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The Sky Has Not Fallen Yet on Punitive Damages in Admiralty Cases

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The Sky Has Not Fallen Yet on Punitive Damages in Admiralty Cases

John Paul Jones*

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I. INTRODUCTION

As surely everyone knows, the United States Supreme Court has recently brought the Due Process Clause to bear on awards of punitive damages made pursuant to state law.¹ The law of the land now

* © 2009 John Paul Jones. Professor of Law, University of Richmond. After the petition for certiorari was filed in *Exxon Shipping Co. v. Baker*, I submitted a brief amicus curiae on behalf of law professors specializing in maritime law. We supported the petition and, without taking a side on the questions raised in this case about the maritime law of punitive damages, called for their resolution. Our participation as amici ended when the petition was granted. Later, I joined a panel of law professors mooted Exxon's counsel in preparation for his oral argument. For their generous and expert assistance in the preparation of this Article, I wish to thank Doris Morgan and Gail Zwimer of the Muse Law Library and Christine Owen, Esq.

1. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am.*,

includes a judicially manageable standard that protects a defendant otherwise liable for punitive damages from awards that are so excessive as to be unfair, that is, arbitrary and capricious. Punitive damages are usually assessed by juries, subject to review by trial and appellate courts.² This initiative has sparked considerable controversy, and the exact parameters of the constitutional standard are still far from certain.³

Into this situation came the case of *Exxon Shipping Co. v. Baker*.⁴ The case was one within admiralty jurisdiction, although by a tortuous path it ended up in federal court based on federal questions.⁵ Applying federal maritime law, a jury assessed damages, both compensatory and punitive. Trial by jury is not unheard of in cases in which maritime law governs, but it is not the norm.⁶ Having already sketched out a constitutional limit to the size of punitive damages,⁷ the Supreme Court was presented in this case with an opportunity for something humbler, that is, an opportunity to either find in federal maritime law the same limit or else to set a different one within the constitutional outer boundary. The Court chose to take a step, and no more, along the latter course. The length of that step and where the next might carry federal maritime law remain to be seen. The better view of what has been decided in this case is a modest one.

Inc. v. Gore, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

2. At common law (and nowadays absent a claim of unconstitutional excess), the latter review for abuse of discretion by the former. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2638, 2008 AMC 1521, 1556 (2008) (Stevens, J., concurring in part and dissenting in part); see *Cooper Indus.*, 532 U.S. at 433; see also *Haslip*, 499 U.S. at 15.

3. The body of academic commentary is big and still growing; it is also varied. See, e.g., Ronald J. Allen, Alexia Brunet & Susan Spies Roth, *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DEPAUL L. REV. 1249 (2007); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779 (2004); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009).

4. 128 S. Ct. 2605, 2008 AMC 1521.

5. See *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 779-82 (9th Cir. 1994).

6. By act of Congress, the option of trial by jury is available in admiralty cases from the Great Lakes and connecting waterways, 28 U.S.C. § 1873 (2006), and in actions on seamen's claims of personal injury arising from negligence on the part of their employers, 46 U.S.C. § 30104(a) (2006). See *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20, 1963 AMC 1093, 1096 (1963).

