PUNITIVE DAMAGES AND A CENTURY OF MARITIME LAW

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ABSTRACT

At 2340 on April 14, 1912, the unsinkable RMS Titanic struck an iceberg in the North Atlantic Ocean with 2,208 passengers and crew on board. When Titanic sank at 0220 on April 15, 679 crewmembers and 817 passengers were lost. At the time, it was the worst disaster in maritime history.

Almost exactly a century later, on January 13, 2012, at 2145 the MS Costa Concordia, a passenger ship operating off the West Coast of Italy, hit a submerged rock 1,000 feet off of the Italian island of Giglio,

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2 See Rosenberg, supra note 1; see also Lester Mitcham, The Statistics of the Disaster, ENCYCLOPEDIA TITANICA 1, 4-5 (Feb. 14, 2001), http://www.encyclopedia-titanica.org/documents/titanic-statistics.pdf (discussing the various inconsistencies in many reports about the event and ultimately concluding that 817 passengers were lost when Titanic sank); Victims of the Titanic Disaster, ENCYCLOPEDIA TITANICA, http://www.encyclopedia-titanica.org/titanic-victims/ (last visited Sept. 6, 2013) (providing a list of Titanic victims, including 679 crewmembers).

cutting a gash down the port side of the hull beneath the waterline. The ship began to sink with 3,229 passengers and 1,023 crewmembers on board. While there was plenty of time to abandon ship, and there were plenty of lifeboats to accommodate the passengers and crew, the captain made the fateful decision to run the ship aground near the port of Giglio. When the ship hit the rocky bottom, even though it had been holed on the port side, it flipped over on its starboard side and sank. Thirty-two people were lost in that accident.

These incidents point out the fact that maritime disasters can be the result of gross negligence and reckless conduct on the part of shipowners, operators, and crewmembers. This Article will address the question of when, and under what circumstances, a court can award punitive damages in personal-injury cases under U.S. law. The answer to that question has been surprisingly elusive.

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8 See Costa Concordia Salvage Crew: How Will Team Remove Italy Shipwreck, supra note 5 (noting that thirty people were declared dead after the shipwreck while two people remain missing).

9 See Dozsa, supra note 6 (noting the numerous failures of both the crewmembers and the captain of Costa Concordia on the night of the shipwreck).

10 See Legge, Farrow, Kimmit, McGrath, & Brown, L.L.P., Significant Decision: Atlantic Sounding v. Townsend Supreme Court Rules in Favor of Punitive Damages in Maintenance and Cure Cases, ADMIRALTY & MAR. MATTERS 1, 2 (2009),
Since the Supreme Court’s decision in *Atlantic Sounding Co. v. Townsend*, new questions have arisen about whether courts have interpreted the Death on the High Seas Act (the “DOHSA”) in a way that exaggerates its preemptive effect, and maritime law has been in a state of confusion on this issue. At some point the U.S. Supreme Court will step into the fray and will need to resolve the inconsistencies caused by five of its decisions: *Sea-Land Services, Inc. v. Gaudet*, *American Export Lines, Inc. v. Alvez*, *Miles v. Apex Marine Corp.*, *Exxon Shipping Co. v. Baker*, and *Townsend*. This Article will focus on those inconsistencies.

http://www.leggefarrow.com/Newsletter%20- %20Atlantic%20Sounding%20v%20Townsend.pdf (noting that the Court’s recent decisions fail to specify whether there are limits on punitive-damage recovery amounts or “whether punitive damages are available under the Jones Act”).


13 See Legge, Farrow, Kimmit, McGrath, & Brown, L.L.P., supra note 10 (discussing Townsend’s unanswered questions regarding the amount of available punitive damages and the possible extension of punitive damages to broader areas of maritime law).

14 Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 584 (1974) (allowing the decedent’s dependents to “recover damages for their loss of support, services, and society, as well as funeral expenses”).


16 Miles v. Apex Marine Corp., 498 U.S. 19, 31, 34 (1990) (recognizing that general maritime law allows wrongful death recovery, but finding that the DOHSA “forecloses recovery for non-pecuniary loss, such as loss of society” and that general maritime law prevents the recovery of lost future wages in a survival action).

17 Exxon Shipping Co. v. Baker, 544 U.S. 471, 508 n.21 (2008) (recognizing that Congress has the ultimate authority in the area of maritime law, but also arguing that when “there is a need for a new remedial maritime rule,” the Court may create “a judicially derived standard, subject of course to congressional revision”).

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I. INTRODUCTION

Punitive damages and loss of consortium are conceptually linked in maritime law by the fact that they are both nonpecuniary. Neither can be measured with precision, and neither represents an out-of-pocket loss to the injured party. Punitive damages punish a tortfeasor for conduct that is willful, wanton, or reckless and that causes injury to another person. Punitive damages are intended to deter wrongdoers from acting in a way that shocks the conscience of society. Damages for loss of consortium reflect the loss that a person experiences when his or her spouse suffers serious bodily injury. Damages for loss of consortium are intended to compensate the spouse of the injured party for the loss of sex, society, and services.

In maritime law, there are two types of personal-injury causes of action: those created by statute and those that exist as part of the general maritime law. One of those maritime statutes, the DOHSA,
limits the damages recoverable by dependents of a person who dies more than three nautical miles from the coasts of the United States to “fair compensation for the pecuniary loss sustained.” This limitation to pecuniary damages has leapt, without congressional intervention, from death cases to cases for seamen’s injuries under the Jones Act and, more recently, to general-maritime-law remedies, such as loss of society, mental anguish, loss of consortium, and finally, punitive damages. Hence, these remedies, all of which are deemed to be nonpecuniary, are linked to one another, and what happens to one remedy happens to them all.

Starting in 1990, lower federal courts began erasing the distinction between statutory remedies and common-law remedies and began broadly preempting all remedies in maritime law that provided nonpecuniary damages—even though punitive damages and damages has existed, for the most part, since the founding of the nation. Id. at 312 (noting that the framers of the Constitution specifically granted power to the courts to hear and decide cases arising under maritime law). The primary nonstatutory, personal-injury actions which are part of the general maritime law are causes of action for injury to passengers on cruise ships, ferries, and casino boats (e.g., sexual assault and battery by members of the crew, injuries to passengers caused by collisions, swells, or excessive rolling, trips and falls, food poisoning); causes of action arising out of recreational boating accidents (e.g., collisions, sinking, fires and explosions, drowning); and actions by injured seamen for medical care and living allowances, known as “maintenance and cure.” See id. at 313, 351 (recognizing that the general maritime law allows passengers and seamen to recover for various injuries).

28 See Robertson, supra note 19, at 465 (noting that, in maritime law, the “non-pecuniary categories of compensatory damages” include “pain and suffering and hedonic (loss of enjoyment of life)” for personal injury cases and “loss of society (companionship, consortium)” for wrongful death cases).
29 See, e.g., Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1506 (5th Cir. 1995) (“The general maritime law will not expand the available damages when Congress has spoken to the relief it deems appropriate or inappropriate.” (citing Anderson v. Texaco, Inc., 797 F. Supp. 531, 536 (E.D. La. 1992))).
30 Punitive damages, also known as exemplary damages, are damages awarded to punish a tortfeasor for conduct that is intentional, grossly negligent, or reckless, and that causes injury to persons or damage to property. See supra notes 21-22 and accompanying text. Courts have awarded punitive damages in cases of oil pollution...
for loss of consortium\textsuperscript{31} have existed as part of the general maritime law since the founding of the nation.\textsuperscript{32} In doing so, lower courts have ignored the Supreme Court’s precedent set forth in the decisions in \textit{American Export Lines, Inc. v. Alvez}\textsuperscript{33} and \textit{Gaudet},\textsuperscript{34} both of which recognized causes of action for the loss of consortium as part of maritime law.\textsuperscript{35} The lower courts’ rationale for ignoring these precedents, and eliminating these general-maritime-law remedies, has been those courts’ interpretations of the Supreme Court’s decision in \textit{Miles v. Apex Marine Corp.}\textsuperscript{36} Whether the courts’ interpretations were mistakes,\textsuperscript{37} or cases of judicial tort reform,\textsuperscript{38} is a matter for

causing environmental damage, \textit{see} Exxon Shipping Co. v. Baker, 554 U.S. 471, 514 (2008); intentional damage to personal property, \textit{see} Robertson, \textit{supra} note 19, at 466 (stating that punitive damages was a remedy for damage to personal property before 1990); and, most recently, intentional withholding of medical care to an injured seaman, \textit{see} Townsend, 557 U.S. at 424.

\textsuperscript{31} Loss of consortium refers to damages caused by the deprivation of the benefits of a family relationship caused by a negligent party’s injury to another family member. \textit{See supra} note 23 and accompanying text. It includes the loss of a spouse’s “frugality, industry, usefulness, attention, and tender solicitude.” \textit{Sea-Land Servs. v. Gaudet}, 414 U.S. 573, 590 (1974) (quoting \textit{Fla. Cent. & Peninsular R.R. Co. v. Foxworth}, 25 So. 338, 347-48 (Fla. 1899)). Less colloquially, loss of consortium is the loss of sex, society, and services that one spouse provides to another. \textit{See supra} note 24 and accompanying text. Loss of consortium applies to the inability to engage in sexual intercourse or to provide society, companionship, nurture, guidance, and household services. \textit{See supra} note 24 and accompanying text. Where one spouse is rendered permanently disabled by virtue of being paraplegic, quadriplegic, comatose, or mentally disabled, claims for loss of consortium can be substantial. \textit{See} \textit{Herold v. Burlington N., Inc.}, 761 F.2d 1241, 1243 (8th Cir. 1985) (finding that a $2-million award to a wife for loss of consortium was not excessive when her husband “was rendered a spastic quadriplegic and suffered brain damage”).

\textsuperscript{32} \textit{See} Healy, \textit{supra} note 25, at 322-23.


\textsuperscript{34} \textit{Gaudet}, 414 U.S. 573.

\textsuperscript{35} \textit{See id.} at 584 (finding that a decedent’s dependent could recover for loss of consortium); \textit{Alvez}, 446 U.S. at 285 (finding that a decedent’s wife had an entitlement to loss-of-consortium damages from the death of her husband).

\textsuperscript{36} \textit{Miles v. Apex Marine Corp.}, 498 U.S. 19 (1990); \textit{see} \textit{Guevarra v. Mar. Overseas Corp.}, 59 F.3d 1496, 1512-13 (5th Cir. 1995) (interpreting \textit{Miles} and determining that courts may not award punitive damages under tort law in maritime law).

\textsuperscript{37} \textit{See Robertson, supra} note 19, at 473-75 (2010) (disagreeing with courts’ interpretations of \textit{Miles}).

\textsuperscript{38} \textit{See} Robert Force, \textit{Tort Reform by the Judiciary: Developments in the Law of
speculation. What is not a matter for speculation is that the extinguishment of these two remedies has had a substantial effect on maritime personal-injury law.

Then, in 2009, the Supreme Court decided Townsend. In a five-to-four decision, the Court stated that those lower courts that barred punitive damages in personal-injury cases brought under the general maritime law were relying on a “reading of Miles [that was] far too broad.” “Miles does not require us to eliminate the general maritime remedy of punitive damages, . . . and the available history suggests that punitive damages were an established part of the maritime law in 1920” when Congress enacted the Jones Act and the DOHSA in response to the 1912 Titanic disaster. After Townsend, punitive damages were again available in cases arising under the general maritime law.

In a plurality opinion in 1980, the Supreme Court addressed whether damages are available for loss of consortium in maritime cases. In Alvez, a lasher (one who secures cargo aboard a ship) lost an eye. In addition to his coverage under the Longshore and Harbor


39 See id. (indicating that the interpretation of Miles is a matter of judicial reform). But see Robertson, supra note 19, at 473-75 (indicating that the interpretations of Miles in subsequent cases are incorrect).

40 See Mala v. Marine Serv. Mgmt., Civ. No. 2006-120, 2009 WL 2170071, at *2-3 (D.V.I. July 20, 2009) (dismissing a wife’s loss-of-consortium claim for her husband’s injuries); Guevara, 59 F.3d at 1513 (holding that punitive damages are no longer well founded in the general maritime law for willful nonpayment of maintenance and cure).


42 See id. at 418-19 (analyzing the broad interpretation of Miles and declining to extend the Court’s ruling to the facts presented).

43 Id. at 422.


45 Townsend, 557 U.S. at 424-25.


47 Id.; see Ana N. Fadich, Glossary of Longshore Terms, USC – SOUTHERN CA ENVIRONMENTAL HEALTH SCIENCES CENTER 1 (Aug. 2008),
Workers Compensation Act (the “LHWCA”), the general maritime law permitted his spouse to sue the shipowner for loss of consortium. The Court cited Alvez with approval in the 2008 case, Exxon Shipping Co. v. Baker.

One would have thought that the rules were now clear: punitive damages and damages for loss of consortium were available remedies in maritime cases unless a statute precluded otherwise. Therefore, injured persons suing under the general maritime law, like passengers on cruise ships, casino vessels, and ferries or recreational boaters, could seek punitive damages if the conduct causing the injury was intentional, grossly negligent, or reckless. Because courts use the same reasoning in determining whether punitive damages and damages for loss of consortium are available, one would think that loss-of-consortium damages were also available in the general-maritime-law claims. Unfortunately, while some courts agreed with this interpretation of Townsend, others did not.

http://hydra.usc.edu/scehsd/web/resources/map/Ports/PDFfiles/FINAL%20Photo%20Glossary%20of%20Longshore%20Terms.pdf.  
48 Alvez, 446 U.S. at 284-85 (affirming the lower court’s decision that allowed the wife to seek a loss-of-society claim under maritime laws).  
51 See, e.g., Lobegeiger v. Celebrity Cruises, Inc., No. 11-21620-CIV, 2011 WL 3703329, at *7 (S.D. Fla. Aug. 23, 2011) (finding that a plaintiff injured on a cruise ship may recover punitive damages for “defendant’s ‘wanton, willful, or outrageous conduct’” (quoting Townsend, 557 U.S. at 409)).  
52 See, e.g., Alvez, 446 U.S. at 284-85 (finding that the common-law principle granting loss-of-consortium damages should translate into maritime law).  
53 See, e.g., Dadgostar v. St. Croix Fin. Ctr., Inc., Civ. No. 1:10-cv-00028, 2011 WL 4383424, at *6 (D.V.I. Sept. 20, 2011) (denying defendant’s motion to dismiss on plaintiff’s claim for loss of consortium because the record was insufficient); Lobegeiger, 2011 WL 3703329, at *7 (finding punitive damages are an available remedy for a passenger injured on a cruise ship).  
54 See, e.g., Doyle v. Graske, 579 F.3d 898, 902, 906 (8th Cir. 2009) (finding that the wife of a recreational boater was not entitled to recover $750,000 in damages that the jury awarded for loss of consortium because “there is no well-established admiralty rule . . . authorizing loss-of-consortium damages” and it is “an area marked by few settled principles”); Mala v. Marine Serv. Mgmt., Civ. No. 2006-120, 2009 WL 2170071, at *2-3 (D.V.I. July 20, 2009) (finding that the wife of a recreational boater, who was severely burned due to negligence of marina, was not entitled to damages for
This Article will unravel that confusion. Maritime statutes are not to be stretched and expanded beyond their texts. As Justice Thomas stated in the 2009 case of *Townsend*,

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. Although “Congress . . . is free to say this much and no more,” . . . we will not attribute words to Congress that it has not written.

