

Louisiana Law Review

Volume 71 | Number 3
Spring 2011

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Repository Citation

Thomas C. Galligan Jr., *Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk*, 71 La. L. Rev. (2011)
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Death at Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk

*Thomas C. Galligan, Jr.**

PREFACE

I have written or co-written many articles for publication in law reviews. Some of them have been traditional legal scholarship (law review articles), and some have taken alternative forms, such as dialogues and remembrances. This Article will essentially be traditional legal scholarship; it will present several maritime law issues that impact the rights of the people affected by the Deepwater Horizon disaster. In the style of the traditional law review article it will explain the applicable legal rules, trace them to a respectable extent, and argue for their repeal or amendment, based on justice, history, contemporary views, and consistency (the idea that sufficiently similar people in sufficiently similar situations should be treated the same). Thus, for the reader, this will be a traditional law review article. But, in the interests of honesty and transparency, I provide this Preface to give the reader some additional personal context. Thus, you may view it as full disclosure. It is that, in part; but it is also my effort to memorialize my experiences and to present my views and arguments against the backdrop in which they were honed and initially expressed vis-à-vis the Deepwater Horizon disaster.

While teaching torts (and other courses) at Louisiana State University (LSU) Law Center during the very late 1980s through 1996,¹ I was also a consultant with the Louisiana Trial Lawyers' Association (LTLA), now the Louisiana Association of Justice (LAJ). Working with that organization, I consulted and testified on various legislative proposals relating to tort law. I also wrote a column in the LTLA newsletter and wrote case summaries of

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* President and Professor of Humanities, Colby-Sawyer College. I am grateful to Professor David Robertson, who reviewed an early draft of the written statement submitted to the House Judiciary Committee, on which subsequent statements and this Article are based, and who made many helpful and insightful comments. I am also in debt to my son, Patrick Galligan, who read, edited, and commented on many drafts of the various statements.

1. I taught at the Paul M. Hebert Law Center at LSU from 1986–1998. I worked with the LTLA from 1988–1996. In 1996, I was appointed Executive Director of the Louisiana Judicial College, at which point I stopped consulting with the LTLA.

Louisiana appellate court² tort decisions. During that period and thereafter, I have been fortunate to speak on tort issues at LTLA and LAJ seminars.³ But it was during that time, while giving a speech on Louisiana tort law⁴ to an LTLA audience in (as I recall) Lafayette, that a lawyer asked me a question that was becoming increasingly common: “Will that be or is that the law in admiralty?” The question arose from the basic fact that many Louisiana tort lawyers have significant maritime personal injury practices and from the reality that admiralty law can be an amalgam of federal and state substantive law thanks to the “maritime but local doctrine.”⁵ But I could not answer the question, because I was not then an expert in maritime law.

Frustrated by my ignorance, I sought advice from my always-reliable friend and mentor, Frank Maraist, who, coincidentally, taught admiralty at LSU and was (and remains) one of the nation’s and State of Louisiana’s foremost admiralty experts. Frank told me that the best solution was for me to teach admiralty because teaching it meant that I would have to learn it; thereafter, I would be able to answer the “is that the law in admiralty” question. Or at least I would be able to make an educated law professor guess. When I protested that Frank taught admiralty, he told me that he would step aside for one year for me to teach the course. He also said that if I enjoyed teaching admiralty, as he promised I would, we would alternate years or find some other appropriate solution.

Naturally, Frank was right. I loved admiralty—a love that led, with Frank’s generosity, to co-authorships with Frank on books and articles and opportunities to speak and write alone and with others as well. That love has continued through the years; it went with me to the University of Tennessee and then came with me to Colby-Sawyer College in New London, New Hampshire. Over the years that love has been the reason I have continued to write and speak about maritime matters to lawyers and judges.

When the Deepwater Horizon exploded on April 20, 2010, I followed with great concern and interest because of my connection to Louisiana and my connection to maritime law. My involvement

2. Of course, I also included relevant U.S. Fifth Circuit decisions and U.S. Supreme Court decisions affecting Louisiana tort law.

3. I have also spoken at seminars in Louisiana sponsored by other organizations including the Louisiana Association of Defense Counsel, the Louisiana Judicial College (of which I was Executive Director from 1996–1998), and the Louisiana State Bar Association.

4. The precise topic involved the recently passed Louisiana Product Liability Act, LA. REV. STAT. ANN. §§ 9:2800.51–.60 (2009).

5. See FRANK L. MARAIST, THOMAS C. GALLIGAN, JR. & CATHERINE MARAIST, *ADMIRALTY IN A NUTSHELL* 8–10 (6th ed. 2010).

grew when my friend Richard Arsenault asked me to organize and co-chair, with him, a Louisiana State Bar Association program concerning the Deepwater Horizon and potential legal issues arising therefrom. I readily agreed, and while sitting at my desk, thinking about that program, I got an email from a staff member with the House Judiciary Committee asking if I would be willing to talk with her and a colleague about various legal issues that might arise in light of the ongoing disaster. During that call I was invited to testify before the committee concerning the rights of the survivors of the 11 workers killed when the rig exploded and related matters. In preparation for that testimony, I prepared a draft statement concerning the Death on the High Seas Act (DOHSA), the Jones Act, and the Limitation of Liability Act, among other things. I urged the House to amend or repeal portions of the statutes noted above. That statement is the basis of this Article.⁶

Later, I was invited to testify before the Senate Judiciary Committee and then the Senate Committee on Commerce, Science, and Transportation.⁷ Before those committees I once again discussed the statutes noted above, as well as maritime punitive damages and the overall climate of risk at sea.

Over the course of the summer, I met many people and learned much. Of all the people I met, no one made a greater impression on me than Keith Jones, a Baton Rouge lawyer, whose son, Gordon, was killed when the rig exploded. Gordon was survived by several family members, including his wife, Michelle, a young son, and another son born days after Gordon's death. His story is tragic and I feel almost as if I am invading the family's privacy by relating it. However, I tell it because of the impression Keith Jones made on me and on so many other Americans who either saw him testify or saw him on television, explaining how unfair, out-of-date, and inconsistent American maritime law had become and how that fact adversely affected his daughter-in-law and his grandsons. Keith Jones is a person of courage, determination, intelligence, and passion. It was an honor to get to know him. What he and the other surviving relatives sought was justice. Why? Because the loss of a family member is a real loss—a real loss beyond any pecuniary loss suffered. It is a real loss because nothing can bring back a lost relative. Chris Jones, Gordon's brother, and—like his father—a

6. In addition to the written statement, I offered oral testimony—which is limited to five minutes—and answered questions. Logistically, the biggest challenge for me regarding the testimony was making sure it was only five minutes long and still captured the essential issues.

7. In the interests of full disclosure, I paid the costs of my transportation and hotel rooms while in Washington, D.C. to testify before Congress.

Baton Rouge lawyer, eloquently spoke for all of the 11 families who lost a loved one on the Deepwater Horizon, when he testified before the Senate Judiciary Committee and said: “Mr. Hayward, I want my brother back.” But there is nothing that can bring Gordon back; all that is left is justice, and aspects of that, as explained below, are hollow. Indeed injustice echoes through American maritime law.

Over the summer, I worked to change the aspects of current American law that deny full recovery to the surviving family members of those killed in a maritime disaster, like the Deepwater Horizon. Although the House of Representatives quickly passed measures that would have provided a fuller, more just recovery to the surviving family members of those killed, the Senate, as of this writing, has not done so. In this piece, I turn from the halls of Congress to the pages of this great law review to establish a brief for change and a call for justice.

In the meantime, I recently read in *U.S.A. Today* that Kenneth Feinberg, the administrator of the \$20 billion Gulf Oil fund, believes that the future for the Gulf after the spill, in environmental terms, is better than expected.⁸ He stated that he believed that the \$20 billion fund should be more than enough to cover claims.⁹ Although I certainly hope Mr. Feinberg is right on both counts, I also know that there are 11 families whose lives will never again be whole, no matter how much time goes by and no matter how those families journey through the grieving process. I am also aware that no matter how adequate the \$20 billion fund is, current law is woefully inadequate to compensate those families for their loss. It is to those issues and their overall impact on maritime law and maritime risk that I now turn.

I. INTRODUCTION

On April 20, 2010, the Deepwater Horizon, a movable drilling rig owned by Transocean and working on behalf of a group that included BP, exploded, killing 11 men and causing oil to spew and spread through the Gulf of Mexico toward land. The ensuing disaster in the Gulf of Mexico resulted in death, injury, environmental devastation, and economic loss to individuals, businesses, and governmental entities. It was the most publicized

8. Oren Dorell, *Chief of BP Fund Says Full Recovery Likely for Gulf*, USA TODAY, Dec. 21, 2010, at A1, available at http://www.usatoday.com/news/nation/2010-12-20-feinberg-oil-spill-fund_N.htm.

