New York Forum

Standard Club

People Claims

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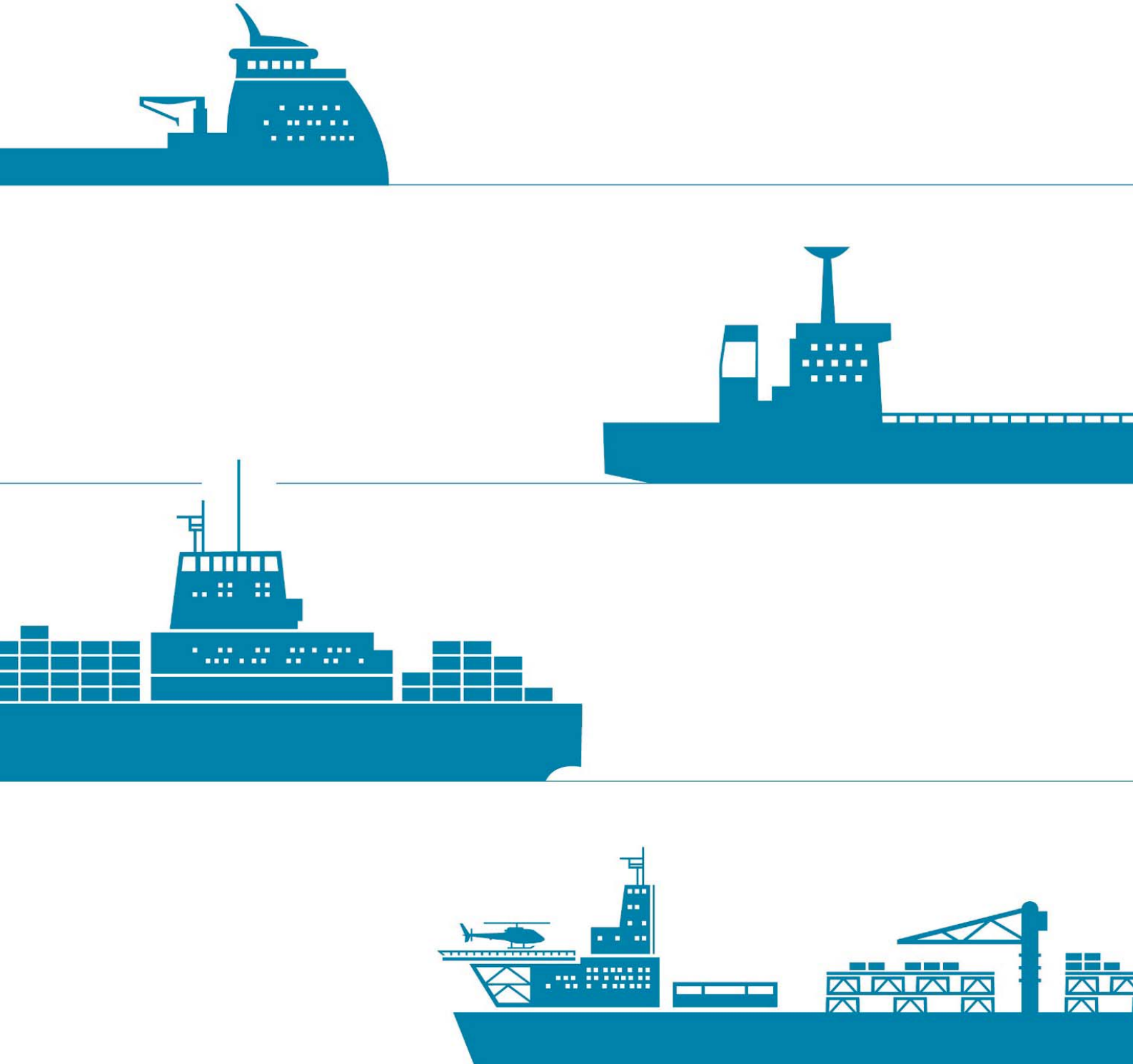

STANDARD CLUB New York Forum

7 June 2018

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PEOPLE CLAIMS

Agenda item no

1

Claims handling after the punitive damages decision in the Ninth Circuit

Batterton v. Dutra Group
880 F.3d 1089 (9th Cir. 2018)

Case Summary

To understand the significance of this case it is important to understand previous decisions regarding punitive damage and maritime law. In 1970, the Supreme Court decided *Moragne v. States Marine Lines*, Inc., 398 U.S. 375. In that case a longshoreman was killed in state waters and the crewmember's widow sued for wrongful death on an unseaworthiness claim. The Supreme Court created a general maritime law unseaworthiness wrongful death action in territorial water. The decision did not address what remedies were available for this cause of action or who may recover as beneficiary. Thus the issue was left to percolate in the circuits.

In 1987, the 9th circuit decided *Evich v. Morris*, 819 F. 2d 256 (9th Cir. 1987). In this case a seaman was killed in Alaska state waters. A non-dependent brother sued for future wages and punitive damages on an unseaworthiness claim. The Ninth Circuit ruled non-dependents could recover for future earnings and punitive damages.

In 1990, the Supreme Court decided *Miles v. Apex Marine Corp.*, 498 U.S. 16. In *Miles*, a seaman was killed by a fellow crewmember in port and the crewmember's widow sued for wrongful death on an unseaworthiness claim. The court explicitly held that a *Moragne* action applied to seaman. The Court held that loss of society (i.e. non-pecuniary) damages were not recoverable by a widow on a *Moragne* action. The rationale was that the Jones Act allows recovery only for pecuniary loss. Note that pecuniary damages are those damages which are not readily quantified or valued in money (i.e. pain and suffering or loss of society).

The conundrum is that after the *Miles* decision was issued, the Supreme Court had ruled that only pecuniary losses were available for wrongful death suits. However, the Ninth Circuit decision of *Evich* held that seaman can get punitive damages, which are generally considered non-pecuniary damages. In 1994, *Sutton v. Earles* was decided in the Ninth Circuit. 26 F.3d 903. That decision concerned teenagers who were killed when their jet ski struck a Navy mooring. The court held that loss of society (i.e. non-pecuniary) damages and future earnings were recoverable by parents on a *Moragne* action. This distinguished *Miles* as applying only to seaman.

In 2009, the Supreme Court took the case to resolve a post-*Miles* split with the Fifth Circuit. In *Atlantic Sound Co., Inc. v. Townsend* a deckhand on a tugboat was injured and the deckhand's employer refused to pay maintenance and cure. The district court allowed punitive damages on the maintenance and cure claim, following the pre-*Miles* 11th Circuit precedent. On appeal, the Court reasoned that the *Miles* restriction to Jones Act remedies

does not apply to maintenance and cure, because maintenance and cure predated the Jones Act, and the Jones Act doesn't address maintenance and cure or its remedies. Since the Jones Act is essentially remedy-granting in nature, it did not take away from age-old maintenance and cure and punitive damages.

Finally, in 2014 the Supreme Court decided *McBride v. Estis Well Service*. 768 F.3d 382. In that case, a seaman was killed and others were injured on an oil rig in territorial waters. The plaintiffs brought a general maritime law claim for unseaworthiness seeking punitive damages. At the appellate level, the court followed Townsend and found that the *Miles* restriction did not apply the unseaworthiness claims. The Supreme Court panel reversed this decision, leaning heavily on FELA for the proposition that the Jones Act controls remedies for wrongful death of a seaman.

In *Batterton v. Dutra Group*, plaintiff Batterton worked as seaman deckhand on the Dutra fleet. Batterton was working on a scow, pumping air into compartment. Compartment being compressed lacked exhaust system and the hatch blew open, crushing Batterton's hand. Batterton sued Dutra in California state court with the following causes of action: 1) Jones Act Negligence; 2) Maintenance and cure; and 3) Unseaworthiness. Batterton also included a claim of punitive damages for unseaworthiness, arguing that the compartment should have had an exhaust system and that pumping air into closed compartment without proper ventilation/exhaust system was grossly negligent. Dutra moved to strike/dismiss punitive damages from complaint, arguing that the decision in *Miles* bars pecuniary damages. Batterton argued that the *Miles* decision was restricted to wrongful death. The district court founds that punitive damages were available and this was affirmed by the Ninth Circuit. The Ninth Circuit also held that punitive damages are not "non-pecuniary" under *Miles*. The court agreed that *Miles* taken alone might be read to suggest bar to punitive damages, but Townsend means that *Miles* should be read narrowly and "non-pecuniary" does not include punitive damages. The holding for *Dutra* is that seamen's may recover punitive damages on unseaworthiness claims, whether for wrong death claims or for personal injury. The Ninth circuit has thus officially split with the Fifth Circuit on this issue.

What does this mean?

- The following jurisdictions are defendant friendly in regards to punitive damages – First, Fifth or Sixth Circuits
- For those who have cases in the Ninth Circuit, punitive damages are a real possibility.

Items for discussion:

1. How do the above decisions influence Jones Act crew claim handling?

Enclosures to Tab 1:

- Court Decision from *Batterton v. Dutra Grp.*

User Name: Rebeca Hamra
Date and Time: Sunday, May 13, 2018 10:14:00 PM EDT
Job Number: 66621238

Document (1)

1. *Batterton v. Dutra Grp., 880 F.3d 1089*
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   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Neutral
As of: May 14, 2018 2:14 AM Z

Batterton v. Dutra Grp.

United States Court of Appeals for the Ninth Circuit

February 8, 2017, Argued and Submitted, Pasadena, California; January 23, 2018, Filed

No. 15-56775

Reporter
880 F.3d 1089 *; 2018 U.S. App. LEXIS 1627 **; 2018 AMC 1; 2018 WL 505256

CHRISTOPHER BATTERTON, Plaintiff-Appellee, v. DUTRA GROUP, Defendant-Appellant.

Subsequent History: Motion granted by Batterton v. Dutra Grp., 2018 U.S. App. LEXIS 5665 (9th Cir. Cal., Mar. 5, 2018)

Rehearing denied by, Rehearing, en banc, denied by Batterton v. Dutra Group, 2018 U.S. App. LEXIS 11420 (9th Cir. Cal., May 2, 2018)

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:14-cv-07667-PJW. Patrick J. Walsh, Magistrate Judge, Presiding.

