CHAPTER 1

Damages Recoverable in Collisions, Allisions, and Other Maritime Incidents

Jeanne L. Amy¹
Michael T. Amy²

§1-1 INTRODUCTION

This chapter focuses on the elements of damages recoverable from vessel collisions, allisions, and other related maritime casualties. Also covered are compensable and noncompensable harms and the valuation of damages recoverable in marine casualties. The citations are illustrative, not exhaustive.³

¹ Jeanne L. Amy is an attorney in the Admiralty and Maritime Practice Group in the New Orleans, Louisiana, office of Jones Walker LLP. Jeanne earned her juris doctor, cum laude, from Tulane University Law School, where she served as the editor-in-chief of the Tulane Maritime Law Journal. Thereafter, she clerked for the Honorable W. Eugene Davis of the US Court of Appeals for the Fifth Circuit. Jeanne is a vice-chair of the Admiralty and Maritime Law Committee of the ABA’s Tort Trial and Insurance Practice Section and is a member of the Women’s International Shipping and Trading Association and the Maritime Law Association of the United States.

² Michael T. Amy is an attorney in the Marine and Energy Practice Group in the New Orleans, Louisiana, office of Deutsch Kerrigan, LLP. Michael earned his juris doctor from Loyola University New Orleans and an LL.M. in Admiralty, with Distinction, from Tulane University Law School. He is a member of the Admiralty and Maritime Law Committee of the ABA’s Tort Trial and Insurance Practice Section and the Maritime Law Association of the United States.

³ The authors wish to acknowledge David J. Sharpe and Robert B. Acomb, III, the authors of Chapter 1 of the first edition of this volume. Their original work remains the substantive backbone of this updated chapter.
Admiralty jurisdiction exists where the personal injury or property damage is related to a vessel in navigation on navigable waters during the course of traditional maritime activity with the potential for affecting maritime activity.\(^4\) Article III of the U.S. Constitution grants the federal courts jurisdiction over maritime cases. Under 28 U.S.C. § 1333, the federal courts have “original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” The “savings to suitors” clause provides concurrent jurisdiction in the state courts as well as federal question jurisdiction for admiralty-type claims pursuant to 28 U.S.C. § 1331 and provides for supplemental jurisdiction on diversity claims within an admiralty claim.\(^5\)

§ 1-2 COMPENSABLE HARMs: THE ELEMENTS OF DAMAGE

Recoverable damages in collision and allision cases depend on whether the injured vessel is a total or partial loss. In a total loss situation, the vessel is unable to be repaired, and damages will include the market value of the vessel at the time of the casualty, its pending freight, and any other related wreck removal and cleanup costs.\(^6\) Total loss can also manifest itself as a “constructive total loss,” which occurs when the vessel could be repaired, but the expense of doing so is greater than the precasualty value of the

---


\(^5\) See also Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 44 S. Ct. 274 (1924); Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992).

When the vessel is capable of being repaired and the precasualty value exceeds the costs of reasonable repairs, it is considered a partial loss. Partial loss damages can consist of the repair costs or the diminished value of the ship if repairs are not made, the ship’s lost earnings during the period of time it was removed from service, and other related expenses including wharfage, pilotage, and salvage.

(A) Property Damages

(a) Total Loss
Where the vessel is a total loss after a collision, the measure of damages is the fair market value of the vessel at the time of the destruction. Fair market value is determined by reference to contemporaneous sales of similar vessels, but in the absence of such a market, other factors are considered to determine “the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.”

The following cases represent some unique circumstances encountered by the courts in determining vessel value. In *Boston Iron & Metal Co. v. The Winding Gulf*, a World War I destroyer, then a dead ship in tow to a shipbreaker for scrap, was valued at her purchase price plus estimated net scrap value. The court used the private negotiated sale, not just acquisition plus towage to the point of collision. In effect, the ship was viewed solely

---

9. Force, supra n. 4 (citing *Sjou v. United States*, 478 F.2d 343 [5th Cir. 1973]). A certain amount of hindsight must be used in determining whether the loss of a vessel is total or partial. Suppose that the owner of a beached vessel decides to abandon her and produces experts to testify as to her salved value. The owner demands damages measured by her precasualty value less her salvage value, and he is entitled to them. But if the vessel and cargo are raised and repaired, then the wrongdoer is entitled to use actual figures to increase the postcollision value and thus to reduce the judgment he pays. *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), abrogated on other grounds by *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).
as property and not as a revenue earner—she still had capital value. In *Brodospas v. United States*, the court used the face amount of a valued hull policy rather than the purchase price of a dead Liberty ship in tow to a Yugoslavian shipyard. As for a live ship, her depreciated value for tax purposes was not conclusive against her insured value, which was about five times greater.

