

Seize and Desist: Damages for Wrongful Maritime Seizure*

Michael H. Bagot, Jr.[†]
Dana A. Henderson**

I.	INTRODUCTION	118
II.	ATTACHMENT AND ARREST IN ADMIRALTY	119
	A. <i>Maritime Attachment</i>	120
	B. <i>Maritime Arrest</i>	122
III.	CLAIMS FOR WRONGFUL SEIZURE	123
	A. <i>Wrongful Arrest and/or Attachment</i>	123
	B. <i>Conversion</i>	125
	C. <i>Trespass</i>	127
IV.	THE SEIZING PARTY’S DEFENSES TO A CLAIM FOR WRONGFUL SEIZURE	128
	A. <i>Advice of Competent Counsel</i>	128
	B. <i>Lack of Knowledge, Intent, Bad Faith, and/or Malice</i>	131
	C. <i>Pursuant to Court Order</i>	131
	D. <i>Condition of Property/Wear and Tear</i>	131
	E. <i>Property’s Actual Use</i>	132
	F. <i>Failure to Mitigate Damages</i>	132
V.	DAMAGES FOR WRONGFUL SEIZURE	133
	A. <i>Damages, Generally</i>	133
	B. <i>Damages Recoverable for Intentional Wrongful Seizure</i>	135
VI.	CLASSES OF DAMAGES RECOVERABLE FOR SPECIFIC TYPES OF LOSSES	137
	A. <i>Repairable Damages—Less than Total Loss</i>	137
	1. Repair Costs, Defendants’ Burden of Proof.....	137

* Article previously published under the title *What Damages May This Way Come? Damages Arising Out of Wrongful Seizure*, as part of the Program Materials for the Southeastern Admiralty Law Institute Seminar 2000. Copyright, Institute of Continuing Legal Education in Georgia. All rights reserved.

[†] Partner, Wagner & Bagot, New Orleans, Louisiana; J.D. with honors 1980, University of Texas; B.A. cum laude 1977, Vanderbilt University.

** Associate, Wagner & Bagot, New Orleans, Louisiana; J.D. cum laude 1997, Tulane University School of Law; B.A. 1994, University of Washington.

2.	Temporary Repairs and Depreciation.....	138
3.	Loss of Use/Demurrage	138
B.	<i>Total Loss</i>	138
1.	Actual vs. Constructive Total Loss	139
2.	Market Value.....	140
3.	Alternative to Market Value—Replacement Cost	141
4.	Special Use/Special Value.....	141
5.	Future Lost Profits Are Not Recoverable.....	142
VII.	PROVING NECESSARY ELEMENTS OF SPECIFIC TYPES OF DAMAGES	143
A.	<i>Loss of Use/Lost Profits</i>	143
B.	<i>Punitive Damages</i>	146
C.	<i>Litigation, Release Costs</i>	148
D.	<i>Prejudgment Interest</i>	149
VIII.	RECOMMENDATIONS TO PRACTITIONERS	150

I. INTRODUCTION

There are two court-sanctioned ways of seizing property or vessels in admiralty. The first is attachment, and the second is arrest. Both have been part of general maritime law since before the United States was a nation. Without these procedures, it is doubtful that maritime commerce would develop as it has. As the United States Supreme Court stated in *In re Louisville Underwriters*:

Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places. In all nations, as observed by an early writer, such courts “have been directed to proceed at such times, and in such manner, as might best consist with the opportunities of trade, and least hinder or detain men from their employments.”. . . To compel suitors in admiralty when the ship is abroad and cannot be reached by a libel in rem to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience, and expense, but would in many cases amount to a denial of justice.¹

Unlike land-based seizure or garnishment law which was found constitutionally infirm by the United States Supreme Court in the

1. 134 U.S. 488, 493 (1890).

Sniadach line of cases,² admiralty procedures for arrest and attachment have been applied throughout our nation's history, with hardly a complaint, due to (a) the historical background of the procedures, (b) maritime commerce's need for such procedures, and (c) the safeguards embodied in the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure³ including swift post-seizure hearing.

This Article will focus on seizures that give rise to a valid complaint: when property has been wrongfully detained or seized through wrongful arrest or attachment, conversion, or trespass, all referred to herein as "wrongful seizure." Further, recommendations for both pursuing and defending such claims will follow the general discussion regarding this type of claim.

II. ATTACHMENT AND ARREST IN ADMIRALTY

Arrest and attachment are admiralty procedures that allow a claimant to either obtain personal jurisdiction over another by attaching that party's assets (attachment)⁴ or to assert a claim in rem directly against the maritime property (arrest).⁵ Maritime arrest and attachment are distinctive admiralty remedies that have been part of U.S. general maritime law jurisprudence since the adoption of the Constitution of the United States.⁶ Attachment has been described by the Supreme Court as a method by which a party may

compel appearance by the process of attachment on the goods of the [wrongdoer], according to the forms of the civil law, as ingrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied⁷

Arrest has been historically based on a legal fiction that personifies the vessel, allowing claims to be asserted directly against the res as if it were

2. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). *But see Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

3. FED. R. CIV. P. Supp. A-F.

4. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 21-2, at 505 (3d ed. 2001).

5. *Id.* § 21-2, at 478-80.

6. *See Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 488-90 (1825); *see also Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 385-86 (1924); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1531-32, 1986 AMC 1, 5 (11th Cir. 1985) (en banc).

7. *Manro*, 23 U.S. at 496; *see also Grand Bah. Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 453, 1978 AMC 789, 799 (W.D. Wash. 1978); *Schiffahrtsgesellschaft*, 773 F.2d at 1533, 1986 AMC at 7-8.

the wrongdoer.⁸ “The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master . . . [i]t is, therefore, not unreasonable, that the vessel should be affected”⁹

The *Manro* decision discusses the history of maritime seizures in light of the Process Act of 1789, which required federal courts to apply civil law as opposed to common law in maritime cases, and the Process Act of 1792, requiring courts to utilize the procedures “according to the principles, rules, and usages, which belong to Courts of admiralty, as contradistinguished from Courts of common law.”¹⁰

In 1842, Congress authorized the Supreme Court to adopt admiralty rules that became effective in 1844.¹¹ These first admiralty rules laid the foundation for maritime procedures, including attachment and arrest which were later adopted as Rule 2 (attachment) and Rules 13-18 (arrest) of the Rules of Practice in Admiralty and Maritime Cases promulgated and adopted by the Supreme Court in 1920.¹² Current Supplemental Rules B, C, and E are direct descendants of the 1920 Rules of Practice, and were codified in 1966 as a supplement to the Federal Rules of Civil Procedure as part of the unification of federal, civil, and admiralty procedure.¹³

Claims for wrongful seizure are maritime torts and will be subject to federal maritime jurisdiction and general maritime law, as long as the acts or omissions meet the necessary “locality-plus-nexus” test.¹⁴

A. *Maritime Attachment*

Maritime attachment allows a claimant to gain in personam jurisdiction over a party by asserting a quasi in rem claim directly against that party’s property located in the jurisdiction.¹⁵ Maritime attachment is

8. See *Harmony v. United States (The Brig Malek Adhel)*, 43 U.S. 210, 233-34 (1844).

9. *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612). See generally *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827); *The Brig Malek Adhel*, 43 U.S. at 233-34.

10. *Manro*, 23 U.S. at 488 (quoting Process Act of 1792, ch. 36, 1 Stat. 276 (1792)).

11. See Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 518.

12. 5 BENEDICT ON ADMIRALTY 57 (Aileen Jenner et al. eds., 7th ed. rev. 1992).

13. See Advisory Committee Notes to the Supplemental Rules for Certain Admiralty and Maritime Claims, Rules B, C, and E; *Grand Bah.*, 450 F. Supp. at 455, 1978 AMC at 800; *Schiffahrtsgesellschaft*, 773 F.2d at 1533, 1986 AMC at 8.

14. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 256, 1973 AMC 1, 15-16 (1972); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533, 1995 AMC 913, 917-18 (1995); see, e.g., *Gaspard v. Amerada Hess Corp.*, 13 F.3d 165, 1994 AMC 1263 (5th Cir. 1994).

15. *Stevedoring Serv. of Am. v. Ancora Transp., N.V.*, 884 F.2d 1250, 1252, 1989 AMC 2789, 2792 (9th Cir. 1989), *vacated*, 506 U.S. 1043, 1993 AMC 2997 (1993).

only appropriate when the plaintiff has a valid in personam admiralty or maritime claim against a defendant, and it allows the plaintiff to assert personal jurisdiction over a defendant who could not otherwise be sued in a particular jurisdiction.¹⁶ Maritime attachment accomplishes the acquisition of personal jurisdiction over a defendant, as well as security for a claim.¹⁷

A writ of maritime attachment is proper when the following prerequisites are met: (1) the plaintiff has a prima facie claim against the defendant which is (2) cognizable in admiralty, (3) the defendant cannot be found within the district in which the action is commenced, (4) the property belonging to the defendant is present or will soon be present in the district, and (5) there is no statutory or general maritime law prohibition to the attachment.¹⁸

Rule B provides that in connection with an admiralty in personam claim, “a verified complaint may contain a prayer for process to attach the defendant’s goods and chattels, . . . if the defendant shall not be found within the district.”¹⁹ A defendant is present in the district if (1) the defendant can be found within the district in terms of jurisdiction, and (2) the defendant can be found within the district for service of process.²⁰ If the answer to each question is affirmative, then the defendant can be found in the district and attachment is inappropriate.²¹ Under Rule B, the seizing party should submit an affidavit attesting that, to the plaintiff’s or his attorney’s knowledge, information, and belief, the defendant cannot be found within the district.²² If the verified complaint sets forth all of Rule B’s requirements of attachment, the court shall issue an order authorizing process of attachment.²³ Under “exigent circumstances,” this plea for attachment may be made directly to the clerk, who shall issue a summons and process of attachment.²⁴

16. *Id.*

17. *Id.* at 1254, 1989 AMC at 2794-95; *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 962, 1985 AMC 1, 9 (1st Cir. 1984), *aff’d*, 804 F.2d 773, 1987 AMC 1115 (1st Cir. 1986); *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 581-82, 1964 AMC 617, 619 (2d Cir. 1963); *Jackson v. Inland Oil Transp. Co.*, 318 F.2d 802, 806 (5th Cir. 1963) (*per curiam*).

18. FED. R. CIV. P. Supp. B; *see also* *W. Bulk Carriers, Pty. Ltd. v. P.S. Int’l, Ltd.*, 762 F. Supp. 1302, 1306, 1991 AMC 2828, 2832 (S.D. Ohio 1991) (citing 7A MOORE’S FEDERAL PRACTICE ¶ B.03 (2d ed. 1988)).

