

[444 US 490]
NORFOLK AND WESTERN RAILWAY COMPANY, Petitioner,

v

KANDYTHER J. LIEPELT, Administratrix, etc.

444 US 490, 62 L Ed 2d 689, 100 S Ct 755, reh den 445 US 972, 64 L Ed 2d
250, 100 S Ct 1667

[No. 78-1323]

Argued November 5, 1979. Decided February 19, 1980.

OPINION OF THE COURT

Mr. Justice Stevens delivered the opinion of the Court.

[1a, 2a] In cases arising under the Federal Employers' Liability Act,¹ most trial judges refuse to allow the jury to receive evidence

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or instruction concerning the impact of federal income taxes on the amount of damages to be awarded. Because the prevailing practice developed at a time when federal taxes were relatively insignificant, and because some courts are now following a different practice, we decided to answer the two questions presented by the certiorari petition in this wrongful-death action: (1) whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and (2) whether it was error for the trial judge to refuse to instruct the jury that the award of damages would not be subject to income taxation.

In 1973, a fireman employed by petitioner suffered fatal injuries in a collision caused by petitioner's negligence.² Respondent, as administratrix of the fireman's estate, brought suit under the FELA to recover the damages that his survivors suffered as a result of his death. In 1976, after a full trial in the Circuit Court of Cook County, the jury awarded

respondent \$775,000. On appeal, the Appellate Court of Illinois held that it was "not error to refuse to instruct a jury as to the nontaxability of an award and also that it was not error to exclude evidence of the effect of income taxes on future earnings of the decedent." 62 Ill App 3d 653, 669, 378 NE2d 1232, 1245 (1978). The Illinois Supreme Court denied leave to appeal.³

The evidence supporting the damages award included biographical data about the decedent and his family and the expert testimony of an economist. The decedent, a 37-year-old man, was living with his second wife and two young children and was contributing to the support of two older children by his first marriage. His gross earnings in the 11 months prior to his death on November 22, 1973, amounted to \$11,988.

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Assuming continued employment, those earnings would have amounted to \$16,828.26 in 1977.

The expert estimated that the decedent's earnings would have increased at a rate of approximately five percent per year, which would have amounted to \$51,600 in the year 2000, the year of his expected retirement. The gross amount of those earnings, plus the value of the services he would have performed

1. 35 Stat 65, as amended, 45 USC §§ 51 et seq. [45 USC §§ 51 et seq.].

2. The issue of liability was vigorously contested at the trial and was the subject of extensive consideration by the Appellate

Court of Illinois, First District. See 62 Ill App 3d 653, 378 NE2d (1978). No aspect of that issue, however, is now before us.

3. App to Pet for Cert A27-A28.

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for his family, less the amounts the decedent would have spent upon himself, produced a total which, when discounted to present value at the time of trial, amounted to \$302,000.

Petitioner objected to the use of gross earnings, without any deduction for income taxes, in respondent's expert's testimony and offered to prove through the testimony of its own expert, an actuary, that decedent's federal income taxes during the years 1973 through 2000 would have amounted to about \$57,000. Taking that figure into account, and making different assumptions about the rate of future increases in salary and the calculation of the present value of future earnings, petitioner's expert computed the net pecuniary loss at \$138,327. As already noted, the jury returned a verdict of \$775,000.

Petitioner argues that the jury must have assumed that its award was subject to federal income taxation; otherwise, it is argued, the verdict would not have exceeded respondent's expert's opinion by such a large amount.⁴ For that reason, pe-

titioner contends that it was prejudiced by the trial judge's refusal to instruct the jury that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

[3] Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on

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the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. See, e.g., *Michigan Central R. Co. v Vreeland*, 227 US 59, 57 L Ed 417, 33 S Ct 192. This is true even if the action is brought in state court. See, e.g., *Chesapeake & Ohio R. Co. v Kelly*, 241 US 485, 491, 60 L Ed 1117, 36 S Ct 630.⁵ In this case the Appellate Court of Illinois recognized that the practice then being followed in Illinois was subject to change when this Court addresses the issue.⁶ We do so now, first considering the evidence question and then the proposed instruction.

4. Respondent argues that the excess is adequately explained by the jury's estimate of the pecuniary value of the guidance, instruction, and training that the decedent would have provided to his children.

5. One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees. HR Rep No. 1386, 60th Cong, 1st Sess, 3 (1908). See also *Dice v Akron, C. & Y. R. Co.*, 342 US 359, 362, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161; *Brady v Southern R. Co.* 320 US 476, 479, 88 L Ed 239, 64 S Ct 232; *Hill, Substance*

and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St LJ 384 (1956).

6. "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that court we will follow the decisions of our own supreme court in *Raines v New York Central R. R. Co.* (1972), 51 Ill 2d 428, 430, 283 NE2d 280, cert denied (1972), 409 US 983, [34 L Ed 2d 247, 93 S Ct 322], . . . and *Hall v Chicago & North Western Ry. Co.* (1955), 5 Ill 2d 135, 149-52, 125 NE2d 77. . . ." 62 Ill App 3d, at 668-669, 378 NE2d at 1245.

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I

[1b, 4] In a wrongful-death action under the FELA, the measure of recovery is "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co. v Vreeland*, supra, at 70, 57 L Ed 417, 33 S Ct 192. The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows

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inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

Although federal courts have consistently received evidence of the amount of the decedent's personal expenditures, see, e.g., *Kansas City S. R. Co. v Leslie*, 238 US 599, 604, 59 L Ed 1478, 35 S Ct 844, and have required that the estimate of future earnings be reduced by "taking account of the earning power of the money that is presently to be awarded." *Chesapeake & Ohio R. Co. v Kelly*, supra, at 489, 60 L Ed 1117, 36 S Ct 630, they have generally not considered the payment of income taxes as tantamount to a personal expenditure and have regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations. See,

7. [5b] This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating the award would be de minimis, introduction of the evidence may

e.g., *Johnson v Penrod Drilling Co.*, 510 F2d 234, 236-237 (CA5 1975), cert denied, 423 US 839, 46 L Ed 2d 58, 96 S Ct 68, 96 S Ct 69.

[5a] Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.⁷

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Respondent argues that if this door is opened, other equally relevant evidence must also be received. For example, she points out that in discounting the estimate of future earnings to its present value, the tax on the income to be earned by the damages award is now omitted.⁸ Logically, it would certainly seem correct that this amount, like future wages, should be estimated on an

cause more confusion than it is worth. Cf. Fed Rule Evid. 403.

8. See *McWeeney v. New York, N. H. & H. R. Co.*, 282 F2d 34, 37 (CA2 1960), cert denied, 364 US 870, 5 L Ed 2d 93, 81 S Ct 115.

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after-tax basis. But the fact that such an after-tax estimate, if offered in proper form, would also be admissible does not persuade us that it is wrong to use after-tax figures instead of gross earnings in projecting what the decedent's financial contributions to his survivors would have been had this tragic accident not occurred.

[6] Respondent also argues that evidence concerning costs of litigation, including her attorney's fees, is equally pertinent to a determination of what amount will actually compensate the survivors for their monetary loss. In a sense this is, of course, true. But the argument that attorney's fees must be added to a plaintiff's recovery if the award is truly to make him whole is contrary to the generally applicable "American Rule." See *Alaska Pipeline Service Co. v Wilderness Society*, 421 US 240, 247, 44 L Ed 2d 141, 95 S Ct 1612. The FELA, however, unlike a number of other federal statutes,⁹ does not authorize recovery of attorney's fees by the successful litigant. Only if the Congress were to provide for such a recovery would it be proper to consider them. In any

event, it surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages in order to offset

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what may be perceived as an undesirable or unfair rule regarding attorney's fees.¹⁰

II

[2b] Section 104(a)(2) of the Internal Revenue Code of 1954, 26 USC § 104(a)(2) [26 USCS § 104(a)(2)], provides that the amount of any damages received on account of personal injuries is not taxable income.¹¹ The section is construed to apply to wrongful-death awards; they are not taxable income to the recipient.¹²

Although the law is perfectly clear, it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. The Missouri Supreme Court expressed the opinion that "it is reasonable to assume the average juror would believe [that its

9. See Civil Rights Act of 1964, Tit. VII, § 706(k), 78 Stat 261, 42 USC § 2000e-5(k) [42 USCS § 2000e-5(k)]; Clayton Act, § 4, 38 Stat 731, 15 USC § 15 [15 USCS § 15]; and numerous others collected in *Alaska Pipeline Service Co. v Wilderness Society*, 421 US, at 260-261, n 33, 44 L Ed 2d 141, 95 S Ct 1612.

10. The dissent takes the position that § 104(a)(2) of the Internal Revenue Code, see nn 11-12, *infra*, which makes personal injury awards nontaxable, "appropriates for the tortfeasor a benefit intended to be conferred on the victim or his survivors." Post, at 498-499, 62 L Ed 2d, at 697. But we see nothing in the language and are aware of nothing in the legislative history of § 104(a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful-death action. Moreover, netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more than net-

ting out the decedent's personal expenditures. Both subtractions are required in order to determine "the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co. v Vreeland*, 227 US 59, 70, 57 L Ed 417, 33 S Ct 192.

11. The statute contains an exception for the reimbursement of medical expenses that have been taken as a deduction. The section provides in relevant part:

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

"(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ."

