Statement of Thomas C. Galligan, Jr.

President and Professor of Humanities, Colby-Sawyer College and Scholar on Torts and Maritime Personal Injury Law

on

The Deepwater Horizon Tragedy: Holding Industry Accountable

before the

U.S. Senate Committee on Commerce, Science, and Transportation

June 30, 2010

I. Introduction

Chairman Rockefeller, Ranking Member Hutchison and members of the Committee, thank you for inviting me to appear before you today. My name is Tom Galligan and since 2006 it has been my good fortune to serve as the President of Colby-Sawyer College in New London, New Hampshire where I am also a Professor in the Humanities Department. From 1998-2006, I was the dean of the University of Tennessee College of Law where I also held a distinguished professorship. From 1986-1998, I was a professor at the LSU Paul M. Hebert Law Center in Baton Rouge, where I also held an endowed professorship. From 1996-1998, I also served as the Executive Director of the Louisiana Judicial College. At both Tennessee and LSU, I taught and wrote about torts and maritime law. I am the author or co-author of several books and many articles on tort law and punitive damages. Along with Frank Maraist, I am the author of three books on maritime law, one of which is and another of which will soon be co-authored by Catherine Maraist. I have also written law review articles on various aspects of maritime law and given countless speeches on torts and maritime law; and I continue to speak and write on those subjects. It is an honor to appear before you today.

The disaster in the Gulf of Mexico has already resulted in death, injury, environmental devastation, and economic loss to individuals, businesses, and governmental entities. Additional damage is occurring every day. The staggering consequences of the spill force us to ask whether

applicable laws are fair, consistent, and up-to-date. Do they provide adequate compensation to the victims of maritime and environmental disasters? And, do our laws provide economic actors with proper incentives to ensure efficient investments in accident avoiding activities? Does our law appropriately hold tortfeasors accountable? Sadly, an analysis of the relevant laws reveals a climate of limited liability and under compensation.

The law under compensates, in part, because, the Jones Act and the Death on the High Seas Act (DOHSA), as interpreted, do not provide damages to the survivors of Jones Act seamen and others killed in high seas maritime disasters for the loss of care, comfort, and companionship suffered as a result of their loved ones' deaths. Aggravating the situation, some courts have inappropriately relied on those recovery denying rules to further limit recovery of nonpecuniary damages in other maritime cases. These failures to fully compensate raise basic issues of fairness and corrective justice. Is it right, consistent with modern law and values, and just to deny recovery for very real damages such as the loss of care, comfort, and companionship one suffers when a loved one is killed? In addition, the failure to compensate raises important issues concerning tort law, deterrence, and accountability.

If the law under compensates, economic actors, when deciding what to do and how to do it, face less than the total costs of their activities. This economic reality may, in turn, lead to under deterrence and increased risk. If the law does not hold people accountable, the risk of injury, death, and damage is increased. In the maritime setting, the climate of limitation is exacerbated by the existence of the 1851 Ship Owner's Limitation of Liability Act. That law allows a ship owner to limit its liability to the post-disaster value of a vessel, providing the relevant events occurred without the privity or knowledge of the ship owner. While punitive damages might make up for the lack of deterrence in some areas, the deterrent role of punitive

damages in admiralty is less significant because of the rule that limits the recovery of punitive damages to compensatory damages in maritime cases at a 1:1 ratio.

I will begin my analysis with a discussion of the legal fact that loss of society damages are not recoverable by the survivors of many who are killed in maritime disasters. In failing to allow recovery of loss of society damages—damages for loss of care, comfort, or companionship—maritime law is contrary to the rule prevailing in the majority of the states. Katherine J. Stanton, *The Worth of Human Life*, 85 N.D. L. Rev. 123, 130-31 (2009). Consequently, maritime law under compensates the surviving families of seamen and those killed in high seas maritime tort disasters. Congress has the chance and ability to change this state of affairs by amending the relevant statutes. Indeed Senator Leahy's proposed 2010 Survivor's Equality Act of 2010, S. 3463, would appropriately amend DOHSA to make loss of society damages recoverable.

Second, I will discuss the extension of the seamen and high seas no loss of society recovery rules to other maritime cases, thereby further limiting potential overall liability. Third, I will describe the anomalous high seas death rule that pre-death pain and suffering damages are not recoverable in a maritime survival actions where death occurs on the high seas. S. 3463 would supersede this anomalous rule.

Fourth, I will briefly explain how under compensation can lead to under deterrence and increased risk. Next, I will address the maritime doctrine of limitation of liability. Senator Schumer's proposed bill, S. 3478, would repeal the relevant provisions of the limitation act and assure more adequate compensation and deterrence.

Finally, I will review the impact of maritime punitive damages rules on risk and deterrence. Senator Whitehouse's proposed bill on maritime punitive damages, S. 3345, would improve those punitive damages rules by restoring the traditional ability to tailor a punitive award to the facts of the case.