19. FED. R. CIV. P. Supp. B.

20. *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264, 268, 1998 AMC 982, 986 (5th Cir. 1998) (citing *LaBanca v. Ostermunchner*, 664 F.2d 65, 67, 1982 AMC 205, 206 (5th Cir. 1981)).

21. *Id.*

22. FED. R. CIV. P. Supp. B.

23. *Id.*

24. *Id.*

Attachment of property, including vessels, may also be pursued in state court, pursuant to the state's procedural requirements for attachment.²⁵ In fact, state law requirements may be less onerous and less expensive than those provided by federal law.²⁶ Property owners have attacked the application of state attachment laws in maritime settings, but their attempts have been repeatedly repulsed.²⁷

B. *Maritime Arrest*

Maritime arrest differs from attachment in that arrest is a purely in rem remedy whereby the claim is asserted directly against a vessel or other maritime property such as freight or cargo.²⁸ This procedure requires that a plaintiff possess a maritime lien, and the in rem process may only be asserted against property that is subject to the lien.²⁹ Unlike attachment, arrest is cognizable only in federal court.³⁰

Rule C provides that an action in rem may be brought to enforce a maritime lien or pursuant to federal statute, and further provides that an action in rem does not preclude a claimant from also asserting an in personam action.³¹ This rule requires that a claimant file a complaint that is accompanied with a verification "on oath or solemn affirmation" that describes with "reasonable particularity" the property subject to the action, and pleads that the property is located within the district.³² If the conditions for an action in rem appear to be present, a warrant for arrest

25. See, e.g., selected coastal states' codal provisions regarding attachment: LA. CODE CIV. PROC. ANN. arts. 3501-3502 (West 2000); ALA. CODE §§ 6-6-140 to -149 (2000); ALASKA STAT. § 09.40.010 (Michie 2000); CAL. CIV. PROC. CODE § 492.010 (West 2000); D.C. CODE ANN. §§ 16-501 to -583 (2000); FLA. STAT. ANN. § 76.01-.32 (West 2000) (stating that attachment is not available in tort actions except those arising from navigation, direction or management of vessels, etc.); GA. CODE ANN. §§ 18-3-1 to -75 (1999); ME. REV. STAT. ANN. tit. 14, § 4101 (West 1999); MD. CODE ANN., CTS. & JUD. PROC. § 2-641 (1998); MASS. GEN. LAWS ANN. ch. 227, § 1 (West 2000); MISS. CODE ANN. § 11-31-1 (2000); N.Y. C.P.L.R. § 7502[c] (Consol. 2000); N.C. GEN. STAT. §§ 1-440.1 to .46 (1999); S.C. CODE ANN. §§ 15-19-10, 15-41-30, 16-3-1300, 43-5-190, 15-19-300 to -340 (Law. Co-op. 1997) (regarding the release of property); TEX. CIV. PRAC. & REM. CODE ANN. § 61.001-003 (Vernon 2000); VA. CODE ANN. § 8.01-533 (Michie 2000); WASH. REV. CODE § 6.25.020 (2000).

26. *Vivian Tankships Corp. v. Castro*, 24 F. Supp. 2d 650, 654, 1999 AMC 1155, 1159-60 (E.D. La. 1998) (involving an unsuccessful constitutional challenge to Louisiana State attachment proceedings which require only a \$250 bond).

27. See *Lejano v. Bandak*, 705 So. 2d 158, 165, 1998 AMC 692, 700 (La. 1997); FED. R. CIV. P. Supp. B, advisory committee's notes.

28. FED. R. CIV. P. Supp. C; see also 2 SCHOENBAUM, *supra* note 4, § 21-3, at 516 n.1.

29. *Id.*

30. See generally *Madruga v. Superior Court*, 346 U.S. 556, 560, 1954 AMC 405, 408 (1954).

31. FED. R. CIV. P. Supp. C.

32. *Id.*

of the property should be issued,³³ and “[t]he courts cannot find a party asserting a bona fide lien liable for wrongful arrest.”³⁴

III. CLAIMS FOR WRONGFUL SEIZURE

The effect and importance of these valid admiralty procedures in a litigation or collection context have been aptly described as follows:

Maritime arrest, like maritime attachment, is a powerful procedural tool in the hands of the plaintiff. The action in rem allows the arrest of the vessel even though the shipowner’s only contact with the jurisdiction is the presence of the vessel. . . . The plaintiff has a considerable tactical advantage because the shipowner must post bond to release the vessel or, alternatively, obtain the plaintiff’s consent or stipulation for release. . . . The shipowner may recover its expense only in a separate action for wrongful arrest, in which the standard for liability is bad faith.³⁵

As a matter of course, an improper seizure should be vacated by the court, and the arresting party will probably be liable for the detention costs including supplies, wharfage, and vessel maintenance expenses.³⁶

A. *Wrongful Arrest and/or Attachment*

Once the property has been attached or arrested pursuant to either Rule B or Rule C, any person with an interest in the property is entitled to a post-seizure hearing, at which that party may, pursuant to Rule E(4)(f), require the seizing party to prove that the arrest or attachment is valid.³⁷

Parties arresting or attaching property under Rules B and C may be summoned to defend the seizure in a post-seizure hearing before the court pursuant to Rule E(4)(f).³⁸ Rule E(4)(f) states that any person with an interest in property that has been arrested or attached “shall be entitled to a prompt hearing at which the plaintiff [the seizing party] shall be required to show why the arrest or attachment should not be vacated or

33. *Id.*

34. Keith B. Letourneau, *A Practical Guide to Admiralty Supplemental Rules A Through E (with Special Emphasis on the Southern District of Texas)*, 22 TUL. MAR. L.J. 417, 447 (1998) (citing *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496 at 500, 1992 AMC 2347, 2354 (5th Cir. 1992); *TTT Stevedores of Tex., Inc. v. M/V Jagat Vijeta*, 696 F.2d 1135, 1141, 1983 AMC 1980 (5th Cir. 1983)).

35. 2 SCHOENBAUM, *supra* note 4, § 21-3, at 517.

36. FED. R. CIV. P. Supp. E; *Marastro Compania Naviera S.A. v. Canadian Mar. Carriers, Ltd.*, 963 F.2d 754, 757, 1993 AMC 2274, 2277 (5th Cir. 1992) (per curiam).

37. FED. R. CIV. P. Supp. E.

38. *Id.*

other relief granted.”³⁹ This rule “is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings.”⁴⁰ While Rule E does not list a specific timeline for the post-seizure hearing, “the court is required to hold a hearing as promptly as possible to determine whether to allow the arrest or attachment to stand.”⁴¹

At the post-seizure hearing, in a maritime attachment case, the seizing party should be prepared to offer proof that (1) the defendant cannot be found in the jurisdiction, (2) the res can be found in the district, (3) the seizing party has a valid, prima facie, in personam admiralty claim against the defendant, (4) the defendant is the true owner of the res, and (5) there is no bar to attachment.⁴² If any of these elements are not present, attachment was improper and should be vacated.⁴³ In an arrest case, the seizing party will have to show (1) a valid lien against (2) *maritime* property that is (3) located in the district, in order for the arrest to stand.⁴⁴ The seizing party will be liable for *custodia legis* costs affiliated with a seizure that is vacated because any of the elements of Rule B or C are not met, even if the seizure was made in good faith.⁴⁵

Generally, an arrest or attachment is considered to be wrongful if it is made either contrary to law or without color of law.⁴⁶ A maritime property owner whose property has been improperly seized may bring suit against the transgressor in the form of a counterclaim or a separate tort action for wrongful seizure.⁴⁷ General maritime law regarding wrongful seizure is analogous to malicious prosecution and originates from land-based law, with its foundation being malice.⁴⁸ “The gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice, or gross negligence of the offending party.”⁴⁹

39. *Id.*

40. *Id.* advisory committee’s notes, 1985 Amendment.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See Michael L. Bono, *Remedies for Wrongful Seizure in Admiralty*—Marastro Compania Naviera S.A. v. Canadian Maritime Carriers, 17 TUL. MAR. L.J. 317, 319-20 (1993) (citing *Stewart v. Sonneborn*, 98 U.S. 187, 192 (1878)).

49. *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297, 1937 AMC 1259, 1266 (5th Cir. 1937); see also *The Alcalde*, 132 F. 576 (D. Wash. 1904); *Artinano v. W.R. Grace & Co.*, 286 F. 702, 706 (E.D. Va. 1923).

Wrongful arrest or attachment may be asserted by an owner of maritime property against the seizing party who will generally be liable for damages (as opposed to costs) only upon a showing of bad faith, malice or gross negligence.⁵⁰ General maritime law considers claims for abuse of process or malicious prosecution to be encompassed within the term “wrongful seizure.”⁵¹

There is a clear advantage to seizing property through court proceedings as opposed to independent “self-help” measures. When seizure is court-sanctioned, the claimant must prove bad faith to recover damages from the seizing party.⁵²

B. Conversion

An owner may also, in specific circumstances, assert a claim for conversion. Conversion is the “unlawful and wrongful exercise of dominion, ownership or control over the property of another, to the exclusion of the same rights by the owner.”⁵³ In an action for conversion caused by wrongful seizure, the property owner must show bad faith unless the seizing party acts without court approval or through self-help measures.⁵⁴ Conversion has been recognized as a tort cognizable in admiralty, provided that the wrong occurred on or over navigable waters.⁵⁵

The United States Court of Appeals for the Fifth Circuit recently explored the concept of negligent conversion in *Adams v. Unione*

50. See, e.g., *State Bank & Trust Co. of Golden Meadow v. Boat D.J. Griffin*, 755 F. Supp. 1389, 1401 (E.D. La. 1991); *Cent. Oil Co. v. M/V Lamma-Forest*, 821 F.2d 48, 51 (1st Cir. 1987); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440, 1989 AMC 910 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820, 1991 AMC 778 (2d Cir. 1990); *Furness Withy (Chartering), Inc., Pan. v. World Energy Sys. Assocs., Inc.*, 854 F.2d 410, 411-12, 1989 AMC 696, 697 (11th Cir. 1988); *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 499, 1992 AMC 2347, 2352 (5th Cir. 1992).

51. *Incas & Monterey Printing & Packing, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 964, 1985 AMC 968, 975 (5th Cir. 1984) (holding, among other things, that counter-security is not required for claims of wrongful seizure, because a claim for wrongful seizure does not arise out of the same transaction or occurrence as the original libel).

