

CONFIDENTIAL BENCH MEMORANDUM:

Sunset Cruises, Inc. v. McGregor

The Sixteenth Annual Judge John R. Brown Admiralty Moot Court Competition — 2009

The Facts of the Case

Plaintiff-appellant Peter McGregor was a seaman employed by defendant-appellee Sunset Cruises, Inc. (Sunset) as a steward aboard Sunset's cruise ship *S.S. Golden Girl*. McGregor lost the vision in his left eye as a result of the captain's refusal to provide him with adequate medical care.

Shortly after the *Golden Girl* left Baltimore for a cruise to Bermuda, McGregor began experiencing a visual disturbance that seemed to originate in the bottom part of his left eye. The ship's doctor diagnosed the problem as a detached retina and told the ship's master, Captain Robert Strong, that McGregor needed to see an ophthalmologist on an emergency basis. He recommended that a pilot vessel or helicopter be summoned to transport McGregor to the nearest hospital.

Captain Strong rejected the doctor's recommendation and ordered McGregor to rest his eyes and await further medical treatment until the ship arrived at Bermuda two days later. That delay in treatment was the cause of McGregor's permanent loss of vision in his left eye.

The Prior Proceedings in the Case

McGregor, invoking admiralty jurisdiction under 28 U.S.C. § 1333(1), sued Sunset in the District of South Carolina. In Count I, seeking compensatory damages, he alleged that Captain Strong, acting in the course and scope of his employment, was negligent in rejecting the physician's recommendation. In Count II, seeking punitive damages, he alleged that Strong's conduct was reckless, callous, willful, and wanton.

Sunset moved to dismiss Count II under Fed. R. Civ. P. 12(b)(6), arguing that punitive damages were unavailable as a matter of law. The district court granted Sunset's motion on the ground that binding circuit precedent precludes holding an employer vicariously liable for punitive damages on the basis of an employee's actions absent the employer's complicity in the employee's objectionable conduct. The district court certified the decision for interlocutory appeal under 28 U.S.C. § 1292(b).

The Fourth Circuit reversed. The majority held that the circuit's prior vicarious liability decisions were not binding in a maritime case on the ground that they were federal common-law decisions of the pre-*Erie* era. Modern thinking holds employers liable in punitive damages for the acts of managerial agents. On remand, McGregor should be permitted to show that Captain Strong was a managerial agent. If McGregor carries that burden, then Sunset is liable in punitive damages (to the extent that Captain Strong's misconduct otherwise justified punitive damages).

The majority also rejected Sunset's argument under *Miles v. Apex Marine Corp.*¹ that a seaman is not entitled to punitive damages for a wrongful withholding of maintenance and cure. *Miles* did not address punitive damages, which have long been an available remedy in this context. Decisions to the contrary in other circuits are simply wrong.

Judge Solomon dissented on both issues. He argued that the circuit's prior vicarious liability decisions did indeed reflect the general maritime law and that the panel was thus bound to follow them. He also argued that the court should defer to the Fifth Circuit and other circuits that hold that a seaman is not entitled to punitive damages for a wrongful withholding of maintenance and cure.

Sunset petitioned for certiorari on the same two questions that had been decided below. This Court granted certiorari on both questions. No other issues are properly before the Court.

Vicarious Liability for Punitive Damages

I. Background:

This Court has addressed an employer's liability in punitive damages for the wrongful conduct of an employee several times. The leading maritime case is *The Amiable Nancy*,² which involved an armed privateer's plundering of a neutral vessel during the War of 1812. Speaking through Justice Story, this Court affirmed the ship-owner/employer's responsibility to pay compensatory damages to the owners of the neutral vessel but explained that the employer was not liable for punitive damages when the employer did not direct, countenance, or participate "in the slightest degree" in the wrong.³ The relevant statement is dictum and the case could undoubtedly be distinguished on its facts if this Court is not inclined to follow it. Justice Story's statement of the rule is nevertheless strong authority for Sunset's argument.

In *Lake Shore & M. S. Ry. Co. v. Prentice*,⁴ this Court followed *The Amiable Nancy* and held under (pre-*Erie*) federal common law that an injured passenger could not recover punitive damages from a railroad based on the misconduct of a conductor on a train. The case could easily be distinguished on its facts if this Court is not inclined to follow it, but once again the statement of the rule is strong authority for Sunset's argument.

¹ 498 U.S. 19 (1990).

² 16 U.S. 546 (1818).

³ *Id.* at 559.

⁴ 147 U.S. 101, 107-108 (1893).

More recently, this Court held in *Pacific Mutual Life Insurance Co. v. Haslip*⁵ that state law may award vicarious punitive damages without offending the Constitution's Due Process Clause. *Haslip* should be of limited relevance.⁶ The issue now before the Court is what general maritime law permits, not the outer limits of constitutional due process. But to the extent that language in *Haslip* can be read to suggest that the normal *respondeat superior* standard for tort liability is appropriate in the punitive damages context,⁷ it is strong authority for McGregor's argument.

