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The Interplay of the Jones Act and the General Maritime Law

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A seaman's rights have changed over time, and the courts' attitudes about how to integrate the pertinent statutory and judge-made law have also varied. Today a seaman who suffers personal injury can sue his employer for unseaworthiness, maintenance and cure, and violation of the Jones Act,[1] and the claims can be joined. Unseaworthiness and maintenance and cure are general maritime law claims, created by judges. Unseaworthiness is a strict liability claim that requires a showing that the seaman was injured either due to a vessel that was not reasonably fit for its intended purpose or by a fellow crewmember who was not fit to serve.[2] Maintenance and cure is a remedy entitling a seaman who becomes injured or sick while in the service of the ship to receive food, lodging, and medical care.[3] The Jones Act primarily allows a claim for negligence.[4] No double recovery is allowed.[5] No recovery for loss of consortium is available under the Jones Act or for unseaworthiness,[6] and in case of a seaman's death, no claim for loss of society or lost future earnings is allowed.[7] Courts are divided over whether to allow a claim for punitive damages for

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[1]46 U.S.C. § 30104.

[2]2 Robert Force and Martin J. Norris, THE LAW OF SEAMEN § 27:8, Westlaw (5th ed. Database updated Nov. 2016).

[3]Id. at § 26:3.

[4]It incorporates 45 U.S.C. § 51 which imposes liability for negligence. It also covers intentional torts and some based on strict liability. Infra at notes 51 and 79.

[5]Id. at § 26:40.

[6]See e.g., Horsley v. Mobil Oil Corp., 15 F.3d 200, 1994 AMC 1372 (1st Cir. 1994); Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 1963 AMC 2318 (2d Cir. 1963), cert. denied, 376 U.S. 949 (1964).

[7]Miles v. Apex Marine Corp., 498 U.S. 19, 1991 AMC 1 (1990).

unseaworthiness,[8] and most courts deny such a claim under the Jones Act.[9]

This article will argue that punitive damages should be available in Jones Act and unseaworthiness actions. It will also criticize the Supreme Court's ruling denying recovery of loss of society and lost future earnings. Before doing so it will examine the background and history of the seamen's personal injury actions. It will suggest that Congress meant for the Jones Act to add to existing remedies and that it implicitly authorized the courts to continue to develop judicially-created remedies. It will suggest that for most of the twentieth century courts carried out this mission, seeing the Jones Act and the general maritime law as dynamic remedies that they could use in combination to provide

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[8]Compare McBride v. Estis Well Serv., 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc), cert. denied, 135 S.Ct. 2310 (2015) (no punitive damages); Horsley v. Mobil Oil Corp., 15 F.3d 200, 1994 AMC 1372 (1st Cir. 1994) (same); Miller v. Am. President Lines, 989 F.2d 1450, 1993 AMC 1217 (6th Cir.), cert. denied 510 U.S. 915 (1993) (same); Penrod Drilling Corp. v. Williams, 868 S.W.2d 993 (Tex. 1993) (same) with Tabingo v. Am. Triumph LLC, 188 Wash.2d 41, 2017 AMC 1139 (2017) (punitive damages allowed); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987) (same); Evich v. Morris, 819 F.2d 256, 1988 AMC 74 (9th Cir.), cert. denied, 484 U.S. 914 (1987) (same). See generally, Stevan C. Dittman, *Amiable or Merry - An Update on Maritime Punitive Damages,* 89 TUL. L. REV. 1059 (2015); David W. Robertson, *Punitive Damages in U.S Maritime Law*: Miles, Baker, *and* Townsend, 70 LA. L. REV. 464 (2010); David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997); Robert Force, *The Curses of* Miles v Apex Marine Corp.: *The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995).

[9]Compare McBride, 768 F.3d 382, 2014 AMC 2409 (not allowing punitive damages); Miller, 989 F.2d 1450, 1993 AMC 1217 (same); Kopczynski v. The Jacqueline, 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) (same) with Baptiste v. Superior Court, 106 Cal. App. 3d 87, 1980 AMC 1523 (1980), cert. denied, 449 U.S. 1124 (1981) (allowing claim). In Den Norske Amerikalinje A/S, 276 F. Supp. 163, 1967 AMC 1965 (N.D. Ohio 1967), the court awarded punitive damages on a Jones Act claim. The Sixth Circuit reversed, finding that the grounds for punitive damages were not satisfied. U. S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1969 AMC 252 (6th Cir. 1969), cert. denied, 398 U.S. 958 (1970). The Sixth Circuit in Kozar v. Chesapeake & O. Ry., 449 F.2d 1238 (6th Cir. 1971), indicated that it did not regard Fuhrman as inferring that punitive damages were available under FELA. The Supreme Court has left the issue open. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 n. 12; 2009 AMC 1521, 1538 (2009). But four dissenting justices said that punitive damages are not available under FELA or the Jones Act. 557 U.S. at 428; 2009 AMC at 1541.

relief for injured seamen and their families and to encourage shipowners to reduce the likelihood of future harm.

At the turn of the twentieth century a seaman suffering personal injury could recover only maintenance and cure and unseaworthiness, and unseaworthiness required a showing that the vessel owner had failed to exercise reasonable care to select a competent crew or to provide a reasonably safe vessel.[10] Maintenance and cure had old roots,[11] but unseaworthiness was a recent remedy,[12] created by the federal courts that followed the example set by a 1876 English statute.[13] The Supreme Court recognized these two claims in 1903 in *The Osceola*,[14] where it held that a seaman could not recover damages for injury caused by a master's or fellow seaman's negligence.[15]

At one time the Supreme Court was fond of saying, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law,"[16] and the Court sometimes combined elements of the Jones Act and the general maritime law to fashion new or broader remedies. In 1970, the Court said that

[10]E.g., Philadelphia & Reading Ry. v. Berg, 274 F. 534 (3d Cir.), cert. denied, 257 U.S. 638 (1921) (the case arose before the passage of the Jones Act); Storgard v. France & Canada S.S. Corp., 263 F. 545 (2d Cir.), cert. denied, 252 U.S. 585 (1920) (same); The Colusa, 248 F. 21 (9th Cir. 1918); Tavares v. Dewing, 33 R.I. 424 (1912) (discussing cases); Cornell Steamboat Co. v. Fallon, 179 F. 293, 294-95 (2d Cir. 1909); The France, 59 F. 479 (2d Cir. 1894); The Henry B. Fiske, 141 F. 188 (D. Mass. 1905); The Robert C. McQuillen, 91 F. 685 (D. Conn. 1899); Grimsley v. Hankins, 46 F. 400 (S.D. Ala. 1891); The Edith Godden, 23 F. 43 (S.D.N.Y. 1885) (imposing liability); Halverson v. Nisen, 11 F. Cas. 310 (D. Ca. 1876) (No. 5,970) (defendant not liable because seaman was unable to show negligence). See also The Norway v. Jensen, 52 Ill. 393 (1869). As the Supreme Court observed in Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928), "Unseaworthiness, as is well understood, embraces certain species of negligence; while the [Jones Act] includes several additional species not embraced in that term." In The Osceola, 189 U.S. 158, 173–74; 2000 AMC 1207, 1213–14 (1903), the Court described some earlier cases where there was negligence in providing safe appliances as unseaworthiness cases.

[11]The earliest American case was Harden v. Gordon, 11 F. Cas. 480, 2000 AMC 893 (C.C.D. Me. 1823) (Story, J.) (tracing its roots to ancient codes).

[12]See supra note 10.

[13]Merchant Shipping Act of 1876, 39 & 40 Vict., c. 80, § 5 (Eng.).

[14]189 U.S. 158 (1903).

[15]The Osceola, 189 U.S. 158, 2000 AMC 1207 (1903).

[16]The earliest instance was Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963). The most recent instance was Exxon Shipping Co. v. Baker, 554 U.S. 471, 508 n. 21 (2008). Most of the decisions making this statement were in the 1970's.

courts would look to federal and state statutes for "persuasive analogy for guidance" when filling in the details of a newly created wrongful death remedy.[17] Twenty years later, in *Miles v. Apex Marine Corp.*,[18] the Court displayed a different attitude when it held that the wrongful death remedy did not include a right to loss of society or lost future earnings. It said,

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.
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> ...
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> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.[19]

More recently a Court majority has changed course, reading the Jones Act as not precluding the award of punitive damages for egregious violations of the maintenance and cure obligation.[20] In *Atlantic Sounding Co. v. Townsend*, the Court said,

> [T]his Court has consistently recognized that the [Jones] Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."[21]

Part I of this article will discuss the background of the Jones Act, and Part II will describe some of the ways in which the Court has interpreted the Jones Act in conjunction with the claims for

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[17]Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408 (1970). The Court also looked to state and federal statutes to demonstrate that there is "no present public policy against allowing recovery for wrongful death." Id at 390.

