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Punitive Damages Against Shipowners

Arthur E. Miller*

NOT LONG AGO a federal district court decision awarded punitive damages in admiralty against a corporate shipowner, for personal injury and death of crew members through the conduct of the ship's master which was imputed to and ratified by the corporation. This was in the case of *Petition of the United States Steel Corporation as Owner of the Steamship Cedarville*.¹ Punitive damages in maritime cases seldom have been awarded. It is seriously to be questioned whether punitive damage awards should be expanded as a modern trend in admiralty decisions.

Much of our national maritime policy is deep-rooted in the body of American admiralty law. Traditionally, Congress and the courts of admiralty have viewed the merchant seaman as within their protective custody because of the inherent danger of his calling and the unique status of his contract of employment. To encourage shipbuilding and develop the American Merchant Marine, similar protection has been extended to the shipowner by enabling him to limit his financial risks in the event of disaster. Conversely, the concept of punitive damages finds no statutory support in our maritime law and has been so seldom awarded as to make questionable its acceptance.

In the above-titled landmark admiralty decision, hereinafter referred to as the *Cedarville*¹ case, an Ohio District Court in 1967 awarded punitive damages under the survival provisions of the Jones Act² for loss of life in a Great Lakes disaster. The policy considerations of the decision are significant in that the corporate shipowner was subjected to unlimited liability in deference to the claims of the deceased seamen, by imputing to it punitive liability for the actions of the ship's master, whom the court characterized as the corporate alter-ego.³

Although the case was reversed in part by the Sixth Circuit Court of Appeals,⁴ in Spring 1969 (see *Editor's Note* at end of this article), it still stands in part, and has potential for real harm to American admiralty law and maritime enterprise.

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¹ 276 F. Supp. 163 (N.D. Ohio 1967).

² 46 U.S.C. 688 (1920); see also 45 U.S.C. 51 (1908); 45 U.S.C. 59 (1910).

³ *Petition of United States Steel Corp.*, *supra* note 1, at 198.

⁴ *U.S. Steel Corp. v. Fuhrman*, 407 F. 2d 1143 (6th Cir., Mar. 7, 1969).

I.

Admiralty Jurisdiction

Authority for admiralty and maritime issues⁵ is conferred on the national judiciary by the United States Constitution.⁶ The Judiciary Act of 1789 directed specific jurisdiction of these matters to the Federal District Courts.⁷ Congressional authority to legislate on behalf of seamen is derived from its constitutional power to regulate commerce.⁸ Therefore, paramount jurisdiction for interpretation of maritime law is vested in the Federal Courts, and power to legislate thereon rests in the national Congress.⁹ Congress has enacted laws sanctioning enforceable rights both in Federal and State Courts, but only on the admiralty side of the Federal Court can a judge decide issues without a jury.¹⁰

The American Merchant Seaman

American maritime law evidences its parental concern for the care of its merchant seamen. They are considered to be the wards of the Admiralty.¹¹ This is so because of the risks of their work and their status on a ship, which find no comparison in shore-side employment.¹² A ship is an independent entity, with only one captain who commands strict obedience from all aboard.¹³ In this setting, the seaman's contract is still considered an exception to the provisions of the Thirteenth Amendment in that it involves surrender of his personal liberty.¹⁴ As a result of this relationship, it is generally recognized that the vessel owner is placed *in loco parentis*, and the captain is made the legal guardian of the seaman.¹⁵

Seamen in most instances have been exempted from the common law rules of contributory negligence and assumption of risk, while remedial legislation has been liberally applied by the courts in their favor.¹⁶ To further insure their safety, Congress enacted the Seamen's Act of 1920.¹⁷

⁵ See generally, Edleman, *Maritime Injury and Death* 2-3 (1960); *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924).

⁶ Art. III, Sec. 2.

⁷ 28 U.S.C.A. 41, 371.

⁸ Art. I, Sec. 8.

⁹ Edleman, *op. cit. supra* note 5; *Panama Railroad Co. v. Johnson*, *supra* note 5.