7. See *supra* note 2 and cases cited therein.

II. A VERY BRIEF SYNOPSIS OF A WIDELY REPORTED CASE

After the tanker EXXON VALDEZ stranded on Bligh Reef in Prince William Sound, some of her cargo of crude oil spilled, causing substantial environmental damage.⁸ Her owner and operator, Exxon Shipping Company, pleaded guilty to violations of the Clean Water Act⁹ and several other federal laws, paying fines of \$25 million and restitution of \$100 million. Exxon also settled for \$900 million claims by the governments of the United States and the State of Alaska for damage to the environment and made payments of \$303 million in settlements to fishermen, private property owners, and private parties. Other litigants sued in the United States District Court for the District of Alaska and were formed into three classes: Native Alaskans, landowners, and commercial fishermen. A class was also formed of more than 32,000 plaintiffs (including Baker) seeking punitive damages. Before the district court, Exxon conceded its liability for compensatory damages. Eventually, a jury heard evidence that Hazelwood, the tanker's master, had been drunk when the accident occurred, that he had left the vessel's bridge without an officer licensed to pilot the Sound, and that Exxon had or should have taken notice that he was an alcoholic who had resumed a habit of drinking on or before duty. The jury found both Exxon and Hazelwood to have been reckless and awarded compensatory damages of \$287 million (from which the court deducted prior voluntary payments, leaving a net of \$19,590,257) plus punitive damages of \$5000 from Hazelwood and \$5 billion from Exxon. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment on Exxon's liability, including its liability respondeat superior for the recklessness of its captain, but reduced the amount of the punitive damages award against the company, eventually to \$2.5 billion. The Supreme Court, on writ of certiorari, vacated and remanded. Justice Alito did not participate.

In its review, the Court considered three questions of law, disposing of two. Unanimously, the Court held that general maritime law allows punitive damages in an action sounding in tort on a claim for income lost by fishermen shut out of their fishing grounds after a vessel's oil spill resulting from recklessness.¹⁰ Five members of the

8. *Baker*, 128 S. Ct. at 2611, 2008 AMC at 1522. This synopsis draws exclusively from the opinion for the Court by Justice Souter. What the Supreme Court thought the facts to be in this case is all that matters when examining what the Court subsequently decided about the law to be applied to them.

9. 33 U.S.C. §§ 1311(a), 1319(c)(1) (2006).

10. *See Baker*, 128 S. Ct. at 2616-19, 2008 AMC at 1529-32.

Court agreed that general maritime law caps the amount of punitive damages available in such a case at the amount of the compensatory damages awarded.¹¹ The Court divided evenly and therefore rendered no judgment as to whether in such a case an owner otherwise faultless may be vicariously liable for punitive damages warranted by recklessness on the part of the master of its ship.

III. PRELIMINARY POINTS

Before turning to these dispositions and then to the question yet open, some attention is due to the answers in *Exxon Shipping Co. v. Baker* to three antecedent questions.

A. *That Robins Dry Dock Is Subject to Exception Is No Longer for Speculation in Other Courts*

As a general matter, maritime law does not allow an award of compensatory damages for missed income opportunities or other economic losses to a plaintiff who has not also suffered at the defendant's hands physical injury to his person or property.¹² Courts and commentators trace this rule to the case of *Robins Dry Dock & Repair Co. v. Flint*,¹³ in which a time charterer was refused compensation for profits lost as a result of negligence by the shipyard that delayed the chartered vessel's return to service. It is apparently still good law.¹⁴ In 1986, the Supreme Court had occasion in *East River Steamship Corp. v. Transamerica Delaval Inc.* to consider "whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic" but declined to reach the issue, referring at that point to its decision in *Robins Dry Dock*.¹⁵ According to Professor Schoenbaum, this exclusionary rule is followed today more or less faithfully in the United States Courts of Appeals for the First, Third, Fifth, and Eleventh Circuits, "with less enthusiasm" in the United States Court of Appeals for the Second Circuit, and with

11. *Id.* at 2633, 2008 AMC at 1550.

12. *See, e.g.*, ROBERT FORCE, ADMIRALTY AND MARITIME LAW 129-30 (2004); THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAW § 14.7, at 124 (4th ed. 2004).

13. 275 U.S. 303, 309-10, 1928 AMC 61, 63-64 (1927).

14. *See, e.g.*, Gas Natural SDG S.A. v. United States, 2008 AMC 2992, 2993 (2d Cir. 2008) (unpublished); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624, 1994 AMC 2705, 2707 (1st Cir. 1994).