II. Loss of Society in Maritime Wrongful Death Cases—Seaman and the High Seas

Loss of society damages are not recoverable in Jones Act wrongful death cases and/or in any case where death occurs on the high seas. This harsh legal reality is inconsistent with modern American law and does not fully or fairly compensate survivors for loss arising from the maritime wrongful death of a loved one. This no recovery rule is also inconsistent with the more progressive recovery available in high seas commercial aviation disasters.

A. Seamen

The analytical starting point in any work place maritime tort case is to determine whether an injured or deceased person was a seaman because that status determines the legal rights of the claimant and family members. A seaman is a person who does the work of a vessel, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), and who has an employment-related connection to a vessel which is substantial in duration (more than 30% of one's work time is spent on a vessel or fleet of commonly owned or controlled vessels), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and nature (the worker is exposed to the perils of the sea). *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997). Maritime law treats a semi-submersible drilling rig as a vessel. *Marathon Pipe Line Co. v. Drilling Rig/Odessa*, 761 F.2d 229,233 (5th Cir. 1985). The moveable drilling rig is a vessel because it is "capable of being used as a means of transportation on water." 3 U.S.C.A. § 3; *Stewart v. Dutra Construction Company*, 543 U.S. 481

(2005). The Deepwater Horizon was a moveable drilling rig and, therefore, under maritime law, it is a vessel. Interestingly, a permanently attached drilling platform, as opposed to a semi-submersible drilling rig, is not a vessel.

Assuming that the Deepwater Horizon was a vessel, workers with a substantial employment-related connection to the Deepwater Horizon would be seamen. A seaman has several possible claims against his or her employer: 1.) the right to recover maintenance and cure; 2.) the right to recover injury caused by the unseaworthiness of the vessel on which he or she served (a vessel is unseaworthy if it presents an unreasonably unsafe condition to the seamen on board); and 3.) a Jones Act, 46 U.S.C.A. § 30104, right to recover in negligence against his or her employer. Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in Nutshell*, 194-99 (5th ed. 2005).

1. Jones Act Negligence

The Jones Act incorporates the provisions of the Federal Employers Liability Act (FELA). 45 U.S.C.A. § 51. The Jones Act (through the FELA) provides certain survivors of seaman killed as a result of their employer's negligence with wrongful death and survival action claims against the employer. Basically, a wrongful death action is an action that compensates certain beneficiaries for the loss they suffer as a result of the death of the victim. A survival action provides recovery for the damages that the decedent suffered before his or her death.

Critically, what do the recoverable damages include and what do they not include in a Jones Act negligence wrongful death action? The survivors can recover any loss of economic support, any lost services, and other traditional types of pecuniary damages. That is they recover economic losses. The survivors *cannot* recover loss of society damages. That is, they cannot

recover for the loss of care, comfort, or companionship caused by the death. Loss of society damages are, in essence, those damages survivors suffer as a result of the fact that the deceased is no longer there to share the joys of life with the them. Thus a surviving spouse may recover any loss of support (net of taxes and what the decedent would have spent on themselves) and loss of service, such as cooking or painting or cutting the lawn and any other economic damages. But the spouse recovers nothing for the loss of the relationship. Likewise, a parent who is not financially dependent upon a child who is killed would recover nothing.

The inability of the Jones Act seaman's survivors to recover loss of society damages in the negligence action does not result from the language of the Jones Act or the FELA. Rather, it is the combination of a 1913 decision of the United States Supreme Court, *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913), which refused to recognize the right to recover loss of society damages under the FELA (and which actually predated the passage of the Jones Act by seven years) and the result of the Court's reliance on that decision in *Miles v. Apex Marine*, 498 U.S. 19 (1990).

One might arguably understand and appreciate the *Vreeland* holding in an era when the law of wrongful death was still in its relative infancy; human life spans were shorter, and given the state of technology, industry, and law, accidental death was a more common part of the American landscape than it is today. However, to deny recovery of loss of society damages in a wrongful death case today is out of the legal mainstream and is a throwback to a past era. A spouse, child, parent, or sibling of a seaman killed in a maritime disaster suffers a very real loss of society and the law should recognize it.

Congress could easily remedy this state of affairs by amending 45 U.S.C.A. § 51, the FELA wrongful death statute, to state that recovery by a named beneficiary in a wrongful death action shall "include nonpecuniary damages for loss of care, comfort, and companionship." That amendment would bring the Jones Act and FELA much more into line with modern tort law regarding the recovery of damages in wrongful death cases, as well as the economic, social, and familial realities of today. Representative Conyer's proposed bill, Securing Protection for the Injured from Limitations on Liability Act, HR 5503, would, among other things, amend the Jones Act to make loss of society damages recoverable in seaman negligence based wrongful death cases.

