IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. G 0130 OF 2010

BETWEEN:

LELAND GRASKE

Plaintiff

AND:

KIRKCONNELL BROTHERS LTD T/A KIRK MARINE

Defendant

WRIT OF SUMMONS

TO: Kirkconnell Brothers Ltd
T/a Kirk Marine
PO Box 72 Lancaster Crescent
George Town

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within [14 days] after service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495G, George Town, Grand Cayman, the accompanying Acknowledgement of Service, stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or return the Acknowledgement within the time stated, or if you return the Acknowledgement without stating therein an intention to contest the proceedings the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 24th day of March 2010

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT
Directions for Acknowledgement of Service are given with the accompanying form.

CLERK OF COURT
CAYMAN ISLANDS GOVERNMENT
MAR 24 2010

GRAND COURT
CAYMAN ISLANDS

STATEMENT OF CLAIM

1. On the 27th day of October 2003 the Defendant, its servants or agents were employed by the Plaintiff to carry out mechanical work to a Caribe motor boat (hereinafter 'the boat') which was at all relevant times motoring in the sea off Grand Cayman and was owned by the Plaintiff.

2. The said mechanical work was carried out by Mr Jason Haynes, an employee, servant or agent of the Defendant. The mechanical work included work to the steering mechanism of the boat.

3. After completion of the mechanical work the boat was returned to the Plaintiff and on the 31st October 2003 the Plaintiff took the boat out with passengers on board for a pleasure cruise.

4. One of the passengers was named Daniel Doyle, a citizen and resident of the United States.

5. Whilst the Plaintiff was steering the boat the Plaintiff lost control of the boat and Mr Doyle was thrown into the water and struck by the boat. The loss of control of the boat was caused by a sudden failure of the steering mechanism and/or mechanical system of the boat.

6. The injuries of Mr Doyle and the accident itself were caused by the negligence of the Defendant, its servant or agents in circumstances where they owed both the Plaintiff and Mr Daniel Doyle a duty to exercise reasonable skill and care in the performance of repair work to the boat.

7. The failure of the Plaintiff to exercise such skill and care as was required caused the boat to fail to operate properly and resulted in the Plaintiff being unable to safely steer the boat and Mr Doyle being thrown into the water and suffering personal injuries, loss and damage.

8. Particulars of Negligence
   (a) Failing to properly perform mechanical work on the boat on or about the 27th October 2003.
   (b) Failing to properly fix a nylon lock nut on the steering mechanism of the boat and/or
   (c) Re-affixing a used nylon lock nut on the steering mechanism of the boat during the course of the mechanical work rather than replacing the nylon lock nut with a new one.

9. As a result of the personal injuries loss and damage sustained by Mr Doyle, Mr Daniel Doyle and Ms Anne Doyle (the wife of Mr Daniel Doyle) filed a civil suit in the United States District Court for the District of Nebraska case No 8:05CV21 (hereinafter the 'US suit') against Mr Leland

Graske, the Plaintiff to this action (hereinafter referred to as 'Graske'). A copy of the Amended Complaint is annexed at Schedule 1 to this Statement of Claim.

10. Graske issued a Third Party complaint against the Defendant (hereinafter referred to as 'Kirk Marine.') alleging that the negligence of Kirk Marine was the proximate cause of the negligence and seeking contribution, indemnity or equitable subrogation from Kirk Marine.

11. After filing of Court papers in the US suit, the Court granted Kirk Marine's motion to dismiss for lack of jurisdiction without prejudice and by consent on the 27th September 2006.

12. On the 10th June 2008 in the US suit Mr Doyle was awarded damages of US$3,238,153 and Ann Doyle the sum of US$750,000 together with taxable Court costs. A copy of this judgment is annexed at Schedule 2 of the Statement of Claim.

13. Graske appealed against the finding of the Court and on the 2nd September 2009 the United States Court of Appeal for the Eighth Circuit affirmed the award in favour of Mr Doyle and reversed the decision of the Court below in relation to the claim for Ms Ann Doyle. A copy of the judgment is annexed at Schedule 3 of the Statement of Claim.

14. The findings of fact in the US suit at page 2 of the judgment stated "The evidence adduced at trial shows that the boat had been repaired by a local mechanic employed by Kirk Marine a few days before the accident that is the subject of this action. Leland Graske testified that the steering mechanism had been frozen. In the repair. Kirk marine reported that its mechanic had disassembled and lubricated the steering mechanism."

15. The findings of law in the US suit at page 25 of the judgment stated "The evidence establishes that a reasonably competent mechanic would have known that a used nylock nut should have been replaced with a new nylock nut and not reinstalled."

16. On the basis of the negligence of the Defendant the Plaintiff believes that the Defendant is liable to contribute to the full extent of the judgment as found against the Plaintiff in the US Suit.

17. The Plaintiff further asserts that the Defendant owed a duty of care to both the Plaintiff and to the passengers in his boat, including Mr Daniel Doyle.

18. By reason of the matters aforesaid the Plaintiff has thereby suffered loss and damage.

19. Particulars

    (a) The payment to Mr Doyle of US$3,238,153.

    (b) The Plaintiff's own legal costs in the claim of Mr Doyle.

And the Plaintiff Claims

20. A contribution towards the damages awarded of US$3,238,153 and resultant taxed Court costs of the proceedings case No 8:05CV21 in the United States District Court for the District of Nebraska pursuant to the Torts (Reform) Law 1996 as amended.

21. A contribution to all legal costs and expenses properly incurred as a result of the Defendant's negligence.

22. Costs.

23. Interest on the said contribution pursuant to the pursuant to the Judicature Law (2007 Revision) at such rate and for such period as the Court deems fit.

Samson & McGrath

Samson and McGrath

Attorney's at Law for the Plaintiff

THIS WRIT was issued by Samson and McGrath Attorney's at Law for the Plaintiff whose address for service is 5th Floor Genesis Building, Genesis Close, George Town, Grand Cayman, OP.O. Box 446

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE

OF WRIT OF SUMMONS

1. The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

   After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495G, George Town, Grand Cayman.

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings must also serve a defence on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

   If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

   If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

   If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, issue a Summons for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.

2. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.

3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (the name stated on the Writ of Summons)".

4. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.

5. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.

6. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.

7. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.

8. A Defendant acting in person may obtain help in completing the form at the Courts Office.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. OF 2010

BETWEEN:

LELAND GRASKE

Plaintiff

AND:

KIRKCONNELL BROTHERS LTD T/A KIRK MARINE

Defendant

ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1.	State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.
2.	State whether the Defendant intends to contest the proceedings (tick appropriate box) ☐ yes ☐ no
3.	If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box) ☐ yes ☐ no

Service of the Writ is acknowledged accordingly

(Signed).....

Attorney for

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Samson & McGrath
Attorneys at Law
5th Floor Genesis Building
Genesis Close
PO Box 446
George Town
Grand Cayman

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.

Statement of Claim Schedule 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE, Plaintiffs, vs. LELAND GRASKE, Defendant.	CASE NO. 8:05CV21 AMENDED COMPLAINT JURY TRIAL REQUESTED

1. This is a civil action in which PLAINTIFFS seek to recover damages for personal injuries sustained on October 31, 2003, on the Grand Cayman Islands

2. This Court has jurisdiction and venue over the parties of this action.

3. **Plaintiff, Daniel Doyle**, (hereinafter referred to as Mr. Doyle) was born on July 7, 1954. At the time of this incident, **Mr. Doyle** was 48 years of age.

4. **Plaintiff, Anne Doyle**, (hereinafter referred to as Anne) is a resident of Ft. Calhoun, Washington County, Nebraska. **Anne is Mr. Doyle's** wife.

5. Defendant, Leland Graske, 23030 Deer Ridge Road, Valley, Nebraska (hereinafter referred to as Defendant) was the owner and operator of a Caribe Classic inflatable boat (hereinafter referred to as "boat") which was used for recreational purposes on the Grand Cayman Islands.

6. At all times pertinent hereto, Mr. Doyle was an invitee aboard Defendant's boat.

7. As Defendant's boat was heading out to sea, without warning, the boat turned sharply to the left, catapulting Mr. Doyle overboard. Defendant's boat subsequently hit Mr. Doyle.

8. When the boat struck Mr. Doyle, it caused a blunt, crushing injury to the ribs on his right side. All 11 ribs of his right side were fractured posteriorly, causing a flail chest. The fractured ribs punctured Mr. Doyle's lung and respiratory insufficiency occurred.

9. Due to the fractured ribs, the skeletal structure of the thorax was unstable, causing fluid to collect in the pleural space, resulting in pleural effusion, congestive heart failure, and pneumonia. There were numerous insults to his pulmonary system; hypoxia and brain injury occurred.

