Ocean and Coastal Law Journal

Volume 24 | Number 1 Article 5

January 2019

Nevor v. Moneypenny Holdings, LLC: Availability of Prejudgment Interest for Mixed Maritime Law and Jones Act Claims

Adam S. Bohanan
University of Maine School of Law

NEVOR V. MONEYPENNY HOLDINGS, LLC: AVAILABILITY OF PREJUDGMENT INTEREST FOR MIXED MARITIME LAW AND JONES ACT CLAIMS

Adam S. Bohanan

I. INTRODUCTION
II. LEGAL BACKGROUND
  A. Unseaworthiness Under Maritime Law
  B. Prejudgment Interest for Personal Injury Claims Under Maritime Law
  C. Prejudgment Interest for Personal Injury Claims Under the Jones Act
III. EXISTING CIRCUIT SPLIT
  A. Prejudgment Interest Is Not Available – Fifth and Sixth Circuits
  B. Prejudgment Interest Is Available – Second Circuit
IV. NEVOR
  A. Facts and Procedural History
  B. Holding and Reasoning
V. ANALYSIS
  A. First and Second Circuit Argument Is More Logical
  B. Trial Courts Should Be Clearer; SCOTUS Should Require It
VI. CONCLUSION

NEVOR V. MONEYPENNY HOLDINGS, LLC: AVAILABILITY OF PREJUDGMENT INTEREST FOR MIXED MARITIME LAW AND JONES ACT CLAIMS

Adam S. Bohanan[1]

I. INTRODUCTION

Among the many things to consider in a maritime personal injury case, including the classic negligence elements of duty, breach, causation, and damages, courts must decide whether and to what extent to assess prejudgment interest.[2] Courts have traditionally seen prejudgment interest as "part of the compensation due plaintiff."[3] "The 'essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss,' and '[f]ull compensation has long been recognized as a basic principle of admiralty law.'"[4] The waters are muddied somewhat when a plaintiff prevails on a mixed claim under both general maritime law and the Jones Act.

In 2016, the United States Court of Appeals for the First Circuit heard an appeal of *Nevor v. Moneypenny Holdings, LLC*, a maritime personal injury case that considered the availability of prejudgment interest on a mixed claim of unseaworthiness at maritime law and under the Jones Act.[5] The District Court had concluded that the plaintiff was entitled to prejudgment interest on such a claim.[6] Moneypenny conceded liability but appealed the award of damages and of prejudgment interest.[7]

The issue of prejudgment interest for a mixed claim was a question of first impression in the First Circuit.[8] The Court noted that the circuit

---

1. J.D. Candidate, 2019, University of Maine School of Law.

2. This is defined as the "[s]tatutorily prescribed interest accrued either from the date of the loss or from the date when the complaint was filed up to the date the final judgment is entered." *Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3. Nevor v. Moneypenny Holdings, LLC, 842 F.3d 113, 124 (1st Cir. 2016) (quoting Osterneck v. Ernst & Whitney, 489 U.S. 169, 175 (1989)).

4. *Id.* (quoting City of Milwaukee v. Cement Div., Nat'l. Gypsum Co., 515 U.S. 189, 195-96 (1995)).

5. *Id*. at 113.

6. *Id.* at 117.

7. *Id.*

8. *Id.* at 116.

courts that had previously dealt with this issue are split, with the Second Circuit holding that prejudgment interest is available and the Fifth and Sixth Circuits holding the reverse.[9] The First Circuit held that "when a court, in a bench trial, awards damages based on mixed Jones Act and unseaworthiness claims, prejudgment interest is available."[10] This Note explores the circuit split and concludes that the First Circuit was correct to follow the Second Circuit's reasoning that a successful Jones Act claim should not preclude prejudgment interest when mixed with a claim under general maritime law. It will also argue that the First Circuit is correct in its precedent that prejudgment interest based on future harm should not be available.