2. Unseaworthiness

Moving from the negligence claim for wrongful death to the unseaworthiness claim for wrongful death, the general maritime law provides certain survivors with wrongful death and survival actions against a vessel owner (or operator under many circumstances) if the seaman is killed as a result of the vessel's unseaworthiness. If the death occurs on the high seas, then DOHSA, 46 U.S.C.A. § 30302, governs the recoverable wrongful death damages arising from the vessel's unseaworthiness. DOHSA limits recovery to "pecuniary loss." 46 U.S.C.A. § 30303. Thus, the survivors of seamen killed as a result of a vessel's unseaworthy condition on the high seas may not recover loss of society damages. Consequently, the spouse, parent, or child, who has no claim for pecuniary damages, recovers nothing for the losses caused by the death of a loved one and all of the issues raised concerning the inequity, incongruity, and antiquated nature of that limitation on recovery discussed above in conjunction with the Jones Act apply to DOHSA. One case worthy of note is *Rux v. Republic of Sudan*, 495 F.Supp.2d 541 (E.D. Va. 2007), which chillingly presents the operation of DOHSA. There, 56 surviving family

members of the 17 sailors killed in the terrorist bombing of the U.S.S. Cole sued the Republic of Sudan under the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(7), alleging that Sudan was at fault for providing material assistance and support to Al Qaeda, the group responsible for the attack. The court held that DOHSA applied and because nonpecuniary damages were not recoverable, 22 family members, including parents and siblings recovered nothing as a result of the deaths even though the court noted:

> The court sympathizes greatly with plaintiffs, who continue to suffer terribly years after their loved ones died. But the court is bound to follow the legal precedent before it. Congress makes the laws; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas, as Congress did in 2000 for cases of commercial aviation accidents on the high seas, is a question for Congress alone. Accordingly, plaintiffs' IIED [intentional infliction of emotional distress] and maritime wrongful death claims are dismissed for failure to state a claim upon which relief can be granted.

495 F.Supp.2d at 565. *See also*, *Rux*, 461 F.3d 461 (4th Cir. 2006), cert. denied, 127 S.Ct. 1325 (2007); *Rux*, 672 F.Supp.3d 726 (E.D.Va. 2009). *See generally*, Ross M. Diamond, *Damage—Unequal Recovery for Death on the High Seas*, 45 Sept.—Trial 34 (2009).

Here, as in *Rux*, in addition to the general and very substantial reasons to allow recovery of loss of society damages in DOHSA cases, there is an additional analytical prong involving a 2000 amendment to DOHSA (referred to in the quote from *Rux* above) that points to the need to amend DOHSA. In response to several highly publicized commercial airline disasters--KAL 007 and TWA 800--Congress amended DOHSA to provide for recovery of nonpecuniary damages

(loss of care, comfort, and companionship), 46 U.S.C.A. § 30307(a), for death resulting from "a commercial aviation disaster occurring on the high seas beyond 12 nautical miles from the shore of the United States…but punitive damages are not recoverable." 46 U.S.C.A. § 30307(b). *See generally,* Stephen R. Ginger and Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Commercial Aviation Disasters Influenced Congress on Compensation for Deaths on the High Seas,* 75 J. of Air Law & Comm. 137 (2010) (discussing the legislation and the jurisprudence). This amendment, which was made retroactive to the day before one of the relevant air disasters, brought DOHSA into the legal mainstream as far as the survivors of victims of commercial aviation disasters. But, while the survivors of the victims of a commercial aviation disaster on the high seas may now recover nonpecuniary damages the survivors of anyone else killed on the high seas may not. It strains reason to come up with a meaningful, rational principle to justify the differential treatment, other than the very real social and political turmoil that followed the high profile tragic air disasters. The disaster of the Deepwater Horizon is, of course, a similarly tragic event, which presents an opportunity to bring the law into some logical, sensible, compassionate symmetry. S. 3463 would make loss of society damages recoverable for the survivors of anyone killed on the high seas.

To add another relevant point to the analysis, OPA 90, 33 U.S.C.A. § 2701 et seq., allows victims of oil spills to recover various damages, including removal costs, § 2702(b)(1); damage to real or personal property, § 2702(b)(2)(B); damage to natural resources used for subsistence, § 2702(b)(2)(C); and economic damages because of damage to property or natural resources even if the claimant does not own the property. § 2702(b)(2)(E). These rights to recover damages assure compensation to persons injured in various ways by an oil spill.

But, critically, OPA 90 does not apply to personal injury or wrongful death claims. *See generally, Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009)(OPA does not cover bodily injury claims damage). Consequently, the survivors of the seaman (or others) killed on the high seas as a result of negligence or unseaworthiness do not recover for loss of society while the persons whose property was damaged or who lost profits do recover. This is not to say that recovery for damaged property or lost profits is not appropriate, it is merely to point out that currently recovery of economic loss is more readily available than recovery for loss of a loved one.