Batterton v. Dutra Grp., 2014 U.S. Dist. LEXIS 189871 (C.D. Cal., Dec. 15, 2014)

Disposition: AFFIRMED.

Core Terms

punitive damages, unseaworthiness, damages, maritime, maritime law, loss of society, wrongful death, pecuniary loss, maintenance and cure, injuries, non-pecuniary, holds, ship, wrongful death action, cause of action, future earning, unavailable, pecuniary, survival, limits, vessel, cases, Seas

Case Summary

Overview

HOLDINGS: [1]-On interlocutory appeal, the court determined that punitive damages were awardable to seamen for their own injuries in general maritime unseaworthiness actions. By implication, Atlantic Sounding Co. v. Townsend held that Miles v. Apex Marine Corp. did not limit the availability of remedies in actions other than maintenance and cure under general maritime law, which included unseaworthiness claims; [2]-Miles did not implicitly overturn Evich v. Morris, in which the court squarely held that punitive damages were available under general maritime law for claims of unseaworthiness; [3]-Pursuant to the FELA, the Death on the High Seas Act, and the Jones Act, wrongful death was a statutory cause of action. Statutory limitation of survivors' damages to "pecuniary loss" had no application to general maritime claims by living seamen for injuries to themselves.

Outcome
Order affirmed.

LexisNexis® Headnotes

Admiralty & Maritime Law > ... > Maritime Tort Actions > Negligence > Damages

Admiralty & Maritime Law > ... > Maintenance & Cure > Damages > Punitive Damages

Admiralty & Maritime Law > Maritime Workers' Claims > Unseaworthiness

Admiralty & Maritime Law > Maritime Workers' Claims > Unseaworthiness > Damages

HN1[] **Negligence, Damages**

Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure. Unseaworthiness is a general maritime cause of action. Atlantic Sounding Co. v. Townsend reads Miles v. Apex Marine Corp. as limiting the availability of damages for loss of society and lost

future earnings and holds that Miles does not limit the availability of punitive damages in maintenance and cure cases. By implication, Townsend holds that Miles does not limit the availability of remedies in other actions "under general maritime law," which includes unseaworthiness claims.

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act

Admiralty & Maritime Law > Maritime Personal Injuries > Maritime Death Actions > Wrongful Death & Survival

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure

Admiralty & Maritime Law > Maritime Workers' Claims > Unseaworthiness

HN2[] **Maritime Workers' Claims, Jones Act**

Starting with Lord Campbell's Act, and continuing through the *Federal Employers' Liability Act*, the *Death on the High Seas Act*, and the *Jones Act*, wrongful death is a statutory cause of action. There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally limited by statute to their resulting "pecuniary loss." These limitations, based on the restrictive recoveries permitted for wrongful death, have no application to general maritime claims by living seamen for injuries to themselves. The Atlantic Sounding Co. v. Townsend court made this distinction when addressing maintenance and cure actions, and there is no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable. The purposes of punitive damages, punishment and deterrence, apply equally to both of these general maritime causes of action. Nor are punitive damages compensation for a pecuniary or non-pecuniary "loss." They are not compensation for loss at all.

Summary:

SUMMARY*

Maritime Law

Affirming the district court's denial of the defendant's motion to strike a prayer for punitive damages, the panel held that punitive damages are awardable to seamen for their own injuries in general maritime unseaworthiness actions.

Disagreeing with the Fifth Circuit, the panel concluded that *Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)*, did not implicitly overrule the holding of *Evich v. Morris, 819 F.2d 256 (9th Cir. 1987)*, that punitive damages are an available remedy for unseaworthiness claims.

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Robert S. Peck and Jeffrey R. White, Center for Constitutional Litigation P.C., Washington, D.C.; Larry A. Tawwater, President, American Association for Justice, Washington, D.C.; for Amicus Curiae American Association for Justice.

Judges: Before: Sidney R. Thomas, Chief Judge, and Andrew J. Kleinfeld and Jacqueline H. Nguyen, Circuit Judges. Opinion by Judge Kleinfeld.

Opinion by: Andrew J. Kleinfeld

Opinion

[*1090] KLEINFELD, Senior Circuit Judge:

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

We address the availability of punitive damages for unseaworthiness.

This case comes to us on a *28 U.S.C. § 1292(b)* certification for interlocutory appeal. The district court certified the appeal, and we granted permission for it. District courts within our circuit have divided on the substantive issue,[1] as have the circuits,[2] and the issue is of considerable importance in maritime law.

Facts

The case comes **[**3]** to us on the pleadings and nothing else. The district court denied a motion to strike the portion of the prayer seeking punitive damages for unseaworthiness. We therefore take our facts from the complaint. They are not proved, and we intimate no view as to whether punitive damages may ultimately turn out to be appropriate.

The plaintiff, Christopher Batterton, was a deckhand on a vessel owned and operated by the defendant, Dutra Group. While Batterton was working on the vessel in navigable waters, a hatch cover blew open and crushed his left hand. Pressurized **[*1091]** air was being pumped into a compartment below the hatch cover, and the vessel lacked an exhaust mechanism to relieve the pressure when it got too high. The lack of a mechanism for exhausting the pressurized air made the vessel unseaworthy and caused permanent disability and other damages to Batterton.

Analysis

The only question before us is whether punitive damages are an available remedy for unseaworthiness claims. We answered it in *Evich v. Morris*.[3] That would be the end of the case, except that Dutra contends, and the Fifth Circuit agrees,[4] that the later Supreme Court decision in *Miles v. Apex Marine Corp*.[5] implicitly overrules **[**4]** *Evich*.

In *Evich* we squarely held that "[p]unitive damages are available under general maritime law for claims of unseaworthiness, and for failure to pay maintenance and cure."[6] We distinguished *Jones Act* claims, where punitive damages are unavailable.[7] The standard for punitive damages, we held, was "conduct which manifests 'reckless or callous disregard' for the rights of others . . . or 'gross negligence or actual malice [or] criminal indifference.'"[8]

Evich was a wrongful death case, not an injury case.[9] But we did not speak to whether there might be any distinction regarding the availability of punitive damages according to whether the seaman had died. Generally, the availability of damages is more restricted in wrongful death cases than in injury cases. So without authority to the contrary, we have no reason to distinguish *Evich* and limit its holding to wrongful death cases. No party has suggested that we do so.

Under *Miller v. Gammie*,[10] we must follow *Evich* unless it is "clearly irreconcilable" with the Supreme Court's decision in *Miles*.[11] *Miles* holds that loss of society damages are unavailable in a general maritime action for the wrongful death of a seaman and that lost future earnings **[**5]** are unavailable in a general maritime survival action.[12] That is because wrongful death

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[1] *Compare, e.g.,* *Rowe v. Hornblower Fleet, No. C-11-4979 JCS, 2012 U.S. Dist. LEXIS 164402, 2012 WL 5833541, at *900 (N.D. Cal. Nov. 16, 2012)* *and* ***Wagner v. Kona Blue Water Farms, LLC, 2010 A.M.C. 2469, 2483 (D. Haw. Sept. 13, 2010)*** *with* *Jackson v. Unisea, Inc., 824 F. Supp. 895, 897-98 (D. Alaska 1992)* *and* *Complaint of Aleutian Enter., Ltd., 777 F. Supp. 793, 796 (W.D. Wash. 1991)*.

[2] *Compare* ***Evich v. Morris, 819 F.2d 256, 258 (9th Cir. 1987)***, *overruling on other grounds acknowledged by* *Saavedra v. Korean Air Lines Co., 93 F.3d 547, 553-54 (9th Cir. 1996)* *and* ***Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1550 (11th Cir. 1987)*** *with* ***McBride v. Estis Well Service, 768 F.3d 382, 384 (5th Cir. 2014)*** (en banc) *and* ***Horsley v. Mobil Oil Corp., 15 F.3d 200, 203 (1st Cir. 1994)***.

[3] ***819 F.2d at 258***.

[4] *See* ***McBride, 768 F.3d at 384***.

[5] *498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)*.

[6] ***819 F.2d at 258*** (citations omitted).

[7] *Id.*

[8] ***Id. at 258-59*** (quoting ***Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985))***.

[9] ***Id. at 258***.

[10] *335 F.3d 889 (9th Cir. 2003)*.

[11] *Id. at 893*.

[12] *Miles, 498 U.S. at 37*.

damages are limited to "pecuniary loss"[13] and because "[t]he *Jones Act*/[*Federal Employers' Liability Act*] survival provision limits recovery to losses suffered during the decedent's lifetime."[14]

The Supreme Court's more recent decision in *Atlantic Sounding Co. v. Townsend*[15] speaks broadly: ***HN1***[] "Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure."[16] Unseaworthiness is a general maritime cause of action.[17] *Townsend* reads *Miles* as **[*1092]** limiting the availability of damages for loss of society and lost future earnings[18] and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases.[19] By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions "under general maritime law,"[20] which includes unseaworthiness claims.

Arguably, *Townsend* leaves room for a distinction between maintenance and cure claims and unseaworthiness claims. The Court recognizes that "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion **[**6]** call for application of slightly different principles and procedures."[21] But nothing in *Townsend*'s reasoning suggests that such a distinction would mean that a limitation ought to be made on the availability of punitive damages as a remedy for general maritime unseaworthiness claims.

So far our discussion suggests that *Miles* does not overturn *Evich*, that *Evich* remains in force as controlling circuit law, and that *Evich*'s holding that punitive damages are available as a remedy for unseaworthiness claims is undisturbed and binding. Appellant's arguments to the contrary, though, are given force by *McBride v. Estis Well Service*.[22]

McBride, a sharply divided Fifth Circuit en banc decision, holds that "punitive damages are non-pecuniary losses"[23] and therefore may not be recovered under the *Jones Act* or under the general maritime law.[24] We held in another context in *Kopczynski v. The Jacqueline* that "[p]unitive damages are non-pecuniary" and so are not allowable under the *Jones Act*.[25] *McBride* has five extensive and scholarly opinions addressing all sides of the question. Six dissenters note that *Miles* "addressed the availability of loss of society damages to non-seamen under general maritime law, not **[**7]** punitive damages,"[26] and that "*Townsend* announced the default rule that punitive damages are available for actions under the general maritime law (such as unseaworthiness)."[27]

Well before our decision in *Evich*, the Supreme Court addressed in *Moragne v. States Marine Lines, Inc*.[28] whether the general maritime law affords a cause of action for wrongful death. The Court overruled its 1886 decision that it did not.[29] Though *Moragne* concerns the availability of a wrongful death action under the general maritime law, it matters in our case, where the seaman did not die, because it bears on how we should understand *Miles*.

