

PUNITIVE DAMAGES IN MARITIME CASES:
CLEANING UP AFTER *EXXON SHIPPING CO. V. BAKER*¹

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¹ This paper was prepared before the publication of *Atlantic Sounding Co., Inc. v. Townsend*, Slip. 08-214 (U.S. S. Ct. June 25, 2009).

I. INTRODUCTION

In the recent case of *Exxon Shipping Co. v. Baker*,² the United States Supreme Court fashioned new maritime law on the subject of punitive damages. Under *Baker*, punitive damages in maritime cases are generally limited to the amount of the plaintiff's compensatory damages. But *Baker* begs another question which the Court failed to consider. Exactly when are punitive damages available under maritime law? That question has been at large in the case law since the landmark decision of *Miles v. Apex Marine*. *Miles* spawned a host of decisions dealing with the availability of punitive damages in maritime cases. Many dealt with seamen's actions for death or injury, but others dealt with non-seafarers' claims. On the eve of *Baker*, the law in this area was notoriously unsettled.

Baker assumes, probably correctly, that punitive damages are available in at least some maritime law cases—although the case did not offer a reasoned analysis of whether punitive damages are in fact recoverable under maritime law. But the *Baker* opinion offers no insight into exactly how the Court's decision in *Miles* confines the availability of punitive damages in marine cases—if it confines them at all. The irony is that *Baker's* punitive damages ratio was predicated heavily on predictability and fairness in the assessment of punitive damages. A fixed ratio is of little practical help if there remains uncertainty over when punitive damages are available.

As of this writing, the Court has heard arguments in *Atlantic Sounding Co., Inc. v. Townsend*,³ a case involving the availability of punitive damages in maintenance and

² 554 U.S. ___, 128 S.Ct. 2605 (2008).

³ 496 F.3d 1282 (11th Cir. 2007), cert. granted ___ U.S. ___, 129 S. Ct. 490 (2008).

cure cases. The outcome of that case should offer some amount of clarification, but the extent to which matters are clarified obviously remains to be seen.

This paper will offer a summary of the procedural history leading up to the *Baker* decision as well as an analysis of the decision itself. It will then move to a discussion of punitive damages in maritime cases after the *Miles* decision. The paper will conclude with an attempt to predict how *Miles* and *Baker* might be harmonized, an effort which one hopes will be rendered largely obsolete by the Court's anticipated decision in *Townsend*.

II. *BAKER*: FACTS AND PROCEDURAL BACKGROUND

The facts of the 1989 *Exxon Valdez* grounding and spill hardly require a reprise. Few ship captains can have been vilified more than “one Joseph Hazelwood,” as he is introduced in the majority opinion.⁴ Hazelwood has been pursued through the reported cases by the same infamy that followed Joseph Conrad's Lord Jim to the remote reaches of the world.⁵ Suffice it to say that the Supreme Court emphasized Hazelwood's “inexplicable”⁶ decision to leave the bridge and do paperwork while his subordinates attempted to navigate Prince William Sound, as well as his status as a relapsed alcoholic—a fact known to his employer, Exxon Shipping Company.

A. *Proceedings Below*

Less notorious is the procedural history of the case. Starting around 1991, civil actions were filed against both Exxon and Hazelwood by commercial fishermen, Native

⁴128 S. Ct. at 2612.

⁵The United States Court of Appeals for the Ninth Circuit actually suggested that, by grounding on Bligh Reef, Captain Hazelwood “refreshed” Capt. William Bligh's infamy some 200 years after the mutiny on the *Bounty*. In re *Exxon Valdez*, 270 F. 3d. 1215, 1221 (9th Cir. 2001).

⁶“Inexplicable” was the Supreme Court's choice of words. 128 S. Ct. at 2612. The Ninth Circuit attributed Hazelwood's departure to intoxication. 270 F. 3d at 1223.

Alaskans and landowners. All were consolidated. Exxon also requested, and received, certification of a class of all plaintiffs seeking punitive damages. Exxon's negligence and liability for compensatory damages were stipulated. A three-phase trial⁷ then took place in the United States District Court for the District of Alaska. Phase I was devoted to the defendants' "recklessness and thus their potential for punitive liability." Phase II set compensatory damages for two categories of plaintiffs (the remaining plaintiffs eventually settled, rendering a fourth phase unnecessary). Phase III determined the amount of punitive damages against both defendants.⁸

In the "Phase I" trial, which commenced on May 2, 1994, the jury found both Exxon and Captain Hazelwood liable for punitive damages.⁹ In Phase II, the jury awarded what the lower court described as a "breathtaking \$5 billion" in punitive damages against Exxon.¹⁰ After Exxon's motion for reduction of this award was denied, it appealed. The initial Exxon Valdez appeal involved a number of issues, many of which were dealt with summarily by the Ninth Circuit. Punitive damages were, for example, recoverable despite the fact that Exxon had been exposed to other criminal and civil sanctions, not to mention enormous clean-up expenses.¹¹ The Ninth Circuit also rejected as "mistaken" Exxon's argument that "punitive damages are not traditionally allowable in admiralty law."¹² The court also disagreed that the plaintiffs' claims were

⁷ The trial was originally to have consisted of four phases, but one was rendered moot by settlement.
⁸ 128 S. Ct. at 2613.

⁹ See *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1048 (D. Alaska 2002).

¹⁰ *Id.* at 1050. Hazelwood was assessed punitives in the amount of \$5,000, or 0.0001% of the award against his employer. *Id.*

¹¹ *In re Exxon Valdez*, 270 F. 3d at 1225-26.