I have noted above how a possible amendment to the Jones Act would deal with the seaman's negligence claim; DOHSA could also be amended to delete the word "pecuniary" before "loss" in 46 U.S.C.A. § 30303 and to add the language, "including nonpecuniary damages for loss of care, comfort, and companionship" after "loss" and S. 3463 would do exactly that.

III. Seaman's Survivors Wrongful Death Claims Against Third-Parties and Non-Seaman Wrongful Death Claims

The beneficiaries of a seaman killed on the high seas may have claims not only against the vessel but may also have general maritime tort claims against other parties, such as manufacturers, contractors, or others. Likewise, the survivors of non-seamen tortiously killed on the high seas may have maritime wrongful death claims. But by definition, if death results on the high seas (or is caused by events on the high seas) then DOHSA applies and nonpecuniary damages would not be recoverable.

As noted, if workers, who are not seaman, are killed as a result of a maritime disaster on the high seas, DOHSA would also govern their survivors' recovery which would be limited to pecuniary damages, as currently defined. The amendments to DOHSA, proposed in S. 3463, making nonpecuniary damages and pre-death pain and suffering damages recoverable, would apply to those claimants as well.

Concomitantly, if the death occurs in territorial waters, nonpecuniary damages would seem to more likely be recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974)(allowing the survivors of an LHWCA worker killed in territorial waters to recover loss of society). *See also, Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages). Thus where one dies may be more relevant to recovery than other critical circumstances, such as the injury to the relevant survivors.

Notably, if a worker is killed on a *stationary drilling platform* located over the high seas, as opposed to being killed on a semisubmersible mobile rig, state law normally would govern his or her tort recovery rights against third persons and state law very probably would mean survivors could recover loss of society and pre-death pain and suffering damages from third persons in a wrongful death action. This is because the Outer Continental Shelf Lands Act, 43 U.S.C.A. § (a)(2)(A), adopts the laws of each adjacent state as the governing law on OCS platforms, which are treated as islands in an upland state (recall that platforms, unlike rigs, are not vessels). *See generally,* Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in a Nutshell*, 323-27 (5th ed. 2005); *Alleman v. Omni Energy Services Corp*, 580 F.3d 280 (5th Cir. 2009). Thus the measure of recovery in a fatal injury action on an off-shore oil or gas production facility (a rig or platform) would depend upon whether the relevant vehicle was a platform or a

rig, even though the job that the killed worker was doing and the cause of the death was exactly the same. The point is that the potential recovery would illogically and unfairly depend upon happenstance not substance.

IV. Expanded Under Compensation

As noted above, the fact that the survivors of seamen and anyone killed on the high seas cannot recover for loss of society damages under compensates and is inconsistent with the current majority rule in America. Aggravating the situation, some courts have actually extended the scope of the Jones Act and DOHSA no recovery rules beyond their express reach and have applied them to limit or deny recovery in other maritime contexts. In *Moragne v. States Marine Lines, Inc.*, 389 U.S. 375 (1970), the United States Supreme Court created a general maritime law action for wrongful death that filled some of the gaps in maritime wrongful death law and that provided recovery in some cases not covered by DOHSA and the Jones Act. Then in, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) the Court held that the *Moragne* claim allowed the survivors of an LHWCA worker killed in territorial waters to recover loss of society damages. In so holding, the Court's decision was consistent with the modern American majority rule allowing recovery of loss of society in wrongful death cases. Thereafter, the Court, in *American Export Lines, Inc. v. Alvez,* 446 U.S. 274 (1980), held that the spouse of an injured long shore worker could recover loss of spciety/loss of consortium in a case where the worker was injured but not killed.

However, two years before *Alvez,* the Court began a trend of liability limiting decisions ostensibly based on Congressional intent. In *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), the Court refused to allow the survivors of someone killed on the high seas to rely

upon the *Moragne* claim to recover loss of society damages because those damages were not recoverable under DOHSA. The Court decided that because Congress had spoken to the subject in DOHSA (limiting recovery to pecuniary damages), the Court was not free to supplement the recovery through the general maritime law. The trend to extend liability limitation was on. Thereafter, in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Court refused to allow the plaintiffs in a high seas death case to "borrow" state law to supplement DOHSA recovery. The limitation trend continued.