[18]498 U.S. 19 (1990).

[19]Id. at 32–33, 36.

[20]Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424, 2009 AMC 1521, 1531 (2009).

[21]557 U.S. at 427; 2009 AMC at 1531 (quoting The Arizona v. Anelich, 298 U.S. 110, 123). On the shifting attitudes of the Supreme Court in regard to statutes relating to maritime law, see David W. Robertson, *Our High Court of Admiralty and its Sometimes Peculiar Relationship with Congress*, 55 ST. LOUIS U. L.J. 491 (2011).

unseaworthiness and maintenance and cure. Part III will focus on some conservative trends in the cases, and Part IV will critique *Miles*. Part V will argue that punitive damages are appropriate in maritime personal injury and wrongful death actions. Part VI will offer a conclusion.

I
BACKGROUND OF THE JONES ACT

As said above, the Court held in *The Osceola* that a seaman could not recover damages for injuries resulting from the negligence of a master or fellow crewmember.[22] The Court made the following pronouncements:

> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
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> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796.
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> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
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> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.[23]

Many, including a seaman's union[24] and parts of the Executive branch, thought that seamen were unable to recover damages for a

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[22]Supra note 14.

[23]The Osceola, 189 U.S. 158, 175, 2000 AMC 1207, 1215 (1903).

[24]The International Seaman's Union of America petitioned Congress for relief saying in part:

master's negligence because they were fellow servants. Although a close reading of the last two pronouncements shows that this is not the case, earlier cases had used the fellow-servant doctrine to deny relief.[25] The Secretaries of Labor and Commerce requested that Congress respond to *The Osceola* by adding a proviso to a section of what was to become the Seamen's Act of 1915, known as the La Follette Act.[26] The suggested language was:

> [The seaman] must obey any order from the master or other officer, or go to prison, but if crippled for life by injury thereby received he has no remedy, because under late decisions the officers are "fellow-servants.

S. DOC. NO. 379, 61st Cong. 3 (1910).

[25]E.g., Quebec S.S. v. Merchant, 133 U.S. 375 (1890) (involving a case that had been removed to the Circuit Court); (Quinn v. New Jersey Lighterage Co., 23 F. 363 (C.C.E.D.N.Y. 1885); The City of Alexandria, 17 F. 390, 392 (S.D.N.Y. 1883). See FORCE & NORRIS, supra note 2, at § 30.2 n. 2 (collecting cases). See also SILAS BLAKE AXTELL, MERCHANT SEAMEN'S LAW 45 (2d ed. 1945). For a detailed study of the four pronouncements, see Joel K. Goldstein, The Osceola *and the Transformation of Maritime Personal Injury Law: Some Propositions about the Case and its Propositions*, 34 RUTGERS L.J. 663 (2003).

[26]In a joint letter to the Senate Commerce Committee dated May 6, 1913, the two secretaries wrote, "Having in view the decision by the Supreme Court in the case of the Osceola (189 U.S., p. 158) the departments beg to suggest the following amendment to section 6 of this bill:" This was followed by language quoted in the text. S. DOC. NO. 211, 63D CONG. 8 (1913). (Until March 1913 the two departments were joined in the Department of Commerce and Labor. See https://www.commerce.gov/page/commerce-history.) As requested, Senator La Follette introduced the measure on the Senate floor. 50 Cong. Rec. 5713 (1913). In providing a summary of the bill's provisions as compared with other bills that had been under consideration, Senator La Follette merely restated the proviso. Id. at 5787. See also STAFF OF S. COMM. ON COMMERCE, 63D CONG., SEAMAN'S BILL 10, 42 (Comparative Print 1915) (comparing the conference agreement with the Senate and House bills). The provision appeared as a separate section at the end of the conference bill. H.R. REP. NO. 63–1439 at 25 (3d Sess. 1915) (Conf. Rep.).

Andrew Furuseth, President of the International Seaman's Union of America, explained the provision this way:

> This proviso was recommended by the departments, no doubt in order to meet a condition peculiar to the sea, where, under existing law and decisions, the seamen must obey orders under penalties of imprisonment, yet may not if injured recover any damages because those entitled to give the order have been held to be follow servants with those under their authority.

Andrew Furuseth, Seaman's Bill, Prepared for the Committee on Commerce, Comparison Between Senate Bill 136 and the House Substitute, 63d Cong. 2–3 (1914) (a copy of this document, which may not be an official federal document, is on file with the author). The newspaper of the International Seamen's Union of America copied the Commerce and Labor Departments' explanation of the provision. *Seamen's Bill Passes Senate*, COAST

> *Provided*, That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be considered fellow-servants with those under their authority.[27]

Dropping the word "*Provided*," Congress added the language as section 20, the final section in the bill. Although Congress intended that seamen would now be able to recover for a master's negligence, the Supreme Court held otherwise in *Chelentis v. Luckenbach S.S. Co.*[28] The Court reasoned that under *The Osceola*, a shipowner's duty was determined "without regard" to the relationship between a seaman and other crewmembers,[29] so that the La Follette Act was "irrelevant."[30]

In *Chelentis*, the seaman also argued that the common-law rules of negligence ought to apply because the Judiciary Act gave district courts exclusive admiralty jurisdiction "saving to suitors in all cases, the right of a common-law remedy, where the

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SEAMEN'S JOURNAL, Oct. 29, 1913, at 2. It later reported the meaning of the provision this way: "The notorious 'fellow servant' rule which usually protects shipowners in damage suits brought by seamen is abrogated in the following language: [quoting the statutory provision]." *President Approves Seamen's Bill*, 28 COAST SEAMEN'S JOURNAL, March 10, 1915, at 10.

The purpose of the 1915 provision has long been suspected. GRANT GILMORE & CHARLES BLACK, JR. THE LAW OF ADMIRALTY 325 (2d ed. 1975); Goldstein, supra note 25 at 715.

[27]Section 20 of the Act to Promote the Welfare of American Seamen, March 4, 1915, c. 153, 38 Stat. 1164, 1185.

[28]Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918). The Court of Appeals and the District Court had come to the same conclusion. See 243 F. 536 (2d Cir. 1917) (affirming a directed verdict for the defendant).

[29]Id. at 384.

[30]Id. There was testimony that the 1915 provision was "too ambiguous." *The Seamen's Bill: Hearing Before the H. Committee on the Merchant Marine and Fisheries*, 63d Cong 420 (Part 1) (1914) (statement of Charles E. Kremer, representing the Northern Michigan Transportation Co. and the Chicago, Racine and Milwaukee Line). The principal objection was that it was not germane to the bill. Id. at 419. It was also said that since "the evident purpose is to kill off the fellow-servant provision," it would conflict with state workmen's compensation acts, and that contrary to the bill, "a seaman is not in command." Id. Another witness testified that the provision had "meaning and significance" but that it was improperly placed in the bill as a proviso to unrelated material. Id. at 106 (Part 2) (Statement of Paul Gottheil, representing Funch, Edye and Co., steamship agents and brokers).

common-law is competent to give it."[31] The Court rejected this argument, saying:

> [W]e find nothing [in the saving-to-suitors clause] which reveals an intention to give the complaining party an *election* to determine whether the defendant's liability shall be measured by *common-law* standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.[32]

Andrew Furuseth, President of the International Seaman's Union of America testified before Congress that *Chelentis* held that section 20 of the La Follette Act "was meaningless because it had reference to the common law, and the common law had no jurisdiction on board a ship ...."[33] In an apparent effort to track the language of *Chelentis* quoted above, Furuseth suggested an amendment to section 20,[34] which Congress accepted with minor changes.[35] This became the Jones Act, which provided:

> That any seaman who shall suffer personal injury in the course of his employment may, *at his election*, maintain an action for damages *at law*, with the right of trial by jury, and in such action all statutes of the United States modifying or extending *the common-law* right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages *at law* with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be

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[31]Section 9 of the Judiciary Act of 1789, 1 Stat. 76, 77. The current version is at 46 U.S.C. § 1333(1).

[32]247 U.S. at 384 (emphasis added).

[33]Establishment of an American Merchant Marine, Hearings Before the Senate Comm. on Commerce, 66th Cong., 2d Sess. 1709 (1920) (statement of Andrew Furuseth).

[34]Id. at 1712.

