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ADMIRALTY LAW

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Damages: Sailing in Fog?

There has been a great deal of activity from the U.S. Supreme Court on down on the issue of punitive damages. Only the *Exxon Valdez* case, before the Court actually involves a maritime matter. Lower courts have had to grapple not only with punitive damages, but also loss of society and loss of consortium damages with varying decisions that seem difficult to reconcile.

The Supreme Court has not found that punitive damages in general violate the U.S. Constitution. It has, however, sought to require that punitive damages bear some reasonable relationship to the actual damages or pecuniary loss recovery. In *Philip Morris U.S.A. v. Williams*, 549 U.S. 127 S.Ct. 1057 (2007), the court went further to say that a punitive damage recovery should not be recoverable against parties not before a court. Further, the punitive damage system must place a defendant on fair notice of the penalties that state law may impose.

The 'Exxon Valdez' Case

In the never-ending *Exxon Valdez* case, the Supreme Court has just recently (Oct. 29, 2007) granted certiorari in this 1989 oil spill in Alaska. The court has agreed to hear argument on and decide three issues:

- (1) whether Exxon is liable in punitive damages for the actions of the master of the Exxon Valdez;
- (2) whether the penalty provisions of the Federal Water Pollution Control Act preempt judge-made punitive damages for the same conduct; and
- (3) what are the appropriate standards for awarding punitive damages under general maritime law.

The Supreme Court's decision should provide valuable guidance for admiralty practitioners.

The U.S. Court of Appeals for the Ninth Circuit has weighed in on *Exxon Valdez* and appears to still believe that a very substantial punitive award should stick to Exxon although the original amount awarded keeps coming down. The December 2006 decision cut the punitive damage award from \$5.0 billion to \$2.5 billion. The Exxon petition for certiorari argued that *Miles v. Apex Marine Corp.* would not permit it such a massive punitive award. Also argued was the 1818 case of *The Amiable Nancy*, discussed below.

The Ninth Circuit reversed and remanded a \$52 million punitive award against Ford Motor Co. following the U.S. Supreme Court decision in *Philip Morris USA v. Williams*. The compensatory award was \$2.3 million. A new trial was ordered. *White v. Ford Motor Co.*, 533 F.3d WL 2445952 (9th Cir. Aug. 30, 2007).

The U.S. Court of Appeals for the Third Circuit applied a restrictive view of punitive damages in *CGB Occupational Therapy Inc. v. RHA Health Services*, 499 F.3d 184 (3d Cir. 2007). This was a bitterly fought case involv-



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ing breach of contract with a noncomplete clause and a tortious interference claim. A \$30 million verdict was reduced by the district court to \$2 million. The Third Circuit reduced it further to \$750,000, citing the Supreme Court decisions.

Punitive Damages in Admiralty

The General Maritime Law is the non-statutory body of judge-made law which has grown since the early days of the U.S. republic. Since 1818, the U.S. Supreme Court has held that the General Maritime Law in the proper case may allow punitive damages. The case is *The Amiable Nancy*, 16 U.S. 546, 4 L.Ed. 456. There the crew of a vessel was involved in trespass, robbery, assault and piracy on another vessel. The Court held that the crew could be liable, while the employer/shipowner was absolved for lack of proof that he ratified or authorized these acts. Prior to the decision of *Miles v. Apex Marine Corp.*, this view that the admiralty law allowed punitive damages

was generally accepted. Punitive damages were allowed "upon a showing of wilful and wanton misconduct by the shipowner." *Complaint of Merry Shipping Inc.*, 650 F.2d 622, 623 (5th Cir. 1981).

Miles v. Apex Marine Corp. is often cited to restrict recoveries in maritime death and injury cases. The better view is to limit *Miles* to its facts rather than use its broad language, which is primarily dicta, beyond the actual holding on its restrictions in a seaman's statutory "Jones Act" case. The *Miles* case involved only the issues of whether (1) a nondependent parent may recover for loss of society of a Jones Act crew member, son under the general maritime law and (2) whether a survival action for the crew member's death allowed recovery of a lifetime's lost earnings. These were the issues on which certiorari was granted and the Court held that "there is a general maritime cause of action for the wrongful death of a seaman, (i.e., unseaworthiness), but that damages recoverable in such an action do not include loss of society, (i.e., the recovery under *Gaudet*). We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings." Although there is broad language in *Miles* justifying the holding, numerous courts have decided to limit *Miles* where the issues claims do not involve a Jones Act seaperson.