12. See Rev Rul 54-19, 1954-1 Cum Bull 179.

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verdict will] be subject to such taxes." *Dempsey v Thompson*, 363 Mo 339, 346, 251 SW2d 42, 45 (1952). And Judge Aldisert, writing for the Third Circuit, agreed:

"We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in *Dempsey v Thompson*, 363 Mo 339, 251 SW2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.

"[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it."

"H. Harper & James, *The Law of Torts* § 25.12, at 1327-28 (1956)." (Footnote omitted.) *Domeracki v Humble Oil & Refining Co.*, 443 F2d 1245, 1251 (1971), cert denied, 404 US 883, 30 L Ed 2d 165, 92 S Ct 212.

A number of other commentators have also identified that risk.¹³

In this case the respondent's expert witness computed the amount of pecuniary loss at \$302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of \$775,000. It is surely not fanciful to suppose that the jury erroneously believed that a

large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. Whether or not this speculation

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is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,

"[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." *Burlington Northern, Inc. v Boxberger*, 529 F2d 284, 297 (1975).

We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

The judgment is reversed, and the case is remanded to the Appellate Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

13. See, e.g., Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L Rev 320 (1965); Feldman, Personal Injury

Awards: Should Tax-Exempt Status Be Ignored?, 7 Ariz L Rev 272 (1966); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St LJ 212 (1958).

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SEPARATE OPINION

Mr. Justice Blackmun, with whom Mr. Justice Marshall joins, dissenting.

In this action for wrongful death arising under the Federal Employers' Liability Act, 35 Stat 65, as amended, 45 USC §§ 51-60 [45 USCS §§ 51-60], the Court today holds that if an award is granted, federal income taxes on the decedent's lost earnings are to be taken into account and are to reduce the amount of the award. The Court further holds that, on request, the jury must be instructed that the award is not subject to federal income tax.

I agree with neither ruling. In my view, by mandating adjustment of the award by way of reduction for federal income taxes that would have been paid by the decedent on his earnings, the Court appropriates for the tortfeasor a benefit

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intended to be conferred on the victim or his survivors. And in requiring that the jury be instructed that a wrongful-death award is not subject to federal income tax, the Court opens the door for a variety of admonitions to the jury not to "misbehave," and unnecessarily interjects what is now to be federal law into the administration of a trial in a state court.

In this day of substantial income taxes, one is sorely tempted, in jury litigation, to accept the propriety of admitting evidence as to a tort victim's earnings *net* after estimated income taxes, and of instructing the jury that an award will be tax-free. This, it could be urged, is only common sense and a recognition of financial realities.

Ordinarily, however, the effect of an income tax upon the recipient of a payment is of no real or ultimate concern to the payer. Apart from required withholding, it just is not the payer's responsibility or, indeed, "any of his business." The concept of "net after taxes" and the omnipresence of the tax collector to be sure, are present facts of life and are within the constant awareness of both recipient and payer. But these factors do not change the basic character of an award for damages, whether that award be one to compensate the surviving victim for his injury, or one to compensate the deceased victim's survivors, by way of statutory wrongful-death benefit, for their loss. The income tax effect should flow and be retained in its own channel. Surely, it should not operate to assist the tortfeasor by way of a benefit, perhaps even a windfall.

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I

The employer-petitioner argues, and the Court holds, that federal income taxes that would have been paid by the deceased victim must be subtracted in computing the amount of the wrongful-death award. Were one able to ignore and set aside the uncertainties, estimates, assumptions, and complexities involved in computing and effectuating that subtraction, this might not be an unreasonable legislative proposition

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in a compensatory tort system. Neither petitioner nor the Court, however, recognizes that the premise of such an argument is the nontaxability, under the Internal Revenue Code, of the wrongful-death award itself.

By not taxing the award, Congress has bestowed a benefit.¹ Although the parties disagree over the origin of the tax-free status of the wrongful-death award,² it is surely clear that the lost earnings could be taxed as income. Cf. *Commissioner v Glenishaw Glass Co.*, 348 US 426, 430-431, 99 L Ed 483, 75 S Ct 473 (1955). See generally M. Chirelstein, *Federal Income Taxation* 39-40 (1977).

1. The parties agree that these awards are not taxable. Of course, it would not be in the interest of either party to take the position that the award is taxable.

2. Respondent maintains that a wrongful-death award is within the exclusion of § 104(a)(2) of the Internal Revenue Code of 1954, 26 USC § 104(a)(2) [26 USCS § 104(a)(2)], which provides that "gross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Brief for Respondent 8-9, and n 2. Petitioner, on the other hand, contends that a wrongful-death award is not, in the words of the statute, "received . . . on account of personal injuries." Petitioner points to an early ruling that wrongful-death damages are not within the Code's definition of income because they merely replace contributions the decedent's relatives would have received from the decedent. IT 2420, VII-2 Cum Bull 123 (1928); see Rev Rul 54-19, 1954-1 Cum Bull 179. Alternatively, petitioner argues that even if wrongful-

In my view, why Congress created this benefit under one statute is relevant in deciding where the benefit should be allocated under another statute enacted by Congress.³

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While Congress has not articulated its reasons for not taxing a wrongful-death award, it is highly unlikely that it intended to confer this benefit on the tortfeasor. Two more probable purposes for the exclusion are apparent. First, taxing the award could involve the same uncertainties and complexities noted by respondent and the majority of the courts of this country as a reason for not taking income taxes into account in computing the award. Congress may have decided that it is simply not worthwhile to enact a complex and administratively burdensome system in order to approximate the tax treatment of the income if, in fact, it had been earned over a period of time by the decedent. Second, Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort. One District Court has reasoned:

death damages are covered by § 104(a)(2), Congress' purpose in enacting that subsection was not to aid tort victims. Rather, § 104(a)(2) can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment, citing H.R. Rep. No. 767, 65th Cong., 2d Sess., 9-10 (1918). Brief for Petitioner 31-32, n 23.

3. Petitioner argues that a decision in this case that would rest on Congress' purpose not to subject wrongful-death awards to federal income taxation would "fundamentally alter all forms of injury compensation in this country," Reply Brief for Petitioner 10-11, since this nontaxability is not limited to awards under the FELA. My position, however, is merely that the policies embodied in one federal statute are relevant in aid of the interpretation of another federal statute. Absent a more explicit statement of Congress' intent, I would not infer a congressional purpose to override the States' traditional power to define the measure of damages applicable to state-created causes of action.

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"The court can divine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as with all exemptions under Section 104, . . . intended to relieve a taxpayer who has the misfortune to become ill or injured. . . ." *Huddell v Levin*, 395 F Supp 64, 87 (NJ 1975),⁴ quoting *Epmejer v United States*, 199 F2d 508, 511 (CA7 1952), quoted in turn in *Haynes v United States*, 353 US 81, 84-85, n 3, 1 L Ed 2d 671, 77 S Ct 649 (1957).

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See also Comment, *Income Tax Effects on Personal Injury Recoveries*, 30 La L Rev 672, 685 (1970); Note, 69 Harv L Rev 1495, 1496 (1956); Note, *Taxation of Damage Recoveries from Litigation*, 40 Cornell LQ 345, 346 (1955).

Whichever of these concerns it was that motivated Congress, transfer of the tax benefit to the FELA tortfeasor-defendant is inconsistent with that purpose. If Congress felt that it was not worth the effort to estimate the decedent's prospective tax liability on behalf of the public fisc, it is unlikely that it would want to require this effort on behalf of the tortfeasor. And Congress would not confer a humanitarian benefit on tort victims or their survivors in the Internal Revenue Code, only to take it away from victims or their survivors covered by the FELA. I con-

clude, therefore, that any income tax effect on lost earnings should not be considered in the computation of a damages award under the FELA.

II

The Court concludes that, as a matter of federal law, the jury in an FELA case must be instructed, on request, that the damages award is not taxable. This instruction is mandated, it is said, because "it is entirely possible that the members of the jury may assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." Ante, at 496, 62 L Ed 2d, at 695. The Court finds it "surely not fanciful to suppose" that the jury acted on that assumption in this case. Ante, at 497, 62 L Ed 2d, at 696.

The required instruction is purely cautionary in nature. It does not affect the determination of liability or the measure of damages. It does nothing more than call a basically irrelevant factor to the jury's attention, and then directs the jury to forget that matter. Even if federal law governed such an admonition to the jury not to misbehave, the instruction required by the Court seems to me to be both unwise

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and unjustified, and almost an affront to the practical wisdom of the jury.

It also is "entirely possible" that the jury "may" increase its damages award in the belief that the defendant is insured, or that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors.

4. Vacated on other grounds, 537 F2d 726 (CA3 1976).

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Charging the jury about every conceivable matter as to which it should not misbehave or miscalculate would be burdensome and could be confusing. Yet the Court's decision today opens the door to that possibility. There certainly is no evidence in this record to indicate that the jury is any more likely to act upon an erroneous assumption about an award's being subject to federal income tax than about any other collateral matter. Although the Court suggests that the difference in the expert's estimation of the pecuniary loss and the total amount of the award represents inflation of the award for federal income taxes, ante, at 496-498, 62 L Ed 2d, at 695-696, this is pure surmise. The jury was instructed that it could compensate for factors on which experts could not place a precise dollar value; and it is "entirely possible" that these, instead, were the basis of the award.