In *Kolstad v. American Dental Association*,⁸ this Court rejected the possibility of vicarious punitive damages under Title VII of the Civil Rights Act. *Kolstad* should also be of limited relevance here since it turned on the interpretation of the governing statute. Some of the *Kolstad* policy arguments nevertheless support Sunset's position.

Most recently, this Court had an opportunity to address the present issue but was unable to do so. In *Exxon Shipping Co. v. Baker*,⁹ Exxon argued that it was not liable to pay punitive damages for the *Exxon Valdez* oil spill based solely on the wrongful conduct of the captain of the ship. This Court was equally divided on the issue (with Justice Alito not participating), thus leaving the question open in the current case.

In the lower courts, the decisions are divided. Under maritime law, most circuits follow the *Amiable Nancy* approach to hold that a shipowner is not liable in punitive damages for the on-board misconduct of the captain or crew (although McGregor can fairly try to distinguish at least some of these cases on their facts). The Ninth Circuit rejected the *Amiable Nancy* approach in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*,¹⁰ a case involving a land-based employee, to adopt the *Restatement's* "managerial agent" rule (under which an employer is liable for punitive damages based on the misconduct of a managerial agent). The First Circuit has adopted a middle ground; each side is likely to cite *C.E.H., Inc. v. F/V Seafarer*¹¹ in support of its position.

Under state law, the majority rule appears to be that the normal *respondeat superior* standard for tort liability also applies to the imposition of punitive damages, thus meaning that an employer can be liable in punitive damages for the misconduct of any employee acting in the scope of his or her employment—without any complicity whatsoever. (Sunset can fairly try to distinguish at least some of these cases on their facts). If

⁵ 499 U.S. 1, 15 (1991).

⁶ Good advocates will still note these less relevant Supreme Court decisions. This Court has shown time and time again that it cares more about its own less relevant decisions than about lower court decisions that are directly on point.

⁷ *Id.* at 14-15.

⁸ 527 U.S. 526, 539-546 (1999).

⁹ 128 S. Ct. 2605 (2008).

¹⁰ 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985).

¹¹ 70 F.3d 694, 705, 1996 AMC 467 (1st Cir. 1995).

this Court were to adopt that rule, the decision below would be affirmed on this issue but on different grounds (and no remand would be necessary).

The *Restatement (Second) of Torts* adopts a position between the *Amiable Nancy-Lake Shore* strict complicity approach and the *respondeat superior* standard followed in many states. Section 909 provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

The key provision for vicarious liability is § 909(c).¹² It recognizes that most employers today are corporations that can act only through their employees. Even *Sunset* must admit that at least some employees' actions should be imputed to the corporation. *Sunset* would presumably limit the class of such employees to those responsible for setting policy. Section 909(c) expands the class to those "employed in a managerial capacity." The *Restatement* does not provide much guidance to identifying managerial employees. In *Exxon Shipping v. Baker*, the jury was instructed that an "employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business."¹³

II. Petitioner (defendant *Sunset Cruises*) may argue:

A. The *Amiable Nancy* establishes the general maritime law rule that was accepted in the pre-Erie era as a matter of federal common law.

In *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), this Court expressly recognized the unfairness of holding a shipowner/employer vicariously liable in punitive damages for the wrongful conduct of the captain and crew. As Justice Story explained:

[T]his is a suit against the owners of the privateer They are innocent of the demerit of this transaction, having neither directed it, nor

¹² Subsections (a) and (d) apply when an employer makes the offending employee's act its own—either authorizing it (§ 909(a)) or ratifying or approving it (§ 909(d)). Subsection (b) holds the employer responsible for its own reckless behavior.

¹³ This Court need not decide whether Captain Strong qualifies as a managerial employee. That decision would be addressed on remand. *McGregor* presumably believes he can carry the burden. If the *Baker* test were to be adopted, that is probably correct.

countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the [plaintiffs], but they are not bound to the extent of vindictive [i.e., punitive] damages.

16 U.S. at 558-559. Although that statement was technically dictum in *The Amiable Nancy*, this Court subsequently applied the same rule in *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), declaring it to be a rule “of general jurisprudence,” *id.* at 106 (as opposed to state law), which would be applicable in maritime cases or any other context in which federal common law applies. The *Lake Shore* Court explained the rule and the rationale as follows:

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal [i.e., an employer], therefore, though of course liable to make compensation for injuries done by his agent [employee] within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent [employee]. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546.

147 U.S. at 107-108. The *Lake Shore* Court continued with a long quotation from *The Amiable Nancy*, explaining that the “rule thus laid down is not peculiar to courts of admiralty.” *Id.* at 108.

Although federal common law is less frequently applicable in the post-*Erie* world, there can be no doubt that federal common law still applies in maritime cases (where it is known as the “general maritime law”). Indeed, just last term this Court recognized in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2008 AMC 1521 (2008), that a version of federal common law controls the availability of punitive damages in maritime cases. The *Lake Shore* Court’s observation that the *Amiable Nancy* rule “is not peculiar to courts of admiralty” clearly signals that the rule does indeed apply in admiralty.

