Punitive Damages in Admiralty for Bad Faith Refusal to Provide Maintenance and Cure: Robinson v. Pocahontas, Inc.

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PUNITIVE DAMAGES IN ADMIRALTY FOR BAD FAITH REFUSAL TO PROVIDE MAINTENANCE AND CURE: ROBINSON V. POCAHONTAS, INC.

In Robinson v. Pocahontas, Inc., the First Circuit upheld an award of punitive damages as a result of a shipowner's bad faith refusal to provide maintenance and cure. An award of this nature is unprecedented and represents one of only a few decisions which have actually awarded punitive damages in admiralty. This Comment examines the Robinson decision in light of its legal foundations, the perimeters of maritime law, and recent developments under the Jones Act and California insurance law. The author concludes that ample grounds exist in admiralty to support the First Circuit's award.

INTRODUCTION

Courts sitting in admiralty have so seldomly awarded punitive damages for maritime torts that the event in itself is noteworthy. In view of this history, the First Circuit's unprecedented decision in Robinson v. Pocahontas, Inc.1 to allow punitive damages2 as a result of a shipowner's refusal to provide an injured seaman with maintenance and cure3 is a brave step toward compelling the shipowner to more fully honor his ancient obligation. The purpose of this Com-

1. 477 F.2d 1048 (1st Cir. 1973).
2. The court affirmed a recovery of $21,336.06 on the maintenance and cure count, $10,000 of which was designated as punitive.
3. Maintenance and cure is the maritime counterpart to workmen's compensation. Like the landbased system of employee protection, the doctrine of maintenance and cure imposes liability without fault upon the shipowner for any injury sustained by a seaman within the course of his shipboard duties. However, unlike workmen's compensation, which is the only relief afforded to the landbased employee, an injured seaman may bring an action for negligence and unseaworthiness with his claim for maintenance and cure. Together, these three remedies provide the seaman far more protection from personal injury than is given to his shorebased counterpart.

The shipowner's liability under this doctrine extends to any injury suffered by a seaman under his employ except those resulting from willful misconduct or aggravation of an old injury which was knowingly concealed by the seaman at the time of his employment. The shipowner remains liable for medical expenses and a small living allowance until the seaman has reached the point of maximum cure and for wages that the seaman would have earned had he stayed
ment is to explore the propriety of this decision in light of its legal foundations, the perimeters of maritime law, and, by analogy, recent developments in California insurance law.

ROBINSON v. POCAHONTAS, INC.: THE FACTS

In April 1967, Earl E. Robinson, a seaman aboard the M/V Arthur J. Minners, which was engaged in fishing operations in the Gulf of Mexico, slipped and fell on some fish slime, incurring back injuries. After a short period of hospitalization, Robinson was fired from his job by the ship's captain on the advice of a company physician, who, after testing, suspected Robinson of malingering and having syphilis. Subsequent to his discharge, Robinson's back condition became critical, requiring emergency medical care. However, further testing at a United States Public Health Service Hospital proved negative, indicating the absence of a serious back problem. After physical therapy failed to improve his condition, Robinson placed himself under private medical care. His ailment was then diagnosed as a herniated disc. Corrective surgery and post-operative therapy somewhat alleviated Robinson's condition.

Several months later, Robinson reentered a Public Health Service Hospital for further treatment. When his condition failed to improve, Robinson returned to his private doctors, who diagnosed a second ruptured disc requiring additional surgery.

Throughout this sequence of events, defendant Sea Coast, the owner of the M/V Arthur J. Minners, refused to fully honor its obligation to pay maintenance and cure. At first, Sea Coast withheld payments on the pretext that Robinson had contracted venereal disease and was fired for cause. When this charge was not substantiated, the defendant began to make irregular payments but refused to authorize payment of back wages even though notified that the mortgage on Robinson's home would be foreclosed if these funds were not disbursed. Finally, Sea Coast terminated all payments when Robinson rejected an inadequate settlement offer.

LEGAL FOUNDATIONS

The Robinson court based its decision to award punitive damages healthy for the term of his employment. See generally G. Gilmore & C. Black, The Law Of Admiralty §§ 6-6-13 (2d ed. 1975) [hereinafter cited as Gilmore & Black].

4. A shipowner's liability for the wages of an injured fisherman extends for the entire term of employment. For example, where the term of employment is for the tuna season, a seaman who is injured in the service of the vessel is entitled to either wages or to his share of the catch for the entire tuna season. Vitco v. Joncich, 130 F. Supp. 945 (S.D. Cal. 1955), aff'd, 234 F.2d 161 (9th Cir. 1956).
mainly upon Justice Stewart's dissenting opinion in *Vaughn v. Atkinson*, a case in which the majority of the Supreme Court allowed an injured seaman to recover attorney's fees as a result of the shipowner's refusal to provide maintenance and cure. The Court stated:

> Our question concerns damages. Counsel fees were allowed in *The Apollon*, 9 Wheat. 362, 379, an admiralty suit where one party was put to expense in recovering demurrage of a vessel wrongfully seized. While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows (*The Iroquois*, 194 U.S. 240), the recovery may also include "necessary expenses." *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371.

Justice Stewart was unable to agree that attorney's fees were recoverable as *compensatory* damages, but he noted that

> [i]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seamen, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages.... While the amount so awarded would be in discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.

The First Circuit justified its reliance on this dissenting opinion by finding that Stewart's position was "seemingly in agreement with the majority's fundamental premise." However, a closer look at the

5. The following cases were also cited for support: *Solet v. M/V Capt. H.V. Dufrene*, 303 F. Supp. 980 (E.D. La. 1969); *Roberson v. S/S American Builder*, 265 F. Supp. 794 (E.D. Va. 1967); and *Stewart v. S.S. Richmond*, 214 F. Supp. 135 (E.D. La. 1963). However, it is difficult to read these cases as supporting the *Robinson* court's position on punitive damages, for these decisions allowed only a recovery of attorney's fees in egregious circumstances. For example, in *Stewart v. S.S. Richmond*, recovery was limited to compensatory damages and attorney's fees, even though the shipowner offered no just reason for withholding maintenance payments and the plaintiff, who had a wife and six children, was "reduced to virtual beggary through lack of funds."