In Part II, this Note will provide the legal background for the claims at issue in *Nevor*, including unseaworthiness at maritime law and the Jones Act. Part III will lay out the circuit split and discuss the facts, holding, and reasoning of the Fifth and Sixth Circuit cases where prejudgment interest is not available and the Second Circuit case where it is available. Part IV will examine the factual and procedural history of *Nevor* and discuss the First Circuit's holding and reasoning. In Part V, this Note will analyze *Nevor* in comparison to the cases from the other circuits and conclude that prevailing on a mixed claim should not preclude the awarding of prejudgment interest. Finally, Part VI will argue that, should this case be appealed, the Supreme Court should grant certiorari in order to resolve this now wider circuit split. This Note will conclude by arguing that the Supreme Court should hold that the approach taken by the First and Second Circuits is the correct one.

II. LEGAL BACKGROUND

A. Unseaworthiness Under Maritime Law

Under maritime law, a vessel is considered seaworthy if it is "properly equipped and sufficiently strong and tight to resist the perils reasonably incident to the voyage for which the vessel is insured."[11] Seaworthiness is generally an implied condition of marine insurance policies.[12]

9. Magee v. United States Lines, Inc., 976 F.2d 821 (2d Cir. 1992); Petersen v. Chesapeake & O. R. Co., 784 F.2d 732 (6th Cir. 1986); Wyatt v. Penrod Drilling Co., 735 F.2d 951 (5th Cir. 1984).

10. *Nevor*, 842 F.3d at 123.

11. *Seaworthy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Id.*

Unseaworthiness can refer to a lack of proper equipment but can also "extend[] not only to the vessel but to the crew" and their actions.[13]

B. Prejudgment Interest for Personal Injury Claims Under Maritime Law

Although courts have not always allowed prejudgment interest for personal injury claims under maritime law, the Supreme Court has long held that prejudgment interest should be treated as part of the substantive law that trial courts apply for two reasons.[14] First, the "'proper measure of damages is inseparably connected with the right of action,' and therefore is a substantive matter that 'must be settled according to general principles of law' underlying the plaintiff's claim."[15] Second, the determination of the "'proper measure of damages' necessarily includes the question of whether prejudgment interest may be awarded."[16] Thus, prejudgment interest is part of total compensation in a judgment because it "serves to compensate for the loss of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury."[17]

However, until the early twentieth century, courts did not grant prejudgment interest in personal injury cases.[18] Interest on judgments had been allowed by statute since the beginning of the nineteenth century, and prejudgment interest at common law began appearing on contract claims by the end of that century.[19] Courts tended to avoid prejudgment interest in personal injury suits on the theory that if a jury were going to make a plaintiff whole with its judgment, then a separate award of interest would be unnecessary.[20]

Beginning in the early twentieth century, courts extended prejudgment interest to maritime property damage cases, employing reasoning similar

13. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 427 (1959). *See also* Cape Fear, Inc. v. Martin, 312 F.3d 496, 500 (1st Cir. 2002) (explaining that crew procedures may make a ship unseaworthy).

14. Michael F. Sturley & David C. Frederick, *Prejudgment Interest in Seamen's Personal Injury Cases: Supreme Court Precedent Lost in a Sea of Procedural Confusion*, 33 J. MAR. L. & COM. 423, 427 (2002).

15. *Id.* (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916)).

16. *Id.* (quoting Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335 (1988)).

17. West Virginia v. United States, 479 U.S. 305, 310 n.2 (1987).

18. Sturley & Frederick, *supra* note 14, at 428.

19. *Id.*

20. *Id.*

to that in breach of contract cases.[21] By the second half of the twentieth century, admiralty courts were beginning to award prejudgment interest on maritime personal injury claims as well, noting that it was unfair to compensate ship owners for property damage more generously than sailors who suffer bodily injury or death.[22] Currently, prejudgment interest under general maritime law for past damages[23] is practically always available.[24]

C. Prejudgment Interest for Personal Injury Claims Under the Jones Act

The Federal Employers' Liability Act (FELA) was enacted in 1908 to allow for a remedy when a railroad worker has been injured or killed on the job in the course of interstate commerce.[25] Although there is no consensus, courts have, more often than not, concluded that prejudgment interest is not available in personal injury suits brought under FELA.[26]

In 1915, Congress passed the Jones Act,[27] which "incorporated the provisions of [FELA] and, has thereby extended the protections afforded by the FELA to seamen."[28] Likewise, there is no clear rule on whether prejudgment interest is allowed under the Jones Act.[29] Among the factors that complicate the analysis is whether the action was for wrongful death rather than for a bodily injury.[30] Still other factors include whether the case was brought in admiralty[31] or at law[32] and whether the case was tried

21. *Id*.

