

# Washington University Law Review

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Volume 72 | Issue 1

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January 1994

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### Recommended Citation

Matthew Hall Armstrong, *Amending the Jones Act to Provide Jones Act Seamen Full Recovery in General Maritime Negligence after Miles v. Apex Marine Corp.*, 72 WASH. U. L. Q. 379 (1994).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol72/iss1/7](https://openscholarship.wustl.edu/law_lawreview/vol72/iss1/7)

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# NOTES

## AMENDING THE JONES ACT TO PROVIDE JONES ACT SEAMEN FULL RECOVERY IN GENERAL MARITIME NEGLIGENCE AFTER *MILES V. APEX MARINE CORP.*

### I. INTRODUCTION

On May 15, 1991, seaman Kenneth Sugden drowned while working aboard the tug boat *Puerto Nuevo*.<sup>1</sup> Sugden was in the process of retrieving a barge from a dock when he fell through a protective cover and into the barge's recently installed "moon pool."<sup>2</sup> Sugden's estate filed a wrongful death action under the federal maritime law to recover nonpecuniary damages against the shipyard.<sup>3</sup> Sugden's case presents a typical example of a controversial issue the admiralty bench has faced since 1988: may a Jones Act<sup>4</sup> plaintiff recover nonpecuniary damages from a nonemployer third-party tortfeasor for negligence under the general maritime law after *Miles v. Apex Marine Corp.*?<sup>5</sup>

After the issue floated around the admiralty courts for a number of years, the Supreme Court addressed the proper maritime wrongful death remedy under the general maritime law in *Miles*. The Court held that the Jones Act, which allows recovery only for pecuniary loss, precludes a true seaman<sup>6</sup> from recovering punitive and nonpecuniary damages in a general

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1. *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455, 456 (W.D. Wash. 1992).

2. *Id.* Duwamish Shipyard, Inc., installed a "moon pool" on the barge. "The moon pool is a tubular pipe, approximately four feet in diameter, that runs from the bottom of the barge's hull to the top deck. Pursuant to its work agreement with [the barge owner and operator], Duwamish also built a cover to be installed on the deck of the barge over the moon pool." *Id.*

3. Sugden's estate sued both his employer, Puget Sound Tug & Barge/Crowley Maritime Corp., and the third-party shipyard, Duwamish Shipyard, Inc. Although the actions were combined, the estate claimed against the employer for pecuniary losses pursuant to the Jones Act and against the third party for pecuniary and nonpecuniary damages under a general maritime law negligence action. The third-party defendant argued that nonpecuniary claims were not allowed because *Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), bars a seaman's recovery of nonpecuniary damages in all suits under the general maritime law. The district court rejected this argument. *Sugden*, 796 F. Supp. at 456.

4. 46 U.S.C. app. § 688 (1988).

5. 498 U.S. 19 (1990).

6. In admiralty, the term "seaman," used either as an adjective or a noun, is a legal term of art. It describes a person, man or woman, who meets the following criteria: (1) is a crew member of a vessel in navigation, *i.e.*, a vessel that is not permanently stationary such as a drydock or an offshore

maritime wrongful death action.<sup>7</sup>

There are four basic theories upon which a true seaman may base a claim for recovery when suffering a personal injury or wrongful death. The first is a Jones Act negligence cause of action.<sup>8</sup> The Jones Act, enacted by Congress in 1920, extends to seamen the same rights and remedies granted to railway workers through the Federal Employers' Liability Act (FELA).<sup>9</sup> The second is a claim based on the Death on the High Seas Act (DOHSA),<sup>10</sup> also enacted by Congress in 1920. The DOHSA allows recovery of pecuniary damages by the surviving beneficiaries of anyone killed on the high seas. The third and fourth are general maritime law actions for unseaworthiness of the ship or for negligence.<sup>11</sup> Because each of these claims is conceptually distinct, a plaintiff may elect to bring a complaint on several claims in order to assure some recovery, or the plaintiff may elect to choose only one such claim.<sup>12</sup> Until *Miles*, the damages recoverable by the plaintiff varied depending upon the theory under which recovery was sought. Punitive damages were traditionally recoverable under the general maritime unseaworthiness and negligence actions, but not under the Jones Act.<sup>13</sup> The maritime plaintiff, therefore,

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oil rig; (2) is permanently attached or assigned to the vessel; and (3) has duties contributing to the function or mission of the vessel. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 357 (1991); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (1987); James A. George, *The 'Triple Crown' of Admiralty Cases*, TRIAL, Oct. 1991, at 46. The term "seaman" or "seamen" is used extensively throughout this Note and always refers to a person who meets all three prongs of the test. For the purposes of this Note, "seaman" is synonymous with "true seaman" and "Jones Act seaman." A Jones Act seaman is one who qualifies for recovery under the Jones Act, *i.e.*, he meets the standard set out in *Wilander*. Although the term "seaman" is used, it is not to be construed in any way other than as generic. The Court has not yet found an appropriate and applicable gender-neutral term to describe the "seaman" crew member, and it is not a purpose of this Note to recommend one.

7. *Miles*, 498 U.S. at 37.

8. 46 U.S.C. app. § 688(a) (1988). The Jones Act does not explicitly state that it is an action predicated on negligence, but it does rely on the negligence-based remedies granted to railway employees in the Federal Employers' Liability Act, 45 U.S.C. § 51 (1988).

9. 45 U.S.C. § 51 (1988). The Jones Act applies to seaman all federal statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway employees." 46 U.S.C. app. § 688(a).

10. 46 U.S.C. app. §§ 761-768 (1988).

11. Seaworthiness is a shipowner's warranty to the seaman of the ship's fitness for duty. The shipowner has an absolute duty to provide a vessel that is fit for its intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Unseaworthiness, therefore, is the failure to meet this obligation. See SCHOENBAUM, *supra* note 6, §§ 4-5, 5-3.

12. SCHOENBAUM, *supra* note 6, § 5-3.

13. See *Dyer v. Merry Shipping Co.*, 650 F.2d 622, 625 (5th Cir. 1981) ("Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy

could plead both a statutory claim and a general maritime claim and recover punitive and other nonpecuniary damages under the general maritime law even though this recovery was unavailable under the statutes.

The Supreme Court eliminated this inconsistency to some degree in *Miles*, holding that a Jones Act seaman<sup>14</sup> may not recover nonpecuniary or punitive damages from his employer under a general maritime wrongful death action based on unseaworthiness.<sup>15</sup> Noting that the Jones Act precluded the recovery of nonpecuniary losses, the Court reasoned that it could not sanction a more expansive remedy than that already given plaintiffs by Congress.<sup>16</sup> The practical result of *Miles* is a sharp reduction in the potential recoverable damages available to a maritime wrongful death plaintiff.<sup>17</sup> Subsequent district court decisions have relied on *Miles* to preclude recovery of nonpecuniary and punitive damages by injured Jones Act claimants against their employers.<sup>18</sup> Thus, after *Miles* the district courts have consistently ruled that a true seaman may recover only pecuniary damages against his employer for wrongful death or personal injury.

Although the *Miles* decision definitively resolved the employer liability issue, it left open the question whether the Court has also eliminated the

vessel." *But see* *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984) (holding that punitive damages are not recoverable under the Jones Act). The court did not address the issue of punitive damages under the general maritime law, however, because the jury found the vessel seaworthy. *Id.* at 560. *See also* Paul S. Edelman, *Admiralty Jurisdiction and the Issues of Jury Trials and Punitive Damages*, in *MARITIME PERSONAL INJURY LITIGATION: JURISDICTION AND DAMAGES* 29, 59-69 (American Bar Ass'n ed., 1991); George L. Waddell, *Punitive Damages in Admiralty*, 19 J. MAR. L. & COM. 65 (1988); Jill Rakoff Loxson, Case Comment, *Recognition of Punitive Damages Under the Jones Act and General Maritime Law*, 5 SUFFOLK TRANSNAT'L L.J. 251 (1981); Michael P. Maslanka, Case Comment, *Punitive Damages in the Admiralty*, 5 MARITIME L. 223 (1980).

14. *See supra* note 6.

15. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990).

16. *Id.* at 36.

17. *George, supra* note 6, at 53.

18. *See, e.g.*, *Ellison v. Messerschmitt-Blokow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992); *Reynolds v. Zapata Off-Shore Co.*, 796 F. Supp. 1015 (S.D. Tex. 1992); *McAleer v. Smith*, 791 F. Supp. 923 (D.R.I. 1992); *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 787 F. Supp. 827 (D. Haw. 1992); *Turley v. Co-Mar Offshore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991); *Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Dunbar v. American Commercial Barge Lines Co.*, 771 F. Supp. 151 (M.D. La. 1991); *Breland v. Western Oceanic, Inc.*, 757 F. Supp. 718 (W.D. La. 1991); *In re MARDOC Asbestos Case Clusters 1,2,5, and 6*, 768 F. Supp. 595 (E.D. Mich. 1991) (extending application of *Miles* to general maritime injury actions so as to preclude the recovery of all nonpecuniary or exemplary damages). *See also* *Duplaintis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991); *Bourque v. Mallard Workover and Drilling, Inc.*, No. 89-1502 (W.D. La. 1991) (adopting narrow interpretation of *Miles* and not extending *Miles* beyond claims for loss of society or consortium).

seaman's right to recover nonpecuniary and exemplary damages from a third-party tortfeasor in a general maritime law negligence action.<sup>19</sup> A true seaman is currently permitted to file a general maritime negligence action against any negligent third party, even though such a claimant may already be compensated for all pecuniary damages under DOHSA, the Jones Act or an unseaworthiness claim. Thus, by proceeding against the third party, the plaintiff may be able to obtain a fuller compensation than would be possible in a suit against only an employer, notwithstanding the Court's determination in *Miles* that all true seamen are entitled to a uniform recovery without regard to the cause of action.

