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Punitive Damages in Admiralty

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and unclear. There have been some departures from prevalent common law standards since the *Rogers* case. The old theory of direct causation, in sharp decline at common law, is apparently gaining ground. This extends the employer's liability beyond the zone of foreseeable risk, and limits it only by the situation existing at the time and place of his negligence. In the field of intervening causes as well, "foreseeability" has been in decline as a formula for limiting the employer's liability. It is clear, however, that there is some point at which he is no longer liable for the harm he has caused. The conduct of a third person may be such that responsibility will "shift" from the negligent employer, or an intervening cause may be so abnormal, or may bring about a result so unrelated in any rational sense to the harm he has threatened, that he will be relieved of liability. It is impossible, and probably undesirable, to attempt to state any rule as to when this will happen and when it will not. So far the courts have been unwilling to ignore the relation between the original negligence and the resulting harm, suggesting perhaps that the concept of proximate cause is too deeply involved with the theory of negligence to be ever torn loose.

Nothing, however, is really impossible in this special statutory liability of employer to employee. There is always the *Kernan* case, with its largely ignored suggestion of liability without end following any breach of duty Thus far the courts, while they have gone beyond the foreseeable, have stopped short of the fantastic, but *Kernan*, like Everest, is "there," waiting for some court to scale its heights and proclaim liability for the most fantastic consequences of a negligent act.

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PUNITIVE DAMAGES IN ADMIRALTY

An exception to the general rule that damages are intended to compensate the injured party, punitive damages are awarded, both as a punishment and a deterrent, in cases involving "a positive element of conscious wrongdoing."[1] While punitive damages are not a substitute for criminal sanctions,[2] they represent an area in which non-criminal courts have borrowed from the criminal law to give additional compensation to the injured party by punishing the wrongdoer for his evil state of mind. Although often criticized, punitive damages are generally accepted by both state and federal courts,[3] and it is reasonable to expect that the same behavior which justifies the award of punitive damages in ordinary tort actions would be present in actions which fall within the jurisdiction of the admiralty courts. However, there are very few admiralty cases which actually

[1] McCORMICK, DAMAGES § 79 (1935).

[2] See, *e.g.*, Allen v. Rossi, 128 Me. 201, 146 Atl. 692 (1929); State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N.W 935 (1906).

[3] McCORMICK, DAMAGES § 78 (1935).

award punitive damages, raising a question as to the acceptance of this doctrine by admiralty courts.

Unfortunately, the award of punitive damages in some areas has been precluded by the wording and judicial interpretation of statutes under which recovery is sought. However, there still remain several areas in which punitive damages should be utilized by the admiralty courts as in common law courts, to punish outrageous behavior and to prevent its recurrence.

Restitutio in Integrum

It was stated in 1936 that "damages in admiralty are not decreed to punish and the doctrine applicable is *restitutio in integrum*,"[4] which would restrict the recovery of the injured party to the cost of returning him to his original condition. In light of the expressions in the following cases, however, it is arguable that the rule of *restitutio in integrum* is only a guideline for determining actual damages and not an absolute limitation of damages in admiralty to compensation.

Before 1859

There are no American cases prior to 1859 in which punitive damages were actually awarded, but several courts discussed the doctrine with apparent approval. These courts reasoned that while punitive damages were not warranted by the particular fact situations involved, punitive damages might be justified if the case had involved slightly different facts.

The most significant of these cases is *The Amiable Nancy*,[5] decided by the Supreme Court in 1818, which discussed the question of who might be liable for punitive damages. The Court held that in an action for marine trespass the owners of the offending vessel were "not bound to the extent of vindictive damages,"[6] because they had neither participated in nor authorized the trespass. The Court apparently viewed punitive damages as a desirable means of punishing the wrongdoer, not as any compensation due to an injured party for the wrong done, and noted that "if this were suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."[7]

The problem of what sort of conduct might entitle a libelant to punitive damages was presented to the Circuit Court in Massachusetts in 1816.[8] In an action for wages brought by the owner of a slave discharged before the return voyage, the court refused to allow the recovery of wages from the end of the return voyage up to the commencement of the suit, but suggested that "if there had been in the case at bar gross fraud, enticement, or oppression, there might have been some reason to have decreed the compensation by way of punishment."[9] The court felt, then, that punitive damages in admiralty, as in common law, required not just wrongful behavior or negligence, but an element of intentional and

[4] The West Arrow, 80 F.2d 853, 858, 1936 A.M.C. 165, 172 (2d Cir. 1936). See also The Baltimore, 75 U.S. (8 Wall) 377 (1869).

[5] 16 U.S. (3 Wheat.) 546 (1818).