6. Justice Harlan also joined in this opinion.


8. The majority opinion characterized the defendant's conduct in withholding such payments as follows:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

*Id.* at 530-31.

9. *Id.* at 530.

10. *Id.* at 540 (Stewart, J., dissenting).

11. *477 F.2d* at 1051. See also *Gilmore & Black*, *supra* note 3, at §§ 6-13, in
majority opinion reveals that the Justices were in agreement on only one point: Attorney's fees should be awarded because of the shipowner's aggravated conduct. At this point, the opinions diverge, with the majority awarding attorney's fees as an item of compensatory damages and the dissent arguing that they should only be recoverable indirectly through an award of punitive damages. For this reason, it is difficult to find any support for the Robinson decision in Vaughn, other than Justice Stewart's suggestion that punitive damages are appropriate in this situation.

Generally, an award of attorney's fees as compensatory damages runs contrary to the established "American rule," which disallows a successful litigant recovery of litigation expenses, including counsel fees, except when provided for by statute or by contract between the parties. The Vaughn decision, however, is uniformly cited as a foundational case to the so-called "bad faith" exception to the American rule. This exception, one of only a few deviations to the general rule, permits recovery of attorney's fees as a result of an unsuccessful litigant's oppressive and vexatious conduct. Although the Court, on occasion, has referred to an award of attorney's fees which the authors contend that the Justices unanimously agreed that punitive damages were recoverable but that the majority chose to award "what were essentially punitive damages under the name of counsel fees" in order to avoid further proceedings and because of their narrow interpretation of the grant of certiorari.

12. In England, a court, in awarding costs, has discretion whether to include attorney's fees. This discretionary award was also permitted in colonial America. However, now the accepted rule in this country is that such fees are not ordinarily recoverable. See 6 Moore's Federal Practice § 54.77[2] (2d ed. 1976); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636 (1974).


14. See Hall v. Cole, 412 U.S. 1, 5 (1975); D. Dobbs, Handbook on the Law of Remedies 198 (1973). The decision to award attorney's fees here was not unprecedented. Justice Douglas, writing the Vaughn majority opinion, cited Rolax v. Atlantic Coast Line Ry., 186 F.2d 473, 481 (4th Cir. 1951), as support for his position. This case, which is generally considered to be the progenitor of the bad faith exception, involved union discrimination against Negroes. The Court awarded counsel fees as a matter of equitable discretion. The Vaughn decision, however, extended this exception into non-equity cases.

There is some support for the proposition that the Vaughn decision created a separate maritime exception to the American rule. See Fleishman Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 645 (1974). This proposition finds additional support in the Court's citation to The Appolon, 22 U.S. (9 Wheat.) 362 (1824). In this case, the Supreme Court affirmed an award of counsel fees arising from an illegal seizure of a vessel, stating that "it is the common course of admiralty to allow expenses of this nature either in the shape of damages, or as part of the costs." Id. at 379.

made under this exception as "punitive" in nature, because it is triggered by conduct which might otherwise permit a recovery of punitive damages, the award is considered to be an element of costs and, therefore, compensatory.\footnote{16}{Hall v. Cole, 412 U.S. 1, 5 (1975).}

Further support for the conclusion that attorney's fees in \textit{Vaughn} were awarded as an item of compensatory damages is found in the fact that the Court allowed recovery of this expense as a matter of law, leaving the award within the discretion of the trial court. Procedurally, this determination runs counter to the established federal policy\footnote{19}{The law of admiralty is generally governed by federal law. \textit{See} D. ROBERTSON, \textit{ADMIRALTY AND FEDERALISM} 136-47 (1970).} which charges the jury with discretion in awarding punitive damages.\footnote{20}{\textit{Day v. Woodworth}, 54 U.S. (13 How.) 363 (1851).}

\section*{Punitive Damages in Admiralty}

Because the \textit{Vaughn} decision affords no new basis for recovery of punitive damages, it is necessary to test the propriety of the \textit{Robinson} holding against Justice Stewart's suggestion that the "traditional concepts of the law of damages"\footnote{21}{\textit{C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES} § 78 (1935).} should apply to a wanton withholding of maintenance and cure. Because of the near uniform acceptance of punitive damages by shorebased courts, one might expect that courts sitting in admiralty have also freely utilized them in appropriate circumstances. However, a review of the history of punitive damages in admiralty indicates that while maritime courts apparently accept the doctrine, they have shown a marked reluctance to actually award such damages.\footnote{22}{\textit{See Note, Punitive Damages in Admiralty}, 18 \textit{HASTINGS L.J.} 995 (1967), for a comprehensive discussion of this area.}

The validity of the doctrine in a maritime action was recognized, in dicta, by the Supreme Court in its early decision of \textit{The Amiable Nancy}.\footnote{24}{16 U.S. (3 Wheat.) 546 (1818) (dictum).} In this case, which arose out of a marine trespass, Justice Douglas, writing for the \textit{Vaughn} majority, termed the defendant's conduct as "callous," "willful," and "persistent." 369 U.S. at 530-31.

\footnote{17}{As a general rule punitive damages will be levied against conduct which is willful, wanton, or reckless. \textit{W. PROSSER, LAW OF TORTS} 9-10 (4th ed. 1971).}

\footnote{18}{\textit{See Note, Attorney's Fees: Where Shall the Burden Lie?}, 20 \textit{VAND. L. REV.} 1216, 1227 (1967).}

\footnote{23}{\textit{See Note, Punitive Damages in Admiralty}, 18 \textit{HASTINGS L.J.} 995 (1967), for a comprehensive discussion of this area.}

\footnote{25}{The plaintiff, a Haytian schooner, was boarded and plundered by the American vessel \textit{Scourge}.}
Story stated: “[I]f this were a suit against the original wrongdoers, it might be proper to go yet farther,26 and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.”27 Punitive damages were denied by the Court because the defendant, the owner of the trespassing vessel, neither authorized nor ratified the acts of its agent.