B. The majority of circuits to address the issue apply the Amiable Nancy-Lake Shore rule as a matter of general maritime law

Except for the Ninth Circuit, which rejected prior circuit precedent to adopt the *Restatement* rule in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985), every federal circuit to address the question requires some level of complicity on the employer’s part before imposing vicarious liability for punitive damages based on an employee’s egregious misconduct. Most courts of appeals follow the *Amiable Nancy-Lake Shore* rule. See *In re P&E Boat Rentals*, 872 F.2d 642, 652, 1989 AMC 2447 (5th Cir. 1989) (en banc); *United States Steel Corp. v.*

Fuhrman, 407 F.2d 1143, 1148, 1969 AMC 252 (6th Cir. 1969); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896).

Even the First Circuit, which has retreated to some extent from the *Amiable Nancy-Lake Shore* rule, requires “some level of culpability” on the part of the employer. See *C.E.H., Inc. v. F/V Seafarer*, 70 F.3d 694, 705, 1996 AMC 467 (1st Cir. 1995). McGregor has alleged none here.

C. Even if the Restatement rule were appropriate in land-based contexts, the distinctive needs and history of the maritime industry justifies a maritime rule based on The Amiable Nancy and Lake Shore

The courts and Congress have long recognized that the maritime industry is unique. Historically, shipowners had little control over ships’ captains, who were accordingly given unprecedented authority and independence. In section 4(2)(a) of the Carriage of Goods by Sea Act (COGSA), Congress recognized that it was inappropriate to hold a shipowner liable at all for the faults of a ship’s captain or crew at sea. *Sunset* does not deny its liability for Captain Strong’s negligence, but the analogy to COGSA § 4(2)(a) still illustrates why it should not be liable in punitive damages for the actions of a captain at sea when it neither directed, nor countenanced, nor participated to the slightest degree in any of his misconduct.

The maritime industry is also among the world’s most dangerous. Even with today’s improved safety standards, a shipowner puts its assets at risk in ways that few other businesses can even imagine. Both Congress and the courts have recognized that these risks, coupled with the need to encourage investment in such a vital industry, justify limiting a shipowner’s liability in ways that do not exist for land-based businesses. In the present context, *Sunset* does not seek to escape liability for compensatory damages — although maritime law often permits shipowners in other contexts to escape liability even for compensatory damages. But the principle of limited liability, which pervades all of maritime law, justifies the limits that this Court recognized almost two centuries ago in *The Amiable Nancy*.

The maritime industry also differs from land-based industries in its peripatetic nature. A vessel such as the *Golden Girl* calls at ports in several dozen different jurisdictions every year. Unlike a purely local business, which can adjust its conduct to comply with whatever the rules of that locality may require, a vessel faces different rules in every port. To the extent that those rules can be uniform, the maritime industry operates more efficiently. This explains the need to create a uniform maritime rule to apply in this case, without regard to the countless variations in state law. For maximum efficiency, the rule should be uniform not only within the United States but internationally, as well. See, e.g., *United States v. Locke*, 529 U.S. 89 (2000). In this very case, for example, the *Golden Girl* was on an international voyage. Because most other nations do not recognize punitive damages at all, see *Exxon Shipping Co. v. Baker*, 128 S. Ct. at

2623-24, this Court should limit the availability of punitive damages to the extent possible in the maritime industry.

D. The dictates of public policy support the Amiable Nancy-Lake Shore rule

In determining the appropriate rule for maritime law, this Court should recall the most basic principles of punitive damages. They are not part of a plaintiff's compensatory damages. A plaintiff accordingly has no entitlement to recover punitive damages. They exist, as the name implies, to be "punitive," to punish the defendant for egregious behavior. Like other forms of punishment under criminal law, they also deter others from engaging in the sort of behavior that justifies an award of punitive damages.

To be effective, however, punitive damages must punish and deter the right person. If punitive damages punish someone who is not guilty of any misconduct, they will not accomplish their stated purpose. They instead resemble the punishment imposed on the whipping boy in Mark Twain's *The Prince and the Pauper*. Similarly, unless they punish the person guilty of misconduct they will not deter the person who might be tempted to commit similar misconduct.

The *Amiable Nancy-Lake Shore* rule ensures that punitive damages do not punish the wrong person. If someone does not direct the relevant misconduct, or countenance it, or participate in it in the slightest degree, that person has done nothing to justify punishment. It may be logical for that person to pay compensatory damages because society's interest in ensuring that the innocent victim of the misconduct is fully compensated outweighs any fairness concerns. But for punitive damages, compensation has nothing to do with the analysis. The entire focus should be on the defendant who has, by definition, done nothing wrong whenever the *Amiable Nancy-Lake Shore* rule applies.