In sum, then, the true seaman suing under the Jones Act cannot recover nonpecuniary damages, but the same seaman may recover nonpecuniary damages when suing for negligence under the general maritime law. It is unclear whether the policy considerations articulated by the Court in *Miles* with respect to Jones Act seamen and unseaworthiness in the general maritime law are to be broadly construed and applied so that the Jones Act precludes true seamen from nonpecuniary recovery against negligent non-employer third parties.

This Note argues that the recovery limitations levied by the Supreme Court in *Miles* result in a misplaced priority on uniformity in admiralty without regard to the subtleties of the Jones Act. Part II briefly reviews the various wrongful death remedies available to the Jones Act seaman. Part III examines the applicability of the Uniformity Doctrine to maritime wrongful death. Part IV distinguishes the full recovery against third parties in another federal no-fault injury compensation scheme: the Longshoreman and Harbor Workers' Compensation Act. Part V analyzes the recent cases permitting Jones Act seamen to recover punitive and other nonpecuniary damages from nonemployer third-party tortfeasors. Part VI concludes that pursuant to the Uniformity Doctrine Congress must amend the Jones Act to provide a full pecuniary and nonpecuniary recovery for the wrongful death of a true seaman.

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19. See *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992); *Mussa v. Cleveland Tankers*, 802 F. Supp. 84 (E.D. Mich. 1992); *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991).

## II. A REVIEW OF THE MARITIME WRONGFUL DEATH REMEDIES: THE BASIS FOR LIABILITY AND THE EXTENT OF RECOVERABLE DAMAGES AVAILABLE TO THE JONES ACT SEAMAN

There are four causes of action that an admiralty plaintiff may file to recover for a maritime wrongful death or personal injury:<sup>20</sup> the Death on the High Seas Act,<sup>21</sup> the Jones Act,<sup>22</sup> the general maritime unseaworthiness claim<sup>23</sup> and the general maritime negligence claim.<sup>24</sup> A true seaman may recover under any single claim or under a combination of the claims for full satisfaction for his injuries.<sup>25</sup> The ultimate result, however, is that after *Miles*<sup>26</sup> a seaman cannot recover anything more than pecuniary losses from his employer under any claim or combination of claims.<sup>27</sup> This Part will consider each of the four causes of action in an effort to determine the possible remedies available to the seaman plaintiff prior to *Miles*.<sup>28</sup> Each cause of action will be reviewed as if Kenneth Sugden, the seaman introduced above,<sup>29</sup> had been the decedent.

### A. *Death on the High Seas Act*

Congress passed the Death on the High Seas Act<sup>30</sup> (DOHSA) in response to the federal judiciary's application of state wrongful death statutes<sup>31</sup> where death was occurring on the "high seas," *i.e.*, beyond the

20. See generally SCHOENBAUM, *supra* note 6, § 7-1, at 235 ("A crazy-quilt pattern of wrongful death actions is recognized in admiralty. . . . Wrongful death in admiralty is best approached by considering separately each liability system, the basis of liability, the extent of recoverable damages, and whether or not other liability regimes can be used in conjunction with it.").

21. 46 U.S.C. app. §§ 761-768 (1988).

22. 46 U.S.C. app. § 688 (1988).

23. See generally SCHOENBAUM, *supra* note 6, §§ 4-5, 5-3, 7-3.

24. See SCHOENBAUM, *supra* note 6, §§ 4-2, 7-3.

25. See *id.* §§ 7-3 to 7-4.

26. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

27. *Id.*

28. The changes after *Miles* will be considered through analysis of applicable case law. See *infra* part V.

29. See *supra* notes 1-3 and accompanying text.

30. 46 U.S.C. app. §§ 761-768 (1988). Section 761 provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond one marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . .

*Id.* app. § 761.

31. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 398 (1970).

three-mile territorial limit.<sup>32</sup> DOHSA ended the inconsistency due to the lack of a federal remedy by providing for uniform recovery.<sup>33</sup> Access to the DOHSA remedy is very broad—one qualifies as a DOHSA plaintiff if the decedent's death occurred on the high seas.<sup>34</sup> If the decedent was a true seaman,<sup>35</sup> then liability may be based on either negligence<sup>36</sup> or unseaworthiness.<sup>37</sup>

Pursuant to congressional intent, DOHSA preempts all state wrongful death statutes.<sup>38</sup> DOHSA also preempts the wrongful death action for negligence or unseaworthiness under the general maritime law which provided the exclusive death remedy for unseaworthiness when a true seaman was killed on the high seas.<sup>39</sup> The result is that if a seaman dies while sailing the high seas due to negligence or unseaworthiness of the ship, he is limited to the DOHSA remedy, which is explicitly limited to pecuniary damages.<sup>40</sup>

If Kenneth Sugden had drowned in waters at least three miles away from shore, then his beneficiaries' only recovery would have been via DOHSA under the strict liability unseaworthiness theory against the tug owner or under the higher burden negligence theory against the third-party shipyard or both. In either case, his beneficiaries could have recovered only for pecuniary losses.

### B. *The Jones Act*

Congress enacted a second statute providing a remedy for maritime

32. 46 U.S.C. app. § 761. One marine league is equal to a distance of three nautical miles or 3041 fathoms, estimated roughly at three miles. BLACK'S LAW DICTIONARY 889 (6th ed. 1990).

33. 46 U.S.C. app. § 761. See SCHOENBAUM, *supra* note 6, § 7-1.

34. 46 U.S.C. app. § 761. See *supra* note 32.

35. See *supra* note 6.

36. 46 U.S.C. app. § 761.

37. See *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399-401 (1970).

38. See *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986).

39. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), *amended by Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 329 (5th Cir. 1982) ("When the incident takes place outside the three-mile limit, DOHSA and DOHSA alone controls.").

40. 46 U.S.C. app. § 762. Section 762 states:

The recovery in such a suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

*Id.*

wrongful death or personal injury in 1920, popularly known as the Jones Act.<sup>41</sup> The Jones Act filled yet another void created after the enactment of DOHSA. After DOHSA, a seaman decedent killed on land could recover under the state wrongful death statute and the decedent seaman killed on waters beyond three miles from shore would recover under DOHSA, but there was no recovery for the seaman unfortunate enough to die on navigable waters within the three-mile territorial limit.<sup>42</sup> The Jones Act rectified this coverage gap by creating a cause of action. Recovery, however, was limited to only those persons who qualify as true seamen.

The Jones Act incorporates the Federal Employers' Liability Act (FELA),<sup>43</sup> extending to seamen the same rights and benefits granted to railway employees by the 1908 railway statute. Like DOHSA, the Jones Act preempts state wrongful death statutes.<sup>44</sup> Liability under the Jones Act, however, depends on a plaintiff's showing of negligence.<sup>45</sup> Although there is no remedy under the Jones Act for unseaworthiness,<sup>46</sup> if the death occurs beyond the three-mile limit the Jones Act negligence claim may be joined with a DOHSA unseaworthiness claim,<sup>47</sup> or if the incident occurs within three miles of the shore, the Jones Act negligence claim may be joined to a general maritime law unseaworthiness claim.<sup>48</sup>

Although state wrongful death statutes historically provided remedies,<sup>49</sup> today the Jones Act is the primary vehicle for a seaman's surviving

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41. 46 U.S.C. app. § 688 (1988).

42. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394-95 (1970). For a good, general discussion of the anomalies in early maritime wrongful death remedies and legislation, see Paul S. Edelman, *Recovery for Wrongful Death Under General Maritime Law*, 55 TUL. L. REV. 1123, 1128-33 (1981).

43. 45 U.S.C. §§ 51-60 (1988).

44. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

45. See *id.* at 154. See also *Lindgren v. United States*, 281 U.S. 38 (1930).

46. *Gillespie*, 379 U.S. at 154.

47. See *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303 (S.D.N.Y. 1965), *aff'd*, 367 F.2d 465 (2d Cir. 1966).

48. See *Patton-Tully Transp. Co. v. Ratliff*, 797 F.2d 206, 212 (5th Cir. 1986). See also *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980); *Holdan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975).