¹² *Id.* at 1226. Professor David Robertson presents a compelling argument that punitive damages are in fact traditionally available under maritime law. See David W. Robertson, "Punitive Damages in American Law," 28 *J. Maritime L. & Comm.* No. 1, p. 73 (January 1997).

barred by a previous settlement between Exxon and the governments of Alaska and the United States.¹³ It rejected Exxon's argument that the Clean Water Act¹⁴ preempted any punitive remedy for oil pollution.¹⁵

The Ninth Circuit also rejected Exxon's various attacks on the lower court's jury instructions. The court declined to make a "clear and convincing" proof standard applicable to maritime cases.¹⁶ Exxon had objected to certain of the trial court's Phase I jury instructions on the ground that, under the "strict complicity" rule articulated in *The Amiable Nancy*,¹⁷ a principal can be held liable for punitive damages only if it authorizes or ratifies reckless or wanton acts by the agent.¹⁸ The trial court rejected Exxon's arguments based on *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*,¹⁹ in which the Ninth Circuit allowed punitive damages to be based on the acts of a "managerial employee."²⁰ On appeal, the Ninth Circuit acknowledged that *Protectus Alpha* was in tension with an earlier Ninth Circuit case, *Pacific Packing & Navigation Co. v. Fielding*.²¹ It concluded, however, that the two cases were not in irreconcilable conflict and that *Protectus Alpha* was in line with due process cases allowing vicarious liability for punitive damages.²²

¹³ *Id.* at 1227-28.

¹⁴ 33 U.S.C. §§ 1251-1387.

¹⁵ 270 F. 3d at 1228-1231.

¹⁶ *Id.* at 1232-33.

¹⁷ 3 Wheat 546 (1818).

¹⁸ See Exxon Valdez No. 264, 1995 A.M.C. 1930, 1941 (D. Alaska 1995).

¹⁹ 767 F.2d 1379 (9th Cir. 1985).

²⁰ *Id.* at 1386.

²¹ 136 F. 577 (9th Cir. 1905).

²² 270 F. 3d at 1236, citing *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15, 111 S. Ct. 1032, 113 L. Ed. 2d. 1 (1991).

After rejecting various attacks on the sufficiency of the evidence in support of Exxon's punitive damages liability,²³ the court proceeded to a review of the award's amount. As of the first *Exxon Valdez* appeal in 2001, the U.S. Supreme Court had decided *BMW of North America, Inc. v. Gore*²⁴ and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,²⁵ both of which clarified the constitutional review requirements for large punitive awards. These cases had not, however, been decided as of the Phase I and Phase II trials. The court therefore embarked on a *de novo* due process review of the \$5 billion award, ultimately concluding, based on the *BMW* factors, that it was "too high." The case was remanded with instructions for the trial court to set a lower award in light of the constitutional standards.²⁶

On remand, the district court applied the BMW factors—reprehensibility, ratio to harm and difference between the award and criminal penalties—and arrived at a reduced award. Exxon's conduct was deemed reprehensible mainly because it had continued to employ Hazelwood as the captain of an oil tanker despite knowledge that he was a relapsed alcoholic.²⁷ With respect to the harm ratio, the lower court had first to determine exactly what the "harm" was in monetary terms. Although Exxon contested the inclusion of its many voluntary payments, the court ultimately valued the harm at \$507,509,094.²⁸ It then chose to apply a ratio of ten to one to this figure—thereby

²³ *Id.* at 1236-38.

²⁴ 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

²⁵ 532 U.S. 424, 121 S. Ct. 1678, 149 L.Ed. 2d 674 (2001).

²⁶ 270 F.3d at 1246-47.

²⁷ *In re Exxon Valdez*, 236 F. Supp. 2d at 1055.

²⁸ *Id.* at 1060.

resurrecting the \$5 billion award the Ninth Circuit had found to be unconstitutionally high.²⁹

Turning to the potential criminal sanctions for comparison's sake, and making a few worst-case assumptions, the district court concluded that Exxon was "quite fairly on notice" that an oil spill in Prince William Sound might result in criminal and civil penalties in excess of \$5 billion.³⁰ Since the district court was obliged to allow some reduction, and since the plaintiffs had suggested that \$4 billion was consistent with *BMW*, the district court adopted that figure.³¹ Exxon, needless to say, appealed again.

While the second appeal was pending, the United States Supreme Court decided another constitutional punitive damages case, *State Farm Automobile Insurance Company v. Campbell*.³² The Ninth Circuit therefore vacated the district court's opinion and remanded anew for reconsideration of the punitive award in light of *State Farm*. The district court, however, brushed *State Farm* aside as adding "no new, free-standing factor to the constitutional analysis of punitive damages."³³ It concluded, yet again, that the jury's breathtaking award had been constitutionally sound in the first place, and this time seized upon a recent Ninth Circuit decision to support its perfunctory "reduction" of this award. In *Zhang v. American Gem Seafoods, Inc.*,³⁴ the Ninth Circuit had upheld a seven-to-one ratio between punitive and compensatory damages in an employment discrimination case. Concluding that any "single digit ratio" of punitive

²⁹ *Id.* at 1065.

³⁰ *Id.* at 1067

³¹ *Id.* at 1068.

³² 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003).

³³ *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1076 (D. Alaska 2004).

³⁴ 339 F.3d 1020 (9th Cir. 2003).

damages to actual damages was more or less acceptable, the district court reduced the jury's award from \$5 billion for \$4.5 billion—an increase of half a billion dollars over the award as previously modified.³⁵

In the third appeal, the Ninth Circuit took matters into its own hands. Over one judge's dissent, the court ordered a reduction of the award to \$2.5 billion.³⁶ Exxon's petition for rehearing was denied,³⁷ although one Ninth Circuit judge dissented from the court's refusal to review *en banc* the conflict between *Protectus Alpha*³⁸ and *Pacific Packing*.³⁹ Exxon then petitioned for a writ of *certiorari* as to three specific questions: first, whether punitive damages could be imposed on a shipowner based on a master's conduct; second, whether the remedies available under the Clean Water Act preempted punitive damages; and third, whether the \$2.5 billion award was within the limits of maritime law, and if so, whether it violated due process. The United States Supreme Court granted Exxon's petition, excluding only the due process component of its third question from review.⁴⁰

B. THE *BAKER* OPINION

The Supreme Court got off to a poor start, dividing four to four⁴¹ on the question of whether maritime law makes a corporation liable for the recklessness of employees acting in a managerial capacity.⁴² Justice Souter's majority opinion does not indicate

³⁵ In re Exxon Valdez, 296 F. Supp. 2d at 1109-1110.