III. Respondent (plaintiff Peter McGregor) may argue:

A. The Amiable Nancy and Lake Shore are distinguishable on multiple grounds.

Sunset's strongest argument depends on this Court's decision in *The Amiable Nancy*, 16 U.S. 546 (1818), but that case is distinguishable from the present for many reasons. Most obviously, the wrongdoer in *The Amiable Nancy* was not a managerial agent as Captain Strong was here. The privateer's captain did not lead the boarding party that discovered that the *Amiable Nancy* was a neutral vessel (but nevertheless plundered her). The guilty actor was only a lieutenant. *Id.* at 547.

Moreover, Justice Story's statements about punitive damages are all dicta. The district court did not award punitive damages, and the Court's opinion explicitly declared that "the only inquiry will be, whether any of the items allowed by the district court were improperly rejected by the circuit court." *Id.* at 559. The issue of punitive damages was not properly before the Court.

Even if the *Amiable Nancy* Court had announced any binding rule on punitive damages, that rule would be limited to the (now irrelevant) privateering context. That limit is plain from the Court's rationale for its announcement:

While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

16 U.S. at 559.

Lake Shore is even more readily distinguishable. Involving, as it did, a railroad, it was not even a maritime case. And the abusive employee was not a managerial employee by any stretch of the imagination. He was a conductor on a train. Indeed, the decision may have been wrong even by the standards of its own time. This Court has explicitly recognized that the *Lake Shore* “Court may have departed from the trend of late 19th century decisions.” *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982).

B. This Court should follow the lead of the majority of states and hold that the normal respondeat superior standard for tort liability also applies to the imposition of punitive damages.

In the absence of an established rule of general maritime law, this Court should follow the lead of the majority of states and hold that the normal *respondeat superior* standard for tort liability also applies to the imposition of punitive damages. “A majority of courts . . . have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification.” *American Society of Mechanical Engineers*, 456 U.S. at 575 n.14.

In formulating the general maritime law, this Court regularly draws on the experience of state law. *See, e.g., Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-839 (1996); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-865 (1986).

It also makes sense to follow state common law to retain as much uniformity as possible between state law and general maritime law. Under the so-called “saving to suitors” clause, 28 U.S.C. § 1333(1), state courts are often called upon to resolve maritime tort cases. To the extent that the two bodies of law are consistent, this can be done more efficiently.

C. In the alternative, this Court should follow the Restatement § 909(c) standard and hold that an employer is liable in punitive damages for the misconduct of those employed in a managerial capacity who act in the scope of their employment.

This Court has often looked to the *Restatements* (particularly the *Restatement of Torts*) as a source of maritime law. See, e.g., *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 132, 1997 AMC 2288, 2295 (1997) (citing *Restatement (Second) of Torts* § 924, comment d (1977)); *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 879, 1997 AMC 2113, 2116 (1997) (*Restatement (Second) of Torts* § 402A (1965); *Restatement (Third) of Torts (Products Liability)* § 6, comment d (proposed final draft, preliminary version, Oct. 18, 1996)); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208-09, 1994 AMC 1521, 1525 (1994) (*Restatement (Second) of Torts* § 886A (1977)). This Court should similarly adopt the § 909(c) standard here.

D. There is no reason to distinguish members of a ship's crew from land-based employees for purposes of holding an employer liable for punitive damages.

Even if it might have been justifiable at one time to excuse shipowners from normal liability for the actions of their crew while the ship was at sea, *cf.* COGSA § 4(2)(a), that time has long since passed. A shipowner no longer sends a ship to sea with no chance for communication until the end of the voyage. Today a ship's captain is in regular contact with shore-based management through a wide range of technologies that permit instantaneous voice, text, visual, and fax communication (not to mention shore-monitoring of a ship's instruments). Management can exercise as much control over the captain's conduct at sea as over any employee on land. *Cf.* Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983) (describing the situation over 25 years ago). In today's world, a ship captain's role is roughly akin to that of a plant manager.

A ship's captain admittedly cannot seek guidance from shore-based management for every navigational decision, particularly during the height of an emergency. But here Captain Strong had ample opportunity to seek whatever guidance might have assisted him in making his decision about how to respond to McGregor's detached retina. If Captain Strong distrusted the medical advice that he received from his own ship's doctor, he could easily have consulted corporate headquarters.

Even the maritime law's historic reliance on limited liability is essentially irrelevant today. In the middle of the 19th century, a shipowner might need the protection of the Limitation Act to be able to incur the risks involved in sending a ship to sea. In today's world, a shipowner protects itself from undue risk by purchasing insurance in a highly sophisticated market that has developed to meet practically every need imaginable.

E. The dictates of public policy support the normal respondeat superior standard or the Restatement rule

Although punitive damages are rarely awarded, they serve an important purpose when truly egregious conduct occurs. More importantly, even when punitive damages are not awarded, their threat deters egregious conduct that might otherwise have occurred. The need and rationale for that deterrence is every bit as strong in the maritime context as it is in any other context.