In any event, it has long been settled that the giving of cautionary instructions is governed by state law when an FELA action is brought in state court. "[Q]uestions of procedure and evidence [are] to be determined according to the law of the forum [in cases arising under the FELA]." *Chesapeake & Ohio R. Co. v Kelly*, 241 US 485, 491, 60 L Ed 1117, 36 S Ct 630 (1916). This Court, to be sure, has asserted federal control over a number of incidents of state trial practice that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. See, e.g., *Brown v Western R. of Alabama*, 338 US 294, 94 L Ed 100, 70 S Ct 105 (1949) (a State cannot apply, in an FELA case, its usual rule that pleadings are construed against the pleader); *Dice v Akron, C. & Y. R. Co.*,

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342 US 359, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule); C. Wright, *Law of Federal Courts* 195-196 (3d ed 1976); Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St LJ 384 (1956). I agree, of course, that state rules that interfere with federal policy are to be rejected, even if they might be characterized as "procedural." See, e.g., Note, *State Enforcement of Federally Created Rights*, 73 Harv L Rev 1551, 1560-1561 (1960). See generally Note, *Procedural Protection for Federal Rights in State Courts*, 30 U Cin L Rev 184 (1961). I cannot conclude, however, that a purely cautionary instruction to the jury not to misbehave implicates any federal interest. This issue truly can be characterized as one of the "ordinary incidents of state procedure," *Dickinson v Stiles*, 246 US 631, 633, 62 L Ed 908, 38 S Ct 415 (1918), which should be governed by state law.

Since the law of Illinois, where this case arose, is that it is not error to refuse to instruct the jury as to the nontaxability of the award, *Raines v New York Central R. Co.*, 51 Ill 2d 428, 480, 283 NE2d 230, 232, cert denied, 409 US 983, 34 L Ed 2d 247, 93 S Ct 322 (1972), and since I believe the trial court correctly excluded evidence of the prospective tax liability of the deceased victim, I would affirm the judgment of the Appellate Court of Illinois.

[486 US 330]
MONESSEN SOUTHWESTERN RAILWAY COMPANY, Appellant

v
GERALD L. MORGAN

486 US 330, 100 L Ed 2d 349, 108 S Ct 1837

[No. 86-1743]

Argued February 22, 1988. Decided June 6, 1988.

OPINION OF THE COURT

[486 US 332]

Justice White delivered the opinion of the Court.

[1a, 2a, 3a] This case concerns the application of state law rules affecting the measure of damages in an action brought in state court under the Federal Employers' Liability Act (FELA), 35 Stat 65, as amended, 45 USC § 51 et seq. [45 USCS §§ 51 et seq.]

I

Appellee was employed by appellant as a railroad brakeman and conductor. In August 1977, appellee fell while alighting from a railroad car and suffered a permanent injury to his back. He returned to work in February 1979 in the less physically demanding position of radio and supply clerk.

Appellee brought an FELA action in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging that his fall was attributable to appellant's negligence. He claimed that his future earning power had been impaired as a result of his injury because he could not obtain certain incentive and shift differential payments in his new position.

The trial judge refused to instruct the jury that any damages award for loss of future earnings would have to

be reduced to present value. Instead, she informed the jury that "[t]he law now provides that there need not be such a reduction." App 61. The judge apparently was referring to the Pennsylvania Supreme Court's decision in *Kaczowski v Bolubasz*, 491 Pa 561, 583, 421 A2d 1027, 1038-1039 (1980), which had instructed state courts to cease discounting future lost earnings to present value because "as a matter of law future inflation shall be presumed equal to future interest rates with these factors offsetting."

The jury found in favor of appellee and awarded damages of \$125,000. The trial judge assessed an additional \$26,712.50 as prejudgment interest pursuant to Rule 238 of the Pennsylvania

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Rules of Civil Procedure. Rule 238 requires state courts in personal injury actions to "add to the amount of compensatory damages . . . , damages for delay at ten (10) percent per annum, not compounded," from "the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later," to the date of the verdict.¹ The judge rejected appellant's contention that Rule 238 could not be applied to FELA actions.

1. Rule 238 provides that, if the defendant made a pretrial settlement offer and the plaintiff's recovery does not exceed 125 per-

cent of that offer, the court cannot award "delay damages" for the period after the offer was made.

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A three-judge panel of the Pennsylvania Superior Court affirmed. 339 Pa Super 465, 489 A2d 254 (1985).

The Pennsylvania Supreme Court granted appellant's petition for allowance of appeal and subsequently affirmed by a narrow margin. 513 Pa 86, 518 A2d 1171 (1986).

The court characterized Rule 238 as a mere "rule of procedure" designed to encourage meaningful settlement negotiations and thereby alleviate congestion in the trial courts. *Id.*, at 98-99, 518 A2d, at 1177. The court concluded that, as neither the "worthy goal" nor the specific provisions of Rule 238 contravened the purposes and provisions of the FELA, the Pennsylvania courts could apply Rule 238 to award prejudgment interest in FELA cases as well as in cases involving only state law. *Ibid.*

The court recognized that whether the trial judge had properly refused to instruct the jury to discount future damages to present value, and instead applied the so-called "total offset" method, was a question of federal law. See *St. Louis Southwestern R. Co. v Dickerson*, 470 US 409, 411, 84 L Ed 2d 303, 105 S Ct 1347 (1985) (*per curiam*). The court noted our discussion of a Federal District Court's use of Pennsylvania's total offset rule in *Jones & Laughlin Steel Corp. v Pfeifer*, 462 US 523, 76 L Ed 2d 768, 103 S Ct 2541 (1983), a case brought under the Longshoremen's and Harbor

2. The three dissenting justices maintained that the trial court's award of "delay damages" under Rule 238 contravened federal substantive law and "undermine[d] the national uniformity FELA was designed to achieve." 513 Pa, at 102, 518 A2d, at 1179. They dismissed as "pure sophistry" the majority's assertion that Rule 238 was a mere procedural device, observing that "[a]ny rule which increases a damage award by twenty-five percent has an undeniably material effect on damages." *Id.*, at 101-102, 518 A2d, at

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Workers' Compensation Act (LHWCA), 33 USC § 904 [33 USCS § 904]. We held in *Pfeifer* that "whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law." *Id.*, at 552-553, 76 L Ed 2d 768, 103 S Ct 2541. Here, the trial judge's use of the total offset rule was held to have been permissible under *Pfeifer* because the reviewing court had itself "deliberately selected" that rule in *Kaczowski v Bolubasz* "after a thorough consideration of various present worth theories and rules." 513 Pa, at 92-93, 518 A2d, at 1174. Nor did the court find any inconsistency between the trial judge's use of the total offset rule and our holding in *Dickerson* that "an utter failure to instruct the jury that present value is the proper measure of [an FELA] damages award is error." 470 US, at 412, 84 L Ed 2d 303, 105 S Ct 1347. Here, reasoned the court, "the trial judge did instruct the jury on present value by charging on the total offset method." 513 Pa, at 94-95, 518 A2d, at 1175.*

We noted probable jurisdiction, 484 US 818, 98 L Ed 2d 27, 108 S Ct 63 (1987), and now reverse.

II

We first consider whether state courts may award prejudgment interest pursuant to local practice in actions brought under the FELA.

1179. In addition, said the dissenters, the trial judge's refusal to instruct the jury to discount any future damages to present value was inconsistent with federal law. The trial judge had "blindly applied" the Pennsylvania total offset rule, they asserted, and had not made the "deliberate choice" among present value theories required by *St. Louis Southwestern R. Co. v Dickerson*, 470 US 409, 84 L Ed 2d 303, 105 S Ct 1347 (1985). 513 Pa, at 100, 518 A2d, at 1178.

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A

[4, 5] State courts are required to apply federal substantive law in adjudicating FELA claims. *Dickerson*, supra, at 411, 84 L Ed 2d 303, 105 S Ct 1347; *Chesapeake & Ohio R. Co. v Kuhn*, 284 US 44, 46-47, 76 L Ed 157, 52 S Ct 45 (1931). It has long been settled that "the proper measure of damages [under the FELA] is inseparably connected with the right of action," and therefore is an issue of substance that "must be settled according to general principles of law as administered in the Federal courts." *Chesapeake & Ohio R. Co. v Kelly*, 241 US 485, 491, 60 L Ed 1117, 36 S Ct 630 (1916); see also *Dickerson*, supra, at 411, 84 L Ed 2d 303, 105 S Ct 1347; *Norfolk & Western R. Co. v Liepelt*, 444 US 490, 493, 62 L Ed 2d 689, 100 S Ct 755 (1980).