Moragne holds that the denial of a wrongful death remedy "had little justification except in primitive English legal history."[30] Lord Ellenborough had held in *Baker v. Bolton* that in "a Civil court, the death of a human being

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[13] *Id. at 32*.

[14] *Id. at 36*.

[15] *557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009)*.

[16] *Id. at 407*.

[17] *See id. at 419*; *see also Miles, 498 U.S. at 29*.

[18] *Townsend, 557 U.S. at 419*.

[19] *Id.*

[20] *Id. at 421*.

[21] *Id. at 423* (quoting *Fitzgerald v. United States Lines Co., 374 U.S. 16, 18, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)*).

[22] ***768 F.3d 382 (5th Cir. 2014)*** (en banc).

[23] ***Id. at 384***.

[24] *Id.*

[25] ***742 F.2d 555, 561 (9th Cir. 1984)***.

[26] ***768 F.3d at 408-09*** (Higginson, J., dissenting).

[27] ***Id. at 413 n.16***; *see* ***id. at 418***.

[28] *398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)*.

[29] *Id. at 409* (overruling *The Harrisburg, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886)*).

[30] *Id. at 379*.

could not be complained **[*1093]** of as an injury."[31] The Court noted that there was no good reason to maintain this "barbarous" view,[32] let alone extend it to the maritime law, the principles of which "included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages."[33] In any event, the common law rule had **[**8]** been overturned in England by Lord Campbell's Act, in American states by wrongful death statutes, and in our federal law by the *Federal Employers' Liability Act*, the Death on the High Seas Act, and the *Jones Act*.[34] The Court noted that its "transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence" had made unseaworthiness doctrine "the principal vehicle for recovery by seamen for injury or death."[35] It concluded that the limitations of the *Death on the High Seas Act* did not preclude the availability of a wrongful death remedy under the general maritime law where the Act did not apply.[36]

Three years after our decision in *Evich*, the Supreme Court decided *Miles v. Apex Marine Corp*.[37] *Miles* was a wrongful death case.[38] The immediate issues before the Court were whether the parent of a deceased seaman could recover under the general maritime law for loss of society and whether a seaman's lost future earnings claim survived his death.[39] A fellow crew member had stabbed a seaman to death.[40] His mother brought a *Jones Act* negligence claim for failure to prevent the deadly assault and a general maritime unseaworthiness claim for hiring an unfit **[**9]** crew member.[41] Among other things, she sought loss of society, lost future income, and punitive damages.[42] The jury, though it found negligence, rejected the unseaworthiness claim, returning a verdict that the ship was seaworthy.[43] The Fifth Circuit reversed, holding that because of the extraordinarily violent disposition of the fellow crewman, the ship was unseaworthy as a matter of law.[44]

Miles declined to limit *Moragne* to its facts.[45] The Court noted that the "*Jones Act* evinces no general hostility to recovery under maritime law."[46] It does not "disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[47] Nor does it "preclude the recovery for wrongful death due to unseaworthiness."[48] The permissibility of a punitive damages award was not before the Court, just loss of society and of future earnings.[49]

[*1094] The basis for Dutra's argument that *Miles* implicitly overturns *Evich* is *Miles*'s discussion of damages. Noting that the *Death on the High Seas Act* limited the availability of damages for wrongful death to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought,"[50] the Court held that damages "for non-pecuniary loss, such as loss of society, **[**10]** in a general maritime action" are barred.[51] Likewise, Lord Campbell's Act, which is the basis for most state and federal statutes for wrongful death recovery, had long been interpreted to provide

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[31] *Id. at 383* (quoting Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

[32] *Id. at 381*.

[33] *Id. at 387*.

[34] ***Id. at 389-90, 394***.

[35] ***Id. at 399***.

[36] ***Id. at 402***.

[37] *498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)*.

[38] *Id. at 21*.

[39] *Id. at 23*.

[40] *Id. at 21*.

[41] *Id.*

[42] *Id. at 21-22*.

[43] *Id. at 22*.

[44] *Id.*

[45] *Id. at 27*.

[46] *Id. at 29*.

[47] *Id.*

[48] *Id.*

[49] *See id. at 23*.

[50] *Id. at 31* (quoting then *46 U.S.C. App. § 762*, now *46 U.S.C. § 30303*).

[51] *Id.*

recovery only for pecuniary loss.[52] And so the Court concluded that the *Jones Act*, too, having inherited the Supreme Court's interpretation in *Vreeland* of Lord Campbell's Act and the *Federal Employers' Liability Act*, also limited recovery to "pecuniary loss."[53] The Court therefore held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a *Jones Act* seaman."[54]

But it is not apparent why barring damages for loss of society should also bar punitive damages. *Miles* itself suggests no such broad interpretation of "pecuniary loss"—it expressly notes that the *Jones Act* "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[55] Lord Campbell's Act and its progeny provide an opportunity for a sailor's widow and children to recover the money that they were deprived of by his death. That is what "pecuniary loss" means: loss of money.[56] Non-pecuniary damages **[**11]** have long been understood to mean claims for such injuries as physical pain, mental anguish, or humiliation,[57] as well as loss of consortium. Punitive damages, allowed by *Evich*, are not "pecuniary loss." Though they are pecuniary, that is, like all damages, for money, they are not for loss. They are punitive, not compensatory. Their relationship to loss is that they may not exceed some multiple of the compensatory damages.[58]

That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen. One might reasonably argue that loss of society is more important than such punishment, or that such punishment is more important than loss of society. However, it cannot reasonably be argued that they are both compensation for "loss." If they were, they would fall within the rubric of compensatory damages, not punitive damages.

Following *Miles*, we held in *Smith v. Trinidad Corp*. that loss of consortium damages are unavailable to the wives of injured mariners in their own actions under the *Jones Act* or **[**12]** general admiralty law.[59] And we noted in *Chan v. Society Expeditions, Inc*. that neither the general **[*1095]** maritime law nor the *Jones Act* permits recovery for loss of society for the wrongful death of a seaman, nor does the *Jones Act* permit it for injury.[60] Neither speaks to punitive damages.

Whatever room might be left to support broadening *Miles* to cover punitive damages was cut off by the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*.[61] The shipowner in *Townsend* argued that *Miles* barred punitive damages for willful failure to pay maintenance and cure.[62] The Court noted that "[h]istorically, punitive damages have been available and awarded in general maritime actions."[63] It found "that nothing in *Miles* or the *Jones Act* eliminates that availability."[64] Unseaworthiness is a general maritime action long predating the *Jones Act*.[65]

It is true, as Dutra contends, that *Miles*, taken alone, might arguably be read to suggest that the available damages for a general maritime unseaworthiness claim by an injured seaman should be limited to those damages permissible under the *Jones Act* for wrongful death. But that is a stretch. The remark upon which Dutra relies is *Miles*'s justification **[**13]** for its narrower conclusion: "that there is no recovery for loss of society in a general maritime action for the wrongful death of a

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[52] *Id. at 32*.

[53] *Id.* (citing *Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 69-71, 33 S. Ct. 192, 57 L. Ed. 417 (1913)*).

[54] *Id. at 33*.

[55] *Id. at 29*.

[56] *See Pecuniary* and *Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[57] CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 105 (West 1935).

[58] *See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471, 513-15, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)*.

[59] *992 F.2d 996 (9th Cir. 1993)*.

[60] *39 F.3d 1398, 1407 (9th Cir. 1994)*.

[61] *557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009)*.

[62] *Id. at 418-19*.

[63] *Id. at 407*.

[64] *Id.*

[65] *See id. at 419*; *see also Miles, 498 U.S. at 29*; *Tabingo v. Am. Triumph LLC, 188 Wn.2d 41, 391 P.3d 434, 438-40 (Wash. 2017)*.

Jones Act seaman."[66] Dutra takes that narrow remark out of context and reads it expansively.[67] *Miles*'s juxtaposition of the terms "pecuniary" and "non-pecuniary loss" was with reference to loss of society, not punitive damages.[68] *Miles* did not address punitive damages. It expressly noted that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb **[*1096]** seamen's general maritime claims for injuries resulting from unseaworthiness."[69] *Miles* further holds that lost future earnings are unavailable in a general maritime survival action.[70] But that is because "[t]he Jones Act/[Federal Employers' Liability Act] survival provision limits recovery to losses suffered during the decedent's lifetime."[71]

It is also true, as Dutra argues, that if we were to interpret *Miles* broadly and *Townsend* narrowly, as the Fifth Circuit has in *McBride*, then we might infer that *Miles* implicitly overruled *Evich*. But we would then have to disregard *Miles*'s statement that the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[72] The Fifth Circuit's leading opinions in *McBride* are scholarly and carefully reasoned, but so are the dissenting opinions, which to us are more persuasive.

HN2[↑] Starting with Lord Campbell's Act, and continuing through the Federal Employers' Liability Act, the Death on the High Seas Act, and the Jones Act, wrongful death is a statutory cause of action.[73] There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally **[**15]** limited by statute to their resulting "pecuniary loss."[74] These limitations, based on the restrictive recoveries permitted for wrongful death, have no application to general maritime claims by living seamen for injuries to themselves. The *Townsend* Court made this distinction when addressing maintenance and cure actions,[75] and there is no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable. The purposes of punitive damages, punishment and deterrence,[76] apply equally to both of these general maritime causes of action. Nor are punitive damages compensation for a pecuniary or non-pecuniary "loss," as described in *Miles*.[77] They are not compensation for loss at all. One might argue for or against the desirability of punitive damages, but unless Congress legislates on the matter, their availability is clearly established not only in *Townsend*[78] but also in *Baker*.[79] They have been recognized as proper in appropriate circumstances since *The Amiable Nancy*.[80]

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[66] Miles, 498 U.S. at 33.