22. *Id*. at 429.

23. Prejudgment interest on future losses that have not yet accrued is never available. *See, e.g.*, Couch v. Cro-Marine Transp., Inc., 44 F.3d 319, 328 (5th Cir. 1995); Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 445 (1st Cir. 1991).

24. Sturley & Frederick, *supra* note 14, at 429.

25. *See* Federal Employers' Liability Act, 45 U.S.C. § 51 (2012).

26. Mitchell J. Waldman, Annotation, *Recovery of Prejudgment Interest in Actions Under the Federal Employers' Liability Act or Jones Act*, 80 A.L.R. Fed. 185, § 2(a).

27. 46 U.S.C. §§ 30101-30106 (2012).

28. Waldman, *supra* note 26, § 1(c).

29. *Id*.

30. *See* Mpiliris v. Hellenic Lines, Ltd., 440 F.2d 1163 (5th Cir. 1971) (holding that prejudgment interest is not allowed for Jones Act claim for wrongful death).

31. *See* Van Beeck v. Sabine Towing Co., 85 F.2d 478 (5th Cir. 1936), rev'd on other grounds, 300 U.S. 342 (1937) (holding that prejudgment interest is discretionary in admiralty actions).

32. *See* Gardner v. Nat'l Bulk Carriers, Inc., 333 F.2d 676 (4th Cir. 1964) (holding that prejudgment interest is not available in a Jones Act action brought at law). *But see* Trexler v. Tug Raven, 290 F.Supp 429 (E.D. Va. 1968), rev'd on other grounds, 419 F.2d 536 (4th Cir. 1969) (holding that prejudgment interest is available at law under the Jones Act).

before a jury.[33] One situation that makes it particularly vexing for understanding what courts think about prejudgment interest is when there is a Jones Act claim mixed with one or more other claims and the judgment does not specify on which claim prejudgment interest has been granted.[34]

Federal circuit courts remain split on whether prejudgment interest is available on a mixed claim. The Fifth Circuit has held that when there are claims under the Jones Act and under general maritime law and the damages are not differentiated between the claims, the fact that prejudgment interest is not available under the Jones Act precludes the award of prejudgment interest on the maritime claim.[35] Similarly, the Sixth Circuit has held that when "it is impossible to determine if the damages awarded relate only to the unseaworthiness claim, prejudgment interest will not be awarded at all."[36] However, the Second Circuit held, in a decision six years after *Petersen*, that when an award on a mixed claim does not apportion the judgment by claim, the award should allow prejudgment interest if it is available on either claim because this "provides the most complete recovery."[37] The circumstances of these conflicting cases will be explored further below.

III. EXISTING CIRCUIT SPLIT

A. Prejudgment Interest Is Not Available – Fifth and Sixth Circuits

The Fifth Circuit considered the issue of prejudgment interest on a mixed Jones Act and maritime claim in *Wyatt v. Penrod Drilling Co*. in 1984.[38] In *Wyatt*, the plaintiff was a kitchen steward on the defendant's oil rig.[39] The workers slept in shifts in shared sleeping quarters and would often get in and out of bed with the lights off to avoid disturbing a sleeping

33. *See* Wyatt v. Penrod Drilling Co., 735 F.2d 951 (5th Cir. 1984) (affirming lower court's decision not to award prejudgment interest on Jones Act claim in a jury trial).

34. Waldman, *supra* note 26, § 2(a).

35. *Wyatt*, 735 F.2d at 956.

