PUNITIVE DAMAGES IN MARITIME BEFORE AND IN THE WAKE OF BATTERTON THE FUTURE - A QUIXOTIC QUEST FOR A LEGAL UNICORN? – PART 2 OF 2[+]

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[+] **Editor's Note:** This essay is part two of a two part work. Part one is an introduction to the Essay and appeared in Volume 21, Winter Edition. Part two will include all **bold face sections** of the Table of Contents.

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IV. The Nail in the Coffin?

A. *Dutra Grp. v. Batterton*

Though federal district courts in the Hawaii,[1] Washington,[2] Missouri,[3] California,[4] and Minnesota[5] as well as state courts in Washington[6] and Virginia[7] addressed the applicability of the reasoning of *Miles* and *Townsend* to claims for punitive damages for breach of the warranty of seaworthiness, three years would pass before another U.S. Court of Appeals would confront the issue.[8] Christopher Batterton was a seaman on a vessel owned by The Dutra Group and injured his hand when a hatch cover blew open [9] because the vessel lacked a mechanism to relieve pressure as it was being pumped into a compartment.[10] This rendered the vessel unseaworthy.[11] On an interlocutory appeal to the Ninth Circuit, the panel noted that the issue in *Miles* was not whether punitive damages were recoverable for breach of the warranty of seaworthiness and that *Miles* clearly stated that general maritime law claims of seamen for unseaworthiness are not limited by the Jones Act.[12] Furthermore, any doubt of the applicability of that decision were put to rest with the *Townsend* opinion.[13] The damages sought in *Miles* were compensatory. Punitive damages punish and deter reckless and callous acts of a tortfeasor.[14] The opinion of the Supreme Court in *Miles* does not overrule the prior precedent of the Ninth Circuit established in *Evich v. Morris*.[15] Hence, the seaman had a valid claim for punitive damages under General Maritime Law for unseaworthiness. With a clear split in two major maritime circuits, the U.S. Supreme Court granted writs.[16]

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[1] Wagner v. Kona Blue Water Farms, LLC, 2010 U.S. Dist. LEXIS 96105 (D. Haw. 2010).
[2] Barrette v. Jubilee Fisheries, Inc., 2011 U.S. Dist. LEXIS 89514 (W.D. WA. 2011).
[3] *In re* Osage Marine Servs., No. 4:10-CV-1674, 2012 U.S. Dist. LEXIS 28483 (E.D. Mo. 2011).
[4] Rowe v. Hornblower Fleet, No. C-11-4979 JCS, 2012 U.S. Dist. LEXIS 164402 (N.D. Cal. 2012).
[5] *In re* Brennan Marine, Inc. v. Brennan Marine, Inc., 123 F.Supp. 3d 1134 (D. Minn. 2015).
[6] Tabingo v. Am. Triumph LLC, 391 P.3d 435 (Wa. 2017), modified 2017 Wash. LEXIS 552 (Wa. 2017); *cert. denied* 138 S.Ct. 648 (2018).
[7] Wayman v. Perdue Agribusiness, L.L.C., 98 Va. Cir. 364 (Cir. Ct. VA 2018).
[8] Batterton v. Dutra Grp. 880 F.3d 1089 (9th Cir. 2018), *rehearing den*. 2018 U.S. App. LEXIS 11420 (9th Cir. 2018; writ granted 139 S.Ct. 627 (2018); reversed and remanded, 139 S. Ct. 227 (2018).
[9] 880 F.3d at, 1090. It appears the vessel was within the territorial waters of California. As noted by the district court judge, the SCOW 3 was near Newport Beach, California. Batterton v. Dutra Grp., 2014 U.S. Dist. LEXIS 189871 at *1 (C.D. Cal. 2014).
[10] 880 F.3d at 1090.
[11] *Id*.
[12] *Id.* at 1093.
[13] *Id.* at 1095.
[14] *Id.* at 1096.
[15] 819 F.2d 256, 258 (9th Cir. 1987) The panel further noted that even were that not the established precedent, the outcome in *Batterton* would still be the same. 880 F.3d at 1096.
[16] 204 L. Ed. 2d 692, 139 S.Ct. 627 (2019).

The majority opinion was written by Justice Alito who authored a critical dissent of the majority opinion in *Townsend*.[17] He was joined by Chief Justice Roberts and Justices Kagan, Gorsuch, Kavanaugh and curiously by Justice Thomas, the author of the opinion in *Townsend*. Justice Ginsburg dissented with whom Justices Breyer and Sotomayor joined.[18]

In summary, Justice Alito examined the history of the claim for breach of the warranty of seaworthiness which initially was a basis for a seaman to collect wages if after signing a contract for a voyage the vessel was unseaworthy as well as a defense to criminal charges for disobedience to follow orders.[19] It became a basis for a claim for personal injury in *The Osceola*; the doctrine was further expanded by the Court in *Mahnich v. Southern S. S. Co*.[20] and became a basis for strict liability of the vessel owner in *Mitchell v. Trawler Racer, Inc*.[21] The *Batterton* majority resolved the matter relying on the *Miles* decision and relegated *Townsend* as "gloss" on that opinion.[22] Justice Alito's opinion in *Batterton* follows in line with the basis for his dissent in *Townsend* in which he questioned whether the two cases cited in the majority opinion in *Townsend* clearly established awards for punitive damages for failure to pay maintenance and cure.[23] Though the majority opinion does not appear to question prior statements of the Court that punitive damages historically have been available under General Maritime Law, Justice Alito dissects the case law cited to support the claim at issue in *Batterton* and states: "For claims of unseaworthiness, the overwhelming historical evidence suggests that punitive damages are not available."[24] Absent a compelling need to promote uniformity with Acts of Congress the Court should not allow a new remedy with no historical basis.[25] The Jones Act and a claim for unseaworthiness are duplicative.[26] In addition, allowing punitive damages for breach of this warranty would create anomalies which should be avoided.[27] Injured seaman could recover punitive damages but if killed beneficiaries would be barred.[28] The displaced owner would be held liable for punitive damages while the operator would not be.[29] In addition, as civil law tradition does not allow punitive damages,

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[17] *Id*.
[18] Justice Ginsburg notes that the Supreme Court reserved the question in *Townsend* whether punitive damages may be recovered under the Jones Act. *Batterton,* 139 S.Ct. at 2291 in response to Justice Alito's citations of the jurisprudence that FELA and hence the Jones Act restricts recovery to compensatory damages and the consistency of the Courts of Appeal to deny punitive damages under both FELA and the Jones Act. *Batterton,* 139 S.Ct. at 2284-2285.
[19] *Id*. at 2280.
[20] 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).
[21] 362 U. S. 539, 549, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).
[22] 139 S.Ct.at 2283.
[23] 557 U.S. at 430.
[24] 139 S.Ct. at 2283. He qualifies this very broad statement later in the opinion stating, "unlike maintenance and cure, unseaworthiness did not traditionally allow recovery of punitive damages."
[25] *Id*. at 2284.
[26] *Id.*
[27] *Id*. at 2286.
[28] *Id*. at 2287.
[29] 139 S.Ct. at 2284.

American shippers would be placed at a disadvantage.[30] The Ninth Circuit was, thus, reversed; and the case was remanded.[31]

The fate of punitive damages for seamen at least for the present seems sealed. Seamen can only seek punitive damages in claims of refusal or arbitrary and capricious failure to pay maintenance and cure. Punitive damages may not be recovered under the Jones Act or for breach of the warranty of seaworthiness. Thus, it would appear that when a right and remedy is created by statute or when a remedy created by jurisprudence overlaps with a statutory right and remedy, the statutory right and remedy prevails.

V. Punitive Damages in Maritime Law – Pending Issues Left Unresolved

The *Batterton* opinion finally puts to rest the question of whether a seaman injured or killed regardless of the location of the incident may recover punitive damages for unseaworthiness. But, considering some of the broad language in *Batterton,* do punitive damages have a future in General Maritime Law? Justice Alito qualifies the restriction on recovery of punitive damages to seaman's claims for unseaworthiness.[32] The majority opinion also does not abrogate the Court's previous statements that punitive damages have been recognized in maritime law since the early days of the Republic. It is now quite well established that punitive damages can be recovered in maritime law except in those cases in which the statutory right and the right established under General Maritime Law overlap, then the remedy or damages may not exceed what is allowed by statute. It must be remembered that claims for punitive damages are *in personam* claims. An action *in rem* only arises with a maritime lien.[33] Punitive damages do not give rise to a maritime lien.[34] Accordingly, there is no *in rem* claim against the vessel.

Nonetheless, many pending issues require resolution in maritime law for claims for punitive damages. What is the standard for gross negligence under General Maritime Law? What is the standard of review to determine if an award is excessive? What is the standard to impute acts of employees to the employer? In the area of personal injury and death may seamen still claim punitive damages for personal injury or death when caused in whole or in part by a third party? May non-seamen[35] seek punitive damages for personal injury or death in territorial waters? In cases of marine pollution, may parties seek punitive damages? May a party seek punitive damages for tortious breach of contract or for tortious interference with a contract? May claimants for damage to property in a collision or allision or for damaged cargo claim punitive damages for gross negligence?

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[30] *Id.*
[31] *Id.*
[32] *Id.* "The lack of punitive damages cases in traditional maritime law is practically dispositive."
[33] *See* Hunley v. ACE Maritime Corp., 927 F.2d 493 (9th Cir. 1991); *see also* Porter v. O.S. Shypoke, 1992 U.S. App. LEXIS 32175 (9th Cir. 1992) in which the panel reversed a punitive damage award for a commercial fisherman for his share of the catch as wages under Alaskan law on the basis that a punitive award does not create a maritime lien and cannot be assessed against the vessel.
[34] *Hunley*, 927 F.2d at 496.
[35] A non-seaman in this context would include an employee covered under the Longshore and Harbor Workers' Compensation Act, invitees on vessels and passengers.

A. What is the Standard for Gross Negligence in Maritime Law?

The Supreme Court in an 1854 maritime personal injury case expressed difficulty in defining the term "gross negligence.[36] In *EXXON VALDEZ*, Justice Souter, expounds on the varied degrees of culpability which have supported claims to punish actors. Reckless conduct includes recognition of a high degree of risk and action or inaction despite that knowledge as well as knowledge of the facts but a failure to appreciate the high degree of risk or harm.[37] Acting or failing to act to increase profit also represented a greater degree of culpability including willful or malicious acts.[38] The Court in *Townsend* stated that punitive damages may be awarded "for wanton, willful, or outrageous conduct."[39] Prior to *Townsend*, the Eleventh Circuit Court of Appeals[40] stated in *dictum* that the standard for punitive damages in a maritime tort requires "'intentional or wanton and reckless conduct'" with "'a conscious disregard of the rights of others.'"[41] Subsequent district court decisions of the Eleventh Circuit cast doubt on this standard in light of the *Townsend* decision.[42] Challenges to the *Sunset Limited* standard were in light *Townsend* at least with respect to non-pecuniary damages were rebuffed by the Eleventh Circuit in *Petersen v. NCL (Bahamas) Ltd*.[43] Nonetheless, two district judges in the Southern District of Florida stated that *Townsend* casts doubt on that standard and held that punitive damages may be recovered for willful, wanton, or outrageous conduct.[44] Other federal district judges in Florida maintain that *Sunset Limited* is still the standard for general maritime law claims in the Eleventh Circuit and that the standard is intentional misconduct.[45] Thus, in the Eleventh Circuit at the present time, sufficient facts must be alleged to constitute intentional misconduct even to survive a Motion to Dismiss.

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[36] S. B. New World v. King, 57 U.S. 469, 474 (1854). Even the learned Justice Story as a circuit court judge noted the difficult to define gross negligence: "The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated." Tracy v. Wood, 24 F. Cas. 117, 118 (Cir. R.I. 1822).

[37] Exxon Shipping v. Baker, 554 U.S. 481, 494 (2008).

[38] *Id*.

[39] *Townsend*, 557 U.S. at 409.

[40] *In re* AMTRACK "SUNSET LIMITED," 121 F.3d 1421, 1427-29 (11th Cir. 1998); *writ denied,* 522 U.S. 1110 (1998).

[41] 121 F.3d at 1428 (quoting CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 699 (1st Cir.1995)).

