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There Are More Things to Punitive Damages in Admiralty Than the 1:1 Ratio Set Forth in Exxon's Legal Philosophy

Thomas C. Galligan Jr.
Louisiana State University Law Center, tgalligan@lsu.edu

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There Are More Things to Punitive Damages in Admiralty Than the 1:1 Ratio Set Forth in *Exxon*'s Legal Philosophy

*Thomas C. Galligan, Jr.**

ABSTRACT

In Exxon Shipping Co. v. Baker, the U.S. Supreme Court recognized the right to recover punitive damages in admiralty cases and held that punitive damages in the case before it could not exceed the amount of the compensatory damages awarded plus the amount of settlements in related cases. In so holding, the Court reviewed many studies related to punitive damages and said that in a case where the defendant's conduct was reckless but not worse, where the damages awarded were substantial, and where the defendant was not motivated by profit a 1:1 ratio of punitive to compensatory damages was appropriate. After Exxon, it was unclear if the decision imposed an across-the-board 1:1 ratio cap on punitive damages vis-à-vis compensatory damages in admiralty or was limited to cases "like" Exxon.

This Article argues that the appropriate reading of Exxon is that it created a variable, multi-factor approach to punitive damages in maritime cases, rather than a universal 1:1 rule. The variable approach is supported by a careful reading of Exxon itself, the desirability of flexibility in imposing punitive damages for purposes of adequate punishment and efficient deterrence, and the jurisprudence since Exxon.

While a variable approach is more desirable than a 1:1 cap, thorny issues arise with the application of any ratio in punitive damages cases involving the arbitrary and capricious failure to pay maintenance and cure. The injured seaman often joins the failure to pay maintenance and cure claim with Jones Act and unseaworthiness claims; but punitive damages are not available in Jones Act and unseaworthiness claims. Thus, where the claims overlap a court must be careful that the compensatory damages denominator in the punitive damages ratio fraction only includes compensatory damages arising out of the failure to pay the maintenance and cure claim. This piece recommends how courts can assure the needed precision and accuracy.

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* LSU Interim President, Dodson & Hooks Endowed Chair in Maritime Law, James Huntington and Patricia Kleinpeter Odom Professor of Law. Special thanks to my former research assistant, Steve Spires, whose work made this piece possible.

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INTRODUCTION

In act I, scene five of the eponymous play, Hamlet tells Horatio, “There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy.”¹ Hamlet is apparently letting his friend know that there are limits to the philosophy they learned together as students at Wittenberg. Likewise, there is more to any area of law than the holding in any particular case, including a U.S. Supreme Court decision, and subsequent courts must consider the context of the previous ruling, the facts, any limiting language in the previous opinion, and the underlying policies or purposes of the relevant body of law. These truths are especially applicable in admiralty because so much of American maritime law is judge-made.

In *Exxon Shipping Co. v. Baker*,² the U.S. Supreme Court acknowledged³ that a plaintiff in an admiralty case may, where

1. WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 5, l. 187–88 (“There more things in heaven and earth, Horatio, Than are dreamt of in your philosophy.”).

2. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

3. The defendant, Exxon, unsuccessfully argued that the Clean Water Act, or 33 U.S.C. § 1321, preempted the punitive damages claim before the Court. *Id.* at 485–90. But technically, Exxon did not “offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case.” *Id.* at 490. But the Court’s entire discussion essentially presupposes that punitive damages are available in maritime cases, and *Atlantic*

appropriate, recover punitive damages. After recognizing the right to recover punitive damages in admiralty, Justice Souter,⁴ writing for the Court, then engaged in an extensive discussion of the appropriate ratio between punitive damages and compensatory damages in the case before the Court. He then stated that the governing ratio in a case “like” *Exxon* was 1:1 (punitive damages: compensatory damages).

Justice Souter’s discussion of the ratio question was extensive, running to 26 pages in the official reports. Justice Souter considered the jurisprudence, but he went beyond it to discuss multiple studies of punitive damages awards. He wrote about the frequency of awards, the magnitude of awards, the ratios of punitive to compensatory damages as revealed in the studies, standard deviations in punitive damages awards, and more. His opinion built to a crescendo in which he stated that in:

cases like this one . . . given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award [for punitive damages in the studies the Court consulted], is a fair upper limit in such maritime cases.⁵

A first read of Justice Souter’s opinion might lead one to conclude that, given the extensive, in-depth discussion of the matter, the Court was articulating a rule for all maritime cases. But the Court expressly stated that the 1:1 ratio was applicable to “cases like this one.” The Court said that the decision was applicable to “such maritime cases.”⁶ “Such maritime cases” are not, literally, all maritime cases. Linguistically, then, “such maritime cases” are “cases like this one.” But what about maritime cases that are not like *Exxon*? Does the 1:1 ratio decision apply to those other cases? Alternatively, is the 1:1 ratio a universal rule for all admiralty cases or is it limited to *Exxon* itself and, perhaps, similar fact situations?

A good place to start the search for a solution to that question is to decide what “cases [are] like” *Exxon*, i.e., to define such cases. Happily, Justice Souter gave us more than a hint of an answer to that question. He described the *Exxon* case as follows: “[Here] [w]e confront . . . a case of reckless action, profitless to the tortfeasor, resulting in substantial

Sounding Co. v. Townsend, discussed herein, confirms that point. 557 U.S. 404 (2009).

4. Justice Souter wrote for the majority. Justice Alito took no part in the consideration of the case. *Exxon*, 554 U.S. 471.

5. *Id.* at 513.

6. *Id.*

recovery for substantial injury.”⁷ Immediately before that statement, Justice Souter wrote that the case involved conduct that was “worse than negligent but less than malicious.”⁸ So perhaps the 1:1 cap would not apply in a case where the defendant’s behavior was malicious—worse than reckless—or where the defendant’s activity that gave rise to the punitive damages claim was profitable or where the plaintiff’s injury was not substantial, i.e., the compensatory damages were not great.⁹ Notably, *Exxon* was also a case where the damage arising from the defendant’s conduct was not difficult to discover.

Since *Exxon*, the U.S. Supreme Court revisited the issue of the recoverability of punitive damages in admiralty in *Atlantic Sounding Co. v. Townsend*.¹⁰ In *Townsend*, the Court, in an opinion by Justice Thomas, held that a seaman could recover punitive damages from an employer who willfully and arbitrarily failed to pay maintenance and cure. Justice Thomas reasoned that (1) punitive damages were available at common law; (2) punitive damages were available in maritime law; (3) there was nothing to indicate that the general rule allowing recovery of punitive damages in admiralty did not apply in maintenance and cure cases; and (4) Congress had not displaced or otherwise abrogated the general rules regarding the recoverability of punitive damages in maintenance and cure cases.¹¹ In a footnote, the Court also said, in part: “Nor have petitioners

7. *Id.* at 510–11. *Exxon* was a case where a relapsed alcoholic, captaining an Exxon oil tanker, ran aground in Prince William Sound and caused significant damages (the jury awarded the relevant plaintiffs \$287 million and Exxon also settled with other plaintiffs for \$303 million). In addition, Exxon paid over \$3 billion in cleanup, penalties, and fines. Exxon’s recklessness was in allowing the alcoholic to continue to captain its ships despite having knowledge of his relapse. The failure to relieve the captain of command was not profit-motivated. The trial court had awarded \$4.5 billion in punitive damages, which the Ninth Circuit ultimately reduced to \$2.5 billion.

8. *Id.* at 510.

9. One of the justifications for punitive damages (as well as class actions) is that if the defendant causes a minor injury to many, no single plaintiff would be economically motivated to file suit, even though the total damages inflicted upon all plaintiffs might be significant. Thus, allowing recovery of punitive damages provides an incentive to sue and consequently deter the defendant from continuing to engage in the wrongful behavior. *See, e.g.*, Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 704 (2005).

10. 557 U.S. 404 (2009).

11. *See* FRANK L. MARAIST ET AL., *ADMIRALTY IN A NUTSHELL* 234–35 (7th ed. 2017); *see also* Thomas C. Galligan, Jr. & Brittan J. Bush, *Displacement and Preemption: The OPA’s Effect on General Maritime Law and State Law Punitive Damages Claims*, 42 CUMB. L. REV. 1 (2011). *See generally Townsend*, 557 U.S. 404.

argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. We do not decide these issues.”¹²

Now, 12 years have passed since the decision in *Exxon* and 11 years have elapsed since the decision in *Townsend*. It is time for a review of those cases that have considered and applied the *Exxon* 1:1 ratio. A review of those decisions reveals that the courts generally and correctly have not treated the 1:1 ratio as a universal cap on the maximum amount of punitive damages recoverable in a maritime tort case. Instead, the courts have adopted a variable approach based on various factors: conduct, profit motivation, and size of the compensatory damages award. Judges have realized that where the defendant engaged in conduct worse than recklessness or where the defendant’s underlying activity giving rise to the liability for punitive damages was profit-motivated, courts can and should award punitive damages in excess of the compensatory damages. Courts have also shown a willingness to award punitive damages greater than compensatory damages in cases where the compensatory damages are not substantial.

Interestingly, maintenance and cure cases involving punitive damages present some interesting and thorny issues regarding the application of any applicable ratio. This is because the maintenance and cure claim may be cumulated with other claims under the Jones Act or for unseaworthiness and punitive damages. Critically, punitive damages are not available in Jones Act cases (other than those involving the arbitrary and capricious failure to pay maintenance and cure),¹³ and in 2019, in *Dutra Group v. Batterton*,¹⁴ the Court held that punitive damages are not recoverable as part of a seaman’s claim against the vessel owner for unseaworthiness based upon the applicable statutory scheme.¹⁵ Thus, where the claims

12. *Townsend*, 557 U.S. at 424 n.11 (citation omitted) (citing *Exxon*, 554 U.S. at 514–15).

13. *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2310 (2015).

14. *Dutra Grp. v. Batterton*, 139 S. Ct. 2275 (2019), *rev’g* *Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir. 2018), *and effectively overruling* *Tabingo v. Am. Triumph, LLC*, 391 P.3d 434 (Wash. 2017), *cert denied*, 138 S. Ct. 648 (2018). A divided *en banc* Fifth Circuit had previously held that punitive damages were not available where a seaman was injured or killed, as a result of an unseaworthy condition of the relevant vessel. *McBride*, 768 F.3d 382.

15. The Court relied upon the Jones Act, 46 U.S.C.A. § 30104. While the U.S. Supreme Court has not considered the issue, and the Fifth Circuit has reserved the questions, *Casaceli v. Martech Int’l, Inc.*, 774 F.2d 1322 (5th Cir. 1985), lower courts have authorized recovery of punitive damages in actions

overlap a court must be careful that the compensatory damages denominator in the punitive damages ratio fraction only includes compensatory damages arising out of the claim for failure to pay maintenance and cure, not damages solely awarded for Jones Act negligence or unseaworthiness. The courts must be careful to assure the needed precision and accuracy.

