliery owner was under no legal obligation to make the delivery, the raising of the excess output could not be said to be necessary. Appeal dismissed.

[Counsel: for the appellants, *Wilfrid Greene*, K.C. and *Rabagliati*; for the respondents, Sir *Stafford Cripps*, K.C. and *Cyril Miller*. Solicitors: for the appellants, *B. A. Woolf* and *Co.*; for the respondents, *Savage Cooper* and *Wright*, agents for *W. H. F. Barklam*, Cardiff.]

## COURT OF APPEAL.

### H.M. Postmaster-General v. Birmingham Corporation.

(Slesser and Roche, L.JJ., and Swift, J.—July 26.)

*Telegraphs—Alteration of telegraph lines—Town planning scheme—Liability for cost of alterations—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 15—Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 7.*

Appeal from the decision of Goddard, J. (reported 153 L. T. Rep. 188; (1935) 1 K. B. 404) on a special case for the argument of a point of law, set down under R.S.C., Order XXV., r. 2. The defendants, in the course of carrying out a town planning scheme, widened and altered the level of certain streets, and this necessitated the taking down and subsequent re-erection of a number of telegraph posts and lines, at a cost of £916 15s. 9d. The question in dispute was whether this cost had to be borne by the plaintiff or the defendants. By the Telegraph Act, 1863, s. 15: "In case the body having the control of any street or public road at any

which they appeared against each other. The son having replied vigorously to his father's argument, the old man forgot time and place so far as to cry out: "Sit down, sir! How dare you use such words to your poor old father?" And such was Victorian family discipline that the son sat down!

AN EMBARRASSED PARENT.

An even more embarrassing situation once arose at the Cork Assizes when Mr. Justice Murphy went the circuit on which one of his sons was practising. The county court appeals were called on, and no one seemed to be in attendance. The first case was called. No answer. "Strike it out," said the judge. No answer to the second. "Strike it out." This went on till the tenth was ordered to be struck out. "What!" shouted a red-haired man at the back of the court, "strike out me case and me having your own son hired in it!" The judge apparently did not catch the drift of the protest. "Come forward, sir, if you have any application to make," he said. The man tramped and barged his way to the witness-box. "You have some application to make, my good man," said the judge, trying to conduct the conversation in a lower tone. "I'm telling you I have your own son hired and he's not here," shouted the indignant appellant. "You tell me that you have retained counsel in this case," translated the embarrassed parent. "'Tis your own son I hired." "And he is probably engaged in the other court." "He's not, but he's not here." "Under these exceptional circumstances, the case may stand for second calling."

# Obituary.

MR. A. ADAMS.

Mr. Alfred Adams, barrister-at-law, of Old Square, Lincoln's Inn, died on Sunday, 28th July. Mr. Adams was called to the Bar by Lincoln's Inn in 1888, of which Inn he was made a Bencher. He was an equity draftsman and conveyancer and for many years enjoyed a busy practice at the Chancery Bar.

MR. G. A. BAKER.

Mr. Godfrey Alexander Baker, B.A. Cantab., solicitor, head of the firm of Messrs. Futvoye & Baker, of John Street, Bedford Row, died on Saturday, 27th July, in his ninetieth year. Mr. Baker was admitted a solicitor in 1871.

MR. F. DAWES.

Mr. Frank Dawes, solicitor, senior partner in the firm of Messrs. Bonser & Dawes, of Oldbury, Worcs., died on Monday, 22nd July. Mr. Dawes served his articles with the late Mr. T. R. Bonser, and was admitted a solicitor in 1898.

MR. T. H. E. FOORD.

Mr. Thomas Herbert Edward Foord, retired solicitor, of Bromley, died on Saturday, 13th July, at the age of eighty-two. Mr. Foord, who was educated at Dulwich College, had been in practice in London as a solicitor for nearly forty years. He retired in 1923.

MR. A. E. LORD.

Mr. Arthur Edward Lord, solicitor, senior partner in the firm of Messrs. Lord & Parker, of Worcester, died at Downton, Radnorshire, on Tuesday, 23rd July, at the age of seventy. Mr. Lord, who was admitted a solicitor in 1887, had been Chairman of Martley Rural District Council for nine years. He had also been a member of Hallow Parish Council since about 1898, and was chairman for twenty-five years.

MR. R. M. ODDIE.

Mr. Roger Muir Oddie, solicitor, head of the firm of Messrs. Oddie & Roebuck, of Blackburn, died in a nursing home at Frodsham, on Friday, 26th July, at the age of fifty-three. Mr. Oddie was admitted a solicitor in 1906. He entered Blackburn Town Council in 1921, and became Chairman of the Finance Committee before his retirement in 1929.

MR. J. R. WOLFENDEN.

Mr. Joseph Richardson Wolfenden, LL.B., solicitor, of Liverpool, died recently at his home at Hoylake. Mr. Wolfenden, who was about forty years of age, was admitted a solicitor in 1920.

MR. T. H. WOODWARK.

Mr. Thomas Harwood Woodwark, J.P., retired solicitor, of Whitby, died on Tuesday, 16th July, in his seventy-ninth year. He was admitted a solicitor in 1878, and in 1883 he entered into partnership with Mr. Robert W. White in the firm of Messrs. Woodwark & White. He retired in 1915. Mr. Woodwark was a member of Whitby Urban District Council from 1895 to 1922, and was elected chairman on eight occasions. He was created a justice of the peace in 1922.

MR. J. R. S. YOUNG.

Mr. John Robert Spencer Young, M.B.E., solicitor, of Battersea, died in a nursing home on Saturday, 20th July, in his fifty-fourth year. He was educated in Wales, and was admitted a solicitor in 1904.

# Notes of Cases.

## House of Lords.

### Ley *v.* Hamilton.

Lord Atkin, Lord Tomlin, Lord Thankerton, Lord Macmillan and Lord Wright. 24th July, 1935.

LIBEL ACTION—DAMAGES RESTORED.

This was an appeal by Mr. Thomas John Ley from an order of the Court of Appeal dated 22nd June, 1934, ordering a new trial of the action in which Mr. Ley claimed damages for libel from Mr. J. W. O. Hamilton of Drayton-gardens, S.W.

The action was tried before the Lord Chief Justice and a special jury and judgment was given for Mr. Ley for £5,000 damages. The appellant, Mr. Ley, a solicitor of New South Wales, had been a member of Parliament in Australia and a cabinet minister of the Government of New South Wales. He was one of the representatives at Geneva. Since 1928 he had lived in this country and had been engaged in business here. Mr. Ley alleged that Mr. Hamilton published letters which libelled him and reflected on his integrity. The defendant said their publication was privileged. The jury awarded £5,000 damages and costs. The Court of Appeal, Lord Justice Scrutton dissenting, ordered the judgment of the Lord Chief Justice to be set aside as regarded the judgment on the claim and directed that there should be a new trial. Mr. Ley now appealed against that order.

LORD ATKIN, in giving judgment, said the libels complained of consisted of extracts from letters. They were obviously highly defamatory, and no defence of justification was put forward. The only substantial defence was a plea of privilege. That plea appeared to him capable of only one construction. He was quite unable to accept the view that the words of the plea "under a sense of duty" entitled the defendant to rely on any duty to make the communication, whether arising from the common business interest set out in the narrative part of the plea or not. If that were so, the particular facts pleaded would be misleading. He had no doubt, therefore, that the only privilege pleaded was as to an occasion created by a continuing joint business interest as narrated in the earlier part of the plea. The other matter which remained to be discussed was the question of damages. The majority of the Court of Appeal had come to the conclusion that the

verdict must be set aside on the ground that the damages were excessive. It was unfortunate that in this case, where there were separate torts, the damages were not separately assessed, but he saw no reason for inferring that the jury took into account any irrelevant consideration in fixing the amount in question. The libel was a gross imputation on a man who had held high position in Australia and whose character was unassailed, and in all the circumstances the amount of damages, substantial as it was, was well within the reasonable limits of a jury's discretion in such matters. In the present case he (his lordship) agreed in every particular with the judgment of the late Lord Justice Scrutton. He (Lord Atkin) was of opinion that the appeal should be allowed and the judgment directed by the Lord Chief Justice be restored with costs in that House and in the Court of Appeal.

The other noble and learned lords concurred.

COUNSEL: *Sir Stafford Cripps*, K.C., and *Valentine Holmes*; *T. J. O'Connor*, K.C., and *Theobald Mathew*.

SOLICITORS: *Cardew, Smith & Ross*; *Alfred E. Johnson*.

[Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.]

## High Court—Chancery Division.

### Archie Parnell and Alfred Zeitlin, Ltd. *v.* Theatre Royal (Drury Lane) Ltd.; Same *v.* Same, Cochran (Third Party).

Eve, J. 26th July, 1935.

CONTRACT — THEATRICAL — BREACH — TOURING RIGHTS — DAMAGES.

This was an action for damages for alleged breach of contract which was brought by Archie Parnell and Alfred Zeitlin, in which Theatre Royal (Drury Lane) Ltd. and Mr. Charles Blake Cochran, theatrical producer, of Old Bond Street, were defendants. The plaintiffs alleged that by an agreement in writing dated 8th July, 1932, between them and the defendants, the defendants granted to the plaintiffs the sole and exclusive licence to perform the play "Cavalcade," by Mr. Noel Coward, with living actors on tour in the provinces for a period of five years. By cl. 14 of the agreement it was provided that no mechanical reproduction of the play or any part thereof by talking films or pictures, television, broadcasting or otherwise howsoever shall be made or done in the territory aforesaid during the continuance of the rights thereby granted. The plaintiffs said the agreement was valueless to them unless it protected them from the advertising of a talking film reproduction of the play, and the showing of such a reproduction in the provinces. They also said that by the agreement the defendants impliedly contracted and warranted jointly that the motion picture rights and the motion picture copyright in the play had not already been sold, that they would not be sold and that they, the defendants, were and would continue to be in a position to prevent advertising or making a talking film of the play in the provinces during the continuance of the rights granted to the plaintiffs. The motion picture rights and motion picture copyright in the play, the plaintiffs said, had in fact been bought without restriction by the Fox Film Corporation from Noel Coward and C. B. Cochrane by agreement of 4th March, 1932. The plaintiffs had lost profits estimated at £60,000 and been put to other loss and expense. Theatre Royal Drury Lane, Ltd. denied liability and pleaded that their rights in the play had been sold without their knowledge or consent, and if they are held liable they claim against Mr. Cochran.

EVE, J., in giving judgment, said: "The plaintiffs are in my opinion entitled to recover damages for the breach from both defendants. The question is how much? No part of the claim is based on any loss sustained during the first tour, but it is pointed out that if notwithstanding the large sum expended in a first tour, substantial profits could be earned, it is not unreasonable to anticipate that further tours could be organised to earn a similar rate of profit. I think there [illegible] this part of the claim a tendency to exaggerate the reduction in the cost of the second and subsequent tours and the same criticism applies to the far more important claim for lost profits. But the bargain was that the plaintiffs should enjoy for a period of five years the exclusive right in the particular territory to produce the play with living actors free from the competition involved in the mechanical reproduction of the play by talking films. They still are exposed to the competition of the mechanical reproduction against which cl. 14 was framed, and have suffered a loss which I fix at the sum of £5,000. I give the plaintiffs judgment for that amount with costs." The further hearing of the third party proceedings was adjourned until next term.

COUNSEL: *Sir Patrick Hastings*, K.C., *Vaisey*, K.C., and *Theobald Mathew*; *Beyfus*, K.C., and *K. E. Shelley*; *Sir William Jowitt*, K.C., and *Wynn Parry*.

SOLICITORS: *S. Myers & Son*; *Gery & Brooks*; *J. D. Langton & Passmore*.

[Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.]

## High Court—King's Bench Division.

### Locker & Woolf Ltd. *v.* Western Australian Insurance Co. Ltd.; Same *v.* Same (Motion).

Swift, J. 10th, 11th July, 1935.

INSURANCE (FIRE)—QUESTIONS IN PROPOSAL FORM—NON-DISCLOSURE AND CONCEALMENT—WHETHER OF MATERIAL FACTS—QUESTION FOR ARBITRATOR—REPUDIATION OF POLICY BY INSURERS—SALVAGE—INSURERS TAKE POSSESSION BEFORE REPUDIATION—WHETHER ESTOPPED.

Motion by policy-holders to set aside an award made by an arbitrator under the Arbitration Act, 1889.

On the 13th of January, 1932, the appellants, trading as "Locker & Woolf," effected a fire insurance policy with the respondents in respect of stock-in-trade, fixtures, etc., at premises in Birmingham. On the 11th April, 1934, a fire occurred causing damage at the premises and the appellants duly made a claim under the policy. In the proposal form for the policy the appellants had stated as their only previous loss by fire "£5 sea," and that no insurance of theirs had ever been declined by any company. In fact, Woolf had suffered damage from a fire in 1919, and in 1930 an insurance company had declined the appellant's proposal for a motor insurance policy. On the 12th April, 1934, the respondents instructed a firm of fire assessors to act for them. The assessors duly took possession of the salvage on the premises and it was disposed of by auctioneers on their instructions. The insurers subsequently repudiated liability under the policy and the matter came before an arbitrator who decided that there had been non-disclosure of material facts in the proposal form for the policy, which justified the respondents in repudiating, and that they were not estopped from doing so by anything which had occurred between the dates of the fire and the repudiation.

SWIFT, J., said that it had been contended for the appellants that there had been no evidence before the arbitrator enabling him to say, having found the facts relative to the non-disclosure, that that non-disclosure was of material facts, and that there must be some such evidence on which he could act. The law on the matter was not even now finally settled. No statute had affected it since 1766, when it had been considered in *Carter* v. *Boehm*, 3 Burr. 1905. The words used by Lord Mansfield there had meant that the evidence of an expert to say whether or not a concealment of fact was material to the making of a policy was inadmissible and that the Court must decide the question without it. That authority was therefore directly contrary to Mr. Samuels' contention. The question had been considered in several more modern cases, namely, *Becker* v. *Marshall* [1922] 12 Ll. L. Rep., p. 413; *Glasgow Assurance Corporation Limited* v. *Symondson and Co.* 16 Com. Cas. 109; and *Glicksman* v. *Lancashire and*

RANK 1 OF 4, PAGE 1 OF 4, DB NRS

231 ATLANTIC PROVINCES REPORTS

205

(231 A.P.R. 205)

GERARD KAVANAGH & GARY CARROLL (plaintiffs) v. CANADIAN TIRE CORPORATION LIMITED (defendant)

1988 St. J. No. 382

INDEXED AS: KAVANAGH and CARROLL v. CANADIAN TIRE CORP. LTD.

74 NEWFOUNDLAND & PRINCE EDWARD ISLAND REPORTS 205

(74 Nfld. & P.E.I.R. 205)

Newfoundland Supreme Court

Trial Division

Lang, J.

March 9, 1989.

SUMMARY:

The plaintiffs commenced an action against Canadian Tire Corporation for damages for wrongful imprisonment.

The Newfoundland Supreme Court, Trial Division, allowed the action and assessed damages accordingly.

DAMAGE AWARDS - TOPIC 630

RANK 1 OF 4, PAGE 2 OF 4, DB NRS

Torts - Injury to the person - False or unlawful imprisonment - [See Torts - Topic 3252 below].

TORTS - TOPIC 3252

Trespass - False imprisonment - What constitutes - Carroll and Kavanagh were shopping at Canadian Tire - Carroll picked up a wheel cylinder kit for Kavanagh, who was picking up other items - Carroll left the store first leaving the kit on the checkout counter for Kavanagh - Kavanagh paid for his items, but did not notice the kit on the counter and left the store without the kit - Carroll and Kavanagh were approached outside the store by three store employees who demanded to know where the kit was - Carroll and Kavanagh were told to return to the store, whereupon the kit was found - The Newfoundland Supreme Court, Trial Division, reviewed the law on false imprisonment and held that Carroll and Kavanagh were falsely imprisoned - The court awarded them each $1,500.00 damages.

CASES NOTICED:

Hayward v. F.W. Woolworth Co. Limited et al. (1979), 23 Nfld. & P.E.I.R. 17; 61 A.P.R.

RANK 1 OF 4, PAGE 3 OF 4, DB NRS

17, refd to. [paras. 84, 93].

Kendall v. Gambler Can. Ltd., [1981] 4 W.W.R. 718; 11 Sask. R. 361 (Q.B.), refd to.

[paras. 84, 93].
Otto v. Wallace (J. Grant) and Meyers, [1988] 2 W.W.R. 728; 84 A.R. 391; 57 Alta. L.R.(2d) 81; 47 D.L.R.(4th) 439 (Q.B.), refd to. [paras. 87, 88, 89, 91, 94].
Smart v. Simpson Sears Ltd. (1984), 51 Nfld. & P.E.I.R. 215; 150 A.P.R. 215, affd. 64 Nfld. & P.E.I.R. 187; 197 A.P.R. 187; 36 D.L.R.(4th) 756 (Nfld. C.A.), consd. [paras. 85, 87, 100107].
Frey v. Fedoruk, [1950] S.C.R. 517, refd to. [paras. 89, 90].
Karogiannis v. Poulus, [1976] 6 W.W.R. 197 (B.C.S.C.), refd



to. [para. 95].
Dendekker v. F.W. Woolworth Co. Ltd. et al. [1975] 3 W.W.R. 429, refd to. [para. 95].
Walters v. W.H. Smith & Son Limited, [1914] K.B. 595, refd to. [para. 104].
McKenzie v. Gibson (1852), 8 V.C.R. 100, refd to. [para. 104].
AUTHORS AND WORKS NOTICED:
Klar, Linden, Cherniak and Kryworuk, Remedies and Torts, vol. 1, c. 7 [para. 87]; pp. 7-12, 7-13 [para. 97].
COUNSEL:
Terence Rowe, for the plaintiffs;
Kenneth Templeman, for the defendant.
END OF DOCUMENT.

HER MAJESTY THE QUEEN
(appellant/
defendant) v. CHARLES LAWRENCE
LeBAR
(respondent/plaintiff)
(A-44-87)
INDEXED AS: LeBAR v. CANADA
90 NATIONAL REPORTER 5;
(90 N.R. 5).
Federal Court of Appeal

Urie, Mahoney, MacGuigan, JJ.
October 27, 1988.

Summary:

LeBar was serving sentences for robbery and escaping lawful custody. During his incarceration the Federal Court of Appeal issued a declaratory decision in R. v. MacIntyre, 44 N.R. 361, wherein the court expressed a method of calculating the term of imprisonment to be served by escapers before their release. LeBar alleged that the R. v.

MacIntyre decision applied to him, making his release date August 10, 1982. The correctional authorities held him until September 22, 1982. LeBar commenced an action for a declaration



that the R. v. MacIntyre decision applied to him and for damages for unlawful imprisonment.

The Federal Court of Canada, Trial Division, in a decision reported in 8 F.T.R. 250, allowed LeBar's action. The court declared that LeBar was entitled to have his term of imprisonment calculated in accordance with the Federal Court of Appeal's decision in R. v. MacIntyre. The court awarded LeBar $430 general damages and $10,000 exemplary damages. The Crown appealed the award of exemplary damages. LeBar appealed both damage awards.

The Federal Court of Appeal dismissed both appeals.

Constitutional Law - Topic 114

Definitions - Rule of law - The Feder al Court of Appeal stated that the necessity for the government and its officials to obey the law is the fundamental aspect of the principle of the rule of law - The rule of law must in all events mean "the law is supreme" and that officials of the government have no option to disobey it - See paragraph 11.

Courts - Topic 8

Precedents - Court of Appeal - Weight - Declaratory judgments - The Crown obtained a declaratory judgment in the Federal Court of Appeal respecting a prisoner's release



date - The Federal Court of Appeal held that the declaratory judgment become a binding precedent and was binding on the Crown in a similar case involving a different prisoner - See paragraph 9.

Criminal Law - Topic 5662.2

Punishments (sentence) - Imprisonment - Term of - Effect of declaratory judgments re other prisoners in similar circumstances - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a declaratory judgment (R. v. MacIntyre), which set out how to calculate the term of imprisonment for escapers - LeBar argued that the decision applied to him, making his release date August 10, 1982 - The correctional au thorities held him until September 22, 1982 - He sued for damages - The Crown argued that R. v. MacIntyre, be ing a declaratory judgment, did not apply to LeBar - The Federal Court of

Appeal affirmed that the Crown was bound by R. v. MacIntyre.

Damage Awards - Topic 630

Torts affecting the person - False or unlawful imprisonment - Correctional authorities improperly detained a prisoner (LeBar) for 43 days after his release date - LeBar sued



for damages for unlawful imprisonment - The Federal Court of Appeal affirmed an award of $10 per day general damages ($430) to LeBar for his wrongful imprisonment - The court also affirmed an award of $10,000 exemplary damages for the correctional authorities' legally unjustifiable conduct - See paragraphs 17 to 27.

Damage Awards - Topic 2012

Exemplary or punitive damages - False imprisonment - [See Damages - Topic 1303 below].

Damages - Topic 1297

Exemplary or punitive damages - Condi tions precedent - The Federal Court of Appeal held that malice or bad faith was not a requirement for the awarding of exemplary damages against the Crown - The only requirement was oppressive, arbitrary or unconstitutional action by the servants of the government - See paragraphs 17 to 19.

Damages - Topic 1303

Exemplary or punitive damages - False or unlawful imprisonment - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a decision setting out how to calculate the term of imprisonment to be served by escapers (R. v. MacIntyre) -



LeBar argued that R. v. Mac-Intyre applied to him and that his re lease date should be August 10, 1982 - The correctional authorities disagreed and held him until September 22, 1982 - LeBar sued for damages for unlawful imprisonment - The Federal Court of Appeal affirmed that the R. v. MacIntyre decision applied to Le-Bar and awarded him $10,000 exemplary damages (plus general damages), for the legally unjustifiable conduct of the correctional authorities in holding him 43 days past his proper release date.

Damages - Topic 2441

Torts affecting the person - False or unlawful imprisonment - General - [See Damage Awards - Topic 630 above].

Estoppel - Topic 386

Estoppel by record - Res judicata as a bar to subsequent proceedings - Issues decided in prior proceedings - The Crown obtained a declaratory judg ment in the Federal Court of Appeal respecting a prisoner's release date - The Federal Court of Appeal affirmed that the issue determined by the declaration became res judicata between the parties and a binding prece dent - Accordingly, the court affirmed that the judgment was binding on the Crown in a similar

case involving a different prisoner - See paragraphs 6 to 9.

Practice - Topic 5656

Judgments and orders - Declaratory judgments - Scope and content - Whether binding - [See Courts - Topic 8 above].

Practice - Topic 5656

Judgments and orders - Declaratory judgments - Scope and content - Whether binding - [See Criminal Law - Topic 5662.2 above].

Cases Noticed

R. v. MacIntyre, [1983] 1 F.C. 603; 44 N.R. 361, appld. [para. 4].

Letter Carrier's Union of Canada v. Canada Post Corporation (1986), 8 F.T.R. 93, refd to. [para. 7].

Emms v. Minister of Indian Affairs and Northern Development and Public Service Commission, [1979] 2 S.C.R. 1148; 29 N.R. 156, refd to.



[para. 8].

Emms v. Minister of Indian Affairs and Northern Development and Public Service Commission, [1978] 2 F.C. 174; 17 N.R. 14, refd to. [para. 8].

Ouimet v. Canada, [1979] 1 F.C. 55; 21 N.R. 247, refd to. [para. 8].

Dyson v. Attorney General, [1911] 1 K.B. 410 (C.A.), refd to. [para. 9].

Manitoba Language Rights Reference, [1985] 1 S.C.R. 721; 59 N.R. 321; 35 Man. R.(2d) 83, refd to. [para. 11].

British Columbia Government Employees' Union v. British Columbia (Attorney General) (1988), 87 N.R. 241, refd to. [para. 11].