[6] *Id.* at 559.

[7] *Id.* at 558.

[8] Emerson v. Howland, 8 Fed. Cas. 634 (No. 4441) (C.C. Mass. 1816).

[9] *Id.* at 638.

conscious misconduct—an evil and wanton disregard of the rights of the other party.

Another example of the state of mind necessary to warrant an award of punitive damages is found in *Murray v. The Charming Betsy*.[10] In that case, a captain of a United States ship, executing orders in his best judgment, mistakenly seized another ship. In an action by the owner of the seized vessel, the Court refused to award punitive damages because the captain was not guilty of wanton disregard of the rights of the other party by merely following his orders. There was nothing about his conduct deserving of punishment.

The broader question of the validity of punitive damages in admiralty cases generally was discussed by Justice Story in 1820.[11] In an action for patent infringement, Justice Story affirmed an award of counsel fees and rejected an earlier denial by the Supreme Court of counsel fees[12] as doubtful authority. He stated that "in cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expenses, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it."[13] He added, "it would be impossible to reconcile the case [denying counsel fees] with the general doctrines of admiralty courts, or with the more recent and well established practice of the supreme court in cases of marine torts and prize.[14] This is a strong indication that the early courts did not regard punitive damages as a stranger to admiralty.

While punitive damages were not awarded in admiralty prior to 1859, these cases point out the possibility of an award of punitive damages and provide a general outline of the principle involved. In an action against the original wrongdoer[15] whose behavior amounts to intentional misconduct,[16] an admiralty court could award punitive damages. Just such a situation arose in 1859.

Gallagher v. The Yankee

In 1859 the District Court for the Northern District of California awarded puntive damages in a maritime tort case.[17] The libel was brought against the captain of *The Yankee* for the unlawful deportation of the libelant from California to the Sandwich Islands. The court awarded exemplary damages, stating that, "for a tort of this kind—high-handed and deliberate, in open and contemptuous violation of the hitherto supposed inviolable rights of the citizen—the court should award exemplary damages."[18]

The Yankee is significant for several reasons. It is the only case in which an award of punitive damages was actually made by an admiralty court. Despite this

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[10] 6 U.S. (2 Cranch) 64 (1804).

[11] Boston Mfg. Co. v. Fiske, 3 Fed. Cas. 957 (No. 1681) (C.C. Mass. 1820).

[12] Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

[13] Boston Mfg. Co. v. Fiske, 3 Fed. Cas. 957 (No. 1681) (C.C. Mass. 1820).

[14] *Id.* at 958.

[15] The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818) (dictum).

[16] Emerson v. Howland, 8 Fed. Cas. 634, 638 (No. 4441) (C.C. Mass. 1816) (dictum).

[17] Gallagher v. The Yankee, 9 Fed. Cas. 1091 (No. 5196) (N.D. Cal. 1859), *aff'd*, 30 Fed. Cas. 781 (No. 18124) (C.C.N.D. Cal. 1859).

[18] *Id.* at 1093.

fact, the court did not discuss the uniqueness of the award and evidenced no hesitancy with regard to the authority of an admiralty court to assess punitive damages in cases involving maritime torts. Moreover, the case has only been cited once in subsequent cases involving punitive damages.[19]

The Yankee is important because it provides some guidelines for the award of punitive damages in admiralty It follows the general rule of punitive damages in recognizing that a wrong which involves malice or a willful disregard of individual rights cannot be adequately dealt with under the principle of *restitutio in integrum.* The actual monetary damage suffered by the libelant was not great, but the behavior of the libelee was outrageous. Compensatory damages would have returned the injured party to his original condition, but only exemplary damages would have been a punishment and a deterrent to the wrongdoer.

After 1859

Following *Gallagher v. The Yankee* several cases arose which, while not allowing punitive damages, suggest principles for their use. There are four problem areas: (1) the extent to which the intent or indifference of the wrongdoer is a factor in awarding punitive damages; (2) the award of punitive damages in actions in rem; (3) the extent to which the principal is liable in punitive damages for the acts of his agent; and (4) the recovery of punitive damages in actions for breach of contract. In addition to these cases, writings by major legal scholars appeared which help to define these principles.[20]

Somewhat more than a wrongful act or negligence is required before punitive damages may be awarded in admiralty The general rule in common law courts is that if the "wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime,"[21] punitive damages may be awarded. This same rule probably also applies in admiralty. A few cases illustrate this. Prior to 1859 the courts denied punitive damages on the ground that there had been no "gross fraud, enticement, or oppression,"[22] or on the ground that the conduct was not a wanton disregard of the rights of the other party.[23] In *The Normania*[24] the court denied exemplary damages against a steamship company, finding that the company had no intent to deceive the libelant, a passenger who, upon inquiry, was erroneously told there would be no steerage passengers aboard the vessel. In 1895 another court denied exemplary damages for breach of charter party by illegal detention of the vessel finding that the charterer acted under legal advice in detaining the vessel.[25]

While the courts have used such varied terms as "gross"[26] misconduct, or

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[19] The William H. Bailey, 103 Fed. 799, 800 (D.C. Conn. 1900) (private damages denied in a suit in rem).