¹⁰ *Ibid.*

¹¹ *Harden v. Gordon*, 11 Fed. Cas. 480, 485 (D.C. Me. 1823); *Garrett v. Moore-McCormack Co., Inc.*; 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

¹² See generally, *Robinson, Admiralty* 279-283 (1939).

¹³ *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31, 38, 62 S. Ct. 886, 86 L. Ed. 1246 (1942).

¹⁴ *Robertson v. Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

¹⁵ *Ibid.*; *Harden v. Gordon*, *supra* note 11; *Petition of United States Steel Corp.*, *supra* note 1, at 172; U.S.C.A. Const. Amndt. 13.

¹⁶ 46 U.S.C.A. 688 note 15 at 41; *Socony-Vacuum Oil Co., Inc. v. Smith*, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939).

¹⁷ *Supra* note 2.

The Jones Act

General maritime law provided no recovery for a seaman injured through the negligence of the ship's captain nor did a cause of action for personal injuries survive his death.¹⁸ To rectify this situation, Congress enacted the Seamen's Act of 1920,¹⁹ hereinafter referred to as the Jones Act. The Jones Act provided the first means through which crew members could attach liability to their shipowner-employers for the negligence of the master, other crew members, or the shipowner himself.²⁰

The Jones Act incorporated the provisions of the Federal Employers' Liability Acts (FELA)²¹ by extending to the seaman the remedies available to railway workers injured in the scope of their employment.²² It further allowed the seaman an election to maintain a civil action for damages with the right of trial by jury not available in an admiralty proceeding.²³ The survival and death provisions²⁴ of the Jones Act were likewise incorporated from the FELA.²⁵ As a death statute, the FELA is modeled after the Lord Campbell's Wrongful Death Act²⁶ which extended a right of compensation for pecuniary loss to the beneficiary as a result of the wrongful death of the deceased.²⁷ The original FELA of 1908 was amended in 1910 to provide a further right to designated beneficiaries for pain and suffering endured before death.²⁸ This claim survived the decedent and preserved for the benefit of his beneficiaries the same right of action to which he would have been entitled had he lived.²⁹ The 1910 survival amendment was likewise incorporated into the Jones Act.³⁰ Therefore, there can be no recovery for the decedent's suffering prior to death if the action under the FELA or Jones Act is for his wrongful death alone; recovery for suffering before death must be based on decedent's right to the claim which survives his death under the 1910

¹⁸ Robinson, *op. cit. supra* note 12, at 309; Boeckman, *Punitive Damages in Admiralty*, 18 *Hastings L. J.* 995, 1005 (1967).

¹⁹ *Supra* note 2.

²⁰ 46 U.S.C.A. 688 note 10, at 37; Edleman, *op. cit. supra* note 5, at 3, 82.

²¹ 45 U.S.C. 51-60.

²² *Supra* note 20; Robinson, *op. cit. supra* note 12, at 311; Prosser, *Law of Torts* 561 (3 ed. 1964).

²³ *Supra* note 20, at 38; Edleman, *op. cit. supra* note 5, at 63; *Panama Railroad Co. v. Johnson*, *supra* note 5.

²⁴ 45 U.S.C. 59 (1910).

²⁵ *Supra* note 20, at 38.

²⁶ 9 and 10 Vict., Ch. 93 (1846).

²⁷ *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59, 69, 57 L. Ed. 417 (1913).

²⁸ *Supra* note 24.

²⁹ 45 U.S.C.A. 59.

³⁰ *Supra* note 20.

amendment.³¹ The two causes of action are distinct.³² Any conscious³³ physical or mental³⁴ pain or suffering endured in an appreciable period of time³⁵ between injury and death will satisfy the requirements. It was under the survival provision that *Cedarville*³⁶ awarded punitive damages. Neither the Jones Act nor the FELA specifically provide for the recovery of punitive damages.