15. 476 U.S. 858, 871 n.6, 1986 AMC 2027, 2038 n.6 (1986).

exceptions based on foreseeability in the United States Courts of Appeals for the Fourth and Sixth Circuits.¹⁶

What allowed these plaintiffs to proceed nevertheless is an exception for commercial fishermen first allowed by the Ninth Circuit¹⁷ and since allowed in the Fifth Circuit,¹⁸ and more recently in the Fourth.¹⁹ From the fact that the Supreme Court allowed these plaintiffs any punitive damages at all, the inference is unavoidable that the Court accepted first their standing to claim compensatory damages that were strictly of the economic sort. (The Court was unanimous on this point, albeit silently so.) Even more telling on this point, if more were necessary, is the fact that five justices keyed their new cap on punitive damages to the sum of the award of compensatory damages. Thus, that maritime law allows qualifying fishermen past the bar of *Robins Dry Dock* is confirmed to a very high level of certainty, that of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*²⁰ The question left open in *East River* is now closed. Somebody seeking only economic damages can state a tort cause of action in admiralty.

B. That Maritime Law Affords Punitive Damages for Recklessness Is No Longer for Debate

Not so long ago, many thought that punitive damages were less generally available in cases governed by maritime law.²¹ More than a

16. SCHOENBAUM, *supra* note 12, at 124-25 n.8.

17. *Union Oil Co. v. Oppen*, 501 F.2d 558, 570, 1975 AMC 416, 435 (9th Cir. 1974).

18. *Louisiana v. M/V Testbank*, 524 F. Supp. 1170, 1173-74, 1982 AMC 2246, 2250-51 (E.D. La. 1981), *aff'd*, 728 F.2d 748, 1984 AMC 2951 (5th Cir. 1984), *aff'd en banc*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985).

19. *Yarmouth Sea Prods., Ltd. v. Scully*, 131 F.3d 389, 395-98, 1998 AMC 825, 833-38 (4th Cir. 1997).

20. Notwithstanding prior judgments to the contrary by at least two circuit courts of appeals, the Supreme Court found in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955), that the maritime law of the United States does not include a rule of literal compliance for marine insurance warranties. Two decades later, Gilmore and Black characterized the *Wilburn Boat* case aptly as "persistently problematic." GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 2-8, at 68 (2d ed. 1975). The opinion by Justice Black for the Court in *Wilburn Boat* nevertheless suggests a severe standard for confirming general maritime law, in effect, a rule that "it ain't" maritime law until the Supreme Court says it is. See Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395, 419-20 (1997). The wisdom of such a standard is debatable; for now, its severity reinforces here an act of confirmation: even to a *Wilburn Boat* level of certainty, the judgment in *Baker* proves that maritime law allows commercial fishermen to recover for lost-profit opportunities notwithstanding the rule of *Robins Dry Dock*.

21. See David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 116-17 (1997).

decade ago, Professor Robertson wrote very persuasively to correct that misunderstanding, but the small size of his data set left the matter somewhat in doubt,²² as has the long silence of the Supreme Court. That maritime law allows punitive damages when a defendant has acted at least recklessly is now confirmed beyond peradventure, that is, to a *Wilburn Boat* level of certainty.

C. *That a General Maritime Law Governs in Cases of Tort Is Confirmed*

That maritime law, rather than that of the forum state, applies to a tort potentially within admiralty's jurisdiction, even when that jurisdiction has not been invoked, is confirmed.²³

Taking a cue from the reasoning of Justice Brandeis in his opinion for the Court in *Erie Railroad v. Tompkins*,²⁴ Professors Clark²⁵ and Young²⁶ have disputed the notion that the reference to cases of admiralty and maritime jurisdiction in Article III of the U.S. Constitution warrants a conclusion that federal judges may, when exercising that jurisdiction, fashion rules of decision displacing state law. Their notions have not found traction in the Supreme Court.