Gould v. Attorney General of Canada et al., [1984] 1 F.C. 1119 (F.C. T.D.); [1984] 1 F.C. 1133; 54 N.R. 232 (F.C.A.),

affd. (1984), 53 N.R. 394; 13 D.L.R.(4th) 491 (S.C.C.), refd to. [para. 12].
R. v. Sowa (1979), 1 Sask. R. 162; 50 C.C.C.(2d) 513, refd to. [para. 15].
Rookes v. Barnard, [1964] 1 All E.R. 367, refd to. [para. 18].
Broom v. Cassell & Co., [1972] A.C. 1027, refd to. [para. 19].
Andrews et al. v. Grand & Toy (Alberta) Ltd., [1978] 2 S.C.R. 229; 19 N.R. 50; 8 A.R. 182; [1978] 1 W.W.R. 557; 3 C.C.L.T. 225; 83 D.L.R.(3d) 452, refd to. [para. 24].
Teno et al. v. Arnold et al.,



[1978] 2 S.C.R. 287; 19 N.R. 1; 3 C.C.L.T. 372; 83 D.L.R.(3d) 609, refd to. [para. 24].
Thornton et al. v. Board of School Trustees of School District No. 57 (Prince George) et al., [1978] 2 S.C.R. 267; 19 N.R. 552; [1978] 1 W.W.R. 607; 3 C.C.L.T. 257; 83 D.L. R.(3d) 480, refd to. [para. 24].
Lindal v. Lindal, [1981] 2 S.C.R. 629; 39 N.R. 361; [1982] 1 W.W.R. 433; 129 D.L.R.(3d) 263, refd to. [para. 24].
Statutes Noticed
Criminal Code, R.S.C. 1970, c. C-34, s. 137 [para. 5].
Canadian Charter of Rights and Freedoms, 1982, preamble



[para. 11].
Authors and Works Noticed
Wade, H.W.R., Administrative Law (5th Ed.), p. 523 [para. 6].
de Smith, Judicial Review of Administrative Action (4th Ed. 1980), by J.M. Evans, p. 475 [para. 9].
Dicey, A.V., Introduction to

the Study of the Law of the Constitution (10th Ed. 1959), by E.C.S. Wade, pp. 193, 202-203 [para. 11].

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Fergus O'Connor, for the respondent.

Solicitors of Record:

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CHARLES LAWRENCE LeBAR v. HER MAJESTY THE QUEEN
T-7306-82

INDEXED AS: LeBAR v. CANADA

8 FEDERAL TRIAL REPORTS 250 (8 F.T.R. 250)

Federal Court of Canada
Trial Division
Muldoon, J.
January 12, 1987.

Summary:
LeBar was serving sentences for robbery and escaping lawful

custody. During his incarceration the Federal Court of Appeal issued a declaratory decision in R. v. MacIntyre, 44 N.R. 361, wherein the court expressed a method of calculating the term of imprisonment to be served by escapers before their release. LeBar alleged that the R. v. MacIntyre decision applied to him making his release date August 10, 1982. The correctional


authorities held him until September 22, 1982. LeBar commenced an action for a declaration that the R. v. Mac-Intyre decision applied to him and for damages for unlawful imprisonment.

The Federal Court of Canada, Trial Division, allowed LeBar's action. The court declared that LeBar was entitled to have his term of imprisonment calculated in accordance with the Federal Court of Appeal's decision in R. v. MacIntyre. The court awarded LeBar $430 general damages and $10,000 exemplary damages.

Courts - Topic 8
Precedents - Court of Appeal - Weight - Declaratory judgments - The Crown obtained a declaratory judgment in the Federal Court of Appeal respecting a prisoner's release date - The Federal Court of Canada, Trial Division, discussed whether the declara tory judgment was binding on the Crown in a similar case involving a different prisoner on the basis of stare decisis - See paragraphs 9 to 26.

Criminal Law - Topic 5662.2
Punishments (sentence) - Imprisonment - Term of - Effect of


declaratory judgments re other prisoners in similar circumstances - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a declaratory judgment (R. v. MacIntyre) which set out how to calculate the term of imprisonment for escapers - Lebar argued that the decision applied to him making his release date August 10, 1982 - The correctional authorities held him until September 22, 1982 - He sued for damages - The Crown argued that R. v. MacIntyre, being a declaratory judgment, did not apply to LeBar - The Federal Court of Canada, Trial Division, held that the Crown was bound by R. v. MacIntyre and stated "it is, if not perfectly res judicata so as to bind these parties in an issue estoppel, then at least it is a matter of stare decisis by which the defendant [the Crown] ought to abide in computing the plaintiff's [LeBar's] term of imprisonment" - See paragraphs 1 to 27.

Damage Awards - Topic 630
Torts affecting the person - False or unlawful imprisonment - Correction authorities improperly detained a prisoner (LeBar) for 43 days after his release date - LeBar sued

for damages for unlawful imprisonment - The Federal Court of Canada, Trial Division, discussed its approach to the assessment of such damages and awarded LeBar $10 per day ($430) general damages for his wrongful imprisonment - The court held that because the prisoner had been involved in criminal activity over the years and incarcerated frequently he had devalued the worth of his liberty thus lowering his general damages considerably - The court also awarded the prisoner $10,000 exemplary damages for the correctional authorities' legally unjustifiable conduct - See paragraphs 28 to 56.

Damages - Topic 1303

Exemplary or punitive damages - False or unlawful imprisonment - LeBar was serving time for robbery and escaping custody - The Federal Court of Appeal issued a decision setting out how to calculate the terms of imprisonment to be served by escapers (R. v. Mac-Intyre) - LeBar argued that the R. v. MacIntyre decision applied to him and his release date should be August 10, 1982 - The correctional authorities held him until September 22, 1982, arguing that the R. v. MacIntyre decision did not apply to



LeBar - LeBar sued for damages for unlawful imprisonment - The Federal Court of Canada, Trial Division, held that the R. v. MacIntyre decision applied to LeBar and awarded him $10,000 exemplary damages (plus general damages) for the legally unjustifiable conduct of the correctional authorities in holding him 43 days past his proper release date - See paragraphs 49 to 56.

Damages - Topic 2441

Torts affecting the person - False or unlawful imprisonment - General - [See Damage Awards - Topic 630 above].

Estoppel - Topic 386

Estoppel by record (res judicata) - Res judicata as a bar to subsequent proceedings - Issues decided in prior proceedings - The Crown obtained a declaratory judgment in the Federal Court of Appeal respecting a prisoner's release date - The Federal Court of Canada, Trial Division, discussed whether the declaratory judgment was binding on the Crown in a similar case involving a different prisoner on the basis of res judicata - See paragraphs 9 to 26.



Practice - Topic 5656

Judgments and orders - Declaratory judgments - Scope and content - Whether binding - [See Criminal Law - 5662.2 above].

Cases Noticed
R. v. MacIntyre, [1983] 1 F.C. 603; 44 N.R. 361, appld. [para. 4 et seq.].
Dyson v. Attorney-General, [1911] 1 K.B. 410; [1912] 1 Ch. 158, refd to. [para. 10].
Canadian Warehousing Association v. R., [1969] S.C.R. 176, refd to. [paras. 10, 12].
Cavanaugh v. Commissioner of Penitentiaries, [1974] 1 F.C. 515, not appld.

[paras. 10, 11].
Angle v. M.N.R., [1975] 2


S.C.R. 248; 2 N.R. 397; 47 D.L.R.(3d) 544, refd to. [paras. 10, 13].
Emms v. R., [1979] 2 S.C.R. 1148; 102 D.L.R.(3d) 193, refd to. [paras. 10, 17].
Minister of Employment and Immigration v. Widmont, [1984] 2 F.C. 274; 56 N.R. 198, refd to. [para. 23].
Maxie v. National Parole Board, [1985] 2 F.C. 163, refd to. [para. 24].
Cdn. Transport (U.K.) Limited v. Alsbury & al. (1952-53), 7 W.W.R. (N.S.) 49, refd to. [para. 26].
Liberty Ornamental Iron Ltd. v. B. Fertleman & Sons Ltd., [1977] 1 F.C. 584; 13 N.R. 552, refd to. [para. 26].
Bradley v. Town of Woodstock


(1978), 22 N.B.R.(2d) 45; 39 A.P.R. 45 (Q.B.), refd to. [para. 36].
Campbell v. S.S. Kresge Co. Ltd. (1976), 21 N.S.R.(2d) 236; 28 A.P.R. 236; 74

D.L.R.(3d) 717 (N.S.S.C.), refd to. [para. 36].
Eagle Motors v. Makoff, [1971]

1 W.W.R. 527 (B.C.C.A.),
refd to. [para. 36].
Bahner v. Marwest Hotel (1970),
75 W.W.R.(N.S.) 729
(B.C.C.A.), refd to. [para.
36].
Roberts v. Buster's Auto Towing
(1976), 70 D.L.R.(3d) 716
(B.C. S.C.), refd to.
[para. 36].
Hayward v. F.W. Woolworth Co.
Ltd. (1979), 23 Nfld. &



P.E.I.R. 17; 61 A.P.R. 17; 98
D.L.R.(3d) 345 (Nfld. S.C.),
refd to. [para. 36].
Carpenter & al. v. MacDonald &
al. (1978), 21 O.R.(2d) 165
(Ont. D.C.), refd to. [para.
36].
Tanner v. Norys, [1979] 5
W.W.R. 724; 21 A.R. 410 (Alta.
S.C.), revsd. [1980] 4 W.W.R.
33; 21 A.R. 372 (C.A.), leave
to appeal refused, [1980] 1
S.C.R. xiii; 25 A.R. 274,
consd. [paras. 37, 38].
Hejduk v. The Queen (B.C.),

[1981] 4 W.W.R. 122
(B.C.S.C.), consd. [paras. 37,
40].

Authors and Works Noticed
Herman and Hayden, Issue



Estoppel and Mutuality of
Parties (1986), 64 Can. Bar
Rev. 437 [para. 21].
Linden, Canadian Tort Law (3rd
Ed. 1982), pp. 44, 45 [para.
29]; 51 [para. 52].
Sarna, L., The Law of
Declaratory Judgments
(1978), pp. 176-178 [para.
10].
Zamir, The Declaratory Judgment
(1962), pp. 1-3, 247-252,
282-284 [para. 10].

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Donald J. Rennie, for the
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Indexed as:
Watters v. Glace Bay (Town) (N.S.C.A.)

Between:
Charles Watters, Appellant, and
The Town of Glace Bay, Glace Bay Police Department, Mike MacLean, David Hillier, and Donald Roper, Roper Construction Company and D. Roper Services Limited, Respondents

Nova Scotia Judgments: [1987] N.S.J. No. 62
Also reported at 34 D.L.R. (4th) 747
Action No. S.C.A. 01586

Nova Scotia Supreme Court - Appeal Division
Clarke C.J.N.S., Hart and Matthews JJ.A.
Heard: January 27, 1987
Judgment: February 9, 1987

Municipal law -- Authority to demolish buildings -- Damages.

The appellant had brought an action for damages against the



Town of Glace Bay after a property owned by him was demolished; he had also sought damages for false imprisonment after he was removed without force from the site of the building and detained for a short time. At trial is was held [72 N.S.R. (2d) 219; N.S.L.N. 12:77] that the Town was justified in demolishing the premises, since it had been unsightly for many years and the owner had received several notices to remedy it. Since the appellant had been obstructing the lawful removal of debris when arrested, his action for false imprisonment also failed at trial.

Held, allowing the appeal, that the Town did not have the authority to demolish the building since "remedy" in s. 224(4) does not include the authority to demolish or destroy a building. The appellant succeeded on this issue and on the issue of wrongful imprisonment; since he had not proved that he suffered any loss due to the demolition of the building, $500 damages were awarded for the unlawful demolition and the false imprisonment. [Nova Scotia Law News, vol. 13, no. 4.]

William R. Burke, for the appellant.
David Miller and D. Geoffrey Machum, for the respondents.

106(1) of the *Children and Young Persons Act* 1933 (orders to be under hand of the Secretary of State or of an Under-Secretary or Assistant Under-Secretary of State).

*Computation of sentence—time passed in care of local authority in accommodation provided for restricting liberty*

**130.**—(1) At the end of section 67(1A) of the *Criminal Justice Act* 1967 there shall be added the words "or—

(*c*) any period during which, in connection with the offence for which the sentence was passed, he was in the care of a local authority by virtue of an order under section 23 of the *Children and Young Persons Act* 1969 and in accommodation provided for the purpose of restricting liberty.".

(2) This section shall not have effect in relation to any sentence imposed before it comes into force.

## PART X

## PROBATION AND THE PROBATION SERVICE, ETC.

*Bail: hostel conditions*

**131.**—(1) In section 3 of the *Bail Act* 1976 (grant of bail) the following subsection shall be inserted after subsection (6)—

"(6ZA) Where he is required under subsection (6) above to reside in a bail hostel or probation hostel, he may also be required to comply with the rules of the hostel.".

(2) In paragraph 8 of Schedule 1 to that Act (restrictions on bail conditions) at the end of sub-paragraph (1) there shall be added the words "or, where the condition is that the defendant reside in a bail hostel or probation hostel, that it is necessary to impose it to assess his suitability for being dealt with for the offence in a way which would involve a period of residence in a probation hostel.".

*Administration of the probation service etc.*

**132.** The amendments specified in Schedule 11 to this Act, being miscellaneous amendments relating to the probation service and committees constituted in relation to it, shall have effect.

## PART XI

## MISCELLANEOUS

### Miscarriages of justice

*Compensation for miscarriages of justice*

**133.**—(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal

representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of compensation shall be assessed by an assessor appointed by the Secretary of State.

(5) In this section "reversed" shall be construed as referring to a conviction having been quashed—

(*a*) on an appeal out of time; or

(*b*) on a reference—

(i) under section 17 of the *Criminal Appeal Act* 1968;

(ii) under section 263 of the *Criminal Procedure (Scotland) Act* 1975; or

(iii) under section 14 of the *Criminal Appeal (Northern Ireland) Act* 1980.

(6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.

(7) Schedule 12 shall have effect.

## Torture

*Torture*

**134.**—(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—

(*a*) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(*b*) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section "lawful authority, justification or excuse" means—

(*a*) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(*b*) in relation to pain or suffering inflicted outside the United Kingdom—





(i) if it was inflicted
the law of the U
official capacity
tion or excuse un

(ii) if it was inflicted
the law of any p
acting in an offic
ority, justificatio
United Kingdom

(iii) in any other cas
under the law of

(6) A person who commit
conviction on indictment to i

*Requirement of Attorney General'*

**135.** Proceedings for an of
begun—

(*a*) in England and Wale
Attorney General; or

(*b*) in Northern Ireland,
Attorney General for

*Extradition under 1870 Act*

**136.**—(1) Torture shall be
dition crimes contained in Sc

(2) For the purposes of the
wherever committed, which
offence against the law of an
*Act* 1870 has been applied by
that Act shall be deemed to
diction of that State.

[Section 136 is repealed by the
section 38(4) of that Act, *post*, §§

*Extradition under Part I*

**137.**—(1)–(3) [*Repealed by*
this supplement.)

(4) For the purposes of the
section (2) above, in their app
under this section as betwee
State, any act or omission, wh

(*a*) an offence mentioned i

(*b*) an offence against the l
shall be deemed to be an offen
State.

(5) In this section "the
Nations Convention Against
Degrading Treatment or
Assembly of the United Natio

*Application to Channel Islands, Is*

**138.**—(1) Her Majesty may
extending sections 134 and 13

(*b*) for references to an offender there were substituted references to a supervised person; and

(*c*) subsection (13) were omitted.

(2) Sections 18 and 19 of the *Criminal Justice Act* 1982 (discharge and variation of attendance centre order and breach of attendance centre orders or attendance centre rules) shall also apply for the purposes of each of those paragraphs but as if—

(*a*) for the references to an offender there were substituted references to the person in respect of whom the attendance centre order has been made; and

(*b*) there were omitted—

(i) from subsections (3) and (5) of section 19, the words ", for the offence in respect of which the order was made," and "for that offence"; and

(ii) from subsection (6), the words "for an offence".

Section 132

## SCHEDULE 11

### Administration of the Probation Service Etc.

*Amendments of Schedule 3 to Powers of Criminal Courts Act 1973*

*Amendment of Local Government Finance Act 1982*

Section 133

## SCHEDULE 12

### Assessors of Compensation for Miscarriages of Justice

1. A person may only be appointed to be an assessor for the purposes of section 133 above if he is—

(*a*) a barrister practising in England and Wales or Northern Ireland;

(*b*) an advocate practising in Scotland;

(*c*) a solicitor practising in any part of the United Kingdom;

(*d*) a person who holds or has held judicial office in any part of the United Kingdom; or

(*e*) a member (whether the chairman or not) of the Criminal Injuries Compensation Board.

2. A person shall hold and vacate office as an assessor in accordance with the terms of his appointment.

3. A person shall vacate office as an assessor—

(*a*) if he ceases to be qualified for appointment as an assessor; or

(*b*) on attaining the age of 72;

unless the Secretary of State considers that it is in the interests of the efficient operation of section 133 above that he should continue to hold office.

4. A person may at any time resign his office as an assessor by giving the Secretary of State notice in writing to that effect.

5. Subject to paragraph 6 below, the Secretary of State may at any time remove a person from office as an assessor if satisfied that—

(*a*) he has been convicted of a criminal offence;

(*b*) he has become bankrupt or has had his estate sequestrated or has made an arrangement with, or granted a trust deed for, his creditors;

(*c*) he is incapacitated by physical or mental illness; or

(*d*) he is otherwise unable or unfit to perform his duties.

6. The power conferred by paragraph 5 above shall only be exercisable—

(*a*) in the case of a person who practises or has practised as a barrister or solicitor in England and Wales or Northern Ireland or who holds or has held judicial office in any of those parts of the United Kingdom, with the consent of the Lord Chancellor; and

(*b*) in the case of a person who practises or has practised as an advocate or solicitor in Scotland or who holds or has held judicial office there, with the consent of the Lord President of the Court of Session.

7. An assessor shall be paid such remuneration and allowances as the Secretary of State may, with the approval of the Treasury, determine.

Section 146

## SCHEDULE 13

## Evidence Before Courts-Martial Etc.

*Interpretation*

1. In this Schedule—

"procedural instruments" means—

(*a*) Rules of Procedure under section 103 of the *Army Act* 1955 or section 103 of the *Air Force Act* 1955;

(*b*) General Orders under section 58 of the *Naval Discipline Act* 1957;

(*c*) rules under section 49 of the *Courts-Martial (Appeals) Act* 1968; and

(*d*) orders under paragraph 12 of Schedule 3 to the *Armed Forces Act* 1976; and

"Service courts" means—

(*a*) courts-martial constituted under the *Army Act* 1955 or the *Air Force Act* 1955;

(*b*) courts-martial constituted under the *Naval Discipline Act* 1957 and disciplinary courts constituted under section 50 of that Act;

(*c*) the Courts-Martial Appeal Court; and

(*d*) Standing Civilian Courts.

*First-hand hearsay*

2. Sections 23 and 24 above shall have effect in relation to proceedings in the United Kingdom or elsewhere before Service courts with the substitution of the following sub-paragraph for section 23(2)(*b*)(i)—

"(i) the person who made the statement is not in the country where the court is sitting; and".

*Documentary evidence*

3. Section 25 above shall have effect in relation to proceedings in the United Kingdom or elsewhere before Service courts as if such proceedings were mentioned in subsection (1) of that section.

4. In section 26 above—

(*a*) the reference to criminal proceedings in paragraph (*a*) includes summary proceedings under section 77 of the *Army Act* 1955, section 77 of the *Air Force Act* 1955 or section 49 of the *Naval Discipline Act* 1957; and

(*b*) in paragraph (*b*) "criminal investigation" includes any investigation which may lead—

(i) to proceedings before a court-martial or Standing Civilian Court; or

(ii) to summary proceedings such as are mentioned in sub-paragraph (*a*) above.

5. Without prejudice to the generality of any enactment conferring power to make them, procedural instruments may make such provision as appears to the authority making any of them to be necessary or expedient for the purposes of Part II of this Act.

*Letters of request etc.*

6.—(1) In section 29 above "criminal proceedings" does not include proceedings before a Service court, but the Secretary of State may by order make provision as to letters of request or corresponding documents for such proceedings.

(2) An order under this paragraph may make different provision for different classes of case.



*Supplem*

(3) The power to make an or
statutory instrument and a st
shall be subject to annulment
Parliament.

(4) Without prejudice to the
make procedural instruments,
vision as appears to the author
relation to letters of request or
a Service court.

*Form*

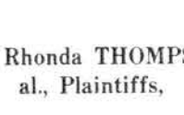
7. For the purpose of helping
(*a*) of courts-martial constit
1955; or
(*b*) of courts-martial constit
plinary courts constitute
to understand complicated issu
under section 103 of either of t
under section 58 of the *Naval Di*
(i) as to the furnishing of e
tence of admissible mate
form would be derived; a
(ii) as to the furnishing of glo
in any case where the court gives
be so furnished.

*Us*

8.—(1) The Secretary of State
above shall have effect in relation
(*a*) to proceedings before Ser
(*b*) to proceedings or procee
courts in specified places.
(2) If an order is made under t
(*a*) subsection (1) of section
court to which the order
paragraph for paragraph
"(*a*) the witness is not in t
(*b*) subsection (2) of that sec
court with the substitutio
ence to a civil offence unc
1955 or section 42 of the A
corresponding civil offence
offence.
(3) An order under this paragr
above shall have effect in relation
ject to such modifications as may
modifications for which sub-parag
(4) The power to make an order
able by statutory instrument and
order shall be subject to annulmen
of Parliament.
(5) Without prejudice to the ge
make procedural instruments, pr
vision as appears to the authority
the purposes of section 32(1) to
such as are mentioned in sub-para
that sub-paragraph.
(6) In this paragraph "modifi
amendments.

Part B claims. Should plaintiff, even after the Secretary's determination, make a claim for payment under Part B, and should said claim be denied or not acted upon expeditiously, plaintiff would have a right to the review proceedings established in 20 CFR 405.801 et seq. The same would hold true with respect to a disagreement over the amount of payment. In the instant situation, however, Section 1395u(b)(3)(C) of the Medicare Act is inapplicable.

Wherefore, in view of the aforementioned, the present action is hereby dismissed without costs. Judgment shall be entered accordingly.




**Evelyn Rhonda THOMPSON et al., Plaintiffs,**

**v.**

**The OFFSHORE COMPANY et al., Defendants.**

**Civ. A. No. 74-H-1632.**

United States District Court,
S. D. Texas,
Houston Division.

July 7, 1977.

Survivors of four Americans who were killed while working on a drilling rig in the Gulf of Suez brought action to recover damages sustained as a result of the deaths. Defendants stipulated liability and the cause proceeded to trial on the issue of damages. The District Court, Carl O. Bue, Jr., J., held that: (1) various claimants including children, widows and parents were entitled to amounts ranging from $7,000 to $150,000 for pecuniary losses resulting from the deaths; (2) the various claimants were entitled to amounts ranging from $10,000 to $25,000 for lost society; (3) because there was an absence of evidence as to the decedents' postaccident consciousness, the survivors were not entitled to recover for the decedents' pain and suffering prior to their deaths; (4) the survivors of the two decedents who had been residents of Arkansas could not rely on the Arkansas Wrongful Death Statute as a basis for recovering damages for mental anguish, grief and sorrow, and (5) the survivors were not entitled to recover penalty wages.

Ordered in accordance with opinion

**1. Death ⇐95(3)**

In action by decedents' survivors to recover for maritime deaths of four men who were killed in the Gulf of Suez, various claimants, including children, widows and parents of the decedents were awarded amounts ranging from $7,000 to $150,000 for loss of support, lost monetary gifts and lost inheritance expectancies. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**2. Death ⇐95(1)**

In action by survivors to recover for maritime deaths of four men killed while working in the Gulf of Suez, various claimants, including children, widows and parents of decedents were awarded amounts ranging from $10,000 to $25,000 for loss of society. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**3. Federal Courts ⇐199**

Federal district court had jurisdiction under the Jones Act, the Death on the High Seas Act and the general maritime law to hear and determine questions of damages stemming from four maritime deaths in the Gulf of Suez. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**4. Death ⇐88**

General maritime remedies, including nonpecuniary damage elements such as loss of society, are properly available in actions covered by the Death on the High Seas Act

Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**5. Death ⇐82**

Although the Death on the High Seas Act does not provide a recovery for conscious pain and suffering experienced by a decedent prior to death, such damages are available under the general maritime law and the Jones Act. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**6. Death ⇐77**

Survivors of four Americans killed while working in the Gulf of Suez did not establish by a preponderance of the evidence any entitlement to recover for the decedents' pain and suffering where the cause of death of three of the four decedents was unknown and where, though an autopsy indicated that the fourth decedent died by drowning, there was no evidence to indicate that he or the other three decedents consciously survived the impact of their fall into the water. Jones Act, 46 U.S.C.A. § 688.