William Howard Taft, former President and Chief Justice, said the basic criterion for the Supreme Court to hear a case “is the need for federal law to be uniform throughout the nation.” As Justice Souter has said, “If all lower courts have reached similar conclusions . . . the law is already uniform. And there is normally no need for the Court to hear the case.” A conflict exists in this area of the law, and the Supreme Court simply needs the right case to bring the matter to the Court’s attention.

II. PUNITIVE DAMAGES IN THE GENERAL MARITIME LAW

Before proceeding, it would be helpful to consider the basis for punitive damages in the general maritime law. Historically, in admiralty cases there was little or no distinction between compensatory and punitive damages. Tracing back the full history of compensatory and punitive damages is difficult because courts often combined the awards in a lump sum with compensatory damages. However, between 1823 and 1923, courts in at least fourteen maritime cases

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56 Id. (citation omitted) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 24 (1990)).
58 Id. at 230-31.
59 See supra notes 53-54 and accompanying text.
61 Id.
imposed monetary penalties punishing shipowners and others for culpable conduct that exceeded the bounds of negligence and intruded into the area of intentional misconduct, recklessness, or gross negligence.  

A. Historical Cases Regarding Punitive Damages

The earliest case illustrating the availability of punitive damages in a maritime case is the 1818 case of Amiable Nancy. In that case, during the War of 1812 the crew of a “private armed American vessel Scourge,” a privateer, had stopped the Haitian vessel Amiable Nancy in an illegal seizure and caused injury to its crew. The privateer was not authorized by its letters of marque to board the Haitian vessel, and hence the injuries were both intentional and unlawful. Justice Story, writing for the Supreme Court, found that punitive damages could be awarded against the crew, but not against the ship in rem, because the owner neither participated in nor approved of the crew’s conduct. The principle was established though. Courts could award punitive damages under maritime law for injuries that the crew of another vessel caused.

In 1851 the Supreme Court, in dicta, discussed punitive damages in admiralty cases regarding a case of an intentional blocking of a waterway. In Day v. Woodworth the Supreme Court noted that it was the practice of the courts of admiralty “to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff for counsel-fees and other real or supposed expenses over and above taxed costs . . . .”

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62 See id. at 115-16 (analyzing courts’ decisions regarding punitive damages in pre-Jones Act maritime cases). Professor Robertson, who is from the University of Texas at Austin, has been a leading scholar on the topic of punitive damages in maritime law. The UT Law Faculty, THE UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW, http://www.utexas.edu/law/faculty/robdw/ (last visited Sep. 01, 2013).

63 See Robertson, supra note 60, at 95-96; The Amiable Nancy, 16 U.S. 546 (1818).

64 See Amiable Nancy, 16 U.S. at 546-50.

65 See id. at 550-51.

66 Id. at 557-59.

67 Id. at 558.

68 Id.


70 Id. at 371-72.
Since admiralty law was a body of common law, and did not involve statutory remedies, that practice was permissible.\textsuperscript{71} Therefore, the use of punitive damages as an indirect means of awarding counsel fees and litigation expenses in admiralty cases was a well-accepted practice in 1851.\textsuperscript{72}

The Supreme Court went on to find that punitive damages were based on “a well-established principle of the common law”\textsuperscript{73} both in England before the founding of the United States and in U.S. courts thereafter.\textsuperscript{74} The courts permitted punitive damages in tort cases that involved “aggravated misconduct or lawless acts,” including those resulting from gross negligence or intentional torts, such as battery, trespass, slander, and libel.\textsuperscript{75} Any conduct that displayed a “degree of moral turpitude or atrocity of the defendant’s conduct”\textsuperscript{76} could be the subject of punitive damages, which were assessed at “the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.”\textsuperscript{77}

In 1893 the Supreme Court heard the case of \textit{Lake Shore & Michigan Southern Railway Co. v. Prentice}.\textsuperscript{78} Prentice was a passenger on a railroad car who police falsely arrested at the instruction of a conductor on charges of disorderly conduct.\textsuperscript{79} The jury awarded the passenger ten thousand dollars in punitive damages.\textsuperscript{80} The Supreme Court found that a rail passenger is entitled to claim punitive damages against a railroad and pointed out that “courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary [punitive] damages . . .”\textsuperscript{81}

\textsuperscript{71} \textit{See id.}
\textsuperscript{72} \textit{See id.}
\textsuperscript{73} \textit{Id.} at 371.
\textsuperscript{74} \textit{Id.} at 370-72.
\textsuperscript{75} \textit{Id.} at 371.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 101-02.
\textsuperscript{80} \textit{Id.} at 104.
\textsuperscript{81} \textit{Id.} at 108.
B. **The Supreme Court and Punitive Damages in Maritime Law**

Today no doubt remains that punitive damages are a remedy available under the general maritime law. 82 The Supreme Court has stated as much in two cases in the past four years: in 2008 in *Exxon Shipping Co. v. Baker* and again in 2009 in *Townsend*. 83

1. Oil pollution: *Exxon Shipping Co. v. Baker*

In 2008 the Supreme Court, in *Exxon Shipping*, 84 decided that punitive damages were proper for environmental damage that the oil tanker SS *Exxon Valdez* caused in March 1989. 85 The tanker, under the command of Captain Joseph Hazelwood, 86 ran aground in Prince William Sound, Alaska, dumping over a million barrels of crude oil into the ocean. 87

Fishermen whose fishing rights had been damaged by the spill filed suit and sought separate remedies for both compensatory and punitive damages. 88 The litigation surrounding the grounding of *Exxon Valdez* took nineteen years to work its way to the Supreme Court. 89 However, the Court decided that “American courts [only began] to speak of punitive damages as separate and distinct from compensatory damages” 90 as the nineteenth century progressed, and it acknowledged

83 See infra Parts II.B.1, 2.
85 Id. at 475-76.
87 Id. at 476.
88 Id. at 476, 479.
89 Id. at 476.
90 See id. at 491-92.
that punitive damages were part of the general maritime law.  

The *Exxon Shipping* case drew a bright line between statutory remedies and general-maritime-law remedies—a line that had become blurred after *Miles v. Apex Marine*. The Court established a precedent that, when a cause of action arises under the general maritime law, such as a cause of action for damages due to oil pollution, and is not statutory, federal courts sitting in admiralty decide both the recoverability of punitive damages and the limit which exists on an award. The Court then reduced the jury’s award of punitive damages from an unprecedented high of $2.5 billion to a much more modest $507.5 million—a mere twenty percent of the original award.

2. Denial of medical care: *Atlantic Sounding Co. v. Townsend*

The Supreme Court, in 2009, decided the most recent case on punitive damages in maritime law. In *Townsend*, the Court found that a shipowner, who willfully and wantonly refused to provide medical care to a seaman who was injured on the job, could be liable for punitive damages. Notably, the Court decided that “punitive damages

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91 See id. at 489-90.
92 *Infra* Part III.E.
93 See *Exxon Shipping Co.*, 554 U.S. at 489-90. The effect on oil-pollution cases in the United States is limited by the fact that, in response to the *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990, commonly referred to as “OPA 90.” See 33 U.S.C. §§ 2701-2762 (2006 & Supp. V 2011). The Act was not intended to preempt state-law remedies stating, “Nothing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability.” § 2718(a).
94 *Exxon Shipping Co.*, 554 U.S. at 490, 515.
96 *Id.* at 407. The decision in *Townsend* was five to four. *Id.* at 406. The unusual majority included Justice Thomas, an originalist who authored the majority opinion, along with the more liberal and nonoriginalist Justices Stevens, Souter, Breyer, and Ginsberg. *Id.* Justice Alito, an originalist, wrote the dissent with the concurrence of Justices Scalia, Kennedy, and Roberts. *Id.* Some legal commentators noted the unusual split among the justices with Justices Thomas and Scalia, who frequently are in agreement, on opposite sides of the issue. E.g., Michael Barone, *Clarence Thomas: The Courage of His Convictions*, WASH. EXAM’R, (Mar. 16, 2012, 4:48 PM), http://washingtonexaminer.com/cla...convictions/article/94780. Michael Barone in *The Washington Examiner* commented
were an established part of the maritime law in 1920”",\(^{97}\) therefore, “Miles does not require us to eliminate the general-maritime remedy of punitive damages for the willful or wanton failure to comply with the duty to pay maintenance and cure.”\(^{98}\)

Because punitive damages have been an available remedy under the general maritime law, they should logically continue to exist as a remedy unless Congress affirmatively acts to expressly preempt them or to implicitly preempt them by occupying the entire field of maritime personal-injury law.\(^{99}\)

3. The newest punitive-damage cases

Since Townsend, a number of courts have applied the case to other cases that involve seamen claiming wrongful denial of medical care, but two have extended the principles announced in that case to claims of nonseamen for punitive damages.\(^{100}\) Either of these cases could potentially create a conflict with the Eighth Circuit’s decision in Doyle v. Groske, which this Article discusses in some detail below.\(^{101}\)

\textit{a. Cruise ship passengers: Lobegeiger v. Celebrity Cruises}

The U.S. District Court for the Southern District of Florida has recognized that Townsend corrected the perception that the Supreme Court meant for Miles to apply to nonstatutory, personal-injury remedies.\(^{102}\) In Lobegeiger v. Celebrity Cruises, Inc., the district court in Miami, the nation’s principal court hearing cruise-line cases,\(^{103}\)

\(\text{Id.}\) 557 U.S. at 422.

\(\text{Id.}\)

\(\text{Id.}\)

\(\text{See id. (holding that Congress did not preempt punitive damages as a remedy under the Jones Act, but implying that it could do so).}\)


\(\text{See infra Part V.A.}\)

\(\text{See Lobegeiger, 2011 WL 3703329, at *6.}\)

\(\text{See Michael D. Eriksen, U.S. Maritime Public Policy Versus Ad-Hoc Federal}\)
decided that an injured passenger was entitled to assert a claim for punitive damages. The court stated, “The opinion in [Townsend] indicates punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress.” The court went on to state that “Justice Thomas, writing for the majority explained, ‘[t]he general rule that punitive damages were available at common law extended to claims arising under federal maritime law.’”

b. Personal injuries caused by oil pollution: The BP oil spill

The U.S. District Court for the Eastern District of Louisiana reached a similar result in the case of In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, more commonly known as the “BP oil-spill case.” There the court said,

As explained in Townsend . . . neither the Jones Act nor the Death on the High Seas Act speak to negligence claims asserted by non-seamen under general maritime law, and punitive damages have long been available at

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105 Id. at *6.
106 Id. (quoting Atl. Sounding Co. v. Townsend, 557 U.S. 404, 411 (2009)).
108 The author does not mean to imply that BP is the party responsible for the spill. Triton Asset Leasing GmbH, a division of Transocean, Ltd. owned and operated the rig, and BP America Production Company chartered it. See U.S. Sues BP, 8 Other Companies in Gulf Oil Spill, WASH. TIMES, Dec. 15, 2010, http://www.washingtontimes.com/news/2010/dec/15/us-sues-bp-8-other-companies-gulf-oil-spill/. As a general principle of maritime law, the owner or operator of a rig is responsible for accidents caused by the operation. See id. BP’s liability appears to be vicarious or statutory, or both. See id. BP is certainly a “responsible party” under the Oil Pollution Act of 1990, but that responsibility attaches with or without fault. See 33 U.S.C. § 2701(32) (2006 & Supp. IV 2011).
common law. The Court finds punitive damages are available to . . . plaintiffs who are not seamen.109

The plaintiffs who may recover punitive damages are those who were “‘exposed to harmful chemicals, odors and emissions’ found within or emanating from oil, dispersants (chemicals used [to] break up an oil slick by making oil more soluble in water), or a mixture of oil and dispersants.”110

Regardless of whether one of these two cases, or even a different case, extends Townsend’s rationale to other general-maritime-law cases, it certainly appears that the Supreme Court will consider this issue again.