52. See, e.g., *Furness Withy*, 854 F.2d 410, 1989 AMC 696. This is not the case in matters involving trespass, in which neither good faith, care, nor knowledge are relevant.

53. *Goodpasture, Inc. v. M/V Pollux*, 602 F.2d 84, 87 1979 AMC 2515, 2520 (5th Cir. 1979) *modified*, 688 F.2d 1003, 1983 AMC 3000 (5th Cir. 1982) (quoting *Bankers Life Ins. Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1004 (5th Cir. 1971)).

54. *Furness Withy*, 854 F.2d at 411, 1989 AMC at 697.

55. *The Lydia*, 1 F.2d 18, 23, 1924 AMC 1001, 1009 (2d Cir. 1924). See generally *Gaspard v. Amerada Hess Corp.*, 13 F.3d 165, 167 (5th Cir. 1994). Another interesting and detailed discussion of maritime conversion can be found in Judge Walter Gex's unreported decision in *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, No. 98-CV-251GR (S.D. Miss July 19, 1999).

Mediterranea di Sicurta.⁵⁶ *Adams* is particularly interesting as it highlights the precarious position in which a salvor and the purchaser of salvaged property may find themselves. This case discusses a salvor's rights and duties, defenses to wrongful seizure, good and bad faith conversion, and sets forth guidelines for awarding damages for negligent conversion, absent bad faith.

In *Adams*, the salvor and the subsequent purchaser of sunken steel were sued for conversion of the cargo.⁵⁷ Although previously advised that the cargo was abandoned, the salvor and the purchaser were notified in writing during the salvage by the cargo owner to cease salvage operations and that the owner claimed title to the goods.⁵⁸ The district court found the salvor and purchaser to have negligently converted the cargo by exercising control by sale, purchase, and consumption, but had acted in good faith.⁵⁹ The cargo interest was awarded the difference between the discounted value of the property and the salvage expenses.⁶⁰

Affirming the lower court's finding of negligent conversion, the Fifth Circuit found that the salvor had a right of possession, and indeed a maritime lien for the salvage award, but no right to sell the goods as the salvor did not acquire title to the property.⁶¹ The court also addressed the good faith issue, and noted that under general maritime law, "it is not entirely clear what constitutes bad faith."⁶² Because there was a factual dispute regarding whether or not the cargo had been abandoned, the Fifth Circuit found that the salvor did not necessarily act in bad faith despite a written directive to the contrary by the cargo owner, but "may not have acted entirely in good faith."⁶³ Despite this note of skepticism, the *Adams* court affirmed the finding that the parties did not act in bad faith nor commit gross negligence, fraud, embezzlement, or corruption, and held that the lower court did not commit clear error in finding that the salvors acted in good faith.⁶⁴

56. 220 F.3d 659 (5th Cir. 2000).

57. *Id.* at 664.

58. *Id.* at 665.

59. *Id.* at 666.

60. *Id.*

61. *Id.* at 673.

62. *Id.* at 676.

63. *Id.*

64. *Id.* at 677.

C. Trespass

An alternate theory for recovery of the improper or illegal seizure of property is the common-law tort of trespass.⁶⁵ “In contrast to the malice requirement of wrongful seizure, the presence or absence of bad faith on the part of the defendant is of no consequence in a common-law trespass action.”⁶⁶ Further, “neither good faith nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the [trespass] action.”⁶⁷

Trespass has been recognized as a cause of action in admiralty, and some courts have specifically adopted the Restatement (Second) of Torts as the substantive law of maritime trespass actions.⁶⁸ The Restatement provides that: “One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another . . . is subject to liability . . . if his presence causes harm”⁶⁹ Note that if the trespasser enters the property negligently, but not intentionally, he will only be liable for the legal (foreseeable) consequences of his conduct.⁷⁰

The Restatement contains a privilege for entry pursuant to a court order, and a court order will bar any finding of trespass.⁷¹ This privilege is only valid if “any writ issued for the execution of the [court] order is valid or fair on its face.”⁷² Absent a showing of bad faith or other conduct sufficient to divest the seizing party of the privilege, entry pursuant to a court order will bar claims of trespass.⁷³

65. See Bono, *supra* note 48, at 319.

66. *Id.*

67. *Id.* at 319 n.14 (alteration in original) (quoting *Poggi v. Scott*, 139 P. 815, 816 (Cal. 1941)).

68. See, e.g., *Nissan Motor Corp. v. Md. Shipbuilding & Drydock Co.*, 544 F. Supp. 1104, 1116, 1983 AMC 663, 672 (D. Md. 1982), *aff'd*, 742 F.2d 1149 (4th Cir. 1984); *Marastro Compania Naviera S.A. v. Canadian Mar. Carriers, Ltd.*, 959 F.2d 49, 1993 AMC 2274 (5th Cir. 1992) (per curiam).

69. RESTATEMENT (SECOND) OF TORTS § 165 (1965); see also *id.* § 158 (intentional acts).

70. See *id.* § 165 cmt. b.

71. See *id.* § 210.

72. *Id.*

73. See *Consol. Rail Corp. v. M/T Hoegh Forum*, 630 F. Supp. 83, 87, 1986 AMC 1122, 1128-29 (E.D. Pa. 1985).

IV. THE SEIZING PARTY'S DEFENSES TO A CLAIM FOR WRONGFUL SEIZURE

A. *Advice of Competent Counsel*

A seizing party may claim that he acted upon the advice of competent counsel, an interesting and complicated defense which may serve as a complete bar to liability for wrongful seizure.

In *Frontera Fruit Co. v. Dowling*, the United States Court of Appeals for the Fifth Circuit, in considering a claim for wrongful seizure of a vessel, held that "the advice of competent counsel honestly sought and acted upon in good faith is alone a complete defense to an action for malicious prosecution."⁷⁴ "Advice of competent counsel" is justified as a defense to a claim for wrongful seizure, based on the reasoning that "[w]here citizens reasonably disagree concerning their rights, powers, and privileges, the doors should be kept open for an orderly determination of their differences."⁷⁵ *Frontera* weighs in favor of allowing a seizing party the access to legal processes such as attachment and arrest until the rights among the parties may be adjudicated.⁷⁶ Until such point, no damages should be assessed against a party for fairly submitting its dispute for determination.⁷⁷

Maritime clients and attorneys should be aware that *Frontera* requires counsel to have "all of the material facts" when advising the client.⁷⁸ This requirement serves to further protect the property owner against wrongful or improper seizure.

As an additional precaution, *Frontera* requires that any seizure be made in good faith.⁷⁹ "[T]he requirement that a claimant act on counsel's advice 'in good faith,' merely begs the question. Did Plaintiff, indeed, act on the advice in good faith?"⁸⁰ A party with knowledge that an arrest or attachment is improper, cannot insulate itself from bad faith liability for wrongful seizure by seizing property through legal counsel.⁸¹

74. *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297, 1937 AMC 1259, 1266 (5th Cir. 1937) (citations omitted).

75. *Id.* at 297, 1937 AMC at 1266.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 297, 1937 AMC at 1265.

80. *Coastal Barge Corp. v. M/V Maritime Prosperity*, 901 F. Supp. 325, 329, 1996 AMC 1093, 1099 (M.D. Fla. 1994) (discussing *Frontera*).

81. *State Bank & Trust Co. of Golden Meadow v. Boat D.J. Griffin*, 755 F. Supp. 1389 (E.D. La. 1991); *Coastal Barge Corp.*, 901 F. Supp. at 329, 1996 AMC at 1099.

The advice of counsel defense was squarely raised in *Coastal Barge Corp. v. M/V Maritime Prosperity*.⁸² In *Coastal Barge*, the vessel was initially arrested in South Africa and subsequently released upon the posting of security, at which time Coastal “expressly agreed not to rearrest the Maritime Prosperity in further pursuit of its claim for legal relief.”⁸³ Notwithstanding that agreement, Coastal later filed an in rem action against the MARITIME PROSPERITY and an in personam action against its owner in the United States District Court for the Southern District of Florida without alerting the court to the prior arrest of the vessel and the earlier agreement.⁸⁴ Although the court initially issued a writ of arrest, it later quashed the warrant upon learning of the existence of the letter of undertaking and agreement not to rearrest the vessel.⁸⁵ In determining that the seizing party was liable for damages attendant to the arrest, the court found that a defendant’s “omission of a known, pertinent fact may constitute reckless disregard of the truth.”⁸⁶ The court further stated that “[w]hether or not Plaintiff followed the advice of its attorneys, its omission exhibited a reckless disregard for the truth, and that omission cannot be considered negligent.”⁸⁷ Under *Coastal Barge*, if the seizing party possesses knowledge which may preclude the arrest of the vessel, but consciously withholds that information, then that party will likely be liable for wrongful seizure, regardless of the advice of counsel.

Marastro involved the seizure of cargo which the court ultimately found was improper, but which was completed with the advice of counsel.⁸⁸ Here, the United States Court of Appeals for the Fifth Circuit affirmed the finding that the defendant acted in good faith without a wanton disregard for the rights of the plaintiff, and upheld an award in the sum of \$123,360.25, representing the cost to the time charterer of storing and safekeeping of the cargo, under 28 U.S.C. § 1921(a)(1)(e).⁸⁹ Defendants objected to the damage award on the grounds that it circumvented *Frontera*, arguing that “advice of counsel” was a complete defense.⁹⁰ Notwithstanding the *Frontera* defense, *Marastro* could subject

82. 901 F. Supp. 325, 1996 AMC 1093 (M.D. Fla. 1994).

83. *Id.* at 326, 1996 AMC at 1095.

84. *Id.*

85. *Id.*

86. *Id.* at 329, 1996 AMC at 1099 (citing *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994)).

87. *Id.*, 1996 AMC at 1100.

88. *Marastro Compania Naviera S.A. v. Canadian Mar. Carriers, Ltd.*, 963 F.2d 754, 1993 AMC 2274 (5th Cir. 1992) (per curiam).

89. *Id.* at 757.

90. *Id.* at 756, 1993 AMC at 2276.

a defendant to substantial exposure for costs, despite acting in good faith and upon the advice of counsel.

