GUEVARA V. MARITIME: CAUGHT IN THE WAKE OF *MILES V. APEX MARINE CORP.*

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I. INTRODUCTION

Reversing its previous decision in *Guevara v. Maritime Overseas Corp.*,[1] the Fifth Circuit has sharply limited recovery in maintenance and cure[2] actions to pecuniary damages in conformity with statutory law.[3] The

1. 34 F.3d 1279, 1995 AMC 321 (5th Cir.) (per curiam), *reh'g granted*, 34 F.3d 1279, 1290 (5th Cir. 1994) (en banc).

2. "Contractual form of compensation given by general maritime law to seaman who falls ill while in service of his vessel." BLACK'S LAW DICTIONARY 954 (6th ed. 1990).

3. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1513, 1995 AMC 2409, 2434 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996). Pecuniary damages are damages that "can be estimated in and compensated by money; not merely the loss of money or salable property or rights, but all such loss, deprivation, or injury as can be made the subject of calculation and of recompense in money." BLACK'S LAW DICTIONARY 392 (6th ed. 1990). "Pecuniary damages are awards designed to restore 'material loss which is susceptible of a pecuniary valuation.'" Anderson v. Texaco, Inc., 797 F. Supp. 531, 534, 1993 AMC 1319, 1322 (E.D. La. 1992) (quoting Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 71 (1913)). "Punitive

court denied recovery of punitive damages for the failure to provide maintenance and cure under both tort-based[4] and contractual[5] perspectives. In the former, damages were confined to the limitations of the Jones Act,[6] and in the latter to compensatory damages.[7] The possibility of recovering attorneys' fees was acknowledged, but only upon proof of the defendant's willful and wanton conduct during the course of the underlying litigation.[8]

The Fifth Circuit had previously held in *Holmes v. J. Ray McDermott & Co*.[9] that an award of punitive damages under the general maritime law may be obtained when an employer willfully and callously refuses to pay maintenance and cure to an injured seaman.[10] However, upon rehearing *Guevara*, the court noted that significant developments in the law of admiralty since the *Holmes* decision required a rethinking of its position.[11]

One major development is the move toward greater uniformity between statutory and maritime law.[12] The United States Supreme Court's 1990 decision in *Miles v. Apex Marine Corp*.[13] held that, because punitive damages for loss of society were precluded under both the Jones Act and the Death on the High Seas Act (DOHSA),[14] they were also precluded under the general maritime law.[15] *Miles* signaled a judicial unwillingness to extend remedies beyond those allowed under statutory law.[16] Consequently, in re-examining the rationale of *Holmes*, the *Guevara* court held that support for *Holmes* can no longer be sustained.[17]

The purpose of this Comment on the *Guevara* decision is twofold. First, the Fifth Circuit used an over-broad application of the *Miles* decision in deciding the second *Guevara* case. The opinion indicates a judicial aversion to extending remedies beyond those provided by statute, whether the cause of action is covered by statute or not. Second, the decision represents a retreat from activist judicial decision making. While some

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damages, on the other hand, do not compensate for a loss, but rather, are imposed to punish and deter by virtue of the gravity of the offense." *Id*. at 534.

4. *See Guevara*, 59 F.3d at 1512, 1995 AMC at 2434.

5. *See id*.

6. 46 U.S.C. app. § 688 (1994).

7. *See Guevara*, 59 F.3d at 1512–13, 1995 AMC at 2434–35.

8. *See id*. at 1513, 1995 AMC at 2435.

9. 734 F.2d 1110, 1985 AMC 2024 (5th Cir. 1984), *overruled by Guevara*, 59 F.3d at 1513, 1995 AMC at 2435.

10. *See id*. at 1118, 1985 AMC at 2034–35.

11. *See Guevara*, 59 F.3d at 1498, 1995 AMC at 2410.

12. *See id*. at 1504–07, 1995 AMC at 2419–25.

13. 498 U.S. 19, 1991 AMC 1 (1990).

14. 46 U.S.C. app. §§ 761–768 (1994).

15. *See Miles*, 498 U.S. at 31–33, 1991 AMC at 10–11. "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id*. at 32–33, 1991 AMC at 11.

16. *See id*. at 27, 1991 AMC at 6–7.

17. *See Guevara*, 59 F.3d at 1498, 1513, 1995 AMC at 2425.

courts interpret their admiralty authority as equal to that of Congress, this court showed deference.

Analyzing *Guevara* requires a brief look at the history of punitive damages, a review of maintenance and cure, and an examination of their place in the general maritime law. This Comment will also discuss the move toward uniformity between the maritime and statutory laws that recently culminated in the *Miles* decision and consider its influence on *Guevara*. Finally, the *Guevara* opinion itself will be critiqued.

II. PUNITIVE DAMAGES AND MAINTENANCE AND CURE

A. The History of Maintenance and Cure

Maintenance and cure is an ancient admiralty law doctrine which has its origins in the medieval period.[18] In the United States, the concept was first discussed by Justice Story[19] in *Harden v. Gordon*.[20] Put simply, maintenance and cure is an obligation imposed on the ship owner to care for his crew when they become injured or ill.[21] "Maintenance" is the right of an injured or ill crew member to food and lodging, while "cure" is the right to medical attention and treatment.[22] The right to maintenance and cure begins when the seaman first signs on to service and continues until discharge.[23] It is a unique right that arises from special dangers and sacrifices involved in maritime employment.[24] As Justice Story explained:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so

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18. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-6, at 281 (2d ed. 1975); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-28, at 289 (2d ed. 1994).

19. *See* GILMORE & BLACK, *supra* note 18, § 6-6, at 281.

20. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047) (Story, Cir. J.).

21. *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527–28, 1938 AMC 343 (1938).

22. *See* SCHOENBAUM, *supra* note 18, § 4-28, at 289–90 (discussing the obligation to provide maintenance and cure).

23. *See* GILMORE & BLACK, *supra* note 18, § 6-7, at 287; *see also* Farrell v. United States, 336 U.S. 511, 518–19, 1949 AMC 613, 618–19 (1949) (holding that a seaman is entitled to maintenance and cure during his service, and after service "only until he was so far cured as possible").

24. *See Harden*, 11 F. Cas. at 483.

> applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.[25]

The right to maintenance and cure has been likened both to workers' compensation[26] and contract right.[27] Commentators Gilmore and Black note that the obligation to provide maintenance and cure arises from the fact of employment; it is "the fact that the seaman is engaged in the service of the ship which creates the right and not the form of contract."[28] Moreover, if a contractual term of employment sought to waive the right to maintenance and cure it would "unquestionably be held void."[29]

Injuries that result from the master's failure to provide adequate maintenance and cure may permit recovery of full tort damages.[30] If the master or ship owner fails to provide the proper level of care and the seaman's condition worsens, the ship owner is liable not only for the increased medical expense and maintenance required, but also for any personal injury that results.[31] As this Comment will demonstrate, the question of whether punitive damages are recoverable for failing to provide maintenance and cure has been a divisive issue among federal courts.

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25. *Id.*

26. *See* Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1284, 1995 AMC 321, 329 (5th Cir.) (per curiam), *reh'g granted*, 34 F.3d 1279, 1290 (5th Cir. 1994) (en banc). *But see* GILMORE & BLACK, *supra* note 18, § 6-6, at 281–82. The authors call the analogy to worker's compensation "misleading" since worker's compensation statutes are really a substitute for negligence actions. *See id*.

> The shipowner's liability for maintenance and cure resembles that of an employer subject to a Workmen's Compensation Act only in that it is a liability without fault which is based on the employment relationship . . . . Not only is the shipowner's liability more extensive than liability under any Workmen's Compensation Act, but the right to maintenance and cure is not the seaman's exclusive remedy against his employer: he may also recover damages for negligence under the Jones Act or for breach of the duty to provide a seaworthy ship.

Id.

