IN THE WAKE OF *BAKER* AND *TOWNSEND*

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I. The Supreme Court's Holdings in *Exxon Shipping v. Baker* and *Atlantic Sounding v. Townsend*

Over three years ago, the Supreme Court decided *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) ("*Baker*") which first held that the water pollution penalties of the Clean Water Act[2] did not preempt punitive damages awards in maritime spill cases. The Court then addressed whether the punitive damages assessed against Exxon of $2.5 billion in view of the $507.5 million in compensatory damages was excessive as a matter of maritime common law. The Court considered that a 1:1 ratio of compensatory to punitive damages in maritime cases was a fair upper limit where the conduct was not intentional or malicious and without behavior driven primarily by desire for gain. *Id.* at 512-3.

Following *Baker,* the Supreme Court decided the issue of an injured seaman's recovery of punitive damages as a result of his employer's willful failure to pay maintenance and cure in *Atlantic Sounding Co., Inc. v. Townsend,* 129 S.Ct. 2561 (2009) ("*Townsend*"), and held these damages were permissible. The Supreme Court based this decision on three principles:

- Punitive damages have long been available at common law;
- The common-law tradition of punitive damages extends to maritime claims; and
- No evidence existed that claims for maintenance and cure were excluded from the general admiralty rule.

Since the only statutory scheme which could serve as a basis for overturning the common law rule that punitive damages were available under maritime law was the Jones Act which permitted injured seamen the right to "elect" to bring a Jones Act claim, the seaman's exclusive remedy was not limited to the Jones Act or there would be no election to make. *Townsend,* 129 S.Ct. at 2570 (citing 46 U.S.C. §30104(a)). In the Court's view, the Jones Act was enacted to enlarge protections of seaman, not

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[2] 33 U.S.C. § 1321.

narrow them and since repeated decisions of the court preserved common-law causes of action such as maintenance and cure, punitive damages remained available in maintenance and cure actions even after the Act's passage. *Id.*

The petitioners argued that the availability of punitive damages was controlled by the Jones Act because of the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) which considered whether general maritime law provided a cause of action for wrongful death based on unseaworthiness. In *Miles*, the Court found that the remedies for wrongful death which had been created under the Jones Act and Death on High Seas Act ("DOHSA")[3], displaced the general maritime rules that had previously denied recovery for wrongful death. But *Townsend* presented a different question – the remedy of maintenance and cure which was established well before the passage of the Jones Act. *Townsend*, 129 S.Ct. at 2572. Since *Miles* did not address maintenance and cure or its remedy, *Miles* did not conflict with *Townsend* decision. *Id.* In a footnote, the Court stated "Because we hold that *Miles* does not render the Jones Act's damages provision determinative of the [seaman's] remedies, we do not address the dissent's argument that the Jones Act, by incorporating the provisions of the Federal Employers' Liability Act, . . . prohibits the recovery of punitive damages in actions under that statute." *Id.* at 2575, n. 12.

As one would expect, the plaintiff bar took advantage of these decisions, and defense attorneys were suddenly explaining to clients that previous reserves might need to be adjusted. The *Townsend* footnote also effectively invited additional claimants to seek damages for their loss of society and/or consortium. If the case was a bad one for the defense in the first place, it just got worse. For a plaintiff, the case just got better. The purpose of this paper is to provide a "cheat sheet" comprising a summary of the cases which follow *Baker* and *Townsend*, and to provide a guide of the issues that may be raised following these decisions.

[3] 46 U.S.C. §§ 30301-30306.

Townsend made clear that punitive damages were available for failure to pay maintenance and cure. Accordingly, much of the recent litigation has focused on whether the defendant employer's actions rise of the level of wanton, willful and outrageous, and if so, does the 1:1 ratio in *Baker* apply? Another string of cases involves whether *Townsend*'s footnote regarding *Miles* opened the door to the availability of non-pecuniary damages to seamen, longshoremen and non-seafarers. This paper focuses on the cases which follow *Townsend* and *Baker*, and its purpose is to provide the reader with insight into the ways in which litigants are utilizing the decisions. Attorneys who defend Jones Act employers should take particular note of the circumstances under which an employer will be held liable for punitive damages for failure to pay maintenance and cure. Those employers who believe the 1:1 *Baker* ratio is an upper limit for any maritime case may be surprised that, at least in the State of Washington, it does not. Others may be surprised that the only Circuit Court decision addressing the availability of non-pecuniary damages under maritime law is the Eighth Circuit, following an appeal from the District of Nebraska.

