Punitive damages for unseaworthiness claims in the USA – a cauldron boiling over?

The recent decisions by the the US Court of Appeals in the McBride case brings back the seeking of recovery of punitive damages in cases involving allegations of unseaworthiness.

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"Double, double, toil and trouble; Fire burn, and cauldron bubble" – Shakespeare's 'Macbeth', Act 4, Scene 1.

As with the three witches at the cauldron in Macbeth, the recent decisions by the three judge panel of the US Court of Appeals for the Fifth Circuit in *McBride v. Estis Well Service*, L.L.C., no. 12-30714 (5th Cir. Oct. 2, 2013) (*McBride*), rehearing *en banc* granted 24 February 2014 brings back onto the main maritime legal stage the seeking of recovery of punitive damages for seamen cases involving allegations of unseaworthiness. This article summarizes how this came about, and the possibility of establishment of a trend in the direction of punitive damages being generally available in US seamen injury and death claims**.**

The Lid Placed Atop the Cauldron of Seamen Damages The Court in *McBride* discusses the fact that punitive damages for unseaworthiness actions were historically available under US law for seamen injury cases. This concept was mentioned as early as 1818, when the US Supreme Court discusses recovery of punitive damages, on top of actual damages found, as "the proper punishment which belongs to lawless misconduct". The notion was that punitive damages would be meted out upon shipowners in cases of egregious wrongdoing, for "gross neglect and cruel maltreatment" or where there was a "failure to observe the dictates of humanity" or perpetrating a "monstrous wrong". For some 150 years, this sort of behaviour in this type of unseaworthiness case would then fall within the ambit of punitive damages as available to be imposed upon a defendant.

Then in 1990, in the case of *Miles v. Apex Marine Corp., 498 US 19 (1990),* the US Supreme Court seemingly indirectly excluded the availability of punitive damages in seamen cases, by its reasoning that recovery in seamen damage cases was limited to only pecuniary losses in unseaworthiness cases involving a 'loss of society' type of damage, and since punitive damages likewise are also not 'pecuniary' damages in nature, were they not likewise unrecoverable? The Fifth Circuit in its decision in the case of *Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496(5th Cir. 1995) states that was indeed the case, in disputes involving another sort of non-pecuniary damage available in US seamen cases, namely damages for a shipowner's wilful and wanton disregard of the legal obligation to provide maintenance and cure to a sick or injured seaman until he reached maximum medical improvement (MMI). It was therefore thought by many legal commentators that this was the beginning of the end of punitive damages in seamen cases in the US, and that the trend was that they would soon be unrecoverable in any circumstance.

The Cauldron of Damages Boils Again The US Supreme Court dramatically changed the direction of the law again in 2009, in *Atlantic Sounding Co., Inc. v. Townsend,* 557 US 404 (2009), which expressly overruled the *Guevara* decision, and allowed for punitive damages for a shipowner's wilful and wanton misconduct in maintenance and cure claims under general maritime law.

The Fifth Circuit in *McBride* simply extended upon this reasoning, and stated that punitive damages should be available to seamen who bring an injury or a death claim when caused by a shipowner's wilful and wanton misconduct in creating an unseaworthy condition.

This decision in McBride is an unmistakable reversal of the trend outlined above, and now the field is open for pleading for punitive damages in US seamen cases, under the rubric of an unseaworthiness claim. This will likely mean that in the future, almost all seamen cases brought in the US will allege 'wilful and wanton' breaches of the general maritime law duty to provide a seaworthy vessel to work upon, in order to avail to the claimant the possibility of recovering punitive damages. But will this result in a dramatic increase in the awards in such cases? For while other federal appellate circuit courts with significant maritime dockets (examples Second, Ninth) may differ in their approach, the Fifth Circuit is viewed by many as the most influential federal appellate court on maritime matters in the USA, and furthermore has a lower rate of reversal when matters are appealed to the US Supreme Court.

Is the Lid Coming Off the Cauldron or Being Fastened More Tightly? First of all, it is easy enough to allege that the circumstances in a seamen case of personal injury or death were 'wilful and wanton', but to prove it is another matter entirely. This is a fairly high standard of misbehaviour and requires a type of evidence which is normally not found to exist in most cases, thus seemingly making it a rare event where it can be proven. However, if a multitude of seamen cases are filed, all alleging this as a cause of action, will it result in a marked increase in success, simply by overwhelming the courts with such allegations, and by sheer volume impressing upon the courts that such misbehaviour is occurring more often? Even if a small percentage of the cases succeed in proving wilful and wanton misconduct, the overall objective number will be significantly higher.