Despite this early indication from the Court that maritime law afforded such relief, the first and only case to actually award punitive damages prior to 1967 was *Gallagher v. The Yankee*,28 decided in 1859. The libel in this action was brought against the captain of *The Yankee* for an unlawful deportation of the libellant from California to the Sandwich Islands. In that decision the court said: “[F]or a tort of this kind—high-handed and deliberate, in open and contemptuous violation of the hitherto supposed inviolable rights of the citizen—the court should award exemplary damages.”29

Following *Gallagher v. The Yankee*, several admiralty courts considered cases in which punitive damages were at issue.30 These courts, although recognizing the validity of the doctrine, refused to allow its application, generally because of the particular facts or because the defendant lacked the requisite state of mind. Therefore, despite the lip service paid to the doctrine in these cases, its acceptance in admiralty remained questionable.31

However, in a 1967 case arising out of a collision between the *Cedarville*, a Great Lakes ore carrier, and a motor vessel, a federal district court held that punitive damages could, and should, be awarded.32 The court’s opinion considered in detail the question of whether punitive damages were ever appropriate in admiralty. Citing *The Amiable Nancy*33 and dicta from several other cases,34 the court concluded that “[t]he cause of action for punitive damages has

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26. The Court found that the defendants were “bound to repair all the real injuries and personal wrongs sustained by the libellants . . . .” 16 U.S. (3 Wheat.) at 559.
27. Id. at 558.
28. 9 F. Cas. 1091 (N.D. Cal.), aff’d, 30 F. Cas. 781 (C.C.N.D. Cal. 1859).
29. Id. at 1093.
30. See, e.g., The Ludlow, 280 F. 162 (N.D. Fla. 1922); The Mascotte, 72 F. 684 (D.C.N.J. 1894); The Normania, 62 F. 469 (S.D.N.Y. 1894).
33. 16 U.S. (3 Wheat.) 546 (1818).
always been recognized as an actionable right in admiralty. On appeal, the Sixth Circuit, though clearly implying that punitive damages could be assessed if given the proper facts, reversed on the grounds that the defendant had neither ratified nor authorized the acts of its agents.

These decisions, in combination with Justice Stewart's dissent in Vaughn and the lack of any precedent denying the doctrine's place in admiralty, would seem to have provided a sufficient legal basis for the Robinson court to have premised its award. Nevertheless, the courts' unexplained reluctance over the years to assess punitive damages remains prominent.

PUNITIVE DAMAGES FOR BREACH OF CONTRACT

As a general proposition, punitive damages are never awarded for breach of contract, even where the breach is malicious or intentional. Although the precise nature of the maintenance and cure relationship is unclear, the courts have found the doctrine to be sufficiently contractual to warrant application of certain contract rules in resolving disputes between seamen and shipowners. For example, the duty to mitigate damages, the right to collect prejudgment interest, and the statute of limitations for oral contracts have been utilized in maintenance and cure suits. In Robinson, the defendant contended that the contract rule regarding punitive damages should apply to a breach of duty to provide maintenance and cure. The First Circuit rejected this defense with little difficulty by reference to the Supreme Court’s statement in Vaughn:

Maintenance and cure differs from rights normally classified as contractual. As Mr. Justice Cardozo said in Cortes v. Baltimore Insular Line, the duty to provide maintenance and cure “is imposed by the law itself as one annexed to employment. . . . Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident.”

35. 276 F. Supp. at 172.
39. Donchette v. Vincent, 194 F.2d 834 (1st Cir. 1952).
41. 369 U.S. at 532-33.
The problem in classifying maintenance and cure stems largely from the fact that "the seaman's right was firmly established in maritime law long before recognition of the distinction between tort and contract." The courts have explained its origin as arising from "the law's concern for a seaman becoming sick, disabled or ill in the service of the ship," and as "a material ingredient in the compensation for the labour and services" of a seaman. In any event, however, the Supreme Court has recognized that "[s]ome of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts."

On a more pragmatic level, the courts have seemed to pick and choose between applying tort or contract rules in a result-oriented fashion. Several decisions have extended beyond any contractual constraints to find a seaman entitled to maintenance and cure benefits even before the signing of the articles of employment. And one court, in allowing an award of consequential damages for breach of a shipowner's duty to pay maintenance, has simply held that "[w]e do not think . . . that the usual rules of damages for breach of contract to pay money are applicable."

In light of these considerations, there was ample discretion for the Robinson court to choose not to apply the contract rule forbidding an award of punitive damages in the maintenance and cure setting.

43. Isthmian Lines, Inc. v. Haire, 334 F.2d 521, 523 (5th Cir. 1964). See also Dryden v. Ocean Accident & Guar. Corp., Ltd., 138 F.2d 291 (5th Cir. 1943), in which the court said:

[A]n employee-employer relationship is a contractual one. Probably many of the details of that relationship—wages, hours, etc., are fixed by specific contract provisions and are express contractual rights. But the right here sought to be enforced by the seamen was not founded on a "meeting of the minds"—it was inexorably attached by ancient and established maritime law to every seaman's contract of employment. The parties had no choice in the matter. It was a duty superimposed by law coincidental with the formation of the contractual relation. The seamen could not contract against it—his or his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right here sought to be enforced. It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law treated as "wards of admiralty."

