TABLE OF CONTENTS

I. INTRODUCTION

Punitive damages and loss of consortium are conceptually linked in maritime law by the fact that they are both nonpecuniary.[19] Neither can be measured with precision, and neither represents an out-of-pocket loss to the injured party.[20] Punitive damages punish a tortfeasor for conduct that is willful, wanton, or reckless and that causes injury to another person.[21] Punitive damages are intended to deter wrongdoers from acting in a way that shocks the conscience of society.[22] Damages for loss of consortium reflect the loss that a person experiences when his or her spouse suffers serious bodily injury.[23] Damages for loss of consortium are intended to compensate the spouse of the injured party for the loss of sex, society, and services.[24]

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.[25] One of those maritime statutes, the DOHSA,

---

[19] *See* David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 464-65 (2010) (noting that both punitive damages and loss of consortium are not meant to reimburse the plaintiff's costs but rather to compensate the plaintiff for other damages that a court cannot easily measure in monetary increments).

[20] *Id.*

[21] *Id.* at 464; *Townsend*, 557 U.S. at 419.

[22] *See* Robertson, *supra* note 19, at 464; James D. Ghiardi, *Punitive Damage Awards—An Expanded Judicial Role*, 72 MARQ. L. REV. 33 (1988) (noting that a court will typically look "for evidence that the defendant acted intentionally, outrageously, recklessly or with conscious disregard for the rights of others").

[23] RESTATEMENT (SECOND) OF TORTS § 693 (1977).

[24] *Id.*

[25] *See* George W. Healy III, *Remedies for Maritime Personal Injury and Wrongful Death in American Law: Sources and Development*, 68 TUL. L. REV. 311, 311-12 (1994) (stating that both Congress and the courts have the power to create causes of action in maritime law). The "general maritime law" is the maritime common law that

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."[26] 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.[27] 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.[28]

Starting in 1990, lower federal courts[29] 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[30] 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).

[26] 46 U.S.C. §§ 30302-30303 (2006).

[27] *See, e.g.*, Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009) (stating that punitive damages are available under the general maritime law); Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 285 (1980) (allowing recovery for loss of society).

[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[31] have existed as part of the general maritime law since the founding of the nation.[32] In doing so, lower courts have ignored the Supreme Court's precedent set forth in the decisions in *American Export Lines, Inc. v. Alvez*[33] and *Gaudet*,[34] both of which recognized causes of action for the loss of consortium as part of maritime law.[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 *Miles v. Apex Marine Corp*.[36] Whether the courts' interpretations were mistakes,[37] or cases of judicial tort reform,[38] is a matter for

causing environmental damage, *see* Exxon Shipping Co. v. Baker, 554 U.S. 471, 514 (2008); intentional damage to personal property, *see* Robertson, *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, *see Townsend*, 557 U.S. at 424.

[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. *See supra* note 23 and accompanying text. It includes the loss of a spouse's "frugality, industry, usefulness, attention, and tender solicitude." Sea-Land Servs. v. Gaudet, 414 U.S. 573, 590 (1974) (quoting 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. *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. *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. *See* 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").

[32] *See* Healy, *supra* note 25, at 322-23.

[33] Am. Exp. Lines, Inc., v. Alvez, 446 U.S. 274 (1980).

[34] *Gaudet*, 414 U.S. 573.

[35] *See id.* at 584 (finding that a decedent's dependent could recover for loss of consortium); *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).

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

[37] *See* Robertson, *supra* note 19, at 473-75 (2010) (disagreeing with courts' interpretations of *Miles*).

[38] *See* Robert Force, *Tort Reform by the Judiciary: Developments in the Law of*

speculation.[39] 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.[40]

Then, in 2009, the Supreme Court decided *Townsend*.[41] 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."[42] "*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"[43] when Congress enacted the Jones Act and the DOHSA in response to the 1912 *Titanic* disaster.[44] After *Townsend*, punitive damages were again available in cases arising under the general maritime law.[45]

In a plurality opinion in 1980, the Supreme Court addressed whether damages are available for loss of consortium in maritime cases.[46] In *Alvez*, a lasher (one who secures cargo aboard a ship) lost an eye.[47] In addition to his coverage under the Longshore and Harbor

---

Maritime Personal Injury and Death Damages, 23 TUL. MAR. L.J. 351, 378-81 (1999) (discussing the need for uniformity in maritime law).

[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).

[41] Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

[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.

[44] Peter Wendt, *You've Been Injured While on the High Seas, Now What?*, THE COMPLETE LAWYER, http://www.thecompletelawyer.com/?p=1390 (last visited Sept. 1, 2013); *Jones Act Assistance*, SIMIEN & SIMIEN, L.L.C., http://www.simien.com/jones-act-lawyers-louisiana.html (last visited Sept. 1, 2013).

[45] *Townsend*, 557 U.S. at 424-25.

[46] Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 276 (1980).

[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.[48] The Court cited *Alvez* with approval in the 2008 case, *Exxon Shipping Co. v. Baker.*[49]

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.[50] 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.[51] 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.[52] Unfortunately, while some courts agreed with this interpretation of *Townsend*,[53] others did not.[54]

---

http://hydra.usc.edu/scehsc/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).

[49] *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 508 n.21 (2008).

[50] *See Townsend*, 557 U.S. at 414-15.

[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.[55] 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.[56]

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."[57] 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."[58] 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.[59]

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.[60] 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.[61] However, between 1823 and 1923, courts in at least fourteen maritime cases

---

loss of consortium).

[55] *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009).

[56] *Id.* (citation omitted) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 24 (1990)).

[57] STEPHEN SOUTER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 230 (2010).

[58] *Id.* at 230-31.

[59] *See supra* notes 53-54 and accompanying text.

[60] *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 83-86 (1997).

