



## Availability of punitive damages in the US for seamen or their survivors

In the recent decision by the US Fifth Circuit Court of Appeals in the *McBride v. Estis Well Services, LLC* case it was ruled that punitive damages are not available to seamen or their survivors under the general maritime law or the Jones Act.

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In so ruling, a majority of the judges, sitting *en banc* (so that the case could be argued before and decided by all of the then 15 judges of the Appeals Court), reversed a decision that had previously been rendered by a three-judge panel of the same Court. It is noteworthy that **six** judges did **not** agree with the *en banc* decision and filed strong dissenting opinions.

To understand the significance of this decision, it is helpful to review some of the history preceding it.

**Brief history of McBride** The underlying case arose out of an occurrence on a barge supporting a truck-mounted drilling rig (the ESTIS RIG 23). One crew member was fatally injured and three others seriously injured when the truck overturned. Haleigh McBride, on behalf of the estate and the minor children of the deceased worker, sought recovery of compensatory and punitive damages, alleging unseaworthiness of the barge under general maritime law and negligence under the Jones Act. (Three other plaintiffs, Saul Touchet, Joshua Bourque and Brian Suire, filed similar separate actions which were later consolidated by the court).

In May 2012, the District Court granted a motion by the defendant employer to dismiss the plaintiff's claims for punitive damages. Due to the District Court's acknowledgement that the punitive damages issue was one of national importance concerning which there was no judicial consensus, plaintiffs were granted an immediate appeal to the Fifth Circuit Court of Appeals, when in October 2013, the three-judge panel reversed the District Court. For a fuller discussion of this decision see the earlier Insight article, [Punitive damages for unseaworthiness claims in the USA – a cauldron boiling over ?](#)

**Punitive damages** Punitive damages are designed to punish and deter reckless misconduct. The misconduct justifying punitive damages is variable and imprecise and can include acts such as bad faith, malice, violence and recklessness. A punitive damages award is not intended to compensate the plaintiff for injuries or damages actually sustained, but to ensure that the defendant and others similarly situated refrain from such conduct in the future. Unlike damages such as those awarded for loss of earnings or pain and suffering, which can be quantified (pecuniary damages), punitive damages are “non-pecuniary” and can greatly exceed the actual loss sustained by the plaintiff. While punitive damages are generally available under US law, they have historically been more limited in maritime cases.

The US Supreme Court addressed the question of whether non-pecuniary damages were available in Jones Act cases in its 1990 decision in [Miles v. Apex](#). *Miles* involved a claim for non-pecuniary damages for loss of society (benefits each family member receives from love, affection etc.), rather than punitive damages. The Supreme Court ruled that Jones Act seamen could only recover pecuniary damages, which did not include damages for loss of society. The reasoning in the *Miles* decision and the cases following it, which became known as the "Miles uniformity principle", was that courts could not expand the damages remedies beyond those allowed by Congress in enacting the Jones Act, which, according to long-standing judicial interpretation, was limited to recovery of pecuniary damages.

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~~Could~~ that punitive damages being non-pecuniary in nature, and therefore unavailable under the Jones Act, were also not to be considered as a remedy under the general maritime law, including claims for failure to pay maintenance and cure.

However, in 2008, the Supreme Court upheld the recovery of punitive damages for a (non-seaman) general maritime law claim in [Exxon v. Baker](#). More recently, in 2009, in a 5:4 decision, the Supreme Court in [Atlantic Sounding v. Townsend](#) overturned *Guevara* and allowed an award of punitive damages when a seaman's employer arbitrarily and capriciously failed to pay maintenance and cure.

It was against this background that the original Fifth Circuit Court of Appeals in [McBride](#) reversed the District Court and ruled that seamen may seek punitive damages in claims arising under the general maritime law for unseaworthiness. The three-judge panel, led by Justice Higginson, emphasized that *Miles* did not directly address the issue of punitive damages and offered a historical basis for their finding. In their opinion, "...the availability of punitive damages for unseaworthiness claims arising under general maritime law was largely unquestioned", although they were not generally sought or awarded. Since unseaworthiness claims were first recognized by the courts in the late 19th century, long before Congress enacted the Jones Act, Congress must be presumed to have known and accepted that punitive damages would remain available for unseaworthiness claims.

