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**SCAC Transport (USA) Inc. v. S.S. Danaos, United States Court of Appeals, Second Circuit, 25 April 1988, 845 F.2d 1157**

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**Floyd v. Lykes (Cont.)**

**ISSUE:** Is it proper for a ship's captain to perform a burial at sea, without prior notification of the next-of-kin, when the vessel is eight days from port?

**ANALYSIS:** Plaintiff argued on appeal that state tort law established a quasi-property right to the body of the deceased in the next-of-kin and that state law was or should be incorporated into the general maritime law. Agreeing that maritime law applied and citing *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257, 259 (2d Cir. 1963), *cert denied* 376 U.S. 949 (1964), the court held that it could "look to the law prevailing on the land" only when the maritime law was silent. Absent a maritime statute, the case should be governed by general maritime case law, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61 (1920), and state law may not be applied where it would conflict with maritime law, *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986).

The court looked to *Brambir v. Cunard White Star, Ltd.*, 37 F. Supp. 906, 907 (S.D.N.Y. 1940), *aff'd mem.*, 119 F.2d 419 (2d Cir. 1941), as the leading case on point. In that case a passenger died eight days from port and the court held that the ship's master had absolute discretion over the fate of the corpse. Further, burial at sea is recognized as a viable option by master, vessel and medical guidebooks.

Defendant cited *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917) to support its case. There, defendant provided an embalmer and morgue and additionally, was only

twenty hours from port when the burial was effected. Other than this easily distinguishable case, the only authority to support defendant's claim was a publication by the United States Public Health Service entitled *The Ships Medicine Chest and Medical Aid at Sea*. That handbook contained the statement "[t]oday burial at sea is the exception". But no expansion of this statement was offered, leaving the reader inconclusive as to whether the meaning was that death at sea was the exception today due to advances in medicine and technology, or that lack of embalming and mortuary facilities was the exception, etc. Thus the plaintiff's case failed for lack of any evidence in support of her cause of action.

In affirming the lower court's decision the court of appeals noted that plaintiff offered no statutes, cases or authorities to contradict *Brambir's* holding, that nothing in the Death on the High Seas Act, 46 U.S.C. §§761-68, or the Jones Act, 46 U.S.C. §688, prohibited burial at sea, and that no abuse of discretion on the part of the captain had been demonstrated. The court insinuated that certain proof not present in the instant case might have allowed the action to go forward. Examples of such facts were if the ship had embalming and mortuary facilities (vessels refrigerated food locker not appropriate), or if the plaintiff had demonstrated both a willingness to reimburse Lykes for its expenses for an unplanned docking at a closer port plus the willingness of the port country to accept an unembalmed cadaver, or if the captain's decision could be classified as "arbitrary, fanciful or unreasonable".

Harold Levy '90

**SCAC TRANSPORT (USA) INC. v. S.S. DANAOS**

**United States Court of Appeals, Second Circuit, 25 April 1988  
845 F.2d 1157**

**A stevedore whose negligence has been determined to be the proximate cause of the litigation can be vouched into arbitration proceedings without its consent and be bound by the findings of the arbitrator.**

**FACTS:** The S.S. Danaos was loading cargo on a vessel when an accident occurred wherein the vessel's Stulken Boom collapsed when a pin in a winch block failed during the loading of a water tank truck. The truck, boom and parts of the vessel suffered damage. The vessel, owned by Danais Shipping Company (Danais), was under a time charter to Big Lift USA, Inc. and Big Lift Shipping Company (N.A.) Inc. (Big Lift), collectively which had contracted with Universal Maritime Service Corp. (Universal) for the stevedoring services.

The truck's owner SCAC Transport (SCAC) commenced this action against Danais, Big Lift and the S.S. Danaos in rem. Danais cross claimed against Big Lift for indemnity. Universal was brought into the action by a third party claim and was cross claimed for indemnification by Big Lift. SCAC settled with Danais. Pursuant to the charter-party between Danais and Big Lift any dispute was to be arbitrated in London. Universal was not a party to this agreement.