[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.[62]

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*.[63] 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.[64] The privateer was not authorized by its letters of marque to board the Haitian vessel, and hence the injuries were both intentional and unlawful.[65] 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.[66] The principle was established though.[67] Courts could award punitive damages under maritime law for injuries that the crew of another vessel caused.[68]

In 1851 the Supreme Court, in dicta, discussed punitive damages in admiralty cases regarding a case of an intentional blocking of a waterway.[69] 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 . . . ."[70]

---

[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*.

[69] *See* Day v. Woodworth, 54 U.S. 363, 363, 371-72 (1851).

[70] *Id.* at 371-72.

Since admiralty law was a body of common law, and did not involve statutory remedies, that practice was permissible.[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.[72]

The Supreme Court went on to find that punitive damages were based on "a well-established principle of the common law"[73] both in England before the founding of the United States and in U.S. courts thereafter.[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.[75] Any conduct that displayed a "degree of moral turpitude or atrocity of the defendant's conduct"[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."[77]

In 1893 the Supreme Court heard the case of *Lake Shore & Michigan Southern Railway Co. v. Prentice.*[78] Prentice was a passenger on a railroad car who police falsely arrested at the instruction of a conductor on charges of disorderly conduct.[79] The jury awarded the passenger ten thousand dollars in punitive damages.[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 . . . ."[81]

---

[71] *See id*.
[72] *See id*.
[73] *Id.* at 371.
[74] *See id.* at 370-72.
[75] *Id.* at 371.
[76] *Id.*
[77] *Id.*
[78] Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893).
[79] *Id.* at 101-02.
[80] *Id.* at 104.
[81] *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

---

[82] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 475 (2008).

[83] *See infra* Parts II.B.1, 2.

[84] *Exxon Shipping Co.*, 554 U.S. 471 (2008).

[85] *Id.* at 475-76.

[86] Hazelwood is mentioned here because he became the "poster child" for the tragedy. *See id.* at 476-79. An inattentive mate on watch, who failed to catch the error by a helmsman, was more directly responsible for causing the grounding. *See* NAT'L TRANSP. SAFETY BD., MARINE ACCIDENT REPORT: GROUNDING OF THE U.S. TANKSHIP *EXXON VALDEZ* ON BLIGH REEF, PRINCE WILLIAM SOUND NEAR VALDEZ, ALASKA, MARCH 24, 1989, (July 31, 1990), *available at* http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/marine_accident_report_1990.pdf. *Contra Exxon Shipping Co.*, 554 U.S. at 476-79.

[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.[91]

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*.[92] 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.[93] 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.[94]

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.[95] 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.[96] Notably, the Court decided that "punitive damages

---

[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.

[95] *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

[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/clarence-thomas-the-courage-of-his-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 impliedly 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]

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]

---

that "[a]t first Thomas was dismissed as a clone of Justice Antonin Scalia. But today even liberal analysts of the court concede that he has set his own course." *Id.*

[97] *Townsend*, 557 U.S. at 422.

[98] *Id.*

[99] *See id.* (holding that Congress did not preempt punitive damages as a remedy under the Jones Act, but implying that it could do so).

[100] *See* Lobegeiger v. Celebrity Cruises, Inc., No. 11-21620-CIV, 2011 WL 3703329, at *7 (S.D. Fla. Aug. 23, 2011); *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011).

[101] *See infra* Part V.A.

[102] *See Lobegeiger*, 2011 WL 3703329, at *6.

[103] *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.[104] 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."[105] 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.'"[106]

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*,[107] more commonly known as the "BP oil-spill case."[108] 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

---

Forum Provisions in Cruise Tickets, FLA. B.J., Dec. 2006, at 21, 21-23 (noting that three major cruise lines, which control seventy-five percent of the North American cruise industry, are based in Miami, Florida, and that two of these cruise lines have federal forum provisions in their passenger tickets requiring all passengers to litigate their disputes and matters before the United States District Court for the Southern District of Florida in Miami).

[104] *See Lobegeiger*, 2011 WL 3703329, at *7.

[105] *Id.* at *6.

[106] *Id.* (quoting Atl. Sounding Co. v. Townsend, 557 U.S. 404, 411 (2009)).

[107] *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011).

[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

---

[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.

[111] *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 585 (1974).

[112] *See, e.g.*, *In re* Cent. R.R. of N.J., 52 F.2d 20, 22 (2d Cir. 1931).

[113] *Cf.* Funk v. United States, 290 U.S. 371, 375 (1933).

[114] *See* Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 258 (2d Cir. 1963). Judge Henry Friendly wrote the *Igneri* decision (1903-1986). *Id*. at 257. Judge

consortium arising from injuries to her longshoreman husband.[115] While the court decided the case on the basis of the husband's statutory right to damages pursuant to the LHWCA,[116] the court's dicta caused later courts to conclude that loss of consortium was not a historically recognized remedy in maritime cases.[117] However, this conclusion was incorrect.[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."[119] The two terms, and the concepts they describe, are markedly different.[120] This Article will correct the misconception by both discussing the unpublished opinion and clearing up the misconstruction of the term "in admiralty."[121]

A. English and American Cases Awarding Damages for Loss of Consortium

While decided after 1776, the 1808 English case of *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.[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. *See* Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, is Dead at 82*, N.Y. TIMES, March 12, 1986, 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. *See id.* In his suicide notes, he talked about his "distress at his wife's death, his declining health and his failing eyesight." *Id.* He was eighty-two. *Id.*

[115] *Igneri*, 323 F.2d at 258.

[116] *Id.* at 258, 268.

[117] *See* Alvez v. Am. Exp. Lines, Inc., 389 N.E.2d 461, 462 (N.Y. 1979).

[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.").

[119] *See infra* Part III.C.2-3.

[120] *See infra* Part III.C.2.

[121] *See infra* Part III.C.2-3.