Id. at 293.
46. An example of this attitude is seen in Sperbeck v. A.L. Burbank Co., 88 F. Supp. 623 (S.D.N.Y. 1950), where the court, wishing to preserve the cause of action in spite of the death of the seaman, chose to classify the right as contractual.
48. Sims v. United States War Shipping Adm'n, 186 F.2d 972, 974 (3d Cir. 1951). The cause of action was based only on failure to provide maintenance.
PUNITIVE DAMAGES UNDER THE JONES ACT

Depending upon the type of injury alleged, a seaman may elect to bring an action for damages resulting from a negligent failure to provide maintenance and cure under the Jones Act\(^4\) rather than under the General Maritime Law. Although the extent of permissible damages under the Jones Act was not considered in the Robinson case, a seaman opting to sue under this Act would, in appropriate circumstances, have substantial basis to argue that punitive damages should be recoverable.

Briefly, the Jones Act is the vehicle which allows a seaman to bring an action at law for injuries sustained in the course of his employment. In the absence of statutory authority, the General Maritime Law affords a seaman no relief for injuries caused by the negligence of the master or fellow crew members.\(^5\) The Jones Act, designed to alleviate this harsh rule, incorporates all the rights and remedies given to railroad workers under the Federal Employees Liability Act (FELA).\(^6\) Together, these two acts provide for survival of the injured seaman’s right of action in favor of his personal representative and further provide that contributory negligence will not bar a seaman’s action but only diminish his recovery.\(^7\) The courts have held that measure of damages under the Jones Act and the FELA is identical and that cases decided under one are persuasive precedent in an action brought under the other.\(^8\) Therefore, it is proper to consider FELA cases in determining the scope of recovery under the Jones Act.

The Supreme Court first recognized the right of the seaman to elect between the Jones Act and the General Maritime Law in Cortes v. Baltimore Insular Line.\(^9\) This case centered around the death of a

\(^5\) The Osceola, 189 U.S. 158, 175 (1903).
\(^7\) Id. § 59 (1964).
\(^8\) Id. § 53.
\(^9\) See, e.g., Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937); Martin v. Atlantic Coast Line R.R., 266 F.2d 397 (5th Cir. 1959).
\(^10\) See 10 A.L.R. Fed. 511, 519 (1972). The Supreme Court, however, has not adopted this as a hard and fast rule. In Cox v. Roth, 348 U.S. 207, 209 (1954), the Court held that the provisions of the FELA should not be mechanically applied to maritime claims but that the admiralty setting must be considered in determining Congress’ intent in enacting the Jones Act. Nevertheless, as a practical matter, cases decided under one should weigh fully in actions brought under the other.
\(^11\) 287 U.S. 367 (1932).
seaman who died from pneumonia contracted aboard the defendant's ship. The administrator of the deceased seaman's estate alleged that the death resulted from the failure of the ship's captain to give the seaman proper care. An action for damages was brought under the Jones Act because claims under the General Maritime Law did not survive a deceased seaman. The issue before the Court was whether a death, which results from the negligent omission to furnish cure, is a personal injury within the meaning of the Jones Act. Writing for the Court, Justice Cardozo stated:

We think the origin of the duty [to provide maintenance and cure] is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of will of the contracting parties. For a breach of duty thus imposed, the remedy upon the contract does not exclude any alternative remedy built upon the tort.57

Having decided that a failure to provide maintenance or cure could result in tort liability, Justice Cardozo then turned his attention to the circumstances in which a master's withholding would result in a negligent personal injury which the statute requires. Using illustrations to make this point,58 Justice Cardozo drew a distinction between the seaman who suffers physical or mental injury and the seaman who merely experiences an economic setback on account of the master's failure to provide either maintenance or cure. The former was held to have suffered a "personal injury" within the meaning of the Jones Act while the latter fell outside the statutory scope.59 An injured seaman, then, whose physical condition is aggravated by his employer's withholding of proper maintenance or cure, need only prove that the employer was negligent in his handling of the matter to bring himself within the spectrum of damages available under the Jones Act.60

57. Id. at 372.
58. Cardozo illustrated this point with three factual situations. The first is where a seaman is starved during the voyage in disregard of the duty to give maintenance, and whose health is permanently impaired. The second is where a seaman is slightly wounded through his own doing, but whose injuries are greatly aggravated from lack of care. In these two factual settings, Justice Cardozo found that "there is little doubt that in the common speech of men he would be said to have suffered a personal injury . . ." Id. at 373. The third illustration involves the situation where an injured seaman is able to borrow in order to provide for his own maintenance or cure. In this circumstance, Justice Cardozo thought there to be no personal injury. Thus, the seaman's only remedy is for his expenditures.
59. Id. at 373-74.
60. See, e.g., De Zon v. American President Lines, Ltd., 318 U.S. 660 (1941); Central Gulf Steamship Corp. v. Sambula, 405 F.2d 291 (5th Cir. 1968); Permeaux v. Socony-Vacuum Oil Co., 198 Mo. App. 463, 192 S.W.2d 138 (1946); GILMORE & BLACK, supra note 3, at § 6-13.
**Comments**

**SAN DIEGO LAW REVIEW**

**Damages Under the Jones Act**

Whether the Jones Act and the FELA permit an award of punitive damages is a question highlighted by recent litigation in the Sixth Circuit. That circuit, the first to decide the issue, has split; it allowed punitive damages in a case brought under the Jones Act but denied them in a FELA action. Such a result is anomalous because it runs contrary to the rule requiring an identity of recovery between the two acts. Nevertheless, a review of these cases illuminates the intricacies of the issue which, in the future, will need to be settled.

The first case to consider the question was *In re Den Norske Amerikalinje A/S (the Cedarville)*, which squarely raised the issue of whether the defendant, United States Steel Corporation, could be held accountable for punitive damages on account of a collision between its steamship, the *Cedarville*, and a Norwegian vessel, in which several of the *Cedarville*'s crew were killed or injured. The district court held that punitive damages were within the spectrum of remedies available in a maritime proceeding, generally, and under the survival portion of the Jones Act, specifically.