36. Petersen v. Chesapeake & O. R. Co., 784 F.2d 732, 741 (6th Cir. 1986) (citing *Wyatt*, 735 F.2d at 956).

37. Magee v. United States Lines, Inc., 976 F.2d 821, 822 (2d Cir. 1992).

38. *Wyatt*, 735 F.2d 951. The Sixth Circuit adopted *Wyatt* in *Petersen*. *Petersen*, 784 F.2d at 741 (holding that prejudgment interest was not available under the Jones Act because it was a jury trial and not available under maritime law because it would have to be submitted to the jury and that even if prejudgment interest under maritime law had been submitted to the jury, the maritime claim was inseparable from the Jones Act claim, meaning that prejudgment interest should not be awarded at all).

39. *Id.* at 952.

colleague.[40] Wyatt had an upper bunk and, because there was no ladder, usually jumped down rather than risk stepping on the person in the lower bunk.[41] On September 24, 1981, at around 4:00 a.m., Wyatt jumped out of bed in the dark and injured his back after falling when his foot struck a chair that had been moved.[42] Wyatt was hospitalized for six weeks due to the injury and was deemed twenty percent permanently disabled after back surgery.[43] Wyatt sued his employers for negligence under the Jones Act and unseaworthiness under maritime law due to the lack of safe exit from the bunks.[44] The judge ultimately concluded that prejudgment interest was not available after the jury found that although the oil rig was unseaworthy and Wyatt's employer was negligent, there was also contributory negligence on Wyatt's part.[45]

In appealing the denial of prejudgment interest, Wyatt attempted to argue that Louisiana state law entitled him to prejudgment interest even though he had made no claim under state law; the Fifth Circuit rejected this and applied federal law.[46] The court noted that under federal law, it could not grant prejudgment interest on Jones Act claims tried to a jury.[47] However, the court noted that it could grant prejudgment interest on a maritime law claim tried to a judge or on a mixed Jones Act and maritime claim tried before a judge, at the judge's discretion.[48] Up to that point, the Fifth Circuit had never addressed prejudgment interest in a mixed claim tried to a jury.[49] In *Wyatt*, the court affirmed the trial judge's reasoning that, since prejudgment interest was not available on damages awarded under the Jones Act by a jury, no prejudgment interest could be awarded at all because it was impossible to determine which damages were attributable to the maritime claim alone.[50] The *Wyatt* court quoted the lower court's comment that "the plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones

40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*. at 953.
45. *Id*.
46. *Id*. at 955 (citing Havis v. Petroleum Helicopters, Inc, 664 F.2d 54 (5th Cir. 1981); Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973)).
47. *Id*. (citing Barrios v. La. Constr. Materials Co., 465 F.2d 1157 (5th Cir. 1972); Sanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958 (5th Cir. 1969)).
48. *Id*. at 956 (citing Ceja v. Mike Hooks, Inc., 690 F.2d 1191 (5th Cir. 1982)).
49. *Id*.
50. *Id*.

Act claim . . . and then attempt to unscramble the verdict after he prevails."[51]

B. Prejudgment Interest Is Available – Second Circuit

The Second Circuit considered the issue of prejudgment interest on a mixed Jones Act and maritime unseaworthiness claim in *Magee v. United States Lines, Inc*. in 1992.[52] A jury awarded Magee a judgment for injuries he sustained while working on a ship owned and operated by United States Lines, Inc.[53] At trial, the parties agreed that the judge would decide the issue of prejudgment interest rather than the jury.[54] After hearing from counsel on the matter, the trial court entered the judgment, less six percent for contributory negligence, but did not include an award for prejudgment interest.[55] After cross-appeals regarding the denial of prejudgment interest and other issues, the Second Circuit vacated the part of the initial judgment that denied prejudgment interest.[56]

In its opinion, the Second Circuit noted that Magee brought claims both for negligence under the Jones Act and for unseaworthiness under general maritime law.[57] The court cited case law stating that a court may augment an award for unseaworthiness with prejudgment interest,[58] but a court generally may not add prejudgment interest to an award under the Jones Act.[59] With regard to these two theories of liability, the jury had answered in the affirmative as to whether the plaintiff had established each claim "by a fair preponderance of the evidence."[60] After the district court judge heard from counsel on the issue of whether plaintiff was entitled to prejudgment interest on the unseaworthiness claim when the jury had not apportioned recovery between the two theories of liability, the judge held that prejudgment interest was not available, relying mainly on Fifth Circuit law as stated above, which the Sixth Circuit followed.[61] Here, the Second

