

“Should the Personal Consumption Deduction be Based on Family Income

or the Decedent’s Own Income” 3/28/00

Thomas R. Ireland
Department of Economics
University of Missouri at St. Louis
8001 Natural Bridge Road
St. Louis, MO 63121
Tel: 314/516-5558
Fax: 314/516-5352
E-Mail: ireland@jinx.umsl.edu

I. Introduction

The decision in *Howard v. Crystal Cruises Inc.*, 41 F.3d 527 (9th Cir. 1994) addressed a narrow issue in forensic economic analysis--whether the personal consumption deduction in a wrongful death action should be based on the income of the family of the decedent or be based on only the income of the decedent. This issue is narrow enough that it had been addressed in the literature of forensic economics only by Gilbert in 1991, Bruce in 1997 and in a series of three short papers by Ward, Trout and Ireland that were prepared expressly to address it in edited of papers on the personal consumption deduction last year (Ireland and Depperschmidt, 1999). When that collection was published, neither the editors or any of the writers were aware of any court decisions that had specifically addressed that issue.

Subsequently, Paul Taylor found specific discussion of that issue in the *Howard* case, which provides the central example for this paper. The second section of this paper discusses the *Howard* case itself. The third section discusses the existing literature on this subject, which consists of papers by Gilbert (1991), Bruce (1997) and the 1999 papers by Ward, Trout and Ireland. The fourth section discusses a set of further unresolved research questions posed by

Howard for which family economics literature provides that at least partial answers. The fifth section provides a brief discussion of *Overly v. Ingalls Shipbuilding, Inc.*, 74 Cal. App.4th 164 (1999), a California case that cites *Howard*. *Overly* deals with a different complex personal consumption issue, but one that is interesting in and of itself. The last section provides brief concluding remarks.

II. The Case of *Howard v. Crystal Cruises, Inc.*

In *Howard v Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir. 1994), the United States Court of Appeals for the 9th Circuit ruled specifically that the trial court was not in error in allowing a personal consumption deduction of 30 percent to be applied to all of family income rather than exclusively the income of a decedent husband. The decision itself is provided in Appendix II of this paper. At the trial court level, the decision had been that Crystal Cruises, Inc. was liable under the Death on the High Seas Act (DOHSA) for the death of Kenneth James Howard. The trial court awarded \$378,794 plus post judgment interest to Vika Howard, the widow, and her son Rolf for their losses under DOHSA. The plaintiff then appealed to the 9th Circuit Court of Appeals on a basis described by the Appeals Court as follows:

The appellant asserts two challenges to the district court's calculations: First, she argues that it was error to apply the 30% figure to the household income (i.e., both her salary and Howard's wages as a grocery clerk) rather than to Howard's income alone, because Howard was unusually frugal, and including her income violates the collateral source rule; and second, she argues that no reduction should have been taken against the valuation of Howard's services, because those services (e.g., painting the house and maintaining the car) were indivisible. We review the district court's computation of damages following a bench trial for clear error... Whether the district court selected the correct legal standard for computing those damages, however, is a question of law subject [**10] to de novo review. *Id.* at 972.

The *Howard* Court rejected the frugality argument out of hand because it found no evidence to support that claim of unusual frugality. The Court also accepted the 30 percent figure

because that figure had been introduced by the plaintiff's economist in the first place, relying on the Cheit tables.¹ The Appeals Court decision does not provide a breakdown indicating how much of the trial court award of \$378,794 was for lost financial support stemming from Kenneth Howard's lost earnings and how much was for lost services. The decision also does not deal clearly with the manner in which lost services were calculated for the purpose of assessing a 30 reduction to that part of the award. It appears clear that a 30 percent reduction was applied to the combined incomes of Kenneth and Vika Howard and at least the value of the services around the home of Kenneth Howard, but this percentage was probably not applied to the total value of family services.²

The Court of Appeals also rejected the collateral source argument raised by the plaintiff, saying (at 531):

the appellant cites to no relevant authority for the proposition that her own income should not be taken into consideration as a part of the total household income. Indeed, the clear weight of authority indicates that alternative means of support available to an adult beneficiary (exclusive of remarriage and, perhaps, insurance) in a DOHSA action may be taken into consideration by a court).

That language makes *Howard* an important decision for forensic economics. Whether or not Kenneth Howard was particularly frugal is a factual issue that would have no significance beyond the Howard case. However, rejecting a collateral source argument for inclusion of the wife's income for purposes of calculating the personal consumption deduction is a conceptual decision that is likely to govern how such calculations are made in DOHSA actions and possibly other federal actions as well.

This is particularly true since, for other reasons, the *Howard* case has been subject to relatively frequent citation. What is cited in most other cases is the sentence included above: "Whether the district court selected the correct legal standard for computing those damages,

however, is a question of law subject [**10] to de novo review. Id. at 972.” Appendix I provides a list of cases appearing in a Lexis search for citations of the *Howard* decision.