22. As Robertson makes clear, passage by Congress of the Jones Act, 46 U.S.C. § 30104 (2006), eventually complicated this question with a suggestion of legislative preemption and concern for separation of powers. However, the question is purely one of general maritime law for the period beginning with recognition of a federal maritime jurisdiction in 1789 and ending shortly after passage of the Jones Act in 1920. From this period, Robertson tendered fifty-nine cases governed by maritime law in which courts had touched on the point of punitive damages, but in only fourteen of them were awards actually made, and of those, only one was by a federal circuit court, *Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823) (No. 2575) (Story, J.), and none were affirmed by a circuit court of appeals as punitive (or exemplary, or vindictive) damages per se. Robertson, *supra* note 21, at 87-116.

23. Recall that the state law claims of this class of commercial fishermen were removed more or less as fellow travelers, per 28 U.S.C. § 1441(c) (2006), on the basis that it was a federal question as to whether other plaintiffs with whom they were joined might continue to press their claims in the wake of a federal consent decree. *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 779-82 (9th Cir. 1994); see also *In re Exxon Valdez*, 767 F. Supp. 1509, 1515-16, 1991 AMC 1482, 1489-90 (D. Alaska 1991) (stating that claims must be governed by maritime law, not Alaskan law).

24. 304 U.S. 64 (1938).

25. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

26. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004); see Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999); see also Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523 (2004).

Together with *Norfolk Southern Railway v. James N. Kirby, Pty Ltd.*,²⁷ the decision in this case should put the matter to rest. If a maritime law made by judges in admiralty cases presents a contradiction to the Supreme Court's view of Article III in 1938, it does not interest the Supreme Court today.

So much for unavoidable inferences from what the Court decided in *Baker*. What was said in this case deserves as much attention as what was left unsaid.

IV. THE LOGIC OF *MILES V. APEX MARINE CORP.* DOES NOT DICTATE PREEMPTION IN THIS CASE

It was argued for Exxon that even if the general maritime law allowed punitive damages in some sorts of cases, they were preempted in a case of this sort by the Clean Water Act,²⁸ which imposed penalties for pollution while expressly preserving preexisting rights to recover damages for injury to private property.²⁹ In *Miles*,³⁰ the Supreme Court had held unanimously³¹ that the Jones Act³² precludes judicial award (in a nondependent mother's *Moragne* action arising from the death of a seaman) of damages in compensation for loss of society.³³ That conclusion had proceeded from another, to wit, that the explicit authorization of pecuniary damages in the Federal Employers Liability Act (FELA)³⁴ leads to the inference that Congress intended to rule out other sorts, not only in cases covered by that statute, but also in cases covered by the Jones Act. Acknowledging the superiority of maritime law made by Congress, the Court in *Miles* foreclosed a judicially fashioned supplement to the pecuniary damages available according to FELA and the Jones Act. In this case, the Court was invited to take a syllogistic path: because Congress did not authorize punitive damages for spills in violation of the Clean Water Act, Congress should be presumed to have intended their preemption by the Act. The argument failed to persuade. The Court acted unanimously when it ruled that the Clean Water Act does not foreclose punitive damages in an action

27. 543 U.S. 14, 22-24, 2004 AMC 2705, 2710-11 (2004) (holding that federal maritime law governs a claim of contract breach when that contract is maritime in nature, even when diversity jurisdiction has been invoked).

28. 33 U.S.C. § 1251 (2006).

29. *Id.* § 1321.

30. 498 U.S. 19, 1991 AMC 1 (1990).

31. Justice Souter did not participate. See *id.* at 21, 1991 AMC at 1.

32. 46 U.S.C. § 30104 (2006).

33. *Miles*, 498 U.S. at 32, 1991 AMC at 11.