The unusual dangers of the maritime industry do not justify a departure from punitive damages. On the contrary, the existence of such a dangerous environment makes it all the more important that the law encourage safe practices that will promote greater safety for workers such as McGregor. If future shipowners know that they are facing the risk of punitive damages, they will take greater care to ensure that their captains provide the health care that their employees require in such a dangerous environment.

The Availability of Punitive Damages in Seamen's Actions

I. Background:

The Constitution authorizes both Congress and the federal courts to create federal maritime law. Article I, § 8 cl. 18; Article III, § 2. When there is no Act of Congress directly controlling a maritime matter, a federal court will decide it “in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”¹⁴ No federal statute directly addresses seamen’s access to punitive damages.

In the admiralty jurisprudence of the 19th century, the lower courts generally agreed that seamen’s employers could be mulcted in punitive damages for seriously blameworthy violations of seamen’s rights. Professor David Robertson exhaustively surveys the cases.¹⁵ There were no directly relevant Supreme Court cases.

*The Osceola*¹⁶ held that seamen hurt at work are entitled to maintenance (room and board) and cure (medical care) from their employers and in addition could sue in tort for vessels’ unseaworthiness, but that they had no action against their employers for negligence. In 1920 Congress enacted the Jones Act¹⁷ to partially overrule *The Osceola* by granting seamen a negligence action against their employers. The Jones Act thus

¹⁴ *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

¹⁵ David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 86-116 (1997).

¹⁶ 189 U.S. 158, 175 (1903).

¹⁷ 46 U.S.C. § 30104.

“complet[ed] the trilogy of heightened legal protections . . . that seamen receive because of their exposure to the ‘perils of the sea.’”¹⁸ It is a truism that the Jones Act was enacted as “remedial [legislation] for the benefit and protection of seamen. . . . Its purpose was to enlarge that protection, not to narrow it.”¹⁹

Neither *The Osceola* nor the Jones Act says anything about punitive damages. Presumptively, though, the truism that the Act was not intended to take away any of the pre-existing seamen’s rights would have carried the 19th century view—that seamen’s employers were exposed to punitive damages in cases of serious wrongdoing—forward in the post-Jones Act jurisprudence. This seems to have been the lower courts’ assumption.²⁰

That seamen can be entitled to punitive damages from their employers was at least arguably the Supreme Court’s assumption in *Vaughan v. Atkinson*,²¹ in which the employer’s failure to provide maintenance to a sick seaman was “callous, . . . recalcitrant[,]. . . willful and persistent.” The seaman did not ask for punitive damages, but the Court vigorously emphasized its disapproval of the employer’s conduct and awarded the seaman the attorneys’ fees he sought. Justices Stewart and Harlan—dissenting on another point—said that the proper doctrinal justification for the fee award was as “exemplary damages in accord with traditional concepts of the law of damages.”²² (In this context “exemplary” is a synonym for “punitive.”) Thereafter a number of courts relied on *Vaughan* as authority for awarding punitive damages to seamen whose employers flouted the maintenance-and-cure obligation.²³

Meanwhile, some lower courts came to the view that punitive damages are *not* available in Jones Act negligence cases.²⁴ The true basis for this line of cases is judicial dislike for punitive damages. The purported doctrinal basis is the following four-step course of reasoning (with the bold type identifying the propositions that are up for grabs in the present case):

¹⁸ *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1994).

¹⁹ *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936).

²⁰ See, e.g., *In re Merry Shipping Co.*, 650 F.2d 622 (5th Cir. 1981); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1145-1149 (6th Cir. 1969).

²¹ 369 U.S. 527, 530-531 (1962).

²² *Id.* at 540.

²³ *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), cert. granted, 129 S. Ct. 490 (Nov. 3, 2008) (No. 08-214); *Hines v. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1987); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Weason v. Harville*, 706 P.2d 306 (Alaska 1985). Cf. also *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (2d Cir. 1978) (punitive damages limited to attorneys’ fees).

²⁴ See, e.g., *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984).

- (1) The Jones Act grants seamen the negligence cause of action by incorporating the Federal Employers' Liability Act (FELA).²⁵ This means that decisions addressing the FELA remedies are generally applicable in Jones Act cases.
- (2) In a line of pre-Jones Act cases stemming from *Michigan Central R. Co. v. Vreeland*,²⁶ it was established that in wrongful death actions under FELA, loss-of-society damages could not be recovered because such damages are not "pecuniary."
- (3) When Congress enacted the Jones Act in 1920, it was presumably aware of the *Vreeland* gloss on FELA and hence must have meant for loss-of-society damages to be unavailable in Jones Act wrongful death actions.**
- (4) Punitive damages, like loss of society damages, are not "pecuniary." Ergo they are not available in FELA or Jones Act cases.**

Then came *Miles v. Apex Marine Corp.*,²⁷ which held that loss-of-society damages are unavailable in maritime common-law wrongful death actions based on unseaworthiness. *Miles* did not address punitive damages, and it did not address seamen's maintenance-and-cure actions. But its reasoning includes a potent argument against punitive damages in maintenance-and-cure cases: If (as *Miles* may be read to hold) the unavailability of loss-of-society damages in Jones Act cases entails their unavailability in seamen's maritime common-law actions, why shouldn't the same be true of punitive damages?