Big Lift tendered the defense to Universal with regard to the London arbitration and required Universal to appear in defense of the action and to indemnify Big Lift. Universal was advised that refusal or neglect of the notice would bar it from objecting to the outcome of the arbitration.

The arbitration ruling was in favor of Danais, and the stevedore's negligence was found to be the proximate cause. Damages included vessel repairs, loss of charter hire, interest and attorney's fees. Universal again declined to assume the defense, when Big Lift informed it that an appeal before the Commercial Court in London was to be heard. After Universal declined to assume defense of the claim and prosecution of the special cases, Big Lift instructed its London solicitors to terminate appeal. Big Lift then commenced an action in the District Court.

The District Court, affirming the finding of the London arbitration as to negligence, found that Big Lift was entitled to indemnity. The damages awarded, however, did not include attorney's fees because the court determined they were beyond what Universal could reasonably contemplate when hired as a stevedore.

**ISSUE:** Whether a stevedore without its consent may be vouched into an arbitration where the stevedore is the charterer's indemnitor?

**ANALYSIS:** The Court of Appeals for the Second Circuit reversed the district court and held that absent a particularized showing of prejudice, a stevedore may be vouched into arbitration under a charter party by a charterer where the stevedore is the charterer's indemnitor. The district court's decision as to attorney's fees was reversed.

Under the common-law practice of voucher, a defendant or indemnitee who seeks indemnification from a third party or indemnitor must serve a notice to defend on the third party. This notice informs the indemnitor of the action against the defendant and offers the opportunity to defend the action.

If the defense is not assumed, the defendant may bring a separate action later to recover its indemnity. The indemnitor can dispute the existence and extent of the indemnity. See *Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727 (3rd Cir. 1971). The third party will be collaterally estopped from relitigating issues decided in the first action in all of the elements of the adjudicatory procedure are met.

Arbitration is cited as an important, efficient and equitable means of dispute resolution when arbitrators are experienced in maritime matters and the evidence is extensive. The Second Circuit noted the procedural aspects of arbitration and court adjudication and concluded contrary to the district court's ruling that the notice received by Universal had no preclusive effect; that absent a particularized showing of harm, procedural differences between arbitration and the judicial process are not grounds for denying a preclusive effect to vouching in notice. Universal did not demonstrate any prejudice suffered as a result of the London arbitration.

For reasons of efficiency vouching is permitted. Stevedores are well aware that charter parties contain arbitration clauses to which they as potential indemnitees are bound. Absent a

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**SCAC v. SS Danaos (Cont.)**

showing of prejudice there is no reason to subject a party to multiple proceedings.

The court concluded that a stevedore must indemnify a shipowner or charterer to whom it has contracted to provide stevedoring services for losses that party sustains from the

stevedore's breach of its warranty of workmanlike service. See *Saks Int'l Inc. v. M/V Export Champion*, 817 F.2d 1011 (2d Cir. 1987). This obligation of indemnity extends to litigation expenses incurred by the shipowner in defense of any suit brought against it as a result of such breach.

Melanie A. Wood '90

**OLIVERI v. DELTA STEAMSHIP LINES, INC.**

**United States Court of Appeals, Second Circuit, 1 June 1988  
849 F.2d 742**

**The same preset value discount rate used in diminishing awards for future pecuniary losses should be used in diminishing awards for future pain and suffering.**

**FACTS:** A licensed third assistant engineer brought an action against the shipowner, Midland Ross Corporation (Midland), under the Jones Act to recover damages for injuries to his foot suffered while working on a vessel. The district court admitted testimony by a union representative as to the probable loss of future wages and promotional benefits of an average new member. The judge instructed the jury that it did not have to accept the testimony and also that it was to render an unadjusted award for both future pecuniary and non-pecuniary loss. The jury awarded \$240,000 for lost future earnings and \$50,000 for future pain and suffering. The judge subsequently deducted 2% from the award for present value discount purposes. Delta appealed on the grounds that evidence regarding Oliveri's future earning capacity was improperly admitted and that the present value discount calculation was incorrectly performed.