The *Exxon* Court also made clear that it was considering the ratio issue based on its admiralty jurisdiction and its authority to develop the law of admiralty in a common-law-type, case-by-case fashion. The Court was not analyzing the issue as a procedural or substantive due process question.¹⁶ But even though *Exxon* was not a due process case, some courts continue to confuse the matter; others question whether *Exxon* may impact the relevant ratio outside the maritime context;¹⁷ and some tend to inappropriately mix the admiralty and due process analyses.¹⁸ Notably, although due process issues may arise in an admiralty case, courts should separate the admiralty analysis and the due process analysis. The court should first consider the ratio question as an admiralty matter (deciding the applicability or not of the 1:1 rule) and only thereafter consider the due process issues, if necessary.

In the following section, I will explain why *Exxon*'s 1:1 ratio is not a bright-line rule based on a careful reading of *Exxon* itself, the ensuing jurisprudence, and the reasons why flexibility is desirable. In Section II, I will discuss the particular ratio issues raised in maintenance and cure cases involving punitive damages. In Section III, I will briefly explain the analytical interaction between a court's admiralty punitive damages analysis and the due process punitive damages analysis. Finally, I will set forth some brief conclusory remarks.

brought by a longshore worker under 33 U.S.C.A. § 905(b). See *In re Rodi Marine LLC*, No. 17-5394, 2019 WL 861251 (E.D. La. Feb. 22, 2019); *Callahan v. Gulf Logistics, L.L.C.*, No. 06 CV-0561, 2013 WL 5236888 (W.D. La. Sept. 16, 2013); *Rutherford v. Mallard Bay Drilling L.L.C.*, No. 99-3689, 2000 WL 805230 (June 21, 2000); *Summers v. Salmon Bay Barge Line, Inc.*, No. 12-5859, 2013 WL 5912917, at *11–12 (W.D. Wash. Nov. 4, 2013).

16. For a discussion of a significant portion of the Court's punitive damages substantive due process decisions, see Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1243–56 (2006); see also *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

17. See, e.g., *Wright v. Fentress Cnty.*, No. 17-0070, 2019 WL 1828302 (M.D. Tenn. Mar. 22, 2019).

18. *Warren v. Shelter Mut. Ins. Co.*, 233 So. 3d 568 (La. 2017).

I. IS THE 1:1 RATIO A BRIGHT-LINE RULE/CAP OR MERELY A GUIDE
APPLICABLE IN CASES LIKE *EXXON*?

In this section, I will discuss the jurisprudence addressing whether the *Exxon* Court's holding of a 1:1 ratio is an across-the-board cap on recovery of punitive damages in maritime cases or merely a guideline applicable to cases like *Exxon* in which the conduct was reckless (and not worse, i.e., malicious), not profit seeking, and where there was a significant compensatory damage award as well as other fines, penalties, settlements paid, or additional compensatory-damages awards in other related cases. I will begin the analysis with *Exxon* itself.

A. *Exxon*

Perhaps the best argument that the 1:1 ratio Justice Souter articulated in *Exxon* is an across-the-board rule is that his analysis leading up to the announcement of the ratio was extensive, even exhaustive.¹⁹ The language is broad. Moreover, the concerns which Justice Souter considered regarding punitive damages—their amount and their variability—are applicable across the board. And, after all, *Exxon* is a U.S. Supreme Court decision. Moreover, Justice Stevens, in partial dissent,²⁰ counselled discretion and judicial restraint. He noted that legislatures, not courts, created “precise ratio[s]” of punitive to compensatory damages.²¹ Justice Ginsburg also dissented, in part,²² and expressed concerns for judicial law-making. Justice Breyer also dissented, in part, because he thought that the circumstances justified a deviation from the 1:1 rule.²³ So one could claim that the partial dissents indicate that those Justices read the 1:1 ratio as a “rule.”

But all that said, the Court, in Justice Souter's opinion, expressly limited its holding to “cases like this one.” And the Court referred to “cases like this one” as “such cases.” Again, such cases, grammatically and logically, are not all cases. Moreover, and critically, in the first paragraph

19. One might question the heavy reliance on social science data and the risks inherent in having a judge, who is not necessarily an expert in social science and statistics, make decisions based on such data. Be that as it may, the Court has famously relied upon social science data in the past. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

20. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 516 (Stevens, J., concurring in part and dissenting in part).

21. *Id.* at 520 (Stevens, J., concurring in part and dissenting in part).

22. *Id.* at 522 (Ginsburg, J., concurring in part and dissenting in part).

23. *Id.* at 525 (Breyer, J., concurring in part and dissenting in part).

of the opinion, Justice Souter stated that the issue before the Court was “whether the award . . . in this case is greater than maritime law should allow in the circumstances.”²⁴ And, he noted the particular factors at play in *Exxon*: reckless—not malicious—conduct, no profit motive behind the wrongful conduct giving rise to the incident, substantial compensatory damages, and other cleanup costs, fines, and penalties. It bears noting, as quoted in the next paragraph, that Justice Souter referred to the damages caused by the oil spill as “staggering.”²⁵ At the end of the day, this language that limits the breadth of the earlier discussion deserves just as much emphasis and weight as the earlier, broad language.

In his *Exxon* opinion, Justice Souter rejected 3:1 punitive to compensatory damages ratios, among others. In rejecting 3:1 or other ratios, he articulated the limiting language quoted herein. He wrote:

[O]ne feature of the 3:1 schemes dissuades us from selecting it here. With a few statutory exceptions, generally for intentional infliction of physical injury or other harm, the States with 3:1 ratios apply them across the board (as do other States using different fixed multipliers). That is, the upper limit is not directed to cases like this one, where the tortious action was worse than negligent but less than malicious, exposing the tortfeasor to certain regulatory sanctions and inevitable damages actions; the 3:1 ratio in these States also applies to awards in quite different cases involving some of the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor’s financial gain. We confront, instead, a case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.²⁶

So, if the Court rejected the 3:1 ratio because it applied in all cases, why would it adopt a 1:1 ratio that applied to all admiralty cases? I contend that it would not; to do so would be illogical. Moreover, in articulating the

24. *Id.* at 476 (majority opinion).

25. *Id.* at 510–11.

26. *Id.* (citations omitted). He also rejected the 2:1 ratio applicable in some federal treble damages statutes because, in part, Congress created them to stimulate enforcement through private actions, an incentive not needed in cases like *Exxon*.

1:1 ratio, Justice Souter, while returning to the social science data he had earlier discussed, said:

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. . . . In a well-functioning system, we would expect that awards at the median [1:1] or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (*cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example*) and cases (*again like this one*) without the modest economic harm or odds of detection that have opened the door to higher awards. . . . On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which *cases like this one* largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a *fair upper limit in such maritime cases*.²⁷

Certainly, Justice Souter relies on the social science research, but I have highlighted the language limiting the application of the 1:1 ratio to “such cases.” Both in distinguishing 3:1 and other ratios and in articulating the 1:1 ratio, Justice Souter consistently limited the 1:1 ratio to “cases like this one.” Words matter, and every word matters in a judicial opinion. The holding of the case is what matters most, and the holding in *Exxon* applies to the facts before the Court. And the reach beyond the holding is expressly limited to “cases like this one.”

Finally, even though some language in Justice Ginsburg's partial dissent could be read as believing Justice Souter had created a rule, she also wrote:

[A]ssuming a problem in need of solution, the Court's lawmaking prompts many questions. The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale: Exxon was not seeking “to augment profit,” nor did it act “with a purpose to injure,” *ante*, at 2622. What ratio will the Court set for defendants who acted maliciously

27. *Id.* at 512–13 (emphasis added) (citations omitted).

or in pursuit of financial gain? See *ante*, at 2631 – 2632. Should the magnitude of the risk increase the ratio and, if so, by how much? Horrendous as the spill from the *Valdez* was, millions of gallons more might have spilled as a result of Captain Hazelwood’s attempt to rock the boat off the reef.²⁸

That language clearly indicates that she understood there may be different applicable ratios in different cases where the defendant’s conduct was more blameworthy or profit-driven.

A fact- or case-type, limited reading of *Exxon* is also appropriate because it is consistent with the nature and purposes of punitive damages. Punitive damages exist to punish and deter the defendant. Punishment should be proportional to the level of wrongdoing. Deterrence should be adequate to induce the defendant and others not to repeat the wrongful behavior giving rise to the plaintiff’s injuries. There are times when the heinous nature of the defendant’s behavior dwarfs the compensatory damages awarded. Alternatively, malicious, or even reckless, behavior may give rise, luckily for the plaintiff, to small compensatory damages awards. This may occur in maintenance and cure cases where the personal injuries are not severe, but the employer willfully and wantonly failed to pay maintenance and cure. Where compensatory damages are low, punitive damages are an inducement to bringing suit where it might not otherwise be worth the investment.²⁹ Now, let me turn to the post-*Exxon* jurisprudence and how various courts have considered and applied the 1:1 ratio.

B. The Post-Exxon Jurisprudence

There are several cases in which the ratio of punitive to compensatory damages was 1:1 or less and, thus, there were no questions concerning whether the 1:1 ratio is an across-the-board cap or a guideline applicable to “cases like” *Exxon*.³⁰ There are some judicial statements that the 1:1

28. *Id.* at 524 (Ginsburg, J., concurring in part and dissenting in part).