10. Defendant was negligent in the following particulars:

a. Allowing Dan Doyle to sit on the tube/gunnel of the boat.

b. Operating the boat while Dan Doyle was sitting on the tube/gunnel of the boat.

c. Failing to provide a seaworthy vessel.

d. Failing to inspect the steering system before operating the boat.

e. Failing to require **Mr. Doyle** to wear a life jacket.

f. Failing to maintain control of the boat.

g. Failing to keep the boat in safe operating condition.

11. As a direct and proximate result of the injuries described herein, **Mr. Doyle** has incurred the following medical expenses:

Nebraska Health System	$	22,129.18
U.M.A.	$	562.00
Methodist Hospital	$	23,685.40
Physicians Clinic	$	1,299.80
Pathology Center	$	270.00
Midwest Pulmonary & Critical Care	$	651.00
Rehab Physicians	$	221.00
Radiologic Center	$	345.00
Memorial Healthcare Systems	$	147,537.50
RAD Assoc. of Hollywood, PA	$	2,398.00
Gastroenterology Consultants, PA	$	1,595.00
National Air Ambulance	$	25,582.00
Dr. Michael A. Langone/Ortho	$	1,800.00
GI Associates/Dr. Schroeder	$	130.90
Cayman Islands Health Services	$	21,501.44
Dr. Rodney Nitcher, D.C.	$	415.00
TOTAL	$	250,123.26

12. As a direct and proximate result of the injuries sustained in this incident, **Mr. Doyle** has sustained lost wages of **$152,826** (as of June 30, 2007).

13. As a direct and proximate result of the injuries sustained in this incident, **Mr. Doyle** has sustained a loss of earning capacity of $562,469 (retirement at age 62) to **$817,112** (retirement at age 66). These sums are calculated to present value.

14. As a direct and proximate result of the injuries sustained in this incident, **Mr. Doyle** will require substantial future care. The total costs associated with the future care range from **$1,776,506** to **$3,126,302**. These sums are calculated to present value.

15. **Mr. Doyle's** injuries and pain and suffering, as hereinabove described, were a direct and proximate result of the unseaworthiness of the aforesaid boat and the negligence of the Defendant

16. As a direct and prox mate result of the above negligent acts and omissions by Defendant, **Mr. Doyle** is entitled to recover damages from Defendant.

17. As a direct and proximate result of the DEFENDANT'S negligence, as set forth herein, **Anne** has suffered loss of consortium as a result of the injuries sustained by her husband, **Daniel Doyle.**

WHEREFORE, Plaintiffs respectfully pray for judgment against Defendant for special damages and for general damages in accordance with the general maritime law and State of Nebraska that will fairly and adequately, but not excessively, compensate them for damages caused by the acts and/or omissions of Defendant, plus prejudgment and post-judgment interest and for all costs expended herein.

DANIEL DOYLE and ANNE DOYLE, Plaintiffs,

By: s/ Ronald J. Palagi
RONALD J. PALAGI, #13206
FROM THE LAW OFFICES OF
RONALD J. PALAGI, P.C.
3131 South 72nd Street
Omaha, Nebraska 68124
(402) 397-5000

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2007, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which sent notification of such filing upon all parties who filed an appearance or motion by electronic filing in this case.

Ronald J. Palagi	rjp@ronaldjpalagi.com
Joseph B. Muller	joe@ronaldjpalagi.com
George W. Soule	george.soule@bowmanandbrooke.com

s/Ronald J. Palagi

Statement of Claim Schedule 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE,

Plaintiffs,

v.

LELAND GRASKE,

Defendant.

8:05CV21

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter is before the court for resolution after a trial to the court from March 31, 2008 to April 8, 2008. This is an action in admiralty for damages for personal injuries in connection with a boating accident that occurred in Grand Cayman Island on October 31, 2003. Plaintiffs allege negligence by defendant Leland Graske in the operation of the boat. This is a trial to the court.

I. Findings of Fact

A. The Accident

The evidence adduced at trial establishes the following. The Doyle and Graske families are longtime friends. In October of 2003, Daniel Doyle and his wife, Anne, visited Graske and his wife, Leslie, at the Graske's condominium in the Cayman Islands.

Leland Graske owns a 14-foot Caribe inflatable boat for recreational purposes in the Cayman Islands. *See* Trial Exhibit ("Tr. Ex.") 1, replica drawing of a Caribe 14-foot boat; Tr. Exs. 2-15, photographs of boat. The boat has seating for six people and is rated for a float capacity of six adults. Tr. Ex. 2-15, 205, photographs of boat; Tr. Ex. 18, Caribe owner's manual, and testimony of Leland Graska. In the boat, there is forward-facing seating for two aft, two midship, and rear-facing seating for two on a cushion in the bow. *Id.* The bow cushion seating is approximately four to five inches below the top of the

inflated sides (gunnel) of the boat.[1] Tr. Ex. 221, photograph. The aft and midship seats are angled down from front to aft. Tr. Exs. 209, 211, photographs. The bow seat is flat. Tr. Ex. 221, photograph. All the seats measured from the top of the seat cushion are approximately 16" above the deck (the bow seat being 13.5"). Tr. Exs. 211, 216, photographs. The aft seat has a back rest. Tr. Ex. 219, photograph. The midship seat has a back rest for the starboard side only. Tr. Ex. 220, photograph. The bow seat has no back rest, but it does have a back stop of approximately 5 inches. Tr. Ex. 221, photograph. There are gunnel hand-hold straps (hand straps) for the midship and bow passengers. Tr. Exs. 206, 289, photographs. The boat was equipped with an outboard 70-horsepower two-cycle engine manufactured by Yamaha. Tr. Ex. 207. A 70-horsepower engine is the maximum horsepower engine approved for use on the craft. Tr. Ex. 18, Caribe owner's manual at 4.

The evidence adduced at trial shows that the boat had been repaired by a local mechanic employed by Kirk Marine a few days before the accident that is the subject of this action. Leland Graske testified that the steering mechanism had been frozen. In the repair, Kirk Marine reported that its mechanic had disassembled and lubricated the steering mechanism. The engine had been used for approximately two hours in the time between the repair and the accident. During those two hours the engine was used at idle or low rpms to travel close to shore.

Leland Graske testified that he has been a boat owner and operator for most of his adult life. Doyle had limited experience as a boat owner and operator. He owned a boat for use on the Missouri River for several seasons and he also owned a small fishing boat

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[1]A gunnel is the outer side of hull of the boat. In this case the tube is the gunnel. *See* Testimony of Herbert Angell.

that he used infrequently. Graske also testified that he believes that Daniel Doyle is an above-average risk-taker. He would rate Doyle's risk-taking as 8 on a scale of 1 -10, ten being the highest.

The testimony at trial establishes that on October 31, 2004, at approximately 10:30 a.m., Daniel Doyle, Leland Graske and Graske's friend, Robert (Bobby) Van Hook went fishing in Graske's Caribe inflatable boat. Graske testified that he swam to the boat's mooring and brought the boat back to shore, where Doyle and Van Hook boarded the boat with a cooler, a fishing tackle box, and fishing rods. No one was wearing a life jacket. There is considerable disagreement in the testimony with regard to the seating of the passengers in the boat.

Doyle testified that he has little or no recollection of the event. Leland Graske testified that he was driving the boat and was standing or sitting behind the midship starboard side steering panel, which rises above the boat's gunnel level and has a wind screen.[2] Graske testified that he recalls Van Hook sitting in the midship starboard side seat holding a diagonal hand strap located on the inside of the port inflatable tube. Graske consistently maintains that Daniel Doyle was seated on the starboard inflated tube, holding at least one hand strap and with his feet between the midship seat and the bow cushion seat. He testified that he does not believe Doyle changed position until he was ejected from the boat.

Bobby Van Hook testified that he was seated on the port side of the midship seat, the fishing equipment was on the starboard side and the tackle box and cooler were on the deck in front of the midship seat. He stated that the fishing rods were propped between

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[2]Starboard is the right side of the boat when facing forward to the bow of the boat and port is the left side of the boat. See Testimony of Herbert Angell.

the bow and the midship seating area, slanting upward toward the stern, on the starboard side. (Tr. Ex. 1). He testified that Graske was seated, not standing, behind the steering wheel. Van Hook also testified that he believes Doyle was initially seated on the port side inflated tube, toward the bow, adjacent to or above the bow seat. Van Hook testified that as the boat accelerated Doyle moved to a fully-seated position in the bow seat on the port side of the seat. It was from this position that the plaintiff was ejected from the boat. He does not recall Doyle holding any hand straps

Graske testified that after the occupants were on board, he steered the boat, at idle speed, through the no-wake zone. He testified that he announced to the passengers that the boat was about to accelerate by saying words to the effect "Here we go." He then increased speed to put the boat on plane.[3] The boat came on plane and, as the defendant was adjusting the trim, the steering linkage disengaged. The motor swung violently clockwise causing the boat to turn hard to the port side.