49. In an 1886 case, *The Harrisburg*, 119 U.S. 199 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court held that the general maritime law did not recognize a wrongful death cause of action for persons killed on the high seas or navigable waters, and that aggrieved parties had to rely on state statutes. *Id.* at 213. Since that decision, nearly every state has enacted wrongful death statutes. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23 (1990). Admiralty courts were forced to apply these statutes because of the lack of any federal legislation. See SCHOENBAUM, *supra* note 6, § 7-1. Under this rather haphazard system, the courts reached inconsistent results. *Id.*



beneficiaries to recover from the employer for wrongful death and personal injury.<sup>50</sup> The no-fault liability Jones Act requires the plaintiff to show only that he is a true seaman and that the injury occurred while in the ship's employ.<sup>51</sup> After determining that the plaintiff qualifies as a true seaman, the only issue to litigate is the amount of plaintiff's recoverable damages.<sup>52</sup>

When Congress drafted the Jones Act, it extended to the seaman plaintiff all of the rights and remedies it previously gave railway employees in FELA<sup>53</sup> so that the plaintiff seaman could maintain an action for "damages" at law.<sup>54</sup> FELA, however, is not clear on the subject of damages. It states only that the railway employers shall be liable in "damages" for the death or injury of the protected employee.<sup>55</sup> The Supreme Court considered the question of applicable damages in *Michigan Central Railroad Co. v. Vreeland*,<sup>56</sup> one of the earliest cases applying FELA. In *Vreeland*, the Court explained that the language of FELA essentially incorporated the language of the first wrongful death statute known as Lord Campbell's Act.<sup>57</sup>

The *Vreeland* Court held that the distinguishing features of Lord Campbell's Act were identical to the 1908 version of FELA because the damages had to result from the deprivation of the pecuniary benefits of the deceased had he not died.<sup>58</sup> Congress passed the Jones Act into law almost eight years after the Court established the ancestry of FELA in *Vreeland*.<sup>59</sup> Presuming, as the Supreme Court did in *Vreeland*, that Congress was aware of the existing law when enacting legislation,<sup>60</sup> the incorporation of FELA also resulted in the incorporation of its pecuniary

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50. See generally SCHOENBAUM, *supra* note 6, § 7-4. The Jones Act completely preempts the application of state wrongful death statutes to maritime wrongful deaths. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

51. 46 U.S.C. app. § 688(a).

52. See *McDermott Int'l v. Wilander*, 498 U.S. 337, 342-355 (1991). The Court discussed the various historical definitions of a Jones Act seaman and held that a Jones Act seaman should be defined "solely in terms of [his] connection to a vessel in navigation," and thus, "it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at 817.

53. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988).

54. 46 U.S.C. app. § 688.

55. 45 U.S.C. § 51.

56. 227 U.S. 59 (1913).

57. *Id.* at 69. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (Eng.).

58. *Vreeland*, 227 U.S. at 70.

59. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

60. *Id.* (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)).

limitations—it has been well settled, then, that the Jones Act provides only for pecuniary damages.<sup>61</sup>

For Kenneth Sugden's survivors, the Jones Act represents the only vehicle for recovery against the employer. Because it is a no-fault liability statute, they need only prove Sugden's status as a seaman, that he fell into the moon pool while in the course of his employment, and that they sustained a certain measure of pecuniary losses. The Jones Act, however, does not permit a negligence action against the third-party shipyard.<sup>62</sup>

### C. *General Maritime Law: Unseaworthiness*

In addition to, or as an alternative to the statutory remedies discussed above, an injured seaman may plead the general maritime law concept of unseaworthiness as the grounds for his recovery.<sup>63</sup> The Supreme Court established the wrongful death remedy under the general maritime law of either unseaworthiness or negligence in *Moragne v. States Marine Lines, Inc.*,<sup>64</sup> after overruling contrary controlling precedent.<sup>65</sup> Basically, seaworthiness is a shipowner's promise to the seaman of the ship's fitness for duty.<sup>66</sup> The duty imposed on the shipowner is an absolute duty to provide a vessel that is fit for its intended purpose.<sup>67</sup> This duty is distinct from a negligence claim<sup>68</sup> under either the Jones Act<sup>69</sup> or the general maritime law.

Although the seaworthiness obligation is absolute and separate from negligence, an accident alone is not enough for recovery.<sup>70</sup> The seaman plaintiff must also show that the unseaworthiness proximately caused the injury.<sup>71</sup> This is a more demanding burden than the mere no-fault causation requirement in a Jones Act claim. The recoverable damages from

61. *Id.*

62. 46 U.S.C. app. § 688 (1988). The Jones Act is a strict liability statute providing any seaman injured in the course of his employment the right to recover damages for the negligence of his employer. Jones Act liability is extended through the employer to other negligent parties employed by the employer including agents and independent contractors. *Id.*

63. *See generally* SCHOENBAUM, *supra* note 6, §§ 4-5, 5-3, 7-3.

64. 398 U.S. 375 (1970).

65. *See infra* part III.C.

66. *See* *The Osceola*, 189 U.S. 158 (1903).

67. *See* *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) (citing *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946)).

68. SCHOENBAUM, *supra* note 6, § 5-3.

69. *See supra* part II.B.

70. SCHOENBAUM, *supra* note 6, § 5-3.

71. *Id.*

a successful unseaworthiness claim were traditionally pecuniary damages<sup>72</sup> and, until *Miles*, punitive damages were also available in a few federal circuits.<sup>73</sup> With *Miles*, the Court disallowed all nonpecuniary and exemplary damages arising from this action.<sup>74</sup>

Accordingly, Sugden's estate could file a claim based upon the general maritime law theory of unseaworthiness in addition to any Jones Act claim. Sugden's estate would argue that the barge on which he was working was unfit for the purpose for which it was intended, and thus was unseaworthy. Given the facts, it would not be difficult to persuade a court that the moon pool cover was unfit, that this was a breach of the shipowner's duty, that Sugden sustained injury as a result of the breach, and that the unfit cover was the proximate cause. By filing an unseaworthiness action in conjunction with a Jones Act claim a plaintiff covers all the possible theories of recovery.

#### D. General Maritime Law: Negligence

Finally, the plaintiff may base a claim on the general maritime law of negligence. The elements of a maritime negligence claim are essentially the same as those of a common-law tort negligence claim<sup>75</sup> including foreseeable consequences.<sup>76</sup> Moreover, the possible damages recoverable under the maritime negligence action mirror those available in a land-based negligence action, *i.e.*, both pecuniary and nonpecuniary losses are compensable.<sup>77</sup> In fact, there is very little difference between a maritime negligence action and a land-based negligence action except for the locality of the wrong. An employee, however, may not bring a maritime negligence action against his employer because both the Jones Act and DOHSA preempt such suits against employers.<sup>78</sup>

Thus, Kenneth Sugden's surviving beneficiaries could not bring a maritime negligence action against his employer because of Jones Act

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72. *Id.*

73. See *supra* note 13.

74. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

75. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

76. See, *e.g.*, *Petition of Kinsmen Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (applying *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) to admiralty), *cert. denied sub nom. Continental Grain Co. v. City of Buffalo*, 380 U.S. 944 (1965).

77. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 127, at 949-54 (5th ed. 1984), for a discussion of pecuniary and nonpecuniary damages recovery in admiralty.

78. See *supra* notes 50 and 39, respectively, and accompanying text.

preemption, but they could bring such an action against the third-party shipyard. By employing a maritime negligence action against the third party and a Jones Act claim against his employer, Sugden's beneficiaries could be assured of a full recovery—pecuniary losses from the employer and nonpecuniary losses from the third-party. The result in *Miles*, however, leaves such recovery in doubt. *Miles* broadly claimed to eliminate all nonpecuniary recovery from general maritime law without specifying if the holding was to be narrowly interpreted and limited to unseaworthiness claims, or to be broadly construed and thus include all general maritime actions, including negligence claims.<sup>79</sup>

### III. THE UNIFORMITY DOCTRINE IN MARITIME WRONGFUL DEATH

#### A. *Maritime Jurisdiction*

Article III of the United States Constitution grants original jurisdiction to the Supreme Court and the lower federal courts for all admiralty and maritime cases.<sup>80</sup> Within this grant of jurisdiction, there is a marriage of statutory law<sup>81</sup> and judge-made common law, also known as the "general maritime law."<sup>82</sup> Thus, there are two potentially conflicting sources of law which judges and practitioners must reconcile into one body understandable and applicable to cases arising in admiralty. While the integration of statutory and common law is not a particularly unique situation in American jurisprudence, the constitutional grant of admiralty

79. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.")

80. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty, and maritime Jurisdiction . . . ." U.S. CONST. art. III, § 2, cl. 1.

81. Congress has the power to legislate on admiralty and maritime matters. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852).

82. See generally SCHOENBAUM, *supra* note 6, §§ 3-1, 4-1.

The general maritime law is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation. It is a body of concepts, principles, and rules, customary and international in its origin, that has been adopted and expounded by federal courts.

*Id.* § 4-1, at 121 n.3 (citing *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *The Thomas Barlum*, 293 U.S. 21 (1934)).

original jurisdiction to the Supreme Court has influenced the role that the Supreme Court plays in the creation of admiralty and maritime law.<sup>83</sup>

Because the Constitution grants the Supreme Court original jurisdiction, the Court is not restricted to merely reviewing lower court decisions in admiralty cases. In admiralty, the federal courts often create the general maritime law from the bench.<sup>84</sup> As a result, the Court has determined over time that there are a few very specific and overriding interests which dictate a strong need for uniformity in admiralty.<sup>85</sup> These interests include regulating international and domestic waterway commerce<sup>86</sup> and protecting

83. See, e.g., *Fitzgerald v. United States Lines*, 374 U.S. 16, 20 (1962) ("Congress has largely left to this Court the responsibility of fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.") (citations omitted). *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335-36 (2d Cir. 1981) ("The Supreme Court has recognized, however, that the federal judiciary has a more expansive role to play in the development of maritime law than in the development of non-maritime federal common law.") (citations omitted).