II. Availability of Punitive Damages in Maritime Law

State Treble Damages Statutes Conflict with Baker (Fourth Circuit)

Norfolk & Portsmouth Belt Line Railroad Co. v. M/V MARLIN, 2009 AMC 1135 (E.D.Va. April 3, 2009) involved a claim for property damage following a vessel's allision with the railroad company's bridge. The court declined to permit a plaintiff to bring a claim under a Virginia statute which would automatically provide for treble damages when a defendant's willful or grossly negligent conduct caused damage to the property of a public service corporation. The court found that the treble damages ratio was strict and inflexible, conflicting with the *Baker* Court's 1:1 ratio and the general maritime law's goal of uniformity.

No Punitives for Breach of Contract or Seaman's Wage Act Claims (Ninth Circuit)

In *Priyanto v. M/S AMSTERDAM*, 2009 WL 1202888 (C.D. Cal. April 30, 2009), a seaman's punitive damage claims for breach of contract and pursuant to the Seaman's Wage Act were denied. With respect to the breach of contract claim, the plaintiffs' only support for punitive damages in a breach of contract claim dated back to 1861 and was contrary to more recent authority holding punitive damages are only available in actions relating to breach of contract if the defendant's actions constitute an independent tort. *Id.* at *3. The court found that the pleadings did not allege an independent tort and would not permit an amendment of the complaint at the late stage of the case. With respect to the Seaman's Wage Act claims, since the statutory scheme already provided for an award of penalties when an employer willfully fails to pay wages on termination, permitting punitive damages would result in an unlawful double recovery.

Injured Seamen May Recover Punitive Damages under the Jones Act (Ninth Circuit)

In *Larson v. Kona Blue Water Farms, LLC*, 2010 AMC 1230 (Cal. Feb. 8, 2010), the Superior Court for the State of California, County of Alameda, held that an injured seaman may recover punitive damages because the Federal Employers' Liability Act ("FELA")[4] provides two distinct and independent liabilities, one to the surviving employee and another to the deceased employee. The court found no uniform controlling federal jurisprudence. The court noted that liability to the personal representative of a deceased employee is limited to pecuniary losses but that limitation did not apply to an injured employee. Moreover, *Miles* did not address the issue of injured seamen. *Id.* at 1244. The court did not consider itself bound by the Ninth Circuit's decision in *Kopcczynski*, which failed to distinguish between the two injured and deceased employees and had relied on cases involving deceased employees. *Id.* at 1245-46. The court summarized "defendant conflates recovery of damages by a personal representative with damages recoverable by a surviving injured seaman. Further, such

[4] 45 U.S.C. § 51 *et seq.*

recovery is in large part based on *dicta*." *Id.* at 1249. The court continued "The smattering of inferior federal (and state court) authorities...falls far short of establishing the existence of a uniform federal jurisprudence... Nor has defendant established how a request for punitive damages by the plaintiff seaman in this case would contravene the essential purpose of the Jones Act or any other federal statute, or interfere with the proper harmony and uniformity of general maritime law. Indeed, it appears that recover of punitive damages by a surviving seaman in a Jones Act case is not contrary to the terms of the Jones Act and is entirely consonant with the right of a seaman to recover punitive damages in traditional maritime cases." *Id.* at 1250, citing *Townsend.*

Baker Did Not Establish a 1:1 Bright Line Rule for Conduct at the "Zenith of Reprehensibility" (Ninth Circuit)

In *Clausen v. Icicle Seafoods, Inc.* (Superior Court, State of Washington, King County March 5, 2010), a Washington State Court denied a motion for reconsideration to reduce a jury's punitive damage award as a result of the defendant's failure to pay maintenance and cure. The court held that *Baker* did not impose a 1:1 bright line rule for all maritime cases, but rather imposed a cap in cases that did not involve "exceptional blameworthiness" or "behavior driven primarily be desire for gain" which was "profitless for the tortfeasor" and "reckless" rather than "intentional". The jury verdict awarded $465,525 in compensatory damages and punitives of $1.3 million, making the ratio 1:2.79.