Doyle was ejected from the boat over the starboard side. The underside of the boat struck him on the right sice of his back and the back of his head. Graske testified that he immediately put the boat in neutral or killed the motor. He and Van Hook located Doyle in the water. Graske was able to steer the boat by holding the engine's drag link in one hand and the throttle in the other. Doyle was hurt, but coherent. He apparently did not lose consciousness, nor was he bleeding. Graske and Van Hook brought Doyle back to shore. Once on shore, they helped him walk to the edge of the beach. They called an ambulance which took him to the Cayman Islands Health Services Authority Hospital in Georgetown, Grand Cayman ("Georgetown Hospital").

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[3] "On plane" means that the boat is going fast enough that the hull of the boat is skimming along the top of the water rather than displacing the water. *See* Testimony of Herbert Angell.

B. The Medical Evidence

At Georgetown Hospital, the emergency room staff diagnosed Doyle with fractures of multiple right posterior ribs, a right flail chest,[4] a right hemothorax, a right pnuemothorax, right posterior chest surgical emphysema, and multiple minor lacerations to his posterior skull, right arm and right shoulder. See Tr. Ex. 37, Georgetown Hospital medical records at 1-2, 36. On admission, Doyle had no adverse neurologic signs or symptoms. *Id.* at 2, 36-37.

Doyle was treated with insertion of a chest tube and transferred to intensive care. *Id.* at 3-5. On the third day of his hospital stay, November 2, 2003, at 4:15 p.m., Georgetown hospital staff witnessed a cardiopulmonary arrest. *Id.* at 49. Cardiopulmonary resuscitation was initiated immediately and the code team arrived within five minutes. *Id.* Doyle was intubated and was placed on a ventilator by 4:30 P.M. *Id.* Thereafter, the plaintiff was sedated, medically paralyzed and kept on a ventilator. *Id.* at 27-29. On November 4, 2003, a chest x-ray showed bilateral changes consistent with acute respiratory distress syndrome. *Id.* at 32-33. Later that day, Doyle was transported by air to the United States for treatment. *Id.* at 34-35. Originally, Doyle was to have been transferred directly to University of Nebraska Medical Center ("UNMC") in Omaha, Nebraska, but, because the respirator in the air ambulance was malfunctioning, Doyle was instead transported, along with Georgetown Hospital's ventilator, to Memorial Regional Hospital in Hollywood, Florida ("Hollywood Hospital"). *Id.* at 35; Tr. Ex. 38, Hollywood Hospital medical records.

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[4] A flail chest describes a chest cavity in which the ribs do not provide enough rigid support for effective inspiration

Doyle was admitted in critical condition to the Hollywood Hospital at 2:37 a.m. on November 5, 2003. Tr. Ex. 38, Hollywood Hospital records at 60. On admission, his injuries were noted to be "a flail chest involving the right hemithorax with multi rib fractures, essentially involving the entire right hemithorax."[5] *Id.* at 24. He was diagnosed with fractures of all eleven right posterior ribs and his right scapula.[6] *Id.* at 25-27. Diagnostic tests also showed underlying pleural effusion and a minimal anterior pnuemothorax.[7] *Id.* at 28. On November 7, a tracheostomy was performed to provide a permanent airway for his continued ventilation.[8] *Id.* at 3, 62. A gastrostomy feeding tube ("G-tube") was also surgically placed that day. *Id.* at 3. Doyle later developed respiratory insufficiency and was transported to UNMC on November 14, 2003. *Id.*

Doyle was admitted to UNMC at 9:46 p.m. on November 14, 2003. Tr. Ex. 39, UNMC records at 37. Doyle's attending physician at UNMC was Dr. Joseph C. Stothert, M.D., Ph.D., the Medical Director for Trauma at UNMC, a surgeon and a Ph.D. Pulmonary Physiologist. Tr. Ex. 79, Stothert curriculum vitae; Tr. Ex. 39, UNMC records at 6. He was discharged on November 19, 2003. Tr. Ex. 38, UNMC records at 38. It was noted in

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[5]A hemithorax is one side of the thorax, which is "[t]he upper part of the trunk between the neck and the abdomen; it is formed by the 12 thoracic vertebrae, the 12 pairs of ribs, the sternum, and the muscles and fasciae attached to these; below, it is separated from the abdomen by the diaphragm; it contains the chief organs of the circulatory and respiratory systems." Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 177000 & 408370).

[6]The scapula is "[a] large triangular flattened bone lying over the ribs posteriorly on either side, articulating laterally with the clavicle at the acromioclavicular joint and the humerus at the glenohumeral joint. It forms a functional articulation with the chest wall, the scapulothoracic articulation." Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 364860).

[7]A pleural effusion is increased fluid in the plural space. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 26240). The pleura is the serous membrane enveloping the lungs and lining the walls of the pleural cavity. *Id.* at 321290. A pnuemothorax is the presence of free air or gas in the pleural cavity. *Id.* at 323250. External compression of the lung by a pneumothorax or pleural effusion can lead to a pulmonary collapse. *Id.* at 85710.

[8]A tracheostomy is an operation to make an opening in the trachea. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 414210).

Doyle s discharge summary that he had been admitted on a ventilator, had a feeding tube in place, and had suffered a closed head injury that left him confused and agitated at times. *Id.* at 37. During his hospitalization, Doyle was weaned from the ventilator and his condition improved to allow him to eat some regular food. *Id.* At the time of his discharge, he was able to speak well and to recognize family and friends. *Id.* Doyle received occupational and physical therapy consultations for ambulation, strength, and to learn how to perform the activities of daily living. *Id.* He was assessed for inpatient rehabilitation by a physical medicine and rehabilitation specialist, Dr. Jason Schave. *Id.* at 40. Dr. Schave diagnosed Doyle with anoxic encephalopathy with coordination difficulties and confusion, impaired activities of daily living and mobility, dysphagia,[9] and agitated behavior. *Id.* Doyle was referred to Methodist Hospital Acute Rehabilitation Center ("Methodist Acute Rehab") for inpatient rehabilitation *Id.* at 37

Doyle underwent a long course of physical and neurological rehabilitation. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. He was hospitalized at Methodist Acute Rehab from November 19, 2003, to December 5, 2003, for medical care and occupational and physical therapy as part of a comprehensive brain injury rehabilitation program *Id.* Doyle's treating physician there was Dr. Jude Cook, M.D., an internist and physical medicine and rehabilitation specialist (also referred to as a physiatrist). *Id.* at 10; Tr. Ex. 107, Cook curriculum vitae.

At the time of his admission, Doyle had right rib fractures, a right clavicle fracture, a right scapular fracture, a G-tube placed, a tracheostomy, he was agitated and had symptoms of dysphagia. Tr. Ex. 104, Trial Deposition of Jude Cook M.D. ("Cook Dep.")

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[9]Dysphagia is difficulty swallowing. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 122190).

at 33. Dr. Cook diagnosed traumatic brain injury and anoxic encephalopathy.[10] *Id.* at 34. A neurological examination revealed a brain injury rated level IV on the Rancho Los Amigos scale, a scale that helps medical professionals determine a person's level of impairment secondary to brain injury.[11] *Id.* at 6. A person with a Rancho level IV brain injury demonstrates poor memory, insight and judgment, lack of awareness of his physical ailments and environment and agitation. *Id.* at 11. Dr. Cook did not diagnose Doyle with depression, but testified that people in a Rancho level IV of brain injury often lack the awareness of their environment or personal health that would lead them to be depressed. *Id.* at 1[illegible] Dr. Cook also found that Doyle's cerebellar functioning, which relates to fine motor control and coordination, was slow but intact. *Id.* at 13. Dr. Cook established goals of brain injury recovery, education of the patient and his family regarding brain injury issues, improving Doyle's mobility to a standby assist level, improving his activities of daily living and his swallowing to an ultimate goal of removal of his tracheostomy. *Id.* at 14-15.

During the term of the hospitalization, Doyle's rib fractures resolved, his ability to swallow improved, and his tracheostomy was removed. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. Dr. Cook's discharge summary notes that during the hospitalization Doyle's cogn tion slowly improved from a Rancho level IV to a near Rancho level VI at the time of his discharge.[12] *Id.* Significantly however, Doyle still had a

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[10] Encephalopathy is any disorder of the brain. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 129640). Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues. *Id.* at 24700.

[11] *See also* Rancho Los Amigos National Rehabilitation Center website ("Rancho Los Amigos website"), http://www.rancho.org/patient_education/cognitive_levels.pdf

[12] Rancho level VI is labeled "Confused-Appropriate." At that level, "a patient shows goal-directed behavior, but relies on cueing for direction. He can relearn old skills such as activities of daily living, but memory problems interfere with new learning. He has a beginning awareness of self and others." *See* Rancho Los Amigos website http://www.rancho.org/research_pted.htm

gastronomy tube, mild agitation and reactive depression secondary to his head injury. *Id.* at 13.