84. See *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). The court observed:

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances to develop federal common law.

*Id.* (citations omitted).

*But see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (refusing to provide for "loss of society" damages under the general maritime law when Congress had not provided for such damages in DOHSA).

85. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970). The court stated:

[T]he Jones Act was intended to achieve "uniformity in the exercise of admiralty jurisdiction" by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. . . . Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. . . . Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system coextensive with, and operating uniformly in, the whole country."

*Id.* at 401-02 (citations omitted). See also *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 596 (1974) (Powell, J., dissenting). In dissent, Justice Powell commented:

Writing for the Court [in *Moragne*], Mr. Justice Harlan stressed the need to "assure uniform vindication of federal policies. . . ." The Court has now rejected these guidelines so recently laid down in *Moragne*. Disregarding the source of law endorsed by *Moragne*, as well as the concern for uniformity expressed in that opinion, the Court has fashioned a new substantive right of recovery in conflict with "accepted maritime law". . . . [T]hese new doctrines are unsound as a matter of principle, will create difficulty and confusion in the litigation of admiralty cases, and are very likely to result in duplicative recoveries.

*Id.* (Powell, J., dissenting).

86. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 688, 677 (1982). In *Richardson*, the Court concluded:

In light of the need for uniform rules governing navigation, the potential impact on maritime

seamen without regard to their proximity to a particular U.S. legal jurisdiction.<sup>87</sup>

### B. *Origins of the Uniformity Doctrine*

Traditionally, the twin pillars of the law of admiralty have been: (1) a "special solicitude" for the welfare of seamen and their families in recognition of the extremely unique perils and hardships that a seaman's life requires,<sup>88</sup> and (2) the principle of uniformity.<sup>89</sup> The Court initially recognized a need for the uniformity of admiralty law in *The Lottawanna*<sup>90</sup> in 1873. The Court held that the nature of admiralty law requires a system of law which operates with equality on any body of navigable waters in the country without regard to the local jurisdiction.<sup>91</sup> Periodically, the Court reaffirms the existence of this overarching notion in its maritime decision making.<sup>92</sup> In 1920, Congress enacted legislation to create causes of action for most maritime wrongful deaths. DOHSA<sup>93</sup>

commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within admiralty jurisdiction of the federal courts.

*Id.*

87. See *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 269-70 (1972).

88. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.

*Moragne*, 398 U.S. at 386-87 (footnotes omitted).

The shaping of the *Moragne* wrongful death remedy was "guided by the principle of maritime law that 'certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Gaudet*, 414 U.S. at 583 (citing *Moragne*, 398 U.S. at 387 (quoting *The Sea Gull*, 21 F. Cas. 909 (C.C. Md. 1865) (No. 12, 578))). See also *id.* at 588 (recognizing the decision to permit a longshoreman's spouse to recover loss of society "is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction") (footnotes omitted).

89. In 1873 the Court recognized the uniformity principle. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1873) (holding that admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country.").

90. *Id.*

91. *Id.*

92. See, e.g., *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system.") (citations omitted).

93. 46 U.S.C. app. §§ 761-768 (1988). See *supra* part II.A.

created an action for the wrongful death of anyone killed on the high seas.<sup>94</sup> In addition, the Jones Act<sup>95</sup> created a cause of action for seamen killed in the course of employment. Thus, Congress supplied to the admiralty courts a uniform set of applicable rules and thereby averted the chaos of as many varying statutes and recoveries for maritime wrongful death as there were states.

### C. *The Moragne Wrongful Death Remedy*

Decades later, in *Moragne v. States Marine Lines, Inc.*,<sup>96</sup> the Court created a right for seamen to recover for wrongful death under the general maritime law.<sup>97</sup> Necessitated by this creation of a general maritime wrongful death remedy, the Court overruled a line of cases based upon *The Harrisburg*,<sup>98</sup> which stated the old maritime rule that, absent a statute, there was no action for wrongful death in admiralty.<sup>99</sup> The Court concluded that through the simultaneous enactment of DOHSA and the Jones Act Congress intended to achieve uniformity of admiralty jurisdiction so that all seamen would have the right to recovery for the negligence of their employers, regardless of the location of the death or personal injury.<sup>100</sup> Further, the Court noted, the concern for uniformity is a recognition that the various state wrongful death acts had encroached upon the “uniform vindication of federal policies” in admiralty law.<sup>101</sup>

According to *Moragne*, the reasons behind the need for uniformity of the maritime law are the same reasons that must be balanced under the doctrine of stare decisis.<sup>102</sup> First, uniformity enables an individual to prepare for the future without the worry of surprise. Second, uniformity furthers fair and expedient litigation and adjudication. Third, uniformity bolsters the

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94. *See id.* app. § 761.

95. 46 U.S.C. app. § 688 (1988). *See supra* part II.B.

96. 398 U.S. 375 (1970).

97. *Id.* at 409.

98. 119 U.S. 199 (1886).

99. *Id.* at 213.

100. *Moragne*, 398 U.S. at 400-01.

101. *Id.* at 401-02. *Moragne* relied on the uniformity principle to create the general maritime law wrongful death and personal injury actions in the face of conflicting state wrongful death statutes. The Court concluded that the recognition of the right to recover for wrongful death and personal injury under general maritime law “will assure uniform vindication of federal policies, removing tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.” *Id.* (citing *Hess v. United States*, 361 U.S. 314 (1960)) (footnotes omitted).

102. *Id.* at 403.

public's faith in the judiciary and its maritime law.<sup>103</sup> These three justifications for the uniformity doctrine must be considered when applying *Miles* to the nonpecuniary claims of the seaman plaintiff against the nonemployer third-party tortfeasor.<sup>104</sup>

#### D. *Miles v. Apex Marine Corp.*

In *Miles v. Apex Marine Corp.*, the Court relied on the uniformity doctrine to justify eliminating nonpecuniary awards in a wrongful death suit brought under the general maritime law unseaworthiness cause of action.<sup>105</sup> Essentially the Court reasoned that uniformity required that the true seaman's wrongful death recovery under the judicially-created general maritime law unseaworthiness cause of action cannot be greater than the recovery allowed by the congressionally-approved statutory recovery in the Jones Act for cases of death resulting from negligence.<sup>106</sup>

First, *Miles* affirmed the existence of a general maritime cause of action based upon unseaworthiness for the wrongful death of a seaman.<sup>107</sup> Second, the Court noted that the Jones Act<sup>108</sup> provides a negligence action for the wrongful death or injury of a seaman against his employer.<sup>109</sup> Further, the Court observed that an injured or killed seaman may have a cause of action against the employer under the *Moragne* general

#### 103. *Id.*

Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with the assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition to every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

#### *Id.*

104. *See infra* parts V, VI.

105. 498 U.S. 19, 27 (1990).

We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. 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 from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to the legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress . . . Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

#### *Id.* at 27-33.

106. *Miles*, 498 U.S. at 32-33.

107. *Id.* at 23-27.

108. 46 U.S.C. app. § 688 (1988).

109. *Miles*, 498 U.S. at 27-30.



maritime law for unseaworthiness<sup>110</sup> as well as under the Jones Act for negligence.<sup>111</sup> Finally, the Court attempted to clarify the remedies and damages available to the injured or killed seamen.

The Court in *Miles* acknowledged that it had previously permitted a wrongful death dependent plaintiff to recover nonpecuniary damages in *Sea-Land Services, Inc. v. Gaudet*.<sup>112</sup> But later, in *Mobil Oil v. Higginbotham*,<sup>113</sup> the Court narrowed the scope of its previous holding to apply only to the wrongful deaths of longshoremen in territorial waters.<sup>114</sup> The Court reasoned in *Higginbotham* that by enacting DOHSA, which expressly limits recovery to pecuniary damages,<sup>115</sup> Congress had spoken directly to the issue and it was not the role of the Court to supplement the congressional intent.<sup>116</sup>

The *Miles* Court next discussed the Jones Act, noting that the Jones Act, unlike DOHSA, does not explicitly limit damages to pecuniary losses.<sup>117</sup> The Jones Act, however, incorporated FELA<sup>118</sup> which allows only for the recovery of pecuniary damages.<sup>119</sup> Thus, the Court concluded that only pecuniary damages may be recovered in a Jones Act negligence action thereby eliminating the possibility of recovery for nonpecuniary damages in Jones Act claims.<sup>120</sup>

In addition to the above conclusions, the *Miles* Court explained its concerns regarding uniformity between the bench-created remedies and the congressionally-created remedies.<sup>121</sup> The Court concluded that the judge-made case law and statutory maritime actions should be consistent, particularly with respect to the issue of recoverable damages.<sup>122</sup> Given

110. *Id.* at 30 (“If there has been any doubt about the matter, we today make it explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.”).

111. *Id.* at 29 (“The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”).

112. *Id.* at 30. See *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 588-89 (1974).

113. 436 U.S. 618 (1978).