³⁶ In re Exxon Valdez, 472 F.3d 600, 625, 633 (9th Cir. 2006).

³⁷ In re Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007).

³⁸ *Supra*, 767 F.2d 1379.

³⁹ *Supra*, 136 F. 577.

⁴⁰ 552 U.S. ___, 128 S.Ct. 2605 (2007).

⁴¹ Justice Alito took no part in the decision.

⁴² 128 S. Ct. at 2616.

who was inclined to uphold the Ninth Circuit and who agreed that more than a master's reckless conduct was required to impose punitive damages on a shipowner. Little if any gleanings on the current status of *The Amiable Nancy* rule will be found in the majority's short discussion of this issue.

A unanimous Court agreed that punitive damages were not preempted by the Clean Water Act ("CWA"). Exxon had argued that the CWA's detailed regime of civil and criminal penalties for water pollution preempted the field and barred judicially-created remedies such as punitive damages. The Court noted that the CWA includes a savings clause which preserves claims for damage to private property from the discharge of oil.⁴³ It rejected the notion that the CWA preserved maritime law claims in general, but severed such remedies as punitive damages. "Nothing in the statutory text," the Supreme Court reasoned, "points to fragmenting the recovery scheme this way."⁴⁴ The Court distinguished two of its previous decisions striking down common law nuisance claims based on the CWA; these nuisance theories, the Court explained, "amounted to arguments for effluent-discharge standards different from those provided by the CWA."⁴⁵ By contrast, allowing punitive damages to vindicate private harms did not threaten to frustrate the CWA's remedial scheme.⁴⁶

The *Baker* court's treatment of punitive damages under the CWA may bear on their availability in other pollution-related contexts. The Oil Pollution Act of 1990,⁴⁷ better known as "OPA 90," was enacted in response to the Exxon Valdez incident. Like

⁴³ *Id.* at 2618, *citing* 33 U.S.C. § 1321(o).

⁴⁴ *Id.* at 2619

⁴⁵ *Id.* at 2619 n. 7.

⁴⁶ *Id.* at 2619.

⁴⁷ 33 U.S.C. § 2702.

the CWA, OPA 90 contains various clauses which appear to preserve existing claims under state and maritime law.⁴⁸ Most cases, however, have held that OPA 90's remedial scheme preempts punitive damages under maritime law.⁴⁹ Given the ease with which a unanimous Court concluded that the CWA did not preempt other maritime law remedies, it seems fair to ask whether the case law and commentary to date has been wrong in concluding that OPA 90 supplants other federal remedies such as punitive damages.

The Court then turned to the size of the punitive award against Exxon. In contrast to the due process review featured in *BMW* and *State Farm*, this was an issue of first impression "within a federal court's jurisdiction to decide in the manner of a common law court."⁵⁰ The Court proceeded to take up the question of whether a \$2.5 billion award exceeded the "bounds justified by the punitive damages goal of deterring reckless (or worse) behavior."⁵¹ Finally freed from the constitutional prism of previous cases, the Court embarked on a survey of punitive remedies dating back to the Code of Hammurabi, observing that penalties at least through the medieval period were usually based on some multiple of actual damages.⁵² The modern-day, more or less unlimited notion of punitive damages was a "common law innovation" which the Court only traced

⁴⁸ See 33 U.S.C. §§ 2718(a), 2718(c); 33 U.S.C. § 2751.

⁴⁹ E.g. *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F. 3d 58, 65-66 (1st Cir. 2000); *Clausen v. M/V NEW CLARISSA*, 171 F. Supp. 2d 1127, 1133 (D. Ore. 2001); see also D. Robertson and M. Sturley, "Recent Developments in Admiralty and Maritime Law at The National Level and in the Fifth and Eleventh Circuits," 27 Tul. Mar. L. J. 495, 591 (Summer 2003); B. Lewis, "It's been 4380 Days and Counting since Exxon Valdez: Is it Time to Change the Oil Pollution Act of 1990?," 15 Tul. Envtl. L. J. 97, 114 (Winter 2001) ("While OPA 90 explicitly refrains from preempting state laws regarding liability and compensation for [oil] spills, the Act does supplant any related federal remedies").

⁵⁰ *Id.*

⁵¹ *Id.* at 2619-20.

⁵² *Id.* at 2620.

back as far as 1763.⁵³ The Court also touched on the fact that, for some period at least, punitive damages served a quasi-compensatory function given that the law previously offered no remedy for certain types of harm.⁵⁴ The present-day institution of punitive damages served only to punish and deter.⁵⁵

The Court then moved to a discussion of the nature of conduct meriting some form of punitive sanction. Recklessness comes in various degrees, ranging from a sort of foggy heedlessness of unknown risks to a callous disregard of known risks.⁵⁶ A profit motive enhances the culpability of a defendant's conduct, as does the likelihood that it will go undetected. Similarly, where an egregious act results in relatively trivial harm, a higher ratio of punitive to compensatory damages is warranted.⁵⁷ From there the Court proceeded to a brief examination of state regulation of punitive damage awards—which ranged from ruling them out entirely to subjecting them to some form of reasonableness review. Despite these restraints, punitive damages awards in the United States tended to be “higher and more frequent” than in other countries.⁵⁸

The Court then confronted, in fairly candid fashion, the growing criticism of punitive damages awards. The actual data, the Court concluded, tended to “undercut” much of the criticism.⁵⁹ There had been no “mass production” of runaway punitive

⁵³ *Id.*, citing *Wilkes v. Wood*, Lofft 1, 18, 98 Eng. Rep. 489, 498 (1763).

⁵⁴ *Id.* at 2620-21.

⁵⁵ *Id.* at 2621.

⁵⁶ *Id.* at 2621-22.

⁵⁷ *Id.* at 2622.