27. *See* Aguilar v. Standard Oil Co., 318 U.S. 724, 730, 1943 AMC 451, 456–57 (1943) ("In the United States [maintenance and cure] has been recognized consistently as an implied provision in contracts of marine employment."); Collinsworth v. Oceanic Fleet, Inc., Nos. CIV.A.91-866 & 91-1864, 1991 WL 165732, at *3 (E.D. La. Aug. 20, 1991) ("In the case of maintenance and cure, there is no inconsistency in awarding punitive damages (even if such damages are nonpecuniary) because the cause of action finds its source in contract, not in tort."). *But see* Vaughan v. Atkinson, 369 U.S. 527, 534, 1962 AMC 1131, 1136–37 (1962) (Stewart, J., dissenting) ("The duty to provide maintenance and cure is in no real sense contractual, and a suit for failure to provide maintenance or cure can hardly be equated, therefore, with an action for breach of contract."); Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 372, 1933 AMC 9, 11 (1932) ("The duty . . . is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.").

28. GILMORE & BLACK, *supra* note 18, § 6-7, at 287.

29. *Id.*

30. *See* SCHOENBAUM, *supra* note 18, § 4-28, at 290.

31. *See id.* § 4-34, at 308–09.

B. Punitive Damages and Maritime Law

Punitive damages date back to "early times in America and in England."[32] First used as a remedy in exceptional and extreme cases, over time punitive damages were "expanded upon and modified . . . up to the present inundation of recent cases."[33] The Supreme Court first recognized the recoverability of punitive damages in the oft cited case[34] of *The Amiable Nancy*,[35] when it recounted the outrageous conduct of the officers and crew of the American privateer Amiable Nancy toward a commandeered vessel:

> [I]f this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.[36]

The right to recover punitive damages depending on the complicity of the defendant was recognized in dicta in a number of early federal cases.[37]

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32. George L. Waddell, *Punitive Damages in Admiralty*, 21 TORT & INS. L.J. 425, 426 (1986).

33. *Id.*

34. *See id.*

35. 16 U.S. (3 Wheat.) 546 (1818) (Story, J.).

36. *Id.* at 558–59.

37. *See* McGuire v. The Golden Gate, 16 F. Cas. 141, 144 (C.C.N.D. Cal. 1856) (No. 8815) (denying punitive damages where the owners of the vessel were blameless in the commission of the tort); Boston Mfg. Co. v. Fiske, 3 F. Cas. 957, 958 (C.C.D. Mass. 1820) (No. 1681) (Story, Cir. J.) ("[T]he jury are at liberty . . . to allow the plaintiff as part of his 'actual damage,' any expenditure for counsel fees, or other charges, which were necessarily incurred to vindicate [the plaintiff's] rights . . . ."); Emerson v. Howland, 8 F. Cas. 634, 638 (C.C.D. Mass. 1816) (No. 4441) (Story, Cir. J.) ("If there had been in the case at bar gross fraud, enticement, or oppression, there might have been some reason to have decreed the compensation by way of punishment; but in the absence of all these circumstances, it cannot be allowed."); Ralston v. The State Rights, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (No. 11,540) (explaining that in a case of willful and malicious collision, exemplary damages may be given above the amount of the actual injury, but although the owners were not in absolute ignorance of the conduct of the captain, the owners were not "truly and particularly informed" of the proceedings of their captain, so exemplary damages were not appropriate); *see also* Waddell, *supra* note 32, at 426–28 (discussing punitive damages in early federal cases).

One example is *Lake Shore & Michigan Southern Railway Co. v. Prentice*.[38] In *Prentice*, the Supreme Court cited English law dating from "before the American Revolution" in holding that "[t]he recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized."[39] Citing Justice Story's reasoning in *The Amiable Nancy*, the court in *Prentice* said:

> A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*.[40]

These cases all hold that some level of employer complicity is required before punitive damages would be assessed against a employer.[41] Not until 1859, in *Gallagher v. The Yankee*,[42] did an appellate court actually allow punitive damages in an admiralty case.[43] In this case, exemplary damages were awarded against a ship's master who had illegally transported the plaintiff against his will to the Hawaiian Islands in compliance with a San Francisco vigilante committee's sentence of banishment.[44]

C. Punitive Damages and Maintenance and Cure

Vaughan v. Atkinson[45] is the seminal case on punitive damages in a maintenance and cure action—even though the question of punitive damages never actually reached the Court.[46] Vaughan served on

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38. 147 U.S. 101 (1893).
39. *Id*. at 106–07.
40. *Id*. at 107–08 (citation omitted).
41. *See* Waddell, *supra* note 32, at 427.
42. 9 F. Cas. 1091 (N.D. Cal.) (No. 5196), *aff'd*, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124).
43. *See* Waddell, *supra* note 32, at 427.
44. *See Gallagher*, 9 F. Cas. at 1093.
45. 369 U.S. 527, 1962 AMC 1131 (1962).
46. *See* GILMORE & BLACK, *supra* note 18, § 6-13, at 312–13 & n.71d. The manner in which the *Vaughan* court treated punitive damages has spawned considerable debate and is central to the issue of whether punitive damages for maintenance and cure are recoverable. Support for the premise that the Supreme Court did not consider punitive damages in *Vaughan* can be found in *Guevara v. Maritime Overseas Corp*., 59 F.3d 1496, 1500–01, 1995 AMC 2409, 2413–15 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996). "We did *not* cite *Vaughan* as an example of the Supreme Court's approval of punitive damage awards in the maintenance and cure context; indeed, we explicitly noted that it was 'subsequent decisions' that made punitive damages available." *Id*. at 1500, 1995 AMC at 2413–14. *But see* GILMORE & BLACK, *supra* note 18, § 6-13, at 313 ("[T]he majority Justices [in *Vaughan*] . . . awarded what were essentially punitive damages under the name of counsel fees.").

Atkinson's vessel and was discharged at the end of a three month voyage.[47] After his termination, Vaughan was hospitalized, treated for tuberculosis, and released some three months later.[48] He remained on hospital outpatient status for over two years.[49] Vaughan later sent his clinical record to his former employer seeking reimbursement for maintenance and cure, but he never received confirmation of his claim.[50] After nearly two years, Vaughan hired an attorney at a fifty percent contingent fee to help him recover on his claim.[51] The Supreme Court ultimately found Vaughan's employer to be "callous" and "recalcitrant" in its attitude, having made no investigation of the merit of the seaman's personal injury claim.[52]

Vaughan sought recovery for exemplary damages, maintenance and cure, and for attorneys' fees.[53] The District Court disallowed his claim for exemplary damages on the theory that such damages were recoverable only when the defendant's failure to make the required payments caused or aggravated the plaintiff's disability.[54]

A divided panel of the Fourth Circuit affirmed the trial court.[55] The circuit court relied upon "the conventional rule that in suits for breach of contract the promisee is not allowed [attorney's fees] in computing the damages payable by the promisor."[56]

When the Supreme Court heard the case, a majority of the Justices interpreted the grant of certiorari narrowly and considered only the issues of counsel fees and mitigation.[57] Because of the employer's "willful and persistent" conduct, the Court awarded Vaughan attorneys' fees.[58] The Court noted that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one."[59] This award of attorney's fees has been interpreted by commentators as a de facto award of exemplary damages.[60]

Justice Stewart dissented, saying the holding departed from the established rule that attorneys' fees are not recoverable as damages.[61]

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47. *See Vaughan*, 369 U.S. at 528, 1962 AMC at 1132.
48. *See id*.
49. *See id*.
50. *See id*. at 528–29, 1962 AMC at 1132.
51. *See id*. at 529, 1962 AMC at 1132.
52. *See Id*. at 530–31, 1962 AMC at 1134.
53. *See id*. at 527–28, 1962 AMC at 1132.
54. *See id*.
55. *See id*. at 528, 1962 AMC at 1132.
56. *Id*. at 529, 1962 AMC at 1133.
57. *See* GILMORE & BLACK, *supra* note 18, § 6-13, at 313 & n.71d.
58. *See Vaughan*, 369 U.S. at 530–31, 1962 AMC at 1133–34.
59. *Id*. at 531, 1962 AMC at 1134 (footnote omitted).
60. *See* GILMORE & BLACK, *supra* note 18, § 6-13, at 313 ("[P]erhaps because of their narrow interpretation of the grant of certiorari and in order to avoid further proceedings, [the Court] awarded what were essentially punitive damages under the name of counsel fees.").
61. *See Vaughan*, 369 U.S. at 539–40, 1962 AMC at 1141 (Stewart, J., dissenting); *see also* Waddell, *supra* note 32 at 431. The "American Rule" holds that litigants generally must bear their own costs. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1502, 1995 AMC 2409,

