

PUNITIVE DAMAGES IN MARITIME LAW: EXXON SHIPPING CO. V. BAKER

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June 24, 2008

Today the Supreme Court filed its decision in *Baker v. Exxon Shipping Co.* resolving the following issues relative to the award of punitive damages in favor of commercial fishermen and other plaintiffs damaged by the 1989 oil spill of the EXXON VALDEZ. The Court stated the issues it considered as:

1. Whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm
2. Whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and
3. Whether the award of \$2.5 billion is greater than maritime law should allow in the circumstances.

It was not contested that the general maritime law does recognize punitive damages. The Court's opinion recognized that

The prevailing rule in American courts also limits punitive damages to cases of ... "enormity," where a defendant's conduct is "outrageous," ... owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable,

The short answers are (1) "no decision"², (2) "yes" and (3) the \$2.5 billion award (reduced by the Ninth Circuit in multiple appeals from the original award of \$5.0 billion plus interest since 1994)³ was excessive and therefore is reduced to a 1:1 ratio to compensatory damages.

The majority opinion delivered by Justice Souter was joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Justices Stevens, Ginsburg and Breyer joined the majority as to its decision on vicarious liability and no-preemption by the Clean Water Act of punitive damages. But there was disagreement as to reversing the award of \$2.5 billion and reducing it to \$507.5 million plus interest. The dissenting opinion of Justice Stevens supported the \$2.5 billion figure for punitive damages, saying Congress has chosen not to impose restrictions in such circumstances. Justice Ginsburg's dissent stated that the Court was engaging in "lawmaking" by concluding that punitive damages may not exceed what the company already paid to compensate victims for economic losses. Justice opposed a rigid 1 to 1 ratio of punitive damages to victim

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² Importantly, the Court did not decide issue # 1 of whether maritime law permits a shipowner to be punished vicariously for the conduct of the ship's master when the owner did not countenance or participate in that conduct. The Court was evenly divided on whether maritime law recognizes corporate liability for punitive damages based on actions of managerial agents such as a master, leaving the decision of the Ninth Circuit on that issue intact. Thus, its decision in *Exxon Shipping Co. v. Baker* is not precedential on this issue.

³ *In re: Exxon Valdez*, 270 F.3^d 1215, 2002 AMC 1 (9th Cir. 2001), reversed and remanded a jury award of \$5 billion punitive damages on the grounds of a Fourteenth Amendment due process of law analysis. *In re Exxon Valdez*, 2007 AMC 1243 (9th Cir. 2007), reduced the subsequent award of the district court to \$2.5 billion.

compensation.⁴

This decision broadly impacts the remedy of punitive damages in maritime law.

As discussed below, the Court's decision on whether damages provided by Congress in its statutory regime for damages under the Oil Pollution Act of 1990 ("OPA-90") (in which, arguably, Congress balanced the interests of individuals, businesses, governments and communities who may be harmed by actions of ship operators against risk of costs that should be imposed on maritime commerce) could have broad application with respect to allowing or not allowing punitive damages where damages are limited by other statutory schemes not only with respect to The Clean Water Act but to such as the Jones Act and the Death on the High Seas Act. The Supreme Court has stated with respect to the Jones Act and Death on the High Seas Act:

when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is ... no cause for enlargement of the damages statutorily provided.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 1996 AMC 305 (1996), citing to *Miles v. Apex Marine*, 496 U.S. 19, 1991 AMC 1 (1990).

EXXON SHIPPING CO. V. BAKER ISSUES

Prior to this decision, the Supreme Court has not directly ruled on the issue of punitive damages under maritime law, but has stated in a *dictum* dating to 1818 that "exemplary" damages are appropriate under some circumstances. Courts and commentators generally assumed that maritime law allowed for awards of punitive damages until the 1990 decision in *Miles v. Apex Marine*, 496 U.S. 19, 1991 AMC 1 (1990). *Miles* held that because Congress had indicated its intent in the Jones Act and Death on the High Seas Act that only pecuniary damages could be awarded in case of death or injury to a seaman. After *Miles*, courts reconsidered under what circumstances, if any, maritime law permitted the award of punitive damages. *Post-Miles* decisions hold that the general maritime law does not allow punitive damages for injury or death to seamen in actions against the seamen's employer or for deaths to any person occurring on the high seas. Splits of authority exist whether punitive damages can be awarded in actions for death or injury of a seaman in claims against a non-employer, for injury non-seamen, and for deaths of non-seamen in territorial waters. The consensus has been that punitive damages can be awarded for tort damage to property, but, important to this appeal, courts have been split on whether they can be awarded for oil pollution. Courts also have been split on under what circumstances punitive damages may be awarded against a ship operator for misconduct by a ship master or crew. Finally, although the Supreme Court has set guidelines for the ratio of punitive damages to actual damages that would not offend concepts of Constitutional due process, the appeal and cross-appeal in *Baker v. Exxon* directly addressed the issue whether the special nature of maritime law under the Constitution permits awards of higher or lower ratios than the limitations placed on the punitive damages allowed in this case by the Ninth Circuit.

⁴ Justice Alito has recused himself from this case due to ownership of Exxon stock. Thus, if the appeal ends up in a four-to-four tie, the Ninth Circuit decision would be affirmed without the decision constituting precedent.