29. See, e.g., Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2004).

30. In *Barnes v. Sea Hawaii Rafting, LLC*, a seaman was injured by an explosion on a small boat used for commercial snorkeling trips. No. 13-00002, 2018 WL 4854662 (D. Haw. Oct. 5, 2018). The employer did not pay maintenance and cure, claiming that it had attempted to investigate the claim, but the seaman did not cooperate. Among other claims, the plaintiff sought punitive damages and attorney’s fees for the willful failure to pay maintenance and cure. The court held that the seaman was entitled to punitive damages. Before that decision, the court

had entered a previous order that the seaman was entitled to maintenance and cure, even though the amount was not established, yet the employer still failed to pay it for five years. The court awarded: past maintenance of \$140,950.34, cure of \$21,697.76, punitive damages in the amount of \$10,000 with attorney's fees and costs to be determined after appropriate motions, pre-judgment interest at 10% per year of \$106,758.02, and post-judgment interest on principal amount at 2.74% per year for a total of \$279,406.12. In *Hicks v. Vane Line Bunkering, Inc.*, the jury found for the defendant on the plaintiff's maritime negligence claim, but for the plaintiff on the maintenance and cure claim. No. 11 Civ. 8158, 2013 WL 1747806 (S.D.N.Y. Apr. 16, 2013). The jury awarded \$445,000 total damages, of which \$123,000 was for punitive damages for the willful and wanton termination of maintenance and cure. The court denied the defendant's motion for a new trial, regarding punitive damages: "Nor is the amount of those damages excessive. While the Supreme Court has questioned whether maritime punitive damages may exceed a 1:1 ratio with the compensatory damages awarded, the \$123,000 punitive damages award here is far less than the \$322,000 compensatory damages award." *Id.* at *7 (citation omitted) (citing *Exxon*, 554 U.S. 471). There was not extensive discussion of *Exxon*. In *Stermer v. Archer-Daniels-Midland Co.*, the trial court found that the defendant's failure to pay maintenance and cure for two-and-a-half years was arbitrary and capricious and warranted a punitive damage award. 140 So. 3d 879 (La. Ct. App. 3d Cir. 2014). The trial court awarded approximately \$637,000 in compensatory (lost wages, pain and suffering, etc.), \$300,000 in punitive damages, and \$150,000 for attorney's fees. The ratio was less than 1:1. The court of appeal affirmed the punitive damages award and remanded for recalculation of attorney's fees. On remand, the court awarded the plaintiff \$309,000 in attorney's fees, which was affirmed, plus another \$10,000 in fees for appeal. *Stermer v. Archer-Daniels-Midland Co.*, 186 So. 3d 319 (La. Ct. App. 3d Cir. 2016). Even with higher fee awards, the ratio was less than a 1:1 ratio, but barely. The court did not cite *Exxon*. In *Varela v. Dantor Cargo Shipping, Inc.*, the plaintiff-crewmember injured his foot while on board the vessel. No. 17-23127-Civ, 2017 WL 7184605 (S.D. Fla. Nov. 14, 2017). He did not receive adequate medical care and developed an infection, which resulted in permanent disability. He brought six claims against the defendant: (1) Jones Act negligence, (2) unseaworthiness, (3) failure to provide maintenance and cure, (4) failure to treat, (5) general negligence, and (6) an in rem action against the vessel. The court entered a default judgment of \$2.8 million for medical expenses, lost wages, and pain and suffering on counts 1, 2, and 4, plus \$29,440 for past maintenance and \$500,000 in punitive damages under count 3 for willful failure to provide maintenance and cure. The court did not have reason to discuss *Exxon* in depth. It did say:

Under the general maritime law, punitive damages are available for the "willful and wanton disregard of the maintenance and cure obligation." *Atl. Sounding*, 557 U.S. at 424. Reasonable attorney fees may also be awarded when a shipowner acts "in bad faith, callously, or unreasonably" in the withholding of maintenance and cure benefits.

Flores, 47 F.3d at 1127. The Defendants have admitted, through default, that their failure to provide the Plaintiff with maintenance and cure was, and continues to be willful, arbitrary, capricious, and in callous disregard for Plaintiff's rights as a seaman. (See Complaint; ECF No. 1, ¶ 44.) Acosta suggests that an amount equal to the total compensatory damages would be an appropriate punitive damage award. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) ("a punitive-to-compensatory ratio of 1:1"). However, under the circumstances of this case, the Court believes that an award of punitive damages in the amount of \$500,000.00 is appropriate.

Id. at *4; see also *Hurtado v. Balerno Int'l*, 408 F. Supp. 3d 1315 (S.D. Fla. 2019). In *Hurtado*, the court awarded \$373,836.16 in punitive damages, which was precisely what the court had awarded for compensatory damages. The court did not indicate that *Exxon* was the reason. And the court also allowed the plaintiff to subsequently seek attorney's fees. In *Graham v. PCL Civ. Constructors, Inc.*, two barges owned by the defendant broke free during a storm and struck the plaintiff's fishing boat, causing damage. No. 11-CV-00546, 2013 WL 6835247 (S.D. Tex. Dec. 23, 2013). The case settled, in part, with the remaining issues, including whether defendant was liable for punitive damages, proceeding to bench trial. The judge ruled that the defendant's conduct was reckless and awarded punitive damages that equaled 65% of compensatory damages "given the standard set forth in *Exxon Shipping v. Baker*." *Id.* at *1. The court said:

The fact that PCL's conduct falls on the lower end of the "punitive damages" culpability spectrum does influence the amount of the award. PCL did not act with malice nor was its conduct motivated by a decision to place economic gain over reasonable safety measures. *Exxon Shipping* cited these among the factors that should be considered in determining the amount of a punitive award. . . . Applying the factors articulated in *Exxon Shipping* to this case, and balancing PCL's culpability at the low end of the spectrum against the relatively low award of compensatory damages, the Court concludes that a punitive damages award of the median ratio—65% of compensatory damages—is the appropriate result.

Id. at *13–14. The court also said:

Although holding that recklessness was sufficient for an award of punitive damages, the Court reasoned that the amount of such an award should depend in part on where the defendant's conduct falls along a spectrum of varying degrees of fault because "cases of the most as well as the least blameworthy conduct trigge[r] punitive liability, from malice and avarice, down to recklessness, and even gross negligence."

Id. at *12 (alteration in original) (footnote omitted) (quoting *Exxon*, 554 U.S. at 512). And:

While not purporting to announce a new threshold for the award of punitive damages in maritime case, *Exxon Shipping* applied a lower standard than a number of district courts have previously applied in denying punitive damages in maritime property damages cases. It is also

ratio is a broad rule, but these statements occur in cases where the punitive damages awarded are less than the compensatory damages awarded.³¹ There is one case in which the court seems to have clearly considered the *Exxon* 1:1 ratio and held that it precluded an award of punitive damages greater than compensatory damages. In *Norfolk & Portsmouth Belt Line Railroad Co. v. M/V MARLIN*,³² a ship allided with a railroad bridge. The precise legal issue was whether the court should allow the plaintiff railroad

a lower threshold than exists under the law of most states, a majority of which require either a finding of malice or of some conduct more egregious than gross negligence, such as “outrageous conduct” or “willful and wanton indifference to the safety of others.”

Id. (citation omitted); see also *Knudson v. M/V Am. Spirit*, No. 14-14854, 2020 WL 1475705 (E.D. Mich. Mar. 25, 2020) (defendant argued that the court should limit any evidence, testimony, or argument that would suggest an amount or calculation of punitive damages that would exceed a 1:1 ratio to any compensatory damages; the court held the issue was premature until there was a punitive damages award at which time defendant could renew the motion).

31. *Nelton v. Cenac Towing Co.*, No. 10-373, 2011 WL 289040 (E.D. La. Jan. 25, 2011). There, the amount of punitive damages was minimal relative to the compensatory damages awarded by the trial court following a bench trial. There was no in-depth discussion of the ratio because it was not an issue. The court did say, citing *Baker*: “[T]he Supreme Court has suggested that under general maritime law, the amount of punitive damages should not exceed the amount of compensatory relief awarded.” *Id.* at *22 (citation omitted). For a similar maintenance and cure case with punitives well below 1:1 citing *Nelton*, see *Jefferson v. Baywater Drilling, LLC*, No. 14-1711, 2015 WL 365526 (E.D. La. Jan. 27, 2015) (\$92,881 for maintenance and cure, \$10,000 compensatory damages, and \$10,000 punitive damages). See *Jefferson v. Baywater Drilling, LLC*, No. 14-1711, 2015 WL 7281612 (E.D. La. Nov. 17, 2015), for subsequent award of \$55,654 in attorney’s fees and costs. Citing *Nelton*, which cited *Baker*, the court said: “As a general rule in maritime cases, punitive damages ‘should not exceed the amount of compensatory relief awarded.’” *Id.* at *6. There are also non-maritime cases where the court discusses *Exxon* and its cap in dicta. See, e.g., *Duckworth v. United States*, 418 F. Appx. 2, 3 (D.C. Cir. 2011); *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008); see also *Joni Hersch & W. Kip Viscusi, Punitive Damages by Numbers: Exxon Shipping Co. v. Baker*, 18 SUP. CT. ECON. REV. 259, 259 (2010) (“The U.S. Supreme Court decision in *Exxon Shipping Co. v. Baker* is a landmark that establishes an upper bound ratio of punitive damages to compensatory damages of 1:1 for maritime cases, with potential implications for other types of cases as well.”); Victor E. Schwartz et al., *The Supreme Court’s Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 882 (2009).

32. *Norfolk & Portsmouth Belt Line R.R. Co. v. M/V MARLIN*, No. 08cv134, 2009 WL 1974298 (E.D. Va. Apr. 3, 2009).

to amend its complaint to seek automatic 3:1 punitive damages under a Virginia statute dealing with the willful destruction of property owned by a public service corporation. The court denied leave to amend, holding that the Virginia law's 3:1 ratio was inconsistent with *Exxon*. (Interestingly, the plaintiff did not request punitive damages under general maritime law).

Technically, *Norfolk & Portsmouth Belt Line Railroad Co.* presented an issue of whether maritime law preempted the operation of state law—or, put differently, whether state law could apply in an admiralty case. Resolution of that issue required an application of the Supreme Court's venerable *Jensen*³³ test and its progeny. In *Jensen*, the issue was whether the survivors of a longshore worker killed on the navigable waters of the United States³⁴ could recover a death benefit under the New York Workmen's Compensation Act. The Supreme Court, in an opinion by Justice Bradley, held that because there was maritime jurisdiction over the case, state law could not apply. In so holding, the Court considered when a state statute could apply in a maritime case (i.e., a case within maritime jurisdiction) and said: “[N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”³⁵ The *Jensen* Court held that application of state workers' compensation law would disrupt the uniformity of national admiralty law, even in the absence of a national workers' compensation law applicable to longshore workers. Congress did not pass the Longshore Workers Compensation Act until 1927.

Thus, in *Norfolk & Portsmouth Belt Line Railroad Co.*, whether the Virginia treble damages act could apply called for an application of *Jensen*. Could the Virginia statute providing 3:1 punitive damages apply in a maritime case under *Jensen*? The *Norfolk* court did not expressly undertake that analysis, but it did hold that the Virginia statute could not apply. It said:

Punitive damages are available under the general maritime law in cases of property damage. Punitive damages are limited to cases where “a defendant's conduct is ‘outrageous’ owing to ‘gross negligence,’ ‘willful, wanton, and reckless indifference for the rights of others,’ or behavior even more deplorable.” [Citation to

33. *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

34. The case was decided 10 years before Congress passed the Longshore and Harbor Worker's Compensation Act. 33 U.S.C. § 901–50.

35. *Jensen*, 244 U.S. at 216. The same test also applies to state jurisprudential rules. See *Wilburn Boat Co. v. Fireman's Fund Ins.*, 348 U.S. 310 (1954).