Although a client may obtain advice of counsel, that party may still be liable for wrongful arrest (and thus exposed to damages for both foreseeable and unforeseeable losses) when the seizing party had information which it failed to bring to the attention of the court, and which would have prevented the seizure of the vessel.⁹¹ Under *Marastro*, a third-party interest may recover costs associated with the seizure of another party's property, despite the seizing party's good faith and reliance on counsel.⁹²

Complicating matters, the advice of counsel defense is in tension with principles of agency which hold a party responsible for the acts and omissions of its legal counsel.⁹³ Under a respondeat superior approach, if the party acted on the advice of counsel, but nevertheless wrongfully seized a vessel or other equipment, that party should be held liable for the resulting damages.⁹⁴

These principles create an inherent conflict that may open counsel to a malpractice suit in the event that a vessel is wrongfully seized and the client is held liable despite the advice of counsel. Perhaps the focus of this defense should be good faith and competency. As admiralty practitioners know, seizing a vessel can be a technical and tedious process, and some counsel are simply more experienced in handling such matters. Maritime clients should seek to identify competent maritime attorneys to assist in arresting or attaching vessels (since such procedures often must be executed very quickly) and retain such counsel to be ready should the need for seizure exist. Further, counsel should heed the warnings discussed below, and exercise caution when utilizing Rules B and C as procedural tools.

The "advice of counsel" defense is, of course, a terrible blow to the owner of a vessel or other equipment which is seized through legal proceedings, wrongfully or perhaps negligently. At least in the short run, the owner's losses are just as great as if his property had been converted or pirated from him.

91. *See generally id.*

92. *Id.*

93. RESTATEMENT (SECOND) OF AGENCY §§ 246, 253 (1958) (See comment to § 253: "that the attorney is subject to discipline by the court does not prevent the client from being liable for his conduct.").

94. *Id.*

B. Lack of Knowledge, Intent, Bad Faith, and/or Malice

A seizing party may also claim lack of knowledge regarding the ownership of the property as a defense to a claim for wrongful seizure.⁹⁵ This would occur in the event that the wrong property was mistakenly seized. The party negligently seizing the wrong property should plead a lack of intent and/or knowledge which would vitiate the malice and/or bad faith elements of conversion and wrongful seizure. Lack of bad faith defenses will require a factual analysis, particularly focused on the parties' working histories and relationships, the reasonableness of their claims in light of various factual information, the use of the equipment, and a specific inquiry into the information available to the parties prior to the seizure. The defenses of lack of knowledge and/or intent may allow a seizing party to circumvent the loss of use, lost profits, and exemplary damages available to the victim of an intentional tort.⁹⁶

C. Pursuant to Court Order

Under the Restatement (Second) of Torts, a party is not liable for trespass when such entry was permitted pursuant to a court order such as a writ of attachment or arrest.⁹⁷ Note, however, the requirement in section 210 that the court order be valid and fair on its "face."⁹⁸

D. Condition of Property/Wear and Tear

The party in possession of the vessel or the equipment may also raise a defense based on the condition of the property if there is a dispute regarding damage to the equipment while it was detained. A nonowner, such as a charterer or other bailee, is not liable for ordinary wear and tear that would have occurred regardless of the custodian of the property.⁹⁹ However, under general maritime law, a bailee owes a duty of due care.¹⁰⁰ Poor storage, abuse to equipment, failure to comply with industry

95. In *Adams v. Unione Mediterranea di Sicurta*, the seizing party/salvor effectively utilized the defense of lack of knowledge, intent, and bad faith to avoid loss of use, lost profit and exemplary damages because the court found the seizing party to be lacking bad faith, and only negligent in converting the cargo. 220 F.3d 659 (5th Cir. 2000).

96. Although courts have exonerated parties from wrongful seizure when they acted on advice of counsel, "honestly sought and acted upon," *Marastro* indicates that a seizing party may be held liable for significant expenses defined as "costs" under 28 U.S.C. § 1921(a)(1)(E) (1994).

97. RESTATEMENT (SECOND) OF TORTS § 210 (1965).

98. *See id.*

99. *See Seaboard Sand & Gravel Corp. v. Moran Towing Corp.*, 154 F.2d 399, 402 (2d Cir. 1946); *Dow Chem. Co. v. Texaco Ref. & Mktg., Inc.*, 887 F. Supp. 853, 864-66, 1996 AMC 1209 (E.D. Va. 1995) (AMC reporter summarizing case).

100. *See Dow Chem.*, 887 F. Supp. at 864, 1996 AMC at 1209.

standards, negligent handling, maintenance, and/or repairs can expose the party in possession of the vessel or equipment to liability for equipment damage which is beyond ordinary wear and tear.¹⁰¹ A seizing party could be analogized to a bailee, and would be wise to adhere to the bailee's standard of care, as seizing parties have been held to that standard.¹⁰²

Ordinary wear and tear is "that deterioration of condition or depreciation in value attributable to normal and reasonable use of an object."¹⁰³ Normal and reasonable use may depend on the service for which the object is intended, its age, and/or industry guidelines or practices.¹⁰⁴

E. Property's Actual Use

A seizing party should engage in discovery regarding the property's average use while in possession of the owner. If the property is not historically in use at all times, a court may discount an award for the vessel's loss of use damages to account for the reduced operations time.¹⁰⁵

F. Failure to Mitigate Damages

A property owner should make all efforts to mitigate his damages due to the seizure in order to avoid a reduction of the recovery.¹⁰⁶ The courts will apportion "damages between the parties where the injured party has, subsequent to infliction of the harm, failed to exercise that degree of care society demands of the reasonable person."¹⁰⁷ If the property owner fails to mitigate damages, the law will deny recovery "for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them."¹⁰⁸ To prevail in

101. See *Rodi Yachts, Inc. v. Nat'l Marine, Inc.*, 984 F.2d 880, 884-85, 1993 AMC 913, 918-19 (7th Cir. 1993); *Seaboard Sand*, 154 F.2d at 402; *Dow Chem.*, 887 F. Supp. at 864-66, 1996 AMC at 1209 (E.D. Va. 1995).

102. See *Tebbs v. Baker-Whiteley Towing Co.*, 271 F. Supp. 529 (D. Md. 1967), *aff'd*, 407 F.2d 1055 (4th Cir. 1969); *Seaboard Sand*, 154 F.2d at 402.

103. *Otto Candies, Inc. v. McDermott Int'l, Inc.*, 600 F. Supp. 1334, 1343 (E.D. La. 1985), *aff'd*, 785 F.2d 1033 (5th Cir. 1986).

104. *Id.*

105. *Marine Transp. Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138, 1141, 1995 AMC 622, 625 (5th Cir. 1994) (holding that loss of use damages be reduced because the vessel was historically in use less than eighty percent of the time).

106. See, e.g., *Tenn. Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 1982 AMC 2700 (5th Cir. 1979) (AMC reporter summarizing case).

107. *Id.* at 932, 1982 AMC at 2700 (citations omitted).

108. *Id.* (quoting *Southport Transit Co. v. Avondale Marine Ways*, 234 F.2d 947, 952 (5th Cir. 1956)).

using this defense, the tortfeasor must show that the injured party's post-incident conduct was unreasonable *and* that it aggravated the harm.¹⁰⁹ However, "infallibility" is not required on the part of the victim and courts specifically recognize that "judgments made at times of crisis are subject to human error."¹¹⁰ Moreover, courts "allow the injured party a wide latitude in determining how to deal with the situation."¹¹¹

V. DAMAGES FOR WRONGFUL SEIZURE

A. *Damages, Generally*

Admiralty courts are courts of equity, empowered to award damages to make parties injured through the fault of others whole.¹¹² Courts have expressed the desire to make victims whole by awarding the money equivalent of damages for losses.¹¹³ As the late Judge John R. Brown noted: "The Chancellor is no longer fixed to the woosack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his land-locked brother, that which equity and good conscience impels."¹¹⁴

"The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked."¹¹⁵

These broad and sweeping principles should be applied to all damage awards and justify awarding remedies which would otherwise be unavailable to claimants. Because admiralty courts retain broad

109. *Id.* at 933, 1982 AMC at 2700.

110. *Id.*

111. *Id.* (citations omitted); *see also* *Marathon Pipe Line Co. v. Drilling Rig Rowan Odessa*, 761 F.2d 229, 233-34, 1986 AMC 2343, 2348 (5th Cir. 1985).

112. *See* *Vaughan v. Atkinson*, 369 U.S. 527, 530, 1962 AMC 1131, 1133 (1962); *Swift & Co. Packers v. Compania Columbiana del Caribe, S.A.*, 339 U.S. 684, 692 (1950); *Phillips Petroleum Co. v. Stokes Oil Co.*, 863 F.2d 1250, 1257, 1994 AMC 601 (6th Cir. 1988) (AMC reporter summarizing case); *Pizani v. M/V Cotton Blossom*, 669 F.2d 1084, 1088-89 (5th Cir. 1982) ("A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity." (quoting *The David Pratt*, 7 F. Cas. 22, 24 (D. Me. 1839) (No. 3597) (Story, J.)); *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 996, 1998 AMC 1453, 1468-69 (5th Cir. 1998) ("Cognizant of the equitable role of a court sitting in admiralty, we remand for a proper determination of damages.").

113. *See* *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 379-80 (5th Cir. 1990); *Standard Oil Co. of N.J. v. S. Pac. Co.*, 268 U.S. 146, 155 (1925).

114. *Compania Anonima Venezolana de Navegacion v. A.J. Perez Exp. Co.*, 303 F.2d 692, 699 (5th Cir. 1962) (citations omitted).

115. *Petition of Kinsman Transit Co.*, 338 F.2d 708, 724 (2d Cir. 1964).

discretion and are courts of equity, in egregious circumstances, such as cases involving conversion, bad faith, or malice, the court may expand the basic tenants of damage guidelines (such as foreseeability), and instead award the plaintiff any damages necessary to right the wrongs made by the seizing party.¹¹⁶

Indeed, courts in the circuits that have adopted the Restatement (Second) of Torts in admiralty cases may award even “unexpected” damages.¹¹⁷ Section 435A of the Restatement provides:

A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where the harm results from an outside force the risk of which is not increased by the defendant’s act.¹¹⁸

Comment (a) to the above section states:

In such a case, the tortfeasor is liable for the consequence although it was unexpected and although he did not believe that it was at all likely that such a result would happen.¹¹⁹

This broad provision of the Restatement along with the equitable power of admiralty jurists, may, in fact, allow parties that do not retain an ownership interest in the seized property, but who are nevertheless affected by the wrongful seizure, to collect costs or damages from the wrongfully seizing party.¹²⁰

The following table depicts damages available in various types of seizure cases:

116. *See id.*

117. RESTATEMENT (SECOND) OF TORTS § 435A (1965).

118. *Id.*

119. *Id.* cmt. a.

120. *Id.*; *see also* *Marastro Compania Naviera, S.A. v. Canadian Mar. Carriers, Ltd.*, 959 F.2d 49, 193 AMC 2268, *on reh’g*, 963 F.2d 754, 193 AMC 2274 (5th Cir. 1992) (per curiam).