Doyle was followed on an outpatient basis by Dr. Cook. Tr. Ex. 104, Cook Dep. at 25. In May 2004, Dr. Cook reported slow improvement. *Id.* Cook examined Doyle again in November 2004, and noted that test results were consistent with a moderate to severe brain injury. Cook Dep. at 29. When Doyle was last seen by Dr. Cook in May 2006, he was neurologically the same as he had been in the previous examination, but continued to be depressed. *Id.* at 42. Based on Dr. Cook's examination of Daniel Doyle, Doyle's history and Dr. Cook's collaborative consultations with other physicians and health providers, Dr. Cook testified that he believed to a reasonable degree of medical certainty that Daniel Doyle is permanently disabled and unemployable. *Id.* at 30-31.

After his release from Methodist Acute Rehab, Doyle was referred to Dr. Richard L. Bowles, Psy.D., a rehabilitation neuropsychologist, for testing to determine the extent of impairment from the brain injury. *Id.* at 18-19; Tr. Ex. 42, Neuropsychological Evaluation dated March 1, 2004 ("Bowles first report") at 1; Tr. Ex. 67, Deposition of Richard L. Bowles, Psy.D., ("Bowles Dep.") at 5. Dr. Bowles diagnosed dementia secondary to acquired brain injury and depressive reaction by history. Tr. Exs. 42, Bowles first report at 7; 104, Cook Dep. at 19; Bowles Dep. at 38. Dr. Bowles reported considerable impairment in numerous cognitive areas including attention/concentration, processing speed, memory and executive functioning and problem solving. Tr. Ex. 104, Cook Dep. at 23; Tr. Ex. 42, Bowles first report at 6. Test results indicated a moderately severe degree of overall impairment. Tr. Ex. 42, Bowles 2004 Report at 7. Bowles recommended 24-hour supervision. *Id.* At the time of the first exam, Dr. Bowles expected Doyle to recover further over the following several months to a year. *Id.* Dr. Bowles reexamined

Doyle in July 2004. Tr. Ex. 43. Neuropsychological Evaluation dated March 1, 2004 ("Bowles second report") at 2 The second neuropsychological examination showed a moderate to severe brain injury. *Id.* at 6. Test results were generally consistent with those obtained in the earlier testing, but there were significant declines in some areas. *Id.* at 4, 6. Doyle continued to exhibit deficits in short term memory, basic and complex attention as well as decreased vigilance and slowed processing of information. *Id.* at 6. Given Doyle's relative lack of progress, Dr. Bowles was concerned about the prognosis for recovery of cognitive function. *Id.*

Doyle's last neuropsychological evaluation was performed by Dr. Bowles in 2005. Tr. Ex. 44, Neuropsychological Evaluation dated June 23, 2005 ("Bowles third report") at 2. Doyle's scores on various tests reflected little change from his 2004 testing. *Id.* at 7. Dr. Bowles found Doyle's status to be incompatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles testified by deposition that Doyle's physical condition is at its maximum improvement. Tr. Ex. 67, Bowles Dep. at 50-52. Dr. Bowles stated that Doyle's psychological condition may be improved with different therapies, but it too is static. *Id.*

At present, the record shows that, although he is within the average range of global intellectual functioning, Doyle has deficits in verbal and visual short-term memory, concentration and complex attention, processing word speed and categorical fluency as well as diminished motor speed and coordination in both hands. Tr. Ex. 44, Bowles third report at 7. He has little motivation, questionable judgment and lacks awareness of safety. *Id.* Doyle continues to need ongoing supervision as a result of the questionable reliability of his judgment and his lack of awareness of safety-related issues. *Id.* His signs and symptoms are consistent with a moderate to severe brain injury. *Id.* Dr. Bowles also

stated that Doyle's status was not compatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles reports that he expects Doyle's cognitive status to remain stable into the future, barring a stroke or other brain injury. *Id.* at 7.

On his treating physician's recommendation, Doyle received outpatient therapeutic services from Quality Living, Inc., in Omaha from 8/2004 to 3/2006. Quality Living records show that he did not make much progress there with the therapy. Tr. Ex. 41, Quality Living, Inc.'s medical records at 21. Other records show that Doyle's cognitive level improved from a Rancho level IV (confused and agitated) to a level VI (confused and appropriate). Tr. Ex. 46 Gilter records at 7; *see* also Rancho Los Amigos website, http://www.rancho.org/patient_education/cognitive_levels.pdf.[12]

At the present time, Doyle is being treated by his family physician, an internist, Dr. Michael F. Gilter. Tr. Ex. 46, Gilter medical records. Dr. Gilter's notes indicate that Doyle has diagnoses of reactive depression and decreased mental status secondary to brain injury. *Id.* at 49. Doyle is also being treated by a psychiatrist, Dr. Rodney L. Nitcher, D.O., Tr. Ex. 45, Nitcher medical records. Dr. Nitcher has expressed the opinion that Doyle's psychiatric condition is chronic and that Doyle needs 24-hour supervision and cannot live alone. Tr. Ex. 288, Allison questionnaires at 3; Tr. Ex. 24, Allison Supplemental Life Care Plan at 2.

All of Doyle's treating physicians agree that he is permanently and totally disabled. Dr. Cook testified to his opinion that Doyle suffered a traumatic brain injury from his boating accident as well as an anoxic encephalopathy due to subsequent events. Tr. Ex. 104, Cook Dep. at 35. All of the doctors agree that his condition relates to an injury sustained

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[12]Rancho level VII is theoretically the highest level a thinking-impaired patient can achieve short of full recovery. See Rancho Los Amigos website, http://www.rancho.org.

as a result of the boating accident described above. See Tr. Ex. 78, Report of Dr. Joseph C. Stothert at 1 (noting "the original injury on October 31, 2003 caused a deterioration in Mr. Doyle's respiratory status leading to an anoxic event" and "the injury to his chest and subsequent events caused the brain injury that Mr. Doyle currently suffers from"). The physicians further agree that it is unlikely Doyle sustained the closed head injury at the time of accident, but is more likely that he had an anoxic hypoxic event during his hospital treatment for the injuries he sustained during the boating accident.[14] Tr. Ex. 104, Cook Dep. at 34. No doctor is of the opinion that the anoxic hypoxic event is unrelated to the boating accident.

C. Duty of Care

At trial, the plaintiffs presented the testimony of Herbert Charles Angell, Nebraska State Boating Law Administrator, with respect to the duty or standard of care for the operator of a boat. See also Tr. Ex. 58, Herbert Angell curriculum vitae. Angell testified that he has investigated more than a thousand boating accidents. He reviewed several boating safety publications. See Tr. Ex. 89, United States Coast Guard ("USCG") inland rules for navigation; Tr. Ex. 92, 2007 Nebraska boating guide. He stated that his review of the evidence in this case led him to conclude that Doyle had been seated on the top of the tube, or gunnel, on the starboard side toward the bow. He testified that, in his opinion, Graske should not have allowed Doyle to sit on the starboard right gunnel or tube and that to have done so violated safe boating practices. He testified that even if Doyle had been seated in the bow seating area at the front of the boat, facing backward, Graske's

[14] "Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood or tissues. It is to be differentiated from hypoxia which is a decrease below normal levels of oxygen in inspired gases, arterial blood, or tissue, short of anoxia." Stedman's Medical Dictionary (27th ed. 2000) at (on Westlaw) Stedmans 24700 & 196880

operation of the boat would have been unsafe and "negligent." He testified, assuming that Van Hook's version of events were true, that Doyle was at first seated on the tube, but sometime in the period of time between the boat's proceeding at no-wake speed and coming up on plane, Doyle assumed a position on the bow seat and was told by both Van Hook and Graske to hold on, but did not do so. It would have been an unsafe boating practice for Graske to proceed. Angell also testified that at planing speed the only safe seating for anyone other than the operator would be in the middle seat facing forward. He stated that the distance between the cushioned area and the top of the tube would not provide an adequate backrest to allow safe seating in the bow cushion seating area.

Michael Sampsel, a mechanical and marine engineer, also testified as an expert witness on behalf of the plaintiffs. He testified that based on the evidence he had reviewed, the hull planing speed of a boat similar to Graske's is estimated to be less than 30 MPH. He further testified that the cushion on the bow of the boat—on which Van Hook claims Daniel Doyle was seated—is not designed to be a seat when the boat is "underway," or going faster than a fast idle.