[122] 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.[123] Baker was bruised, but he survived; his wife lived for about a month but subsequently died from her injuries.[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).[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[126] but denying further damages arising after her death.[127] The House of Lords said,

> [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.[128]

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.[129] American common law has also long recognized the right of a spouse to seek damages for loss of consortium.[130]

B. Early Maritime Cases Awarding Damages for Loss of

---

[123] *Id.* at 1033, 1 Camp. at 493.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1033, 1 Camp. at 493-94 (finding the plaintiff was entitled to damages of £100).

[127] *Id.* at 1033, 1 Camp. at 493.

[128] *Id.*

[129] *See id.*

[130] *See, e.g.*, Nelson v. Nelson, 296 F. 369, 376 (2d Cir. 1924); Furnish v. Mo. Pac. Ry., 15 S.W. 315, 317 (Mo. 1891); James v. Christy, 18 Mo. 162, 164 (1853); Ford v. Monroe, 20 Wend. 210, 210 (N.Y. Sup. Ct. 1838).

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*

---

[131] Courts frequently award loss-of-consortium damages in rail cases to the spouses of injured passengers. *See* Davis v. Balt. & Ohio R.R., 256 F. 407, 407 (D. Mass. 1919); Walsh v. Atl. Coast Line R.R., 256 F. 47, 48 (D. Mass. 1916); Fuller v. Naugatuck R.R., 21 Conn. 557, 571 (1852); Kelley v. N.Y., New Haven & Hartford R.R., 46 N.E. 1063, 1063 (Mass. 1897); Skoglund v. Minneapolis St. Ry. Co., 47 N.W. 1071, 1072 (Minn. 1891); Nashville & Chattanooga R.R. v. Smith, 77 Tenn. 470, 474 (1882).

[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*."[135] The issue appears to be that the wife died before the husband commenced the suit.[136] Justice Chase stated in *The Sea Gull*,[137] 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."[138] 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.[139]

In 1912, in *New York & Long Branch Steamboat Co. v. Johnson*,[140] 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 *Slatington*.[141] The award was "for the loss of the aid, comfort, and society of his wife . . . including therein probable future deprivation and expenses . . . ."[142] 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.[143] The husband was then in an admiralty court participating in an in rem case.[144] 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

---

[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).

[140] N.Y. & Long Branch Steamboat Co. v. Johnson, 195 F. 740 (3d Cir. 1912).

[141] *Id.* at 740-41.

[142] *Little Silver*, 189 F. 980, 987 (D.N.J. 1911).

[143] *N.Y. & Long Branch Steamboat Co.*, 195 F. at 740-41.

[144] *Id.* at 742.

relief."[145]

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,[146] injured in a slip and fall,[147] injured due to excessive rolling of the ship,[148] injured in a recreational boating accident caused by the swell of a passing ship,[149] and injured while boarding a launch.[150] 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.[151]

---

[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

---

[152] Sea-Land Servs. v. Gaudet, 414 U.S. 573, 574-75, 584-88 (1974).
[153] *See* Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274 (1980).
[154] *See* Villers Seafood Co. v. Vest, 813 F.2d 339 (11th Cir. 1987).
[155] *See* Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997).
[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

---

[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.[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.[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."[170] While some use those terms interchangeably, the terms are not the same.[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[172] or a maritime contract.[173] Admiralty law is a subcategory of maritime law and applies to suits claimants bring against a vessel or piece of property in rem[174] to enforce a maritime lien.[175] Therefore, while all admiralty cases are maritime cases, not all maritime

---

[168] *Infra* Part III.C.4.

[169] *Infra* Part III.C.5.

[170] *See* Robert M. Jarvis, *Admiralty and Maritime Law—Cases and Materials,* 6 U. BRIDGEPORT L. REV. 431, 431 n.1 (1985).

[171] *Id.*

[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).

[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, pilotage services, stevedoring services, etc.).

[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); BLACK'S LAW DICTIONARY 797 (9th ed. 2009) (defining in rem as Latin for "against a thing").

[175] *See* Leon v. Galceran, 78 U.S. 185, 190 (1870); Jarvis, *supra* note 170, at 431 n.1.

cases are admiralty cases.[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.[177] A federal court may hear a maritime case without having physical possession of maritime property.[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.[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);[180] quasi in rem cases to secure jurisdiction over maritime defendants that cannot be found "within the district"[181] by seizing the defendant's property in the district; possessory and petitory cases seeking to resolve ownership and title to vessels;[182] and limitation-of-liability cases seeking to divide a limited res among maritime-lien claimants after a maritime casualty.[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.

[177] *See* Madruga v. Super. Ct. Cal., 346 U.S. 556, 560 (1954); David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 La. L. Rev. 685, 698 (1995).

[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.[184]

The Second Circuit in *Igneri* analyzed cases decided under maritime law and cases decided under admiralty law as if they were interchangeable.[185] 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.[186] As has previously been shown, there is a long history of recognizing loss-of-consortium claims under maritime law.[187] To see how courts have dealt with loss of consortium under admiralty jurisdiction, it is helpful to look at a historical case.[188]

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.[189] 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.[190] 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."[191] The court awarded damages in the sum of $15,000.[192]

The court in *Phelps* addressed whether the Phelpses could bring their claims in the admiralty side of the federal courts[193] and whether

---

[184] *See* sources cited *supra* notes 180-83; *see, e.g.*, Merch. Nat'l Bank of Mobile v. Dredge Gen. G.L. Gillespie, 663 F.2d 1338, 1343 (5th Cir. 1981) (discussing the "seizure of a vessel under Rule C in an *in rem* action").

[185] *See* Igneri v. Cie. De Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963).

[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.[194] The Phelpses wisely chose to sue for breach of the contract of passage (i.e., the ticket), rather than suing solely in tort.[195] The court reasoned that, while a cause of action in tort might not create a maritime lien[196] 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.[197] 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.[198]

3. The "lost" decision: *Savage v. New York Steamship Co.*

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 amisit* has been shown *in admiralty*.'"[199]

---

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.