		TYPE OF DAMAGES RECOVERABLE			
		Costs	Foreseeable	Unexpected	Punitive
T Y P E	<i>Marastro</i> (losses to third parties effected by the seizure)	•			
	Negligence	•	•		
	Trespass (bad/good faith is irrelevant)	•	•		
O F	Conversion (negligent, in good faith)*	•	•		
	Wrongful Seizure	•	•	•	
C A S E	Wrongful Seizure (willful & wanton)	•	•	•	•
	Conversion (intentional, in bad faith)	•	•	•	•

* In *Adams*, the seizing party who acted in good faith, but negligently converted the cargo, was ordered to pay the difference between the discounted value of the cargo and salvage costs. *Adams v. Unione Mediterranea di Sicurta*, 220 F.3d 659 (5th Cir. 2000).

The injured party bears the burden of proof to show the amount, as well as the fact, of damages.¹²¹ Damages do not have to be proven “with mathematical exactness provided that there is reasonable data from which the amount of damages can be ascertained with reasonable certainty, ‘and the party who has caused the loss may not insist on theoretical perfection.’”¹²²

B. Damages Recoverable for Intentional Wrongful Seizure

While a negligent tortfeasor is only liable for damage to the property and other reasonably expectable damages, the intentional tortfeasor is responsible generally for *all* consequences of his acts—even

121. *Pizani v. M/V Cotton Blossom*, 669 F.2d 1084, 1088-90 (5th Cir. 1982); *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 87 (5th Cir. 1960).

122. *Compania Pelineon de Navegacion S.A. v. Tex. Petroleum Co.*, 540 F.2d 53, 56, 1976 AMC 1245, 1249 (2d Cir. 1976) (quoting *Entis v. Atl. Wire & Cable Corp.*, 335 F.2d 759, 763 (2d Cir. 1964)).

those that cannot reasonably be anticipated.¹²³ An intentional tortfeasor is liable for any damages provided in the Restatement (Second) of Torts, which may include: repair costs, depreciation, loss of use, lost profits, punitive damages, storage costs, incidentals, release costs, and interest.¹²⁴

Admiralty courts have adopted the Restatement (Second) of Torts as general maritime law in tort matters.¹²⁵ In *Goodpasture*, the court relied on the Restatement for the proposition that “a plaintiff may generally recover the reasonable market value of the goods converted, as of the time and place of conversion.”¹²⁶

The Restatement suggests that when a person is liable for conversion, he is liable for the value of that property and, in certain cases, pecuniary losses that were caused by the conversion, including loss of use.¹²⁷ The Restatement provides:

- (1) When one is entitled to a judgment for the conversion of a chattel or the destruction or impairment of any legally protected interest in land or other thing, he may recover either
 - (a) the value of the subject matter or of his interest in it at the time and place of the conversion, destruction or impairment
- (2) His damages also include . . .
 - (b) the amount of any further pecuniary loss of which the deprivation has been a legal cause;
 - (c) interest from the time at which the value is fixed; and
 - (d) compensation for the *loss of use* not otherwise compensated. . . .

Illustration 13(o). *Loss of use of chattel*. [There are cases where] the chattel is returned to the plaintiff, so that, under the rule stated in § 922, the defendant must be credited with its value at the time of return and the plaintiff does not recover its full value. *In this case there may be recovery for the loss of use during the period of detention.*¹²⁸

Therefore, maritime law, incorporating the Restatement, provides for loss of use and diminution in value in situations when the equipment has been detained for a period of time and is returned in damaged condition.

123. See RESTATEMENT (SECOND) OF TORTS § 927 (1979).

124. See *id.*

125. See *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1006, 1983 AMC 3000 (5th Cir. 1982) (AMC reporter summarizing case); *Isbell Enters., Inc. v. Citizens Cas. Co. of N.Y.*, 431 F.2d 409, 416, 1971 AMC 2112, 2122 (5th Cir. 1970); *Marastro*, 959 F.2d at 53, 1993 AMC at 2273 (5th Cir. 1992).

126. *Goodpasture*, 688 F.2d at 1006, 1983 AMC at 3000 (citation omitted) (citing the RESTATEMENT (SECOND) OF TORTS § 222A (1965) for the proposition that a bailee who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor).

127. RESTATEMENT (SECOND) OF TORTS § 927 (1979).

128. *Id.* (emphasis added).

In addition to the Restatement, there is jurisprudential support for the premise that lost profits are recoverable in intentional wrongful seizure cases where an award limited to the value of the property would fail to fully compensate the injured party.¹²⁹ In *Roco Carriers, Ltd. v. M/V Nurnberg Express*,¹³⁰ an action against a common carrier for nondelivery of cargo, the court noted that, in general, damages for conversion are limited to the value of the property.¹³¹ However, the *Roco Carriers* court also found that the purpose of awarding damages in conversion cases is to fully compensate the injured party.¹³² Deviation from the general rule is proper under *Roco Carriers*, and “lost profits are recoverable ‘if they may reasonably be expected to follow from the conversion.’”¹³³

VI. CLASSES OF DAMAGES RECOVERABLE FOR SPECIFIC TYPES OF LOSSES

If, while the wrongfully seized property is in the custody of another, it is damaged or lost, the owner should be able to recover such specific damages.¹³⁴ Further, an innocent property owner will likely experience losses in connection with loss of use and lost profits.¹³⁵ A discussion of the types of damages available for specific type of losses follows.

A. *Repairable Damages—Less than Total Loss*

1. Repair Costs, Defendants’ Burden of Proof

An award to an owner in a case of repairable damage shall be sufficient to repair the damaged property to its pre-casualty condition.¹³⁶ When the equipment is not a total loss, “the measure of damages is the reasonable value of repairs plus demurrage occasioned by the time taken to complete the repairs.”¹³⁷

129. See *Roco Carriers, Ltd. v. M/V Nurnberg Express*, No. 83 Civ. 8904, 1990 WL 270422, 1991 AMC 398 (S.D.N.Y. Sept. 27, 1990).

130. *Id.*

131. *Id.* at *2, 1991 AMC at 401.

132. *Id.*

133. *Id.* (quoting *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326 (N.Y. 1980) (en banc)).

134. See *id.*

135. See *id.*

136. See *The Baltimore*, 75 U.S. (8 Wall.) 377, 385 (1869); *The Granite State*, 70 U.S. (3 Wall.) 310, 314 (1865); *The Elmer A. Keeler*, 194 F. 339, 342 (2d Cir. 1912).

137. *Zanzibar Shipping, S.A. v. R.R. Locomotive Engine No. 2199*, 533 F. Supp. 392, 394, 1982 AMC 1420, 1422 (S.D. Tex. 1982) (citing *The Umbria*, 166 U.S. 404, 421-22 (1896)).

Once the owner has established the cost of repairs, it is the defendant's burden to prove the repairs unreasonable.¹³⁸ When a defendant shows that the figure claimed by the plaintiff includes noncompensable improvements, the plaintiff's claims will be reduced accordingly.¹³⁹

2. Temporary Repairs and Depreciation

The costs of temporary repairs may be recoverable if they were incurred under a reasonable belief that they were necessary.¹⁴⁰ This follows from the reasoning that when damaged property is not restored to its precollision condition, the owner's entitlement to the replacement value of the property should not be limited by the owner's efforts to make provisional repairs to the damaged structure pending its replacement.¹⁴¹ In the *Elmer A. Keeler* case, the owner made temporary repairs that did not restore the facility to its full usefulness, but such repairs were found to be reasonable.¹⁴² Thus, that court properly affirmed the award of replacement costs and temporary repairs, less depreciation.¹⁴³

3. Loss of Use/Demurrage

Lost profits for the period the vessel is out of service, associated repairs, and incidental costs and fees associated with detention should be recoverable in a case of repairable damage.¹⁴⁴ Thus, the owner should not be allowed recovery for items such as fuel, or possibly crew, insurance, or other "operational" costs that were saved because the vessel was undergoing repairs and not in operation.

B. Total Loss

In *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Service, Inc.*, a barge owner brought an action for loss of use

138. Michael A. Snyder, *Maritime Collision Damage to Vessels and Fixed Structures*, 72 TUL. L. REV. 881, 908 (1997) (citing *The Ruthie M.*, 4 F. Supp. 317, 318 (E.D.N.Y. 1933), *aff'd*, *The Morton Coal Co. v. The Crosby*, 68 F.2d 1010 (2d Cir. 1934)).

139. *O'Brien Bros. v. The Helen B. Moran*, 160 F.2d 502, 505-06 (2d Cir. 1947).

140. *See Compania Punta Alta, S.A. v. Dalzell*, 162 F. Supp. 926, 931, 1958 AMC 2007, 2013-14 (S.D.N.Y. 1958) (adopting *Pan-Am. Petroleum & Transp. Co. v. United States*, 27 F.2d 684, 685-86, 1928 AMC 1347, 1349 (2d Cir. 1928)).

141. *See The Elmer A. Keeler*, 194 F. at 342.

142. *See id.*

143. *See id.*

144. 2 SCHOENBAUM, *supra* note 4, § 14-6, at 312. *See generally* *State Bank & Trust Co. v. Boat D.J. Griffin*, 755 F. Supp. 1389 (E.D. La. 1991).

against a tug owner.¹⁴⁵ That court held that it is fundamental that when a vessel is lost or damaged, “the owner is entitled to its money equivalent, and thereby to be put in as good a position pecuniarily as if his property had not been destroyed.”¹⁴⁶ Where a vessel is a total loss, the measure of damages is usually the market value at the time of loss less salvage value received, plus interest and net freight pending.¹⁴⁷ In a total loss case, the measure of damages should generally not include loss of use, lost profits, or other consequential damages.¹⁴⁸ “The established rule is that in a case of a total loss, the owner is not compensated for the loss of use of the boat.”¹⁴⁹

1. Actual vs. Constructive Total Loss

A vessel consumed by fire or lost on the high seas is obviously an actual total loss. A constructive total loss is a loss that occurs when property is damaged so extensively that the costs necessary for salvage and repair exceed its precasualty market value.¹⁵⁰ The constructive total loss determination is one that can only be made upon inspection of the vessel.

In *Lenfest v. Coldwell*,¹⁵¹ the court discussed the distinction between an actual total loss and a constructive total loss.¹⁵²

A total loss of a vessel occurs when the vessel no longer exists *in specie* or when she is absolutely and irretrievably sunk or otherwise beyond the possible control of the insured. . . . The doctrine of “constructive total loss” was designed to alleviate the harshness of the requirement of an “actual total loss,” where a shipowner is the insured, and where the costs of repairs would exceed the repaired value of the ship.¹⁵³

145. 899 F.2d 377, 379-81 (5th Cir. 1990).