[20] 2 SUTHERLAND, DAMAGES § 292 (1916); 2 SEDGEWICK, DAMAGES § 599(b) (9th ed. 1912).

[21] PROSSER, TORTS § 2, at 9 (3d ed. 1964).

[22] Emerson v. Howland, 8 Fed. Cas. 634, 638 (No. 4441) (C.C. Mass. 1816).

[23] Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

[24] 62 Fed. 469 (S.D.N.Y. 1894).

[25] The Mascotte, 72 Fed. 684 (D.C.N.J. 1895).

[26] Emerson v. Howland, 8 Fed. Cas. 634, 638 (No. 4441) (C.C. Mass. 1816).

"malice"[27] or "lawless misconduct,"[28] it is clear that if the courts will award punitive damages at all, they will only do so for wrongs involving a "positive element of conscious wrongdoing."[29]

There are two views on the applicability of punitive damages to actions in rem. One court has taken the view that the doctrine of punitive damages cannot be applied to actions in rem.[30] "In the American admiralty a tort creates a maritime lien or privilege,—a jus in re. This lien or privilege, however, is only as security for actual damages for the wrong done, for which the ship herself is bound to make compensation."[31]

The other possible view is that if the shipowner acted out of malice, punitive damages might be recovered in an action in rem. In *The Seven Brothers*[32] the court refused to allow punitive damages in an action in rem stating, "as the libel is in rem, and thus in effect against the owner of the vessel, who is not proved to have had any share in or knowledge of the malicious act, punitive damages cannot be awarded."[33] The language used by this court would not entirely exclude punitive damages from an action in rem, but would require the libelant to prove malice on the part of the owner of the vessel. This argument rests upon the premise that an action in rem is in effect an action against the owner and should not necessarily be restricted to the actual injury suffered.

Two leading writers on damages in the early part of the century reached different conclusions on this question. Sutherland stated that admiralty courts could award punitive damages, "though not in a suit *in rem* against a vessel for a maritime tort."[34] Sedgewick reached an entirely different conclusion, arguing, "if the owner himself is master, or authorizes the act, no reason is perceived why he should not be responsible in exemplary damages, whether the proceeding is in rem or in personam."[35] This view appears to be more in harmony with the purpose of punitive damages to punish malicious behavior and does not protect a wrongdoer merely because the action brought is in rem.

The third problem area is the liability of a principal for the acts of his agent. In admiralty this problem is most frequently encountered in actions against the owner of the vessel for acts done by the master or crew of the vessel. Probably the most explicit statement of what acts by the seaman will incur liability on the part of the owner to the extent of punitive damages appears in *The Ludlow*.[36] The court denied punitive damages against the shipowner for wrongful imprisonment of a seaman, on the basis that the shipowner is exempt from punitive damages "unless it can be shown that the owner acquiesced in or ratified the wrong, or that the deed was perpetrated in the line of the agent's authority."[37] The question

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[27] McCormick, Damages § 79 (1935).

[28] The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818).

[29] McCormick, Damages § 77 (1935).

[30] The William H. Bailey, 103 Fed. 799 (D.C. Conn. 1900).

[31] *Id.* at 800.

[32] 170 Fed. 126 (D.R.I. 1909).

[33] *Id.* at 127.

[34] 2 Sutherland, Damages § 392 (4th ed. 1916).

[35] 2 Sedgewick, Damages § 599(b) (9th ed. 1912).

[36] 280 Fed. 162 (N.D. Fla. 1922).