**7. Death ⇐95(3)**

A survivor may recover under the Death on the High Seas Act, the Jones Act and general maritime law for the actual financial contributions the decedent would have made during his normal anticipated life span; proper measure of damages for such loss of support is the reasonable pecuniary expectancy of each survivor over the remaining life expectancy of the decedent or the survivor, whichever is shorter. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**8. Death ⇐95(3)**

In determining the "reasonable pecuniary expectancy" recoverable by a survivor under the Death on the High Seas Act, the Jones Act and general maritime law, for purpose of awarding damages for loss of support, it is necessary to determine first how much money the decedent would have had available and how much of that sum he would have contributed to his beneficiaries. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

**9. Death ⇐95(3)**

For purpose of making an award of damages for loss of support in action under the Death on the High Seas Act, the Jones Act and general maritime law, any future inflationary effect on wages is not to be considered in calculating the decedent's future earnings over his work-life expectancy; additionally, a survivor's future pecuniary loss must be discounted to present value for purposes of present payment by employing an interest rate appropriate at the time and place of trial. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**10. Death ⇐95(3)**

Under the Death on the High Seas Act, the Jones Act and general maritime law, spouse and child survivors are entitled to recover upon a proper showing for the loss of prospective inheritance which they might have received if decedent had not died prior to his anticipated life expectancy. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**11. Death ⇐95(3)**

Where parent survivors of decedents killed while working in the Gulf of Suez were in their mid-fifties, comparison of parents' normal life expectancies with anticipated life expectancies of their deceased sons, both of whom were in their 20's when they died, did not give rise to a reasonable expectancy on the part of the parents that upon their sons' natural deaths they would have inherited any potential increase in their respective sons' estates and, therefore, parents were not entitled to recover for lost inheritance expectancies. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**12. Death ⇐95(3)**

For purpose of determining whether survivors were entitled to recover lost in-

heritance expectancies, in action arising out of maritime deaths, court must determine in light of all pertinent factors whether the decedent would have amassed an inheritable estate if he had lived to his normal life expectancy and whether each survivor claimant would continue to be the natural object of the decedent's affection and beneficence if he lived out his expectancy. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**13. Death ⇐95(3)**

Where survivors who sought to recover for maritime deaths were suing each on his or her own behalf and not on behalf of the decedent's estate, survivors were not entitled to recover the loss of economic value of each decedent's life; such a measure seldom reflects the realistic expectations of survivors and is unduly punitive. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**14. Death ⇐95(3)**

For purpose of determining financial losses which survivors can recover in action to recover for maritime deaths, court must focus on the financial loss suffered by each survivor with reference to the decedent's history of earnings and contributions and anticipated future earning potential as a means of establishing a maximum monetary amount available for distribution as such financial losses are proved. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**15. Death ⇐32**

If administratrix of decedent's estate is entitled to recover under the Jones Act, her recovery would not be on behalf of the estate but solely as trustee for the designated survivors. Jones Act, 46 U.S.C.A. § 688.

**16. Death ⇐86(2)**

Under the Death on the High Seas Act, the Jones Act and general maritime law, children of a decedent are entitled to a recovery for the pecuniary loss of nurture, guidance and training occasioned by the death of their parent; damages properly are awardable to each child for such loss until he or she reaches majority, although such loss necessarily diminishes in value as the child approaches majority. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**17. Death ⇐95(3)**

In determining the amount of compensable loss suffered by children of decedents, in action to recover for maritime deaths, court should take into account evidence that the decedent was periodically absent from home for employment purposes and that similar absences could be anticipated in the future; court should also realistically appraise the decedent's contributions to his children's guidance, training and nurture up until his death, as established by the evidence. 46 U.S.C.A. § 596; Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**18. Death ⇐87**

Loss of a decedent's services is recoverable under the Death on the High Seas Act, the Jones Act and the general maritime law; therefore, a survivor may recover the monetary value of household services the decedent provided and would have continued to provide but for his wrongful death. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**19. Death ⇐95(3)**

In determining the appropriate quantum of damages for lost services, in action to recover for maritime deaths, court should consider the nature of the relationship between a particular survivor and the decedent as well as the decedent's anticipated presence at home in light of his age and the nature of his occupation. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**20. Death ⇐88**

Although loss of a decedent's society is not a recognizable element of damages under either the Jones Act or the Death on the High Seas Act because it represents a nonpecuniary loss, damages for lost society are recoverable under general maritime

law. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**21. Death ⇐88**

For purpose of an award of damages for loss of a decedent's "society" under the general maritime law, term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection.

See publication Words and Phrases for other judicial constructions and definitions.

**22. Death ⇐58(1)**

Because a loss of society is not a financial loss, financial dependency need not be shown by immediate family members in order to recover for loss of society under the general maritime law.

**23. Death ⇐88**

For purpose of awarding damages for "loss of society" under the general maritime law, surviving spouses' loss of consortium is encompassed within "loss of society" damage category.

See publication Words and Phrases for other judicial constructions and definitions.

**24. Death ⇐89**

Survivors suing under the Jones Act and the Death on the High Seas Act cannot recover damages for nonpecuniary losses such as mental anguish and grief. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

**25. Death ⇐35**

In view of fact that the Arkansas Wrongful Death Statute does not apply to injuries which occur outside the territorial boundaries of the state of Arkansas, survivors of Arkansas residents who were killed while working in the Gulf of Suez could not rely directly on the Arkansas Wrongful Death Statute as a basis for recovery for mental anguish, grief and sorrow. Ark. Stats. § 27–909.

**26. Admiralty ⇐1.20(6)**

General maritime cause of action for wrongful death is not dependent on adjacent state law and if elements of recovery are borrowed from state death acts, they must be consonant with federal maritime policies.

**27. Admiralty ⇐1.20(6)**

Federal district court could not utilize Arkansas Wrongful Death Statute as a basis for supplementing damages recoverable under general maritime law by survivors of two Arkansas residents who were killed while working in the Gulf of Suez. Ark. Stats. § 27–909.

**28. Seamen ⇐32**

Sections grouped under heading "Effects of Deceased Seamen" set forth the exclusive statutory remedy available to a deceased seaman's estate and survivors to recover wages earned but not wrongfully withheld at the time of death. 46 U.S.C.A. §§ 621–628.

**29. Seamen ⇐32**

Congress has power to provide for the disposition of the wages and effects of seamen who die in service. 46 U.S.C.A. §§ 596, 621–628.

**30. Seamen ⇐32**

Fact that employers of deceased seamen did not pay wages which decedents had accrued to the decedents' survivors immediately following the deaths did not entitle survivors to recover penalty wages. 46 U.S.C.A. § 596.

**31. Seamen ⇐18**

Owners of vessels are not liable for penalty wages if "sufficient cause" exists for nonpayment. 46 U.S.C.A. § 596.

**32. Seamen ⇐32**

For purpose of rule that owners of vessels are not liable for penalty wages if "sufficient cause" exists for nonpayment, fact that claim for penalty wages by survivors of deceased seamen in the context of a death action was a novel claim with respect to which there was a lack of case authority

was a "sufficient cause" for withholding wages. 46 U.S.C.A. § 596.

See publication Words and Phrases for other judicial constructions and definitions.

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. STATEMENT OF CASE

CARL O. BUE, Jr., District Judge.

On the evening of October 8, 1974, the No. 4 leg of the Drilling Rig GEMINI suddenly gave way in the Gulf of Suez, thereby tilting the drilling platform and causing nineteen men and the approximate 400 ton drilling rig equipment package ("rig package") within which they were working to slide off the platform into the Gulf 25 feet below. Eighteen of the nineteen men aboard died, including four American citizens. This action is brought by the survivors of the four American decedents to recover the damages sustained as a result of their deaths. The defendants have stipulated liability.

The cause proceeded to trial before the Court on the issue of damages and after hearing testimony of witnesses, considering the exhibits and depositions offered into evidence and hearing the arguments of counsel, the Court now makes and enters its findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

### II. FINDINGS OF FACT

1. Plaintiffs are citizens of the United States of America. Defendant Offshore International, S.A., is a Panamanian corporation and a wholly-owned subsidiary of defendant The Offshore Company, a Delaware corporation.

#### *A. The Accident*

2. The four Americans working aboard the Drilling Rig GEMINI on the evening of October 8, 1974, were John Hayes, Troy Eaton, Edwin Jones and Larry Reel. It was dark outside. The evidence establishes that the events culminating in their deaths occurred suddenly. According to Arnold Feller, who as the Senior Field Superintendent of the GEMINI was aboard the TENDER 21, a structure containing living quarters adjacent to the drilling platform, the rig package, consisting of pipe, girders from the derrick and other structures, tore loose from its position on the platform and slid off the edge and into the ocean below within eight to ten seconds of the No. 4 leg's initial collapse.

3. An Egyptian employee had just walked from the platform to the adjacent TENDER 21 to get water. Although he witnessed the casualty, no evidence has been introduced that he observed or heard any of the men in the water below following the platform's capsize. All men on the TENDER 21 immediately joined in a search from life rafts for any survivors in the water. *See* Plaintiffs' Exhibits 23, 24 and 28. Other vessels and helicopters also joined in the search. One Egyptian employee was pulled from the water. None of the other 18 men were located on this initial search effort, which covered several hours.

4. The drilling platform itself slowly collapsed and drifted with the prevailing three knot current for approximately four miles over the next four hours until being recovered. Given an approximate wind of five miles per hour, Mr. Feller estimated that the ocean in the vicinity of the accident consisted of two-foot waves at six-second intervals.

5. The bodies of John Hayes, Troy Eaton and Edwin Jones were never found, and their exact cause of death is therefore unknown. An autopsy indicates that Larry Reel, whose body was recovered, died of asphyxia caused by drowning. *See* Plaintiffs' Exhibit 3.

6. Dr. Joseph Jachimczyk, Chief Medical Examiner for Harris County, Texas, and expert in the field of forensic pathology, testified that death by drowning is not immediate and that men possessing the physical capabilities of these four decedents would survive for some time in the water before drowning, if that were the cause of death.

7. It is not known whether any of the four decedents consciously survived the fall into the water or whether the impact of their fall, coupled with the fall of the approximate 400 ton rig package which they were aboard, rendered them unconscious upon impact. Thus, there is no evidence of a struggle for life on the part of any of the four decedents.

### B. *The Four Decedents and Their Survivors*

#### 1. *John Hayes*

[1, 2] 8. At the time that he was killed on October 8, 1974, John Hayes was ten days short of his 52nd birthday, with a life expectancy of 21.8 years and a work life expectancy of 13.3 years. *See* Defendants' Exhibits 1 and 2. He was survived by two children: Evelyn Rhonda Hayes Thompson, age 25 at the time of his death, and Mark Hayes, 17 years of age at that time. Hayes was divorced in 1966, his son Mark thereafter lived with the former Mrs. Hayes until joining the Navy in November, 1974, and his daughter Rhonda had been married since 1968.

9. John Hayes was first employed by the defendants in 1968 and had worked overseas from 1968 until his death. Rhonda Thompson testified that Hayes would visit her and her brother one to two weeks every two years and that he wrote her twice a month. Neither child visited Hayes while he was employed outside the United States.

10. Because his daughter had been married since 1968, Hayes did not provide any periodic support for her, but did make monetary gifts to her approximating $1,000.00 each year. The credible evidence further establishes that Hayes provided $200.00 monthly support for Mark, or $2,400.00 annually, *see* Defendants' Exhibit 18, and more likely than not would have continued such payments until Mark reached majority. Hayes also bought his son a car during 1974. Hayes did not list Mark as a dependent for income tax purposes. *See* Defendants' Exhibit 13.

11. Hayes was employed as a toolpusher at an annual salary in 1974 of $28,800.00, including seniority, overseas service bonus and an overseas cost-of-living allowance. Pay records reflect the following annual earnings from 1969 through 1973:

| Year | Earnings |
|---|---|
| 1969 | $18,743.87 |
| 1970 | 14,219.35 |
| 1971 | 21,176.29 |
| 1972 | 17,451.23 |
| 1973 | 24,598.77 |

*See* Defendants' Exhibit 6. At the time of death, Hayes' gross estate was valued at $17,766.68, all but $125.00 of which represented cash savings in a bank account. *See* Defendants' Exhibit 26. His net estate of $14,000.00 was divided evenly between his two children.

12. Considering his age, his prior earnings record since 1968 and the testimony of Dr. John Allen, an economics teacher at Texas A & M University, and Mr. Noah Mead, Director of Personnel, Training and Safety for defendant The Offshore Company, the Court finds that Hayes' earnings over the remainder of his 13.3 work life expectancy, excluding increases attributable to inflation, would approximate $30,000.00 yearly. Given the $14,000.00 net value of his estate upon death, as compared to his annual earnings to that date, and recognizing that any comparable savings amassed up to retirement would be significantly depleted by Hayes for living expenses during a minimum retirement period of 8.5 years, the Court finds, based on this record and the lack of evidence as to any retirement benefits available to the decedent, that his inheritable estate at death, in addition to the $14,000.00 previously distributed to his survivors, would have been $30,000.00. Thus, each child would have an inheritance expectancy, in addition to the

$7,000.00 previously received, of $15,000.00. Such a sum, discounted to present value at 5 percent in accordance with Hayes' life expectancy of approximately 22 years, approximates $5,000.00.

13. Mark Hayes is entitled to recover for loss of support at $200.00 per month for a four-year period. Discounted at 5 percent for future payments, this sum equals approximately $10,000.00. The Court further awards Mark Hayes $2,000.00 for loss of nurture.

In view of evidence of monetary gifts made by Hayes to his children, Rhonda Thompson and Mark Hayes each are awarded after discount at 5 percent the sum of $10,000.00 of this pecuniary loss.

14. For loss of their father's society, and taking all pertinent factors into account, Rhonda Thompson and Mark Hayes each are entitled to recover $15,000.00.

*2. Troy Eaton*

15. At the time of his death, Troy Eaton was 40 years of age with a life expectancy of 31.5 years and a work life expectancy of 23 years. *See* Plaintiffs' Exhibit 21. He was survived by his wife, Mrs. Louzelle Eaton, age 46 with a life expectancy of 32.8 years, *see* Defendants' Exhibit 1, and four children by a prior marriage: Johnnie June, 20; Ricky, 18; Drinda, 15; and Mandie, 9.

16. Troy Eaton's prior marriage to Thelma Louise Eaton ended in divorce in January, 1971, and he married Louzelle Eaton in May, 1971. Eaton had been employed overseas since 1968 and following his marriage to Mrs. Eaton in May, 1971, he returned to the Middle East. Mrs. Eaton thereafter joined him in Malta, and they remained abroad until December, 1972, when Mrs. Eaton returned to Wichita Falls, Texas. Eaton visited his wife in March, 1973, and he returned to the United States from overseas assignment during June of that year.

He and Mrs. Eaton worked and lived together in Wichita Falls until February, 1974, at which time Eaton entered into defendants' employ as a toolpusher overseas. The day prior to his departure, he and Mrs. Eaton signed an earnest money contract for the purchase of a 270 acre wheat farm. Mrs. Eaton visited the decedent in Cairo for three or four days during July, 1974. She testified that the purpose of the visit was to verify the monthly salary to which Eaton was entitled because the monthly checks she had received since February, 1974, were lower than what she had contemplated.

17. Following the divorce of their parents in 1971, Eaton's four children lived with their maternal grandparents. Johnnie June married in May, 1972, at age 17 and has her own family. Ricky quit school in the ninth grade, then worked as an oil field worker until he joined the Navy at age 18 in April, 1974. He presently works on an offshore drilling rig. Drinda and Mandie currently live with their mother and stepfather in Abilene, Texas.

18. Eaton saw very little of his four children during the approximate four-year period between his 1971 divorce and his 1974 death. Johnnie June, Ricky and Drinda testified that they generally saw their father every few months for a day at a time. During the period from March, 1973, until February, 1974, when Eaton was living in Wichita Falls, he visited them on a more regular basis. Ricky, Drinda and Mandie also stayed with their father and stepmother in Wichita Falls, but the visits were short because of friction between the children and Mrs. Eaton.

19. The uncontradicted evidence establishes that the total support payments made by Eaton to his four children were as follows:

| Year | Amount | Dependents |
|---|---|---|
| 1971 | $1,100.00 | Johnnie June, Ricky, Drinda and Mandie |
| 1972 | 1,850.00 | Ricky, Drinda and Mandie |
| 1973 | 1,275.00 | Ricky, Drinda and Mandie |
| 1974 | 210.00 | Drinda and Mandie |

*See* Defendants' Exhibit 10. Eaton made gifts to the children approximating $200.00 annually or $50.00 to each child.

20. Income tax and employment records reflect the following approximate income for Eaton from 1970 until October, 1974, at

which time his monthly income was $2,100.00:

| Year | Earnings |
|---|---|
| 1970 | $16,000.00 |
| 1971 | 12,000.00 |
| 1972 | 14,000.00 |
| 1973 | 16,000.00 |
| 1974 | 14,000.00 |

*See* Defendants' Exhibits 7 and 14. Eaton's estate at death was valued at $1,675.00, consisting entirely of personal property. *See* Defendants' Exhibit 27. Not including the effects of inflation, the Court estimates that Eaton's annual earnings both at home and abroad would have averaged $18,000.00 over the remainder of his work life expectancy.

21. Ricky, Drinda and Mandie are entitled to recover for a pecuniary loss of nurture caused by their father's death. Given their respective ages, and in view of the history of the parent-child relationship in each instance following Eaton's 1971 divorce, Ricky is awarded $2,000.00, Drinda is awarded $4,000.00, and Mandie is awarded $8,000.00.

22. The four children may well have been deprived of a full inheritance expectancy in light of decedent's remarriage to Mrs. Eaton, whose life expectancy is actually longer than Eaton's. *See* Finding of Fact 15. The evidence also supports a small award for loss of support to Eaton's two youngest children, Drinda and Mandie. For loss of an appropriate inheritance expectancy and support, including gifts, and taking all factors contained in the evidence and discussed above into account, the Court makes the following awards, after discounting at 5 percent where appropriate:

| Child | Amount |
|---|---|
| Johnnie June | $ 7,000.00 |
| Ricky | 7,000.00 |
| Drinda | 12,000.00 |
| Mandie | 17,000.00 |

23. For loss of their father's society, each child is awarded $10,000.00.

24. Mrs. Eaton has suffered a pecuniary loss of support and services and the loss of a reasonable expectancy of a future inheritance of substantial assets not exhausted by the decedent and herself during retirement. For this total pecuniary loss, the Court finds that an appropriate award, assuming Mrs. Eaton's annual entitlement to one-half of the decedent's $18,000.00 estimated annual income over the remainder of his 23 year work life expectancy, discounted at 5 percent for future payments, is $150,000.00. The Court further awards Mrs. Eaton $25,000.00 for loss of her husband's society.

### *3. Edwin Jones*

25. Edwin Jones was 28 years of age at the time of his death, with a work life expectancy of 34.2 years and a life expectancy of 43 years. *See* Plaintiffs' Exhibit 21. Jones was survived by his 56 year old father, with a life expectancy of 19 years, his 55 year old mother, with a life expectancy of 25 years, and three brothers and one sister. *See* Defendants' Exhibit 1. Only his mother and father seek to recover for Jones' wrongful death.

26. The evidence reflects a predictable pattern for Edwin Jones and his brothers. While living at home, each brother would pay $200.00 per month to their parents for room and board. Two sons have married and live near their parents. They no longer make financial contributions.

The decedent lived at home through his junior year of high school, then served in the Army for two years. He thereafter returned home to Dierks, Arkansas, and worked at different construction-related jobs prior to his employment with defendants in August, 1974, as a crane operator/roustabout foreman/floorman. *See* Plaintiffs' Exhibit 16. Up to the time of departure for Egypt, he lived at home with his parents.

27. Upon joining the Army, Jones opened a joint checking account with his mother. Mrs. Jones testified that the decedent intended to deposit $500.00 per month into this checking account during his employment with defendants and that she would be able to draw on this account as necessary. She further stated that she intended to accumulate as much in the account as possible.

28. The Court therefore finds that the decedent would have continued to provide support for his parents of $200.00 per month until he married. It is reasonable to assume, in light of the testimony and Defendants' Exhibit 4, that Jones would have married by his mid-thirties. Accordingly, Mr. and Mrs. Jones jointly are awarded $15,000.00, after discounting future payments at 5 percent, for loss of support and services.

29. Because of their respective ages, Mr. and Mrs. Jones could not reasonably expect to inherit the estate which the decedent would have amassed had he lived a normal life. Therefore, Mr. and Mrs. Jones have not been deprived of an inheritance expectancy as a result of their son's untimely death.

30. Taking into account the life expectancies of Mr. and Mrs. Jones at the time of their son's death, and all factors bearing on the relationship between them and the decedent, the Court awards Mr. and Mrs. Jones $10,000.00 each or a total of $20,000.00 for loss the their son's society.

*4. Larry Reel*

31. Larry Reel also was from Dierks, Arkansas. He signed up with Edwin Jones to work for defendants as a floorman and shared an apartment with him in Cairo. At the time of his death, Reel was 24 years of age and had a life expectancy of 46.4 years and a work life expectancy of 37.8 years. *See* Plaintiffs' Exhibit 21. He was survived by his parents, his mother being 58 years old with a life expectancy of 22.6 years, his father, 55 years of age with a life expectancy of 19.6 years, a step-brother, a step-sister and a full brother, all married. Decedent's father died one week before the trial in this cause. His parents seek a recovery for damages stemming from his wrongful death.

32. Subsequent to his graduation from high school, Reel attended college for one semester, served in the Army and thereafter worked for lumber and construction companies. Reel lived at home prior to going overseas in the fall of 1974, and although he did not make periodic payments for room and board, he did pay the family bills on occasion. Neither parent could approximate decedent's financial contributions on a monthly basis. *See* Deposition of Hillery Reel.

33. Before leaving for Egypt, Reel opened a joint savings account with his mother. It was understood that Reel would deposit $500.00 monthly into the account and that his mother would draw on the account only when necessary. Giving plaintiffs the benefit of the doubt, the Court finds that at the time of Reel's death, his parents suffered a loss of services and support, after discounting at 5 percent for future payments, of $15,000.00.

34. In light of the anticipated life expectancies of Mr. and Mrs. Reel at the time of their son's death, the Court finds that they could not expect to survive the decedent. Therefore, they did not possess a reasonable inheritance expectancy which was damaged by Reel's premature death.

35. Based on anticipated life expectancies, and taking all pertinent factors bearing on this particular parent-child relationship into account, the Court finds that decedent's parents suffered a loss of his society in the amount of $10,000.00 each or a total of $20,000.00.

36. The following damages therefore are awarded to the named individuals:

| Survivor(s) | Pecuniary Loss | Loss of Society | Total |
|---|---|---|---|
| Rhonda Thompson | $ 15,000.00 | $ 15,000.00 | $ 30,000.00 |
| Mark Hayes | 27,000.00 | 15,000.00 | 42,000.00 |
| Mrs. Troy Eaton | 150,000.00 | 25,000.00 | 175,000.00 |
| Johnnie June Eaton Bell | 7,000.00 | 10,000.00 | 17,000.00 |
| Ricky Eaton | 9,000.00 | 10,000.00 | 19,000.00 |
| Drinda Eaton | 16,000.00 | 10,000.00 | 26,000.00 |
| Mandie Eaton | 25,000.00 | 10,000.00 | 35,000.00 |
| Mr. & Mrs. Jones | 15,000.00 | 20,000.00 | 35,000.00 |
| Mr. & Mrs. Reel | 15,000.00 | 20,000.00 | 35,000.00 |
| TOTAL | $279,000.00 | $135,000.00 | $414,000.00 |

37. Payroll checks covering the wages due and owing the four decedents at the time of their death were submitted to the representatives of the respective estates in July, 1975. *See* Plaintiffs' Exhibits 17–20. Plaintiffs have opted not to negotiate the wage checks received from defendants in

order to ensure that their claims for double penalty wages pursuant to 46 U.S.C. § 596 are not waived. Accordingly, defendants will pay to the representative of each decedent's estate the face value of Plaintiffs' Exhibits 17 through 20, i.e. John Hayes, $3,197.85; Troy Eaton, $1,691.15; Edwin Jones, $481.97; and Larry Reel, $314.29.

The evidence demonstrates that a substantial portion of each wage check tendered by defendants in July, 1975, represented a voluntary payment of vacation pay and contract bonus, items which defendants did not legally owe as of October 8, 1974. The Court therefore finds no basis for adjudging interest against defendants on the earned wage portion of each payment from date of casualty until the date judgment is executed.

## III. CONCLUSIONS OF LAW

[3, 4] 1. Jurisdiction of this Court to hear and determine the damage questions stemming from the four maritime deaths in the Gulf of Suez is proper pursuant to the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.* (hereinafter "DOHSA") and the general maritime law. *Law v. Sea Drilling Corp.*, 510 F.2d 242, 250 (5th Cir.), *aff'd on rehearing*, 523 F.2d 793 (5th Cir. 1975). *But see Barbe v. Drummond*, 507 F.2d 794, 801 (1st Cir. 1974) (general maritime remedy not available in DOHSA actions); *McPherson v. Steamship South African Pioneer*, 321 F.Supp. 42, 47 (E.D.Va.1971). Defendants argue that general maritime remedies are not properly available for actions covered by DOHSA, a position in accord with the First Circuit but contrary to the Fifth Circuit's clear holding in *Law v. Sea Drilling Corp., supra.* This Court will apply the law as announced by the Fifth Circuit and recognize a recovery in this action which encompasses the nonpecuniary damage elements of the general maritime law, particularly loss of society. Defendants' contention that the Fifth Circuit erred in *Law v. Sea Drilling Corp., supra*, is more appropriately considered by that court.