[1b, 6] The question of what constitutes "the proper measure of damages" under the FELA necessarily includes the question of whether prejudgment interest may be awarded to a prevailing FELA plaintiff. Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. *West Virginia v United States*, 479 US 305, 310, and 310-311, n.2, 93 L Ed 2d 639, 107 S Ct 702 (1987); *General Motors Corp. v Devex Corp.*, 461 US 648, 655-656, 76 L Ed 2d 211, 103 S Ct 2058 (1983); *Poleto v Consolidated Rail Corp.*, 826 F2d 1270, 1278 (CA3, 1987); *Wilson v Burlington Northern R. Co.*, 803 F2d 563, 566 (CA10 1986)

3. Other courts have uniformly recognized that the availability of prejudgment interest under the FELA is a question of federal law. See, e.g., *Poleto v Consolidated Rail Corporation*, 826 F2d 1270, 1274 (CA3 1987); *Louisiana & Arkansas R. Co. v Pratt*, 142 F2d 847, 848 (CA5 1944); *Chicago, M., St. P. & P. R. Co. v Busby*, 41 F2d 617, 619 (CA9 1930); *Carmouche v Southern Pacific Transportation Co.*, 734 SW2d 46, 47 (Tex App 1987); *Wicks v Central R. Co.*, 129 NJ Super 145, 147, 322 A2d 488, 489, cert denied, 66 NJ 317, 331 A2d

(McKay, J., concurring), cert denied, 480 US 946, 94 L Ed 2d 790, 107 S Ct 1604 (1987). Moreover, prejudgment interest may constitute a significant portion of an FELA plaintiff's total recovery. Here, for example, the trial court's award of \$26,712.50 in prejudgment interest under Rule 238 increased appellee's total recovery by more than 20 percent. Accordingly, the Pennsylvania courts erred in treating the availability of prejudgment interest in FELA actions as a matter of state law rather than federal law.³

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[1c] The Pennsylvania courts cannot avoid the application of federal law to determine the availability of prejudgment interest under the FELA by characterizing Rule 238 as nothing more than a procedural device to relieve court congestion. In *Dice v Akron, C. & Y. R. Co.*, 342 US 359, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161 (1952), the Ohio courts had applied a state procedural rule in an FELA action that permitted the judge rather than the jury to resolve factual questions as to whether a release had been fraudulently obtained. We reversed on the ground that "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.*, at 363, 96 L Ed 398, 72 S Ct 312, 47 Ohio Ops 53, 63 Ohio L Abs 161. See also *Brown v Western R. Co. of Alabama*, 338 US 294, 298-299, 94 L Ed 100, 70

17 (1974); *Mobile & O. R. Co. v Williams*, 219 Ala 238, 249, 121 So 722, 731 (1929).

4. The Court of Appeals for the Third Circuit recognized in an FELA action that Rule 238 is substantive in nature. *Poleto v Consolidated Rail Corporation*, supra, at 1274. Indeed, even the Pennsylvania Supreme Court has acknowledged that Rule 238 has "both procedural and substantive elements." *Laudenberger v Port Authority of Allegheny County*, 496 Pa 52, 66, 436 A2d 147, 154 (1981).

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S Ct 105 (1949). Similarly, prejudgment interest constitutes too substantial a part of a defendant's potential liability under the FELA for this Court to accept a State's classification of a provision such as Rule 238 as a mere "local rule of procedure."⁴ We therefore turn to the issue of whether federal law authorizes awards of prejudgment interest in FELA actions.

B

[7] Neither the FELA itself nor the general federal interest statute, 28 USC § 1961 [28 USCS § 1961], makes any mention of prejudgment interest. It is true that Congress' silence as to the availability of interest on an obligation created by federal law does not, without more, "manifes[t] an unequivocal congressional

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purpose that the obligation shall not bear interest." *Rodgers v United States*, 332 US 371, 373, 92 L Ed 3, 68 S Ct 5 (1947).

[2b] We can discern a sufficiently clear indication of legislative intent with regard to prejudgment interest under the FELA, however, when we consider Congress' silence on this matter in the appropriate historical

context. In 1908, when Congress enacted the FELA, the common law did not allow prejudgment interest in suits for personal injury or wrongful death. See C. McCormick, *Law of Damages* § 56 (1935); 1 T. Sedgwick, *Measure of Damages* § 316 (9th ed 1912).⁵ This was the rule in the federal courts. *Pierce v United States*, 255 US 398, 406, 65 L Ed 697, 41 S Ct 365 (1921);⁶ *Mowry v Whitney*, 14 Wall 620, 653, 20 L Ed 860 (1872); see also *Poleto*, *supra*, at 1276, 1278; *Wilson*, *supra*, at 565; *Louisiana & Arkansas R. Co. v Pratt*, 142 F2d 847, 848 (CA5 1944). Congress expressly dispensed with other common-law doctrines of that era, such as the defense of contributory negligence, see 45 USC § 53 [45 USCS § 53], in order "to provide liberal recovery for injured workers" under the FELA. *Kernan v American Dredging Co.*, 355 US 426, 432, 2 L Ed 2d 382, 78 S Ct 394 (1958). But Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment

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interest, and we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*.⁷

5. As Justice Blackmun's dissent concedes, the authorities recognized even two decades after the enactment of the FELA that "interest usually was not awarded" in personal injury actions involving claims for both economic and noneconomic injury. *Post*, at 347, 100 L Ed 2d, at 365-366 (citing McCormick § 56, p 224).

6. In *Pierce*, the Government obtained a criminal judgment against a corporation, and a fine was imposed. The Government then brought a civil action against the corporation's shareholders to satisfy the judgment. The Court held that the Government was entitled to interest only from the date of the civil judgment and not from the date of the prior criminal judgment. It was observed that "[a] common law judgments do not bear interest; interest rests solely upon statutory provision." 255 US, at 406, 65 L Ed 697, 41 S Ct 365. Accordingly, as the only applicable statute provided for postjudgment interest in

civil actions, the Government could not obtain interest prior to the date of the civil judgment either as postjudgment interest in the criminal action or as prejudgment interest in the civil action.

7. Similarly, the Court refused in an early FELA case to depart from the common-law rule that a right of action for personal injury was extinguished by the death of the injured party. See *Michigan Central R. Co. v Vreeland*, 227 US 59, 67-68, 57 L Ed 417, 33 S Ct 192 (1913). The Court noted that the FELA did not expressly provide for the survival of the injured employee's right of action, and that state survival statutes were inapplicable because "[t]he question of survival is not one of procedure, but one which depends on the substance of the cause of action." *Id.*, at 67, 57 L Ed 417, 33 S Ct 192 (quoting *Schreiber v Sharpless*, 110 US 76, 80, 28 L Ed 65, 3 S Ct 423 (1884)).

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Moreover, we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that "Congress at least acquiesces in, and apparently affirms, that [interpretation]." *Cannon v University of Chicago*, 441 US 677, 703, 60 L Ed 2d 560, 99 S Ct 1946 (1979); see also *Gulf Oil Corp. v Copp Paving Co.*, 419 US 186, 200-201, 42 L Ed 2d 378, 95 S Ct 392 (1974); *Flood v Kuhn*, 407 US 258, 283-284, 32 L Ed 2d 728, 92 S Ct 2099 (1972). The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA. See, e.g., *Poleto*, 826 F2d, at 1279; *Wilson*, 803 F2d, at 566; *Kozar v Chesapeake & Ohio R. Co.*, 449 F2d 1238, 1244 (CA6 1971); *Pratt*, *supra*, at 848-849; *Chicago, M., St. P. & R.R. Co. v Busby*, 41 F2d 617, 619 (CA9 1930); *Carmouche v Southern Pacific Transportation Co.*, 734 SW2d 46, 47 (Tex. App. 1987); *Melin v Burlington Northern R. Co.*, 401 NW2d 418, 420 (Minn. App. 1987); *Wicks v Central R. Co.*, 129 NJ Super 145, 147, 322 A2d 488, 489, cert. denied, 66 NJ 317, 331 A2d 17 (1974); *Murmann v New York, N. H. & H. R. Co.*, 258 NY 447, 450, 180 NE 114, 115 (1932) (*per curiam*); *Mobile & O.R. Co. v Williams*, 219 Ala 238, 249, 121 So 722, 731 (1929); *Bennett v Atchison, T. & S. F. R. Co.*, 187 Iowa 897, 903-904,

8. Congress considered a proposal to authorize prejudgment interest under the general federal interest statute, 28 USC § 1961 [28 USCS § 1961], during deliberations on the Federal Courts Improvement Act of 1982, Pub L 97-164, 96 Stat 25. The proposal was omitted from the final legislation. S Rep No. 97-275, pp 11-12 (1981).

9. Justice Blackmun's dissent does not recognize the obvious difference between the instant case and previous cases in which the Court allowed prejudgment interest on certain pecuniary losses. See, e.g., *General Motors Corp. v Devex Corp.*, 461 US 648, 654-656, 76 L Ed 2d 211, 103 S Ct 2058 (1983); *Jacobs v United States*, 290 US 13, 16-17, 78 L Ed 142, 54 S Ct 26, 96 ALR 1 (1933); *Waite v United States*, 282 US 508, 509, 75 L Ed 494, 51 S Ct

174 NW 805, 807 (1919); *Grow v Oregon Short Line R. Co.*, 47 Utah 26, 29, 150 P 970, 971 (1915). Congress has amended the FELA on several occasions since 1908. See 36 Stat 291 (1910); 53 Stat 1404 (1939); 62 Stat

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989 (1948). Yet, Congress has never attempted to amend the FELA to provide for prejudgment interest.⁸ We are unwilling in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries. If prejudgment interest is to be available under the FELA, then Congress must expressly so provide.⁹

III

[3b] We turn now to the question whether the trial court acted consistently with federal law in instructing the jury not to discount appellee's future lost earnings to present value:

[3c, 8] We have consistently recognized that "damages awards in suits governed by federal law should be based on present value." *Dickerson*, 470 US, at 412, 84 L Ed 2d 303, 105 S Ct 1347. The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the fu-

227 (1981). In none of those cases did the plaintiff seek prejudgment interest on a cause of action arising under a statute that, like the FELA, was enacted at a time when prejudgment interest was generally unavailable on similar causes of action arising under the common law. The Court would have had no occasion in those cases to consider whether the Congress that adopted the statute under which prejudgment interest was sought intended to dispense *sub silentio* with a well-established common-law rule barring prejudgment interest on similar claims. Hence, we cannot accept the dissent's characterization of our analysis as a "departure from our normal inquiry into the relation between an allowance of interest and Congress' purpose in creating [the underlying] obligation." *Post*, at 348, 100 L Ed 2d, at 366.