However, he went on to say that "if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages."[62]

After *Vaughan*, the limitation of punitive damages to attorneys' fees remained a divided issue, as "two lines of authority h[ad] developed in the circuits."[63] In *Robinson v. Pocahontas, Inc*.,[64] the First Circuit held that under *Vaughan*, a "callous, willful, or recalcitrant" failure to pay maintenance and cure warranted punitive damages not limited to attorneys' fees.[65] The Fifth Circuit did the same.[66] The Second Circuit also requires "'a showing of callousness or recalcitrance in withholding maintenance and cure'" in order to award attorneys' fees.[67] But in conformity with *Vaughan,* the Second Circuit refused to extend punitive damages beyond attorneys' fees.[68]

The Fifth Circuit's 1987 decision in *Morales v. Garijak, Inc*.[69] set forth a jurisdictional standard to be satisfied before compensatory and punitive damages will be awarded for maintenance and cure:

> If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition [to maintenance and cure] for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.[70]

Morales remained "the law of [the Fifth] Circuit"[71] until *Holmes v. J. Ray McDermott & Co*.[72] was overruled by an en banc opinion in the

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2416 (5th Cir. 1995). Limited exceptions to the rule have been sanctioned. *See id*. An example would be where an opponent has acted in bad faith; in this instance, the court would find "fee-shifting" appropriate. *See id*.

62. *Vaughan*, 396 U.S. at 540, 1962 AMC at 1141 (Stewart, J., dissenting).

63. Waddell, *supra* note 32, at 431.

64. 477 F.2d 1048, 1973 AMC 2268 (lst Cir. 1973).

65. *See id*. at l051, 1973 AMC at 2271–72.

66. *See* Harper v. Zapata Off-Shore Co., 741 F.2d 87, 88, 1985 AMC 979, 981 (5th Cir. 1984); Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118, 1985 AMC 2024, 2034 (5th Cir. 1984), *overruled by* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1513, 1995 AMC 2409, 2435 (5th Cir. 1995) (en banc).

67. *See* Kraljic v. Berman Enter., Inc., 575 F.2d 412, 414, 1978 AMC 1297, 1300 (2d Cir. 1978) (quoting Roberts v. S.S. Argentina, 359 F.2d 428, 430–31, 1966 AMC 1079, 1080 (2d Cir. 1966)).

68. *See id*. at 416, 1978 AMC at 1303.

69. 829 F.2d 1355, 1988 AMC 1075 (5th Cir. 1987).

70. *Id*. at 1358, 1988 AMC at 1079.

71. Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1282, 1995 AMC 321, 324–25 (5th Cir.) (per curiam), *reh'g granted*, 34 F.3d 1279, 1290 (5th Cir. 1994) (en banc).

72. 734 F.2d 1110, 1118, 1985 AMC 2024, 2034 (5th Cir. 1984), *overruled by* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1513, 1995 AMC 2409, 2435 (5th Cir. 1995) (en banc).

rehearing of *Guevara*.[73] Returning to a strict interpretation of *Vaughan*, the *Guevara c*ourt concluded that in limited cases where the proper showing of egregious fault is made, "*Vaughan* and *Miles* still permit the recovery of attorney's fees in maintenance and cure cases . . . . However, . . . punitive damages should no longer be available in cases of willful nonpayment of maintenance and cure under the general maritime law."[74]

The determining factor in the Fifth Circuit's about-face was the Supreme Court's decision in *Miles v. Apex Marine Corp.*[75] *Miles* was the culmination of a twenty year judicial movement toward uniformity between statutory and maritime law.[76] To understand *Miles* and its effect on *Guevara*, this Comment requires a brief exploration of the trend toward uniformity in maritime law.

III. *MILES V. APEX MARINE CORP.*: THE QUESTION OF UNIFORMITY IN MARITIME LAW

A. Judicial and Congressional Powers over Maritime Law

Admiralty law[77] is a hybrid of judge-made and statutory law.[78] The Constitution provides that "judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . . ."[79] "This grant of judicial power is the only instance where the Constitution delegates jurisdiction over an entire subject matter to the federal judiciary."[80] Congress codified this grant of power when it enacted the Judiciary Act of 1789,[81] and conferred on the district courts "original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures . . . where the seizures are

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73. Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1513, 1995 AMC 2409, 2435 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706, (1996).

74. *Id*. at 1513, 1995 AMC at 2435.

75. 498 U.S. 19, 1991 AMC 1 (1990). The Fifth Circuit discusses the impact *Miles* had on its own jurisprudence at *Guevara*, 59 F.3d at 1504–07, 1995 AMC at 2419–25.

76. *See generally* John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 283–85 (1993) [hereinafter Brown, *Admiralty Judges*] (concluding Supreme Court decisions have reversed the traditional roles of Congress and admiralty judges; in *Miles*, the Supreme Court held admiralty judges should supplement the statutory remedies only to achieve uniform vindication of legislative policies). For discussions of uniformity in maritime law, see 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); John D. Kimball, *Miles: "This Much and No More . . . ,"* 25 J. MAR. L. & COM. 319 (1994).

77. "The terms 'admiralty' and 'maritime' law are virtually synonymous." BLACK'S LAW DICTIONARY 47 (6th ed. 1990).

78. *See* Wolfgang Hoppe, *The Supreme Court at Sea: Twenty Years of Admiralty Jurisprudence*, 24 J. MAR. L. & COM. 671, 709, 717 (1993).

79. U.S. CONST. art. III, § 2, cl. 1.

80. SCHOENBAUM, *supra* note 18, § 1-1, at 1.

81. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

made, on waters which are navigable from the sea by vessels of ten or more tons burthen."[82]

The leading case of *De Lovio v. Boit*[83] declares the courts' jurisdiction over the maritime law.[84] In *De Lovio*, Justice Story opined that "[t]he language of the constitution will therefore warrant the most liberal interpretation" of a maritime court's jurisdiction, perhaps even going so far as to allow "that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe."[85] "The substantive body of general maritime law was originally adopted by the Court based upon its constitutional grant of authority."[86]

The Court has also acknowledged Congress' extraordinary power to legislate in areas of maritime law.[87] Both the Necessary and Proper Clause[88] and the Commerce Clause[89] are cited as Constitutional sources for this power.[90] The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[91] Congress' constitutional grant under the Commerce Clause is probably "broad enough to support any congressional action supportable under the admiralty grant."[92] In *Gilman v. Philadelphia*[93] the Court further acknowledged the application and broad authority of the Commerce Clause.[94]

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82. *Id*.

83. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) (Story, Cir. J.).

84. *See* SCHOENBAUM, *supra* note 18, § 1-1, at 2.

85. *De Lovio*, 7 F. Cas. at 443; *see also* SCHOENBAUM, *supra* note 18, § 1-1, at 2 (discussing *De Lovio*).

86. Kimball, *supra* note 76, at 322.

87. *See id*. at 323.

88. U.S. CONST. art I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

89. *Id*. cl. 3.

90. *See, e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 214–15, 1996 AMC 2076, 2083 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.").

91. U.S. CONST. art I, § 8, cl. 3.

92. DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 145 (1970); *see also* Kimball, *supra* note 76, at 323 ("[T]he power to regulate interstate commerce encompasses the control, for that purpose and to the extent necessary, of all the navigable waters of the United States.").

93. 70 U.S. (3 Wall.) 713 (1866).

94. *See id*. at 724–25.

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.

Where, then, is the dividing line between the two branches? The uneasy equilibrium is evidenced in *The Lottawana*.[95] The issue in *The Lottawana* concerned the law of maritime liens.[96] Discussing the role of Congress under the Commerce Clause, the Court noted:

> Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime.[97]

But the Court noted that "the question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly . . . exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."[98] The Court opined:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."[99]

A similar position was outlined in *Panama Railroad Co. v. Johnson*.[100] *Panama Railroad* concerned the constitutionality of the Jones Act, which allowed suits to be brought in common law courts rather than requiring that they be filed in federal court as admiralty cases.[101] The Jones

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Id.; *see also* The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871) (explaining that the commerce power "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States").