Exxon]. In *Exxon*, the Supreme Court suggested that in many cases the appropriate ratio of punitive damages to compensatory damages would be .65:1 or less. In any event, except for the most extreme cases, the maximum permissible ratio is likely 1:1.³⁶

The district court continued:

The Virginia statute provides a strict and inflexible ratio of punitive damages to actual or compensatory damages. The ratio, 3:1, is automatically applied; an automatic punitive remedy in the form of triple damages is inconsistent with *Exxon's* 1:1 ratio of punitive to compensatory damages, and therefore conflicts with the general maritime law.³⁷

While the court did not expressly apply *Jensen*, its presence looms large. Clearly, the *Norfolk* court decided that *Exxon* provided a uniform maritime rule that would not abide the application of seemingly inconsistent state law. Presumably then the court believed that *Exxon's* 1:1 ratio was a broadly applicable cap.³⁸ However, *Norfolk & Portsmouth Belt Line Railroad Co.* essentially stands alone.

Arguably, the most significant decision in which a court awarded punitive damages that were greater than compensatory damages is *Clausen v. Icicle Seafoods, Inc.*³⁹ There, the trial court found the defendant-employer, Icicle, liable to the plaintiff-seaman for both negligence and for the failure to pay maintenance and cure. The lower court awarded Clausen \$453,000 in damages for Icicle's negligence, \$37,420 in compensatory damages for maintenance and cure, \$1.3 million in punitive damages for willful misconduct in failing to pay maintenance and cure, \$387,558 in attorney fees (only for time spent on the maintenance and cure claim), and \$40,547 in costs. The trial court determined the ratio as follows: "Adding together the unpaid maintenance and cure and attorney's fees award, the amount of compensatory damages

36. *Norfolk & Portsmouth Belt Line R.R. Co.*, 2009 WL 1974298, at *3 (citations omitted).

37. *Id.* at *4.

38. For a good discussion of *Jensen* and the supposed conflict between an admiralty rule and state law, see *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994) (holding federal maritime law did not preempt Rhode Island legislation affording expanded state-law remedies for oil pollution damage even in the face of maritime jurisprudence limiting the recoverability of economic loss absent personal injury of property damage).

39. *Clausen v. Icicle Seafoods, Inc.*, 2010 AMC 793 (Wash. Super. Ct. 2010) (referred to as *Clausen I*).

is \$465,525. The punitive damages are \$1.3 million. The resulting ratio is 1:2.79.”⁴⁰ The \$465,525 number included attorney fees and costs.⁴¹

On appeal, the Washington Supreme Court affirmed and read *Exxon* narrowly. The *Clausen* court decided that *Exxon* did not provide a universal 1:1 cap on punitive damages in maritime cases. The Washington Supreme Court noted that the facts in *Exxon* established that Exxon’s “conduct was not at the extreme end of the scale of egregiousness, no profit motive was expressly involved, and there was already a substantial recovery for damages.”⁴² The court distinguished Icicle’s activity and said it involved lying “at the extreme end of the scale. The jury found that Icicle acted callously or willfully and wantonly in its failure to pay maintenance and cure.”⁴³

As the court noted, Icicle’s conduct was ongoing and egregious. It refused to pay for spinal injections and surgery that its designated doctor had recommended. Icicle only paid Clausen \$20 per day in maintenance when it knew that he was basically homeless and that he was living in a broken-down recreational vehicle. Icicle also made false statements in a federal court complaint that it filed seeking to terminate Clausen’s

40. *Id.* at 797.

41. Alternative ratios are (1) the ratio of 3.06, if costs are excluded, and (2) the ratio of 34.74, if costs and attorney’s fees are excluded. The trial court—in addition to reading *Exxon* as only applying to “reckless” conduct, as opposed to establishing a bright-line rule in all maritime cases—also discounted Icicle’s claim that *Exxon* limited punitive damages awarded for willful failure to pay maintenance and cure by relying on footnote 11 in *Townsend*:

The defendant claims that the *Exxon* case provided a universal cap of a 1:1 ratio between punitive damages and compensatory damages in all maritime cases. The Court disagrees. In *Atlantic Soundings v. Townsend*, 557 U.S. at , 129 S. Ct. 2561, 2574, 2009 AMC 1521, 1537 n.11 (2009), the Supreme Court stated that it was not applying a recovery cap as it did in the *Exxon Valdez* case. Specifically, the Court stated: “Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. *See Exxon Shipping Co. v. Baker*, 554 U.S., 128 S. Ct. 2605, 2008 AMC 1521, [slip op] at 42 (2008) (imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues.” Thus, *Atlantic Soundings* specifically did not impose a 1:1 limit as implied by the defendant.

Id. at 794–95 (alteration in original).

42. *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 835 (Wash. 2012) (referred to as *Clausen II*).

43. *Id.*

maintenance and cure benefits. Moreover, the court stated that Icicle's conduct was profit-motivated.⁴⁴

By comparison, the *Clausen* court understood Exxon's conduct to be "reckless conduct," and said that the *Exxon* Court "embraced a variable limit approach based on culpability."⁴⁵ The *Clausen* court also said:

We find nothing in the *Exxon* case establishing a general rule limiting the jury's role in determining appropriate damages. The *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found. To the contrary, the United States Supreme Court expressly limits its holding to the facts presented. In the first paragraph of the opinion, the issue is framed as "whether the award . . . *in this case* is greater than maritime law should allow *in the circumstances*." *Exxon*, 554 U.S. at 476, 128 S. Ct. 2605 (emphasis added). . . . Nothing in the *Exxon* opinion can be read as overruling cases allowing higher punitive awards or limiting the government's ability to statutorily provide other limits. Quite the opposite, the Court seems to embrace an approach of applying a variable limit based on the tortfeasor's culpability.⁴⁶

Thus, to the *Clausen* court, *Exxon* created a variable approach based on the defendant's culpability, meaning the appropriate punishment should match the wrongdoing.

There is a very basic reason underlying the *Clausen* court's conclusion that punitive damages in maintenance and cure cases should not be capped by a 1:1 ratio. In order to recover punitive damages in a maintenance and cure case, the seaman must show that the employer was arbitrary and willful in failing to pay maintenance and cure. Arbitrary and willful or capricious behavior is different from reckless behavior. It is worse. And *Exxon* articulated its holding and its 1:1 ratio in a case involving reckless behavior, not arbitrary or willful action. Thus, any maintenance and cure case in which the court awards punitive damages has to involve behavior that is more culpable on the blameworthiness scale⁴⁷ than Exxon's conduct.

44. *Id.* at 836.

45. *Id.*

46. *Id.* at 835.

47. In her dissent in *Exxon*, Justice Ginsburg said that Exxon's behavior was on the "low end of the blameworthiness scale." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 524 (2008) (Ginsburg, J., dissenting).

The *Clausen* court also noted that punitive damages beyond the 1:1 ratio to compensatory damages were necessary as a “deterrent.”⁴⁸ The court said:

A variable punitive damages award creates a disincentive to employers who would otherwise prefer to hold out on paying maintenance and cure until a suit is filed, if at all. Because seamen do not qualify for state or federal worker compensation, their only recourse from being abandoned when sick or injured on the job is maintenance and cure.⁴⁹

This is particularly apt because in some cases, the maintenance and cure award may be low even though the employer’s conduct is egregious. For instance, in *Clausen*, the maintenance and cure awarded, absent other damages, was \$37,420. If the court capped the punitive damages award by a 1:1 ratio, then the maximum award for punitive damages would have been \$37,420—perhaps inadequate to provide any real deterrence to an employer dead set on not paying its seamen maintenance and cure.⁵⁰ Thus, in a case where the compensatory damage award is low, a potential in a maintenance and cure case, punitive damages in excess of the compensatory damages award may be necessary to deter the defendant from engaging in the same or similar conduct in the future.

Moving to admiralty cases that do not involve the failure to pay maintenance and cure, in *McWilliams v. Exxon Mobil*,⁵¹ the plaintiff claimed he developed leukemia as result of exposure to benzene while working on the defendant’s vessels and brought general maritime law and Jones Act claims. The jury awarded \$5.5 million in compensatory damages, plus \$12 million in punitive damages (original ratio of 2.18 to

48. *Clausen II*, 272 P.3d at 836.

49. *Id.*

50. Interestingly, *Clausen II* classified attorney’s fees as compensatory in nature, even though they are only available upon a finding of willful and wanton conduct. *Id.* at 832 (citing *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962)). The Washington Supreme Court accepted the trial court’s calculation:

After including the attorney fees in the compensatory award, the trial court found the punitive damages award was less than three times the size of the compensatory award and within due process limits. Because *Icicle* does not contend the punitive damages award violates due process, we need not determine whether the trial court used the correct standard or applied it properly.

Id. at 836 n.5.

51. *McWilliams v. Exxon Mobile Corp.*, 111 So. 3d 564 (La. Ct. App. 3d Cir.), *writ denied*, 125 So. 3d 451 (La. 2013).

1). The case is somewhat unique because the trial court had struck all of the defendant's defenses based upon the defendant's violation of court orders. Thus, neither the appellate nor trial courts discussed defendants' actions vis-a-vis the actual injury McWilliams suffered. The court of appeal upheld the sanctions, reduced the compensatory award slightly, and upheld the amount of the punitive damage award, resulting in an adjusted ratio of 2.28 to 1. As to *Clausen* and *Baker*, the court said:

We agree with the Washington Supreme Court's analysis of *Exxon*. Therein, the United States Supreme Court did not establish a general rule pertaining to punitive damages, but rather, narrowly tailored that result to the unique case before it. Most notably, the United States Supreme Court must also agree with the *Clausen* court's analysis, as it denied certiorari in that case. The Defendants' assertion that any punitive damage award must adhere to a 1:1 compensatory to punitive damages ratio is devoid of merit. As the Defendants do not challenge the amount of the award other than as related to the compensatory damage award, we can find no error in the jury's award.⁵²

Thus, there was no detailed analysis of the issue in *McWilliams*, and it is unclear to what extent the defendant's misconduct in the litigation may have influenced the punitive damages award. Be that as it may, the decision is a rejection of the contention that *Exxon* established an across-the-board cap on punitive damages for all maritime cases.