[67] *Miles* states:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent **[**14]** 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. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32-33.

[68] *See* id. at 31-33.

[69] Id. at 29.

[70] Id. at 36.

[71] *Id.*

[72] Id. at 29.

[73] Id. at 31-32.

[74] Id. at 31, 32 (citing Vreeland, 227 U.S. at 69-71).

[75] 557 U.S. at 419-20.

[76] *See* Exxon Shipping Co., 554 U.S. at 492-93.

[77] *See* 498 U.S. at 30-33.

[78] 557 U.S. at 407 ("Historically, punitive damages have been available and awarded in general maritime actions . . . . We find that nothing in *Miles* or the Jones Act eliminates that availability.").

[79] 554 U.S. at 489-90, 515 (noting that the issue of punitive damages in maritime law "falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result," and allowing an award of punitive damages).

[80] 16 U.S. (3 Wheat.) 546, 4 L. Ed. 456 (1818).

Conclusion

The district court correctly denied Dutra's motion to strike the prayer for punitive damages. They are indeed awardable to seamen for their own injuries in **[**16]** general maritime unseaworthiness actions. Under *Miller v. Gammie*,[81] we cannot treat *Evich* as overruled by *Miles* unless *Miles* is "fundamentally inconsistent with the reasoning"[82] of *Evich* and *Evich* is "clearly irreconcilable"[83] with *Miles*. It is not. Under the *Miller* standard, *Evich* remains good law. And under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*.

AFFIRMED.

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[81] *335 F.3d 889 (9th Cir. 2003)*.

[82] *Id. at 892*.

[83] *Id. at 893*.

PEOPLE CLAIMS

Agenda item no

2

Unearned wages and the Third Circuit's decision in *Joyce v. Maersk Line, Ltd.*

Joyce v. Maersk Line, Ltd.
Third Circuit Court of Appeals 2017

Case Summary

Crewmember James Joyce was a member of the Seafarers International Union (SIU). SIU and Ship Operators (including Maersk Line, Ltd) negotiated a collective bargaining agreement (CBA), known as the "Standard Freightship Agreement 2012." Joyce signed an "Articles of Agreement" which bound him to serve as bosun aboard the M/V MAERSK OHIO from Sept. 19, 2012 – Dec. 18, 2012. This agreement was incorporated by reference into the CBA. After setting sail from Port Newark on September 18, 2012 on the M/V MAERSK OHIO, Joyce was stricken with kidney stones approximately six weeks into the voyage. He was declared unfit for duty and repatriated to the United States from a hospital in Spain.

When a seaman is injured or ill, he can generally seek the following remedies: 1) Negligence under the Jones Act; 2) Unseaworthiness under General Maritime Law; and 3) Maintenance and cure (i.e., daily lodging/food and medical care); and 4) Unearned wages until the end of the voyage or length of contract. The Standard Freightship Agreement (CBA) defined unearned wages as "base wages only," not to include overtime. General maritime law generally provides that overtime pay for overtime not worked is included in unearned wages. This can practically double a seaman's unearned wage claim. Prior versions of the Standard Freightship Agreement did not define unearned wages. Joyce received only base pay as unearned wages for the time left on his contract after he was medically discharged. He filed a putative class action suit in NJ alleging the portions of the CBA governing unearned wages violated general maritime law.

The third circuit precedent for this case was the decision in *Barnes v. Andover*, a decision from 1990. The decision in that case was whether a seafarer was bound by the maintenance rate set in a CBA between the shipowner and the seafarers' union. The court found that maintenance is "the living allowance for a seaman while he is ashore recovering from injury or illness." The contract set maintenance at $8 per day. The court held it was "inconsistent…with the traditional doctrine of maintenance" to say that the rate in a union contract "is binding on a seaman who can show higher daily expenses." The $8 rate was held inadequate. The court reasoned: there was no basis "for permitting contracts to override a common law maritime right of a seaman that has not been preempted by the labor laws." The caveat was that unions and shipowners could "agree

on what they believe is a realistic rate of maintenance with the expectation that the parties would voluntarily abide by that rate and thereby avoid litigation."

The *Joyce* case was argued before both the NJ District Court and before the Third Circuit (en banc) by Jack J. Walsh of Freehill Hogan & Mahar. The District Court distinguished *Barnes* on the basis that its holding was limited to whether the maintenance rate set in a CBA is enforceable. It found *Barnes* had no application with respect to the enforceability of a CBA provision governing unearned wages.

There were three issues on appeal. First, Joyce argued that a seafarer's right to unearned wages dates back almost one thousand years and should be treated exactly like the right to maintenance and cure. Second, Joyce argued that overtime pay has consistently been a part of the common law right to unearned wages. Third, Joyce argued that, under *Barnes*, an unearned wage rate set in a CBA can be set aside when there is evidence that it is insufficient.

The appellate court reconsidered *Barnes* in light of the pre (1st, 6th, 9th) and post-*Barnes* circuit court opinions (2nd, 5th, 11th) which reached the contrary holding. The court, en banc, stated "We now agree that the broad labor policies which undergird federal labor law, as well as the nature of the collective bargaining process, require adherence to the terms of a collective bargaining agreement, including rates established for maintenance and unearned wages." They further went on to say that "We do not rely on the doctrine of pre-emption; rather, we recognize…that the need for judicial intervention to protect seamen has been substantially lessened." They also stated that they "accept the modern reality of unionized seafarers who negotiate for comprehensive contracts."

There is a caveat. Although the Third Circuit expressly overruled *Barnes* in holding that both unearned wages and maintenance are subject to modification by union contracts, it carved out the following exception: "A seafarer with a basis to allege that an entire collective bargaining agreement is, or the process whereby it was entered into was, 'unfair or inadequate' may bring that complaint to court." They further held that because maintenance, cure and unearned wages are "so deeply rooted in common law" that, absent congressional action, they cannot be completely abrogated by contract.

Discussion Questions:

1. How will this decision affect cases that have already been filed in other circuits?

2. What is the impact on crew claims handling going forward?

Enclosures to Tab 2:

- Court decision from *Joyce v. Maersk Line Ltd.*

User Name: Rebeca Hamra
Date and Time: Saturday, May 12, 2018 9:25:00 PM EDT
Job Number: 66605775

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1. *Joyce v. Maersk Line Ltd., 876 F.3d 502*
   Client/Matter: -None-
   Search Terms: Joyce v. Maersk Line Ltd., 876 F.3d 502
   Search Type: Natural Language
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Cases	-None-

Joyce v. Maersk Line Ltd.

United States Court of Appeals for the Third Circuit

October 18, 2017, Argued; December 4, 2017, Opinion Filed

No. 16-3553

Reporter
876 F.3d 502 *; 2017 U.S. App. LEXIS 24433 **; 210 L.R.R.M. 3169; 2018 AMC 13; 2017 WL 5985995

JAMES L. JOYCE, Appellant v. MAERSK LINE LTD

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 2-13-cv-05566). District Judge: Hon. Esther Salas.

Joyce v. Maersk Line, Ltd., 2016 U.S. Dist. LEXIS 107333 (D.N.J., Aug. 12, 2016)
Joyce v. Maersk Line, Ltd., 2016 U.S. Dist. LEXIS 85151 (D.N.J., June 30, 2016)

Core Terms

wages, seafarers, unearned, collective bargaining agreement, overtime, courts, maritime law, negotiation, union contract, common law, cure, rates, maintenance and cure, abrogated, shipowner, shipping, district court, bargaining, modified, binding, collective bargaining process, unionized, benefits, circuits, expenses, maritime, overrule, parties, rights, common law right

Case Summary

Overview
HOLDINGS: [1]-Where a seaman, who was a union member, was subject to a CBA providing that if a seafarer was medically discharged prior to the conclusion of his contract, he was entitled to unearned wages for the remaining contract period, but where the applicable CBA did not include overtime in the definition of unearned wages, the seaman properly received only base pay as unearned wages for the time left on his contract after he was medically discharged and he was not entitled to overtime pay because it was not included in the CBA; [2]-The court overruled its decision in Barnes v. Andover and enforced the rate of unearned wages set forth in the CBA, holding that a union contract that included rates of maintenance, cure, and unearned wages would not be reviewed piecemeal unless there was evidence of unfairness in the collective bargaining process.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN1 **Maritime Workers' Claims, Maintenance & Cure**

The U.S. Court of Appeals for the Third Circuit holds that a union contract freely entered by a seafarer — a contract that includes rates of maintenance, cure, and unearned wages — will not be reviewed piecemeal by courts unless there is evidence of unfairness in the collective bargaining process. In so holding, the Court overrules its decision in Barnes v. Andover Co., L.P.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN2 **Summary Judgment Review, Standards of Review**

Appellate courts review a summary judgment determination de novo, applying the same standard that the district court applied.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] Entitlement as Matter of Law, Genuine Disputes

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] Standards of Review, De Novo Review

Appellate courts exercise plenary review over questions of law.

Governments > Courts > Judicial Precedent

HN5[] Courts, Judicial Precedent

It is the tradition of the appellate court that the holding of a panel in a precedential opinion is binding on subsequent panels. Third Cir. R. 9.1, Internal Operating P. Appellate courts adhere strictly to that tradition and will only depart on a rare occasion. Consideration by the entire court en banc is therefore required to overrule a prior panel's precedent, Third Cir. R. 9.1, Internal Operating P. and appellate courts do not overturn our precedents lightly. Appellate courts also recognize, however, that stare decisis is not an inexorable command.

Governments > Courts > Judicial Precedent

HN6[] Courts, Judicial Precedent

In general, appellate courts decide cases before them based on their own examination of the issue, not on the views of other jurisdictions. But, when an appellate court finds that its reasoning has been met by universal disapproval by other jurisdictions, those contrary views may impel it to consider whether the reasoning applied by our colleagues elsewhere is persuasive.