Clausen is worth reading. The court was of the view that everything the defendant did (or did not do) warranted a significant punitive award as the defendant's conduct was at the "zenith of reprehensibility", having preyed on a man incapable of work, living in a broken recreational vehicle, and had done so intentionally, repeatedly and for the purpose of corporate profits. The court upheld the jury award of the 1:2.79 ratio, citing cases which upheld damages awards with even higher ratios.

Government Agent's Willful Failure to Pay Maintenance and Cure Is Subject to the Suits in Admiralty Act, Foreclosing the Possibility of Punitive Damages (Ninth Circuit)

Reece v. Keystone Shipping Co., 2010 WL 2331068 (W.D. Wash. March 25, 2010) involved a plaintiff's attempt to assert a punitive damages claim against an agent of the government and circumvent the exclusivity of the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 30901, *et. seq.* Under the SAA's limited waiver of sovereign immunity, Congress dictated that the government would answer for the actions of its agent. The plaintiff argued that *Townsend* permitted recovery for punitive damages against a governmental agent. The court denied this argument noting that, if anything, *Townsend* demonstrated why a claim for punitives should not be allowed since Congress specifically chose to make the SAA an exclusive statutory remedy.

Seamen May Recover Punitive Damages for Unseaworthiness but not under the Jones Act (Ninth Circuit)

Three decisions were issued in *Wagner v. Kona Blue Water Farms, LLC,* 2010 WL 1837839 (D. Hawaii May 6, 2010), 2010 WL 3566731 and 2010 WL 3566730 (D. Hawaii Sept. 13, 2010) pertaining to the issue of punitive damages under the Jones Act, unseaworthiness and vessel owner negligence. The court held that it was bound by the Ninth Circuit's decision in *Kopczynski v. The Jacqueline*, 742 F.2d 55 (9th Cir. 1984) which held that punitive damages were not available under Jones Act negligence claims. The court said *Townsend* (referring to the footnote) deliberately stated no opinion on whether the Jones Act prohibits the recovery of punitives. However, the court noted that the *Townsend* dissent argued that the Jones Act prohibited the recovery of punitive damages and used an analysis which mirrored the approach of the Ninth Circuit in *Kopczynski.* Since the majority in *Townsend* was silent on the issue and the dissent approved the Ninth Circuit's approach, the court found that *Townsend* was not irreconcilable with *Kopczynski.*

On the issue of punitive damages for unseaworthiness causes of action, the court found it was bound by the 1987 decision of the Ninth Circuit, *Evich v. Morris*, 819 F.2d 256 which allowed punitive

damages under general maritime law claims for unseaworthiness. The court noted that *Townsend* Court's footnote 12 did not address whether *Miles* precludes the recovery of punitive damages in Jones Act claims and found *Evich* was not irreconcilable with *Miles* because unseaworthiness, unlike wrongful death, is a general maritime law creation and not a product of statute. *Id.* at *8. Since *Evich* was binding, punitive damages were available under general maritime law claims for unseaworthiness.

Imposition of Punitive Damages Is So Important, It May Warrant Reconsideration (First Circuit)

In *Mulligan v. Maritrans Operating Co.*, 2010 WL3038091 (D. Mass. July 30, 2010), the court found that the defendant acted in a willful and wanton manner in refusing to provide authorization for a procedure to alleviate the seaman's pain and injury during a six month time period, even though its prior actions had not been unreasonable. Apparently, the court's finding was primarily based on defense counsel's lack of explanation as to the delay. On reconsideration, the court believed that the defendant should have made clear previously the basis for the delay. However, the court noted that its focus was unknown to the parties until the court's order and believing the issue was so important that it should not be considered on a technicality, set aside the punitive damages award.

A Court May Consider the 1:1 Ratio in Determining Jurisdiction and a Defendant's Right to a Jury Trial (Sixth Circuit)

Adams v. James Transportation, 2010 WL 4789290 (W.D. Ky. Nov. 17, 2010) presents an interesting use by a defendant of a claim for punitive damages. In that case, the plaintiff filed suit under the Jones Act, general maritime law negligence and for maintenance and cure, requesting a jury trial. The defendant counterclaimed for reimbursement for medical payments it made based on plaintiff's alleged fraudulent concealment of past medical problems. The defendant sought $31,000, attorney fees, costs and punitive damages. The plaintiff then filed an amended complaint seeking to waive his right to a jury demand; the defendant objected, claiming that it would interfere with its right to a jury trial. The court found independent subject matter jurisdiction did not exist over the counterclaim because diversity

jurisdiction required that the claim be $75,000 or greater and the plaintiff's behavior did not justify a 1:1 punitive damages ratio.