[37] *Id.* at 163-64; *accord,* Pacific Packing & Navigation Co. v. Fielding, 136 Fed. 577 (9th Cir. 1905).

of the liability of the principal to the extent of punitive damages for the acts of his agent acting within the general scope of authority without participation or ratification by the principal is one which has plagued all of our courts[38] and has not been clearly decided by our common law courts.[39]

The final problem area involves liability for punitive damages for breach of contract. It is a general rule that punitive damages are not recoverable in an action for breach of contract, even though the breach is intentional and accompanied by malice.[40] In *Crowley v. S.S. Arcadia*[41] punitive damages were denied in an action for breach of contract to carry passengers. However, the court based the denial on the lack of malice or wrongful intent and not on a general rule against such an award. The general rule is so widely accepted, however, that it is unlikely that punitive damages could be recovered in an action for breach of contract. An exception to this rule is recognized where the breach amounts to an independent cause of action for tort.[42] In *The Normania*[43] a passenger brought an action for false representations with respect to the presence of steerage passengers. Punitive damages were denied because of a lack of intent to deceive. An award of punitive damages in this type of case should not be summarily rejected merely because the representations were made in connection with a contract.

These four problem areas involve the question of punitive damages in isolated types of admiralty cases. Just as Justice Story commented on the general availability of punitive damages to admiralty courts in 1820,[44] Sedgewick and Sutherland each reached the same conclusion nearly one hundred years later. In 1912 Sedgewick stated that "exemplary damages are awarded in admiralty, as in other jurisdictions."[45] Sutherland stated in 1916 that "as a rule a court of equity will not award such damages, but courts of admiralty will."[46] However, neither of these writers cited cases which actually award punitive damages.[47]

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[38] McCormick, Damages § 80 (1935).

[39] The Supreme Court has denied liability where there has been no participation or express ratification by the principal. Lake Shore M.S. Ry. v. Prentice, 147 U.S. 101 (1893). However, a more recent federal case argued that the real question was not whether there had been express ratification but whether the act was participated in by so much of the principal's organization that the behavior "can fairly be said to be truly that of the principal." General Motors Acceptance Corp. v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959). This rule seems to be more applicable to large corporations in which an agent's behavior may only rarely be ratified by a high ranking corporation official.

[40] Otto v. Imperial Cas. & Indem. Co., 277 F.2d 889 (8th Cir. 1960); Young v. Main, 72 F.2d 640 (8th Cir. 1934); Crogon v. Metz, 47 Cal. 2d 398, 303 P.2d 1029 (1956).

[41] 1965 A.M.C. 988 (S.D. Cal. 1964).

[42] Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944); Chelini v. Nieri, 32 Cal. 2d 480, 196 P.2d 915 (1948).

[43] 62 Fed. 469 (S.D.N.Y. 1894).

[44] Boston Mfg. Co. v. Fiske, 3 Fed. Cas. 957 (No. 1681) (C.C. Mass. 1820).

[45] 2 Sedgewick, Damages § 599(b) (9th ed. 1912).

[46] 2 Sutherland, Damages § 392 (4th ed. 1916).

[47] Sutherland cited The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818), and Boston Mfg. Co. v. Fiske, 3 Fed. Cas. 957 (No. 1618) (C.C. Mass. 1820).

Punitive Damages and Maintenance and Cure

Admiralty recognizes several remedies which present special problems in the award of punitive damages. A shipowner is absolutely liable without fault to the seaman for maintenance and cure for all injuries and sicknesses which arise while the seaman is in the service of the ship, with the exception of injury or illness caused by the seaman's gross and willful misconduct or existing at the time the seaman signed on the ship and knowingly concealed by him.[48] Basically, the recovery is limited to the cost of maintaining and curing the injured or sick seaman. But "if the master or owner fail to provide proper care and as a result the seaman's condition is aggravated, the shipowner is liable not only for the increased medical expenses and maintenance that may become necessary, but also for resulting damages. That is to say, following such a breach of duty the seaman may recover full tort damages "[49]

Such a situation was present in the case of *Vaughan v. Atkinson*[50] in which the seaman brought an action for maintenance and cure and damages for willful and persistent failure to pay maintenance and cure. The Supreme Court reversed a denial of damages and awarded counsel fees as damages to the seaman, stating: "The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure than this one.[51]

Vaughan v. Atkinson is the first case to allow counsel fees in an action for maintenance and cure, and the award has been viewed as special damages[52] and as a judicial penalty.[53] In Justice Stewart's dissent, he asserted that there was no basis for awarding counsel fees as damages for failure to pay maintenance and cure, but he did recommend that punitive damages would be appropriate in this case "if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman."[54] To give punitive damages in such a situation would be in line with the view that once the shipowner has breached his duty to provide maintenance and cure, he is liable for full tort damages. Because of the importance of maintenance and cure to the seaman, the award of exemplary damages in cases involving a flagrant violation of the duty to meet this obligation would both compensate the seaman for that failure, and at the same time discourage a repetition of this behavior.

Punitive Damages and Unseaworthiness

It has been well established in this country since 1903 that both a ship and the shipowner are "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship."[55] This duty "is absolute and is

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[48] GILMORE & BLACK, ADMIRALTY 254 (1957).