[196] Today, most maritime tort cases can be in rem or in personam, with one major exception: cases that seamen bring for personal injuries under the Jones Act do not create a maritime lien against the ship and can only be in personam. *See* 46 U.S.C. § 30104 (2006). The words "at law" in the Jones Act exclude causes of action "in admiralty." *See id.*; McLaughlin v. Dredge Gloucester, 230 F. Supp. 623, 627-28 (D.N.J. 1964). Seamen may bring suits in rem for injuries caused by unseaworthiness. *See* Guzman v. Pichirilo, 369 U.S. 698, 698-99 (1962). Torts actions for cargo damage can be either in rem or in personam. *See* Oriente Commercial, Inc. v. M/V *Floridian*, 529 F.2d 221, 222-23 (4th Cir. 1975); All Alaskan Seafoods, Inc. v. M/V *Producer*, 882 F.2d 425, 429-30 (9th Cir. 1989).

[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.[200] 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.[201] 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.[202] A close reading of that case helps explain why the Second Circuit's decision is in error.[203]

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.[204] 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.[205] 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.[206]

He therefore found no negligence on the part of the shipowner.[207] That should have ended the case, but the district judge

---

[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.[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 *per quod consortium amisit* has been shown *in admiralty*. The nearest approach that I know of is *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 *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 *in admiralty were substituted for the common-law suits*.[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.[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.[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.[212] In fact, the *Savage* case stands for just the opposite—that claimants could bring loss-of-consortium cases on the common-law aid of the court.[213] *Moses v.*

---

[208] *See id.* at 781.

[209] *Id.* (citing Moses v. Hamburg-Am. Packet Co., 88 F. 329 (S.D.N.Y. 1898)) (emphasis added).

[210] *See id.*

[211] *See id.*

[212] Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 265 (2d Cir.1963) (citing *Savage*, 185 F. at 781).

[213] *See Savage*, 185 F. at 781.

Hamburg-American Packet Co. further illustrates the point.[214] 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.[215]

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.[216] That is, courts are not to expand maritime liens because liens confer rights in property.[217] A maritime lien is a necessary element of a claim brought "in admiralty" but not in all maritime cases.[218] Judge Friendly simply misinterpreted the district court's opinion.[219]

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.[220] Under the LHWCA, as in all workers' compensation statutes, there exists a quid pro quo employer and employee.[221] The employers of longshoremen, usually stevedores, get immunity from suit in exchange for "securing compensation" for the benefit of the longshoremen.[222] A stevedore typically "secures compensation" by purchasing a workers' compensation policy of

---

[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.

[220] *See* Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 268 (2d Cir.1963).

[221] *See* 33 U.S.C. § 902 (2006 & Supp. V 2011).

[222] *See* 33 U.S.C. § 905 (2006).

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

---

[223] *See* 33 U.S.C. § 932 (2006).

[224] *See* 33 U.S.C. §§ 906, 908 (2006).

[225] *See infra* notes 226-30 and accompanying text.

[226] *See* 33 U.S.C. §§ 905, 933 (2006).

[227] *See* 33 U.S.C. § 933 (2006).

[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)).

LHWCA.[232] 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 *Igneri* case was simply wrong in his interpretation of the LHWCA.[239]

---

[232] *Id.* at 266.

[233] *See* 46 U.S.C. § 301 (Supp. V 2011); 33 U.S.C. §§ 905, 933 (2006).

[234] *See* 46 U.S.C. § 301; 33 U.S.C. §§ 905, 933.

[235] *See* 33 U.S.C. § 933.

[236] *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. *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. *See* 33 U.S.C. § 933(i).

[238] H.R. REP. No. 92-1441, at 4703 (1972).

[239] *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.[240] For that reason, only husbands could claim for the loss of their wives' consortium.[241]

The district court in *Igneri* found that "there is no maritime precedent for a suit for loss of consortium by either spouse,"[242] a statement that was clearly in error in 1962.[243] The Second Circuit had entertained suits for loss of consortium in maritime cases on at least four occasions,[244] the district courts in New York had ruled on at least two such cases,[245] New York state courts had heard at least one such case,[246] the Third Circuit had awarded loss-of-consortium damages in at least one maritime case,[247] and even the Supreme Court had awarded them in a maritime case.[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

---

[240] *See* Harry Poulos, *Is There Consortium Before Birth? Expanding the Availability of Loss of Society Damages in Wrongful Death Actions*, 24 LOY. U. CHI. L.J. 559, 562 (1993).

[241] *See id.*

[242] *Igneri*, 207 F. Supp. at 238.

[243] *See infra* notes 241-45 and accompanying text.

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

[245] *See* Gustafson v. Swedish Am. Line, 1938 WL 63747 (S.D.N.Y. 1938); Gustafson v. Swedish Am. Line, 1940 WL 71156 (N.Y. Sup. Ct. 1940); Behringer v. Ferryboat *Columbia*, 1937 WL 63621 (E.D.N.Y. 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).

[247] *See* N.Y. & Long Branch Steamboat Co. v. Johnson, 195 F. 740 (3d Cir. 1912) (affirming damages for loss of consortium).

[248] *See* Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949).

into the headnotes of the cases.[249] 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.[250]

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.[251] The court went on to say that "[w]e have found no maritime cases relating to claims by wives for loss of consortium."[252] 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."[253] In light of the precedent missed by the Second Circuit, its conclusion is historically inaccurate.[254] 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.[255]

In *Christofferson v. Halliburton Co.*, the Court of Appeals for the Fifth Circuit aligned itself with the Second Circuit's *Igneri* decision.[256] At the time, the Fifth and Second Circuits handled more maritime cases than any of the other circuit courts.[257] The Fifth Circuit included the port cities of New Orleans, Houston, Miami, Jacksonville,

---

[249] *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).

[250] *See generally* William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 554 (1984-85) (noting the ease of online legal research in the early 1980s).