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ture." Kelly, 241 US, at 489, 60 L Ed 1117, 36 S Ct 630; see also Dickerson, *supra*, at 412, 84 L Ed 2d 303, 105 S Ct 1347. And, as [486 US 340]

Kelly and Dickerson demonstrate, the rule governs in FELA cases. Hence, a "failure to instruct the jury that present value is the proper measure of a damages award is error." 470 US, at 412, 84 L Ed 2d 303, 105 S Ct 1347.

[3d] Here, the trial court instructed the jury that although it "used to be" that juries were to reduce an award to "something called present worth," the law now provided that there need not be such a reduction. Tr 701-702. The "law" referred to was the Pennsylvania Supreme Court's decision in *Kaczowski v Bolubasz*, 491 Pa 561, 421 A2d 1027 (1980), which held that future inflation would be conclusively presumed to equal future interest rates and that state courts in Pennsylvania therefore were not to reduce damages to present worth. It was error for the court to have refused on the basis of this state rule to allow an FELA award to be reduced to present value, just as it was error for the court in *Pfeifer* to have failed to make "a deliberate choice" as to how an LHWCA award was to be reduced to present value and to have "assum[ed] that it [was] bound by a rule of state law." 462 US, at 553, 76 L Ed 2d 768, 103 S Ct 2541.

[9a] Under the Court's FELA

cases, the jury has the task of making the present value determination. It was observed in *Kelly*, for example, that "it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on deferred payments, with annual rests, and reach a present cash value." 241 US, at 491, 60 L Ed 1117, 36 S Ct 630. We declined to decide in that case "[w]hether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life." *Ibid*. We did not suggest that the difficulty could also be met by permitting the present value calculation to be made by the judge rather than the jury.

The question was addressed more directly two years later in *Louisville & Nashville R. Co. v Holloway*, 246 US 525, 62 L Ed 867, 38 S Ct 379 [486 US 341]

(1918), which held that an FELA defendant was not entitled to a jury instruction that the present value of future losses must as a matter of law be computed at the State's 6 percent legal interest rate. The state trial court had properly refused to give an instruction that "sought to subject the jury's estimate give to [such a] rigid mathematical limitation." *Id.* at 528, 62 L Ed 867, 38 S Ct 379.¹⁰

10. A similar issue was presented in *Vicksburg & Meridian R. Co. v Putnam*, 118 US 545, 30 L Ed 257, 7 S Ct 1 (1886), a tort action brought against a railroad by an injured passenger. The trial judge had instructed the jury to calculate the present value of the plaintiff's damages at the rate shown in standard annuity tables. This Court held that such an instruction "tended to mislead the jury . . . by giving them to understand that the tables were not merely compe-

tent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the plaintiff's life, and the extent of the injury which he had suffered." *Id.* at 557, 30 L Ed 257, 7 S Ct 1. The Court observed that "it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of

There is nothing in Pfeifer to suggest that the judge rather than the jury is to determine the discount rate in FELA actions. There, we repeatedly indicated that the present value calculation is to be made by the "trier of fact." See 462 US, at 534, 536, 538, 547-548, 550-551, n 32, 76 L Ed 2d 768, 103 S Ct 2541. Of course, because Pfeifer was tried to the Bench, the "trier of fact" in that case was a judge rather than a jury.

[9b, 10, 11] We do not mean to suggest that the judge in an FELA action is foreclosed from assisting the jury in its present value calculations. Indeed, because "[t]he average accident trial should not be converted into a graduate seminar on economic forecasting," *id.*, at 548, 76 L Ed 2d 768, 103 S Ct 2541 (quoting *Duca v. Marina Mercante Nicaraguense, S. A.*, 634 F.2d 30, 39 (CA2 1980)), the judge has an obligation to prevent the trial proceedings on the

[466 US 342] present value issue from becoming unnecessarily prolonged and the jury from becoming hopelessly mired in "difficult mathematical computation." It is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge

does not in effect pre-empt the jury's function." A trial judge's instructions to the jury with regard to discount methods—provided that they do not "subject the jury's estimate to . . . rigid mathematical limitation[n]," *Holloway, supra*, at 528, 62 L Ed 867, 38 S Ct 379—are entitled to substantial deference on appellate review.

[3e] In the present case, however, the trial judge instructed the jury that a zero discount rate was to be applied as a matter of law to appellee's future damages. This instruction improperly took from the jury the essentially factual question of the appropriate rate at which to discount appellee's FELA award to present value, and therefore requires reversal.

IV

[1d, 2c, 3f, 12] We conclude that Pennsylvania's prejudgment interest and "total offset" rules were improperly applied to this FELA action. The judgment of the Pennsylvania Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice Blackmun, with whom Justice Marshall joins, concurring in part and dissenting in part.

the jury." *Id.*, at 554, 30 L Ed 257, 7 S Ct 1. The Court discussed this aspect of the Putnam decision in *Chesapeake & Ohio R. Co. v. Kelly*, 241 US 485, 60 L Ed 1117, 36 S Ct 630 (1916), without questioning its continued validity or intimating that a different rule might apply in FELA actions. See *id.*, at 491-492, 60 L Ed 1117, 36 S Ct 630.

11. [9c] Moreover, as we recognized in *Pfeifer*, "nothing prevents parties interested in keeping litigation costs under control from stipulating to [the 'total offset' method's] use before trial." 462 US, at 523, 550, 76 L Ed 2d 768, 103 S Ct 2541.

HERNANDEZ v. M/V RAJAAN
Circuit 841 F.2d 582 (5th Cir. 1988)

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Etc., and Dianella Ship-
ping Corporation, Defendants-Third
Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY IN-
DUSTRIES, LTD., Cargill, Inc., et al.,
Third Party Defendants-Appellees.

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle,
etc., in rem, and Dianella Shipping
Corporation, Defendants-Appellants.

Nos. 85-2608, 87-2044.

United States Court of Appeals,
Fifth Circuit.

March 30, 1988.

Before CLARK, Chief Judge,
BRIGHT and POLITZ, Circuit Judges.

CLARK, Chief Judge:

The district court held a vessel owner liable to a longshoreman injured while loading palletized bags of rice into the vessel's cargo hold. We affirm that court's judgment of liability and portions of the damages awarded. We also affirm the rejection of the vessel owner's limitation of liability defense. We vacate, reverse or modify certain portions of the damages award we find to be erroneous.

On September 21, 1983, Alejandro Hernandez was partially paralyzed while working as a longshoreman aboard the M/V RAJAAN, a vessel owned by the Dianella Shipping Corp. The RAJAAN had docked in Freeport, Texas en route to Jordan to take on a cargo of rice. Hernandez, a thirty-two year old Mexican citizen, was helping to unload pallets of rice in the cargo hold of the RAJAAN. One of the hydraulic winches used to lower the pallets of rice malfunctioned and a 110-pound sack of rice fell

onto Hernandez. As a result, he was permanently paralyzed from the chest down and retained only limited use of his arms.

Hernandez filed suit against Dianella, in personam, and against the M/V RAJAAN in rem. Dianella and the RAJAAN impleaded several third-party defendants.

Hernandez settled with the third-party defendants for \$410,000.00 before trial with the agreement that the settling defendants would be reimbursed if Hernandez's recovery exceeded \$3,000,000.00. The Texas Employer's Insurance Association intervened and recovered \$159,585.91 in compensation and medical benefits paid to Hernandez.

The district court sitting without a jury found Dianella and the M/V RAJAAN liable under 33 U.S.C. § 905(b) (1986). It awarded Hernandez pecuniary and non-pecuniary damages in the following amounts:

Lost future wages	\$ 800,221.00
Lost household services	\$ 37,000.00
Past medical expenses	\$ 155,472.48
Future medical expenses	\$ 582,000.00
Attendant care	\$ 730,000.00
Future medical supplies	\$ 152,000.00
Transportation and non-medical commodities	\$ 465,000.00
Pain and suffering	\$1,000,000.00
	\$3,969,693.48

The court found Hernandez 5% negligent and reduced the recovery to \$3,771,208.80. The court held a separate proceeding after trial on Dianella's petition to limit liability to the value of the vessel and pending freight under 46 U.S.C. § 183(a) (1975). The court rejected the petition on grounds that Dianella had not met its burden of proving that it lacked privity or knowledge of the negligent conditions which caused Hernandez's injuries.

Dianella appeals the finding of negligence and disputes the calculation of damages. We affirm the district court's findings on liability however find several portions of the damage award to be in error.

B) Damages

Dianella contends that several components of the damage award are excessive.

