



THE SAGA OF PUNITIVE DAMAGES UNDER *MILES V. APEX MARINE* CONTINUES WITH RECENT NINTH CIRCUIT OPINION

In the aftermath of the US Supreme Court's landmark decision in *Miles v. Apex Marine Corp.*,¹ federal and state courts have grappled with whether a seaman has the right to recover punitive damages under a claim of unseaworthiness. The Ninth Circuit Court of Appeals, in *Batterton v. Dutra Group*,² has recently joined some courts who answer in the affirmative - a seaman may sue for punitive damages under a general maritime claim of unseaworthiness even after *Miles*. This creates uncertainty for shipowners and their underwriters.

¹ 498 U.S. 19 (1990)

² No. 15-56775, 2018 WL 505256 (9th Cir. Jan. 23, 2018)

Miles held that non-pecuniary damages of loss of society and lost future earnings were not available in a wrongful death action brought by a deceased seaman's wife. The First and Fifth Circuits have held that under *Miles*, seamen cannot recover non-pecuniary damages; since punitive damages are non-pecuniary they are unrecoverable³.

Prior to *Miles*, the Ninth Circuit held punitive damages were available under general maritime law for claims of unseaworthiness⁴. The question before the court in *Batterton v. Dutra Group* was whether *Miles* overturns this prior holding.

The Ninth Circuit reads *Miles* narrowly as only limiting wrongful death cases to pecuniary damages and not all claims arising under general maritime. As support for this rationale, the Ninth Circuit cites to the US Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*⁵. In *Townsend*, the Supreme Court held that the *Miles* prohibition against punitive damages did not apply to maintenance and cure claims. Additionally, the *Townsend* Court noted that historically punitive damages were available under general maritime law and *Miles* did not change that availability. The Ninth Circuit extends the *Townsend* rationale for permitting punitive damages under maintenance and cure claims to unseaworthiness claims under the general maritime law.

Prior to the Ninth Circuit's decision, the Washington State Supreme Court in *Tabingo v. Am. Triumph LLC*⁶, held similarly that a seaman could sue for punitive damages under an unseaworthiness claim. The defendant vessel owner petitioned the US Supreme Court to grant a writ of certiorari to review the Washington decision. The argument supporting the Supreme Court's intervention was that by allowing the Washington decision to stand, there would be uncertainty injected into general maritime jurisprudence. This would lead to shifting standards of liability for vessel owners based on where the plaintiff seaman files his unseaworthiness suit. Two weeks before the Ninth Circuit's opinion, the US Supreme Court denied the writ of certiorari, leaving the issue unresolved.

What comes next?

By allowing seamen to recover punitive damages in an unseaworthiness claim, the Ninth Circuit and the 15 US District Courts under its jurisdiction, stand in direct opposition to the First, Second, Fifth, and Sixth Circuits. It is unlikely that this schism among the federal courts will be ignored by the US Supreme Court much longer. In the meantime, plaintiff seamen and defendant vessel owners will receive different treatment under general maritime law depending on where the suit is filed. This will make it difficult for shipowners and their underwriters

to plan for potential liabilities arising out of crew personal injury suits. To avoid the specter of punitive damages, shipowners facing Jones Act suits in a Ninth Circuit venue should bend every effort to challenge the venue whenever possible.

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³ *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014)

⁴ *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987)

⁵ 557 U.S. 404 (2009)

⁶ 188 Wash.2d 41 (2017)

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