United States Steel argued that punitive damages could not be assessed under the Jones Act because the statute did not specifically provide for them. This contention, however, was easily swept aside by the court on the grounds that "specific reference is neither common nor necessary" in federal statutes because exemplary damages are a creature of common law. Furthermore, the court found that

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61. See notes 54 & 55 and accompanying text supra.
63. *Id.* at 174.
64. *Id.* at 176. The court cited *The Amiable Nancy*, 16 U.S. 546 (1818); Ralston v. The States Rights, 20 F. Cas. 201 (E.D. Pa. 1836); Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282 (1872), for the proposition that punitive damages are available in admiralty, and *Cain v. Southern R.R.*, 199 F. 211 (D.C. Tenn. 1911), to bolster its specific holding. In *Cain*, which involved a wrongful death action brought under the FELA, the court clearly implied that punitive damages might have been available in a survival action if such an action were allowed under the Act (the survival section of the act was later added by amendment). The court also cited *Ennis v. Yazoo & M. Valley R.R.*, 188 Miss. 509, 79 So. 73 (1918), as precedent for the proposition that punitive damages are recoverable under the FELA. This decision, however, is also susceptible to a reading that punitive damages are not necessarily available because it is unclear whether the trial court's punitive award was based on state common law or under the FELA's survival section. In any event, the trial court's award was overturned on appeal. See 10 A.L.R. Fed. 511, 537 (1972).
65. 276 F. Supp. at 176.
other statutes which employ the same general language as the Jones Act have been interpreted as allowing punitive relief.\textsuperscript{66}

On appeal, this decision was vacated \textit{sub nom} on the ground that United States Steel had not authorized or ratified the acts of the Cedarville's captain, a fact upon which the lower court had predicated its judgment.\textsuperscript{67} Although this disposition of the case did not allow the court to reach the issue, it implied that, given the proper facts, punitive damages would be recoverable under the Jones Act.\textsuperscript{68}

In \textit{Kozar v. Chesapeake and Ohio Railway},\textsuperscript{69} a subsequent litigation arising under the FELA, the question was reconsidered. The district court, in a detailed opinion, held that a deceased railway worker's estate could collect punitive damages under the survival provisions of the Act. Because of the limited case law addressing the question,\textsuperscript{70} the court buttressed its decision on congressional intent.


\textsuperscript{68} The court said:

\begin{quote}
We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident. Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him.
\end{quote}

\textit{Id.} at 1148.


With the exception of the Gunnip decision, the Kozar court read these cases as allowing compensatory recovery only. And in Gunnip, although the court allowed a seaman to amend his Jones Act complaint to pray for punitive damages, it expressly reserved the question of whether such damages might be recovered. Therefore, after considering the limited precedential value of these decisions, the Kozar court found that only \textit{United States Steel Corp. v. Fuhrman} "seems to stand as authority." 320 F. Supp. at 350.

The courts have consistently overlooked Phillip v. United States Lines Co., 240 F. Supp. 992 (E.D. Pa. 1965), \textit{aff'd}, 355 F.2d 25 (3d Cir. 1966) and Mpaliris v. Hellenic Lines, Ltd., 323 F. Supp. 865, 694 (S.D. Tex. 1970), \textit{aff'd}, 440 F.2d 1163 (5th Cir. 1971). Both the district court and the appellate court in the Phillip case expressly reserved the question of whether, under the proper facts, a punitive award could be allowed under the Jones Act. The court of appeals, by citing Basista v. Weir, 340 F.2d 74 (3d Cir. 1965), a case which allowed punitive damages under a federal statute employing the same general language as the Jones Act, seemed to imply that it would allow such a recovery under different facts.

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in enacting the statute. It found that Congress' intent was to safeguard the health of railroad employees by extending and enlarging the remedies available to an injured worker under the common law.

Furthermore, the court reasoned that a railway could have been held liable for punitive damages prior to the enactment of the FELA and that there is no reason to believe that Congress sought to limit this recovery in light of the Act's paternal purposes.

On appeal, the circuit court disagreed with the lower court on all points and reversed. First, the circuit court reasoned that while indeed Congress did not intend to limit available remedies at common law, the lower court was mistaken in characterizing "the right to recover punitive damages at common law a 'common law remedy.'" Second, the court found a series of "clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under the act are compensatory only." Den Norske was laid aside because it was reversed by Fuhrman, about which the court said: "Any inference that may be extracted from the reading of Fuhrman that punitive damages may be recoverable in an admiralty proceeding cannot be regarded as controlling in this case."

Of the four courts within the Sixth Circuit to consider the question, three have either expressly or impliedly indicated that, given proper facts, punitive damages can be awarded in suits brought under the acts. One commentator who has noted the lower court decision in Kozar has concluded that the FELA "does not of itself preclude punitive damages in appropriate situations"; another author found

In Mpiiris, the district court concluded that the facts did not warrant an award of punitive damages under the Jones Act.

71. 320 F. Supp. at 346-47. This sentiment would apply with equal force in admiralty because the Jones Act has been construed as remedial legislation "for the benefit and protection of seamen who are peculiarly the wards of admiralty." Arizona v. Anelich, 298 U.S. 110, 123 (1936).


73. Id. at 353.

74. Id. at 355.

75. Kozar v. Chesapeake & Ohio Ry., 449 F.2d 1238 (6th Cir. 1971).

76. Id. at 1240. The appellate court concluded that punitive damages is a damages theory which is quite distinct from a remedy.

77. Id. at 1242. The court cited the following cases: Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913); American R.R. v. Didricksen, 227 U.S. 145 (1913); Gulf, Colorado & Santa Fe Ry. v. McGinnis, 228 U.S. 173 (1913).