In *Colombo v. BRP U.S. Inc.*,⁵³ a California court of appeal also rejected an across-the-board 1:1 ratio for punitive to compensatory damages in maritime cases. *Colombo* was a maritime products liability case. The defendant manufacturer had knowledge of the risk posed by its product and knowledge of similar previous accidents. The trial court found the defendant liable for failure to provide a warning that riding on the back of a jet ski without protective clothing could result in serious personal injuries if the rider fell off the back of the jet ski and into the vessel's powerful jet stream. The jury awarded two teenagers, who suffered horrific orifice injuries when they were thrown off the vessel and into the jet stream, \$3.39 million and \$1.06 million in compensatory damages, respectively. The jury also apportioned fault equally between the jet ski manufacturer, the rental company, and the employee driving the jet ski on which the victims were riding as passengers (1/3 each). The jury also held, under federal maritime law, that the manufacturer's conduct entailed

52. *Id.* at 579.

53. *Colombo v. BRP US Inc.*, 179 Cal. Rptr. 3d 580 (Ct. App. 2014).

“reckless or callous disregard for the rights of others” and awarded the plaintiffs \$1.5 million in punitive damages.⁵⁴

The defendant contended that *Exxon* mandated that the punitive damages awarded could not exceed the compensatory damages. The *Colombo* court rejected that argument, citing *Clausen* and *McWilliams*.⁵⁵ It read *Exxon* as establishing a rule for “that” case.⁵⁶ *Exxon* did not create a bright-line rule in maritime cases, capping the punitive damages award at the amount of compensatory damages recovered.⁵⁷ *Colombo* also noted that the *Exxon* majority said that a 1:1 ratio might not be appropriate in cases where the wrongdoing was hard to detect or where the compensatory damages were small and thus might not provide sufficient incentive to sue.⁵⁸

Turning to the particular awards at issue, the *Colombo* court found that for one victim, the ratio of punitive damages to compensatory damages was less than 1:1. But for the second victim the ratio was 3.78 to 1. This was due, in part, to the California rule governing joint and several liability. Under the applicable rule, a joint tortfeasor in California is jointly and severally liable for economic damages but only severally liable for non-economic damages.⁵⁹ The jury had awarded the plaintiff at issue \$63,494 in economic damages and \$1 million in noneconomic damages. Thus, the manufacturer was liable for \$63,494 in economic damages (jointly and severally) and \$333,333 in noneconomic damages (severally) for a total of \$396,827, which was less than the \$1.5 million the jury awarded in punitive damages. The question for the court was whether the latter award was “excessive as a matter of maritime law.”⁶⁰ The court held that it was not. It noted that the *Exxon* Court had several times stated that Exxon’s conduct was on the lower end of the blameworthiness scale—reckless but not malicious. The *Colombo* court found that the jet ski manufacturer’s conduct was on the higher end of the blameworthiness scale. The defendant knew and had known for quite some time that passengers falling off the back of its jet skis were suffering orifice injuries; knew that with the operator seated in the operator’s seat, a passenger might not be able to

54. *Id.* at 590–91.

55. *Id.* at 604–05.

56. *Id.* at 607.

57. *Id.*

58. *Id.*

59. CAL. CIV. CODE § 1431.2 (West 2020). It is not clear why the court decided to apply California law on joint and several liability rather than the maritime rule under which the defendant would have been potentially liable for 100% of the economic and non-economic damages whatever its share of fault.

60. *Colombo*, 179 Cal. Rptr. 3d at 607–08.

see the warning under the console; and knew that the manufacturer considered but did not place a warning at the back of the ski where the passenger could have seen. Another manufacturer did exactly that, but the defendant did not do so because of a concern about a possible dilution effect.⁶¹ Thus, the court concluded that the \$1.5 million in punitive damages awarded to the second victim was “a reasonable and proportionate measure of the [manufacturer’s] blameworthiness . . . in failing to adequately warn her of the need to wear the requisite protective clothing to reduce or minimize the risk of potentially severe orifice injury from the PWC jet-thrust nozzle.”⁶²

Interestingly, while not expressly discussed, the ratio of punitive damages to compensatory damages for the second victim in *Colombo*, 3.78:1, would only have been 1.41:1 had the defendant been liable for the entire \$1,000,000 in non-economic damages that the plaintiff suffered. While 1.41:1 is still greater than 1:1, it is interesting to note that the compensatory award for noneconomic damages is less than the amount that the jury awarded and that the plaintiff suffered. Thus, a defendant not liable for all the harm that it caused might not be adequately deterred in an economic sense, when considering what to do and how to do it. This is a variant on the situation when compensatory damages are insufficient to incentivize a suit, leading to underdeterrence. One will recall that in *Exxon*, the Court uttered its 1:1 ratio in a case where the damage award was “substantial.”⁶³

Warren v. Shelter Mutual Insurance Co.,⁶⁴ like *Colombo*, is a maritime products liability case, involving failure-to-warn claims. In *Warren*, a group of young people were engaged in recreational boating on a former channel of the Calcasieu River in Louisiana. While travelling at a high speed, the steering in the boat failed and the vessel J-hooked. That is, it violently turned when the steering failed and went into a spin. Derek Hebert and four other passengers were ejected from the boat. The kill switch had not been engaged, so the boat spun around. Its propeller struck Derek nineteen times, killing him. His parents, who were estranged, brought wrongful death and survival actions against the vessel’s owner, the owner’s son—who had been operating the vessel at the time of the injury—and Teleflex, the manufacturer of the hydraulic steering system. The plaintiffs alleged that Teleflex was reckless in its failure to place a warning on the steering system itself that the loss of even a small quantity

61. *Id.* at 607–09.

62. *Id.*

63. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 510–11 (2008).

64. *Warren v. Shelter Mut. Ins.*, 233 So. 3d 568 (La. 2017).

of hydraulic fluid—3.2 teaspoons—could result in a total failure of the steering system.

The plaintiff-mother settled her claims, and the father's case proceeded to trial. The amount of the mother's settlement was confidential. The jury found the manufacturer was aware of the risk of steering failure caused by loss of hydraulic fluid and had unreasonably failed to warn of the risk on the steering column itself. The jury awarded \$125,000 in compensatory damages—\$100,000 in the survival action and \$25,000 in the wrongful death action. It also awarded \$23 million in punitive damages.⁶⁵ Apparently, the jury concluded that the father and son did not enjoy a close relationship. The ratio of punitive damages to compensatory damages was 184:1.

The defendant appealed on numerous grounds, including the amount of the punitive damages vis-à-vis the compensatory damages. The defendant challenged the award on constitutional grounds and admiralty grounds. The Louisiana Third Circuit Court of Appeal affirmed the lower court's decision.⁶⁶ The Third Circuit concluded that Teleflex's conduct justified the imposition of punitive damages, and it then reviewed the amount of the award to determine if it was excessive. The appellate court did not find the award excessive. In reference to *Exxon*, the court said:

In *Exxon Shipping Co. v. Baker*, . . . the Court discussed the upper limits for punitive damage awards in maritime cases of that type, acknowledging that the inquiry was very specific to the facts of that case. The Court articulated that its effort to find such a limit was relevant only to cases “with no earmarks of exceptional blameworthiness within the punishable spectrum . . . and cases . . . without the modest economic harm or odds of detection that have opened the door to higher awards.” Based upon the facts in *Exxon*, where the damage was economic and involved an accidental running aground by a tanker, the Court ultimately arrived at a 1:1 ratio but discussed higher awards, distinguishing itself from cases that involve egregious conduct and dangerous activity “carried on for the purpose of increasing a tortfeasor's financial gain.” By comparison, the *Exxon* Court said, “We confront, instead, a case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury.”

The Court in *Exxon* repeatedly narrowed its findings to the facts

65. The wrongful death and survival awards were apparently under Louisiana law, and the punitive damages were awarded under maritime law.

66. *Warren v. Shelter Mut. Ins.*, 196 So. 3d 776 (La. Ct. App. 3d Cir. 2016).

in that case where the harm was economic loss, the conduct was unintentional and inadvertent, there was no motive for financial gain, and the compensatory damages were substantial at \$507,500,000. . . . The Court poignantly noted that Exxon had already paid millions in clean-up costs, and distinguished *Exxon* from cases involving a tortfeasor's egregious conduct and a motive for gain.⁶⁷

As can be seen, the court of appeal did not read *Exxon* as articulating a generally applicable rule, but rather a rule applicable in the case before the Court and other cases that shared its characteristics. The Third Circuit then stated that in reviewing the punitive award it could consider potential damages (as the U.S. Supreme Court seemed to have indicated in one of its early constitutional punitive damages decisions), not just actual damages.⁶⁸ It noted that had the plaintiff lived, the potential recovery for an amputated or severely damaged leg could have exceeded \$10,000,000. It then said that even with a potential \$8,000,000 compensatory damages award, rather than \$10,000,000, the ratio of the punitive damages award to the compensatory damages awarded would be 2.8:1. The Third Circuit stated that the 2.8:1 ratio was "a number within even *Exxon*'s generalized upper limits, and well below the due process requirements discussed by the Supreme Court in the constitutional analyses" given the reprehensibility of defendant's conduct.⁶⁹

The defendant petitioned the Louisiana Supreme Court to review the case and the Louisiana Supreme Court granted review on a number of issues.⁷⁰ On the punitive damages issue, the Louisiana Supreme Court, in an opinion by Justice Guidry, concluded that the evidence supported the jury's conclusion that the defendant acted "wantonly, recklessly, or in callous disregard for the safety of its customers"⁷¹ and that a punitive damages award was justified. The court then turned to the question of whether the punitive damages award was excessive. Teleflex once again raised both admiralty and constitutional challenges to the award and further claimed that the *Exxon* decision rejected the use of potential injury in determining the applicable denominator for the critical ratio.⁷²

67. *Id.* at 811, 814.

68. *Id.* at 816. The U.S. Supreme Court decision is *TXO Production Corp. v. Alliance Resources Corp.* 509 U.S. 443 (1993).

69. *Warren*, 196 So. 3d at 816.

70. *Warren v. Shelter Mut. Ins.*, 233 So. 3d 568 (La. 2017).

71. *Id.* at 589.

72. *Id.* at 590.

The court analyzed both *Exxon* and the U.S. Supreme Court's constitutional decisions. As for *Exxon*, the Louisiana Supreme Court said:

We first address the issue of whether *Exxon* set forth a 1:1 ratio recovery cap for punitive damages in general maritime cases. Teleflex argues the lower courts erred in not reducing the jury's award of punitive damages in accordance with *Exxon*, where the Court reduced a punitive damages award applying a 1:1 ratio to compensatory damages. Although *Exxon* may not have set forth a "recovery cap" per se, we find the Court in *Exxon* was expressly attempting to set a "fair upper limit" for punitive damages "in cases with no earmarks of exceptional blameworthiness within the punishable spectrum . . . , cases . . . without intentional or malicious conduct, and without behavior driven primarily for gain . . . , and cases . . . without the modest economic harm or odds of detection that have opened the door to higher awards."⁷³

Thus, like the Third Circuit and the courts in *Clausen*, *McWilliams*, and *Colombo*, the Louisiana Supreme Court did not read *Exxon* as articulating an across-the-board rule regarding punitive damages in all maritime cases, even though it did somewhat cryptically say: "In effect, the Court established that, under general maritime law, punishment for conduct minimally related to the goals of punishment and deterrence could be quantifiably limited and subject to a 1:1 ratio with compensatory damages, which in the *Exxon* case were substantial."⁷⁴ The sentence is not entirely consistent with what the Louisiana Supreme Court said earlier, but the court does couch its statement in reference to a case where the compensatory damages were substantial. Whatever the court meant by that sentence, what it did was consistent with its earlier statement that *Exxon* did not create a per se rule applicable to all admiralty cases. And what it did, while reducing the punitive damages award, was to allow recovery of punitive damages in an admiralty case that were significantly greater than the compensatory damages that the jury had awarded.