Then, in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), the Court considered a case involving a seaman killed in *territorial* waters. There, a seaman was brutally murdered by a bellicose fellow crew member, who repeatedly stabbed the decedent. The decedent's mother sued the employer alleging, among other things, a Jones Act negligence wrongful death claim and a *Moragne* general maritime law wrongful action claim arising out of an unseaworthy condition of the vessel (the presence of the bellicose seaman). In a somewhat surprising decision, the Court refused to allow the mother to recover her loss of society damages on the unseaworthiness general maritime law wrongful death claim. The Court reasoned that when Congress enacted the Jones Act in 1920 and incorporated the FELA, it must have been aware of the *Vreeland* decision, holding that the FELA did not authorize wrongful death recovery for loss of society damages, and so Congress must have incorporated that holding in the Jones Act as judicial "gloss." *Id.* at 32. The *Miles* Court then reasoned that since Congress supposedly did not intend to allow recovery for loss of society damages in a Jones Act based wrongful death claim for negligence, such damages were not available in a general maritime law (*Moragne/Gaudet*) wrongful death action based on unseaworthiness. This was because, the Court said: "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 [unseaworthiness] than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33. *See generally,* David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend* , 70 La. L. Rev. 463 (2010). The *Miles* decision was, of course, arguably inconsistent with the spirit, if not the holding, of *Gaudet* and *Moragne*, and scholars have criticized it. *See* Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com. 249 (1993); 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). Moreover the Supreme Court has twice refused to extend the holding of *Miles. Atlantic Sounding Co., Inc. v. Townsend,* 129 S.Ct. 2561 (2009)(recognizing right to recover punitive damages in case alleging the arbitrary and willful failure to pay maintenance and cure); *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages).

However, despite the scholarly criticism and the Court's failure to extend the holding of *Miles,* some lower courts have relied upon *Miles, Tallentire,* and *Higginbotham* to limit recovery of nonpecuniary damages in maritime cases that do not fall under those holdings. For instance, in *Scarborough v. Clemco Industries,* 391 F.3d 660 (5th Cir. 2004), the fifth circuit said that loss of society damages were not recoverable in any wrongful death action involving a seaman, even when the claim was against a third party, who was *not* the decedent seaman's employer or the owner of the vessel on which he or she was killed. In *Doyle v. Graske,* 579 F.3d 898 (8th Cir. 2009)(boat passenger and spouse brought action in admiralty for personal injuries and loss of consortium damages sustained in boating accident off the coast of Grand Cayman Island when

steering linkage disengaged), the court held that general maritime law did not allow loss of consortium recovery for the spouse of a non-seafarer (non-seaman/non-longshore worker) injured, as opposed to killed, on the high seas. *See also, Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994). And, in *Tucker v. Fearn,* 333 F.3d 1216 (11th Cir. 2003), the court, again relying upon *Miles* held that the father of a minor killed in a sailboat accident in Alabama territorial waters could not recover loss of society damages under the general maritime law. In *Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496 (5th Cir. 1995), the court relied on *Miles* to deny recovery of punitive damages in a case involving the alleged arbitrary failure to pay maintenance and cure. Of course the Supreme Court abrogated the holding of *Guevara* in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009)(allowing punitive damages).

Of course all courts have not extended *Miles* beyond its holding. *See, Kahumoku v. Titan Maritime, LLC,* 486 F.Supp.2d 1144 (D.Hawai'i 2007)(law entitles LHWCA worker to recover punitive damages in maritime tort case); *Clark v. W & M Kraft, Inc.*, 2007 WL 120136 (S.D. Ohio 2007)(loss of consortium recovery claim available for seaman's spouse and son against third party); *In re Consolidated Coal Co.,* 228 F.Supp.2d 764 (N.D.W.Va. 2001))(loss of consortium recovery claim available for seaman's spouse against third party); *Rebardi v. Crewboats, Inc.,* 906 So.2d 455 (La. App. 1st Cir. 2005)(punitive damages available).

The fact that some courts have not extended *Miles* beyond its holding and some have done so results in inconsistency. But, more importantly, the fact that courts have extended *Miles* increases the number of cases in which the law fails to recognize the reality of injury and loss and in so doing either fails to compensate for that loss at all or, at best, under compensates. The extension of limited liability and under compensation expands the general climate of limited liability in maritime tort cases and hence maritime disasters. The extensions increase the

possibility of under deterrence and the potential for increased and inefficient risk. Amending the Jones Act (actually the FELA) and DOHSA, to allow recovery for loss of care, comfort, and companionship would solve the problem because the amendments would do away with the language upon which courts have relied to limit recovery and increase risk.

V. Survival Action Pre-Death Pain and Pain and Suffering

Additionally, shifting from the wrongful death claim to the survival action claim, the Supreme Court in a case that did not involve a seaman has refused to allow recovery of pre-death pain and suffering as part of a survival action claim if death occurs on the high seas. *Dooley v. Korean Air Lines Co*., Ltd., 524 U.S. 116 (1998). The law does allow the Jones Act seaman's survivors to recover for pre-death pain and suffering. *See*, David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 Tul. Mar. L.J. 493 (2008). Thus, *Dooley* does not apply to those seaman claims but in any case covered by *Dooley,* involving a death caused by events on the high seas, no matter how much the decedent may have suffered before his or her death, those damages are not recoverable.