[251] *See* Igneri v. Cie. De Transports Oceanique, 323 F.2d 257, 265-66 (2d Cir. 1963).

[252] *Id.*

[253] *Id.* at 268.

[254] *See supra* notes 241-45 and accompanying text.

[255] The Supreme Court in *Alvez* stated in 1980 that "[f]orty-one States and the District of Columbia allow recovery by a wife or couple" for loss of consortium. Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 284 n.11 (1980).

[256] *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).

[257] *See* Roger Allen, *Admiralty*, 6 GOLDEN GATE U.L. REV. 337, 337 & n.1 (1976).

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).

[259] *See, e.g.*, Westcott v. McAllister Bros., 463 F. Supp. 1039, 1043 (S.D.N.Y. 1978); Davidson v. Schlussel Reederei KG, 295 So. 2d 700, 700-01 (Fla. Dist. Ct. App. 1974).

[260] *See* Kathleen Sweeney Tillotson, *Loss of Consortium in Negligent Injury Under the General Maritime Law: The Unrigging of* Igneri—American Export Lines, Inc. v. Alvez, 5 MAR. LAW. 117, 119 (1980) ("The *Igneri* rule was followed for eleven years . . . .").

[261] *See* Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 275-76 (1980) (holding that a wife could claim loss of consortium for a nonfatal injury).

[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.

[265] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970).

[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.

[271] *See, e.g.*, Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119, 123 (5th Cir. 1994) (denying a loss-of-consortium claim); Murray v. Anthony J. Bertucci Constr. Co., 958 F.2d 127, 128 (5th Cir. 1992) (vacating the jury's award for loss of society); Michel v. Total Transp., Inc., 957 F.2d 186, 188 (5th Cir. 1992) (reversing award for loss of consortium).

[272] *See* Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103, 104 (1996) (noting the lack of uniformity in applying *Miles* by numerous district and circuit courts, including the Fifth Circuit).

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.' [But once Congress did, a]n 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.").

[279] 46 U.S.C. §§ 30104-30106 (2006).

[280] John W. deGravelles, *Supreme Court Charts Course for Maritime Punitive Damages*, 22 U.S.F. MAR. L.J. 123, 130 (2010).

[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]."[282] 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.[283]

IV. HOW THE GENERAL MARITIME LAW SHOULD DEVELOP

It is often said that "[t]here is no federal . . . common law."[284] This is only partially true.[285] In the field of maritime law, the Supreme Court is the "common law court of last review."[286] 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.[287] Therein lies the tension.[288]

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.[289] 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.[290] Nowhere has this been more true than in the development of the "*Miles* uniformity principle."[291]

---

[282] Barrette v. Jubilee Fisheries Inc., No. C10-01206 MJP, 2011 WL 3516061, at *6 (W.D. Wash. Aug. 11, 2011).

[283] deGravelles, *supra* note 280, at 130.

[284] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[285] Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585-86 (2006).

[286] Exxon Shipping Co. v. Baker, 554 U.S. 471, 507 (2008).

[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).

[289] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 28-33 (1990) (explaining how the court balances uniformity of the general maritime law and constitutional principles of separation of powers and preemption).

[290] *See* Joshua Hanbury, *A Beacon for the Protection of Seamen: The Eleventh Circuit Permits Punitive Damages for the Willful Withholding of Maintenance and Cure in* Atlantic Sounding Co. v. Townsend, 20 U.S.F. MAR. L.J. 238, 245-49 (2008).

[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]

---

[292] *See Miles*, 498 U.S. at 37 (recognizing a uniform system in maritime tort law); Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 821 (2001) (Ginsburg, J., concurring) (articulating a shared-venture approach in maritime law).

[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))).

[294] *See, e.g.*, Atl. Sounding Co. v. Townsend, 557 U.S. 404, 425-32 (2009) (Alito, J., dissenting) (supporting the uniform approach to maritime law). Chief Justice Roberts joined Justice Alito and so did Justices Scalia and Kennedy. *Id.* at 425.

[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.

[298] 46 U.S.C. § 30303 (2006).

[299] *See Townsend*, 557 U.S. at 422-24.

[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

---

[301] *See* Metcalfe v. The *Alaska*, 130 U.S. 201, 209 (1889) (restating the holding from Lewis v. Rickards, 119 U.S. 199 (1886) as follows: "[I]n the absence of an act of congress or of a statute of a state giving a right of action therefor, a suit in admiralty could not be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which was caused by negligence."). *But see* Garris v. Norfolk Shipbuilding & Drydock Corp., 210 F.3d 209, 226 (4th Cir. 2000) (J. Holcomb concurring) (stating that 46 U.S.C. §§ 30104-30106 & 46 U.S.C. §§ 30301-30308 superseded Morgane v. States Marine Lines, Inc., 398 U.S. 375 (1970), which overruled *Lewis*, 119 U.S. 199).

[302] McBride v. Estis Well Serv., No. 12-30714, 2013 WL 5474616, at *2 (5th Cir. Oct. 2, 2013).

[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).

[304] *See* 28 U.S.C. § 1333 (1949); *see also* Rod Sullivan, *A Constitutional Approach to Maritime Personal Injury Law*, 43 J. MAR. L. & COM. 393, 421-22 (2012) (listing the remedies that the statute attempts to preserve).

[305] Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).

[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 Souter[313] 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]

---

[309] *See* Robert Force, *The Curse of* Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 797 (1995); Sullivan, *supra* note 304, at 396.

[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.[316] The Court, through Justice Scalia's opinion, unanimously found that such a remedy existed.[317] 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.[318]

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."[319] 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.[320]

However, in *Garris*, Justice Scalia adopted what appears to be a nontextualist approach.[321] He described a "prudential effect" that he

---

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

[316] *See* Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001).

[317] *See id.* at 812, 820.

[318] *See id.* at 820-21.