III. LOSS OF CONSORTIUM UNDER THE GENERAL MARITIME LAW

More contentious than the question of whether the general maritime law includes punitive damages as a remedy is the question of whether it also provides damages for loss of consortium.111 There are dozens of maritime cases where courts have awarded loss-of-consortium damages, and neither the defendants nor the courts contested the issue of whether the remedy was available.112 It appears that the legal community assumed that, because loss-of-consortium damages were part of the common law of England before the founding of the United States and because each of the thirteen original states were colonies of England before 1776, loss of consortium was part of U.S. common law after 1776 for injuries occurring both on land and at sea.113

The first serious question about whether plaintiffs could recover damages for loss of consortium under the general maritime law did not arise until the Second Circuit’s 1963 case of Igneri v. Cie. de Transports Oceaniques.114 Igneri involved a wife’s claim for loss of

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109 See In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, 2011 WL 4575696, at *11.
110 Id. at *1.
112 See, e.g., In re Cent. R.R. of N.J., 52 F.2d 20, 22 (2d Cir. 1931).
consortium arising from injuries to her longshoreman husband.\textsuperscript{115} While the court decided the case on the basis of the husband’s statutory right to damages pursuant to the LHWCA,\textsuperscript{116} the court’s dicta caused later courts to conclude that loss of consortium was not a historically recognized remedy in maritime cases.\textsuperscript{117} However, this conclusion was incorrect.\textsuperscript{118} Later courts’ readings of Igneri’s dicta was hampered by the fact that the Igneri court cited to an unpublished opinion and by the fact that later courts misconstrued the technical term “in admiralty,” which refers to cases brought in rem, and interpreted it to mean the same as “in the general maritime law.”\textsuperscript{119} The two terms, and the concepts they describe, are markedly different.\textsuperscript{120} This Article will correct the misconception by both discussing the unpublished opinion and clearing up the misconception of the term “in admiralty.”\textsuperscript{121}

\textbf{A. English and American Cases Awarding Damages for Loss of Consortium}

While decided after 1776, the 1808 English case of \textit{Baker v. Bolton} illustrates the English common law’s treatment of damages for loss of consortium near the time of the founding of the United States.\textsuperscript{122}

Friendly worked as a vice-president for Pan American World Airways from 1946 to 1959 and served on the Second Circuit Court of Appeals from 1959 to 1974. \textit{See} Michael Norman, \textit{Henry J. Friendly, Federal Judge in Court of Appeals, is Dead at 82}, N.Y. TIMES, March 12, 1986, \textit{http://www.nytimes.com/1986/03/12/obituaries/henry-j-friendly-federal-judge-in-court-of-appeals-is-dead-at-82.html}. He was married to his wife for fifty-five years and he committed suicide one year and four days after her death. \textit{See id.} In his suicide notes, he talked about his “distress at his wife’s death, his declining health and his failing eyesight.” \textit{Id.} He was eighty-two. \textit{Id.}

\textsuperscript{115} Igneri, 323 F.2d at 258.
\textsuperscript{116} Id. at 258, 268.
\textsuperscript{118} See id. at 463 (“In our opinion, examination of . . . the Igneri decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight.”).
\textsuperscript{119} \textit{See infra} Part III.C.2-3.
\textsuperscript{120} \textit{See infra} Part III.C.2.
\textsuperscript{121} \textit{See infra} Part III.C.2-3.
\textsuperscript{122} \textit{Baker v. Bolton}, (1808) 170 Eng. Rep. 1033 (K.B.); 1 Camp. 493-94 (appeal taken from Eng.).
Baker and his wife were on top of a stagecoach that overturned.\textsuperscript{123} Baker was bruised, but he survived; his wife lived for about a month but subsequently died from her injuries.\textsuperscript{124} Baker sued for nonpecuniary damages including “the comfort, fellowship, and assistance of his said wife” (i.e., his loss of society) and his “great grief, vexation, and anguish of mind” over her death (i.e., his mental anguish).\textsuperscript{125} The court divided the damages into those accruing before death and those accruing after, permitting the recovery of damages that arose during Mrs. Baker’s one-month convalescence\textsuperscript{126} but denying further damages arising after her death.\textsuperscript{127} The House of Lords said,

\begin{quote}
[T]he jury could only take into consideration the bruises which the plaintiff [Mr. Baker] had himself sustained, and the loss of his wife’s society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution [death]. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff’s wife, must stop with the period of her existence.\textsuperscript{128}
\end{quote}

Historically, in the English common law, damages for loss of society and mental anguish were available to persons whose spouses were injured in nonfatal accidents.\textsuperscript{129} American common law has also long recognized the right of a spouse to seek damages for loss of consortium.\textsuperscript{130}

\section*{B. \textit{Early Maritime Cases Awarding Damages for Loss of}}
Consortium

There are so many cases awarding damages for loss of consortium to fathers and spouses of passengers injured aboard ships that discussion of them all would be tedious. However, a selection of those cases is illustrative in rebutting the Igneri assertion that courts did not award these damages in maritime cases. ¹³¹

In 1825 the United States District Court for the District of Maine, in Plummer v. Webb,¹³² awarded damages to a father for loss of the services of his son, who was under the age of fourteen, falsely imprisoned, and beaten while on a voyage from the United States to Europe aboard a ship named Romulus.¹³³ The court noted:

There is indeed no direct proof that he was beaten by the master. But it was the master’s duty to protect him from the violence of his subordinate officers. . . . It is his duty to interpose his authority for the protection of all his men from the intemperate violence of his inferior officers, and if he suffers them to be ill-treated he ought to be held as a joint trespasser. He is intrusted by the law with the supreme power on board of his ship, and what is done by his permission must be considered as done by his authority. In the present case, the obligation to protect this boy was particularly strong, because he was placed in his care under peculiar circumstances.¹³⁴

In 1865 Chief Justice Salmon Chase, while serving as a circuit judge, awarded $2,100 in damages to a husband for loss of consortium after his wife was injured in a collision between “the steamer Sea Gull


¹³² Plummer v. Webb, 19 F. Cas. 894 (D. Me. 1825) (No. 11,234), aff’d in part, 19 F. Cas. 891 (C.C.D. Me. 1827) (No. 11,233).

¹³³ Id. at 894, 897.

¹³⁴ Id. at 897.
with the steamer Leary.” The issue appears to be that the wife died before the husband commenced the suit. Justice Chase stated in The Sea Gull, citing Baker v. Bolton, “The suit is not prosecuted by an administrator, but by the husband of the deceased, and redress is sought for damages to him through injuries to her.” Because he was pursuing a claim for his own damages for loss of consortium, rather than damages for the estate, the court permitted the case to proceed.

In 1912, in New York & Long Branch Steamboat Co. v. Johnson, the Third Circuit affirmed the District Court of New Jersey’s award for $700 to a husband whose wife was injured while a passenger in a collision between the steamboat Little Silver, en route from New York to Long Branch, and the tugboat Slattington. The award was “for the loss of the aid, comfort, and society of his wife . . . including therein probable future deprivation and expenses . . . .” While the husband initially filed suit in state court, that case was stayed by the filing of a petition to limit the shipowner’s liability. The husband was then in an admiralty court participating in an in rem case. In affirming the award, the Third Circuit stated, “[W]e are clear that [Mr.] Johnson’s claim was recoverable in admiralty. The injury to Mrs. Johnson was a maritime tort, and clearly warranted maritime

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135 The Sea Gull, 21 F. Cas. 909, 909-10 (C.C.D. Md. 1865) (No. 12,578) (emphasis added).
136 Id.
137 Id. In Steamboat Co. v. Chase, the Supreme Court approved the language of The Sea Gull. Steamboat Co. v. Chase, 83 U.S. 522, 532 (1873). Steamboat Co. v. Chase is historically interesting because of its rejection of the concept that the Constitution requires maritime law to be uniform throughout the nation. Id. at 534. The doctrine of uniformity, as a constitutional doctrine, was first articulated in Southern Pacific Co. v. Jensen, which held that a state law is invalid when it actually conflicts with the general maritime law or federal statutes. S. Pac. Co. v. Jenson, 244 U.S. 205, 212 (1917).
138 Sea Gull, 21 F. Cas. at 910.
139 See id. at 909-10 (finding that the husband could seek redress for damages done to him through his injuries to his wife).
141 Id. at 740-41.
142 Little Silver, 189 F. 980, 987 (D.N.J. 1911).
144 Id. at 742.
relief.”

Other than vessel collisions, spouses of injured passengers have been entitled to claim damages for loss of consortium when their spouse was sexually assaulted by a member of a ship’s crew, injured in a slip and fall, injured due to excessive rolling of the ship, injured in a recreational boating accident caused by the swell of a passing ship, and injured while boarding a launch. Notably, four of these cases arose in New York and one in the Supreme Court, yet the Second Circuit cited none of them when it decided the Igneri case.

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145 Id. at 741. Other cases in which loss-of-consortium damages were awarded to the spouses of passengers injured in vessel collisions include The North Star, 3 F.2d 1010 (D. Mass. 1925) (holding that the husband of a female passenger thrown from the ship’s berth in a collision on the high seas was entitled to a claim for his loss of consortium in a limitation of liability proceeding in rem) and In re Central Railroad of New Jersey, 52 F.2d 20 (2d Cir. 1931) (awarding damages of $2,500 each to two husbands for loss of consortium when their wives were injured in a collision between a ferry and a steamer in state territorial waters on North River, New York).

146 Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949) (finding that the husband of a woman who was raped on a passenger vessel during a voyage from Norfolk to Washington, D.C., was entitled to claim damages for loss of consortium, but finding no liability against the defendant on other grounds).

147 Burstein v. U.S. Lines Co., 134 F.2d 89 (2d Cir. 1943) (finding that the husband of a passenger who was injured in a slip and fall during an intercoastal voyage from Los Angeles to New York was entitled to sue for loss of “the services, society and companionship” of his wife); see also Mayer v. Zim Israel Navigation Co., 289 F.2d 562 (2d Cir. 1961) (permitting a husband to claim loss of consortium when his wife was injured on a passenger vessel, but finding no liability on other grounds); Gustafson v. Swedish Am. Line, 1938 WL 63747 (S.D.N.Y. 1938) (recognizing a husband’s claim for loss-of-consortium damages resulting from injuries to his wife on a passenger ship, but dismissing the case on other grounds).

148 Voltman v. United Fruit Co., 147 F.2d 514 (2d Cir. 1945) (finding that the husbands of female passengers, who were injured when a ship rolled excessively in heavy seas, causing furniture to shift, on a voyage from New York to Central America, were entitled to claim damages for loss of consortium).

149 Behringer v. Ferryboat Columbia, 1937 WL 63621 (E.D.N.Y. 1937) (awarding a husband $125 for loss of consortium when he and his wife were injured due to a swell from a passing ferry that tossed them about).

150 Dresner v. Riviera Ass’n, 161 N.Y.S.2d 701 (N.Y. Sup. Ct. 1957) (permitting the husband of a woman who was injured when boarding a launch in territorial waters to pursue a claim for the loss of his wife’s “services and consortium”).

151 See Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963).
C. Modern Loss-of-Consortium Cases in Maritime Law

In 1974 the Supreme Court, in *Sea-Land Services v. Gaudet*, recognized that most states permitted such claims and found that the widow of a longshoreman suing a nonemployer was entitled to a loss-of-consortium claim.152 In 1980 the Court continued to award damages for loss of consortium in the case of an injury to a longshoreman in *American Express Lines Inc. v. Alvez*.153 In 1987 the Eleventh Circuit permitted the spouse of a seaman to recover those damages without comment in *Villers Seafood Co. v. Vest*.154 Finally, in 1997 the Supreme Court remanded a case without commenting on a claim for loss of consortium in *Harbor Tug & Barge Co. v. Papai*.155

1. Why Judge Friendly wrongly decided the Igneri case

Peter Igneri was a longshoreman who was struck by a bale of rubber while discharging a ship in the Port of New York.156 His injuries were catastrophic, and he suffered complete paralysis of the lower extremities and bladder, commonly defined today as paraplegia.157 He and his wife, Theresa Igneri, sued the shipowner under state common law for negligence.158 Upon hearing the shipowner’s motion to dismiss Mrs. Igneri’s claim for loss of consortium, the district court found that it would be improper to recognize a longshoreman’s spouse’s claim for loss of consortium because the Jones Act denied such a right to the spouse of a seaman.159 The court dismissed Mrs. Igneri’s claim with prejudice, and she appealed.160 The Second Circuit affirmed the dismissal of the claim.161

Consider for a moment how Peter Igneri’s paraplegia likely

154 See *Villers Seafood Co. v. Vest*, 813 F.2d 339 (11th Cir. 1987).
156 Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 258 (2d Cir. 1963).
157 Id.
158 Id.
159 Id. at 236-37, 239.
160 Id. at 259.
161 Id. at 268.
affected the life of his wife. The complaint in Igneri stated that, as a result of the accident, Theresa “has been deprived of the services of her husband, Peter Igneri, his companionship, support, love, affection and consortium, as well as all facilities and domiciliary happiness normally enjoyed in normal marriage.”\(^{162}\) The claim understates the real effect of paraplegia on the spouse of an injured party.\(^{163}\) In most cases, after a husband completes his medical treatment, his wife becomes the primary caregiver. She may have to catheterize him multiple times per day and provide him with sponge baths and meals. If she has her own career, she may be required to cut back on her hours. If she was a homemaker, she may be required to begin working to provide the family with a steady source of income. Her husband is likely rendered impotent, and the possibility of having children with her husband may either come to an end or be made substantially more difficult. She must do all the shopping and provide all the care for their children. Vacations become extraordinarily difficult. Sedans are abandoned in favor of wheelchair-accessible vans. Dancing, joint outdoor activities, and even going to a restaurant for a quiet “date” become a chore. Paraplegia completely changes the life of not only a paraplegic but also of his or her spouse.\(^{164}\)

There are a number of reasons why Igneri was wrongly decided.\(^{165}\) First, the court used the terms “in admiralty” and “in maritime law” interchangeably, when the two terms are not interchangeable.\(^{166}\) Second, the court did not have access to computerized word searching and, therefore, was unable to locate its own prior cases where it had sustained actions for loss of consortium in both admiralty and maritime cases.\(^{167}\) Third, the court misinterpreted

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\(^{162}\) Id. at 258-59.

\(^{163}\) See id. at 262 n.13. The author attempted to contact Mrs. Igneri to obtain background on how her husband’s paraplegia affected her life, but she passed away in 2005. Theresa Igneri was 49 at the time of the accident that injured her husband. The effects of paraplegia on the spouse of the injured party listed in this paragraph are based upon the author’s experience in representing injured seamen and speaking with their spouses.

\(^{164}\) Igneri, 323 F.2d at 262.

\(^{165}\) See Alvez v. Am. Exp. Lines, Inc., 389 N.E.2d 461, 463-64 (N.Y. 1979) (describing why the Igneri case was wrongly decided); infra notes 166-69 and accompanying text.

\(^{166}\) Infra Part III.C.2.