78. 449 F.2d at 1243.

that assessment of such damages falls within the purview of congres-
sional intent.\textsuperscript{80} The conclusions of these commentators run contrary
to the \textit{Kozar} circuit court and would seem to cast a shadow on the
strength of that decision. Furthermore, the appellate opinion in
\textit{Kozar} failed to adequately come to grips with the \textit{Cedarville}
precedent by distinguishing it as "an admiralty proceeding." By disposing
of \textit{Cedarville} in this manner, the circuit court ignored the vital fact
that Jones Act cases are closely tied to the FELA by history and
decision.

\textbf{Moragne v. States Marine Lines}

The extent of recoverable damages under the Jones Act has been
further complicated by the Supreme Court's recent decision of
\textit{Moragne v. States Marine Lines},\textsuperscript{81} which has thrown the area of
maritime wrongful death into chaos. Prior to this decision, maritime
deadth actions were governed by the venerable rule of \textit{The Harris-
burg}\textsuperscript{82} that maritime law afforded no remedy for wrongful death. The
Jones Act and a companion statute, the Death on the High Seas Act
(DOHSA),\textsuperscript{83} were enacted, in part, to fill the void left by \textit{The Harris-
burg} rule. In \textit{Moragne}, the Court overturned \textit{The Harrisburg} and
held that an action "does lie under the General Maritime Law for
death caused by violation of maritime duties."\textsuperscript{84} This new rule is
troublesome because it replaces the void that the Jones Act death
sections were designed to fill, leaving the relationship between the
two in a state of uncertainty.\textsuperscript{85} Although it may take many years
before the boundaries of the \textit{Moragne} rule are precisely defined, early authority\textsuperscript{86} indicates that \textit{Moragne} may either supplement or

\textsuperscript{80} Note, Punitive Damages Under the Federal Employees Liability Act, 40
U. Cm. L. Rev. 289, 297 (1971).
\textsuperscript{81} 398 U.S. 375 (1970). This action arose out of the death of a longshoreman
while working aboard a vessel in navigable waters within the state of Florida.
\textsuperscript{82} 119 U.S. 199 (1886). This decision followed the traditional common law
rule developed in Baker v. Bolton, 170 Eng. Rep. 1033 (1808), that a right of action
expires with the victim.
\textsuperscript{83} 46 U.S.C. §§ 761-768 (1970). This Act provides a remedy for death "caused
by wrongful act, neglect or default occurring on the high seas beyond a marine
league from the shore of any state." \textit{Id.} § 761. The DOHSA permits only a
recovery for wrongful death without a survival action.
\textsuperscript{84} 398 U.S. at 409.
\textsuperscript{85} It appears that the \textit{Moragne} remedy reaches deaths which would other-
wise be covered by either the Jones Act or DOHSA. See, e.g., Law v. Sea Drilling
Corp., 523 F.2d 793 (5th Cir. 1975); Renner v. Rockwell Int'l Corp., 403 F. Supp.
849 (C.D. Cal. 1975); GILMORE & BLACK, supra note 3, at § 6-32.
\textsuperscript{86} In George & Moore, Wrongful Death and Survival Actions Under the
Com. 1, 17 (1972), the authors contend that the Jones Act and the DOHSA "were
enacted to fill a void in the General Maritime Law, and as such there was clearly
no congressional intent to make an action under the General Maritime Law

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entirely displace a death recovery under the Jones Act. Such a result would allow a deceased seaman’s estate to claim damages under the General Maritime Law free of any statutory limitations.

Generally, punitive damages, if allowed for wrongful death, are recoverable in a survival action where damages are measured by the wrong done to the decedent.87 One of the questions left by the Court in Moragne “for further sifting through the lower courts”88 was whether a wrongful death action under the General Maritime Law permits a decedent’s claims to survive his death, or whether the recovery is limited to the loss to his dependents. Those lower courts which have thus far considered the question have held that survival rights are inherent in an action for wrongful death under the General Maritime Law,89 and, in dicta, have indicated that punitive damages may be assessed in a maritime survival action.90

subservient to a cause of action under either or both statutes.” In Note, *Maritime Wrongful Death and Survival Actions: A Moragne For All Waters*, 22 Loy. L. Rev. 646, 659 (1976), the author states:

There is also the remote possibility that the Jones Act survival action will be entirely displaced by the new federal maritime survival action; that is, claims for a decedent seaman’s conscious pain and suffering, caused by either the employer’s negligence or the vessel’s unseaworthiness, might be asserted solely under the federal maritime survival action.

See also Gilmore & Black, supra note 3, at § 6-33.

87. In the absence of express or implied language in the wrongful death statute authorizing a punitive award, the usual rule is that such damages are not recoverable. This rule has developed because the goal of the wrongful death action is to recompense the loss the death caused to the survivors. See D. Dobbs, *Handbook on the Law of Remedies*, 556-65 (1973).

The Jones Act, the FELA, and the DOHSA have adopted this measure of damages. See, e.g., Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937) (Jones Act claim); Moore-McCormick Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961) (DOHSA claim); Allendorf v. Elgin, Joliet & Eastern Ry., 8 Ill. 2d 164, 133 N.E.2d 288 (1956) (FELA claim). In proper circumstances, however, punitive damages may be recovered in a survival action where damages are measured by the wrong done to the decedent before his death. See D. Dobbs, *Handbook on the Law of Remedies* 552-55 (1973).

88. 398 U.S. at 408.