[35]The only significant change was the addition of the final sentence on jurisdiction. There were minor typographical changes, and Congress changed "in the case of the death . . . " to "in case of the death . . . "

> under the court of the district in which the defendant employer resides or in which his principal office is located.[36]

By referring to the rights of railway employees, the Jones Act incorporates the Federal Employers' Liability Act ("FELA") that was initially adopted in 1908. FELA allows two kinds of claims for negligence. One is for injuries or death caused by negligence of officers, agents or employees of the railroad, and the other is for injury or death "by reason of any defect or insufficiency, due to its negligence, in its cars, engines appliances...or other equipment."[37] A 1910 amendment added a survival remedy.[38] FELA absorbed the railroads' pre-existing duties and added to them. Prior to 1908, the federal common-law fellow-servant doctrine obligated railroads to exercise reasonable care in hiring competent employees and in providing a safe place to work.[39]

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[36]Section 33, Act of June 5, 1920, c. 250, 41 Stat. 988, 1007 (emphasis added). As codified, the statute omitted the initial word "That." Today the re-codified version reads:

> 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. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104. By making the claim available "at law," the drafters sought to avoid the question of whether federal courts could exercise diversity jurisdiction to hear a maritime claim under the saving to suitors clause, an issue then current. SILAS BLAKE AXTELL, supra note 25 at 45. See Philadelphia & Reading Ry. v. Berg, 274 F. 534 (3d Cir.), cert. denied, 257 U.S. 638 (1921).

[37]Act of April 22, 1908, 35 Stat. 65, 45 U.S.C. § 51.

[38]Act of April 5, 1910, c. 143, § 2, 36 Stat. 291. See 45 U.S.C. § 59.

[39]Baltimore and O. R.R., v. Baugh, 149 U.S. 368, 385–86 (1893). See also THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE, 101–09 (1869); Albert Martin Kales, *Fellow Servant Doctrine in the United States Supreme Court,* 2 MICH. L. REV. 79, 88 (1903); Note, *Master's Duty to Keep Safe the Servant's Working Place,* 16 HARV. L. REV. 593 (1903); *Liability of Employers: Hearing on H.R. 239 Before the S. Comm. on Interstate Commerce,* 59th Cong., 11 (1906), at 125 (statement of Hugh L. Bond, Jr., Vice-President of the Baltimore and Ohio Railroad Co.). Prior to the adoption of FELA, several states had liberalized the law, either by judicial decision, or by statute, but federal common law applied to cases tried in federal court. Many characterize the fellow-servant doctrine as a defense. E.g., Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring); Owens v. Union Pac. R.R. Co., 319 U.S. 715, 719 (1943); DAN B. DOBBS, PAUL T. HAYDEN, ELEN M. BUBLICK, TORTS AND COMPENSATION, 944 (8th ed. 2017). Some saw it as an exception to the respondeat superior rule. E.g., Sullivan v.

Thus, prior to 1908, railroads, under the federal common law, and vessel owners, under the general maritime law of unseaworthiness, owed their workers similar duties.[40]

Although the Jones Act incorporates FELA, it is not its equivalent. FELA is an exclusive remedy[41]— the Jones Act is not.[42] By allowing seamen an election to sue "at law," the Jones Act at least implicitly preserves the right to sue "in admiralty" for unseaworthiness and maintenance and cure.[43] A seaman can pursue these actions *in rem* as well as *in personam*.[44] As will be discussed in the next section, the initial impact of having the election was modest. The election's greater value was the potential that judges would expand these general maritime law rights.

Mississippi & Mo. R.R, 11 Iowa 421, 423 (1861). Others saw it as an expression of the general rule that a person is not liable for another's wrongful acts. WILLIAM M. MCKINNEY, A TREATISE ON THE LAW OF FELLOW-SERVANTS, 4 (1890).

[40]Dixon v. United States, 219 F.2d 10, 1955 AMC 498 (2d Cir. 1955). See Goldstein, supra note 25, at 684. Some maritime cases held that the seaman could recover for unseaworthiness where a master or mate negligently failed to correct the unsafe condition that he knew about. Id. at 695. At common law the owner was liable for the negligence of a vice principal, someone to whom the owner had delegated its duties to its employees. Baugh, 149 U.S. at 187–88 (quoting Railroad Co. v. Moore, 29 Kan. 632, 644 (1883)). In New England R.R. v. Conroy, 175 U.S. 323 (1899), the Court held a train conductor was not a vice principal, overruling Chicago, M. & St. P. Ry. v. Ross, 112 U.S. 377 (1884). The seaman had an advantage over a land-based worker in that there was no defense of assumption the risk because seamen were required to obey the vessel's master. See infra text at note 78.

[41]See infra text at note 86. See also Moore v. Chesapeake & O. Ry., 291 U.S. 205, 215-16 (1934) (saying that prior to the adoption of FELA, violations of the Safety Appliance Acts could be the basis of suit under the common law but must now be brought under FELA).

[42]See Atl. Sounding Co. v. Townsend, 557 U.S. 404, 416; 2009 AMC 1521, 1539 (2009).

[43]Id. The terms "in admiralty" and "in law" refer to the procedures followed when suit is brought in a federal district court. Until 1966 federal courts used different rules of procedure for admiralty and non-admiralty cases. See DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES, 73–74 (3d ed. 2015). Today the Federal Rules of Civil Procedure apply to all civil claims brought in federal court and the particular procedural rules applicable to admiralty claims can be invoked by a party asserting a claim for relief under Rule 9(h).

[44]Reed v. The Yaka, 373 U.S. 410, 1963 AMC 1373 (1963) (involving a longshoreman's suit). Jones Act claims cannot be brought in rem. Plamals v. The Pinar Del Rio, 277 U.S. 151, 1928 AMC 932 (1928).

II
COMBINING THE JONES ACT, UNSEAWORTHINESS AND MAINTENANCE AND CURE REMEDIES

One might be forgiven for thinking that on its face the Jones Act gives two options to a seaman who sues in federal court in the absence of diversity jurisdiction.[45] One option would be to sue for unseaworthiness and maintenance and cure on the "admiralty side." The second option would be to sue "at law" under the new statute for the remedies available to railway workers under FELA. If the seaman chose to sue for unseaworthiness, he would need to show negligence either in providing an unsafe place to work or in the hiring of an unfit crewmember. If he chose to sue under the Jones Act, he could recover for the negligence of a fellow worker, including that of the vessel's master, and also for the employer's negligence in providing a safe place to work which included providing reasonably competent fellow workers.

If the Jones Act had been interpreted as suggested above, its modification of the law would have been modest. Recovery under the Jones Act would require a showing of negligence, causation, and damages, and would be reduced by the seaman's negligence. The right to sue under the general maritime law would add little. Unseaworthiness was covered by the Jones Act,[46] and maintenance and cure recoveries, although vitally important in some instances, were far less than full recovery. Moreover, any claims brought "in admiralty" would be tried without a jury. Indeed, an editorial in the Seamen's Journal, the official newspaper of Furuseth's union, questioned whether the Jones Act "would add anything to the existing right of a seaman to bring suit

[45]If diversity exists, he may also sue on the "law side" pursuant to 28 U.S.C. § 1332. Any seaman might also sue in state court under the saving-to-suitors clause. 28 U.S.C. § 1333(1).

[46]See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, 297 (5th Hornbook ed. 2001). To the extent that unseaworthiness related to the reasonable care required in providing a safe vessel, this was covered by FELA. To the extent unseaworthiness required reasonable care to provide a competent crew, this was part of the common-law obligation under the fellow-servant doctrine which FELA absorbed. See supra text at note 39. Until the mid-1940's the unseaworthiness remedy was little used. GILMORE & BLACK, supra note 26 at 383.

in a court of admiralty for damages for personal injuries suffered in the course of his employment."[47] Over time the Supreme Court essentially rewrote the Jones Act making it a more powerful remedy, added to the rights associated with unseaworthiness and maintenance and cure, and created hybrid remedies.

The Court rejected the idea that the seaman could sue under the Jones Act only "at law" and held that suit could also be brought "in admiralty."[48] Further, seamen could sue for maintenance and cure along with either a suit for unseaworthiness or a claim under the Jones Act.[49] Of greater significance, the Court eventually allowed seamen to have the Jones Act, unseaworthiness, and maintenance and cure claims decided in the same suit, provided there would be no double recovery.[50]

The Court gave another liberal reading of the Jones Act and FELA by holding that these statutes encompass an intentional tort claim even though FELA requires a showing of "negligence."[51] The Court refused to be constrained by the "rule" that statutes in derogation of the common law are to be strictly construed. Instead, it said, "[The word 'negligence'] is to be construed liberally to fulfill the purposes for which it was enacted."[52]

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[47]*Bill H.R. 10378*, 33 THE SEAMEN'S JOURNAL, May 26, 1920, at 6. The editorial said that railway workers were not satisfied with FELA and that the only practical remedy was a federal workers' compensation statute. In another editorial, the Seamen's Journal noted the delays involved in bringing suits for negligence and the risks that claims could be thrown out "for lack of evidence." *Maritime Compensation*, 33 SEAMEN'S JOURNAL, June 30, 1920, at 6.

