LEGGE FARROW

ADMIRALTY AND MARITIME MATTERS

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UNFORESEEN CONSEQUENCES OF *TOWNSEND*: SEAMEN MAY RECOVER PUNITIVE DAMAGES ON UNSEAWORTHINESS CLAIMS IN THE NINTH CIRCUIT

The District Court of Hawaii recently denied a defendant's attempt to strike a Jones Act seaman's claim for punitive damages brought pursuant to the plaintiff's unseaworthiness cause of action. *Wagner v. Kona Blue Water Farms, LLC*, 2010 AMC 2469 (D. Hawaii Sept. 13, 2010). This ruling underscores the confusion lingering from the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*[1] regarding the availability of punitive damages in seamen's personal injury suits. More importantly, *Wagner* highlights the increased exposure ship owners now face vis-à-vis punitive damages.

Factual Background

Michael Wagner was a commercial diver who brought a four-count complaint against his employer alleging (1) negligence under the Jones Act; (2) a general maritime claim for maintenance and cure; (3) a general maritime claim for unseaworthiness; and (4) defendant's negligence as vessel owner. Although he initially plead for the recovery of punitive damages on all four claims, the district court only considered the availability of punitive damages on the Jones Act claim (2010 AMC 2455) and the unseaworthiness claim (2010 AMC 2469). The court determined that punitive damages were not available under the Jones Act, but were potentially available under the unseaworthiness claim.

Punitive Damages Possibly Recoverable in Seamen's Unseaworthiness Suits

For nearly twenty years, courts have precluded seamen from recovering punitive damages on unseaworthiness claims because punitive damages are not recoverable under the Jones Act.[2] This punitive damages bar stems from *Miles v. Apex Marine Corp.*,[3] where the Supreme Court held that a seaman's survivor could not recover loss of society or lost future earnings on an unseaworthiness claim when those same non-pecuniary damages were unavailable under the Jones Act. Although *Miles* dealt specifically with the general maritime law wrongful death cause of action, which did not

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[1] 129 S.Ct. 2561 (2009); *see also* Legge Farrow Maritime Newsletter of June 2009, available at www.leggefarrow.com.

[2] *See, e.g.*, *Guevara v. Mar. Overseas Corp.*, 34 F.3d 1279, 1284 (5th Cir. 1994); *Horsely v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993).

[3] 498 U.S. 19, 37 (1990).

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exist until 1970,[4] the Supreme Court spoke in broad terms about the need for uniform remedies in seamen's personal injury suits. Put simply, recovery should not turn on the fortuity of where an injury or death occurs; whether a seaman is harmed at berth or at sea, recovery should be the same.

Apparently, the District Court of Hawaii found the uniformity principle's logic unpersuasive in light of *Townsend*. The *Wagner* court limited *Miles* to its specific holding and determined that *Miles* does not address damages generally recoverable on unseaworthiness claims; rather, *Miles* only discusses damages recoverable pursuant to allegations of unseaworthiness brought in conjunction with a *Moragne* general maritime law wrongful death claim. Because the Ninth Circuit recognized the recoverability of punitive damages on unseaworthiness claims before *Miles*,[5] the district court denied the defendant's motion to dismiss. Ship owners should take note. *Wagner*, at a minimum, reflects a shift in judicial thinking where courts are apt to value a plaintiff's right to plead punitive damages greater than a uniform remedial scheme in seamen's personal injury suits.

While vessel owners are concerned over this trend, the shift also encourages unprincipled and disparate treatment of American seamen. Allowing a seaman who suffers a non-fatal injury as the result of an unseaworthy condition to recover punitive damages while excluding the family of a seaman killed by the same condition from recovering punitive damages is difficult to reconcile. Congress has statutorily limited the recoverable damages in personal injury suits brought under the Jones Act and for deaths occurring on the high seas. Only by applying these congressional limits uniformly, can admiralty courts ensure that seamen's personal injury suits are resolved in an equitable manner.

Punitive Damages under the Jones Act Remains an "Open" Question

Although the *Wagner* court found for the employer on this issue, the recoverability of punitive damages on a Jones Act claim will continue to be a reoccurring point of contention in seamen's personal injury lawsuits. As the *Wagner* court emphasized, "[n]otably, *Townsend* leaves open the question of whether punitive damages may be recovered in claims brought pursuant to the Jones act."[6] It is axiomatic that open legal questions breed litigation.

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[4] Even though the Death on the High Seas Act, first enacted in 1920, provided a limited statutory wrongful death cause of action, there was no general maritime law wrongful death cause of action until the Supreme Court created one. *See generally Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

[5] *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987).

[6] 2010 AMC at 2463 (citing Footnote 12 of Justice Thomas' Opinion in *Townsend*).

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Ultimately, the *Wagner* court found for the employer because the Ninth Circuit clearly characterizes punitive damages as "non-pecuniary.[7]" This is the lynchpin because the Supreme Court determined that railroad workers could not recover "non-pecuniary" damages under the Federal Employers' Liability Act ("FELA"), which is incorporated by the Jones Act (46 U.S.C. § 30104).[8] Further, the Supreme Court has interpreted Congress' 1920 unaltered incorporation of the FELA into the Jones Act as congressional assent to the imposition of the Supreme Court's judicially-created "non-pecuniary" damage limitation in seamen's personal injury cases brought under the Jones Act.[9] Because courts uniformly characterize punitive damages as "non-pecuniary," and "non-pecuniary" damages are unavailable under FELA which is incorporated by the Jones Act, a seaman cannot recover punitive damages on his Jones Act negligence claim.

Although maritime employers should continue to prevail on the argument that punitive damages are a class of non-pecuniary damages that are not recoverable under the Jones Act, they will nevertheless continue to face plaintiffs who assert that *Townsend* fundamentally alters Jones Act employer liability for negligence as well as for maintenance and cure.

Conclusion

Townsend provided plaintiffs with ammunition to attack the preclusive effect of the *Miles* uniformity principle in seamen's personal injury cases. Likewise, creative plaintiffs' counsel will continue their campaign to expand the reach of *Townsend* beyond the maintenance and cure cause of action. As a result, maritime employers face increased exposure to punitive damages, not only in terms of the maintenance and cure obligation, but also with regards to other seamen's remedies.

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[7] *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984).
[8] *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71-72 (1913); *Gulf, Colo. & Santa Fe R.R. Co. v. McGinnis*, 228 U.S. 173, 175-76 (1913).
[9] *Miles*, 498 U.S. at 32.

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