90. See, e.g., Renner v. Rockwell Int’l Corp., 403 F. Supp. 849, 852 (C.D. Cal. 1975) (the court, in listing those items of damages recoverable under Moragne stated: “The damages recoverable in a survival action traditionally include all ‘loss or damage [which] decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived. . .’. Cal. Probate Code § 573
For these reasons it appears that punitive damages are likely to be available in a *Moragne* styled wrongful death action. However, if the remedy under the General Maritime Law does, indeed, supplement or displace the Jones Act survival action, the law may take the peculiar posture that punitive damages would be allowed where the injured seaman dies, but denied under *Kozar* if he lives. Such a result, of course, is illogical in light of the purpose behind a survival action which is to merely allow a personal representative to pursue whatever claims the decedent would have had had he lived.\textsuperscript{91}

**Tortious Breach of Contract**

Justice Cardozo, in the *Cortes* opinion, observed that a breach of a contractual obligation may result in tort liability. In that decision he stated: “We think the origin of the duty [to provide maintenance and cure] is consistent with a remedy in tort, since the wrong, if a violation of contract, is also something more. . . . The remedy upon the contract does not exclude an alternative remedy built upon the tort.”\textsuperscript{92}

This theory has come to be known as “tortious breach of contract,”\textsuperscript{93} and its application enables courts to award recoveries beyond the usual measure of contract damages. In the most recent extension of this theory the California courts have held that an insurer’s bad faith disposition of a claim against it may result in a tortious breach of contract.\textsuperscript{94} These courts have read into the insurance agreement an implied duty of good faith and fair dealing on both parties.\textsuperscript{95} This duty encompasses other duties, one of which places upon the insurer the responsibility not to unreasonably withhold—or threaten to withhold—policy payments without probable

\textsuperscript{91} See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 553 (1973).

\textsuperscript{92} 287 U.S. at 372.

\textsuperscript{93} The *Cortes* opinion has been cited as recognizing the theory of “tortious breach of contract.” See, e.g., Sperbeck v. A.L. Burbank & Co., 190 F.2d 449, 453 (2d Cir. 1951).


cause to do so. These duties exist independently of any contractual terms, and breach of any of them sounds in tort regardless of the fact that the breach may also constitute a breach of contract. Once a derogation of this implied duty is proven, the breaching party may become liable for the entire spectrum of tort damages, including punitive damages where appropriate.

*Fletcher v. Western National Life Insurance Co.* is illustrative of the California approach and is important to the present discussion because substantial punitive damages were awarded on facts remarkably similar to a shipowner’s withholding of maintenance and cure. In this case the plaintiff suffered back injuries as a result of an industrial accident. He was placed on disability and eventually fired from his job. There was virtually a unanimous agreement among numerous doctors, including an independent medical examiner, that the plaintiff’s disability resulted from the accident.

Although these medical opinions were known to the defendant insurer, its claims manager decided that the claim was one for sickness and not injury, a decision which greatly reduced the insurer’s liability. Subsequently, the claims manager, upon the strength of a single doctor’s opinion, concluded that the insured’s condition was in part caused by a concealed congenital back problem, notified the plaintiff that no further payments would be made, and demanded restoration of all policy benefits. Finally, the insurer offered to settle the dispute by allowing the plaintiff to retain the policy benefits already paid in return for a cancellation of the policy and a full release. The defendants conceded that this conduct was “outrageous,” and the jury impliedly found that the defendants acted either with the intent to cause the plaintiff emotional distress or with reckless disregard of this result.

100. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
101. The policy provided coverage of $150 per month for a two year maximum period in case of sickness and $150 per month for a maximum period of 30 years in the event of injury.
On the theory of intentional infliction of emotional distress, the court of appeal upheld the jury's award of compensatory and punitive damages against both the insurer and the claims manager. The defendant contended that punitive damages were improper because the case sounded in contract. The court, while recognizing this argument, rejected it on the grounds that the action arose from an implied duty of good faith and fair dealing which obligated the insurer not to do anything which would deprive the insured of the policy benefits. Such an action sounds in tort irrespective of the fact that a breach of contract may be involved, and punitive damages are allowed in the proper case.

Because of the similar position of insurer to insured and shipowner to seaman, it is very tempting to draw a strong analogy between the California line of bad faith insurance cases and a failure to provide maintenance and cure. There are, however, several considerations which may stand between such an analogy. First, on a factual level, insurance contracts are quite distinct from contracts of employment. Because the insurance business is thought to be “affected with the public interest” and subject to stringent regulation, the courts have long recognized the special nature of the insurance contract. In Fletcher, for instance, the court observed that the insurance industry is “governmentally regulated to a substantial degree. It is affected with a public interest and offers services of a quasi-public nature.” The Fletcher court further concluded that a special relationship exists between an insurer and its insured which is the by-product of “the great disparity in the economic situations and bargaining abilities of the insurer and the insured,” as well as “the fact that the insured does not contract . . . to obtain a commercial advantage but to protect [himself] against the risks of accidental losses . . . .”

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102. The jury awarded $10,000 punitive damages against the claims manager and $840,000 against the insurer. The trial judge ordered a remittitur, reducing the award to $180,000, which was accepted by the plaintiff. The lesser amount was upheld on appeal.

103. Id. at 400-02, 89 Cal. Rptr. at 92, 95.

104. The court rejected the contention that the award of punitive damages was improper because the case sounded in contract. The court reasoned that the defendant's conduct was essentially tortious and that full tort damages could be recovered despite the fact that the conduct also amounted to a breach of contract. Id. at 400-02, 89 Cal. Rptr. at 93-94.

105. Id. at 401, 89 Cal. Rptr. at 93.

106. Id. at 401-02, 89 Cal. Rptr. at 93-94.


109. Id. at 403-04, 89 Cal. Rptr. at 95.

110. Id. at 404-04, 89 Cal. Rptr. at 95.

111. Id. at 404, 89 Cal. Rptr. at 95.
To some extent, however, these same considerations are applicable to the maritime employment contract. Certainly, it may be contended that the seaman is in an unequal bargaining position, although the existence of labor unions considerably dilutes the force of this contention. More persuasively, though, it can be argued that the very origin of the maintenance and cure relationship lies in the law's concern for the seaman's well-being. Therefore, implying a duty of good faith into the relationship would go far in implementing this concern.