*The City of Alexandria* involved a dredge built and uniquely modified over time. The judge determined the dredge could be replicated at once for less than it cost to construct her piecemeal, but this must be a very unusual situation. Normally the estimated reproduction cost is considerably higher than figures arrived at through other formulations. Where an owner’s labor in restoring a fishing vessel was given no weight in setting the value of the vessel when she was later lost, the figure was clearly erroneous. In *King Fisher Marine Service, Inc. v. NP Sunbonnet*, the court found that a barge originally purchased for $30,000, its market value, was actually worth almost eight times the purchase price because its characteristics made the barge especially apt for the owner’s commercial use and the cost of building another barge with the same “special qualities” was a more appropriate value.

**Constructive Total Loss: Damages Exceed Repaired Value**

The precollision market value of a vessel places a ceiling on the judgment that the owner of a damaged vessel can recover for repairs, even if repairs are actually performed. While the value may be expressed in various ways, such as capitalized earnings, market price, or replacement costs, each

---


14 *The City of Alexandria*, 40 F. 697 (Dist. Ct. 1889).

15 *Id.*

16 *Greer v. United States*, 505 F.2d 90, 1975 AMC 195 (5th Cir. 1974).


sum must be depreciated to arrive at the value at the time of the collision; the lowest value is the constructive total loss figure to be exceeded by repair costs. Lost profits of the collision-interrupted voyage are recoverable as well as the value of the vessel, but no other loss of use is recoverable.

Hull insurance proceeds operate largely outside the constructive total loss valuation scheme. In Asphalt International, Inc. v. Enterprise Shipping Corp., a time-chartered vessel, the Oswego Tarmac, was rammed amidships by the Elektra. At the time of the collision, the Oswego Tarmac was loading asphalt. The force of the repeated impacts was sufficient to rupture four of the Oswego Tarmac’s tanks, spewing heated asphalt across the harbor. Appraisers appointed by both shipowners estimated the repair costs at not less than $1,500,000. The fair market value of the tanker prior to the collision was $750,000 or approximately one-half the repair costs; therefore, the Oswego Tarmac was a constructive total loss, and the owner sold her for scrap, receiving $157,500. The tanker was insured for three times her sound market value. The owner proceeded further to recover $1.335 million on the hull policy. The charterer insisted that the tanker could be repaired and brought suit for breach of contract against the owner. The court held that the doctrine of commercial impracticability excused the shipowner from applying the insurance proceeds to reconstruct the demolished forty-four-year-old tanker.

(c) Partial Loss
(1) Direct Repair Costs: Goods and Services
Ideally, the measure of compensation to the owner for collision damage to his vessel is the difference between the values of the vessel before and after the collision. Practically, the cost of repairs plus the loss of earnings during loss of use are the starting point for calculating partial loss damages. The burden of persuasion is on the owner to establish that the immediate layup of the vessel for repairs was essential to keep the vessel in operation and reasonably seaworthy in all respects.

19 See O’Brien Bros. v. The Helen B. Moran, 160 F.2d 502, 1947 AMC 493 (2d Cir. 1947), a basic constructive total loss case; opinion by Judge Learned Hand.
20 Id.; Taylor v. Port of Brookings Harbor, 198 F.3d 255 (9th Cir. 1999).
22 Id.; see also McDonough Marine Serv., Inc. v. The M/V Royal St., 465 F. Supp. 928, 1982 AMC 2701 (E.D. La. 1979), aff’d 608 F.2d 203 (5th Cir. 1979).
The owner further has the basic burden to produce evidence that collision repairs were required to be performed due to the defendant’s negligence. Where the owner’s evidence is insufficient to enable the court to differentiate between temporary and permanent repairs or between the owner’s own repair work and collision damages, the owner will not be compensated, for fear of overcompensating him or speculating on the apportionment.24 However, repairs performed and supervised by the owner’s own employees are compensable, provided detailed records enable the court to determine that the owner’s employees would otherwise have been busy accomplishing other tasks.25