[319] *See Townsend*, 557 U.S. at 425-32 (Alito, J., dissenting); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* THE TANNER LECTURES ON HUMAN VALUES 79 (1995), *available at* http://www.tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf.

[320] *See* Scalia, *supra* note 319, at 79, 99.

[321] *See Garris*, 532 U.S. at 820.

believed federal maritime statutes should have on the development of the general maritime law.[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.[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.[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.[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.[326] He appears to be doing just what he has warned others against—using "democratically adopted texts [as] mere springboards for judicial lawmaking."[327]

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."[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.[329] As he said in *Exxon Shipping*, "we may not slough off our responsibilities for common law remedies because Congress has not made a first move."[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

---

[322] *Id.*

[323] *See* Scalia, *supra* note 319, at 98.

[324] *See* 46 U.S.C. § 30301 (2012).

[325] *See generally* Scalia, *supra* note 319 (discussing the textualist approach to statutory construction).

[326] *See Garris*, 532 U.S. at 820.

[327] *See* Scalia, *supra* note 319, at 99.

[328] Exxon Shipping Co. v. Baker, 554 U.S. 471, 507 (2008).

[329] *Id.*

[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]

---

[331] *See id.* at 507; Norfolk Shipbuilding & Drydock v. Garris, 532 U.S. 811, 820 (2001); Miles v. Apex Marine Corp., 498 U.S. 19, 37 (1990); Sullivan, *supra* note 304, at 394-97.

[332] *See* Sullivan, *supra* note 304, at 397.

[333] *See* Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 284-85 (1980); *Exxon Shipping*, 554 U.S. at 507; *Garris*, 532 U.S. at 820.

[334] *See* 28 U.S.C. § 1333(1) (2006); *Exxon Shipping*, 554 U.S. at 507.

[335] *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009).

[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.[338] 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.[339]

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.[340]

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 impliedly repeal or modify the obligation of the shipowner to provide medical care.[341] 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.[342]

Today, courts continue to find preemption where Congress did not intend for preemption to exist.[343] 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

---

[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] Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313-14 (2004).

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.

---

[344] Sprietsma v. Mercury Marine, 537 U.S. 51, 69-70 (2002).

[345] *See* United States v. Locke, 529 U.S. 89, 110-11 (2000).

[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).

[347] Am. Exp. Lines v. Alvez, 446 U.S. 274, 283-84 (1980) (alteration in original).

[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.[349]

The Federal Employers Liability Act ("FELA") gives railway workers the right to sue their employers for negligence.[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.[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.[352]

In passing the DOHSA, Congress insisted that it not extend to accidents occurring on territorial waters.[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.[354] What

---

[349] 46 U.S.C. § 30104 (2006 & Supp. V 2011).

[350] 45 U.S.C. § 51 (2006); Atchison, Topeka & Santa Fe Ry. Co. v. Buelle, 480 U.S. 557, 561, 566 (1987).

[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).

[352] 46 U.S.C. § 30302 (2006).

[353] S. REP. NO. 66-216, at 3 (1919); H.R. REP. NO. 66-674, at 3 (1920).

[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.[355] Foreign precedent is hardly a viable basis for projecting congressional intent 70 years later, or for making policy choices 160 years later.[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.[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.[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.[359] The Court decided as such in *Yamaha Motor Corp. v. Calhoun*.[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.[361]

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

---

that such remedies are available under federal maritime law).

[355] *See* 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).

[356] *See* 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).

[357] *See* 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).

[358] *See* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 215-16 (1996); E. Travis Ramey, *Congress Hatches the Egg: Justice Thomas's Textual Mandate Test for Preemption*, 62 ALA. L. REV. 1119, 1137 (2011).

[359] *See Calhoun*, 516 U.S. at 215-16.

[360] *Id.*

[361] *See 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, *supra* note 304, at 399-400.

high seas,[362] much like the reasoning that railway workers cannot obtain punitive damages against their employing railway,[363] courts have no reason to conclude that Congress has expunged punitive damages from maritime cases that arise close to shore involving seamen.[364] 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.[365] 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.

[363] *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 428 (2009) (quoting Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993)); Robertson, *supra* note 60, at 134-35 (discussing the confusion and courts' different views on which actions allow punitive damages).

[364] *See In re* Plaquemine Towing Corp., 190 F. Supp. 2d 889, 892-93 (M.D. La. 2002) (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); Powers v. Bayliner Marine Corp., 855 F. Supp. 199, 200-03 (W.D. Mich. 1994) (holding that representatives of estates of sailboat passengers could recover loss-of-society and punitive damages).

[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

---

[366] *See* 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 and third parties for willful and wanton conduct that caused injuries).

[367] *Cf.* Wells v. Transocean Terminal Operators, Civil Action No. 11-00019-RET-DLD, 2011 WL 2883003, at *1, *5 (M.D. La. June 22, 2011) (discussing the applicability of civil rights statutes to civil rights violations in a maritime setting).

[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.[370] 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.[371] Under living constitutionalism, the remedies are fundamental to a concept of ordered liberty.[372] 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.[373]

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.[374]

A. Women Would be the Primary Beneficiaries

As a practical matter, men are more frequently catastrophically injured on navigable waters than are women.[375] Men participate more frequently in recreational boating than women do;[376] men work more frequently aboard vessels, oil production platforms, and in maritime-related employment;[377] and men seem to get hurt more frequently than

---

[370] *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551, 559–61 (2009) (discussing different theories of constitutional interpretation); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003); *supra* notes 29-32 and accompanying text.

[371] 28 U.S.C. § 1333(1) (2006); *see* Balkin, *supra* note 370, at 550.

[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).

[375] *See* FLA. FISH & WILDLIFE CONSERV. COMM'N DIV. OF LAW ENFORCEMENT, BOATING ACCIDENTS STATISTICAL REPORT 2010, 4, 43 (2010), *available at* http://myfwc.com/media/1406840/2010_boating_statbook_final1.pdf.