Paul J. Larson, a marine accident investigator, marine surveyor, consultant and retired Commander in the USCG, testified that he also investigated the accident. Tr. Ex. 54, Larson curriculum vitae. He reviewed the deposition testimony in this case as well as various boating safety regulations, guides and statistics. *See* Tr. Ex. 87, USCG requirements for recreational boats; Tr. Ex. 88, USCG boating statistics; Tr. Ex. 93, California Boating Law; Tr. Ex. 94, Federal Safety Tips. Based on his knowledge and investigation of this and numerous other "fall overboard" type accidents, he testified that, in his opinion, it was "negligent" for Graske to have allowed Doyle to sit on the tube of the boat. He testified that the operator of a boat is responsible for all aspects of safe operation

of the vessel. In his opinion, a sudden mechanical failure caused the accident, but the unsafe boating by Graske in allowing Doyle to remain seated on the tube while the boat was underway was the cause of Doyle's fall overboard. Also, he testified that a shipowner has a nondelegable duty to maintain a ship in a seaworthy condition. Larson also testified that if a passenger were sitting on the tube of the boat, holding the hand straps would not have prevented ejection from the boat. He further testified that, even if the testimony of Bobby Van Hook were credited and Doyle moved from the tube to the bow cushion seat after the vessel was underway and was warned to hold a hand strap, but did not, Graske's operation of the boat would have been in violation of safe boating practices. Larson also stated that the bow cushion area would not have been a safe seat while the boat was underway at planing speeds.

The defendant's expert, Robert MacNeill, a naval architect, human factors engineer and Coast Guard Licensed Captain, also testified at the trial. Tr. Ex. 261, Robert MacNeill curriculum vitae. He testified that he has investigated or reviewed investigations of hundreds of boating accidents in connection with consulting provided to the Coast Guard with respect to the implementation of the federal boat safety act. He further stated that in preparation for testimony in this case he physically inspected and operated Leland Graske's inflatable boat. Tr. Ex. 202-227, photographs of boat, Tr. Ex. 260, Supplemental Report of Robert MacNeill (received for limited purpose of measurements). He testified that, in his opinion, there are occasions when it would be safe to allow a passenger to sit on the tube of an inflatable boat. With respect to a duty of pre-trip inspection by a boat operator, he stated that it would be sufficient for the operator to make sure that the boat was operational. He also testified that, in his opinion, any passenger who was seated in the front of the boat and was not holding on to a hand strap would have been thrown out

of the boat in a sudden turn. He also testified that he knew of no rules, regulations, or standards that would require a boat operator to insist that a passenger hold a handhold.

D. Damages

Daniel Doyle's wife, Anne, and his children also testified at the trial. They testified with respect to Doyle's abilities and disabilities and to differences in his personality since the accident. Anne Doyle also testified to the differences to her life and to the Doyles' marriage since the accident.

The parties have stipulated that the Doyles have incurred medical bills to date in the amount of $252,617. Filing No. 295, Ex. A, Stipulation. Tr. Ex. 22, Summary of Medical Bills. The evidence shows that prior to the accident, Daniel Doyle was employed as a mechanical engineer earning between $52,692 and $57,301 per year for the years 1999 to 2002. Tr. Exs. 81-85, Income Tax Returns, 1999-2003. He would have been expected to continue working until he reached age 66, his Social Security full retirement age. Tr. Ex. 255, John Scarborough Supplemental Economic Loss Analysis at 2. There is no evidence that he would have been inclined to retire any earlier.

Both parties submitted evidence on the cost of providing medical and supportive care to Doyle in the future. According to life expectancy tables, Doyle would be expected to live to age 79. Tr. Ex. 80, Standard Ordinary Mortality Table; Tr. Ex. 26, Report of Kent Jayne at 8. The plaintiffs' expert, Kathie Allison, a certified life care planner, presented three alternative life care plan scenarios. Tr. Ex. 23, Allison Life Care Plan; Tr. Ex. 24, Supplement to Life Care Plan. Option I would provide additional assistance for Doyle to remain in his home, such as help with home maintenance and cleaning, as well as a household attendant for 111.6 hours per week, and would cost $66,811 to $67,051 annually, in today's dollars. Tr. Ex. 23 at 10; 24 at 4. Option II would provide for live-in

care for Doyle and would cost between $102,600 and $109,500 annually, at the rate for care of $280 to $300 per day. *Id.* Option III would provide supportive living at a facility designed for brain-injured people such as Quality Living, Inc., and would cost $82,125 annually. *Id.* Under each option, Ms. Allison's life care plan would also include additional sums for physicians' visits, medication and supplies, physical and occupational therapy, equipment, and mileage, at an approximate cost of between $2,434 and $3,049 per year. *Id.* at 4. Ms. Allison estimates the lifetime cost for Doyle's care under Option I would be $1,830,876 to $1,866,482; under Option II would be $2,765,834 to $2,978,611; and under Option III would be $2,232,140 to $2,261,366 in today's dollars. *Id.*

William H. Burke, Ph.D., a certified rehabilitation counselor and Board-certified disability analyst and rehabilitation consultant, testified on behalf of the defendant. Tr. Ex. 258, William Burke, Ph.D. curriculum vitae. He stated that he had reviewed Doyle's medical records, physicians' recommendations, Ms. Allison's life care plan and the depositions and testimony in this case. He concluded that Daniel Doyle has a combination of cognitive and higher cognitive deficits that interfere with his ability to live independently. He agreed that Doyle needs someone available for round-the-clock care. He also presented several options for Doyle's continued care. Tr. Ex. 257. Each included costs for medical care, equipment and medication.

Dr. Burke's first option for Doyle's supportive care is based on the assumption that Mrs. Doyle would continue to care for Daniel Doyle in his home and that she preferred to do so. *Id.* at 13. Dr. Burke testified that this option contemplates the utilization of a community living coach for 40 hours per week to enable Doyle to perform work-type activities in the community. Dr. Burke estimated that the community living coach services could be provided for $23,712 per year. *Id.* at 15.

Option II assumes that Mrs. Doyle would not be available and would provide Doyle with a live-in personal care attendant and homemaker along with household production assistance and case management to replace those services provided by his wife. *Id.* Dr. Burke estimated that the services of a live-in personal care attendant could be obtained for approximately $50,219 per year, including room and board. *Id.* at 16.

Option III provides for placement of Doyle in an assisted-living facility. Dr. Burke estimated that this option would cost between $28,416 and $49,320 per year. Dr. Burke's calculations do not include any compensation for Mrs. Doyle or other family members in caring for Doyle. Dr. Burke testified that he envisioned the assisted-living option to be utilized when Doyle was elderly.

The plaintiffs' economic expert witness, Kent Jayne, M.A., M B.A., a vocational Economic Consultant and Rehabilitation economics specialist, calculated the value of Doyle's lost earnings as of July 2007 to be $152,826. *See* Tr. Ex. 25, Report of Kent Jayne at 8; Tr. Ex. 61, Kent Jayne curriculum vitae. He calculated that the present value of Doyle's diminished earning capacity from July 1, 2007 to his retirement age of 66 is $817,112. *Id.* The defendant's economic expert, John Scarbrough, Ph.D., calculated Doyle's lost future wages according to a worklife expectancy of 12.6 years from the age of 49, to account for the likelihood that Doyle would not live to the age of 66, or would have been out of the workforce at times. Tr. Ex. 255, Scarbrough Supplemental Report at 4. He also factored the projected cost of health insurance and retirement benefits into his future earnings analysis and also calculated the present value of Doyle's lost earnings before and after a deduction of Doyle's Social Security disability benefits. *Id.* Dr. Scarbrough's analysis resulted in a total net economic loss for past and future wages in the

amount of $886,696 (present value), if disability payments were deducted, and of $1,059,785, without the deduction of disability payments

Dr. Scarbrough also analyzed the future cost of medical care and supported living for Doyle and calculated present value under both Ms. Allison's Life Care Plan and the plan proposed by Dr. Burke. Tr. Ex. 255, Scarbrough Supplemental Report at 4. According to Dr. Scarbrough's analysis the present value of the future costs of Doyle's care under Ms. Allison's Option I (household attendant) would be $1,580,750. *Id.* at 21, Table A.2 for Option I. The present value of the future costs of Doyle's care under Ms. Allison's Option II (live in care) would be $2,449,476. *Id* at 22, Table A.2 for Option II. The present value of the future costs of Doyle's care under Ms. Allison's Option III (supported living) would be $1,919,934. *Id.* at 23, Table A.2 for Option III. Under the scenarios presented by defendant's expert, Dr. Burke, the present value of the future costs of Doyle's care under Option I (wife available) would be $656,762. *Id.* at 30, Table A.4 for Option I. The present value of the future costs of Doyle's care under Option II (wife not available - home care) would be $1,285,272. *Id* at 31, Table A.4 for Option II. The present value of the future costs of Doyle's care under Option III (wife not available - facility care) would be $830,691. *Id.* at 32, Table A.4 for Option III.

II. Conclusions of Law

A. Law

This action arises under the admiralty and maritime jurisdiction of this court pursuant to 28 U.S.C. § 1333. General maritime law governs a tort claim when conditions of location and connection to maritime activity are satisfied. *Sisson v. Ruby*, 497 U.S. 358, 369 (1990). The general tort concepts of negligence and proximate cause apply in admiralty and maritime cases. *Phillips Petroleum Co. v. Stokes Oil Co.*, 863 F.2d 1250, 1255 (6th

Cir. 1988). In tort actions, courts look to the Restatement (Second) of Torts as a source of general common law principles to determine general maritime law. *See Wallis v. Liddy*, 188 F.3d 505, 525 (4th Cir. 1999); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002).