34. 45 U.S.C. § 51 (2006).

where plaintiffs have sued for economic loss resulting from environmental injury by a vessel. According to Justice Souter, it was simply too hard for the Court to accept a conclusion that the Clean Water Act, explicitly protective of the environment, forecloses *sub silentio* compensatory damages of sorts other than mentioned, and that made it just as hard to conclude that the Act forecloses punitive damages for economic losses while allowing compensatory damages for such losses.³⁵ Invoking *United States v. Texas*,³⁶ Justice Souter noted the absence of a clear indication in the Clean Water Act of any intent on the part of Congress to occupy the entire field, or else to abrogate a principle of federal common law.

It is tempting to ascribe the Court's insistence on clear signals from Congress when general maritime law is in jeopardy of preemption to concern for "the characteristic features of the general maritime law"³⁷ with which the Court was once so preoccupied. It is enough for now, however, to note that this Court agreed unanimously that the "analytical framework of *Miles*"³⁸ does not force a conclusion that the Clean Water Act preempts claims for punitive damages.³⁹

V. SOMETIMES, PUNITIVE DAMAGES SHOULD NOT EXCEED IN AMOUNT THE COMPENSATORY DAMAGES AWARDED

Having agreed that maritime law allows an award of punitive damages in a case of economic loss resulting from recklessness and that an award in this case is not preempted by statute, the Court could turn to consideration of the amount of the award against Exxon. A bare majority agreed that general maritime law generally caps the amount of punitive damages available in such a case at the amount of the compensatory damages awarded.⁴⁰ Even Justices Scalia and Thomas, who abjure judicial power to enforce the Due Process Clause by capping punitive damages awarded by reference to state law, agreed that the Court could and should make such a cap a part of our federal

35. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619, 2008 AMC 1521, 1532 (2008).

36. 507 U.S. 529, 533-39 (1993) (holding that the Debt Collection Act, 31 U.S.C. § 3701, does not preempt U.S. Government claim under federal common law to prejudgment interest).

37. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216, 1996 AMC 2076, 2084 (1917).

38. *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1506, 1995 AMC 2409, 2422-23 (5th Cir. 1995) (en banc) (finding that the Jones Act forecloses punitive damages when wrongful failure to pay maintenance and cure aggravates the injury).

39. *Baker*, 128 S. Ct. at 2619, 2008 AMC at 1532.

40. *Id.* at 2633, 2008 AMC at 1550.

maritime law. Those who disagreed did so on grounds of discretion rather than jurisdiction; none disclaimed the authority.

What matters is the case type contemplated here. If what makes this case suitable for capping is that it is one in which plaintiffs suffered no physical damage to their persons or property, then this cap's future application depends on the reach of the rule of *Robins Dry Dock*. Having confirmed in this case the standing of commercial fishermen to sue when their only loss is economic, the Court then sets something of a limit on the punitive damages they may recover when the defendant's conduct is no worse than reckless.⁴¹ Seen in this way, the cap applies only to those privileged to sue for lost profit opportunities when all others are barred.

What also matters are the case types distinguished by the Court and therefore unlimited by this cap. The Court apparently does not intend this cap for cases in which the defendant's conduct is intentional or malicious, or in which the defendant's behavior was driven primarily for desire for gain, or in which the economic harm does not otherwise afford plaintiffs sufficient incentive to recoup their losses, or in which the harm eludes detection for want of incentive.⁴²

Seen in this light, the cap is an undertaking more modest in scope than in drama.⁴³

VI. IT REMAINS TO BE SEEN WHETHER AN OWNER OTHERWISE WITHOUT FAULT WILL BE LIABLE VICARIOUSLY FOR PUNITIVE DAMAGES CAUSED BY THE RECKLESSNESS OF THE SHIP'S MASTER

Conspicuously left open by the decision in this case is the question of whether the general maritime law ought to allow an award of punitive damages against an otherwise faultless shipowner on the

41. That the Court contemplated conduct more blameworthy without reaching it with this cap seems clear from the Court's notice of the fact that the jury was not asked to consider the possibility of fault worse than reckless. *Id.* at 2614, 2008 AMC at 1525-26. On that basis, the Court treated this case "categorically as one of recklessness." *Id.* at 2631 n.23, 2008 AMC at 1548 n.23.