The Shipowner and Limitation of Liability

The American shipowner has likewise enjoyed the concerned attention of Congress. Maritime usages long have recognized that the vessel entrepreneur would have little incentive to risk his financial resources or entertain the idea of borrowing substantial funds for construction if he had to face unlimited liability from a multitude of interests should a catastrophe at sea occur.³⁷ Historically, the shipowner was at a disadvantage with his landed competitor, who, by forming a corporation, could avoid losing his entire fortune.³⁸

As a means of developing the American Merchant Marine in order to remain competitive in the world market place, Congress passed the Limitation of Liability Act of 1851,³⁹ as an inducement to encourage ship building.⁴⁰ The Act of 1851 enabled the shipowner to limit loss even though his fault was established in a maritime disaster. To successfully limit liability the accident must have occurred without the *privity* or *knowledge* of the shipowner.⁴¹ Once fault is established, the Act of 1851 permitted the shipowner to petition the Court to limit his liability to a stated sum comprised of the value of the ship following the disaster⁴² and her pending freight, if any.⁴³ Since the value of the ship was negligible in the event of a sinking, the Act of 1851 was later amended to provide that the value of the distributable fund could be no less than

³¹ *Supra* note 29, see note 5, at 344; *Petition of United States Steel Corp.*, *supra* note 1, at 175.

³² *Ibid.*

³³ *Id.* note 12, at 337, also note 13, at 340.

³⁴ *Edleman*, *op. cit. supra* note 5, at 128, citing *Civil v. Waterman Steamship Co.*, 217 F. 2d 94 (2nd Cir. 1954).

³⁵ *Supra* note 33.

³⁶ *Petition of United States Steel Corp.*, *supra* note 1.

³⁷ *Robinson*, *op. cit. supra* note 12, at 875-884; *Edleman*, *op. cit. supra* note 5, at 573-575.

³⁸ *Ibid.*

³⁹ 46 U.S.C. 181 *et seq.*

⁴⁰ *Butler v. Boston and S.S.S. Co.*, 130 U.S. 527, 9 S. Ct. 612, 32 L. Ed. 1017 (1889); *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 47 S. Ct. 357, 71 L. Ed. 612 (1927).

⁴¹ 46 U.S.C.A. 183(a).

⁴² *The City of Norwich*, 118 U.S. 468, 6 S. Ct. 1150, 30 L. Ed. 134 (1886).

⁴³ *Supra* note 41; 46 U.S.C.A. 185(a); *Edleman*, *op. cit. supra* note 5, at 575.

\$60.00 multiplied by the vessel's gross tonnage to extend coverage for claims involving personal injury and death.⁴⁴ The shipowner was now able to protect his personal resources and other ships in his fleet not involved in the disaster.⁴⁵ The provisions of the Act of 1851 are not to be confused with the Harter Act⁴⁶ or the Carriage of Goods By Sea Act,⁴⁷ which completely exonerate the shipowner from liability for cargo loss under certain conditions.⁴⁸

The Act of 1851 did not provide that the conduct of the master imputed privity to the shipowner; that would defeat limitation. However, under a later amendment,⁴⁹ the privity or knowledge of the master *at or prior to* the commencement of the voyage was deemed that of the owner with respect to loss of life or bodily injury.

It is important to remember that the Jones Act did not repeal the earlier Limitation Statutes.⁵⁰ Seamen's claims for personal injury and death against the shipowner remained subject to his limitation even though, in an action involving many interests, the amount recoverable might be less than the full pecuniary loss granted under the Jones Act.⁵¹

Limitation of liability was not an issue in the *Cedarville* case.⁵² The corporate shipowner concentrated his defense against the claims for punitive damages as a result of the events after the collision and before the sinking. Nevertheless, discussion of shipowner limitation offers perspective to the policy of minimizing the scope of shipowner liability when claims of injured seamen are presented in circumstances identical to those in *Cedarville*.⁵³ One can only appreciate the unprecedented scope of *Cedarville*⁵⁴ when one has an awareness of the carefully prescribed legislative intent to confine the boundaries of shipowner loss.