[42] Lobegeiger v. Celebrity Cruises, Inc., No. 11–21620–CIV, 2011 U.S. Dist. LEXIS 93933 at *21(S.D. Fl. 2011); Doe v. Royal Caribbean Cruises, Ltd., No. 11-23323-CIV, 2012 WL 920675 at *3-4 (S.D. Fla. Mar. 19, 2012).

[43] 748 F. App'x 246, 251-52 (11th Cir. 2018).

[44] *Lobegeiger*, 2011 U.S. Dist. LEXIS 93933 at *21; Doe v. Royal Caribbean Cruises, 2012 WL 920675 at *3-5.

[45] Crusan v. Carnival Corp., 2015 U.S. Dist. LEXIS 191522 at *18 (S.D. Fl. 2015); *accord* Bonnell v. Carnival Corp., 2014 U.S. Dist. LEXIS 200919, 2014 WL 12580433 (S.D. Fl. 2014); Terry v. Carnival Corp., 3 F. Supp. 3d 1363 (S.D. Fl. 2014); Kennedy v. Carnival Corp., 2019 U.S.Dist. LEXIS 368678 (S.D. Fl. 2019), Noon v. Carnival Corp., 2019 U.S.Dist. LEXIS 136528 (S.D. Fl. 2019), Simmons v. Royal Caribbean Cruises, 2019 U.S. Dist. LEXIS 137425 (S.D. Fl. 2019).

The Ninth Circuit in *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.*,[46] relied on a U.S. Supreme Court opinion decided under 42 U.S.C. § 1983[47] in which the Court stated that punitive damages can be awarded for outrageous conduct, reckless indifference to the rights of others, and "actual intent to injure or evil motive . . ."[48] or gross negligence, which appears to be sliding scale of conduct. A federal district court in Hawaii in a scuba diving case, turned to Hawaiian law to define the standard for punitive damages as indifference to a legal duty or "utter forgetfulness."[49] In the early 1970s when claims for punitive damages in maritime cases arose anew, the Second Circuit used the same tautology: "gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.[50] The Fifth Circuit pithily stated that "willful and gross disregard" for the rights of another is sufficient for punitive damages.[51] In a maritime contract dispute, the Fifth Circuit quoting Corbin on Contracts, stated that gross negligence is inflicted willfully or wantonly.[52]

Judge Barbier's decision in the *TRANSOCEAN HORIZON* case after the first phase of the trial sheds light on gross negligence and willful misconduct under the Oil Pollution Act.[53] A Responsible Party under the Oil Pollution Act has limited liability depending on the type of facility involved in the discharge or threat of discharge of oil[54] unless the incident was proximately caused by the "gross negligence" or "willful misconduct" of the Responsible Party.[55] In addition, the amount of the civil penalty assessed under the Clean Water Act is enhanced if caused by gross negligence or willful misconduct.[56] Finding the terms are not synonymous, gross negligence differs from willful misconduct in that gross negligence does not include recklessness.[57]

Thus, it would appear the gross negligence under General Maritime Law would be any act of the tortfeasor which could be categorized along a sliding scale of action greater than simple negligence up to and including willful acts. While intent is not necessary for gross negligence there

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[46] 767 F.2d 1379, 1385 (9th Cir. 1985).
[47] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…."
[48] Smith v. Wade, 461 U.S. 30, 48 (1982).
[49] Hambrook v. Smith, No. 14-00132-CIV, 2016 U.S. Dist. LEXIS 109484, *101-102 (D. Haw. 2016).
[50] *In re* MARINE SULPHUR QUEEN, 460 F.2d 89, 105 (2d Cir. 1972).
[51] *In re* Complaint of Merry Shipping, 650 F.2d 622, 625 (5th Cir 1981).
[52] Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401, 411 (5th Cir. 1982); *see also* Operaciones Tecnicas Marinas S.A.S. v. Diversified Marine Servs., LLC, 913 F. Supp. 2d 254,258 (E.D. La. 2012) in which Judge Feldman states that acts need not be willful for punitive damages; wanton or recklessness regarding the safety of others will also be sufficient for imposition of punitive damages (referencing Computalog U.S.A. v. Blake Drilling & Workover Co., 1996 U.S. Dist. LEXIS 19074, *7 (E.D. La. 1996)).
[53] *In re* Oil Spill, 21 F.Supp. 3d 657 (E.D. La. 2014).
[54] 33 U.S.C. § 2704.
[55] *Id.* § 2704 (c)(1)(A).
[56] *Id.* § 1321 (7)(D).
[57] 21 F.Supp. 3d at 734.

must nonetheless be some appreciation of risk to others and a disregard for those risks. Either knowledge, an appreciation of a higher risk of harm or utter disregard for the potential of a higher risk of harm to others is a key element in assessing whether the acts of a party constitute gross negligence.[58]

B. What is the standard to impute gross negligence to the employer or principle?

The Supreme Court in *EXXON VALDEZ* granted writs on two questions of law. One was the availability of punitive damages under General Maritime Law; and the other was the standard for corporate liability for acts of managerial agents.[59] The Court though acknowledging that the courts of appeals were divided over the question,[60] nonetheless, split evenly on this issue and was unable to reach a consensus.[61]

Exxon asserted that under maritime law the vessel owner cannot be held liable for the reckless acts of the master of the vessel.[62] Baker, on the other hand, maintained that the standard adopted by the Ninth Circuit in *Protectus Alpha Nav. Co*.[63] which adopted § 909(c)[64] and applied in *EXXON VALDEZ* was the proper standard for imputation of gross negligence. The Supreme Court first addressed liability of the vessel owner for the acts of the master and crew in *The Amiable Nancy* and exonerated the vessel owners to pay exemplary damages for the outrageous acts of the master and crew as they "neither directed it, nor countenanced it, nor participated in it in the slightest degree."[65] Since 1818, the U.S. Supreme Court had not addressed the issue despite the long standing split in the circuits.

As *EXXON VALDEZ* arose out of the Ninth Circuit, the standard of Protectus Alpha applied. While refueling at the North Pacific Dock on the Columbia River, the vessel PROTECTOR owned by Protectus Alpha Navigation Co., Ltd. caught fire.[66] Units from various towns arrived along with the Coast Guard and began to implement a plan to suppress the fire.[67] The North Pacific dock foreman arrived and ordered the vessel to be cast off from the dock despite protests from the fire chief and his assistant.[68] As a result, the fire renewed as the vessel floated

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[58] *See* C. Bowman Fetzer, Jr., "Navigating Through the Variations and Admissibility of Conduct Required to Support Punitive Damages at Sea," 13 LOY. MAR. L.J. 27 (2013).
[59] *Exxon Shipping,* 554 U.S. at 481.
[60] *Id*. at 482.
[61] *Id*. at 484.
[62] *Id*. at 482.
[63] Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985).
[64] Restatement (Second) of Torts (1977).
[65] 16 U.S. 546, 557 (1818). At the time, vessel owners could not seek limitation of liability in admiralty. The Shipowner's Limitation of Liability Statute which exonerates or limits the liability of the vessel owner when not in privity or knowledge with the acts of the master was not passed by Congress until 1851. See James J. Donovan, "The Origins and Development of Limitation of Shipowners' Liability," 51 TUL. L. REV. 999 (1979).
[66] 767 F.2d at 1381.
[67] *Id*.
[68] *Id.*

adrift and then stranded away from any fire equipment.[69] One fireman was killed, another injured and the vessel was a total loss.[70]

The Ninth Circuit adopted § 909 of the Restatement (Second) of Torts. Under common law, the principle is liable for punitive damages if it authorized or ratified the acts of the employee.[71] Section 909(c) extends the employer's liability if the gross negligence is that of an agent in a "managerial capacity" and acting in the scope of employment.[72] The panel recognized that this standard reflected the modern business age as corporations act only through employees.[73] The dock foreman was in a managerial capacity and acting in the scope of employment. Hence, the corporation was liable for his callous reckless acts.[74] While noting Oregon state law imputes grossly negligent acts of menial employees to the employer,[75] the court did not have to decide that as the individual was in a managerial position.[76]

In *United States Steel Corp. v. Fuhrman*,[77] the Sixth Circuit reversed the trial judge who found U.S. Steel liable for punitive damages for the acts of the master of the vessel which collided in heavy fog with another vessel in the Straits of Mackinac resulting in the deaths of 10 crewmen.[78] Reviewing the trial court's ruling under the clearly erroneous standard of review,[79] the panel reversed not only the determination that the master's actions constituted gross negligence[80] but in *dictum* stated that the corporate owner could not be held liable for punitive damages absent authorization or ratification of the acts of the master either before or after the incident or the master was incompetent and the vessel owner was reckless in hiring.[81]

The U.S. Court of Appeals for the First Circuit adopts yet another hybrid in *CEH, Inc. v. F/V Seafarer*.[82] The owner of the lobster vessel sued to recover compensatory and punitive damages for willful destruction of lobster gear. The trial court awarded compensatory damages as

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[69] *Id*. at 1385.
[70] *Id*.
[71] 767 F.2d at 1386.
[72] *Id*.
[73] *Id*. at 1387.
[74] *Id*. at 1385.
[75] *Id*. at 1387.
[76] 767 F.2d at 1387. *See also In re* Oil Spill, 2014 Phase I Trial, Sept. 4, 2014, 21 F.Supp. 3d 657, 750 (E.D. La. 2014). Judge Barbier in his findings of fact and conclusions of law after the Phase I trial of the Transocean Horizon spill, applied this standard as well as the 5th Cir. standard of *In re* P&E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989). He concluded that a under the standard of the Fifth Circuit, the BP employees were not in a position to make policy for the corporation nor did the company act recklessly in hiring them. However, under the standard of the Ninth Circuit, the acts of the employees were imputed to make the corporation liable for punitive damages. *Id*. at 75.
[77] 407 F.2d 1143 (6th Cir. 1969).
[78] *Id*. at 1144.
[79] *Id*. at 1146.
[80] *Id*. at 1147 (finding no evidence that the master acted in other than good faith in beaching the vessel).
[81] *Id*. at 1148.
[82] 70 F.3d 694 (1st Cir. 1995).

well as $50,000 in punitive damages against one captain of the offending vessel and $10,000 against the owner.[83] The panel reviewed the precedent established by early decisions of the Supreme Court[84] a prior decision of the First Circuit[85] as well as the Fifth,[86] Sixth[87] and Ninth Circuits[88] and concluded that the principal is liable for punitive damages when the agent is in a managerial capacity *and* acts in the course of employment *but* also the principal must have some level of culpability in the acts causing the damage.[89] There was not only complete delegation of authority to the master but also a failure of the owner to establish any policy trawling in areas with lobster traps.[90] The Fifth Circuit on the other hand adopted a standard as stringent as or stricter than the Sixth Circuit and requires the employee to have authority to make policy for the principle or corporation in order to hold the principle liable for punitive damages.[91]

Only one district court in the Second Circuit has confronted the question. In *Stepski v. M/V Norasia Alya*,[92] a container vessel collided with and destroyed a 42 foot long fishing boat off Long Island resulting in personal injury claims by the occupants of the fishing boat.[93] In addition to compensatory damages, the claimants sought punitive damages for the alleged gross negligence of the master.[94] In addressing the claim for punitive damages, Judge James Gwin accepted the proposition that punitive damages are available but as there was no precedent in the Second Circuit for vicarious liability of the employer or principle.[95] After discussing the circuit split, he opted to amalgamate the standards of the First Circuit,[96] the Fifth Circuit,[97] and the Sixth Circuit[98] as opposed to the less stringent standard of the Ninth Circuit[99] and dismissed the punitive damage claim.[100]

Time will only tell when the U.S. Supreme Court will again be called upon if ever to resolve this multi-circuit split; it failed to reach a consensus in *EXXON VALDEZ,*[101] one of the most significant maritime decisions of the Court in the opening of the Twenty-first Century. The Court

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[83] *Id*. at 698.
[84] *The Amiable Nancy*, 16 U.S. 546; Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101 (1893).
[85] Muratore v. M/S Scotia Prince, 845 F.2d 347 (1st Cir. 1988).
[86] *In re* P & E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989).
[87] United States Steel v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), cert. denied, 398 U.S. 958 (1970).
[88] Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc, 767 F.2d 1379 (9th Cir. 1985).
[89] 703 F.3d at 705.
[90] *Id*.
[91] *In re* P & E Boat Rentals, Inc., 872 F.2d 642, 652-653 (5th Cir. 1989).
[92] No. 7:06-CV-01694, 2010 U.S. Dist. LEXIS 16602*, 2010 WL 6501649 (S.D. N.Y. 2010).
[93] *Id.* at *2.
[94] *Id.* at *6-*7.
[95] *Id.* at *29-*30.
[96] CEH, Inc. v. F/V Seafarer, 70 F.3d 694, (1st Cir. 1995).
[97] *In re* P&E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989).
[98] United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969).
[99] Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc, 767 F.2d 1379 (9th Cir. 1985).
[100] *Stepski,* 2010 U.S. Dist. LEXIS 16602 at *32.
[101] 554 U.S. at 484.

in the past has looked to the Restatement (Second) of Torts to establish the standard for products liability claims,[102] state common law to allow recovery for negligent infliction of emotional distress[103] and even crafted its own standard for the "bare metal defense" in products liability cases.[104] It could adopt the Restatement (Second) of Torts § 909 in whole or in part or may fashion its own standard drawing from the amalgam of principles already applied and adopted by the various circuit courts of appeals which have confronted the issue. In exercising its authority under the Constitution and operating as a "common law" Court to fashion maritime law, it will likely adopt an amalgam or fusion of standards too difficult to foresee at present.