9. *Id.*

oil field disaster since the *Exxon Valdez* debacle off the coast of Alaska.

The staggering consequences of the Deepwater Horizon spill force America and the world to ask whether applicable United States laws are fair, consistent, and up to date. Do they provide adequate compensation to the victims of maritime and environmental disasters? And do those laws provide economic actors with proper incentives to ensure efficient investments in accident avoidance activities? Does the law appropriately hold tortfeasors accountable? Sadly, an analysis of the relevant laws reveals a climate of limited liability and undercompensation.

The law undercompensates, in part, because the Jones Act and DOHSA, as interpreted, do not provide damages to the survivors of Jones Act seamen and most others killed in high seas maritime disasters for the loss of care, comfort, and companionship suffered as a result of their loved ones' deaths. Thus at the core of America's undercompensatory maritime liability regime are two outdated statutes passed in 1920 that provide what is today miserly recovery for wrongful death. The limited recovery provided by the Jones Act and DOHSA are out of step with the majority American rule. And due to an exception in DOHSA and the difference between the legal treatment of a rig and a fixed platform, the entire system is internally inconsistent to such an extent that it is nonsensical, further adding to a regime of inconsistency, which will be explained further below.

Aggravating the situation and furthering the problem of undercompensation, as noted below, some courts have inappropriately relied on those recovery-denying wrongful death rules to further limit recovery of nonpecuniary damages in other maritime cases to which the Jones Act and DOHSA do not, by their terms, expressly apply. These failures to fully compensate victims raise basic issues of fairness and corrective justice. Is it right, consistent with modern law and values, and just to deny recovery for very real damages such as the loss of care, comfort, and companionship one suffers when a loved one is killed?

In addition, and critically, the failure to compensate raises important issues concerning tort law, deterrence, and accountability. If the law undercompensates the victims of tortious behavior, then economic actors, when deciding what to do and how to do it, face less than the total costs of their activities. This economic reality will, in turn and inevitably, lead to underdeterrence and increased risk. If the law does not hold people accountable, the risk of injury, death, and damage increases. The economist will persuasively point out that this combination of undercompensation and underdeterrence will cause increased risk

and suboptimal levels (more than desired) of personal injury in any industry in which they prevail, including the maritime oil and gas industry.

In the maritime setting, the climate of limitation is exacerbated by the existence of the 1851 Ship Owner's Limitation of Liability Act. That law allows a ship owner to limit its liability to the post-disaster value of a vessel, providing the relevant events occurred without the privity or knowledge of the ship owner. Predictably and rationally, the relevant maritime actor who knows it will be able to limit its liability will not take optimal precautions because it does not face all of the costs of its activities.

Although punitive damages might make up for the lack of deterrence in some areas, the deterrent role of punitive damages in admiralty is less significant because of the U.S. Supreme Court's decision in *Exxon Shipping Co. v. Baker*,¹⁰ which limited the recovery of punitive damages to compensatory damages in many maritime cases to a 1:1 ratio (between the punitive damages and the compensatory damages).

What does it all add up to? The sum total is a liability regime in which victims of tortious behavior are treated neither fairly nor consistently. That tragic reality means that maritime actors, when deciding what to do and how to do it, do not face all the accident or risk costs that their conduct presents, resulting in more risk than is optimal. More risk inevitably leads to more injury, which by definition results in repeated instances of undercompensation. Thus the vicious cycle continues. Congressional action amending the Jones Act and DOHSA to allow recovery of damages to the survivors of those killed in maritime high seas disasters would begin the process of necessary legal repair. The proposed amendments would also undermine the decisions that have inappropriately extended the reach of the Jones Act and DOHSA, because those decisions rely upon the limits on recovery in those statutes to provide further limits on recovery. Full compensation to the survivors of those killed in maritime disasters would, in turn, mean maritime actors would be forced to consider all of the costs of their actions when deciding what to do and how to do it, resulting in a safer world where the created risk approaches, rather than exceeds, optimal limits. Full and effective reform should also include repeal or amendment of the Limitation of Liability Act and a reexamination of the maritime punitive damages rule articulated in *Baker*.

I will begin my analysis with a discussion of the legal fact that the surviving family members of many (but not all) who are killed

10. 554 U.S. 471, 513 (2008).

in maritime disasters on the high seas are not entitled to recover loss of society damages. In failing to allow recovery of loss of society damages—damages for loss of care, comfort, or companionship—maritime law is contrary to the rule prevailing in the majority of the states.¹¹ Consequently, maritime law undercompensates the surviving families of seamen and those killed in high seas maritime tort disasters, and it does so in a way that is out of step with the majority rule in America.¹² Second, I will discuss the extension of the seamen and high seas no-loss-of-society recovery rules to other maritime cases, which extension further limits potential overall liability. Third, I will describe the anomalous high seas wrongful death rule that pre-death pain and suffering damages are not recoverable in maritime survival actions.¹³ Fourth, I will briefly explain how undercompensation can lead to underdeterrence and increased risk. Next, I will address the maritime doctrine of limitation of liability.¹⁴ Finally, I will review the impact of maritime punitive damages rules on risk and deterrence.¹⁵

II. LOSS OF SOCIETY IN MARITIME WRONGFUL DEATH CASES— SEAMEN AND THE HIGH SEAS

Loss of society damages are not recoverable in Jones Act wrongful death cases or in any case, other than a commercial aviation disaster, where death occurs on the high seas. This harsh legal reality is inconsistent with modern American law and does not fully or fairly compensate survivors for losses arising from the maritime wrongful death of a loved one. It is also inconsistent with

11. Katherine J. Santon, *The Worth of a Human Life*, 85 N.D. L. REV. 123, 130–31 (2009).

12. As noted, this past summer Congress had the chance and ability to change this state of affairs by amending the relevant statutes. The House of Representatives did exactly that in passing H.R. 5503. Various Senate bills, taken together, would have made the relevant changes, but the Senate did not pass them. For instance, Senator Leahy's proposed Survivor's Equality Act of 2010, S. 3463, would have appropriately amended DOHSA to make loss of society damages recoverable.

13. The House bill, H.R. 5503, made the necessary changes, and S. 3463 would also have done so but was not passed. *See supra* note 12.

14. Once again, the House bill, H.R. 5503, made the necessary changes, repealing aspects of the Limitation of Liability Act. Senator Schumer's proposed bill, S. 3478, would have repealed the relevant provisions of the limitation act to assure more adequate compensation and deterrence, but it was not passed.

15. Senator Whitehouse's proposed bill on maritime punitive damages, S. 3345, would improve those punitive damages rules by restoring the traditional ability to tailor a punitive award to the facts of the case.

the applicable law governing recovery against a third party—not the decedent’s employer¹⁶—on a fixed platform and arguably inconsistent with the applicable law in territorial waters. As noted, this no-recovery rule is also inconsistent with the more progressive recovery available in high seas commercial aviation disasters, a reality that makes the entire high seas recovery regime nonsensical.

A. Seamen

The analytical starting point in any workplace maritime tort case is to determine whether an injured or deceased person is or was a seaman, because his status determines the legal rights of the claimant and his family members. A seaman is a person who does the work of a vessel¹⁷ and who has an employment-related connection to a vessel that is substantial in duration (more than 30% of one’s work time is spent on a vessel or fleet of commonly owned or controlled vessels)¹⁸ and nature (the worker is exposed to the perils of the sea).¹⁹ Maritime law treats a semi-submersible drilling rig as a vessel.²⁰ Moreover, a moveable drilling rig is a vessel because it is “capable of being used . . . as a means of transportation on water.”²¹ The Deepwater Horizon was a moveable drilling rig and, therefore, under maritime law, it was a vessel. Interestingly, a permanently attached drilling platform, as opposed to a semi-submersible drilling rig, is not a vessel, and we will return to the inequities that might arise from that distinction below.

Assuming that the Deepwater Horizon was a vessel, workers with a substantial employment-related connection to the Deepwater Horizon would be seamen. A seaman has several possible claims against his or her employer: (1) the right to recover

16. The survivors would, under most federal and state workers’ compensation schemes, be entitled to a no fault death benefit from the employer but would not be entitled to recover in tort. See MARAIST, GALLIGAN & MARAIST, *supra* note 5, at 288–91 (discussing benefits under the Longshore and Harbor Workers’ Compensation Act (LHWCA)). The survivors would be entitled to recover in tort from a third party and, as noted, this recovery would include recovery from the third party for the survivors and loss of care, comfort, and companionship. See generally Thomas C. Galligan, Jr., *A Primer on the Patterns of Louisiana Workplace Torts*, 55 LA. L. REV. 71, 91–95 (1994).

17. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991).

18. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995).

19. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555 (1997).

20. *Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA*, 761 F.2d 229, 233 (5th Cir. 1985).

21. 1 U.S.C. § 3 (2006); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 489 (2005).

maintenance and cure; (2) the right to recover for injuries caused by the unseaworthiness of the vessel on which he or she served (a vessel is unseaworthy if it presents an unreasonably unsafe condition to the seamen on board); and (3) a Jones Act²² right to recover in negligence against his or her employer.²³

1. Jones Act Negligence

The Jones Act incorporates the relevant provisions of the Federal Employers Liability Act (FELA)—the right to recover in negligence from the employer, comparative fault, etc.²⁴ The Jones Act (through the FELA) provides certain survivors of seamen killed as a result of their employers' negligence with wrongful death and survival action claims against their employers. Basically, a wrongful death action is an action that compensates certain beneficiaries for the loss they suffer as a result of the death of the victim. In most jurisdictions, a survival action provides recovery for the damages that the decedent suffered before his death. Let me begin with the available wrongful death remedies.

Critically, what do the recoverable damages include and what do they not include in a Jones Act negligence wrongful death action? The survivors of a deceased seaman whose death was caused by his employer's negligence can recover any loss of economic support, any lost services, and other traditional types of pecuniary damages. That is, the surviving family members recover purely economic losses. The survivors *cannot* recover loss of society damages. That is, they cannot recover for the loss of care, comfort, or companionship that they suffer as a result of the tortiously caused death. To restate, loss of society damages are, in essence, those damages survivors suffer as a result of the fact that the deceased is no longer alive and there to share the joys of life with the survivors. Thus, in a Jones Act wrongful death action, a seaman's surviving spouse may recover any loss of support (net of taxes and what the decedent would have spent on himself) and loss of service, such as cooking or painting or cutting the lawn, and any other economic damages.²⁵ But the spouse recovers nothing for the

22. 46 U.S.C. § 30104 (Supp. 2009).

23. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *ADMIRALTY IN A NUTSHELL* 194–99 (5th ed. 2005).

24. 45 U.S.C. § 51 (2006).

25. There are various approaches to setting an economic value on a human life, whatever the value of a person's relationship with others. Of course, the various approaches may yield different conclusions as to that economic value. See Associated Press, *How to Value Life? EPA Devalues Its Estimate*, MSNBC.COM (July 10, 2008, 4:34 PM), <http://www.msnbc.msn.com/id/25626294/>.

loss of the relationship. And if the spouse cannot prove any resulting economic loss, the spouse would recover nothing. Likewise, a parent who is not financially dependent upon a child who is killed would recover nothing whether that child is an adult or a small child.

The inability of a seaman's survivors to recover loss of society damages in the negligence action does not result from the language of the Jones Act or the FELA. Rather, it is the result of the combination of the 1913 U.S. Supreme Court decision of *Michigan Central Railroad Co. v. Vreeland*,²⁶ which refused to recognize the right to recover loss of society damages under the FELA (and which actually predated the passage of the Jones Act by seven years), and the Court's reliance on that decision in *Miles v. Apex Marine Corp.*,²⁷ which will be discussed in further detail below.

One might arguably understand and appreciate the *Vreeland* holding in an era when the law of wrongful death was still in its relative infancy; human life spans were shorter, and given the state of technology, industry, and law, accidental death was a more common (albeit still tragic) part of the American landscape than it is today. However, to deny recovery of loss of society damages in a wrongful death case today is out of the legal mainstream; it is a throwback to a past era. Barring recovery for loss of society is a legal message that in cases where the rule applies, the relationship itself has no value, other than its pecuniary or economic value. The no-recovery rule communicates to a spouse or parent that, to the law, the relationship between spouses or between parents and children is a purely economic relationship; it communicates the message that the loss of love, care, comfort, and companionship is incidental to the economic relationship, that it is incapable of being valued, and, therefore, that it is worthless. This is a harsh message that is totally inconsistent with modern reality and values. Moreover, it is inconsistent with the majority rule on land, which as noted,²⁸ provides that loss of society is recoverable in a wrongful death action. A spouse, child, parent, or sibling of a seaman killed in a maritime disaster suffers a very real loss of society, and the law should recognize it.

Congress could easily bring the law governing the right of the survivors of a seaman to recover for the seaman's wrongful death

26. 227 U.S. 59, 74 (1913).

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

28. See *supra* note 12. In some states, this result is achieved by expressly recognizing the right to recover loss of society as nonpecuniary damages. In others, courts interpret local statutes that allow recovery of pecuniary damages to also include loss of society damages.

into step with modern conceptions of family relationships and into conformity with the majority land-based rule by amending the FELA wrongful death statute²⁹ to state that recovery by a named beneficiary in a wrongful death action shall “include nonpecuniary damages for loss of care, comfort, and companionship.” That amendment would bring the Jones Act and the FELA into line with modern tort law regarding the recovery of damages in wrongful death cases, as well as the economic, social, and familial realities of today.³⁰

2. Unseaworthiness

Moving from the negligence claim³¹ for wrongful death to the unseaworthiness claim for wrongful death, the general maritime

29. 45 U.S.C. § 51 (2006).

30. The House of Representatives passed Representative Conyer’s Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, which did exactly that.

31. The Jones Act supplies the seaman (and his or her survivors) with a negligence action against the employer. *See* MARAIST, GALLIGAN & MARAIST, *supra* note 5, at 247–48. As a result of workers’ compensation laws, most land-based employees do not have the right to recover in negligence against their employer. 2 DAN B. DOBBS, *THE LAW OF TORTS* § 395, at 1104 (2001). They have the right to recover workers’ compensation, and in a death case, their survivors would recover a workers’ compensation death benefit from the employer. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 11.06, at 11-29 to 11-30 (2004 ed., Supp. 2010). The workers’ compensation claim is a no fault claim and, therefore, by definition recovery does not require a showing of employer fault. *Id.* In return for this no fault recovery right, the employee (and his or her survivors) loses his or her right to recover in negligence from the employer. 2 DOBBS, *supra*, § 395, at 1104. This legal result is accomplished by providing the employer immunity from negligence actions. MARAIST & GALLIGAN, *supra*, § 11.06, at 11-29 to 11-30. The no fault recovery is less than total tort recovery—it is commonly medical expenses plus two-thirds of lost wages, plus potentially a scheduled amount depending upon the type of injury. 2 DOBBS, *supra*, § 392, at 1098–99. By providing a negligence action against the employer, one might say that the Jones Act (and FELA) is more generous than the generally applicable law because it provides the potential for full tort recovery. Of course, the seaman does not have an unfettered right to no fault benefits—his or her no fault right to recover for maintenance and cure or unseaworthiness is subject to the judicially developed maritime law. *See* MARAIST, GALLIGAN & MARAIST, *supra* note 5, at 220–46. Moreover, in a Jones Act case, the seaman (and his or her survivors) has a relaxed burden of proving causation. *Id.* at 254. This reduced burden is definitely a benefit to the plaintiff. As a result, one might contend that the negligence action coupled with the relaxed burden of proof concerning causation is some sort of tradeoff for full recovery in a wrongful death action. However, it is worth noting that there is no support for that trade-off contention in the legislative history of the Jones Act.

law provides certain survivors of a seaman with wrongful death and survival actions against a vessel owner (or operator under many circumstances) if the seaman is killed as a result of the vessel's unseaworthiness. If the death occurs on the high seas, then DOHSA³² governs the recoverable wrongful death damages arising from the vessel's unseaworthiness. Passed in 1920, like the Jones Act, DOHSA expressly limits recovery to "pecuniary loss."³³ Thus, the survivors of seamen killed as a result of a vessel's unseaworthy condition on the high seas may not recover loss of society damages. Consequently, the spouse, parent, or child, who has no claim for pecuniary damages, recovers nothing for the losses caused by the death of a loved one, and all of the issues raised concerning the inequity, incongruity, and antiquated nature of that limitation on recovery discussed above in conjunction with the Jones Act apply to DOHSA.