95. 88 U.S. (21 Wall.) 558 (1875).

96. *See id*. at 561.

97. *Id*. at 577.

98. *Id*. at 576.

99. *Id*. at 574; *see also* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160–61, (1920) (observing that the federal courts derive their authority to apply the principles of maritime law from the constitutional grant of power).

100. 264 U.S. 375, 1924 AMC 551 (1924).

101. *See id*. at 387, 1924 AMC at 555–56.

Act was attacked on the grounds that it violated the grant of maritime jurisdiction in section 2 of Article III of the Constitution.[102] The Court upheld the Act as well as the power of Congress to enact such legislation.[103] The Court noted, however, that there are limitations to those powers:

> When all is considered . . . there is no room to doubt that the power of Congress extends to [all cases in admiralty] and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments,—when not relating to matters whose existence or influence is confined to a more restricted field,—shall be coextensive with and operate uniformly in the whole of the United States.[104]

B. The Struggle Between the Judicial and the Legislative Branches

This brief overview has illustrated the jurisdictional problems between the judicial and legislative branches,[105] as well as the continuing effort to harmonize and seek uniformity.[106] Occasionally, however, the powers of the branches conflict.

The Osceola[107] is a dramatic example of a power struggle between the legislature and judiciary which resulted in the passage of the Jones Act.[108] In 1896, a seaman on board the Osceola was injured in a voyage to Milwaukee and sought to recover for his master's negligence.[109] In a landmark decision, the Supreme Court held that injured seamen have a right to maintenance and cure and can recover for the unseaworthiness of the vessel, but that the general maritime law did not provide a remedy for

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102. *See id*. at 385, 1924 AMC at 554. The two arguments that the Jones act was unconstitutional were that (1) the act withdrew a maritime action from the admiralty jurisdiction; and (2) it "disregards the restriction [of section 2 of Article III] in respect of uniformity." *Id*. at 387, 1924 AMC at 555–56.

103. *See id*., 1924 AMC at 556.

104. *Id*. at 386–87 (citation omitted).

105. *See* Hoppe, *supra* note 78, at 710–716 (discussing the historical conflicts between Congressional legislation and Supreme Court decisions in admiralty law).

106. *See id*. at 716–17 (discussing the role of the Supreme Court in subordinating the powers of the judiciary to the legislative will).

107. 189 U.S. 158 (1903).

108. *See* GILMORE & BLACK, *supra* note 18, § 6-20, at 325; SCHOENBAUM, *supra* note 18, § 4-20 at 249.

109. *See The Osceola*, 189 U.S. at 159.

negligence.[110] Justice Brown's opinion provided a thorough review of the historic protections accorded seamen as well as a snapshot picture of the state of the law at the time.[111]

His analysis yielded four propositions: (1) that the vessel and her owners are liable when a seaman falls sick or is wounded in the service of the ship to the extent of his maintenance and cure, and to his wages at least so long as the voyage is continued; (2) that the vessel and her owner must indemnify the seamen for injuries caused by the unseaworthiness of the ship; (3) that all the members of the crew are *fellow servants* and seamen cannot recover for injuries sustained due to the negligence of another member of the crew beyond the expense of maintenance and cure; and (4) that the seaman may not recover an indemnity for the negligence of the master or any member of the crew.[112]

Twelve years later, Congress tried to overrule the Supreme Court's holding in *The Osceola* by passing a statute which reversed the fellow servant doctrine, which was viewed as the impediment to a remedy for negligence.[113] The Supreme Court "called the 1915 Act 'irrelevant' and relied upon *The Osceola*'s fourth proposition to hold there was no recovery for negligence."[114] Finally, in 1920 Congress passed the Jones Act,[115] which overruled the fourth proposition and created a cause of action in negligence for the death or injury of any seaman that occurs in the course of his employment.[116]

The Jones Act incorporated the substantive recovery provisions of the Federal Employer's Liability Act (FELA),[117] thus making them applicable to seamen.[118] FELA, passed in 1908, was a congressional response to the growing human calamity of personal injury accidents then occurring in the

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110. *See id*. at 175.

> The court explained that the owners of the vessel were not present upon the vessel and the master was not a part owner. Thus, the court's conclusion was rooted in the "fellow servant doctrine" which holds that the master and crew are treated as fellow servants and that no action may lie against either the owners or the ship for negligence received through the negligence of the master or crew.

SCHOENBAUM, *supra* note 18, § 4-8 n.5, at 198.

111. *See The Osceola*, 189 U.S. at 168–75.

112. *See id*. at 175.

113. *See* SCHOENBAUM, *supra* note 18, § 4-8, at 198.

114. *Id*. (footnotes omitted) (quoting Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918)).

115. 46 U.S.C. app. § 688 (1994).

116. *See* SCHOENBAUM, *supra* note 18, § 4-8, at 198.

117. 45 U.S.C. §§ 51–60 (1994).

118. *See* GILMORE & BLACK, *supra* note 18, § 6-26, at 351. When Congress passed the Jones Act, it "apparently did not want to waste any time on thinking about the special problems of maritime workers." *Id*. In the Jones Act, Congress incorporated "all statutes of the United States conferring or regulating the right of action for death in the case of railway employee." 46 U.S.C app. § 688(a) (1994).

railroad industry.[119] By 1889, the plight of the railroad worker had become so serious that President Benjamin Harrison stated: "It is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier."[120]

FELA's remedies provide only that employers shall be liable in damages for the injury or death of one protected under the Act. FELA does not specifically prohibit the recovery of punitive damages.[121] However, in *Michigan Central Railroad Co. v. Vreeland*,[122] the Supreme Court interpreted FELA's wrongful death provision as identical to that of Lord Campbell's Act.[123] Though damages were not explicitly limited, *Vreeland's* interpretation of FELA limited recovery to pecuniary loss.[124]

Years later, Justice O'Connor noted that the *Vreeland* "gloss" on FELA was also applicable to the Jones Act.[125] Justice O'Connor reasoned that because FELA was intended to be incorporated unaltered into the Jones Act, the pecuniary limitations on damages were incorporated as well.[126] Thus in *Miles*, the Jones Act was held to preclude punitive damages for wrongful death.[127]

There is some support for the assertion that Congress did not intend the Jones Act to be an all-inclusive statute.[128] "Congress . . . meant to leave the pre-statutory unseaworthiness remedy intact and merely . . . add a remedy, previously not available, for injuries resulting from operating

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119. *See* Lance P. Martin, Comment, *The Discombobulated State of FELA and Jones Act Jurisprudence and a Prognostication for Seamen's Claims for Purely Emotional Injuries*, 19 TUL. MAR. L.J. 433, 436 & n.19 (1995).

120. 12 MESSAGES AND PAPERS OF THE PRESIDENT 5486 (Richardson ed., 1897), *reprinted in* Martin, *supra* note 119, at 436 n.19.

121. *See* 45 U.S.C. §§ 51–60 (1994); GILMORE & BLACK, *supra* note 18, § 6-26, at 351–53.

122. 227 U.S. 59 (1913).

123. *See id.* at 69. Lord Campbell's Act was the first wrongful death statute and compensated the families of persons killed by accidents. *See id.* The Act became the prototype for subsequent American wrongful death statutes, some of which contained almost identical language. *See id.* at 70. The relevant text of Lord Campbell's act reads:

> Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . . Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (Eng.).

124. *See Vreeland*, 227 U.S. at 71.

125. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32, 1991 AMC 1, 10 (1990).

126. *See id.*, 1991 AMC at 10–11.

127. *See id.* at 36, 1991 AMC at 14.