However, the issue of whether or not to use family income or personal income for calculating the personal consumption deduction does not arise in any of those cases except the *Howard* case itself. This case is also important because the decision was petitioned to the United States Supreme Court, where certiorari was denied. This means that the United States Supreme Court did not find appealable error in the reasoning of the 9th Circuit Court of Appeals.

To this writer’s knowledge, no other case law addresses the issue of whether the personal consumption deduction should be based on family income or only on the income of the decedent.

III. Individual vs. Family Income in the Forensic Economics Literature

The issue of whether or not the personal consumption deduction should be based on family income or only on the decedent’s income has been addressed in the forensic economics literature only by Gilbert (1991), Bruce (1997) and by three short papers by Ward, Trout and Ireland (1999).³ Gilbert did not directly discuss what was the legal standard, but distinguished between what he called “the family income approach” and “the welfare approach.” The family income approach is the approach required in the *Howard* decision of determining compensation by the net impact on family income. This involves multiplying family income by the assumed personal consumption percentage and subtracting that amount from the decedent’s money income. (Gilbert did not address the loss services issue.) What Gilbert called the welfare approach involved attempting to restore the family back to the same point on an indifference curve as before the decedent’s death. Gilbert argued that this implied applying the personal consumption percentage to the decedent’s income only and invoked an indifference curve analysis to show how this would work. The problem with Gilbert’s analysis is that it presumes that

survivors can be made whole along some specified dimension that takes into account the decedent as a producer of income, but does not take into account various intangible aspects of the losses of survivors. It is not reasonable to suppose that survivors can be put back onto the same indifference curve by the simple expedient of not subtracting the decedent's consumption of family income not earned by the decedent, but it does seem reasonable to assume that income spent by other family members on the decedent should not be subtracted from their losses.

Bruce (1997) works from the model developed by Gilbert, but raises important questions about the nature of the marriage which ended by the death of one of the spouses. He argues that Gilbert's welfare approach is warranted in cases of an "idealized marriage" in which there is a great deal of consumer interdependency between spouses in the form of love. Bruce argues that in a "marriage of convenience" or "a marital partnership," the family income approach is appropriate since the relationship depends on convenience in joint production activities.

Ward, Trout and Ireland (1999) make no distinction about the nature of a marriage, nor do they define the approach of basing personal consumption on the decedent's income only as a "welfare" approach, although Ward does use some arguments that are consistent with the Gilbert and Bruce position. Ward argues that the deduction should be based only on the decedent's own income, suggesting (at 32.2):

Forensic economists should have a goal of maximizing the scope of their measurement of damages, as long as such measurement is theoretically sound. When we calculate an earnings loss to survivors we realize that it is the utility generated by earnings that is lost rather than the earnings themselves. Similarly, the survivors lose the utility of household services performed by the decedent rather than just the physical activity represented by the services. The utility generated by the spending of earnings or consumption of household services cannot be disassociated from the survivors' relationship with the decedent.

For example, assume that a husband and wife went to lunch every Friday, to talk over events of the week. As a result of the wrongful death of the husband, sufficient earnings are restored to the wife to allow her to again go to lunch on Friday. Certainly the wife has

not been compensated for the loss of the lunch by a monetary award equal to the cost of her lunch. The expenditure for lunch was only a part of the utility she received from the lunch.

In this passage, Ward is arguing that important utility measurement errors will result if family income is used as the basis for the personal consumption deduction. This is because there are family interdependencies in the values of family expenditures that are not captured by allocating expenditures strictly on the basis of apparent costs. Ward then goes on to argue that the collateral source argument does apply. He sees no reason why there should be a difference between not being allowed to introduce the fact that a surviving spouse has remarried and what amounts the surviving spouse may have been spending in support of the decedent.

Trout's argument is of a practical nature. All of the studies that forensic economists have relied upon to measure consumption expenditures by family members have been based on household income. Further, "it is not possible to trace the earnings of multiple members of a household through the consumption chain with any accuracy. . . Incomes of different family members often go into a common pool, from which distribution of expenditures is made without any effort to trace the particular dollars of income being spent." Trout argues that the income basis that should be used is the income basis used in studies being relied upon for percentage measures. He points out that "most" studies rely on family income and thus that the percentages should be applied to family income. In fact, this author is not aware of *any* study that relies exclusively on individual income for purposes of calculating percentages of consumption. Thus, Trout's argument translates into an argument for always using family income.

Ireland's contribution to the 1999 volume was to indicate philosophic support for the position taken by Ward, but to also pose theoretical complexities created by both positions. Ireland begins with an example of the hypothetical family of John and Mary Doe, who earn

\$90,000 per year and \$10,000 per year, respectively. Mary is assumed to be the decedent and to have had a personal consumption percentage of 15 percent of family income. Under these circumstances, Mary would have personal consumption of \$15,000, meaning that her death results in a \$5,000 per year savings (\$15,000 in consumption minus \$10,000 in earnings) to the family under the family income approach (a possibility also discussed in the Ward paper). Ireland then goes on to consider the fact that many of Mary's consumption expenditures would have been tied to her activity in the labor market, including child care, extra transportation cost, extra clothing cost and extra food cost, none of which could have been included in a Schedule C for employee business expenses. Ireland therefore suggests that Mary's consumption expenditures are a function of her role in the labor market in a way that is not captured by looking at and subtracting for employee business expenses. This poses an important set of problems for the family income approach.

