Legal Backgrounder

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Maritime Law Provides No Safe Harbor for Asbestos Plaintiffs Seeking Nonpecuniary Damages

by Brian J. Schneider

For nearly half a century, plaintiffs alleging harm from asbestos have pursued damages mostly under state common law. In the last several years, however, federal maritime law has gradually begun to displace state common law as the preferred vehicle in such lawsuits targeted at "seamen." This Legal Backgrounder highlights one important development in maritime law as it relates to asbestos claims: common-law wrongful-death suits brought by the estates of former Navy sailors.

These wrongful-death claims, which the US Supreme Court has only recognized in the last few decades, frequently seek recovery for "nonpecuniary" damages—variably referred to as "loss of society" or "loss of consortium"—arising from the loss of intimacy and companionship shared with the decedent prior to death. As discussed more fully below, maritime-law cases addressing asbestos and other product-liability claims have held that such nonpecuniary damages are unavailable.

The US Supreme Court Recognizes General Maritime Wrongful-Death Claims

The Harrisburg, 119 U.S. 199 (1886), is the logical starting point for any analysis of wrongful-death damages in the context of maritime law. The US Supreme Court held that recovery for wrongful death was unavailable under admiralty (*i.e.*, maritime) law. The decades following *The Harrisburg* produced two significant legal and policy developments on the issue of recoverable damages in maritime death cases.

First was the permissive way in which courts allowed plaintiffs in maritime wrongful-death cases to supplement their claims by reference to state wrongful-death laws. By either legislation or judicial decision, many jurisdictions abrogated the common-law rule of no recovery that had been extended to maritime claims by *The Harrisburg*. Thus, while those jurisdictions did not have the power to overrule the highest court in the land, they simply side-stepped its impact by enforcing (through supplementation) their own laws.

Second, Congress waded into maritime issues with the enactment of two statutes in 1920. The first, the Jones Act, serves as a maritime workers' compensation scheme. The act incorporated the Federal Employers' Liability Act's (FELA) liability and damages recovery framework. FELA prohibits recovery of nonpecuniary damages in wrongful-death cases. The Jones Act has a fairly limited scope, applying only for the benefit of seamen and only against a seaman's employer.

The other statute enacted in 1920, the Death on the High Seas Act (DOHSA), is not so limited. It applies to all maritime death claims—even where the death occurs on land, so long as the injury causing death occurred at sea—regardless of whether the plaintiff was a seaman or the defendant his employer. In order to invoke DOHSA, a plaintiff's injury (with some exceptions not relevant here) must have occurred beyond three nautical miles off

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the coast of the United States. The law limits damages to the "pecuniary losses" visited upon the beneficiaries of a decedent's estate and likewise prohibits the recovery of nonpecuniary damages.

The Supreme Court reentered the fray in 1970 with *Moragne v. States Marine Lines, Inc*., 398 U.S. 375 (1970). In that case, a longshoreman died in the territorial waters of Florida. Because he was not a seaman, the Jones Act did not apply. Likewise, because the death did not occur because of injury on the high seas, DOHSA did not apply. Finally, the lower courts concluded that Florida law did not provide a cause of action for wrongful death occurring in its territorial waters. Thus, there was no mechanism by which state law could be allowed to supplement the maritime claim. On appeal, the Court concluded that *The Harrisburg* had served as a source of confusion for lower courts. It therefore explicitly overruled that precedent, ultimately recognizing a general maritime-law cause of action for wrongful death.

Justice Harlan wrote for a unanimous Court, stating that its past decisions undermined critically needed "'uniformity in the exercise of admiralty jurisdiction.'" *Id*. at 401 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 155 (1964)). The Court's caselaw in this area, Justice Harlan reasoned, must be consistent with federal statutory enactments. He looked to DOHSA and the Jones Act for guidance, and explained:

> [M]uch of what is ordinarily regarded as 'common law' finds its source in legislative enactments. … It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles. … We must, therefore, analyze with care the congressional enactments that have abrogated the common-law rule in the maritime field, to determine the impact of the fact that none applies to the situation of this case.

Id. at 392 (citations omitted). With those Acts of Congress in mind, the Court recognized for the first time in *Moragne* a general maritime-law cause of action for wrongful death. Thus, resort to state law would no longer be necessary.

The parties asked the Court to define the scope of the damages permitted under the new cause of action. The Court declined, stating that final resolution "should await further sifting through the lower courts in future litigation."

The Court Reverses Course on Maritime Wrongful-Death Actions

After twenty years of lower court "sifting," the Court decided to take up another maritime damages case, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). A crewman fatally stabbed a fellow member of a ship's company while the ship was docked in the harbor of Vancouver, Washington. The estate filed a claim against the decedent's employer under the Jones Act, as well as a claim under general maritime law against both the employer and against a non-employer defendant. As part of the claims, the estate sought to recover nonpecuniary damages for loss of consortium. The Court agreed to determine whether those damages were available to a seaman's estate under general maritime law, again assessing them against the backdrop of federal statutory law in order to promote uniformity in application of maritime law.

In advancing that policy of uniformity, the Court explained how "legislation has always served as an important source of … admiralty principles," as such enactments send "signals to which an admiralty court must attend." *Id*. at 24. This is because Congress does not "'merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.'" *Ibid* (quoting *Moragne*, 385 U.S. at 391). Applying these principles to maritime cases, the Supreme Court observed that "[m]aritime tort law is now dominated by federal statute." *Id*. at 36. Since Congress has legislated extensively in the area of maritime law, an admiralty court should therefore "look primarily to these legislative enactments for policy guidance." *Id*. at 27

The Court—as it had done in *Moragne* in recognizing wrongful-death causes of action—again looked to DOHSA and the Jones Act. Because neither statute permits recovery of nonpecuniary damages in a wrongful-death case, the Court held that such damages are likewise unavailable under the general maritime law. The Court explained that it meant to "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id*. at 37.