128. *See, e.g.*, GILMORE & BLACK, *supra* note 18, § 6-34, at 374.

negligence."[129] A rationale for interpreting the Jones Act broadly can be understood by seeing the problems in reading it too narrowly:

> If the Jones Act was to be narrowly read as affording a remedy only in cases where no remedy had been available before, the courts had their work cut out for them: arguments about whether the proximate cause of the injury was a defective piece of machinery (thus unseaworthiness) or negligence in the use of machinery itself in good order would necessarily go on forever.[130]

This analysis is vital to an understanding of the *Guevara* decision. If a maintenance and cure action is viewed as within the statutory protections of the Jones Act, then only compensatory damages are available to the plaintiff.[131]

A second issue arising from the *Guevara* decision is the status of the remedy for wrongful death and the deference between the judiciary and the legislature. Until *The Harrisburg*[132] was overruled in 1970 by *Moragne v. States Marine Lines, Inc.*,[133] there was no general maritime remedy for wrongful death.[134] In *Moragne*, the Supreme Court noted that both Congress[135] and every state[136] had established actions for wrongful death, thereby creating a public policy sanctioning recovery for fatal injuries.[137] Some of the problems that *The Harrisburg* posed were addressed when Congress passed DOHSA[138] in 1920 to provide a remedy for deaths occurring on the high seas.[139] "Congress did not legislate a federal remedy for state waters but chose rather to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States.'"[140] The use of state remedies by admiralty judges to provide a remedy for death caused in territorial water was sanctioned by the Supreme Court in *Western Fuel Co. v. Garcia*.[141]

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129. *Id.* § 6-34, at 375.

130. *Id.*

131. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1511–12, 1995 AMC 2409, 2432–33 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996).

132. 119 U.S. 199 (1886).

133. 398 U.S. 375, 409, 1970 AMC 967, 993 (1970).

134. *See The Harrisburg*, 119 U.S. at 213.

135. *See, e.g.*, 46 U.S.C. app. §§ 761–768 (1994).

136. *Moragne*, 398 U.S. at 390, 1970 AMC at 979.

137. *See id.* at 390–91, 1970 AMC at 979–80.

138. 46 U.S.C. app. §§ 761–768 (1994).

139. *See* Brown, *Admiralty Judges*, *supra* note 76, at 272. The high seas are those waters which are more than a marine league from shore. *See id.* A marine league is equal to one-twentieth part of a degree latitude or three geographical miles. *See* BLACK'S LAW DICTIONARY 967 (6th ed. 1990).

140. Brown, *Admiralty Judges*, *supra* note 76, at 272 (quoting S. REP. NO. 66-216, at 3 (1919)).

141. *See* 257 U.S. 233, 242 (1921).

Both DOHSA and the Jones Act provide a negligence remedy to injured seamen,[142] but the Jones Act also grants a wrongful death remedy when seamen are killed as a result of their employer's negligence.[143] However, the Jones Act does not provide a remedy for the wrongful death of a seaman caused by a breach of the warranty of seaworthiness under general maritime law,[144] and the Supreme Court has not allowed state wrongful death statutes to fill the gap and provide such a remedy.[145]

In *Moragne*, the Court concluded that the creation by the legislature of a cause of action for wrongful death suggested that the same cause of action should exist within the maritime common law.[146] The *Moragne* Court indicated a desire to do more than narrowly apply the specific pronouncements of Congress.[147] In a unanimous opinion written by Justice Harlan, the Court stated that in the absence of explicit congressional action to the contrary, it was free to modify existing maritime remedies to include a wrongful death action.[148]

In *Sea-Land Services, Inc. v. Gaudet*,[149] the Court refused to follow the statutory guidelines of DOHSA and allowed damages in a *Moragne* wrongful death cause of action.[150] The Court allowed recovery of certain non-pecuniary damages where an accident occurred inside U.S. territorial waters, noting that there was no specific congressional intent to foreclose recovery.[151]

Like *Moragne*, *Gaudet* involved the death of a longshoreman in territorial waters.[152] The *Gaudet* court addressed the issue of whether the decedent's recovery for his personal injuries prior to his death would bar a subsequent wrongful death action.[153] Justice Brennan acknowledged that "a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime."[154] He noted, however, that the policy underlying a wrongful death remedy is compensation of the

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142. *See* 46 U.S.C. app. § 688(a) (1994).

143. *See id*.

144. *See* Brown, *Admiralty Judges*, *supra* note 76, at 273.

145. *See id*.

146. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392–93, 1970 AMC 967, 981 (1970).

147. *See id*. at 393, 1970 AMC at 981.

148. *See id*. at 393, 401, 1970 AMC at 981, 987.

149. 414 U.S. 573, 1973 AMC 2572 (1974).

150. *See id*. at 583 & n.10, 1973 AMC at 2580 & n.10; GILMORE & BLACK, *supra* note 18, § 6-33, at 369–70.

151. *See Gaudet*, 414 U.S at 574, 585–88, 588 n.22, 1973 AMC at 2573, 2582–884, 2583 n.22.

152. *Compare id*. at 574, *with* Moragne v. State Marine Lines, Inc., 398 U.S. 375, 376, 1970 AMC 967, 969 (1970).

153. *See Gaudet*, 414 U.S. at 579–83, 1973 AMC at 2577–80.

154. *Id*. at 579, 1973 AMC at 2577.

decedent's dependents for their losses.[155] He concluded that the remedy should not be precluded merely because the decedent, during his lifetime, is able to recover damages for his personal injuries.[156] Justice Brennan, guided by the maritime principle laid down by Justice Chase in *The Sea Gull*,[157] found no statutory language that would require a contrary conclusion.[158]

Justice Brennan similarly analyzed the elements of damages available in the general maritime remedy.[159] DOHSA limited awards to pecuniary losses, thus preventing recovery for loss of society.[160] Despite these limitations, the Court held that loss of society is an element of the maritime wrongful death remedy.[161] Justice Brennan concluded that "our decision 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."[162] In a strong dissent, Justice Powell decried what he perceived to be a departure from *Moragne* and a well established policy in favor of uniform admiralty rules.[163]

The split in the court led to a limitation of *Gaudet* in *Mobil Oil Corp. v. Higginbotham*,[164] where the Supreme Court held that in the case of a death on the high seas, the decedent's survivors could not recover loss of society damages when bringing a *Moragne* wrongful death action.[165] The Court's decision showed great deference to DOHSA as a "primary guide," both for the sake of "uniformity and because Congress' considered judgment has great force in its own right."[166] The *Higginbotham* decision presaged by twelve years the Court's unanimous opinion in *Miles v. Apex Marine Corp*., which virtually reversed the more independent course that the *Gaudet* Court had pursued.[167]

C. Miles v. Apex Marine Corp. *and its Progeny*

Ludwick Torregano was a seaman aboard the M/V Archon when he was killed by a fellow crew member in July 1984.[168] Torregano's mother, Mercedel Miles, sued the Apex Marine Corporation and others alleging

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155. *See id*. at 583, 1973 AMC at 2580.
156. *See id*.
157. The Sea Gull, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578). "[I]t 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." *Id*. at 910.
158. *See Gaudet*, 414 U.S. at 583, 1973 AMC at 2580.
159. *See id*. at 584–91, 1973 AMC at 2580–86.
160. *See id*. at 586–87, 1973 AMC at 2583.
161. *See id*. at 587, 1973 AMC at 2583.
162. *Id*. at 588, 1973 AMC at 2583–84.
163. *See id*. at 595–96, 1973 AMC at 2589–90.
164. 436 U.S. 618, 623–24, 1978 AMC 1059, 1064–65 (1978).
165. *See id*. at 625–26, 1978 AMC at 1065–66.
166. *Id*. at 624, 1978 AMC at 1064.
167. 498 U.S. 19, 1991 AMC 1 (1990).
168. *See id*. at 21, 1991 AMC at 2.

negligence under the Jones Act and breach of the warranty of seaworthiness under general maritime law.[169] Miles sought compensation for loss of support and services and loss of society resulting from her son's death.[170] She also sought punitive damages and compensation to the estate for Torregano's pain and suffering preceding his death and for his lost future income.[171]

On appeal, the Supreme Court held that DOHSA and the Jones Act limit the recovery of a seaman's family to pecuniary damages, precluding recovery of non-pecuniary damages such as loss of society.[172] The Court reasoned that because the Jones Act incorporates FELA it must also incorporate FELA's pecuniary limitations.[173]

The Court's decision to restrict the level of recovery reflected an acknowledgment by the Court that Congress had already created a statutory remedy for this type of injury.[174] The Court felt that the opinion remedied an "anomaly" created by the *Higginbotham* decision, which prohibited the recovery of non-pecuniary damages for deaths occurring on the high seas, but left open recovery for deaths occurring within territorial waters.[175] *Miles* eliminated the inconsistency by holding that any wrongful death action brought on behalf of a Jones Act seaman is limited to pecuniary loss: "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."[176] *Miles* precludes judges from fashioning general maritime tort rules inconsistent with DOHSA and the Jones Act.[177]

Soon after *Miles* was decided, it was relied upon in a multitude of lower court decisions.[178] *Miles* was followed by the Sixth Circuit in *Miller*

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169. *See id*. The breach of warranty of seaworthiness claim was based upon the defendant's hiring of a crew member unfit to serve. *See id*.