C. Punitive Damages for Personal Injury and Death – Status and Location

Whether punitive damages may be recovered for personal injury and death claims under General Maritime Law will likely depend on the status of the party making the claim, maritime employees, passengers, recreational boaters, the location of the accident giving rise to the claim and the defendant. May a seaman seek punitive damages for the gross negligence of a third-party non-employer? May a non-seaman injured in the same occurrence as a seaman in territorial waters seek punitive damages from any potentially gross negligent party? In *Higginbotham* when the Supreme Court restricted damages for death claims to those defined by the statute, the majority still recognized that "the measure of damages in coastal waters will differ from that on the high seas"[105] and even if the difference is significant, it does little damage to uniformity.[106] This does not address the conundrum for death versus personal injury claims on the high seas or death or personal injury claims of non-maritime claimants in territorial waters injured in the same event as a seaman. The Death on the High Seas Act applies to any wrongful death claim occurring "beyond 3 nautical miles from the shore of the United States"[107] and expressly restricts recovery to pecuniary damages only.[108] What happens if an accident on the high seas results in death to some and personal injury to others, may those injured recover punitive damages but those killed may not as precluded by statute?

1. Seaman vs. Third Parties - Personal Injury and Death Claims

The result in *Batterton* applies only to Jones Act seamen for claims based on unseaworthiness of the vessel. The question remains whether seamen will be barred from recovering punitive damages if killed or injured in territorial waters due to the negligence of an unrelated third party. The Fifth Circuit denied a claim for non-pecuniary damages against a third party in a claim for wrongful death of a seaman in *Scarborough v. Clemco Industries*.[109] Judges in the Eastern District of Louisiana initially were split on the viability of the *Scarborough* decision in light of *Townsend*. Judge Fallon in *Collins v. A.B.C. Marine Towing, L.L.C.*[110] determined that *Townsend* effectively overruled the precedent of *Scarborough* and denied a third party non-

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[102] East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 876 (1986).
[103] Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994); Metro-North RR v. Buckley, 521 U.S. 424 (1997); Norfolk & Western RR v. Ayers, 538 U.S. 135 (2002).
[104] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).
[105] *Higginbotham,* 436 U.S. at 624.
[106] *Id.*
[107] 46 U.S.C. § 30302.
[108] *Id.* § 30303.
[109] 391 F.3d 660 (5th Cir. 2005); *cert. denied*, 544 U.S. 999 (2005).
[110] No. 14-1900-CIV, 2015 U.S. Dist. LEXIS 119985, 2015 WL 5254710 (E.D. La. 2015).

employers Motion to Dismiss the seaman's claim for punitive damages.[111] Shortly thereafter, Judge Morgan reached the opposition conclusion and dismissed a seaman's claim for punitive damages against a third party non-employer.[112] The judges in the Eastern District where the issue has arisen for the most part agree that a seaman cannot recover punitive damages from t non-employer third party under General Maritime Law.[113] The *Scarborough* decision requires closer scrutiny as its precedent for denying seaman's claims against third party non-employers for punitive and non-pecuniary damages is questionable.

Mr. Scarborough worked on vessels and sandblasted production platforms in the Gulf of Mexico. He contracted silicosis and sued his employer under the Jones Act as well as the manufacturer of equipment used in the sandblasting operation[114] His suit was successful with a jury awarding $650,000 and a finding of negligence of the employer and defective equipment rendering the vessel unseaworthy.[115] He subsequently died 21 years later due to his injury;[116] his wife and adult children then filed a survival action and wrongful death suit under Louisiana law against two other defendants which were found liable in the prior suit.[117] Counsel for the family conceded that the prior judgment satisfied any claim for pecuniary damages and that the claim was only for non-pecuniary damages.[118] The defendant's filed motions for summary judgment arguing among other things that the prior judgment had preclusive effect[119]and that as the decedent was a seaman the claimants could not claim in the subsequent suit he was not a seaman and that they could recover non-pecuniary damages.[120] The trial judge held that the parties were bound by the

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[111] 2015 U.S. Dist. LEXIS 119985 at *17; Judge Zaney agreed with Judge Fallon in followed suit in Hume v. Consol. Grain & Barge, Inc., 2016 U.S. Dist. LEXIS 36183, 2016 WL 1089349. (E.D. La. 2016). Judge Fallon reached the opposite conclusion in Wade v. Clemco Indus. Corp., 2017 U.S. Dist. LEXIS 13580, 2017 WL 434425 (E.D. La. 2017).

[112] 2015 U.S. Dist. LEXIS 157173, 2015 WL 74289581 (E.D. La. 2015).

[113] *See also* Rinehart v. Nat'l Oilwell Varco L.P., 2017 U.S. Dist. LEXIS 60270, 2017 WL 1407699 (E.D. La. 2017((Fallon, J.); Rockett v. Belle Chasse Marine Transp., LLC, 260 F.Supp. 2d 688 (E.D. La. 2017) (Lemmon, J.); Wiltz v. M-I, LLC, 356 F.Supp. 2d 591 (E.D. La. 2018) (Brown, J.) Other judges in the Eastern District have also applied *Scarborough* to bar seaman's claims for non-pecuniary damages against non-employer third parties. *See* Schutt v. Alliance Marine Servs., LP, 2017 U.S. Dist. LEXIS 80902, 2017 WL 2313199 (E.D. La. 2017) (Lemelle, J); Melancon v. Gaubert Oil Co., 2017 U.S. Dist. LEXIS 126680, 2017 WL 3438346 (E.D. La. 2017).

[114] 391 F.3d at 662.

[115] *Id*. at 662. The judgment was entered in June, 1981 (Scarborough v. Clemco Indus., 264 F. Supp. 2d 437, 439 (E.D. La. 2003).

[116] 264 F. Supp. 2d at 439.

[117] *Id*.; *see* 264 F.Supp.2d at 448 n. 4 (Coating Specialists, Inc. and Land and Marine Applicators, the vessel owners/operators, were assessed a combined 60% of the fault. Pulmosan and Clemco also defendants in the wrongful death suit were assigned a combined 40% of the fault. The defendants were determined to be solidary obligors).

[118] 264 F. Supp. 2d at 446.

[119] *Id*. at 442.

[120] *Id*.

finding of seaman status and that the *Miles* uniformity principle precluded recovery of non-pecuniary damages.[121]

The Fifth Circuit affirmed. On important factor, however, about this case is the sea change in admiralty jurisdiction since the entry and satisfaction of the initial judgment in 1981. The first trial judge applied maritime law to the claim against the employer and vessel and Louisiana state products liability law against the two other parties.[122] Since then admiralty jurisdiction morphed with the decisions of *Sisson v. Ruby*[123] and *Grubart*.[124] The Fifth Circuit applied the newer location and maritime connection test and determined that the court exercised admiralty jurisdiction over the claims requiring the application of maritime law.[125] In addition, the claim did not arise within territorial waters.[126] This thus invokes the Death on the High Seas Act and its limitations on pecuniary damages.[127] Furthermore, the panel in *Scarborough* borrowed the reasoning which the court sitting *en banc* adopted in *Guevara v. Maritime Overseas Corp*.[128] which has since been abrogated by the Supreme Court in *Townsend.* Furthermore, the claimants were seeking to recover non-pecuniary damages essentially grounding their claim on the *Gaudet* decision. In *Gaude*t, the employee settled his case and then subsequently died. His family then sought to recover non-pecuniary damages in a wrongful death suit. A split Court allowed recovery. However, the viability of *Gaudet* is highly questionable in light of the severe restriction the Supreme Court placed on it in *Miles* when it stated that the case applies only to longshoremen and only in territorial waters.[129] That being said, as Justice Powell pointed out in his dissent in *Mellon v. Goodyear*,[130] once a FELA claim is reduced to a settlement or judgment, any wrongful death claim is also extinguished.[131]

Also, the reasoning of the Court in *Batterton*, further undermines the rationale of *Scarborough*. The majority in *Batterton* acknowledges that historically punitive damages have been recognized under General Maritime Law.[132] But, as the Court found no "historical evidence" that exemplary damages were awarded in the formative years of claims based on unseaworthiness it denied recovery of punitive damages.[133] It would be disingenuous of the Court to acknowledge the long time availability of punitive damages under General Maritime Law and yet deny their recovery to a seaman injured or killed in territorial waters due to the gross negligence of a third party. While the Jones Act negligence claim and claim for breach of the warranty of seaworthiness overlap, a seaman injured or killed by the conduct of a non-employer third party and non-vessel

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[121] *Id*. at 447.
[122] *Id*. at 440.
[123] Sisson v. Ruby, 497 U.S. 358 (1990).
[124] Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).
[125] 391 F.3d at 666.
[126] *Id*.
[127] DOHSA applies even if the death occurs on shore as long as the wrongful acts occur on the high seas. (Mott v. M/V GREEN WAVE, 210 F.3d 565 (5th Cir. 2000) DOHSA is not alluded to in the opinion, however. But also see: Hays v. John Crane, Inc., 2014 U.S. Dist. LEXIS 184953, 2014 WL 10658453 (S.D. Fla. Oct. 10, 2014).
[128] 391 F.3d at 667-68 (citing to 59 F.3d 1496 (5th Cir. 1995)).
[129] 498 U.S. at 31-32.
[130] 277 U.S. 335 (1928).
[131] Sea-land Servs., Inc. v. Gaudet, 414 U.S. 573, 597 (1974).
[132] *Batterton*, 139 S.Ct. at 2283.
[133] *Id*. at 2287.

owner to which he is attached does not overlap with any statutory remedies and places seamen in the same class as any other non-seaman killed or injured in maritime accidents in territorial waters. To deny a seaman the right to recover punitive or even non-pecuniary damages when caused by the acts of an independent third party solely because of his status as a seaman though available to non-seamen lacks any logical or legal basis. To extend the eponymous *Miles* uniformity principle to such claims is a non-sequitur as uniformity is advanced and promoted treating seaman the same damages as any other person killed or injured in territorial waters.[134]

It is doubtful that longshoremen as "seafarers" would have claims for punitive damages for personal injury and death in territorial waters against third parties. If "seafarers" are to have equivalent rights under General Maritime Law. It would be illogical to give LSHWCA employees a right to recover punitive damages yet deny them to true seamen. The 1972 Amendments to the Longshore Act ended the strict liability claim of the eponymous Sieracki Seaman[135] based on unseaworthiness but allowed covered employees to seek damages "caused by the *negligence* of a vessel"[136] which is a standard of "reasonable care under the circumstances."[137] One could maintain that the abolition of the warranty of seaworthiness was displaced in 1972 by the Amendments reducing the duty of the vessel owner to one of "reasonable care under the circumstances."[138] It would certainly be a curious anomaly to allow employees covered under the Longshore Act to recover punitive damages from the vessel owner or operator yet deny them to seamen. Uniformity in recovery of all those engaged in maritime employment would appear to be the more judicious result.