Second, it must be remembered that the General Maritime Law does not allow a seaman to recover for injuries sustained by the negligence of the shipowner. An action for breach of the duty to deal in good faith would probably have to be brought under the Jones Act, attendant with the uncertain state of punitive damages under that Act. The practical effect of funnelling a breach of this duty through the Jones Act would be to afford the injured seaman no greater recovery than is already available to him under the Cortes decision. Thus, the analogy to insurance law is not very helpful in expanding the basis for an injured seaman to recover punitive damages.

Finally, it should be noted that even if the above contentions are found to be logically sound and weighty, admiralty courts will not ordinarily find landbased law to be persuasive by analogy unless the proposed change is accepted with near uniformity by common law courts. At present, the California approach has not gained accept-

112. *See, e.g.*, The Osceola, 189 U.S. 158 (1903), which held that a seaman has no action under the General Maritime Law for injuries sustained through the negligence of his master. This decision left the seaman with only his remedy for maintenance and cure.

113. The concept of negligence under the Jones Act is broad enough to encompass even intentional torts when committed in the course of the employer's business. *See* M. Norris, *The Law of Seamen* § 691 (3d ed. 1970). For this reason, a breach of the duty to deal in good faith which amounts to an intentional infliction of emotional distress will likely fall within the purview of the Jones Act. If, however, an action for intentional infliction of emotional distress would be actionable through the General Maritime Law, a recovery of punitive damages under such a theory would encounter the same historical reluctance which presently exists in actions for punitive damages caused by refusal to provide maintenance and cure. Therefore, even if an action for intentional infliction of emotional distress were allowed under the General Maritime Law, an injured seaman would not have an expanded basis for recovering punitive damages.

ance outside of that state, though several states seem receptive to the
idea.115

STANDARD OF CONDUCT

Whereas compensatory damages are awarded to compensate the
plaintiff for his injuries, punitive damages are levied as punishment
or deterrent because of the nature of the defendant’s conduct.116
Generally, conduct which is willful, wanton, or reckless justifies an
award of punitive damages.117 These adjectives are employed to de-
scribe conduct which, though still only negligent, is so highly un-
reasonable and at such great variance from ordinary care118 that it is
treated as if it were intended.119

There is no logical reason why punitive damages in admiralty
should be governed by a different standard. Those few admiralty
courts which have dealt with the question have applied this general
rule. In The Amiable Nancy,120 the Court described the defendant’s
conduct as a “gross and wanton outrage, without any just provoca-
tion or excuse.” More recently, in the Cedarville case, a federal
district court held that punitive damages could be recovered where
the master’s “misconduct evinces a reckless and wanton disregard
for the rights of the claimants.”121

Although the Robinson court made no explicit finding as to the
culpability of the defendant, for its guideline it seemed to follow the
usual common law standard by quoting the Vaughn dissent requiring
“wanton and intentional disregard of the legal rights of the sea-
men.” The Robinson opinion, however, is unclear as to which of
the defendant’s acts met this requirement. From the facts as given,122
it is fair to assume that the award was not based on the failure to give
either maintenance or cure but on the third part of this doctrine, the
shipowner’s duty to pay back wages.123 Such an assumption is based

115. See, e.g., Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 531
(1975).
118. Id. at 10.
120. 16 U.S. (3 Wheat.) 546 (1818).
121. Id. at 558.
122. 276 F. Supp. at 198.
123. 369 U.S. at 540 (Stewart, J., dissenting).
124. See text accompanying notes 3-5 supra.
125. Liability for back wages arises in the same manner as maintenance and
cure—that is, a seaman who is injured in the service of the ship becomes entitled
to wages which he would have earned had he remained healthy for the entire
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on the rule that a shipowner is not liable for private medical expenses unless the seaman is able to bear his burden of proving that "proper and adequate care was not available at [a Public Health Service] hospital." As the court made no specific finding that the defendant knew the exact extent of its liability, it can be inferred that the defendant held some doubt as to its duty to provide both maintenance and cure. Such a doubt would probably remove a defendant from punitive liability. The facts further seem to indicate that Sea Coast should have known of its liability for back wages and did in fact know that withholding these wages would cause Robinson to lose his home. It is hard facts like these which would authorize an assessment of punitive damages against the wrongdoer.

CONCLUSION

In awarding punitive damages for bad faith refusal to provide maintenance and cure, the Robinson decision is responsive to the traditional maritime concern for seamen's well-being. This concern lies at the very origin of the maintenance and cure doctrine, and a judicious use of punitive damages in proper circumstances would go far toward implementing this policy. From this perspective, then, it must be concluded that the Robinson case was correctly decided.

When viewed from a strictly legal standpoint, the decision was without a strong foundation in admiralty law. At present, however, the law of admiralty is only a step away from recognizing the propriety of awarding punitive damages for bad faith refusal to provide maintenance and cure. Although punitive damages have almost never been awarded in admiralty, there is no reason to believe that the General Maritime Law does not sanction such an award. Furthermore, where the circumstances are such as to allow an action for punitive damages under the Jones Act, an injured seaman would }


\(^{127}\) In this instance the shipowner's duty to pay maintenance was somewhat contingent upon his duty to provide private medical care. This is so because a shipowner is not liable for maintenance payments during the time the seaman spends in the hospital, for the seaman incurs no living expenses inside the hospital. See Gilmore & Black, supra note 3, at § 6-12. Sea Coast's liability to pay maintenance was contingent upon it's liability to pay for private medical care. Therefore, it is arguable that it also held a good faith doubt as to whether or not Robinson was entitled to maintenance payments for the time he spent in the hospital under private care.
have promising grounds to argue that punitive damages should be awarded. The Cedarville litigation has laid a solid framework for a punitive recovery under the Jones Act, although the refusal to allow punitive damages under the FELA will eventually need to be reconciled. In addition, the development of punitive damages in California insurance law can serve as a possible model for maritime courts to follow. Therefore, if the courts are willing to put aside their historical reluctance to allow punitive damages, the Robinson decision is likely to be followed in the future.

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