51. *Id*. (quoting Barton v. Zapata Offshore Co., 397 F. Supp. 778, 780 (E.D. La. 1975).
52. Magee v. United States Lines, Inc., 976 F.2d 821 (2d Cir. 1992).
53. *Id*. at 822.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id*. (citing Petition of the City of New York, 332 F.2d 1006, 1007-08 (2d Cir.), *cert. denied*, 379 U.S. 922 (1964)).
59. *Id*. (citing Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 592 (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962)).
60. *Id.*
61. *Id.*

Circuit reached a different conclusion than the district court and the Fifth and Sixth Circuits.[62]

The court reasoned that it is hardly unusual for a tort claim to result in recovery under separate theories of liability as it did in this case.[63] The court then gave a number of examples of situations that support its preferred rule that "where only a single award of damages, not segregated into separate components, is made . . . the successful plaintiff [should] be paid under the theory of liability that provides the most complete recovery."[64] Further, it is settled law in the Second Circuit that prejudgment interest should be granted on a maritime claim unless exceptional circumstances militate against it.[65] By the time of this opinion, it was "well recognized" that claims under unseaworthiness and under the Jones Act are like conjoined twins and that "'since the recovery is the same under either count, the question whether [plaintiff] recovers for negligence or for unseaworthiness is hardly worth asking.'"[66] The court, therefore, held that because there was no difference in the recovery under either claim, there was no reason to deny prejudgment interest when it was allowed under one but not the other.[67]

IV. NEVOR

A. Facts and Procedural History

In *Nevor v. Moneypenny Holdings, LLC*, Judge Selya wrote for a three-judge panel of the First Circuit and affirmed the district court's award of prejudgment interest on a maritime personal injury claim brought both for negligence under the Jones Act and for unseaworthiness under general maritime law in a bench trial.[68]

Plaintiff-appellee Kenneth Nevor (Nevor) had been a professional sailor with experience sailing, repairing, racing, and transporting sailboats

62. *Id.*

63. *Id.*

64. *Id.* (citing Mallis v. Bankers Trust Co., 717 F.2d 683, 695 (2d Cir. 1983) (federal securities law and common law fraud and misrepresentation); Foley v. City of Lowell, Mass., 948 F.2d 10, 17 (1st Cir. 1991) (federal and state civil rights claims); Doty v. Sewall, 908 F.2d 1053, 1063 (1st Cir. 1990) (fair representation claim under Labor-Management Reporting and Disclosure Act and state civil rights law)).

65. *Id.* at 823.

66. *Id.* (quoting Gilmore & Black, *The Law of Admiralty* 389 (2d ed. 1975)).

67. *Id.*

68. *See* Nevor v. Moneypenny Holdings, LLC, 842 F.3d 113 (1st Cir. 2016).

and racing yachts.[69] After beginning to sail as a child, Nevor had competed in a number of elite sailing races by the time he was thirty-five years old.[70] At the time of the incident that led to his filing the lawsuit, Nevor was employed by defendant-appellant Moneypenny Holdings, LLC (Moneypenny), the owner of a fifty-two-foot sailboat named Vesper and a thirty-five-foot motor support vessel named Odd Job.[71]

In March 2011, Nevor was among the crew members preparing the Vesper for a regatta in the Caribbean.[72] As the vessel travelled near the British Virgin Islands, the crew was required to return to St. Thomas to clear customs, but the Vesper would continue on without them.[73] The Odd Job was dispatched to collect the crew members and take them ashore, and once the boats were alongside each other, the captain of the Vesper told Nevor and some of the other crew members to move from the Vesper to the Odd Job.[74] Although the wind was blowing at a normal speed for the time of year, eight to twelve knots, the sea was choppy.[75] Despite this, the captain did not lash the vessels together before beginning the crew transfer.[76]