In the wake of *Miles*, several courts have indeed seized upon that decision in order to hold that seamen may not seek punitive damages in maritime common-law actions based on unseaworthiness.²⁸ A number of others have further extended *Miles* to mean that seamen may not seek punitive damages in maritime common law actions for maintenance and cure.²⁹ The most elaborately reasoned of these cases is *Guevara v. Maritime Overseas Corp.*³⁰ The core doctrinal reasoning in all of these cases was essentially the same; the courts added a fifth step to the four-step course of reasoning set forth above:

²⁵ 45 U.S.C. §§ 51-60.

²⁶ 227 U.S. 59, 69 (1913).

²⁷ 498 U.S. 19 (1990).

²⁸ See, e.g., *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir., 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993).

²⁹ *Kopacz v. Delaware River & Bay Authority*, 248 Fed. Appx. 319 (3d Cir. 2007); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995); *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996).

³⁰ 59 F.3d 1496 (5th Cir. 1995) (en banc).

(5) If seamen cannot seek punitive damages in Jones Act cases, they cannot seek punitive damages in maritime common-law actions such as maintenance and cure.

The final piece of the puzzle is this Court's decision last term in *Exxon Shipping v. Baker*,³¹ upholding a punitive damages award to fishermen whose livelihoods were damaged by the supertanker *Exxon Valdez*'s spillage of oil off the coast of Alaska in 1989. The Court was unanimous (8-0, Justice Alito not participating) that federal maritime common law supported an award. (Five Justices held that the lower courts' punitive award of \$2.5 billion had to be reduced to \$507.5 million; three argued that the \$2.5 billion award should have been left standing.)

The arguments in this case should center on the legitimacy of the propositions in bold type above (numbers (3), (4), and (5)) and on the meaning and proper implications of *Baker*, *Miles*, and *Vaughan*.

II. Petitioner (defendant Sunset Cruises) may argue:

A. Baker is not on point.

1. Exxon conceded that federal maritime law sometimes allows the recovery of punitive damages. See 128 S. Ct. at 2619: "Other than its [Clean Water Act] preemption argument, [Exxon] does not offer a legal ground for concluding that maritime law should never award punitive damages. . . ." Accordingly, the Court did not address the matter.

2. In *Baker*, the plaintiffs were "commercial fishermen, Native Alaskans, and landowners," 128 S. Ct. at 2613, suing for losses arising out of the oil spill's damage to Prince William Sound. Thus *Baker* was essentially a property damage case. This is a highly significant fact, as the First Circuit's jurisprudence illustrates. In that circuit, punitive damages are recoverable in maritime property-damage cases but not in maritime personal injury cases. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701-702 (1st Cir. 1995); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994). That distinction makes sense: The problem of overblown jury awards is much less significant in the property-damage context than in personal injury matters, where jury sympathies are more easily inflamed.

B. Miles is dispositive.

1. *Miles* teaches that any category of damages that is precluded in Jones Act actions is also precluded in closely related maritime common-law actions:

The Jones Act applies when a seaman has been [injured or] killed as a result of negligence, and it limits recovery to pecuniary loss. The gen-

³¹ *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

eral maritime claim^[32] here alleges that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.”

498 U.S. at 32-33.

2. Punitive damages are precluded in Jones Act actions. *Guevara*, 59 F.3d at 1506; *Horsley*, 15 F.3d at 203; *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Miller*, 989 F.2d at 1457; *Evich v. M/V Capella*, 819 F.2d 256, 258 (9th Cir. 1987); *Kopczynski*, 742 F.2d at 560-561; *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993).

3. Maintenance-and-cure actions are closely related to Jones Act actions; they are part of the “trilogy” of seamen’s remedies. *Chandris*, 515 U.S. at 354. Therefore, the holding in *Miles* dictates that the decision below must be reversed.

C. Except for the decision below and the Eleventh Circuit’s decision in Townsend, every court of appeals to address the matter has concluded that Miles precludes punitive damages in maintenance-and-cure cases.

The overwhelming majority of circuit court decisions conclude that *Miles* precludes punitive damages in maintenance-and-cure cases. *See, e.g., Kopacz v. Delaware River and Bay Authority*, 248 Fed. Appx. 319 (3d Cir. 2007); *Guevara*, 59 F.3d 1496 (5th Cir. 1995); *Glynn*, 57 F.3d 1495 (9th Cir. 1995).

Even the Eleventh Circuit’s decision in *Townsend* seems to accept that *Miles* points in the direction of precluding punitive damages in maintenance-and-cure cases, albeit not so strongly as to overcome pre-*Miles* circuit precedent. *See also Stone*, 918 P.2d 551 (Alaska 1996); *Maritime Overseas*, 917 S.W.2d 17 (Tex. 1996).