II.

Punitive Damages in Admiralty

Punitive (exemplary) damages are awarded as a punishment for the outrageous conduct⁵⁵ of the defendant, making him an example to deter

⁴⁴ 46 U.S.C.A. 183(b) (1935).

⁴⁵ Robinson, *op. cit. supra* note 12, at 936.

⁴⁶ 46 U.S.C.A. 190.

⁴⁷ 46 U.S.C.A. 1300.

⁴⁸ Robinson, *op. cit. supra* note 12, at 875.

⁴⁹ 46 U.S.C.A. 183(e) (1935).

⁵⁰ Robinson, *op. cit. supra* note 12, at 908, 920; In Re Petition of East River Towing Co., 266 U.S. 355, 45 S. Ct. 114, 65 L. Ed. 324 (1924); 46 U.S.C.A. 688, at 136, 137.

⁵¹ *Ibid.*

⁵² Petition of United States Steel Corp., *supra* note 1.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Restatement of Torts, 2d, Sec. 908(1).

future wrongdoers.⁵⁶ The award is justified as a matter of public policy,⁵⁷ and constitutes an exception to the rule that damages are intended only to compensate the plaintiff for his loss.⁵⁸

Punitive damages were not awarded in an admiralty case prior to 1859,⁵⁹ although the courts recognized the existence of the doctrine in maritime law as early as 1818.⁶⁰ Since they have been so seldom awarded, punitive damages are of questionable acceptance, although never expressly rejected by admiralty courts.⁶¹

Admiralty cases have discussed the necessary elements for making the award, citing conscious misconduct with malicious and willful disregard of individual rights.⁶² An early case stated that punitive damages could be awarded against a shipowner for injuries caused by the willful and malicious acts of the ship's captain.⁶³ Although punitive damages were not granted in the above case,⁶⁴ it formed a basis for the *Cedarville*⁶⁵ decision.

III.

The Cedarville Case⁶⁶

On May 7, 1965, the S.S. Cedarville sank forty minutes after a collision with a foreign ship in dense fog. Ten crew members were lost, and claimants were awarded punitive damages under the survival provisions of the Jones Act for what the court described as "outrageous," "willful," and "horrendous" disregard for human safety on the part of the ship's captain.⁶⁷ The court found that the captain's decision to beach the vessel, which had no reasonable chance of success, as opposed to ordering the crew to abandon ship, evidenced a "grotesque" indifference for human life.⁶⁸ In this opinion, Judge Connell stated that, "the captain had an aberration for saving property, and an amnesia for saving people."⁶⁹

⁵⁶ Oleck, *Damages to Persons and Property* 27 (1961 rev. ed.); Oleck, *Cases on Damages* 91 (notes) (1962).

⁵⁷ *Id.* at 541.

⁵⁸ McCormick, *Damages* 275 (1935).

⁵⁹ Boeckman, *op. cit. supra* note 18, at 996.

⁶⁰ *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L. Ed. 456 (1818); *Petition of United States Steel Corp.*, *supra* note 1, at 172.

⁶¹ Boeckman, *op. cit. supra* note 18, at 1008.

⁶² Boeckman, *op. cit. supra* note 59 (*Id.* at 996).

⁶³ *Ralston v. The State Rights*, 20 Fed. Cas. 201 (E.D. Pa. 1836).

⁶⁴ *Ibid.*

⁶⁵ *Petition of United States Steel Corp.*, *supra* note 1.

⁶⁶ *Ibid.*

⁶⁷ *Id.* at 167-170.

⁶⁸ *Id.* at 199.

⁶⁹ *Id.* at 196.