Because the boats were not lashed together, they separated just as Nevor stepped off the Vesper toward the Odd Job.[77] Nevor slipped as the boats moved apart, and he reached out for the lifeline of the Vesper with his hand and the Odd Job with his foot.[78] He managed to make it across to the Odd Job, but the bicep of his right arm was torn from the bone by the physical stress of the event.[79] Nevor stayed to help prepare for the race for two weeks after his injury before returning the United States for surgery.[80] After the operation, Nevor underwent six months of physical therapy, but upon completion of the therapy, residual atrophy was found in his reattached muscle.[81] Months later, a specialist advised Nevor that his right arm was weaker than his left and would probably remain so; the physician

69. *Id*. at 116.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id*. at 116-17.
80. *Id.* at 117.
81. *Id.*

concluded that Nevor would no longer be able to perform the type of heavy lifting required by his previous work on sailing vessels.[82]

In June 2013, Nevor filed suit against Moneypenny in Rhode Island federal district court, alleging negligence under the Jones Act and unseaworthiness under general maritime law.[83] After a four-day bench trial, the district court awarded Nevor "$1,460,458 in damages ($710,458 for loss of earnings and loss of future earning capacity and $750,000 for pain, suffering, and mental anguish)."[84] The court later granted Nevor's motion to add prejudgment interest to the award, "which totaled $858,029, [and] brought the aggregate judgment to $2,318,487 (plus costs)."[85] Moneypenny appealed,[86] conceding liability but claiming that the damage award was excessive and that prejudgment interest was inappropriate.[87] The First Circuit affirmed the district court's award of damages in full before moving on to the question of prejudgment interest.[88]

B. Holding and Reasoning

There were two issues related to prejudgment interest in *Nevor*, only one of which is relevant to our discussion. In addition to Moneypenny's assertion that Nevor's success on his Jones Act claim should have ruled out any award of prejudgment interest, Moneypenny also argued that, even if Nevor were entitled to prejudgment interest, it should not have been awarded based on damages for future harm.[89] The Court was quickly able to dispense with the latter issue, as there was clear and long-established law on the matter.[90]

When considering the question of prejudgment interest on a mixed award on claims for negligence under the Jones Act and unseaworthiness under general maritime law, the court applied "de novo review to

82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id.* Moneypenny filed two separate appeals, but the First Circuit considered them as one consolidated appeal. *Id*. n.3.
87. *Id*. at 117.
88. *Id*. at 117-21.
89. *Id*. at 121.
90. *Id.* at 125 ("In this circuit, the law is well-established that 'prejudgment interest should not be awarded on damages for future loss, either liquidated or unliquidated.' *Borges*, 935 F.2d at 444-45 (collecting cases). This is a reflection of the commonsense notion that interest should not accrue before the harm itself has occurred").

questions of law and abuse-of-discretion review to judgment calls."[91] The Court also noted that the First Circuit has never addressed this issue.[92]

This section of the opinion begins with a brief discussion of the state of the law in this area and sets up the circuit split as described above.[93] The Court notes that prejudgment interest is generally not available in pure Jones Act suits but is generally available for unseaworthiness under general maritime law.[94] The Court then lays out the split over whether prejudgment interest is available on a mixed claim, with the Fifth and Sixth Circuits saying that it is not available and the Second Circuit saying that is.[95]

After setting the scene, which Judge Selya calls "the stormy sea [in which] we must anchor our analysis," he dismisses Moneypenny's attempt to avoid the issue of the mixed award by claiming that the district court had awarded damages based on the Jones Act claim alone.[96] The order in which the district court awarded prejudgment interest "explicitly found that Nevor was entitled to prejudgment interest because the damages award was, at least in part, under general maritime law."[97] The Court found that the district court's finding that the damages award was based in part on unseaworthiness was not clearly erroneous and that the district court's "characterization of its own findings is entitled to some deference."[98] After noting that the district court, which was sitting without a jury, was "entitled to weigh the evidence and to draw reasonable inferences," the Court concluded that Nevor's damages award was, in fact, mixed.[99]