Seaman Entitled to Fees for Withholding of Maintenance Until Plaintiff Submitted to an IME (Ninth Circuit)

Following a jury trial, the court in *Mai v. American Seafoods, LLC.*, 249 P.3d 1030 (Court of Appeals of Washington, March 14, 2011) held that an IME could not be required if a seaman established a *prima facie* burden of injury while in the service of a ship and the vessel owner agreed to pay maintenance and cure without questioning the need for some course of medical treatment which was curative in nature. Attorney fees were appropriate but punitives were not at issue because *Townsend* post-dated the jury verdict.

Choosing One Physician's Opinion over Another Does Not Warrant a Punitive Damages Award (Fifth Circuit)

The court in *Smith v. Florida Marine Transporters, Inc.*, 2011 WL 2580625 (E.D. La. June 29, 2011) dismissed with prejudice a seaman's claims for punitive damages for failure to pay maintenance and cure based on the argument that that the employer chose to believe one physician over another in cessation of maintenance and cure payments.

Passengers May Recover Punitive Damages under General Maritime Law (Eleventh Circuit)

Lobegeiger v. Celebrity Cruises, Inc., 2011 WL 3703329 (S.D. Fl. Aug. 23, 2011) held that, in light of *Townsend,* the Eleventh Circuit's preclusion of punitive damages in personal injury claims in *In Re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1999) was no longer correct. *Id.* at *7. The plaintiff was a passenger onboard a cruise ship who sustained serious injuries to her finger, which may have been exacerbated by the actions and inactions of the onboard physician.

Claimants with General Maritime Law Claims pre-OPA May Recover Punitive Damages (Fifth Circuit)

One of the issues in a recent decision by Judge Barbier in *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010* (E.D. La. Aug. 26, 2011) involved the question of whether OPA[5] was the exclusive remedy for private, non-governmental entities asserting economic loss and property damage claims, requiring claims for economic damages to be solely against the "Responsible Party". The question was framed: "whether, or to what extent, OPA has displaced any claims previously existing under general maritime law, including claims for punitive damages." Citing *Baker* and *Townsend*, the court questioned whether long-standing federal law could be displaced by statutes which were silent on the issue.

With respect to the claims of any non-commercial fisherman who alleged solely economic loss without any property damage, the court held that since pre-OPA they claimants had not had a viable claim, their claims must be dismissed. However, the claims of commercial fisherman and those who sustained physical damage to their property were not displaced by OPA since OPA "saved" admiralty and maritime law. 33 U.S.C. § 2751(e). On the issue of punitive damages, since OPA was silent on their availability, the court held plaintiffs who could have asserted general maritime claims for punitive damages before OPA's enactment could maintain those claims.

III. Availability of Loss of Consortium/Society Damages in Maritime Cases

No Loss of Society for Relatives of Non-Seaman Who Died in Territorial Waters (Fifth Circuit)

The case of *In Re Maryland Marine*, 641 F.Supp.2d 579 (July 9, 2009) involved the relatives of a non-seaman who died in Alabama waters. The claimants acknowledged that no statute permitted this recovery but argued that *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), which awarded loss of consortium damages to the widow of a longshoreman under the general maritime law who could not recover those damages under any state or federal statutes, if properly applied, provided them relief.

[5] The Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.*

Although the claimants argued that Congress did not intend to occupy the entire field of maritime law remedies, the court declined this argument, finding *Gaudet* only applied to longshoremen in territorial waters. The court also noted the traditional protection of maritime workers and cited the Eleventh Circuit decision of *Tucker v. Fern*, 333 F.3d 1216 (11th Cir. 2003) which held a non-dependent father of a non-seafarer minor killed in territorial waters was not entitled to loss of society damages under general maritime law since it would permit non-seamen's survivors more liberal recovery than seamen's survivors.