The court reviewed the evidence of Teleflex's conduct and reiterated that its behavior was "wanton, reckless, or in callous disregard for the safety of others."⁷⁵ But it did not find the conduct "at the extreme end of the reprehensibility spectrum,"⁷⁶ as the Third Circuit had concluded. The court then turned to an analysis of the facts from a constitutional

73. *Id.* (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008)).

74. *Id.* at 594.

75. *Id.* at 595.

76. *Id.*

perspective. Ultimately, the Louisiana Supreme Court amended the punitive award, reducing it to \$4.25 million, for a ratio of 34:1, if one calculates the ratio using the actual compensatory damages awarded. But the Louisiana Supreme Court seemed to approve of the court of appeal's determination that the compensatory damage awards were unusually low (perhaps justifying deviation from 1:1). The court discussed the "potential harm" in light of *Exxon* versus the "actual harm." The court noted that the mother had settled her claim prior to trial. Notably, in applying the 1:1 ratio in *Exxon*, Justice Souter considered not just the compensatory damages awarded but also the amount of settlements Exxon had paid, in determining the compensatory damages—the denominator of the ratio fraction. In calculating its ratio of punitive to compensatory damages, the *Warren* court said:

However, the majority in *Exxon* did not expressly address whether potential harm remains a valid consideration in general maritime cases with regard to the 1:1 ratio set in that case, and we decline to try to anticipate how that Court might rule. But actual harm is certainly a relevant consideration, as the history of the *Exxon* case reveals. In that case, the district court, as explained above, considered settlements paid to the plaintiffs during the litigation as relevant compensatory damages under the ratio analysis. In the instant case, the compensatory damages awarded to the father were understandably low, and there is no suggestion the jury abused its discretion with regard to those awards. The mother of Derek settled her claims prior to trial, thus the compensatory damages she received could logically be added to the denominator in the ratio analysis as included in the actual harm caused by the defendant's conduct. In *Hutto v. McNeil-PPC, Inc.*, 2011–609 (La. App. 3 Cir. 12/7/11), 79 So.3d 1199, writ denied, 86 So.3d 628 (La. 4/27/12), the court of appeal recently affirmed general damages in the amount of \$2,000,000 to each parent for the death of their child in a products liability case. Thus, using that amount, relevant compensatory damages in this case could reasonably total \$2,125,000, which when compared to the punitive damages awarded by the jury, would result in a ratio of 10.8:1, beyond the single digit limits of constitutional due process as well as the upper limits in *Exxon*.⁷⁷

77. *Id.* at 597–98.

The court concluded that while Teleflex's conduct was reprehensible and caused great harm to Derek and his family, Teleflex did not act maliciously, and its behavior was not primarily profit-seeking. The *Warren* court then again noted that the compensatory damages actually awarded were low, but the harm caused was great—the loss of a child. “[T]hus the door was opened to higher awards.”⁷⁸

Concluding, the court held that \$23 million violated both due process and maritime law. The court then used the “actual harm” wrongful death damages cited above to calculate a new punitive award:

In this case, the harm caused was great—physical injury resulting in the violent death of a young man—while the defendant's conduct was not the most egregious on the spectrum of punishable cases, and the compensatory damages actually awarded were relatively small. In our view, based on the actual harm, and the relevant compensatory damages as outlined in the *Exxon* line of cases, we find that a punitive damage award of \$4,250,000, with a ratio of 2:1 to relevant compensatory damages of \$2,125,000, more appropriately furthers the goal of punitive damages, that is, to punish and to deter future conduct, while protecting the defendant's right to due process. Accordingly, we amend the jury's award of punitive damages to \$4,250,000, and affirm as amended.⁷⁹

At the end of the day, the Louisiana Supreme Court in *Warren* authorized recovery of punitive damages greater than 1:1, based, in part, on the fact that the compensatory damages awarded were low. While the court ultimately stated that the ratio of punitive to compensatory damages was 2:1, that statement must be read in light of the court's use of comparable wrongful death awards in similar cases, rather than the actual compensatory damages awarded, due, in part, to the confidentiality of the mother's settlement amount.

C. Lessons from the Jurisprudence

To recap, virtually all of the courts that have meaningfully discussed the impact of *Exxon*'s statement concerning the 1:1 ratio of punitive to

78. *Id.* at 598.

79. *Id.* at 599; see generally Josie N. Serigne, Comment, *Don't Rock the Boat: Developing a Uniform System of Maritime Punitive Damages After Baker and Townsend*, 79 LA. L. REV. 327 (2018).

compensatory damages have refused to treat it as a per se rule applicable in all admiralty cases. Rather than emphasizing the broad scope of Justice Souter’s review of the relevant social science data on punitive damages, the lower courts have emphasized the limiting language in Justice Souter’s opinion. That is, the lower courts have treated the 1:1 ratio as the precise holding of the *Exxon* case, a holding applicable to the facts before the Court. At most, the courts have treated *Exxon* as a rule for cases “like” *Exxon*. Those are cases where the defendant’s conduct constituted recklessness or gross negligence and not worse, such as willful, wanton, malicious, arbitrary, capricious, or intentional wrongdoing. Additionally, *Exxon* was a case in which the damage was not difficult to detect—it was substantial and overt. It was also a case where the compensatory damages, fines and penalties, cleanup costs, and settlements of claims were substantial, even gargantuan. Moreover, *Exxon* was a case in which the defendant’s behavior—not taking action to relieve a known, relapsed alcoholic of command of an oil tanker—was not motivated by profit.

All of the cases discussed above that refused to create a per se 1:1 cap on punitive damages in maritime cases have read *Exxon* as limited to its holding or to cases “like” the one before the Court, based on the language the Court used. Most of the lower courts have also distinguished *Exxon* from the facts before them.⁸⁰ For instance, in *Clausen*, the Washington Supreme Court distinguished *Exxon* because the conduct at issue in the case before it, namely, willful and wanton failure to pay maintenance and cure, was much worse than reckless. It was “nearer the ‘most egregious’ end of the culpability scale.”⁸¹ Additionally, the Washington Supreme Court noted that the defendant’s conduct was motivated by profit and that punitive damages were needed to deter the defendant from treating other seamen as it had treated the plaintiff. Interestingly, while there is some recent inconsistent language in *Dutra Group v. Batterton*,⁸² courts generally give special solace to seaman, treating them as the wards of the court.⁸³ Of course, all of the punitive damages cases involving the arbitrary and capricious failure to pay maintenance and cure, by definition, involve seaman. *Exxon* did not.

80. Cf. *McWilliams v. Exxon Mobil Corp.*, 111 So. 3d 564 (La. Ct. App. 3d Cir. 2013). *McWilliams* quotes *Clausen* extensively and then adopts its holding without distinguishing *Exxon* in its discussion of punitive damages. *Id.* But *McWilliams* might be explained in reference to the fact that the court had struck all of the defendant’s defenses, so it was in a rather unique procedural posture. *Id.* at 568.

81. *Clausen II*, 272 P.3d 827, 836 (Wash. 2012).

82. *Dutra Grp. v. Batterton*, 139 S. Ct. 2275 (2019).

83. See, e.g., *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

The *Colombo* court also distinguished *Exxon*, finding that the jet ski manufacturer's conduct was on the higher end of the blameworthiness scale. Moreover, the application of the California several liability rule regarding non-economic losses meant that the total liability of the jet ski manufacturer was less than the total damages caused. Thus, the California non-economic damages rule mitigated the substantiality of the compensatory damage award—a fact distinguishing *Colombo* from *Exxon*, where all the known, recoverable damage was substantial.

Warren is a case where even though the Louisiana Supreme Court did not find that the defendant's conduct was on the highly blameworthy end of the scale, the compensatory damages were insignificant—\$100,000 on the survival action and \$25,000 on the father's wrongful death action—compared to the injury caused—the death of a young man. Even then, in reducing the jury's \$23,000,000 punitive damages award to \$4,250,000, the court resorted to an examination of compensatory damages in the parents' wrongful death actions to justify its conclusion that the ratio of punitive damages to compensatory damages was 2:1. The ratio was much higher if one focused on the actual compensatory damages that the jury awarded the father.

Thus, the courts have wisely applied a “a variable limit,”⁸⁴ to quote *Clausen*, based on the defendant's culpability,⁸⁵ the difficulty of detecting the damage caused, the substantiality of the compensatory damages awarded, and whether the defendant was motivated by profit. This multi-factor analysis is necessary to provide fair and proper punishment⁸⁶ as well as efficient deterrence.⁸⁷ The variable limit also is more consistent with the language Justice Souter used in *Exxon* than an across-the-board, per se 1:1 ratio cap on punitive damages in all maritime cases. In the next section, I will turn to a particular issue that may arise in applying a ratio test to a punitive damages award in maintenance and cure cases.

84. *Clausen II*, 272 P.3d at 835.

85. This is of course akin to, if not synonymous with, the courts' consideration of the reprehensibility of the defendant's conduct, which the courts consider in a substantive due process challenge to a punitive damages award.

86. Culpability and punishment should be morally proportionate.

87. Culpability is relevant to deterrence, but the fact that difficult-to-detect injuries may lead to underenforcement of the relevant right or that small compensatory damages may inadequately deter is particularly relevant to deterrence.