It is not necessary for repairs to have been actually performed in order for the owner to recover damages measured by the estimated repair costs or surveys.26 But if the vessel continues in service, the absence of repairs may well cast doubt upon the necessity and the magnitude of permanent repairs that the owner asserts were essential to return the vessel to a seaworthy and serviceable condition.27

(2) Peripheral Repair Costs

Salvage expenses, including the use of the plaintiff owner’s own vessels, are includable as damages.28 Where collision repairs necessitate dry-docking, the dry-dock charges are an element of damages. Since not all collision damage can be ascertained without dry-docking, the risk of unnecessary dry-docking charges rests upon the wrongdoer. Where a vessel is dry-docked primarily to do collision repairs, and owner’s work is also
performed, dry-docking expenses are charged to the wrongdoer, without the sort of allocation that is done in the case of loss of use damages. However, when a vessel is dry-docked primarily to do owner’s work, and collision work is also performed, the tendency today is to relieve the wrongdoer of dry-docking charges, just as he would pay nothing for loss of use that was completely overlapped by the owner’s work.\textsuperscript{29}

The owner’s survey charges are an allowable damage element, even though the surveyor also reports to the owner’s underwriters.\textsuperscript{30} While the defendant must pay his own surveyor, if the plaintiff-owner deprives the defendant of the opportunity to perform a joint survey, the absence may be noted unfavorably by the judge who passes on amounts and elements of property damage.\textsuperscript{31} But absence of a joint survey is not fatal to the plaintiff-owner’s case.\textsuperscript{32} The fees for surveys done on the owner’s underwriters’ behalf are not recoverable.\textsuperscript{33}

The cost of removing cargo to make repairs is a normal element of damage. But where it cost five times as much to remove solidified cargo as the carrying barge was worth, the barge owner recovered only the barge’s value as a constructive total loss.\textsuperscript{34} In addition, the victim who pays cargo claims for collision damage and rehandling damages in addition to transshipment charges may include those items as damages against the wrongdoer.

\textbf{(d) Incidental Collision Expenses}

Incidental collision damages recoverable by the owner include wreck removal costs, which can be very large. Prior to the holding of \textit{Wyandotte}


\textsuperscript{31} \textit{See Delta Marine Drilling Co. v. M/V Baroid Ranger}, 454 F.2d 128, 1972 AMC 312 nn. 3-4 (5th Cir. 1972).

\textsuperscript{32} \textit{Dominican Maritime, S.A. v. The Inagua Beach}, 572 F.2d 892, 1978 AMC 1552 (1st Cir. 1978).


\textsuperscript{34} \textit{McDonough Marine Serv., Inc.}, 465 F. Supp. 928, \textit{aff’d per curiam}, 608 F.2d 203 (5th Cir. 1979) (different point on appeal).
Transp. Co. v. United States,\textsuperscript{35} wreck removal expenses were borne by the United States. Today, the United States may either enjoin a wrongdoer to remove the wreck that obstructs navigation or do the job itself and sue for reimbursement. The wrongdoer may not limit his liability against the wreck removal costs.\textsuperscript{36}

General average expenses, commissions and interest on disbursements, and settling agents’ commissions are includable as collision damages, since they appear in the York-Antwerp Rules.\textsuperscript{37} General average contributions owing to a damaged vessel from cargo but uncollected by the vessel may be included as an element of damage against the wrongdoer.\textsuperscript{38}

Where a grain elevator owner had to pay carrying charges to customers whose grain deliveries were postponed a month when the dock went out of service, the carrying charges were a recoverable element of damages.\textsuperscript{39}

\textbf{(B) Economic Damages in Partial Loss Cases}

\textbf{(a) Loss of Use, Detention/Demurrage, and Substitution of Vessels}

Where the vessel is a total loss, the owner may not recover as damages the loss of use of the vessel; he can recover only the value of the vessel plus interest and pending freight.\textsuperscript{40} Damages for loss of use of a vessel\textsuperscript{41} are confined to partial loss situations. Loss of use would ideally be measured by the