\(^{167}\) Infra Part III.C.3.
the purpose and scheme of the remedy provided for in the LHWCA.\textsuperscript{168} And fourth, it was inordinately offended by the fact that Mrs. Igneri was claiming loss of consortium because she was deprived of the sex, society, and services of her husband when historically loss of consortium had been provided to husbands of female tort victims—not wives of male tort victims.\textsuperscript{169}

2. Admiralty law and maritime law

To understand how the court wrongly decided Igneri and how courts have wrongly interpreted it since, it is helpful to define the difference between the terms “maritime law” and “admiralty law.”\textsuperscript{170} While some use those terms interchangeably, the terms are not the same.\textsuperscript{171} Maritime law refers to the broad categories of statutory and general maritime laws that apply to cases that arise either out of a maritime tort\textsuperscript{172} or a maritime contract.\textsuperscript{173} Admiralty law is a subcategory of maritime law and applies to suits claimants bring against a vessel or piece of property in rem\textsuperscript{174} to enforce a maritime lien.\textsuperscript{175} Therefore, while all admiralty cases are maritime cases, not all maritime

\begin{itemize}
\item \textsuperscript{168} Infra Part III.C.4.
\item \textsuperscript{169} Infra Part III.C.5.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See Exec. Jet Aviation v. City of Cleveland, Ohio, 409 U.S. 249, 253 (1972) (defining maritime tort cases as cases that occur on either the high seas or the navigable waters of the United States and that have a nexus to a traditional maritime activity).
\item \textsuperscript{173} See Garcia v. Warner, Quinlan Co., 9 F. Supp. 1010, 1011 (S.D.N.Y. 1934) (establishing that maritime contracts include contracts to carry goods by sea, charter vessels, sell existing vessels, repair vessels, or provide necessaries to vessels, such as supplies, fuel, piloting services, stevedoring services, etc.).
\item \textsuperscript{174} See Merch. Nat’l Bank of Mobile v. Dredge Gen. G.L. Gillespie, 663 F.2d 1338, 1350 (5th Cir. 1981) (explaining that, in an admiralty suit, an action in rem is directed towards a vessel, cargo, or some other piece of property rather than against a person, and the action seeks to dissolve or transfer title to property to satisfy a maritime lien); \textit{BLACK’S LAW DICTIONARY} 797 (9th ed. 2009) (defining in rem as Latin for “against a thing”).
\item \textsuperscript{175} See Leon v. Galceran, 78 U.S. 185, 190 (1870); Jarvis, \textit{supra} note 170, at 431 n.1.
\end{itemize}
cases are admiralty cases.\(^\text{176}\) In an admiralty case, the court must have possession of some type of tangible or intangible maritime property—usually a vessel, cargo, bank account, bond, or “letter of undertaking”—in order for the court to have in rem or quasi in rem jurisdiction.\(^\text{177}\) A federal court may hear a maritime case without having physical possession of maritime property.\(^\text{178}\) The key differences are that, while both state and federal courts have jurisdiction to hear maritime cases, only federal courts have jurisdiction to hear admiralty cases; because the power to seize and arrest ships and property to enforce a maritime lien in rem or quasi in rem is strictly federal.\(^\text{179}\) 

There are four types of admiralty cases: in rem cases involving arrest of a vessel or cargo to enforce a maritime lien (e.g., ship mortgage claims, crew wage claims, cargo damage claims, salvage claims, and prize claims);\(^\text{180}\) quasi in rem cases to secure jurisdiction over maritime defendants that cannot be found “within the district”\(^\text{181}\) by seizing the defendant’s property in the district; possessory and petitory cases seeking to resolve ownership and title to vessels;\(^\text{182}\) and limitation-of-liability cases seeking to divide a limited res among maritime-lien claimants after a maritime casualty.\(^\text{183}\) Each of these cases involves the admiralty court taking physical possession of a piece of property—often by having the U.S. Marshals seize the property—and resolving disputes between owners and lienholders concerning their

\(^{176}\) See Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1491 (5th Cir. 1992); supra notes 172-75 and accompanying text.


\(^{178}\) See Madruga, 346 U.S. at 560.

\(^{179}\) See Rounds v. Cloverport Foundry & Mach. Co., 237 U.S. 303, 306 (1915) (explaining that admiralty cases are strictly federal); Perry v. Haines, 191 U.S. 17, 37-38 (1903); In re The Moses Taylor, 71 U.S. 411, 430-31 (1866); see also Madruga, 346 U.S. at 560 (“Admiralty’s jurisdiction is ‘exclusive’ only as to those maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien.”).

\(^{180}\) FED. R. CIV. P. SUPP. C.

\(^{181}\) FED. R. CIV. P. SUPP. B.

\(^{182}\) FED. R. CIV. P. SUPP. D.

\(^{183}\) FED. R. CIV. P. SUPP. E.
competing claims of ownership and title to the property.  

The Second Circuit in Igneri analyzed cases decided under maritime law and cases decided under admiralty law as if they were interchangeable.  However, because admiralty law exclusively involves the resolution of maritime-lien claims, the question that arose was whether a claim for loss of consortium created a maritime lien.  As has previously been shown, there is a long history of recognizing loss-of-consortium claims under maritime law.  To see how courts have dealt with loss of consortium under admiralty jurisdiction, it is helpful to look at a historical case.

In the 1877 case of Phelps v. The Steamship City of Panama, Mr. and Mrs. Phelps were traveling as passengers on the SS City of Panama from Tacoma to San Francisco when Mrs. Phelps fell twenty feet down an open hatchway.  Mr. and Mrs. Phelps sued the vessel in rem in the Territorial Court for the Territory of Washington in Port Townsend for her fractured arm and for his loss of consortium.  The territorial court applied U.S. admiralty law and stated that “two actions lay, one by the husband alone, for his losses, per quod consortium amisit, and for expenses of cure, etc., another by herself and husband for what she personally had suffered.” The court awarded damages in the sum of $15,000.

The court in Phelps addressed whether the Phelpses could bring their claims in the admiralty side of the federal courts and whether

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186 See id.
187 See supra notes 152-55.
188 Phelps v. S.S. City of Panama, 1 Wash. Terr. 518 (1877).
189 Id. at 539, 542.
190 Id. at 519, 533, 536, 542.
191 Id. at 533.
192 Id. at 547.
193 See id. at 522-29. At that time, the federal courts were divided into civil, admiralty, and equity divisions, each having separate and distinct jurisdiction. Id. at 536 (noting that “[t]he Constitution recognizes, in the language it employs, a triple
they could bring the claims in rem. The Phelps wisely chose to sue for breach of the contract of passage (i.e., the ticket), rather than suing solely in tort. The court reasoned that, while a cause of action in tort might not create a maritime lien against the ship, a cause of action for breach of a contract of passage was no different than a cause of action for breach of a contract of carriage for cargo. Because cargo owners have historically had liens against vessels, which they could enforce by an action in rem, the court reasoned that passengers who sued for breach of contract could similarly have maritime liens that they could enforce against the vessel.


The Second Circuit in Igneri said, “In a [d]istrict [c]ourt opinion in Savage v. New York, N. & H.S.S. Co., adopted by this Court, 185 Fed. 778, 781 (1911), Judge Hough stated in dictum that ‘No instance of what is in substance an action per quod consortium amisset has been shown in admiralty.’”

distribution of jurisdiction into law, equity, and admiralty.” (citing U.S. CONST. art. III § 2)). Article III, Section 2 states “[t]he judicial Power shall extend to all Cases, in Law and Equity . . . [and] to all Cases of admiralty and maritime Jurisdiction.” U.S. CONST. art. III § 2. Admiralty courts were considered to be courts of equity while common-law causes of action were brought under the civil side of the federal courts. See Phelps, 1 Wash. Terr. at 536.

194 Phelps, 1 Wash. Terr. at 535-36.
195 Id. at 531.

197 Phelps, 1 Wash. Terr. at 535.
198 Id. at 535-36.
199 Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 265 (2d Cir. 1963) (emphasis added).
The Second Circuit affirmed *Savage*, an unpublished district court case, without a written opinion. Because of that, it has been difficult for later courts to analyze *Igneri* and to see the opinion on which the Second Circuit based much of its decision. However, a copy of the case has now been located in Internet archives, and it is currently possible to do what circuit courts have been unable to do in the fifty years since the *Igneri* case was decided—that is, read the *Savage* decision. A close reading of that case helps explain why the Second Circuit’s decision is in error.

In the *Savage* case, sixty-four-year-old Mrs. Ella Savage was a passenger on the SS *Rosalind*, a passenger vessel operated by the New York, Newfoundland & Halifax Steamship Company, in the Port of New York when Mrs. Savage tripped and fell on the deck, breaking her tibia, fibula, and ankle. Both she and her husband sued the steamship company; she for her injuries and he for the medical expenses he incurred and his loss of consortium. Judge Hough wrote,

> It is in my opinion too plain for further discussion that on a clear day in June, in the latitude of New York City, on the sunny side of such an object as a house or deck saloon, a construction of the size of this chain box was plainly visible to any person of reasonably good vision and in the possession of his faculties.

He therefore found no negligence on the part of the shipowner. That should have ended the case, but the district judge

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200 The federal reporter published the previously unpublished district court decision. *Savage v. N.Y., Newfoundland & Halifax S.S. Co.*, 188 F. 778, 781 (2d Cir. 1911).

201 One hundred nine cases cite *Igneri*, but only two of those cases also cite *Savage*. See, e.g., *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 280 (1980) (citing *Savage*, 188 F. 778 at 781) (supporting the notion that there was no clear decisional authority sustaining a general-maritime-law right of recovery for loss of society).

202 *Savage*, 188 F. at 779-81.

203 See infra notes 204-19 and accompanying text.

204 *Savage*, 185 F. at 779.

205 *Id.* at 778.

206 *Id.* at 780.

207 *Id.*
undertook to opine further.\textsuperscript{208} He stated,

It is not, however, to be understood that any opinion is thereby to be inferred as to the existence of jurisdiction in such a libel as that of Dr. Savage. No instance of what is in substance an action \textit{per quod consortium amisset} has been shown \textit{in admiralty}. The nearest approach that I know of is \textit{Moses v. Hamburg Packet Company} (D. C.) 88 Fed. 329, where a recovery was had by a father for the loss of services of his son, who had been injured on shipboard. The son also had brought his libel, as Mrs. Savage did here. In those cases, however, no question of jurisdiction was raised, and it was purposely avoided. The suits were originally brought at \textit{common law}, and were discontinued upon a stipulation by counsel for the steamers that they would appear and make no defense on the merits, if libels \textit{in admiralty} were substituted for the \textit{common-law} suits.\textsuperscript{209}

What the district judge was saying in dicta was that a cause of action for loss of consortium, while available at common law in maritime cases, could not be brought under the court’s admiralty jurisdiction because damages for loss of consortium did not create a maritime lien.\textsuperscript{210} Because claimants only bring cases in admiralty to enforce maritime liens, an admiralty court would lack jurisdiction to hear a loss-of-consortium claim.\textsuperscript{211} Judge Friendly’s conclusion that loss-of-consortium claims were not available in maritime cases is simply not supported by the case he cited.\textsuperscript{212} In fact, the \textit{Savage} case stands for just the opposite—that claimants could bring loss-of-consortium cases on the common-law aid of the court.\textsuperscript{213} \textit{Moses v. Hamburg Packet Company} (D. C.) 88 Fed. 329, where a recovery was had by a father for the loss of services of his son, who had been injured on shipboard.

\begin{thebibliography}{99}
\bibitem{208} See \textit{id.} at 781.
\bibitem{209} Id. (citing Moses v. Hamburg-Am. Packet Co., 88 F. 329 (S.D.N.Y. 1898)) (emphasis added).
\bibitem{210} See \textit{id.}
\bibitem{211} See \textit{id.}
\bibitem{212} Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 265 (2d Cir.1963) (citing \textit{Savage}, 185 F. at 781).
\bibitem{213} See \textit{Savage}, 185 F. at 781.
\end{thebibliography}
Hamburg-American Packet Co. further illustrates the point. In that case, a court had admiralty jurisdiction based upon the stipulation of the parties that the plaintiffs would dismiss their common-law suits and bring their suits in admiralty and the defendant would not state any objections.

The reason that the district court determined that it would not allow a claim for loss of consortium in an admiralty case, but would in a common-law case, is that courts strictly construe maritime liens. That is, courts are not to expand maritime liens because liens confer rights in property. A maritime lien is a necessary element of a claim brought “in admiralty” but not in all maritime cases. Judge Friendly simply misinterpreted the district court’s opinion.

4. The remedial scheme in the Longshore Act

The third reason that the Second Circuit incorrectly decided Igneri is that Judge Friendly misconstrued the remedial scheme embodied in the LHWCA. Under the LHWCA, as in all workers’ compensation statutes, there exists a quid pro quo employer and employee. The employers of longshoremen, usually stevedores, get immunity from suit in exchange for “securing compensation” for the benefit of the longshoremen. A stevedore typically “secures compensation” by purchasing a workers’ compensation policy of

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214 Moses v. Hamburg-Am. Packet Co., 88 F. 329 (S.D.N.Y. 1898). As a consequence of a collision between the SS Persia and the SS Saginaw, four-year-old Jacob Moses had his hand amputated. Id. at 329. His father, in the clothing business, brought suit for his son’s injuries and the loss of his son’s services—which is loss of consortium—because the son “was likely to be brought up in the same or a similar business.” Id. at 331. The father was awarded $500 and the son $2,500 against the vessel that caused the collision. Id.

215 See id. at 329.

216 See Atl. & Gulf Stevedores, Inc. v. M/V Grand Loyalty, 608 F.2d 197, 200-01 (5th Cir. 1979) (stating that maritime liens are to be strictly construed).

217 Id.

218 See supra notes 172-75 and accompanying text.

219 See supra notes 196-215 and accompanying text.


insurance; although, the stevedore has the option to self-insure.\(^{223}\) Workers’ compensation insurance covers workers’ medical expenses and two-thirds of a worker’s average weekly wage until the worker reaches maximum medical improvement.\(^{224}\) However, that is not the end of the remedial scheme.\(^{225}\)

A stevedore, or its insurer, pays for a longshoreman’s injuries regardless of whether the injuries are the result of the negligence of the stevedore or the negligence of a third party, such as the ship on which the longshoreman was working, a trucker on the pier, or a defective product.\(^{226}\) However, as part of the scheme, the longshoreman assigns to the stevedore his right to sue third parties in a common-law action to recover for their negligence either under state law or, if applicable, under the general maritime law.\(^ {227}\) If the stevedore declines to pursue the third party, the longshoreman has the right to bring the same state or maritime common-law suit against those third parties.\(^ {228}\) If the longshoreman is successful, the first proceeds of that state or maritime common-law suit are repayment for the compensation and medical expenses paid by the stevedore.\(^ {229}\) Anything above what was paid goes to the longshoreman.\(^ {230}\) Consequently, a longshoreman’s common-law right to sue third parties is an integral part of the entire remedial scheme.