⁵⁸ *Id.* at 2622-24. The reference to other countries suggests some interest on the part of the Court in keeping U.S. maritime law consistent with that of other countries. There was, however, no express discussion of the importance of international uniformity in maritime law.

⁵⁹ *Id.* at 2624.

damages awards.⁶⁰ Indeed, on average, the ratio between compensatory and punitive damages tended to be less than one to one.⁶¹ One might think such a statistic would tend to endorse the usual discretionary review by courts. The Court, however, identified the problem of “outlier cases,” *i.e.* punitive awards with ratios many times that of compensatory damages.⁶² Although these outlier awards were relatively rare, they created a general sense of arbitrariness and uncertainty which the Court was not prepared to tolerate. If the federal courts needed guidelines to ensure fair criminal sentences, similar guidelines were needed in the context of punitive damages.⁶³

In its previous due process cases, the Court had rejected the notion of a simple mathematical formula for punitive damages.⁶⁴ It had, however, suggested that awarded should generally be confined to a single-digit ratio, and that a 1:1 ratio might be the limit in cases of substantial compensatory damages.⁶⁵ In the context of maritime law, the Court was free to shape a more concrete rule. The question was whether some more principled system or rule might enhance the predictability, and therefore the fairness and deterrent value, of punitive damages. Three approaches were considered: a verbal formulation for discretionary review of the sort already in use in most states, a “hard dollar cap,” or a “ratio” or “maximum multiple” of compensatory damages. The Court rejected the verbal formulation as offering inadequate protection against “unpredictable outliers.”⁶⁶ The cap approach was problematic in that there was no dependable

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2625.

⁶³ See *id.* at 2628-29.

⁶⁴ *Id.* at 2626 [citations omitted].

⁶⁵ *Id.*, quoting *State Farm*, 538 U.S. at 425, 123 S. Ct. 1513.

⁶⁶ *Id.* at 2628.

mechanism for periodic review of the cap by the Court.⁶⁷ A fixed cap was best imposed by statute, since a legislature could review the appropriateness of the cap at will. The Court settled on the ratio approach.⁶⁸

At about this point the majority confronted what was likely to be going on in the minds of most readers, namely what business did a court have imposing numerical limits or ratios on damages? Wasn't this a legislative function entirely? Justice Souter cited the rule against perpetuities as an example of a such a "judicial innovation," and rejected the notion that "judges cannot use numbers."⁶⁹ Having dispatched that objection, the Court got down to the business of adopting a ratio. Many states had adopted (by statute) a ratio of three times compensatory damages. This ratio was, however, applied "across the board" by most states, which did not mean it was a "reasonable limit in this type of case." Neither did the "legislative signposts," such as they were, point to a two to one ratio.⁷⁰

Instead, the Court seized upon the "median ratio" reflected in the literature on punitive damages, which was roughly .65 to one. The Court thought it "fair to assume that the greater share of the verdicts studied...reflect reasonable judgments about the economic penalties appropriate in their particular cases." Since the weight of punitive awards were actually less than compensatory damages, the Court selected the 1:1 ratio as the "fair upper limit" in "such maritime cases." By "such maritime cases" the Court meant those "with no earmarks of exceptional blameworthiness" and "without the

⁶⁷ *Id.* at 2629.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2630.

⁷⁰ *Id.* at 2631-32.

modest economic harm or odds of detection with have opened the door to higher awards.”⁷¹

Despite all the earlier pillorying of Capt. Hazelwood and his employer, the case was classed as one *without* exceptional blameworthiness, because neither defendant acted intentionally or maliciously and neither was motivated by profit.⁷² As the harm was both enormous and easily detected, the case fell into the 1:1 ratio category. Taking the lower court’s compensatory damages figure of roughly half a billion dollars at face value, punitive damages were limited to a similar amount.⁷³

Justices Roberts, Scalia, Kennedy and Thomas joined in the majority opinion.⁷⁴ Justice Stevens filed a dissent in which he stressed the prevalence of federal legislation in the maritime field.⁷⁵ Although Congress had seen fit to protect shipowners from liability in the Limitation Act,⁷⁶ it had declined to impose any general limitation on punitive damages. Justice Stevens saw no reason for the Court to impose a limitation where Congress had failed to do so.⁷⁷ Stevens also characterized the remedies available under maritime law as, on the whole, less generous than those available under state law,⁷⁸ which he thought gave punitive damages some lingering compensatory value in

⁷¹ *Id.* at 2633.

⁷² *Id.*

⁷³ *Id.* at 2633-34.

⁷⁴ *Id.* at 2611, 2634.

⁷⁵ *Id.* at 2634-35.

⁷⁶ 46 U.S.C. § 30505.

⁷⁷ 128 S. Ct. 2635-36.

⁷⁸ Stevens cited as an example the recovery limitations imposed by *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). 128 S.Ct. at 2637 n. 5. While *Robins* was of some value to Exxon in defending against the plethora of spill-related claims, e.g. *In re the Exxon Valdez*, 1995 AMC 1416 (D. Ala. 1994), commercial fishermen were excepted from *Robins* by *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

maritime cases.⁷⁹ He considered “caps and ratios” to be within the exclusive province of the legislature, observing that the majority had not cited a single example of a state court imposing a punitive damages ratio. In Justice Stevens’ view, traditional abuse of discretion review should be applied unless Congress acted to cap punitive awards or subject them to a ratio.⁸⁰

Justice Ginsberg also dissented; like Justice Stevens, she found the majority’s decision “venturesome” and thought the question of a cap or ratio for punitive damages in maritime cases was one better left to Congress.⁸¹ She also questioned the need for the rule announced by the majority, since the very data relied upon by the majority suggested that runaway punitive awards were not a serious concern. Finally, Justice Ginsberg saw the majority opinion as prompting many questions, such as the appropriate ratio in cases of malicious conduct or pursuit of financial gain. Was the Court, she wondered, signaling that a 1:1 ratio was “the maritime-law ceiling,” or perhaps even the new outer limit of due process?