[376] *See* BOATING SERVS. RES. CTR., U.S. COAST GUARD, NAT'L RECREATIONAL BOATING SURVEY 2011, 31–32 (2011), *available at* http://www.uscgboating.org/assets/1/workflow_staging/assetmanager/671.pdf.

[377] *See* Bliss Cartwright et al., *Jobs and Industry Gender Segregation: NAICS Categories and EEO-1 Job Groups*, MONTHLY LABOR REV., Nov. 2011, at 41, *available at* http://www.bls.gov/opub/mlr/2011/11/art3full.pdf.

women do.[378] 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.[379] A prime example of this is the case of *Doyle v. Graske*.[380]

Daniel Doyle was involved in an accident while boating off the coast of Grand Cayman Island.[381] 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.[382] Something on the underside of the boat struck him in the back of the head, causing a traumatic brain injury.[383]

The case was tried without a jury in Nebraska, where both Mr. Doyle and the boat's owner, Mr. Graske, resided.[384] The court found "that both Daniel and Anne Doyle have suffered an incalculable loss."[385] The brain injury left Daniel Doyle with "enough awareness of his condition to appreciate his predicament . . . but . . . powerless to change his situation."[386] 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

---

[378] *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.

[379] *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).

[380] 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.

[381] *Id.* at 1072.

[382] *Id.* at 1072-73.

[383] *Id.* at 1073, 1075.

[384] *See id.* at 1072.

[385] *Id.* at 1087.

[386] *Id.*

longer the person she married."[387] 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."[388] The court assessed $750,000 as the damages for loss of consortium.[389]

Anne Doyle's situation is not unique.[390] When men are catastrophically injured on ships and boats, it is often their spouses who bear the burdens of caregiving.[391] The negligent parties get a windfall due to this misinterpretation of maritime law, which denies loss of consortium in maritime cases.[392] 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.[393] 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 *Gaudet* and *Alvez*.[394] Given the narrow holdings of those decisions,

---

[387] *Id.* at 1087-88.

[388] *Id.* at 1088.

[389] *Id.*

[390] *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).

[391] *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.

[392] *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).

[393] *See* sources cited *supra* note 351.

[394] Neither Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), nor *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.

> 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.

[401] *See, e.g.*, *Doyle*, 579 F.3d 898; Igneri v. Cie. De Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963).

[402] Doyle v. Graske, 559 U.S. 1036 (2010).

accident to render assistance.[403] 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.[404] The law requires the master or operator of a vessel to turn around and "render necessary assistance to each individual affected."[405] While the failure to stop and render aid is a crime, and the operator may be punished by imprisonment for up to two years,[406] the chances of the accident being detected and the failure of the master of the tug to see the sailboat are small.[407] An operator may be tempted to continue on his way and not report the collision.[408]

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.[409] If the tugboat owner learns of the accident and destroys the GPS track or other evidence of the

---

[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").

[404] *See* Compl. at 2-4, Bolton v. Mobro Marine, Inc., No. 06-CA-1320 (Fla. Cir. Ct. 2006).

[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).

[409] *See* E. D. Vickery, *Special Problems of Personal Injury and Death Arising out of Collision Disaster Cases*, 51 TUL. L. REV. 896, 910 (1977) (noting that masters and owners of vessels incur no personal liability).

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.[452] It has "4,229 people aboard including over 3,000 tourists and a crew of more than 1,000."[453] Captain Francesco Schettino, fifty-two, has been the ship's captain for the past six years.[454]

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.[455] 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.'"[456] 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:[457]

"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.*"[458]

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

---

[452] *Timeline of Italian Cruise Ship* Costa Concordia *Disaster*, NEWS.COM.AU (Jan. 18, 2012, 11:29 AM), http://www.news.com.au/world/timeline-of-italian-cruise-ship-costa-concordia-disaster/story-e6frfkyi-1226247193532 [hereinafter *Timeline*].

[453] *Id.*

[454] Nick Pisa, Rebecca Evans & Christian Gysin, *Italy's Most Hated Man: Facebook Anger at Skipper of Doomed Cruise Liner Who 'Abandoned Ship Hours before Passengers'*, MAIL ONLINE (Jan. 17, 2012, 4:49 AM), http://www.dailymail.co.uk/news/article-2087126/Costa-Concordia-captain-Francesco-Schettino-Facebook-anger-Italys-hated-man.html.

[455] Reid B. Sprague, *Schettino Update . . .*, THE CHAIN LOCKER (Sept. 8, 2012), http://www.reidbsprague.net/1/post/2012/09/schettino-update.html.

[456] Pisa, Evans & Gysin, *supra* note 454.

[457] *Id.*

[458] *Id.*

and see, Antonello, we're right in front of Giglio."[459] *Costa Concordia* hits Le Scole, a well-known shoal on the southeastern tip of Giglio Island,[460] located about 1,000 feet from the shoreline.[461] The grounding causes a 160-foot-long gash in the port side of the vessel.[462] The crew steers the vessel away from the rocks and back toward the open water.[463] 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.[464]

2145: "[The] first alarm is sounded: two long whistles and one short, informing the crew of a problem."[465]

---

[459] 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.

[460] Rossella Lorenzi, Concordia *Not the First Sunk by Treacherous Reef*, DISCOVERY NEWS (Nov. 27, 2012 3:00 AM), http://news.discovery.com/earth/oceans/concordia-reef-120207.htm; *Cruise Disaster: Timeline of How the* Concordia *Disaster Unfolded*, THE TELEGRAPH (Jan. 16, 2012, 10:13 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9019049/Cruise-disaster-timeline-of-how-the-concordia-disaster-unfolded.html [hereinafter *Cruise Disaster: Timeline*].

[461] 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.

[462] *Raising the* Concordia *– the Biggest Marine Salvage Operation Ever*, THE TELEGRAPH (Oct. 27, 2012, 5:36 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9637990/Raising-the-Concordia-the-biggest-marine-salvage-operation-ever.html.