As the Igneri court recognized, virtually every state recognizes a cause of action for loss of consortium.\(^ {231}\) However, the court’s finding, in interpreting a seaman’s remedy under the Jones Act, that “[t]he policy . . . was that the new remedy for the employee was to be exclusive and that claims of relatives recognized by state law were to be abrogated” could not be similarly applied to third-party claims under the

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\(^{225}\) See infra notes 226-30 and accompanying text.
\(^{228}\) See id.
\(^{229}\) See id.
\(^{230}\) See id.
\(^{231}\) Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 260 & n.2 (2d Cir.1963) (citing RESTATEMENT (FIRST) OF TORTS § 693 (1938)).
The very first premise of the statement is wrong—neither the Jones Act nor the LHWCA were intended to be the exclusive remedy for personal injuries suffered by seamen and longshoremen or their spouses.\(^{233}\) Those acts are the exclusive remedy for seamen and longshoremen against their employers, but in neither of those acts did Congress attempt to affect the common-law remedies that seamen and longshoremen had against third parties.\(^{234}\)

The policy of the LHWCA was exactly the opposite in the case of third-party injuries—Congress did not intend for the statutory remedy to be the exclusive remedy but intended it to be a secondary remedy.\(^{235}\) Permitting common-law suits against third parties benefitted both the stevedore and the longshoreman; the former more than the latter because the stevedore received the first recovery from any monies received from those third parties.\(^{236}\) One of the purposes of the law was to encourage actions against third parties when the stevedore had to pay compensation for the negligent acts of someone else.\(^{237}\)

Because third-party actions are part of the remedial scheme under the LHWCA, depriving a spouse of a claim for loss of consortium was clearly not Congress’s motive in passing the Act, and Congress displayed no intent to modify the common law—it sought to permit parties to benefit from the common law.\(^{238}\) Judge Friendly in the \textit{Igeneri} case was simply wrong in his interpretation of the LHWCA.\(^{239}\)

\(^{232}\) \textit{Id.} at 266.  
\(^{235}\) \textit{See} 33 U.S.C. § 933.  
\(^{236}\) \textit{See} 33 U.S.C. § 933(e).  
\(^{237}\) The wife was not entitled to maintain a cause of action for loss of consortium against the husband’s employer because the employer, by securing compensation against injury to the husband, had immunity to suit from the other under the LHWCA. \textit{See} Smither & Co. v. Coles, 242 F.2d 220, 225 (D.C. Cir. 1957). However, where the negligent party was someone other than the employer, there was no compensation immunity granted under the Act. \textit{See} 33 U.S.C. § 933(i).  
\(^{238}\) H.R. REP. No. 92-1441, at 4703 (1972).  
\(^{239}\) \textit{See} Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 268 (2d Cir. 1963).
5. Sexism and loss of consortium

There is no denying that, historically, the remedy of loss of consortium was rooted in the concept that a wife was the property of a husband and that he derived from her the benefits of sexual intercourse and the bearing of children; the comfort, companionship, and society that marriage holds the prospect of bringing to a single man; and the services that a wife provides to the couple and to their children.\(^\text{240}\) For that reason, only husbands could claim for the loss of their wives’ consortium.\(^\text{241}\)

The district court in \textit{Igneri} found that “there is no maritime precedent for a suit for loss of consortium by either spouse,”\(^\text{242}\) a statement that was clearly in error in 1962.\(^\text{243}\) The Second Circuit had entertained suits for loss of consortium in maritime cases on at least four occasions,\(^\text{244}\) the district courts in New York had ruled on at least two such cases,\(^\text{245}\) New York state courts had heard at least one such case,\(^\text{246}\) the Third Circuit had awarded loss-of-consortium damages in at least one maritime case,\(^\text{247}\) and even the Supreme Court had awarded them in a maritime case.\(^\text{248}\) The reason these nine cases never came to the attention of district courts was that the loss-of-consortium damages were never the issue on appeal, and, hence, under the previously used “key number” systems, discussion of loss of consortium never made it


\(^{241}\) See id.

\(^{242}\) \textit{Igneri}, 207 F. Supp. at 238.

\(^{243}\) See \textit{infra} notes 241-45 and accompanying text.

\(^{244}\) See Mayer v. Zim Israel Navigation Co., 289 F.2d 562 (2d Cir. 1961); VolLMann v. United Fruit Co., 147 F.2d 514 (2d Cir. 1945); Burstein v. U.S. Lines Co., 134 F.2d 89 (2d Cir. 1943); \textit{In re} Cent. R.R. of N.J., 52 F.2d 20 (2d Cir. 1931).


\(^{246}\) See Dresner v. Riviera Ass’n, 161 N.Y.S.2d 701 (N.Y. Sup. Ct. 1957) (dismissing the loss-of-consortium claim with leave to amend).


It is only with the computerized word searches that became available in the 1980s that we can learn of the full scale and the common nature of the award of these types of damages.

Hearing a case on appeal, the Second Circuit located just one of these cases, the Third Circuit case of New York & Long Branch Steamboat Co. v. Johnson, but failed to locate the four cases in which the Second Circuit had awarded such damages to husbands of injured wives. The court went on to say that “[w]e have found no maritime cases relating to claims by wives for loss of consortium.” Therefore, the court held that “the scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly injured.” In light of the precedent missed by the Second Circuit, its conclusion is historically inaccurate.

Derivative remedies have historically been a part of maritime law, and there is no basis for the federal courts to eliminate a remedy that remains viable in the vast majority of state courts throughout the nation.

In Christofferson v. Halliburton Co., the Court of Appeals for the Fifth Circuit aligned itself with the Second Circuit’s Igneri decision. At the time, the Fifth and Second Circuits handled more maritime cases than any of the other circuit courts. The Fifth Circuit included the port cities of New Orleans, Houston, Miami, Jacksonville,

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See generally James A. Sprowl, The Westlaw System—A Different Approach to Computer-Assisted Legal Research, 16 JURIMETRICS J. 142, 147 (1976) (explaining that Westlaw’s key numbering system is based on headnote summaries, which are condensed summaries of the points of law addressed in each judicial decision).


Id. at 268.

See supra notes 241-45 and accompanying text.


See Christofferson v. Halliburton Co., 534 F.2d 1147, 1148-49 (5th Cir. 1976) (holding that a wife had no cause of action for loss of consortium).

Tampa, and Savannah, and the Second Circuit included the Port of New York.258 A number of state and district courts followed the decision as well.259 The denial of damages for loss of consortium therefore became common in U.S. maritime cases.260

D. Setting the Law Right: American Export Lines v. Alvez

Finally, in 1980, the Supreme Court set the law concerning damages for loss of consortium right in Alvez.261 In that case the Court awarded damages for loss of consortium to the wife of an injured longshoreman against the owner of a ship.262 It stated that:

[A] remedial omission in the Jones Act [by not mentioning loss of consortium] is not evidence of considered congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that “no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.”263

258 See Aguiluz-Nunez v. Carnival Cruise Lines, Inc., 584 F.2d 76 (5th Cir. 1978) (Miami case); British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75 (2d Cir. 1977) (New York case); Fla. Canal Indus., Inc. v. Rambo, 537 F.2d 200 (5th Cir. 1976) (Tampa case); Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272 (5th Cir. 1976) (New Orleans case); United States v. Lykes Bros. S.S. Co., 511 F.2d 218 (5th Cir. 1975) (Houston case); Davis v. M/V Ester S., 509 F.2d 1377 (5th Cir. 1975) (Jacksonville case); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974) (Savannah case).
262 Id.
263 Id. at 283-84 (alteration in original).
With regard to Igneri, the Court found that “the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society in Igneri. Subsequent developments, however, have altered the legal setting . . . .” 264

The policy of the general maritime law has always been to grant “special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages.” 265 However, the law would only stay “fixed” for about ten years. 266 The Alvez decision was a plurality decision. 267 Only three justices agreed with Justice Brennan’s opinion. 268 Chief Justice Burger and Justice Powell concurred only in the result, and three justices believed that the case was not ripe for consideration by the Supreme Court. 269 As a plurality decision, its precedential value was suspect, and ten years later came the Supreme Court decision in Miles v. Apex Marine. 270 After Miles, the influential Fifth Circuit felt free to ignore Alvez and went on denying damages for loss of consortium. 271 However, the Fifth Circuit was misreading Miles. 272

264 Id. at 280.
266 Compare Alvez, 446 U.S. at 276 (holding that the general maritime law affords a cause of action for loss of consortium), with Miles v. Apex Marine Corp., 498 U.S. 19, 37 (1990) (holding that the general maritime law does not afford a cause of action for loss of society).
267 See Alvez, 446 U.S. at 275, 286 (four justices affirmed, two concurred in the judgment, and three dissented).
268 Id. at 275.
269 Id. at 286.
270 Miles, 498 U.S. at 37.
E. Confusing the Law Yet Again: Miles v. Apex Marine

Miles is a statutory maritime personal-injury case that the mother of a deceased seaman brought to recover for loss of society.\(^{273}\) The Supreme Court denied the mother’s claim for loss of society because the seaman’s remedy that the Jones Act created did not include that particular cause of remedy.\(^{274}\) The Supreme Court said that Congress, which created the Jones Act, was “free to say ‘this much and no more.’” \(^{275}\) [But once Congress did, an admiralty court is not free to go beyond those limits.\(^{275}\) However, the holding in Miles said nothing about nonstatutory personal-injury suits for passengers and recreational boaters.\(^{276}\) These maritime remedies ran dreadfully aground after the Supreme Court’s decision in Miles even though Miles did not require that result.\(^{277}\) However, lower courts interpreting Miles found that by passing the DOHSA\(^{278}\) and the Jones Act\(^{279}\) in 1920, Congress intended to preempt the general maritime law of personal injury.\(^{280}\) That congressional intent had apparently remained undiscovered by the courts for seventy-one years.\(^{281}\)

Courts have given “greater pre-emptive effect” to the acts of Congress designed to create remedies for maritime injuries “than is

\(^{273}\) Miles, 498 U.S. at 21-22.
\(^{274}\) Id. at 32-33.
\(^{275}\) Id. at 24.
\(^{276}\) See generally id. at 19 (requiring no analysis of personal-injury suits for either a passenger or recreational boater because the plaintiff resembled an injured seaman).
\(^{277}\) See id.
\(^{278}\) 46 U.S.C. §§ 30301-30308 (2006) (“When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent’s spouse, parent, child, or dependent relative.”).
\(^{281}\) “Among the impediments to such discussion [of policy issues regarding punitive damages in maritime law] have been the courts’ evident misunderstanding of the history of maritime punitive damages and the temptation to stop thinking once someone points out that punitive damages are ‘non-pecuniary.’” Robertson, supra note 60, at 164.
required by [their] text[s].” The extension of the Supreme Court’s reasoning in *Miles*, which involved a statutory remedy that Congress created to apply only to seamen, to general-maritime-law claims where no statute applies, is an error.  

**IV. HOW THE GENERAL MARITIME LAW SHOULD DEVELOP**

It is often said that “*[t]here is no federal . . . common law.*” This is only partially true. In the field of maritime law, the Supreme Court is the “common law court of last review.” It both establishes and guides the formation of the general maritime law, known among maritime practitioners as maritime common law, and interprets statutory maritime law as created by Congress. Therein lies the tension.

In maritime law the Supreme Court attempts to juggle the constitutional principles of the separation of powers, the supremacy clause, federalism, and preemption with the unconstitutional, but often stated, goal of uniformity in the maritime law. In interpreting what the Supreme Court has attempted to accomplish, many lower courts have elevated the principle of uniformity above the principles espoused in the Constitution. Nowhere has this been more true than in the development of the “*Miles* uniformity principle.”

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283 deGravelles, *supra* note 280, at 130.  
287 *See id.* at 518-20 (interpreting statutory maritime law and maritime common law together).  
288 *See id.* (holding statutory maritime law does not preempt maritime common law on punitive damages).  
291 *See id.*
Two competing theories have emerged on the question of how admiralty law should develop.292 One theory, called the “uniformity theory,” says that maritime common law should mimic maritime statutory law and find prudential guidance from both sets of law despite the fact that Congress has not passed a new maritime personal-injury statute since 1920.293 Chief Justice Roberts and Justices Scalia, Kennedy, and Alito adhered to this theory.294

A. Justice Alito’s Miles Uniformity Approach

Justice Alito advocated the “Miles uniformity principle,”295 in his dissenting opinion in Townsend and stated that the “policy choices reflected in statutes creating closely related claims” should guide courts in creating the general maritime law.296 The “statutes creating closely related claims,” which Justice Alito referred to are the seamen’s cases under the Jones Act and wrongful death cases under the DOHSA.297 The basic error of the Miles uniformity approach is that it wrongly assumes that a policy choice, to limit damages in cases of wrongful death to “fair compensation for the pecuniary loss sustained”298 reflected congressional intent to limit damages in all maritime cases.299 That interpretation lacks textual, purposivist, and historical support in the law.300


293 See Garris, 532 U.S. at 817, 820 (majority opinion); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401-02 (1970) (“[U]niformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be ‘a system of law coextensive with, and operating uniformly in, the whole country.’” (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874))).


295 See Hanbury, supra note 290, at 245-49.

296 Townsend, 557 U.S. at 426 (Alito, J., dissenting).

297 Id.; see Miles, 498 U.S. at 32-34.


300 See infra notes 301-04 and accompanying text.
Prior to those acts, no general-maritime-law remedy existed for negligently caused maritime deaths.\(^{301}\) When Congress passed the DOHSA in 1920, it was creating a new remedy unknown in 1789 when states ratified the Constitution and when Congress enacted the Judiciary Act,\(^{302}\) which includes the saving-to-suitors clause.\(^{303}\) However, the common law did have causes of action for punitive damages and loss of consortium, and Congress intended the saving-to-suitors clause to preserve, or in other words to save, those common-law remedies in maritime cases from preemption by federal law.\(^{304}\)

Justice O’Connor, who wrote the majority opinion in *Miles*, included a much-quoted statement that “[w]e sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will . . . .”\(^{305}\) Justice O’Connor’s statement would have been clearer had she said “we are not free to expand [statutory] remedies at will . . . .”\(^{306}\) Such a statement would have signaled a recognition of Congress’s superior position in creating new maritime remedies and an acknowledgment of the principle that Congress is vested with legislative power\(^{307}\) to “regulate Commerce.”\(^{308}\) Perhaps no other phrase in the history of maritime law has caused such


\(^{303}\) 28 U.S.C. § 1333(1) (2006) (“[S]aving to suitors in all cases all other remedies to which they are otherwise entitled” in admiralty and maritime cases).


\(^{306}\) *Id.*

\(^{307}\) U.S. CONST. art. I, § 1.

\(^{308}\) U.S. CONST. art. I, § 8, cl. 3.
confusion. Ever since then, courts have exaggerated the preemptive effect of the Jones Act and the DOHSA.309

**B. Justice Ginsburg’s Shared-Venture Approach**

The second approach is called the “shared-venture” theory.310 In *Norfolk Shipbuilding & Drydock Corp. v. Garris*, Justice Ginsburg stated, “I see development of the law in admiralty as a shared venture in which ‘federal common lawmaking’ does not stand still” waiting for action by Congress.311 In light of Congress’s inaction in the field of maritime personal-injury law for over ninety years, Justice Ginsburg’s position seems practical.312 The shared-venture approach appears to be similar to the approaches taken by Justices Souter313 and Thomas.314 Justices Kagan and Sotomayor have not yet had the opportunity to express their views on how maritime law should develop into the future.315

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310 See *Garris*, 532 U.S. at 821 (Ginsburg, J., concurring). It was the shared-venture theory that prevailed when the Court was asked to incorporate a cause of action for products liability into the general maritime law. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986). The Court stated, “We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law. This Court’s precedents relating to injuries of maritime workers long have pointed in that direction.” *Id.*

311 *Garris*, 532 U.S. at 821 (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994)).