2. Application of State Law for Punitive Damages in Territorial Waters - Personal Injury and Death Claims

It is axiomatic that a Jones Act seaman may not append a state law claim onto a maritime tort claim.[139] Thus, as explained in *Yamaha Motor Corporation, U.S.A. v. Calhoun*, non-seamen may append state law remedies for personal injury and death occurring within the territorial waters of a state.[140] Natalie Calhoun, a twelve year old, was killed operating a jet ski in the waters of

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[134] Long ago, the Supreme Court also held that a seaman's contract with the vessel and employer does not affect his rights of full recovery from a third party. *The Hamilton*, 207 U.S. 398 (1907).
[135] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
[136] 33 U.S.C. § 905(b) (italics added).
[137] Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 163 (1981); *see also* Rhodes v. Genesis Marine, LLC, 2019 U.S. Dist. LEXIS 116859 *; 2019 WL 3081699 (E.D. La. 2019) in which Judge Morgan gives a thorough review, analysis and application of the duty of the vessel owner under § 905(b).
[138] *Id.*
[139] Yamaha Motor Corp., U. S. A. v. Calhoun, 516 U.S. 199, 215 (1996). This restriction also applies to workers covered under the Longshore and Harbor Workers' Compensation Act as they are "seafarers." *Id*.
[140] The territorial waters of Louisiana are set at 3 geographic miles seaward of its coastline. United States v. Louisiana, 422 U.S. 13 (1975); *see also* Oliver P. Stockwell, The Boundaries of the State of Louisiana, 42 LA. L. REV. 1043 (1982); Texas state boundaries extend 3 nautical miles (marine leagues) from the coast. United States v. Louisiana, 363 U.S. 1, 85 (1959). The territorial waters of Alabama and Mississippi were also established at 3 geographic miles. Florida's territorial waters in the Gulf of Mexico are 3 nautical miles. The territorial waters for

Puerto Rico.[141] A wrongful death and survivor's suit under the laws of Pennsylvania was filed against the manufacturer of the jet-ski alleging a product defect.[142] Yamaha asserted that the wrongful death cause of action acknowledged by the Supreme Court in *Moragne* precluded the adoption of state law remedies.[143] Reasoning that *Moragne* applied only to those who work on vessels and maritime employees and the unseaworthiness doctrine[144] and as Congress has not legislated in the area of wrongful death in territorial waters,[145] state law applies to damages for others, in this case a recreational boater.[146] Importantly and oft forgotten, the Court in a footnote reserved resolution of the question of whether state liability standards also applied in these instances.

Application or adoption of state law principles in maritime claims whether the claim is brought in a federal or state court is a daunting, confusing and harrowing task.[147] In The Harrisburg[148] though substantive overruled in Moragne, the Court also addressed the statute of limitations for the claims brought under state law. The Court determined that regardless of which state law may apply,[149] the state statute of limitations applied thus barring the claim.[150] Though dictum, the logical conclusion is that when a state law claim is appended to a maritime claim, the all the substantive state law applies to that claim. The Court has yet to resolve whether state substantive law or substantive maritime law applies to a state appended claim.[151] It would be logical to apply the state substantive law especially in those instances as in The Harrisburg when

states on both the Atlantic and Pacific coasts are limited to 3 geographic. miles. (43 U.S.C. §1301(b).

[141] 516 U.S. at 201.

[142] *Id.* at 201-202.

[143] *Id.* at 202.

[144] *Id.* at 213.

[145] *Id.* at 215.

[146] 516 U.S. at 216.

[147] David W. Robertson, "Displacement of State Law by Federal Maritime Law," 26 J. MAR. L. & COM. 325 (1995); Hon. John W. deGravelles, "The Application of State Law in a Maritime Case: A Primer on "The Devil's Own Mess," 15 LOY. MAR. L. J. 5 (2016).

[148] 119 U.S. 199 (1886).

[149] *Id.* at 214. Either Massachusetts or Pennsylvania law.

[150] *Id*.

[151] 516 U.S. at 216 n. 14. The Third Circuit left undisturbed the trial court's determination of whether Pennsylvania or Puerto Rico law would apply. The Court has not resolved whether a state suvivor's action applicable on the high seas could be appended to a DOHSA action. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 215 n. 1 (1986).

the state statute of limitations is less than the three-year maritime statute of limitations for personal injury or death claims[152] and has extinguished the remedy.[153]

The Eleventh Circuit Court of Appeals confronted the issue in the "Sunset Limited" Train Crash at Bayou Canot, Alabama.[154] After a tug and barge damaged a railway bridge, the "Sunset Limited" crashed resulting in deaths, injuries and property damage. The trial court held that it had admiralty jurisdiction, and that Alabama substantive law would apply based on the judge's interpretation of *Yamaha*.[155] The Eleventh Circuit reversed based on its prior precedent[156] and had to weigh the interests of the State of Alabama with the interests of uniformity in maritime law. In doing so, the panel determined that the Alabama wrongful death statute conflicted in fundamental ways with substantive maritime law: (a) apportionment of damages among joint tortfeasors and (b) recovery of punitive damages based on simple negligence for wrongful death claims.[157] Not only was the activity which caused the calamity fundamentally maritime in nature, basic but also maritime rights were at risk.[158] If state law is adopted, it is adopted as an integrated whole including any limitations.[159] Thus, having found aspects of Alabama law in conflict with and incompatible with rights afforded by maritime law, federal maritime interests outweighed the interests of the state.[160]

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[152] 46 U.S.C. § 30106. "Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." State statutes of limitations can neither shorten (McAlister v. Magnolia Petroleum Co., 357 U.S. 221 [1958]) nor lengthen the time within which to bring suit (Konrad v. South Carolina Elec. and Gas Co., 308 S.C. 167, 417 S.E. 2d 557 [1992]). Generally, the equitable doctrine of laches applies to all other maritime claims including maintenance and cure. (THOMAS J. SCHOENBAUM, *Admiralty and Maritime Law*, vol. 1 § 1016, p. 953 (6th Edition 2018).

[153] A party may not renounce prescription until after it has accrued under Louisiana law. (LSA-C.C. art. 449) As explained by the court in *State in Interest of Taylor*, 637 So.2d 512 [La. App. 1st Cir. 1993]), prescription bars the remedy and "terminates the right of access to the courts for enforcement of the existing right. . . ." (*Id*. at 514). It is a procedural device raising combined questions of law and procedure. A maritime suit filed in state court is subject to state procedural rules which determine if it is timely filed. (*See* Dozier v. Ingram Barge Co., 706 So.2d 1064, 1066 [La. App. 4th Cir. 1998]).

[154] 121 F.3D 1421 (11th Cir. 1997); *writ den.,* 522 U.S. 1110 (1998). This case will be referred to as "Sunset Limited" herein.

[155] *Id*. at 1422.

[156] Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir.1986).

[157] *Sunset Limited*, 121 F.3d at 1426.

[158] *Id*. at 1426-27.

[159] THE TUNGUS v. Skovgard, 358 U.S. 588, 592 (1959). The longshoreman slipped and fell to his death into a vat of hot coconut oil; his spouse sued the vessel for unseaworthiness. As the case predates *Moragne*, there was no wrongful death claim under General Maritime Law. Therefore, the claimants sought to adopt New Jersey's wrongful death statute; the question was whether the state act incorporated a claim for unseaworthiness.

[160] *Sunset Limited*, 121 F.3d at 1427.

Applying these principles to maritime claims while attempting to adopt Louisiana law, the same result should be reached. Though Louisiana has adopted comparative fault,[161] it has abandoned solidarity of negligent parties.[162] A negligent party now under Louisiana law pays only that percentage of fault or negligence assigned.[163] Maritime law, on the other hand, has pure comparative fault[164] and imposes solidarity amongst joint tortfeasors allowing the claimant to recover the entire sum from one party alone.[165] Louisiana state and federal courts, however, have not considered this conflict between substantive maritime law and substantive state law. Both have adopted state law to award non-pecuniary damages to non-seamen. The Louisiana Court of Appeal for the First Circuit, nonetheless, applied Louisiana law to affirm an award for non-pecuniary damages as well as damages for pre-death pain and suffering for a self-employed commercial fisherman killed in Louisiana territorial waters in a collision with another vessel.[166] The wrongful death and survival action were brought under Louisiana law.[167] The defendant maintained that the decedent was a "seafarer."[168] The court read *Yamaha* more restrictively to apply only to seamen and longshoremen.[169] Further, the court concluded that the state interests overrode any minor conflict with maritime law.[170] The vessel owner did not raise the issue of the compatibility of Louisiana tort principles with those of maritime law. Judge Sarah Vance in In re Marquette Transp. Co. Gulf-Inland, LLC[171] also held that the beneficiaries of a self-employed commercial fisherman killed in a collision in waters bordering Louisiana and Texas[172] was not a "seafarer." The beneficiaries sought to recover pecuniary, non-pecuniary and punitive damages.[173] Though the court dismissed the claim for punitive damages in a prior ruling,[174] the claimants could proceed to recover non-pecuniary damages under Texas statute.[175] Again, in this case the defendant did not raise the issue of the compatibility of Texas law with fundamental principles of maritime law

Texas substantive tort law also fundamentally conflicts with the principles of maritime tort law. Texas tort law applies what is labeled proportionate responsibility[176] denying recovery to a claimant who is more than 50% responsible. Also, the trier of fact in Texas must apportion

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[161] La. Civ. Code Art. 2323(A).
[162] *Id*. at art. 2324, unless parties conspire to commit an intentional tort or willful act.
[163] *Id*.
[164] THOMAS J. SCHOENBAUM, *Admiralty and Maritime Law*, vol. 1, Practitioner's Treatise § 5:7, pp. 308-310 (6th Ed. 2018).
[165] Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).
[166] Trinh v. Dufrene Boats, Inc. 6 So. 3d 830 (La. App. 1st 2009); *writ den.*, 5 So.3d 166 (La. 2009; U.S. cert. denied, 558 U.S. 875 (2009).
[167] 6 So. 3d at 833.
[168] *Id*. at 839-840.
[169] *Id*. at 841-842.
[170] *Id*. at 844.
[171] 182 F. Supp. 3d 607 (E.D. La. 2016).
[172] *Id*.
[173] *Id*.
[174] *Id*.
[175] *Id*. at 613.
[176] Tex. Civ. Prac. & Rem. Code § 33.00.

responsibility amongst all claimants, defendants, settling parties and responsible third parties.[177] Mississippi long ago abandoned the strict contributory negligence rule of common law and adopted pure comparative negligence by statute[178] which is more compatible with maritime tort principles. Alabama continues to adhere to the strict application of contributory negligence any of which will bar recovery.[179] Thus, to adopt and apply state law to recover punitive damages would require the state law to be consistent in all respects with maritime tort law.