170. *See id*. at 21–22, 1991 AMC at 2.

171. *See id*. at 22, 1991 AMC at 2.

172. *See id*. at 37, 1991 AMC at 14. The court also held that a general maritime survival action could not include recovery for the decedent's lost future earnings. *See id*.

173. *See id*. at 32, 1991 AMC at 10.

174. *See id*. at 27, 1991 AMC at 6–7.

175. *See id*. at 33, 1991 AMC at 11.

176. *Id*. For good analyses of the *Miles v. Apex Marine Corp.* decision and its effects, see Stephen G. Flynn, *Punitive Damages After* Haslip & Miles v. Apex Marine*: Allowable for Everyone but Seamen?*, 5 U.S.F. MAR. L.J. 155 (1992); Jeffrey V. Brown, Note, Penrod Drilling Corp. v. Williams*: The Sinking of Another Maritime Anomaly*, 31 HOUS. L. REV. 1317 (1994) [hereinafter Brown, *Another Maritime Anomaly*]; William J. Pallas, Comment, *The Elimination of Punitive Damages for Seamen: How Far Does* Miles *Reach?*, 18 TUL. MAR. L.J. 89 (1993).

177. *See* Brown, *Another Maritime Anomaly*, *supra* note 176, at 1324.

178. *See, e.g.*, Horsley v. Mobil Oil Corp., 15 F.3d 200, 203, 1994 AMC 1372, 1377 (lst Cir. 1994) (holding that Miles and its progeny preclude recovery of punitive damages or loss of society damages in an unseaworthiness action brought under the general maritime law); Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1094, 1994 AMC 13, 29 (2d Cir. 1993) (precluding recovery of punitive damages by parents of a nonseaman killed in a pleasure craft collision), *cert. denied*, 510 U.S. 1114 (1994); Bell v. Zapata Haynie Corp., 855 F. Supp. 152, 154, 1995 AMC 785, 786 (W.D. La. 1994) (holding punitive damages unavailable to a seaman for negligence but recoverable for failure to pay maintenance and cure); Frantz v. Brunswick

v. American President Lines, Ltd.,[179] which went much further than the Supreme Court and held that punitive damages were not available to seamen under the general maritime law in an unseaworthiness action for wrongful death.[180] After briefly reviewing the intent of the Jones Act, FELA, DOHSA, the Federal Tort Claims Act,[181] and the Longshore and Harbor Worker's Compensation Act,[182] the Sixth Circuit reached the conclusion "that there is a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions."[183] The court based this conclusion on the observation that none of these statutes permitted recovery of punitive damages.[184] The court concluded that Congress had already spoken on the issue and an admiralty court is not free to supplement the remedies Congress has allowed seamen.[185]

But in *Glynn v. Roy Al Boat Management Corp.*,[186] the Ninth Circuit declined to restrict punitive damages to the same extent as the Sixth Circuit.[187] The court noted that "[b]ecause *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance."[188]

In *Ortega v. Oceantrawl, Inc.*[189] a district court did not agree "that the rationale in *Miles* extends to an exemplary damage claim in regard to maintenance and cure," and noted "[t]he Supreme Court in *Miles* sought to establish a policy of uniformity of damages for the Jones Act, the Death on the High Seas Act and general maritime law."[190] The court's holding precluded recovery of punitive damages for a general maritime

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Corp., 866 F. Supp. 527, 532, 1994 AMC 1954, 1959–60 (S.D. Ala. 1994) (striking the plaintiff's cause of action for punitive damages under the general maritime law based upon the *Miles* decision); Ortega v. Oceantrawl, Inc., 822 F. Supp. 621, 624, 1993 AMC 902, 905–06 (D. Alaska 1992) (precluding punitive damages under the doctrine of unseaworthiness but agreeing that *Miles* did not extend to failure to pay maintenance and cure).

179. 989 F.2d 1450, 1993 AMC 1217 (6th Cir. 1993).

180. *See id*. at 1459, 1993 AMC at 1228.

181. 28 U.S.C. § 2674 (1994).

182. 33 U.S.C. §§ 901–950 (1994).

183. *Miller*, 989 F.2d at 1457, 1993 AMC at 1225.

184. *See id*.

185. *See id*. at 1458, 1993 AMC at 1226 (quoting *Miles*, 498 U.S. at 36, 1991 AMC at 13).

186. 57 F.3d 1495, 1995 AMC 2022 (9th Cir. 1995).

187. *See id*. at 1505, 1995 AMC at 2036.

188. *Id*. at 1503, 1995 AMC at 2033. However, the court looked to *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962), for guidance, saying "we see no support for punitive damages in addition to attorney's fees in Vaughan itself." *Id*. at 1504, 1995 AMC at 2035. The court went on to say that it could find "no other reason why punitive damages, in addition to attorney's fees, should be allowed." *Id*. at 1505, 1995 AMC at 2035. Thus the court concluded "[w]e therefore hold that punitive damages are not available, although attorney's fees are, where the shipowner has been willful and persistent in its failure to investigate a seaman's claim for maintenance and cure or to pay maintenance." *Id*., 1995 AMC at 2036.

189. 822 F. Supp. 621, 1993 AMC 902 (D. Alaska 1992).

190. *Id*. at 624, 1993 AMC 905.

unseaworthiness claim and a Jones Act negligence claim.[191] Its decision, however, had no effect on the law of damages related to maintenance and cure: "The failure to pay a maintenance and cure claim is a contractual claim, implied in the seaman's employment contract with the shipowner. Such a claim is not governed by any statute and does not implicate strict liability or negligence standards."[192]

The Fifth Circuit seemed to be in accord that *Miles* did not extend to maintenance and cure.[193] In *Anderson v. Texaco, Inc.*,[194] the plaintiffs were injured when a gas explosion aboard a drilling rig blew a door off its hinges and into the face of one and knocked the other out of his bunk.[195] Broussard sued for failure to pay maintenance and cure.[196] The court noted that after *Miles* there was no doubt that punitive damages are nonpecuniary.[197] The court further noted:

> The application of *Miles* . . . does not affect [plaintiff's] punitive damages claim for failure to pay maintenance and cure.
>
> . . . *Miles* does not affect the availability of nonpecuniary damages under the general maritime law, if Congress has not already defined the relief available in a particular factual setting.
>
> Thus, punitive damages for willful failure to pay maintenance and cure, a firmly rooted general maritime law claim, is unaffected by *Miles* because failure to pay is a contractual claim not reached by any maritime statute.[198]

Is the *Miles* decision well founded? While *Miles* and *Guevara* discuss the desire for uniformity,[199] perhaps the real issue is the balance of power between the legislature and judiciary. Should the Court show deference to congressional intent?[200] And, if so, what is that balance? In *Miles*, Justice

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191. *See id*. at 623, 1993 AMC 904–05.

192. *Id*. at 624, 1993 AMC 905–06.

193. *See, e.g.*, Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1283–84, 1995 AMC 321, 327–29 (5th Cir.) (per curiam) (holding that Miles does not bar punitive damages for failure to pay maintenance and cure), *reh'g granted*, 34 F.3d 1279, 1290, (5th Cir. 1994) (en banc); Bell v. Zapata Haynie Corp., 855 F. Supp. 152, 154, 1995 AMC 785, 787 (W.D. La. 1994) (granting the defendant's motion for summary judgment on the availability of punitive damages for an unseaworthiness action but denying partial summary judgment on the issue of inadequate maintenance and cure payments).

194. 797 F. Supp. 531, 1993 AMC 1319 (E.D. La. 1992).

195. *See id*. at 533, 1993 AMC at 1320.