\begin{footnotesize}
\textsuperscript{37} Moore-McCormack Lines, Inc. v. The Esso Camden, 244 F.2d 198, 1957 AMC 971 (2d Cir. 1957).
\textsuperscript{39} Cargill, Inc. v. Taylor Towing Services, Inc., 483 F. Supp. 1094, 1980 AMC 2796 (E.D. Mo. 1979), aff’d in this respect, 642 F.2d 239 (8th Cir. 1981).
\textsuperscript{40} The Umbria, 166 U.S. 404, 422 (1897); A & S Transp. Co. v. The Fajardo, 688 F.2d 1, 1983 AMC 10 (1st Cir. 1982) (bareboat charterer thus limited, also, citing marginal exceptions to stated rule).
\textsuperscript{41} Loss of use damages are also referred to as “detention damages” and, loosely, as “demurrage.” Note, however, that technically the term “demurrage” is the amount paid to the vessel owner for the use of the ship beyond the time fixed in the charter party. See Thomas J. Schoenbaum, Admiralty and Maritime Law 163, n. 30 (6th ed. 2018).
\end{footnotesize}
charter hire for an identical vessel, and this can often be accomplished with barges but only occasionally with larger vessels. Courts usually have to turn to the second best alternative, net profits from operation of the damaged vessel; that is, gross freight less expenses. The rules were old when they were recapitulated in *The Potomac*. If there is inadequate certainty that a vessel would have been earning income but for collision repairs, loss of use damages should be denied.

(b) Future Earnings

Hypothetical future earnings of the vessel damaged by collision (not sunk) are limited to the voyage in progress, as a rule. Outsiders to the collision get nothing at all, under the general rule of *Robins Dry Dock & Repair Co. v. Flint*.

Purely economic losses, even though related to a collision or allision, are subject to the bright-line rule of *State of Louisiana v. M/V TESTBANK*, in which the Fifth Circuit held that no recovery would be allowed for economic damages without direct physical damage to property or a proprietary interest.

(c) Interest as Damages

Prejudgment interest is normally awarded on admiralty collision damages, so as to reimburse the victim for loss of use of its capital goods or its money

---

43 105 U.S. 630, 632 (1882).
47 *Taira Lynn Marine Ltd. No. 5, L.L.C. v. Jays Seafood, Inc.*, 444 F.3d 371 (5th Cir. 2006); see also *Catalyst Old River Hydroelectric Ltd. P’ship v. Ingram Barge Co.*, 639 F.3d 207 (5th Cir. 2011) (finding a barge blocking a hydroelectric station’s intake channel to be damage to a proprietary interest); but see *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198 (5th Cir. 1995) (holding that costs incurred by the owner of an offshore oil platform to avoid damage to its platform constituted damage to a proprietary interest; however, the owner’s claims for lost income during the shutdown period were not recoverable).
from the date of the accident until the date of judgment. Prejudgment interest is a compensatory element of damages; it does not constitute punitive damages. Prejudgment interest is calculated on the total damages suffered by the claimant. Old English cases gave interest of right on the value of a totally lost vessel, and then discretionary interest on that sum as a component of total damages, but, as the Third Circuit has noted, US courts have not followed this practice since 1874. The district judge who declines to award prejudgment interest should explain why he has so exercised his discretion, because it is an abuse of discretion to deny interest without explanation.

If loss of use damages are awarded, interest during the period is withheld because the two elements overlap, and loss of use normally produces higher recovery for the plaintiff, provided the evidence is available. The judge has discretion in exceptional circumstances to deny prejudgment interest altogether for unreasonable delay attributable to the claimant in prosecuting the claim, or by impeding a settlement by demanding extravagant damages in bad faith, or by failing to prove that actual damages were sustained. Where repairs or other charges have been incurred but not

---

48 Annotation, Award of Prejudgment Interest in Admiralty Suits, 34 A.L.R. Fed. 126, treats this subject exhaustively and keeps it up to date. See also Ryan Walsh Stevedoring Co. v. James Marine Servs., Inc., 792 F.2d 489, 493, 1987 AMC 1611 (5th Cir. 1986) (holding that the award of prejudgment interest on the loss of use award was proper and in line with circuit precedent and finding that "this circuit has consistently held that prejudgment interest on repair costs runs from the date of the accident even though the owner does not pay these costs until some later date").

49 In re Bankers Trust Co., 658 F.2d 103, 110, 1982 AMC 1098 (3d Cir. 1981), cert. denied, 456 U.S. 961, 1982 AMC 2107 (1982) ("Since 1874 courts in the United States have not distinguished between prejudgment interest on the value of a vessel as a separate part of damages and prejudgment interest on the total damage award.").