42. *Id.* at 2631, 2008 AMC at 1548.

43. Nothing was said about how what might have happened should factor in, although the jury was instructed to take it into account and the district court found it relevant on review of the verdict amount. Setting out for the Court the facts on which its several decisions apparently were based, Justice Souter described how Hazelwood tried to rock his ship free of the reef, "a maneuver which could have spilled more oil and [could have] caused the ship to founder." *Id.* at 2613, 2008 AMC at 1524. But otherwise the Court did not express itself on what greater havoc might have been wrought by the captain's recklessness, so it is not certain whether in future cases what might have happened should be considered in setting a higher or lower cap than this one.

basis of respondeat superior when its captain's own conduct qualifies as reckless or worse. This point was unsettled before, and still is. The Court in this case must have regarded the Exxon Shipping Company as itself reckless.⁴⁴ Nevertheless, it undertook to decide whether the company might otherwise be liable for the recklessness of the master of the EXXON VALDEZ. The Court divided equally, leaving undisturbed the ruling of the Ninth Circuit.⁴⁵ No justice offered an opinion on the point.

Perhaps there is a message to be decoded from the transformation of this question in the course of the Court's opinion. In its petition for certiorari, Exxon asked the Court to take up the question:

May federal maritime law impose punitive damages on a shipowner [as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits] for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?⁴⁶

As paraphrased by Justice Souter, however, the first question for which a writ of certiorari was granted was "whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm."⁴⁷ Later in the same opinion, the Court stated, "We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents"⁴⁸ Thus the question seems to have been bandied about in various degrees of generality. As originally posed by Exxon, the question is peculiar to maritime law: whether a shipowner otherwise innocent is liable in punitive damages for misconduct on the part of the master. A moment's reflection on the term *master* itself offers a handle for answering that question—or at least for limiting its answer: any employer may have countless agents, but a ship can have but one master, to be distinguished therefore from all others acting for the ship on the owners' authority.

Only two persons were judged to be reckless in this case, the company and Captain Hazelwood. It was not suggested to either the

44. According to the Court's opinion, "the jury found *both* Hazelwood and Exxon reckless and thus potentially liable for punitive damages." *Id.* at 2614, 2008 AMC at 1525-26 (emphasis added).

45. *Id.* at 2616, 2008 AMC at 1526-28.

46. Brief for Petitioners at i, *Baker*, 128 S. Ct. 2605 (No. 07-219).

47. *Baker*, 128 S. Ct. at 2611, 2008 AMC at 1522.

48. *Id.* at 2614, 2008 AMC at 1526.

jury or the Supreme Court that dereliction by the ship's third officer (without which the grounding could not have occurred) ought to be imputed to the company. Nor was it suggested that recklessness on the part of those shoreside managers responsible for leaving Captain Hazelwood in command (when they knew he had resumed drinking) should not be imputed. Indeed, the only question presented by the petitioner and prompted by the facts is one of imputing liability to the company for the actions of a ship's master while his ship was underway. If in other cases, setting a boundary line for imputing to the company somewhere along a continuum of managerial authority might be arbitrary or at least troublesome,⁴⁹ it is not here. Among managerial agents, the master is *sui generis*.