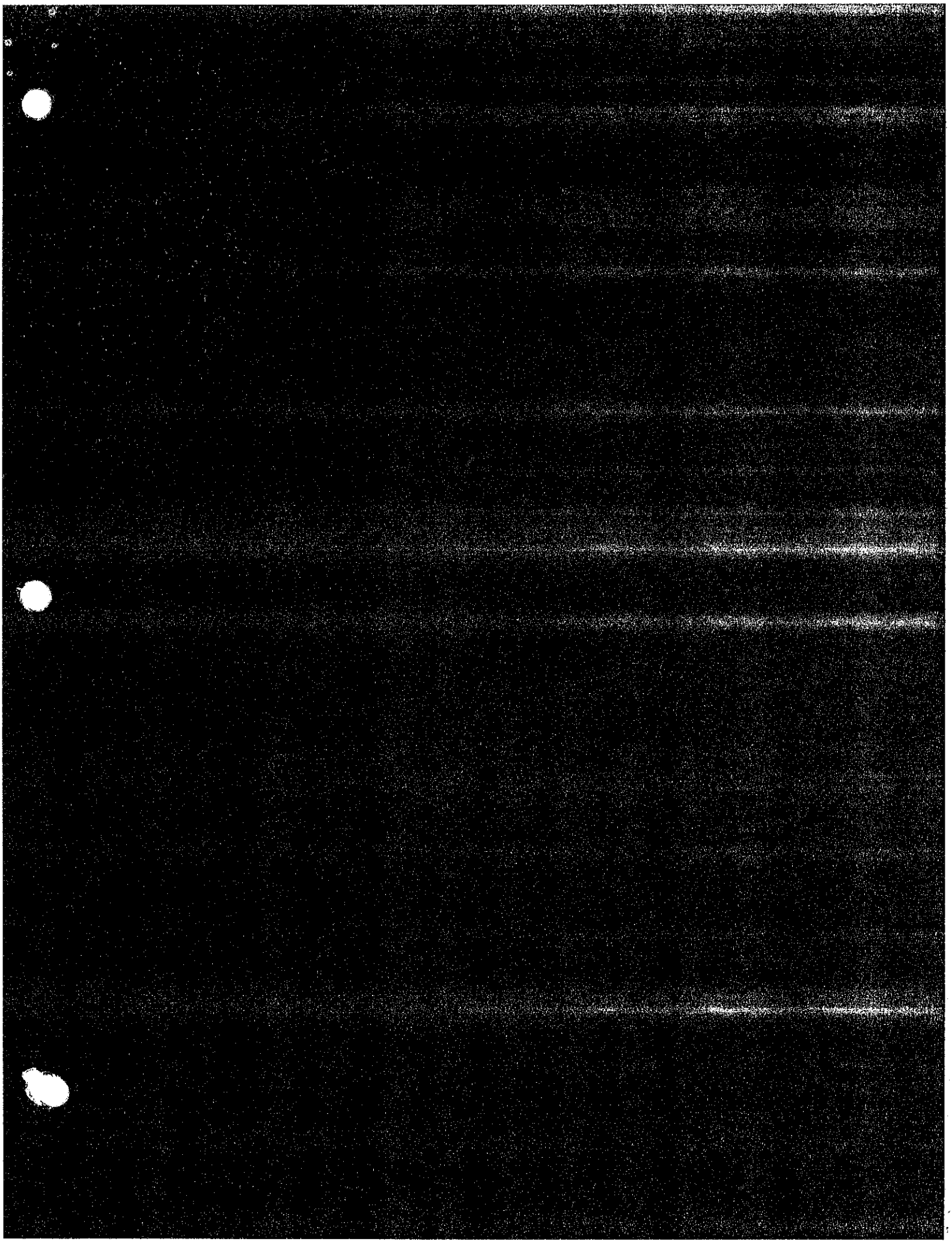
In order to succeed on a claim of negligence under maritime law, a plaintiff must establish all elements of a negligence cause of action in admiralty, which are essentially the same as land-based negligence under the common law: 1) the existence of a duty of care owed by the defendant to the plaintiff; 2) the breach of that duty of care; 3) a causal connection between the offending conduct and the resulting injury, which is called "proximate cause"; and 4) actual loss, injury or damage suffered by the plaintiff. *Pearce v. United States*, 261 F.3d 643, 647-48 (6th Cir. 2001); *Hanley v. St. Paul Fire & Marine Ins. Co.*, 118 Fed. Appx. 914, 919 (6th Cir. 2004). The duty of care can be derived from "duly enacted laws, regulations, and rules; . . . custom . . . or . . . the dictates of reasonableness and prudence." *Galentine v. Estate of Stekervetz*, 273 F. Supp. 2d 538, 544 (D. Del. 2003).

As a general rule, a shipowner owes to a person lawfully aboard the vessel "the duty of exercising ordinary care, which is held to mean reasonable care under the circumstances of each case." *Urian v. Milstead*, 473 F.2d 948, 951 (8th Cir. 1973); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). Under that standard, the degree of care required must be in proportion to the apparent risk. *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988). In other words, under certain situations, reasonable care may be a very high degree of care and in another situation it may be less. *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416, 421 (5th Cir. 1986). The "extent to which the circumstances surrounding maritime travel are different

from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case." *Mendelson v. Delaware River & Bay Authority*, 112 F. Supp. 2d 386 (D. Del 2000).

Admiralty law also adheres to principles of comparative fault. *United States v Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221 (1994). Accordingly, proportional division of liability applies in admiralty cases. *See, e.g., Phillips Petroleum Co. v. Stokos Oil Co., Inc.*, 863 F.2d 1250, 1255 (6th Cir. 1988) ("Damages in admiralty cases are generally allocated among tortfeasors based on comparative fault."). Under the maritime rule, the plaintiff's comparative negligence mitigates his damages. *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 208 (1st Cir. 1988).

Admiralty law imposes joint and several liability on tortfeasors. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 n.30 (1979) (stating that "the general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury"). Where joint and several liability is imposed, "[n]ormally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor." *Id.*; *see also McDermott, Inc. v. AmClyde*, 511 U.S. at 210 n.10 (noting that comparative negligence and joint and several liability are not incompatible). Joint and several liability allows a plaintiff to recover from one of multiple defendants, when plaintiff's recovery from other tortfeasors is limited by outside facts, such as a defendant's insolvency, making other defendants, rather than the innocent plaintiff, responsible for the shortfall. *McDermott*, 511 U.S. at 210 n.10. Although the damages assignable to the plaintiff's own culpability must be subtracted from whatever damages the plaintiff has proven at trial, the defendant would still be liable "in full for the



United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3144

Daniel Doyle; Anne Doyle, Plaintiffs/Appellees, v. Leland Graske, Defendant/Appellant, v. Jason R. Haynes; Caribe Inflatables USA, Inc.; Kirk Marine, Third Party Defendants.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: April 16, 2009
Filed: September 2, 2009

Before LOKEN, Chief Judge, HANSEN and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Daniel Doyle suffered injuries while he was a passenger on a boat owned and operated by Leland Graske. Doyle brought an action in Nebraska state court, claiming

that Graske was negligent in his operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction. The district court, sitting without a jury, found that Doyle's injuries were caused by Graske's negligence, and awarded compensatory damages to Doyle, as well as loss-of-consortium damages to his wife, Anne. We affirm the district court's judgment in favor of Daniel Doyle, but reverse its award of loss-of-consortium damages to Anne Doyle.

I.

On October 31, 2003, Graske and two friends, Daniel Doyle and Robert Van Hook, decided to go fishing in the waters off the coast of Grand Cayman Island, where Graske owned a vacation home. The three set out on Graske's inflatable boat at around 10:30 a.m. The boat was fourteen feet long, with a seventy-horsepower engine and room for six passengers. It featured two seats at the stern (or rear), two more at midship, and a cushion for two passengers at the bow (or forward end). Both seats at the stern faced forward and included backrests. The stern seat on the starboard side (*i.e.*, the right side while looking forward) was known as the "helm seat" because of its position opposite the boat's steering wheel, located on a console at midship. The forward side of the console functioned as a backrest for the starboard midship seat. The other midship seat (on the port, or left, side) and the bow cushion seats did not have backrests, and passengers sitting on the latter had to ride facing the rear. An inflatable tube formed most of the boat's hull, and there were hand straps along the top of the tube for passengers sitting at midship or in the bow.