50 Alkmeon Naviera, S.A. v. The Marina L, 633 F.2d 789, 1982 AMC 153 (9th Cir. 1980) (remanding for explanation of denial of prejudgment interest or for computation of interest). The Fifth Circuit has affirmed an adequately explained denial of prejudgment interest, see Inland Oil & Transp. Co. v. Ark-White Towing Co., 696 F.2d 321, 327-28 (5th Cir. 1983).


paid, interest starts to run upon payment, since that is when the plaintiff loses the use of his money.\textsuperscript{53} It has been held that a plaintiff who must repair, and hence improve, his shore structure prematurely may not recover interest on the involuntary improvement that extends the life of the structure.\textsuperscript{54}

The rate of prejudgment in admiralty cases lies within the judge’s discretion; it is governed neither by the legal rate in the forum state\textsuperscript{55} nor by the postjudgment rate established by federal law.\textsuperscript{56} Because constructive total loss is a hybrid doctrine, interest could run either from the date of loss (as in actual total loss) or from the date of repair (as in cases where repairs cost less than restored value). In \textit{The Manhattan}, the commissioner let interest run from the sinking of a United States dredge,\textsuperscript{57} but the district judge modified the decision to start interest with the payment for repairs, which was subsequently affirmed.\textsuperscript{58}

Interest on actions against the United States under the Suits in Admiralty Act\textsuperscript{59} may be set at a rate of 4\% per year and will run as ordered by the court, but cannot start prior to the date of suit.\textsuperscript{60} Yet if the claim is based on a contract providing for interest, interest may be awarded at the rate and for the period provided in the contract.\textsuperscript{61} Under the Public Vessels Act,\textsuperscript{62} interest may run only from the date of judgment, unless the claim is based on a contract providing for interest.\textsuperscript{63}

\textsuperscript{54} \textit{Freeport Sulphur Co. v. The Hermosa}, 526 F.2d 300, 1977 AMC 588 (5th Cir. 1976), settled before rehearing en banc, 1977 AMC 508.
\textsuperscript{57} 1935 AMC 227 (E.D. Pa. 1934).
\textsuperscript{60} 46 U.S.C. § 30911(a).
\textsuperscript{61} 46 U.S.C. § 30911(b).
\textsuperscript{63} 46 U.S.C. § 31107.
(C) Litigation Expenses

Admiralty collision cases do not seem to be different from ordinary property damage actions. Expert testimony fees are taxable as costs, payments to satisfy liabilities to third parties (such as carried cargo) are includable as damages, and costs are taxed in the discretion of the trial judge.

§ 1-3 NONCOMPENSABLE HARMS

(A) Nominal and Punitive Damages

Nominal damages served peculiar needs of common-law pleadings and judgments. However, nominal damages are not awarded in a “cause of damage civil and maritime.” Punitive damages have more traditionally been at issue in personal injury litigation, as discussed in more detail in Chapter 12, “Punitive Damage Awards Under General Maritime Law and Ancillary State Claims,” infra, but not, so far, in collision damage to property.

(B) Pleasure Boat Use

While repairs to, and the total loss value of, a pleasure boat are compensable, loss of use of a pleasure boat is not. Justice Brown wrote in 1897:

It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least, a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure.

---


66 The Conqueror, 166 U.S. 110, 133 (1897) (concerning Frederick W. Vanderbilt’s 182-foot steam yacht).
The quoted statement was questioned by Justice Cardozo in *Brooklyn Eastern District Terminal v. United States*, stressing the absence of evidence that the owner could or would use or charter *The Conqueror*, and suggesting that given suitable evidence of value, loss of pleasure use would be compensable, but the no-compensation rule was restated in *Oppen v. Aetna Insurance Co.* where the court noted but declined to follow Justice Cardozo’s 1932 dicta.

(C) Economic Losses to Outsiders

Where a ship strands and blocks a channel, other vessels whose movements are interrupted have no claim for loss of use or profits. The basic rule is that of *Robins Dry Dock & Repair Co. v. Flint*, which stands for the proposition that a claimant cannot recover for economic losses that are not associated with physical damages.

(D) Attorneys’ Fees

While collision and stranding cases follow the general American rule that each party pays his own lawyer’s fees, there is an exception: where one defendant’s lawyer secures a release of an outsider’s claim, another defendant can be required to help pay the lawyer’s fee.