Finally, Justice Breyer seemed to be content with a 1:1 ratio for the “mine-run case of reckless behavior,” but felt that Exxon’s conduct had indeed been egregious and that the Ninth Circuit’s \$2.5 billion dollars, crammed as it was down the throat of the trial judge, was justified. After all, even the due process cases acknowledged that at least a “few” awards could exceed a single-digit ratio.⁸² Given the extreme nature of the facts, a “limited exception to the Court’s 1:1 ratio” was warranted.⁸³

⁷⁹ *Id.* at 2636-37.

⁸⁰ *Id.* at 2637.

⁸¹ *Id.* at 2639.

⁸² *Id.* at 2640, citing *State Farm*, 538 U.S. at 425.

⁸³ *Id.*

III. *BAKER*—IMMEDIATE IMPACT

Justice Ginsberg’s dissent affords an appropriate starting point for a consideration of *Baker*’s immediate contribution to the maritime law of punitive damages.⁸⁴ Exactly how the majority’s 1:1 ratio is to apply is far from clear. The ratio does seem applicable to the “mine-run” of recklessness cases, but a higher ratio still seems allowable in cases of “exceptional blameworthiness,” as well as cases of nominal compensatory damages or low probability of detection. The phrase “exceptional blameworthiness” seems to embrace cases of intent or malice, as well as those involving a profit motive. In short, there now seem to be two categories of maritime punitive damages cases: those involving “mine-run” recklessness, and those involving “exceptional blameworthiness.” The *Baker* ratio limits punitive damages in the first category of cases, but a higher ratio is still possible in the second category.

Dividing up punitive cases in this fashion presents some conceptual problems. What exactly is “mine-run” recklessness? Commonplace or everyday recklessness begins to sound a lot like negligence. And isn’t exceptional blameworthiness usually a prerequisite for punitive damages? Punitive damages do, after all, represent an exceptional remedy which is supposed to be confined to cases of egregious conduct. The negligent tortfeasor is already “blameworthy,” so something more—exceptional blameworthiness, if you will—is arguably required in punitive cases. The distinction implied by the Court could be read as encouraging the imposition of punitive damages (at least in an amount approaching compensatory damages) in cases involving little more than negligent conduct.

⁸⁴ Little need be said about the rule of *The Amiable Nancy*, the Court having failed to reach any consensus on its current vitality. Perhaps the question will come up again when nine justices are available.

Who, moreover, decides the applicable ratio in a jury case? Will juries be instructed to consider whether indicia of exceptional blameworthiness are present, and if not to confine their punitive award to an amount less than compensatory damages? Or will judges decide whether particular cases are subject to the *Baker* ratio? The Supreme Court's due process cases clearly applied to post-verdict review of punitive awards, but where *Baker* fits in procedurally is not explained. In the year since *Baker* was decided, the lower courts have not taken up any of these issues.

IV. INDIRECT QUESTIONS—THE STATUS OF PUNITIVE DAMAGES UNDER MARITIME LAW

The Supreme Court also ignored the many issues surrounding the availability of non-pecuniary damages (including punitive damages) in maritime cases, noting only in passing that Exxon did “not offer a legal ground for concluding that maritime law should never award punitive damages.”⁸⁵ Exxon had argued as much before the Ninth Circuit in the first of its appeals.⁸⁶ In petitioning for *certiorari*, however, Exxon requested consideration only of whether punitive damages were preempted by the CWA. No general assault on punitive damages in maritime law cases was attempted. Perhaps this was a tactical gambit by Exxon—the chances of achieving a limit on punitive damages were greater than the chance of excluding them altogether.

A. PUNITIVE DAMAGES AFTER MILES V. APEX MARINE

There is in fact considerable disagreement in the maritime cases over whether and when punitive damages are recoverable. Most of the confusion springs from *Miles v. Apex Marine Corp.*,⁸⁷ in which the United States Supreme Court held that the

⁸⁵ 128 S.Ct. at 2619.

⁸⁶ In re Exxon Valdez, 270 F. 3d at 1226.

⁸⁷ 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).

survivors of a deceased seaman could not recover loss of society on their general maritime law wrongful death claim. In brief, the Court reasoned that two statutory enactments, the Jones Act and the Death on the High Seas Act (DOHSA), limited the remedies for wrongful death to “pecuniary damages.” In the case of DOHSA, the limitation was express—Congress had included the phrase “pecuniary damages” in the act itself.⁸⁸ That was not true of the Jones Act, but that legislation was modeled upon the Federal Employer’s Liability Act (“FELA”), and FELA had long been construed as confining its wrongful death remedy to pecuniary loss.⁸⁹ If Congress had chosen to limit seamen’s beneficiaries to pecuniary loss in DOHSA and the Jones Act, it was “inconsistent with our place in the constitutional scheme” for the Court to “sanction more expansive remedies in a judicially created cause of action.”⁹⁰ This was particularly true given that the plaintiff’s claim was for unseaworthiness, which, unlike the Jones Act, required no proof of fault.

1. PUNITIVE DAMAGES IN SEAMEN’S CASES

Miles did not concern itself with punitive damages. Punitive damages are, however, generally considered to be non-pecuniary in nature.⁹¹ Thus a number of courts have held that *Miles* precludes recovery of punitive damages in many types of seamen’s cases. Since *Miles* clearly stands for the proposition that non-pecuniary damages are

⁸⁸ 46 U.S.C. § 30303.

⁸⁹ For this the Court cited *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), in which it was stated that a wrongful death plaintiff could recover based on a “reasonable expectation of pecuniary assistance or support,” but that “[c]ompensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings.” *Id.* at 70.

⁹⁰ 498 U.S. at 32.