2. At the trial the parties stipulated liability on the part of defendants so that all issues in contention concern the proper measure of damages.

### *A. Recovery for Pain and Suffering of the Decedents Prior to Death*

[5] 3. Although DOHSA does not provide a recovery for conscious pain and suffering experienced by a decedent prior to death, such damages are available under the general maritime law and the Jones Act. *Roberson v. N.V. Stoomvaart Maatschappij*, 507 F.2d 994, 995 (5th Cir. 1975); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137, 140 (5th Cir.), *cert. denied*, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218 (1972); *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 165–67 (4th Cir. 1972); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1275 (6th Cir. 1970), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971).

In cases involving drowning, the courts generally have required evidence of a struggle or other post-accident consciousness on the part of the decedent before awarding damages for his pain and suffering prior to death. *See, e. g., Barton v. Brown (The Corsair)*, 145 U.S. 335, 348, 12 S.Ct. 949, 36 L.Ed. 727 (1892); *Petition of United States Steel Corp., supra* at 1275–76; *Grantham v. Quinn Menhaden Fisheries, Inc.*, 344 F.2d 590 (4th Cir. 1965); *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489, 495 (5th Cir. 1962); *Gardner v. National Bulk Carriers, Inc.*, 221 F.Supp. 243, 246 (E.D.Va.1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964).

4. The fact that, as in the case at bar, an autopsy established the cause of a decedent's death as drowning has been held insufficient by the Fifth Circuit Court of Appeals to warrant an award for pain and suffering in the absence of proof that the decedent was conscious of his plight after he hit the water and that he unsuccessfully struggled to save his life. *Davis v. Parkhill-Goodloe Co., supra* at 495. As stated therein and of direct relevance to the instant showing by plaintiffs:

"Great ingenuity was exercised in putting forward a medical theory based upon expert testimony of the probable length of time it took for a person finally to expire in drowning. But there are so many unknowns in this unexplained slipping or falling of Davis into the water, that we should only say that substantial evidence will be required to sustain a finding of consciousness upon which to rest the permissibie assumption of pain."

*Id.* (footnote deleted).

[6] The cause of death as to three of the four decedents is unknown. They may have been killed instantly by the rig package which they were aboard as it slid off the barge and plummeted into the water 25 feet below, or they may have drowned. An autopsy indicates that Larry Reel died by drowning. However, regardless of the exact cause of death, there is no evidence indicating that Reel or the other three decedents consciously survived the impact of the fall into the water, *see* Findings of Fact 3 and 7, and the Court finds no basis for reasonably inferring such.

5. The cases cited by plaintiffs in support of an award for pain and suffering are inapposite because in each case there was evidence of the decedent's consciousness following the mishap and prior to his death. Additionally, *Soloman v. Warren,* 540 F.2d 777 (5th Cir. 1976), *petition for cert. filed sub nom., Warren v. Serody,* 45 U.S.L.W. 3815 (U. S., May 26, 1977) (No. 76–1673), is distinguishable because that case involved special application of the Florida Survival Statute to a plane crash at sea and the award of damages for the pain and suffering of those aboard from the time they most likely perceived their probable death until impact. Such is not the case here where impact was immediate.

Therefore, in light of the prevailing case authorities as applied to these facts, the Court concludes that plaintiffs have not proved by a preponderance of the evidence any entitlement for pain and suffering of the decedents.

*B. Pecuniary Loss to Survivors*

[7, 8] 6. A survivor may recover under DOHSA, the Jones Act and the general maritime law for the actual financial contributions the decedent would have made during his normal anticipated life span. *Sea-Land Services v. Gaudet,* 414 U.S. 573, at 584–85, 94 S.Ct. 806, 39 L.Ed.2d 9; *Davis v. Parkhill-Goodloe Co.,* 302 F.2d 489, 494 (5th Cir. 1962); *Petition of the United States,* 418 F.2d 264, 272 (1st Cir. 1969). The proper measure of damages for such loss of support is the reasonable pecuniary expectancy of each survivor over the remainder of the life expectancy of the decedent or the survivor, whichever is shorter. *The Complaint of Cambria Steamship Co.,* 505 F.2d 517 (6th Cir. 1974), *cert. denied,* 420 U.S. 975, 95 S.Ct. 1399, 43 L.Ed.2d 655 (1975). In determining a reasonable expectancy,

"a guide is set by determining first how much money the decedent would have had available, and how much of that sum he would have contributed to his beneficiaries."

*In re Sincere Navigation Corp.,* 329 F.Supp. 652, 659 (E.D.La.1971).

[9] 7. In calculating the decedent's future earnings over his work-life expectancy, from which support contributions would have been made, any future inflationary effect on wages is not to be considered. *Davis v. Hill Eng'r, Inc.,* 549 F.2d 314, 332 (5th Cir. 1977), *citing Johnson v. Penrod Drilling Co.,* 510 F.2d 234 (5th Cir.) (en banc), *cert. denied,* 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975). Additionally, a survivor's future pecuniary loss must be discounted to present value for purposes of present payment by employing an appropriate interest rate prevailing at the time and place of trial. *Johnson v. Penrod Drilling Co., supra.*

[10, 11] 8. The law also entitles spouse and child survivors to recover upon a proper showing for the loss of the prospective inheritance which might have been received if the decedent had not died prior to his anticipated life expectancy. *Soloman v. Warren, supra* at 790–92, *citing Martin v. Atlantic*

*Coast Line R.R. Co.*, 268 F.2d 397 (5th Cir. 1959); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1959). Due to the age of the parent survivors of Larry Reel and Ed Jones and their normal life expectancies as compared to the anticipated life expectancies of their deceased sons, there can be no reasonable expectancy that they would have inherited upon his natural death any potential increase in their respective sons' estates, even assuming that they were designated at the time of their sons' deaths as legatees under validly-executed wills. *Petition of United States*, 303 F.Supp. 1282, 1306 (E.D.N.C.1969), *aff'd*, 432 F.2d 1357 (4th Cir. 1970); *Wasilko v. United States*, 300 F.Supp. 573, 601 (N.D. Ohio 1967), *aff'd*, 412 F.2d 859 (6th Cir. 1969).

[12] The Court, taking into account all pertinent factors, must determine, first, whether the decedent, if he had lived his normal life expectancy, would have amassed an inheritable estate, and second, whether each survivor-claimant "would continue to be the natural object of his [the decedent's] affection and beneficence if he lived out his expectancy". *National Airlines, Inc. v. Stiles, supra* at 403.

9. Plaintiffs contend that "[t]he lost wages of the decedents claimed herein represent the measure of pecuniary loss sustained by these claimants," discounted for personal consumption and present value. Plaintiffs' Arguments and Authorities, October 14, 1976, at 3, 14–15. Plaintiffs thus ask this Court to presume that the total financial loss to each set of survivors, including the parents of Larry Reel and Ed Jones, for loss of support, contribution and prospective inheritance is equal to the anticipated gross income of each decedent less his personal consumption during the remainder of his work life expectancy.

[13–15] If this Court adopted such a formula, it would in fact be awarding each set of survivors the economic value of the decedent's estate, rather than the value of *each plaintiff's* diminished pecuniary expectation. Because each survivor is suing on his or her behalf and not on behalf of the estate, *see, e. g., Sea-Land Services v. Gaudet, supra; Hassan v. A. M. Landry & Son, Inc.*, 321 F.2d 570, 571 (5th Cir. 1963), *cert. denied*, 375 U.S. 967, 84 S.Ct. 486, 11 L.Ed.2d 416 (1964); *In re Southern Steamship Company's Petition*, 135 F.Supp. 358 (D.Del.1955), the survivors are not entitled under the law to recover the loss of economic value of each decedent's life, as such a measure seldom reflects the realistic expectations of the survivors, especially parents, and is unduly punitive. *The Complaint of Cambria Steamship Co.*, 505 F.2d 517, 522–23 (6th Cir. 1974), *cert. denied*, 420 U.S. 975, 95 S.Ct. 1399, 43 L.Ed.2d 655 (1975) (general maritime law); *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934), *cert. denied*, 293 U.S. 577, 55 S.Ct. 89, 79 L.Ed. 674 (1934) (DOHSA); *In re Farrell Lines, Inc.*, 339 F.Supp. 91, 95 (E.D.La.1971) (Jones Act and general maritime law); *Clinton v. Ingram Corp.*, 312 F.Supp. 539 (N.D.Miss.1970) (Jones Act). Rather, the proper focus is on the financial loss suffered by each survivor with reference to the decedent's history of earnings and contributions and anticipated future earning potential as a means of establishing a maximum monetary amount available for distribution as such financial losses are proved. As stated by the Fifth Circuit in the context of a Jones Act action:

> "If the plaintiff as administratrix is entitled to recover under the Jones Act, her recovery would not be on behalf of the estate but solely as trustee for the designated survivors, that is, in this case the widow and minor children."

*Hassan v. A. M. Landry & Son, Inc., supra* at 571. Such is the status in which these representative plaintiffs sue.

[16] 10. Children of a decedent are entitled to a recovery for the pecuniary loss of nurture, guidance and training occasioned by the death of their parent. *Soloman v. Warren, supra* at 788–90. As pointed out by the Fifth Circuit in *Soloman*, damages properly are awardable to each child for such loss until he or she reaches majority, although such loss necessarily diminishes in

value as the child approaches majority and leaves his parents' home for college or his separate home. *Soloman v. Warren, supra* at 788–90, *and cases cited therein.*

[17] In determining the amount of loss suffered by the children, the Court should take into account evidence that the decedent periodically was absent from his home for employment purposes and that similar absences could be anticipated in the future. *See, e. g., Curry v. United States,* 338 F.Supp. 1219, 1224 (N.D.Cal.1971). The Court also should realistically appraise the decedent's contributions to his children's guidance, training and nurture up until his death, as established by the evidence. *See, e. g., Moore-McCormack Lines, Inc. v. Richardspn,* 295 F.2d 583, 588 (2d Cir. 1961), *cert. denied,* 370 U.S. 937, 82 S.Ct. 1577, 8 L.Ed.2d 806 (1962).

[18, 19] 11. Loss of a decedent's services is recoverable under DOHSA, the Jones Act and the general maritime law. *Sea-Land Services v. Gaudet, supra,* 414 U.S. at 584–85, 94 S.Ct. 806. A survivor may recover the monetary value of household services the decedent provided and would have continued to provide but for his wrongful death. In determining the appropriate quantum of damages for lost services, the Court should consider the nature of the relationship between a particular survivor and the decedent, and the decedent's anticipated presence at home in light of his age and the nature of his occupation. *See, e. g., Michigan Central R.R. Co. v. Vreeland,* 277 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Curry v. United States, supra* at 1223–24.

*C. Nonpecuniary Loss to Survivors*

[20, 21] 12. Although loss of a decedent's society is not a recognizable element of damages under either the Jones Act or DOHSA because it represents a nonpecuniary loss, *see Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257, 266 (2d Cir. 1963), *cert. denied,* 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969 (1964) (Jones Act); *First Nat'l Bank v. National Airlines, Inc.,* 288 F.2d 621, 624 (2d Cir. 1961), *cert. denied,* 368 U.S. 859, 82 S.Ct. 102, 7 L.Ed.2d 57 (1961) (DOHSA), it is recoverable under the general maritime law. *Sea-Land Services v. Gaudet,* 414 U.S. 573, 584–92, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). As defined by the Supreme Court in *Gaudet,*

> "[t]he term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."

*Id.* at 585, 94 S.Ct. at 815 (footnote deleted).

A treatise relied upon heavily by the Supreme Court in *Gaudet* lists eight criteria which properly are considered in determining a right to and amount of recovery for loss of society:

> (1) Relationship of husband and wife, or of parent and child . . .;
> (2) Continuous living together of parties at and prior to time of wrongful death;
> (3) Lack of absence of deceased or beneficiary for extended periods of time;
> (4) Harmonious marital or family relationships;
> (5) Common interest in hobbies, scholarship, art, religion, or social activities;
> (6) Participation of deceased in family activities;
> (7) Disposition and habit of deceased to tender aid, solace and comfort when required; and
> (8) Ability and habit of deceased to render advice and assistance in financial matters, business activities and the like.

S. Speiser, Recovery for Wrongful Death 223 (1966). *See In re Farrell Lines, Inc.,* 378 F.Supp. 1354, 1358 n.5 (S.D.Ga.1974).

[22] Defendants, focusing solely on terminology employed by the Supreme Court in *Moragne v. States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), and *Sea-Land Services v. Gaudet, supra,* contend that financial dependency should be a prerequisite to recovery under the general maritime law for a nonpecuniary loss of society. Decisions in this circuit subsequent to *Moragne* and *Gaudet* have rejected

such a restrictive application of the general maritime remedy and have recognized the standing of children, spouses and parents of a decedent to recover for a loss of society. *See Skidmore v. Grueninger,* 506 F.2d 716, 729 n.11 (5th Cir. 1975) (adult daughter), *decision on remand,* (Memorandum Opinion on Remand, C.A. No. 70–1015, Section D) (E.D.La., December 10, 1975); *Herbert v. Otto Candies, Inc.,* 402 F.Supp. 503, 507 (E.D.La.1975) (spouse and children); *Hamilton v. Canal Barge Co.,* 395 F.Supp. 975, 985 (E.D.La.1975) (parents); *cf. The Complaint of Cambria Steamship Co.,* 505 F.2d 517, 524–25 (6th Cir. 1974), *cert. denied,* 420 U.S. 975, 95 S.Ct. 1399, 43 L.Ed.2d 655 (1975). These courts properly have looked to the Jones Act, DOHSA and state wrongful death acts for guidance in defining those survivors who may invoke the general maritime law. Moreover, because a loss of society is not a financial loss, it would be inappropriate to conclusively presume that only those family members financially dependent on the decedent have suffered such loss. Accordingly, a financial dependency need not be shown by these immediate family members in order to recover for loss of society under the general maritime law.

[23] The surviving spouse also may properly recover for a loss of consortium, which is encompassed within the broader "loss of society" damage category. *Skidmore v. Grueninger, supra* at 728.

[24] 13. It is settled law that survivors suing under the Jones Act and DOHSA cannot recover damages for nonpecuniary losses such as mental anguish and grief. *Petition of M/V Elaine Jones,* 480 F.2d 11, 31 (5th Cir. 1973), *cert. denied,* 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1976); *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969 (1964). The Supreme Court in *Sea-Land Services v. Gaudet, supra,* 414 U.S. at 585 n.17, 94 S.Ct. 806, 39 L.Ed.2d 9, also has held that mental anguish, sorrow and grief are not compensable under the general maritime law, although a nonpecuniary loss of society is compensable.[1] *See McDonald v. Federal Barge Lines, Inc.,* 496 F.2d 1376 (5th Cir. 1974).

[25] Additionally, the survivors of Larry Reel and Ed Jones may not rely directly on the Arkansas Wrongful Death Statute, Ark. Stat.Ann. § 27–909, as a basis for recovery for mental anguish, grief and sorrow because the Arkansas statute does not apply to injuries which occur outside the territorial boundaries of the State of Arkansas. *Crowder v. Gordons Transports, Inc.,* 387 F.2d 413, 415 (8th Cir. 1967); *Bell Transpor-*

1. The Court, adopting the analysis of Professor Speiser in his treatise on wrongful death, explained the reason for allowing a nonpecuniary recovery for loss of society (which includes "love, affection, care, attention, companionship, comfort, and protection", 414 U.S. at 585, 94 S.Ct. at 815), and disallowing a nonpecuniary recovery for grief and sorrow as follows:

> "The former [loss of society] entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death. . . . '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. This requires a somewhat negative approach. . . . In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have contributed in terms of support, assistance, training, comfort, consortium, etc. . . .'"

414 U.S. at 585 n.17, 94 S.Ct. at 815. The above-quoted language is important in that the Fifth Circuit Court of Appeals, in its *pre-Gaudet* opinion in *Petition of M/V Elaine Jones,* 480 F.2d 11 (5th Cir. 1973), *cert. denied,* 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1976), grouped loss of society with mental anguish into a general nonpecuniary category labelled "survivor's grief" for which recovery was denied. 480 F.2d at 29–34; *see e. g., Hueschen v. Fluor Ocean Services, Inc.,* 483 F.2d 1396 (5th Cir. 1973), opinion withdrawn following settlement, 494 F.2d 1354 (1974). Because this grouping was overbroad in light of the subsequent *Gaudet* decision, and because the Supreme Court has recognized a recovery for loss of society, the lengthy analysis and conclusions in *Petition of M/V Elaine Jones, supra,* are of little precedential value today. *See Landry v. Two R. Drilling Co.,* 511 F.2d 138, 140–41 (5th Cir. 1975); *McDonald v. Federal Barge Lines, Inc.,* 496 F.2d 1376 (5th Cir. 1974).

*tation Co. v. Morehead*, 246 Ark. 170, 437 S.W.2d 234 (Ark.1969). Plaintiffs contend, however, that the damage items incorporated in the Arkansas statute should be applied in this case so as to "supplement" the general maritime law. In so arguing, plaintiffs seek to do indirectly what they cannot do directly, that is, utilize the substance of the Arkansas statute.

[26] In *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Supreme Court fashioned a new federal cause of action for wrongful death to replace the prior reliance on non-uniform state wrongful death statutes. The Court declared that, in defining the contours of this new remedy, state laws should be consulted with a view toward discerning general principles and trends that might properly be encompassed within the scope of the new federal action. However, the general maritime cause of action for wrongful death is not dependent on adjacent state law, *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970), and if "elements of recovery [are] borrowed from state death acts [they] must be consonant with federal maritime policies." *Petition of M/V Elaine Jones*, *supra* at 31 n.15; *see Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953).

[27] In *Gaudet*, the Supreme Court clearly enunciated not only the elements of damages recoverable in a *Moragne*-type action, but also explained why damages for grief and mental anguish should not be allowed. *See* note 1, *supra*. Therefore, because the Supreme Court has rejected a recovery for grief, this Court cannot and will not rely on a state statute that runs counter to the prohibition announced in *Gaudet*. *See In re Farrell Lines*, 378 F.Supp. 1354, 1360–61 (S.D.Ga.1974).

*D. Penalty Wages Pursuant to 46 U.S.C. § 596*

14. Plaintiffs seek penalty wages as provided by 46 U.S.C. § 596. The statute provides:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

At the time the four decedents were killed, they had accrued earned wages during the existing pay period. The decedents did not possess any causes of action under Section 596 for wages payable yet wrongfully withheld by the defendants.

15. Plaintiffs argue that in view of the defendants' failure to pay to them within the statutory time period the wages accrued by the decedents, they are entitled to invoke Section 596. Thus, they seek an additional two days pay for every day the wages plus penalties have remained outstanding, including the time which has elapsed during this judicial proceeding which commenced two months following the tragedy. Contending that the accrued wage payments by defendants in July, 1975, did not stop the running of the statutory time period, *see* Finding of Fact 37, *supra*, plaintiffs compute their entitlement as follows up until the time of trial:

| Decedent | Daily Wage | Accrued Wages, Less Expenses, at Death | Penalty Wages |
|---|---|---|---|
| John Hayes | $160.00 | $3,197.85 | $116,800.00 |
| Troy Eaton | 140.00 | 1,691.15 | 102,200.00 |
| Edwin Jones | 83.32 | 481.97 | 60,833.33 |
| Larry Reel | 83.32 | 314.29 | 60,833.33 |

16. Plaintiffs' claim for penalty wages pursuant to Section 596 in the special context of a death action is apparently novel. Neither counsel nor this Court has located any case authorities which discuss the standing of the survivors of a deceased seaman to invoke the Section 596 penalty wage provision when they are not paid the decedent's accrued wages immediately following his death. In light of another section within Title 46 entitled "*Effects of Deceased Seamen*" which deals specifically with the accrued wage problem that arises when a seaman dies at sea, *see* 46 U.S.C. §§ 621–28, the Court finds no merit to plaintiffs' argument that they are entitled to a recovery pursuant to Section 596.

17. Defendants have briefed at length their contention that these decedents were not "seamen" on a "voyage" as those terms are used in the wage protection statutes contained in Title 46, including Sections 596 and 621–628. Given the nineteenth century derivation of these statutes, the Court acknowledges difficulties in technically applying these statutes to a modern maritime setting such as an offshore drilling rig. However, the Court need not address itself to the appropriate scope of these terms as used in these special wage statutes. Even assuming that the decedents were "seamen" on a "voyage," and therefore were within the scope of these provisions, the Court nevertheless concludes that penalty wages pursuant to Section 596 clearly are not recoverable by these plaintiffs.

18. The United States Supreme Court recently has stated that

> "[t]he obvious concern of § 596 is that the shipowner not unlawfully withhold wages, and thereby unjustly enrich himself while wrongfully denying the seaman the benefits of his labor."

*American Foreign S.S. Co. v. Matise*, 423 U.S. 150, 159, 96 S.Ct. 410, 416, 46 L.Ed.2d 354 (1975). Other courts have more specifically noted that

> "the apparent rationale of § 596 [is] that sea[men] not be stranded in foreign ports or domestic ports remote from where they were employed without payment of a significant portion of the amounts due them, so as to obviate their being without funds or under economic compulsion to sign new articles on terms and conditions dictated by the master or owner."

*Eaton v. SS. Export Challenger*, 376 F.2d 725, 727–28 (4th Cir. 1967); *accord, Ladzinski v. Sperling Steamship and Trading Corp.*, 300 F.Supp. 947, 954 (S.D.N.Y.1969); *Malanos v. Chandris*, 181 F.Supp. 189, 191 (N.D.N.Y.1959).

[28] 19. Sections 621 thru 628 of Title 46, grouped under the heading "*Effects of Deceased Seamen*," set forth a procedure to be followed in disposing of a deceased seaman's accrued earnings if he dies while at sea. Section 623, entitled "*Penalty for neglect of master*," further provides for a treble damage remedy which may be assessed if the master or owner of the vessel does not duly pay such wages.

In substance, these sections provide for an interpleader-like procedure whereby unpaid wages are deposited in the federal district court where the deceased seaman resided. Persons claiming an entitlement to the fund thereafter may come forward and assert their respective claims. The district court then shall award the fund to those claimants deemed by the court to be lawfully entitled to it. Through such a device, the burden of determining entitlement to the fund is placed on the court, thus protecting both the owner of the vessel and the rightful claimants from a misguided payment to a person not lawfully entitled thereto.

[29] 20. No judicial authorities have been cited by counsel or located by this Court which discuss the interplay between Section 596 and Sections 621–28. It is clear, however, from an examination of the statutory language contained in these provisions that Sections 621 *et seq.* govern

claims by the estates of deceased seamen for wages accrued prior to death. To hold otherwise and make owners of vessels susceptible to penalty wage liability under Section 596 if they do not pay such wages to the seaman's survivors within two days of death would wholly negate the obvious intent of Congress in enacting Sections 621 *et seq.*, which was to set up a *judicial* procedure to be followed in distributing the earned wages of a deceased seaman. *See In re Holmberg's Estate*, 193 F. 260, 262 (N.D.Cal.1912). Thus, the Court concludes that the sections covering "Effects of Deceased Seamen" set forth the exclusive statutory remedy available to a deceased seaman's estate and survivors to recover wages earned but not wrongfully withheld at the time of death. As stated in *In re Buckley*, 33 F.2d 615, 616 (D.Mass.1929):

> "There can be no doubt as to the power of Congress to provide for the disposition of the wages and effects of seamen who die in service. It has undertaken to do so by statutes which provide a complete scheme of disposition."

21. Plaintiffs contend that the United States Supreme Court in *American Foreign S.S. Co. v. Matise*, 423 U.S. 150, 155 n.9, 96 S.Ct. 410, 46 L.Ed.2d 354 (1975) recognized that an action under Section 596 survives a deceased seaman and can be prosecuted by his legal representative. In *Matise*, the Supreme Court allowed the plaintiff-seaman's representative to be substituted for the seaman where the seaman died during the course of the legal proceeding previously filed by him pursuant to 46 U.S.C. § 596. This situation is factually distinct from the instant case wherein the decedents' survivors have instituted independent claims for penalty wages pursuant to 46 U.S.C. § 596 which the decedents did not possess at the time of their demise. Thus, the *Matise* case has no bearing on the question of whether or not Section 596 can be invoked directly by these plaintiffs.

