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# Oliveri v. Delta Steamship Lines, Inc., United States Court of Appeals, Second Circuit, 1 June 1988, 849 F.2d 742

## 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-pecuinary 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 value 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 investment 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.

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