From the helm seat, Graske steered the boat slowly through the no-wake zone – a zone extending two hundred yards from shore in which boats are prohibited from traveling above five miles per hour. When the boat was past the zone, Graske said, "Here we go," or words to that effect, and began accelerating. As the boat came on plane – that is, reached a speed at which its hull was no longer displacing the water,

but skimming across it – a nylock nut came loose from the boat's steering system, causing the system to malfunction and the boat to turn abruptly and sharply to the left.

Despite the sudden turn, Graske was able to maintain his position behind the steering wheel. Van Hook, who was sitting on one of the midship seats, managed to remain on the boat as well. Doyle, however, was thrown overboard. Accounts differ concerning where Doyle was located when he was ejected. According to Graske, Doyle was sitting on the inflatable tube, with his feet between the starboard midship and bow seats, and with at least one hand on a hand strap. According to Van Hook, Doyle was seated on the bow cushion (having moved there from the tube), and was not holding any hand strap. Doyle himself cannot remember.

Wherever he was sitting, Doyle was thrown into the water, and as the boat continued turning counterclockwise, it struck him in the back and on the head. Graske immediately put the boat in neutral. Doyle was some distance from the boat, injured but conscious. Graske brought the boat closer to Doyle, and Van Hook grabbed hold of him, eventually pulling him onto the inflatable tube.

Graske guided the boat to shore. From there, Doyle was transported to a local hospital and then transferred to medical facilities in the United States. Doctors diagnosed him with a flail chest, his respiration hindered by multiple rib fractures. Because of difficulties breathing, Doyle suffered permanent brain injury while hospitalized.

Doyle brought an action against Graske in Nebraska state court, claiming negligence in Graske's operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction under 28 U.S.C. § 1333(1). He sought to implead several third-party defendants, including a mechanic who repaired and reassembled the boat's steering system just days before the accident. Graske, however, was unable to establish personal jurisdiction over the third-party defendants,

and his claims were ultimately dismissed without prejudice. Doyle filed an amended complaint, adding his wife, Anne, as a plaintiff.

Following a bench trial, the district court entered judgment in favor of the Doyles. Applying general maritime law, the court found that Graske was negligent in his operation of the boat, and that Graske's negligence was a proximate and substantial cause of Doyle's injuries. It also determined that Doyle's own negligence contributed to his injuries, because he should have been more aware of the dangers around him. The court apportioned ninety percent of the fault for Doyle's injuries to Graske and potential tortfeasors, including the mechanic, and the remaining ten percent to Doyle himself. Taking account of Doyle's comparative negligence, the court awarded $3,238,153 in compensatory damages to Doyle. It also awarded $750,000 in damages for loss of consortium to Anne, but that amount did not reflect any proportional reduction for Doyle's comparative fault. Graske appeals.

II.

Graske first challenges the district court's finding that he was negligent in the operation of the boat. Because negligence in admiralty is a factual determination, we may not set aside the district court's finding unless it is clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 20 (1954). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id.* (internal quotations omitted).

Under general maritime law, a boat owner owes a duty of reasonable care to passengers lawfully aboard his boat. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959). The district court found that Graske breached this duty by bringing the boat on plane while Doyle was seated in "a position of danger." The court acknowledged that according to Graske, Doyle was sitting on

the tube when the accident occurred, whereas according to Van Hook, Doyle was sitting on the bow cushion. But the court determined that this difference of opinion was immaterial, because "both the tube and the bow cushion seat are positions of danger while accelerating a small watercraft on the open ocean." Given that Doyle was sitting at either one position or the other, the court reasoned that Graske should have known that it was unsafe to accelerate. Accordingly, the court concluded that by bringing the boat on plane, Graske failed to exercise reasonable care for Doyle's safety, and was thus negligent in his operation of the boat.[1]

Graske does not dispute that his actions were negligent if Doyle was sitting on the tube. Indeed, various boating experts testified at trial that sitting on the tube was unsafe while the boat was planing, and there was no testimony to the contrary. Graske focuses instead on the district court's finding that his operation of the boat was negligent if Doyle was sitting on the bow cushion. Graske argues that this finding is clearly erroneous. We disagree.

At trial, Michael Sampsel, a mechanical and marine engineer, testified that the bow cushion was an unsafe position while the boat was on plane. Sampsel noted that the cushion was naturally subject to greater motion at higher speeds, given its location in the boat's bow. According to Sampsel, however, the cushion's design did not account for such increased motion. Quite the opposite, he explained, the cushion's short height – just 13.5 inches above the deck – meant that passengers would be sitting in an unusual posture, with their knees higher than normal. He also noted that the lack of thigh restraints or backrests meant that passengers would be prone to sliding across the cushion. Sampsel acknowledged the presence of nearby hand straps, but

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[1]Graske contends that the district court abused its discretion by failing to make a specific finding of fact as to where Doyle was sitting when the accident occurred. Because Doyle's exact seating position is not an ultimate fact necessary to reach a decision, we reject Graske's contention. *See Allied Van Lines, Inc. v. Small Bus. Admin.*, 667 F.2d 751, 753 (8th Cir. 1982).

maintained that they were meant for use in lifting the boat, not for use by passengers. In Sampsel's opinion, therefore, the bow cushion's location and design rendered the seat unsafe while the boat was on plane, and Graske violated safe boating practices if he proceeded to accelerate with Doyle sitting there.

The testimony of two other experts was not inconsistent with Sampsel's conclusion. Paul Larson, a marine surveyor and investigator, testified that when the boat was planing, a seat at midship was "a better and safer position" than one in the bow. He did not rule out the possibility that if Doyle was seated on the bow cushion when the accident occurred, then Graske's operation of the boat was negligent. According to Larson, whether Graske failed to exercise reasonable care would depend on the circumstances. Herbert Angell, a boating law administrator for the State of Nebraska, took a similar position. Like Larson, Angell testified that whether it was negligent to allow Doyle to sit on the bow cushion would depend on how fast the boat was traveling and other environmental conditions.

The only expert witness who stated categorically that sitting in the bow was safe at planing speed was Robert MacNeill, a boat manufacturing consultant. The district court noted, however, that MacNeill's expertise was in designing yachts, not small recreational vessels. The court therefore declined to credit MacNeill's testimony regarding the safe operation of Graske's fourteen-foot boat. Giving due deference to the district court's determination of credibility, we cannot say that its refusal to accept MacNeill's testimony was unreasonable.

In light of the record as a whole, we conclude that substantial evidence supports the district court's conclusion that Graske breached a duty of reasonable care if Doyle was seated on the bow cushion when the boat came on plane. The definitive testimony of Sampsel, and the fact-dependent opinions of two other experts, provided sufficient basis for the court to find that the bow cushion was a position of danger under the circumstances, such that Graske should have known not to accelerate while

Doyle was seated there. Given that the only other position where Doyle could have been located was on the tube – a position Graske does not dispute would have been unsafe – we hold that the district court's finding of negligence in Graske's operation of the boat is not clearly erroneous.

III.

Graske next challenges the district court's determination that his negligent operation of the boat was a proximate and substantial cause of Doyle's injuries. Issues of proximate causation in admiralty "involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). We may not disturb the district court's determination unless it is clearly erroneous. *Am. Home Assurance Co. v. L & L Marine Serv., Inc.*, 875 F.2d 1351, 1354 (8th Cir. 1989).

Graske invokes the doctrine of superseding cause, arguing that the negligent repair of the boat's steering system superseded his negligent operation of the boat, thereby relieving him of liability for Doyle's injuries. The allegedly negligent repair of the boat, however, could not have been a superseding cause of Doyle's injuries. The doctrine of superseding cause applies "where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a *later* cause of independent origin that was not foreseeable." *Sofec*, 517 U.S. at 837 (emphasis added) (internal quotation omitted). Here, the allegedly negligent repair of the boat occurred *before* Graske's negligence, and thus could not have superseded it. Accordingly, the doctrine of superseding cause is of no avail to Graske.

Graske also invokes the doctrine of inevitable accident, arguing that Doyle's injuries would have occurred as a result of the failure of the boat's steering system, regardless of whether Graske's operation of the boat was negligent. We doubt that the

doctrine of inevitable accident applies outside the context of collision liability, where it may be raised as an affirmative defense by vessels accused of causing collisions. *See The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 7-2, at 486-88 (2d ed. 1975). But even assuming that the doctrine does apply in this general context, it would not apply in this case. An accident cannot be said to have been inevitable if it could have been prevented by "human skill and precaution, and a proper display of nautical skill." *The Louisiana*, 70 U.S. (3 Wall.) at 173. The district court did not clearly err in finding that Doyle's injuries could have been prevented if Graske had exercised reasonable care by waiting to accelerate until Doyle was seated at midship or the stern. After all, Graske and Van Hook were riding in those areas when the boat suddenly turned, and both were able to avoid harm. Doyle's injuries were therefore not the inevitable consequence of the malfunctioning of the boat's steering system. The district court's finding that Graske's negligence was a proximate and substantial cause of Doyle's injuries is not clearly erroneous.