The Court also dealt swiftly with Moneypenny's argument that, "even if the lack of non-skid product rendered the Odd Job unseaworthy, the record does not establish that this particular unseaworthiness contributed to Nevor's injuries."[100] The Court stated that, even if Moneypenny's assertion were plausible, it would not change the Court's conclusion on unseaworthiness, given that the district court's findings on Moneypenny's failure to provide appropriate training and safety measures were "well-

91. *Id*. at 121.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*. at 122 (citing Magee v. United States Lines, Inc., 976 F.2d 821, 822 (2d Cir. 1992); Petersen v. Chesapeake & O. R. Co., 784 F.2d 732, 741 (6th Cir. 1986); Wyatt v. Penrod Drilling Co., 735 F.2d 951, 956 (5th Cir. 1984)).
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.

documented . . . and those findings are alone sufficient to show that the damages award was based at least in part on a viable theory of unseaworthiness."[101]

Satisfied that damages were based on both a successful unseaworthiness claim and a successful Jones Act claim, the Court turned to the question of whether the Jones Act claim precludes prejudgment interest on the mixed award.[102] Assuming without deciding that a Jones Act claim on its own would not bear prejudgment interest, the Court held that "when a court, in a bench trial, awards damages based on mixed Jones Act and unseaworthiness claims, prejudgment interest is available."[103]

The Court noted that, as opposed to some of the cases Moneypenny cites, Nevor wanted the Court to grant a remedy that was available before the advent of the Jones Act, namely the award of prejudgment interest on a maritime law award.[104] The Court acknowledged that "'prejudgment interest traditionally has been considered part of the compensation due plaintiff'"[105] and that the "'essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss' and '[f]ull compensation has long been recognized as a basic principle of admiralty law.'"[106] Prejudgment interest attempts to help make injured plaintiffs whole, but Moneypenny's view of prejudgment interest would keep many successful plaintiffs from recovering all that they would ordinarily receive from a claim.[107]

A plaintiff recovering damages on an unseaworthiness claim, or any maritime law claim, can lose the right to prejudgment interest if exceptional circumstances make such an award inappropriate or inequitable.[108] Exceptional circumstances could include "undue delay by the prevailing party, exorbitant overestimation of damages, or bad faith."[109] The Court concluded that there was no such circumstance evident

101. *Id*. at 122-23 (citing Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 427 (1959); Cape Fear, Inc. v. Martin, 312 F.3d 496, 500 (1st Cir. 2002) (both explaining that crew procedures and not only the condition of the ship may make a ship unseaworthy)).

102. *Id*. at 123.

103. *Id*.

104. *Id*.

105. *Id*. at 124 (quoting Osterneck v. Ernst & Whitney, 489 U.S. 169, 175 (1989)).

106. *Id*. (quoting City of Milwaukee v. Cement Div., Nat'l. Gypsum Co., 515 U.S. 189, 195-96 (1995)).

107. *Id*.

108. *Id*.

109. *Id*.

in this case; Nevor "prosecuted his case forcefully, but not unreasonably so."[110]

Next, the Court noted that although it has never addressed the exact issue presented in this case, it has ruled on a sufficiently analogous case.[111] In that case, the Court ruled that if a plaintiff "raises claims under parallel causes of action . . . and receives a damages award straddling both of those fully aligned claims, the defendant may not cite the presence of a more restricted remedy on one claim to deny the plaintiff a more expansive remedy on the other claim."[112] Because there were overlapping claims with one allowing greater recovery, the Court concluded that "the plaintiff may choose to be awarded damages based on state law if that law offers a more generous outcome than federal law."[113]

Ultimately, the Court held that the same reasoning applied here as when "a plaintiff has prevailed on fully aligned Jones Act and unseaworthiness claims."[114] Because Nevor was entitled to prejudgment interest on the unseaworthiness claim, even if it were a standalone claim, "there is no logical reason why his broader success should strip him of that entitlement."[115]

After settling the mixed claim issue, the Court overturned the district court's award of prejudgment interest based on future harm, saying that the court "went too far."[116] First Circuit precedent has long held that "prejudgment interest should not be awarded on damages for future loss."[117] The Court concluded that the district court was bound to follow precedent and that "its failure to do so constitutes reversible error."[118]

---

110. *Id*.