Ireland then considers problems posed by the approach of using only the decedent's income. Here, Ireland deals with the problem posed by Trout that the distribution of family income may not be easily traceable to the sources of that family income. From a family income perspective, basic needs can reasonably be considered the highest priority expenditures, with expenditures then proceeding to lower and lower priority uses of income. Ireland asks whether, if the loss is to be based on Mary Doe's income only, it should be the first \$10,000 of family income or the last \$10,000 of family income, suggesting that the percentage of the first \$10,000 consumed by Mary as personal consumption might be very different from the last \$10,000 of family income. This would be true even if Mary Doe's average rate of personal consumption could be reasonably measured as 15 percent of family income. However, Ireland suggests that since the legal system has never resolved whether Mary's income should be treated as the first or

last \$10,000 of family income, it may be reasonable to use her average rate of 15 percent as a compromise solution.

IV. Further Issues for Research in Family Economics

Ward's argument, as quoted above, points to the need to address in more detail the issue of what are family goods and services. Some goods and services produced within families are private goods and services consumed only by individual family members, while others are characterized as "family goods and services." Family goods are essentially public goods produced within and of benefit to family members, but not other persons. Expenditures on public utilities and housing have many public elements in the sense that they are non rival in consumption. If a home is heated for one family member, the benefits are available with a nearly zero marginal cost to other family members. Forensic economists recognize these family goods as indivisible benefits that should not be treated as personal consumption by a decedent since they remain needed by survivor without reduction in cost. However, as Ward suggests, there are many family good elements in other less obvious family circumstances such as a family going to an entertainment event together.

If the decedent provided companionship, guidance and counsel at dinner or in the context of various entertainment venues, should the cost of the decedent's dinners and entertainment be treated as personal consumption for the decedent. Or should that cost be treated as an ancillary cost of services provided by the decedent for survivors? In almost all legal constituencies, lost guidance, counsel and educational assistance are recoverable where minor children are involved. In most, those same services are recoverable even for adult children and spouses. Thus, if the services provided at dinners and entertainment venues are recoverable, it is certainly arguable that expenditures made to pay for the decedent's costs in such contexts are really family good

expenditures rather than the personal consumption and maintenance of the decedent.

For these and other reasons, there should be more research into how family expenditures on goods and services and the investment of time and energy by individual family members mesh together to produce the services individuals are able to provide to each other within family contexts. None of the existing studies of personal consumption are designed to answer the questions forensic economists are asked to address in the context of wrongful death litigation, as Ward suggests.

Another set of questions revolve around family bargaining issues. If Lundberg and Pollak (LP 1996) and Lundberg, Pollak and Wales (LPW 1996) are correct, it should make a difference in consumption patterns which of the two spouses earned which parts of a \$100,000 family income. A family in which both spouses earned \$50,000 per year would not have the same consumption patterns as a family in which the husband earns \$70,000 and the wife earned \$30,000. The focus of the LPW study is not on the percentage of total family income used by each marital partner, but on the types of items that would be purchased. LPW concluded that higher earnings by a wife resulted in greater expenditures on women's clothing and children's clothing. LP summarize other studies showing that increased relative earning by a wife causes reduced expenditure on alcohol and tobacco, increases in child health and nutrition as well as the shift in clothing expenditures. In none of the existing studies is the distribution of the sources of family income treated as a variable considered in determining the size of personal consumption expenditures, but the distribution of family income may well be an important variable in determining the predicted personal consumption of family income by a decedent.

One may regard the LP and LPW positions as considering elements similar to the elements raised by Bruce (1997) in introducing the concepts of "marriage of convenience" and "marital

partnership.” However, while Bruce sees his “idealized marriage” and his “convenience” and “partnership” types of marriages as polar examples, LP and LPW (and the entire literature of family bargaining theory) takes an intermediate position. Marital partners do have interdependent utility functions, but not perfectly interdependent utility functions ascribed to Bruce’s “idealized marriage.” Even with interdependent utility functions, bargaining still takes place between marital partners over access to and use of family resources. This occurs on both income and expenditure sides of the family ledger and with respect to both the provision of and the benefits derived from family service production. It would be very desirable to have more information about how such bargaining under conditions of interdependent utility functions between family members influences rates of personal consumption expenditures.

Likewise, a Bruce’s “convenience/partnership” concept of marriage leads to abstract conclusions that are also not typical of most families. Most spouses do take either other’s welfare into account for reasons that transcend power in bargaining relationships. However, the implicit model underlying the decision of the *Howard* Court can be described as consistent with this concept.