B. The Rest of Us

Up to this point, I have focused on the rights a seaman's survivors have for death caused by negligence under the Jones Act and for death caused by an unseaworthy condition on the high seas under DOHSA.³⁴ That focus arose out of the fact that the genesis of this Article was the Deepwater Horizon disaster and at least some of the 11 people killed on board were most certainly seamen. However, it is now appropriate to step back and make a very important analytical point about DOHSA. DOHSA applies to the survivors of anyone killed on the high seas and the survivors of anyone who suffers fatal injury on the high seas, even if the death itself later occurs on land.³⁵ Thus, for example, DOHSA governs the rights of the survivors of a person tortiously killed on a cruise ship on the high seas. Moreover, by way of another example, DOHSA governs the rights of survivors of those killed in the territorial waters of a foreign sovereign. DOHSA applies to both define recovery and deny recovery of loss of society damages in any high seas wrongful death case.³⁶ Thus, the limited wrongful death recovery available under DOHSA affects not only the

32. 46 U.S.C. § 30302 (2006).

33. *Id.* § 30303.

34. The beneficiaries of a seaman killed on the high seas may have claims not only against the vessel but may also have general maritime tort claims against other parties, such as manufacturers, contractors, or others. *See generally* MARAIST, GALLIGAN & MARAIST, *supra* note 5, at 163–82.

35. *Motts v. M/V GREEN WAVE*, 210 F.3d 565 (5th Cir. 2000).

36. DOHSA applies, that is, other than in a Jones Act, negligence wrongful death case.

survivors of seamen who are killed as a result of a high seas unseaworthy condition but also all the rest of us as well. Hereafter, I will weave the rights of the survivors of seamen with the rights of others because all survivors of those tortiously killed deserve a full, fair, modern, and consistent recovery.

One DOHSA case worthy of note is *Rux v. Republic of Sudan*,³⁷ which chillingly presents the reach and operation of DOHSA. There, 56 surviving family members of the 17 sailors killed in the terrorist bombing of the *USS Cole* sued the Republic of Sudan under the Foreign Sovereign Immunities Act,³⁸ alleging that Sudan was at fault for providing material assistance and support to al-Qaeda, the group responsible for the attack.³⁹ The court held that DOHSA applied because the deaths occurred in a foreign port and nonpecuniary damages were not recoverable under DOHSA.⁴⁰ Twenty-two family members, including parents and siblings, recovered nothing as a result of the deaths even though the court noted:

The court sympathizes greatly with plaintiffs, who continue to suffer terribly years after their loved ones died. But the court is bound to follow the legal precedent before it. Congress makes the laws; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas, as Congress did in 2000 for cases of commercial aviation accidents on the high seas, is a question for Congress alone. Accordingly, plaintiffs' [intentional infliction of emotional distress] and maritime wrongful death claims are dismissed for failure to state a claim upon which relief can be granted.⁴¹

1. Inconsistencies in Recovery

As noted in *Rux*, in addition to the general and very substantial reasons to allow recovery of loss of society damages in DOHSA cases, there is an additional analytical prong involving a 2000

37. 495 F. Supp. 2d 541 (E.D. Va. 2007), *remanded*, No. 07-1835 (4th Cir. July 14, 2009).

38. 28 U.S.C. § 1605(a)(7) (2006) (amended 2008).

39. *Rux*, 495 F. Supp. 2d at 543.

40. *Id.* at 563.

41. *Id.* at 565; *see also* *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006); *Rux v. Republic of Sudan*, 672 F. Supp. 2d 726 (E.D. Va. 2009), *aff'd in part*, 2011 WL 327275 (4th Cir. Feb. 3, 2011). *See generally* Ross M. Diamond, *Unequal Recovery for Death on the High Seas*, TRIAL, Sept. 2009, at 34.

amendment to DOHSA that points to the need to amend DOHSA. But that inconsistency is only one of several involving the right to recover for wrongful death in a maritime case. One already noted above is the fact that where a tortious death occurs on land, the majority rule is that loss of society damages are recoverable, but not on the high seas. Now, let us turn to an inconsistency on the high seas itself before considering several others.

a. The Commercial Aviation Disaster Exception

In response to several highly publicized commercial airline disasters—KAL 007⁴² and TWA 800—Congress amended DOHSA to provide for recovery of nonpecuniary damages (loss of care, comfort, and companionship)⁴³ for death resulting from “a commercial aviation disaster occurring on the high seas beyond 12 nautical miles from the shore of the United States . . . but punitive damages are not recoverable.”⁴⁴ This 2000 amendment, which was made retroactive to the day before one of the relevant air disasters, brought DOHSA into the legal mainstream for the survivors of victims of commercial aviation disasters. Clearly this amendment was a step into the twenty-first century for the survivors of those killed in commercial aviation disasters. But, although the survivors of the victims of a commercial aviation disaster on the high seas may now recover nonpecuniary damages, the survivors of anyone else killed on the high seas may not. It strains reason to come up with a meaningful, rational principle to justify the differential treatment, other than the very real social and political turmoil that followed the high profile tragic air disasters. But the solution created a rather foolish inconsistency under DOHSA. The Deepwater Horizon is, of course, a similarly tragic event, which presented and still presents an opportunity for Congress to bring

42. The most noteworthy decision arising out of the KAL 007 disaster is, perhaps, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). There, a mother, who was not financially dependent upon her decedent daughter, sued KAL for causing her daughter’s death. The Court held that DOHSA applied to the case, and because the statute limited recovery to pecuniary damages, the plaintiff was not entitled to recover. *Id.* at 231.

43. 46 U.S.C. § 30307(a) (2006).

44. *Id.* § 30307(b). See generally Stephen R. Ginger & Will S. Skinner, *DOHSA’s Commercial Aviation Exception: How Mass Airline Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. AIR L. & COM. 137 (2010) (discussing the legislation and the jurisprudence).

the law into some logical, sensible, compassionate symmetry. To date Congress has not done so.⁴⁵

b. The Death of Workers, Who Are Not Seamen, on Territorial Waters

As noted, when workers who are not seamen are killed as a result of a maritime disaster on the high seas, DOHSA governs their survivors' recovery, and that recovery is limited to pecuniary damages, as currently defined.⁴⁶ Concomitantly, if the non-seaman worker's death occurs on territorial waters, nonpecuniary damages would more likely be recoverable although defendants might attempt to argue otherwise.⁴⁷ Thus, where one dies may be more relevant to recovery than other critical circumstances, such as the work being performed or the nature of the injury to the relevant survivors. These inconsistencies arising from location become even more apparent when one considers death on the drilling platform, as opposed to death on the rig.

c. Drilling Platforms

If a worker is tortiously killed on a *stationary drilling platform* located over the high seas, as opposed to a semisubmersible mobile rig, state law will generally govern his tort recovery rights against third persons.⁴⁸ And state law very probably would mean survivors would recover loss of society and pre-death pain and suffering damages from third persons in a wrongful death action. This is

45. H.R. 5503 made the appropriate change. The Survivor's Equality Act of 2010, S. 3463, would have made loss of society damages recoverable for the survivors of anyone killed on the high seas but was not passed.

46. As noted below, DOHSA applies to high seas wrongful death cases, although the survivors of a seaman killed on the high seas as a result of the employer's negligence would, as noted above, have a Jones Act wrongful death claim against the employer arising out of the negligence (limited like the DOHSA claim to pecuniary damages). Those seaman survivors would have a DOHSA wrongful death claim arising out of any unseaworthiness against the vessel owner. And DOHSA would govern their wrongful death recovery against third persons. None of those claims would result in recovery of loss of society damages under the current law.

47. See *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (allowing the survivors of an LHWCA worker killed in territorial waters to recover loss of society); see also *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1995) (allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages).

48. As noted, workers' compensation law would govern the recovery from the employer, which would generally be liable for a death benefit to certain beneficiaries, and the employer would be immune from a tort action.

because the Outer Continental Shelf Lands Act (OCSLA)⁴⁹ adopts the laws of the applicable adjacent state as the governing law on Outer Continental Shelf (OCS) platforms, which are treated as islands in an upland state (recall that platforms, unlike rigs, are not vessels).⁵⁰ Thus the measure of recovery in a fatal injury action on a high seas off-shore oil or gas production facility (a rig or platform) would depend upon whether the relevant vehicle was a platform or a rig, even though the job that the tortiously killed worker was doing when injured and the functional cause of the death were exactly the same. The point is that the potential recovery would illogically and unfairly depend upon happenstance rather than substance. Additionally, if the worker was killed on a platform on territorial waters, state law would apply and the worker's survivors would be entitled to recover loss of society damages.