[49] *Id.* at 270.

[50] 369 U.S. 527, 1962 A.M.C. 1131 (1962).

[51] *Id.* at 531, 1962 A.M.C. at 1134.

[52] 111 U. PA. L. REV. 684, 686 (1963).

[53] 12 CATHOLIC U. L. REV. 62, 64 (1963).

[54] Vaughan v. Atkinson, 369 U.S. 527, 540, 1962 A.M.C. 1131, 1141 (1962) (dissenting opinion).

[55] The Osceola, 189 U.S. 158, 175 (1903).

not satisfied by due diligence."[56] This remedy has come into much greater use in recent years, and "in most cases the pleader would be better off to rely exclusively on unseaworthiness,"[57] rather than joining this claim with one under the Jones Act.[58] However, this remedy has been described as limited to providing compensation for the injuries received. In 1920 Hughes stated that "for a breach of this duty, the owner is liable for compensatory damages,"[59] and several courts have described a recovery for unseaworthiness as compensatory.[60] Because this duty is based on strict liability providing compensatory relief, it is likely that the doctrine of *restitutio in integrum* is controlling, and punitive damages could not be recovered in an action based on unseaworthiness.

In addition to the traditional remedies for maintenance and cure and unseaworthiness, Congress in the last fifty years has seen fit to give maritime workers and others certain statutory remedies to provide added assurance of compensation for personal injury. These acts include the Jones Act,[61] the Death on the High Seas Act,[62] the Public Vessels Act,[63] and the Longshoremen's and Harbor Workers' Compensation Act.[64] Due to a combination of the wording and the judicial interpretation of these acts, it can be said that in all probability recovery under these acts is limited to actual damages.

Punitive Damages and the Jones Act

The Jones Act[65] provides that any seaman injured in the course of his employment may, at his election, maintain an action at law with the right of trial by jury against his employer for the employer's negligence. In the event the seaman is killed, his personal representative may bring an action at law for wrongful death and certain causes of action survive. This act does not provide an action for longshoremen and other harbor workers whose rights against their employers are covered by the Longshoremen's and Harbor Workers' Compensation Act.[66]

The question of the availability of punitive damages under the Jones Act was recently presented in *Phillip v. United States Lines Co.*[67] In an action for the wrongful death of a seaman under the Jones Act against the shipowner the court denied a motion for retrial on the issue of punitive damages, saying that it was not necessary to decide whether a corporate shipowner could be held liable for punitive damages in an action under the Jones Act since the requisite elements for an award of punitive damages were not present in this case.

While the court in *Phillip v. United States Lines Co.* did not rule out the

[56] GILMORE & BLACK, ADMIRALTY 252 (1957).

[57] *Id.* at 316.

[58] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[59] HUGHES, ADMIRALTY 205 (2d ed. 1920).

[60] Rogosich v. Union Dry Dock & Repair Co., 67 F.2d 377, 1934 A.M.C. 219 (3d Cir. 1933); Globe S.S. Co. v. Moss, 245 Fed. 54 (6th Cir. 1917).

[61] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[62] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

[63] 43 Stat. 1112-13 (1925), 46 U.S.C. §§ 781-99 (1964).

[64] 44 Stat. 1424-46 (1927), 33 U.S.C. §§ 901-50 (1964).

[65] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[66] 44 Stat. 1424-46 (1927), 33 U.S.C. §§ 901-50 (1964).

[67] 240 F Supp. 992, 1965 A.M.C. 1494 (D. Pa. 1965).

possibility of punitive damages under the Jones Act, the cases which have dealt with related problems seem to do so. The Jones Act provides that "in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . ."[68] Seamen are placed "on the same basis as railway employees under the Federal Employers' Liability Act."[69]

McCormick has stated that the Federal Employers' Liability Act denies a recovery of punitive damages,[70] and the following cases support that conclusion. In 1911 the Federal Employers' Liability Act was construed as limiting a recovery by the statutory beneficiaries of a deceased railroad employee to the "pecuniary injury or loss sustained by the beneficiaries . . . excluding all consideration of punitive damages. . . . ."[71]

A few cases have dealt with the nature of compensation under the Jones Act itself. These cases do not involve punitive damages specifically, but the conclusions which the courts reach have a bearing on the issue. It seems apparent that damages under the Jones Act are "compensatory"[72] and "limited to actual pecuniary loss."[73]

However, section 59 of the Federal Employers' Liability Act[74] provides that the deceased employee's own right of action survives for the benefit of certain beneficiaries. Section 59 has been interpreted to include damages for the decedent's pain and suffering before death.[75] While this section has not been taken to mean that the beneficiaries can recover punitive damages, some of the recoveries for pain and suffering would seem to approach that result.[76] The Jones Act provides this same relief for pain and suffering,[77] and the same use of pain and suffering awards might be made in cases involving deceased seamen.