There is much room for interaction between family bargaining theorists and forensic economists in the areas relating to a mixed concept of marriage that is not amenable to the Gilbert and Bruce alternatives. In order to answer some of these questions, forensic economists need to know how real families actually function, both on the income/service production side and on the expenditure/benefit distribution of services side of the family ledger. Ward’s thoughtful remarks come closer to the mark than either Gilbert or Bruce in that regard, but Ward’s analysis still contains discussion of intangible elements that would be rejected by judges in many constituencies.

A third set of questions revolves around lost services of a decedent as distinct from lost financial support from lost income. As suggested in endnote (1), there are reasons to believe that the *Howard* Court may have used a different standard with respect to lost services within the Howard family than it used for the personal consumption deduction. In order for the Court to have considered the personal consumption from family services on a total family service basis, the court would have had to have known what were Vika Howard's services before the death of Kenneth Howard. Since the plaintiff's economist would have had no reason to calculate that value, the 30 percent reduction for Kenneth Howard's services may have been applied only to Kenneth Howard's own service production. If the court had taken Vika Howard's services into account. Suppose, for example that Kenneth Howard's services were adjusted to have been worth \$5,000 per year and Vika Howard's services were adjudged worth \$15,000 per year. The total value of services in the Howard home would then have been worth \$20,000, with 30 percent of that amount being \$6,000. That would imply that the plaintiff owed the defendant a \$1,000 offset for the net increase in family services available to Vika Howard after the death of Kenneth Howard.

Still another issue is the percent of consumption that should be assumed for lost services. The *Howard* Court used the same 30 percent figure from the Cheit tables that was used by the plaintiff's economist for lost earnings. There is no reason, based on any data sources available, to assume that the percentages would be the same for services as for income. No data exists about the percentages of consumption by individuals within families of the non market services produced within those families. However, there are many reasons to suppose that those percentages would probably be smaller than the percentages for personal consumption in the form of expenditures of income. Services for purely self consumption are not normally even included in

time use studies as services. The term service almost implies “for another family member” or at least that the service has important “family good” qualities. A bath taken by an adult father is not a “service” in the usual sense of that term, but the effort of a father in bathing his infant son is a service.

While this has not been discussed in the existing literature, forensic economists actually take two approaches for valuing lost services. Using one approach, services are implicitly defined as “services for survivors.” Any service decedent had provided for himself or herself is treated as “not a service,” but as self maintenance or entertainment or some other non service activity. Using the other approach, services are defined as any activity that would benefit other family members at least part of the time, so that some of those activities should be subtracted for self consumption. With almost no research at all in the area of the distribution of the benefits of non market services to individual family members, there is little that forensic economists can do to significantly improve their estimates. However, the differences between money income based and service based contributions by decedents need to be made clear to triers of fact.

V. The *Overly v. Ignalls Shipbuilding, Inc.* Case

This author’s LEXIS search uncovered only case that cites *Howard* and also has anything to do with personal consumption. That case is *Overly v. Ignalls Shipbuilding, Inc.*, 74 Cal. App. 4th 164 (1999). This case addresses a somewhat different issue than the issue of whether the income basis should be family income or the decedent’s income only, but the issue is closely related. In *Overly*, the issue is how personal consumption should be handled in personal injury cases in which the injury will result in a shortened life expectancy for the injured party. Robert Overly was still alive at the time of this decision, but was expected to have a shortened life expectancy. In this case, the defendant argued that during “lost future years,” the logic of the

California Wrongful Death Act suggested that the consumption of both spouses during the projected “lost years period” should be deducted from lost earnings.

The *Overly* Court suggested that there was no basis for deducting the consumption of the uninjured spouse, but that the issue of using a “net” approach to lost years with respect to the injured spouse has some apparent legal support. Nevertheless, the *Overly* court rejected the logic of the decedent, making two observations relevant to the current paper. At [**22], the Court said:

. . . as a general matter, applying a personal consumption deduction in this context would introduce undesirable elements of speculation and uncertainty into an already difficult calculation. For example, it is difficult to conceive how a defendant could prove the use that an injured plaintiff would have made of lost years earnings had his life expectancy not been cut short. It is equally hard for us to imagine how a defendant would distinguish the injured party’s “personal” consumption from the consumption of dependents living with that injured party.

The *Overly* Court adds [at *25]:

Speculating as to how the injured party may have spent those future earnings if not for the tortious conduct is a very different exercise than permitting a wrongful death plaintiff to prove damages for lost support by accounting for his or her supporter’s other expenses.

VI. Conclusion

It is important for forensic economists to be more aware of the need to both read court cases and to consider whether questions raised by those court cases have been addressed by economists dealing with matters other than forensic damage calculations. This paper provides few definitive answers, but it does provide a useful framework for considering the specific question of how forensic economists ought to think about the problems posed by questions such as how the personal consumption deduction should be applied in different types of family circumstances.