2. *The Fix*

Ironically, when the U.S. Supreme Court, in *Moragne v. States Marine Lines, Inc.*,⁵¹ first recognized a jurisprudential maritime wrongful death cause of action, it did so because of inconsistencies in the rights of the survivors of maritime workers to recover in wrongful death actions. It acted to fill holes that the Jones Act and DOHSA did not fill. Forty years after *Moragne*, inconsistencies have both remained and multiplied. What are the inconsistencies? Recovery for wrongful death, governed by state tort law, is usually more generous when the death occurs on land than it is under the Jones Act and DOHSA. Recovery for death arising from a commercial aviation disaster on the high seas is more generous than recovery for any other death occurring on the high seas and governed by DOHSA. Recovery for wrongful death of non-seamen workers⁵² is probably more generous when the death occurs in territorial waters as opposed to on the high seas. Recovery for wrongful death is more generous if the death occurs on a platform (whether the platform is located in territorial waters or on the high seas) than when the death occurs on a rig. The solution is an amendment to DOHSA.

49. 43 U.S.C. § 1333(a)(2)(A) (2006).

50. See generally *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280 (5th Cir. 2009); MARAIST & GALLIGAN, *supra* note 23, at 323–27.

51. 398 U.S. 375 (1970).

52. It might be even more accurate to say “non-seafarer” workers, as opposed to “non-seaman” workers.

I have noted above how a possible amendment to the Jones Act would deal with the seaman's negligence claim; DOHSA could also be amended to delete the word "pecuniary" before "loss" in 46 U.S.C. § 30303 and to add the language, "including nonpecuniary damages for loss of care, comfort, and companionship" after "loss."⁵³

3. *An Additional Point on Undercompensation and Consistency: OPA 90*

To add another relevant point to the analysis, the Oil Pollution Act of 1990 (OPA 90),⁵⁴ passed in the wake of the *Exxon Valdez* oil spill, allows victims of oil spills to recover various damages, including removal costs,⁵⁵ damage to real or personal property,⁵⁶ damage to natural resources used for subsistence,⁵⁷ and economic damages because of damage to property or natural resources even if the claimant does not own the property.⁵⁸ These rights to recover damages assure compensation to persons injured in various ways by an oil spill.

Critically, OPA 90 does not apply to personal injury or wrongful death claims.⁵⁹ It does not grant any right to recover for personal injury or wrongful death arising out of an oil spill. Consequently, the survivors of the seaman or others killed on the high seas as a result of negligence or unseaworthiness do not recover for loss of society, although persons whose property was damaged or who lost profits do recover. This is not to say that recovery for damaged property or lost profits is not appropriate; it is merely to point out that currently recovery of economic loss is more readily available than recovery for loss of a loved one. Certainly, human life and personal injury are just as worthy of compensation as property damage and economic loss.

III. EXPANDED UNDERCOMPENSATION

As noted above, the fact that the survivors of seamen and anyone killed on the high seas cannot recover for loss of society damages undercompensates them and is inconsistent with the

53. See *supra* note 45.

54. 33 U.S.C. §§ 2701–2762 (2006).

55. *Id.* § 2702(b)(1).

56. *Id.* § 2702(b)(2)(B).

57. *Id.* § 2702(b)(2)(C).

58. *Id.* § 2702(b)(2)(E).

59. See generally *Gabarick v. Lauren Mar. (Am.), Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009) (stating that OPA 90 does not cover bodily injury claims).

current majority rule in America. However, some courts have aggravated the situation. Some courts have extended the scope of the Jones Act's and DOHSA's no-recovery rules beyond their express reach and have applied them to limit or deny recovery in other maritime contexts. In *Moragne*,⁶⁰ the U.S. Supreme Court created a general maritime law action for wrongful death that filled some of the gaps in maritime wrongful death law and that provided recovery in some cases not covered by DOHSA and the Jones Act. As noted above, the Court created the general maritime wrongful death action to fill holes in the law. Then in *Sea-Land Services, Inc. v. Gaudet*,⁶¹ the Court held that the *Moragne* claim allowed the survivors of an LHWCA worker killed in territorial waters to recover loss of society damages. The Court's decision was consistent with the modern American majority rule allowing recovery of loss of society in wrongful death cases.⁶² Thereafter, the Court, in *American Export Lines, Inc. v. Alvez*,⁶³ held that the spouse of an injured longshore worker could recover for loss of society and loss of consortium in a case where the worker was injured but not killed.

However, two years before *Alvez*, the Court began a trend of liability-limiting decisions ostensibly based on congressional intent. In *Mobil Oil Corp. v. Higginbotham*, the Court refused to allow the survivors of someone killed on the high seas to rely upon the *Moragne* claim to recover loss of society damages because those damages were not recoverable under DOHSA.⁶⁴ The Court decided that because Congress had spoken to the subject in DOHSA⁶⁵ (limiting recovery to pecuniary damages), the Court was not free to supplement the recovery through the general maritime law.⁶⁶ The trend to extend liability limitations was on. Thereafter,

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

61. 414 U.S. 573 (1974).

62. *Id.* at 588-89.

63. 446 U.S. 274 (1980).

64. 436 U.S. 618 (1978).

65. Of course, a similar sort of argument in *Moragne* itself might have gone something like this: In DOHSA, Congress provided a wrongful death action to the survivors of those killed on the high seas. In the Jones Act it provided a wrongful death action to the survivors of negligently killed seamen. Congress did not provide anyone else with a Jones Act action so it must have meant not to do so. Thus, the Supreme Court should not do so. By creating the general maritime law wrongful death action, the Court recognized the appropriateness of developing and shaping maritime tort law to make it up to date, fair, logical, consistent, and coherent.

66. Of course, an amendment to DOHSA that expressly made loss of society damages recoverable in DOHSA cases would obviate any need to supplement the DOHSA claim via the general maritime law or state tort law.

in *Offshore Logistics, Inc. v. Tallentire*,⁶⁷ the Court refused to allow the plaintiffs in a high seas death case to “borrow” state law to supplement DOHSA recovery.⁶⁸ The limitation trend continued.

Then, in *Miles*,⁶⁹ the Court considered a case involving a seaman killed in territorial waters. In *Miles*, a seaman had been brutally murdered by a bellicose fellow crew member, who repeatedly stabbed the decedent.⁷⁰ The decedent’s mother sued the employer, alleging, among other things, a Jones Act negligence wrongful death claim and a *Moragne* general maritime law wrongful death action claim arising out of an unseaworthy condition of the vessel (the presence of the bellicose seaman).⁷¹ In a somewhat surprising decision, the Court refused to allow the mother to recover her loss of society damages on the unseaworthiness general maritime law wrongful death claim.⁷² The Court reasoned that when Congress enacted the Jones Act in 1920 and incorporated the FELA, it must have been aware of the *Vreeland* decision—holding that the FELA did not authorize wrongful death recovery for loss of society damages—and so Congress must have incorporated that holding into the Jones Act as judicial “gloss.”⁷³ The *Miles* Court then reasoned that because Congress supposedly did not intend to allow recovery for loss of society damages in a Jones Act wrongful death claim for negligence, such damages were not available in a general maritime law (*Moragne/Gaudet*) wrongful death action where the death was caused by an unseaworthy condition of the vessel. This was because, the Court said, “[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault [unseaworthiness] than Congress has allowed in cases of death resulting from negligence.”⁷⁴ The *Miles* decision was, of

67. 477 U.S. 207 (1986).

68. *Id.* at 217.

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

70. *Id.* at 21.

71. *Id.* at 21–22.

72. The reader will note that DOHSA did not apply to the case because the wrongful conduct occurred in territorial waters, not the high seas.

73. *Miles*, 498 U.S. at 32.

74. *Id.* at 32–33. See generally David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463 (2010). An amendment to the Jones Act to allow recovery of loss of society damages in Jones Act (and FELA) wrongful death cases would effectively supersede the ruling in *Miles* as it would eviscerate its analytical foundation. Because Congress supposedly did not authorize the recovery of loss of society damages in the Jones Act, the Court should not do so in a seaman’s survivor’s general maritime law wrongful death claim.

course, arguably inconsistent with the spirit, if not the holding, of *Gaudet* and *Moragne*, and scholars have criticized it.⁷⁵ Moreover, the Supreme Court has twice refused to extend the holding of *Miles* in *Atlantic Sounding Co. v. Townsend*⁷⁶ and *Yamaha Motor Corp. v. Calhoun*.⁷⁷ Indeed, in *Calhoun*, the Court held that where the decedent was a non-seafarer killed in territorial waters, his survivors could use state law to recover for loss of society damages in a maritime wrongful death case.⁷⁸

However, despite the scholarly criticism of *Miles* and the Court's own subsequent failure to extend the holding of *Miles*, some lower courts have relied upon *Miles*, *Tallentire*, and *Higginbotham* to limit recovery of nonpecuniary damages in maritime cases that do not fall under those holdings.