⁹¹See *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1504 (5th Cir. 1995) (en banc); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984); *In re Two-J Ranch, Inc.*, 534 F.Supp.2d 671, 684 (W.D. La. 2008); *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 873 (E.D. La. 1989).

not available in seamen's death cases, the cases uniformly hold that punitive damages are unavailable in such cases.⁹² Most courts have also extended *Miles'* reasoning to personal injury claims by living seamen. They have done so whether the seaman sought damages under the Jones Act⁹³ or the general maritime law doctrine of unseaworthiness.⁹⁴ Some cases present the additional complication of a seaman's claim against a party other than the seaman's employer. Whether non-pecuniary remedies of various sorts were available against a non-employer defendant was for several years the subject of a lively dispute in the Eastern District of Louisiana.⁹⁵ In the 2004 case of

⁹² E.g. *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004 (no punitives recoverable in action by survivors of Jones Act seaman); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F. Supp. 179, 181 (E.D. Tex. 1991) (punitives not available to seaman's widow). C.f. *In re Marine Sulphur Queen*, 460 F.2d 89, 104 (2d Cir. 1972) (pre-*Miles* case upholding lower court's refusal to award punitive award in wrongful death negligence/unseaworthiness because requisite proof was lacking) *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 523 n. 11 (6th Cir. 1974) (because punitive damages require proof of gross negligence or malice, they are not recoverable in unseaworthiness cases).

⁹³ *Miller*, supra, at 1457; *Hollinger v. Kirby Tankships, Inc.*, 910 F. Supp. 571, 572 (S.D. Ala. 1996) (Jones Act plaintiff may not recover punitives because "punitive damages are unavailable under the general maritime law post-*Miles*"); *Bayes v. OPI International*, 1994 AMC 286, 288 (S.D. Tex. 1992) (no punitive damages in seaman's personal injury case); *Haltom*, supra; *Matter of Mardoc Asbestos Case Cluster I, 2 & 6*, 768 F. Supp. 595 (E.D. Mich. 1991) (punitive damages not available under the Jones Act). See also *Kopczynski*, supra note 91, at 560-61 (pre-*Miles* case holding that punitive damages are unavailable under the Jones Act because they are non-pecuniary).

⁹⁴ E.g. *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993); *Ponder v. M/V CHILBAR*, 234 F. Supp. 2d 1355 (S.D. Ga. 2002); *Hollinger*, supra; *Haltom*, supra. But see *Dyer v. Merry Shipping, Inc.*, 650 F.2d 622, 625-26 (5th Cir. 1981) (punitive damages available for violation of seaworthiness duty).

⁹⁵ Compare *Mastrodonato v. Sea Mar, Inc.*, 2000 WL 739284 (E.D. La. 2000) (denying consortium), *Complaint of L.L.P. & D. Marine, Inc.*, 1997 WL 772819 (E.D. La. 1997) (denying punitive damages) and *Ellener v. John E. Graham & Co.*, 821 F. Supp. 1136 (E.D. La. 1992) (denying consortium) with *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75, 76 (E.D. La. 1991) (allowing consortium); *Stogner v. Central Boat Rentals, Inc.* 326 F.Supp.2d 754, 757 (E. D. La. 2004), abrogated by *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004), cert. denied, 544 U.S. 999 (2005) (allowing punitive damages) and *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787, 788-89 (E.D. La. 1991) (allowing punitive damages). See also *Trident Marine, Inc. v. M/V ATTICOS*, 876 F. Supp. 832, 837 (E.D. La. 1994) (acknowledging split in Eastern District of Louisiana); *Petition of Cleveland Tankers, Inc.*, 843 F. Supp. 1157, 1159-60 (E.D. Mich. 1994) (allowing consortium); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455, 457 (W.D. Wash.1992) (allowing loss of society).

Scarborough v. Clemco Industries,⁹⁶ the Fifth Circuit concluded that the uniformity principles of *Miles* precluded a seaman's spouse from recovering non-pecuniary damages under any circumstances.⁹⁷ If *Scarborough* is correct, then punitive damages should not be available in a seaman's case against a non-employer defendant.

Although the cases are fairly uniform in denying seamen and their families punitive damages in death and injury cases, the circuits are split on the availability of such damages in the case of a wrongful denial of maintenance and cure. In *Vaughan v. Atkinson*,⁹⁸ the United States Supreme Court held that attorney's fees could be recovered for a willful or vexatious denial of cure. Two judges dissented, objecting that attorney's fees were not generally available in admiralty cases, but that their equivalent could be awarded indirectly as "exemplary damages."⁹⁹ Since *Vaughan*, the reported cases have conflicted over whether a recalcitrant employer can be charged with attorney's fees alone, or both attorney's fees and punitive damages.¹⁰⁰ As this paper goes to press, the United States Supreme Court has before it *Atlantic Sounding Co. v.*

⁹⁶ *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004), cert. denied, 544 U.S. 999 (2005).

⁹⁷ *Id.* at 668.

⁹⁸ 369 U.S. 527 (1962).

⁹⁹ *Id.* at 540.

¹⁰⁰ Compare *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), cert. granted ___ U.S. ___, 129 S. Ct. 490 (2008) (allowing punitive damages) with *Kopacz v. Delaware River*, 2007 AMC 2403, 2406-07 (3d Cir. 2007), *Guevara*, supra note 91 and *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1046 (1996) (all denying punitive damages); see also *In re Complaint of J.A.R. Barge Lines, L.P.*, 307 F. Supp. 2d 668 (W.D. Pa. 2004) (predicting that Third Circuit would not allow punitive damages for failure to provide maintenance and cure); *Blige v. Geechee Girl*, 180 F. Supp. 2d 1349, 1354-55 (S.D. Ga. 2001) (Eleventh Circuit likely to rule that punitive damages are not available in maintenance and cure claims); *Boyd v. Cinmar of Gloucester*, 919 F. Supp. 208 (E.D. Va. 1996) (no punitive damages on maintenance and cure claim despite contrary Fourth Circuit dictum).

Townsend,¹⁰¹ which was argued on March 2, 2009. *Townsend* should resolve the circuit split on punitive damages in the context of maintenance and cure.