On this question, consider the Fire Statute,⁵⁰ in which it seems settled that Congress has excused shipowners from vicarious liability for even compensatory damages to those suffering property loss or damage from fire aboard ship caused by recklessness on the part of her crew. Consider also the Limitation of Liability Act,⁵¹ in which it seems settled that Congress has capped at the value of a ship the vicarious liability of her owners for even compensatory damages to those suffering property loss or damage caused by recklessness on the part of her crew. In such a legal tableau, it is not unreasonable for the Court to fashion for a shipowner that is blameless—even negligent—a monetary cap on punitive damages assessed for the recklessness of the crew. But the recklessness contemplated here is exclusively that of the master of the *EXXON VALDEZ*,⁵² and it is far from settled that the Limitation Act protects an owner from vicarious liability for the negligence of the master.⁵³ Indeed, with respect to claims of personal

49. “‘Unfortunately, no good definition of what constitutes a managerial capacity has been found,’ and determining whether an employee meets this description requires a fact-intensive inquiry.” *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 543 (1999) (citations and internal quotations omitted) (remanding punitive damages award for further inquiry regarding employer’s good faith efforts to forestall unlawful discrimination).

50. 46 U.S.C. § 30504 (2006).

51. *Id.* § 30506.

52. The Court notes that the grounding resulted from the failure, after Hazelwood had left the bridge, of the ship’s third mate to turn her back into the channel as he had been ordered, but makes nothing more of it. *Baker*, 128 S. Ct. at 2612, 2008 AMC at 1523. Had that nonfeasance also been considered, it would have invited the question of whether it could be imputed to either the master or the shipowner in a way that left either liable.

53. Precedents are scarce and commentators are divided. According to Schoenbaum, “[f]or purposes of establishing privity or knowledge regarding limitation as to personal injury and death claimants, but not for property loss claimants, the privity or knowledge of the master of the vessel is deemed conclusively the privity or knowledge of the owner.” SCHOENBAUM, *supra* note 12, § 15-7, at 154 (emphasis added) (citing 46 U.S.C. § 183(e)

injury or death, Congress has settled the matter: privity or knowledge of the master at the beginning of a voyage is imputable to owners attempting to avail themselves of the privilege of limiting their liability.⁵⁴

For the proposition that by our general maritime law an owner is not liable to the extent of exemplary or punitive damages for qualifying misconduct on the part of his ship's master, in which the owner did not at least acquiesce, *The Amiable Nancy*⁵⁵ is ever invoked. The authority of that case has already been called into question on at least two grounds. It seems generally agreed that Justice Story's statement is at best dictum, given both the manner in which it was framed and the fact that the owners of the abused brig claimed only compensatory damages (and were refused so much of them as were claimed for lost profits).⁵⁶ It has been pointed out also that this case arose from a stop at sea of the AMIABLE NANCY by an armed

(recodified at 46 U.S.C. § 30506); *Moore-McCormack Lines, Inc. v. Armco Steel Corp.* (The Mormackite), 272 F.2d 873, 1960 AMC 185 (2d Cir. 1959)). In *Moore-McCormack*, the court of appeals agreed that the corporate shipowner should be refused limitation when ship and cargo were lost as a consequence of an uncalibrated stabilogauge. What was therefore said about privity and knowledge imputed from her master was dictum.

For the proposition that knowledge or privity of a ship's master cannot be imputed to her corporate shipowner, David E.R. Woolley in 3 BENEDICT ON ADMIRALTY § 42, at 5-17 n.4 (rev. ed. 2008), cites *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 15 F. Cas. 884 (C.C. Cal. 1877) (No. 8506), *aff'd*, 102 U.S. 541 (1881), where again the point is only dictum. Also cited is *Quinlan v. Pew*, 56 F. 111 (1st Cir. 1893), which, on its facts, is equally inapt and therefore offers more dictum, but Judge Putnam refers at page 115 to *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889), in which the Supreme Court approved limitation after a vessel struck a rock off Martha's Vineyard while under the control of her second mate, not licensed to pilot those waters. According to the Court, unanimously per Justice Bradley, placing a competent officer in charge while underway was the duty of her master, unimputable to her owners.

By virtue of his office and the rules of maritime law, the captain or master has charge of the ship and of the selection and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas.