[48]Panama R.R. Johnson, 264 U.S. 375, 1924 AMC 551 (1924).

[49]Pacific S.S. v. Peterson, 264 U.S. 375, 1928 AMC 1932 (1928).

[50]Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 1959 AMC 832 (1959). See also McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224, 1958 AMC 1754, 1757 (1958) (although the maintenance and cure count was not before the Court, it recited that the three claims are usually brought together). In an earlier case the Court said that the unseaworthiness and Jones Act claims could be pursued in the same suit, but it was unclear if the seaman could submit only one to the factfinder. Baltimore S.S. v. Phillips, 274 U.S. 316, 1927 AMC 946 (1927). See generally, GILMORE & BLACK, supra note 26 at 343-48. In Fitzgerald v. United States Lines, 374 U.S. 16, 1963 AMC 1083 (1963), the Court ruled that the jury must be allowed to find the facts on the unseaworthiness and maintenance and cure claims if the seaman demands a jury trial for the Jones Act claim.

[51]Jamison v. Encarnacion, 281 U.S. 635, 1930 AMC 1129 (1930).

[52]281 U.S. at 640, 1930 AMC at 1132.

The Court also extended the reach of FELA and the Jones Act by not incorporating the common law concept of proximate causation. Instead, the Court held:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[53]

The remedy of maintenance and cure not only survived the Jones Act but continued to develop independently of it. The Court expanded the reach of maintenance and cure, applying it to seamen injured on shore leave,[54] and extending coverage until the seaman reached maximum cure.[55] Most importantly, the court held that the vessel owner owed full liability even when the vessel owner was without fault and when the seaman was negligent.[56] The Court did not mention and apparently was not troubled that the Jones Act had a different liability scheme, one of pure comparative fault.[57]

More importantly, the Court showed a liberal tendency in the way it handled the overlap of the Jones Act and maintenance and cure. Rather than allow one remedy to limit the other, the Supreme Court determined to enlarge their reach. Prior to the adoption of the Jones Act, a vessel owner that negligently

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[53]Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506 (1957) (construing FELA). Ferguson v. Moore-McCormick Lines, Inc., 352 U.S 521, 1957 AMC 647 (1957) (applying the standard under the Jones Act). The Court reaffirmed the holding in CSX Transp. v. McBride, 564 U.S. 685, 2011 AMC 1521 (2011) (construing FELA).

[54]Warren v. United States, 340 U.S. 523, 1951 AMC 416 (1951).

[55]Farrell v. United States, 336 U.S. 511, 1949 AMC 613 (1949).

[56]Warren v. United States, supra note 54; Aguilar v. Standard Oil Co., 318 U.S. 724, 730, 1943 AMC 451, 457 (1943).

[57]Some cases had treated a seaman who injured himself through his own willful wrongdoing as if he were no longer in the service of the ship. E.g., Jackson v. Pittsburgh S.S. Co., 131 F.2d 668, 1943 AMC 885 (6th Cir. 1942) (involving a seaman who was injured when he jumped about six feet from the vessel to the dock when there was no ladder; the court said with respect to the seaman's Jones Act claim that any negligence on the vessel's part in failing to provide a ladder bore no causal relation to the injury). The Supreme Court has said that to be in the service of the ship means that the seaman is "generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders." Farrell v. United States, 336 U.S. 511, 516,1949 AMC 613, 617 (1949).

breached its duty to provide necessary medical care was obligated to compensate the seaman for consequential damages.[58] After 1920 the owner would be liable under both the general maritime law and the Jones Act.[59] There was a problem, however, if a seaman died due to the master's negligence in securing proper medical attention. Before 1970 the general maritime law did not recognize a claim for wrongful death in territorial waters.[60] Also, under FELA, which the Jones Act incorporated, a railroad would not ordinarily be obligated to provide medical care to sick employees.[61] Consequently, neither maintenance and cure nor the Jones Act, standing alone, would provide relief if a seaman died due to the vessel owner's neglect in providing medical care. Yet, by combining these two obligations, the Supreme Court held in *Cortes v. Baltimore Insular Line*,[62] that an employer could be liable.[63] The Court explained that the Jones Act is to be liberally construed "in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings."[64] The Court wrote, "A double remedy during life is not without a rational office if the effect of the duplication is to carry the remedy forward for others after death."[65]

Cortes is significant in several respects. It demonstrates a liberal way of integrating the Jones Act with the general maritime law. It also rejects the idea that the Jones Act remedy should not

[58]The Iroquois, 194 U.S. 240, 2009 AMC 834 (1904).

[59]Cortes v. Baltimore Insular Line, 287 U.S. 367, 375, 1933 AMC 9, 12 (1932).

[60]See Moragne v. States Marine Lines, 398 U.S. 375, 1970 AMC 967 (1970).

[61]See Cortes v. Baltimore Insular Line, 287 U.S. 367, 376, 1933 AMC 9, 13 (1932). The Second Circuit had said, "A railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for injury or death resulting from a failure to furnish such treatment." Cortes v. Baltimore Insular Line, 52 F.2d 22, 24; 1931 AMC 1437, 1440 (2d Cir. 1931), rev'd, 287 U.S. 367, 1933 AMC 9 (1932).

[62]287 U.S. 367, 1933 AMC 9 (1932).

[63]287 U.S. at 375-76, 1933 AMC at 13.

[64]287 U.S. at 375. 1933 AMC at 13. Another case where the Court refused to limit the Jones Act by FELA's terms is Cox v. Roth, 348 U.S. 247, 1955 AMC 942 (1955). The Court held that a Jones Act claim survives the death of an individual tortfeasor even though FELA allowed survival actions only against a railroad's receiver. 45 U.S.C. § 57.

[65]287 U.S. at 375, 1933 AMC at 13.

apply if relief might be obtained under the general maritime law.[66] The Court said the remedies are "overlapping"[67] and that a seaman was privileged to "sue indifferently on any one of them."[68] Moreover, the case creates a hybrid remedy when death is caused by failure to provide medical care, one broader than that allowed by the general maritime law or the Jones Act standing alone.

The Supreme Court also developed the unseaworthiness remedy independently of the Jones Act. It transformed unseaworthiness from a negligence-based regime to one of strict liability, and emphasized that "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."[69] In a 1944 case, *Mahnich v. Southern S.S. Co.*,[70] the Court acknowledged that although some cases had required a showing of negligence to support a personal injury claim for unseaworthiness, it held that unseaworthiness is a strict liability remedy. Its main argument was that the Court had supposedly held in *The Osceola*,[71] that no negligence was required.[72] There the Court had said,

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[66]287 U.S. at 375, 1933 AMC at 12.

[67]Id.

[68]Id.

[69]Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498, 1971 AMC 277, 281 (1971) (holding that a single negligent act does not render a vessel unseaworthy); Mitchell v. Trawler Racer, Inc., 362 U.S 539, 550, 1960 AMC 1503, 1512 (1960) (imposing "absolute" liability for injuries caused by unseaworthy conditions).

[70]321 U.S. 96 (1944).

[71]189 U.S. 158 (1903).

[72]321 U.S. at 100. The only case prior to The Osceola holding that unseaworthiness liability was absolute was The H.A. Scandrett, 87 F.2d 708, 1937 AMC 326 (2d Cir. 1937). Mahnich also relied on dicta in other cases. 321 U.S. at 100. In one of the cases relied upon the Court had said,

> Considering the custom prevailing in those waters and other clearly established facts, in the present cause, we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages . . . . The verdict shows that the jury found gasoline had been negligently placed in the can or that through negligence no life preservers were put on board, or that both of these defaults existed, and that as a result of one or both respondent suffered injury without contributory negligence on his part. In effect the charge was more favorable to the petitioner than it could have demanded, and we think no damage could have resulted from the erroneous

> That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.[73]

In 1960 the Court conceded that *Mahnich* was probably wrong but insisted that the precedent was now firmly established. The Court wrote:

> It is arguable that the import of the above-quoted . . . proposition in *The Osceola* was not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness. Support for such a view is to be found not only in the historic context in which *The Osceola* was decided, but in the discussion in the balance of the opinion, in the decision itself (in favor of the shipowner), and in the equation which the Court drew with the law of England, where the Merchant Shipping Act of 1876 imposed upon the owner only the duty to use 'all reasonable means' to 'insure the seaworthiness of the ship.' This limited view of *The Osceola*'s pronouncement as to liability for unseaworthiness may be the basis for subsequent decisions of federal courts exonerating shipowners from responsibility for the negligence of their agents because that negligence had not rendered the vessel unseaworthy . . . . Such a reading of the *Osceola* opinion also finds arguable support in several subsequent decisions of this Court . . . .
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> There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have

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theory adopted by the trial court.

Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259, 2009 AMC 1803, 1805–06 (1922). In that case the trial judge erroneously instructed the jury that the vessel owner could be liable based on Washington's common law for negligence in placing gasoline in a can that usually carried coal oil and was so labeled. The trial court erred in not instructing according to the maritime law instead of the common law. The quoted language means that the error was harmless. "Without regard to negligence," meant without regard to the common-law cause of action for negligence. GILMORE & BLACK, supra note 26 at 391. "The charge [was] more favorable to the petitioner" because contributory negligence was a defense at common law but not under maritime law. At least as late as 1928 the Supreme Court continued to view unseaworthiness as a species of negligence. See Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928).

[73] 189 U.S. at 175.

> developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.[74]

Did the Court overstep its bounds by creating a more liberal remedy than the one devised by Congress? Although this troubled Learned Hand,[75] his was a minority view.

Courts also used the law of unseaworthiness to enlarge the Jones Act remedy. Under FELA as originally adopted, the defendant could raise the defense of assumption of the risk under most circumstances.[76] The Court refused to read this defense into

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[74]Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 546, 550 (1960) (footnote omitted). In Miles v. Apex Marine, 498 U.S. 19, 25 (1990), the Court acknowledged that in Mahnich "this Court transformed the warranty of seaworthiness into a strict liability obligation." The libel in The Osceola alleged among other things that the owners were negligent in supplying suitable and safe appliances. See Steven F. Friedell, *A Lump of Coal—Behind the Scenes of* The Osceola, 34 RUT. L.J. 637, 642 (2003). The trial judge instructed the advisory jury that the evidence led him to believe that the owners were negligent in this regard. Id. at 647. The owners argued that the appliances were safe, id. at 649, and in certifying its questions to the Supreme Court, the Circuit Court of Appeals implicitly reversed the trial court on the issue of unseaworthiness when it wrote, "The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea ...." The Osceola, 189 U.S. 158, 159, 2000 AMC 1207, 1208 (1903).

[75]Gill v. United States, 184 F.2d 49, 57, 1950 A.M.C. 1513, 1526 (2d Cir. 1950) (dissenting opinion). Judge Hand said that since the Jones Act was an exclusive remedy for death under Lindgren, it was "hard to understand" why that should not also be true for non-fatal injuries. He conceded that the Supreme Court would not likely agree. Id. Professor Force has raised a similar concern and argues that "the history and role of the courts in fashioning rights and remedies under the general maritime law" should lead the courts to reject the idea that the unseaworthiness action must move in lock step with the Jones Act. Robert Force, *The Curses of* Miles v Apex Marine Corp.: *The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 785 n. 160 (1995).

[76]The only exception was if injury resulted from a violation of a federal statute promoting employees' safety. Act of April 22, 1908, 35 Stat. 66. See Seaboard Air Line Ry. v. Horton, 233 U.S. 492, 503 (1915). In 1939 Congress abolished FELA's assumption of risk defense where the injury "resulted in whole or in part from the negligence of any of the officers, agents, or employees" of the employer. Act of Aug. 11, 1939, 53 Stat. 1404; 45 U.S.C. § 54. See Fashauer v. New Jersey Transit Rail Operations, 57 F.3d 1269, 1274 (3d Cir. 1995).

the Jones Act.[77] The unseaworthiness cases had already not allowed the defense, because the courts recognized that a seaman, while at sea, is subject to the master's discipline and cannot "withdraw from service and refuse to use tools and appliances which they think dangerous."[78] Recognizing this feature of life at sea, the Court held that the assumption or risk defense did not apply to the Jones Act.

In another case the Court combined elements of the negligence and unseaworthiness remedies to provide relief not available under either alone. After *Mahnich*, a vessel's unseaworthiness provided the basis for a remedy when no negligence could be shown. However, as mentioned, prior to 1970 the courts did not recognize a wrongful death recovery for seamen caused by unseaworthiness when it occurred in territorial waters. The Jones Act provided a wrongful-death remedy, but required a showing of negligence. In a 5-4 decision, *Kernan v. American Dredging Co.*,[79] the Court held that the Jones Act wrongful death remedy applies even without negligence when the death results from the employer's violation of any statute or regulation, even though the statute or regulation is not intended to protect against this type of injury. The Court rejected the fundamental common law rule that statutory violations are pertinent to the negligence issue only if the statute is intended to protect the tort victim from the type of risk to which he was exposed.[80] That rule, typified by the famous case of *Gorris v. Scott*,[81] prevents courts from imposing strict liability.[82] The *Kernan* Court relied on a series of rulings in FELA cases that imposed strict liability, but those cases were limited to the violation of two safety statutes that appeared to be tied to FELA. *Kernan* expanded those holdings to apply to the violation

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[77]The Arizona v. Anelich, 298 U.S. 110, 1936 AMC 627 (1936).

[78]Storgard v. France & Canada S.S. Corp., supra note 10, at 548; The Colusa, 248 F. 21 (9th Cir. 1918).

[79]355 U.S. 426, 1958 AMC 251 (1958).

[80]See Restatement (Second) of Torts § 286.

[81][1874] 9 L.R. Exch. 125 (Eng.). In that case the defendant shipowner violated an order made by the Privy Council that required certain sheep to be kept in pens. Although the sheep washed overboard, the violation did not demonstrate negligence because the order was intended only to prevent contagious diseases among sheep.

[82]See Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 518 (7th Cir. 2007) (Posner, J.).

of any safety statute. In the course of its opinion the Court said, "But it is clear that the general congressional intent was to provide liberal recovery for injured workers, [citation omitted] and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."[83] The Court thereby filled in a gap left by the law of unseaworthiness, allowing the Jones Act to serve as a quasi-unseaworthiness remedy when a statute or regulation is violated.

Procedurally as well, the Court used the various seaman's remedies to give the seaman the best of both worlds. Despite the language in the Jones Act that implied that a jury trial would be available only for the Jones Act claim, the Court held that plaintiffs are entitled to have the unseaworthiness and maintenance and cure claims decided by a jury if they are combined with a Jones Act claim.[84]

III
CONSERVATIVE TRENDS AND THE *MORAGNE* REACTION

Some cases construing FELA and Jones Act took a conservative turn, holding that these statutes preempted a remedy under state law. In a pair of cases decided on the same day, the Supreme Court reversed the decisions of state courts and held that FELA precluded state worker's compensation statutes from taking effect.[85] Over a strong dissent by Justice Brandeis the Court concluded,

> [T]he Federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those

[83]355 U.S. at 432, 1958 AMC at 256.

[84]Fitzgerald v. United States Lines, 374 U.S. 16, 1963 AMC 1083 (1963).

[85]N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147 (1917); Erie R.R. Co. v. Winfield, 244 U.S. 170 (1917).

> instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive.[86]

It would have sufficed for the Court to say that since FELA allowed recovery for negligently inflicted injuries it implicitly denied recovery where negligence could not be shown.[87] But the majority went further and read FELA as occupying the field so that the law would be uniform throughout the country.[88] The seriousness of this holding became clear a month later when, in *New York Central & Hudson River R.R. Co. v Tonsellito*,[89] the Court held that the father of a seventeen-year-old railway worker was denied the right to recover under state common law for the medical expenses he incurred when his son was negligently injured. Had the worker paid his own medical expenses he would have been allowed recovery for those amounts under FELA. But FELA does not contain a provision applicable to minor railway workers.[90] Even Justice Brandeis concurred in the result.[91]

The idea of federal exclusivity took a dramatic turn when the Court applied it to a claim for a seaman's wrongful death. Prior to 1920 there was no federal statute covering wrongful death at sea, but the Supreme Court allowed state wrongful death statutes to provide a remedy.[92] In *Lindgren v. United States*,[93] the Court held

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[86]244 U.S. at 172.

[87]The Court reasoned as much at the end of its opinion in the New York Central case. 244 U.S. at 153.

[88]244 U.S. at 149. Legislative history supported this conclusion. The House Report stated, "A federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union . . . ." H.R. REP. NO. 1386, 60th Cong., at 3 (1908).