111. *Id*.

112. *Id*. (quoting Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 146 (1st Cir. 2009) (explaining that "a successful plaintiff's right to a particular remedy under federal law does not trump his right to a more advantageous remedy under state law").

113. *Id*. (quoting *Tobin*, 553 F.3d at 146; *accord* Freeman v. Package Mach. Co., 865 F.2d 1331, 1345 (1st Cir. 1988) (noting that while plaintiff is "entitled to only a single slice of the pie[,] . . . the choice of the slice [is] his").

114. *Id*.

115. *Id*.

116. *Id*. at 125.

117. Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 444 (1st Cir. 1991).

118. *Nevor*, 842 F.3d at 125.

V. ANALYSIS

A. First and Second Circuit Argument Is More Logical

The Fifth and Sixth Circuits held that on a mixed claim under unseaworthiness and the Jones Act, a plaintiff is not entitled to prejudgment interest. Although it is available on a standalone unseaworthiness claim, it is not available on a standalone Jones Act claim, and therefore the Jones Act prohibition "cancels out" the availability under maritime law. This argument does not hold water. These courts point to no analogous situation in which recovery on one type of claim renders recovery on another type of claim invalid. It points to no analogous situation in which the default position is to allow a plaintiff to recover less than what is available. The courts here simply argue, with scant support, that if a plaintiff cannot have one, then the plaintiff cannot have either.

This notion would strike many, including the Second Circuit and now the First, as antithetical to the ideas that prejudgment interest is part of what is due a plaintiff and that a plaintiff should be able to recover in whatever way will come closest to making the plaintiff whole. Because Nevor prevailed on his mixed claim under unseaworthiness and the Jones Act and because the award was not apportioned between them, the district court made the determination that if Nevor could not have one, he could still have the other and be awarded prejudgment interest based on the unseaworthiness claim. Aside from making more sense and there being no logical reason for a judgment otherwise, this method allows greater recovery for the plaintiff. It is unclear why the Fifth and Sixth Circuits wish to penalize successful litigants. The First and Second Circuit approach is more sensible and more appropriate to the task of making plaintiffs whole again.

B. Trial Courts Should Be Clearer; SCOTUS Should Require It

A large part of the issue presented in this case and the cases like it is that trial courts, either through a jury or judge, do not specify how much of the award is based on each claim in a mixed award. Knowing that this has caused consternation and has left avenues for appeal, it seems that lower courts could easily avoid this situation by making a determination as to how much of the award is based on each claim. This would give more clarity to the litigants in a given case. It would also give more clarity to future litigants as to what strategy they might pursue when making their case. Further, it might reduce the possibility of trial court decisions being overturned on appeal.

More importantly for this case, it would obviate this circuit split because if a court knew that, say, half the award was based on unseaworthiness and half on the Jones Act, the court could then award prejudgment interest on the unseaworthiness award alone and leave the Jones Act award untouched. However, such determinations themselves as to how much of the award is based on each claim would likely become the point on which appeals are made. It may not make much difference how clear trial courts are about what the award is based on if there is still a difference of opinion about whether and when prejudgment interest is available.

This leads us to the ultimate point of this Note. The Supreme Court of the United States can and should settle this. As of this writing, Moneypenny has not filed for certiorari, but if it did, this would be the sort of long-standing circuit split that the Court might take on. It is difficult to say how the Court would rule, but based solely on the idea that granting prejudgment interest allows a plaintiff to recover more fully, it is likely that the Court would agree with the approach adopted in the First and Second Circuits and allow prejudgment interest on a mixed claim. Hopefully they will get the chance to have their say.

VI. CONCLUSION

Although the First Circuit likely reached the correct conclusion with respect to the availability of prejudgment interest, the waters will remain unsettled until the Supreme Court steps in to put an end to the debate among the circuits. With no known petition for certiorari on the horizon, that ship may have sailed for now. However, at least within the First and Second Circuits, plaintiffs who wish to recover prejudgment interest on a mixed claim for unseaworthiness and under the Jones Act now have smooth sailing.