3. Personal Injury and Death Claims on the High Seas

The Death on the High Seas Act presents a conundrum because as stated previously it restricts the recovery of beneficiaries to pecuniary loss.[180] Situations could well arise in which people may be killed or injured in the same occurrence or exposure to pathogens on cruise ships. According to the World Health Organization, passengers on cruise ships contract respiratory infections frequently.[181] Legionnaire's Disease, an often fatal respiratory infection, has been linked to spa baths on cruise ships[182] as well as the drinking water supply.[183] Cruise ship passengers may either get sick or even die from exposure to the pathogen. Those who get sick due to the negligence of the vessel owner to properly treat either spa water or the water supply system may sue the vessel owner and recover compensatory damages and possibly punitive damages under General Maritime Law. However, those killed due to exposure and negligence or fault of the vessel owner are limited to pecuniary losses only.[184]

Some guidance to resolve this conundrum may be found in the decision of the landlocked U.S. Court of Appeals for the Eighth Circuit in *Doyle v. Graske*.[185] Leland Graske owned a vacation home on Grand Cayman Island.[186] He and Daniel Doyle and another friend decided to go fishing in an inflatable boat owned and steered by Mr. Graske.[187] As Mr. Graske sped after having traversed through the no wake zone, Mr. Doyle fell out of the boat and sustained serious injuries to his chest and head.[188] He was transported to the U.S. and sustained further brain injury due to

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[177] *Id*. § 33.003; the practice for designating a "responsible third party" is established in Tex. Civ. Prac. & Rem. Code § 33.004.
[178] Miss. Code Ann. § 11-7-15.
[179] Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240 (Ala. 2014).
[180] 46 U.S.C. § 30303.
[181] World Health Organization, *Sea Travel Advice,* https://www.who.int/ith/mode_of_travel/communicable_diseases/en/ (last visited Aug. 5, 2019).
[182] National Library of Medicine: National Center for Biotechnology Information, *Epidemiology & Infection*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2870400/ (last visited Aug. 5, 2019).
[183] Maddalena Castellani Pastoris, et al. "Legionnaires' Disease on a Cruise Ship Linked to the Water Supply System: Clinical and Public Health Implications," Clinical Infectious Diseases 1999; 28:33–8.
[184] Celebrity Cruises, Inc. v. Essef Corp. (In re Horizon Cruises Litig.), 101 F. Supp. 2d 204 (S.D. N.Y. 2000).
[185] 579 F.3d 898 (8th Cir. 2009); *cert. denied*, Graske v. Doyle, 559 U.S. 1036 (2010); Doyle v. Graske, 558 U.S. 1036 (2010).
[186] 579 F.3d at 901.
[187] *Id*. The vessel had capacity for 6 passengers.
[188] *Id*. at 902.

breathing difficulties.[189] Mr. Graske, who sought compensatory damages, and his wife, who sought damages for loss of consortium, initially brought suit in a Nebraska state court which was removed to federal court invoking admiralty jurisdiction.[190] After a non-jury trial, the court awarded in excess of $3.2 Million for Mr. Graske and an additional $750,000 for loss of consortium for his wife.[191] The defendant appealed the finding of liability, causation and the loss of consortium award.

The appeals panel first considered whether loss of consortium had a history in maritime law using the analysis of *Townsend*[192] and concluded that the award of damages for loss of consortium in maritime law was only of recent origin, specifically in *American Export Lines, Inc. v. Alvez*[193] in 1980.[194] The panel distinguished that case on the basis that Mr. Alvez was a longshoreman non-fatally injured in territorial waters while Mr. Graske was a "non-seafarer" not fatally injured outside of state territorial waters.[195] This would create anomalies with statutory law, namely the Death on the High Seas Act, which *Miles* cautions against.[196] First, spouses of those not fatally injured on the high seas could recover damages for loss of consortium while those killed on the high seas would be barred from recovery.[197] Second, "non-seafarers'" rights would be greater than rights of spouses of seamen whose recovery is restricted to pecuniary damages.[198] The reasoning of the Eighth Circuit not only reflects the reasoning of Justice Harlan in *Moragne*[199] which resolved similar disparities in maritime law for wrongful death and foreshadows the reasoning of the Court in *Batterton* which requires an analysis of the historical availability of punitive damages for the claim. This leads one to the conclusion that it is highly doubtful "non-seafarers" injured on the high seas will be able to recover punitive damages under general maritime law. Though the Supreme Court eschews from making policy decisions, it has recognized its essential role in fashioning general maritime law. One must ask whether it would be good policy to allow those injured on the high seas to recover greater damages than those killed.

D. Is there a standard for excessive punitive damages?

Constitutional challenges to excessive punitive damage awards began with the decision of the U.S. Supreme Court in *Browning-Ferris Indus. v. Kelco Disposal, Inc*.[200] in which the Court held that the challenges to such awards could not be made under the Fines and Penalties Clause of the Eighth Amendment. It did not address Due Process concerns until directly confronted with the issue in *BMW of North America, Inc. v. Gore*[201] in which the Court outlined certain guideposts for

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[189] *Id*.
[190] *Id*.
[191] Doyle v. Graske, 565 F. Supp. 2d 1069, 1088 (D. Neb. 2008); 579 F.3d at 902.
[192] 579 F.3d at 905-906.
[193] 446 U.S. 274 (1980).
[194] 579 F.3d at 906.
[195] *Id*.
[196] *Id*. at 906-907.
[197] *Id*. at 907.
[198] *Id*.
[199] 398 U.S. 375 (1970).
[200] 492 U.S. 257 (1989).
[201] 517 U.S. 559 (1996); *See also* State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

lower courts to follow to determine the reasonableness or excessiveness of punitive damage awards: (1) an evaluation of the degree of the proscription conduct; (2) the ratio between compensatory damages awarded and punitive; and (3) a comparison between the punitive damage award and civil and criminal penalties imposed for similar prohibited conduct.[202] However, when a federal court exercises its admiralty jurisdiction, review of punitive damage awards lay outside the parameters of the due process evaluation and must be viewed for conformity with maritime law.[203] As such, a more rigorous standard is applied which based on studies would be in the range of a 1:1 ratio with compensatory damages[204] where the conduct is not exceptional blameworthiness lacking intent, malice or economic gain.[205] In the *EXXON VALDEZ* case, the Court also considered the penalties which could be assessed under the Clean Water Act which doubles the penalty for knowing violations.[206] The constitutional upper limit of 1:1 is not too low.[207]

But, is the 1:1 ratio of punitive to compensatory damages an absolute upper limit? Does particular blameworthiness such as malice, intent, action taken to increase profits at the expense of safety or to avoid detection of violations of standards, nonetheless, justify an award in excess of the 1:1 ratio? In *Clausen v. Icicle Seafoods, Inc*.,[208] the Washington Supreme Court affirmed an award of $1.13 Million in punitive damages for willful failure to pay maintenance and cure.[209] The U.S. Supreme Court denied the application for writs. More recently, in *Warren v. Shelter Mut. Ins. Co.*,[210] the Louisiana Supreme Court, in the death of a recreational swimmer, applied the standard of the *BMW* case and reduced a punitive damage award against the manufacturer from $23 Million to $4.25 Million representing a 2:1 ratio to the compensatory damages.[211] Federal district court judges and courts of appeals will likely more closely scrutinize punitive damage awards and likely will reduce clearly outrageous awards or awards which grossly exceed the 1:1 ratio. However, to assert that the ratio is an absolute 1:1 ratio would be a misstatement of the law as the Supreme Court also clearly stated that the 1:1 ratio was appropriate in that case[212] and a single digit ratio is appropriate when the compensatory damages are substantial.[213] But, as Justice Ginsburg asks in her opinion concurring and dissenting in part: "Should the magnitude of the risk increase the ratio and, if so, by how much?"[214]

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[202] 517 U.S. at 574.
[203] *Exxon Shipping Co.,* 554 U.S. at 502.
[204] *Id*. at 512.
[205] *Id*. at 513.
[206] *Id*. at 514.
[207] *Id*.
[208] 174 Wn.2d 70, 272 P.3d 827 (Wa. 2012), *cert. denied*, 568 U.S. 823 (2012).
[209] 272 P.3d at 830. The maintenance and cure award was $37,420; the jury awarded $453,100 in compensatory damages under the Jones Act. In addition, the trial court awarded $387,558.00 in fees and $40,547.57 in costs. The punitive damage award was 30 times greater than the amount owed for maintenance and cure but about 2.5 times the Jones Act compensatory damage award.
[210] 233 So.3d 568 (La. 2017).
[211] *Id.* at 599. While a writ was not taken in Warren to the U.S. Supreme Court, it is likely the Court would have denied it, also.
[212] *Exxon Shipping Co.,* 554 U.S. at 512-513.
[213] *Id*. at 514-515.
[214] *Id*. at 524.

E. Punitive Damages for Marine Pollution, Property Damage and Breach of Contract

The *Miles, Townsend, Batterton* trilogy establish an analysis which begins with the premise that punitive damages are an historical element of damages under General Maritime Law, but only as a general proposition. However, with respect to any particular cause of action or claim, one must establish an entrenched historical narrative for an award of punitive damages. Justice Alito's opinion in *Batterton* is based on the premise that there is no firmly established history of maritime jurisprudence awarding punitive damages for seaman's claims based on unseaworthiness as well on the fact that seamen's claims also have a statutory basis. Thus, it would seem that in order to have a viable punitive damage claim, the claimant must show that there is an historical underpinning to the claim and that there is no statutory overlap.

1. Punitive Damages for Marine Pollution

Marine pollution has garnered the attention of the public, Congress and the courts for years and likely culminated in the disaster on March 24, 1989, when S/T EXXON VALDEZ ran aground on Bligh Reef in Alaska[215] and discharged 11 million crude oil into Prince William Sound.[216] Those owning property damaged by the crude had a claim under general maritime law. Those seeking economic damages were limited at the time to the parameters established by the eponymous Robins Dry Dock Rule[217] which restricted recovery of economic damages to those with a proprietary interest in the property damaged. The door was not opened to commercial fishermen by the Ninth Circuit in *Union Oil Co. v. Oppen.*[218] The end result of the *Testbank* decision[219] of the Fifth Circuit which discusses the *Oppen* opinion allowed commercial fishermen to maintain their claims for damages.[220] The passage of the Oil Pollution Act of 1990[221] substantially expanded the parameters for those seeking economic damages as a result of oil pollution.[222] 33 U.S.C. § 2702 (b)(2)(B) allows the owner or lessee of real or personal property damaged by oil to recover damages including economic losses. 33 U.S.C. § 2702 (b)(2)(E) goes further and allows "any claimant" to recover for "loss of profits or earning capacity" resulting from injury to or destruction of real or personal property or natural resources. This vastly expands the

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[215] *Id*. at 476.
[216] *Id*. at 478.
[217] Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).
[218] 501 F.2d 558, 570 (9th Cir.1974) (oil pollution claims resulting from an oil spill from a production facility off the coast of California in 1969 (501 F.2d at 559).
[219] 752 F.2d 1019 (5th Cir. 1985). M/V TESTBANK and M/V SEA Daniel collided in the Mississippi River Gulf Outlet resulting in 12 tons of pentachlorophenol, PCP, being released into the water. 752 F.2d at 1020. This resulted in the temporary suspension of fishing and shrimping in the outlet but extended over an area covering 400 square miles. *Id*.
[220] The trial court did not dismiss the claims of commercial fishermen. This ruling was not appealed. Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981). *See also* 752 F.2d at 1021 n. 2.
[221] 33 U.S.C. § 2701, *et seq*. Act Aug. 18, 1990, P. L. 101-380, Title I, § 1001, 104 Stat. 486.
[222] 33 U.S.C. § 2702 (b)(2).

parameters of those who can seek recovery for damages.[223] Thus, with respect to pollution by oil[224] the strict parameters of the Robins Dry Dock Rule have been scuttled for a more expansive class of claimants. But when the pollutant is other than oil, the specter of Robins Dry Dock continues to loom large.

The *EXXON VALDEZ* opinion establishes without question that punitive damages are available for damages caused by a marine pollution event. However, the enactment of OPA 90 directly as a result of that event raises the question to what extent does general maritime law and punitive damages for marine pollution continue to be viable. Does OPA 90 completely displace General Maritime Law[225] or do those claims which also overlap with it and satisfy the proprietary interest rule of Robins Dry Dock have cognizable claims for punitive damages? Only one federal court of appeals has confronted this question.

The U.S. Court of Appeals for the First Circuit in *South Port Marine, LLC v. Gulf Oil Limited Partnership*[226] is the only U.S. Appeals Court to confront the issue. While transferring gasoline from an onshore facility to a tank barge, between 23,000 and 33,000 gallons of the gasoline spilled into the Portland Harbor.[227] South Port's facility was substantially damaged by the gasoline, and the company brought suit for the damage to the facility, lost profits and loss of goodwill and business stress[228] and sought compensatory and punitive damages under OPA 90 and Maine State law.[229] The panel explained that OPA has a comprehensive list of damages with the exception of punitive damages.[230] The court chose not to address 33 U.S.C. § 2751(e) which preserves "admiralty and maritime law" except to the extent it is provided in the Act.[231] Rather, it chose to rely on the Supreme Court's reasoning in *Miles* that where there is an overlap between

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[223] *Id.* § 2702 (b)(2)(B); see also Robert Force, Martin Davies and Joshua S. Force, SYMPOSIUM: DEEP TROUBLE: LEGAL RAMIFICATIONS OF THE DEEPWATER HORIZON OIL SPILL: Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases, 85 TUL. L. REV. 889, 930-931 (2011); *see also* David W. Robertson, Criteria for Recovery Of Economic Loss Under The Oil Pollution Act Of 1990, 7 TEX. J. OIL GAS & ENERGY L. 241 (2011/2012).