The most recent case to distinguish *Miles* was the U.S. Court of Appeals for the Eleventh Circuit in *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282 (Aug. 23, 2007). The case allowed a claim for punitive damages where a shipowner-employer of a seaman wilfully withheld "maintenance" (daily sustenance) due the seaman employee. The concurring opinion in *Townsend* cites numerous cases confining *Miles* to its facts. In accord is *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1503 (9th Cir. 1995). In another context, the Second Circuit decided to limit *Miles* to its facts in *Wartman v. Commodore Cruise Line*, 1996 WL 47914 (1996), discussed further below.

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Punitive damages were allowed in an egregious products liability case involving a forged safety certificate on a cruise line Jacuzzi where use of the Jacuzzi resulted in Legionnaire's Disease. *In Re Horizon Cruises Litigation*, 101 F.Supp.2d 204 (S.D.N.Y. 2000).

New York courts have also allowed a punitive damage claim in a general maritime law collision case, *Frazier v. City of New York*, 612 NYSupp2d 806 (Sup. Ct., Bronx Cty. 1994).

Defendants often cite *In Re Amtrak Sunset Ltd.*, 121 F.3d 1421 (11th Cir. 1997), to deny punitive damages in a death case. But that case dealt with an Alabama death statute, a punitive death statute allowing recoveries based on the degree of negligence. The court held that the general maritime law would deny recovery for punitive damages based only in negligence.

Although the *Townsend* case was liberal on damages for withholding maintenance payments, it cited contrary authority especially the Fifth Circuit in *Maritime Overseas Corp. v. Guevara*, 59 F.3d 1496 (1995), and various district courts. It also reiterated that punitive damages are unavailable in "Jones Act" cases as they are in "Death on the High Seas Act" (DOHSA) cases.

Although recent Supreme Court cases have restrictions on the amount of punitive damages recoverable in relation to general damages and the parties before the court, there is no question that punitive damages recoveries are constitutional.

Loss of Consortium, Society

Following *Miles* it has become clear that the majority of holdings limit Jones Act and DOHSA claims involving loss of consortium and loss of society. *Miles* decided the punitive damage issue. But these are statutory claims, so these damages should be recoverable under the general maritime law. *American Export Lines v. Alvez*, 446 U.S. 173 (1980), allowed a loss of consortium claim for a longshoreman's wife. Even a crew member whose Jones Act negligence cause of action may preclude a loss of consortium claim may have a recovery for loss of consortium damages under the general maritime law of unseaworthiness. See *Michel v. Total Transp. Inc.*, 957 F.2d 186 (5th Cir. 1992), and *Murray v. Anthony J. Bertucci Const. Co.*, 958 F.2d 127 (5th Cir. 1992), cert. den. (1992). Another case allowed loss of consortium for the spouse of a Jones Act seaman suing a third party, not the vessel owner. *Gerdes v. G&H Towing Co.*, 967 F.Supp. 943 (S.D. Texas 1997) (products case).

The leading case allowing loss of consortium in the Second Circuit is *Wartman v. Commodore Cruise Line, Ltd.*, 1996WL 47964 (2d Cir. 1996). There the court decided that *Miles* had covered a totally different issue and limited relief since it involved a Jones Act seaman. In *Wartman*, a wife recovered for loss of consortium for an injured husband against a cruise line. *Wartman* was followed in *Burke v. Quick Lift, Inc.*, 464 F.Supp.2d 150 (E.D.N.Y. 2006). A later case cited from time to time to the contrary is *Friedman v. Cunard Line Ltd.*, 996 F.Supp. 303 (S.D.N.Y. 1998), where neither the court nor plaintiff's attorney knew of or cited *Wartman*.

Other jurisdictions have allowed loss of society claims under the general maritime law. *Emery v. Rock Island Boatworks, Inc.*, 847 F.Supp. 114, 117-118 (D.C. Ill. 1994); *Skidmore v. Groeninger*, 506 F.2d 716, 727-729 (5th Cir. 1975); *Powers v. Bayliner Marine Co.*, 855 F.Supp. 199, 201-202 (W.D. Mich. 1994).