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN7[] Maritime Workers' Claims, Maintenance & Cure

The U.S. Court of Appeals for the Third Circuit agrees that the broad labor policies which undergird federal labor law, as well as the nature of the collective bargaining process, require adherence to the terms of a collective bargaining agreement, including rates established for maintenance and unearned wages in admiralty. For that conclusion, the court does not rely on the doctrine of preemption; rather, it recognizes, as have sister circuits, that the need for judicial intervention to protect seamen has been substantially lessened, and thus the common law basis for requiring courts to disregard the freely negotiated agreements of private parties and to refuse to enforce the terms of the collective bargaining agreement also carries substantially less force. Although maritime remedies cannot be abrogated, courts should not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement. The adequacy of the maintenance or overtime rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract.

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN8 **Maritime Workers' Claims, Maintenance & Cure**

Consistent with principles of contract law, a seafarer with a basis to allege that an entire collective bargaining agreement is, or the process whereby it was entered into was, unfair or inadequate may bring that complaint to court.

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure

HN9 **Maritime Workers' Claims, Maintenance & Cure**

Maintenance, cure, and unearned wages are so deeply rooted in common law that, absent congressional action, they cannot be completely abrogated by contract.

Civil Procedure > Appeals > Standards of Review

HN10 **Appeals, Standards of Review**

An appellate court may affirm a district court on any ground supported by the record.

Counsel: Dennis M. O'Bryan, Esq. [ARGUED], O'Bryan Baun Karamanian, Birmingham, MI, Counsel for Appellant.

John J. Walsh, Esq. [ARGUED], Freehill Hogan & Mahar, New York, NY, Counsel for Appellee.

Martin J. Davies, Tulane University Law School, New Orleans, LA, Amicus Curiae.

Judges: Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and ROTH, Circuit Judges.

Opinion by: JORDAN

Opinion

[*503] OPINION OF THE COURT

JORDAN, *Circuit Judge*.

Today we stop swimming against the tide of opinion on an important question of maritime law. Following the lead of several of our sister circuits, **HN1** we now hold that a union contract freely entered by a seafarer — a contract that includes rates of maintenance, cure, and unearned wages — will not be reviewed piecemeal by courts unless there is evidence of unfairness in the collective bargaining process. In so holding, we overrule our decision in *Barnes v. Andover Co., L.P., 900 F.2d 630 (3d Cir. 1990)*.

I. Background

The facts of this case are not in dispute. James Joyce was a member of the Seafarers International Union. He signed "Articles of Agreement" **[**2]** with the shipping company Maersk Line Limited and agreed to serve as a bosun aboard the MAERSK OHIO for a three-month period, from September 18, 2012 until December 18, 2012. **[*504]** The Union and Maersk had reached a collective bargaining agreement that governed the terms of all unionized seafarers' employment with Maersk. The collective bargaining agreement was incorporated by reference into the Articles of Agreement between Joyce and Maersk.

Not long after the MAERSK OHIO departed as scheduled from the Port of Newark, New Jersey, Joyce fell ill. He was examined onboard and diagnosed with kidney stones. That diagnosis was later confirmed at a hospital in Spain, and he was declared unfit for duty and repatriated to the United States.

The collective bargaining agreement provided that, if a seafarer was medically discharged prior to the conclusion of his contract, he was entitled to unearned wages for the remaining period of the contract. Overtime was not included in the definition of unearned wages. Joyce accordingly received only base pay as unearned wages for the time left on his contract after he was medically discharged.

Dissatisfied, Joyce filed a putative class action in the United States **[**3]** District Court for the District of New Jersey. He alleged that the "portions of the [collective bargaining agreement] governing unearned wages ... violated general maritime law[.]" *Joyce v. Maersk Line, Ltd., No. 13-5566, 2016 U.S. Dist. LEXIS 85151, 2016 WL 3566726, at *1 (D.N.J. June 30, 2016)*. More particularly, he claimed that he was owed overtime pay.[1] *2016 U.S. Dist. LEXIS 85151, [WL] at *2*. The

[1] It may seem odd to assert that overtime pay is owed for

District Court disagreed and granted summary judgment to Maersk on the ground that, as a matter of law, given the collective bargaining agreement, Joyce was not entitled to overtime. *2016 U.S. Dist. LEXIS 85151, [WL] at *6-7*. In doing so, the Court distinguished our decision in *Barnes*. *Id.* We had said in that case that the specifics of what is covered by a seafarer's right to "maintenance" — traditionally, the right to food and lodging expenses — could be modified by a court, even if those specifics were established in a collective bargaining agreement. *Barnes, 900 F.2d at 640*.

Joyce now asks us to overturn the District Court's ruling on unearned wages.[2] Because seafarers were entitled at common law to both maintenance and unearned wages, he argues that our holding in *Barnes* should extend to unearned wages set by a collective bargaining agreement, making the union contract subject to change by court order to conform with traditional maritime law. His appeal presents an opportunity for us to reconsider **[**4]** our holding in *Barnes*.[3]

[*505] II. Standard of Review

Because the District Court granted Maersk's motion for summary judgment, ***HN2***[] we review its determination *de novo*, applying the same standard that it applied. *Shelton v. Bledsoe, 775 F.3d 554, 559 (3d Cir. 2015)*. ***HN3***[] A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. There are no factual disputes at all in this case. Instead, we are faced with a pure question of law: whether, on the agreed facts, Maersk was entitled to judgment based on the collective bargaining agreement. Our review is thus plenary. *See McCann v. Newman Irrevocable Tr., 458 F.3d 281, 286 (3d Cir. 2006)* (explaining that ***HN4***[] we exercise plenary review over questions of law).

III. Discussion[4]

A. *Review of Barnes v. Andover Co., L.P., 900 F.2d 630 (3d Cir. 1990)*

Joyce's argument relies heavily on our holding in *Barnes*, so we turn to it first. The question in that case was whether a seafarer was bound by the maintenance rate set in a collective bargaining agreement between the shipowner and the seafarers' union. *Barnes, 900 F.2d at 631*. We began our analysis by recognizing the deeply rooted duty at common law for a shipowner to pay a seafarer's maintenance. *Id. at 633*. "Maintenance is the living allowance for a seaman while he is ashore recovering from injury or illness." **[**5]** *Id.* It derives from medieval maritime laws and has long been recognized by American courts. *Id.* The right to "cure," which is payment for "medical expenses incurred in treating the seaman's injury or illness[,]" has the same origin. *Id.*

The duty to pay maintenance and cure arose from what was viewed as the "peculiarity" of seafarers' lives. *Id.* Justice Story explained the views of society at the time: "[seamen] are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence." *Id.* (quoting *Harden v. Gordon, 11 F. Cas. 480, 483, F. Cas. No. 6047 (C.C.D. Me. 1823)* (No. 6,047)). Thus, "[i]f some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment." *Id.* (quoting *Harden, 11 F. Cas. at 483*). By imposing the duty on shipowners to pay for

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overtime not worked, but there is precedent for Joyce's assertion that overtime a seafarer expected to work but was unable to because of illness or injury is pay that should be included in unearned wages. *See* ***Padilla v. Maersk Line, Ltd., 721 F.3d 77, 82 (2d Cir. 2013)*** (recognizing that, where "much of [a seafarer's] income was derived from overtime compensation," an injured seafarer could recover overtime as unearned wages because he "was entitled to recover in full the compensation that he would have earned 'but for' his injury"); *Lamont v. United States, 613 F. Supp. 588, 593 (S.D.N.Y. 1985)* (holding that where the "apparent custom and practice" of seafarers was to work a substantial amount of overtime, an injured seafarer was "entitled to recover, in full, the compensation that he would have earned but for his illness or injury").

[2] Joyce had also brought suit based on the Shipowners' Liability Convention and the daily per diem maintenance rate under the collective bargaining agreement. Although the District Court ruled against him on those claims too, he does not appeal those rulings here.

[3] We thank Professor Martin J. Davies of Tulane University Law School for his insightful amicus brief discussing *Barnes* and the questions of maritime law before us.

[4] The District Court had jurisdiction under *28 U.S.C. § 1333*. We have appellate jurisdiction pursuant to ***28 U.S.C. § 1291***.

maintenance and cure, "the interest of the owner will be immediately connected with that of the seamen." *Id.* (quoting *Harden, 11 F. Cas. at 483*). That arrangement benefitted both seafarers and owners — the former had the benefit of someone "watch[ing] over their health with vigilance and fidelity," and the latter had employees who were "urge[d] ... to encounter hazards in the ship's service." *Id.* ***[**6]*** (quoting *Harden, 11 F. Cas. at 483*).

Those duties remain in maritime law. Indeed, in *Barnes* we observed that, besides being long entrenched in maritime law, the responsibility to pay maintenance and cure has been "construed liberally" and "consistently expanded" by the courts. *Id.* The scope of that responsibility extends "beyond injuries sustained on board ship or during working hours" and is in force "until the seaman has reached the point of maximum cure." *Id. at 633-34*. The right to maintenance and cure exists "regardless of ... fault" by the seafarer. *Id.* ***[*506]*** *at 633*. Only in cases of willful misconduct has a seafarer been held to be outside the scope of the right. *Id.*

With that background, we directed our attention to the central question in *Barnes*, namely whether a contract that established a maintenance rate was binding on a union member. *Id. at 631*. The contract at issue established a rate of maintenance of $8 per day. *Id. at 632*. We held that it was "inconsistent ... with the traditional doctrine of maintenance" to say that the rate in a union contract "is binding on a seaman who can show higher daily expenses." *Id. at 640*. We therefore analyzed the $8 per day rate and determined it to be inadequate. *See id. at 644* (concluding that the maintenance award should include **[**7]** "expenses actually incurred or paid in connection with ... permanent lodging," including "gas and electric bills" and "home insurance" but not "automobile expenses and toiletries").