[224] Oil is defined in the act broadly. 33 U.S.C. § 2701(23); "'oil' means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil….".

[225] Judge Higginson in United States v. Am. Commer. Lines, L.L.C., 759 F.3d 420 (5th Cir. 2014) succinctly explains the often conflated terms displacement and preemption. "Technically, however, preemption refers to whether federal statutory law supersedes state law, while "displacement" applies when, as here, a federal statute governs a question previously governed by federal common law." 759 F.3d at 422 n.1.

[226] 234 F.3d 58 (1st Cir. 2000).

[227] *Id*. at 61.

[228] *Id*.

[229] *Id*.

[230] *Id.* at 64.

[231] 33 U.S.C. § 2751 (e). "Admiralty and Maritime Law. Except as otherwise provided in this Act, this Act does not affect— (1) admiralty and maritime law…."

General Maritime Law and statutes passed by Congress, the statute prevails.[232] Hence, in this case the statute prevails eliminating any claim for punitive damages for oil pollution.[233]

Other Courts of Appeal when required to address this matter will likely reach the same conclusion as the First Circuit. The Act makes the Responsible Party strictly liable for any damages caused by an oil discharge but limits its liability.[234] Defenses to liability are limited.[235] But, if the Responsible Party is grossly negligent, its conduct is willful, violates applicable Federal safety regulations, fails to report the discharge, cooperate with the responsible official or comply with an order, the liability cap is lost.[236] The Act fails to create any right of OPA claimants to sue for punitive damages. It is equally unlikely courts will read the savings provision of § 2751 broadly to preserve maritime claims not within the purview of the Act.[237]

The first district judge to address this savings clause is Judge Rebecca Beach Smith in *National Shipping Company of Saudi Arabia (Nscsa) v. Moran Mid-Atlantic Corporation*.[238] In addressing the admiralty and maritime savings clause of the Act, Judge Smith held that the maritime claims for the collision damage sustained by the tanker and caused by the tug and barge were the only maritime claims preserved.[239]

Judge Lemelle addressed the effect of § 2751 in *Gabarick v. Laurin Maritime (America) Inc.*[240] The issue in that case was whether the claimants whose claims were cognizable under General Maritime Law could sue rather than filing claims against the designated Responsible Party as well as a third party involved in the vessel collision. Based on prior opinions by other district judges in the Eastern District of Louisiana,[241] he reasoned that OPA 90 is a comprehensive act covering all aspects of marine oil pollution.[242] Importantly, § 2751 also has an introductory clause stating "except as otherwise provided in this Act" which clearly means that those claims not covered in the Act are preserved under General Maritime law.[243] In addition, 33 U.S.C. § 2702(a) is inclusive: "Notwithstanding any other provision or rule of law, and subject to the provisions of this Act...." He also concluded that this precluded direct claims in court against a third-party vessel despite § 2709 which permits any person to bring a claim for contribution against any one potentially liable reasoning that this would frustrate Congressional intent by fostering piecemeal litigation.[244]

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[232] *S. Port Marine, LLC v. Gulf Oil Ltd. Pshp.*, 234 F.3d 58, 65-66 (5th Cir. 2000).
[233] *Id*.
[234] 33 U.S.C. § 2704.
[235] *Id.* § 2703.
[236] *Id.* § 2704(c)(1).
[237] The opening clause of 33 U.S.C § 2751(e) would appear to preserve only those claims which do not fall within the purview of § 2702(2)(b)(2).
[238] 924 F. Supp. 1436 (E.D. Va. 1995); *aff'd. sub. nom.* 122 F.3d 1062 (4th Cir. 1997).
[239] *Id*. at 1447.
[240] 623 F. Supp. 2d 741 (E.D. La. 2009).
[241] *Id*. at 746.
[242] *Id*.
[243] *Id*.
[244] *Id*. at 750.

Judge Barbier, on the other hand, reached the opposite conclusion in one of the early decisions in the DEEPWATER HORIZON spill.[245] In ruling on a Motion To Dismiss the B1 Master Complaint which consisted of claims for economic damages by processing and distributing claimants, recreational and commercial businesses, recreational, plant and dock workers, owners of real property and others,[246] one issue relevant to this discussion was whether parties whose claims for economic damages satisfied the proprietary interest rule and were commercial fishermen had viable claims under General Maritime Law against potentially negligent parties who were not designated Responsible Parties under OPA 90. He distinguished the decision of the First Circuit in *Southport Marine* and Judge Lemelle's opinion in *Gabarick* on the basis that the U.S. Supreme Court decided the *EXXON VALDEZ* case which addressed Exxon's argument that the Clean Water Act displaced federal maritime common law and the *Townsend* decision which also addressed the question of legislation and its effect on federal maritime common law claims.[247] While OPA 90 is a comprehensive statute regarding damages for marine pollution, it contains two savings provisions which save traditional maritime law claims[248] and state law.[249] The Act addresses the liability of the designated Responsible Party but not any other potentially liable party.[250] Finally, allowing economic damage claims formerly cognizable under General Maritime Law will not frustrate the purpose of OPA 90.[251] Thus, these claims are still viable under General Maritime Law. Likewise, with respect to punitive damages, Judge Barbier applied the reasoning of *Townsen*d and concluded that OPA 90 was silent regarding punitive damages and preserves existing maritime claims.[252] Hence, the claims for punitive damages against non-Responsible Third Parties are also viable under General Maritime Law.[253]

An important distinction between the claims addressed in Judge Barbier's opinion and the claim for punitive damages confronted by the First Circuit in *Southport Marine* is that the claim for punitive damages in Southport was made solely against the Responsible Party and not a potentially liable third party. Similarly, the claims in the *National Saudi Shipping* case also involved claims between the Responsible Party and the negligent tug with no claim for punitive damages. Also, though Judge Lemelle in *Gabarick* addressed the displacement issue of § 2751, the question was not whether punitive damages could be recovered from either the designated Responsible Party or a potentially liable third party. Though the Fifth Circuit has addressed the displacement question in *United States v. American Commercial Lines*,[254] the issue before the court was whether the Responsible Party could sue companies it had contracted to clean up the spill and which had been paid by the Oil Spill Trust Fund after the U.S. government sued the Responsible Party for what it paid from the Fund. It was not addressing the question whether claimants who

[245] *In re* Oil Spill, 808 F. Supp. 2d 943 (E.D. La. 2011).
[246] *Id*. at 948.
[247] *Id*. at 960-961.
[248] 33 U.S.C. § 2751(e).
[249] *Id.* § 2318(a)(2). "Nothing in this Act . . . . shall . . . .(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law."
[250] 808 F. Supp. 2d at 961.
[251] *Id*. at 962.
[252] *Id*.
[253] *Id*. at 963.
[254] 759 F.3d 420 (5th Cir. 2014).

satisfy the proprietary interest rule in maritime law could also file claims for punitive damages against a potentially liable third party.

Another reason exists why claimants satisfying the proprietary interest rule of Robins Dry Dock should be barred from pursuing claims under General Maritime Law against third parties who may be at fault or have contributed to the marine pollution event. As noted by Judge Lemelle in *Gabarick v. Laurin Maritime*, OPA 90 is comprehensive legislation designed by Congress to reduce litigation and to promote prompt payments of claims.[255] In addition, the Act creates a statutory right of subrogation for any party which pays removal costs and damages under the Act.[256] If a claimant can assert a maritime claim for damages against a third-party, then it would appear this would serve as a disincentive to the Responsible Party to settle though it is subrogated to the claimant's right. However, § 2709 also creates a statutory right of contribution in favor of any person[257] against any person which may be liable under the Act or any other law. To say the Act lacks clarity is obvious. Other Courts of Appeal when confronted with this question will probably reach the same result as the First Circuit in *Southport Marine* and deny punitive damages for those claims falling within the purview of OPA 90.

The extent to which state law claims are saved under OPA 90 is less clear despite the savings clause in the Act. The Supreme Court made it clear in *Askew v. American Waterways Operators, Inc.*[258] that states may regulate in the maritime field as long as the state law does not conflict with federal maritime law or Congressional legislation.[259] It held that the Florida Pollutant Discharge Prevention and Control Act[260] constitutional.[261] Since the enactment of OPA 90, courts have given the Act more preemptive effect. The Eleventh Circuit, in *Boca Ciega Hotel, Inc. v. Bouchard Transportation Company, Inc*.,[262] held that the presentment requirement of OPA 90 precluded claimants from bringing state law claims against vessel owners whose vessel collided in Tampa Bay causing a release of thousands of gallons of oil and other pollutants even though the state law had a presentment requirement.[263] Judge Smith in the *National Saudi Shipping* case[264] also addressed the state savings clause when the owner of the tanker sought to bring state common law claims for contribution against the tug and tow which were at fault to cause the spill.[265] The judge addressed the question whether the claimant tanker owner could nonetheless have a preserved common law action for contribution under § 2718(a). She determined that the savings clause was added to allow states to impose greater liability for pollution than afforded by OPA.[266] This would appear to be the proper interpretation of the state savings clause and in accordance

[255] 623 F. Supp. 2d at 750.
[256] 33 U.S.C. § 2715.
[257] *See id.* § 2701 (27) for definition of person.
[258] 411 U.S. 325 (1973).
[259] *Id.* at 342.
[260] Fla. Stat. § 376.011 et seq.
[261] 411 U.S. at 328.
[262] 51 F.3d 235 (5th Cir. 1995).
[263] *Id.* at 236, 239.
[264] 924 F. Supp. at 1447.
[265] *Id.* In addition, § 2709 of OPA allows any party to bring a claim against another party for contribution under the Act or any other law. This would appear to displace any maritime law claim for contribution and preempt any state common law claim for contribution.
[266] *Id*. at 1448.

with the *Askew* decision of the Supreme Court as long as the point source of the pollution is within the territorial waters of the state.[267] Thus, if a state pollution act imposes greater financial liability on the polluter claimants may seek greater compensation under the state act. Only if the state act also allows punitive damages and the standard for punitive damages under state law does not conflict with the standard under General Maritime Law may parties then seek punitive damages under state law. It would seem from the present state of the law that courts likely will not allow punitive damage claims at least for oil pollution under any state common law principles.

The Oil Pollution Act applies only to oil as defined in the Act.[268] Damage caused by other pollutants which may be released into the navigable waters would continue to be governed by General Maritime Law including the strictures of the proprietary interest rule as modified by the *TESTBANK* decision and the potential of punitive damages as the general proposition of the EXXON VALDEZ opinion still holds true.

2. Punitive Damages for Damage to Property other than Pollution

Collisions between vessels have occurred since man has taken to the sea in ships resulting in loss of life and damage to property. Collisions occurring on navigable waters of the U.S. fall within the admiralty jurisdiction of a federal court.[269] Likewise, allisions[270] now fall within admiralty jurisdiction with the passage of the Admiralty Extension Act.[271] Claims for damages to cargo are governed by the Harter Act and Carriage of Goods by Sea Act.[272]

Research has failed to reveal any case prior to the late Twentieth Century in which any claimant sought punitive damages for property. There is little reason to think that the general rubric espoused in the *EXXON VALDEZ* case would not apply to property damaged in a collision or an allision of a vessel with a wharf, dock, bridge or other structure on or built over navigable water. *EXXON VALDEZ* involves the stranding of the vessel on a reef in navigable waters. Reported cases out of the Western District of Louisiana,[273] Eastern District of Louisiana,[274] District Court of Oregon,[275] Southern District of New Jersey,[276] Southern District of New York[277] demonstrate that

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[267] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); *see also In re* Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014).

[268] 33 U.S.C. § 2701(23) and 33 U.S.C. § 2720.

[269] A collision is any striking of a moving vessel with another moving vessel or a vessel at anchor. *See* London Assurance v. Companhia De Moagens, 167 U.S. 149 (1897).