IV.

Finally, Graske challenges the district court's award of loss-of-consortium damages to Doyle's wife, Anne. "Loss of consortium" refers to "loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations." *Black's Law Dictionary* 1031 (9th ed. 2009). In the context of marriage, the terms "loss of consortium" and "loss of society" are used interchangeably. *In re Midland Enters., Inc.*, 886 F.2d 812, 816 n.4 (6th Cir. 1989). Graske contends that general maritime law does not allow recovery for loss of consortium by the spouse of a nonseafarer negligently injured beyond the territorial waters of the United States. A "nonseafarer" is someone, like Doyle, who is neither a seaman covered by the Jones Act, 46 U.S.C. § 30104, nor a longshore or harbor worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205

n.2 (1996). We review *de novo* the question whether general maritime law allows recovery for loss of consortium. *See In re Am. Milling Co.*, 409 F.3d 1005, 1013 (8th Cir. 2005).[2]

The Supreme Court's most recent guidance on how to approach this sort of problem came in *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009). There, the Court considered "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure." *Id.* at 2565. The Court began its analysis by reviewing the history of punitive damages under the common law generally and federal maritime law specifically. Based on that review, the Court determined that "punitive damages have long been available at common law," and that "the common-law tradition of punitive damages extends to maritime claims." *Id.* at 2569. The Court reasoned that because "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule," the only question remaining was whether the rule had been abrogated by Congress's enactment of the Jones Act, which provided seamen a statutory cause of action for negligence. *Id.* The Court concluded that the rule had survived the Jones Act, because the Act did not address either maintenance and cure or its remedy. *Id.* at 2572. Because Congress had not altered the traditional understanding regarding the availability of punitive damages in admiralty, the Court held that "such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law." *Id.* at 2575.

Applying the *Townsend* approach here, we conclude that there is no well-established admiralty rule, as there is with respect to punitive damages, authorizing

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[2]The Doyles contend that Graske waived his argument that loss-of-consortium damages are unavailable under general maritime law by raising it for the first time in a post-verdict motion. In ruling on that motion, however, the district court considered and rejected Graske's argument on the merits. The issue is a purely legal one, and we proceed to consider it.

loss-of-consortium damages as a general matter. In 1963, the question whether maritime law allowed recovery of loss-of-consortium damages by the wife of a longshoreman negligently injured in state territorial waters was "presented for the first time in a federal Court of Appeals." *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 258 (2d Cir. 1963). In an opinion by Judge Friendly, the Second Circuit noted that common-law authorities regarding a wife's recovery for loss of consortium were "conflicting," *id.* at 265, and that there were no maritime cases pertaining to the issue except for two district court decisions denying such recovery. *Id.* at 265-66. Against this backdrop, the court rejected the wife's loss-of-consortium claim. *Id.* at 267.

Loss-of-consortium damages were not definitively recognized under general maritime law in any context until 1974, when the Supreme Court held in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), that a wife could recover such damages for the wrongful death of her husband, a longshoreman killed in state territorial waters. Six years later, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), the Court extended *Gaudet* to personal injury actions, holding that "general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." *Id.* at 276 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment). The plurality in *Alvez* explained in its discussion of the Second Circuit decision in *Igneri* that although "the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society," *id.* at 280, *Gaudet* had since provided "the conclusive decisional recognition of a right to recover for loss of society that *Igneri* found lacking." *Id.* at 280-81.

The short history of loss-of-consortium damages in admiralty consists almost entirely of the Supreme Court's relatively recent decisions in *Gaudet* and *Alvez*. Given the narrow holdings of those decisions, general maritime law on loss-of-consortium damages remains an area marked by few settled principles. Thus, unlike

the Court in *Townsend*, which was not asked to "change maritime law in its operation as an admiralty court," we cannot simply apply a preexisting general rule left unaltered by Congress. 129 S. Ct. at 2574 n.11.

The Court in *Alvez* recognized a right to recover loss-of-consortium damages for nonfatal injuries to a spouse in the territorial waters of the United States, but Doyle was injured nonfatally beyond such waters, off the coast of Grand Cayman Island. Whether someone in the position of Doyle's wife may recover loss-of-consortium damages is an open question in this circuit. Because we are confronted with an issue of first impression, we must continue the development of general maritime law "in the manner of a common law court." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605; 2619 (2008); *see Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959).

In exercising this authority, we heed the policy choices made by Congress. "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990). Where there is no recognized claim under general maritime law, as there was in *Townsend*, an admiralty court should look to legislative enactments governing closely related claims for policy guidance. *Id.* at 27. After reviewing the relevant policy pronouncements by Congress, we conclude that allowing recovery for loss of consortium here would give rise to two serious disparities between general maritime law and legislative policies. These anomalies counsel against recognizing a right to recovery.

First, the spouses of those injured nonfatally beyond state territorial waters would be treated differently than the spouses of those injured fatally. Congress enacted the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30301 *et seq.*, to provide a remedy in admiralty for wrongful deaths occurring more than three miles from the shore of the United States. *Id.* § 30302. Under DOHSA, a decedent's survivors may recover only for pecuniary loss; damages for loss of society are not

available. *Id.* § 30303. The Supreme Court has held that DOHSA provides the exclusive measure of damages in wrongful-death actions arising beyond the three-mile limit. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978). Accordingly, the spouses of those injured fatally beyond that limit have no claim to loss-of-consortium damages. To allow recovery of such damages by the spouses of those injured *nonfatally* in the same waters would thus give rise to a significant anomaly. Indeed, the Court confronted just such a disparity in *Alvez*, and extended the holding of *Gaudet* to avoid it. Five Justices agreed that "there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society." *Alvez*, 446 U.S. at 281 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment) ("Since I see no rational basis for drawing a distinction between fatal and nonfatal injuries, I join in the judgment of the Court."). *Alvez* rejected a disparity between fatal and nonfatal injuries *within* territorial waters, and there is no reason to think that a disparity of that kind *beyond* such waters is more acceptable.

Second, if the spouses of injured nonseafarers like Doyle could recover loss-of-consortium damages on claims of negligence, then their rights under general maritime law would be greater than the rights of the spouses of injured seamen under the Jones Act. Although the Jones Act provides an action in negligence for injury to seamen, it does not authorize recovery by the seaman's spouse for loss of consortium. *See Miles*, 498 U.S. at 32. It would be odd if the relief available to the spouse of a nonseafarer were more expansive than that which Congress has afforded the spouse of a seaman. After all, the principles of maritime law have always included "a special solicitude for the welfare of seamen and their families." *Id.* at 36; *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970) (noting the development under maritime law of "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages"). There is no reason to believe that Congress meant to place the spouses of injured seamen in a worse position than the spouses of injured nonseafarers. *Cf. Igneri*, 323 F.2d at 267 ("We

can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore.").

Given the value of uniformity recognized in *Miles*, 498 U.S. at 33, we agree with the Fifth and Ninth Circuits that general maritime law does not allow recovery of loss-of-consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States. *See Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1408 (9th Cir. 1994); *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 122-23 (5th Cir. 1994). It may be argued in reply that this holding creates an anomaly of its own. Under the rule we establish here, Anne Doyle may not recover loss-of-consortium damages, because her husband was negligently injured in waters beyond our nation's territorial sea. But under the rule set forth in *Alvez* (assuming that rule is not limited to the wives of harbor workers), she would have been able to recover for loss of consortium if the accident had occurred within territorial waters. This kind of disparity, however, already exists in maritime law: Loss-of-consortium damages are available under *Gaudet* when a wrongful death occurs in territorial waters, but not under *Higginbotham* and DOHSA when the death occurs on the "high seas." *See Higginbotham*, 436 U.S. at 624 & n.20. We therefore conclude that our holding best coincides with the congressional policies reflected in DOHSA and the Jones Act, as well as the Supreme Court's development of general maritime law.

* * *

For these reasons, the judgment of the district court is affirmed in part and reversed in part.

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE

OF WRIT OF SUMMONS

1. The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

   After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495G, George Town, Grand Cayman.

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings must also serve a defence on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

   If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

   If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

   If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, issue a Summons for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.

2. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.

3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (the name stated on the Writ of Summons)".

4. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.

5. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.

6. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.

7. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.

8. A Defendant acting in person may obtain help in completing the form at the Courts Office.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 0538 OF 2009

BETWEEN:

LELAND GRASKE

Plaintiff

AND:

KIRKCONNELL BROTHERS LTD T/A KIRK MARINE

Defendant

ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.

2. State whether the Defendant intends to contest the proceedings (tick appropriate box)

☐ yes ☐ no

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box)

☐ yes ☐ no

Service of the Writ is acknowledged accordingly

(Signed).....

Attorney for

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Samson & McGrath
Attorneys at Law
5th Floor Genesis Building
Genesis Close
PO Box 446
George Town
Grand Cayman

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.