Spouse of Injured Non-Seafarer Not Entitled to Loss of Consortium Where Accident Was Outside Territorial Waters (Eighth Circuit)

Following similar logic as in *Maryland Marine*, in *Doyle v. Graske*, 579 F.3d 898 (8th Cir. Oct. 21, 2009), the Eighth Circuit declined to permit loss of consortium damages to the spouse of a non-seafarer who was injured in a recreational boat in the Grand Caymans. Since there was no well-established rule authorizing loss of consortium damages as there was with respect to punitive damages under maritime law, the court felt it was not being asked to change maritime law as the *Townsend* Court had been asked to do. Since the issue was one of first impression in the Eighth Circuit, the court decided it would continue the development of general maritime law "in the manner of a common law court." *Id.* at 906. With no recognized claim under general maritime law as there had been in *Townsend*, the court looked to legislative enactments governing closely related claims for guidance and concluded that permitting recovery would result in serious disparities between general maritime law and legislative policies. First, spouses of those injured beyond territorial waters (as was the case in *Doyle*) would be treated differently than those who claims were subject to the Death on the High Seas Act (which would not permit recovery). Moreover, the rights of spouses of injured non-seafarers would be greater than the rights of the spouses of injured seamen under the Jones Act, which would be "odd" since the principles of maritime law "always included a special solitude for the welfare of seamen and their families." *Id.* at 907. Certiorari was denied by the Supreme Court on March 29, 2010.

No Loss of Society Damages for Siblings of Seaman Who Died in Territorial Waters (Fifth Circuit)

In *Crescent Towing & Salvage Co. v. M/V BELO HORIZONTE*, 2009 WL 5171792 (E.D. La. Dec. 21, 2009), the court dismissed the claims of the siblings of a seaman who died while in Louisiana territorial waters. The siblings claimed that their claim for loss of society damages was different from the issue faced by the *Miles* Court because, unlike the situation in *Miles*, they were dependent on the deceased seaman. The Court declined to accept this argument, finding that *Miles* did not limit its decision to nondependent survivors.

Fisherman's Wife Not Entitled to Loss of Consortium for Accident in Territorial Waters (Second Circuit)

In *Stepski v. M/V Norasia Alya*, 2010 WL 6501649 (S.D.N.Y. Jan. 21, 2010), the court applied *Miles* to hold that loss of consortium damages were unavailable to the wife of an injured fisherman following a collision in territorial waters. The Court assumed that *Townsend* stood for the proposition that punitive damages are generally available under general maritime law but found the facts did not warrant it.

Loss of Consortium Unavailable to Longshoreman's Widow Injured outside Territorial Waters (Fifth Circuit)

Sinegal v. Merit Energy Co., 2010 WL 1335151 (W.D. Louisiana March 29, 2010) addressed a widow's claim for loss of consortium following the injuries and subsequent death of her husband while outside territorial waters. Finding Fifth Circuit jurisprudence clear regarding a general maritime law loss of consortium claim for injuries on the Outer Continental Shelf and citing *In Re Maryland Marine*, the court held loss of consortium damages were unavailable. *Townsend* did not compel a different conclusion because *Miles* addressed a different issue.

Loss of Consortium Damages Available to Wife of Seaman for Unseaworthiness (Ninth Circuit)

In denying a motion to dismiss in *Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 3516061 (W.D. Wash. Aug. 11, 2011), the court held loss of consortium damages were available to the wife of an injured seaman. The seaman was a deckhand onboard a fishing vessel who was allegedly exposed to unsafe levels of Freon and suffered permanent lung damage. The Ninth Circuit case of *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) ("*Smith*") precluded loss of society claims for every maritime tort that occurred on the high seas. However, the court held it was not bound by *Smith* in light of the *Townsend* Court's statement that the reading of *Miles* as limiting recovery in maritime cases to the remedies under the Jones Act was far "too broad". *Id.* at *6. The court applying the analytical framework of *Townsend* and held that loss of consortium damages were available under general maritime law before the enactment of the Jones Act, denying the motion to dismiss with respect to the unseaworthiness claim.

IV. Conclusion

While the true reach of *Baker* and *Townsend* is still developing, the maritime law's goal of uniformity has once again become anything but uniform in view of the inconsistency of the decisions rendered in past few years. Until federal circuits with heavy maritime dockets decide the issues against the backdrop of *Baker* and *Townsend*, the uncertainty faced by litigants will most certainly continue.