312 See *Townsend*, 557 U.S. at 416, 420-21 (“Congress knows how to restrict the traditional remedy of maintenance and cure ‘when it wants to.’” (quoting Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987))).

313 “[W]e may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule.” Exxon Shipping Co. v. Baker, 554 U.S. 471, 508 n.21 (2008).

314 See, e.g., Justice Thomas’s statement that “this Court has recognized that it may change maritime law in its operation as an admiralty court.” *Townsend*, 557 U.S. at 424 n.11. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Thomas in that opinion. *Id.* at 406.

315 *See supra* notes 313-14 (identifying only Chief Justice Roberts and Justices Scalia,
The *Miles* uniformity approach and the shared-venture approach were contrasted against each other in *Garris* when the Supreme Court again attempted to navigate between the rocks of federal statutory remedies and the shoals of the *Miles* uniformity approach to reach the safe channel of a common-law remedy for the wrongful death of a longshoreman on territorial waters. The Court, through Justice Scalia’s opinion, unanimously found that such a remedy existed. However, this opinion, perhaps more than any other, defined the two points of view on how the general maritime law should develop in the future.

C. Justice Scalia’s Prudential-Guidance Approach

Justice Scalia, who dissented from the majority decision in *Townsend*, is the Supreme Court’s primary proponent of the doctrine of constitutional construction, known as “originalism,” and of statutory construction, known as “textualism.” He said,

I believe my philosophy of statutory construction in general (known loosely as textualism) and of constitutional construction in particular (known loosely as originalism) is repugnant to the first instincts of much of the legal profession . . . . [However,] to abandon textualism, [is] to render democratically adopted texts mere springboards for judicial lawmaking.

However, in *Garris*, Justice Scalia adopted what appears to be a nontextualist approach. He described a “prudential effect” that he

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Kennedy, Thomas, Ginsburg, Souter, and Alito as the participating members of the court).


317 See *id.* at 812, 820.

318 See *id.* at 820-21.


321 See *Garris*, 532 U.S. at 820.
believed federal maritime statutes should have on the development of the general maritime law.\textsuperscript{322} As a textualist, Justice Scalia’s position has always been that it is the text that Congress voted on and approved that guides the Court’s interpretation of a statute.\textsuperscript{323} For example, if Congress called an act the “Death on the High Seas Act” it must have intended the Act to only apply to deaths occurring on the high seas.\textsuperscript{324} Extending the effect of the Act by analogy, by example, or by “prudential effect” to deaths occurring on territorial waters is simply not part of textualism.\textsuperscript{325}

By directing future courts to look for a prudential effect, Justice Scalia was asking those courts to discern legislative intent without the benefit of extensive legislative history.\textsuperscript{326} He appears to be doing just what he has warned others against—using “democratically adopted texts [as] mere springboards for judicial lawmaker.”\textsuperscript{327}

\textbf{D. Justice Souter’s Common-Law-Court-of-Last-Review Approach}

Justice Souter identified the Supreme Court’s role in developing the general maritime law as the “common law court of last review.”\textsuperscript{328} Under his approach, where Congress has not acted, the Court should permit maritime common law to grow and develop much the way the common law has grown and developed for centuries in nonmaritime settings.\textsuperscript{329} As he said in \textit{Exxon Shipping}, “we may not slough off our responsibilities for common law remedies because Congress has not made a first move.”\textsuperscript{330} If Congress and the Supreme Court share the responsibility to develop the general maritime law, then the common-law-court-of-last-review approach better expresses the principles of the separation of powers, federalism, and the supremacy doctrine than do

\textsuperscript{322} Id.
\textsuperscript{323} See Scalia, \textit{supra} note 319, at 98.
\textsuperscript{325} See generally Scalia, \textit{supra} note 319 (discussing the textualist approach to statutory construction).
\textsuperscript{326} See \textit{Garris}, 532 U.S. at 820.
\textsuperscript{327} See Scalia, \textit{supra} note 319, at 99.
\textsuperscript{329} Id.
\textsuperscript{330} Id. at 508 n.21.
either the *Miles* uniformity or prudential-guidance approach of Justices Alito and Scalia.\(^{331}\) Under those constitutional principles, Congress is vested with power to legislate, but in the absence of legislation, the general maritime law should grow and develop and take prudential guidance from state law.\(^{332}\) Since the common law of virtually every state recognizes both punitive damages and loss of consortium as remedies, the Supreme Court, as the “common law court of last review” should accept its guidance from those state common-law decisions.\(^{333}\) It is incongruous for the states to develop common-law remedies, for Congress to have “saved” common-law remedies to parties in the saving-to-suitors clause, and for the Supreme Court to refuse to make those common-law remedies part of the general maritime law.\(^{334}\)

**E. Justice Thomas’s Avoid-Exaggerating, Preemptive-Effect Approach**

No approach to the growth of the general maritime law has been more elegantly stated than that of Justice Clarence Thomas. His position is that looking for guidance from statutes that were enacted in 1920 to create or deny remedies in the general maritime law in the twenty-first century causes the Supreme Court to “attribute words to Congress that it has not written.”\(^{335}\) He went on in *Townsend* to write that “[t]he 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.”\(^{336}\) “Limiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of this Court’s other decisions interpreting the statute.”\(^{337}\)


\(^{332}\) See Sullivan, *supra* note 304, at 397.


\(^{336}\) *Id.*

\(^{337}\) *Id.* at 424-25.
Efforts to suggest that congressional acts intended to benefit seamen impliedly preempt common-law remedies have been made and rejected since at least the 1820s. In *Harden v. Gordon*, a shipowner confronted Justice Story, whose compassion for seamen was legendary, with the argument that the passage of a statute by Congress requiring shipowners to provide for a medicine chest to be kept aboard ship preempted a seaman’s right to maintenance and cure.

Justice Story dismissed the argument as follows:

In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or pro tanto of former laws; otherwise the statute is supposed to be merely declarative or cumulative.

Justice Story found that, because the obligation to provide a medicine chest aboard ship was consistent with the obligation to provide maintenance and cure, the passage of the statute did not imply repeal or modify the obligation of the shipowner to provide medical care. Instead, the statute created an additional obligation to have a medicine chest onboard so that the shipowner could promptly provide medical treatment without having to await arrival at the next port of call.

Today, courts continue to find preemption where Congress did not intend for preemption to exist. The rule of law today is that courts should not presume implied field preemption except when Congress has expressed “a clear and manifest intent to sweep away state

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338 See, e.g., Harden v. Gordon, 11 F. Cas. 480, 483-85 (C.C.D. Me. 1823) (No. 6,047) (holding that the Navigation Acts did not preempt the right to maintenance and cure).
339 See id. at 481, 483-84.
340 Id. at 484.
341 See id.
342 See id.
343 See id.
common law.” 344 Where Congress intends to preempt the common law, it must leave no room for the common law, or the general maritime law, in the matter at hand. 345 Neither the Jones Act nor the DOHSA left room for the common law or the general maritime law. 346

In the plurality opinion of Alvez, the Supreme Court recognized the absence of congressional intent to preempt preexisting general maritime law and counseled future courts against using the Jones Act and the DOHSA to limit nonstatutory remedies:

[T]he liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law . . . . Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that “no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.” 347

The reason for those instructions is that the Jones Act discloses no intent that it applies to passengers on passenger ships, recreational boaters, or even seamen suing third parties other than their employer. 348 The Jones Act merely states,

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.

346 See Ugo Colella, The Proper Role of Special Solicitude in the General Maritime Law, 70 Tul. L. Rev. 227, 258 (1995) (providing that the purpose of the Jones Act and the DOHSA was simply to fill in gaps that the general maritime law left and not to replace or overturn existing law).
348 Sullivan, supra note 304, at 399-400.
Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.\textsuperscript{349}

The Federal Employers Liability Act (“FELA”) gives railway workers the right to sue their employers for negligence.\textsuperscript{350} While a majority of federal circuit courts that have considered the issue have determined that an employee suing an employer under FELA cannot recover punitive damages, the Supreme Court has never ruled on the question.\textsuperscript{351}

Similarly, the DOHSA merely states,

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent’s spouse, parent, child, or dependent relative.\textsuperscript{352}

In passing the DOHSA, Congress insisted that it not extend to accidents occurring on territorial waters.\textsuperscript{353}

Even the conclusion that the passage of the Jones Act and the DOHSA, in March of 1920, expressed a congressional policy to prohibit seamen from seeking punitive damages when they are the victims of willful or wanton misconduct is one with little legal support.\textsuperscript{354} What

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\textsuperscript{351} See Campbell v. BNSF Ry. Co., 600 F.3d 667, 671 (6th Cir. 2010) (finding that FELA did not provide punitive damages); Kozar v. Chesapeake & Ohio Ry. Co., 449 F.2d 1238, 1243 (6th Cir. 1971) (stating that no case exists since the enactment of FELA where the Court has allowed a movant to recover punitive damages).
\textsuperscript{353} S. REP. NO. 66-216, at 3 (1919); H.R. REP. NO. 66-674, at 3 (1920).
\textsuperscript{354} See Atl. Sounding Co. v. Townsend, 557 U.S. 404, 421-22 (2009) (stating that punitive damages have been a remedy for willful, wanton, or outrageous conduct and}
support it has is based on English court decisions interpreting the Fatal Accidents Act of 1846, also known as Lord Campbell’s Act.\footnote{355} Foreign precedent is hardly a viable basis for projecting congressional intent 70 years later, or for making policy choices 160 years later.\footnote{356}

Justice Thomas’s approach is perhaps the best. The principle that these acts impliedly preempt the maritime common-law remedies of punitive damages and loss of consortium is simply inaccurate.\footnote{357} When Congress has set limits on the application of its statutes, there is little reason to conclude that it also intended the statute to operate outside those limits.\footnote{358} For example, when Congress enacted a law applying to deaths on the high seas, there is no reason to conclude that it intended the same law to apply to deaths on territorial waters.\footnote{359} The Court decided as such in \textit{Yamaha Motor Corp. v. Calhoun}.\footnote{360} Similarly, when Congress enacts a remedy permitting seamen to sue their employers, there is no reason to conclude that it intended the same act to limit the damages available to nonseamen, such as recreational boaters and passengers, or to seamen when they sue parties other than their employers, such as a product manufacturer for products liability.\footnote{361}

While courts have reason to conclude that punitive damages are unavailable when seamen sue shipowners for deaths occurring on the

\footnote{355} See \textit{Miles v. Apex Marine Corp.}, 498 U.S. 19, 32 (1990) (stating that Lord Campbell’s Act shaped the creation of FELA and that FELA shaped the provisions in the Jones Act).

\footnote{356} See \textit{Al-Bihani v. Obama}, 619 F.3d 1, 5-6 (D.C. Cir. 2010) (concluding that international law does not and should not control interpretation of domestic law).

\footnote{357} See \textit{Am. Exp. Lines v. Alvez}, 446 U.S. 272, 282-84 (1980) (concluding that neither the Jones Act nor the DOHSA sweeps aside general-maritime-law remedies).


\footnote{359} See \textit{Calhoun}, 516 U.S. at 215-16.

\footnote{360} Id.

\footnote{361} Id. at 215 (stating that Congress has not explicitly defined remedies available for nonseafarers in territorial waters); Duplantis v. Texaco, Inc., 771 F. Supp. 787, 788-89 (E.D. La. 1991) (holding that a seaman could seek punitive damages from a nonemployer, third party for willful and wanton conduct that caused the injuries); Sullivan, \textit{supra} note 304, at 399-400.
high seas, much like the reasoning that railway workers cannot obtain punitive damages against their employing railway, courts have no reason to conclude that Congress has expunged punitive damages from maritime cases that arise close to shore involving seamen. Claims arising from accidents occurring in territorial waters, within three nautical miles of the coastline, involving recreational boating accidents, collisions, or other accidents injuring passengers on ferries, cruise ships, casino vessels, or excursion boats, and claims arising from land-based travelers, like motorists or rail passengers, whose injuries and deaths are subject to maritime law merely because they were passing over a bridge struck by a ship, should be entitled to claim punitive damages and damages for loss of consortium. In addition, there is no reason to conclude that punitive damages are unavailable for willful or wanton misconduct resulting in a seaman’s claims for products liability where

362 The term “high seas,” as used in the DOHSA, refers to “high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States.” In re Air Crash Off Long Island, New York, on July 17, 1996, 209 F.3d 200, 205 (2d Cir. 2000) (quoting 46 U.S.C. app. § 761 (1920)). A “marine league” is three nautical miles. Id. However, in In re Air Crash Off Long Island, two of three judges on the Court of Appeals for the Second Circuit found that the three-mile limit had been expanded to twelve miles by presidential proclamation. Id. at 212-15. Justice Sotomayor, who then was a judge on the Second Circuit Court of Appeals, vigorously dissented from the majority in that case. Id. at 215-26.


365 See Plaquemine Towing Corp., 190 F. Supp. at 892-93 (holding that neither the Jones Act nor the DOHSA applies to nonseamen, and therefore courts should allow nonseamen to recover for punitive and loss-of-consortium damages). But see In re Amtrack “Sunset Limited” Train Crash in Bayou Canot, Ala. v. Warrior & Gulf Navigation Co., 121 F.3d 1421, 1427-28 (11th Cir. 1997) (denying nonpecuniary damages to nonseamen on wrongful-death claims governed by federal maritime law).
the negligent party is not the seaman’s employer.366 Further, courts should award punitive damages for civil rights violations that occur in the maritime setting in the same way they award punitive damages for civil rights violations that occur ashore.367

Because nothing in the text of either the Jones Act or the DOHSA discloses a congressional intent to occupy the entire field of maritime personal-injury law, and because no court has suggested that Congress intended to do so between the time Congress passed the acts in 1920 and seventy-one years later when the Supreme Court decided Miles, it appears unlikely that the DOHSA and the Jones Act were attempts to preempt the field of maritime personal injury law.368

V. A RIGHT TO PUNITIVE DAMAGES AND LOSS OF CONSORTIUM

If the premise of this Article is correct and both punitive damages and loss of consortium are available remedies in all nonstatutory maritime personal-injury cases, then these remedies are property rights protected by the constitutional doctrine of substantive due process under the Fourteenth Amendment.369 Principles of fair play and substantial justice would make punitive damages and loss of consortium available because the right to these remedies is a fundamental right, both under concepts of originalism and living

368 See Force, supra note 309, at 797 (providing that Congress’s legislation in one area is not sufficient to preempt maritime remedies in absence of Congress’s purpose to do so); Colella, supra note 346, at 258 (providing that the purposes of the Jones Act and the DOHSA were simply to fill in gaps that the general maritime law left).
369 “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. art. XIV, § 1. This applies as well to the federal government. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-96 (1971).
constitutionalism. Under originalism, the rights existed at the time of the founding of the nation and the adoption of the Judiciary Act of 17989 with the saving-to-suitors clause. Under living constitutionalism, the remedies are fundamental to a concept of ordered liberty. Every state recognizes the entitlement to assert these remedies, and the federal courts have the constitutional obligation to as well, if not under the Fourteenth Amendment then under the privileges-and-immunities clause of Article IV of the Constitution.