II. PARTICULAR RATIO ISSUES IN MAINTENANCE AND CURE CASES

One unique aspect of maritime law, which is of ancient origin, is the seaman's right to recover maintenance and cure when injured in the service of the ship.⁸⁸ The right to recover maintenance and cure arises out of the relationship between the seaman and the shipowner, often the employer. It is a no-fault remedy.⁸⁹ Maintenance is the right to a per diem living allowance for food and lodging, akin to what the seaman would have received if working and living on board the ship.⁹⁰ Once the seaman proves entitlement to maintenance, then the rate is often set by custom in the port⁹¹ or potentially by a collective bargaining agreement.⁹² Cure is the right to receive medical treatment or the cost thereof until the seaman reaches maximum medical cure.⁹³

While the right to recover maintenance and cure does not depend upon shipowner or employer fault, the defendant's fault in failing to pay maintenance and cure may give rise to additional liability. The U.S. Court of Appeals for the Fifth Circuit set forth the liability framework in *Morales v. Garijak*.⁹⁴ In the first instance, when a seaman makes a claim for maintenance and cure, a shipowner is entitled to make a reasonable investigation before commencing payments.⁹⁵ If the shipowner reasonably but incorrectly decides that it does not owe maintenance and cure, then the defendant is liable for the maintenance and cure owed. Contrariwise, if the shipowner's conclusion that it does not owe maintenance and cure is unreasonable, then the shipowner is liable not only for the unpaid maintenance and cure but also any ensuing damages.⁹⁶ "These are the damages that have resulted from the failure to pay, such as the aggravation of the seaman's condition, determined by the usual principles applied in tort cases to measure compensatory damages."⁹⁷ Interestingly, employer negligence in conducting the investigation concerning the seaman's entitlement to maintenance and cure would not only create general

88. *Farrell v. United States*, 336 U.S. 511, 523 (1949) (Douglas, J., dissenting); *The Osceola*, 189 U.S. 158 (1903).

89. *See, e.g.*, *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994).

90. *Id.* at 1011–12.

91. *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582 (5th Cir. 2001).

92. *See, e.g.*, *Castro v. M/V Ambassador*, 657 F. Supp. 886 (E.D. La. 1987).

93. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975).

94. *Morales v. Garijak*, 829 F.2d 1355 (5th Cir. 1987).

95. *Id.* at 1358.

96. *Id.*

97. *Id.*

maritime law liability but also Jones Act⁹⁸ liability, i.e., the seaman is entitled to recover in negligence against its employer under the Jones Act.⁹⁹ If the shipowner's conduct is worse than negligent, it may be liable for greater damages. If the employer is callous or capricious in its failure to pay maintenance and cure, it may be liable for attorney's fees and punitive damages.¹⁰⁰ The *Morales* court recapped its scheme as follows:

Thus, there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.¹⁰¹

The right to recover attorney's fees based on the shipowner's arbitrary and capricious failure to pay maintenance and cure arises, in part, out of the U.S. Supreme Court's somewhat opaque opinion in *Vaughan v. Atkinson*.¹⁰² In *Vaughan*, the Court, in an opinion by Justice Douglas, relied upon equity as well as the fact that courts in admiralty had awarded counsel fees in some cases to justify the award of attorney's fees to a seaman whose employer had callously failed to pay maintenance and cure. In a dissent, Justice Stewart, joined by Justice Harlan, would not have allowed counsel fees per se but would have allowed punitive damages if the shipowner's conduct was a "wanton and intentional disregard of the legal rights of the seaman," in which case there could be "indirect compensation" for counsel fees.¹⁰³ But technically, anything the dissenters said about punitive damages was gratuitous because the plaintiff had not sought punitive damages. Despite the decision's opacity, it is now accepted that the arbitrary and capricious failure to pay maintenance and

98. 46 U.S.C. § 30104.

99. *Id.*

100. *Morales*, 829 F.2d at 1358.

101. *Id.*

102. *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In *Hicks v. Tug PATRIOT*, the court referred to *Vaughan* as cryptic. 783 F.3d 939, 943 (2d Cir. 2015).

103. *Vaughan*, 369 U.S. at 539–40 (Stewart, J., dissenting).

cure will give rise to potential shipowner liability for both attorney's fees¹⁰⁴ and punitive damages.¹⁰⁵

Frequently, injured seamen will join their claims for maintenance and cure with a Jones Act negligence claim and an unseaworthiness claim. Thus, a seaman's recovery can include maintenance, cure, compensatory damages brought about by the failure to pay maintenance and cure, attorney's fees and punitive damages if the employer was arbitrary and capricious in failing to pay maintenance and cure, compensatory damages caused by the employer's negligence under the Jones Act, and compensatory damages for the unseaworthiness of the vessel. Critically, the compensatory damages for the failure to pay maintenance and cure, the Jones Act violation, and the unseaworthy condition of the vessel may and probably will overlap. Naturally, the seaman can only recover once. Additionally, and importantly, the seaman may not recover attorney's fees or punitive damages on the Jones Act (other than that part of a Jones Act claim that arises from the negligent failure to pay maintenance and cure resulting in additional injuries) or unseaworthiness claims.¹⁰⁶ These realities present particular issues in applying any ratio test to a punitive damages award in a maintenance and cure case. I will discuss these niceties below.

Starting simply, assume a seaman, Popeye, is injured in the service of the ship, and Popeye's employer, Oyl, arbitrarily refuses to pay him maintenance and cure. The court determines that Popeye was entitled to \$10,000 in maintenance and cure. Assume that for some reason, Popeye's attorney did not seek attorney's fees. If *Exxon* created a bright line rule that punitive damages could not exceed compensatory damages, then the maximum punitive damages that the court could award is \$10,000.¹⁰⁷

104. *Stermer v. Archer-Daniels Midland Co.*, 140 So. 3d 879 (La. Ct. App. 3d Cir. 2014).

105. *Atl. Sounding Co. v. Townsend*, 557 U.S. 404 (2009); *see also Hicks*, 783 F.3d at 943; *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1190 (11th Cir. 1987); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051–52 (1st Cir. 1973).

106. *Dutra Grp. v. Batterton*, 139 S. Ct. 2275 (2019).

107. Indeed, in several cases the punitive award did not exceed the compensatory damages, so ratio application was not a problem. *See, e.g.*, *Barnes v. Sea Haw. Rafting, LLC*, No. 13-00002, 2018 WL 4854662 (D. Haw. Oct. 5, 2018) (\$140,950.34 for past maintenance, \$21,697.76 for cure, and \$10,000 in punitive damages); *Hicks v. Vane Line Bunkering, Inc.*, No. 11CV8158, 2013 WL 1747806 (S.D.N.Y. Apr. 16, 2013) (\$322,000 in compensatory damages and \$123,000 in punitive damages); *Jefferson v. Baywater Drilling, LLC*, No. 14-1711, 2015 WL 365526 (E.D. La. Jan. 27, 2015) (\$92,881 for maintenance and cure, \$10,000 in compensatory damages, and \$10,000 in punitive damages); *Stermer v. Archer-Daniels-Midland Co.*, 140 So. 3d 879 (La. Ct. App. 3d Cir.

But, if alternatively, as argued above, *Exxon* instead created a variable limit depending upon multiple factors, and the court decided that Oyl's conduct was particularly egregious, then it could award over \$10,000. Likewise, if Popeye had miraculous powers of recovery (aided no doubt by the consumption of spinach) and was back to work much faster than a normal seaman, then the \$10,000 maintenance and cure award may seem rather low in reference to the amount needed for punishment and deterrence. That factor also might militate in favor of an award of punitive damages that exceeds \$10,000.

Next, let us assume that Popeye's attorney does seek both punitive damages and attorney's fees and that the court awards \$10,000 in damages for failure to pay maintenance and cure, \$10,000 in attorney's fees, and \$20,000 in punitive damages. What is the ratio of punitive damages to compensatory damages? There are three possible answers: (1) 2:1 if we compare the punitive damages award (\$20,000) to the damages for failure to pay maintenance and cure (\$10,000); (2) 1:1 if we consider the attorney's fees as part of the compensatory damages and add them to the failure to pay maintenance and cure (\$10,000 + \$10,000 = \$20,000); (3) or 3:1 if we treat the attorney's fees as punitive damages and add the attorney's fees to the punitive damages (\$10,000 + \$20,000 = \$30,000).

First, we can safely eliminate the 3:1 possibility. Even though *Vaughan* and the *Vaughan* dissent fostered some confusion on the issue,¹⁰⁸ the courts in both *Hicks v. Tug PATRIOT*¹⁰⁹ and *Clausen*¹¹⁰ considered the question post-*Exxon* and concluded that an award of attorney's fees in a failure to pay maintenance and cure case is compensatory in nature, not punitive. In *Hicks*, the court concluded that "*Atkinson's* holding that an award for attorney's fees may be made where the refusal to pay maintenance and cure was 'callous,' 'willful,' and 'persistent' is not inconsistent with a punitive award."¹¹¹

In *Clausen*, the court reviewed *Vaughan* and concluded:

Thus, while the fees are tied to a certain level of culpability [arbitrary and capricious conduct], the focus is on compensating the seaman for necessary expenses incurred in litigation, rather than on punishing and deterring the employer. Although fee-shifting in this context may have a punitive feel, it serves to

2014) (\$637,000 in compensatory (lost wages, pain and suffering, etc.), \$300,000 in punitive damages).

108. See, e.g., *Hicks v. Tug PATRIOT*, 783 F.3d 939, 943–45 (2d Cir. 2015).

109. *Id.*

110. *Clausen II*, 272 P.3d 827 (Wash. 2012).

111. *Hicks*, 783 F.3d at 945.

compensate the seaman for being forced to bring an action to recover what he was clearly entitled to all along.¹¹²

Thus, according to both *Hicks* and *Clausen*, an award of attorney's fees in a maintenance and cure case is a compensatory award. That conclusion would indicate that the appropriate ratio in the Popeye and Oyl hypothetical would be 1:1 because adding the maintenance and cure damages (\$10,000) to the award of attorney's fees (\$10,000) yields a total compensatory damages award of \$20,000, which is equal to the punitive damages awarded. This is indeed what occurred in *Clausen*.¹¹³ Of course, even if the ratio was greater than 1:1, that still might be acceptable under the variable-limit approach adopted by the cases discussed in the previous section and endorsed herein.

Now, let us enhance the details of the hypothetical. Suppose Popeye recovers \$10,000 in unpaid maintenance and cure, \$10,000 in compensatory damages arising out of the failure to pay maintenance and cure, \$10,000 in attorney's fees, and \$30,000 in punitive damages. Once again, the applicable ratio would seem to be 1:1. Maintenance and cure (\$10,000) plus compensatory damages (\$10,000) plus attorneys' fees (\$10,000) equals \$30,000, which is the same amount as the punitive damages awarded. The new addition here is the compensatory damages arising out of the failure to pay maintenance and cure. As noted above, such damages, including medical expenses and non-economic damages, are recoverable if the ship owner unreasonably fails to pay maintenance and cure.¹¹⁴

But what if the seaman joined the maintenance and cure claim with a Jones Act or unseaworthiness claim? In that case, there may be damages that the seaman suffered as a result of the initial negligence or unseaworthiness and then additional damages suffered as a result of the failure to pay maintenance and cure. Should the court, when considering

112. *Clausen II*, 272 P.3d at 832.