Punitive Damages and the Death on the High Seas Act

The Death on the High Seas Act[78] creates a right of action in the personal representative on behalf of the spouse, parent, child or dependent relative of a person killed as a result of wrongful act, neglect, or default occuring on the high

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[68] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[69] PROSSER, TORTS § 82, at 561 (3d ed. 1964); see Panama R.R. v. Johnson, 264 U.S. 375, 1924 A.M.C. 551 (1924); Sabine Towing Co. v. Brennan, 85 F.2d 478 (5th Cir. 1936).

[70] MCCORMICK, DAMAGES 287 (1935).

[71] Cain v. Southern Ry., 199 Fed. 211 (C.C.E.D. Tenn. 1911).

[72] Petition of Southern S.S. Co., 135 F. Supp. 358, 363 (D. Del. 1955); see also Sabine Towing Co. v. Brennan, 85 F.2d 478 (5th Cir. 1936).

[73] Gerardo v. United States, 101 F. Supp. 383, 385 (N.D. Cal. 1951).

[74] 36 Stat. 291 (1910), 45 U.S.C. § 59 (1964).

[75] Great No. Ry. v. Capitol Trust Co., 242 U.S. 144 (1916).

[76] GILMORE & BLACK, ADMIRALTY 307 (1957). For example, one District Court awarded $40,000 for pain and suffering in an action under the Jones Act. Naylor v. Isthmian S.S. Co., 94 F. Supp. 422 (S.D.N.Y. 1950). This decision was reversed because of errors in the admission and exclusion of evidence. 187 F.2d 538 (2d Cir. 1951). However, the court did not discuss the excessiveness of this award. If awards of this size are permitted to stand, they may be used by the jury as a means of punishment.

[77] Cleveland Tankers v. Tierney, 169 F.2d 622, 1949 A.M.C. 151 (6th Cir. 1948).

[78] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

seas, against the vessel, person, or corporation which would have been liable if the person had not been killed. The Act specifically limits the recovery to a "just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought."[79] The wrongful death statutes of Illinois,[80] Maine[81] and New Jersey[82] are similarly worded and punitive damages have been rejected in those states.[83] In light of this limitation, it seems apparent that recovery under the Death on the High Seas Act is limited to actual monetary loss to the beneficiaries as a result of the death—an amount based on decedent's life expectancy, his probable earnings, and his contributions to the beneficiaries.[84]

Unlike the Federal Employers' Liability Act, the Death on the High Seas Act does not contain a provision expressly providing for survival of decedent's action and allowing, by implication, an additional recovery for pain and suffering before death. The narrow limits of the Death on the High Seas Act would seem to preclude an award of punitive damages.

Punitive Damages and State Wrongful Death Statutes

An action for wrongful death may fall into one of three categories. It may be an action for the death of a seaman against his employer in which case the Jones Act[85] applies. It may be an action arising more than three nautical miles from shore and the Death on the High Seas Act,[86] and in an action for the death of a seaman against his employer, the Jones Act[87] also applies. However, if the action arises in the territorial waters of a state, and does not involve an action for the death of a seaman against his employer, the state wrongful death acts may apply. It has been decided that the federal courts sitting in admiralty will apply the law of the state where death occurred.[88]

It is in this third category of cases that the admiralty court might be expected to award punitive damages. If the state in which the death occurred permits a recovery of punitive damages, the admiralty court would presumably also permit such a recovery. While many state wrongful death statutes do not provide for recovery of punitive damages, there are many which expressly or impliedly do. They fall into three distinct categories. The first type of statute is entirely punitive. That is, the entire award for wrongful death is based on culpability and is therefore viewed as punitive in nature. Massachusetts[89] and Alabama[90] have such statutes. The second type of statute expressly provides for an additional award of punitive damages to be added to the compensatory damages. The statutes of South

[79] 41 Stat. 537 (1920), 46 U.S.C. § 762 (1964).

[80] ILL. REV. STAT. ch. 70, § 2 (1963).

[81] ME. REV. STAT. ANN. tit. 18, § 2552 (1964).

[82] N.J. STAT. ANN. § 2A:31-5 (1952).

[83] Meehan v. Central R.R., 181 F Supp. 594 (S.D.N.Y. 1960); Conant v. Griffin, 48 Ill. 410 (1868); Oakes v. Maine Cent. R.R., 95 Me. 103, 49 Atl. 418 (1901).