67 287 U.S. 170, 1932 AMC 1487, 1490 (1932).
68 485 F.2d 252, 257 1973 AMC 2165, 2172 (9th Cir. 1973) (“Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages.”); see also *Snavely v. Lang*, 592 F.2d 296, 297 (6th Cir. 1979) (“*The Conqueror* has been interpreted as creating an ironclad rule that under federal maritime law demurrage is not an allowable item of damage for loss of use of a private pleasure craft.”); *Thomson v. United States*, 266 F.2d 852, 856 (4th Cir. 1959) (“Demurrage is not allowable damage in a case of this sort, for valuation of the loss of use of a pleasure craft is highly speculative and immeasurable.”).
70 275 U.S. 303, 1928 AMC 61 (1927). Other applications of the rule include *In re Kingston Shipping Co.*, 667 F.2d 34, 1982 AMC 2705 (11th Cir. 1982), cert. denied, 458 U.S. 1108 (1982) (*Blackthorn/Capricorn* collision); *Akron Corp. v. The Cantigny*, 706 F.2d 151 (5th Cir. 1983) (stranding); *Louisville & N.R.R. v. The Bayou Lacombe*, 597 F.2d 469, 1980 AMC 2914 (5th Cir. 1979) (collision damage to bridge interrupted rail traffic); *Dick Meyers Towing Serv., Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978) (where a tugboat operator was denied economic damages resulting when the tug was unable to timely deliver its tow after a lock on a river was closed as a result of defendant’s negligence).
(E) Insurance Premiums

The owner of a detained vessel in a sense pays something for nothing, when he pays hull insurance premiums while the vessel is detained. The courts have refused to allocate premium costs between the protection afforded the owner and the protection that he could not use.72

(F) Cosmetic Repairs

Collision damage rules apply in a commercial setting, and the principle of *restitutio in integrum* does not reach so far as cosmetic repairs or depreciation of appearance.73 Presumably, damage to a vessel’s appearance could be compensated when that reduces her salability, as with a pleasure vessel, but not just her appearance in the eyes of her owner.

§ 1-4 VALUATION OF HARMS: AMOUNTS OF DAMAGES

(A) Prima Facie Values

Even where market prices for chartering equivalent vessels are available, the collision victim must produce evidence that he suffered a loss in order to recover for loss of use and excess expenses. If the victim would not have chartered his own yacht if she had been available74 or if he kept his business going without demonstrable expense,75 then purely theoretical damages are erroneous and/or extravagant.

---

72 See cases collected in *Nordasilla Corp. v. Norfolk Shipbuilding & Drydock Corp.*, 1982 AMC 99, 107 (E.D. Va. 1981) (magistrate’s report), particularly *Sinclair Ref. Co. v. The American Sun*, 188 F.2d 64, 67, 1951 AMC 845, 849 (2d Cir. 1951). See also *Moore-McCormack Lines, Inc. v. The Esso Camden*, 141 F. Supp. 742, 1956 AMC 2018, 2022 (S.D.N.Y. 1956) (“Although there is authority that insurance costs should not be deducted as an expense incident to a particular voyage, precedents amply support the Commissioner’s conclusion that this item be disallowed as a detention expense”) (subsequent negative appellate treatment pertains to other issues).


74 *The Conqueror*, 166 U.S. 110 (1897).

75 *Brook. E. Dist. Terminal*, 287 U.S. at 1932 AMC 1487 (1932); *Bolivar County Gravel Co. v. Thomas Marine Co.*, 585 F.2d 1306, 1979 AMC 1806 (5th Cir. 1978).
The inclusion or exclusion of an element of damages is a conclusion of law, readily assignable as error on appeal; valuation of damages is usually a finding of fact, reversible only if “clearly erroneous” under Federal Rule of Civil Procedure 52(a) and its predecessors.\(^7\)

**(B) Reducing Damages**

The defendant bears the burden of reduction by persuading the judge to cut down or allocate expenses. Causation is the key to denial of damages; that is, the defendant bears the burden of proof to show that the owner’s expenses would have been incurred regardless of the collision. Discovery of the owner’s records is the key to allocating amounts between expenditures on the owner’s account and expenditures attributable to the collision. If the defendant fails to produce the owner’s records, he virtually accepts the owner’s prima facie case on the amount of damages. In practice, the topics treated in the following sections are affirmative defenses, although in theory they are denials of the amount of claimed damages.