D. Vaughan is not on point.

It was the *dissenters* in *Vaughan*, not the Court, who suggested that punitive damages might be awarded in maintenance-and-cure cases. *Miles* makes clear that the dissenters were wrong. The en banc Fifth Circuit in *Guevara*, 59 F.3d at 1500-1503,

³² “General maritime law,” *Miles*, 498 U.S. at 21, is a synonym for “maritime common law,” *Baker*, 18 S. Ct. at 2616.

thoroughly explains why *Vaughan* provides no support for punitive damages in maintenance-and-cure cases.

E. Guevara, in which the 16-member Fifth Circuit was unanimous in holding that seamen cannot seek punitive damages in maintenance-and-cure cases, is a fine blueprint.

Because of its coverage of America's main offshore oil-and-gas operations and of important rivers and inland waterways, the Fifth Circuit has more experience with seamen's injury cases than any other court. Its *Guevara* opinion was scholarly, well-reasoned, and thorough, and the court was unanimous. *Guevara* is therefore entitled to this Court's careful attention and respect.

F. Policy arguments.

1. Punitive damages are widely disapproved and are not recognized in most of the world. See *Baker*, 128 S. Ct. at 2623-24.

2. If this Court announces that seamen can seek punitive damages, there will be a flood of foreign-seamen's litigation in this country.

3. As the courts in *Guevara* and *Glynn* recognized, awarding attorneys' fees against recalcitrant employers is a completely adequate penalty. No good purpose could be served by piling on additional punishment.

III. Respondent (plaintiff Peter McGregor) may argue:

A. Baker is dispositive.

1. The *Baker* Court held that punitive damages are recoverable under federal maritime common law. It was unanimous (8-0) on the point. Three Justices thought the plaintiffs should get \$2.5 billion in punitive damages; the majority cut the award to \$507.5 million. So there are at least 507,500,000 reasons for concluding that federal maritime law allows punitive damages, at least in some contexts.

2. The *Baker* holding necessarily implies that seamen can seek punitive damages. Many of the *Baker* plaintiffs were commercial fishermen claiming that the destruction of Prince William Sound impaired or destroyed their livelihood. As the *Baker* Court explained, fisherman can sue for loss of livelihood only because of their resemblance to seamen, "the favorites of the admiralty." *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974). *Cf.* 128 S. Ct. at 2630 n.21 (citing *Oppen* as the basis for the fishermen's cause of action).

3. If seamen can ever seek punitive damages, they must be able to do so when employers dishonor the maintenance-and-cure obligation. Seamen's employers' responsibility to sick and hurt seamen for maintenance and cure is the oldest and most fundamental of the seamen's rights. *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665, 667 (1943); *Harden v. Gordon*, 11 F.Cas. 480, 482-483 (C.C.D. Me. 1923) (No. 6,047) (Justice Story, sitting on circuit). If punitive damages are ever appropriate in seamen's cases, it necessarily follows that they are appropriate in the maintenance-and-cure context. See *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997); Robertson, *supra* note 15, at 163.

B. Vaughan supports punitive damages in maintenance-and-cure cases.

When Clifford Vaughan fell ill with tuberculosis, his employer's refusal to provide maintenance was "callous, . . . recalcitrant, . . . willful and persistent." 369 U.S. at 530-531. As a result, Vaughan, sick as he was, had to go to work as a taxi driver. When he brought suit, the district court held that he was entitled only to the unpaid maintenance—no damages and no attorneys' fees—and further that the employer was entitled to a credit for Vaughan's taxicab earnings. The Fourth Circuit affirmed. Reversing, this Court held that the credit was inappropriate and that attorneys' fees should have been awarded. Justices Stewart and Harlan dissented on the credit point. On the attorneys' fees issue, Justices Stewart and Harlan indicated that the Court had probably reached the right result, but that the attorneys' fees award needed a firmer doctrinal foundation than the majority had provided.³³ They said that the proper doctrinal packaging was as "exemplary damages in accord with traditional concepts of the law of damages." 369 U.S. at 540.

The *Vaughan* majority expressed no disagreement with Justice Stewart's and Justice Harlan's views on the fee-award point. Indeed, the majority opinion bristles with indignation on behalf of the mistreated seaman, and it seems evident that the only reason the majority did not award punitive damages was that Vaughan had not sought them. Accordingly, many lower courts interpreted *Vaughan* as supporting punitive damages against callous and recalcitrant employers in maintenance-and-cure cases. See, e.g., *Robinson*, 477 F.2d at 1051. So did the leading treatise. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 313 (2d ed. 1975).

³³ The majority's explanation of the doctrinal basis for the fee award is analyzed in David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507, 552-553 (1996).

C. This Court has made clear that the Jones Act did not take away any pre-existing maintenance-and-cure rights and remedies. In the pre-Jones Act jurisprudence, punitive damages for withholding maintenance and cure was a well-accepted remedy.