To remedy this situation, Congress could amend the law to not only make loss of society damages recoverable, as suggested above, but also to make pre-death pain and suffering available in maritime survival actions. S. 3463 would do exactly that by making damages for pre-death pain and suffering recoverable.

VI. Under Compensation Leads to Under Deterrence and Increased Risk

Critically, in terms of the subject of this hearing—holding industry accountable--if the law under compensates, it will, by definition, under deter which will lead to lower than optimal

investments in safety. Lower investments in safety and accident avoidance can lead to increased risk. This is true because when deciding what to do and how to do it, the rational economic actor will consider the costs of its activities. To the extent that a person does not have to pay a cost, it is much less likely to take that unpaid cost into account when deciding what to do and how to do it. As Judge Guido Calabresi so ably noted many years ago in *The Costs of Accidents: A Legal and Economic Analysis* (1970), one of the costs economic actors must consider is the costs of accidents. The costs of accidents are just as real and important as the costs of goods, the costs of raw materials, and the costs of labor. The critical importance of encouraging actors to take account of accident costs is also at the heart of Judge Richard Posner's important law and economics scholarship and jurisprudence on negligence. *See, e.g.,* Richard A. Posner, *A Theory of Negligence,* 1 J. of Legal Stud. 29 (1972). This truism about taking account of accident costs is also the crux of Judge Learned Hand's famous negligence formula that provides that one is negligent if the burden or cost of avoiding a loss is less than the probability of the loss occurring times the anticipated magnitude (or value) of the loss if the loss arises *and* the actor fails to incur the burden, i.e., the costs of accident avoidance. Put algebraically as Judge Hand himself did, one is negligent if $B < P \times L$ and the actor does not avoid the loss by making the investment in safety. Interestingly Judge Hand originally articulated his famous and influential negligence formula in a maritime tort case. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

If a person does not take account of the costs of accidents when deciding what to do and how to do it, he or she will under invest in safety. Of course, compensatory damages are based in corrective justice and are designed to make the plaintiff whole—to put him or her in the position he or she would have been in if the wrong had never occurred. Professor Douglas

Laycock has called it the "plaintiff's rightful position." Douglas Laycock, *Modern American Remedies* 14 (1985). However, compensatory damages also play another role in the regulation of American tort law because tort law not only compensates, it also deters unsafe conduct. And compensatory damages play a critical role in deterrence. Damages in tort cases force people to consider the costs of accidents when making decisions about engaging in risk. Moreover, as I have written:

> In addition to forcing actors to pay some accident costs, compensation performs a second efficiency related function. The tort system operates as a data bank providing actors access to information on the number of accidents that do occur, the damages that accident victims suffer, and the dollar value of those damages. In this regard the "fault" system facilitates actors' ex ante [beforehand] calculations by providing them with the data they need to calculate the value of the damages that their activities impose on others. Given a large number of similarly situated actors, over time damages paid might be expected to somewhat equal the actual value ex ante of an activity's accident costs … But in order for our current system to operate most effectively, some real relationship must exist between the accident costs society wants the actor to consider beforehand and the damages we force the actor to pay after the fact. The damages we award to compensate plaintiffs in personal injury cases and the categories of accident costs we want actors to consider ex ante should highly correlate. If actual damages awarded in tort suits do not reflect the costs we want actors to consider ex ante, but the system relies upon those actual awards as a "definition" of accident costs, then the system will not optimally deter. If the damages awarded in tort suits are less than the total costs we want actors to discount ex ante, we are encouraging people to consider less than all of the costs of that activity and

> to overengage in it. Likewise, if we overcompensate accident victims we are encouraging actors to underengage in the activity.

Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 25-29 (1990)(footnotes omitted).

To reiterate, to the extent tort law does not adequately compensate, it under deters and contributes to a more dangerous world than people have a right to expect. And, in the maritime setting the law under compensates because it does not compensate for loss of society in seaman and high sea death cases (other than commercial aviation disasters) and because courts have extended those no recovery rules to other maritime contexts. Of course maritime disasters and oil spills can cause more harm than injury and death. They cause damage to the environment and that damage to the environment devastates lifestyle, culture, and global well-being. It harms everyone.