[84] GILMORE & BLACK, ADMIRALTY 306 (1957).

[85] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[86] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

[87] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[88] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[89] MASS. ANN. LAWS ch. 229, § 6E (1958).

[90] ALA. CODE tit. 7, § 123 (1958); see McDonald v. The Barge 204, 194 F Supp. 383, 1961 A.M.C. 1205 (S.D. Ala. 1961).

Carolina[91] and Kentucky[92] are typical of this type. The third category embodies those states statutes which do not expressly provide for punitive damages but which have been interpreted by the state courts to impliedly provide for punitive damages. Typical are the statutes of Virginia[93] and Mississippi.[94]

A district court recently allowed a recovery of compensatory damages by the wife of a deceased seaman from her husband's employer under the Jones Act and in addition a recovery of punitive damages by the wife against the owner of a barge also involved in the accident under the Alabama Wrongful Death Act.[95] While this was not an admiralty court, it is likely that the same result would be reached in admiralty courts applying state wrongful death statutes allowing punitive damages.

Punitive Damages and State Survival Statutes

Under the general maritime law a cause of action for personal injuries resulting from a maritime tort does not survive the death of the injured party or the tortfeasor.[96] In order to remedy this situation, Congress passed the Jones Act[97] and the Death on the High Seas Act.[98] These acts create causes of action for wrongful death and, under the Jones Act, for the survival of certain other causes of action. However, neither of these acts allows a recovery of punitive damages. As a result, these statutes do not act to provide a recovery of punitive damages for personal injuries in the American admiralty if the injured party dies as a consequence of the tortious conduct. This limitation may be overcome in certain cases by the application of state survival statutes. While there are no cases which deal with the survival of a maritime claim for punitive damages, cases have been presented which may be applicable to such claims.

In 1941 the Supreme Court decided that if a cause of action exists under the general maritime law, the admiralty court may adopt a state survival statute to preserve the cause of action.[99] In 1964 the Court held that while a seaman's claim based on unseaworthiness does not survive under the general maritime law or the Jones Act, it may be preserved under the survival statute of the state in whose waters death occurs.[100]

If the general maritime law permits the recovery of punitive damages, there seems to be no reason why the admiralty courts should not perserve such a claim by adopting the state survival statute. In *O'Leary v. United States Lines Co.*,[101] the court argued that in determining whether a claim should be preserved under a state survival statute, the court must first establish that the claim existed under

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[91] S.C. CODE ANN. § 10-1954 (1962).

[92] KY. REV. STAT. § 411.130 (1960).

[93] VA. CODE ANN. § 8-636 (1950). See 46 VA. L. REV. 1036 (1960).

[94] MISS. CODE ANN. § 1453 (1964 Supp.). See also Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955).

[95] McDonald v. The Barge 204, 194 F. Supp. 383, 1961 A.M.C. 1205 (S.D. Ala. 1961).

[96] DUNLAP, COURTS OF ADMIRALTY 87 (1836).

[97] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[98] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

[99] Just v. Chambers, 312 U.S. 383, 1940 A.M.C. 1110 (1941).

[100] Gillespie v. United States Steel Corp., 379 U.S. 148, 1965 A.M.C. 1 (1964).

[101] 215 F.2d 708 (1st Cir. 1954).

the general maritime law, not state substantive law. The court pointed out the inconsistancy of holding that general maritime principles should be applied to torts if the injured party survives and state substantive law to establish tort liability if the party dies and his claim is preserved by state law. For instance, if a passenger is killed in the territorial waters of a state, the question is not whether the state substantive law would allow a recovery of punitive damages, but whether the general maritime law would allow punitive damages and is the state survival statute effective to perserve such a claim for punitive damages. There are several states which have statutory provisions for the survival of claims for punitive damages after the death of the injured party. While the question has not been settled in most states, the statutes of Texas[102] and Mississippi[103] have been interpreted as permitting the survival of claims for punitive damages.[104] The Nevada Survival Statute[105] expressly provides for the survival of these claims, and the courts of Florida have discussed but not decided this question.[106] The Georgia[107] statute expressly precludes a recovery against the representative of a deceased wrongdoer but is silent as to a recovery by the representative of the injured party

Two problems remain to be considered. First, does the Jones Act conflict with the application of state survival statutes? Second, does the Death on the High Seas Act conflict with the state survival statutes, or more simply, may these state survival statutes be applied to torts on the high seas?