The standards under which we review a damage award for excessiveness are well known. A trial judge's assessment of damages is a finding of fact which we review under the clearly erroneous standard. *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1023, 1035 (5th Cir.1984), (citing, *Calderera v. Eastern Airlines, Inc.*, 705 F.2d 773, 783 (5th Cir.1983)). This court will not overturn a damage award unless the trier of fact abused its discretion. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326, 331 (5th Cir.1987) (citing, *Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir.1976)). A verdict will be considered excessive only if it is greater than the maximum amount the trier of fact could properly have awarded. *Sosa, supra*, at 1035. An appellate court may not determine excessiveness by comparing verdicts in similar cases, but rather must review each case on its own facts. *Winbourne v. Eastern Airlines, Inc.*, 758 F.2d 1016, 1018, (5th Cir.1984), cert. denied, 474 U.S. 1036, 106 S.Ct. 603, 88 L.Ed. 2d 582 (1985); *Sosa, supra*, at 1035.

Having determined that an award is excessive, this court may either order a new trial on damages or may give the plaintiff the option of avoiding a new trial by agreeing to a remittitur of the excessive portion of the award. *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 919 (5th Cir.1987) (citing, *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 142 (5th Cir.1986)); *Wells v. Dallas Independent School District*, 793 F.2d 879, 883-84 (5th Cir.1986). This Circuit follows the maximum recovery rule under which a remittitur may reduce damages only to the maximum amount a trier of fact could properly have awarded. *Osburn, supra*, at 919 (citing, *Zeno v. Great Atlantic & Pacific Tea Co.*, 803 F.2d 178, 181 (5th Cir.1986)); *Calderera v. Eastern Airlines, Inc.*, 705 F.2d 773, 784 (5th Cir.1983). Under these criteria, we review each component of the damage award.

1) Lost Wages

The trial court calculated the present value of Hernandez's lost future wages using

the below-market discount rate. In arriving at the sum of \$800,221.00, the court relied exclusively on the calculations of Hernandez's expert. The expert assumed a work-life expectancy of 30 years and used the average full-time United States longshoreman's rate of \$23,000.00 per annum. The court adjusted this figure upward to account for seniority and added an additional 15% for fringe benefits. The court adjusted the figures downward to account for inflation, subtracted federal income taxes and multiplied by .85 to arrive at the present value of lost future wages.²

The record does not support these findings. Hernandez's tax returns show that he had been a part-time longshoreman for the three years preceding his injury. His wage rate was \$14.00 per hour. In 1980 he earned \$8,341.00, in 1981 he earned \$8,634.00, in 1982 he earned \$6,500.00 and in 1983 (prior to the accident) he earned \$2,600. No evidence supports the court's conclusion that Hernandez, a part-time worker, would have gained any seniority had he been able to remain on the job. There is no evidence that Hernandez had ever received any fringe benefits.

In *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir.1983) (en banc), cert. denied sub. nom., *Heinrich Schmidt Reederei v. Byrd*, 467 U.S. 1252, 104 S.Ct. 3537, 82 L.Ed.2d 842 (1984) (*Culver II*) the Circuit en banc stated that:

"calculation of the lost income stream begins with the gross earnings of the injured party at the time of the injury. To this amount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would have been required to pay such as income tax and work expenses."

Culver II, 722 F.2d at 117.

[4] Based on *Culver II*, the trial court was clearly erroneous in accepting a damage calculation based on the average longshoreman's wage rate. *Culver II* requires

2. The trial court failed to subtract \$56,000 for social security taxes. Hernandez concedes a

remittitur in this amount would be due.

HERNANDEZ v. M/V RAJAAN
Cite as 841 F.2d 582 (5th Cir. 1988)

the court to use the plaintiff's gross earnings at the time of the injury. The court further erred by adding fringe benefits and seniority in the absence of evidence that Hernandez was entitled to these benefits while he was working part time.

[5] Dianella presented a computation using the below-market discount rate method but substituting Hernandez's actual earnings in the 3.82 years preceding the accident without seniority and fringe benefits. Under these calculations, Hernandez's lost wages would amount to \$190,296.00.³ Hernandez has not had the opportunity to challenge the accuracy of Dianella's calculations. We therefore hold that on the issue of lost wages Hernandez may either agree to a remittitur in the amount of \$689,925.00, or he may opt for a new trial under the dictates of *Culver II* and this opinion.

ii) *U.S. or Mexican Rates*

[6] In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is called into question by *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). In *Sure-Tan*, the Supreme Court remanded an award of a six-months back pay to several illegal aliens stating that:

"in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

3. Because social security taxes have been subtracted from Dianella's calculation of lost wages, it is not necessary to deduct from this

Sure-Tan, 104 S.Ct. at 2814. By similar logic, Dianella argues that Hernandez should be deemed ineligible to recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Although Dianella's argument may have been correct at the time of Hernandez's injury, the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), has placed a belated stamp of legitimacy on the district court's assumption that Hernandez could remain in the United States. Section 1255a(a)(2)(A) of the Act provides that any alien who:

"establish[es] that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date ..."

and who meets the other requirements of the Act may be considered an alien lawfully admitted for temporary residence. The record indicates that Hernandez has resided in the United States continuously since 1970 and is therefore likely eligible for resident alien status. We need not ponder the effect of applying *Sure-Tan*'s "legal readmittance into the United States" language to the court's award of lost wages and medical expenses to Hernandez. An illegal alien who has demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act is entitled to a damage award based on United States wage and medical rates.

iii) *Household Services*

[7] The district court awarded \$87,000.00 for lost household services. The court calculated that Hernandez would have performed 10 hours of household services a week for the remainder of his 72 year life expectancy. However, there was no evidence that Hernandez had performed any household services prior to his injury. Hernandez testified that he lived alone in

sum the amount of \$56,000.00 which Hernandez conceded was in error.

an apartment at the time of his injury and performed no yard or automobile work. His wife and three children lived in Mexico and his services could not have contributed to their household.

It is indisputable that Hernandez, a paraplegic, has lost his ability to perform household services in the future. However, the trial court is not at liberty to grant damages for lost household services in the absence of any evidence that Hernandez performed household services in the past. See e.g., *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 133, 142 (5th Cir.1986). In addition, because Hernandez received an award for attendant care, the additional recovery for lost household services would constitute a double recovery. The erroneous allowance of \$87,000.00 for lost ability to perform household services is reversed.

iv) Medical Expenses

The trial court awarded \$153,472.48 in past medical expenses, \$152,000.00 for future medical supplies and \$582,000.00 in future medical and hospital expenses exclusive of attendant care. Hernandez's expert arrived at these figures by estimating what medical expenses Hernandez had incurred to date as a paraplegic and what expenses he could be expected to incur given his permanent disability.

[8] Dianella challenges the expert's calculation of future medical and hospital expenses on the basis that he used tax exempt rather than taxable bonds. Dianella contends that the proper figure should have been \$451,000.00. However, Dianella presents no legal authority suggesting that the expert's choice of tax exempt bonds was improper. Both types of investment were available and either properly could be used in the calculation. See, e.g., *Culver II, supra*, 722 F.2d at 122. This part of the award is supported by substantial evidence.

[9] Dianella further contends that the court should have calculated medical expenses using Mexican rather than United States rates. Dianella cites *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1034 (5th Cir.1984) in which we upheld the use of American medical rate in calculating medi-

cal expenses for a Mexican national only after a finding that "[the plaintiff] would not receive adequate medical care in Mexico." *Sosa*, 736 F.2d at 1034. Dianella contends that because the court made no such finding in Hernandez's case, it cannot calculate future medical expenses using American rates. However, *Sosa* does not state that a finding of inadequate foreign medical care must precede every award of medical expenses based on American rates. The decision of which rate to use is a finding of fact which varies from case to case. In this case, Hernandez has been under the care of doctors in Houston and, as discussed in § II, *supra*, is probably entitled to remain in the United States for his medical care. The court's award of medical expenses based on American rates is therefore not clearly erroneous.

v) Transportation and Non-Medical Commodities:

[10, 11] The court awarded \$446,400.00 for transportation expense and \$18,600.00 for non-medical commodities such as utility bills, cleaning and laundering. Substantial evidence supports the district court's finding that paraplegics do incur higher utility bills and laundering expenses than non-paraplegics. However, substantial evidence does not support the court's award for transportation expenses. Hernandez testified that he never owned a vehicle before the accident and that since the accident, he only leaves his house to visit friends at a local social hall. He makes this 20-block trip in his wheelchair for exercise. No evidence was presented that Hernandez needed a modified van for medical reasons. This testimony does not support the court's finding that Hernandez required the continuous use of a fully new van plus modifications and operating expenses totaling \$446,400.00.

Dianella's expert testified that a large, two-door sedan provided customary transportation for paraplegics at a cost, including upkeep, of \$24,248.00. In light of Hernandez's testimony concerning his infrequent use of transportation, this is the largest award supportable by the evidence.

HERNANDEZ v. M/V RAJAAN

Cite as 841 F.2d 582 (5th Cir. 1988)

Hernandez may accept a remittitur in the amount of \$422,151.00 or choose a new trial on the issue of transportation expenses limited to meeting proven needs on a basis of using or renting vehicles of reasonable cost.

vi) Attendant Care

[12] The court found that Hernandez would incur \$12,547.00 per year in attendant care expenses, at a present value of \$730,000.00. The court based its conclusions on Hernandez's expert's testimony that Hernandez would require four hours of assistance by a nurse's aide daily. In the alternative, Hernandez's wife could be compensated on the basis of a nurse's aide's salary for her assistance in "bathing, housekeeping and meal preparation."