22. Although not urged by plaintiffs, the Court concludes that the statutory purpose behind Sections 621 *et seq.* has been satisfied in the instant case. The instant action was filed on December 12, 1974, two months following the tragedy. Thereafter, defendants prepared drafts payable to the legal representatives of the four estates covering the accrued unpaid earnings of the decedents plus bonuses not technically accrued at the time of death. Plaintiffs, in lieu of negotiating the wage checks, held them so as to preserve a claim for penalty wages, which was thereafter urged in Plaintiffs' Third Amended Complaint. The Court now is in a position to make a distribution in accordance with 46 U.S.C. § 627.

[30] Technically, the defendants have not complied with the procedures contemplated by Sections 622 and 627 in that they did not pay the decedents' accrued wages to a Coast Guard official who in return would deliver them to the district court for later distribution. Nevertheless, in conjunction with other relief requested by plaintiffs, this district court now can make the appropriate distribution of unpaid wages to the decedents' respective estates. Moreover, the time lag between the date of the casualty and the later proffer of payment by defendants is not out of line with other reported decisions under these sections. *See, e. g., In re Ginther*, 189 F.Supp. 872 (D.Md.1960) (nine months between seaman's death and payment of wages into court). Accordingly, plaintiffs' request for penalty wages pursuant to Section 596 will be denied.

[31, 32] 23. In the alternative, the Court would note that owners of vessels are not liable for penalty wages under 46 U.S.C. § 596 if "sufficient cause" exists for nonpayment. "Sufficient cause" has been interpreted to include instances where the applicability of Section 596 to a given set of facts is unclear and there is no bad faith in withholding of wages. *See The Velma L. Hamlin*, 40 F.2d 852 (4th Cir. 1930), *and cases cited therein; Bassis v. Universal Line, S.A.*, 322 F.Supp. 449, 459 (E.D.N.Y. 1970). Given the novelty of plaintiffs' claim in a death action context, "sufficient cause" for withholding wages clearly should exist in this case.

## IV. CONCLUSION

24. Counsel for plaintiffs stated at trial that plaintiffs no longer seek a recovery of punitive damages. Therefore, this requested element of damages is denied as moot.

25. By reason of the foregoing findings of fact and conclusions of law, plaintiffs are entitled to judgment against the defendants as follows:

| | |
|---|---|
| (A) For the death of John Hayes: | |
| (1) Unpaid Wages | $ 3,197.85 |
| (2) Evelyn Rhonda Thompson | 30,000.00 |
| (3) Mark Hayes | 42,000.00 |
| TOTAL | $ 75,197.85 |
| (B) For the death of Troy Eaton: | |
| (1) Unpaid Wages | $ 1,691.15 |
| (2) Louzelle Hawkins Eaton | 175,000.00 |
| (3) Johnnie June Eaton Bell | 17,000.00 |
| (4) Ricky Eaton | 19,000.00 |
| (5) Drinda Eaton | 26,000.00 |
| (6) Mandie Eaton | 35,000.00 |
| TOTAL | $273,691.15 |
| (C) For the death of Edwin Jones: | |
| (1) Unpaid Wages | $ 481.97 |
| (2) Mr. & Mrs. Jones | 35,000.00 |
| TOTAL | $ 35,481.97 |
| (D) For the death of Larry Reel: | |
| (1) Unpaid Wages | $ 314.29 |
| (2) Mr. & Mrs. Reel | 35,000.00 |
| TOTAL | $ 35,314.29 |

26. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

Counsel for the plaintiffs will submit an appropriate judgment within twenty (20) days incorporating by reference these findings of fact and conclusions of law. Legal interest will run from the date of judgment, the Court having determined from a full review of the record that there is no factual or legal basis to hold otherwise.




**Leonard W. FRYER and Floyd F. Whitmore, Executors of the Manford F. Fryer Estate, Plaintiffs,**

**v.**

**UNITED STATES of America, Defendant.**

**Civ. No. 74-26-W.**

United States District Court,
S. D. Iowa, W. D.

July 7, 1977.

Estate filed action for refund of estate tax. After United States conceded matters at issue and authorized refund to overassessed tax and the interest due, the District Court, Hanson, Chief Judge, held that, with respect to overpayment made in the form of 3½% government bonds, taxpayers were entitled to interest at the rate of 3½% and not at the rate of 7%.

Order accordingly.

**1. Estoppel ⇐62.2(3)**
**United States ⇐40**

Absent any apparent intention to deceive or mislead, United States was neither bound nor estopped by an unauthorized act of one of its agents.

**2. Estoppel ⇐62.2(4)**
**United States ⇐40**

In view of evidence that communication from chairman of revenue section of the Department of Justice to taxpayer was unauthorized or at least contrary to congressional intent, United States was not bound by nor estopped by the statements made by the chairman.

**3. Internal Revenue ⇐1742**

Government can establish the terms and conditions under which bonds may be used to satisfy tax obligations and may determine the conditions under which revenue payment by bonds may be refunded.

**Vivian Marie SELF, as administratrix of the estate of Danny Joe Self, deceased, etc., Plaintiff-Appellee, Cross-Appellant,**

**v.**

**GREAT LAKES DREDGE & DOCK COMPANY, a corporation, Defendant, Third Party Plaintiff-Appellant, Cross-Appellee,**

**and**

**Chevron Shipping Company, Third Party Defendant, Cross-Appellant.**

**GREAT LAKES DREDGE & DOCK COMPANY, a corporation, Plaintiff-Appellant, Cross-Appellee,**

**v.**

**CHEVRON SHIPPING COMPANY, Defendant-Appellee, Cross-Appellant,**

**and**

**Italia Societer Per Az Di Nav, Defendant.**

**Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability, Plaintiff-Appellee, Cross-Appellant,**

**Great Lakes Dredge & Dock Company, a corporation, Claimant-Appellant, Cross-Appellee.**

No. 85-3673.

United States Court of Appeals, Eleventh Circuit.

Dec. 1, 1987.

Rehearing and Rehearing En Banc Denied Jan. 6, 1988.

Ship collided with dredge barge flotilla, injuring and killing crew members of flotilla. Injured crew and survivors of dead crewmen instituted separate actions against employer and dredge operator. Operator filed third-party complaints in each action against operator of ship. Owner of ship filed complaint seeking limitation of liability. The United States District Court for the District of Florida, Howell W. Melton, J., entered judgment on jury verdict finding dredge operator guilty of negligence but also finding that such negligence in no way caused injury to crew. Plaintiffs appealed. The Court of Appeals, 688 F.2d 716, reversed and remanded. After denial of rehearing, 693 F.2d 135, and denial of certiorari, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346, the District Court, No. 77-635-CIV-J-M, Daniel Holcombe Thomas, J., 613 F.Supp. 1428, found negligence and awarded damages, but limited damages because of settlement by plaintiff with one of parties. Appeal was taken. The Court of Appeals, Clark, Circuit Judge, held that: (1) survivors of fatally injured seaman could recover from dredge and barge owner full damages, less amount already recovered from shipowner through settlement; (2) evidence did not support trial court's assumption that deceased seaman would never have earned more than minimum wage during periods he was not working on dredge; and (3) shipowner was not entitled to limitation of damages.

Affirmed in part, reversed in part and remanded.

**1. Damages ⇐6**

Any inequity which results from implementation of seamen's damage award should be borne by tort-feasors rather than seaman himself.

**2. Damages ⇐63**

Seaman's widow and children could recover from employer and owner and operator of dredge and barge full damages, less amount already recovered through settlement with owner of ship which collided with barge and dredge, even though employer was found to be only 30 percent negligent, shipowner was found to be 70 percent negligent, and settlement by shipowner was less than 70 percent of total damages.

**3. Federal Courts ⇐941**

District court's failure to make sufficient findings to permit adequate review of claims of seaman's widow and children for

damages resulting from collision causing seaman's death required remand, where seaman's employer and seaman's widow disagreed about appropriateness of certain claims for damages.

**4. Death ⇐82**

Damage award for conscious pain and suffering is appropriate, depending on facts, in maritime wrongful death actions.

**5. Death ⇐105**

District court should have made specific findings of both pain and suffering damages to which seaman may have been entitled, where seaman was conscious for at least a few minutes after barge overturned and before seaman was sucked under water to his death.

**6. Federal Courts ⇐941**

Lack of discussion of seaworthiness and whether any unseaworthiness of dredge enhanced dredge owner's liability to seaman required remand to allow district court to state its findings clearly, even though district court's award of nonpecuniary damages implied that district court found vessel to be unseaworthy.

**7. Shipping ⇐80**

Violations of safety regulations can lead to finding of unseaworthiness.

**8. Shipping ⇐86(3)**

Punitive damages should be available in cases where shipowner willfully violated duty to maintain safe and seaworthy ship or where shipowner's acts, or failures to act, recklessly increased danger of disaster.

**9. Death ⇐105**

Specific determination about punitive damages was required in wrongful death action, where dredge owner had been warned by local pilots' association about possibility of exact type of collision that occurred, involving ship shearing into barge and dredge, but owner chose to ignore warnings, and may not even have passed warnings onto crew of dredge.

**10. Federal Courts ⇐941**

Although in absence of clear findings by district court concerning award of prejudgment interest in admiralty case, Appellate Court should search record for peculiar circumstances and decide to award or deny prejudgment interest without remand, remand of prejudgment interest question for explicit findings by trial court was ordered, where case had been remanded to district court for consideration of other possible awards of damages.

**11. Death ⇐77**

District court's assumption or finding that seaman killed in collision would hold only semi-skilled jobs at minimum wage during off-months, for remainder of his career, was not supported by evidence; uncontradicted evidence established that prior to his death seaman had worked in construction field, where wages are typically higher than minimum wage, during at least one non-dredge period.

**12. Federal Courts ⇐937**

Remand was warranted for calculation of present value of future earning's award in wrongful death action, where district court used improper case-by-case method, and it was likely that entire damages figure would need to be recalculated due to remand for reassessment of use of minimum wage in figuring future earnings.

**13. Death ⇐98**

Although $70,000 loss of society, love and companionship award to widow and $15,000 to each of fatally injured seaman's two children was small, it was not so grossly inadequate to require remand in wrongful death action.

**14. Collision ⇐11**

Provision of pilot rules for inland waters requiring that dredge "straighten out within the cut" for the passage of a vessel or tow when the dredge has given approaching vessel or tow signal that channel is clear requires that dredge bring line of dredge so it is parallel to channel rather than just swing dredge's bow out of channel.

**15. Collision ⇐123**

When ship involved in collision is in violation of statutory rule designed to prevent collision, burden shifts to that ship to

disprove that violation was contributing cause of the collision.

**16. Collision ⇐74**

Dredge-barge flotilla which violated rule requiring dredge to "straighten out" after giving approaching vessel signal that channel is clear failed to meet its burden under Pennsylvania rule to show that violation was not cause of collision between ship and barge attached to dredge, where angle in which dredge and attached barge was positioned in channel distorted perception of navigation of tanker, causing problems in determining course to safely pass flotilla.

**17. Admiralty ⇐73**

Adoption of federal rules of evidence did not modify substantive burdens and presumptions long established in federal admiralty law.

**18. Federal Civil Procedure ⇐2011**

When document party seeks to admit is full of inadmissible material, it is incumbent on party to specifically note admissible sections.

**19. Federal Civil Procedure ⇐1439**

Deposition of coast guard commander who prepared formal coast guard report on collision between ship and dredge-barge flotilla could not, in its entirety, be admitted in action brought by widow of fatally injured seaman, if barge owner wished to gain admission of specific passages of deposition, it should have brought passages to attention of district court.

**20. Collision ⇐146, 147**

In admiralty cases where district court assesses relative degrees of fault for collision, there is not place for active-passive negligence doctrine; tort-feasor only passively negligent will presumably bear smaller percentage of fault for injury, and, if, because of other rules and obligations, passively negligent tort-feasor initially pays more than its share, it can seek contribution from more active tort-feasor.

**21. Shipping ⇐209(3)**

District court's conclusions that ship's distribution system for maritime notices was inadequate, that ship's owner should have been aware of fault in information system, and that therefore, owner was not entitled to limit its liability in action arising out of collision between ship and barge-dredge flotilla, were not clearly erroneous 46 U.S.C.A. §§ 183, 183(a).

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Dewey R. Villareal, Jr., Carl R. Nelson, Tampa, Fla., Courtney W. Stanton, Jacksonville, Fla., John M. Kops, Warren M. Faris, New Orleans, La., for Great Lakes Dredge & Dock Co.

G. Morton Good, Miami, Fla., Richard G. Rumrell, Jacksonville, Fla., for Chevron Shipping Co. & Chevron Transport Corp.

Leonard C. Jaques, Detroit, Mich., for Self.

Appeals from the United States District Court for the Middle District of Florida.

Before CLARK, EDMONDSON and KEITH *, Circuit Judges.

CLARK, Circuit Judge:

On February 5, 1975, the ship Robert Watt Miller struck the dredge Alaska and a barge in the St. Johns River near Jacksonville, Florida. A number of seamen were killed or injured in the accident, and this litigation ensued. After over twelve years of proceedings, this case is now before this court for a second time. In the earlier appeal, *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir.1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983), this court reversed the judgment of the district court because of errors that led to findings of negligence but no award of damages. On remand, the district court conducted a nonjury trial, found negligence, awarded damages, but limited damages because of a settlement by the plaintiff with one of the parties. *See In re Chevron Transport Corp.*, 613 F.Supp. 1428 (M.D.Fla.1985). All parties

* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

appealed to this court raising at least twelve issues altogether. For the reasons discussed below, we affirm in part and reverse in part the judgment of the district court.

## I. FACTS

The background and facts of this case are extensively detailed by the district court, *see* 613 F.Supp. at 1431–33, and in this court's earlier opinion, *see* 688 F.2d at 717, and will only be summarized here.

### A. *The Parties*

Great Lakes Dredge and Dock Company ("Great Lakes") was the owner and operator of the dredge Alaska and the barge involved in the accident. The Chevron Transport Corporation owned the ship Robert Watt Miller, which collided with the barge and dredge. The vessel was operated by Chevron Shipping Company (collectively "Chevron" unless otherwise noted).

Vivian Marie Self is the widow of Danny Joe Self, a seaman and member of the crew of the barge (collectively "Self" unless otherwise noted). While engaged in the performance of his duties for his employer, Great Lakes, Danny Self lost his life in the accident. Vivian Self was one of the original plaintiffs in this action, which included claims of injured seamen and the representative of the one other seaman who lost his life in the accident. All plaintiffs other than Self have settled their claims. The case is an action at law under § 20 of the Jones Act, 46 U.S.C. § 688 and under general maritime law. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

### B. *The Accident*

To briefly summarize, at a little before noon on February 5, 1975, the Robert Watt Miller was proceeding at full speed up the St. Johns River approaching the Port of Jacksonville. The pilot of the vessel, knowing the Alaska was in the area, radioed to inform the dredge that the ship would soon be passing. The Robert Watt Miller came around a turn in the channel and saw for the first time the placement of the dredge and barge. Based only on visual estimates, the pilot guided the Robert Watt Miller to the north side of the channel. The leverman of the dredge Alaska, when he saw the Robert Watt Miller, stopped dredging and swung the bow of the dredge toward the south bank of the channel.

As the Robert Watt Miller continued up the channel, the pilot and master of the ship noticed a significant sheer of the vessel to port, toward the south side of the channel. According to the district court,

> an order of 10 degrees right rudder was given. The sheer continued and an order of 20 degrees right rudder was given. The master then initiated an order of hard starboard rudder and full ahead on the engines. That order was given at 12:09 but the sheer continued so a full astern was ordered at 12:11.

Immediately before impact the pilot of the Robert Watt Miller radioed a warning to the Alaska informing the leverman to clear the dredge and barge of all personnel. He also blew the warning whistle. At about the same time the operator of the dredge's tender tug Tarheel State, lying on the port side of the Alaska, saw the danger, sounded the tug's whistle and moved out of the path of the Robert Watt Miller.

Between 12:10 and 12:12, the time having not been exactly established, the bow of the Robert Watt Miller struck the Alaska. The bow first contacted the dredge's port anchor boom, then struck the hull about 100 feet aft of the bow. The impact broke the coupling between the Alaska and the [barge]. The Robert Watt Miller slipped down the side of the Alaska, came into contact with the Barge thus causing her to be loosened from the connections to the dredge. The momentum of the Robert Watt Miller continued forward along the [barge] and rolled the barge over on her starboard side. The Robert Watt Miller's engines were stopped at 12:13.

When the Barge rolled over several crewmen were injured; two, including the plaintiff's decedent, lost their lives. The plaintiff's decedent, Danny Self, was

a deckhand aboard the Alaska. Around noon on February 5, 1975, he and other crew members gathered in the mess hall for lunch. One minute prior to collision one of Self's fellow crewmen went to the door of the mess hall, saw the Robert Watt Miller and yelled out to the others. At this time the men ran from the mess hall aft to the port side to a ladder near the stern. They continued down the ladder to the main deck and across the gangway to the barge. The men had just reached the barge when the impact of the Robert Watt Miller rolled it over. Eleven crew members were cast into the water.

Immediately, rescue attempts were made by the dredge's tender tugs, the survey boat Canaveral and a small fishing boat. In addition, crew members of the Alaska and the Robert Watt Miller threw life rings and flotation equipment attempting to save the men in the water.

Burke, a crew member of the Alaska, had grabbed his life jacket from the handrail when leaving the mess hall. He attempted to save Self by holding on to him, but the suction and current prove stronger than the grips of Self and Burke. Self was pulled away and lost his life.

*In re Chevron Transport Corp.*, 613 F.Supp. at 1433.

C. *The Litigation*

Each of the death and personal injury claimants instituted separate actions against their employer, Great Lakes Dredge & Dock Co. Great Lakes in turn filed third-party complaints in each action against Chevron Shipping Co., as operator of the Robert Watt Miller. Great Lakes also filed suit against Chevron Shipping Co. and Italia Societe Per Az Di Nav. As owner of the Robert Watt Miller, Chevron Transport Corporation filed a complaint seeking exoneration from or limitation of liability.

613 F.Supp. at 1431. Both Chevron companies settled with all of the personal injury and death claimants, including Self. Chevron paid Self the sum of $315,000. The original trial judge severed the third-party complaints and conducted a jury trial between the personal injury plaintiffs and Great Lakes. The jury found that Great Lakes was negligent but found that Great Lakes was not liable to the plaintiffs. For reasons explained in *Ebanks*, this court reversed. On remand, a different district judge consolidated the pending actions for a nonjury trial. All of the personal injury claimants except for Self settled with Great Lakes. At trial, Self's claims against Great Lakes were tried as well as liability issues between Great Lakes and Chevron. The issues of Chevron's and Great Lakes' damages were reserved for later trial.

At trial, all three major parties (Self, Great Lakes, and Chevron) made allegations about causes of the accident and the injuries to seamen. Self alleged that Great Lakes failed to comply with various safety regulations requiring lookouts, life preservers, safety skiffs, and emergency drills. Self and Chevron alleged that Great Lakes improperly positioned the barge and dredge in the channel. Great Lakes alleged that Chevron negligently allowed its vessel to travel through the channel with insufficient information about the location of the dredge. Evidence on these and other claims were presented at trial.

The trial judge ruled that Chevron was negligent and liable because of the sheer of the vessel and that Great Lakes was liable because of the placement of the dredge and barge in the channel. The court found that Self's total damages amounted to $661,354.00 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron, and because the trial court was of the view that this court's opinion in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir.1979),[1] required an apportionment of damages, the court awarded Self a judgment of $198,406.20 against Great Lakes, which represents 30%

1. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

of Self's total damages. The details of the rulings challenged on appeal are discussed more fully below.

D. *This Appeal*

On appeal all three parties are proceeding as appellants or cross-appellants challenging rulings made by the district court below. In the six briefs filed on appeal, at least twelve issues are raised, and in this opinion we must reach all but two of the points raised. For the most part, we will address the issues in the order in which they were presented to this court.

## II. SELF'S CLAIMS AGAINST GREAT LAKES

The trial court found that Great Lakes negligently breached its duty to Danny Self by failing to follow Corps of Engineers safety regulations as required by Great Lakes' dredging contract with the government. 613 F.Supp. at 1437. The court also found that Great Lakes' negligence was a proximate cause of the drowning of Self. *Id.* at 1438. Although in its initial brief Great Lakes did not directly challenge these findings on appeal, we note as a preliminary matter that they are fully supported by the record and the applicable law. We must thus address Self's claims on appeal—challenges to the amount and apportionment of damages.

A. *Apportionment of Damages*

In this appeal Self challenges the application by the district court of apportionment principles set out by this court in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir.1979), to the award of damages to Self. Because the court determined that Great Lakes was 30% responsible for the accident, and because Self had settled with Chevron (which was found by the district court to be 70% responsible), the court awarded Self only 30% of the total damages of $661,354. Chevron had paid Self $315,000 and taken a release. The district court was of the opinion that *Leger* required this result, which meant that Self received compensation in the sum of $513,406.20, or $147,948.80 less than the total damages of $661,354.

To understand *Leger*, it is necessary to briefly review the law controlling the apportionment of damages in maritime cases. As early as 1855, it was the law in American courts that damages arising from a maritime collision should be equally divided among joint tortfeasors, regardless of their degree of responsibility for the collision. *See The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1855). The Supreme Court in *The Schooner Catharine* drew on earlier English law that required equal division of damages. Then, in 1975, finding the United States to be "virtually alone among the world's major maritime nations" in adhering to the equal division of damages rule, the Supreme Court overturned *The Schooner Catharine* and adopted a rule of proportional fault for liability for property damage arising from maritime collisions. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 403, 95 S.Ct. 1708, 1712, 44 L.Ed.2d 251 (1975).[2] *Reliable Transfer* did not address liability for personal injuries caused by a maritime collision.

The Fifth Circuit in *Leger* extended the proportional fault rule of *Reliable Transfer* to reach personal injuries. 592 F.2d at 1249.[3] The *Leger* court then endorsed a rule set out by the district court requiring that "the judgment awarded to the claimant against a nonsettling defendant is credited with the dollar amount represented by the proportion of negligence, if any, attributed to the settling parties." *Id.* at 1248. The court in *Leger* explicitly took the approach that the plaintiff who settles with one joint tortfeasor takes the benefit, or burden, of his bargain. If he makes a

2. The primary holding in *Reliable Transfer* is narrow and relatively simple: "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among parties proportionately to the comparative degree of their fault...." 421 U.S. at 411, 95 S.Ct. at 1715–16.

3. We have no doubts about the correctness of this aspect of the *Leger* holding.

"good" settlement, he could receive total compensation more than his actual damages, while if he makes a "bad" settlement he would receive less than his actual damages. *Id.* at 1250 & n. 9.[4]

Two months after this court issued its opinion in *Leger*, the Supreme Court decided *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). The *Edmonds* opinion included language that cast serious doubt over the full implications of the *Leger* approach. In the wake of *Edmonds*, the Eleventh Circuit backed away from and disavowed certain aspects of *Leger*. *See Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir.1982); *Drake Towing Company v. Meisner Marine Construction Company*, 765 F.2d 1060 (11th Cir.1985).

Although not directly related to the holding in the case, the Court's opinion in *Edmonds* strongly and repeatedly reaffirmed the right of a plaintiff to recover from any single tortfeasor the full compensation for damages incurred. " 'Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or anyone of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.' " 443 U.S. at 260 n. 9, 99 S.Ct. at 527 n. 9 (quoting *The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876)). The Court noted that a "concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability." 443 U.S. at 260 n. 8, 99 S.Ct. at 527 n. 8.

[1] The Supreme Court in *Edmonds* specifically considered the implications of its opinion in *United States v. Reliable Transfer*, on which the *Leger* decision is based: "[In *Reliable Transfer*] we did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both." *Id.* at 271 n. 30, 99 S.Ct. at 534 n. 30 (emphasis in original). The Court noted that "[c]ontribution remedies the unjust enrichment of the concurrent tortfeasor, and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched." *Id.* In our opinion, this statement rejects the philosophy in the *Leger* case that it is the plaintiff who bears the loss or obtains the gain under facts such as are in this case. The philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself. *Joia v. Jo-Jo Service Corp.*, 817 F.2d 908, 917 (1st Cir.1987).

In *Ebanks*, this court's earlier opinion in this case, the panel considered the language quoted above and concluded that "[*Leger's*] effect as precedent has been weakened by *Edmonds*." 688 F.2d at 720. Then, in *Drake Towing*, the court ordered that one joint tortfeasor pay full damages (less that attributable to the plaintiff's own negligence), even though the plaintiff had already settled with another joint tortfeasor. *See* 765 F.2d at 1067. The court considered the *Leger* opinion, and described the *Leger* holding in extremely narrow terms, thereby construing *Leger* to avoid a conflict with the approach endorsed by the Supreme Court in *Edmonds*. At least one other circuit court has determined that the *Leger* approach cannot withstand the more recent *Edmonds* opinion; that court specifically approved of this court's *Ebanks* deci-

4. In *Leger*, the plaintiff made a "good" settlement and ultimately received $310,171.05 in compensation for his injuries, even though the injuries amounted to only $284,090.00. Similarly, in the primary Eleventh Circuit case to follow *Leger*, the plaintiff received $121,000 in compensation although his damages were only $60,000. *See Gormly v. Van Ingen*, 736 F.2d 624, 625 (11th Cir.1983). The *Leger* court overlooked in its calculations that Travelers Insurance Company received $82,331 of the $127,840 received by Leger from Dresser, leaving Leger with $246,321 ($63,920 balance plus $182,331 initially paid by Travelers). Thus, Leger received less than the total damages awarded.

sion, while specifically rejecting *Leger*. *See Joia*, 817 F.2d at 915–17.

