The Law of Punitive Damages under the General Maritime Law Doctrine of Unseaworthiness: The Defense Perspective

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Jeffrey R. Bale

Mr. Bale has practiced law in Texas for over 33 years. During his years in practice, Mr. Bale has tried a significant number of cases to conclusion in both state and federal court, jury and non-jury. He has tried cases involving serious and catastrophic personal injury and death, premises liability, maritime cargo, business disputes, complex non-competition contract disputes, wrongful termination, insurance coverage disputes, fraud and deceptive trade practices, products liability, copyright infringement, and securities-related issues. Mr. Bale has also handled many maritime casualty cases, including incidents resulting in catastrophic collisions/allisions, well shut-in cases, cargo claims, maritime pollution and miscellaneous property damage matters from the initial investigation of the incident through conclusion. In addition, Mr. Bale has served as lead counsel in mass tort cases involving thousands of plaintiffs and in multidistrict antitrust class action litigation involving allegations of price fixing of lease oil royalty payments.

As items of special note, Mr. Bale was recently interviewed by the Forbes Business Network in connection with its program airing on American Airlines entitled, "Special Tribute: America's Best Lawyers." Significantly, Mr. Bale's co-authored article, Engerrand and Bale, *Seaman Status Reconsidered*, 24 South Texas Law Journal 431 (1983), was cited with approval by the Supreme Court of United States in rendering its decision in the case of *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991). Mr. Bale also served as Chair of the Admiralty Law Committee of the Defense Research Institute, a national defense organization based in Chicago, Illinois, from 2000-2002. Mr. Bale was recently selected to be listed in the *Best of the U.S.*, a non-paid directory of professionals in the United States. Mr. Bale has lectured at seminars on topics ranging from the Americans with Disabilities Act to handling the defense of occupational exposure cases. Finally, Mr. Bale has been accorded a peer-reviewed AV rating by Martindale-Hubbell Legal Directory, the highest rating available by that publication.

In addition to an active trial practice, Mr. Bale has also handled the appellate aspects of many cases. Mr. Bale was integrally involved in the appeal of *Guevara v. Maritime Overseas Corporation*, 59 F.3d 1496 (5th Cir. 1995), which abolished the availability of punitive damages in maintenance and cure cases within the Fifth Circuit. Mr. Bale also served as lead counsel in the case of *Maritime Overseas v. Waiters*, 923 S.W.2d 36 (Tex.App.--Houston [1st Dist.] 1995), *aff'd. as modified*, 917 S.W.2d 17 (Tex. 1996), which extended the *Guevara* punitive damage prohibition to maintenance and cure cases within the State of Texas.

In his practice, Mr. Bale represents the interests of offshore and onshore seismic companies, vessel owners and operators, offshore drilling contractors, stevedores, refineries, manufacturers and suppliers of products, marine terminals, marine underwriters, P&I clubs, and general liability underwriters.

Mr. Bale earned his Bachelor of Science undergraduate degree from the University of Texas at El Paso in 1977. He then attended South Texas College of Law in Houston, Texas, where he earned his Juris Doctorate in 1981. Mr. Bale is licensed to practice before the Supreme Court of the United States, the United States Courts of Appeals for the Fifth and Eleventh Circuits, the United States District Courts for the Southern and Eastern Districts of Texas, and all courts, trial and appellate, within the State of Texas. Mr. Bale is a member of the State Bar of Texas, the Houston and Fort Bend County Bar Associations, the Maritime Law Association of the United States, in which he holds Proctor status, the Defense Research Institute, the Southeastern Admiralty Law Institute and the Texas Association of Defense Counsel. He was born in 1954.

Lewis E. Henderson

Mr. Henderson has practiced law in Texas and Louisiana for over twenty-five years. In that time, Mr. Henderson has gained substantial experience in the defense of personal injury and wrongful death cases, especially as related to the maritime industry. In addition to his experience in the defense of mass tort litigation, he has been integrally involved in the defense of premises liability, products liability and toxic tort cases, insurance coverage matters, contract disputes and general insurance defense litigation.

Mr. Henderson has published legal articles in the Journal of Maritime Law and Commerce and the Tulane Law Review, including *The Wreck Act Duties to Mark and Remove,* Vol. 21, No. 3, JOURNAL OF MARITIME LAW AND COMMERCE (July, 1990), and has co-authored numerous papers presented at admiralty seminars, including *Prosecuting and Defending a Jones Act Case Including Experts - The Defense Perspective*, 1994 State Bar of Texas Admiralty and Maritime Seminar, League City, Texas, *Sailing in Occupied Waters: The Aftermath of Miles*, 1995 University of Texas School of Law 4th Annual Admiralty and Maritime Law Conference, Houston Texas, *Punitive Damages Including Maintenance and Cure*, 1996 State Bar of Texas Admiralty and Maritime Seminar, League City, Texas, *Damages Recoverable in Death Cases*, 1997 Fifteenth Tulane Admiralty Law Institute, New Orleans, Louisiana, 72 TULANE L. REV. 717 (1997), *Current Frontiers in Maritime Fatal Injury Litigation*, 2000 University of Texas School of Law 9th Annual Admiralty and Maritime Law Conference, Houston, Texas.

Mr. Henderson has an AV rating from Martindale-Hubbell Legal Directory. He earned a Bachelor of Business Administration/Petroleum Land Management undergraduate degree from The University of Oklahoma in 1974, a Juris Doctorate from the Loyola University School of Law (New Orleans) in 1982, and Masters of Law Degree in Admiralty from the Tulane University School of Law in 1987. Mr. Henderson is licensed to practice before the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, the United States District Courts for the Southern and Eastern Districts of Texas, the Eastern, Middle and Western Districts of Louisiana, and in all Texas and Louisiana state courts. Mr. Henderson is a member of the Texas and Louisiana State Bar Associations, the Bar Association of the Fifth Federal Circuit, the Houston and Fort Bend County Bar Associations, the Maritime Law Association of the United States, and the American Association of Professional Landmen.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (cont.)