Moreover, there is evidence that environmental disasters can have devastating mental health effects. *See, Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars in Support of Respondents in Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008)(No. 07-219) at 8. In natural disasters the effects typically subside within two years, *id.* (*citing* Catalina M. Arata et al., *Coping with Technological Disaster: An Application of the Conservation of Resources Model to the Exxon Valdez Oil Spill*, 13 J. Traumatic Stress 23, 24 (2000)). But, technological disasters resulting from breakdowns by humans "consistently have social, cultural and psychological effects that are both more severe and longer-lasting." *Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars, supra* at 8 (citations omitted). The effects are particularly acute where the disaster impacts renewable

resource communities like fisheries. *Id.* at 9. These effects manifested themselves in the Prince William Sound community in the wake of the Exxon Valdez spill in: chronic feelings of helplessness, betrayal, and anger; high rates of anxiety, depression, and post-traumatic stress; increased health care demands; increased crime rates; and more. *Id.* at 13-18. These injuries were very real and absent some compensation or device to force actors to consider them when deciding what to do and how to do it (i.e. some device to hold them accountable), they will not be forced to do so, tending towards under deterrence and increased risk.

While OPA 90 provides liability for removal costs, property damage, economic loss, and more, it does not cure the problem of under compensation and under deterrence in maritime personal injury and wrongful death cases because it does not apply to maritime personal injury and wrongful death cases. The under compensation resulting from the current state of maritime personal injury and wrongful death law and the serious emotional harm that can result from a maritime, environmental disaster is not only unfair and inconsistent but it will potentially lead to increased risk. These economic realities are exacerbated in the maritime setting by the existence of the 1851 Ship Owner's Limitation of Liability Act.

VII. Limitation of Liability

The Limitation of Liability Act, 46 U.S.C.A. § 30501 et seq., applies to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the limitation act allows a vessel owner (and some others) to limit its liability to the post-voyage value of the vessel if the liability is incurred without the privity or knowledge of the owner. 46 U.S.C.A. §§ 30505(a), (b), and 30506(e). And, the owner is entitled to retain any hull insurance. One may justifiably wonder whether an act passed at a time before the modern development of

the corporate form (and other liability limiting devices) and the evolution of bankruptcy law is still salient; however, limitation is still extant as a matter of maritime law. The vessel owner creates a fund equal to the post-accident value of the ship (not including the hull insurance). The claimants then share the fund in proportion to the value of their claims. Personal injury and wrongful death claimants share with other claimants but if the vessel is a seagoing vessel and the fund is not adequate to provide the personal injury and wrongful death claimants with recovery equal to $420 times the gross tonnage of the vessel, the owner must provide the difference, up to $420 per ton but no more. 46 U.S.C.A. § 30506 (b).

OPA 90 has its own liability limitation scheme and the applicable limit in this matter seems to be $75,000,000. While the Supreme Court has not considered the matter, lower federal courts have held that the OPA 90 supersedes the limitation act on OPA 90 claims. *See, e.g., Complaint of Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 595 (5th Cir. 2008) (dicta); *Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009).

But, as noted, OPA 90 does not apply to personal injury or wrongful death. Thus the Limitation of Liability Act is applicable in a maritime disaster to allow a vessel owner to limit its liability for personal injury and wrongful death claims. Clearly, this liability limiting device can lead to drastic under compensation to the victims of maritime disasters. Repealing the relevant portions of the Limitation of Liability Act would, of course, cure the problem of under compensation and under deterrence in general. Senator Schumer's proposed bill, S. 3478 would do exactly that.

VIII. Maritime Punitive Damages

The under compensation and under deterrence resulting from the dated, inconsistent no recovery rules described above and the Limitation of Liability Act might be alleviated by the availability of punitive damages; however, the U.S. Supreme Court in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), held that punitive damages in most maritime cases are limited to or capped by a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded.

Punitive damages are damages in addition to compensation which are designed to punish and deter. They are only awarded where the plaintiff has proven fault; compensatory damages are awarded; *and* the plaintiff proves that the defendant's conduct was worse than negligence; *i.e*, it was intentional, willful, wanton, or reckless.

But how could punitive damages potentially alleviate the under deterrence caused by under compensatory damage awards?

> It is common ground among legal scholars and economists that inefficient behavior will not be deterred unless actors are forced to internalize all of the costs associated with their activities. Although adequate deterrence may generally be achieved through an award of compensatory damages, an award of punitive damages may be necessary to achieve complete deterrence in cases in which compensatory damages fail to fully account for the costs of a tortfeasor's actions.

Brief Amici Curiae of Sociologists, Psychologists, and Law and Economic Scholars, supra at 2.

The United States Supreme Court has twice in the last two and one half years held that punitive damages are recoverable under general maritime law. *See, e.g., Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009); *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008).

After these two decisions punitive damages are arguably are available in seaman related cases given the holding in *Townsend* that a seaman may recover punitive damages under the general maritime law arising out of the arbitrary and willful failure to pay maintenance and cure. But punitive damages have not been traditionally recoverable in DOHSA cases. The matter will now be the subject of future argument and litigation. Notably, however, the potential absence of punitive damages in cases involving deaths for which no loss of society and/or no recovery of pre-death pain and suffering are available may inadequately deter those who engage in activities that may cause injury or loss of life because it can result in an undervaluing of human life and the tragic ramifications when it is lost. *See,* Thomas C. Galligan, Jr. *Augmented Awards: The Efficient Evolution of Punitive Damages,* 51 La. L. Rev. 3 (1990).