But will this lead to the quanta of judicial awards many times over and above the pecuniary losses assessed in favour of a successful seamen claimant? Perhaps not. In *Exxon Shipping v. Baker,* 554 US 471 (2008), which was one of the cases arising out of the grounding and subsequent pollution from the EXXON VALDEZ in Alaska in 1989, the US Supreme Court found that normally punitive damages should not exceed compensatory damages in maritime law cases, meaning a 1:1 ratio would be the normal upper limit of such damages, although this would still mean a potential doubling of an award. However, in that case the US Supreme Court also mentioned that if factual circumstances warranted, a higher figure might be justified, although that would seem that would occur only in the rarest of circumstances.

But with the already high monetary awards that are frequently given to seamen claimants in the US, even if only at most a potential doubling of awards in a punitive damage finding, this is still a considerable amount of additional money in such cases, and demands our attention. At this writing, it is unknown if a request will be made in the *McBride* case for a rehearing *en banc* by the Fifth Circuit, and/or an application for appeal to the US Supreme Court. But the financial stakes are high, and this decision signals a significant change in US law for seamen claims. This development may also encourage those individuals with only tenuous ties to the US to make claims in US courts, on the chance of gaining a large punitive damages award.

Also, with future legislative action by the US Congress in this area highly unlikely, it would seem that the federal courts in the US are fashioning a sort of middle ground, between civil cases that award purely compensatory loss, and criminal cases that punish and fine the defendant, by allowing a 'punishment' to be inflicted on a defendant in a civil court action. It is mentioned in the *McBride* case opinion in a footnote that:

"Punitive damages" and "exemplary damages" are synonymous. They reflect two principal purposes of such damages: to *punish* the wrongdoer and thereby make an *example* of him in the hopes that doing so will deter him and others from wrongdoing. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 82–83 (1997). For ease of reference, we refer to all such damages as "punitive damages."

It seems that the Fifth Circuit is saying that this development will allow courts, in appropriate factual circumstances, to make 'examples' of an errant shipowner to the rest of the maritime industry, placing others on notice of the type of behaviour that will incur the wrath of the US legal system, and thus result in an overall enhancement of seaworthiness of the merchant marine fleet in the future. This would be a worrying trend for shipowners in view of the fact that many seamen cases in the US are brought in state court and/or are subject to a jury trial in the first instance. With increased activity in the US Gulf, and a slow but upward revival of shipping activity generally in the US, the impact of the *McBride* decision could be far reaching and long lasting, and create an overall significant increase in the costs of seamen claims under US maritime law.

But is the 'lid on the cauldron' of punitive damages actually being fastened even more tightly than before? On 24 February 2014, the Fifth Circuit granted the application for rehearing of the case *en banc*, that was requested not only by the Defendant in the case, but also by two non-parties, namely the International Association of Drilling Contractors and the Offshore Marine Service Association, that filed an 'amicus' brief about the issue covered in the motion for

rehearing. Ordinarily such motions are not granted, and so the fact that this motion for rehearing was granted in this case may signal that the Fifth Circuit is about to revise its position in a full or partial reversal of its prior judgment, or alternatively, and somewhat less likely, that the Fifth Circuit is going to issue, after rehearing, a more comprehensive opinion backing the initial decision.

En banc rehearings, in which the case is reheard by all of the sitting, active judges of the Fifth Circuit as a single court (seventeen judges), are very rarely granted – less than 5 per cent of such requests are favourably heard.

Final written briefs are not due until 25 April 2014, and only thereafter will a new decision be issued (likely after additional oral argument is scheduled and heard, either in May or as late as September), when we shall know what direction the Fifth Circuit will take on the issue.

Gard will continue to monitor the outcome of this case and the further developments of this issue in the US legal system, as it is critical to the overall scope of recoverable damages, as the Fifth Circuit is highly influential in the U.S. on such seamen legal issues. And, of course, the possibility exists that the US Supreme Court may deign to take up the issue, and the fires under the 'cauldron' of punitive damages will be stoked high again, this time by the nine Justices of the Supreme Court in Washington D.C., after the seventeen at the Fifth Circuit in New Orleans. Will the lid be kept on or lifted off forever?

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