**(C) Avoidable Consequences**

What conduct is so unreasonable as to be an avoidable consequence was discussed in general terms by Judge Friendly in *Ellerman Line, Ltd. v. The President Harding*.\(^7\) The item at issue was the unloading of the damaged vessel’s full cargo, a part of which proved to be unnecessary. Judge Friendly wrote: “[I]n order to prove that a plaintiff’s adherence to an initially proper decision how to mitigate damages has become unreasonable, the defendant must show that such adherence had become not merely erroneous but palpably so.”\(^7\)

---


\(^7\) 288 F.2d 288, 1961 AMC 2137 (2d Cir. 1961).

\(^7\) *Id.* at 291, 1961 AMC 2139. *See also* *Fed. Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 352 (2d Cir. 1986) (“Although the contamination of the cargo began because of the ship’s negligence in permitting fluid containing lead to leak from an adjacent tank, the ship was not liable for further damage that would have been avoided if the shipper, acting through its agent, had not followed an unreasonable course of conduct. The District Court properly limited recovery to the diminished value of the portion of cargo loaded to the four-foot level, the point at which it became unreasonable for the shipper to load additional cargo without determining whether lead was the source of the contamination.”); *Mecom v. Levingston Shipbuilding Co.*, 622 F.2d 1209, 1214 (5th Cir. 1980) (“The applicable standard for judging a plaintiff’s conduct is whether his decision falls within the ‘range of reason,’ not whether he has chosen the most prudent course of action.”)
One kind of avoidable consequence consists of primary conduct of a victim, such as the master of a negligently damaged vessel, who by his postaccident act or default allegedly aggravated his harm or failed to prevent great loss. In re Cherokee-Seminole Steamship Corp. shows first that the defense argument is one of causative intervening negligence, not the disallowance of damages or a contest over values, and second, that a heavy burden rests on the defendants to show that the plaintiff’s conduct was virtually unforeseeable, not merely negligent.

Another avoidable consequence is refusal to salvage a readily salvable vessel and cargo. The undisputed victim cannot charge the whole loss to the wrongdoer, but he can recover the costs of salvage and repair.

(D) Unreasonably High Repair Costs

The replacement of structural aspects of a vessel often requires the repairman to remove large quantities of serviceable materials. For example, to replace two of a barge’s collision-damaged thirty-five-foot timbers costing $630 would have required $8,273 in labor and materials. If reinforcing the damaged timbers would make the barge serviceable, one can readily see why this should be done rather than restoring the barge to the full status quo. The serviceability standard may still leave the vessel depreciated prematurely, and the owner can be compensated for loss of value of his damaged but serviceable vessel; however, the burden of producing persuasive evidence lies upon the owner.

Where a repair contract contained a $100-per-day penalty clause that the owner did not take advantage of even though the vessel was redelivered five days late, the court reduced the owner’s repair charges by $500. A cash payment to the superintendent of the repairman is not includable as recoverable damages.

Where dry-docking a vessel for collision repairs allows the owner to push back the next annual survey by several months, the wrongdoer is

79 70 F.2d 335, 1934 AMC 577 (2d Cir. 1934).
80 The Baltimore, 7.5 U.S. (8 Wall.) 377, 387 (1869).
entitled to a credit for the benefit to the owner; if further repair work owing to the collision is done at the next annual survey, the wrongdoer is not required to pay for that dry-docking at all.84

(E) New for Old: Vessels v. Shore Structures

Under maritime law, the overcompensation of the vessel owner who receives a repaired vessel in better condition than she was before the collision is prevented by specifically deducting “owner’s work,” or work performed on the owner’s account that enhances the value of the vessel, provided the defendant furnishes adequate evidence and repair invoices.85 Otherwise, new for old does not operate with respect to repairing vessels. 86

Shore structure repairs, by contrast, are reduced or “depreciated” according to the estimated improvement of the structure by installing new materials in place of the old collision-damaged areas: “new for old.”

Most shore structures depreciate at a rate susceptible of being estimated, and where repairs required by collision extend the useful life of the whole structure, the wrongdoer need not pay for the extension. This deduction is called “new for old,” and it is a common component of repair damage disputes. 87 But where no evidence of depreciation is placed into evidence, even if the structure is nine years old, it is proper to deduct nothing for depreciation. In effect, the plaintiff restores new for old and is compensated in full.88

Somewhere in between these go/no go extremes lies the structure that contains component parts. The repair or replacement of a damaged component, such as a duster of pilings near a pier, may not extend the life of the pier at all, especially if the pilings must be removed when the pier is reconstructed at the end of its unaffected useful life.89