Endnotes

1. The tables relied upon were taken from Earl F. Cheit (1961), Table 3.5, page 78, showing that personal consumption by one adult in a two adult family should be assessed at 30 percent. It is not made clear in the Howard decision, but it appears that their son Rolf was not living with his parents at the time of the death of Kenneth Howard because the Cheit figure for a two adult family with one minor dependent would have been 26 percent.
2. There are good reasons for questioning whether either the trial court or the Court of Appeals applied the same method to support from lost earnings to lost services. It would have been easy to calculate the value of total family income based on tax records. If the plaintiff's economist had only applied the 30 percent reduction to Kenneth Howard's earnings, the judge could have increased the size of income subject to the 30 percent reduction by the amount of Vika Howard's earnings. Presumably, the plaintiff's economist would have calculated the value of Kenneth Howard's services and included them in his testimony. However, it is highly unlikely that the plaintiff's economist would have done the same with Vika Howard's services. There would have been no simple way for the judge to have made this calculation, given (1) that a typical wife provides more hours of services than a typical husband and (2) that there is no reason why the value of the wife's services should be calculated at the same dollar per hour rate as those of a husband. Thus, without some agreed to measure for the value of Vika Howard's services, a total value of family services to which 30 percent should be applied would not have existed. It is not clear from the decision what was done with this. It appears likely that the 30 percent was actually applied to the value of the incomes of both Kenneth and Vika Howard's money earnings plus the value of Kenneth Howard's services, but not Vika Howard's services.
3. Brookshire and Smith (1990) do take the position that the personal consumption deduction should be deducted from family income, but do not consider alternatives. They say, on page 50, that:

Had he not died, Jack Doe would have spent some amount of total family income exclusively on himself. This amount would not have been available to the rest of Jack's family. Since the family would not have enjoyed this part of income anyway, now that Jack is dead, they have not lost this portion of projected income. We therefore reduce the wage loss estimate by some amount that reflects Jack's personal consumption.

References

- Brookshire and Smith. 1990. *Economic/Hedonic Damages*. Anderson Publishing Company. Cincinnati, Ohio.
- Bruce, Christopher. 1997. "Determination of Personal Consumption Expenditures in Fatal Accident Actions: A Note." *Journal of Forensic Economics*. 10(3):291-296.
- Cheit, Earl F. 1961. *Injury and Recovery in the Course of Employment* John Wiley & Sons, Inc. New York.

Gilbert, Roy A. 1991. "Estimating Personal Consumption of a Deceased Family Member." *Journal of Forensic Economics*. 4(2):175-185.

Ireland, Thomas R. 1999. "Issues Determining the Basis of the Personal Consumption Deduction." Reading # 34 in *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption*. Lawyers & Judges Publishing Co. Tucson, AZ.

-----, and Thomas O. Depperschmidt. 1999. *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption*. Lawyers & Judges Publishing Co. Tucson, AZ.

Lundberg, Shelly and Robert A. Pollak. 1996. "Bargaining and Distribution in Marriage." *Journal of Economic Perspectives*. 10(4):139-158.

Lundberg, Shelley, Robert A. Pollak and Terrence J. Wales. 1996. "Do Husbands and Wives Pool Their Resources? Evidence from the United Kingdom Child Benefit." *Journal of Human Resources*. 32(3):463-480.

Trout, Robert B. 1999. "Why the Basis of a Decedent's Personal Consumption Should be Family Income. Reading # 33 in *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption*. Lawyers & Judges Publishing Co. Tucson, AZ.

Ward, John O. 1999. "Defining the Basis of Decedent's Personal Consumption in Wrongful Death Litigation: Personal or Family Earnings?" Reading #32 in *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption*. Lawyers & Judges Publishing Co. Tucson, AZ.