We conclude that the district court erred in relying upon the *Leger* opinion in requiring Great Lakes to pay Self only $198,406.20 instead of $356,350. As we previously mentioned, although this court in *Ebanks* reversed the district court in this case because of a misapplication of the *Leger* principles, it is not altogether surprising that on remand the district court (through a different district judge) again misapplied *Leger*. The *Ebanks* case, in not following *Leger*, relied in part on the fact that in *Leger* all tortfeasors were before the court and jury for the sole purpose of allocating to each tortfeasor its percentage of liability for paying Leger's damages in the amount of $284,090, awarded to Leger in a prior jury trial.

> The trial court granted Dresser's motion for a new trial on the ground that the jury should have been informed that DWC and Continental were originally defendants, that Leger had settled his claims against them, and that Travelers was to receive one-half of all sums received by Leger from Dresser. The court considered it necessary that the jury be aware of the continuing interest in the law suit of the various witnesses from DWC and Continental.

*Leger*, 592 F.2d at 1247.

*Leger* thus differs from this case because Chevron was not before the court in the trial of this case at the first trial but was a party in this second trial for the purpose of assessing liability between Chevron and Great Lakes as to their purported claims against each other. However, at no time after the settlement did Self seek any further damages from Chevron. Under the principle announced in *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir.1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant. The purpose of the second trial in this case was not the same as the second trial in the *Leger* case, which had as its sole purpose the apportionment of damages between the tortfeasors.

There are other facts that distinguish this case from those very peculiar facts in *Leger*. As mentioned previously, Travelers' policyholders, DWC and Continental, had a monetary interest in the amount of damages collected by Leger from non-settling codefendant Dresser. Their interest in Leger's damages was that Travelers was to receive one-half of any funds collected by Leger from Dresser. There is no similar agreement in this case. Another distinctive fact was that in the second trial on the sole issue of the apportionment of liability amongst the three tortfeasors, DWC, Leger's employer was found to be guilty of no negligence, thus skewing the award of damages in the amount of $82,331.05 paid by Travelers in DWC's behalf to Leger in settlement. Thus, this sum was not used in reducing the judgment and was a windfall to Leger, which offset in part the sum that Leger had to pay to Travelers. The last distinctive difference between the *Leger* case and this one is that Leger was found to be 35% contributorily negligent, which affected the complicated calculations.

Because of these distinctions, namely the change in the law by *Edmonds* and *Ebanks*, and the differences in the facts, we do not consider *Leger* as controlling our opinion in this case.

We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case and that in the absence of a settlement, the amount of contribution turns on the percentage of fault of each joint tortfeasor. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). *Leger* upheld that "settling defendants are relieved of any further liability to the plaintiff." 592 F.2d at 1248 (relying upon *Luke v. Signal Oil & Gas Co., supra.*). It is obvious that the rule announced in *Luke* overrides the right of contribution.

We acknowledge that the rule that we adopt today may cause disparity in the

percentage of payment as between the settling and nonsettling tortfeasors in maritime personal injury actions. We note, however, that this court is not unique in adopting such a rule. Among those states that have incorporated comparative fault principles into their tort systems, but have retained the rule that there is no contribution from settling tortfeasors, there is a split of authority as to how a nonsettling tortfeasor's share of damages should be calculated. Some states have adopted the rule that *Leger* employed, while others require that the nonsettling tortfeasor's share be reduced only by the amount paid by a settling tortfeasor. Prosser and Keeton, *The Law of Torts*, § 67 at 476 (5th ed. 1984).

[2] As we are bound by the Supreme Court's guidance and the rule in *Edmonds*, we adopt the latter of these approaches.[5] We hold that Self can recover from Great Lakes the full damages, less the amount already recovered from Chevron through the settlement. The *Leger* approach has much merit in terms of efficiency and realistic settlement practices, but *Edmonds* and Eleventh Circuit cases following *Edmonds* require this result.[6]

Finally, we note that the remedial nature of general maritime law, and the Jones Act in particular, support this result. "The joint and several loss allocating mechanism which serves to provide an injured seaman his full judgment is consonant with the policy behind the Jones Act, to provide protection to seamen who are victims of negligence." *Joia*, 817 F.2d at 917 (citations omitted). In cases such as this, the general goal of maritime law is to provide quick and full compensation to the injured seaman, while leaving the primary litigation dispute to the question of which joint tortfeasor is liable for what percentage of the damages. Historically maritime law has treated seamen as in need of special protection; until the Supreme Court suggests otherwise, we cannot move away from that special protection to an arguably more "efficient" system in which an injured seaman is viewed as an equal party with equal bargaining power. Because of our resolution of this claim, we need not reach Self's contention that the trial court erred by apportioning liability based on degrees of fault for the collision, instead of apportioning liability based on degrees of fault for the death of Danny Self. Arguably, because Chevron had nothing to do with the safety violations of Great Lakes, Great Lakes bears a greater degree of responsibility for Self's death than it does for the collision itself. We do not address this argument.

### B. *Specific Findings of Damages*

[3] On appeal, Self argues that the district court failed to make adequate findings

5. In doing so, we note that the facts in this case make our decision compelling. Self was innocently eating his lunch on the barge some thirteen years ago as the Robert Watt Miller was bearing down upon the barge. His widow settled her claim and her children's claims with Chevron, owner of the Robert Watt Miller. The claim against Great Lakes is still unpaid and the subject of this appeal. Both tortfeasors were obviously negligent. Self's widow should not be penalized for settling with Chevron; nor should one in her position be forced to await the outcome of a lawsuit between two litigious defendants in order to ensure receipt of damages properly assessed against them.

6. Effectively, our holding today reaffirms the rule set out in *Billiot v. Sewart Seacraft*, 382 F.2d 662, 664–65 (5th Cir.1967), which the *Leger* court rejected based on *Reliable Transfer*. Because the Supreme Court's more recent opinion in *Edmonds* reveals that *Leger* misconstrued *Reliable Transfer*, we return to the rule in effect before *Leger* modified it. Because *Leger* was a panel decision, and the en banc court has not overruled *Billiot*, we consider *Billiot* still to be valid law. *Billiot* held that a claimant may settle with one tortfeasor, proceed against another for the total amount of the damages, and the court will deduct the amount paid by the settling tortfeasor from the recovery against the second tortfeasor. This results in the claimant receiving the exact amount of his damages. The risk or wisdom of settling in contrast to going to trial falls upon whichever tortfeasor had the best foresight.

We note that, unlike the Eleventh Circuit, the Fifth Circuit has fully endorsed the *Leger* approach, and has plainly stated the effect it can have on a seaman's recovery. *See, e.g., In re Incident Aboard D/B Ocean King*, 813 F.2d 679, 689 (5th Cir.1987); *Diggs v. Hood*, 772 F.2d 190, 196 (5th Cir.1985). Because we think this approach is inconsistent with Supreme Court doctrine, we cannot agree with the Fifth Circuit.

of fact as required by Fed.R.Civ.P. 52 concerning various claims for damages. With regard to certain issues discussed below, we agree. Rule 52 requires that the trial court "find the facts specially and state separately its conclusions of law thereon." "[T]he findings must be specifically detailed to give [an appellate court] a clear understanding of the analytical process by which ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir.1977). "This court cannot be left to guess. The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir.1975).

Although the district court's opinion is generally careful and thorough, it does fail to make sufficient findings to permit adequate review of Self's claims for damages. A remand for appropriate findings is the normal procedure. *See Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir.1976). A "remand is not required if a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case. Where the acts relied upon to support the judgment are in the record and are undisputed remand is unnecessary." *Gulf Towing Co. v. Steam Tanker, AMOCO New York*, 648 F.2d 242, 245 (5th Cir. Unit B June 1981). As discussed below, however, Great Lakes and Self disagree about the appropriateness of certain claims for damages. In this case, we think it more appropriate for the district court to make the initial findings on these claims, because that court has had the benefit of receiving first hand all of the evidence of the events leading to Danny Self's death.

1. *Conscious Pain and Suffering*

The trial court made no findings or award of damages for conscious pain and suffering experienced by Danny Self before he died. Although the lower court's opinion makes no reference to pain and suffering, the record paints a vivid picture of the final moments of Self's life. According to Burke, the seaman who tried to save Self, men thrown into the water when the barge overturned were sucked under the water for what "seemed like an eternity." Record, Volume 24, at 61. After Burke surfaced, Self then surfaced, and Burke saw that Self had no life jacket. Burke told Self to hold on to him, which Self did. *Id.* at 62. According to Burke,

> we struggled more or less. For the most part, his feet were on my shoulders and I was kicking, trying to surface. He was on top of me. That's where we stayed. Then we hit the ship and that's when he lost it, or I lost him, however it worked out. We lost our grip on one another. I saw him leaving me. I tried to reach him, but the buoyancy of my jacket kept me up so I couldn't. And I just saw him slip under me.... I know the water was moving very swiftly.... It was cold. I don't know what the exact temperature was, but it was pretty icy to go overboard, I know that.

*Id.* at 62–64. It seems clear that Self was conscious for at least a few moments after the barge overturned and before Self and Burke lost their grip and sucked Self under the water to his death.

**[4, 5]** A damages award for conscious pain and suffering is appropriate, depending on the facts, in maritime wrongful death actions. *See Hlodan v. Ohio Barge Line*, 611 F.2d 71, 76 (5th Cir.1980); *Dickerson v. Continental Oil Company*, 449 F.2d 1209, 1216 (5th Cir.1971). In *Hlodan*, the "evidence showed that for some undetermined number of minutes before his death Hlodan was aware of his predicament, and that his death by drowning was not instantaneous." 611 F.2d at 76. In *Dickerson*, the court wrote that if "the decedent was conscious while in the water, ... then it must be without dispute that he did suffer some pain ... from the anguish of struggling against drowning." 449 F.2d at 1216. We think that in this case the district court should have made specific findings about pain and suffering damages

to which Self may be entitled. *See Lettsome v. United States*, 411 F.2d 917, 923 (5th Cir.1969) (remanding for specific Rule 52(a) findings on pain and suffering in maritime injury case).

2. *Unseaworthiness*

[6] Similarly, the district court made no specific mention or findings about the seaworthiness of the dredge Alaska. It may be that the lower court factored a finding of unseaworthiness into the award of damages, or that the court found that the vessel was in fact seaworthy. Without any discussion of seaworthiness and of whether any unseaworthiness should enhance Great Lakes' liability to Self, however, we cannot adequately review the district court judgment. *See Glapion v. MS Journalist*, 487 F.2d 1252 (5th Cir.1973) (affirming specific findings concerning seaworthiness due to defect in ship, but remanding for specific findings concerning safety violation). In light of the district court's award of nonpecuniary damages to Self, we can almost assume that the court found the vessel to be unseaworthy. *See Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) (en banc) (holding that nonpecuniary damages cannot be awarded under Jones Act). Rather than speculating, however, we prefer to allow the district court to state its findings clearly.

[7] The record suggests that a finding of unseaworthiness would be plausible. Violations of safety regulations can lead to findings of unseaworthiness, *see Manning v. M/V "Sea Road,"* 417 F.2d 603 (5th Cir.1969), as can the failure to adequately train a ship's crew, *see Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558 (11th Cir.1985). We leave to the district court on remand the determination in the first instance of questions of seaworthiness and possible enhancement of damages. *See Farbwerke Hoeschst A.G. v. M/V "Don Nicky,"* 589 F.2d 795 (5th Cir. 1979) (remanding for specific findings on unseaworthiness and damages).

3. *Punitive Damages*

[8, 9] As with unseaworthiness, the lower court order is silent about punitive damages. Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of Great Lakes by the district court, or where the shipowner's acts (or failures to act) recklessly increased the danger of a disaster. In this case, Great Lakes had been warned by local pilots' association about the possibility of the exact type of collision that occurred (involving a ship shearing into the barge), yet Great Lakes chose to ignore the warnings, and may not even have passed the warnings on to the crew of the dredge Alaska. Furthermore, Great Lakes' failure to maintain adequate safety devices and procedures on the Alaska may rise to the level of willfulness or recklessness. In light of these facts, we think that some specific determination about punitive damages must be made. We will leave the initial decision to the district court on remand. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B July 1981) (remanding for findings on punitive damages).

4. *Prejudgment Interest*

[10] Again, the lower court opinion is silent about prejudgment interest. In general,

> prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest is created only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay prejudgment interest.

*Noritake Co. v. M/V Helienic Champion*, 627 F.2d 724, 728 (5th Cir. Unit 1980) (footnote and citations omitted). Although it is accepted practice to *award* prejudgment interest without making specific findings, *see id.* at 729, a denial of interest usually calls for specific findings.

> [I]n any admiralty case in which the trial court refuses to award prejudgment interest, the best practice would be for it

to detail the peculiar circumstance it has found, and specifically indicate that it is denying prejudgment interest as an exercise of the discretion created by the existence of peculiar circumstances.

*Id.* at 729 n. 4. In the absence of clear findings by the district court, an appellate court could search the record for "peculiar circumstances" and decide to award or deny prejudgment interest without a remand. *See Noritake*, 627 F.2d at 730 (awarding interest); *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir.1986) (denying interest). In this case, however, because we are remanding to the district court for reconsideration of other possible awards of damages, we choose also to remand this question for explicit findings by the court below.[7]

C. *Minimum Wage for Life*

[11] Before his death, Danny Self did not typically work on a dredge year round (presumably because of the seasonal nature of the work). In addition to the dredge work, the district court "assume[d] Mr. Self would also work 790 hours per year ... at a job earning minimum wage." 613 F.Supp. at 1438. On appeal, Self contends that the district court erred by making this assumption, arguing that the "assumption" was not a finding of fact, and that if it was, it is clearly erroneous.

In reviewing the district court's opinion, it is not clear whether this assumption was a finding, and thus it is unclear whether the assumption deserves the deference normally accorded to findings of fact. For purposes of this decision, we will assume that the assumption *is* a finding of fact. Having searched the record on appeal, however, we can find no evidence to support the assumption, and we thus determine that, based on the current record, it is clearly erroneous. The trial judge apparently drew the assumption from an assumption made by Great Lakes' expert. *See supra* note 12. Yet, as the expert admitted, his assumption did not take into account any experience or skills that Self would acquire in his dredging work, notwithstanding the fact that the district court found that Self would advance to the position of mate and then leverman on the dredge. By adopting the expert's assumption, the district court essentially held that a leverman (who is second only to the captain of a dredge) would hold only semi-skilled jobs during the off-months, for the remainder of his career. The assumption also ignores the uncontradicted evidence that prior to his death Self had worked in the construction field during at least one of the non-dredge periods, and that the wages in the construction field were typically higher than minimum wage. Based on the record, we thus hold that the district court's assumption is clearly erroneous.

On remand, the trial court may decide to require more evidence as to Self's non-dredge work. We do not reject the possibility that based on further evidence the trial court will conclude that Self would only earn the minimum wage for at least a portion of his career. We only hold that based on the record as it now stands, there is no support for the trial court's assumption that Self would never have earned more than the minimum wage during the periods he was not working on a dredge.[8]

7. A remand in this case is especially appropriate because there is a possibility that some form of interest was already calculated into the district court's award to Self. Apparently, the district court adopted without modification the pecuniary loss calculations proposed by Great Lakes' expert, *see* Record, Vol. 29 at 12–62, and there is a suggestion that these figures include some type of interest, *see id.* at 26. If, in fact, prejudgment interest was included in the award made by the court below, appellate review would have been simplified if that fact was made clear in the district court's decision, along with an explanation of how the interest was calculated.

8. We acknowledge that one likely reason behind the trial judge's adoption of the defendant's expert's assumption is that the plaintiff failed to present completely comprehensive evidence of these damages. While there is sufficient evidence in the record to make us question the trial court's assumption, we must repeat Judge Johnson's admonition that "it would behoove future litigants when preparing for trial to study carefully the horizon of damages before heading off down the trail.... The record at trial must be fully developed on the issue of damages.... Relying on an appellate court to sort through the record and calculate the appropriate damages merely delays achieving a just and reason-

D. *Reduction of Future Wages to Present Value*

[12] Self challenges on appeal the method used by the district court to calculate the present value of its award of future earnings. As Great Lakes concedes in their brief on appeal, the district court used the "case-by-case" method that was specifically rejected by the en banc court of the former Fifth Circuit in *Culver v. Slater Boat Co.*, 722 F.2d 114, 120 (5th Cir.1983) (en banc).[9] *Culver* required that courts in this circuit use the "below-market discount" method to adjust awards of future damages to present value. The district court's mistake is largely due to its reliance on Great Lakes' expert, who used the incorrect method.

In this appeal, Great Lakes argues that the error was harmless. Its expert used a 10.75% discount rate, which is substantially higher than the 1%–3% rate approved in *Culver*. Because their expert allowed for inflation in the initial calculations (contrary to the approach used in *Culver*), Great Lakes argues that the effective discount rate is only marginally higher than the 3% rate approved in *Culver*. Thus, according to Great Lakes, the use of the improper method was harmless.

For two reasons, we decline to reach the question of whether the use of the discredited case-by-case method can ever be harmless. First, the Great Lakes expert applied the too-high discount rate to *all* future damages, including those not adjusted upward for inflation. Thus, at least for certain portions of the damages award, the effective discount rate was substantially higher than is proper. Second, in light of our remand above for a reassessment of the use of the minimum wage for Danny Self's entire life, it is likely that the entire damages figure will need to be recalculated. On remand, the district court should use the "below-market discount" method described in *Culver* and *Deakle v. John E. Graham & Sons*, 756 F.2d 832 (11th Cir. 1985).

E. *Damage for Loss of Society*

[13] The district court awarded to Mrs. Self $70,000 for the loss of society, love, and companionship of her deceased husband, and the court awarded $15,000 to each of Danny Self's two children. On appeal, Mrs. Self argues that these awards are grossly inadequate. Self cites numerous cases where $200,000 to $500,000 was awarded for loss of society. Great Lakes, on the other hand, cites cases where $25,000 to $75,000 was awarded for loss of society.

In reviewing the amount of damage awards, this court is generally limited to the question of whether the trier of fact abused its discretion. *See Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir.1976). While the district court did not describe how it determined the amount of the awards for loss of society, we do not find any abuse of discretion in the amount. "Although the award was small, it was not 'unconscionably inadequate,' therefore, we may not disturb the award on appeal." *Kramer v. Keys*, 643 F.2d 382, 386 (5th Cir. Unit A Apr. 1981) (citation omitted). We thus affirm the district court's award of damages for loss of society.[10]

## III. GREAT LAKES' CLAIMS AGAINST CHEVRON

The remainder of this opinion deals with issues arising out of Chevron's and Great

ably accurate final judgment." *Dealke v. John E. Graham & Sons*, 756 F.2d 821, 834 (11th Cir.1985). If the trial court on remand concludes that plaintiff was negligent in presentation of evidence on this issue, he may reach the same conclusion as he initially reached. We remand because it is not clear to us why the minimum wage figure was used.

9. *Culver* is binding precedent on this court. *See Stein v. Reynolds Securities, Inc.*, 756 F.2d 821 (11th Cir.1985).

10. On remand, the trial court can, at its discretion, consider additional evidence on this point, and increase the award for loss of society if appropriate. We do not hold that the amount of the award is at all *required* to be at the level set by the district court, only that the level set is within the range of permissible awards.

Lakes' attempts to shift responsibility for the collision to determine apportionment of damages to their respective vessels. As discussed above, the district court found that Great Lakes was negligent toward Danny Self by failing to maintain and conduct certain required safety features and procedures. The lower court also found that Great Lakes violated the Pilot Rules for Inland Waters, 33 C.F.R. § 80.26(c) (1974) (in effect at the time of the collision), and that the violation was a contributing cause of the collision. On appeal, Great Lakes challenges this finding, as well as two other rulings made by the district court.

A. *Violation of 33 C.F.R. § 80.26(c)*

[14] The Pilot Rules for Inland Waters, in force in February of 1975, required that

> [w]hen any pipe line or swinging dredge shall have given an approaching vessel or tow the signal that the channel is clear, the dredge shall straighten out within the cut for the passage of the vessel or tow.

33 C.F.R. § 80.26(c) (1974) (no longer in effect). The district court held that Great Lakes violated that regulation because, instead of "straightening out" and bringing the line of the dredge so that it was parallel to the channel, the leverman of the dredge brought the bow closer to the bank of the river (and thus farther from the center of the channel). Great Lakes argues that the trial judge misinterpreted the regulation and that even if there was a violation of the regulation the district court incorrectly applied the rule in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to shift the burden to Great Lakes to disprove that the violation was related to the accident.

1. *The Violation*

Both Chevron and Great Lakes (and Self in support of Chevron on this issue) argue that the plain language of the rule supports their positions. Chevron argues that the words "straighten out in the cut," or the channel, means just that—straighten out instead of lie at an angle. Great Lakes on the other hand argues that if the rule intended to require that a dredge be parallel to the channel, it would have so stated. After hearing testimony on the meaning of § 80.26(c), the trial judge determined that "straighten out in the cut" meant "straighten out to be parallel to the line of the cut." The court then found that Great lakes violated that rule. While a "finding of statutory fault is primarily a factual issue governed by the clearly erroneous standard," *Orange Beach Water, Sewer and First Protection Authority v. M/V Alva*, 680 F.2d 1374, 1380 (11th Cir.1982), we must review the district court's ruling to ensure that it did not misinterpret the meaning of the rule.

Great Lakes argues that the district court's interpretation that the rule means "parallel to the channel" is in conflict with the Coast Guard's interpretation of the rule; Great Lakes argues that we must defer to the agency's interpretation of its own rule. The "agency interpretation" that Great Lakes advances is the formal report made by the Coast Guard following its investigation into the collision. Great Lakes argues that in the report's conclusions, no mention was made of a violation of § 80.26(c), and this constitutes an interpretation by the Coast Guard that the rule did not mean "parallel to the channel" and thus the rule was not violated.[11] We note

11. In its brief, Great Lakes quotes from the conclusions of the Coast Guard's report: "The corrective action of moving completely out of the channel *at pilot request* (as opposed to swinging the bow over) taken by Great Lakes Dredge and Dock Company in response to the pilots [sic] letter and Coast Guard requests was adequate to allow safe navigation in the area." (emphasis added). Great Lakes argues that the quoted language suggests that Great Lakes took the appropriate action. Reading the report in its entirety, however, we reach a different conclusion. The report describes two methods for a dredge to move out of the way of a passing ship: swinging the bow over or moving the *entire* dredge out of the way. The report details how Great Lakes only moved the bow over. We read the quoted language to approve the other method—moving the entire dredge out of the channel. We do not perceive any conclusions about simply moving the bow over. The primary point of the Coast Guard's conclusion from which Great Lakes quoted is that the local pilots should be informed that they should, in

that, as Great Lakes concedes, the legal conclusion that Great Lakes did not violate the rule is inadmissible evidence. *See Smith v. Ithaca Corporation*, 612 F.2d 215, 223 (5th Cir.1980). We decline to take Great Lakes' invitation to construe the absence of any mention of § 80.26(c) as a formal agency interpretation of that rule. This case is quite different from cases in which an agency has formally interpreted a rule, or has promulgated an interpretation in the Code of Federal Regulations. *See, e.g., Allen M. Campbell Company General Contractors v. Lloyd Wood Construction Co.*, 446 F.2d 261 (5th Cir.1971). In this case, we have only the Coast Guard's silence, which we will not take to be a formal interpretation that "straighten out in the cut" does not mean "parallel to the channel."

In the absence of any formal interpretation by the Coast Guard of the meaning of § 80.26(c), we find that the district court reasonably relied on the testimonial evidence presented by a number of witnesses, including Coast Guard officials and a Great Lakes employee, to the effect that they would interpret the rule to mean "parallel to the channel." Great Lakes cites a number of cases involving facts very similar to those here where the courts did not find any fault in a dredge swinging its bow out of the channel. *See, e.g., The Ditmar Koel*, 65 F.2d 555 (5th Cir.1933); *The Freeport*, 99 F.2d 842 (4th Cir.1938). None of the cited cases, however, involved an interpretation of § 80.26, and there was no suggestion in any of the cases that there was a then-existing rule that the dredge arguably violated. Here, we have a rule that requires a dredge to "straighten out in the cut." After considering the rule and the testimony, we affirm the district court's interpretation that the rule means "parallel to the channel," and that Great Lakes violated the rule.[12]

the future, request that the entire dredge be moved, instead of merely having the bow swung over.