114. *Miles*, 498 U.S. at 31 (citing *Higginbotham*, 436 U.S. at 622-23).

115. 46 U.S.C. app. § 762 (1988).

116. *Miles*, 498 U.S. at 31 (citing *Higginbotham*, 436 U.S. at 625).

117. *Id.* at 32.

118. 45 U.S.C. §§ 51-60 (1988). See *supra* notes 43-60 and accompanying text.

119. 45 U.S.C. § 51.

120. *Miles*, 498 U.S. at 32-33.

121. *Id.* at 33-34.

122. *Id.* at 31 (“But in an ‘area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.”) (quoting *Mobil Oil v. Higginbotham*, 436 U.S. 618, 625 (1978)).

this conclusion in favor of uniformity as primary motivation, the Court refused to grant more expansive remedies in a judicially-created cause of action—general maritime law of unseaworthiness—than are available in the congressionally-created cause of action—Jones Act negligence.<sup>123</sup> The Court's final conclusion was that the holding in *Miles* restored "a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."<sup>124</sup>

Strictly interpreting the above-quoted phrase, then, *Miles* appears to have reached a very definitive conclusion: there is to be no recovery of any nonpecuniary damages by a Jones Act seaman if the suit results out of a wrongful death regardless whether the suit is brought under a claim of unseaworthiness or negligence. However, some district courts are asking whether *Miles* may be read narrowly to deny recovery of nonpecuniary damages only in suits brought against an *employer*<sup>125</sup> leaving open the possibility of such recovery against third-party nonemployer defendants.<sup>126</sup>

#### IV. FULL RECOVERY AGAINST THIRD-PARTIES IN ANOTHER FEDERALLY LEGISLATED NO-FAULT INJURY COMPENSATION SCHEME: THE LONGSHOREMAN AND HARBOR WORKERS' COMPENSATION ACT

Under existing law, it is clear the seaman plaintiff could only hope to recover nonpecuniary damages by bringing a general maritime negligence action against any allegedly negligent third party. The plaintiff would have to prove the same elements of a land-based negligence claim in order to recover full compensation.<sup>127</sup>

Given the confusing nature of the maritime wrongful death remedy,<sup>128</sup> it should not be surprising that neither the Supreme Court nor Congress has yet tackled the problem of the seaman plaintiff and maritime third-party liability. However, in a slightly different setting Congress and the courts have established and administered a scheme, like that of the Jones Act, which permits full statutory recovery under a strict no-fault liability theory while, unlike the Jones Act, also allowing suits against a negligent third party. This strict no-fault employer liability scheme is the Longshoreman

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123. *Miles*, 498 U.S. at 32-33.

124. *Id.* at 33.

125. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

126. *See infra* part V.

127. *See supra* part II.D.

128. *See supra* part II.

and Harbor Workers' Compensation Act (LHWCA).<sup>129</sup>

*A. The Longshoreman and Harbor Workers' Compensation Act*

The LHWCA provides compensation for the disability or death of "any person engaged in maritime employment"<sup>130</sup> when the injury or death occurs upon navigable waters of the United States<sup>131</sup> or "any adjoining pier, wharf, dry dock . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."<sup>132</sup> The LHWCA is the exclusive remedy against the employer for the longshoreman's wrongful death.<sup>133</sup> The LHWCA plaintiff may recover death benefits, including compensation for the spouse and dependent children, from the employer according to formulas specified in the statute.<sup>134</sup>

*B. The Section 905(b) Remedy*

Unlike the Jones Act, however, section 905(b) of the LHWCA provides a statutory cause of action for negligence against a third party, including a wrongful death remedy.<sup>135</sup> The third-party cause of action is limited to

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129. 33 U.S.C. § 901-950 (1988).

130. 33 U.S.C. § 902(3). Unconditionally excluded from coverage are (1) "a master or member of a crew of any vessel"—they may rely on the Jones Act; and (2) "any person engaged by a master to load or unload or repair any small vessel under eighteen tons." 33 U.S.C. § 902(3)(G), (H).

131. Prior to the 1972 amendments, the Court held that state compensation could not reach longshoremen injured seaward of the water's edge skirting piers and docks. This line was known as the *Jensen* line. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Victory Carriers v. Law*, 404 U.S. 202 (1971).

132. 33 U.S.C. § 903(a). In order to fall within the scope of the LHWCA coverage, the employee must satisfy both the situs test of section 903(a) and the status test of section 902(3).

133. 33 U.S.C. § 905(a).

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

*Id.*

134. 33 U.S.C. § 909.

135. 33 U.S.C. § 905 (b).

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title [detailing compensation], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the

naming vessels as defendants.<sup>136</sup> Essential elements necessary to invoke section 905(b) include admiralty jurisdiction,<sup>137</sup> that the wrong had a significant relationship to traditional maritime activity,<sup>138</sup> and the involvement of a "vessel."<sup>139</sup> For recovery against a third-party vessel, the successful 905(b) prima facie case must prove: "(1) that the vessel had a duty to protect against the hazard; (2) that the shipowner breached that duty; (3) that the plaintiff suffered injury; and (4) that the damages were proximately caused by the defendant's breach of duty."<sup>140</sup> Basically, the longshoreman must satisfy the prima facie requirements of a standard common-law tort claim.<sup>141</sup>

The possible recovery available to the section 905(b) plaintiff is much fuller than that permitted a true seaman under either the Jones Act or the general maritime law of unseaworthiness after *Miles*.<sup>142</sup>

contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

*Id.* See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (holding a vessel owner liable for damages under maritime tort law for his negligence causing injury to a worker).

136. 33 U.S.C. § 905(b). The plaintiff may sue against non-vessel negligent third parties for wrongful death under the general maritime law if death occurred within state or territorial waters, or under DOHSA if occurring beyond the three mile limit. See *supra* note 32 and accompanying text. Of course, if there is no admiralty jurisdiction, nothing precludes the plaintiff from seeking relief under the applicable state wrongful death and survival statutes.

137. To be eligible, the plaintiff must satisfy both the status test and the situs test. See *supra* note 132.

138. See, e.g., *Christoff v. Bergeron Indus.*, 748 F.2d 297 (5th Cir. 1984) (holding that an injury to a welder sustained when he fell through a hole on the deck of a barge which was resting on a marine railway over a river was not within admiralty jurisdiction because the wrong had no significant relationship to traditional maritime activity).

139. 33 U.S.C. 902(21) defines a "vessel":

Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of in or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter, or barge boat charterer, master, officer, or crew member.

*Id.*

140. See SCHOENBAUM, *supra* note 6, § 6-10.

141. See KEETON ET AL., *supra* note 77, § 30.

142. A section 905(b) plaintiff may recover:

(1) medical and rehabilitation expenses (past and anticipated in the future); (2) pain and suffering (past and anticipated in the future); (3) mental anguish and distress caused by symptoms, treatment, inactivity, and changed self-image (past and future); (4) permanent disability and disfigurement, if any; (5) impaired ability to enjoy life; (6) loss of earnings (past and future); (7) spouse's loss of consortium; (8) punitive damages; and (9) prejudgment interest.

SCHOENBAUM, *supra* note 6, § 6-10.

Finally, the section 905(b) plaintiff is not required to elect between section 903 employer compensation and section 905(b) third-party compensation; both remedies may be pursued concurrently.<sup>143</sup>

### C. *Mechanics for Insuring Equality Among the Parties*

The LHWCA provides that after compensating the plaintiff, the employer is permitted to sue the third-party vessel under a subrogation and assignment of right theory.<sup>144</sup> Further, the employer must be involved in all settlement agreements between the plaintiff and the third party to insure there is no double recovery or over-compensation of any one party.<sup>145</sup> The employer also has an independent cause of action under the general maritime law against a negligent third-party vessel.<sup>146</sup>

### D. *Section 905(b) and the Jones Act Seaman*

The LHWCA is evidence that Congress is capable of creating a federal statutory scheme by which a wrongful death or personal injury plaintiff may recover both from the employer and from a negligent third party without compromising one recovery for the other. Moreover, the LHWCA plaintiff is permitted to recover more than just the pecuniary damages available to the Jones Act wrongful death plaintiff. Under the LHWCA scheme, the wrongful death plaintiff is able to recover pecuniary losses from the employer and nonpecuniary losses from the negligent third party.<sup>147</sup> Thus, if *Miles* eliminated the true seaman's opportunity to recover nonpecuniary damages in all general maritime law claims, then the result is that the LHWCA plaintiff may find a fuller remedy under a

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143. 33 U.S.C. § 933(a).

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

*Id.*

144. See SCHOENBAUM, *supra* note 6, § 6-11.

145. SCHOENBAUM, *supra* note 6, § 6-12.

146. SCHOENBAUM, *supra* note 6, § 6-13. This is an independent, judicially-created general maritime law cause of action known as a *Burnside* claim, based on *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 409 (1969).

147. See *supra* part IV.B. In fact, this district court specifically held that *Miles* does not reach to the longshoreman's recovery for loss of spouse's society under section 905(b) in the general maritime law. The court reasoned, however, that this result was due to the fact that the plaintiff was a longshoreman under the LHWCA and not a seaman. The court did not address whether the outcome would have been the same if the plaintiff had qualified as a seaman. *Id.*

no-fault liability plan than his counterpart who qualifies for the Jones Act remedy.