Appendix I. Cases citing Howard v. Crystal Cruises, Inc.
Lexis Search on 1/20/99

1. AMBASSADOR HOTEL CO. v. WEI-CHUAN INV., No. 97-56423, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 189 F.3d 1017; 1999 U.S. App. LEXIS 20818; Fed. Sec. L. Rep. (CCH) P90,643; 99 Cal. Daily Op. Service 7152; 99 Daily Journal DAR 9157, April 14, 1999, Argued and Submitted, Pasadena, California, August 31, 1999, Filed
2. EVANOW v. M/V NEPTUNE, No. 97-35248, No. 97-35249, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 163 F.3d 1108; 1998 U.S. App. LEXIS 31645; 1999 AMC 517; 98 Cal. Daily Op. Service 9218; 98 Daily Journal DAR 12904, September 14, 1998, Argued and Submitted, Portland, Oregon, December 21, 1998, Filed
3. CIGNA PROP. & CAS. INS. CO. v. POLARIS PICTURES CORP., No. 96-56252, No. 96-56789, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 159 F.3d 412; 1998 U.S. App. LEXIS 26869; 41 Fed. R. Serv. 3d (Callaghan) 1359; 1999 AMC 1; 98 Cal. Daily Op. Service 7920; 98 Daily Journal DAR 11008, August 7, 1998, Argued and Submitted, Pasadena, California, October 22, 1998, Filed
4. FIREMAN'S FUND INS. COS. v. BIG BLUE FISHERIES, INC., No. 96-36053, No. 96-36135, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 143 F.3d 1172; 1998 U.S. App. LEXIS 7852; 1998 AMC 1608; 98 Cal. Daily Op. Service 3082; 98 Daily Journal DAR 4237, February 3, 1998, Argued, Submitted, Seattle, Washington, April 24, 1998, Filed
5. DUPUIS v. ALASKAN SHORES F/V, No. 96-36264, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1998 U.S. App. LEXIS 1876, February 3, 1998 **, Submitted, Seattle, Washington ** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4., February 9, 1998, Filed, RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT., Reported in Table Case Format at: 1998 U.S. App. LEXIS 11425.
6. UNITED STATES v. PEND OREILLE COUNTY PUB. UTIL. DIST. NO. 1, No. 95-36289, No. 96-35022, No. 96-35045, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 135 F.3d 602; 1998 U.S. App. LEXIS 1107; 98 Cal. Daily Op. Service 710; 98 Daily Journal DAR 993; 28 ELR 20555, October 7, 1997, Argued, Submitted, Seattle, Washington, January 28, 1998, Filed
7. CHAN v. SOCIETY EXPEDITIONS, INC., No. 96-35210, No. 96-35372, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 123 F.3d 1287; 1997 U.S. App. LEXIS 22795; 1997 AMC 2713; 97 Cal. Daily Op. Service 7012; 97 Daily Journal DAR 11355, May 29, 1997, Argued, Submitted, San Francisco, California, August 29, 1997, Filed

8. PHONE FUNDERS, INC. v. TELECARE, INC., NO. 96-55129, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1997 U.S. App. LEXIS 12497, May 8, 1997, Argued and Submitted, Pasadena, California, May 29, 1997, FILED, RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

9. BARTLESON v. UNITED STATES, No. 95-15528, No. 95-15561, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 96 F.3d 1270; 1996 U.S. App. LEXIS 24951; 45 Fed. R. Evid. Serv. (Callaghan) 785; 96 Cal. Daily Op. Service 7154; 96 Daily Journal DAR 11742, August 15, 1996, Argued, Submitted, San Francisco, California , September 25, 1996, Filed

10. HAWAIIAN FISHING CO. v. M.D.R. INC., No. 94-15993, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1996 U.S. App. LEXIS 13553, May 6, 1996, Argued and Submitted, Honolulu, Hawaii, May 24, 1996, FILED, RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT., Reported in Table Case Format at: 86 F.3d 1162, 1996 U.S. App. LEXIS 42007.

11. HOWARD v. CRYSTAL CRUISES, INC., No. 93-15489, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 41 F.3d 527; 1994 U.S. App. LEXIS 33665; 1995 AMC 305; 94 Cal. Daily Op. Service 9095; 94 Daily Journal DAR 16940, July 14, 1994, Argued, Submitted, San Francisco, California, December 1, 1994, Filed, Certiorari Denied April 24, 1995, Reported at: 1995 U.S. LEXIS 2909.

Appendix II
The Decision in Howard v. Crystal Cruises, Inc.

VIKA L. HOWARD, individually and as Personal Representative of the ESTATE OF KENNETH JAMES HOWARD, Deceased, Plaintiff-Appellant, and ROLF HOWARD, Plaintiff, v. CRYSTAL CRUISES, INC., a California corporation, Defendant-Appellee.
No. 93-15489

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
41 F.3d 527; 1994 U.S. App. LEXIS 33665; 1995 AMC 305; 94
Cal. Daily Op. Service 9095; 94 Daily Journal DAR 16940

July 14, 1994, Argued, Submitted, San Francisco, California

December 1, 1994, Filed

SUBSEQUENT HISTORY:

[**1] Certiorari Denied April 24, 1995, Reported at: 1995 U.S. LEXIS 2909.

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-91-00642-DFL. David F. Levi, District Judge, Presiding.

COUNSEL:

Allan S. Haley, Nevada City, California, for the plaintiff-appellant.

Walter T. Johnson, Lillick & Charles, San Francisco, California, for the defendant-appellee.

JUDGES:

Before: Edward Leavy and Andrew J. Kleinfeld, Circuit Judges, and Fred van Sickle, * District Judge. Opinion by Judge Leavy.

* The Honorable Fred van Sickle, United States District Judge for the Eastern District of Washington, sitting by designation.

OPINIONBY: LEAVY

OPINION: [*528] OPINION

LEAVY, Circuit Judge:

This appeal arises out of an admiralty wrongful death action in which a widow appeals from the district court's entry of judgment in her favor, arguing that the court erred by applying a federal statute rather than general maritime law to her claim, and by miscalculating the economic impact to her of her husband's death. We reject these contentions and affirm.