In reaching that conclusion, we acknowledged that we were departing from the reasoning of three other United States Courts of Appeals — the First, Sixth, and Ninth Circuits — which had faced the same question but decided the matter differently. *Id. at 635*. Those other courts had determined that the "contractual rate should be binding so long as the collective bargaining process ha[d] been fair and the rate of maintenance ha[d] been subject to real negotiation." *Id.* (citing *Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 949 (9th Cir. 1986)*). They recognized that federal labor laws did not directly preempt maritime law on maintenance, but they saw the policy behind national labor laws as sufficiently weighty and clear to prevent courts from modifying a bargained-for rate of maintenance in a union contract. *Id.*

Barnes explicitly rejected that reasoning.[5] Although we indicated "sympath[y] with an approach that would encourage the use and reliability of collective bargaining agreements," we believed it was not well-founded in law. *Id. at 640*. We declared that we "kn[e]w of no basis for permitting such contracts to override **[**8]** a common law maritime right of a seaman that has not been preempted by the labor laws." *Id.* Therefore, we said, "unless Congress determines that the circumstances giving rise to the need for maintenance have changed and that collective bargaining is now a more appropriate way to deal with the issue of the ill or injured seaman, the common law remedy must remain in full force." *Id.*

We placed a caveat on our holding, however, noting that unions and shipowners could "agree on what they believe is a realistic rate of maintenance with the expectation that the parties would voluntarily abide by that rate and thereby avoid litigation." *Id.* Somewhat incongruously, though, we then immediately approved the frustration of such expectations by saying that the plaintiff in *Barnes* had "met his common law burden of producing evidence ... that the $8 rate was insufficient to provide him with food and lodging." *Id.* Hence, the bargained-for rate was set aside. *Id.*

B. *Joyce's Argument*

Joyce argues that *Barnes* allows us to hold that he is entitled to overtime pay in his unearned wages. His logic proceeds in three steps. First, he says that the seafarer's right to unearned wages dates back almost a thousand **[**9]** years and should be treated exactly like the right to maintenance. Second, he claims that overtime pay **[*507]** has consistently been a part of the common law right to unearned wages. Third, Joyce connects the first two steps to *Barnes*: an unearned wage rate set in a collective bargaining agreement can be set aside when there is evidence that it is insufficient, as was the maintenance rate in *Barnes*.

We do not take issue here with Joyce's first assertion. There is ample evidence that, at common law, seafarers were and still are entitled to unearned wages. *See Vaughan v. Atkinson, 369 U.S. 527, 535 n.2, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962)* (Stewart, J., dissenting)

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[5] We did agree, however, that the union contract was not directly preempted. *See* ***Barnes, 900 F.2d at 637-39***.

(collecting cases for the proposition that "[t]he earliest codifications of the law of the sea provided for medical treatment and wages for mariners injured or falling ill in the ship's service."); *see also Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1122 (11th Cir. 1995)* (recognizing that unearned wages were historically part of the relief sought in an action for cure and maintenance). There is less of an historical anchor, though, for the second step in Joyce's argument, that the common law right to unearned wages includes overtime. Nonetheless, that proposition is sound. Wage rates for ancient mariners were typically set by contract in an agreement then known as the shipping **[**10]** articles, and the general rule was that "[t]he stipulation in the shipping articles [was] conclusive as to wages[,] and no more [could] be recovered on any special promise to pay for severe or extra labor or exposure in the course of duty[.]" 1 Theophilus Parsons, *A Treatise on Maritime Law* 447-48 (1859) (footnote omitted). A seafarer's right to his "full wages," *The R.R. Springer, 4 F. 671, 672 (S.D. Ohio 1880)*, therefore meant recovery only of the amount stipulated in the articles. Gradually, however, that recovery broadened to encompass "the full amount reasonably expected by the parties to be paid during the voyage." *Lamont v. United States, 613 F. Supp. 588, 593 (S.D.N.Y. 1985)*. Modern courts have therefore included tips, *Flores, 47 F.3d at 1122-25*, and accumulated time off, *Lipscomb v. Foss Mar. Co., 83 F.3d 1106, 1109-11 (9th Cir. 1996)*, as part of the unearned wage remedy under general maritime law. Thus, today, as long as the parties' "reasonable expectation includes 'overtime,'" *Lamont, 613 F. Supp. at 593*, and such wages are "not speculative," *Padilla v. Maersk Line, Ltd., 721 F.3d 77, 82-83 (2d Cir. 2013)*, they are recoverable. *See id. at 82* (awarding payment for overtime as part of unearned wages for seafarers who fell ill because "it was the custom and practice for seafarers ... to derive substantial income from overtime compensation and that, consequently, such compensation was a common expectation of both the seamen and of [the shipowner]"); *see also Shaw v. Ohio River Co., 526 F.2d 193, 199 (3d Cir. 1975)* (noting that **[**11]** accumulated leave time is a component of wages).

There is undeniable wisdom to an approach that looks to the expectations of the parties when delimiting the unearned wage remedy of a seafarer. When overtime is a "common expectation" and the seafarer's entitlement to it is "essentially undisputed," *Padilla, 721 F.3d at 82*, overtime can be considered merely "wages the seaman would have earned" absent injury, *Barnes, 900 F.2d at 634 n.2*.

If we were to follow *Barnes*, then, Joyce would likely be correct on the third point of his argument as well; we would be hard-pressed to say that courts have no power to modify unearned wage rates established by collective bargaining agreements.[6] But **[*508]** every other circuit court to address the conflict between collectively bargained-for rights and seafarers' rights at common law has seen the issue differently than we did. Joyce's claim thus hinges on the continuing validity of *Barnes*.

C. *Reconsidering Barnes*

HN5[] "It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels." Third Circuit I.O.P. 9.1. "We adhere strictly to that tradition[]" and will only depart "on a rare occasion." *In re Grossman's Inc., 607 F.3d 114, 117 (3d Cir. 2010)* (en banc). Consideration by the entire court en banc is therefore required **[**12]** to overrule a prior panel's precedent, Third Circuit I.O.P. 9.1, and "[w]e do not overturn our precedents lightly." *Al-Sharif v. U.S. Citizenship & Immigration Servs., 734 F.3d 207, 212 (3d Cir. 2013)* (en banc). We also recognize, however, that "*stare decisis* 'is not an inexorable command.'" *Id.* (quoting *Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*).

HN6[] In general, "we decide cases before us based on our own examination of the issue, not on the views of other jurisdictions." *In re Grossman's, 607 F.3d at 121*. But, when we find that our reasoning has been met by "universal disapproval" by other jurisdictions, those contrary views may "impel us to consider whether the reasoning applied by our colleagues elsewhere is persuasive." *Id.* That was the case in *In re Grossman's*, where we reevaluated a test established for stays in bankruptcy cases. *Id. at 119-20*. The decision we were

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[6] The District Court concluded that *Barnes* was not binding because it viewed that precedent as being cabined to maintenance. *See Joyce, 2016 U.S. Dist. LEXIS 85151, 2016 WL 3566726, at *6* ("The Court agrees with Defendant that *Barnes* does not govern Plaintiff's claim with respect to unearned wages."). That is not an unreasonable position, and we agree with Amicus Curiae that "the right to unpaid wages is different in some respects from the right to maintenance and cure." (Amicus Curiae Br. at 6.) We are not persuaded, however, that those differences would necessitate limiting *Barnes* (and our holding today) to maintenance. We therefore think that Joyce has the better of that particular argument and that, if we were not to overrule *Barnes*, its logic would militate strongly in his favor.

considering then had been called "one of the most criticized and least followed precedents" in the bankruptcy realm, *id. at 120* (quoting *Firearms Imp. & Exp. Corp. v. United Capital Ins. Co. (In re Firearms Imp. & Exp. Corp.), 131 B.R. 1009, 1015 (Bankr. S.D. Fla. 1991)*), and had been "uniformly" rejected by other courts. *Id.*

Barnes has not been met with the same vocal rejection, but, when it was decided, three other courts of appeals had already reached the opposite conclusion, holding that the rate of maintenance in a freely bargained-for union contract was binding on the seafarers who signed it. *Al-Zawkari v. Am. Steamship Co., 871 F.2d 585, 588 (6th Cir. 1989)*; *Macedo v. F/V Paul & Michelle, 868 F.2d 519, 522 (1st Cir. 1989)*; *Gardiner, 786 F.2d at 949-50*. As already noted, the Court in *Barnes* recognized those **[**13]** decisions but rejected their reasoning. *See Barnes, 900 F.2d at 632* ("[W]e will depart from the position of the First, Sixth and Ninth Circuits."). In the twenty-seven years since, every other circuit to consider the question has, in turn, rejected *Barnes* and adopted the majority position. *Ammar v. United States, 342 F.3d 133, 146 (2d Cir. 2003)*; *Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1291 (11th Cir. 2000)*; *Baldassaro v. United States, 64 F.3d 206, 212 (5th Cir. 1995)*. And three circuits have extended their holdings to cover not just maintenance but also unearned wage rates established in collective bargaining agreements. *See Padilla, 721 F.3d at 82* ("[W]hile the entitlement to unearned wages arises under general maritime law, rates for unearned wages may **[*509]** be defined and modified in collective bargaining agreements[.]" (citing *Ammar, 342 F.3d at 146-47*)); *Cabrera Espinal v. Royal Caribbean Cruises, Ltd., 253 F.3d 629, 631 (11th Cir. 2001)* ("[T]he remedies provided for in maritime law [including wages] may be altered although not abrogated by collective bargaining agreements." (citing *Frederick, 205 F.3d at 1291*)); *Lipscomb, 83 F.3d at 1108* ("[T]he method for calculating the amount of maintenance, cure, and wages may be determined by the collective bargaining process[.]" (citing *Gardiner, 786 F.2d at 949*)). Our opinion in *Barnes* leaves us standing alone and suggests that a reevaluation of that decision is in order.

Barnes rested on the idea that common law protections for seafarers arose from the "traditional doctrine[s]" of maintenance and cure, and that there was "no basis" in the law to allow union contracts "to override **[**14]** [those] common law maritime right[s]" when they had not been expressly "preempted by the labor laws." *Barnes, 900 F.2d at 640*. But, as recognized by the Ninth Circuit, this country's "national labor policy is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations." *Gardiner, 786 F.2d at 948*. Those policies favor honoring holistic contracts between "labor and management ... that will effectively regulate every aspect of their ... relationship ... from the most crucial to the most minute[.]" *Id. at 948-49* (quotations and citations omitted).