If, on the other hand, the true seaman had a comparable system of recovery by which he could recover under a no-fault negligence scheme from his employer and still seek nonpecuniary awards from negligent third parties, then there would be no need to consider the sweeping statement of *Miles*. But because the seaman does not have the statutory right to seek recovery from the negligent third party, it is necessary to consider the few post-*Miles* cases that have recently been decided in the federal district courts. These decisions are helpful in determining whether a Jones Act plaintiff may still seek nonpecuniary remedies from negligent third parties under the general maritime negligence cause of action as well as no-fault compensation from the employer under the Jones Act or the general maritime unseaworthiness cause of action.

#### V. RECENT CASES PERMITTING AND DENYING JONES ACT SEAMEN RECOVERY OF NONPECUNIARY AND PUNITIVE DAMAGES FROM NONEMPLOYER THIRD-PARTY TORTFEASORS

The district courts are split regarding wrongful death recovery by a Jones Act seaman from a negligent third party.<sup>148</sup> Since *Miles v. Apex Marine Corp.*,<sup>149</sup> there have been only three cases holding that a Jones Act seaman could recover nonpecuniary damages in a general maritime law wrongful death or personal injury action from a negligent third party.<sup>150</sup>

#### A. *Rebstock v. Sonat Offshore Drilling*

The first case to recognize nonpecuniary damages, *Rebstock v. Sonat Offshore Drilling*,<sup>151</sup> came six months after the Supreme Court decided *Miles*. In *Rebstock*, the District Court for the Eastern District of Louisiana

148. See *supra* note 18.

149. 498 U.S. 19 (1990).

150. The three cases are: *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991); *Mossa v. Cleveland Tankers*, 802 F. Supp. 84 (E.D. Mich. 1992); and *Sugden v. Puget Sound Tug Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992).

A pre-*Miles* case of some minor interest, *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421 (5th Cir. 1988), permitted recovery of nonpecuniary damages from an employer and third party on a joint liability theory based on unseaworthiness under the general maritime law. This case is notable for holding the employer and third party jointly liable rather than for anything it says to the recovery of nonpecuniary damages by a Jones Act plaintiff in the general maritime law. Nonetheless, it places the issue in some historical context.

151. 764 F. Supp. 75 (E.D. La. 1991).

held that a seaman's wife could seek loss of consortium damages in a general maritime negligence action against a third party.<sup>152</sup> Acknowledging that the district courts in Louisiana had applied the *Miles* ban on nonpecuniary damages to Jones Act plaintiffs suing under the general maritime unseaworthiness theory,<sup>153</sup> the court distinguished *Rebstock* from *Miles*, noting that in *Rebstock* the plaintiffs did not assert a Jones Act claim despite having Jones Act seamen status.<sup>154</sup> Instead the plaintiffs asserted a general maritime law negligence action against the third-party defendant drilling and oil companies.<sup>155</sup> Finding that plaintiffs' status as Jones Act seamen was irrelevant, the court ruled that plaintiffs could recover loss of consortium damages because the general maritime law of negligence was similar to the common law of negligence.<sup>156</sup>

In distinguishing *Miles*, the court opined that the *Miles* court's emphasis on uniformity did not prevent its ruling. The court viewed *Miles* as creating a uniform rule for suits by seamen against their employers, without considering the issue of seamen suing third parties.<sup>157</sup> The court in *Rebstock* suggested that because of the LHWCA, to deny plaintiff the loss of consortium damages under the general maritime law of negligence would create the same type of inconsistency in maritime law that *Miles* had cured. The court noted that section 905(b) of the LHWCA<sup>158</sup> permits the spouse of a longshoreman suing a nonemployer vessel for negligence to recover loss of consortium damages. If such recovery were denied in the instant case, the spouse of a Jones Act seaman suing a nonemployer for negligence could not equally recover the loss of consortium damages.<sup>159</sup> The court concluded that in the interest of uniformity, as expressed in *Miles*, the

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152. *Id.* at 76.

153. *Id.* at 75 (citing *Breland v. Western Oceanic, Inc.*, 755 F. Supp. 718 (W.D. La. 1991); *Anglada v. Tidewater, Inc.*, 752 F. Supp. 722 (E.D. La. 1990); *Turley v. Co-Mar Offshore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991); *McGee v. Bean Dredging Corp.*, No. 90-0394 (E.D. La. March 8, 1991)). Note, however, that unlike *Rebstock*, all of these "cases involved a Jones Act claim by the injured seamen against the seaman's employer combined with claims for unseaworthiness under the general maritime law." *Id.* at 75 n.1.

154. *Id.* at 75.

155. *Id.* at 75-76. The third-party defendants in *Rebstock* were Sonat Offshore Drilling and Amoco Production Company. *Id.* at 75.

156. *Id.* at 76. The court relied on *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 386 (5th Cir. 1985), a pre-*Miles* case in which the Fifth Circuit allowed an injured seaman's spouse asserting a general maritime law negligence claim against a third party to recover damages for loss of consortium. *Id.*

157. *Id.*

158. 33 U.S.C. § 905(b). See *supra* part IV for a discussion of the LHWCA.

159. *Rebstock*, 764 F. Supp. at 76.

inconsistency may be avoided by allowing the nonpecuniary damages claim to stand against the third-party defendants in negligence.<sup>160</sup>

### B. *Mussa v. Cleveland Tankers*

The second post-*Miles* case permitting recovery of nonpecuniary damages from a third party is *Mussa v. Cleveland Tankers*.<sup>161</sup> The *Cleveland Tankers* court held that a Jones Act seaman could assert a punitive damages claim against a nonemployer third party under the general maritime law for negligence.<sup>162</sup> The plaintiffs in *Cleveland Tankers* were seamen aboard the M/V Jupiter which was carrying a cargo of gasoline.<sup>163</sup> As the tanker unloaded its cargo at the third party defendant's dock,<sup>164</sup> the ship exploded into flames. As a result of the explosion and ensuing fire, the ship broke loose from its moorings, drifted into the navigation channel, and subsequently partially sank.<sup>165</sup> In response to the plaintiffs' suit for punitive damages, the third party defendant moved to dismiss based on *Miles*.<sup>166</sup> The *Cleveland Tankers* court ruled that *Miles* did not apply because, in its view, the *Miles* policy of uniformity for wrongful death and personal injury actions was limited to situations in which the Jones Act seaman sued his employer under related Jones Act and general maritime law claims.<sup>167</sup> In contrast, the court noted that in *Cleveland Tankers*, the plaintiff seamen claimed under a single maritime negligence theory which does not have a statutory remedy different from the remedy provided under the general maritime law.<sup>168</sup>

160. *Id.*

161. 802 F. Supp. 84 (E.D. Mich.), *claim dismissed*, 791 F. Supp. 679 (E.D. Mich. 1992).

162. *Id.* at 86.

163. *See* Petition of Cleveland Tankers, Inc., 791 F. Supp. 669, 671 (E.D. Mich. 1992).

164. *Id.* The dock was owned by Total Petroleum, Inc.

165. *Id.*

166. *Cleveland Tankers*, 802 F. Supp. at 85.

167. *Id.* at 86.

168. *Id.*

Total's argument that *Miles* [controls] the present case goes too far. Such an argument seeks to extend *Miles*' policy of uniformity to situations, such as the one presented in the cases at bar, where Jones Act seamen are not suing their employer under related Jones Act and general maritime law claims, but instead, are suing a third-party . . . under a single general maritime claim of negligence. To wit, plaintiffs are suing [a third party] for their alleged negligence in causing the accident giving rise to their injuries. In the action against [this third party] no situation is presented where statutory law provides a remedy different than the remedy provided under general maritime law, unlike the situation in *Miles*. As such, *Miles* does not control the instant actions as to plaintiffs' claims against [the third party].

*Id.* at 86 & n.1 (noting that "[n]o Jones Act claim is available against a nonemployer third party. 46 U.S.C. app. § 688.").



Relying on *Rebstock*<sup>169</sup> for its holding, *Cleveland Tankers* explained and dismissed three cases in which nonpecuniary damages claims were not allowed in actions by Jones Act seamen against third parties. In the first, *Turley v. Co-Mar Offshore Marine Corp.*,<sup>170</sup> an injured Jones Act seaman sued his employer and a third party for Jones Act negligence and general maritime law unseaworthiness.<sup>171</sup> The plaintiff's wife sued for loss of consortium.<sup>172</sup> The court dismissed the nonpecuniary claim against the employer on the basis of *Miles*.<sup>173</sup> The *Cleveland Tankers* court, however, found that the *Turley* opinion did not clearly explain the justification for dismissal of the nonpecuniary claim against the third party defendant.<sup>174</sup>

Similar claims were presented in *Donaghey v. Ocean Drilling & Exploration Co.*,<sup>175</sup> the second case distinguished in *Cleveland Tankers*.<sup>176</sup> In *Donaghey*, the court held that *Miles* compelled dismissal of loss of consortium and service claims under either the Jones Act or the general maritime law.<sup>177</sup> Although the *Donaghey* opinion failed to indicate the relationship of the defendant third parties to the seaman plaintiff, *Cleveland Tankers* inferred an employer-employee relationship because the plaintiff in *Donaghey* had included a Jones Act negligence action with his other claims.<sup>178</sup>

169. See *supra* part V.A.

170. 766 F. Supp. 501 (E.D. La. 1991).