196. *See id*., 1993 AMC at 1321.

197. *See id*. at 534, 1993 AMC at 1322. For a discussion of pecuniary and punitive damages, see *supra* note 3.

198. *Anderson*, 797 F. Supp. at 536, 1993 AMC at 1326.

199. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 27, 1991 AMC 1, 6; Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1506, 1995 AMC 2409, 2423 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996).

200. *See* Kimball, *supra* note 76, at 320 ("While Congress unquestionably has power to pass legislation which affects all aspects of the maritime law, under the Constitution the Court has an

O'Connor's pivotal statements concerning the respective roles of Congress and the admiralty court in establishing rights and remedies in maritime make her position very clear:

> Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.
>
> . . . .
>
> . . . 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 these 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. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.
>
> . . . .
>
> . . . We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.[201]

But *Miles* leaves certain questions unanswered. Does the reasoning of the case extend beyond wrongful death actions? And, in the interests of uniformity, does *Miles* apply to those maritime causes of action where Congress has not specifically expressed its intent? In the Fifth Circuit, the answer is now "yes" to both questions.[202]

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equal, if not preeminent, role and is vested with jurisdiction to declare the general maritime law.").

201. *Miles*, 498 U.S. at 24, 27, 36, 1991 AMC at 4, 6–7, 14.

202. *See Guevara*, 59 F.3d at 1506–07, 1995 AMC at 2423–25.

IV. *GUEVARA V. MARITIME*: AN OVERBROAD APPLICATION OF *MILES V. APEX MARINE CORP*?

A. Guevara v. Maritime

On May 29, 1990, Domingo Guevara was injured while serving as a member of the crew on the vessel *Overseas Philadelphia*, which was owned and operated by his employer, Maritime Overseas Corporation (Maritime).[203] While the crew prepared to leave port, Guevara helped to secure the gangway, which was being lifted by the ship's crane.[204] The task was being performed during stormy weather.[205] Guevara injured his knee when he had to jump from a catwalk to the deck below to avoid being hit by the moving gangway.[206] He promptly reported his injury, but continued his employment until the ship returned to port four months later.[207]

Upon his return, Guevara underwent surgery for his injury, and was forced to make several formal demands on Maritime for maintenance and cure.[208] Guevara brought a negligence claim under the Jones Act, an unseaworthiness claim under the general maritime law, and sought punitive damages for his employer's failure to pay maintenance and cure in a timely manner.[209] Following a jury trial, the court awarded Guevara $131,000 in compensatory damages for his injury and $60,000 in punitive damages for Maritime's arbitrary and capricious failure to pay maintenance and cure.[210]

Maritime argued on appeal, *inter alia*, that the recovery of punitive damages for failure to pay maintenance and cure is barred by *Miles v. Apex Marine Corp*.[211] The court originally disagreed, distinguishing the *Miles* action as a wrongful death claim while Guevara's claim was for maintenance and cure.[212] The court acknowledged that in the wake of *Miles*, several appellate courts held that punitive damages were no longer available under general maritime law.[213] The court distinguished these

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203. *See id*. at 1498, 1995 AMC at 2410.

204. *See id*.

205. *See id*. at 1498–99, 1995 AMC at 2410.

206. *See id*. at 1499, 1995 AMC at 2410.

207. *See id*., 1995 AMC at 2410–11. By working for the entire voyage, Guevara apparently qualified for union benefits. *See id*., 1995 AMC at 2411.

208. *See id*.

209. *See id*.

210. *See id*.

211. Guevara v. Maritime Overseas Corp., 34 F.3d 1279, 1282, 1995 AMC 321, 324 (5th Cir.) (per curiam), *reh'g granted*, 34 F.3d 1279, 1290 (5th Cir. 1994) (en banc).

212. *See id*. at 1284, 1995 AMC at 327–29.

213. *See id*., 1995 AMC at 327 (citing Horsley v. Mobil Oil Corp., 15 F.3d 200, 203, 1994 AMC 1372, 1377 (lst Cir. 1994)) (holding that Miles and its progeny preclude recovery of punitive damages or loss of society damages in an unseaworthiness action brought under the general maritime law); Miller v. American President Lines, Ltd., 989 F.2d 1450, 1459, 1993 AMC 1217, 1228 (6th Cir. 1993) (holding punitive damages are not available in a general maritime law unseaworthiness action for wrongful death of a seaman); Sky Cruises, Ltd. v. Andersen, 592 So.2d 756, 756, 1992 AMC 1333, 1333 (Fla. Dist. Ct. App. 1992) (per curiam)

cases on the grounds they did not relate to maintenance and cure.[214] The court likened maintenance and cure to a workers' compensation-like employee benefit with no counterpart in federal statutory law.[215] Judge Garwood concurred with the majority opinion, but urged the *en banc* court to reexamine the availability of general punitive damages in maintenance and cure cases in light of the *Miles* decision.[216] A majority of the court agreed to rehear the case.[217]

On rehearing, the Fifth Circuit reversed its panel decision, holding punitive damages are not available in actions for willful nonpayment of maintenance and cure.[218] The court overruled its decision in *Holmes v. J. Ray McDermott & Co.*,[219] which allowed an award of punitive damages under the general maritime law when an employer willfully and callously refuses to pay maintenance and cure to an injured seaman.[220]

B. Analysis

The Fifth Circuit has interpreted *Miles* as applying to all general maritime causes of action.[221] Noting that subsequent developments have rendered the *Holmes* decision untenable,[222] the *Guevara* Court overruled *Holmes* by reinterpreting the three cases used by the *Holmes* court to support its decision: *Vaughan*, *Merry Shipping Co*., and *Robinson*.[223]

The law of the Fifth Circuit now states that *Vaughan* only allows attorneys' fees for willful failure to pay maintenance.[224] The court said that the history of *Vaughan* shows that where a case has been cited for its award of punitive damages, it is primarily because the losing party in the lawsuit engaged in bad faith conduct during the *litigation*, not in pre-trial

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(holding that under general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness); Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 295 (Tex. 1993) (per curiam) (holding that punitive damages are not available in unseaworthiness action for nonfatal injuries of Jones Act seaman under general maritime law).

214. *See Guevara*, 34 F.3d at 1284, 1995 AMC at 328.

215. *See id*. Specifically, maintenance and cure has no counterpart in the Jones act or in DOHSA. *See id*. For an excellent discussion of the history of the Jones Act, see Robert Dalquist, *Punitive Damages Under the Jones Act*, 6 MAR. LAW. 1 (1981).

216. *See Guevara*, 34 F.3d at 1284–85, 1995 AMC at 329.

217. *See id*. at 1290.

218. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1513, 1995 AMC 2409, 2435 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996).

219. 734 F.2d 1110, 1985 AMC 2024 (5th Cir. 1984), *overruled by Guevara*, 59 F.3d at 1513, 1995 AMC at 2435.

220. *See Guevara*, 59 F.3d at 1513, 1995 AMC at 2435.

221. *See id*. at 1506, 1995 AMC at 2423–24.

222. *See id*. at 1510, 1995 AMC at 2429.

223. *See id*. at 1500–04, 1508, 1995 AMC 2419–27 (discussing Vaughan v. Atkinson, 369 U.S. 527, 1962 AMC 1131 (1962); Dyer v. Merry Shipping Co., 650 F.2d 622, 1981 AMC 2839 (5th Cir. 1981); and Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1973 AMC 2268 (1st Cir. 1973)).

224. *See Guevara*, 59 F.3d at 1503, 1995 AMC at 2418.

conduct.[225] But in the original *Vaughan* decision, the Supreme Court held that a willful and arbitrary failure to pay maintenance and cure gave rise to a claim for attorneys' fees as well as compensatory damages.[226] As an exception to the American Rule,[227] the court noted that the fee-shifting of *Vaughan* is not punitive in the sense that it punishes tortious conduct; but is instead a mechanism for punishing abuses of the litigation process.[228]

The Fifth Circuit also disavowed *Robinson v. Pocahontas, Inc.*[229] In *Robinson*, the First Circuit upheld an award of punitive damages in a seaman's claim for maintenance and cure.[230] One of the reasons given by the *Guevara* Court for its refusal to follow *Robinson* was the opinion's reliance primarily on the arguments of the *Vaughan* dissent.[231] Moreover, the Court noted that *Robinson* was decided seventeen years prior to *Miles* and argued that today the First Circuit would overrule *Robinson's* award of punitive damages in a maintenance and cure action.[232] The Court cited *Horsely v. Mobil Oil Corp*.[233] as evidence of how the First Circuit would rule today.[234] *Horsely*, however, is not on point with respect to maintenance and cure. In *Horsely*, the plaintiff brought an unseaworthiness action and sought damages for loss of parental society and spousal society.[235] Maintenance and cure was not an issue before the court.[236] The First Circuit's *Horsely* opinion did not overrule or even mention *Robinson*—which remains valid law.