12. Arguably, a commonsense approach supports Great Lakes: By swinging the bow toward shore, instead of bringing the dredge to a position parallel to the channel, Great Lakes actually brought the dredge *farther* out of the channel. As was argued below, however, a rule requiring the dredge to be parallel to the channel serves a number of plausible goals, including presenting a lesser target for an approaching vessel and giving an approaching vessel the proper perspective of the center line of the channel. The district court presumably had this second point in mind when it concluded that the "angle at which the Alaska and [the barge] was positioned in the Drummond Creek Cut distorted the perception of the navigators of the Robert Watt Miller as the tanker came around Broward Point Turn." 613 F.Supp. at 1436.

2. *The Pennsylvania Rule*

[15] Having affirmed the district court's determination that Great Lakes violated 33 C.F.R. § 80.26(c) (1974), we must now consider the applicability of the rule set out in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to the facts of this case. In *The Pennsylvania*, the Supreme Court held that when a ship involved in a collision is in violation of a statutory rule designed to prevent collisions, the burden shifts to that ship to disprove that the violation was a contributing cause of the collision. Specifically, the Court wrote:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the cases, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

*Id.* at 136, 22 L.Ed.2d at 151. In that case, the Court held that although the steamship Pennsylvania was primarily responsible for its collision with the bark Mary R. Troop, the bark was also liable because of its violation of a rule requiring the use of foghorns when underway in fog.

Since its inception over one hundred years ago, *The Pennsylvania* rule has increasingly come under attack, with courts and commentators terming the rule "harsh," *Board of Commissioners v. M/V Farnsum*, 574 F.2d 289, 297 (5th Cir.1978), and "drastic," G. Gilmore & C. Black, *The Law of Admiralty* 494 (2d ed. 1975). The harshness of the rule is clear when viewed in light of the pre-*Reliable Transfer* rule of *The Schooner Catharine*, requiring equal division of damages among joint tortfeasors. *See The Pennsylvania*, 86 U.S. (19 Wall.) at 138, 22 L.Ed. at 152. Prior to *Reliable Transfer*, a ship that violated a rule but could not overcome *The Pennsylvania* burden would be liable for an equal share of the damages caused by a collision, even though the violation only marginally contributed to the collision. Critics have advocated the rule's abolition, *see* Tetley, *The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?* 13 J.Mar.L. & Com. 127 (1982), and courts, including the former Fifth Circuit, have ensured that *The Pennsylvania* burden is not insurmountable, *see Compania de Maderas de Caibarien v. The Queenston Heights*, 220 F.2d 120, 122–23 (5th Cir.1955).

Great Lakes goes beyond criticizing *The Pennsylvania* rule, however, and argues that the rule has been overturned by the Supreme Court in *United States v. Reliable Transfer Co. See supra* at 1545. In support of this claim, Great Lakes cites a Ninth Circuit case which includes language suggesting that *The Pennsylvania* decision was overruled by *Reliable Transfer. See People of the State of California v. Italian Motorship Ilice*, 534 F.2d 836, 840 (9th Cir.1976). Great Lakes, however, misunderstands the effect of *Reliable Transfer* and misreads the Ninth Circuit's *Ilice* decision, which expressly refused to disturb an application of *The Pennsylvania* rule by the district court in that case. *Id.*

What Great Lakes misunderstands, and what the Ninth Circuit noted, is that the adoption of comparative fault by the Supreme Court in *Reliable Transfer* did nothing to overturn *The Pennsylvania* rule, but instead simply eased the rule's harshness.[13] Prior to *Reliable Transfer*, a ship unable to overcome *The Pennsylvania* rule bore an equal portion of the liability; after *Reliable Transfer*, a ship that violated a statutory rule is only liable in proportion to the comparative degree of fault for the accident.

**[16, 17]** To make clear what the rule set out in *The Pennsylvania* is still viable, we note that *The Pennsylvania* involved presumptions and burdens of proof, while the *Reliable Transfer* case involved divisions of liability. The goals underlying *The Pennsylvania* rule—a concern that maritime rules be strictly observed—were not in the least disturbed by the *Reliable Transfer* decision. "The clear general rule is that the navigational rules are 'rigorously enforced' and strictly interpreted." *Garrett v. Higgenbotham*, 800 F.2d 1537, 1540 n. 6 (11th Cir.1986) (citing *Belden v. Chase*, 150 U.S. 674, 698, 14 S.Ct. 264, 271, 37 L.Ed. 1218 (1893)). "Masters [of ships] are bound to obey the rules, and entitled to rely on the assumption that they will be obeyed...." *Belden*, 150 U.S. at 699, 14 S.Ct. at 272. The need to strictly enforce maritime rules is as strong today as it was in 1874, and the *The Pennsylvania* decision announced one hundred years ago still furthers that purpose. We thus find that the district court appropriately applied *The Pennsylvania* rule to this case, and we affirm the district court's finding that Great Lakes did not meet its burden under that rule.[14]

13. Even the critics of *The Pennsylvania* rule acknowledge that *Reliable Transfer* did not overturn it. *See* Tetley, *supra*, 13 J.Mar.L. & Com. at 145.

14. Great Lakes also argues that the presumptions of *The Pennsylvania* rule should not be applied in the face of the seemingly conflicting presumptions found in *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895), which held that when a moving vessel strikes an anchored one a presumption of negligence on the part of the moving vessel arises. We do not see these presumptions as conflicting—together they only suggest that both Great Lakes and Chevron are presumptively liable (Great Lakes for its rule violation and Chevron because of its

B. *Exclusion of Commander Cavallero's Deposition*

Great Lakes challenges the failure of the district court to admit into evidence at least portions of a deposition taken by the parties of Coast Guard Commander Samuel Cavallero. Commander Cavallero was the investigating officer who prepared the formal Coast Guard report on the collision. *See supra* at 1552–1553. The report, although not its conclusions, were admitted; the trial judge refused to admit the deposition.

When Great Lakes attempted to have the deposition read into evidence, Chevron objected and argued that the deposition was "all hearsay." The trial judge decided to review the deposition overnight. *See* Record, Vol. 27 at 148–53. The following morning, after reading most of the deposition, the trial judge ruled that the deposition could not, in its entirety, be admitted; he stated that the "great majority of it is hearsay." He did admit all exhibits that were properly identified in the deposition. *See* Record, Vol. 28 at 32. On appeal, Great Lakes argues that the judge committed error by refusing to admit the deposition.

[18, 19] We have reviewed the challenged deposition in its entirety, and agree with the district court's conclusion that most of the deposition is hearsay. On appeal, Great Lakes points to specific small portions of the deposition that would arguably be admissible. Great Lakes, however, did not bring any of these passages to the attention of the district court, and made no requests to admit specific portions. When a document a party seeks to admit is full of inadmissible material, it is incumbent on the party to specifically note the admissible sections. The district court cannot be expected to wade through a 129–page deposition pulling out the handful of admissible exchanges in the document. We affirm the refusal of the district court to admit the deposition in its entirety, and we hold that Great Lakes cannot attempt on appeal to gain the admission of specific passages when Great Lakes did not present those passages to the district court. If any of the passages were vitally important to Great Lakes' defense, as they claim on appeal, they should have raised them to the district court. A district court will almost always be willing to consider specific sections of a document that is not admissible in its entirety.

C. *Great Lakes' Claim for Indemnity*

Great Lakes challenges the district court's order, entered before the trial, granting Chevron's motion for summary judgment on Great Lakes' claim for indemnity from Chevron. At the time the motion was granted, Great Lakes argued that it might be held liable based only on a technical finding of unseaworthiness, and that in such a case Great Lakes had a right to indemnity from Chevron based on the concepts of active and passive negligence. The district court rejected this argument, and granted Chevron's motion. Great Lakes retained, of course, a right to contribution from Chevron.

[20] In *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir.1982), the new Fifth Circuit considered arguments similar to those presented here by Great Lakes. As that court indicated, the active-passive negligence doctrine was a device aimed at easing the burden of the equally-divided-damages rule of *The Schooner Catherine*. As discussed above, however, the Supreme Court rejected that rule in favor of comparative fault in *United States v. Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 1708, 44

status as the moving vessel). In any event, the district court explicitly, and appropriately, weighed the competing presumptions of *The Pennsylvania* and *The Oregon* cases in determining the proportionate fault of the two vessels in question. *See Complaint of Chevron Transport Corporation*, 613 F.Supp. at 1436.

In a footnote in its brief, Great Lakes also argues that *The Pennsylvania* rule may conflict with the general burdens of persuasion set out in Fed.R.Evid. 301. We reject the suggestion that the Federal Rules of Evidence altered *The Pennsylvania* rule. We agree with the Fifth Circuit that the adoption of the federal rules did not modify the substantive burdens and presumptions long established in federal admiralty law. *See James v. River Parishes Co.*, 686 F.2d 1129, 1133 (5th Cir.1982).

L.Ed.2d 251 (1975). The Fifth Circuit noted that it "is difficult to see the need for the active-passive indemnification rule in a comparative fault system." *Loose*, 670 F.2d at 501–02. That court abolished the active-passive negligence rule. We agree with this reasoning, and hold that in an admiralty case where the district judge assesses the relative degrees of fault, there is no place for the active-passive negligence doctrine. A tortfeasor only passively negligent will presumably bear a smaller percentage of the fault for an injury. If, because of other rules and obligations, a passively negligent tortfeasor initially pays more than its share, it can seek contribution from the more active tortfeasor. In the case below, the district court granted partial summary judgment on the issue of indemnity, and left the possibility of contribution available. We affirm the district court on this point.

## IV. CHEVRON'S CLAIMS AGAINST GREAT LAKES

[21] On appeal, Chevron argues that the district court erred by denying its complaint seeking limitation of liability under the 135-year old Limitation of Liability Act, 46 U.S.C. § 183 (1986). According to that act, the

> liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity of knowledge of such owner or owners, shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

*Id.* § 183(a). As this court has detailed,

> a determination of whether a shipowner is entitled to limit his liability involves a two-step analysis.... "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

*Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1563–64 (quoting *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir.1976)) (other citations omitted).

In the limitation of liability context, the district court's findings about negligence, unseaworthiness, privity, and knowledge are considered on appeal to be factual findings subject to review under the clearly erroneous standard. *See Hercules Carriers, Inc.*, 768 F.2d at 1565. Chevron argues in this appeal, however, that the district court erred as a matter of law in finding negligence, privity, and knowledge. Because we read the district court's opinion differently than Chevron, and we think Chevron misunderstands the lower court's holding, we affirm the district court's refusal to allow Chevron to limit its liability.

According to Chevron's briefs on appeal, the district court ruled that Chevron was negligent because a critical Notice to Mariners discussing the dredging operation was not on board the Robert Watt Miller at the time of the collision. Chevron points to the district court's statement that "there is no evidence that the notice ... ever reached the Robert Watt Miller," 613 F.Supp. at 1437, and argues that the district court impermissibly shifted the burden of proof on the issue of negligence away from Great Lakes and onto Chevron. Chevron argues that while there was no evidence that the notice was on the ship, there also was no evidence that the notice was *not* on the ship. Thus, according to Chevron, Great Lakes did not carry its burden of proof. *See Hercules Carriers, Inc.*, 768 F.2d 1564.

Chevron, however, mischaracterizes the district court's holding. In the district court's opinion, the question of the Notice to Mariners does not form the basis of the negligence proven by Great Lakes, but instead goes to privity, an issue on which

Chevron has the burden of proof. The negligence found by the district court is in the fact that Chevron allowed the master of its ship to sail into "unfamiliar waters" "completely unaware" of the dangers that lay in its path. 613 F.Supp. at 1437. Having made this finding of negligence (which is supported by the record), the district court turned to the issue of privity. The burden was then on Chevron to prove that it was unaware of the potential problem. On that issue, the district court looked to adequacy of the distribution system for maritime notices and found it lacking. Because the district court ruled that Chevron should have been aware of the faults in its information dissemination system, the court ruled that Chevron was not entitled to limit its liability. *Id.* After having reviewed the record, and taking into account the shifting burdens of proof, we cannot say that the district court was clearly erroneous in any of its findings on this point. We thus affirm the denial of Chevron's complaint seeking to limit its liability.[15]

## V. CONCLUSION

For the reasons discussed above, we affirm in part and reverse in part the judgment of the district court, and we remand this case for further proceedings in accordance with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.


15. Both the Chevron Transport Corporation, the owner of the Robert Watt Miller, and the Chevron Shipping Company, the managing agent responsible for the operation of the ship, have sought to limit their liability. Because of our affirmance of the district court on this point, we do not reach the question of when, if ever, a managing agent can utilize the Limitation of Liability Act. *See In re Amoco Transport Co.*, 1979 A.M.C. 1017 (N.D.Ill.1979) (refusing to permit managing agent to limit its liability).

**Myra Holladay SIMS and Florida Import and Compliance Association, Plaintiffs–Appellees,**

**v.**

**STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant–Appellant.**

**No. 86–3055.**

United States Court of Appeals, Eleventh Circuit.

Dec. 2, 1987.

Owner of gray market vehicle and trade association brought action against Florida and its Department of Highway Safety and Motor Vehicles challenging constitutionality of Florida statute preventing owner of gray market vehicle from acquiring title and vehicle registration in Florida until owner has obtained required documentation from federal government that he has complied with federal emission and safety standards. The United States District Court for the Northern District of Florida, No. TCA 85–7214, William Stafford, Chief Judge, declared statute unconstitutional. State and Department appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) owner and trade association had standing to bring action; (2) Florida statute was preempted by Clean Air Act; (3) Safety Act did not preempt Florida statute; and (4) statute violated commerce clause.

Affirmed in part and remanded.

Tjoflat, Circuit Judge, filed a dissenting opinion.

**1. Federal Civil Procedure ⇐103.2**

To satisfy requirements of standing, plaintiff must allege personal injury fairly traceable to challenged conduct and likelihood of redress by requested relief.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendants' motions for summary judgment be, and the same are, DENIED.


**Naomi HINSON, Individually and as next friend of William G. Hinson, Jr., Vertre Lee Stanfield, next friend of Treavor Revelle Stanfield, Derek Wayne Stanfield and James Christopher Stanfield, Eleanor Meyers, Guardian of the Estate of Treavor Revelle Stanfield, Derek Wayne Stanfield and James Christopher Stanfield, Plaintiffs,**

v.

**SS PAROS, in rem and Leeward Navigation Ltd., in personam, Defendants.**

**Texas Employers' Insurance Association, Intervenor.**

**Civ. A. No. 74-H-1270.**

United States District Court,
S. D. Texas,
Houston Division.

Nov. 16, 1978.

Widow, on her own behalf, and as next friend and natural guardian of minor child, and intervening plaintiff, as next friend and guardian of three minor children, brought suit in admiralty to recover damages from vessel and owner for death of longshoreman who, while working aboard vessel, placed one hand upon chain of port rail which gave away causing him to fall over side of vessel and drown. The District Court, Sterling, J., held that: (1) failure of inspection of defendants' personnel to reveal wasted condition of link of chain which broke constituted negligence on behalf of defendants and was proximate cause of longshoreman's death; (2) although only fleetest seconds passed between time longshoreman fell from vessel and time he drowned, award of $5,000 damages for pain and suffering was warranted; (3) evidence established that loss of financial support as result of death of longshoreman, who had been living with two different women and two sets of children at time of his death, had been sustained in amount of $40,000 for widow, $5,000 for legitimate child and $5,000 each for three illegitimate children, whose mother had died, and (4) since "tort" recovery of beneficiaries of longshoreman was less than total workmen's compensation which might be paid in future, but more than what had been paid to date, balance of judgment which exceeded amount paid to date should be paid to beneficiaries.

Judgment accordingly.

**1. Shipping ⇐84(3½)**

In suit in admiralty against vessel and its owner to recover damages for death of longshoreman who, while working aboard vessel, placed one hand upon chain of port rail which gave away causing him to fall over side of vessel and drown, failure of inspection of defendant's personnel to reveal wasted condition of link of chain which broke constituted negligence on behalf of defendants and was proximate cause of longshoreman's death.

**2. Shipping ⇐84(3½)**

Owners of vessel had continuing duty to inspect and replace safety chains that constituted vessel's rail to insure safety of those working on board vessel, including longshoremen in position of plaintiffs' decedent who placed hand on chain which broke, causing him to fall into water and drown.

**3. Death ⇐95(1)**

Evidence established that damages due to loss of value of deceased longshoreman's advice, counsel, guidance, affection and society to two different women and two sets of children with which longshoreman had been living at time of his death amounted to $15,000 for his widow and each of his legitimate and illegitimate children.

**4. Death ⇐82**

Although only fleetest seconds passed between time longshoreman fell from vessel and time he drowned, award of $5,000 damages for pain and suffering was warranted.

**5. Death ⇐95(3)**

Evidence established that loss of financial support as result of death of longshoreman who had been living with two different women and two sets of children at time of his death had been sustained in amount of $40,000 for widow, $5,000 for legitimate child and $5,000 each for three illegitimate children, whose mother had died.

**6. Workers' Compensation ⇐2197**

Workmen's compensation carrier which had voluntarily paid compensation to widow and children of longshoreman without statutory award had nonstatutory right of subrogation for amounts paid, as if award had been made pursuant to statute. Longshoremen's and Harbor Workers' Compensation Act, § 33(b) as amended 33 U.S.C.A. § 933(b).

**7. Workers' Compensation ⇐2245**

Under Longshoremen's and Harbor Workers' Compensation Act, employer or its compensation carrier may not recover from shipowner damages in excess of those for which shipowner was liable to employee or his beneficiaries. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

**8. Workers' Compensation ⇐2190**

Workmen's compensation carrier did not have an independent cause of action based upon negligence against shipowner to recover, not only amount of compensation paid to date, as result of death of longshoreman, but to recover total projected amount of compensation benefits that it would probably have to pay in the future, since recovery sought involved speculative damages, contrary to rule against such recoveries. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

**9. Workers' Compensation ⇐2251**

Since "tort" recovery of beneficiaries of longshoreman was less than total workmen's compensation which might be paid in future, but more than what had been paid to date, balance of judgment which exceeded amount paid to date should be paid to beneficiaries and compensation carrier must continue to make its periodic payments. Longshoremen's and Harbor Workers' Compensation Act, § 33(f) as amended 33 U.S.C.A. § 933(f).

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Mandell & Wright, Sidney Ravkind, Houston, Tex., for plaintiff Naomi Hinson.

Dyer & Henkel, Curtis Dyer, Corpus Christi, Tex., for plaintiffs Vertre Lee Stanfield and Eleanor Meyers.

Eastham, Watson, Dale & Forney, John P. Forney, Jr., Houston, Tex., for defendants.

Fulbright & Jaworski, Theodore Goller, Jr., Houston, Tex., for intervenor.

MEMORANDUM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STERLING, District Judge.

This case was tried before the court, August 29 September 6, 1977. Plaintiff, Naomi Hinson, on her own behalf, and as next friend and natural guardian of a minor child, and intervening Plaintiff, Eleanor Meyers, as next friend and guardian of three minor children, brought this suit in admiralty to recover damages from Defendants occasioned by the death of William G. Hinson, who was employed as a longshoreman by T. Smith & Son (Texas), Inc., aboard Defendants' vessel on or about September 16, 1974, in the Port of Houston, Texas. Intervenor, Texas Employers' Insurance Association, brought an intervening complaint to recover from Defendants the amounts expended in compensation and funeral expenses under the provision of the Longshoremen and Harbor Workers' Compensation Act, and filed a cross-claim against Defendants seeking damages for

amounts it must pay in the future to the heirs of William G. Hinson as a result of his death. Having heard all the evidence, the court enters the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. On September 16, 1974, Plaintiffs' decedent, William G. Hinson, a longshoreman employed by T. Smith & Son (Texas), Inc., was working aboard the vessel PAROS which was owned by Defendant Leeward Navigation, Ltd. and which was situated in the navigable waters of the United States in the Port of Houston, Texas. Texas Employers' Insurance Association was the workmen's compensation carrier for T. Smith & Son (Texas), Inc. and therefore insured its liability under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, et seq.

2. On September 16, 1974, the longshoremen began working aboard the S/S PAROS at the Equity Grain Elevator loading grain to the vessel at 7:00 a. m. At that time, Plaintiffs' decedent was employed as foreman of the gang working the vessel's No. 2 hatch.

3. At approximately 8:15 a. m. on September 16, 1974, William Hinson walked to the inboard or port rail of the vessel in order to talk to Louis Guillory and Walton Guillory who were seated on a bitt near the port rail.

4. The port rail consisted of a series of stanchions, each of which contained two eyes. Through these eyes were passed two chains which constituted the vessel's rail.

5. Hinson walked between the bitts upon which Louis and Walton Guillory were seated and the rail. He then turned to talk to them and placed one hand upon the chain rail itself. At that moment, and without warning, the upper chain gave way and Hinson fell over the side of the vessel. He managed to cling to the chain momentarily by one hand, but then fell striking one of the pier's fenders and thence into the waters of the Houston Ship Channel where he drowned.

6. Subsequent examination of the chain revealed that at the point where it parted the link was completely wasted by rust and it had simply pulled apart.

[1] 7. Testimony presented by steamship company officials, and others, clearly indicates that the vessel owners had a continuing duty to inspect these chains in order to insure the safety of those working aboard the vessel. The inspection performed by Defendants' personnel failed to reveal the wasted condition of the link in question. The failure of such inspection constitutes negligence on behalf of Defendants, and such negligence was a proximate cause of Plaintiffs' decedent's death.

8. Texas Employers' Insurance Association, a compensation insurance carrier for Plaintiffs' decedent's employer, has expended $35,403.18 to the date of trial in compensation benefits paid to or on behalf of Plaintiffs, and is entitled to a lien in that amount against any judgment awarded to Plaintiffs herein.

9. William G. Hinson was the ceremonial husband of Naomi Hinson and the natural father of William Hinson, Jr.

10. William G. Hinson was the natural father of the minors Treavor Stanfield, Derek Stanfield, and James Stanfield, who are thus William G. Hinson's illegitimate children by Vertre Lee Stanfield.

11. William G. Hinson, prior to and until his death, provided financial support for his wife, Naomi Hinson, and legitimate son, William Hinson, Jr., as well as for Vertre Lee Stanfield, now deceased, and his illegitimate children, Treavor, Derek, and James Stanfield. William G. Hinson thus maintained two households, neither knowing of the existence of the other.

12. William G. Hinson, prior to and until his death, provided care, influence, guidance, affection, and society to Naomi Hinson, William Hinson, Jr., and Treavor, Derek, and James Stanfield. As a direct result of his death, these Plaintiffs have been wrongfully deprived of William G. Hinson's care, influence, guidance, affection, and society.

13. William G. Hinson was 66 years old at the time of his death and earned $21,000 the last year of his life. As a foreman he was able to earn money as a longshoreman without hard manual labor.

## CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and of the parties.

[2] 2. The owners of the S/S PAROS had a continuing duty to inspect and replace the safety chains that are an integral part of the vessel itself in order to insure the safety of those working on board the vessel, including longshoremen in the position of William G. Hinson.

3. Defendants, owners, negligently failed adequately to inspect and repair the chain rail in question on or before September 16, 1974, and such negligent failure was the proximate cause of Plaintiffs' decedent's death.

4. On the occasion in question, William G. Hinson was not negligent in leaning against the chain rail or in failing to detect the wasted link.

[3] 5. In view of the evidence that William Hinson had, in effect, two families, and was living with two different women and sets of children at the time of his death, the value of his advice, counsel, guidance, affection, and society as items of damages must be calculated as to each family. Damages due to loss of the above have been sustained by the Plaintiffs on account of the death of their decedent as follows:

| | |
|---|---|
| Naomi Hinson | – $15,000.00 |
| William Hinson, Jr. | – $15,000.00 |
| Treavor Revelle Stanfield | – $15,000.00 |
| James Christopher Stanfield | – $15,000.00 |
| Derek Wayne Stanfield | – $15,000.00 |

[4] 6. William Hinson undoubtedly did suffer fear of life and pain before his death. Although only the fleetest seconds passed between the time William G. Hinson fell and the time he died, damages for pain and suffering have been sustained, which the court finds to be in the amount of $5,000.00.