113. What gets included as compensatory damages makes a real difference in the ratio. For instance, in *Clausen*, the relevant ratio was 3.06:1 if costs are excluded, and 34.74:1 if costs and attorney's fees are excluded. Interestingly, in a case tried to the jury, the jury would assess the maintenance and cure damages, any compensatory damages, and punitive damages. The court would assess the attorney's fees. This was not problematic for the *Clausen* court. *Id.* at 836. Given the situation, the court should probably not instruct the jury on the ratio because, without knowing the attorney's fees awarded, the jury would not know the total amount of compensatory damages awarded, and any instruction concerning the ratio would be hopelessly confusing and incomplete.

114. *Hicks*, 783 F.3d at 941; *Stermer v. Archer-Daniels-Midland Co.*, 140 So. 3d 879, 885–86 (La. Ct. App. 3d Cir. 2014).

the propriety of any punitive damages award, and determining the appropriate denominator for the punitive to compensatory damages ratio or fraction, include all of the compensatory damages? This is apparently what some courts have done.¹¹⁵ The problem with this approach is that punitive damages are not available on the Jones Act (other than a claim arising from failure to pay maintenance and cure) and unseaworthiness claims, only on the claim for the arbitrary and capricious failure to pay maintenance and cure. Thus, the factfinder in determining the proper amount of punitive damages needed to punish and deter the defendant who has arbitrarily and capriciously failed to pay maintenance and cure must consider only the wrong for which punitive damages may be imposed, not some other, additional wrongs. For instance, if the court awarded Popeye \$40,000 for injuries caused by the initial accident that did not arise out of the failure to pay maintenance and cure, that \$40,000 should not be part of the compensatory damages denominator for purposes of determining the applicable ratio of punitive damages to compensatory damages.

Thus, lawyers representing both seamen and shipowners, and employers, would be wise in a case with multiple claims—failure to pay maintenance and cure, Jones Act negligence, and unseaworthiness—to ask for the allocation of damages based on the relevant claims. In a trial to the bench, the parties would ask the court to make separate awards for each claim. In a trial to a jury, the parties would ask the judge to put separate damages lines for each claim. For instance, the court should be clear in determining the amounts for maintenance and cure. The court should also distinguish between Jones Act negligence damages or unseaworthiness damages and the maintenance and cure award. One tricky issue here is that Jones Act or unseaworthiness damages for medical expenses may include palliative treatment, which is not encompassed by cure. Those palliative care damages should not be part of the analysis of the punitive damages ratio on any punitive damages claim. Moreover, compensatory damages on the Jones Act and unseaworthiness claims may extend beyond maintenance that would cease at maximum medical cure. For instance, the Jones Act and unseaworthiness damages may include future lost earning capacity. The court should not consider those damages in any analysis of the punitive damages ratio. Moreover, any damages for pain and suffering, mental anguish, or loss of enjoyment of life should not be part of the ratio analysis with one exception. But, any of the Jones Act damages that

115. *Varela v. Dantor Cargo Shipping, Inc.*, No. 17-23127, 2017 WL 7184605 (S.D. Fla. Nov. 14, 2017); *McWilliams v. Exxon Mobil Corp.*, 111 So. 3d 564 (La. Ct. App. 3d Cir. 2013).

coincide with any compensatory damages to which the seaman is entitled because of the unreasonable failure to pay maintenance and cure may be part of the analysis of the punitive damages ratio. Those Jones Act negligence claims overlap with the general maritime law right to recover damages occasioned by the failure to pay maintenance and cure. The simple point arising out of this potentially complex legal situation is that the court should try as much as is reasonably possible to clearly segregate and separate the categories of damages and their various causes. This separation should both avoid double compensation as well as ensure the denominator of the fraction of punitive and compensatory damages is as accurate as possible.

The allocation is logical and consistent with common sense lawyering. From the plaintiff's perspective, the allocation is a way to protect any punitive award from attack on appeal. One could imagine a defense counsel arguing on appeal that the punitive award was excessive because the jury or judge imposed punitive damages based on all of the claims, and punitive damages are not available for Jones Act (other than failure to pay maintenance and cure) and unseaworthiness claims. The downside for the plaintiff is a need for precision in argumentation and establishing causal relationships that may be difficult.

From the defense perspective, allocation of damages is protection against a jury or judge effectively awarding punitive damages based on all of the various claims and all of the damages, and a reviewing court merely giving deference to the factfinder's vast discretion in awarding damages. One downside for defendants is that allocation puts more damage lines on a verdict form, and a jury, perhaps more than a judge, may feel inclined to fill them all.

In sum, punitive damage awards in cases involving willful and wanton failure to pay maintenance and cure raise some unique concerns regarding the application of a ratio test. The issues are particularly prominent in cases where the seaman joins the claim for failure to pay maintenance and cure—on which punitive damages may be recovered—with Jones Act and unseaworthiness claims—on which punitive damages generally may not be recovered. Clear allocation of particular damages to particular claims seems to be the best solution. In the next section, I turn briefly to the interplay of any admiralty ratio test with other constitutional attacks on punitive damages.

III. ADMIRALTY PUNITIVE DAMAGES AND THE CONSTITUTION

The discussion above dealt with the proper amount of punitive damages in maritime cases and what, if any, binding effect *Exxon's* 1:1

ratio had beyond its precise holding. But, as noted, the U.S. Supreme Court has decided that there are procedural due process requirements in punitive damages cases.¹¹⁶ Moreover, the Court has held that there is a substantive due process limit to the size of a punitive damages award.¹¹⁷ The Court has articulated three factors for consideration on review: (1) the defendant's reprehensibility, (2) the ratio between punitive and compensatory damages, and (3) a comparison between the punitive award and existing criminal and civil penalties for similar misconduct.¹¹⁸ The Court has defined factors for consideration concerning reprehensibility,¹¹⁹ indicated that ratios of 10:1 or greater would be constitutionally suspect,¹²⁰ and held that a court may not award punitive damages to punish a defendant for injuries inflicted on non-parties to the litigation.¹²¹

So how do the due process limits on the recovery of punitive damages apply in a maritime case, particularly the substantive due process cases limiting the amount of an award for punitive damages? Cases involving maritime punitive damages are punitive damages cases, so clearly the jurisprudence on punitive damages due process applies. But, it would make the most sense for a court in reviewing a punitive damages award in a maritime case to first review the award under the maritime jurisprudence discussed above. Only after the admiralty punitive damages review should a court conduct the due process review. This is because the initial review under maritime law may result in a reduction which would obviate or minimize any due process concerns. As Justice Souter wrote in *Exxon*:

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard.¹²²

116. *Cooper Indus. v. Leatherman Tool Corp.*, 532 U.S. 424 (2001) (mandating de novo review because an award of punitive damages was not a finding of fact); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (holding failure to provide meaningful post-trial or appellate review of the amount of punitive damages violated the defendant's right to procedural due process).

117. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

118. *Id.*

119. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003).

120. *Id.*

121. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

122. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501–02 (2008).

Thus, *Exxon* counsels separation of the admiralty review of punitive damages from the due process, constitutional review. All courts have not done so.¹²³ Merging the analyses will lead to confusion and inconsistency. On the maritime side, it may lead to arguments that awards of up to 10:1 are not suspect—a spurious claim, at least in cases “like” *Exxon*. On the due process side, it might lead to arguments that the 1:1 ratio has a constitutional due process dimension that it clearly does not.¹²⁴ There is no reason to create needless confusion.

CONCLUSION

The U.S. Supreme Court in *Exxon* limited the amount of recoverable punitive damages to the amount of compensatory damages awarded, plus settlements. In so holding it articulated a 1:1 ratio for maritime cases “like” *Exxon*, a case which involved the following: reckless conduct but not worse; damages that were not difficult to detect; a substantial damages award coupled with significant cleanup costs as well as criminal and other penalties; and, finally, the absence of a profit motive behind *Exxon*’s wrongdoing. In the years since the Court decided *Exxon*, the most convincing lower court decisions considering the question have limited *Exxon* to its facts or to cases manifesting the characteristics outlined above.

The courts have read *Exxon* as creating a variable limit on the size of awards of maritime punitive damages. There are decisions authorizing punitive awards in excess of the compensatory damages awarded where the defendant’s conduct is worse than reckless—willful, wanton, malicious, arbitrary, or capricious. In addition, courts have considered the profit motive and, perhaps more implicitly than explicitly, the size or adequacy of the compensatory damages award. In doing so, the courts have awarded or affirmed punitive damages in excess of compensatory damages in a number of cases.

The variable limit on punitive damages in maritime cases is appropriate given the range of misconduct that may give rise to the claim and the circumstances of individual cases. For instance, in the maintenance and cure cases, there is no liability for punitive damages unless the defendant shipowner has arbitrarily and capriciously failed to pay

123. See *Warren v. Shelter Mut. Ins.*, 233 So. 3d 568 (La. 2017).

124. See, e.g., *Hersch & Viscusi, supra* note 31 (“The U.S. Supreme Court decision in *Exxon Shipping Co. v. Baker* is a landmark that establishes an upper bound ratio of punitive damages to compensatory damages of 1:1 for maritime cases, with potential implications for other types of cases as well.”); *Schwartz et al., supra* note 31.

maintenance and cure. By definition, arbitrary and capricious misconduct is worse than reckless, so the maintenance and cure cases are distinguishable from *Exxon*.

Moreover, punitive damages greater than compensatory damages may be necessary to punish and deter recalcitrant employers where maintenance and cure awards are not large. Additionally, where compensatory damage awards are low because of the peculiar circumstances of a case, such as the California several liability rule in *Colombo* or the quality of the father-son relationship in *Warren*, factfinders must have some flexibility to impose fair but adequate punishment and provide efficient deterrence.

As a word of warning, the application of any ratio in maintenance and cure cases can be tricky, especially where the claim for failure to pay maintenance and cure overlaps with other claims, such as Jones Act claims and unseaworthiness claims, for which punitive damages may not be recoverable. Thus, courts should make sure to allocate damages in such claims to the various theories of recovery so as to avoid confusion and careless analysis. Finally, the courts should consider questions concerning admiralty punitive damages before any substantive due process review. This too will avoid confusion.

In closing, let me return to Hamlet to note that there is indeed much more to the question of the ratio between punitive and compensatory damages in admiralty cases than 1:1. And, looking forward, if one can paraphrase one of Horatio's final lines, because as borrowed, it expresses a universal judicial truth: Of this I am sure the courts shall have more to speak.¹²⁵

125. SHAKESPEARE, *supra* note 1, at act 5, sc. 2, l. 434. The actual quote is, "Of that I shall have also cause to speak."