Since radio-telephone communication was established between the captain and his shore-side superiors immediately after the collision, Judge Connell found that there was imposed on such superiors a duty to speak in order to countermand the captain's decision to beach the vessel.⁷⁰ Their silence and refusal to interfere amounted to an express ratification and clothed the captain with such unlimited authority as to make him the alter-ego of the corporation.⁷¹ His acts were "tantamount to those of the board of directors."⁷² He was not answerable to any superior.⁷³

The Conduct of the Captain and Punitive Damages

As it relentlessly impugned the captain's conduct, the court was no doubt moved by concern for the traditional protection afforded seamen and a captain's parental duty for their care. The reasoning is not free from doubt, and must be examined with respect to the judgment of the captain in times of emergency, and the requisite intent, in order to find a punitive award.

It is fundamental in maritime law that the conduct of a captain in the frantic moments of grave emergency should not be judged by hindsight.⁷⁴ He should not be condemned when every available choice would not be free from danger.⁷⁵ A court should not substitute its judgment in retrospect.⁷⁶ If the captain fails it may be an error of judgment only,⁷⁷ and in times of emergency or excitement "a choice may be mistaken, yet prudent."⁷⁸

The conduct necessary to subject a wrongdoer to punitive damages involves actual, positive and conscious elements of disregard or indifference.⁷⁹ The requisite malice of a captain⁸⁰ must be predicated on a guilty intent.⁸¹ Can it be clearly shown that the captain of the S.S. Cedarville manifested such guilty intent?

⁷⁰ *Id.* at 198-199.

⁷¹ *Ibid.*

⁷² *Id.* at 178-179.

⁷³ *Ibid.*

⁷⁴ *Kelley Island Lime and Transport Company v. The City of Cleveland, et al.*, 1942 A.M.C. 1317 (N.D. Ohio 1942).

⁷⁵ *The Mohegan*, 28 F. 2d 795 (2d Cir. 1928); *The Walter A. Luckenbach*, 14 F. 2d 100 (9th Cir. 1926).

⁷⁶ *Reiss Steamship Co. v. The Claremont*, 12 F. Supp. 288 (W.D. N.Y. 1935).

⁷⁷ *The Walter A. Luckenbach*, *supra* note 75.

⁷⁸ *Prosser, op. cit. supra* note 22, at 172.

⁷⁹ *McCormick, op. cit. supra* note 58, at 280.

⁸⁰ *Ralston v. The State Rights*, *supra* note 63.

⁸¹ *Lake Shore and Michigan Southern Ry. v. Prentice*, 147 U.S. 101, 107, 108, 13 S. Ct. 261, 37 L. Ed. 97 (1893); see also *supra* note 9, Supreme Court decisions and Federal interpretation are controlling in maritime law.

The captain of the *Cedarville* faced a choice between abandoning ship in zero visibility with obscured vessel traffic nearby, or attempting to save the ship and the crew by beaching the vessel. He chose the latter. His decision was the wrong one.

The court, however, had little trouble in deciding that his judgment in a time of dire emergency was not only wrong but was also "horrendous," "outrageous," and "wanton."⁸² The court was also able to find the requisite element of positive guilty intent needed to assess punitive damages. The captain's decision to beach the vessel was made with "an aberration for saving property and an amnesia for saving people."⁸³ More remarkable is the fact that this determination was made by a court that did not hear a single witness but probed the captain's mind through evidence read by counsel from prior depositions and testimony taken from official United States Coast Guard proceedings.⁸⁴

The Alter-Ego and Punitive Damages by Ratification

The master portrayed as the corporate alter-ego is not an unfamiliar characterization in maritime law,⁸⁵ but the scope of this concept has been limited. In *Cedarville*,⁸⁶ the court bound corporate superiors with an affirmative duty to override the captain's decision. Their silence transformed the captain into the alter-ego⁸⁷ of the corporation. What are the requirements of Federal law needed in order to impute punitive damages?

Punitive damages are not usually imputed to the employer-principal for the conduct of the employee-agent unless he participated in or ratified such conduct.⁸⁸ This is especially so in the case of corporations, which can only act through their agents; and there the loss eventually falls on the blameless stockholders.⁸⁹ The Federal rule is enunciated in *Lake Shore and Michigan Southern Ry. Co. v. Prentice*,⁹⁰ which stated that *participation* is needed to impute punitive liability to the principal. Participation by silent acquiescence implying ratification can be estab-

⁸² Petition of United States Steel Corp., *supra* note 1; *supra* note 72.