Butler, 130 U.S. at 554; *see also* *La Bourgogne*, 210 U.S. 95 (1908) (holding unanimously per Judge White that owners were entitled to limitation when their vessel was lost by collision after speeding in fog). "[T]he burden of proving that . . . a willful departure [by ship's officers] from [standing orders to go slowly in fog] was indulged in, and was brought home to or countenanced by the [company], was cast upon the claimants." *La Bourgogne*, 210 U.S. at 126-27.

54. "In a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner." 46 U.S.C. § 30506(e).

55. 16 U.S. (3 Wheat.) 546, 558-59, 2000 AMC 2693, 2700-02 (1818).

56. Brief for Respondents at 17, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07-219).

schooner cruising under a U.S. letter of marque, so that, while the case itself is within instance jurisdiction, Justice Story's solicitude for the owner of the abusing schooner ought to be viewed as peculiar to those offering their vessels for national service in time of war.⁵⁷

There is yet a third objection to be made to the relevance of Justice Story's remark. The misconduct that he had in view was not that of the schooner's master, but that of a boarding party directed by her first officer. Indeed, in the court martial that followed, the master of the privateer was not among those charged. Rather, he testified for the prosecution against the members of the boarding party, under oath denying even knowledge of what had transpired that day aboard the brig and out of his sight and reach.⁵⁸ That a shipowner ought not to be liable in exemplary or punitive damages for misconduct by a master of its choosing and enjoying its confidence hardly follows from a case in which the Supreme Court expressed its reluctance to make such an award against the innocent owner for misconduct of crewmen of which even their captain was ignorant.

Whether the master is manager so that his misconduct is that of the company itself, or else servant capable of independent conduct for which the company might be liable only vicariously is a fine question. That the damages in question are compensatory or punitive should not influence the answer, because each sort serves its own purpose. What should matter is the extent to which the master actually exercises discretion at the behest of the owners. On the basis of nothing more than tradition, perhaps, the masters of seagoing vessels ought to be presumed part of management, on the assumption that they can still hire and fire, pledge the ship for necessities, and bind her in a contract with her salvors. Out of respect for changing conditions in the industry, such a presumption ought to be rebuttable, enabling the owners to prove that their arrangement with the master of their vessel reserved for a superior ashore such powers. A fine line would then be presented to owners: on one side of it, the chance to escape vicarious liability by proving they denied their master in name the authority and autonomy traditionally evoked by such a title; on the other, the risk of thereby confirming shoreside mismanagement of the sort found here.

57. *Id.* at 21-22; see also Brief for the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources, as *Amici Curiae* in support of Respondents at 13-14, *Baker*, 128 S. Ct. 2605 (No. 07-219).

58. See Court Martial for the Trial of Sundry Seamen at the Navy Yard Charlestown, Jan. 25, 1815, *microformed on Records of General Courts Martial and Courts of Inquiry of the Navy Department, 1799-1867, Reel 195* (Nat'l Archives & Records Serv.).

VII. CONCLUSIONS

It should not be overlooked that this case confirms to the utmost degree of certainty three points of maritime law anterior to the three questions of law with which the Supreme Court was presented.

- Our general maritime law does not deny judges the power to award punitive damages
- The barrier to recovery of economic damages found in *Robins Dry Dock* is porous; it permits such claims by fishermen, and may permit others.
- Maritime law governs a tort within admiralty's jurisdiction even when federal jurisdiction is invoked on another basis.

Otherwise, the case should be seen as responding with these points of maritime law:

- The damages-limiting logic of *Miles* can be taken too far; it does not foreclose awarding punitive damages in cases in which the Clean Water Act is implicated.
- The amount of an award of punitive damages pursuant to maritime law is limited in certain types of cases to the amount of compensatory damages awarded. Cases in which the defendant's conduct is more egregious than reckless are not so limited. Indeed, the limit may apply only to cases in which an award of economic damages is made notwithstanding the rule of *Robins Dry Dock*.

It remains to be seen whether a shipowner otherwise not complicit may be liable vicariously for the recklessness of a master.