[89]244 U.S. 360 (1917). The father also sought recovery for loss of services.

[90]The case arose in New Jersey state court, which allowed the father relief under the "common law," presumably under New Jersey common law. 87 N.J.L. 651, 655 (1915). One wonders if a federal court trying the case would have been able to provide relief under federal common law.

[91]Id. at 362.

[92]Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479 (1923) (death caused before 1920); Western Fuel Co. v. Garcia, 257 U. S. 242 (1921) (same); The Hamilton, 207 U.S. 398 (1907) (death on the high seas). The same was true as to state survival statutes. See Just v. Chambers, 312 U.S. 383 (1941) (applying state survival statute to allow tort suit to someone who was injured while on board vessel as guest;

that when a seaman is killed, the Jones Act precludes a wrongful death claim under state law "either to create a right of action not given by the [Jones Act], or to establish a measure of damages not provided by that Act."[94] In *Lindgren*, a seaman was killed by his employer's negligence in installing equipment on a lifeboat. He died without leaving beneficiaries under the Jones Act. His niece and nephew, his nearest relatives, were not dependent upon him. The administrator of the seaman's estate sought recovery under Virginia's wrongful death statute, which did not require dependency but limited damages to $5,000. The administrator sued only on the grounds of negligence and did not seek relief based on unseaworthiness. The District Court found in favor of the plaintiff, but this was reversed on appeal, and the Supreme Court affirmed. The Court reasoned that prior to the adoption of the Jones Act it had allowed state wrongful death statutes to be applied in admiralty only because Congress had not acted. However, now that the Jones Act provides a wrongful death remedy, that law was "paramount and exclusive."[95]

Had the *Lindgren* Court stopped there it would have been a simple application of the preemption doctrine that the Court had applied in the FELA cases. However, the Court went further. Even though Lindgren had not sought recovery for wrongful death based on unseaworthiness, the Court added that no such claim could be made under state law. It reasoned that prior to the Jones Act, the maritime law provided no right to recover for wrongful death due to unseaworthiness, and the Jones Act did not change this. Further, the Court stressed that the Jones Act allows a seaman who suffers non-fatal injuries the right to elect to sue for unseaworthiness, but that the statute creates no such election in the case of death.[96] As a result, the Jones Act remedy for wrongful death was "necessarily exclusive."[97] Although the discussion

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the guest died afterwards from unrelated causes).

[93]281 U.S. 38 (1930).

[94]Id. at 47.

[95]Id.

[96]Supra text at note 36. The current version of the Jones Act, supra note 36, gives the personal representative an election, presumably to reflect the right under Moragne to recover under the general maritime law.

[97]281 U.S. at 48.

about unseaworthiness was dictum, in 1964 in *Gillespie v. United States Steel Corp.*,[98] the Court held that state wrongful death statutes cannot provide a seaman's survivors with a recovery for unseaworthiness.

Gillespie precluded a wrongful death recovery for survivors of seamen who died from injuries in territorial waters as a result of non-negligently created unsafe conditions.[99] This gap in liability provided one of the bases for Justice Goldberg's dissent in *Gillespie*,[100] and was echoed a few years later when the Supreme Court overturned precedent and held in *Moragne v. States Marine Lines*,[101] "[T]hat an action does lie under general maritime law for death caused by violation of maritime duties."[102]

Although *Moragne* did not overrule *Lindgren* or *Gillespie*, it refused to read the Jones Act as precluding other federal remedies.[103] Moreover, *Moragne* left open for future resolution the measure of damages and the beneficiaries of the newly-created general maritime law remedy.[104] It said that the courts could fashion answers by looking to the Death on the High Seas Act[105] ("DOHSA") and state wrongful death statutes for "persuasive analogy for guidance."[106] It implied that no statute would be determinative.

Although *Moragne* involved the death of a longshoreman who was killed in territorial waters, there was no doubt that the decision was intended to apply also to seamen.[107] A few years after *Moragne* the Court held in another case involving the death of a longshoreman that the *Moragne* remedy included a recovery for loss of society.[108]

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[98]379 U.S. 148 (1964).

[99]For death due to injuries on the high seas, the Death on the High Seas Act adopted in 1920, allows recovery of pecuniary losses. 46 U.S.C. §§ 30301–30308.

[100]Gillespie v. United States Steel Corp., 379 U.S. 148, 159 (Goldberg, J., dissenting).

[101]Moragne v. States Marine Lines, 398 U.S. 375, 1970 AMC 967 (1970).

[102]398 U.S. at 409, 1970 AMC at 993.

[103]398 U.S. at 396, n. 12; 1970 AMC at 983, n. 12.

[104]398 U.S. at 406-08, 1970 AMC at 992–93.

[105]46 U.S.C. §§ 30301–30308.

[106]398 U.S. at 408, 1970 AMC at 993.

[107]See 398 U.S. at 395–96, 1970 AMC at 983. The Court acknowledged this in Miles v. Apex Marine Corp., 498 U.S. 19, 30, 1991 AMC 1, 9 (1990).

[108]Sea-Land Servs. v. Gaudet, 414 U.S. 573, 1973 AMC 2572 (1973).

IV
LIMITING *MORAGNE*, CRITIQUE OF *MILES*

Later decisions by the Supreme Court cut the promise of *Moragne* short. In *Mobil Oil Corp. v. Higginbotham*,[109] the Court held that DOHSA, which limits wrongful death recovery to pecuniary losses, is the exclusive federal remedy for cases that fall within the terms of that statute. The Court reasoned, "[W]hen [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."[110] More importantly, in *Miles v. Apex Marine Corp.*,[111] the Court ruled that neither loss of society nor lost future earnings could be compensated when a seaman's wrongful death was caused by unseaworthiness. It reasoned that when Congress adopted the Jones Act it must have known that cases construing FELA had denied recovery of damages for loss of society and lost future income.[112] Therefore, these damages cannot be recovered under the Jones Act. As for the unseaworthiness claim, the Court reasoned that it would inappropriate for a court administering a strict-liability remedy to allow a more liberal recovery than Congress had allowed for negligence claims. For this latter proposition, *Miles* relied on the Court's reasoning in *Higginbotham*.[113]

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[109]436 U.S. 618, 1978 AMC 1059 (1978).

[110]436 U.S. at 625, 1978 AMC at 1065. For criticism of Higginbotham, see John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law*, 24 J. MAR. L. & COM. 249 (1993).

[111]498 U.S. 19, 1991 AMC 1 (1990).

[112]The Court relied on Mich. Central R.R. Co. v Vreeland, 227 U.S. 59 (1913) which held that FELA did not support a claim for loss of society. The survival provision, 45 U.S.C. § 59, provides, "Any right of action given by this Act to a person suffering injury shall survive to his personal representative . . ." A 1915 case construed this to mean,

> that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative.

St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915).

[113]498 U.S. at 31.

Miles is a difficult case. In one sense *Miles* looks a lot like *Higginbotham.* The plaintiffs in these cases were seeking more than could be obtained under DOHSA or the Jones Act. However, the issues in the two cases were not the same. DOHSA allows no choice of remedy for a general maritime law claim.[114] Had the *Higginbotham* Court allowed recovery of loss of society for death on the high seas, the pecuniary damage limitation set by DOHSA would have been "meaningless." *Miles* does not present that problem. The Jones Act, by allowing an election, authorizes extra-statutory remedies.[115] Consequently, it would not thwart Congress' will if damages for all wrongful deaths occurring in territorial waters were determined under the general maritime law. Just as maintenance and cure is not limited by the principles governing Jones Act claims,[116] there is no reason to assume that the unseaworthiness remedy must conform to the limits of the Jones Act.

Limits on recovery under the unseaworthiness claim ought to be determined by policy, and, as the Court acknowledged, allowing claims for lost future earnings promotes efficiency.[117] Liability for unseaworthiness is based on the idea that courts can reduce the likelihood of harm by imposing the cost of injuries on the parties best able to prevent the loss.[118] Courts that treat the Jones Act remedy liberally ought not to freeze the general maritime law remedies to the way they existed in 1920.

Even if it does not control, the Jones Act can be a source of policy. However, the Jones Act does not expressly exclude either loss of society or lost future earnings. FELA, and the version of

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[114]For a seaman's death on the high seas, two wrongful death actions can be brought, a negligence action under the Jones Act, and an unseaworthiness action under DOHSA. See Peace v. Fidalgo Island Packing Co., 419 F.2d 371, 1970 AMC 1580 (9th Cir. 1969); see also Kernan v. Am. Dredging Co., 355 U.S. 426, 430 n. 12, 1958 AMC 251, 255 (1958).