[270] Weyerhaeuser Co. v. Atropos Island, 777 F.2d 1344, 1246 n. 1 (9th Cir. 1985). An allision is the striking by a vessel of a stationary structure such as bridge or pier over or on navigable waters.

[271] 80 P.L. 695, 62 Stat. 496 (1948). 46 U.S.C. § 30101.

[272] T. SCHOENBAUM, *Admiralty and Maritime Law*, Vol. 2, 6th Ed., Chap. 10, §10:16, p. 952 (West 2018).

[273] Consolidated Aluminum Corp. v. C.F. Bean Corp., 639 F.Supp. 1173 (W.D. La. 1986); *In re* Complaint of Cameron Boat Rentals, Inc., 693 F.Supp. 577 (1988).

[274] Pillsbury Co. v. Midland Enterprises, Inc., 715 F.Supp. 738 (E.D. La. 1989); Maritans Operating Partners v. Diana T. M/V, 1999 U.S. Dist. LEXIS 3248 (E.D. La. 1999).

[275] *In re Sause Bros. Ocean Towing*, 769 F.Supp. 1147 (D. Or. 1991).

[276] BP Exploration & Oil v. Moran, 147 F.Supp 2d 333 (S.D. N.J. 2001).

[277] Stepski v. M/V Norasia Alya. 2010 U.S. Dist. LEXIS 16602, 2010 WL 6501649 (S.D. N.Y. 2010).

every judge acknowledges that punitive damages may be recovered in maritime law for property damage. However, in all but one case, the trial court held that the claimant failed to submit sufficient evidence to meet the standard of maritime law to recover punitive damages.

Judge Costas, now on the Fifth Circuit, as a district judge in the Southern District of Texas, Galveston Division, awarded punitive damages in a collision case, In *Graham v. PCL Civ. Constructors, Inc.*[278] The plaintiff was the owner of a fishing vessel which was damaged when the defendant's barges broke free during a storm.[279] The parties settled the claim for repairs to the vessel and storage fees.[280] The issues at trial were damages for lost profits, crew payments and punitive damages for the alleged recklessness in mooring the barges.[281] Judge Costas looked to the reckless standard of the Restatement (Second) of Torts § 500[282] and to the Supreme Court's discussion of recklessness in the EXXON VALDEZ case which he stated was a lower standard that federal district courts had previously applied.[283] Recognizing that the discussion of what conduct will rise to the standard to award punitive damages is largely academic, there are practical consequences in each case.[284] He concluded that the defendant was reckless based on numerous factors[285] and though the barge owner did not have actual knowledge or realize the high risk of danger, the company should have recognized this high risk with having its barges inadequately moored and with a storm pending.[286] Balancing all the factors, he reasoned that the culpability of the defendant was on the low end of the spectrum and awarded punitive damages at the lowest ratio referenced in EXXON VALDEZ, .65% of the compensatory damages.[287]

3. Punitive Damages for Breach of Contract

As a general rule in common law, punitive damages are not awarded for breach of contract unless the breach constitutes an independent tort or unless the conduct of the breaching party is so reprehensible.[288]

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[278] No. 3:11-CV-00546, 2013 U.S. Dist. LEXIS 179688, 2013 WL 6835247 (S.D. Tex. Dec. 23, 2013).
[279] *Id.* at *1
[280] *Id*.
[281] *Id.*
[282] *Id*. at *35. "Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so."
[283] 2013 U.S. Dist. LEXIS 179688 at *36.
[284] *Id.* at *39.
[285] *Id*. at *40 (the mooring pilings were temporary, more cables could have been used and even the on-site supervisor knew the moorings were adequate only for a short time in low wind conditions).
[286] *Id*. at *40-*41.
[287] *Id*. at *42. The total amount of punitive damages was $69,512.72. *Id.* at *47.
[288] TIMOTHY MURRAY, *Corbin on Contracts,* vol. 11, § 59.2.

Morrison v. The JOHN L. STEPHENS[289] is the earliest case found in which the court awarded punitive damages for breach of the contract of carriage for passengers on a vessel. The plaintiff paid a premium for a private stateroom for himself and his wife for a voyage from New York to San Francisco.[290] When the vessel arrived in Panama he was informed that the suite would be shared with another male passenger to which the plaintiff "remonstrated with natural indignation."[291] Having paid $525 for the private suite, the court concluded that the actions of the vessel owner was a clear breach resulting from "grossest carelessness or by reckless cupidity…"[292] The sum of $2,500 was awarded, almost 5 times greater than the cost of the passage.[293]

More recent jurisprudence, however, indicates that the courts adjudicating breach of maritime contract claims will observe the common law standard requiring that the breach of contract to constitute a separate and independent tort to recover punitive damages. Claims for punitive damages for breach of contract began to appear in the 1980's flowing from the decision of Judge Henry Friendly in *Marine Sulphur Queen*.[294] Most of the reported cases are for damage to cargo shipped under a bill of lading[295] while a few others are claims for breach of a bailment contract,[296] breach of warranty,[297] time charterparty,[298] contracts to repair vessels[299] and for failure to pay seaman's wages.[300]

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[289] 17 F. Cas. 838 (N.D. Cal. 1861).
[290] *Id*.
[291] *Id*.
[292] *Id*. at 840.
[293] *Id*. at 840.
[294] Securos Banvenez, S.A. v. S/S OILVER DRESCHER, 761 F.2d 855, 861 (2d Cir. 1985). One case arising out of the Northern District of California predates this opinion. Punitive damages were sought for vegetables damaged during shipment from California to Hong Kong. The trial judge denied punitive damages stating that California law did not allow punitive damages for breach of contract. Cosmos U.S.A., Inc. v. U.S. Lines, Inc., 1983 A.M.C. 1172 (N.D. Cal. 1980).
[295] *Cosmos U.S.A, Inc*., 1983 A.M.C. 1172; Securos Banvenez, S.A. v. S/S OILVER DRESCHER, 761 F.2d 855, 861 (2d Cir. 1985); Thyssen, Inc. v. S.S. FORTUNE STAR, 777 F.2d 57 (2d Cir. 1985); Armada Supply v. S/T AGIOS NIKOLAS, 639 F. Supp. 1161 (S.D. N.Y. 1986); Leather's Best Int'l., Inc. v. MV LLOYD SERGIPE, 760 F. Supp. 301 (S.D. N.Y. 1991); Gamma-10 Plastic, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244 (8th Cir. 1994); Jones v. Compagnie Generale Maritime, 882 F. Supp. 1079 (S.D. Ga. 1995).
[296] Hudson River Cruises, Inc. v. Bridgeport Drydock Corp., 892 F. Supp. 380 (D. Conn. 1994); Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217 (11th Cir. 2000); Alpha Int'l Trading Co. v. Maersk, Inc., 141 F. Supp. 2d 580 (W.D. N.C. 2001).
[297] Jurgensen v. Albin Marine, Inc., 214 F. Supp. 2d 504 (D. Md. 2002).
[298] Rev-Lyn Cont. Co. v. Patriot Marine, LLC, 760 F. Supp. 2d 162 (D. Mass. 2010).
[299] Ryan Marine Servs. v. Hudson Drydocks, Inc., No. 06-2245-CIV, 2011 U.S. Dist. LEXIS 144036, 2012 A.M.C. 701, 2011 WL 6209801 (W.D. La. 2011); Operaciones Tecnicas Marinas S.A.S. v. Diversified Marine Servs., LLC, 913 F. Supp. 2d 254 (E.D. La. 2012).
[300] Privanto v. M/S AMSTERDAM, CV-07-3811-AHM (JTLx), 2009 U.S. Dist. LEXIS 40833, 2009 WL 1202888 (C.D. Cal. 2009); Paul v. All Alaskan Seafoods, 24 P.3d 447 (Wa. App. Div. One 2001), petition for review granted, 41 P.3d 484 (Wa. 2002).

Both COGSA and the Harter Act govern the duties and liabilities of both shippers and carriers of cargo in both foreign and domestic shipping.[301] As a general rule, COGSA applies to contracts of carriage of goods by sea between foreign and U.S. ports[302] and the Harter Act applies to domestic carriage by sea including inland waterways.[303] COGSA applies to contracts of carriage of goods between foreign and domestic ports "tackle to tackle" during loading and discharge and during the voyage.[304] The Harter Act applies between discharge until delivery.[305] The carrier's liability under COGSA is limited to $500 per package.[306] The Harter Act contains no limitation on the carrier's liability; however, courts have extended the "per package" limitation to cargo transported between domestic U.S. ports and subject to the Harter Act.[307]

Despite the statutory limitation of liability, courts have acknowledged the right of the owner of cargo to seek punitive damages for breach of the contract of carriage. The cargo owner in *Securos Banvenez, S.A. v. S/S OILVER DRESCHER*[308] sought punitive damages for cargo which was carried on deck despite the underdeck stowage requirement noted in the bill of lading. The claimant based its claim on *Marine Sulphur Queen* which revived the long dormant remedy in maritime law. Judge Van Graafeiland writing for an unanimous court affirmed the trial judge's denial of punitive damages solely on the basis that such an award is discretionary and the appeals court found no abuse of discretion.[309]

Judge Henry Friendly, one of the most esteemed admiralty jurists of the late Twentieth Century, authored a scholarly and lodestar opinion addressing a claim for punitive damages for breach of the contract of carriage. In *Thyssen, Inc. v. S.S FORTUNE STAR*,[310] steel pipe was transferred during transit from under deck stowage to on deck stowage and damaged during the voyage.[311] Thyssen sued to recover $65,000 in damages as well as an additional $100,000 in punitive damages for the deviation.[312] The trial judge awarded compensatory damages and $25,000 in punitive damages.[313]

On appeal, the Second Circuit reversed the award of punitive damages. Judge Friendly citing the Restatement (Second) of Contracts § 355 (1979) which expresses the general rule of common law prohibiting punitive damages as well as available scholarly articles on punitive damages for breach of contract,[314] the panel adopted the general rule of common law stating that punitive damages are unavailable for breach of contract in maritime law even if the breach is

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[301] SCHOENBAUM, *supra* note 164, at 953.
[302] *Id*. at 955.
[303] *Id*.
[304] *Id*. at 658-659
[305] *Id*. at 659
[306] SCHOENBAUM, *supra* note 164, at 1039
[307] *Id*.
[308] 761 F.2d 855, 861 (2d Cir. 1985).
[309] *Id*.
[310] 777 F.2d 57 (2d Cir. 1985); referred to as *Thyssen* hereafter.
[311] *Id*. at 59.
[312] *Id*.
[313] *Id*. at 60.
[314] *Id*. at 63.

intentional or done with malicious intent.[315] The Court of Appeals recognized the exception of common law for maritime law that to recover punitive damages the breach of contract must constitute an independent willful tort.[316]

The rule of deviation as it applies to a contract of carriage of goods arises out of the law of marine insurance and should be interpreted by the laws of marine insurance.[317] Applying the principle of deviation of a vessel for marine insurance coverage to carriage of goods, an unreasonable deviation stripped the carrier of limitations and exceptions in bills of lading as it amounted to a breach of warranty,[318] Though some early decisions of U.S. courts referred to deviation in cargo cases as a tort,[319] the panel concluded that a deviation, tough intentional, is not a tort but a breach of contract.[320] Absent the breach constituting an independent tort, the court refused to expand the exception recognized by common law to allow punitive damages for contract breach "which is as much a part of the general maritime law as is the rule allowing such…."[321]

Judge Conner also of the Southern District of New York applied the principles outlined in Judge Friendly's opinion in *Thyssen* shortly thereafter in *Armada Supply v. S/T AGIOS NIKOLAS*[322] and found that the actions of the carrier constituted a separate and distinct tort and awarded $250,000 in punitive damages and $4,130,000 in compensatory damages.[323] The fuel oil was contaminated on delivery.[324] When the cargo owner attempted to secure a warrant to arrest the vessel, it left the jurisdiction of the United States and then utilized the fuel oil and pumped the cargo into its own bunkers.[325] He concluded that the carrier not only deviated from the bill of lading but with intent converted the cargo to its own use.[326] He analyzed the legislative history of COGSA, the developments leading up to the Brussels Convention which COGSA implemented, prior jurisprudence[327] and found not legislative prohibition to award punitive damages in the statute.[328]

In a later decision from the Southern District of New York for punitive damages against the shipper for loss of cargo and the intentional and fraudulent backdating of bills of lading, the judge denied punitive damages.[329]

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[315] *Thyssen,* 777 F. 2d at 63.
[316] *Id*.
[317] *Id.* at 63-64 (citing another learned maritime jurist, Judge Learned Hand); Farr v. Hain S.S. Co. 121 F.2d 940 (2d Cir. 1941).
[318] *Thyssen,* 777 F. 2d at 64.
[319] *Id*.
[320] *Id*. at 65.
[321] *Id*. at 66.
[322] 639 F. Supp. 1161 (S.D. N.Y. 1986).
[323] *See id*. at 1162.
[324] *See id*.
[325] *Id*. at 1163.
[326] *Id*.
[327] 639 F. Supp. at 1163-64.
[328] *Id*. at 1165.
[329] Leather's Best Int'l., Inc. v. MV LLOYD SERGIPE, 760 F. Supp. 301, 314 (S.D. N.Y. 1991).

