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Damages Not to be Overlooked

By Marilyn Raia

In addition to loss of use damages (Pacific Maritime Magazine November 2015) there are other types of damages in maritime cases that to some are illogical if not unfair. However, when a maritime casualty occurs, they should not be overlooked because they are both logical and fair.

Prejudgment Interest

Prejudgment interest is interest accruing on damages from the date the damages are incurred until the date judgment is entered against the responsible party. Prejudgment interest represents the time value of money. It is based on the theory that the defendant had use of the funds to which the plaintiff was entitled from the day the right to damages arose. Prejudgment interest is not a penalty.

Whether a party can recover prejudgment interest is within the discretion of the trial judge. However, in admiralty cases, prejudgment interest will be awarded unless there are exceptional circumstances making an award of prejudgment interest unfair. Three circumstances in which prejudgment interest is commonly denied are:

1) when the party seeking prejudgment interest has unreasonably delayed in prosecuting its case; 2) when the party seeking prejudgment interest has made a bad faith estimate of the damages and the estimate adversely affected the prospects for settlement; or 3) when the party seeking prejudgment interest did not suffer any actual damages.

The rate at which prejudgment interest is awarded is also within the discretion of the trial judge. In 1982, Congress amended a statute, 28 U.S.C. § 1961, to require district courts to set the interest rate accruing after a judgment is entered based on the 52 week US Treasury bill rate. By amending this statute, Congress intended to take away an incentive to delay litigation because the 52-week US Treasury bill rate is less than the cost of money. There is no similar statute governing the rate at which prejudgment interest should be awarded. However, there is a judicially-fashioned rule governing the rate of prejudgment interest in admiralty cases, namely, the rate should be the same rate as the post judgment rate set forth in 28 U.S.C. § 1961 unless the equities of a particular case make another rate more appropriate. Prejudgment interest is compounded annually.

The date on which prejudgment interest begins to accrue is also within the discretion of the trial judge. Most often prejudgment interest accrues from the date of the casualty or in the case of cargo damage or loss, from the date the cargo was delivered or should have been delivered. When an insurance company has paid its insured for a loss and seeks reimbursement from the responsible party, many but not all courts award interest from the date the insurance company made its payment.

Western Pacific Fisheries, Inc. v. S/S President Grant, 730 F.2d 1280 (9th Cir. 1984), is one of the more frequently cited admiralty cases involving prejudgment interest. In 1980, the *S/S President Grant* struck the fishing vessel *Martin Higgins* in the fog near the Golden Gate Bridge. The insurers of the *Martin Higgins* paid for the total loss of the vessel. Then they sued the owner of the *S/S President Grant* for reimbursement. After trial, the district court apportioned 85 percent of the fault to the *S/S President Grant* and 15 percent to the *Martin Higgins*, and awarded the insurers of the *Martin Higgins* 85 percent of what they had paid plus the cost of a diver to see if the wreck obstructed navigation. The district court also awarded prejudgment interest to the insurers at 8 percent per annum from the date they had paid for the

total loss of the *Martin Higgins*. Post judgment interest was awarded at the rate of 9.29 percent in accordance with 28 U.S.C. § 1961. The insurers appealed the award of prejudgment interest at an 8 percent rate arguing it was inadequate to compensate them because the actual cost of money to them was 19.53 percent. The Ninth Circuit reversed the district court's award. It held the prejudgment interest rate should be the same as the statutory post judgment interest rate. It sent the case back to the district court instructing the trial judge to calculate prejudgment interest on the same basis as post judgment interest unless she finds "on substantial evidence" that the equities of the case required a different rate.

Overhead and Profit

When a vessel is damaged in a casualty, the responsible party may undertake the necessary repairs rather than hiring a third party to do the work. Under those circumstances, overhead and profit may be recoverable. *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322 (9th Cir. 1981), illustrates the point.

Dillingham entered into a contract with the Coast Guard to install a sonar system on the USCG Cutter *Mellon* at the Dillingham Shipyard. Dillingham sub-contracted with Associated Insulation to install dampening asbestos tile in the lower ammunition handling room. Associated Insulation's employees negligently left a valve on a propane tank open, resulting in an explosion that caused damage to the vessel.

Dillingham's contract with the Coast Guard required it to "make good at his own cost and expense any and all loss of or damage of whatsoever nature to the vessel..." Because of its contractual obligation to the Coast Guard, Dillingham repaired the vessel. Dillingham and its insurer then filed suit against Associated Insulation. The district court found Associated Insulation solely at fault and awarded Dillingham the cost of vessel repairs as well as local overhead expenses. It did not award corporate headquarters overhead expenses allocated to the job nor profit. Associated Insulation appealed the award of local overhead to Dillingham and Dillingham appealed the lack of an award for corporate headquarters overhead expenses and profit.

The Ninth Circuit held both local and corporate headquarters overhead expenses were recoverable because overhead is a "recognized element of the cost to a contractor in performing a job." Although corporate headquarters overhead expenses were not directly attributable to a particular job, they were routinely apportioned to the work performed by the shipyard and therefore should be recoverable as part of the repair costs. The Ninth Circuit also noted profit was a reasonable return upon the investment of business assets and resources in a project. If an independent contractor had undertaken the job, profit would be an expected part of its charges. The court reasoned that if Dillingham were to use its resources on another project rather than on the repair of the cutter, it would expect to earn a reasonable profit on that project. Accordingly, profit was also recoverable as part of the cost to repair the cutter.

Unrepaired Damage

When a vessel is damaged in a casualty, the vessel owner may decide not to undertake repairs. That does not mean the party responsible for the damage is not liable for the cost of those repairs.

In *United States v. Shipowners & Merchants Tugboat Co.*, 103 F. Supp. 152 (N. D. Ca 1952), a tug owned by the defendant struck the *S/S Golden Gate*, a vessel owned by the United States.

The tug was solely at fault. The estimated cost of repairs was \$5,400. The **S/S Golden Gate** remained unrepaired (except for minor temporary repairs) for eighteen months. The vessel was then sold at a price set by the US Maritime Commission for the disposal of surplus vessels which was the only legal price it could have been sold for. The defendant argued it should not be liable for any amount in excess of the cost of temporary repairs because the government sold the vessel in an unrepaired condition for the same price it would have sold the vessel for had it been repaired. The district court rejected that argument. It held the amount of recoverable damages in a collision case when the damaged vessel is not repaired can be measured by: 1) the estimated cost of repairs; or 2) the diminution of value of the market value of the vessel as a result of the casualty. It also held the sales price of the vessel eighteen months after the collision by itself had no evidentiary significance in measuring the diminution in value of the vessel. The defendant also had to show what the vessel was worth immediately before the collision and failed to do so. The court recognized a "well-settled principle of law" that a liable party "cannot escape the consequences of his wrongdoing merely because his victim was fortunate enough to receive reparation from a collateral source."

In *Yarmouth v. Scully*, 1998 AMC 825 (4th Cir. 1997), Yarmouth's fishing vessel **Lady Olive Marie** was struck by the racing sailboat Coyote. Two months later, and before the repairs could be made, the **Lady Olive Marie** was lost at sea due to causes unrelated to the collision. The district court awarded the estimated repair costs and prejudgment interest to Yarmouth. Scully appealed the repair cost award arguing he should not be liable for repairs that were not made and would never be made. The Fourth Circuit rejected the argument noting "vessel repairs are not a 'prerequisite to an award for physical damages caused by a collision'".

Some types of damages in admiralty cases may seem unfair or illogical. Usually they are neither and should not be overlooked when legal action against a responsible party is being considered.