[115]Atl. Sounding Co. v. Townsend, 557 U.S. 404, 413, 2009 AMC 1521, 1531 (2009).

[116]See supra text at notes 56 to 65.

[117]498 U.S. at 36.

[118]FELA has a similar goal. See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 555, 1994 AMC 2113, 2130 (1994); H.R. REP. NO. 60–1386, at 2 (1908); *Liability of Employers*, supra note 39, at 78 (statement of Samuel Gompers, President of the American Federation of Labor).

the Jones Act that the *Miles* court considered,[119] simply provide that the injured are entitled to "damages."[120] The Court, in its early interpretation of these statutes, not Congress itself, is responsible for excluding loss of society and lost future earnings.[121] The Court could have avoided a conflict by re-interpreting the Jones Act and FELA in keeping with the idea that Congress intended for these statutes to be interpreted liberally in favor of injured workers.[122] Alternatively, it could have exercised its authority to develop the general maritime law and leave for another day whether to re-interpret the statutes.

Perhaps the strongest argument in favor of *Miles* is that it creates a uniform treatment for all seamen's wrongful death claims. Whether from injuries on the high seas or while occurring in territorial waters, these claims now provide relief only for pecuniary loss. However, uniformity in maritime death cases has not been attained. Non-seamen's deaths give rise to recovery for loss of society and, in some circumstances, even recovery of lost future earnings.[123] There is no reason why families of seamen, the wards of the admiralty, should be treated less favorably.

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[119]46 U.S.C. app. § 688(a) (1988) (prior to recodification). The current version merely provides that the seaman or personal representative may bring an action at law and incorporates FELA.

[120]45 U.S.C. §§ 51, 52, 53, 54. As for the claim for lost future earnings, this ought to come within the terms of 45 U.S.C. § 59. An injured person can recover for lost future earnings, so these earnings ought to be within the "right of action" provided by 45 U.S.C. § 51.

[121]See supra note 112. For criticism of this aspect of the decision, see Robertson, supra note 21, at 510–13; Thomas C. Jr. Galligan, *Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk*, 71 LA. L. REV. 787, 796–97 (2011). Robertson argues that Miles disregarded the teaching of The Arizona v. Anelich, 298 U.S. 110, 1936 AMC 627 (1936), that courts should not read into the Jones Act a defensive doctrine that was not expressly part of FELA. Galligan argues that denying recovery for loss of society is "inconsistent with modern reality and values." Id. at 796.

[122]See supra text at notes 64, 83.

[123]Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 1996 AMC 305 (1996) (state wrongful death and survival actions can supplement the relief available when death occurs in territorial waters to those who are neither seamen or longshore workers). As for longshore workers killed in territorial waters, Gaudet, supra n. 108, held that their survivors are entitled to recover loss of society. Miles preserved this right. 498 U.S. at 31. 1991 AMC at 10. See Nieves v Cooper Marine & Timberlands Corp., 2017 WL 3473807 (E.D. Ark. 2017).

More fundamentally, uniformity in this context is of limited value. In general, uniform sets of rules make it easier for courts to administer the law, and provide certainty for parties in planning their transactions. Neither of these concerns has much weight in this context. Having different rules of damages would complicate a court's task only in the unusual case where it is unclear if the wrongful act that caused death occurred on the high seas or in territorial waters. Similarly, it is hard to imagine that a lack of uniformity in measuring damages would impede commerce. If, at the margin, a rule of greater liability for wrongful death would increase safety, this would be in the public interest.

Some courts have extended *Miles* to deny recovery of loss of society when a seaman is negligently killed by a non-employer.[124] They have done so to promote uniformity without explaining why the advantages of treating employers and non-employers uniformly outweigh the disadvantages of not compensating family members for their loss of society. Because the law of seamen's injuries is not static, that law might change in ways that are unfavorable to seamen. However, when making a change, courts ought to be guided by policy.

V
PUNITIVE DAMAGES

One of the baffling developments in the wake of *Miles* has been some courts' refusal to allow punitive damages in Jones Act and unseaworthiness suits.[125] Nothing in *Miles* addresses the punitive damages issue, and nothing in FELA or the Jones Act limits recovery to compensatory damages.

[124]Scarborough v. Clemco Indus., 391 F.3d 660, 2005 AMC 96 (5th Cir. 2004), cert. denied, 544 U.S. 999 (2005) (denying claims in a wrongful death suit for loss of society and for non-pecuniary damages); Davis v. Bender Shipbuilding & Repair Co., 27 F.3d 426, 1994 AMC 2587 (9th Cir.), cert. denied, 513 U.S. 1000 (1994) (denying claims for lost future earnings). But see Collins v. A.B.C. Marine Towing, 2015 AMC 2491 (E.D. La. 2015) (refusing to follow Scarborough on the grounds that it had been effectively overruled by the Supreme Court's decision in Atl. Sounding Co. v. Townsend, 557 U.S. 404, 2009 AMC 1521 (2009), which allows claims for punitive damages in appropriate situations involving maintenance and cure claims).

[125]See supra note 9.

It will be helpful to treat non-fatal personal injury cases separately from wrongful death cases. The case for allowing punitive damages in non-fatal injury situations is simple. Although FELA and the Jones Act are silent on the issue, neither statute was written on a blank slate. FELA added to the federal common law obligations that a railroad owed its employees,[126] and federal common law allowed punitive damages.[127] Similarly, the Jones Act modified the maritime law which also allowed punitive damages.[128] As the *Townsend* Court reasoned, Congress' silence on the issue ought to lead one to conclude that it did not intend to change the existing law.[129] This conclusion is supported by the policy underlying the two statutes. They were intended to increase the rights of injured plaintiffs, not to restrict them. Further, the threat of punitive damages furthers the Congressional purpose of deterring wrongdoing.

The issue is more complicated in the wrongful death area. Prior to the adoption of FELA and the Jones Act, neither federal common law[130] nor maritime law[131] recognized a claim for wrongful death. However, federal courts awarded wrongful death damages in accordance with governing state statutes.[132] State statutes varied, and courts differed over whether they permitted

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[126]See supra note 39 and accompanying text.

[127]E.g., Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885); Philadelphia, W. & B.R. Co. v. Quigley, 62 U.S. (21 How.) 202 (1858); Day v. Woodworth, 54 U.S. (11 How.) 363 (1851). Several cases are collected at Kozar v. Chesapeake & O. Ry., 30 F. Supp. 335, 353 (W.D. Mich. 1970), rev'd 449 F.2d 1238 (6th Cir. 1971). For a similar argument, see Robertson, supra note 8 at 495. See also, Force, supra note 8 at 790–93.

[128]See Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 411, 2009 AMC 1521, 1525 (2009).

[129]In Townsend the Court held that punitive damages are available in maintenance and cure cases and said,

> Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.

557 U.S. at 424, 2009 AMC at 1538. In a footnote, the Court left open whether punitive damages were available in Jones Act and unseaworthiness cases. Id. at n. 12.

[130]Insurance Co. v. Brame, 95 U.S. 754 (1877).

[131]The Harrisburg, 119 U.S. 144 (1886).

[132]See e.g., The Hamilton, 207 U.S. 398 (1907) (death on the high seas); Texas & Pac. Ry. Co. v. Cox, 145 U.S 593 (1892) (death of railway employee).

punitive damages.[133] Although some statutes specifically allowed punitive damages,[134] where statutes were silent, some courts interpreted them as allowing them,[135] others did not.[136] In recent years a slight majority of states having silent statutes have construed them as limiting recovery to compensatory damages, but the trend seems to be moving toward allowing punitive damages.[137]

The absence of an express provision for punitive damages in the wrongful death and survival provisions of FELA leaves one in doubt as to Congress' intention. The Sixth Circuit Court of Appeals opinion in *Kozar v. Chesapeake & O. Ry Co.*,[138] is the leading case denying recovery of punitive damages under FELA.[139] *Kozar* reasoned that the federal common law cases that allowed punitive damages did not involve "a railroad employee or an employee's administrator suing his employer for injuries or death on the job."[140] That is a weak argument. The federal common law imposed a tort duty upon railroads toward their employees.[141] Breach of the duties imposed by the fellow-servant

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[133]See Annotation, Exemplary or Punitive Damages as Recoverable in Action for Death, 94 A.L.R. 384 (1935).

[134]E.g., Linck's Adm'r v. Louisville & N. R.R Co., 107 Ky. 370 (1899).