If there is a constitutional right to assert causes of action for punitive damages or loss of consortium, then what would change? Some examples, drawn from real life, might best explain the difference.

A. Women Would be the Primary Beneficiaries

As a practical matter, men are more frequently catastrophically injured on navigable waters than are women. Men participate more frequently in recreational boating than women do; men work more frequently aboard vessels, oil production platforms, and in maritime-related employment, and men seem to get hurt more frequently than

372 See Balkin, supra note 370, at 559-61.
373 “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2.
374 See infra Parts V.A-C (discussing the differences affecting women, survivors of vessel collisions, and stowaways).
women do.\footnote{See Dep’t of Health & Human Servs. et al., Worker Health Chartbook 2004, at 83, available at http://www.cdc.gov/niosh/docs/2004-146/pdfs/2004-146.pdf.} Despite the monumental changes that have occurred in the United States over the past fifty years in the redefined roles of men and women, at sea, men still are more frequently injured than women, and their spouses are still more likely to be caregivers in the case of a serious accident.\footnote{See Women and Caregiving: Facts and Figures, Family Caregiver Alliance, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=892 (last visited Sept. 6, 2013).} A prime example of this is the case of Doyle v. Graske.\footnote{Doyle v. Graske, 565 F. Supp. 2d 1069 (D. Neb. 2008), rev’d 579 F.3d 898 (8th Cir. 2009), cert. denied, 559 U.S. 1036 (2010). Ronald J. Palagi and Joseph B. Muller, counsel for Anne Doyle, consulted the author of this Article who reviewed the petition for certiorari prior to its filing with the Supreme Court.}

Daniel Doyle was involved in an accident while boating off the coast of Grand Cayman Island.\footnote{Id. at 1072.} While riding in a fourteen-foot inflatable boat on the way to go fishing, Mr. Doyle was ejected from the boat into the water because the boat’s steering linkage disengaged, which caused the engine to swing violently clockwise and the boat to turn hard to the left.\footnote{Id. at 1072-73.} Something on the underside of the boat struck him in the back of the head, causing a traumatic brain injury.\footnote{Id. at 1073, 1075.}

The case was tried without a jury in Nebraska, where both Mr. Doyle and the boat’s owner, Mr. Graske, resided.\footnote{See id. at 1072.} The court found “that both Daniel and Anne Doyle have suffered an incalculable loss.”\footnote{Id. at 1087.} The brain injury left Daniel Doyle with “enough awareness of his condition to appreciate his predicament . . . but . . . powerless to change his situation.”\footnote{Id.} Of more consequence to this Article is that the court also found that “[a]s a result of Daniel Doyle’s injury, Anne Doyle has essentially lost the companionship of the person she once knew. The course of her life . . . was irreversibly altered by the accident. She has become a full-time caregiver for a person who is no
longer the person she married.”\footnote{Id. at 1087-88.}\footnote{Id. at 1088.} The court awarded Mr. Doyle $1 million in damages but noted that because of her loss, Anne Doyle “should be compensated for this intangible loss at a level close to that of her husband.”\footnote{Id. at 1088.} The court assessed $750,000 as the damages for loss of consortium.\footnote{Id.}

Anne Doyle’s situation is not unique.\footnote{See, e.g., Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274 (1980); Igneri v. Cie de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963).} When men are catastrophically injured on ships and boats, it is often their spouses who bear the burdens of caregiving.\footnote{See FAMILY CAREGIVER ALLIANCE, supra note 379. The same can be true, of course, for men. See supra notes 140-45 and accompanying text. For example, if an elderly female passenger on a cruise ship is injured, it is likely her husband who would provide the after-accident care.} The negligent parties get a windfall due to this misinterpretation of maritime law, which denies loss of consortium in maritime cases.\footnote{See Doyle v. Graske, 579 F.3d 898 (8th Cir. 2009) (holding that a wife’s loss-of-consortium award was improper); Igneri, 323 F.2d 257 (2d Cir. 1963) (concluding that a wife cannot recover for the loss of her husband’s consortium); Mala v. Marine Serv. Mgmt., No. 2006-120, 2009 WL 2170071 (D.V.I. July 20, 2009) (dismissing a wife’s loss-of-consortium claim).} Rather than having to provide a lifetime of nursing care, negligent parties get the benefit of having the injured parties’ spouses provide the care for free.\footnote{See sources cited supra note 351.} It is simply unjust.

The Eighth Circuit reversed the award of damages for loss of consortium to Mrs. Doyle finding that:

The short history of loss-of-consortium damages in admiralty consists almost entirely of the Supreme Court’s relatively recent decisions in \textit{Gaudet} and \textit{Alvez}.\footnote{Neither Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), nor \textit{Alvez}, 446 U.S. 274 (1980), involved the enforcement of a maritime lien. While they were both maritime cases, neither was truly a case “in admiralty.” See supra Part III.C.2. This is one of the problems that comes from using the terms “maritime cases” and “admiralty cases” interchangeably. See supra Part III.C.2.} Given the narrow holdings of those decisions,
general maritime law on loss-of-consortium damages remains an area marked by few settled principles. Thus, unlike the Court in Townsend, which was not asked to “change maritime law in its operation as an admiralty court,” we cannot simply apply a preexisting general rule left unaltered by Congress. 395

This Article points out the numerous errors in the reasoning of the Eighth Circuit in Doyle. 396 Loss of consortium has a long history in maritime cases. 397 The court failed to appreciate the difference between the terms “admiralty law” and “maritime law” and applied cases dealing with the former, which require that a claimant have a maritime lien in order to recover, to a case brought under the “maritime law” where the existence of a maritime-lien law plays no part. 398 The court did not have access to the unpublished Savage case, on which the Second Circuit based its decision in Igneri and could not see for itself that, in Savage, the common law recognized causes of action for loss of consortium under maritime law, but there were few cases where maritime liens for loss of consortium were found to exist under admiralty law. 399 The Eighth Circuit was simply deprived of the information it needed to make an informed decision. 400 Because there was no conflict between the circuits, it was unlikely from the start that the Supreme Court would grant certiorari. 401 It did not. 402

B. Survivors of Vessel Collisions

An example of a case in which the result would be different is when a mariner violates the obligation to remain at the scene of an

395 Doyle, 579 F.3d at 906.
396 See infra text accompanying notes 397-400.
397 See N.Y. & Long Branch Steamboat Co. v. Johnson, 195 F. 740 (3d Cir. 1912); The Sea Gull, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578).
398 See Doyle, 579 F.3d at 905–07. In defense of the Eighth Circuit, it is not likely that many admiralty or maritime cases arise in Nebraska.
399 See supra Part III.C.3.
400 See supra text accompanying notes 200-01.
accident to render assistance. The following situation illustrates the point. Say, for example, a tug towing a barge northbound from Guantanamo Bay, Cuba, strikes a sailboat cruising off the coast of Florida at night. The law requires the master or operator of a vessel to turn around and “render necessary assistance to each individual affected.” While the failure to stop and render aid is a crime, and the operator may be punished by imprisonment for up to two years, the chances of the accident being detected and the failure of the master of the tug to see the sailboat are small. An operator may be tempted to continue on his way and not report the collision.

Under the current state of the law in most circuits, while the conduct of the master of the tug is reprehensible and is likely to cause death, no civil remedy exists pursuant to which the court can impose punitive damages against the master. If the tugboat owner learns of the accident and destroys the GPS track or other evidence of the

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403 See Hunley v. Ace Mar. Corp., 927 F.2d 493, 497-98 (9th Cir. 1991) (recognizing that the law of admiralty creates a duty for “men of the sea to go to the aid of life and property in distress,” and the duty is even more crucial “where the prospective rescuer played a part in the original accident”).


405 See 46 U.S.C. § 2303(a) (2006) (“The master or individual in charge of a vessel in a marine casualty shall . . . render necessary assistance to each individual affected . . . and . . . give the master’s or individual’s name and address and identification of the vessel to the master or individual in charge of any other vessel involved in the casualty . . . .”).

406 Id. § 2303(b).

407 See Jason Parent, No Duty to Save Lives, No Reward for Rescue: Is That Truly the Current State of International Salvage Law?, 12 ANN. SURV. INT’L & COMP. L. 87, 111-12 (2006) (stating that the primary bar to enforcement of the sanctions is the fact that the colliding vessel’s negligence will go unnoticed); Patrick J. Long, Comment, The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea, 48 BUFF. L. REV. 591, 610 (2000) (“Only those castaways who survive, and who can identify a passing ship, would be able to sue the ship’s captain for leaving them behind.”).

408 See Hunley, 927 F.2d at 495 (finding that the colliding vessel left the scene of the accident without reporting it); Compl. at 3, Bolton, No. 06-CA-1320 (alleging that the crew of the tug did not turn the vessels around and did not report the accident).

collision, courts cannot assess punitive damages against the tugboat owner.\textsuperscript{410}

In \textit{Hunley v. ACE Maritime Corp.}, a similar set of facts faced the Ninth Circuit.\textsuperscript{411} In that case the MV \textit{Eastern Grace} collided with the fishing vessel \textit{Tryend} off the coast of Oregon in daylight and then departed from the scene of the accident without offering assistance.\textsuperscript{412} The trial court awarded a surviving fishing captain $25,000 in punitive damages.\textsuperscript{413} However, because the plaintiffs only commenced the case against the vessel in rem, the court set the award aside on the basis that punitive damages did not create a maritime lien against \textit{Eastern Grace}, only an in personam claim, presumably against the vessel’s captain.\textsuperscript{414}

If the \textit{Miles} uniformity principles were applied, punitive damages would not be available to punish the master for failing to render assistance to the injured captain; however, they would be available to the owner of the sunken fishing boat for failing to render assistance in saving the boat.\textsuperscript{415}

\textbf{C. Harsh Treatment of Stowaways}

In November of 1997 ten young men, most of them in their teens, who lived in the barrios adjacent to the commercial port in Puerto Plata, Dominican Republic, entered through a fence of the port intending to stow away on a vessel bound for the United States.\textsuperscript{416}

\textsuperscript{410} See 46 U.S.C. § 30505(a), (b) (2006) (the liability of the tug owner is limited to the value of the tug itself); C.B.L., Annotation, \textit{Liabilities of the Parties to a Contract of Towage with Respect to Injury Sustained by the Tow or Tug During the Performance of the Towage Service}, 54 A.L.R. 104, at § 46 (1928) (stating that when the conditions causing the injury are not within the tug owner’s “privity of knowledge,” he is only liable for the value of the tug).

\textsuperscript{411} \textit{Hunley}, 927 F.2d at 495.

\textsuperscript{412} \textit{Id.}

\textsuperscript{413} \textit{Id.}

\textsuperscript{414} \textit{Id.} at 496.

\textsuperscript{415} See supra Parts IV.A, V.B.

Once inside the port, they located a forty-foot ocean shipping container, which was sitting on a chassis and had a wood floor. Judging from the container’s position in the queue of containers lined up to be loaded aboard the ship, they determined that it would be one of the first loaded, meaning that it would be inside the hold of the ship, shaded from direct sunlight.

Using a handheld drill and a keyhole saw, they cut a hole in the floor of the container just large enough for them to fit through one at a time. Equipped with a milk jug filled with water and a few things to eat, the ten young men entered into the container, replaced the portion of the wood floor they had cut out, and waited. Unbeknownst to them, the loading sequence of the ship was exactly the opposite of what they predicted. The container they selected would be loaded last and placed on top of three other containers on the deck of the MV Pampero, in the direct sunlight.

According to the complaint filed in the case, on November 3, 1997, the conditions inside the container became unbearable and the stowaways began banging on the container in order to attract the attention of the crew. The crew heard the stowaways and located the container from which the noise was coming. The stowaways, who had cut a hole in the bottom of the container to initially gain access to the inside, re-opened the hole and yelled out to the crew members of the vessel “we’re dying in here,” “get us out,” and “we need water.” The crew members laughed in response and yelled back “no water” and “we can’t get you out.”

The stowaways remained in the container until 3:00 p.m. the
following day when the ship arrived in Florida. Upon opening the container in Florida, it was found that three of the stowaways had died from “suffocation due to environmental oxygen depletion.” The authorities took the remaining seven stowaways to local hospitals.

Admittedly, the duty owed by a ship to stowaways is minimal.\(^{417}\) “The only duty owed to a stowaway is to give him humane treatment while he is onboard.”\(^{418}\) However, after discovering the stowaways, the crew’s treatment of the stowaways was, at least arguably, inhumane.\(^{419}\) Throughout the course of the day and a half from the time the crew discovered the stowaways until the container was unloaded, crewmembers frequently passed the sealed container. The ship’s officers reported finding urine and feces on the deck adjacent to the container and advised the captain. The captain admitted knowing that the stowaways were in the container, and he admitted to taking no action. Even though the ship had fresh water hoses on deck, the crew ignored the stowaways’ pleas.

Because the deaths of the three young stowaways occurred in international waters more than a marine league from the United States, the DOHSA governed their claims and limited damages to “the pecuniary loss sustained by the individuals for whose benefit the action is brought.”\(^{420}\) The “individuals for whose benefit the suit is brought” were, in that case, the parents of the dead stowaways. However, because the decedents were teenagers from poor families, their parents could produce no evidence that their sons provided them with any financial support, and hence they could show no pecuniary damages. With regard to the surviving stowaways, who were hospitalized after

\(^{417}\) See Buchanan v. Stanships, Inc., 744 F.2d 1070, 1074 (5th Cir. 1984) (finding that the only duty the defendant would have owed to a stowaway would be the duty of humane treatment); The Laura Madsen, 112 F. 72, 72 (W.D. Wash. 1901) (holding that the owners and masters of vessels owe only a minimal duty of humane treatment to the stowaways that necessarily remain on board).