The Supreme Court has elsewhere explained that the term "seaman" is "a maritime term of art" that is to be construed "broadly." In defining the term, the Court reasoned:

> [T]he requirement that an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342, 346 (1991).

The Court returned to the question of maritime wrongful-death damages in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). *Calhoun* addressed a wrongful-death claim by the estate of a 12-year-old girl who was killed riding a jet ski on vacation with her family in Puerto Rico. The Court considered whether *Miles* limited the damages available to the estate, or whether the family could resort to more generous state-law damages. Adopting the latter position, the Court explained that while the uniformity principles espoused in *Miles* apply to any decedent who was "a seaman, longshore worker, or person otherwise engaged in a maritime trade," those principles did not apply to a "non-seafarer" such as Ms. Calhoun. *Id*. at 202.

While *Calhoun* found that the need for maritime-law uniformity did not apply to a vacationing child, it nevertheless expanded the universe of those to whom the doctrine of uniformity applies—namely, anyone engaged in a "maritime trade." Thus, in light of the already liberal definition the Court applied to "seaman," courts have found only a very "narrow" class of cases, such as the vacationing beachgoer in *Calhoun*, escape the mandate set forth in *Miles* against wrongful-death damages.

The Supreme Court's most recent pronouncement on wrongful-death damages under maritime law came several years ago in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). In *Townsend*, a maintenance-and-cure case brought by a ship's crew member against the owner of the vessel, the Court distinguished the claim before it from the wrongful-death claim at issue in *Miles*. In so holding, the Court described *Miles* as concluding "that Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law." *Id*. at 419. The *Townsend* Court further explained:

> [I]t was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed; until then, there was no general common-law doctrine providing for such an action. As a result, to determine the remedies available under the common-law wrongful-death action, "an admiralty court should look primarily to these legislative enactments for policy guidance." It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA.

Id. at 420 (quoting *Miles*, 498 U.S. at 27).

Bar on Nonpecuniary Damages in Maritime-Law Claims Extends to Non-Employer Defendants

In suits involving silicon, asbestos, and other substances to which workers may have been exposed, the plaintiffs routinely invoke maritime-law principles against defendants other than their employer, such as

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the manufacturer of the substance or a part containing it. Federal and state courts addressing such wrongful-death claims that seek nonpecuniary damages have noted that *Miles* applies with equal force to non-employer defendants.

In one such case, *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004) the US Court of Appeals for the Fifth Circuit followed *Miles* and affirmed a lower court's ruling that nonpecuniary damages were unavailable in a maritime-law wrongful-death case against a hood manufacturer alleged to have contributed to the decedent's development of silicosis. Similarly, in *In re Goose Creek Trawlers*, 972 F. Supp. 946 (E.D.N.C. 1997), a federal district court in North Carolina applied *Miles* and held that the estate of a self-employed seaman could not recover nonpecuniary damages in a wrongful-death case against the owner of a fishing vessel with which the decedent's vessel collided.

Two courts have similarly extended *Miles* to asbestos claims by estates of former Navy sailors suing for mesothelioma against product defendants. The first, *John Crane, Inc. v. Hardick*, 772 S.E.2d 610 (Va. 2012), involved a wrongful-death claim by a former Navy sailor's widow who claimed her husband contracted the disease while serving aboard Naval ships. The estate filed suit against a gasket and packing supplier, claiming that its products contributed to the disease. Reversing the award of loss-of-society damages to the estate, the Supreme Court of Virginia looked to the *Miles* line of cases. After finding that the decedent was indeed a seaman within the contemplation of maritime law, the court held that recovery of loss-of-society damages against a non-employer were unavailable. In so holding, the unanimous court explained that because such damages would not be available under either DOHSA or the Jones Act, *Miles* and its progeny dictated that loss-of-society damages are likewise unavailable against a product defendant in a wrongful-death case brought under general maritime law.

A Florida federal court relied on *Hardick* two years later in deciding *Hays v. John Crane, Inc.*, No. 09-81881-CIV-KAM, 2014 U.S. Dist. LEXIS 184953 (S.D. Fla. 2014). As in *Hardick*, *Hays* involved a claim by a former Navy sailor's estate for loss-of-society damages against the same product defendant as in *Hardick*. After similarly finding that the decedent's Navy service on ships qualified him as a seaman under maritime law, the district court similarly heeded the Supreme Court's call for uniformity and found that nonpecuniary damages for loss of society were unavailable to the estate.

Conclusion

Miles v. Apex Marine Corp. put an end to legislative and judicial efforts to help maritime plaintiffs navigate around federal laws and judicial precedents when they sought nonpecuniary damages in wrongful-death claims. *Miles*, and several subsequent Supreme Court rulings clarified Congress' primacy as the creator of causes of action under maritime law. Judicial decisions interpreting the reach of maritime law, the Court explained, must advance the principle of uniformity. Because Congress had indicated an opposition to nonpecuniary damages in wrongful-death suits in the Jones Act and the Death on the High Seas Act, any other recovery over and above this carefully limited statutory scheme would be, in the Court's words, "illegitimate."

As displayed by the lawsuits in cases such as *Scarborough, Hardick,* and *Hays,* plaintiffs' lawyers continue to invoke maritime law despite *Miles*. Their efforts to distinguish *Miles* and its progeny on the ground that those cases involved harm by employers, not by third parties, have thus far proven ineffective. Courts should continue to rebuff assertions that harm caused by third-party, non-employer defendants can be redressed with nonpecuniary damages through maritime law. *Miles*'s bar on such claims applies equally to suits against employers and non-employers.

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