[135]Union Ry. Co. v. Carter, 129 Tenn. 459 (1914) (decedent was shot and killed while trying to avoid arrest for stealing a ride); Matthews v. Warner's Adm'r, 70 Va. 570 (1877) (construing statute that said jury is to award such damages as "may seem fair and just").

[136]Gohen v. Texas Pac. Ry. Co., 10 F. Cas. 536 (C.C.W.D. Tex. 1876) (No. 5,506) (construing Texas statute).

[137]1 STEIN ON PERSONAL INJURY DAMAGES §3:33, Westlaw (3d ed., database updated Oct. 2017).

[138]Kozar v. Chesapeake & O. Ry., 449 F.2d 1238 (6th Cir. 1971).

[139]See Miller v. Am. President Lines, 989 F.2d 1450, 1993 AMC 1217 (6th Cir.), cert. denied 510 U.S. 915 (1993) (involving the Jones Act); Wildman v. Burlington N. R.R. Co., 825 F.2d 1392 (9th Cir. 1987); Kopczynski v. The Jacqueline, 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) (involving the Jones Act). In McBride v. Estis Well Serv., 768 F.3d 382, 390 (5th Cir. 2014), cert. denied, 135 S.Ct. 2310 (2015), the court said, "Every circuit court case on the subject holds that punitive damages are not recoverable under FELA because those losses are non-pecuniary." It cited Miller and Wildman. See also Phillip M. Smith, *A Watery Grave for Unseaworthiness Punitive Damages: McBride v. Estis Well Service, L.L.C.*, 76 LA. L. REV. 619 (2015) (arguing that punitive damages should not be available for unseaworthiness because they should not be available under the Jones Act or FELA).

[140]449 F.2d at 1240–41.

[141]Supra note 39 and accompanying text.

doctrine were "personal wrongs" of the employer.[142] Had a railroad intentionally, or through wanton and willful misconduct, failed to provide a safe place to work resulting in personal injury, there is no doubt that the federal common law would have allowed punitive damages.

Kozar also said that although FELA was not intended to "take away any 'remedy' available at common law to an injured employee," punitive damages are not a "remedy."[143] The court is wrong on this point as the Supreme Court has said that punitive damages are a remedy.[144]

Kozar also quoted several opinions that seemed to suggest that FELA only allows pecuniary damages,[145] but none of those cases held that punitive damages were not allowed, and the courts used the term "pecuniary damage" to distinguish recovery for loss of society and emotional damage.[146] A rational legislature could

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[142]Baltimore and O. R.R., v. Baugh, supra note 39, at 387.

[143]449 F.2d at 1240.

[144]Atlantic Sounding Co. v. Townsend, 557 U.S. at 420, 422, 2009 AMC at 1534–35.

[145]449 F.2d at 1241–42.

[146]This was true, for example, in American R.R. Co. v. Didricksen, 227 U.S. 145 (1913) where the Court said,

> The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of *pecuniary* benefits by the wrongful death of the injured employee. *The damage is limited strictly to the financial loss thus sustained.* The court below went beyond this limitation by charging the jury that they might, in estimating the damages, 'take into consideration the fact that they are the father and mother of deceased, and the fact that they are deprived of his society and any care and consideration he might take of them or have for them during his life.' [5 Porto Rico Fed. Rep. 408.]
>
> The loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this.

Id. at 149-50 (emphasis added).

In one early case a court said,

> It is clear that under the Act of 1908, which was in force at the time this accident occurred in 1909, in case of an injury resulting in the death of an employe, no provision was made for the survival of the right of action of the injured employe himself . . . . Such survival of the injured employe's right of action was expressly

conclude that a survivor's grief and other emotional loss are too speculative to warrant compensation, but that it is appropriate to deter egregious wrongdoing through awards of punitive damages.

The Supreme Court has given guidance about how to apply FELA when the statute is silent on a particular issue. In *Consolidated Rail Corp. v. Gottshall*,[147] the Court had to decide whether FELA allowed claims for negligent infliction of emotional distress. FELA, while allowing recovery for "injury," says nothing about these types of claims. The Court held that such claims were allowed provided that there was either impact, or that the victim was within the zone of danger. The Court looked to the development of the common law in 1908 when FELA was adopted. Even though the narrower "impact" test was more common in 1908, and even though the zone of danger test was at the time of the Court's decision followed in only 14 jurisdictions, the Court determined that the zone of danger test was more consistent with FELA's twin goals of compensating victims and preventing future harms.[148] The Court rejected the more liberal "bystander" rule because no state had adopted it in 1908.[149] Seen in this light, courts ought to allow punitive damages in FELA

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provided for by section 2 of the later amendatory Act of April 5, 1910 [45 U.S.C. § 59].

I also think it clear that under the Act of 1908, before the amendment of 1910, in an action brought for the statutory beneficiaries to recover damages for the death of an employe, the recovery is limited to the pecuniary injury or loss sustained by the beneficiaries from the death of the deceased, and that the measure of damages is compensation for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise, from the continued life of the deceased, *excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors and suffering of the deceased.*

Cain v. Southern Ry. Co., 199 F. 211, 212 (C.C.E.D. Tenn. 1911). It is hard to know whether the court meant that punitive damages would not be allowed—they were not requested—or whether they would be allowed under the 1910 act. In drafting the 1910 act the House of Representatives rejected an amendment that would have precluded punitive damages from the survival statute. 45 Cong. Rec. 2260 (1910). The Ninth Circuit has concluded that the legislative history of the 1910 statute is "ambiguous and inconclusive" as to the availability of punitive damages. Wildman v. Burlington N. R.R. Co., 825 F.2d 1392, 1395 (9th Cir. 1987).

[147]512 U.S. 532, 1994 AMC 2113 (1994).

[148]512 U.S. at 555, 1994 AMC at 2130.

[149]512 U.S. at 556, 1994 AMC at 2131.

wrongful death cases. Even though a minority of states allowed punitive damages in such cases in 1908 and even if that is the minority rule today, it is more consistent with the deterrent goal of FELA.

Even if the Supreme Court were to hold that FELA does not allow for punitive damages, and even if the same were true of the Jones Act, unseaworthiness cases should be treated differently. The *Miles* syllogism about the relationship between the Jones Act and the unseaworthiness claims does not work here. The syllogism supposes that if Congress does not provide a remedy for a negligence claim, courts are not free to provide that remedy when negligence is not shown. Although unseaworthiness is a strict liability claim, when unseaworthiness results from wanton and willful misconduct there is no reason to deny a punitive damage claim.

VI
CONCLUSION

What would have happened if the Supreme Court in *Chelentis* had given the La Follette Act the intent that Congress and the Departments of Labor and Commerce had intended: to overrule *The Osceola* and allow a suit for negligence for personal injuries?[150] In that case, it is almost certain that Congress would not have passed the Jones Act. As a result, parties would not obtain a jury trial in federal court in the absence of diversity. That would have hurt most plaintiffs. On the other hand, because the La Follette Act lacked a wrongful death provision, state wrongful death laws would have continued to apply, allowing at least some survivors recoveries denied them by *Lindgren*, *Gillespie*, and *Miles*. Punitive damages would have been allowed, consistent with the general maritime law. Federal and state courts would have remained free to develop the maritime law of negligence, and unseaworthiness might still have become a strict liability regime.

[150]See supra note 26 and accompanying text.

It is hard to imagine the law without the Jones Act. Nonetheless, it seems useful to engage in this alternate history because Congress adopted the Jones Act to do what it failed to accomplish in 1915, to fix the result in *The Osceola.*[151]

Two trends have been at work since 1920. One has been a liberal effort to improve the seamen's lot, reading the Jones Act as reinforcing the judiciary's designs to protect seamen. The other has read the Jones Act as limiting additional remedies. This latter trend reached its peak in *Miles* when it declared,

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.[152]

This article suggests that neither the Jones Act nor FELA are overly dominating. They provide little detail. Nor are the waters today any more crowded than they were when seamen injured by their own negligence and without their employers' fault were allowed full recovery of maintenance and cure,[153] when the Court fashioned a wrongful death remedy when a seaman died due to lack of proper medical care,[154] when unseaworthiness became a strict liability remedy,[155] or when those injured by intentional wrongdoing were allowed to sue for "negligence."[156] The *Miles* Court felt constrained not by statutes, but by the Court's statutory interpretations. When those interpretations no longer appear justified, they should be re-examined, and when appropriate, overruled. Until that happens, courts should once again view statutes as providing guidance, but not control, over the development of the general maritime law.

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[151]See supra text at note 26.
[152]498 U.S. at 36.
[153]See supra text at note 56.
[154]See supra text at note 62.
[155]See supra text at note 70.
[156]See supra text at note 51.