

Will Plaintiffs Get a Better or Worse Recovery On Maritime Wrongful Death Claims by Relying on State Damage Law?

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The U.S. Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun*, 516 US 199, 133 L.Ed.2d 578, 116 S.Ct. 619 (1996), held that the plaintiffs in a claim under maritime law for wrongful death of a "non-seafarer" may rely on state law of damages, in order to achieve a recovery of non-economic damages such as loss of society. The decision, in effect, enables such plaintiffs to avoid a risk that substantive maritime wrongful death law might not allow recovery of non-economic damages.

The decisional background leading up to *Yamaha* starts with the U.S. Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*, 398 US 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970). It judicially created a maritime substantive law right for recovery of damages for wrongful death of a non-seafarer on navigable waters other than the high seas. The only statutory maritime wrongful death law then and now was and is the Jones Act, 46 USC § 30104 *et seq.*, applicable to the death of seamen on any waters, and the Death on the High Seas Act, 46 USC § 30301 *et seq.*, applicable to the death of anyone on the high seas. Those seas are waters more than three nautical miles (a marine league) offshore of any U.S. state or territory. Thus, *Moragne* created a maritime wrongful death right of recovery for deaths of non-seamen killed in state territorial and inland navigable waters.

Moragne did not address the measure of damages for the substantive maritime law right of recovery for wrongful death that it created. In the later case of *Sea-Land Services, Inc. v. Gaudet*, 414 US 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974), non-economic damages were held recoverable in a *Moragne* wrongful death claim. In *Miles v. Apex Marine Corp.*, 498 US 19, 112 L.Ed.2d 275, 111 S.Ct. 317 (1990), however, the court said that the *Gaudet* measure applies only to claims arising out of the death of a longshoreman in U.S. territorial waters. 498 US at 31. *Miles* held that a deceased seaman's survivors could not recover non-economic damages unavailable under the Jones Act limitation of "pecuniary" loss by resorting to a *Moragne* claim based on unseaworthiness.

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An important question following the *Yamaha* decision is whether in a *Moragne* claim for maritime wrongful death, the claimants can invoke state law for recovery of non-economic damages as permitted by *Yamaha*, but avoid a state law limitation on the recoverable amount of such damages. ORS 31.710 (formerly ORS 18.560) limits the amount of recovery of non-economic damages to \$500,000. The constitutionality of that limit in wrongful death claims was upheld in *Hughes v. Peacehealth*, 344 Or. 142 (2008).

A further question as to recoverable damages in a *Moragne* claim for wrongful death of a non-seafarer may arise because of the U.S. Supreme Court's recent decision in *Exxon Shipping v. Baker*, 554 US ____, 171 L.Ed.2d 570, 128 S.Ct. 2605 (2008). There, the court created a judicial limitation on punitive damage recoveries in claims governed by maritime law. The limitation in such cases is that punitive damages cannot exceed the amount awarded for compensatory damages. This rule for maritime law cases, only, contrasts with the court's earlier decisions holding that at least single-digit multiples of compensatory damages fall within constitutional due process limitations on recovery of punitive damages. *Phillip Morris USA v. Williams*, 549 US 346, 166 L.Ed.2d 940, 127 S.Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 155 L.Ed.2d 585, 123 S.Ct. 1513 (2003).

So, in a maritime claim for wrongful death of a non-seafarer arising in Oregon territorial navigable waters (*i.e.*, inland navigable waters or coastal waters within three nautical miles offshore), will the plaintiffs, if they seek punitive damages, be able to recover 100% of any punitive damage award? Or, will the state of Oregon have the right to 60% of any punitive damage recovery pursuant to ORS 31.735 (formerly ORS 18.540)? Put another way, can the plaintiffs in such a maritime wrongful death claim rely on state law for recovery of non-economic compensatory damages, but avoid state law and invoke substantive maritime law, only, as to recovery of punitive damages? There is no split of punitive damages in maritime law.

Such questions could arise, for example in a wrongful death claim growing out of a collision of two pleasure boats on the Willamette River in Portland, with one person being killed by wrongful conduct of one of the boat operators. If the collision was due to drunkenness of the defendant, a claim for punitive damages would be in order. Such an accident is clearly governed by maritime law, as the U.S. Supreme Court held in *Foremost Ins. Co. v. Richardson*, 457 US 668, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982). Plaintiff's counsel could pursue a wrongful death claim based on *Moragne* without resorting to Oregon damage law, but would risk a holding that

non-economic damages for loss of society would not be available as a matter of maritime law. By invoking state damage law per *Yamaha*, non-economic damages are clearly available for wrongful death, but capped at \$500,000 (ORS 31.710), if that cap applies in a maritime wrongful death claim.

There appear to be no reported decisions so far on these questions. Counsel for the parties in a maritime claim for wrongful death of a non-seafarer arising from an accident in Oregon territorial navigable waters should, however, anticipate such questions, and be prepared to argue for a particular point of view. Admiralty substantive law governs a maritime claim, whether it is brought in U.S. District Court or in state court pursuant to the “saving to suitors” clause of 28 USC § 1333. Plaintiffs seeking punitive damages, if Oregon law applies on that subject, will need to face up to *DeMendoza v. Huffman*, 334 Or. 425 (2002), where the court held at 432:

“ORS 18.540 unambiguously creates in the state a substantive right as a judgment creditor to 60% of any punitive damages award.”

Note that these questions will not arise in a wrongful death claim for a seaman’s death made against his employer. The Jones Act limits wrongful death recovery to “pecuniary” loss (*i.e.*, economic damages), and *Miles* held that a seaman’s beneficiaries could not obtain a broader measure of damages by asserting a *Moragne* claim for unseaworthiness. Neither will such questions arise in claims for wrongful death occurring on the high seas under the Death on the High Seas Act, also limiting recovery to “pecuniary” loss. *Mobil Oil Corp. v. Higginbotham*, 436 US 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978). State law may not be used to obtain non-economic damages in a case falling within DOHSA. *Offshore Logistics, Inc. v. Tallentire*, 477 US 207, 91 L.Ed.2d 174, 106 S.Ct. 2485 (1986).

In claims arising out of non-seafarer deaths in Washington territorial navigable waters, plaintiffs may try to use the *Exxon Shipping* decision as a means of claiming punitive damages which would not be recoverable at all under Washington law. If that position is taken, however, can a plaintiff persuade a court to apply Washington law for recovery of non-economic loss of society damages, but allow recovery of punitive damages under general maritime law per *Exxon Shipping*?

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