On the issue of loss of consortium and society, the ruling in *Chart v. Society Expeditors, Inc.*, 39 F.3d 1398 (9th Cir. 1994), is an aberration and should be challenged. There, a father and child died in an excursion from a cruise ship. The court applied the Death on the High Seas Act (DOHSA) and Jones Act case precedent to their claims. Neither statute allows nonpecuniary recoveries. Loss of consortium claims for injuries were equated with loss of society for death claims. And the *Miles* case reasoning was extended where it should have been restricted. It is a nonsequitur to argue that what has been applied to a DOHSA recovery should be applied to an injury recovery.

The Supreme Court has required that punitive damages bear some reasonable relationship to the actual damages or pecuniary loss recovery. In 'Philip Morris U.S.A.', the court went further to say that a punitive damage recovery should not be recoverable against parties not before a court.

Several courts have denied loss of consortium in claims which do not involve longshoremen whereas the *Gaudet* and *Alvez* cases of the Supreme Court would allow loss of consortium and loss of society for a longshoreman. In *Matter of Everglades Boat Tours*, 484 F.Supp.2d 1259 (M.D. Fla. 2007), an airboat was held to be a vessel within admiralty jurisdiction and the court denied loss of consortium. The case cites *Lollie v. Brown Marine Service*, 995 F.2d 1565 (11th Cir. 1993). *Ramsey v. Delaware River and Bay Authority*, Superior Ct., N.J., Cape May County, Sept. 10, 2007, also denied loss of consortium and relied upon *Friedman v. Cunard Line*, 996 F.Supp. 303 (S.D.N.Y. 1998). The *Friedman* case was decided after the *Wartman* (where loss of consortium was allowed by the Second Circuit), but it appears that the parties were unaware of the *Wartman* ruling.

The Fifth Circuit has held that even in a longshoreman's death case, there is no recovery if there are only nondependent parents. *Matter of American River Transp. Co.*, 05-30878, June 19, 2007, *Ponce v. M/V Altair*, 493 F.Supp.2d 880, 894, 895 (S.D. Texas 2007) (cites earlier Fifth Circuit cases to the contrary).

Emotional Injuries

The *Chan* case cites Supreme Court authority to allow recovery for emotional injuries for those in the "zone of danger" under the

Federal Employees Liability Act. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). This was stated to be the common-law rule followed in 14 jurisdictions as of that date and *Chan* held this to be the General Maritime Law also.

Then, in 1996, Title 46 of the U.S. Code was amended. Section 30509(b)(1)(B) provides that there is cruise line liability for "emotional distress, mental suffering or psychological injury" if it is "the result of the claimant having been at actual risk of physical injury, and the risk was caused by the negligence or fault of a crewmember or the owner, master, manager, agent, or operator."

Death Claims

In *Moragne v. States Marine Lines*, the Supreme Court created a wrongful death remedy for nonseaman injured in territorial waters. The remedy includes loss of society and loss of consortium.

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), involved death due to a jet ski accident in waters off Puerto Rico. The Supreme Court decided in this maritime case that state and federal causes of action for wrongful death are available to the plaintiff for a death in territorial waters. After remand, the Third Circuit affirmed the district court ruling that domiciliary law of plaintiff (Pennsylvania) applied to general compensatory damages (a generous state statute) and local law (Puerto Rico) applied to punitive damages (no recovery).

What are the boundaries for DOHSA to apply? The Second Circuit ruled that Proclamation 5928 extended the boundary of the territorial sea to 12 miles, making the high seas operative only beyond the 12-mile mark. *In Re Air Crash Off Long Island, New York on July 17, 1996*, 209 F.3d 200 (2000). Florida, Louisiana and Texas also claim state waters beyond three miles. The Florida constitution, for instance, has a boundary in conflict with a decision under the Submerged Lands Act which deals with division of natural resources between states and the federal government.

There is thus controversy over where the high seas begin as well as whether loss of society is recoverable in cases not involving longshoremen.

Conclusion

Damages in an admiralty context can be difficult to navigate particularly in view of the varying status of plaintiffs (i.e., seaman, nonseaman, longshoreman), and the location of the accident (high seas, territorial waters). An admiralty practitioner's awareness of what the various statutes and cases say and represent in this regard is as important to navigating a case as radar is to a seaman.

- 1. *Exxon Shipping v. Baker*.
- 2. 498 U.S. 19 (1990).
- 3. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578.
- 4. *American Export Line v. Alvez*, 446 U.S. 173 (1980).
- 5. 43 U.S.C. §51, et seq.
- 6. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). *Moragne* was an "unseaworthiness" case when that remedy was available to longshoremen, although not allowed since 1972. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001), extended the same remedy for death due to "negligence" in state waters.