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Damages on the high seas

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The 9th U.S. Circuit Court of Appeals said yes, while the 5th U.S. Circuit Court of Appeals and others said no. Now it is up to the U.S. Supreme Court to decide whether punitive damages are available to Jones Act seamen in unseaworthiness cases. The question is, will the high court see this issue as one worthy of attention?

On Aug. 30, the Dutra Group filed its petition for certiorari after the 9th Circuit ruled that seaman Christopher Batterton may seek punitive damages in his unseaworthiness claim. *Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir. 2018). Four years earlier, the Supreme Court denied certiorari on the same issue in *McBride v. Estis Wells Services*, 768 F.3d 382 (5th Cir. 2014) (en banc). In doing so, the court chose not to resolve a decades-old dispute in maritime law.

Recent decisions have brought this dispute to a head and now, with two of the most important maritime circuits on divergent courses, the Supreme Court has reason to establish a uniform course for punitive damages in Jones Act seaman's unseaworthiness claims.

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A Brief History

Controversy regarding punitive damages in maritime cases is not new, nor is the Supreme Court's desire to address such controversies. Not long ago in *Atlantic Sounding v. Townsend*, 557 U.S. 404 (2009), the Supreme Court resolved a circuit split and found punitive damages are available for the denial of maintenance and cure benefits to Jones Act seamen when that denial is willful and wanton.

As for the ability of seamen to collect punitive damages in unseaworthiness claims, *Miles v. Apex Marine*, 498 U.S. 19 (1990) is said to have sparked the division that led to the present day circuit split. *Miles* held that nonpecuniary losses are not available under Jones Act wrongful death or unseaworthiness wrongful death claims. While "punitive damages" are not mentioned in this decision (sparking countless arguments about what constitutes "nonpecuniary" losses), *Miles'* reasoning has provided the support for parties to argue and for both state and federal courts to hold that punitive damages are not available in unseaworthiness claims.

Before *Miles*, the 5th and 9th Circuits were uniform in their pronouncement that punitive damages are available in unseaworthiness claims. See *In re Merry Shipping*, 650 F.2d 622 (5th Cir. 1981) and *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987). Before either of those decisions, a California Court of Appeal came to the same conclusion. *Baptiste v. Superior Court*, 106 Cal. App. 3d 87 (1980). However, with the *Miles* decision, the door was opened to arguments that the bar against non-pecuniary damages in unseaworthiness cases included punitive damages. Indeed shortly after *Miles*, the 1st, 2nd and 6th Circuits denied punitive damages in unseaworthiness cases. But seamen have contended that *Miles* never barred punitive damages, and after *Townsend*, seamen seeking punitive damages argued that it overturned *Miles*, even though *Townsend* stated that *Miles* remained good law.

Thus, *Miles* and *Townsend* created the map that led to the divergent paths of *McBride* and *Batterton*.

The McBride Decision

Until this year, maritime employers took comfort in the 5th Circuit's en banc 9-6 decision in *McBride* that *Townsend* did not alter *Miles* holding. Based on *Miles*, the 5th Circuit found that seamen may not recover non-pecuniary losses, such as punitive damages, under the Jones Act or for unseaworthiness claims under the general maritime law. The court rejected arguments that *Townsend* overruled or undermined *Miles*, and found that "the Jones Act limits a seaman's recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness." *McBride*, 768 F.3d at 384.

The 5th Circuit, in granting a rehearing en banc, recognized the need to resolve this issue, but the Supreme Court decided to pass on Mr. McBride's petition for cert.

A Split Emerges

Before *Batterton*, the Washington Supreme Court ruled that seamen can recover punitive damages in unseaworthiness cases, in direct conflict with *McBride*. *Tabingo v. Am. Triumph LLC*, 391 P.3d 434 (Wash. 2017). The defendant vessel owner/ operator then petitioned for certiorari before the U.S. Supreme Court, but their petition was denied.

Then came *Batterton's* decision that seamen may recover punitive damages in unseaworthiness actions. The 9th Circuit relied on *Evich*, observing that *Evich* "squarely held that '[p]unitive damages are available under general maritime law for claims of unseaworthiness'" and finding *Miles* did not overrule *Evich*. *Batterton*, 880 F.3d at 1096. Rather, the 9th Circuit found "*Miles* did not address punitive damages" and *Townsend* implicitly

confirmed that *Miles* does not limit the availability of punitive damages in unseaworthiness claims. The 9th Circuit reasoned that *Townsend* allowed punitive damages for maintenance and cure, and there is "no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to awardable damages." Id. The 9th Circuit in *Batterton* acknowledged *McBride* but read it as a sharply divided decision, finding the dissenting opinions to be more persuasive.

A Match Race for the Supreme Court

Now, with two major admiralty circuits expressing contradictory views on an issue with vital legal and business ramifications for the maritime industry, and the Dutra Group's petition for certiorari on file, will the maritime community finally get a uniform rule from the high court on whether a Jones Act seaman can recover punitive damages in unseaworthiness claims? Or does the denial of certiorari in *Tabingo* foreshadow things to come?

Should *Batterton* remain in place in the 9th Circuit, it will certainly raise seamen's demands in this jurisdiction. This may force more settlements, as plaintiffs will have more leverage against exposed insureds given that punitive damage are generally not covered. Maritime lawyers will need to change how they assess their cases for trial, as juries will now often be instructed on punitive damages whenever plaintiffs pursue a claim under general maritime law.

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