⁸³ *Id.* at 196.

⁸⁴ *Id.* at 165, "This Court did not directly hear any witness, but all counsel had the privilege of reading to the Court whatever evidence it chose, from both the Coast Guard investigation and the depositions taken in these matters. . . ." "The question here presented to this Court by the reading of such testimony from these two sources is limited to the question whether punitive damages may or ought to be assessed in this case."

⁸⁵ *The Silver Palm*, 94 F. 2d 776, 780 (9th Cir. 1937).

⁸⁶ Petition of United States Steel Corp., *supra* note 1.

⁸⁷ *Id.* at 198.

⁸⁸ Oleck, *op. cit. supra* note 56, at Sec. 271 (par. 1); McCormick, *op. cit. supra* note 58, at Sec. 80.

⁸⁹ *Ibid.* (McCormick); Oleck, *Cases on Damages* 91 (notes) (1962).

⁹⁰ *Supra* note 81, at 107, 112; see also Boeckman, *op. cit. supra* note 18, at 999.

lished only if there is an affirmative corporate duty to speak, which the court found mandatory in *Cedarville*.⁹¹

Is there a unique relationship between the captain and the shipowner in times of emergency that will not permit divided or displaced authority?

Maritime custom has acknowledged that the authority and decisions of the captain in times of emergency should be free from outside interference.⁹² He is on the scene, able to evaluate the circumstances, and in the best position to make a decision because of his sailing experience. It has long been the practice of the land-based shipowner not to hinder the master's judgment.⁹³ The lack of any naval support or instruction to the Captain of the U.S.S. Pueblo, in his time of crisis, is a current example of this maritime tradition. There cannot be two captains of the same ship.⁹⁴

In each ship there is one man who in the hour of emergency or peril at sea can turn to no other man. There is one who alone is ultimately responsible for the safe navigation, engineering performance, accurate gunfire and morale of his ship. He is the commanding officer. He is the ship!

*Bronze Plaque: Office of Chief of U.S. Naval Operations*⁹⁵

Punitive Damages Under the Jones Act

The propriety of a punitive award under the Jones Act is not at all clear. It is important to remember that the Jones Act incorporated the FELA, whose wrongful death provisions were patterned after Lord Campbell's Act.⁹⁶ There is authority for the rule that the FELA denies punitive damage recoveries⁹⁷ and that such damages cannot be recovered under statutes modeled after Lord Campbell's Act.⁹⁸ FELA and Jones Act awards have been viewed as being limited to pecuniary loss for death and compensatory damage for pain and suffering before death.⁹⁹

There also is merit in the contention that the 1910 survival amendment of the FELA is unrelated to Lord Campbell's Act.¹⁰⁰

⁹¹ Petition of United States Steel Corp., *supra* note 1.

⁹² The Walter A. Luckenbach, *supra* note 75; *President of India v. West Coast S.S. Co.*, 213 F. Supp. 352, 358 (D.C. Oreg. 1962); *The North Star*, 3 F. 2d 1010, 1011 (D.C. Mass. 1925); *The Princess Sophia*, 61 F. 2d 339, 349, 352 (9th Cir. 1932).

⁹³ *Ibid.*

⁹⁴ *The North Star*, *supra* note 92, at 1011.

⁹⁵ *Bucher of the Pueblo*, *Life*, February 7, 1969, at 15.

⁹⁶ *Supra* note 22, 26.

⁹⁷ McCormick, *op. cit. supra* note 58, at 287.

⁹⁸ Annot., 94 A.L.R. 384-386 (1935).

⁹⁹ *Michigan Central Railroad Company v. Vreeland*, *supra* note 27; 45 U.S.C.A. 59 note 5, at 334; *McDonald v. The Barge 204*, 194 F. Supp. 383 (S.D. Ala. 1961).