171. *Id.* The plaintiff-seaman in *Turley* sustained injuries while employed by Co-Mar as crew on the vessel *M/V C/Enforcer*. Plaintiffs alleged both negligence under the Jones Act and unseaworthiness under general maritime law. *Id.* The opinion, however, sheds little light on the third party's relationship to the plaintiff or its role in the litigation.

Although there is no fact upon which to base the premise, it is possible that *Turley's* counsel made the third party a defendant with an eye toward skirting *Miles*. Thus, Mrs. *Turley*, unable to recover from the employer as mandated by *Miles*, would have a nonemployer deep pocket from which recovery might be forthcoming.

172. *Id.* The original complaint was amended to add Mrs. *Turley* as plaintiff claiming for recovery for loss of consortium, services and society. *Id.*

173. *Id.* at 502. In addition to its reliance on *Miles*, the district court also cited *Anglada v. Tidewater, Inc.*, 752 F. Supp. 722 (E.D. La. 1990), which held "that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Turley*, 766 F. Supp. at 501.

174. *Cleveland Tankers*, 802 F. Supp. at 87.

175. 766 F. Supp. 503 (E.D. La. 1991).

176. *Cleveland Tankers*, 802 F. Supp. at 87.

177. *Donaghey*, 766 F. Supp. at 504.

178. *Cleveland Tankers*, 802 F. Supp. at 87 ("A conclusion that the defendants in both *Turley* and *Donaghey* were employers of the seamen-plaintiffs may be inferred from the fact that in each action, the seamen-plaintiff sued for negligence under the Jones Act—a claim raised by a seaman against his employer."). The opinion relied on a pre-*Miles* case, *Wheatley v. Gladden*, 660 F.2d 1024, 1026 (4th Cir. 1981), for the proposition that "an employer-employee relationship is a necessary antecedent to a

Finally, the district court in *Cleveland Tankers* expressly refused to follow *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*.<sup>179</sup> In *Texaco Refining*,<sup>180</sup> the Texas Supreme Court rejected a general maritime claim for loss of society arising as a result of the death of a man who was not a Jones Act seaman.<sup>181</sup> The decedent was simply a “good samaritan” crushed by the wake of Texaco Refining’s passing boat while trying to help another boatman.<sup>182</sup> The Texas Supreme Court held that loss of society damages are unrecoverable under general maritime law due to *Miles*.<sup>183</sup> *Cleveland Tankers* rejected the holding as an extension of *Miles* into a “blanket rule” and refused to extend *Miles* beyond its plain language.<sup>184</sup>

### C. *Sugden v. Puget Sound Tug & Barge Co.*

A third district court addressed the nonpecuniary recovery issue with respect to nonemployer third-party tortfeasors in *Sugden v. Puget Sound Tug & Barge Co.*<sup>185</sup> The decedent in *Sugden*,<sup>186</sup> a Jones Act seaman working aboard a tug assigned to retrieve a barge from the third-party defendant’s dock, allegedly drowned as a result of the third-party defendant’s improper installation of a moon pool and cover.<sup>187</sup> On the third-party defendant’s motion for partial summary judgment, the district court held that the family of a deceased Jones Act seaman may recover nonpecuniary damages from a nonemployer defendant in a general maritime

Jones Act negligence claim.” 802 F. Supp. at 87.

179. *Cleveland Tankers*, 802 F. Supp. at 87.

180. 808 S.W.2d 61 (Tex.), cert. denied, 112 S. Ct. 301 (1991).

181. *Texaco Refining*, 808 S.W.2d at 63.

182. *Id.*

183. *Id.*

184. *Cleveland Tankers*, 802 F. Supp. at 87 (“Such a statement goes well beyond the above-detailed facts of *Miles* and its reasoning by extending a blanket rule against loss of society claims in all general maritime actions without any proffered reason for such a broad extension.”).

185. 796 F. Supp. 455 (W.D. Wash. 1992).

186. The *Sugden* plaintiffs were the estate and surviving family members of the deceased seaman. The plaintiffs filed against both the employer Puget Sound Tug & Barge, owned by Crowley Maritime Corp., and the third-party shipyard, Duwamish Shipyard, Inc. Although the opinion is not definitive, it may be inferred from the repeated references to the decedent’s status as a Jones Act seaman that the plaintiffs proceeded under a Jones Act negligence action against the employer. *Id.* at 456.

187. The decedent died a particularly horrible death. It is alleged that Duwamish negligently manufactured the cover on the newly-installed moon pool. Apparently, the cover failed to save the decedent from falling into the depths of the moon pool where he drowned. *Sugden*, 796 F. Supp. at 456.

law wrongful death action.<sup>188</sup>

After a brief review of maritime wrongful death actions and *Miles*' focus on the need for uniformity in admiralty, the court found that *Miles* did not reach the instant issue of nonemployer third-party liability for nonpecuniary damages.<sup>189</sup> The court noted that prior to *Miles*, in *Sea-Land Services, Inc. v. Gaudet*,<sup>190</sup> the Supreme Court permitted a longshoreman's dependent to recover nonpecuniary damages, including loss of society, suffered as a result of a wrongful death in territorial waters under the general maritime law.<sup>191</sup> The *Sugden* court recognized that *Miles* eliminated the recovery for loss of society in a general maritime action for wrongful death of a Jones Act seaman.<sup>192</sup> Nevertheless, the district court ruled that because a nonemployer owes a duty of reasonable care under the circumstances to the employee of a third party, and because no third-party suits can be brought under the Jones Act, the duty of care applies without regard to the decedent's status as a Jones Act seaman.<sup>193</sup> Thus, the court held the principles of *Miles* do not apply and *Gaudet* controls.<sup>194</sup> In effect, the court in *Sugden* allowed the decedent plaintiff to shirk his true seaman status with respect to a third party in order to assure nonpecuniary recovery.

#### D. *Anderson v. Texaco, Inc.*

Compare the three cases above with *Anderson v. Texaco, Inc.*,<sup>195</sup> however, in which a different district court in the Eastern District of Louisiana reached the opposite conclusion. In *Anderson*, the true seaman plaintiff suffered injuries as the result of an explosion following third-party mistakes made in the sequence of opening and closing high pressure gas valves.<sup>196</sup> *Anderson* sought a variety of compensatory and punitive damages under the Jones Act, the general maritime law of negligence, and the general maritime law of unseaworthiness.<sup>197</sup> The court sustained the

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188. *Sugden*, 796 F. Supp. at 457.

189. *Id.*

190. 414 U.S. 573 (1974).

191. *Sugden*, 796 F. Supp. at 456.

192. *Id.* See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990); see also *supra* part III.D.

193. *Sugden*, 796 F. Supp. at 457.

194. *Id.* The court also relied on *Rebstock*, 764 F. Supp. 75 (E.D. La. 1991), discussed *supra* in part V.A.

195. 797 F. Supp. 531 (E.D. La. 1992).

196. *Id.* at 532-33.

197. *Id.* at 533.

defendant's motion to dismiss all of these punitive damages claims because the court believed that *Miles* foreclosed such claims from a Jones Act plaintiff.<sup>198</sup>

After reviewing the reasoning found in *Miles* and some confirming post-*Miles* caselaw,<sup>199</sup> the *Anderson* court adopted the general *Miles* principle that actions under the Jones Act are limited to pecuniary losses alone.<sup>200</sup> Turning to the issue of punitive damages under the general maritime law, the court stated that despite a different theory of recovery,<sup>201</sup> the general maritime law claims "encompass the same factual events and the same injuries as their Jones Act claims."<sup>202</sup> The court in *Anderson* acknowledged that punitive damages are available in admiralty under some circumstances,<sup>203</sup> but held that *Miles* compels the barring of punitive damage awards when a Jones Act claim is merely realleged in terms of the general maritime law of negligence and unseaworthiness.<sup>204</sup>

The court held that *Miles* stood for the "fundamental principle" that judge-made remedies must be uniform with the remedies enacted by Congress.<sup>205</sup> Accordingly, when Congress has addressed the remedies for certain injuries, plaintiffs cannot look to the general maritime law as an alternative source of remedies based on the same allegations.<sup>206</sup> Thus, in

198. *Id.* at 536.

199. *See id.* at 534. The court recognized a split in authority regarding the reach of *Miles* to general maritime claims, including a split among the district courts in the Eastern District of Louisiana. *Id.* (citing *In re Matter of Waterman Steamship Corp.*, 780 F. Supp. 1093 (E.D. La. 1992) (adopting an expansive view of *Miles*); *Logue v. Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992) (adopting a narrow view of *Miles*)).

200. *Anderson*, 797 F. Supp. at 534.

201. The theories of recovery, rather than being statute-based, are unseaworthiness and negligence. *See supra* part II.C. for a discussion of an unseaworthiness claim. *See supra* part II.D for a discussion of a negligence claim.

202. *Anderson*, 797 F. Supp. at 534.

203. *Id.* ("Punitive damages have long been awarded under the general maritime law against defendants who engage in 'lawless misconduct' that amounts to 'gross and wanton outrage.'") (citing *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 626 (5th Cir. 1981)).