**ISSUES:** 1. Is testimony from an official of the union, which the injured plaintiff was barred from joining, admissible as evidence to ascertain the lost expected earnings?

2. Whether the same present value discount rate employed in diminishing awards for future pecuniary losses should also be used in diminishing awards for future pain and suffering?

**ANALYSIS:** 1. The Court of Appeals admitted the testimony as evidence stating that the court has wide discretion in deciding to admit testimony of any witness. Admissions of such testimony will more likely be upheld when the evidence used to establish lost future pecuniary gains is backed by empirical evidence such as wage scales and contracts of employment. The data presented to the jury must be sufficiently clear so that the jury could reasonably assess the plaintiff's chances of promotion and salary incrementation over the years. Furthermore, the court must clearly instruct the jury that they may disregard any parts of or the entire testimony of a witness.

2. The Court of Appeals remanded to the lower court only the issue of the proper calculation of the discount rate for future pecuniary loss, holding the lower court erred when it reduced the jury award by a one time flat 2% deduction from the total amount. The court cannot take away this prerogative from the jury without stipulation from both parties. The Court of Appeals did not find such stipulation, and therefore the issue of the present value discount to be deducted was to be retried before a new jury. This amount would be deducted from the lump sum award of the previous jury.

The two components to this deduction are the projected inflation rate, and the projected rate of return on a risk free invest-

ment over the period the plaintiff would lose his expected wages. Given this, the amount that the jury awards is deemed as taking the discount rate into consideration. However, if by party stipulation the discounting is left to the judge then the court must instruct the jury not to incorporate discounting in their calculation. The judge will calculate it using the 2% per year standard. Furthermore, if the plaintiff shows that the jury, despite the instructions of the court, incorporated the discount rate in their final award the judge had to accept this and not further diminish award.

The Court of Appeals upheld the lower court's determination of a one time, 2% reduction of the jury award for non-pecuniary future loss. The court acknowledged that several older decisions from this circuit held contrary to imposing any kind of reduction of lost future non-pecuniary gain. See *Alexander Nash-Kelvinator Corp.*, 271 F.2d 524 (2d Cir. 1959); *Yodice v. Koninklijke Nederlandsche Stoombot Maatschappij*, 443 F.2d 756 (2d Cir. 1971); and *Rapisardi v. United Fruit Co.*, 441 F.2d 1308 (2d Cir. 1971). However, starting with *Chiarello v. Domenico Bus Service Inc.*, 542 F.2d 833 (2d Cir. 1976), the court stated that "discounting was not only appropriate but preferable." *Id.* at 886. In *Metz v. United Technologies Corp.*, 754 F.2d 63 (2d Cir. 1985), the court set the rule that the discount rate used would be below the rate used when calculating lost pecuniary expectancy. "All that is essential is to reach a result that properly takes into account the time value of money." 764 F.2d at 68 n.3. The court, allowed the 2% reduction in the award to stand. Recognizing the discrepancy with the majority of other circuit and state courts, it went on to say that "[i]f we were writing on a clear slate, we might be inclined to accept the view of the other circuits and reject any discounting of future non-pecuniary losses. However, we are obliged to reckon with the clear preference for discounting expressed by this circuit ..." 849 F.2d at 751.

The court allowed the award to be diminished in an express attempt not to prejudice the plaintiff here by ordering a new trial on this issue as well. The defendants, in trying to get as large a present value discounting as possible will seek to keep the calculation away from the court, and to present the jury with as high discount rate figures as possible in order to minimize the final award. Injured plaintiffs in seeking higher awards will try to have the court decide the issue. It seems that given the court's rationale, the acknowledgment of its minority view, and its interest in keeping uniformity throughout the circuits, the court may be persuaded to follow the majority view in the future and not allow present value deduction on future pain and suffering losses.

Kimon C. Thermos '90

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