**The majority opinion, dissent and concurrence** The majority opinion of the *en banc* Court in [McBride](#) was written by Judge Eugene Davis, who opined that *Atlantic Sounding v. Townsend* did not affect or alter the Supreme Court's earlier decision in *Miles v. Apex* with respect to a seaman's right to recover non-pecuniary damages, including punitive damages, in a case involving a claim for unseaworthiness. While *Atlantic Sounding v. Townsend* allowed punitive damages for arbitrary and capricious failure to pay maintenance and cure, it had explicitly reaffirmed *Miles v. Apex*, stating the "the reasoning of *Miles* remains sound."

One judge of the Fifth Circuit Court *en banc* joined the opinion of Judge Davis, while seven judges wrote or joined in two separate opinions concurring with the result. Judge Haynes and Judge Elrod's concurring opinion rejected the plaintiff's argument that punitive damages have always been available for unseaworthiness claims. They emphasized that the availability of punitive damages for seamen is left for Congress to decide, not the courts. Judge Clement filed another strong concurring opinion, addressing the historical development of unseaworthiness, maintenance and cure and the Jones Act, and countering the plaintiff's argument that if punitive damages are available in one kind of general maritime law claim (i.e. for failure to pay maintenance and cure), they should be available in all:

*"Throughout all these sources, one searches in vain for actual authority establishing that pre-Jones Act unseaworthiness plaintiffs were entitled to an award of punitive damages. Rather, the primary authority supporting punitive damages in unseaworthiness cases appears to be a collective judicial "oh, hell, why not" principle that holds that because punitive damages are available in many other types of actions they should also be available in unseaworthiness cases."* <sup>1</sup>

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The two dissenting opinions are mainly a recitation of the original panel's decision, which was authored by Judge Higginson. The dissenting judges argue that punitive damages should be available in all unseaworthiness cases; and that claims under the Jones Act and general maritime law are and should be considered distinct from one another. Thus, Congress's decision to disallow non-pecuniary damages for Jones act negligence claims does not necessarily lead to the same determination for claims arising under general maritime law.

**Consequences and the future?** For now, the *McBride en banc* decision is binding only on district courts in the Fifth Circuit, which comprises Mississippi, Louisiana and Texas. While the Fifth Circuit is often considered to be the leading circuit court for maritime cases, courts in other circuits are not bound to follow its precedent. The waters continue to be “muddy” with respect to the availability of punitive damages in US seamen’s cases. The Ninth Circuit, which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Mariana Islands is seemingly in accord with the Fifth Circuit’s views, but other circuits could deviate. If that should happen in a future case, conditions may be ripe for the issue to be considered by the US Supreme Court.

And what of the *McBride* case itself? At a presentation on 22 October 2014 at the Philadelphia meeting of the US Maritime Law Association, it was stated that it is possible the plaintiff in *McBride* will not choose to seek an appeal to the US Supreme Court, however, we have since learned that the attorney for the plaintiff may be seeking aide for an amicus brief for judicial review of the decision. Amicus briefs are often filed in appeals concerning matters of a broad public interest by a person or a government with a strong interest in the subject matter. Even though they are not a party to the action, they may apply to the court for permission to file a brief on behalf of the plaintiff, but in reality, to submit its own views. An application to the Supreme Court for judicial review does not mean the Court will hear the case. It will not be known for certain whether the case will be appealed until after the time for filing an appeal expires in early December 2014.

As always, Gard Members should seek the guidance of Gard and our local correspondents when faced with seamen's cases in the US, which, as can be seen from the above discussion, often present complex legal issues.

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1 <http://www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-30714-CV2.pdf#page=21> .