The first problem deals with the conflict between the Jones Act and state survival statutes. In *Gillespie v. United States Steel Corp.*[108] the Court held that while the Jones Act is the exclusive remedy for the wrongful death of a seaman, it is not exclusive with respect to survival of actions. In other words, if the seaman had a cause of action under the general maritime law independant of statute, the claim may be preserved by state statute.[109] It would seem, then, that if the seaman was injured under circumstances which would entitle him to a recovery of punitive damages under the general maritime law, this claim might be preserved by applying the state survival statute. For example, if a seaman dies as the result of the intentional misconduct of his employer, the Jones Act does not preclude a recovery of punitive damages which may be warranted under the general maritime law and preserved by a state survival statute.

The second problem involves the application of state survival statutes to torts committed on the high seas. Several recent district court cases have held that state survival statutes may be applied to preserve claims arising on the high seas which would not survive under the Death on the High Seas Act[110] or the Jones

[102] TEX. REV. CIV STAT. ANN. art. 5525 (1958).

[103] MISS. CODE ANN. tit. 23, §§ 609-10 (1956).

[104] Wagner v. Gibbs, 80 Miss. 53, 31 So. 434 (1902); Houston-American Life Ins. Co. v. Tate, 358 S.W.2d 645 (Tex. Civ. App. 1962).

[105] NEV. REV. STAT. § 41.100 (1957).

[106] FLA. STAT. § 45.11 (1965). See Fowlkes v. Simmons, 101 So. 2d 375 (Fla. 1958).

[107] GEORGIA CODE ANN. § 3-504 (1962).

[108] 379 U.S. 148, 1965 A.M.C. 1 (1964); *accord,* Holland v. Steag, 143 F Supp. 203, 1965 A.M.C. 1843 (D. Mass. 1956).

[109] The Court applied this rule to preserve a claim based on unseaworthiness.

[110] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

Act.[111] In *Holland v. Steag, Inc.*,[112] the court held that an admiralty court may apply the state survival statute of the domicile of the tortfeasor to preserve a claim based on the general maritime law. This rule has been applied to preserve claims for pain and suffering[113] and to preserve a claim for all personal injuries,[114] neither of which would survive under the Death on the High Seas Act.

The decision in each of these cases is based on the conclusion that the Death on the High Seas Act is not exclusive as to survival of causes of action arising on the high seas. It may be, then, that if the injured party had a cause of action for punitive damages under the general maritime law, that cause of action may survive under the state survival statute of the domicile of the tortfeasor even though the cause of action accrued on the high seas.

Punitive Damages and Other Statutory Remedies

The Public Vessels Act[115] provides that a "libel in personam in admiralty may be brought against the United States,"[116] for damages caused by a public vessel of the United States, "and for compensation for towage and salvage services"[117] rendered to a public vessel of the United States. Similarly, the Suits in Admiralty Act[118] provides that in cases involving merchant vessels owned and operated by the United States, a recovery in personam may be had against the United States if a recovery could have been had in rem or in personam against a private owner. Punitive damages could not be recovered under these statutes since the only remedy given is against the United States. The United States is immune from suit unless Congress removes such immunity,[119] and statutes which waive immunity are to be strictly construed in favor of the sovereign.[120]

The Longshoremen's and Harbor Workers' Compensation Act[121] provides compensation for disability or death to injured maritime employees except government employees, and masters and crews of vessels. The compensation is limited by statute and is the exclusive remedy against the employer. It appears, therefore, that punitive damages could not be recovered under its provisions. The act does not preclude a recovery against third parties for torts[122] and presumably would not preclude a recovery of punitive damages in such action based on the general maritime law.

Conclusion

Although punitive damages may have been eliminated in the areas in which recovery is based on federal statute, the utility of punitive damages in other types of admiralty suits should not be overlooked.

111 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).
112 143 F Supp. 203, 1956 A.M.C. 1834 (D. Mass. 1956).
113 207 F Supp. 468, 1956 A.M.C. 2350 (S.D.N.Y. 1962).
114 United States v. The S.S. Washington, 172 F Supp. 905 (E.D.N.Y. 1959).
115 43 Stat. 112-13 (1925), 46 U.S.C. §§ 781-99 (1964).
116 43 Stat. 112 (1925), 46 U.S.C. § 781 (1964).
117 *Ibid.*
118 41 Stat. 525-28 (1920), 46 U.S.C. §§ 741-52 (1964).
119 Hill v. United States, 50 U.S. (9 How.) 385 (1850).
120 McMahon v. United States, 342 U.S. 25, 1951 A.M.C. 1913 (1951).
121 44 Stat. 1424-26 (1927), 33 U.S.C. §§ 901-50 (1964).
122 GILMORE & BLACK, ADMIRALTY 251 (1957).