146. *Id.* at 379 (quoting *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1185, 1984 AMC 1769, 1775 (5th Cir. 1984)).

147. *The Umbria*, 166 U.S. 404, 421 (1897).

148. *Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988); *A & S Transp. Co. v. Tug Fajardo*, 688 F.2d 1, 2, 1983 AMC 10, 11-12 (1st Cir. 1982).

149. *Robin Hood*, 899 F.2d at 382.

150. *See Snyder, supra* note 138, at 886, 908 (citing *O'Brien Bros. v. The Helen B. Moran*, 160 F.2d 502, 505, 1947 AMC 493, 496 (2d Cir. 1947)); *see also Self Towing, Inc. v. Brown Marine Servs., Inc.*, 837 F.2d 1501, 1506 (11th Cir. 1988); *Ryan Walsh Stevedoring Co. v. James Marine Servs., Inc.*, 792 F.2d 489, 491, 1987 AMC 1611, 1613 (5th Cir. 1986).

151. 525 F.2d 717, 1975 AMC 2489 (2d Cir. 1975).

152. *See generally id.*

153. *Id.* at 723-24, 1975 AMC at 2497; *see also Champion Int'l Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 1982 AMC 2496, 2500 n.1 (S.D.N.Y. 1982) (stating that actual total loss “exists only when the property insured is completely destroyed, ceases to exist *in specie*, or is irretrievably placed beyond the control of the assured.”).

The costs of raising a vessel should be factored into the calculation as to whether or not the vessel is a constructive total loss.¹⁵⁴

2. Market Value

If the equipment is a total loss, the plaintiff may recover the market value of the vessel or equipment at the time of loss plus all pending freight, less any salvage value.¹⁵⁵ Market value is “that sum which would be paid for the vessel by a willing buyer after fair negotiations with a willing seller.”¹⁵⁶ Often, market value is determined by the contemporaneous sales of similar property in the ordinary course of business.¹⁵⁷ The goal is to make the plaintiff whole and to determine the amount of money that would compensate the plaintiff as if the property had never been seized.¹⁵⁸ Market value will depend on the type of market, the demand, and the price.¹⁵⁹ Courts have great latitude in determining the amount of property values.¹⁶⁰

Evidence that can help establish market value includes proposed contracts and offers, business projections, trade publications, testimony of experts and/or competitors (hopefully friendly), and historical earnings of the owner and/or particular property involved. Defendants will encounter great difficulty in arguing that a plaintiff’s earnings would have been minimal in the face of trade publications that the market for a particular piece of equipment is the hottest it has ever been. Trade publications are especially credible because they are prepared for nonlitigious purposes and broadly disseminated.

The value of the property may be approximated if an actual market value cannot be determined, and other evidence may be considered in reaching this estimate.¹⁶¹ Such “other evidence” may include

154. See *N. Barge Line Co. v. Royal Ins. Co.*, 1974 AMC 136, 138 (N.D. Iowa 1973), *aff’d*, 492 F.2d 1248 (8th Cir. 1974).

155. See *Standard Oil Co. v. S. Pac. Co.*, 268 U.S. 146, 155-56 (1924); *The Baltimore*, 75 U.S. (8 Wall.) 377, 386 (1869); *B & M Towing Co. v. Wittliff*, 258 F.2d 473, 475 (5th Cir. 1958).

156. *Bisso v. Inland Marine Waterways Corp.*, 139 F. Supp. 387, 389 (E.D. La. 1956) (citing *Standard Oil*, 268 U.S. at 156).

157. See *id.*

158. See generally *Standard Oil*, 268 U.S. at 155; *Robin Hood*, 899 F.2d at 379.

159. See generally *Bisso*, 139 F. Supp. at 389.

160. See *Socony Mobil Oil Co. v. Tex. Coastal Int’l, Inc.*, 559 F.2d 1008, 1013, 1997 AMC 2598, 2605 (5th Cir. 1977) (citing *Drake v. E.I. DuPont de Nemours & Co.*, 432 F.2d 276, 279, 1970 AMC 1915, 1920 (5th Cir. 1970)).

161. See *Standard Oil*, 268 U.S. at 155-56; *Bisso*, 139 F. Supp. at 389.

replacement cost, depreciation, expert opinion, and the amount of insurance.¹⁶²

3. Alternative to Market Value—Replacement Cost

If the market value of the property cannot be ascertained, the most appropriate measure of value is “replacement cost.”¹⁶³ In a maritime tort context, “[w]hen no market value exists for a vessel, ‘other evidence such as *replacement cost* . . . can also be considered.’”¹⁶⁴

The value awarded for replacement of the property must cover the costs of purchase of new property that is comparable to the lost item in all material respects.¹⁶⁵ “Where the available replacement is less than comparable in some material way, the court must take the defect into account in calculating the overall replacement cost.”¹⁶⁶

Replacement value should be calculated by determining the actual cost to replace the vessel, depreciated to account for the barge’s remaining useful life at the time of the loss.¹⁶⁷ In assessing the “useful life” of a barge, the *Robin Hood* court considered that the property owner maintained the barge in better than average condition.¹⁶⁸ Thus, although the average life of other barges was estimated to twenty years, the court found that particular barge’s life span to be thirty years, due to the owner’s superior maintenance.¹⁶⁹

4. Special Use/Special Value

On occasion, an owner may submit evidence regarding the special use or special value of the property.¹⁷⁰ For example, in determining replacement value, the *Robin Hood* court properly considered the

162. See *Greer v. United States*, 505 F.2d 90, 93, 1975 AMC 195, 198 (5th Cir. 1974) (per curiam); *Carl Sawyer, Inc. v. Poor*, 180 F.2d 962, 963 (5th Cir. 1950); *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1185, 1984 AMC 1769, 1775 (5th Cir. 1984).

163. See *Margate Shipping Co. v. M/V Orgeron*, 143 F.3d 976, 990-92, 1998 AMC 2383, 2401 (5th Cir. 1998); see also *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 379-80 (5th Cir. 1990).

164. *Robin Hood*, 899 F.2d at 380 (quoting *King Fisher*, 724 F.2d at 1185, 1984 AMC at 1775 (5th Cir. 1984)).

165. See *Margate*, 143 F.3d at 991, 1998 AMC at 2403.

166. *Id.* at 992, 1998 AMC at 2404 (citing *Robin Hood*, 899 F.2d at 382).

167. See *Robin Hood*, 899 F.2d at 381.

168. See *id.*

169. See *id.*

170. See *The President Madison*, 91 F.2d 835, 843-46, 1937 AMC 1375, 1389-91 (9th Cir. 1937); *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1186, 1984 AMC 1769, 1775-77 (5th Cir. 1984); *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 380-81 (5th Cir. 1990).

“special value” of the barge, as being uniquely suited to a specific task.¹⁷¹ In *Robin Hood*, there were no barges comparable to the vessel seized, and hence no established market value.¹⁷² Therefore, “other evidence” such as expert opinion, special uses, replacement costs, modification costs, etc., formed the basis of determining an appropriate replacement value award.¹⁷³

In *King Fisher Marine Service, Inc. v. NP Sunbonnet*, the barge’s value in the market was not determinative of its value to the owner because it was not normally used as a barge, but rather as a dry dock platform.¹⁷⁴ The United States Court of Appeals for the Fifth Circuit held, in part, that awarding greater damages due to the equipment’s special “value to the owner” is one of policy . . . where one who has arrived at a bargain of unique value to him is deprived of it by the fault of another, . . . he should recover it.”¹⁷⁵ In *King Fisher*, it is interesting to note that the Fifth Circuit affirmed a \$200,000 “replacement cost/value to owner” award despite the fact that the barge was purchased on the open market for \$30,000 only two days prior to its destruction.¹⁷⁶ The court defended the decision because the owner immediately “procured the most similar and suitable replacement.”¹⁷⁷

5. Future Lost Profits Are Not Recoverable

It is the established rule of law that where a vessel is deemed a total loss the probable profits are not recoverable.¹⁷⁸ This rule exists because the law does not consider a sunken ship incapable of replacement.¹⁷⁹ Ships are considered to be commodities, to be bought and sold, and one can always be purchased to take the place of the lost vessel.¹⁸⁰ If there is delay in acquiring a replacement vessel, interest earned on the damage award is deemed to compensate the owner for his loss of use damages.¹⁸¹

171. See *Robin Hood*, 899 F.2d at 380.

172. See *id.*

173. See *id.* at 379.

174. 1983 AMC 2001, 2007 (E.D. La. 1982) *aff’d*, 724 F.2d 1181, 1984 AMC 1769 (5th Cir. 1984).

175. *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 729 F.2d 315, 316 (5th Cir. 1984) (per curiam).

176. See *id.*

177. *Id.*

178. *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 648, 1989 AMC 2447, 2455 (5th Cir. 1989) (citations omitted).

179. *Id.*

180. *Id.*; see also *Barger v. Hanson*, 426 F.2d 640, 642 (9th Cir. 1970) (citing *The Hamilton*, 95 F. 844, 845 (E.D.N.Y. 1899)).

181. *Barger*, 426 F.2d at 642.

However, *Barger v. Hanson*,¹⁸² which was cited with approval by the United States Court of Appeals for the Fifth Circuit in *P & E Boat Rentals*,¹⁸³ may actually support a vessel owner's claim for lost of use/profits damages.¹⁸⁴ *Barger* involved a fishing vessel deemed a constructive total loss shortly before the start of salmon fishing season.¹⁸⁵ Immediately after the accident, the owner began looking for a replacement vessel, but was unable to find and properly outfit one until approximately one month later.¹⁸⁶ The trial court awarded the shipowner his lost profits for that month, because the damages were not speculative, and the owner encountered difficulty in replacing the vessel due to a shortage of vessels for sale during the fishing season.¹⁸⁷ The *Barger* court stated that the loss of his boat and equipment at the beginning of the season amounted to "the loss of the tools of his trade."¹⁸⁸

VII. PROVING NECESSARY ELEMENTS OF SPECIFIC TYPES OF DAMAGES

A. *Loss of Use/Lost Profits*

Loss of use/lost profits damages are usually available in repairable damage cases but not in cases of total loss.¹⁸⁹ However, these awards are appropriate if the award for property damages will not fully compensate the owner.¹⁹⁰ Lost profits are governed by largely the same principles as "loss of use," and are referred to herein interchangeably.