Cases (cont.)

TABLE OF AUTHORITIES (cont.)

Cases (cont.)

TABLE OF AUTHORITIES (cont.)

Cases (cont.)

TABLE OF AUTHORITIES (cont.)

Cases (cont.)

Statutes, Rules and Codes

Other Authorities

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HISTORICAL DEVELOPMENT OF SEAMEN'S CAUSES OF ACTION AND REMEDIES

Historically, seamen have enjoyed special protection in admiralty courts because they are viewed "emphatically [as] the wards of the admiralty." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942) (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1923) (No. 6,047). This historical sentiment was based on the perceived unique and strenuous conditions surrounding a seaman's employment on a vessel. *See* Matthew H. Frederick, Note, Adrift in the Harbor: Ambiguous-Amphibious Controversies and Seaman's Access to Workers' Compensation Benefits, 81 Tex. L. Rev. 1671, 1675-76 (2003) ("[This] doctrine rests in part on the peculiar conditions of the seaman's employment, his lack of bargaining power, and a particular view of seaman as a class needing special protection."). Accordingly, in an attempt to protect their health and safety, courts of admiralty slowly developed two unique duties that the vessel owed to a seaman: the duty to provide maintenance and cure and the duty of seaworthiness. *The Osceola*, 189 U.S. 158, 175 (1903). A breach of either of these duties resulted in a cause of action by the seaman against the vessel. *Id.* However, seamen had no right under the general maritime law to recover damages for the negligence of the vessel's master or crew. *Id.*; *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

Then, in 1920, Congress passed the Jones Act, 46 U.S.C. § 30104, which for the first time gave seamen statutory protection from the negligence of their employers by allowing them to maintain an action for damages at law with the right to a jury trial. Although a seaman may sue anyone other than his or her employer for negligence under the general maritime law, the seaman's lawsuit against his or her employer for negligence is governed exclusively by the Jones Act. *Lindgren v. United States*, 281 U.S. 38 (1930). However, the Jones Act does not specifically address elements of damage. Instead, it provides the seaman with the rights and remedies afforded to railway employees pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. As a result, standards for the nature and measure of damages must be determined from cases dealing with both the Jones Act and the FELA.

Thus, with the passage of the Jones Act, Congress completed "the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.' " *Chandris, Inc. v. Latsis*, *supra*, 515 U.S. at 354 (citations omitted). In its *Chandris* opinion the Supreme Court quoted from its opinion in *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 354 (1991), in which it noted that "[t]raditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are

subjected.' "

Seamen claims under the Jones Act and the General Maritime Law. The "trilogy" of potential claims a seaman has against his employer include: **(1)** a Jones Act negligence claim, **(2)** a claim that the ship was unseaworthy, and **(3)** a claim for maintenance and cure. *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 163 (Tex. 2012), *citing Chandris, Inc. v. Latsis*, *supra*, 515 U.S. at 354. The unseaworthiness claim and the maintenance and cure claim arise under general maritime law, while the negligence claim is statutory. *Weeks Marine, supra* at 163. "Historically, conceptually, and functionally, the unseaworthiness and Jones Act tort actions are 'Siamese twins.' " *Id.* (citations omitted). Both compensate a seaman for injuries suffered. *Id.* "The much older maintenance and cure action does not derive from tort principles and is something like a first cousin to the other two." *Id.* It does not compensate for injuries but instead serves a curative function. *Id.*, *citing Johnston v. Tidewater Marine Serv.*, 116 F.3d 478, at *2 (5th Cir. 1997) (per curiam) ("A claim for unseaworthiness is compensatory in nature . . . while a claim for maintenance and cure is curative in nature."). Consistent with this historical backdrop, in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), the Supreme Court stated that, as it has repeatedly explained, "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures." *Id.* at 423; *see also Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 18 (1963); *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 138–139 (1928) (emphasizing that a seaman's action for maintenance and cure is "independent" and "cumulative" from other claims such as negligence, and that the maintenance and cure right is "in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act]").

However, as noted below, the distinction between claims arising under the Jones Act and those arising under the general maritime law, i.e., unseaworthiness, is important given the manner in which courts have treated the availability of punitive damages to injured seaman under each cause of action.

HISTORICAL DEVELOPMENT OF PUNITIVE DAMAGES UNDER THE GENERAL MARITIME LAW

Punitive or "exemplary" damages have long been a part of Anglo-American law, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991), and they "have long been an available remedy at common law for wanton, willful, or outrageous conduct," *Atlantic Sounding Co., Inc. v. Townsend*, *supra*, at 409. Indeed, in *Atlantic Sounding* the Court observed that "American courts have . . . permitted punitive damages awards in appropriate cases since at least 1784." *Id.* at 410. In that year punitive damages were awarded in *Genay v. Norris*, 1 S.C.L. 6, 6, 1784 WL 26 (S.C. Com. Pl. Gen. Sess. Jan. 1784), when the defendant poisoned a glass of wine and then gave it to the plaintiff to drink. The plaintiff drank the wine, grew very ill, and experienced the gut-wrenching effects for several months. The Court approved the award of "very exemplary damages" because the defendant's conduct represented "a very wanton outrage." *Id.*; *see also Coryell v. Colbaugh*, 1 N.J.L. 77, 77, 1791 WL 380 (1791) (the court awarded punitive damages because the defendant's conduct was "of the most atrocious and dishonorable nature"). Similarly, the Supreme Court awarded punitive damages in *Day v. Woodworth*, 54 U.S. 363, 363-364 (1851), where the

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