204. *Anderson*, 797 F. Supp. at 536.

205. *Id.* at 535. *See supra* note 105 for text of actual discussion in *Miles*.

206. *Anderson*, 797 F. Supp. at 535-36. ("[A]fter *Miles*, admiralty courts cannot view the general maritime law as another life-bearing star in the litigation galaxy when determining the scope of permissible relief in maritime cases.")

The *Anderson* court went on to chart a future course for other courts by requiring a court to: first evaluate the factual setting of the case and determine what statutory remedial measures, if any, apply in that context. If the situation is one addressed by a statute like the Jones Act or DOHSA, and the statute informs and limits the damages that are recoverable, the statute alone governs the remedy.

*Anderson*, the court rejected the plaintiff's general maritime law claims against the nonemployer third party for nonpecuniary damages because based on an evaluation of the factual events, relief was available under the Jones Act.<sup>207</sup>

## VI. AMENDING THE JONES ACT TO PROVIDE SEAMEN FULL RECOVERY IN GENERAL MARITIME NEGLIGENCE

We return once again to Kenneth Sugden. As noted earlier, after *Miles*, the only hope of Sugden's surviving beneficiaries to recover nonpecuniary damages is through a general maritime negligence action against the third-party defendant shipyard. As the case law now stands, Sugden's claim may or may not survive a motion to dismiss. Some district courts would read *Miles* narrowly to bar nonpecuniary damages only against an employer in general maritime unseaworthiness claims.<sup>208</sup> Other courts, however, would read *Miles* broadly, reasoning that the sweeping language in *Miles* addressing nonpecuniary claims serves as a clear and unambiguous decree against such remedies for Jones Act seamen.<sup>209</sup> This split in authority is unfair to all parties involved because it fails to promote the purposes underlying the uniformity doctrine.<sup>210</sup>

The problem is not with the language of the Jones Act because it is relatively clear on its face. The problem lies in what the Jones Act fails to state in its plain language. The land-based law of torts recognized the inadequacy of pecuniary damages only and now allows for the recovery of both pecuniary and nonpecuniary damages. The time has come for the Jones Act to leave the safe harbors of the nineteenth century and sail the oceans of full wrongful death recovery.

### A. Proposed Jones Act Amendment: Section 688(c)

The solution to the authority split is rather simple. The Supreme Court has spoken with regard to nonpecuniary losses under the Jones Act,

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*Id.* If the statute does not apply, then presumably recovery may be had on the precedent developed in the general maritime law.

207. *Id.* The court also explicitly stated that "*Merry Shipping* has, indeed, been overruled." *Id.* at 535.

208. See, e.g., *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991); *Mossa v. Cleveland Tankers*, 802 F. Supp. 84 (E.D. Mich. 1992); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992).

209. See, e.g., *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992).

210. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27, 33 (1990).

DOHSA, and general maritime unseaworthiness. The *Miles* holding does not need to be disturbed. The answer to the question whether *Miles* applies to bar Jones Act seamen from nonpecuniary recovery in general maritime negligence from nonemployer third parties rests with Congress. Congress must amend the Jones Act to explicitly permit any person qualifying as a Jones Act seaman to recover nonpecuniary damages in general maritime suits in negligence against any responsible party other than the seaman's employer.<sup>211</sup>

The proposed amendment should appear as 46 U.S.C. app. § 688(c) and read as follows:<sup>212</sup>

In the event of personal injury or wrongful death to a person covered under this section caused by the negligence of a third party—not the employer, owner, owner pro hac vice, agent, operator, or charterer of the seaman's vessel; and not the fellow servants or fellow employees of the seaman—then such seaman, or anyone otherwise entitled to recover damages by reason thereof, may bring a general maritime negligence action against such party in accordance with the concepts and precedents of the action, and the employer shall not be liable to the third party for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. The liability of the third party under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the third party except remedies available outside of this section.

The proposed subsection amendment is similar to that already existing in section 905(b) of the LHWCA. Like that subsection, under the proposed subsection the Jones Act seaman would benefit from a full recovery. In

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211. The fact that Congress has not yet considered legislation to cure the anomaly addressed by this Note should not lead to the conclusion that the problem is one of theoretical concern only. The lack of a proposed solution similar to the one suggested by this Note is probably due to a general satisfaction with the status quo and a fear of congressional meddling among those attorneys practicing maritime personal injury. The defense bar would obviously oppose any Jones Act amendment which might result in larger plaintiff recoveries.

The reasons behind the plaintiff bar's apathy, however, are more complex. Although the rational reader may think that plaintiff attorneys would seek a method for fuller recovery, there is a fear that once Congress focuses its attention on maritime recovery, it might choose to eliminate the Jones Act altogether rather than pass a full recovery amendment. Some practitioners feel that given this possibility, recovery under the Jones Act as it now exists has been adequate for almost ninety years and continues to be satisfactory. Interview with Robert K. Udziela, Partner of Pozzi, Wilson, Atchison, O'Leary & Conboy, in Portland Oregon (July 10, 1993).

212. The language of this proposed amendment closely resembles that of section 905(b) of the LHWCA.

addition to the traditional pecuniary damages available from the no-fault Jones Act, a section 688(c) plaintiff would be able to recover “past and anticipated pain and suffering; mental anguish and distress resulting from the symptoms, treatment, inactivity, and past or future changed self-image; permanent disability and disfigurement; impaired ability to enjoy life; spouse’s loss of consortium; and punitive damages.”<sup>213</sup> There are three benefits to this proposed Jones Act amendment, it: (1) promotes uniformity; (2) recognizes the “special solicitude” afforded seamen in the maritime law; and (3) ends third-party insulation from tort liability.

*B. Proposed Section 688(c) Will Promote Uniformity*

First, the change would result in a more uniform maritime wrongful death recovery than now exists. The uniformity principle and the *Miles* Court’s analysis support the alteration. The *Miles* Court recognized the value of uniformity. The Court also recognized that the LHWCA falls within admiralty jurisdiction. Congress saw fit to address the scope of recoverable damages with respect to longshoremen injured while working in an area of traditional maritime activity by enacting the LHWCA. Congress chose to grant longshoremen the right to seek nonpecuniary and pecuniary recovery under the general maritime negligence theory from a third-party vessel which played a role in the infliction of the injury. Thus, Congress knew the existing case law when enacting the measure. By the same token, enacting the proposed section 688(c) would result in Congress’ insuring that Jones Act seamen and longshoremen, both of whom must sustain injury within territorial waters to qualify and both doing traditional maritime work within admiralty jurisdiction, receive equal, not disparate, recovery.<sup>214</sup>

*C. Proposed Section 688(c) Will Encourage Admiralty Policy of “Special Solicitude” Towards the True Seaman*

Second, amending the Jones Act with section 688(c) encourages continuation of the Court’s traditional “special solicitude” toward

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213. See SCHOENBAUM, *supra* note 6, § 6-10.

214. Of course, uniformity could be furthered another step by amending DOHSA in the same way, but there is no disparate treatment between longshoremen and seamen under DOHSA. In either case, the plaintiff may only recover for pecuniary losses. See *supra* part II.A. for a discussion of the remedies available under DOHSA.

seamen.<sup>215</sup> Currently, the Jones Act seaman is at a disadvantage compared to the longshoreman given the everyday dangers of the job. *Miles* states that the seaman must no longer look to the courts for protection,<sup>216</sup> but where does that leave the seaman? The answer, of course, as *Miles* indicates, is that the seaman must look to the Congress and the states for substantive legal protection through legislation.<sup>217</sup> With the incorporation of section 688(c) into the Jones Act, Congress will be accepting its responsibility to continue the nation's long unspoken policy of "special solicitude" to her seamen.

*D. Proposed Section 688(c) Will End Third-Party Insulation from Tort Liability*

Third, amending the Jones Act will eliminate the third-party's insulation from liability for its conduct, often times egregious and wanton, that may contribute to or result in a seaman's wrongful death. In the case of Kenneth Sugden, under some current interpretations of *Miles*, the defendant shipyard would not owe any user of the barge, with its dangerous moon pool, the duty to provide a safe cover. The shipyard could produce any product for use solely by a seaman, no matter how ill-designed or dangerous, and so long as a seaman is the only person injured, then there is absolutely no liability consequence to the third party. And without section 688(c) to clarify the rights of the seaman, the injured seaman will recover far less for his injury or death than will the injured or dead longshoreman. The seaman would be without any nonpecuniary recovery against the shipyard, while his counterpart on the wharf has a full recovery.

## VII. CONCLUSION

Although *Miles* clearly stands for uniformity in its reasoning and conclusion, the ultimate result is that its broad language has created more confusion rather than clarifying the rule. Despite the possibility that the Court could resolve the issue itself, Congress must eventually address the problem of maritime wrongful death in an effort to bring about equal and fair treatment for all victims of maritime wrongful death. Amending the Jones Act with proposed section 688(c) to allow the Jones Act seaman a full recovery against nonemployer third-party tortfeasors under a general

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215. See *supra* note 88 and accompanying text.

216. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

217. *Id.*



maritime negligence theory is the best solution to an unending disparity in admiralty law.

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