HN7[↑] We now agree that the "broad labor policies which undergird federal labor law, as well as the nature of the collective bargaining process, require adherence" to the terms of a collective bargaining agreement, including rates established for maintenance and unearned wages. *Frederick, 205 F.3d at 1291*. For that conclusion, we do not rely on the doctrine of preemption; rather, we recognize, as have our sister circuits, that "the need for judicial intervention to protect seamen has been substantially lessened[,]" *Ammar, 342 F.3d at 146*, and thus the common law basis for requiring courts to disregard the freely negotiated **[**15]** agreements of private parties and to refuse to enforce the terms of the collective bargaining agreement also carries substantially less force, *see Gardiner, 786 F.2d at 948*. Although maritime remedies cannot be abrogated, courts should not "lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement," *id.*, and Congress has clearly expressed that it is generally the role of private labor agreements, not courts, to "regulate all aspects of the complicated relationship" between employer and employee, *id. at 949* (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)*). That is not only the better outcome for shipping companies, which can plan with certainty what their responsibilities will be, but it is also better for seafarers, whose collective bargaining strength can negotiate more favorable employment terms and conditions. We are persuaded that piecemeal judicial review of "one of many elements ... over which the parties negotiate" discourages that back-and-forth process. *Id.* (citation omitted). Put differently, "[t]he adequacy of the maintenance [or overtime] rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by **[**16]** the union and the seamen who voted for the contract." *Baldassaro, 64 F.3d at 213* (quoting *Gardiner, 786 F.2d at 949*); *see also Gardiner, 786 F.2d at 949* ("[T]he nature of the 'give and take'

process of collective bargaining suggest[s] that acceptance **[*510]** of a particular package of benefits should be binding on the union members.").

With our course change today, we remove ourselves from "engaging in overt legislation of particular dollar figures" in union contracts, and instead "enforce privately negotiated contractual rates[.]" *Al-Zawkari, 871 F.2d at 588*. The majority position we adopt accepts the "modern reality" of unionized seafarers who negotiate for comprehensive contracts. *Ammar, 342 F.3d at 146*. At the start of this century, the Second Circuit recognized that the days when wary and "friendless" seafarers needed the protection of the common law had largely passed. *Id.* "[T]oday, 'most seamen are union members with a union-negotiated package of compensation and benefits of which the right to maintenance [and unearned wages] is a small component[.]'" *Id.* (quoting T. Schoenbaum, *Admiralty and Maritime Law* § 6-32, at 361 (2d ed. 1994)); *cf. Macedo, 868 F.2d at 522* (recognizing that collective bargaining agreements are "highly approved generally" and that enforcing their limitations on maintenance is "quite different" from enforcing limitations negotiated by **[**17]** "an individual seaman"). Unionization has produced a "well-organized work force with sophisticated leaders who constantly press for better working conditions" and the need for judicially fashioned protection has "substantially lessened." *Ammar, 342 F.3d at 146*. Negotiated union contracts strike a balance by "encompassing a wide range of issues for which some provisions will result in greater protection ... while others will result in less." *Cabrera Espinal, 253 F.3d at 631* (citing *Frederick, 205 F.3d at 1291*). Enforcing union contracts as written respects the priorities that modern seafarers have expressed through arms-length and well-informed negotiations.[7]

The scope of our decision today makes the holding in *Barnes* untenable, so that unearned wages and maintenance are alike subject to modification by union contracts. *See, e.g., Lipscomb, 83 F.3d at 1108* ("[T]he method for calculating the amount of maintenance, cure, and wages may be determined by the collective bargaining process[.]"). That is logical given the shared common law origins of maintenance, cure, and unearned wages. *See Cabrera Espinal, 253 F.3d at 631* ("General maritime law guarantees seamen: '(1) maintenance, which is a living allowance; (2) cure, which covers nursing and medical expenses; and (3) wages.'" (quoting Herbert R. Baer, *Admiralty **[**18]** Law of the Supreme **[*511]** Court* 6 (3d ed. 1979))).[8] Our holding thus overrules *Barnes* and extends that reversal to the case before us.

But we also adopt a backstop protection for seafarers, as prescribed by our sister circuits.**HN8**[↑] Consistent with principles of contract law, a seafarer with a basis to allege that an entire collective bargaining agreement is, or the process whereby it was entered into was, "unfair or inadequate" may bring that complaint to court. *Gardiner, 786 F.2d at 949*. The Second Circuit implicitly made that point when it upheld a maintenance figure set in a union contract where there was no allegation "that [the] agreement was not a legitimately negotiated agreement, or that [the seafarer's] interests were not adequately represented in the negotiation process, or that the agreement as a whole is unfair." *Ammar, 342 F.3d at 146*. Other circuit courts have also stressed that protection. *See Frederick, 205 F.3d at 1291* ("[A]s in *Baldassaro*[*v. United States*] and *Gardiner*[*v. Sea-Land Service, Inc.*], [the plaintiff] makes no allegations that the [collective bargaining agreement] as a whole is unfair or that the union did not adequately represent him."); *Baldassaro, 64 F.3d at 213* ("As in *Gardiner*,

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[7] In considering the preemption question in *Barnes*, we recognized the modern reality that seafarers are "neither friendless nor improvident." ***900 F.2d at 636***. Yet we rejected the idea that collective bargaining agreements could replace common law rights. Our opinion was rooted in the understanding that "the Supreme Court has shown no inclination to depart from its long-established solicitude for seamen." *Id. at 637*. Just a few months later, however, the Supreme Court did place some bounds on that solicitude and acknowledged that when Congress "speak[s] directly" to maritime remedies, courts are limited in their ability "to supplement Congress' answer" by pointing to the special status of seamen. *Miles v. Apex Marine Corp., 498 U.S. 19, 31, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)* (internal quotation marks omitted); *see id. at 27* ("We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection .... In this era, an admiralty court should look primarily to these legislative enactments for policy guidance."). So, while the Court has since reiterated that seafarers remain "wards of admiralty," *Atl. Sounding Co., Inc. v. Townsend, 557 U.S. 404, 417, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009)*, our departure from *Barnes* in favor of enforcement of the labor laws is consistent with the pronouncements of the Court as well as those of the courts of appeals. It also reflects an appreciation of the problems inherent in deciding piecemeal the terms of freely entered collective bargaining agreements.

[8] We recognized in *Barnes* that "[t]he right to unearned wages ... has the same historical basis as maintenance and cure." ***900 F.2d at 634 n.2***.

there is no allegation in this case that the [collective bargaining agreement] **[**19]** as a whole is unfair or that this seaman was not adequately represented by the Union."). Joyce has not challenged the negotiation process or the contract in its entirety, so that backstop is not at issue here.

We note a significant further limitation on our ruling: ***HN9***[↑] maintenance, cure, and unearned wages are so deeply rooted in common law that, absent congressional action, they cannot be completely abrogated by contract. *See, e.g.,* *De Zon v. Am. President Lines, Ltd., 318 U.S. 660, 667, 63 S. Ct. 814, 87 L. Ed. 1065 (1943)* (recognizing that "no private agreement is competent to abrogate" the shipowner's duty to pay maintenance and cure); *Al-Zawkari, 871 F.2d at 588* ("While the duty to provide maintenance cannot be *entirely* abrogated, as an implied contractual provision, the right to maintenance can be modified and defined by contract."); *Gardiner, 786 F.2d at 948* ("Although the right to maintenance is presumed to exist because of its establishment at common law, its rate may be subject to the negotiation process."). We would look askance, then, at any collective bargaining agreement that purported to eliminate those rights. We need not wrestle with that limitation today, however, because we are satisfied that defining unearned wages without including overtime was, "in relation to the whole scheme of benefits[,]" *Gardiner, 786 F.2d at 949*, not a complete **[**20]** abrogation of Joyce's common law right to wages.[9] *Cf. Barnes, 900 F.2d at 645* (Lifland, J., dissenting) ("Collective bargaining has not abrogated the right when it clearly recognizes the right and places a dollar value on [it] ... in the context of ... bargaining over wages, hours and other terms and conditions of employment which results in a myriad of benefits appropriate to the maritime environment.").[10]

[*512] IV. Conclusion

It is the rare case in which we overrule our own precedent. But when our Court is in disagreement with every other circuit to consider a question, it can be **[**21]** wise to reconsider our prior reasoning. Having done so here, we overrule *Barnes v. Andover* and will enforce the rate of unearned wages set forth in the collective bargaining agreement between Joyce and Maersk. Consequently, we will affirm.[11]

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[9] We urge courts who are faced with the question of whether a right has been abrogated to consider the agreement holistically. A contract that limits the common law rights to maintenance, cure, and unearned wages is most likely to withstand scrutiny if it expressly recognizes those rights and indicates how the rates have been bargained for in the negotiation.

[10] We also emphasize that, consistent with our reasoning, our holding only applies to unionized seafarers. The collective bargaining process is such a benefit to unionized seafarers and shipowners that it warrants enforcing collective bargaining agreements that modify traditional maritime rights of maintenance, cure, and unearned wages. This rationale does not apply to modify those traditional rights of a non-unionized employee. The disparate treatment of unionized and non-unionized seafarers is not inequitable, *but cf.* *Gardiner, 786 F.2d at 951* (Fletcher, J., dissenting) ("[U]nion seamen and non-union seamen working for the same employer might receive different maintenance rates."); rather, it reflects the different choices of free agents who are then differently situated.

[11] ***HN10***[↑] "We may affirm the district court on any ground supported by the record." *Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999)*.

PEOPLE CLAIMS

Agenda item no

3

Pregnancy at sea

Discussion Questions:

- Should pregnant mariners be allowed to sail once a pregnancy is disclosed?
- What should the cut-off date be for shipboard service for pregnant crewmembers?
- Does a crewmember's pregnancy while sailing trigger an obligation to pay maintenance and cure?
- Should wages through the end of articles or the contract be paid to a pregnant crewmember if she leaves the service of the ship due to the pregnancy?

Enclosures to Tab 2:

- USCG Pregnancy Policy

WEIGHT STANDARDS

Servicewomen are exempt from the weight & body fat standards:

-during pregnancy

-for a period of 6 months following the delivery date

-if nursing, an additional period of 6 months

Total exemption period may not exceed 12 months from date of delivery.