Dianella contends that at most Hernandez requires one or two hours of attendant care daily. In fact, Dianella states that Hernandez would have difficulty being available for four hours of care each day in light of his active rehabilitation schedule. Dianella further states that Hernandez's wife should be compensated on a minimum wage scale, not at the salary of a nurse's aide. Dianella assumes that Hernandez's wife will be available to provide attendant care and that her care will be comparable to that care provided by a nurse's aide. Under its calculations, the maximum amount recoverable for attendant care is \$141,534.50.

The evidence supports the district court's rejection of Dianella's assumptions. Hernandez will require skilled attendant care for the rest of his life. The record does not establish that his wife will continue to provide it or will provide it as competently as a nurse's aide. The trial court's award for attendant care is affirmed.

vii) Pain and Suffering

[13] The trial court awarded \$1,000,000.00 for pain and suffering. Dianella disputes this finding on the basis that Hernandez was instantly paralyzed from the waist down and could not have felt any substantial pain as a result of the injury. Dianella contends that mental anguish does

not justify the award in light of testimony by Hernandez's treating physician that he had adjusted well to the disability.

In *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 632 (5th Cir.1983), we stated that:

"any amount awarded for pain and suffering depends to a great extent on the trial court's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation."

Hyde, 697 F.2d at 632. Each award for pain and suffering depends heavily on its own facts. *Allen v. Seacoast Products*, 623 F.2d 355, 364 (5th Cir.1980).

The trial court based its award for pain and suffering on testimony that Hernandez suffered "phantom pains" in his legs, underwent several painful surgical procedures and would probably require more surgery in the future. He has experienced a catastrophic change in his lifestyle which has caused a significant degree of mental anguish. In light of this testimony, \$1,000,000.00 is not a clearly excessive award beyond the "maximum possible recovery for these injuries." *Sosa, supra*, 736 F.2d at 1035. This award is affirmed.

viii) Pre and Post Judgment Interest

The district court awarded prejudgment interest on the full damage award at a rate of 9% per annum accruing from the date of the injury to the date of the judgment. The court awarded postjudgment interest at a rate of 8.18% per annum.

[14] The award of prejudgment interest in admiralty cases is within the discretion of the trial court. *Curry v. Fluor Drilling Services, Inc.*, 715 F.2d 893, 896 (5th Cir. 1983) (citing *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 988 (5th Cir.1978)). In cases arising under 33 U.S.C. § 905(b), prejudgment interest is the rule, not the exception. *Webster v. M/V MOOLCHAND, Sethia Liners Ltd.*, 730 F.2d 1035, 1040 (5th Cir.1984) (citing *Helatre v. Mobil Oil Co.*, 709 F.2d 1031, 1042 (5th Cir.1983)).

[15] However, the trial court erred in awarding prejudgment interest with re-

spect to future damages. *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209, 212 (5th Cir.1986); *Wyatt v. Pehrod Drilling Co.*, 735 F.2d 951, 956 n. 4 (5th Cir. 1984). At oral argument Hernandez conceded that a remittitur of prejudgment interest on future damages was due. We affirm the award of prejudgment interest on past damages and the award of post-judgment interest, but direct the district court to recalculate the amount of interest awarded on future damages and vacate its prejudgment interest award.

ix) *Credit for Settlement:*

[16] The third-party defendants settled with Hernandez before trial for \$410,000.00 and then participated in the trial to establish Dianella's negligence. Dianella concedes that under *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1251 (5th Cir.1979) it is not automatically entitled to a credit for the settlement. It argues, however, that the amount of the settlement must be deducted from the total damages awarded for Hernandez's injury. Dianella's arguments have merit.

In a recent decision, the Eleventh Circuit held that a plaintiff in a maritime suit is entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants. *Self v. Great Lakes Dredge & Dry Dock Company*, 832 F.2d 1540, 1548 (11th Cir.1987). We find the Eleventh Circuit's reasoning in *Self* sound. Hernandez is only entitled to one recovery for the injuries he suffered. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 520 (5th Cir.1986). Because the court's award against Dianella represented 100% of the loss Hernandez suffered (less 5% for contributory negligence) his award from Dianella must be reduced by any amount he received in a settlement from the third-party defendants.

C) *Limitation of Liability*

At a separate hearing after the verdict was rendered, the district court denied Dia-

nella's petition to limit its liability to the value of the vessel plus pending freight, pursuant to 46 U.S.C. § 183(a) (1958). Section 183(a) provides that:

"The liability of the owner of any vessel ... for any loss, damage, or injury ... done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[17-19] "Privity" as used in the statute means some fault or neglect in which the shipowner personally participates. "Knowledge" means personal cognizance or means of knowledge of which the shipowner is bound to avail himself. *Matter of Texaco, Inc.*, 570 F.Supp. 1272, 1278 (E.D. La.1983). The burden of establishing lack of privity or knowledge is on the shipowner. *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir.1976). The court denied the defense holding that Dianella did not meet its burden of establishing lack of privity or knowledge about the malfunctioning winch.

[20] Dianella's managing agent and port engineer testified that they did not have privity or knowledge of negligent acts or unseaworthy conditions. However, this testimony does not establish that the RAJAAN's owner lacked privity or knowledge of the unseaworthy conditions nor does it establish who exercised control over the RAJAAN. In light of this failure of proof by Dianella and the fact that proof of privity or knowledge of the RAJAAN's owners was solely within Dianella's control, we affirm the findings of the district court.

The costs of this appeal will be equally divided between the parties.

AFFIRMED in part, subject to possible remittitur, and, in part, VACATED and REMANDED.



4. The value of the vessel plus pending freight was \$2,820,917.39. We recognize that the adjustments in damages awarded could render this issue moot. However, since the case must go

back for further consideration by the district court, it is in the interest of justice to rule on the issue now in the event it recurs.

HERNANDEZ v. M/V RAJAAN

Circuit 848 F.2d 498 (5th Cir. 1988)

Before CLARK, Chief Judge,
BRIGHT* and POLITZ, Circuit Judges.

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC**

(Opinion March 30, 1988, 5 Cir.,
1988, 841 F.2d 582)

PER CURIAM:

In its petition for rehearing, Dianella correctly points out that the legal and factual issues involved in our determination that Hernandez had demonstrated eligibility for permanent resident status under the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), were not properly briefed or developed in either this court or the district court. Part B(ii) of this court's opinion of March 30, 1988, 841 F.2d 582, which concluded that Hernandez had demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act, was improper, and that part of our opinion is hereby withdrawn and the following is substituted:

ii) U.S. or Mexican Rates

In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is challenged by Dianella on the basis of *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2808, 81 L.Ed.2d 732 (1984). In *Sure-Tan*, the Supreme Court remanded an award of back pay to several illegal aliens, stating that:

"In computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were

not lawfully entitled to be present and employed in the United States."

Sure-Tan, 104 S.Ct. at 2814. Dianella argues that Hernandez similarly should be deemed ineligible to recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Hernandez asserts that he was working in the United States at the time of his injury, and the district court found that he intended to continue working in this country on a permanent basis. The record demonstrates that Hernandez had been in the United States since 1970 for substantial periods of time and had worked as a longshoreman for almost four years preceding the accident. At the time of the accident, Dianella was accepting Hernandez's labors on the M/V RAJAAN without regard to the status of his citizenship. As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship with their employer in *Sure-Tan*, in which a back-pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations.

The question here is whether, given Hernandez's status as an illegal alien, the district court's decision to grant damages to Hernandez for future lost wages based upon his employment status at the time of injury and for the lengthy period preceding injury was clearly erroneous. *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1035 (5th Cir.1984). We conclude that it was not.

The burden of proof in the calculation of damages was initially on Hernandez who had to establish the damages his injury had caused and was likely to cause in the future. Once Hernandez proved his prior wages in the United States, the burden shifted to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the court did not err in basing its award on Hernandez's past earnings stream as required by *Cul-*

ver II. Dianella is liable to make Hernández whole for the injury inflicted. It cannot defeat his right to recover by asserting that his award for future lost wages should be based upon speculation regarding what he might be earning were he in Mexico. Hernández has now applied for amnesty under the Immigration Reform and Control Act of 1986, but this development is a matter that we need not now consider.

This correction of Part B(ii) of our opinion of March 30, 1988, does not affect our partial affirmance of the district court's use of U.S. wage rates for the calculation of Hernández's damages.

In all other respects, the petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN STACY,
Plaintiff-Appellant,
v.
REDERIE OTTO DANIELSEN, A.S.;
K.S. ARIES SHIPPING,
Defendants-Appellees.