Additionally, even if available, the Court in *Exxon Shipping Co. v. Baker*, limited the amount of punitive damages recoverable in maritime cases to a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded. Justice Stevens was among the dissenters and of one of the reasons for his disagreement with the majority was that maritime law was under compensatory.

The majority noted that studies did not indicate a "marked increase" in the frequency of punitive damages over recent years. *Id.* at 2624. It also noted that the dollars awarded had not grown over time in real terms. *Id.* And the Court pointed out that the mean ratio of punitive damages to compensatory damages in the cases studied was less than one to one. *Id.* But the Court was apparently concerned with the potential unpredictable spread between high and low punitive awards and it was that concern which prompted the decision to generally limit the ratio of punitives to compensatories to 1:1. *Id.* at 2625. Critically, the Court pointed out that the case before it involved conduct which was worse than negligence but not malicious. *Id.* at 2631. It

also noted that the activity was "profitless" to the tortfeasor. *Id.* The decision and the ratios should arguably not apply to cases involving higher levels of blameworthiness or "strategic financial wrongdoing." *Id.* n.24.

Whatever one might argue about cases to which the *Exxon Shipping Co. v. Baker* 1:1 ratio should not apply, I believe that most lower court judges sitting in admiralty cases would apply the ratio to maritime cases they decide due to a concern about being overruled. The ratio cap then deprives a judge or jury of the traditionally available ability to tailor a punitive award, within Constitutional due process limits, s*ee BMW of North America v. Gore,* 517 U.S. 559 (1996), to the particular facts of the case, including the level of blameworthiness, the harm suffered, the harm threatened, the profitability of the activity, and other relevant factors. Indeed one wonders if the 1:1 ratio aspect of *Exxon Shipping Co. v. Baker* would have been decided the same way if another maritime environmental disaster had occurred before the decision.

Senator Whitehouse's proposed bill, S. 3345, would restore the traditional ability to tailor a punitive award to the facts of the case by providing: "[I]n a civil action for damages arising out of a maritime tort, punitive damages may be assessed without reference to the amount of compensatory damages assessed in the action." The effect of the proposed amendment would be to increase the deterrent impact of punitive damage awards in maritime cases.

While the Supreme Court has never considered the issue, several courts have held that punitive damages are not available under OPA 90. *See, e.g., South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001). *See* the discussion in: Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May

2010 (Available from Louisiana State Bar Association and the authors). The cited decisions say that OPA 90 preempts maritime law and therefore punitive damages are not available in a case involving maritime law and OPA 90. Interestingly, OPA 90 actually provides that it does not affect admiralty or maritime law. 33 U.S.C.A. § 2751(e). Moreover, OPA 90 does *not* provide that punitive damages are *not* recoverable; it is merely silent on the subject. And both *South Port Marine LLC v. Gulf Oil Ltd*., 234 F.3d 58 (1st Cir. 2000) and *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001) were decided before the Supreme Court's affirmation of the right to recover punitive damages in *Townsend* and *Exxon*. Indeed in *Exxon*, the Court refused to find that the Clean Water Act, 33 U.S.C.A. § 1321 *et seq.*, which was silent on the subject of punitive damages, precluded the recovery of punitive damages under maritime law. Finally, OPA 90 does not, as noted, apply to personal injury and wrongful death claims. Consequently, any preemptive affect OPA 90 might have on punitive damages in personal injury and wrongful death cases would seem to be limited.

IX. Conclusion

Recovery in maritime tort cases is under compensatory. The failure to allow recovery of loss of society damages in seaman and high seas maritime wrongful death cases (other than commercial aviations disasters) is unjust, dated, inconsistent, and out of alignment with current values. The rules not only fail to compensate but they arguably lead to under deterrence and increased risk because economic actors do not have to take those risks into account in deciding what to do and how to do it. S. 3463 remedy that injustice. The extension of those rules beyond the contexts in which they arose exacerbates the problems and extends the climate of liability limitation. This risky state of affairs is aggravated by the 1851 Ship Owner's Limitation of Liability Act, the relevant parts of which S. 3478 would repeal, and the potential positive effect

of punitive damages is limited by the 1:1 punitive damages to compensatory damages rule of *Exxon Shipping Co. v. Baker*. S. 3345 would restore traditional flexibility in maritime punitive damages cases. As noted and as the various proposed bills referred to herein show, amendment and reform is both possible and necessary. The tragedy in the Gulf of Mexico provides a sad but necessary opportunity for our nation to reconsider our law and make it more just in the aftermath of this disaster.