[463] *What Really Happened*, NATIONAL POST, http://wpmedia.news.nationalpost.com/2012/01/fo0121_cruisesink.pdf (last visited Sept. 7, 2013).

[464] Nick Squires & Victoria Ward, Costa Concordia*: Captain 'Says He Tripped and Fell into Lifeboat'*, THE TELEGRAPH (Jan. 18, 2012, 10:36 AM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9022170/Costa-Concordia-captain-says-he-tripped-and-fell-into-lifeboat.html.

[465] *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.[466] The parents call the local police who then call the Italian Coast Guard in Livorno, Italy.[467]

2147: "The electricity goes off. Many passengers begin to panic."[468]

2150: "The ship begins to list. In the restaurants, dinnerware crashes off tables. Some passengers rush to their cabins for their life vests."[469]

2200: "Rogelio Barista, a cook on board the *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.'"[470]

2205: "Capt Schettino radios Costa Crociere, the ship's owners, and raises alarm."[471]

2206: The Italian Coast Guard in Livorno, Italy, calls and asks what is going on:[472]

> [COAST GUARD]: Good evening *Costa Concordia*. Do you have problems on board?
>
> *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?

---

[466] *Decision Looms on Ending* Concordia *Rescue Operations*, CNN (Jan. 19, 2012, 9:41 PM), http://www.cnn.com/2012/01/19/world/europe/italy-cruise-main.

[467] *See id.*

[468] *Timeline*, *supra* note 452; *Cruise Disaster: Timeline*, *supra* note 460.

[469] *Timeline*, *supra* note 452.

[470] *Cruise Disaster: Captain Ordered Dinner as Ship Sank*, THE TELEGRAPH (Jan. 16, 2012, 9:09 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9019114/Cruise-disaster-Captain-ordered-dinner-as-ship-sank.html.

[471] *Cruise Disaster: Timeline*, *supra* note 460.

[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.[473]

2216: The Italian Coast Guard calls the ship again.[474] The ship admits that water is coming into the hull but says there is no emergency.[475]

2220: Ship begins listing to port.[476]

2230: "Under pressure from the coastguard, the captain agrees to send a Mayday signal. . . . The ship is by now listing at 20 degrees."[477]

2250: "Again under pressure from the coastguard, the captain orders the ship to be abandoned."[478]

2252: "The 'abandon ship' signal is given: seven short whistles and one long."[479] The captain turns hard to port to bring the ship close

---

[473] Nick Squires, Costa Concordia*: New Audio Recording of Officer Reporting 'Black-Out'*, THE TELEGRAPH (Jan. 19, 2012, 4:11 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9025402/Costa-Concordia-new-audio-recording-of-officer-reporting-black-out.html (italics ommitted).

[474] *Cruise Disaster: Timeline*, *supra* note 460.

[475] *Id.*

[476] *See* Costa Concordia *Casualty Probe Pinpoints Series of Human Failures*, SEATRADE INSIDER (May 26, 2013), http://www.seatrade-insider.com/news/news-headlines/costa-concordia-casualty-probe-pinpoints-series-of-human-failures.html.

[477] *Cruise Disaster: Timeline*, *supra* note 460.

[478] *Id.*

[479] *Timeline*, *supra* note 452; *Cruise Disaster: Timeline*, *supra* note 460.

to the island of Giglio.[480] As the ship runs aground, she flips to her starboard side, leaving the gash on the port side visible.[481]

2315: "The first lifeboat reaches Giglio."[482] "In all, some 4,000 of the ship's 4,229 make it to safety aboard a lifeboat."[483] Italian rescuers say they "plucked around 100 people from the water and around 60 from the ship."[484]

2240: Captain Schettino, second in command Dimitri Christidis, and another officer, Silvia Coronia, get into a lifeboat.[485]

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

---

480 *See* Martin Evans, Patrick Sawer, & Nick Squires, *Italy Cruise Ship Disaster: Did Island 'Sail-Past' Put Ship on Course for Disaster?*, THE TELEGRAPH (Jan. 15, 2012, 11:12PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/9016774/Italy-cruise-ship-disaster-did-island-sail-past-put-ship-on-course-for-disaster.html.

481 *See* Costa Concordia *Disaster: New Photos Show Ship Hours After It Ran Aground*, L.A. TIMES, http://framework.latimes.com/2012/01/14/cruise-ship-runs-aground-off-italy/#/0 (last updated Mar. 27, 2012, 5:12 AM) (stating that *Costa Concordia* ran aground and laid on its starboard side); Bryan Chan, *Cruise Ship Runs Aground Off Italy*, L.A. TIMES (Jan. 14, 2012), http://framework.latimes.com/2012/01/14/cruise-ship-runs-aground-off-italy/#/0 (stating that *Costa Concordia*'s gash was visible).

482 *Timeline*, *supra* note 452.

483 Dario Thuburn, *The* Costa Concordia*'s Final Moments Caught on Camera*, NAT'L POST, http://news.nationalpost.com/2012/01/15/timeline-the-costa-concordias-last-minutes/ (last updated Jan. 16, 2012, 9:09 AM).

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![486]

0050: The Italian Coast Guard takes control of the rescue operation.[487]

Costa Concordia lost 5 crewmembers and 27 passengers.[488] They include, "14 Germans, [6] Italians, [4] French, [2] Americans, a Hungarian, a Peruvian and an Indian."[489]

"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."[490]

---

[486] *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).

[487] *Cruise Disaster: Timeline*, *supra* note 460.

[488] *List of Dead, Missing from Italy Cruise Ship*, CONTRA COSTA TIMES (Jan. 12, 2012, 6:49:33 AM), http://www.contracostatimes.com/ci_19774302.

[489] *Timeline*, *supra* note 452.

[490] *Id.*