85 See Pinto v. The Fernwood, 587 F.2d 1327, 1976 AMC 744 (1st Cir. 1974), where the owner’s evidence was not forthcoming. Owner’s work is considered in the next section.
86 See Shepard S.S. Co. v. United States, 111 F.2d 110, 1940 AMC 573, 578 (2d Cir. 1940).
87 E.g., Portland Pipeline Corp. v. The Barcola, 1982 AMC 2725 (D. Me. 1982).
88 City of New Orleans v. Am. Commercial Lines, Inc., 662 F.2d 1121, 1982 AMC 1296 (5th Cir. 1981) (finding that depreciation was inappropriate when the structure had not deteriorated).
89 See Freeport Sulphur Co. v. The Hermosa, 526 F.2d 300, 1977 AMC 508 (5th Cir. 1976).
Where a shore structure is old but good, the courts seem to lose their capacity to compromise. At one extreme, the vessel owner can scarcely argue that a fully depreciated bridge can be struck with impunity simply because it has zero value, and so the law seems to gravitate to the other extreme: that the bridge owner recovers full repair costs without deduction for extending the structure’s life. As an example, see *In re Canal Barge Co.*,90 where the Fifth Circuit stated:

Since the repairs neither enhanced the value nor extended the life of Eads [Bridge], reduction of recoverable repair costs by depreciation previously taken would leave . . . [the bridge owner] in a significantly worse economic position than before the accident.91

When price levels and interest rates were low and stable, straight-line depreciation over the useful life of a structure worked fairly well.92 Today, much more complex depreciation formulas have been proposed and even applied, seeking to compensate without overcompensating.93

(F) Owner’s Work: Overlapping Time, Expenses, and Revenue Losses

Since the *Ferdinand Retzlaff*,94 the shipowner in Great Britain has had considerable discretion to have his damaged but functional vessel repaired permanently and at a time and place of his choosing, even if temporary repairs abroad would have saved the wrongdoer considerable demurrage by postponing a ten-day overhaul until its scheduled time less than a month later. The British standard of behavior, according to Judge Brandon, is that of a prudent uninsured shipowner in the plaintiff’s situation. The owner is entitled both to err on the side of caution and concern for safety, and to combine collision repairs and general overhaul (including

---

91 480 F.2d 11, 27, 1973 AMC 843, 864.
94 [1972] 2 Lloyd’s L.R. 120 (Q.B. Adm.).
dry-docking) so as to minimize the combined costs. If an identifiable increase in detention results from the owner’s work, that is to be deducted from collision damages. The evidence to support the immediate or accelerated dry-docking of an unseaworthy vessel temporarily restored to service needs to be furnished carefully and explicitly, and if the initial fact finder is unpersuaded, it will be very difficult to overturn his decision as “clearly erroneous.”

Where a vessel is seaworthy but needs work and where she is then rendered unseaworthy by collision, her immediate dry-docking expenses are chargeable to the wrongdoer without deduction for the owner’s work that is done while she is in dock, as long as the time in dock is not extended by the owner’s work, and even though the owner had already scheduled his own work to be done shortly. If the collision does not render the vessel unseaworthy, the dry-docking is charged to the owner, and if heavy weather en route to the shipyard is the supervening cause of dry-docking, the wrongdoer need not pay for the dry-dock charges that the collision caused. This rule follows the rule on detention damages: if the owner’s work causes overlapping detention, the wrongdoer pays only for detention in excess of the owner’s work, since the vessel earns nothing while off-hire having the owner’s work done.

(G) Inflation and Exchange Rate Fluctuations

The British Admiralty Court can now render a judgment in pounds sterling, or in the currency in which the repair bills were paid, or in another currency in which the plaintiff usually does business. US courts still must give judgments in US dollars, but in two recent salvage cases, the judgments have given added sums: in one case, to compensate for exchange rate fluctuations, and in the other case, as a 27% “equitable

uplift” to compensate for inflation where interest was fixed by 46 U.S.C. § 746 at 4%.102

§ 1-5 CONCLUSION

When allisions and collisions occur, many interests seek to recover—from the vessel owner, to the impacted waterborne or shoreside structures, or to the interests who experience business interruption costs due to property and loss of use damages—yet there are special rules to keep in mind that determine who can recover under the circumstances. This brief primer aims to provide information to the practitioner who needs some preliminary guidance on recoverable damages when litigating cases involving these often unique marine casualties in order to protect or pursue their client’s interests.