[5] 7. The evidence presented as to the way in which William G. Hinson divided his bounty between the two households was skimpy at best. In consequence of this, William G. Hinson's age, his prior earnings and the life style he maintained, the court finds that economic damages for loss of financial support as a result of William G. Hinson's death have been sustained as follows:

| | |
|---|---|
| Naomi Hinson | – $40,000.00 |
| William Hinson, Jr. | – $ 5,000.00 |
| Treavor Revelle Stanfield | – $ 5,000.00 |
| James Christopher Stanfield | – $ 5,000.00 |
| Derek Wayne Stanfield | – $ 5,000.00 |

[6] 8. Intervenor, Texas Employers' Insurance Association (Texas Employers'), has voluntarily paid compensation to the Plaintiffs without a statutory award, in the sum of $35,403.18 at the time of trial. Texas Employers' has a non-statutory right of subrogation to such amounts paid, as if such an award had been made pursuant to 33 U.S.C. § 933(b). *Louviere v. Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1978); *Landon v. Lief Hoegh and Co., Inc.*, 521 F.2d 756 (2d Cir. 1975); *Davillier v. Cavn Venezuelan Line*, 407 F.Supp. 1234 (E.D.La.1976).

9. Texas Employers', citing *Federal Marine Terminals v. Burnside Shipping*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969), has alleged an independent cause of action based upon negligence against the shipowner to recover, not only the amount of compensation paid to the various Plaintiffs to date (its "lien"), but seeks to recover the total projected amount of workmen's compensation benefits it will probably have to pay all Plaintiffs in the future, which is the sum of $335,987.00. Such recovery must be denied.

In 1972, Congress, by the Amended Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901, et seq., substantially raised the compensation rate to longshoremen suffering injury or death. The widow in this case receives over $300.00 every two weeks. The widow was nine years younger than the deceased who was 66 years old at the time of his death. The Plaintiffs' damages are based upon the life and work expectancy of

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their 66 year old decedent. The compensation benefits payable to Plaintiffs are based, among other things, upon the life expectancy of the Plaintiffs. The work-life expectancy of Plaintiffs' decedent is relatively short while the life expectancy of Plaintiffs is relatively long. Thus, the expected compensation benefits are far greater than the damages recoverable by the Plaintiffs.

The court concludes that the Amended Act as a whole, and § 905(b) in particular, has modified *Burnside* to the extent that employers or their compensation insurance carriers are limited to the recovery of compensation benefits paid, as provided in § 933, and that in no instance can they recover more than the injured worker or his beneficiaries.

Subsection (b) of § 905 is new, and provides as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

No case directly in point has been discovered. However, the court concludes that the suggestion in *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 761 (2nd Cir. 1975), that *Burnside* has become obsolete by virtue of § 905(b) of the Amended Act is correct. Such suggestion is as follows:

> "It may be, too, that a *Burnside* type of action no longer exists in the light of the provision that 'the remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter'. [6]
>
> "[6] The argument would be that section 905(b) includes employer and carrier in the phrase 'or anyone otherwise entitled to recover damages by reason thereof' and allows only actions under section 933 which includes subrogation actions."

[7] Thus, this court concludes that Congress did not intend that the employer or his compensation carrier would be permitted to recover from the shipowner damages in excess of those for which the shipowner was liable to the employee or his beneficiaries. Congress stated its intention in § 905(b) that the remedies specified in the Amended Act were to be exclusive.

[8] The recovery sought in this regard involves speculative damages contrary to the rule against such recoveries. *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Aldon Industries, Inc. v. Lon Myers & Associates, Inc.*, 517 F.2d 188 (5th Cir. 1975); *Compania Pelineon De Navegacion, S. A. v. Texas Petroleum Co.*, 540 F.2d 53 (2nd Cir. 1976).

10. Moreover, the amount of compensation benefits which Texas Employers' may have to pay in the future depends upon a number of contingencies such as the continued life of the beneficiaries, the possible remarriage of the widow and school attendance by the children.

11. Section 933(f) of Title 33 U.S.C. provides:

> "(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this

section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

In this case, no statutory award has been made. This court is hesitant to accept the figure proposed by the Intervenor as the amount which will ultimately be paid in compensation. Until an award has been made by the Secretary which fixes the boundaries of payment to the beneficiaries of the deceased, it is impossible for this court to hold, one way or the other, as to the proper disposition of the funds recovered by the judgment to be entered in this case.

[9] The problem becomes one from which the Congress gives no assistance other than from the obvious meanings of their words. Under 33 U.S.C. § 933(e), if the employer brings action against the ship or its owner, there is an explicit procedure for the disposition of the fund which results. However, where the injured or deceased longshoreman brings suit, § 933(f) provides for an altogether different result. If the injured, covered, employee brings suit on his own behalf, he, or as in this case his beneficiaries, are entitled to the full "tort" recovery from the vessel or its owners. The employer, or its carrier, is entitled, by "assignment" or "subrogation", to recoup what has been paid in the way of compensation. What, then, occurs when the "tort" recovery of the beneficiaries of the decedent is less than the total compensation which may or must be paid in the future, but more than has been paid to date? The court concludes that the balance of the judgment which exceeds what has been paid to date shall be paid to the beneficiaries at this time. The compensation carrier must continue to make its periodic payments. At such time as a formal award is made, the carrier will be entitled to credit against such award in the amounts paid to Plaintiffs under the judgment in this case. Congress, in 33 U.S.C. § 933(f), indicates a preference that the lump sum judgment be given to the Plaintiffs, and having Texas Employers' credit that amount against anticipated payments.

12. The judgment in this case may or may not result in adequate compensation for Plaintiffs' attorneys. Reallocation to Plaintiffs' attorneys of the money distributed to Texas Employers' under their indemnity lien may be allowed. *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281 (5th Cir. 1978). If agreement upon this question cannot be reached, a hearing will be set.

13. In the event that any of the foregoing findings of fact also constitute conclusions of law, they are adopted as conclusions of law. In the event that any of the foregoing conclusions of law also constitute findings of fact, they are also adopted as findings of fact.

The parties shall submit an agreed form of judgment to the court in accordance with these findings of fact and conclusions of law.


**Paul E. SCOTT et al., Plaintiffs,**

**v.**

**Bill MOORE et al., Defendants.**

**Civ. A. No. B–75–26–CA.**

United States District Court,
E. D. Texas,
Beaumont Division.

Nov. 16, 1978.

Action was brought to recover for assault and beating committed upon nonunion workers, and for loss of tools and equipment. The District Court, Joe J. Fisher, Chief Judge, held that: (1) assaulted and beaten nonunion laborers and their employ-

Response that a citation of *Walder* appears immediately after the quoted language from the Senate report. Given the unmistakable language of Section 2515 ("*no* evidence" may be received in "*any* proceeding" before "*any* court" (emphasis added)), we conclude that Congress intended the *Walder* rule to apply to Section 2515, but did not intend to make an exception for sentencing hearings, bail revocation hearings, or any other proceeding in which evidence is being introduced affirmatively by the government. *See United States v. Manuszak*, 438 F.Supp. 613 (E.D.Pa.1977).[5] The Senate Report's citation of *Walder* buttresses our conclusion, since that case relies heavily on the difference between affirmative use of unlawfully obtained evidence to prove facts and the use of such evidence to contradict a defendant's untruths.

[5] We therefore remand to the district court for an expedited hearing on the legality of the electronic surveillance and its nexus with the government's evidence. The mandate shall issue forthwith.

REMANDED.


**Peter HLODAN, Administrator of the Estate of William James Hlodan, deceased, Plaintiff-Appellee, Cross-Appellant,**

**v.**

**OHIO BARGE LINE, INC., a corporation, Defendant-Appellant, Cross-Appellee,**

**Warfield Towing Service, Inc., a corporation, Defendant-Appellant.**

**No. 77-2326.**

United States Court of Appeals, Fifth Circuit.

Jan. 28, 1980.

Survivors of deckhand, who drowned while attempting to rescue a deckhand from another vessel who had fallen into the Mississippi River, brought wrongful death action against the owners of both vessels, alleging negligence under the Jones Act against the deceased deckhand's employer and a general claim of negligence and unseaworthiness against both owners. The United States District Court for the Northern District of Mississippi, William C. Keady, Chief Judge, rendered judgment for the survivors for $151,000 and owners appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) the district court's use of the words "extraordinary negligence" in defining the owners' burden of showing that the deckhand was contributorily negligent was not prejudicially erroneous, since the charge was correct considered as a whole; (2) evidence of the deckhand's lack of contributory negligence was sufficient for the jury; (3) there was no error in refusing an instruction that the deckhand was himself responsible for any condition of unseaworthiness on his vessel, since the deckhand, as watchman, had no contractual duty to be in charge of rescuing seamen falling off other vessels; (4) a Jones Act claim joined with a general maritime claim did not bar an award of nonpecuniary damages where the cause of action arose out of an occurrence on inland waters; and (5) the evidence supported an award of $25,000 for the deckhand's conscious pain and suffering before death.

Affirmed.

**1. Seamen ⇐29(5.17)**

In wrongful death action by survivors of deckhand, who drowned when he attempted to rescue deckhand who had fallen into river from another vessel, against owners of both vessels, instruction which used words "extraordinary negligence" in defining burden of showing deckhand contributorily negligent under Jones Act was errone-

5. We thus need not decide whether we would follow the Second Circuit's constitutional holding in *Schipani* or whether an exclusionary rule based on the constitution applies at bond revocation proceedings.

ous, but, considered in light of charge as a whole, which properly delineated requirement for deckhand's conduct under rescue doctrine to be that of "ordinarily prudent person under the circumstances," was not prejudicially erroneous. Jones Act, 46 U.S.C.A. § 688.

**2. Seamen ⇐29(5.16)**

In wrongful death action by survivors of deckhand, who drowned when he attempted to rescue deckhand who had fallen into river from another vessel, against owners of both vessels, alleging negligence under Jones Act against deckhand's employer and general claim of negligence and unseaworthiness against both defendants, evidence presented jury question on whether seaman's jumping into river without life jacket amounted to contributory negligence. Jones Act, 46 U.S.C.A. § 688.

**3. Seamen ⇐9**

General maritime law imposes duty upon shipowners to provide seaworthy vessel and that duty is absolute and is independent from duty of reasonable care imposed by Jones Act. Jones Act, 46 U.S.C.A. § 688.

**4. Seamen ⇐29(4)**

Contributory negligence is not ordinarily defense under claim of unseaworthiness, but speaks only to question of damages. Jones Act, 46 U.S.C.A. § 688.

**5. Seamen ⇐29(4)**

Deck watchman could not be held liable for any condition of unseaworthiness on vessel, which resulted in his own death when he jumped into water to attempt to rescue deckhand who had fallen from another vessel, where watchman had no contractual duty to his employer to be in charge of rescuing seamen falling off vessels other than his own. Jones Act, 46 U.S.C.A. § 688.

**6. Damages ⇐30**

Nonpecuniary damages are properly awarded under unseaworthiness claim based on general maritime law; however, nonpecuniary damages are improper under Jones Act claim alone. Jones Act, 46 U.S.C.A. § 688.

**7. Damages ⇐30**

Jones Act claim joined with general maritime claim did not bar award of nonpecuniary damages where cause of action arose out of occurrence in inland waters. Jones Act, 46 U.S.C.A. § 688.

**8. Federal Courts ⇐543**

Plaintiff could not appeal from remittitur order that he had accepted.

**9. Death ⇐95(1)**

In wrongful death action by survivors of deckhand, who drowned when he attempted to rescue deckhand who had fallen into river from another vessel, against owners of both vessels, alleging negligence under Jones Act against deckhand's employer and general claim of negligence and unseaworthiness against both defendants, award of $25,000 for deckhand's conscious pain and suffering before his death was supported by the evidence, which indicated that for some undetermined period of minutes before his death deckhand was aware of his predicament and that his death by drowning was not instantaneous. Jones Act, 46 U.S.C.A. § 688.

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Frank S. Thackston, Jr., Greenville, Miss., James Daigle, New Orleans, La., Ernest Lane, III, Joel J. Henderson, Greenville, Miss., for defendant-appellant, cross-appellee.

Cohn, Carr, Korein, Kunin, Schlichter & Brennan, Jerome J. Schlichter, David J. Letvin, East St. Louis, Ill., for plaintiff-appellee, cross-appellant.

Appeal from the United States District Court for the Northern District of Mississippi.

Before MORGAN, RONEY and GARZA, Circuit Judges.

RONEY, Circuit Judge:

William Hlodan, a 20-year old deckhand employed by Ohio Barge Line, Inc. on the M/V STEEL LEADER, drowned when he attempted to rescue a Warfield Towing Ser-

vice, Inc. deckhand who had fallen into the Mississippi River from a Warfield tug, the M/V JOHN K.

Hlodan's next of kin brought a wrongful death action against Ohio Barge Line, Hlodan's employer, and Warfield Towing, alleging negligence under the Jones Act against Ohio Barge Line, 46 U.S.C.A. § 688, and a general claim of negligence and unseaworthiness against both defendants, seeking damages for pecuniary loss, loss of support and companionship, and survival damages. In answer to special interrogatories, the jury found that Ohio Barge Line, Hlodan's employer, was negligent, that Hlodan himself was not contributorily negligent, and that both defendants, Ohio Barge Line and Warfield Towing, breached their warranties of seaworthiness to Hlodan. A general verdict of $200,000 was returned for Hlodan's survivors, which was reduced by the district judge to $151,000.

Defendants raise several issues on appeal: the district court's use of the words "extraordinary negligence" in defining for the jury the standard of Hlodan's conduct that would bar his recovery under the rescue doctrine; an erroneous finding by the jury of no contributory negligence, and improper instructions on that issue; improper nonpecuniary damages; and an unsupported award for decedent's conscious pain and suffering. Plaintiff attempts to cross-appeal the remittitur he accepted. There being no error, we affirm.

The M/V STEEL LEADER was owned and operated by defendant Ohio Barge Line. She was pushing a mixed tow of between 16 and 20 barges southbound on the Mississippi River. The M/V JOHN K, a small harbor tug, was in the process of removing a barge from the M/V STEEL LEADER's tow when Willie Dobbins, a deckhand on the JOHN K who had been drinking, fell into the river near midnight without his life jacket. The JOHN K's master radioed the STEEL LEADER's master, Captain Jackson, that his man was in the river.

Captain Jackson grabbed a megaphone, yelled to his men there was a man overboard from the JOHN K, and told them to attempt rescue. Hlodan and two other deckhands ran to a point on the barge approximately 15 feet from where Dobbins, his eyes rolled back and apparently in shock, was floundering in the water. Hlodan doffed his own life jacket, placed his wallet, wristwatch and other items from his pockets on the deck, and plunged into the eddy-laden Mississippi to save Dobbins. A good swimmer, Hlodan soon reached the nearly unconscious Dobbins, but Dobbins, a 230-pound man, grabbed at Hlodan's neck. A deckhand threw his life jacket to Hlodan, but it floated beyond Hlodan's grasp. Realizing he could not gain control of the incapacitated Dobbins, Hlodan wrested himself free and began to swim toward shore. Hlodan's body was found floating in the Mississippi the next morning. Dobbins likewise drowned in the Mississippi that night.

[1] In the course of instructing the jury on the standard of conduct under the Jones Act that would prevent a rescuer from recovering for the negligence of others, the district court used the words "extraordinary negligence" in defining defendant's burden of showing Hlodan was contributorily negligent. Defendant argues that this instruction would permit recovery by Hlodan's survivors despite his own negligence, if defendant's proof did not meet the more onerous "extraordinary negligence" standard. Considering the charge as a whole, however, we find that the district court properly delineated the requirement for Hlodan's conduct under the rescue doctrine to be that of an "ordinarily prudent person under the circumstances." The perhaps inadvisable use of the word "extraordinary" did not leave the jury with the wrong impression as to the correct standard. *Grigsby v. Coastal Marine Service*, 412 F.2d 1011, 1022 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970).

[2] Defendant Ohio Barge Line argues that Hlodan's jumping into the Mississippi without a life jacket amounted to prohibitive contributory negligence as a matter of law under the Jones Act. Thus defendant argues the district court's denial of a judg-

ment notwithstanding the verdict or a new trial was error. There was a conflict in the testimony regarding whether Hlodan threw his life jacket to Dobbins, or simply deposited it on the deck of the barge before he attempted the rescue, although he apparently removed his socks, shoes and his shirt, which were under the life jacket, before jumping into the water. The record indicates Hlodan attempted rescue at his captain's directive, even though the ship's owner had never instructed the crew on rescue procedures. Furthermore, the STEEL LEADER's barges were not equipped with lifesaving equipment, and there was evidence that other equipment, including an intercom system that might have been used to alert other crew members of the situation, was inoperable. Defendant had the burden of proof on this issue. It was squarely presented to the jury. It was for the jury, not the court, to decide whether Hlodan acted as an ordinary prudent person should have acted under the emergency circumstances as shown by the evidence in this case. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*).

**[3–5]** The district court refused a requested instruction that Hlodan was himself responsible for any condition of unseaworthiness on the M/V STEEL LEADER. General maritime law imposes a duty upon shipowners to provide a seaworthy vessel. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927 (1922). That duty is absolute, and is independent from the duty of reasonable care imposed by the Jones Act. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). Consequently, contributory negligence is not ordinarily a defense under a claim of unseaworthiness, but speaks only to the question of damages. *See Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431, 59 S.Ct. 262, 83 L.Ed. 265 (1939). Where the seaman claiming a breach of the owner's warranty of seaworthiness himself is directly responsible to the owner for maintaining the vessel's seaworthiness, the jury has been held to be entitled to consider whether that fact should bar recovery. *Reinhart v. United States*, 457 F.2d 151, 152–153 (9th Cir. 1972). The district court here found that "Hlodan, as watchman, had no contractual duty to Ohio to be in charge of rescuing seamen falling off of vessels other than the M/V STEEL LEADER." There being no error in this finding, there was no error in the district court's refusal to give the requested instruction.

**[6, 7]** With respect to the damages awarded under each count of plaintiff's complaint, it is clear that nonpecuniary damages awarded Hlodan's survivors for his death would be proper under an unseaworthiness claim based on general maritime law. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). On the other hand, nonpecuniary damages would be improper under a Jones Act claim alone. *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 529 (5th Cir. 1979) (*en banc*). The question here is whether a Jones Act claim joined with a general maritime claim bars the award of nonpecuniary damages, where the cause of action arose out of an occurrence on inland waters. This Circuit has previously held the presence of a Jones Act claim would not bar *Moragne*-type nonpecuniary damages on a general maritime claim of unseaworthiness based upon an occurrence in territorial waters. *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 143 (5th Cir. 1975), *on rehearing*, 517 F.2d 675, 676. "The remedy created in *Moragne* for wrongful death obviously extends to deaths of Jones Act seamen in United States territorial waters." 517 F.2d at 676. *See also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960); Note, *Ivy v. Security Barge Lines, Inc.: The Fifth Circuit Continues* Higginbotham's *Retreat*, 25 Loyola L.Rev. 215, 219 n.38 (1979). Prompted by *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the *en banc* Court recently considered anew the interface between the Jones Act and general maritime law, noting,

The Jones Act remedy for negligence remains unaffected by either the rules governing damages recoverable for unseaworthiness in general maritime law or by changes in those rules.

*Ivy v. Security Barge Lines, Inc.*, 606 F.2d at 528. The *en banc* Court stated in a footnote,

> A seaman may, of course, join a claim for unseaworthiness under general maritime law with his Jones Act claim for negligence. We do not here reach the issue of whether after [*Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581] nonpecuniary damages may be recovered in such an action if unseaworthiness is found.

*Ivy v. Security Barge Lines, Inc.*, 606 F.2d at 528 n.8.

*Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), was a Death on the High Seas Act (DOHSA) case, concerning an accident 100 miles from the Louisiana shore. 46 U.S.C.A. §§ 761–767. The Court considered only the issue of whether, in addition to the strictly pecuniary damages available under DOHSA, *see* 46 U.S.C.A. § 762, a decedent's survivors may recover nonpecuniary damages for unseaworthiness under general maritime law as well. In holding that DOHSA provides the exclusive remedy for death on the high seas, and that consequently nonpecuniary damages are prohibited by the literal language of the statute, the Court expressly stated that *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, still applies to incidents occurring on coastal waters. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 623, 98 S.Ct. 2010. *Gaudet*, a case involving death on territorial waters, permitted recovery for nonpecuniary loss under general maritime law, and established standards for measuring compensable damages in such actions. *See* 414 U.S. at 583–591, 94 S.Ct. 806. The district court in the present case measured damages according to the *Gaudet* standards.

We conclude, therefore, that *Mobil Oil Corp. v. Higginbotham* has no bearing upon this Circuit's rule that a Jones Act claim may be joined with a wrongful death claim for nonpecuniary damages based on general maritime law, where the incident does not arise on the high seas, and that nonpecuniary damages may be recovered under the unseaworthiness claim. *See Ivy v. Security Barge Lines, Inc.*, 606 F.2d 529, 532–534 (Brown, C. J., dissenting); *Landry v. Two R. Drilling Co.*, 511 F.2d 138, *on rehearing*, 517 F.2d 675. Fatal accidents on the high seas were provided a federal remedy under DOHSA. *Moragne* afforded a wrongful death remedy under general maritime law, so that similar accidents in territorial waters would not be subject to the varied, and sometimes nonexistent, remedies afforded by state wrongful death statutes. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 624 n.18, 98 S.Ct. 2010. That Congress has chosen to limit recoveries based on deaths on the high seas to pecuniary damages does not limit the primary purpose of *Moragne*, which is to ensure that survivors of seamen like William Hlodan who perish in state waters receive adequate compensation for their losses.

In this case the district court, in ruling that the $200,000 was excessive but denying the defendants' motion for a new trial conditioned upon plaintiff's acceptance of a remittitur, made separate awards under each cause of action, broken down as follows:

| | | |
|---|---|---|
| I. | Pecuniary loss | |
| | (a) Loss of support | |
| | (1) Accrued | $12,500.00 |
| | (2) Future loss, discounted to present value | 34,496.60 |
| | Total loss of support | 46,996.60 |
| | (b) Loss of services | |
| | (1) Accrued | 9,000.00 |
| | (2) Future loss, discounted to present value | 24,837.56 |
| | Total loss of services | 33,837.56 |
| | Total pecuniary loss | 80,834.16 |
| II. | Non-pecuniary loss | |
| | (a) Decedent's conscious pain and suffering | 25,000.00 |
| | (b) Loss of society (both parents) | 45,000.00 |
| | Total non-pecuniary loss | 70,000.00 |
| | TOTAL LOSS | $150,834.16 |

Plaintiff accepted the remittitur. We need not decide the effect if the district court had not made that division. We need only hold here that where the jury makes specific findings of liability on the separate causes of action, Jones Act negligence and general maritime unseaworthiness, and there is an allocation of damages to each, separate recovery is appropriate. This result is not altered by *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958).

[8] The jury in this case returned a verdict of $200,000. The trial court ordered a new trial unless plaintiff accepted a reduction of $49,000 in the verdict. Hlodan accepted the reduced verdict instead of a new trial, "under protest." Judgment was entered on his behalf. Plaintiff now attempts to cross-appeal, contending the jury verdict should be reinstated. Plaintiff may not, however, appeal from a remittitur order he has accepted. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977); *Keene v. International Union of Operating Engineers, Local 624*, 569 F.2d 1375 (5th Cir. 1978).

[9] Finally, defendants claim an allocation of $25,000 under general maritime law for William Hlodan's conscious pain and suffering before his death is unsupported by the evidence. The evidence showed that for some undetermined number of minutes before his death Hlodan was aware of his predicament, and that his death by drowning was not instantaneous. The survival claim was proper, and the evidence supports the award. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 156–158, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

AFFIRMED.


**Clayton G. LOWE and Lucille Lowe, his wife, Plaintiffs,**

**Clayton G. Lowe, Plaintiff-Appellant,**

**v.**

**UNITED STATES of America, Defendant-Appellee.**

**No. 79–2229**
**Summary Calendar.***

United States Court of Appeals, Fifth Circuit.

Jan. 28, 1980.

Employee of subcontractor engaged in building facility for United States government was injured while descending from construction trailer on temporary cement block steps constructed by subcontractor. He brought suit against the Government, as landlord of facility, under the Federal Tort Claims Act. The United States District Court for the Middle District of Florida, George C. Young, Chief Judge, 466 F.Supp. 895, denied liability, and employee appealed. The Court of Appeals held that under contract, safety was sole responsibility of the contractor and the Government could not be liable just because it retained right to require adherence to safety regulations.

Affirmed.

**1. United States ⇐78(9)**

Although contract between Government and general contractor provided that Government would notify contractor of any noncompliance with safety and health provisions of contract and act to remedy failure of contractor to take corrective action, such action was not mandatory and safety was the sole responsibility of the contractor and Government could not be liable for injuries sustained by employee of subcontractor while descending from construction trailer on temporary cement block steps merely because Government retained right to require adherence to safety regulations.

* Fed.R.App.P. 34(a); 5th Cir. R. 18