In *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928), this Court held that the Jones Act “was not intended to restrict in any way the long-established right of a seaman to maintenance, cure, and wages.” In the pre-Jones Act jurisprudence, punitive damages was a well-accepted remedy in maintenance-and-cure cases. Seamen were awarded punitive damages against employers who dishonored the maintenance-and-cure obligation in *The Rolph*, 293 F.269, 272 (N.D. Cal. 1923), *aff’d*, 299 F. 52 (9th Cir. 1924); *Unica v. United States*, 287 F. 177, 180 (S.D. Ala. 1923); *The Margharita*, 140 F. 824, 828 (S.D. Ga.), *rev’d on other grounds*, 140 F. 820 (5th Cir. 1905); *The Troop*, 118 F. 769, 772 (D. Wash. 1902), *aff’d*, 128 F. 856 (9th Cir. 1904); *The City of Carlisle*, 39 F. 807, 817 (D. Ore. 1889); *Tomlinson v. Hewett*, 24 F.Cas. 29, 32 (D. Cal. 1872) (No. 14,087). Dicta in many other cases confirmed the availability of punitive damages in maintenance-and-cure cases. See Robertson, *supra* note 15, at 86-116.

D. Baker’s analysis of statutory preemption refutes petitioner’s interpretation of Miles.

Petitioners insist that *Miles* means the Jones Act preempts seamen’s right to seek punitive damages in maintenance-and-cure cases. In *Baker*, this Court rejected Exxon’s argument that the Clean Water Act preempted the fishermen’s punitive damages remedy. The *Baker* Court’s reasoning, 128 S. Ct. at 2619, is equally applicable here. The linchpin is that if the basic right to maintenance and cure has not been preempted—and petitioners must concede that it has not—then the remedies attaching to that right have likewise not been preempted.

E. Policy arguments.

1. *Miles* cites the work of Richard Posner as presenting “strong policy arguments” for allowing recovery of lost future income in survival actions. 498 U.S. at 36-37. Posner also presents strong policy arguments for punitive damages in cases of serious wrongdoing. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 48, 160-163, 184-185, 302-307 (1985).

2. In the maintenance-and-cure context, the absence of punitive damages would have two undesirable consequences: It would encourage unscrupulous employers to take advantage of unrepresented or incompetently represented seamen. And it would mean that a seaman with a pure maintenance-and-cure claim unaccompanied by a related Jones Act or unseaworthiness claim would have difficulty finding a competent lawyer. Fee awards are keyed to “the amount involved and the results obtained,” *Glynn*, 57 F.3d at 1501 n.8, and will therefore generally be too low to attract first-class lawyers to the seaman’s side.

F. Other arguments that respondent might make:

1. If *Miles* was even a blemish on the availability of punitive damages, someone in *Baker* would have said so. No one did.

2. *Miles* does not rule out all “non-pecuniary” damages for seamen. The *Miles* Court affirmed a \$140,000 award for the deceased seaman’s pain and suffering. 498 U.S. at 33.

3. Punitive damages are not “non-pecuniary.” BLACK’S LAW DICTIONARY (8th ed. 2004) defines “nonpecuniary damages” as “damages that cannot be measured in money.” *Baker* says that punitive damages are awarded as “measured retribution.” 128 S. Ct. at 2633. This is an essentially meaningless semantic argument anyway. See Robertson, *supra* note 15, at 80-83, 164-165.

4. Petitioner’s interpretation of *Miles* is inconsistent with all of this Court’s jurisprudence treating congressional preemption of federal common law. See, e.g., *Isbrandtson Co. v. Johnson*, 343 U.S. 779, 783 (1952).

5. Inasmuch as seamen in pre-Jones Act cases were entitled to seek punitive damages for their employers’ violations of maritime tort law, see Robertson, *supra* note 15, at 86-116, they should be able to do so in Jones Act cases. Remember that the Act’s “purpose was to enlarge [seamen’s] protection[s], not to narrow [them].” *The Arizona*, 298 U.S. at 123.

6. The contention that Jones Act plaintiffs cannot seek punitive damages is often rested on the assertion that FELA plaintiffs cannot. This, too, is wrong. See the thorough and careful opinion in *Kozar v. Chesapeake and Ohio Ry. Co.*, 320 F.Supp. 335 (W.D. Mich. 1970). *Kozar* was reversed by the Sixth Circuit, 440 F.2d 1238 (6th Cir. 1971). The Sixth Circuit’s opinion is extremely implausible. It sidesteps FELA’s legislative history by claiming that punitive damages is not a “remedy,” 440 F.2d at 1240, and it tortures the *Vreeland* line of cases (addressing loss-of-society damages in wrongful death cases) to mean that “damages recoverable under [FELA] are compensatory only,” *id.* at 1241.

7. Regrettably, *Guevara* was poorly reasoned and wrongly decided. For a detailed critique of *Guevara*, see David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293 (2000).