Admiralty Law

Noteworthy Developments: U.S. Supreme Court and Beyond

By Paul S. Edelman and James E. Mercante

August 21, 2009

A major decision with many implications in the marine world, **Atlantic Sounding Co. Inc. v. Townsend**, was decided by the U.S. Supreme Court on June 25, 2009, on certiorari from the U.S. Court of Appeals for the Eleventh Circuit.[1] The issue was whether punitive damages, recently affirmed in maritime cases in the Exxon Valdez oil spill litigation, could be applied to a willful failure of a ship owner to pay "maintenance" and "cure" expenses to injured crew members. Most federal appellate courts have only allowed payment of attorney's fees for such willful failure.

Maintenance and Cure

The legal obligation of a seaman's employer to provide maintenance and cure dates back centuries as an aspect of general maritime law.[2] Maintenance is a monetary amount to compensate an injured seaman for out-of-pocket daily expenses such as food and lodging that the seaman would not otherwise have to incur while living aboard ship. Cure is payment for a seaman's medical treatment to the point of maximum medical improvement.

Since 1987, only the Eleventh Circuit allowed punitive damages in an action for maintenance and cure in **Hines v. J.A. LaPorte Inc.**, 820 F.2d 1187.

Townsend, a seaman injured aboard a tugboat and deprived of maintenance and cure, pursued punitive damages and the same were found by the trial and appellate court to be recoverable. Because the Eleventh Circuit decision conflicted with other circuits in this regard, the U.S. Supreme Court granted certiorari.

Punitives at Common Law

Justice Clarence Thomas authored the majority 5-4 decision in Atlantic Sounding affirming that punitive damages were available at common law since at least 1784 (approving award of "very exemplary damages" because spiking wine represented a "very wanton outrage")[3] and another court concluded in 1791 that a breach of promise of marriage was "of the most atrocious and dishonorable nature" supporting damages for "example's sake."[4] Punitives have been afloat since 1818 in admiralty in The Amiable Nancy, where privateers attacked a non-English ship during the War of 1812, and this was considered "lawless misconduct."[5]

The employer in Atlantic Sounding stressed **Miles v. Apex Marine Corp.**, 498 U.S. 19 (1990), as the basis to reject punitive damages. Miles has been used by many courts to restrict recoveries for injured or deceased crew members. The U.S. Supreme Court decided to limit Miles to its facts, which plaintiffs' bar may seize upon. Miles was a General Maritime Law claim for

wrongful death damages by the mother of a deceased crew member. The crewman was killed in territorial waters and the claims included loss of society. However, Miles was a Jones Act death case that did not involve either maintenance and cure or the availability of punitive damages; the court disallowed any damages not available by federal legislation applicable to maritime deaths. Neither the Jones Act[6] for crew members, nor the Death on the High Seas Act[7] applicable to all such deaths outside territorial waters, allowed recovery for loss of society. Thus, Atlantic Sounding sought a ruling that if punitive damages were unavailable in tort for a Jones Act seaman who died in the service of the ship, it should not be available for willful failure to pay contractual maintenance and cure. This was rejected.

In distinguishing, but not overruling Miles, Justice Thomas noted that the common-law tradition of punitive damages extends to maritime claims and as no legislation restricts a punitive recovery for failure to pay maintenance and cure, the remedy should be available.

Under "appropriate factual circumstances," the court decided that such damages remain available for the 'wilful' or 'wanton' failure to comply with the duty to pay maintenance and cure.[8]

Indeed, maintenance and cure (and the unseaworthiness remedy) was available long prior to the Jones Act which was passed in 1920 to allow an injured seaman the right to "elect" to bring a negligence cause of action against the employer with similar favorable treatment afforded to railroad workers.[9] Thus, according to the Supreme Court, the Jones Act represented a choice of actions, not an exclusive remedy, thereby maintaining the viability of common-law causes of action.[10]

Miles has been cited by the defense bar to champion maritime uniformity. Justice Thomas disparaged this, noting "the laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action."