The U.S. Court of Appeals for the Eighth Circuit in *Gamma-10 Plastics v. American President Lines*[330] in referencing *Thyssen* reversed the trial court's ruling on a Motion to Amend a complaint to seek punitive damages in a claim for untimely delivery of cargo if the breach of contract constitutes a separate tort.[331] The Eleventh Circuit likely would hold that COGSA is the exclusive remedy for a breach of contract claim even if the breach is an independent tort. Polo Ralph Lauren, L.P. sued Tropical Shipping for the loss of clothing lost at sea.[332] Though Polo was not a named party on the bill of lading, its suit against the carrier was based on claims of negligence, breach of contract and bailment.[333] The appeals court affirmed the trial court's ruling that the bailment and negligence displaced by COGSA.[334] It held that COGSA is the claimant's exclusive remedy.[335] Only one other district court has considered the statute of limitations in a claim for breach of the contract of carriage with an appended claim for tort and unfair trade practice and held that even if such claims could be brought the statute of limitations of COGSA would apply to these subsidiary claims.[336]

Only two judges in the Eastern District of Louisiana have addressed whether punitive damages may be sought for breach of contract. First, Magistrate C. Michael Hill in *Ryan Marine Servs. V. Hudson Drydocks, Inc*.[337] relying on *Thyssen*[338] dismissed a claim for punitive damages on a fraud based claim in a breach of contract to repair a vessel as the breach did not constitute an independent tort.[339] Likewise, Judge Martin L.C. Feldman noting the rule adopted in *Thyssen* as precedent[340] and citing Magistrate Hill's opinion,[341] denied a motion to strike a claim for punitive damages under Rule 12(b)(6) in a suit for breach of contract on the basis the allegations were sufficient to allege a separate independent tort.[342]

The remaining cases in which punitive damages have been sought are wage claims by seamen. Federal statute requires the master at the end of the voyage to pay wages of a seaman within twenty-four hours of discharge of cargo or within four days of discharge of the seaman whichever is earlier.[343] The seaman can recover penalty wages amounting to two days wages for each day of delayed payment[344] if the withholding is arbitrary or unreasonable.[345] In an unpublished opinion and ruling in chambers on the employer's motion to strike a claim for punitive

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330 32 F.3d 1244 (8th Cir. 1994).
331 *Id*. at 1257.
332 Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217, 1219 (11th Cir. 2000).
333 *Id.*
334 *Id*.
335 *Id*. at 1220.
336 Alpha Int't Trading Co. v. Maersk, Inc. 141 F. Supp. 2d 580, 582-83 (W.D. N.C. 2001).
337 No. 06-2245-CIV, 2011 U.S. Dist. LEXIS 144036, 2011 WL 6209801 (W.D. La. 2011).
338 2011 U.S. Dist. LEXIS 144036 at *13.
339 *Id*. at *14.
340 Operaciones Tecnicas Marinas S.A.S. v. Diversified Marine Servs., LLC , 913 F. Supp. 2d 254, 261-262 (E.D. La. 2012).
341 *Id*. at 262.
342 *Id*.
343 46 U.S.C. § 10313; *See also* SCHOENBAUM, *supra* note 164 at 442-456.
344 46 U.S.C § 10313 (g).
345 Henry v. S/S BERMUDA STAR, 863 F.2d 1225, 1240 (5th Cir. 1989).

damages based on breach of contract and the Seaman's Wage Act, the judge followed the general rule that punitive damages are not awarded in breach of contract cases unless there is an independent tort.[346] Here there was no independent tort[347] and though the claimants did not address the Seaman's Wage Act, he noted that the Act is punitive in nature and that adding another punitive element would amount to double recovery of punitive damages.[348] Thus, he granted the employer's motion to strike.[349] In *Paul v. All Alaskan Seafoods*,[350] a commercial fisherman employed on a vessel to fish on the high seas and within the territorial waters of Russia sought double wages under Washington statute.[351] Being exempt from the Seaman's Wage Act,[352] the court appropriately held that the Washington statute for double wages did not conflict with federal statute[353] law or that federal maritime law did not preempt the state wage act.[354] Thus, unless a seaman is exempt under the Seaman's Wage Act, state penalties for wrongful withholding of wages will apply. If there is no state act, a federal court may well allow a claim for punitive damages based solely on a tort basis. By federal statute if the agreement for wages is a share of fishing agreements,[355] the statute preserves these seamen common law rights.[356]

The Seaman's Protection Act[357] was passed by Congress in 1984 to provide seamen with a federal statutory remedy for retaliatory discharge in prompt response to the Fifth Circuit's decision in *Donovan v. Texaco* that a seaman had no claim against an employer for retaliatory discharge for reporting safety violations.[358] The Act prohibits the discharge of a seaman who reports in good faith to the Coast Guard or other appropriate federal agency belief of a violation of a marine safety law[359] or refuses to perform duties assigned on the reasonable belief that the duties would "result in serious injury to the seaman, other seamen, or the public."[360] Suit may be filed in an appropriate federal district court for relief including reinstatement with back pay, costs and attorney's up to $1,000.[361] The Seventh Circuit Court of Appeals has also affirmed an award of punitive damages against an employer for violation of the Act.[362] Judge Posner of that circuit

[346] Pryanto v. M/S AMSTERDAM, No. 07-3811-CIV AHM, 2009 U.S. Dist. LEXIS 40833 at *7-*8, 2009 WL 1202888 (C.D. Cal. 2009).
[347] *Id.* at *8.
[348] *Id*. at *8-*9.
[349] *Id*. at *9.
[350] 24 P.3d 447 (Wa. App. Div. 1 2001), *rehearing granted*, 41 P. 3 484 (Wa. 2002).
[351] *Id.* at 449.
[352] *Id*. at 451 (citing 46 U.S.C. § 10301(b) which exempts seamen who by "custom or agreement … share in the profit or result of the voyage….").
[353] *Id*. at 452.
[354] *Id*. at 455.
[355] 46 U.S.C. § 10601.
[356] *Id.* § 10602(c).
[357] *Id.* § 2114.
[358] 720 F.2d 825 (5th Cir. 1983).
[359] 46 U.S.C. § 2114(a)(1)(A).
[360] *Id.* § 2114(a)(1)(B)
[361] *Id.* § 2114(b)(2)(3) (amended 2010).
[362] Gaffney v. Riverboat Services of Indiana, 451 F.3d 424, 464 (7th Cir. 2006).

also held that the federal statute is not exclusive and that state common law doctrines of retaliatory discharge remain viable claims.[363]

VI. Conclusion – The Future of Punitive Damages - A Quixotic Quest for A Legal Unicorn?

Courts and attorneys espouse the familiar apothegm that maritime law should be governed by uniform rules for the benefit of maritime commerce especially now in the age of global commerce and also by uniform rights and remedies for breaches of maritime duties and contractual obligations. The habitual refrain far too often is just that, words with little substance.

The same can be said about the aphorism that punitive damages historically have been available and awarded in maritime law.[364] Words and phrases relegated to philosophical dispositions that have no practical meaning or effect for seaman and those subject to the vicissitudes of the sea. Regarding punitive damages in the wake of the *Batterson* decision, we are left with a hodge-podge of laws dependent on the status of a claimant, location where the claim arose and the type of claim.

With *Batterton*, the Supreme Court presently sealed the fate of seamen and likely employees covered under the Longshore Act to recover punitive damages for gross negligence or reckless conduct of the employer and vessel regardless if the tort resulting in personal injury or death occurred on the high seas or internal U.S. waters. It would also be inconsistent to allow maritime employees falling with the coverage of the Longshore Act to recover punitive damages. Attempting to bring seamen and other "seafarers" within the ambit of recovery of punitive damages will likely begin with an attack on the Achilles heel of the restriction on the recovery of "pecuniary" damages only under the Jones Act negligence claim. This restriction is part of what Justice O'Conner in Miles branded as the "hoary tradition" of FELA when the Jones Act was adopted by Congress.[365] This is especially true with the anachronistic if not antediluvian decision in *Michigan R.R. Co. v. Vreeland*,[366] the genesis of this restriction and which at the time was based on the interpretation of the then existing wrongful death statutes by U.S. state courts and English courts.[367] But, recoverable damages for wrongful death have not remained static since 1913 with states allowing recovery for loss of society, loss of consortium, care and love and affection.[368] Even the U.S. Supreme Court acknowledged this in *Gaudet* when it allowed recovery of loss of society for a longshoreman and again in *Alvez*, permitting recovery for loss of consortium in a claim under General Maritime Law. The Jones Act,[369] as amended in 2006, eliminated the word "damages" as superfluous; but as it always adopted FELA by reference, one must bear in mind that FELA has no restrictive language on "damages" if the personal injury or death was "by reason of any *defect or insufficiency*, due to its negligence, in its cars, engines, appliances,

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[363] Robinson v. Alter Barge Line, Inc. 513 F.3d 668, 671 (7th Cir. 2008).
[364] At. Sounding, Co. v. Townsend, 557 U.S. at 408-09.
[365] 498 U.S. at 32.
[366] 227 U.S. 59 (1913).
[367] *Id*.
[368] *See* 22A Am Jur 2d Death § 206; George Blum, et al., *Loss of consortium, companionship, society, and the like*.
[369] 46 U.S.C. § 30106, as amended in 2006, Pub. L. 109-304, § 6(c), Oct. 6, 2006 (120 Stat. 1510).

machinery,…boats, wharves or other equipment."[370] Any strict construction of the language would be hard pressed to read into it the word "pecuniary." At least with respect to non-pecuniary damages an assault on the once formidable Citadel of *Vreeland* is vulnerable and should eventually fall like the walls of Jericho.

It does no disservice to uniformity to allow seaman the right to recover punitive damages due to the gross negligence of a third-party non-employer. The Fifth Circuit precedent of *Scarborough* is dubious. Not only is its reliance on *Miles* as its foundation unreliable but the contradictory position of the plaintiffs on the decedent's status even after a judicial finding of seaman's status, likely doomed recovery. There is no legal or logical reason to deny seamen recovery from non-employer third parties of not only non-pecuniary but also punitive damages. It is a curious anomaly to allow non-seamen and those workers not within the coverage of the Longshore Act and recreational boaters to recover punitive and non-pecuniary damages and deny them to those employed in and exposed to the perils of the sea. Whether the Courts of Appeal and Supreme Court will allow non-seaman injured on the high seas to recover punitive damages remains an open question; yet it would be irrational to allow such recovery. Maritime law is still left with a binary system based on location in that regard with non-seafarers allowed to recover punitive damages for death and personal injury within the 3 nautical mile limit of the U.S. shore and internal waters as well as appending state remedies to their claims. Uniformity, if there is any, is based on status and location.

It is clear that courts may allow punitive damages for property in collisions and allisions, breach of contract which constitutes an independent tort, marine pollution claims when not caused by or due to oil and certain seamen's wage claims. Considering the present disposition of the courts that only exceptional circumstances can justify an award of punitive damages, counsel may well be on a quixotic quest to pursue what likely will remain a legal unicorn. Pursuit of that unicorn makes the practice of law a thrilling and exciting intellectual pursuit which is rewarding in itself.

[370] 45 U.S.C. § 51.