No. 09-15579
D.C. Nos.
4:07-cv-05487-CW
08-cv-03586-CW
OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted March 10, 2010¹
San Francisco, California

Filed June 29, 2010

Before: Cynthia Holcomb Hall, John T. Noonan and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Noonan;
Dissent by Judge Hall

¹The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

James J. Tamulski, Emard Danoff Port Tamulski & Paetzold LLP, San Francisco, California, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

Dense fog off of Point Reyes, California, "the foggiest point on the Pacific coast." K. Goodwin, *Point Reyes Visions* (2008). A covey of fishing vessels trolling for salmon in the fog. Afternoon, July 13, 2007, M/V *Eva Danielsen* departs San Francisco loaded with cargo destined for Portland. The *Eva Danielsen* is 291 feet in length and has a dead weight of 4,286 tons. Among the covey of fishing vessels is the *Marja*, owned and operated by Brian Stacy. At 5 P.M., the radar of the *Marja* picks up the *Eva Danielsen*, one mile away, headed to the *Marja* on a collision course. The *Marja* signals the danger to the freighter. The *Eva Danielsen* avoids hitting the *Marja* but comes close enough for Stacy to hear her engine and machinery and to feel the vessel's wake. She passes at close quarters.

Having passed the *Marja*, the *Eva Danielsen* collides with the F/V *Buona Madre*. The collision destroys the fishing vessel and results in the death of her captain, Paul Alan Wade. This lawsuit followed from these events.

PROCEEDINGS

Brian Stacy brought this suit against the owners and operators of the *Eva Danielsen* for the negligent infliction of emotional distress. Stacy alleged that the freighter was proceeding at an unsafe speed without a proper lookout, proper radar equipment, or proper signals in violation of the International Navigation Rules Act. Stacy alleged that this action put him in grave and imminent risk of death or great bodily harm,

impacting him emotionally so that he could not work and needed psychiatric help.

On motion of the defendants, the district court dismissed Stacy's first amended complaint for failure to state a cause of action. The court stated:

The Court concludes that, because very few jurisdictions employ a zone of danger test that lacks a "witnessed harm" requirement, even if a maritime [negligent infliction of emotional distress (NIED)] claim may be brought under a zone of danger theory, the claim must be premised on the plaintiff's having experienced a "psychic injury" by "witnessing another being seriously injured or killed," *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1408 (9th cir. 1994)) (emphasis omitted), while simultaneously being threatened with physical injury to him or herself. The Court will thus evaluate Plaintiff's allegation of NIED under *Chan's* formulation of the zone of danger test.

Stacy appeals.

ANALYSIS

Jurisdiction is based on federal maritime jurisdiction of torts committed on the high seas. 28 U.S.C. § 1333(1). We disregard as erroneous and irrelevant Stacy's alternative jurisdictional theory of diversity of citizenship.

We review de novo the dismissal. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009). We accept as true facts alleged and draw inferences from them in the light most favorable to the plaintiff. *Id.* The sufficiency of the complaint is governed by the general maritime law of the United States. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994). The federal standard for the

negligent infliction of emotional distress is provided by *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994).

[1] Under this test, applicable in the maritime jurisdiction of the United States, a tort is committed by a defendant subjecting a plaintiff to emotional harm within "the zone of danger" created by the conduct of the defendant. *Id.* In *Gottshall*, the Supreme Court held that "the zone of danger" test allowed recovery for "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* The Supreme Court went on to quote a law review article's exposition: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* at 548 (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm*, 34 U. Fla. L. Rev. 447, 489 (1982)).

[2] Stacy alleged that he was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent action of the defendants. Nothing more was required to assert a cause of action cognizable under maritime law.²

(Text continued on page 9412)

²The dissent is based on the proposition that the zone of danger test requires a plaintiff to witness harm to another person, rejecting the mine-run cases where the plaintiff is the direct victim of negligent conduct. The zone of danger test, however, only came to accommodate bystanders after many years of doctrinal development. See, e.g., *Jarrett v. Jones*, 258 S.W.3d 442, 445 (Mo. 2008). The dissent relies on our decision in *Chan* as though it adopted the witness test as exclusive. Judge Goodwin wrote for the panel in *Chan*: "at issue here is the *psychic injury* that comes from *witnessing* another being seriously injured or killed." 39 F.3d at 1408. The panel did not address the case where a plaintiff suffers psychic damage from a direct encounter.

Failure to distinguish between direct and derivative emotional harm undermines the dissent. The dissent relies on a passage from *Gottshall* rejecting the Third Circuit's "foreseeability" test. Nothing in this passage

imposes a "witnessed harm" requirement for claims of direct emotional harm.

The dissent also relies on two annotations. The first bears the title, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger*, 89 A.L.R. 5th 255 (2010) (underline added). Given the title of this annotation, it is unsurprising that the cases therein only involve "witnessed harms." A book titled *New York Skyscrapers* will likely not discuss the Sears Tower or Taipei 101. We would err, of course, to conclude that these structures do not exist. The second annotation simply does not support the dissent's position; it contains ample authorities applying the zone of danger test to direct victims, not only bystanders. See *Recovery for Negligent or Intentional Infliction of Emotional Distress Under Jones Act* (46 U.S.C.A. Appx. § 688) or *Under Federal Employers' Liability Act* (45 U.S.C.A. §§ 51 et seq.), 123 A.L.R. Fed. 583 § II.A.3 (2010) (citing, *inter alia*, *Hall v. Norfolk S. Ry. Co.*, 829 F. Supp. 1571, 1576 (N.D. Ga. 1993) ("A majority of jurisdictions now use the 'zone of danger' rule, which permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself.")).

The dissent repeats its fallacy by relying on two cases that purportedly "formulate the 'zone of danger test' as including a 'witnessed harm' requirement." Dis. Op. 9424. By their own terms, those cases addressed "negligent infliction of emotional distress upon injury to a third person." *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 600 (Mo. 1990) (emphasis added); see *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (applying the zone of danger test to "a bystander who is in the zone of physical danger" (emphasis added)).

The dissent's "not-so hypothetical" scenario is vivid and thought-provoking. It underscores the dissent's faulty rationale. The dissent envisions a speeding motorist who nearly collides with "dozens, perhaps hundreds of other vehicles" over a two-hundred mile stretch of highway. Dis. Op. 9428. At the end of this distance, the motorist dramatically collides with a big rig. *Id.* at 9427-28. The "dozens, perhaps hundreds of other vehicles" could potentially prevail against the speeding motorist under a zone of danger theory, assuming they each suffered emotional distress from their own near-collisions. See, e.g., *Wooden v. Raveling*, 71 Cal. Rptr. 2d 891 (Ct. App. 1998); see also *Camper v. Minor*, 915 S.W.2d 437, 442 (Tenn. 1996) (noting that the zone of danger test "arose primarily from 'near-miss' automobile accident cases"). The vehicles sufficiently

[3] The Supreme Court has not abandoned its statement of the tort inflicted by creating a zone of danger. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 430 (1997) ("immediate risk of physical harm" created by the defendant's conduct); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146 (2003) ("those who escaped instant physical harm, but were 'within the zone of danger of physical impact'"). As would be expected, the Ninth Circuit has followed this standard. *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1082 (9th Cir. 2003).

The dissent cites cases in which various state courts defined the zone of danger by reference to the plaintiff being the witness of an accident to someone else. *Gottshall* cited those cases. It did not endorse them. *Gottshall* explicitly stated that the zone included a plaintiff "placed in immediate risk of physical harm."

Chan tells us how we have maritime jurisdiction of a claim for the tortious infliction of emotional injury. It is otherwise not instructive here. Judge Goodwin, writing for the panel in *Chan*, stated: "at issue here is the psychic injury that comes from witnessing another being seriously injured or killed." 39 F.3d at 1408 (emphasis omitted). After setting out its understanding of the various tests for the tort at issue, the court declared: "it is clear that we need not decide which test to adopt today to decide this appeal. None of these theories allows recovery for emotional distress when the plaintiff was not present at the accident scene." *Id.* at 1409.

near the final collision with the big rig may possibly recover as bystanders. Cf., e.g., *Zea v. Kolb*, 613 N.Y.S.2d 88, 88 (App. Div. 1994); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980). Yet under the dissent's approach, the most obvious candidate for recovery—the driver of the big rig—would have no claim against the speeding motorist. After all, the driver of the big rig did not witness any collision between the speeding motorist and a third party; the driver of the big rig was the direct victim of negligent conduct, and under the dissent's view, his claim is foreclosed by *Chan*.

[4] Nothing in *Chan* addresses a claim of emotional damages by a person directly endangered by a vessel. Nothing in *Chan* purports to refine or reject the teaching of the Supreme Court in *Gottshall*. Nothing in *Chan* is relevant to the adequacy of Stacy's complaint.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

S.T.D.P.

HALL, Circuit Judge, dissenting:

The majority's dramatic rendering of the events that led to the tragic death of plaintiff Brian Stacy's fellow fisherman, Paul Wade, omits certain important facts. The majority also refuses to follow binding circuit precedent, *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), in which a three-judge panel of this court defined the contours of the "zone of danger" test for claims of negligent infliction of emotional distress ("NIED") under general maritime law, and announced a formulation of that test which is well grounded in state common law, appropriate to the maritime context, and consistent with Supreme Court precedent regarding claims of NIED under federal common law. *Id.* at 1408-09.

Under the *Chan* formulation of the "zone of danger" test—which is the only one of the three major common law tests defining the class of plaintiffs who can recover damages for NIED that even arguably applies in this case—recovery of damages for NIED is allowed without proof of any physical impact or injury to the plaintiff, so long as he or she: (1) witnessed peril or harm to another, and (2) was also threatened with physical harm as a consequence of the defendant's negligence. *Id.* at 1409. I believe we are bound by *Chan*, and that Stacy has not stated and cannot state a claim for NIED under