For instance, in *Scarborough v. Clemco Industries*, the Fifth Circuit said that loss of society damages were not recoverable in any wrongful death action involving a seaman, even when the claim was against a third party who was *not* the decedent seaman's employer or the owner of the vessel on which he or she was killed.⁷⁹ Thus, the Fifth Circuit extended the holding of *Miles* to claims (against third-party tortfeasors) that were not at issue in *Miles* and that are not implicated in either the Jones Act or DOHSA.

In *Tucker v. Fearn*, a panel of the Eleventh Circuit, again relying upon *Miles*, held that the father of a minor killed in a sailboat accident in Alabama's territorial waters could not recover loss of society damages under the general maritime law.⁸⁰ By applying *Miles* to a case that did not involve a seaman or the Jones Act, the court applied the decision beyond its holding to deny recovery.

In *Doyle v. Graske*, the court relied heavily on DOHSA in holding that general maritime law does not allow loss of consortium recovery for the spouse of a non-seafarer (a non-seaman or non-longshore worker) injured, as opposed to killed, on

75. See John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249 (1993); Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995).

76. 129 S. Ct. 2561 (2009) (recognizing a right to recover punitive damages in case alleging the arbitrary and willful failure to pay maintenance and cure).

77. 516 U.S. 199 (1995) (allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages).

78. *Id.* at 202.

79. 391 F.3d 660 (5th Cir. 2004).

80. 333 F.3d 1216 (11th Cir. 2003).

the high seas.⁸¹ Here the court relied upon a wrongful death statute to limit recovery in a personal injury case that did not involve wrongful death. That is, the court extended DOHSA's no-loss-of-society rule to bar recovery for loss of consortium where no death had occurred.⁸² In *Guevara v. Maritime Overseas Corp.*,⁸³ the court relied on *Miles* to deny recovery of punitive damages in a case involving the alleged arbitrary failure to pay maintenance and cure, which was not at issue in *Miles*. In doing so, the court clearly extended the recovery-limiting holding of *Miles* beyond the wrongful death context to a traditional maritime law claim. Notably, in what might be read as a signal to all courts that consider pushing *Miles* beyond its holding, the Supreme Court abrogated the holding of *Guevara* in *Townsend*.⁸⁴

Lower courts have disagreed on whether to extend *Miles* beyond its holding. Some, in the spirit of a lower federal court applying U.S. Supreme Court jurisprudence but going no further to "make law," have refused to extend *Miles* beyond its legislative base and its holding.⁸⁵ But the fact that some courts have not extended *Miles* beyond its holding and some have done so results in inconsistency (there we are again—back to inconsistency). Perhaps even more importantly, the fact that courts *have* extended *Miles* increases the number of cases in which the law fails to recognize the reality of injury and loss and in doing so either totally fails to compensate for loss or, at best, undercompensates. The extension of limited liability and undercompensation expands the general climate of limited liability in maritime tort cases and hence maritime disasters. It extends limitations on recovery beyond the express reach of the Jones Act and DOHSA, and it does so in reliance on the failure of those two statutes to allow

81. 579 F.3d 898 (8th Cir. 2009) (involving a boat passenger and spouse who brought action in admiralty for personal injuries and loss of consortium damages sustained in a boating accident off the coast of Grand Cayman Island when the steering linkage disengaged); *see also* *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994).

82. *See Doyle*, 579 F.3d at 907.

83. 59 F.3d 1496 (5th Cir. 1995).

84. *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009) (allowing punitive damages).

85. *See Kahumoku v. Titan Mar., LLC*, 486 F. Supp. 2d 1144 (D. Haw. 2007) (law entitles LHWCA worker to recover punitive damages in maritime tort case); *Clark v. W&M Kraft, Inc.*, No. 1:05-CV-00725, 2007 WL 120136 (S.D. Ohio Jan. 10, 2007) (loss of consortium recovery claim available for seaman's spouse and son against third party); *In re Consol. Coal Co.*, 228 F. Supp. 2d 764 (N.D.W. Va. 2001) (loss of consortium recovery available for seaman's spouse against third party); *Rebardi v. Crewboats, Inc.*, 906 So. 2d 455 (La. Ct. App. 2005) (punitive damages available).

recovery of nonpecuniary damages. The extensions of limited liability increase the possibility of underdeterrence and, as described more fully below, the potential for increased and inefficient risk taking. Amending the Jones Act (actually FELA) and DOHSA to allow recovery for loss of care, comfort, and companionship would go a long way toward solving the problem because the amendments would do away with the language upon which courts have relied to limit recovery for bona fide damages (for what most courts would consider nonpecuniary damages) and thereby effectively increases risk.

IV. SURVIVAL ACTION: PRE-DEATH PAIN AND SUFFERING

Additionally, shifting from the wrongful death claim to the survival action claim, the Supreme Court in a case that did not involve a seaman, *Dooley v. Korean Air Lines Co.*,⁸⁶ relied upon DOHSA and refused to allow recovery of pre-death pain and suffering as part of a survival action claim where death occurred on the high seas. Concomitantly, the law *does allow* the Jones Act seaman's survivors to recover for pre-death pain and suffering.⁸⁷ So, we are faced with another glaring example of inconsistency. Although *Dooley* does not apply to seaman survival actions, in any case covered by *Dooley*, involving a death caused by events on the high seas, no matter how much the decedent may have suffered before his death, those damages are not recoverable. DOHSA does not expressly deal with maritime survival actions, but only wrongful death actions. To rely upon DOHSA to limit recovery in an action to which it does not apply causes further undercompensation, underdeterrence, and resulting increased risk. To remedy this situation, Congress should amend the law not only to make loss of society damages recoverable, as suggested above, but also to make pre-death pain and suffering available in maritime survival actions.⁸⁸

86. 524 U.S. 116 (1998).

87. See David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 TUL. MAR. L.J. 493 (2008). That the survivors of a Jones Act seaman suing in negligence can recover for pre-death pain and suffering, but survivors of other decedents cannot, is yet another example of inconsistency in maritime wrongful death and personal injury law.

88. H.R. 5503 did so and S. 3463 proposed to do so but, as the reader knows, the Senate has not acted on that bill.

V. UNDERCOMPENSATION LEADS TO UNDERDETERRENCE AND INCREASED RISK

Throughout this Article I have said that if tort law undercompensates injured victims or their survivors then that undercompensation will lead to increased risk. Here I will explain the theoretical underpinnings of those statements, all of which are based on simple economics and common sense. Critically, in terms of holding people and industry accountable, if the law undercompensates, it will by definition underdeter, which will lead to lower than optimal investments in safety. Lower investments in safety and accident avoidance lead to increased risk. This is true because when deciding what to do and how to do it, the rational economic actor will consider the costs of its activities. To the extent that a person does not have to pay a cost, he is much less likely to take that unpaid cost into account when deciding what to do and how to do it. As Judge Guido Calabresi so ably noted many years ago in *The Costs of Accidents: A Legal and Economic Analysis*,⁸⁹ one of the costs economic actors must consider is the cost of accidents. The costs of accidents are just as real and important as the costs of goods themselves, such as the costs of raw materials and the costs of labor. The critical importance of encouraging actors to take account of accident costs is also at the heart of Judge Richard Posner's important law and economics scholarship and jurisprudence on negligence.⁹⁰ This truism about taking account of accident costs is the crux of Judge Learned Hand's famous negligence formula that provides that one is negligent if the burden or cost of avoiding a loss is less than the probability of the loss occurring multiplied by the anticipated magnitude (or value) of the loss, if the loss arises *and* the actor fails to incur the burden, i.e., the costs of accident avoidance. Put algebraically, per Judge Hand, one is negligent if $B < P \times L$ and the actor does not avoid the loss by making the investment in safety. Interestingly, Judge Hand originally articulated his famous and influential negligence formula in a maritime tort case.⁹¹ Basically the notion of tort law forcing actors to internalize the costs of their actions when determining what to do and how to do it is the core of all law and economics jurisprudence and scholarship on torts.

89. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

90. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

91. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

If a person does not take account of the costs of accidents when deciding what to do and how to do it, he will underinvest in safety. Of course, compensatory damages are based in corrective justice and are designed to make the plaintiff whole—to put him in the position he would have been in if the wrong had never occurred. Professor Douglas Laycock has called it the “plaintiff’s rightful position.”⁹² The idea of compensatory damages, in and of themselves, might seem irrelevant to optimal economic behavior. However, compensatory damages also play another role in the regulation of American tort law because tort law not only compensates, but also deters unsafe conduct. And compensatory damages play a critical role in deterrence. The threat of paying compensatory damages in tort cases forces people to consider the costs of accidents when making decisions about engaging in behavior that might pose risk to others. As I have written previously in this law review:

In addition to forcing actors to pay some accident costs, compensation performs a second efficiency related function. The tort system operates as a data bank providing actors access to information on the number of accidents that do occur, the damages that accident victims suffer, and the dollar value of those damages. In this regard the “fault” system facilitates actors’ *ex ante* [beforehand] calculations by providing them with the data they need to calculate the value of the damages that their activities impose on others. Given a large number of similarly situated actors, over time damages paid might be expected to somewhat equal the actual value *ex ante* of an activity’s accident costs But in order for our current system to operate most effectively, some real relationship must exist between the accident costs society wants the actor to consider beforehand and the damages we force the actor to pay after the fact. The damages we award to compensate plaintiffs in personal injury cases and the categories of accident costs we want actors to consider *ex ante* should highly correlate. If actual damages awarded in tort suits do not reflect the costs we want actors to consider *ex ante*, but the system relies upon those actual awards as a “definition” of accident costs, then the system will not optimally deter. If the damages awarded in tort suits are less than the total costs we want actors to discount *ex ante*, we are encouraging people to consider less than all of the costs of that activity and to overengage

92. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 15 (1st ed. 1985).

in it. Likewise, if we overcompensate accident victims we are encouraging actors to underengage in the activity.⁹³

To reiterate, to the extent tort law does not adequately compensate victims, it underdeters risky conduct and contributes to a more dangerous world than people have a right to expect. And in the maritime setting the law undercompensates because it does not compensate victims for loss of society in cases involving the death of seamen and others on the high seas (other than commercial aviation disasters) and because courts have extended those no-recovery rules to other maritime contexts. The failure to compensate for loss of society in Jones Act and DOHSA cases is a germ that infects the entire deterrence scheme of maritime wrongful death and personal injury law. When extended to cases that are not expressly governed by those statutes, it is a germ that threatens to become a plague, a plague causing inefficiently high levels of personal injury, death, and concomitant property loss; economic damages; and environmental devastation. Maritime disasters and oil spills that cause injury and death also cause damage to property, the economy, and the environment. Those damages devastate lifestyles, culture, and even global well being. They harm everyone.

Moreover, there is evidence that environmental disasters can have devastating mental health effects.⁹⁴ In natural disasters the effects typically subside within two years,⁹⁵ but technological disasters resulting from breakdowns by humans “consistently have social, cultural, and psychological effects that are both more severe and longer-lasting.”⁹⁶ The effects are particularly acute where the disaster impacts renewable resource communities like fisheries.⁹⁷ These effects manifested themselves in the Prince William Sound community in the wake of the *Exxon Valdez* spill by causing chronic feelings of helplessness, betrayal, and anger; high rates of anxiety, depression, and post-traumatic stress; increased health care demands; increased crime rates; and more.⁹⁸ These injuries

93. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 25–29 (1990) (footnotes omitted).

94. See Brief Amici Curiae of Sociologists, Psychologists, and Law and Economics Scholars in Support of Respondents, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (No. 07-219), 2008 WL 275482 at *8 [hereinafter Amici Brief].

95. *Id.* (citing Catalina M. Arata et al., *Coping with Technological Disaster: An Application of the Conservation of Resources Model to the Exxon Valdez Oil Spill*, 13 J. TRAUMATIC STRESS 23, 24 (2000)).

96. *Id.*

97. *Id.* at *9.

98. *Id.* at *13–18.

were very real, and absent some compensation or device to force actors to consider them when deciding what to do and how to do it (i.e., some device to hold them accountable), they will not be forced to do so, tending toward underdeterrence and increased risk.

Although OPA 90 provides liability for removal costs, property damage, economic loss, and more, it does not cure the problem of undercompensation and underdeterrence in maritime personal injury and wrongful death cases because it does not apply to maritime personal injury and wrongful death cases. The undercompensation resulting from the current state of maritime personal injury and wrongful death law and the serious emotional harm that can result from a maritime, environmental disaster is not only unfair and inconsistent but also will potentially lead to increased risk. These economic realities are exacerbated in the maritime setting by the existence of the 1851 Ship Owner's Limitation of Liability Act.

VI. LIMITATION OF LIABILITY

The Limitation of Liability Act⁹⁹ applies to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the Act allows a vessel owner (and some others) to limit liability to the post-voyage value of the vessel if the liability is incurred without the privity or knowledge of the owner.¹⁰⁰ And the owner is entitled to retain any hull insurance.¹⁰¹ One may justifiably wonder whether an act passed at a time before the modern development of the corporate form (and other liability limiting devices) and the evolution of bankruptcy law is still salient; however, limitation is still extant as a matter of maritime law. The vessel owner creates a fund equal to the post-accident value of the ship (not including the hull insurance). The claimants then share in the fund in proportion to the value of their claims. Personal injury and wrongful death claimants share with other claimants, but if the vessel is a seagoing vessel and the fund is not adequate to provide the personal injury and wrongful death claimants with recovery equal to at least \$420 times the gross tonnage of the vessel, the owner must provide the difference, up to \$420 per ton, but no more.¹⁰² *Transocean, Ltd.*, the owner of the *Deepwater Horizon*, has petitioned to limit its liability, and the

99. 46 U.S.C. §§ 30501–30512 (2006).

100. *Id.* §§ 30505(a)–(b), 30506(e).

101. *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886).

102. 46 U.S.C. § 30506(b) (2006).

estimated value of the fund is \$27 million.¹⁰³ A full discussion of the wisdom of limitation and its potential repeal or amendment is beyond the scope of this Article; however, here it is important to note that the possible existence of the right to limit liability, absent privity or knowledge, increases the risk of undercompensation and concomitant underdeterrence in maritime tort law.¹⁰⁴

VII. MARITIME PUNITIVE DAMAGES

The undercompensation and underdeterrence resulting from the dated, inconsistent no-recovery rules described above and the Limitation of Liability Act might be alleviated by the availability of punitive damages. However, the U.S. Supreme Court decision in *Baker*¹⁰⁵ provided that punitive damages in many maritime tort cases are limited to, or capped by, a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded. This decision might thwart the efficient imposition of punitive damages in maritime tort cases.

103. Mark Long & Angel Gonzalez, *Transocean Seeks Limit on Liability*, WALL ST. J., May 13, 2010, at A5, available at <http://online.wsj.com/article/SB10001424052748704635204575241852606380696.html>.

104. One may question whether limitation, even if other nations recognize the right to limit, is still sound policy. One may also ask why, if the purpose of the Act is to protect American shipping, the law is still necessary in a world where fewer and fewer seagoing vessels are American registered vessels. Finally, one may argue that there may be some basis for limitation of cargo claims where the risk of loss and the fact of limitation may figure in the bargain the shipper and carrier strike. That argument is substantially weaker in the case of the personal injury or wrongful death victim—particularly where the injuring vessel is a third party tortfeasor, i.e., the defendant has no contractual agreement or relationship with the injured or killed victims.

OPA 90 has its own liability limitation scheme, and the applicable limit on liability for a responsible party, absent gross negligence, is \$75,000,000. 33 U.S.C. § 2704 (2006). Although the Supreme Court has not considered the matter, lower federal courts have held that the OPA 90 supersedes the limitation act on OPA 90 claims. *See, e.g., In re S. Scrap Material Co.*, 541 F.3d 584, 595 (5th Cir. 2008) (dicta); *In re Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997); *Gabarick v. Lauren Mar. (Am.), Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009).

But, as noted, OPA 90 does not apply to personal injury or wrongful death. Thus the Limitation of Liability Act is applicable in a maritime disaster to allow a vessel owner to limit its liability for personal injury and wrongful death claims. Clearly, this liability-limiting device can lead to drastic undercompensation to the victims of maritime disasters. Repealing the relevant portions of the Limitation of Liability Act would, of course, cure the problem of undercompensation and underdeterrence in general. Again, as noted, H.R. 5503 repealed the relevant portions of the Limitation of Liability Act. Senator Schumer's proposed bill, S. 3478, would also have done so, but the Senate has not acted.

105. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

Punitive damages are damages in addition to compensation that are designed to punish and deter. They are only awarded where the plaintiff has proven fault, compensatory damages are awarded, *and* the plaintiff proves that the defendant's conduct was worse than negligent, i.e., it was intentional, willful, wanton, or reckless.