2. PUNITIVE DAMAGES AND NON-SEAMEN'S CASES

With respect to non-seamen's cases, the availability of punitive damages is unsettled. Although it has been said that "[t]he current trend in the case law supports a punitive damages claim under the general maritime law when there is no overlap with federal statutes,"¹⁰² the decisions reflect no clear consensus. They conflict, for example, on whether punitive damages are available on general maritime law claims for the deaths of non-seamen.¹⁰³ A number of cases also hold that punitive damages are unavailable in personal injury cases, even to non-seamen. Most prominent among these cases is *In re Amtrak "Sunset Ltd" Train Crash*.¹⁰⁴ *Amtrak* involved the tragic collision of a tug and barge with a railroad bridge, resulting in forty-seven deaths and numerous injuries. The Eleventh Circuit explained that maritime law allowed punitive damages only in "exceptional circumstances, such as a willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel and in those very rare situations of intentional wrongdoing."¹⁰⁵ It refused to allow punitive damages to be recovered by personal injury claimants. Various other courts have

¹⁰¹ *Supra* note 100.

¹⁰² Stogner, *supra* note 95, at 757 (E. D. La. 2004).

¹⁰³ Compare *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993) and *Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39, 41 (E.D. Tex. 1992) (no punitive damages in non-seaman death claims), with *Air Crash Belle Harbor*, 2006 AMC 1340, 1377 (S.D.N.Y. 2006) (punitive damages available in general maritime law death claim); *Voillat v. Red and White*, 2006 AMC 66, 74-75 (N.D. Cal. 2004) (survivors of passenger may recover punitive damages); *Powers v. Bayliner*, 855 F. Supp. 199, 202 (W.D. Mich. 1994) (punitive damages available to estates of deceased recreational boaters).

¹⁰⁴ 121 F.3d 1421 (11th Cir. 1997), *cert denied*, 522 U.S. 1110 (1998).

¹⁰⁵ *Id.* at 1429. See also *McDonald v. Carnival*, 1999 AMC 2081, 2082 (S.D. Fla. 1999) (striking plaintiff's punitive damage claim against cruise line because case did not involve "exceptional circumstances").

refused to allow punitive damages on maritime personal injury claims by cruise passengers, recreational boaters and other nonseafarers.¹⁰⁶ Such cases inspired a 1997 commentator to observe that, although punitive damages had not quite “disappeared from maritime personal injury and wrongful death law,” “they seem to be rapidly disappearing.”¹⁰⁷ Other cases hold that punitive damages are freely available to nonseafarers.¹⁰⁸ While the latter line of decisions may represent the current trend, one 2004 decision allowed a personal injury plaintiff to amend his complaint to add a punitive damages claim because the claim was “uncertain,” rather than clearly futile, in light of *Miles*.¹⁰⁹ Expressing similar sentiments, an earlier court declined to “navigate

¹⁰⁶ See, e.g., *Ostrowiecki v. Aggressor Fleet, Ltd.*, 2008 WL 5234391 (E.D. La. Dec 11, 2008) (no punitive damages for non-seaman’s confinement aboard a vessel); *O’Hara v. Celebrity Cruises*, 979 F. Supp. 254, 255 (S.D.N.Y. 1997) (no punitives in passenger’s personal injury case); *Hunter v. Seabulk Offshore Ltd.*, 993 F. Supp. 973 (E.D. La. 1998) (no punitives in passenger’s personal injury case); *Cochran v. A/H Battery*, 909 F. Supp. 911, 922 (S.D.N.Y. 1995) (no punitive claim for passenger in ferry allision); *Adler v. Royal Cruise*, 1996 AMC 1349, 1359 (N.D. Cal. 1996) (no punitive damages in passenger personal injury case); *Frantz v. Brunswick Corp.* 866 F. Supp. 527, 532 (S.D. Ala. 1994) (no punitive damages in boat product defect case); *Earnhart v. Chevron USA, Inc.*, 852 F. Supp. 515, 516 (E.D. La. 1993) (no punitive damages for passenger under general maritime law); *Ostrowiecki v. Aggressor Fleet, Ltd.*, 2008 WL 5234391 (E.D. La. 2008) (no punitive damages in non-seaman’s claim of intentional infliction of emotional distress); *Earhart v. Chevron U.S.A., Inc.*, 852 F. Supp. 515 (E.D. La. 1993) (no punitive damages for injuries resulting from allision with submerged object); *Ellison v. Messerschmidt-Bolkow-Blohm*, 807 F. Supp. 39, 41 (E.D. Tex. 1992) (no punitive damages for offshore helicopter crash). See also *Hollinger*, supra note 93, at 572 (seaman’s injury case stating that “punitive damages are unavailable in general maritime law post-*Miles*.”)

¹⁰⁷David W. Robertson, “Punitive Damages in American Law,” 28 J. Maritime L. & Comm. No. 1, p. 73 (January 1997) at p. 155.

¹⁰⁸ See e.g. *Kahumoku v. Titan Maritime, LLC*, 486 F. Supp. 2d 1144 (D. Hawai’i 2007) (punitive damages available in 905(b) claim); *Plaquemine Towing*, 190 F. Supp. 2d 889, 893 (M.D. La. 2002) (passengers can recover punitive damages despite their unavailability to seamen); *Jurgensen v. Albin Marine, Inc.*, 214 F.Supp.2d 504, 509 (D. Md. 2002) (punitive damages available in boat defect case); *Rutherford v. Mallard*, 2001 AMC 2813, 2818 (E.D. La. 2000) (punitive damages available in 905(b) case); *Hester v. Cottrell*, 2001 AMC 2017, 2020 (E.D.N.C. 2001) (punitive damages available in non-seaman’s case); *In re Horizon Cruises Litigation*, 101 F. Supp. 2d 204, 211-214 (S.D.N.Y. 2000) (punitive damages available for passenger injury); *Edwards v. Jones*, 1999 AMC 1078 (D. Md. 1999) (punitive damages available in recreational boating case); *Rebardi v. Crewboats, Inc.*, 2004-0642 (La. App. 1 Cir. 2/11/05); 906 So.2d 579 (punitive damages available in personal injury wake damage case). Many of these cases extend *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (1996) to injury cases and hold that state law punitive damages remedies can augment maritime law, particularly with respect to accidents in state territorial waters.