Lost profits, when recoverable, are only appropriate when they are a direct result of injury to the vessel and can be proven with "reasonable certainty."¹⁹¹ The shipowner bears the burden of establishing lost profits.¹⁹²

182. 426 F.2d 640 (9th Cir. 1970).

183. 872 F.2d 642 (5th Cir. 1970).

184. *See Barger*, 426 F.2d at 640.

185. *Id.* at 641.

186. *Id.*

187. *Id.*

188. *Id.* at 642.

189. *Robin Hood*, 899 F.2d at 382.

190. RESTATEMENT (SECOND) OF TORTS § 927 (1979); *see also* Roco Carriers, Ltd. v. M/V Nurnberg Express, 1990 WL 270422, at *3, 1991 AMC 398, 401 (S.D.N.Y. Sept. 27, 1990).

191. *Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d 389, 395, 1998 AMC 825, 833 (4th Cir. 1997); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1155, 1991 AMC 346, 353 (5th Cir. 1990); *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001, 1985 AMC 2554, 2559 (5th Cir. 1984); *Marine Transp. Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138, 1140-42, 1995 AMC 622, 625 (5th Cir. 1994); *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 822, 1984 AMC 2559, 2572 (11th Cir. 1984); *Moore-McCormack Lines, Inc. v. The Esso Camden*, 244 F.2d 198, 201 (2d Cir. 1957).

192. *See Bolivar County Gravel Co. v. Thomas Maine Co.*, 585 F.2d 1306, 1308 n.2, 1979 AMC 1806, 1808 n.2 (5th Cir. 1979).

The vessel owner need not present evidence of specific lost opportunity, contract or charter.¹⁹³ Proof that there was a market demand and that, but for the damage, the maritime property would likely have been utilized in commerce, is reasonably certain evidence of lost profits.¹⁹⁴ The vessel owner has a duty to mitigate damages, but is not required to take on specific contracts to prove lost profits when it would not be able to fulfill the agreements.¹⁹⁵

What constitutes “reasonable certainty” is a question of fact.¹⁹⁶ This factual analysis often requires a showing that the equipment “has been engaged, or was capable of being engaged in a profitable commerce.”¹⁹⁷

If a vessel is active in a “ready market,” profits are reasonably supposed.¹⁹⁸ That the vessel was in immediate demand after repairs “demonstrates ‘that profits may be reasonably supposed to have been lost because the vessel was active in a ready market.’”¹⁹⁹ A “ready market” can also be established through testimony that the vessel’s voyages before and after the collision were profitable.²⁰⁰

If it is probable that the vessel would have been used during its detention time, demurrage damages are established with “reasonable certainty.”²⁰¹

In *Rogers Terminal & Shipping Corp. v. International Grain Transfer, Inc.*,²⁰² “the Fifth Circuit . . . held that while loss of profits must be proved with reasonable certainty, the mere fact that such damages may

193. See *Skou v. United States*, 478 F.2d 343, 346, 1973 AMC 1482, 1485 (5th Cir. 1973) (noting that “[t]he requirement that a shipowner offer proof of loss is not equivalent to a requirement that he prove the loss of a specific charter at a definite time and place.”). *Standard Marine Towing Servs., Inc. v. M.T. Dua Mar*, 708 F. Supp. 562, 564 (S.D.N.Y. 1989); *Weeks Dredging & Contracting, Inc. v. B Turecamo Towing Corp.*, 482 F. Supp. 1053, 1058, 1981 AMC 260, 267 (E.D.N.Y. 1980).

194. See *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001, 1985 AMC 2554, 2561 (5th Cir. 1984); *The Conqueror*, 166 U.S. 110, 133 (1897); *In re M/V Nicole Trahan*, 10 F.3d 1190, 1196, 1994 AMC 1253, 1258 (5th Cir. 1994).

195. See *M/V Nicole Trahan*, 10 F.3d at 1197, 1994 AMC at 1259-60.

196. See *id.* at 1195, 1994 AMC at 1257.

197. *Delta S.S. Lines*, 747 F.2d at 1001, 1985 AMC at 2561 (quoting *The Conqueror*, 166 U.S. 110, 125 (1896)).

198. *M/V Nicole Trahan*, 10 F.3d at 1195, 1994 AMC at 1259 (“[T]he vessel lost valuable time . . . (And time *is* money in such a market.”)).

199. *Id.* at 1194, 1994 AMC at 1259 (quoting *Delta S.S. Lines*, 747 F.2d at 1001, 1985 AMC at 2561).

200. See *Delta S.S. Lines*, 747 F.2d at 1000-01, 1985 AMC at 2560-62.

201. See *Marine Transp. Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138, 1141, 1995 AMC 622, 625 (5th Cir. 1994); see also *Inland Oil & Transp. Co. v. Ark-White Towing*, 696 F.2d 321, 326-27 (5th Cir. 1983) (holding that loss of use was not proved with reasonable certainty where there was “no evidence that the . . . barges *would* have been used during this time span”).

202. 672 F.2d 464 (5th Cir. 1982) (per curiam).

not be susceptible of exact measurement does not make them any less recoverable.”²⁰³

Specific proof is not required to show lost profits because (1) it would impose an “onerous burden” and (2) it would be a rejection of the traditional maritime rule that “a proper method of determining lost detention profits is to seek a fair average based on a number of voyages before and after [the collision].”²⁰⁴

In *The M/V Tako Invader*, the damage award was based on estimates which relied on historical data for that vessel’s similar voyages.²⁰⁵ While actual invoices would have been preferable, the court found that the “estimates were not so speculative that the district court could not find with ‘reasonable certainty’ that the damages claimed may be ‘reasonably inferred to have been incurred as a result of the collision.’”²⁰⁶

In *Miller Industries v. Caterpillar Tractor*,²⁰⁷ the court affirmed a grant of lost profits for a fishing vessel, concluding that the plaintiffs proved their loss by presenting the catches of three other vessels for the same time period their vessel was down.²⁰⁸ The court found that the comparative evidence was appropriate by showing the daily average catch of the four vessels.²⁰⁹

The court in *Orduna S.A. v. Zen-Noh Grain Corp.*,²¹⁰ considered the “three voyage rule” methodology, and determined that the use of this methodology was proper.²¹¹ The “three voyage rule” considers profits from the voyage immediately before the voyage, the casualty voyage itself, and the voyage immediately after the casualty voyage.²¹² Similarly, the “six-voyage rule” applied in *Delta Steamship Lines v. Avondale Shipyards, Inc.*,²¹³ looks to the three voyages prior to and the three voyages after the casualty voyage, but not the casualty voyage itself.²¹⁴ The *Orduna* court stated that while some courts use the six-voyage rule and others use the three-voyage rule to calculate lost profits, neither formula is mandatory, rather, all that is required is that the damages be

203. *Id.* at 466 (citation omitted).

204. *Nicole Trahan*, 10 F.3d at 1194 (citation omitted).

205. *M/V Tako Invader*, 37 F.3d at 1141, 1995 AMC at 625-26.

206. *Id.* at 1141-42, 1995 AMC at 625 (citation omitted).

207. 733 F.2d 813, 822, 1984 AMC 2559, 2572 (11th Cir. 1984).

208. *Id.*

209. *Id.*

210. 913 F.2d 1149, 1991 AMC 346 (5th Cir. 1990).

211. *Id.* at 1155, 1991 AMC at 352.

212. *Id.*

213. 747 F.2d 995, 1985 AMC 2554 (5th Cir. 1984).

214. *Id.* at 1000-01, 1985 AMC at 2560.

calculated with “reasonable certainty.”²¹⁵ Any reasonable decision by a lower court should be upheld on appeal.

Lost revenue may also be determined by examining the owner’s tax returns or the difference in the vessel’s gross receipts and the cost of goods sold and the maintenance of the vessel.²¹⁶

“The damages must not be merely speculative, and something else must be shown other than the simple fact that the vessel was laid up for repairs.”²¹⁷ Actual loss necessary for demurrage, the *Skou* court held, was demonstrated in *The Potomac v. Cannon*,²¹⁸ which awarded average net profits to the owner because the vessel had been “engaged in a certain, permanent, and lucrative trade” prior to the time it was down for repairs.²¹⁹ A surveyor’s estimate of profits and general operating costs and services may not be sufficient to prove damages.²²⁰

The amount of a lost profit award should be limited to the time period required to complete repairs to the vessel.²²¹ If the owner’s own conduct caused any loss of profits, or delay in the release of the property, then demurrage is improper.²²²

When a vessel is taken out of service through actions of a third party, either the time charterer or the vessel owner, but not both, may make a claim for damages for loss of use.²²³

B. Punitive Damages

General maritime law has long allowed the recovery of punitive damages.²²⁴ While the *Merry Shipping* case involved a seaman’s claim

215. *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1155, 1991 AMC 346, 353 (5th Cir. 1990); *Delta S.S. Lines v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001, 1985 AMC 2554, 2561 (5th Cir. 1984) (“[A] proper method of determining lost detention profits is to seek a fair average based on a number of voyages before and after.”); *see also* *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 414, 1982 AMC 1976, 1993 (5th Cir. 1982) (holding that the calculation of average net profit of vessel by using two years before casualty was proper).

216. *See* *Sea Trek, Inc. v. Captain Tom’s Seafood*, No. CIV.A.97-150, 1998 WL 149576, at *2 (E.D. La. Mar. 24, 1998).

217. *Skou v. United States*, 478 F.2d 343, 345, 1973 AMC 1482, 1484 (5th Cir. 1973) (quoting *The Conqueror*, 166 U.S. 110, 127 (1896)).

218. 105 U.S. 630 (1882).

219. *Id.* at 632.

220. *Mitsui O.S.K. Lines v. Horton & Horton, Inc.*, 480 F.2d 1104, 1106 (5th Cir. 1973) (holding that the damage award should be modified because an award based solely on a surveyor’s estimate, and not on competent testimony, is conjecture).

221. *Fireman’s Fund Ins. Cos. v. Big Blue Fisheries, Inc.*, 143 F.3d 1172, 1177, 1998 AMC 1608, 1613 (9th Cir. 1998).