FAMILY CARE

Expecting service members should receive counseling on the responsibilities of balancing family care and obligations to the Coast Guard.

Temporary Separation is available for members who desire to remain at home for a period of up to 2 years.

BREASTFEEDING

When possible, Commanding Officers/Officers in Charge will ensure use of a private, clean room for expressing breast milk during the workday.

REFERENCES

General: Pregnancy in the Coast Guard, COMDTINST 1000.9

Aviation Duty: Coast Guard Aviation Medicine Manual, COMDTINST M6410.3 (series)

Uniforms: Uniform Regulations, COMDTINST M1020.6 (series), 3.C.12.

Weight: Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series), 5.B.

Military Assignments and Authorized Absences COMDTINST M1000.8A, 2.A.2.i.

Family Child Care Program: Child Development Services Manual, COMDTINST M1754.15, Ch. 5

FURTHER QUESTIONS?

See your healthcare provider, Work Life staff, or Work Life counselor for pregnancy and family care questions. Contact the Gender Policy Advisor for guidance on workplace concerns.

Coast Guard Office of Diversity & Inclusion (CG-12B)

U.S. Coast Guard
2703 Martin Luther King Jr.
Ave. SE Stop 7907
Washington, DC 20593-7907
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COMMAND GUIDE TO PREGNANCY POLICIES

Policies and References for Commands regarding pregnant members.

PREGNANCY POLICIES

Pregnancy is an exciting time in a woman's life. This guide provides a quick reference for commands on the policies affecting the unit and the pregnant servicewoman. Commanding Officers/Officers in Charge are responsible for ensuring that the pregnant servicewoman is aware of these policies and has access to the references and resources. For further clarification, see reference section.

DUTY RESTRICTIONS

Upon confirmation of pregnancy, servicewomen are exempt from:

-standing at parade rest for >5 min

-physical training requirements that may affect the health of the fetus or mother (including weapons & boat crew training, swimming qualifications, etc.)

-diving or rescue swimming duty

-exposure to chemical, toxic, or environmental hazards

No pregnant servicemember shall deploy or remain aboard a ship, including small boat duty, beyond her 20th week of pregnancy.

Pregnant aviation personnel may be deployed INCONUS after the 20th week only if medical facilities equivalent to or better than those currently provided to the member at the assigned air station or available at the deployment site.

Resumption of deployments or assignments to cutters or OCONUS duties, including INCONUS aviation duties, will normally be deferred for 6 months following delivery.

Unless prescribed by a healthcare provider earlier in the pregnancy, servicewomen are usually placed in light duty status between the 36th and 38th week of pregnancy.

Watchstanders should be limited to a 40-hour workweek during the last 3 months of pregnancy.

MATERNITY UNIFORMS

Maternity uniforms may be worn during pregnancy and up to 60 days after returning from maternity leave.

Uniforms are available at the Uniform Distribution Center or at an Air Force exchange (except the maternity ODU). Enlisted women receive a enlisted supplemental clothing allowance (SUPP CMA) after turning in a CG- 5155A form to the Servicing Personnel Office (SPO).

Commanding Officers/Officers in Charge may authorize appropriate civilian attire when there is no uniform equivalent or maternity uniforms no longer fit comfortably.

MATERNITY LEAVE

Commands shall authorize:

-up to 30 days of prenatal leave if the healthcare provider deems it necessary

-for a married member on active duty whose spouse gives birth to a child, 10 days of non-chargeable leave.

-42 days of postpartum convalescent leave after discharge.

PERFORMANCE EVALS

Commands shall ensure that pregnant servicewomen do not receive adverse evaluations strictly as a result of pregnancy.

PEOPLE CLAIMS

Agenda item no

4

Medicare, releases and conditional payment notices

Introduction

The Medicare Secondary Payer ("MSP") rules are complex and, in important respects, uncertain. The Centers for Medicare and Medicaid Services ("CMS") administer the MSP rules. In general, Medicare and Medicaid Services ("CMS") administer the MSP rules. In general, Medicare is considered a secondary payer to workers' compensation insurers and liability insurers. The duty to protect Medicare payments applies not only in cases that go to litigated judgment in which past or future medical expenses are awarded, but also to personal injury settlements.

Workers' compensation insurers and liability insurers must report to Medicare when a settlement is made to a claimant who has received Medicare benefits for the injury. If Medicare is not reimbursed for the payments it has made as a secondary payer, Medicare can seek recovery from virtually everyone in the personal injury settlement, including the claimant receiving the settlement funds, the claimant's attorney who received a share of the settlement, and the primary payer who paid the settlement funds. Medicare is not bound by what the parties state in the settlement agreement as to which party is responsible to reimburse Medicare (although that is binding as between the parties to the settlement) or what portion, if any, of the settlement is for past or future medical expenses.

If Medicare has paid for any medical care prior to settlement, the settlement agreement should provide for reimbursement to Medicare. Whether and how these principles apply to potential future Medicare payments is less clear. There is disagreement about the extent to which federal law requires settling parties to protect Medicare from paying for future medical expenses. If the parties know that the claimant will be a Medicare beneficiary for future accident-related medical expenses. Medicare prefers that the parties set up a Medicare set-aside account ("MSA") containing the likely amount of those future medical expenses to the extent Medicare otherwise would bear them. MSAs are widely used in settling workers' compensation cases because the CMS has issued a series of specific guidelines on how and when MSAs should be utilized in that context. The CMS has not yet established such guidelines for liability cases, however, and the commentaries (and Medicare's internal policies) are in disagreement about whether MSAs which never are required are even appropriate in a liability settlement. There is a case from a district court in New Jersey that appears to hold that no MSA is required in a third party liability case. There does not seem to be any case expressly holding a contrary position, nor does there seem to be any case that has addressed the issue in the Jones Act context.

In evaluating the need for a settlement agreement to set up an MSA or otherwise protect Medicare for potential future accident-related medical expenses, the following questions are pertinent:

1. Does the settlement include compensation for future accident-related medical expenses?
2. Is Medicare likely to be called upon to pay for significant accident-related care in the future? The more likely it is that Medicare will be asked to pay significant amounts fo future accident-related medical care, the more risk is associated with doing nothing to protect Medicare.
3. What are the potential consequences of failing to establish an MSA? One risk is that Medicare will pay future accident-related medical bills and then seek reimbursement (with interest and possible penalties) from those who paid or received the settlement proceeds. Medicare's right to try to recover from shipowners or the Club under these circumstances is uncertain.

Typical Medicare release language in Jones Act crewmember personal injury settlement is as follows: XXXX (Plaintiff) and not XXXX (shipowner) is responsible to pay his future medical expenses, including but not limited to any reimbursements due to Medicare. Should XXXX (Plaintiff) fail to satisfy or resolve with Medicare responsibility for payment of past or future medical expenses, and Medicare seeks recovery from XXX (shipowner), XXXX (Plaintiff) agrees to reimburse XXXX (shipowner) for any amounts that Medicare recovers from them or either of them."

A member received a conditional payment notice in 2017 for a case that was settled in 2013. The amount that Medicare claimed was less than $15,000. Similar release language as the above was used at the time of settlement. The plaintiff's lawyer and claimant ignored the member's calls and request for payment. The member ended up seeking the assistance of Medicare expert to negotiate the payment.

Discussion Questions:

1. Anyone else receive a conditional payment notice for a Jones Act personal injury settlement?

2. What steps should be taken to protect shipowners from the above scenario?

PEOPLE CLAIMS

Agenda item no

5

Next of kin notifications in tricky situations

Introduction

Shipowners often have an unwritten policy that a crewmember's next of kin will be notified if they are either unconscious or have passed away. However, there are many extenuating circumstances that can render a crewmember temporarily incompetent but conscious. In these cases it is questionable whether next of kin should be notified and the company policy often leaves the risk management team in a quandary for what the "right decision" is in regards to next of kin notification.

Examples of "tricky situations" include:

1. When a crewmember suffers from a stroke or brain injury but the illness does not render the crewmember unconscious

2. When a crewmember is suffering from mental health issues, such as psychosis or showing suicidal tendencies

3. When a crewmember seems to be having an addictive crisis

Discussion Questions:

- What is your company's current policy regarding next of kin notification?
- Does your next of kin notification policy address what would happen in the situations above?
- What is your company's procedure in regards to who and how next of kin notifications are made? What happens if there are two next of kin listed in conflicting documents?

PEOPLE CLAIMS

Agenda item no

6

Pre-employment medical questionnaires, alcohol policies and drug/alcohol tests after incidents

Discussion Questions

1. What do you like/dislike about your company's pre-employment medical questionnaire (if one exists)? Ideas for improvement?

2. What is your company's alcohol policy on the ship? How is it enforced? Is the policy helping to prevent incidents?

3. What is your company's policy for drug and alcohol testing after incidents?

PEOPLE CLAIMS

Agenda item no

7

Best practice for missing crewmembers

Introduction

When a crewmember goes missing in a foreign country, the shipowner's obligations are often defined by the foreign country's immigration laws and the Maritime Labour Convention. However, what happens when a crewmembers goes "missing" in his country of origin, i.e. when an American crewmember goes missing in a US port.

Discussion Questions:

- Does your company have a policy for what to do in situations where a crewmember fails to report back to the ship while on shore leave or simply goes "missing"?

- If no policy exists, what do you believe is a company's obligation in terms of searching and notifying the family in regards to a missing crewmember situation?
    - How long do you search?
    - Whom do you notify?
    - What authorities do you contact?
    - Do you notify next of kin and when?

PEOPLE CLAIMS

Agenda item no

8

Case handling: Crewmembers with a mental illness

Discussion Questions:

1. What policies are in place to determine adequate mental health status prior to hire?

2. Once hired and sailing on the ship, what rights does the employer have to remove a crewmember from service of the ship when a mental health issue renders the crewmember unfit to serve but he refuses to see a doctor?

3. What happens when a crewmember is in a jurisdiction which has a reputation for not recognizing mental health issues that are commonly recognized in the US?

4. At what point is a crewmember with a mental health issue considered “fit to fly”?

5. If a crewmember is considered “cured” after a mental illness, what should a prudent shipowner do to ensure the crewmember is actually ok to sail again?