FACTS AND PRIOR PROCEEDINGS

In September 1990, Kenneth James Howard ("Howard"), his wife, Vika, and their son, Rolf, took a Mexican vacation cruise aboard the CRYSTAL HARMONY, a vessel of Bahamian registry operated by Crystal [**2] Cruises, Inc. ("Crystal"), a California corporation. While disembarking from the CRYSTAL HARMONY as it lay anchored within Mexican territorial waters, Howard suffered a severe laceration to his right Achilles tendon. He received emergency medical attention aboard the CRYSTAL HARMONY and underwent surgery in Acapulco to repair the damaged tendon. Less than a month after returning home to Sacramento, Howard suddenly fell ill and died. An autopsy revealed that blood clots from the injured area had lodged in his pulmonary arteries and fatally obstructed the flow of blood to his lungs.

Seven months later, Mrs. Howard filed the instant wrongful death action in federal district court against Crystal, asserting individual claims on behalf of herself, her son, and her mother-in-law, as well as claims on behalf of Howard's estate, under the general maritime law of the United States and the Death [*529] on the High Seas Act ("DOHSA"), 46 U.S.C. @@ 761-67. Following a bench trial, the district court found in favor of the plaintiffs and awarded them damages totalling \$373,379 plus prejudgment interest. Both parties then filed timely motions to alter or amend the judgment [**3] under Fed. R. Civ. P. 59(e). The court granted the motions and entered an amended judgment, again in favor of the plaintiffs, for \$ 378,794 plus postjudgment interest. Mrs. Howard (hereafter, "appellant") has timely appealed from the amended judgment, arguing that the district court erred by applying DOHSA rather than the general maritime law, and by reducing the damages for lost income and services by 30% to reflect Howard's personal consumption.

ANALYSIS

I. DOHSA/General Maritime Law

The district court concluded that the provisions of DOHSA governed this action. That determination involves a question of law subject to de novo review. See *Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993) (all legal conclusions of district court sitting in admiralty examined de novo).

Section 1 of DOHSA provides that whenever the death of a person shall be caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of [**4] the United States, in admiralty

46 U.S.C. @ 761.

It is undisputed that Howard died as the result of a wrongful act that occurred "beyond a marine league [i.e., three nautical miles] from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States[.]" See *id.* Accordingly, and in order to

determine whether the district court correctly applied DOHSA as the exclusive remedy in this wrongful death action, see *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232-33, 91 L. Ed. 2d 174, 106 S. Ct. 2485 (1986), we must answer the question of whether something that happens within the territorial waters of a foreign state occurs on the "high seas" for purposes of DOHSA.

We are aware of only two reported decisions from this Circuit that have touched on the question of the meaning of "high seas" under DOHSA. In *Roberts v. United States*, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070, 42 L. Ed. 2d 665, 95 S. Ct. 656 (1974), we indicated, [*5] without deciding, that DOHSA's "high seas" could be read as applying to foreign territorial waters. See *id.* at 527 n.7 ("Because Congress only has power to fix the extent of territorial waters measured from the shores of its own country it may well have considered all waters beyond one marine league from those shores to be 'high seas' for purposes of DOHSA so long as navigable, even though within the territorial waters of a foreign state."). Nine years later we again discussed, but did not decide, the issue in *Williams v. United States*, 711 F.2d 893, 895 n.3 (9th Cir. 1983) ("It is not clear whether such tortious acts [i.e., those occurring within the territorial waters of foreign states] fall within the purview of the DOHSA.") (citing *Roberts*).

While it is true that we have not previously disposed of this precise question, the clear weight of authority rejects the appellant's position. See, e.g., 2 *Ellen M. Flynn, et al., Benedict on Admiralty* @ 81c, at 7-11 n.20 (7th ed. 1993) ("It appears to be settled that the term 'High Seas' within the meaning of DOHSA is not limited to international waters, but includes [*6] the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore."); Thomas J. Schoenbaum, *Admiralty and Maritime Law* @ 7-2, at 238 (1987) (DOHSA applies "even [to] those killed in foreign territorial waters.") (footnote omitted). Accord *Sanchez v. Loffland Bros.*, 626 F.2d 1228, 1230 & n.4 (5th Cir. 1980) (per curiam) (seaman killed in Venezuela), cert. denied, 452 U.S. 962, 69 L. Ed. 2d 974, 101 S. Ct. 3112 (1981); *Public Admin'r of New York County v. Angela Compania Naviera, S.A.*, 592 F.2d 58, 60-61 (2d Cir.) (Greek seaman from Liberian-Panamanian ship died in Greece after sailing in Indian, Pakistani, [*530] and Japanese waters), cert. denied, 443 U.S. 928, 61 L. Ed. 2d 897, 100 S. Ct. 15 (1979); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 803-804 & n.9 (E.D. Pa.) (helicopter crash in Scottish waters), as modified on reh'g, 677 F. Supp. 803 (1987), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); [*7] *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277, 1280 (W.D. Pa. 1983) (scuba diving accident in Bahamian waters), *aff'd*, 738 F.2d 423 (3d Cir.), cert. denied, 469 U.S. 858, 83 L. Ed. 2d 121, 105 S. Ct. 188 (1984); *First & Merchants Nat'l Bank v. Adams*, 1979 A.M.C. 2860, 2863-64 (E.D. Va. 1979) (plane crash in Canadian waters), *aff'd* in part, *rev'd* in part on other grounds, 644 F.2d 878 (4th Cir. 1981); *Kunreuther v. Outboard Marine Corp.*, 757 F. Supp. 633, 634 (E.D. Pa. 1991) (snorkeling accident in Jamaican waters); *Moyer v. Klosters Rederi*, 645 F. Supp. 620, 623-24 (S.D. Fla. 1986) (cruise ship passenger died after snorkeling in Mexican waters); *In re Air Crash Disaster Near Bombay*, 531 F. Supp. 1175, 1182-84 (W.D. Wash. 1982) (plane crash in Indian waters); *Cormier v. Williams/Sedco/Horn Constructors*, 460 F. Supp. 1010, 1011-12 (E.D. La. 1978) (seaman drowned [*8] in Peruvian river); *Mancuso v. Kimex, Inc.*, 484 F. Supp. 453, 454-55 (S.D. Fla. 1980) (plane crash in Jamaican waters); *Hammill v. Olympic Airways, S.A.*, 398 F. Supp. 829, 834 (D. D.C. 1975) (plane crash in Greek waters) (implicit in dictum).