\(^{418}\) Vickery, supra note 409, at 909 (citing The Laura Madsen, 112 F. at 72).

\(^{419}\) See ITF Seafarers’ Section Conference, Singapore, October 8-10, 1997, ITF Policy on Stowaways, available at http://www.itfseafarers.org/files/seealso/docs/453/Stowaways.pdf (stating that humane treatment of stowaways includes “[c]hecks on a stowaway’s physical and mental health; [p]rovision of suitable food and lodging; [and] [a]voidance of action or behaviour that might intimidate”).

the incident, the court limited their damages by applying the Miles uniformity principle even though the stowaways were not subject to either the DOHSA or the Jones Act.

By excluding punitive damages in death cases, shipowners have a perverse financial incentive to kill stowaways rather than treat them humanely. While killing them, or simply permitting them to die, may theoretically result in criminal prosecution, in reality there is no evidence that courts have ever imposed criminal penalties against a ship’s officer for actions that have resulted in the death of a stowaway.

Compare the claims of the deceased stowaways with the claims of those who survived. The survivors were entitled to claim for their pain and suffering and for punitive damages for their maltreatment. Justice Scalia noted the incongruity of this result during the oral argument in *Townsend*:

JUSTICE SCALIA: Do you acknowledge that there are no punitive damages available in the event of death?

MR. SULLIVAN: Yes.

JUSTICE SCALIA: Well, that—you want to talk about what’s a sensible system and what is not a sensible

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421 The Coast Guard attempted to revoke the license of a ship’s captain who put three stowaways ashore on the sparsely populated Great Iguana Island in the Bahamas after discovering them on the SS *Pioneer Lake* during a voyage from Kingston, Jamaica, to Boston. *See In re Francis J. Harris, License No. 109944, 1953 WL 78896 (U.S.C.G. 1953)*. The stowaways were apparently forced into a lifeboat and then thrown over the side of the lifeboat when it arrived in the surf and they refused to go into the water voluntarily. *Id.* At an administrative hearing, the administrative law judge found that the captain had not acted with sufficient wantonness or recklessness to warrant an action against his license, and the judge dismissed the charges. *Id.*

422 Many American seamen have heard an often-told story that illustrates the low regard seamen have for stowaways. As the story goes, a chief mate on a U.S. vessel, upon discovering that stowaways were hiding in the chain locker on a vessel, ordered the anchors to be dropped when the vessel arrived in port. Because the chain locker is piled deep with anchor chain that spills from the chain locker to the deck at a high rate of speed, no one inside the locker could possibly survive. While the story is often told, no one knows where it originated or whether it is true. It nevertheless illustrates the low regard most seamen have for the lives and safety of stowaways.
system. In the days when Massachusetts used to have a—when I was in law school, they had a compensation limit for wrongful death, but to limit for pain and suffering, for negligence; and the line was back her up again—back her up again, Sam, she’s not quite dead yet [laughter].

MR. SULLIVAN: Judge, I—

JUSTICE SCALIA: Is—is—is this going to be the same thing, where—where the shipowner says, well, you know, if—if—if I treat him badly enough that he dies, I don’t get hit with the punitive damages?

MR. SULLIVAN: I would hope that would not be the case.

JUSTICE SCALIA: Yeah, but it is invited, isn’t it?423

Admittedly it is invited. The real issue here is whether Congress ever intended to preempt these remedies as a matter of law.424 If it did not, then doing so by judicial fiat represents a violation of the principle of the separation of powers.425 Congress should make these choices, not the courts.426

Justice Alito’s minority position in Townsend was that “[w]hen Congress incorporated FELA unaltered into the Jones Act, Congress must have intended to incorporate FELA’s limitation on damages as well.”427 The weakness of that argument resides in the fact that there is no evidence from which one can gather guidance from Congress.428 Recall that when Congress passed the DOHSA, it provided a remedy of pecuniary damages where no compensatory remedy previously existed.429 Congress simply never considered the matter of punitive damages.430 Those, like Justice Scalia, who argue for an expansive

424 See Townsend, 557 U.S. at 415-16.
425 See id. at 420 (citing Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990)).
426 Miles, 498 U.S. at 27.
427 Townsend, 557 U.S. at 428 (Alito, J., dissenting) (citing Miles, 498 U.S. at 32).
428 Id. at 414-15 (majority opinion).
429 Id. at 415-16; see supra notes 301-03 and accompanying text.
430 Townsend, 557 U.S. at 418.
view of *Miles* would assert that even the survivors are not entitled to claim punitive damages.\(^{431}\) Therein lies the dispute—should classes of claimants with no statutory impediments to recovering punitive damages suddenly be deprived of that preexisting right simply because Congress failed to address the issue in 1920?\(^{432}\) The reasoning of those who would argue the expansive view is flawed.

### VI. CONCLUSION

One-hundred years after the sinking of the RMS *Titanic*, U.S. courts continue to struggle with remedies for nonpecuniary damages, such as punitive and loss-of-consortium damages, in maritime cases.\(^{433}\) They are slowly coming to the realization that Congress’s intent in passing the Jones Act and the DOHSA was to address gaps in the law, which the sinking of *Titanic* revealed.\(^{434}\) It was never Congress’s intent to stop the growth of the general maritime law or, even worse, to impliedly preempt remedies that already existed in the law.\(^{435}\) Those courts that have eliminated punitive and loss-of-consortium damages in maritime cases, based on the passage of the Jones Act and the DOHSA, have done so in error.\(^{436}\)

Courts around the country are gradually coming to the realization that the preemption of punitive and loss-of-consortium damages is unwarranted.\(^{437}\) While the Eighth Circuit has said that damages for loss of consortium are unavailable to nonseafarers,\(^{438}\) district courts in Louisiana and Florida have said that nonseafarers may recover punitive damages in the sinking of the *Deepwater Horizon* oil rig and that passengers may recover punitive damages against cruise

\(^{431}\) *Id.* at 426 (Alito, J., dissenting).

\(^{432}\) *Id.* at 416-17, 428.


\(^{434}\) *See supra* Part II.B.3.

\(^{435}\) *See supra* note 368 and accompanying text.

\(^{436}\) *See supra* notes 297-300 and accompanying text.

\(^{437}\) *See supra* Part II.B.3.

\(^{438}\) *Doyle*, 579 F.3d. at 908.
Both district courts were correct. The Eighth Circuit was in error.

The Supreme Court will need to once again step into the fray because consistency among lower courts is not forthcoming. The Supreme Court approved the award of punitive damages in Exxon Shipping and Townsend and the award of damages for loss of consortium in Alvez. Miles is good law as applied to seamen, but it becomes bad law when courts “attribute words to Congress that it has not written” by exaggerating the preemptive effects of the Jones Act and the DOHSA. The four cases should be interpreted as follows: first, the Jones Act only applies to cases brought by seamen against their employers; second, the DOHSA only applies to deaths occurring on the high seas; third, the LHWCA only applies to cases brought by longshoremen against their employers; and fourth, in all other cases, the general maritime law permits the recovery of nonpecuniary damages, such as loss-of-consortium and punitive damages. Any other interpretation of maritime law is a case of mistaken preemption.

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440 See supra Part II.B.3.
441 See supra Part V.A.
442 See supra notes 57-59 and accompanying text.
446 Townsend, 557 U.S. at 424.
447 See supra notes 233-34 and accompanying text.
448 See supra notes 324-25 and accompanying text.
449 See supra notes 233-34 and accompanying text.
450 Townsend, 557 U.S. at 424; Alvez, 446 U.S. at 284-86.
451 See supra notes 298-300 and accompanying text.
VII. APPENDIX: A CHRONOLOGY OF COSTA CONCORDIA’S ACCIDENT:
A LOOK AT WHAT REALLY HAPPENED

Friday, January 13, 2012

1900: Costa Concordia departs from Civitavecchia (near Rome) on a one-week cruise, bound for Savona, Italy. It has “4,229 people aboard including over 3,000 tourists and a crew of more than 1,000.” Captain Francesco Schettino, fifty-two, has been the ship’s captain for the past six years.

2112: Passing close to Giglio Island to salute the shore residents is an age-old Italian maritime tradition, called an “inchino,” which Costa Concordia had done three or four times before. In August, the ship passed close to Giglio sounding its whistle causing “the mayor to send a congratulatory e-mail to the captain for providing such a ‘spectacle to tourists.’” On this night, a teacher on Giglio, Patrizia Tievolli, forty-six, who is the sister of Antonello Tievolli, the headwaiter on Costa Concordia, posts the following comment on Facebook:

“Shortly, the Costa Concordia will pass really, really close, a big hello to my brother who will disembark at Savona and finally get to enjoy some holiday.”

2142: Captain Schettino calls the headwaiter and says, “Come

453 Id.
456 Id., Evans & Gysin, supra note 454.
457 Id.
458 Id.
and see, Antonello, we’re right in front of Giglio.”\footnote{Costa Concordia hits Le Scole, a well-known shoal on the southeastern tip of Giglio Island, located about 1,000 feet from the shoreline. The grounding causes a 160-foot-long gash in the port side of the vessel. The crew steers the vessel away from the rocks and back toward the open water. Captain Francesco Schettino explained,}

The route was decided as we left Civitavecchia, but I made a mistake on the approach. I was navigating by sight because I knew the depths well and I had done this manoeuvre three or four times. But this time I ordered the turn too late and I ended up in water that was too shallow. I don’t know why it happened, I was a victim of my instincts.\footnote{2145: “[The] first alarm is sounded: two long whistles and one short, informing the crew of a problem.”}

\footnote{Nick Squires, Vicky Ward, Cruise Disaster: Captain was Bringing Crew Member Close to His Island Home, THE TELEGRAPH (Jan. 16, 2012, 1:02 PM GMT), http://www.telegraph.co.uk/news/worldnews/europe/italy/9017767/Cruise-disaster-captain-was-bringing-crew-member-close-to-his-island-home.html.}


\footnote{Josh Levs, What Caused the Cruise Ship Disaster?, CNN (Jan. 16, 2012, 8:36 AM), http://www.cnn.com/2012/01/15/world/europe/italy-cruise-questions.}


\footnote{Timeline, supra note 452.}
2146: A crewmember uses his cell phone to call his parents in Prato, Italy, and tell them that the ship has been involved in an accident and that all the dishes fell off the shelves on impact.\textsuperscript{466} The parents call the local police who then call the Italian Coast Guard in Livorno, Italy.\textsuperscript{467}

2147: “The electricity goes off. Many passengers begin to panic.”\textsuperscript{468}

2150: “The ship begins to list. In the restaurants, dinnerware crashes off tables. Some passengers rush to their cabins for their life vests.”\textsuperscript{469}

2200: “Rogelio Barista, a cook on board the \textit{Costa Concordia} said: ‘The captain wanted us to cook for him around ten or ten thirty, and I saw him with a woman we did not recognize.’”\textsuperscript{470}

2205: “Capt Schettino radios Costa Crociere, the ship’s owners, and raises alarm.”\textsuperscript{471}

2206: The Italian Coast Guard in Livorno, Italy, calls and asks what is going on:\textsuperscript{472}

\begin{quote}
[COAST GUARD]: Good evening \textit{Costa Concordia}. Do you have problems on board?
\textit{CONCORDIA}: Yes, affirmative, we have a blackout on board. We are checking the situation.
[COAST GUARD]: Do you need assistance or for the moment, are you only staying in the Giglio area?
\end{quote}


\textsuperscript{467} See id.

\textsuperscript{468} \textit{Timeline}, supra note 452; \textit{Cruise Disaster: Timeline}, supra note 460.

\textsuperscript{469} \textit{Timeline}, supra note 452.


\textsuperscript{471} \textit{Cruise Disaster: Timeline}, supra note 460.

\textsuperscript{472} Id.
CONCORDIA: Yes, affirmative, we are staying here in the area to verify the blackout.

[COAST GUARD]: What type of problem, only generators? Because the Carabinieri of Prato got a call from a relative of a crew member who said that during the dinner everything fell on his head.

CONCORDIA: No, negative, we have a blackout and we are verifying the conditions on board.

[COAST GUARD]: Yes, since the passengers said you made them put on life jackets, is this correct?

CONCORDIA: I repeat, we are verifying the conditions of the blackout.

2216: The Italian Coast Guard calls the ship again. The ship admits that water is coming into the hull but says there is no emergency.

2220: Ship begins listing to port.

2230: “Under pressure from the coastguard, the captain agrees to send a Mayday signal. . . . The ship is by now listing at 20 degrees.”

2250: “Again under pressure from the coastguard, the captain orders the ship to be abandoned.”

2252: “The ‘abandon ship’ signal is given: seven short whistles and one long.” The captain turns hard to port to bring the ship close


474 Id.


477 Id.

478 Id.

479 Id.
to the island of Giglio. As the ship runs aground, she flips to her starboard side, leaving the gash on the port side visible.

2315: “The first lifeboat reaches Giglio.” “In all, some 4,000 of the ship’s 4,229 make it to safety aboard a lifeboat.” Italian rescuers say they “plucked around 100 people from the water and around 60 from the ship.”

2240: Captain Schettino, second in command Dimitri Christidis, and another officer, Silvia Coronia, get into a lifeboat.

Saturday, January 14, 2012

0040: Captain Schettino and the Italian Coast Guard have a conversation:

Schettino: Where are your rescuers?
[Coast Guard]: My air rescue is on the prow. Go. There are already bodies, Schettino.
Schettino: How many bodies are there?
[Coast Guard]: I don’t know. I have heard of one. You are the one who has to tell me how many there are. Christ.
Schettino: But do you realize it is dark and

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482 Timeline, supra note 452.
484 Timeline, supra note 452.
485 Squires & Ward, supra note 464.
here we can’t see anything . . .

[COAST GUARD]: And so what? You want to go home, Schettino? It is dark and you want to go home? Get on that prow of the boat using the pilot ladder and tell me what can be done, how many people there are and what their needs are. Now."\footnote{Transcript: Costa Concordia Captain and Italian Coast Guard, USA TODAY, http://travel.usatoday.com/cruises/story/2012-01-17/Transcript-Costa-Concordia-captain-and-Italian-coast-guard/52613814/1 (last updated Jan. 17, 2012, 3:27 PM).}

0050: The Italian Coast Guard takes control of the rescue operation.\footnote{Cruise Disaster: Timeline, supra note 460.}


“Carnival Corp., the parent company of Costa Crociere, estimates the cost of the disaster at $US85-$US95 million. The news sent shares of the US-based group plunging almost 14 per cent.”\footnote{Id.}