¹⁰⁰ Petition of United States Steel Corp., *supra* note 1, see generally 174-176.

IV.

Summary and Conclusions

*Cedarville*¹⁰¹ is important because it awarded punitive damages in an admiralty case, made the first such award under the Jones Act, ruled that the claim survived death, and imputed punitive liability to a shipowner for the conduct of its master in a time of emergency. The decision is novel in that the above issues have been very arguable in maritime law. To affirmatively decide so many issues of questioned legal validity is to give the *Cedarville*¹⁰² case an almost unprecedented scope in admiralty law.

Aside from its legal implications, the case may introduce serious ramifications in our maritime policy, *i.e.*, shipbuilding cannot be encouraged by an atmosphere of unlimited liability for vessel owners.

The recent past history of the American Great Lakes fleet is far from encouraging. Vessel construction and repair costs have skyrocketed, and a new American vessel has not been built since 1960. Our Canadian competitors, on the other hand, have built many new maximum size ships during the past ten years, through a government subsidy which permits vessel construction at 55% of the comparable American cost.¹⁰³ In 1953, 403 U.S. flag ships operated on the Great Lakes; in 1963, the same fleet consisted of 269 ships of which 60% were over 40 years old.¹⁰⁴ From the ten-year period 1953 to 1963, the United States Merchant Marine fleet declined 11%; in the five-year period 1958-1963, the Great Lakes segment of this fleet declined 22%.¹⁰⁵ The Great Lakes vessel industry has always been part of the American economic and military backbone.¹⁰⁶ During World War II it kept 90% of the nation's steel industry supplied with iron ore.¹⁰⁷

The integrated or private carriers, such as the Great Lakes fleet of the United States Steel Corporation, operate on the Great Lakes to provide raw materials for the large steel companies who own and operate them. Capital will always be provided by the parent firm because it must maintain its means of supply.

The position of the common carrier and small independent is very different. These carriers serve the public demand for transportation and materials. They must justify their existence by making a profit in trans-

¹⁰¹ Petition of United States Steel Corp., *supra* note 1.

¹⁰² *Ibid.*

¹⁰³ Vessel Construction Program To Aid Domestic Trades: Hearings Before The Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, United States Senate 65, 66 (1964).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Id.* at 73.

portation-for-hire alone, not as a mere incident of service to a larger firm. Unlike the private carrier with unlimited financial resources, they are able to invest in shipbuilding only profit made from transportation operations *per se*.

These small carriers have struggled to exist in the shadow of the private carriers who have no obligation to provide dependable public service at non-discriminatory rates.¹⁰⁸ Their very existence is additionally threatened by predatory railroad competition.¹⁰⁹ At least ten small independent vessel companies have gone out of business on the Great Lakes since 1960.¹¹⁰

The concept of punitive damages against a shipowner should be strictly confined and not become a general proposition of admiralty law. The national shipbuilding policy would be dealt another setback if the already beleaguered public transportation segment of the Great Lakes vessel industry had to expend its diminishing margin of return for protection instead of capital needed to stay in business.

[*Editor's Note:* When proofs of this article were being read, the Sixth Circuit Court of Appeals reversed the decision of the District Court, as to ratification of the actions of the ship's captain, which was necessary in order to validate punitive damages against the owner.¹¹¹ But this reversal left unaffected the District Court's holding that under the Jones Act survival provisions, punitive damages could be awarded (yet did not decide that such award *is* proper under the Jones Act). The Appeals Court, in effect, spoke only of the "ratification" and said that company officers were not obliged to countermand or decide the captain's orders.]

¹⁰⁸ *Id.* at 236.

¹⁰⁹ *Decline of Coastwise and Intercoastal Shipping Industry: Hearings Before The Merchant Marine and Fisheries Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate 118, 124 (1960).*

¹¹⁰ *Supra* note 103, at 96.

¹¹¹ *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir., Mar. 7, 1969).