Applying the above authorities to the facts of this case, we conclude that there is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant, particularly when the law in question was expressly designed to cover wrongful deaths occurring outside the territorial boundaries of the United States. Accordingly, we hold that the district court did not err by applying DOHSA as the exclusive remedy here. n1 See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. at 232-33.

-----Footnotes-----

n1 Citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990), Crystal contends that the general maritime law of the United States would not make a difference in the outcome of this appeal, even if we were to hold that DOHSA does not govern this action. While support exists for this position, see, e.g., Thomas J. Schoenbaum, *Admiralty and Maritime Law* @5-7 at 53, 7-3 at 91 (Supp. 1992) and cases collected thereat, we decline to reach the merits of this argument in the light of our holding.

-----End Footnotes-----[**9]

II. 30% Reduction of Damages

After calculating the total amount of damages to be awarded the appellant for her loss of Howard's support and services, the district court reduced those figures by 30% to reflect that portion of the recovery which the court found should be attributed to Howard's personal consumption. The appellant asserts two challenges to the district court's calculations: First, she argues that it was error to apply the 30% figure to the household income (i.e., both her salary and Howard's wages as a grocery clerk) rather than to Howard's income alone, because Howard was unusually frugal, and including her income violates the collateral source rule; and second, she argues that no reduction should have been taken against the valuation of Howard's services, because those services (e.g., painting the house and maintaining the car) were indivisible. We review the district court's computation of damages following a bench trial for clear error. See *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 970 (9th Cir. 1994). Whether the district court selected the correct legal standard for computing those damages, however, is a question of law subject [**10] to de novo review. *Id.* at 972.

Section 2 of DOHSA provides that damages must represent "a fair and just compensation for the pecuniary loss sustained[.]" 46 U.S.C. @ 762. Accord 1 Martin J. Norris, *The Law of Maritime Personal Injuries* @ 6:5, at 320 (4th ed. 1990) ("Under the Death on the High Seas Act [a widow] is entitled to a fair and just compensation for the pecuniary loss she has suffered by the reason of the death of the decedent.") (footnote omitted). As a practical matter, these damages are limited to two things: loss of support and loss of services. See 2 Martin J. Norris, *The Law of Seamen* @ 29:1, at 307 (4th ed. 1985).

The appellant's own economic expert expressed the concept of "personal consumption" in terms of a percentage of total household [**531] income, and relied on a chart (the so-called "Cheit Table") which showed that the average head of household in a two-person/two-income household consumes 30% of the total household income. The district court found that the appellant's testimony concerning Howard's unusual frugality was unsupported by the evidence. n2 We find no

clear error in [**11] this holding, both as to loss of income and loss of personal services.

-----Footnotes-----

n2 For example, the district court pointed out that, whatever economies Howard may have taken in some matters, he and his wife used both incomes in order to take expensive vacations, as exemplified by the Mexican cruise that cost him his life.

-----End Footnotes-----

As for the argument concerning the collateral source rule, the appellant cites to no relevant authority for the proposition that her own income should not be taken into consideration as a portion of the total household income. Indeed, the clear weight of authority indicates that alternative means of support available to an adult beneficiary (exclusive of remarriage and, perhaps, insurance) in a DOHSA action may be taken into consideration by a court. See, e.g., Joseph E. Edwards, Annotation, "Determination of Amount of Award of Damages Under Death on the High Seas Act (46 USCS @@ 761-768)," 16 A.L.R. Fed. 679, 725-26 (1973 & Supp. 1993) and authorities [**12] collected thereat.

CONCLUSION

We conclude that the district court did not err in its determination that DOHSA provides the exclusive remedy for the appellant's wrongful death action, and we reject the appellant's contention that the district court erred by reducing her lost income and services damages by 30% to reflect Howard's personal consumption. Because we find no merit to any of the appellant's remaining arguments, the decision of the district court is

AFFIRMED.