¹⁰⁹ *Jameson v. Holland America*, 2004 AMC 771, 772 (W.D. Wash. 2004).

these choppy waters in an effort to discover whether or not punitive damages exist with regard to nonseafarers,” because the facts did not warrant the imposition of punitive damages even if they were available.¹¹⁰

Most of the jurisprudence in this area has involved death and injury cases. Property damage cases involving punitive damages claims have been less common. One, *CEH, Inc. v. Seafarer*,¹¹¹ held that punitive damages “though rarely imposed,” had long been recognized as a general maritime law remedy.¹¹² The right to recover punitive damages for the intentional or reckless destruction of property was not affected by *Miles*.¹¹³

These cases raise various fairness and uniformity issues. Why, for instance, should passengers be able to recover punitive damages from vessel owners (as some cases have held) when seamen and their families cannot? And if (as other cases have held) punitive damages are not available in general maritime law personal injury cases, why should they be available in property cases?¹¹⁴ Were the victims of the *Amtrak* disaster less deserving of vindication than the commercial interests who sued Exxon? If, as the Supreme Court insisted, fairness and predictability are essential goals, why should some bad acts be subject to punitive damages when other (often worse) acts are not? The confusion over when punitive damages are available in maritime death and

¹¹⁰ Kelly v. Bass Enterprises Production Co., 17 F. Supp. 2d 591 600 (E.D. La. 1998).

¹¹¹ 70 F.3d 694 (1st Cir. 1995).

¹¹² Id. at 699.

¹¹³ Id. at 701.

¹¹⁴ The *CEH, Inc.* court recognized this argument as having “some force,” but concluded that *Miles* was concerned “with inconsistency with a Congressional pronouncement.” 70 F.3d at 701-02.

injury cases undercuts the certainty and predictability which the Court attempted to provide with its 1:1 punitive damages ratio.

B. *BAKER* AND THE AVAILABILITY OF PUNITIVE DAMAGES UNDER MARITIME LAW

One will read *Baker* in vain for clues about exactly when maritime law allows a punitive remedy. Some will argue that the case acknowledges the broad availability of punitive damages under maritime law? But the fact is Exxon did not raise the basic existence of punitive damages under maritime law in its *certiorari* petition, and the Court specifically noted that Exxon made no attempt to argue that punitive damages were simply not available. That said, it hardly seems likely that the Court would have fashioned a rule for limiting punitive damages if those damages were simply unavailable in maritime cases. Although the case lacks a definitive holding to this effect, *Baker* pretty clearly implies that punitive damages are available in at least some maritime law cases. If so, then those cases which have read *Miles* so broadly as to write punitive damages completely out of maritime law are wrong.

But conceding this much, there is still considerable doubt over when exactly punitive damages are available in maritime cases. *Baker* involved a commercial loss to fishermen. One could argue that *Baker* stands for the availability of punitive damages in cases of property damage or economic loss, but has no applicability in injury and death cases. In the latter category of cases, the exact effect of *Miles* would remain to be determined.

This narrow reading of *Baker* leaves the same problems as before: in injury and death cases, how far do the ripples from *Miles* extend? The cases to date are uniform in holding that, since punitive damages seem just as non-pecuniary as loss of society

damages, they are unavailable in general maritime law death cases under *Miles*.¹¹⁵ Nothing in *Baker* suggests that this modest extension of *Miles* is incorrect. Many cases also hold that punitive damages are generally unavailable under the Jones Act. Again, *Baker* does not stand in the way of this interpretation. It is interesting to note, however, that during oral argument in *Townsend*, Justice Ruth Bader Ginsburg found it “troublesome” that availability of punitive damages for wrongful denials of maintenance and cure seemed to depend heavily on whether those damages were also available under the Jones Act and FELA—questions which the Court had never actually decided.¹¹⁶

Such comments give us some reason to hope that *Townsend* may, in the process of deciding whether punitive damages are available in the context of maintenance and cure, clarify whether those damages are in fact generally unavailable under the Jones Act. Given *Baker*’s apparent comfort with the notion of imposing punitive damages in maritime cases, it is possible that the *Townsend* court may confine *Miles* to general maritime law death cases in which the pecuniary limitation is driven by the express limitation to that effect in DOHSA and the similar limitation which the courts have imposed on FELA. Whether this limitation applied only to seamen or to all general maritime law death claimants would probably be a question for another day.

If *Miles* does bar recovery of punitive damages in Jones Act injury case, the same will probably be true of injury claims for unseaworthiness. Again, if Congress has not seen fit to allow seaman to recover such damages for negligence, they should not be recoverable where liability exists in the absence of fault. But other mystery areas would remain. For example, can seamen recover punitive damages against non-employer

¹¹⁵ See *supra* note 92.

¹¹⁶ Transcript of Oral Argument at 9-11, *Atl. Sounding Co., Inc. v. Townsend*, No. 08-214 (Mar. 2, 2009).

defendants, against whom they have no remedy under the Jones Act or the unseaworthiness doctrine. Most cases to date have answered this question in the negative, but the outcome in *Townsend* may call those cases into doubt.

More importantly, the question of whether punitive damages are available in non-seamen's cases would also remain unsettled. As previously discussed, the trend in the case law has been that the limitations of *Miles* apply to seamen and their beneficiaries, and not to passengers, recreational boaters and the like. Some courts, however, continue to hold that *Miles* did away with punitive damages in admiralty, at least in injury and death cases. If *Townsend* expands seamen's access to punitive damages, it probably follows that those damages are freely available in cases involving non-seamen. But if *Townsend* restricts punitive damages in the interest of uniformity, we are left with the same question: do the uniformity considerations which prevent seamen from recovering punitive damages in death and injury cases extend to similar cases involving non-seamen? *Baker* does not answer this question at all, and it remains to be seen whether *Townsend* will shed any additional light on it.