The dissent by Justice Samuel Alito maintained that the Federal Employers Liability Act (applicable to railroads), on which the Jones Act is based, prohibits the recovery of punitive damages. And it seems a window was left open in footnote 11 of Atlantic Soundings as to whether the Exxon Valdez punitive damage recovery cap of a 1:1 ratio to actual damages would apply in maintenance and cure cases.[11] This issue was expressly left undecided although plaintiffs will no doubt see any such cap as malleable based upon the extent of a defendant's wanton acts.

For plaintiffs, there is interesting speculation now that punitive damages might be available for an egregious situation of a vessel's unseaworthiness. A cause of action in unseaworthiness, available to seamen, is also an old non-statutory remedy under the General Maritime Law, like maintenance and cure. From the defense view, the restrictions in Miles and its progeny still hold water, including many scenarios not specifically addressed by the Miles court.

More (or Less) Maintenance

In a decision dated Aug. 10, 2009, Southern District Judge Leonard B. Sand enforced a provision in a collective bargaining agreement limiting the duration of maintenance payments. In **Stanton v. Buchanan Marine**, 2009 WL 2447823 (S.D.N.Y.), the employer paid maintenance at the rate of $30 per day but terminated payment at 90 days even though Stanton, who underwent surgery,

had not recovered from his injury and remained not fit for duty. The daily rate ($30) and duration (90 days) was pursuant to a provision in the collective bargaining agreement between union and employer.

Judge Sand referred to the Second Circuit's decision in **Ammar v. United States**, 342 F.3d 133 (2d Cir. 2003), which permitted a collective bargaining agreement to limit the rate of maintenance to a figure below the seaman's actual daily expenses. Judge Sand acknowledged that admiralty courts have considered whether it is permissible for a collective bargaining agreement to alter the employer's maintenance duty by establishing a maintenance rate less than the actual cost of food and lodging for the unionized seaman on the vessel. However, Judge Sand looked to the Second Circuit's Ammar ruling for support which permitted a cap on the maintenance rate because it was the product of "legitimate negotiation" in a union contract involving compensation and benefits.

On the other hand, employment contracts providing for maintenance payments at an unrealistically low amount involving non-union seaman have been held invalid.[12]

Conclusion

It is interesting to see such a basic and contractual general maritime law remedy as maintenance and cure wind up in the nation's highest court. The Atlantic Sounding ruling, allowing a punitive element for willful failure to pay maintenance and cure, may result in vessel owners seeking the advice of admiralty counsel as to whether to pay such claims, even if disputed, and then seeking reimbursement or offset in subsequent litigation simply to avoid a potential punitive sanction.

Paul S. Edelman *is of counsel at Kriendler & Kriendler.* **James E. Mercante** *is an admiralty partner at Rubin, Fiorella & Friedman and commissioner on the Board of Commissioners of Pilots of the State of New York.*

Endnotes:

1. 557 U.S. —, 2009 U.S. LEXIS 4732.

2. 2009 U.S. LEXIS 4732 at ***17.

3. *Genay v. Norris,* 1 S.C.L. 6, 7 (C.P. and Gen. Sess. 1784).

4. *Coryell & Colbaugh,* 1 N.J.L. 77 (1791).

5. **The Amiable Nancy**, 16 U.S. 546 (1818) (Justice Story).

6. Jones Act, 46 U.S.C. §30104.

7. **Death on the High Seas Act** ("DOHSA"), 46 U.S.C. 30301-30306 (applies only to individuals killed by conduct on the high seas).

8. *Atlantic Sounding* at ***32.

9. The Jones Act incorporates **Federal Employers' Liability Act**, 45 U.S.C. §51 et seq.

10. *Atlantic Sounding* at ***22.

11. ***Exxon Shipping Co. v. Baker***, 554 U.S. —, —; 128 S.Ct. 2605 (2008); see also New York Law Journal, **Admiralty Law**, Sept. 19, 2008 (Edelman/Mercante).

12. ***Incandela v. American Dredging Co.***, 659 F.2d 11, 1981 AMC 2401 (2d Cir. 1981).