So how could punitive damages potentially alleviate the underdeterrence caused by undercompensatory damage awards?

It is common ground among legal scholars and economists that inefficient behavior will not be deterred unless actors are forced to internalize all of the costs associated with their activities. Although adequate deterrence may generally be achieved through an award of compensatory damages, an award of punitive damages may be necessary to achieve complete deterrence in cases in which compensatory damages fail to fully account for the costs of a tortfeasor's actions.¹⁰⁶

The U.S. Supreme Court has twice in the last three years held that punitive damages are recoverable under general maritime law.¹⁰⁷ After these two decisions, punitive damages are available in seamen-related cases, given the holding in *Townsend* that a seaman may recover punitive damages under the general maritime law arising out of the arbitrary and willful failure to pay maintenance and cure. Punitive damages have not been traditionally recoverable in DOHSA cases. The scope of the seaman's right to recover punitive damages and their availability under DOHSA will now be the subject of future argument and litigation. Notably, however, the potential absence of punitive damages in cases involving deaths for which no recovery of loss of society or pre-death pain and suffering, or neither, is available may inadequately deter those who engage in activities that may cause injury or loss of life because it can result in an undervaluing of human life and tragic ramifications when it is lost.¹⁰⁸

Additionally, as noted, although holding punitive damages are recoverable in maritime tort suits, the Court in *Baker* limited the amount of punitive damages recoverable in many maritime cases to a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded.¹⁰⁹ Justice Stevens was among the

106. Amici Brief, *supra* note 94, at *2.

107. *See, e.g.*, *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

108. *See* Galligan, *supra* note 93.

109. *Baker*, 554 U.S. at 476.

dissenters, and one of the reasons for his disagreement with the majority was that maritime law was undercompensatory.¹¹⁰

The majority noted that studies did not indicate a “marked increase” in the frequency of punitive damages over recent years.¹¹¹ It also noted that the dollars awarded had not grown over time in real terms.¹¹² And the Court pointed out that the mean ratio of punitive damages to compensatory damages in the cases studied was less than 1:1.¹¹³ But the Court was apparently concerned with the potential unpredictable “spread” between high and low punitive awards, and it was that concern that prompted the decision to generally limit the ratio of punitives to compensatories to 1:1.¹¹⁴ The Court apparently concluded that the data concerning the range or spread raised questions about notice, fairness, and consistency.

The holding in *Baker* is actually relatively narrow. It does not stand for the proposition that punitive damages in maritime tort cases are always limited to a 1:1 ratio between punitive and compensatory damages. Critically, the Court pointed out that the case before it involved conduct that was worse than negligent but not malicious.¹¹⁵ It also noted that the activity was “profitless” to the tortfeasor.¹¹⁶ Therefore, the decision and the capping ratio should not apply to cases involving higher levels of blameworthiness (malice) or “strategic financial wrongdoing.”¹¹⁷

Whatever one might argue about cases to which the *Baker* 1:1 ratio should or should not apply, I am concerned that most lower court judges deciding admiralty cases will apply the ratio to these cases due to a concern about being overruled. If they do, the ratio cap will then deprive a judge or jury of the traditionally available ability to tailor a punitive award, within constitutional due process limits,¹¹⁸ to the particular facts of the case, including the level of blameworthiness, the harm suffered, the harm threatened, the profitability of the activity, and other relevant factors. Indeed one wonders if the 1:1 ratio aspect of *Baker* would have been decided the same way if another maritime environmental disaster had occurred before the decision. But we will never know.¹¹⁹

110. *See id.* at 521 (Stevens, J., dissenting in part).

111. *Id.* at 498 (majority opinion).

112. *Id.* at 497.

113. *Id.* at 498.

114. *Id.* at 499.

115. *Id.* at 510–11.

116. *Id.* at 511.

117. *Id.* at 510 n.24.

118. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

119. Senator Whitehouse’s proposed bill, S. 3345, would have restored the traditional ability to tailor a punitive award to the facts of the case by providing:

VIII. CONCLUSION

The Deepwater Horizon disaster in the Gulf and the deaths of the 11 workers killed in the explosion have forced American maritime law to face up to a sad, unjust, outdated, inconsistent, and dangerous truth: Recovery in maritime personal injury and wrongful death cases is undercompensatory. The failure to allow recovery of loss of society damages in seaman and high seas maritime wrongful death cases (other than commercial aviation disasters) is unjust, dated, inconsistent, and out of alignment with current values. The rules are outdated because the majority American rule today is that loss of society damages are recoverable in a wrongful death case.

The Jones Act and DOHSA rules are inconsistent because what survivors recover depends more on where their loved one died than on the substantive aspects of the case. The survivors of an oil field worker killed on land as a result of a tort are much more likely under the majority rule to recover loss of society damages than the survivors of an oil field worker killed on a rig on the high seas, who will be denied that recovery. The survivors of an oil field

“[I]n a civil action for damages arising out of a maritime tort, punitive damages may be assessed without reference to the amount of compensatory damages assessed in the action.” S. 3345, 111th Cong. (2010). The effect of the proposed amendment would have been to increase the deterrent impact of punitive damage awards in maritime cases. But, the Senate did not act.

Although the Supreme Court has never considered the issue, several courts have held that punitive damages are not available under OPA 90. *See, e.g.,* *S. Port Marine, LLC v. Gulf Oil Ltd. P’ship*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V NEW CARISSA*, 171 F. Supp. 2d 1127 (D. Or. 2001); *see also* JAMES P. ROY ET AL., *BP DEEPWATER HORIZON GULF OF MEXICO OIL POLLUTION DISASTER, PRELIMINARY ANALYSIS: LAW, DAMAGES, AND PROCEDURE* (2010), available at http://www.justice.org/cps/rde/xbcr/justice/JPR_-_BP_-_Prelim_Analysis.pdf. Those courts state that OPA 90 preempts maritime law, and therefore punitive damages are not available in a case involving maritime law and OPA 90. Interestingly, OPA 90 actually provides that it does not affect admiralty or maritime law. 33 U.S.C. § 2751(e) (2006). Moreover, OPA 90 does *not* provide that punitive damages are *not* recoverable; it is merely silent on the subject. And two of the cases, *South Port Marine* and *Clausen*, were decided before the Supreme Court’s affirmation of the right to recover punitive damages in *Townsend* and *Baker*. Indeed in *Baker*, the Court refused to find that the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. 2009), which was silent on the subject of punitive damages, precluded the recovery of punitive damages under maritime law. *Baker*, 554 U.S. at 489. Finally, OPA 90 does not, as noted, apply to personal injury and wrongful death claims. Consequently, any preemptive effect OPA 90 might have on punitive damages in personal injury and wrongful death cases would seem to be limited and *South Port* and *Clausen* merit reexamination.

worker killed on a stationary platform are more likely, through the application of state law, to recover loss of society damages than the survivors of an oil field worker killed on a rig on the high seas, who will be denied that recovery. The survivors of someone killed in territorial waters (particularly a nonseafarer) are more likely to recover loss of society damages under either state law or maritime law than the survivors of anyone killed on the high seas. And finally, the survivors of someone killed in a commercial aviation disaster on the high seas will recover loss of society damages whereas the survivors of anyone else killed on the high seas will not. That is not justice; it is nonsensical legal tyranny.

The recovery-denying rules not only fail to compensate but also inevitably lead to underdeterrence and increased risk because economic actors do not have to take those risks into account in deciding what to do and how to do it. Aggravating matters, some courts have extended the Jones Act and DOHSA no-recovery-for-loss-of-society-damages rules beyond the contexts in which they arose. These extensions exacerbate the problems because they increase the numbers of cases in which plaintiffs are undercompensated. This, in turn, increases the cases in which maritime actors need not take account of the full accident costs their activities create when deciding what to do and how to do it. In turn, the climate of liability limitation has grown and so has the risk of resulting injury and death. The solution is simple—amend the Jones Act and DOHSA. This risky state of affairs is aggravated by the 1851 Ship Owner's Limitation of Liability Act, and the potential positive effect of punitive damages is limited by the 1:1 punitive damages to compensatory damages rule of *Baker*. As noted, amendment and reform are both possible and necessary.

In conclusion, the disaster in the Gulf of Mexico spurs a tragic but necessary opportunity for our nation to reconsider our law and to make it just. Congress should act to repair this unjust, outdated, inconsistent, and dangerous state of legal affairs, and lawyers, judges, and concerned citizens should take up the call and convince our federal legislators to do just that.