The final underpinning of *Holmes* was *Dyer v. Merry Shipping Co.*[237] Here the *Guevara* opinion is on more solid ground in applying the doctrine of *Miles*. In *Merry Shipping*, the Fifth Circuit allowed punitive damages in a wrongful death case brought as a general maritime unseaworthiness cause of action.[238] The court concluded that punitive damages may be recovered under the general maritime law upon a showing of willful and wanton misconduct by the shipowner.[239] Nine years later, *Miles* overruled *Merry Shipping Co*. and changed the admiralty landscape by conforming

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225. *See id*., 1995 AMC at 2417.

226. *See Vaughan*, 369 U.S. at 530–31, 1962 AMC at 1134.

227. *See Guevara*, 59 F.3d at 1502, 1995 AMC at 2416 (referring to the "American Rule" which generally requires litigants bear their own costs of litigation).

228. *See id*. at 1502–03, 1995 AMC at 2417.

229. 477 F. 2d 1048, 1973 AMC 2268 (lst Cir. 1973).

230. *See id*. at 1051, 1993 AMC at 2272–73.

231. *See Guevara*, 59 F.3d at 1508, 1995 AMC at 2426.

232. *See id*., 1995 AMC at 2427.

233. 15 F.3d 200, 203, 1994 AMC 1372, 1377 (1st Cir. 1994) ("*Miles* mandates the conclusion that punitive damages are not available in an unseaworthiness action under the general maritime law.").

234. *See Guevara*, 59 F.3d at 1508, 1995 AMC at 2427.

235. *See Horsely*, 15 F.3d at 200, 1994 AMC at 1372–73.

236. *See id*.

237. 650 F.2d 622, 1981 AMC 2839 (5th Cir. 1981).

238. *See id*. at 623, 1981 AMC at 2839.

239. *See id*. at 626, 1981 AMC at 2845.

the remedies of the general maritime law to the remedies available under statutory law.[240]

Based on the *Guevara* court's re-analysis, *Holmes* is no longer the law of the Fifth Circuit.[241] But in discarding *Holmes*, the court was faced with a dilemma: if *Holmes* no longer applies, where does that leave maintenance and cure? Since *Miles* dealt with statutory law, it becomes problematic for the court to fully apply *Miles* to a judicially created cause of action.

To solve this, the Court seized on Justice Cardozo's analysis in *Cortes v. Baltimore Insular Line, Inc.*,[242] and his discussion of "overlapping statutes."[243] When one has a cause of action which might be pursued under one of two remedies, then the plaintiff has the prerogative of pursuing either one.[244] In *Cortes*, Justice Cardozo noted that the maritime law gave the seaman a remedy in damages for breach of the duty to provide maintenance and cure but that the remedy abated at the seaman's death.[245] He also found that the Jones Act allowed a seaman's estate to recover for maintenance and cure.[246] Cardozo reasoned that because the Jones Act expressly allows an action by a deceased seaman's personal representative for a "personal injury,"[247] the estate could also recover for unpaid maintenance and cure.[248] *Cortes* provided the decedent's survivors a remedy in statutory law where none existed in general maritime law.[249] The *Cortes* decision was an "end-run" around the maritime law to allow a humane recovery[250] in statutory law.

The problem with the Fifth Circuit's analysis of *Cortes* in *Guevara*, however, is that while Justice Cardozo was seeking to expand the ability of a plaintiff to recover where the statute precluded any recovery, *Guevara* shrinks that ability by conforming the maritime action of maintenance and cure to the statutory confines of *Miles*. "[O]nce there is a statutory/general maritime law overlap in the factual circumstances that are covered [in a case]," the rule of *Miles* is invoked and punitive damages are precluded.[251] The court admits that *Cortes* doesn't apply to the facts of *Guevara,* because the Jones Act can only "overlap" if there is an underlying

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240. *See Guevara*, 59 F.3d at 1507, 1995 AMC at 2425.

241. *See id*. at 1513, 1995 AMC at 2435 (overruling *Holmes*).

242. 287 U.S. 367, 374–75, 1933 AMC 1 (1932).

243. *See Guevara*, 59 F.3d at 1511–12, 1995 AMC at 2431–33. In *Guevara*, the overlap was between the Jones Act and general maritime law. *See id*.

244. *See id*. at 1511, 1995 AMC 2432 (quoting *Cortes*, 287 U.S. at 375, 1933 AMC 12).

245. *See Cortes*, 287 U.S. at 371, 1933 AMC 10.

246. *See id*. at 374–76, 1933 AMC 12–13.

247. *See* 46 U.S.C. app. § 688(a) (1994).

248. *See Cortes*, 287 U.S. at 376, 1933 AMC 13.

249. *See id*. at 287 U.S. at 374–76, 1933 AMC 12–13.

250. *See supra* note 157.

251. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1512, 1995 AMC 2409, 2432–33 (5th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 706 (1996).

negligence action.[252] The plaintiff in *Guevara* suffered no personal injury; thus there is no underlying negligence action or statutory overlap and the general maritime law is not constrained by statute.

But in one bold stroke, the court noted that in contract-like actions (to which Guevara's action was more similar) punitive damages should not be allowed because: (1) given the above (negligence) analysis it follows that if punitive damages are denied in a tort-based action where there is personal injury, then by implication they should also be denied in a contract-based action;[253] (2) there is no related legislative scheme wherein punitives are allowed;[254] (3) the overall concern for uniformity;[255] and (4) punitive damages are generally unavailable for breach of contract, and to allow them here would be anomalous.[256]

Thus, the court effectively slammed the door on punitive damages in an action for maintenance and cure under both tort and contract theories.

V. CONCLUSION

The extent of the court's decision in *Guevara* illustrates more than an underlying aversion to punitive damages. The Fifth Circuit might have followed the Ninth Circuit's holding[257] that *Vaughan* dictates only attorney's fees are recoverable where reckless and wanton conduct is involved for failure to pay maintenance and cure. The *Guevara* decision is far broader and the Court is clearly in agreement with the *Miles* opinion which precludes any judicial remedies outside those provided by statute. *Guevara's* "overlapping statute"[258] analysis thus provides a blueprint for deciding future tort-based maritime claims.

The Fifth Circuit's reversal in *Guevara* is not only a curtailment of punitive damages, it is also what some have characterized as a retreat from the court's constitutional duty to declare the admiralty law.[259] The Honorable John R. Brown[260] lamented the recent change in the Supreme Court's direction as

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252. *See id*., 1995 AMC 2434. A failure to pay maintenance and cure is cognizable under the Jones Act only if the seaman suffered a personal injury. *See* 46 U.S.C. app. § 688(a) (1994).

253. *See Guevara*, 59 F.3d at 1512–13, 1995 AMC at 2434.

254. *See id*. at. 1513, 1995 AMC at 2434.

255. *See id*., 1995 AMC at 2435.

256. *See id*.

257. *See supra* notes 186–88 and accompanying text.

258. *See supra* text accompanying notes 242–50.

259. *See* Brown, *Admiralty Judges*, *supra* note 76, at 283.

260. The Honorable John R. Brown of the Fifth Circuit Court of Appeals, served as Chief Judge from 1967 to 1979. Judge Brown died on January 23, 1993 at the age of 83. *See id*. at 250 n.†

an abandonment of their traditional roles as admiralty judges.[261] Has the Fifth Circuit now given up *their* "admiralty hats?"[262]

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261. *See id*. at 283.
262. *See generally id.* at 283–85 (discussing the role of admiralty judges).