222. *Id.*

223. *Ferromet Res., Inc. v. Chemoil Corp.* No. 91-4310, 1992 WL 142411, at *3 (E.D. La. June 9, 1992), *vacated*, 5 F.3d 902, 1995 AMC 157 (5th Cir. 1993).

for unseaworthiness, its broader holding supports the award of punitive damages in “all actions under the general maritime law including those of non-seamen.”²²⁵ Further, punitive damages are appropriate in intentional property damage cases.²²⁶ The claimant alleging the right to punitive damages carries the burden of proof to show that the “reckless conduct amounted to a conscious disregard of the rights of others.”²²⁷

Punitive damages are appropriate upon a showing of willful and wanton misconduct by the shipowner.²²⁸ “‘Willful’ is a state of mind surpassing in culpability ordinary negligence but less than intentional harm . . . ‘Wantonness’ . . . [is] ‘the doing of some act or omission . . . with reckless indifference to the knowledge that such act or omission will likely or probably result in injury.’”²²⁹

Employers should not be held vicariously liable for the willful and wanton misconduct of their employees unless the employer authorized or otherwise ratified the acts.²³⁰ When faced with claims of punitive damages arising from an act or omission of an employee, employers should seek to establish that the employee lacked policy-making authority, so as to avoid vicarious liability for such damages.²³¹

In *P & E Boat Rentals*, the United States Court of Appeals for the Fifth Circuit held that liability could not be imputed to the employer, because the employees responsible for the casualty were “lower echelon” employees lacking policy-making authority, and since their acts had not been ratified by the employer, punitive damages were inappropriate.²³² “[P]unitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. In such a case, the corporation itself cannot be considered the wrongdoer.”²³³ If, however, an “upper echelon” employee

224. See *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 73 (1804); *In re Merry Shipping, Inc.*, 650 F.2d 622, 624, 1981 AMC 2839, 2842 (5th Cir. 1981).

225. Complaint of Cameron Boat Rentals, Inc., 683 F. Supp. 577, 585 (W.D. La. 1988) (citing *Evich v. Morris*, 819 F.2d 256, 1998 AMC 74 (9th Cir. 1987)).

226. See generally *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701-02, 1996 AMC 467, 472 (1st Cir. 1995).

227. *Id.* at 704, 1996 AMC at 472; *Amiable Nancy*, 16 U.S. at 559; *Protectus Alpha Navigation v. N. Pac. Grain Growers*, 767 F.2d 1379, 1385-87, 1986 AMC 56, 64 (9th Cir. 1985).

228. See generally *Protectus*, 767 F.2d at 1385, 1986 AMC at 64.

229. *Cameron Boat Rentals*, 683 F. Supp. at 585 (citing PROSSER & KEETON, *THE LAW OF TORTS* § 34, at 212 (1984)).

230. See *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 652, 1989 AMC 2447, 2462 (5th Cir. 1989).

231. See *id.* at 652, 1989 AMC at 2462.

232. See *id.* at 652-53, 1989 AMC at 2462.

233. *Id.* at 652, 1989 AMC at 2462.

with “policy-making authority” is the willful and wanton wrongdoer, a punitive damage award is appropriate.²³⁴

The decision of the United States Supreme Court in *Miles v. Apex Marine Corp.*²³⁵ held that damages recoverable in an action for wrongful death of a seaman do not include loss of society. *Miles* may also be read to limit the recovery of nonpecuniary damages, including punitive damages, in general maritime cases.²³⁶ However, in a well-reasoned opinion involving punitive damages for the destruction of lobster traps, the United States Court of Appeals for the First Circuit limited *Miles* to cases involving Jones Act seamen and other cases where there was some conceivable overlap between statutes such as the Jones Act, DOHSA, and jurisprudence.²³⁷ In cases where Congress has not spoken, the *CEH* court held that *Miles* did not bar nonpecuniary relief. Specifically, “the uniformity principal enunciated in *Miles* is inapplicable,” and the plaintiffs were “entitled to forms of relief traditionally available under the general maritime law, including punitive damages.”²³⁸

C. *Litigation, Release Costs*

Generally, each party in an admiralty action will bear its own costs absent bad faith or a statutory or contractual provision to the contrary.²³⁹ A party may be indemnified for litigation costs if the other is contractually bound to defend a claim.²⁴⁰ Costs associated with the release of the equipment, including litigation, and investigative costs necessary to secure such release should be recoverable when the vessel has been wrongfully seized.²⁴¹ These costs may include customs costs, taxes, shipping costs, fines, fees, etc.²⁴²

234. *Id.* at 652-53, 1989 AMC at 2461-62.

235. 498 U.S. 19, 1991 AMC (1990).

236. *See generally id.*

237. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 1996 AMC 467 (1st Cir. 1995).

238. *Id.* at 702, 1996 AMC at 476. *CEH* has been cited with approval and as the basis for awarding punitive damages in the following admiralty cases: *Gravatt v. City of New York*, 53 F. Supp. 2d 388 (S.D.N.Y. 1999); *In re Horizon Cruises Litigation*, 101 F. Supp. 2d 204 (S.D.N.Y. 2000); *Juno Marine Agency, Inc. v. Taibl*, 761 So. 2d 373 (Fla. Dist. Ct. App. 2000).

239. *See generally* *Vaughan v. Atkinson*, 369 U.S. 527, 530, 1962 AMC 1131, 1133 (1962); *Cantieri Navali Riuniti v. M/V Skyptron*, 802 F.2d 160, 165, 1987 AMC 463, 470 (5th Cir. 1986); *Noritaki Co. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980).

240. *See generally* *Ryan Walsh Stevedoring Co. v. James Marine Servs., Inc.*, 792 F.2d 489, 493, 1987 AMC 1611, 1616 (5th Cir. 1986).

241. *See generally* *Domar Ocean Transp., Ltd. v. Indep. Ref. Co.*, 783 F.2d 1185, 1191, 1987 AMC 1448, 1456 (5th Cir. 1986).

242. *Id.* at 1191, 1987 AMC at 1456.

Attorneys' fees are generally not recoverable, absent a contractual or statutory basis for such awards.²⁴³ The *Galveston* court held that, in admiralty, awards of attorneys' fees were typically only appropriate in abuse of litigation circumstances, and a party's "[n]ot acting 'in an equitable manner' does not support an award of attorneys' fees."²⁴⁴ The defendant's acts or omissions which amount to fraud, conversion, gross negligence, or misconduct, should be attributed to the underlying tort claim and considered in awarding punitive damages, not attorneys' fees.²⁴⁵ If the wrongfully seizing party's counsel has not abused the litigation process, an award of attorneys' fees is inappropriate.²⁴⁶

In *Vaughan v. Atkinson*, the court awarded attorneys' fees because the defendant had been "callous . . . willful and persistent," and his "recalcitrance" forced the plaintiff "to hire a lawyer and go to court to get what was plainly owed him."²⁴⁷

Clearly, there is tension between these two principles. On one hand, the general rule as enumerated in *Galveston* indicates that attorneys' fees are rarely recoverable, but *Vaughn* allowed the award of attorneys' fees due to particularly callous circumstances. While the law is not entirely clear with regard to when an award of attorneys' fees is appropriate, in cases of intentional, bad faith, and wrongful seizure, certainly the better rule is to fully recompense the plaintiff, an approach in line with the goal of awarding damages in accord with equity principles.²⁴⁸

D. Prejudgment Interest

The right to prejudgment interest shall be awarded absent special or peculiar circumstances that would make such an award inequitable.²⁴⁹

With a partial loss of the vessel, the court, in its discretion, may award prejudgment interest from the date of accident, the date repairs could have been made, the date repairs were made, or from the date

243. See generally *Galveston County Navigation Dist. No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 356, 1996 AMC 2850, 2854 (5th Cir. 1996).

244. *Id.* at 359, 1996 AMC at 2859.

245. See *id.*

246. See *id.*

247. *Vaughn v. Atkinson*, 369 U.S. 527, 530-31, 1962 AMC 1131, 1134; see also *Cardinal Shipping Corp. v. M/S Seisho Maru*, 744 F.2d 461, 474, 1985 AMC 2630, 2651 (5th Cir. 1984).

248. *Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir. 1962).

249. See generally *The President Madison*, 91 F.2d 835, 847, 1937 AMC 1375, 1394-95 (9th Cir. 1937); *Todd Shipyards Corp. v. Auto Transp. S.A.*, 763 F.2d 745, 752-53, 1987 AMC 1831, 1842 (5th Cir. 1985).

payment was made for repairs.²⁵⁰ In the Fifth Circuit, the general rule is that the court will award damages from the date of the accident.²⁵¹

VIII. RECOMMENDATIONS TO PRACTITIONERS

There are several points that any person contemplating seizing property or any person whose property is seized should keep in mind. Seizing parties should obtain as much information as they possibly can, relating not only to their claim but also as to the ownership of the property to be seized, paying particular attention to any facts that may contradict the seizing party's understanding as to ownership of the property. More particularly, the selection of certain facts and omission of others may form the basis for a later finding that the property was seized in bad faith. Certainly, the seizing party should hire competent counsel and provide counsel with all facts known to the seizing party, as well as inform counsel as soon as the seizing party knows of any changes in those facts. If the seizing party becomes aware of any facts that lead it to doubt its prior information, it should either release the property or ask a competent court for a judicial determination, based on all facts, as to the rights of the respective parties. Seizing parties may also wish to consider utilizing state law procedures which may be less cumbersome than federal admiralty arrest and attachment provisions. Finally, if the property is damaged during the seizure and the owner has it repaired, and the repairs are negligently performed, the seizing party will probably be held liable for the increased damage to the property, but he or she may be able to pursue claims for contribution or indemnity against the repairer.

With respect to maritime property owners, attachment under Rule B and many state laws can often be avoided by posting a bond or appointing an agent for service of process in states in which the owner is conducting business. Of course, such a bond or the appointment of an agent will not protect an owner from maritime arrest under Rule C, when a valid lien exists, as such measures are irrelevant under maritime arrests. After seizures, owners should do everything possible to obtain the release of the property including, in local cases, involving police and local tribunals, and, in international cases, diplomatic, local, or international tribunals. Moreover, the owners should carefully document the condition of their property, their maintenance records, lost profits, as well as mitigate their damages through use of their remaining assets. In the

250. See generally *Todd Shipyards*, 763 F.2d at 753, 1987 AMC at 1842.

251. See *Ryan Walsh Stevedoring Co. v. James Marine, Inc.*, 792 F.2d 489, 493, 1987 AMC 1611, 1616 (5th Cir. 1986).

event that the seizure of the property has caused or threatens to cause grave losses to the owners, they will probably be justified in taking greater risk with respect to their remaining assets, comfortable in the belief that courts of equity will give them a fair recovery even if those efforts at mitigation fail.

Maritime seizures are not for the faint of heart, but require that the seizing party act scrupulously within the bounds of law. Failing to do so may subject the seizing party to substantial damages and penalties, even when that party acts on advice of counsel. Hopefully, this article offers some guidelines in preventing at least some wrongful seizures. However, when such seizures occur, both sides should consider the points raised herein in mitigating losses, where possible, and proving or contesting losses when they occur.