1. Vicarious Liability for Punitive Damages for Acts of Employee or Agent

As mentioned above, the Supreme Court's decision does not resolve the conflicting decisions between the circuits whether punitive damages can be awarded against a corporate defendant for acts of its managing agents.

Matter of P & E Boat Rentals, Inc., 872 F.2^d 642, 1989 AMC 2447 (5th Cir. 1989), held that under maritime law punitive damages should not be awarded against a party vicariously liable for the wanton acts of an employee, unless the party itself authorized or ratified those acts. See also *Muratore v. M/V Scotia Prince*, 845 F.2^d 347, 1993 AMC 2937 (1st Cir. 1988). *P & E Boat Rentals* recognized the split of authority on the issue whether a principal may be held liable for punitive damage for the acts of an agent, and followed RESTATEMENT (SECOND) OF TORTS § 909 for the rules that a principal has punitive liability for the acts of an employee or agent under the following conditions:

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

P & E Boat Rentals held that punitive damages should not be awarded against a corporation for the acts of foremen who did not have “policy-making authority”, where there was no showing that managers with policy making authority had knowledge of the reckless practice of operating crew boats at high speed in fog. *In re the Exxon Valdez, Order # 264*, 1995 AMC 1930 (D. Ak. 1995), determined that the Ninth Circuit does not require authorization or ratification of wanton acts as a prerequisite for punitive damages where the actor was a managerial employee acting within the scope of his employment. *Order # 264* held that the rule applies to shore-based managerial employees and to ship-based managerial employees including a vessel master. *In re: Exxon Valdez*, 270 F.3^d 1215, 2002 AMC 1 (9th Cir. 2001), overruled the holding of *Pacific Packing & Nav. Oc. v. Fielding*, 136 Fed. 577 (1905), denying vicarious liability for punitive damages absent ratification or authorization by the vessel owner, and affirmed that a corporation may be subject to punitive damages for the reckless or willful acts of employees “who are employed in a managerial capacity while acting in the scope of their employment”. It affirmed a jury instruction defining a “managerial capacity” employee as one who “supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation’s business.” It further affirmed that “merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to employer’s policy or instructions.” *CEH, Inc. v. F/V Seafarer*, 70 F.3^d 694, 1996 AMC 467 (1st Cir. 1995), discussed the remedy of punitive damages under the general maritime law in affirming the award of punitive damages against the employer of a vessel master (who had management authority) who it was found maliciously destroyed property of competing commercial fishing vessels. *CEH* applied § 909(c) to affirm the award against the employer of the master where the owner delegated “nearly absolute managerial authority” to the master, but stated that it did not adopt the § 909(c) rule in wholesale “because § 909(c), read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal”, as there was some culpability of the principal in failing to supervise the master, and, instead, delegated unsupervised management authority despite

a raging tension between draggers and lobster fishers. 1996 AMC 481. *Jones v. Compagnie Generale Maritime*, 882 F. Supp. 1079, 1995 AMC 2573 (S.D. Ga. 1995), denied punitive damages against a vessel owner for theft committed by its crewmembers in the absence of proof that the defendant authorized or approved the actions, or was reckless in allowing them to happen or that the crewmembers were acting within the scope of employment. See also *United States Steel Corp. v. Fuhrman*, 407 F.2^d 1143 (6th Cir. 1969), which is in accord with *P & E Boat Rentals*.

The dissenting opinion of Judge Kozinski in *In re Exxon Valdez*, 2007 AMC 1243 (9th Cir. 2007), extensively discussed the issue of vicarious liability of a ship operator for fault of a vessel master or crew.

2. The Clean Water Act is not the Exclusive Remedy for Oil Pollution

In an argument raised late in the Ninth Circuit appeals process, Exxon contended that the First Circuit rule stated in *Southport Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3^d 58, 2001 AMC 609 (1st Cir. 2000), should be adopted instead of the Ninth Circuit rule that is the subject of the appeal. *Southport* held that the general admiralty and maritime law does not provide for punitive damages for oil spills – the Federal Water Pollution Prevention and Control Act (the “FWPCA”, also commonly called “The Clean Water Act”, as amended by OPA 90), 33 U.S.C. § 1251 *et seq.*, is the exclusive federal remedy for damages from oil spills, and the Clean Water Act does not provide for punitive damages. The argument can be summarized that in adopting the Clean Water Act, Congress carefully balanced the various interests, including potential costs to be imposed on maritime commerce, and calibrated a statutory scheme of penalties for pollution that does not allow for enhancement of the statutorily imposed damages. The Court held that in the Clean Water Act

... there is no clear indication of congressional intent to occupy the entire file of pollution remedies ... nor for that matter do we perceive that punitive damages for private harms will have and frustrating effect on the CWA remedial scheme, which would point to preemption.

3. Amount of Punitive Damages

Exxon v. Baker looked to studies of punitive damages awards in civil law and found that the median ratio of awards was less than 1:1, and held that as the conduct of Exxon Shipping Co. was not one of “exceptional blameworthiness”, 1:1 is a fair upper limit in such maritime cases.

The Court made it very clear that its determination was not based on a due process or other constitutional basis:

Today’s inquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. ...

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes’s “bad man” can look ahead with some ability to know what the stakes are

in choosing one course of action or another. ... And when the bad man's counterparts turn up from time to time, the penalty scheme the face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage. ... The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.

On this issue, the Court concluded:

On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost of the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ration, which is above the median award, is a fair upper limit in such maritime cases.