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Francis A. King

COMMENT

Punitive Damages in Admiralty—Analysis and Impact of *Cedarville*

*Francis A. King**

ON MAY 7, 1965, THE GREAT LAKES ore carrier *Cedarville* collided with the motor vessel *Topdalsfjord* in a dense fog in the Straits of Mackinac. The collision pierced the *Cedarville's* hull and caused her to capsize some 40 minutes later with her full crew aboard. As a result of the tragedy the *Cedarville's* owners[1] petitioned[2] to limit their liability to the amount prescribed by statute.[3] Numerous claims, by injured seamen and representatives of deceased seamen, all of which contained counts for punitive damages, were joined in the action. The United States District Court for the Northern District of Ohio ultimately awarded punitive damages to the claimants.

It is the purpose of this Comment to examine the court's reasoning and decision, prognosticate about its future effect, and to show why the court should have denied punitive damages. The discussion commences with an historical background of punitive damages in maritime law and encompasses: (1) a detailed description of the case itself; (2) an evaluation of the court's reasoning; and (3) a discussion of the effect of the decision on the maritime industry and (4) of an insurer's liability for punitive damages.

I. HISTORICAL BACKGROUND

Prior to the *Cedarville* case, a curious feature of United States maritime law was that no recorded case had ever awarded punitive damages against a shipowner or maritime corporation for the willful, wanton, or criminal acts of the owner's servants or employees.

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* THE AUTHOR: FRANCIS A. KING (B.A., Syracuse University; J.D., Case Western Reserve University) practices law in Cleveland, Ohio, and serves, among other clients, shippers' insurers. The author gratefully acknowledges the assistance of CHARLES R. SCHAEFER in the preparation of this article for publication.

[1] United States Steel Corporation was the owner of the *Cedarville* who would ultimately be liable.

[2] Petition of Den Norske Americaninje A/S for Exoneration From or Limitation of Liability, 276 F. Supp. 163 (N.D. Ohio 1967) [hereinafter cited as the *Cedarville* case].

[3] 46 U.S.C. § 183 (1964).

This curious feature is completely contrary to the pattern of shore-based law which has increasingly held that punitive damages may be recovered against a corporation for the willful and wanton acts of its agents[4] or against a master for the acts of his servant.[5] The decisions permitting punitive damages rely on one or the other of two theories. The more strict of the two theories permits punitive damages against a corporation for the acts of its agents in the same manner, and to the same extent, that they would be recoverable against the individual.[6] The reason given for this harsh rule is usually that a corporation can only act through its agents and there is no reasonable or rational distinction between the recklessness, willfulness, or criminal action of the employee and that of the corporation.[7] Under this strict view, a corporation is liable in punitive damages for acts done by its employees if such acts are within the scope of their employment and if such acts would render the individual liable for punitive damages, under similar circumstances.

Other courts, loath to cloak the corporation with full responsibility for the willful or malicious acts of their employees, have adopted a rule requiring participation, authorization, or ratification[8]

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[4] Much of this law has developed in suits brought against railroad corporations for the willful and wanton or deliberate misconduct of their agents. *See, e.g.*, Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887); Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489 (1875); Alabama G.S. Ry. v. Arnold, 80 Ala. 600, 2 So. 337 (1886); Central Pass. Ry. v. Chatterson, 29 S.W. 18 (Ky. 1895).

The leading case is the *Harris* case which has been cited with approval numerous times. *E.g.*, Afro-American Publishing Co. v. Jaffee, 366 F.2d 649, 662 (D.C. Cir. 1965); Hudson v. Louisville & N. Ry., 30 F.2d 391, 392 (5th Cir. 1929); Westre v. Chicago M. & St. P. Ry., 2 F.2d 227 (8th Cir. 1924); Winters v. Cowen, 90 F. 99, 102 (N.D. Ohio 1898), where exemplary damages were awarded to the plaintiff for his being ejected from a train.

[5] *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77 (1935).

[6] *See, e.g.*, Kelite Prods., Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); State Bank of Waterloo v. Potosi Tie & Lumber Co., 299 Ill. App. 524, 20 N.E.2d 893 (1939); Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943).

[7] Memphis St. Ry. Co. v. Stratton, 131 Tenn. 620, 176 S.W. 105 (1915). *See also* the interesting discussion by Mr. Justice Stone in Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927), where the Court upheld a state statute which assessed damages, including punitive damages, on a corporation for the acts of a servant.

[8] The ratifying, authorizing, or participating, must be done by an individual authorized to act or speak for the corporation. Although the range of acts constituting ratification under this view is broad, the most common ground on which claimants attempt to prove ratification is retention of the wrongdoer after the corporation has been fully apprised of the facts. *See* Cobb v. Simon, 119 Wis. 597, 97 N.W. 276 (1903).

The same principle has been used to justify recovery of punitive damages against a master, for the acts of his servant. *See* Rickelts v. Chesapeake & O. Ry., 33 W. Va. 433, 10 S.E. 801 (1890); Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877). A number of courts, however, refuse to hold as a matter of law that retention of the servant constitutes ratification. *See, e.g.*, Dillingham v. Anthony, 73 Tex. 47, 11 S.W. 139 (1889); Robinson v. Superior Rapid Transit Ry., 94 Wis. 345, 68 N.W. 961 (1896).

by the corporation.[9] Under either view, however, a corporation is liable for punitive damages if it knowingly employs an incompetent, negligent, or malicious employee,[10] or if the wrongful act is committed by some superior officer representing the corporation in its corporate capacity.[11] Although these landlocked concepts are well established, they have not been applied to maritime fact situations. Moreover, it appears that there have been few attempts to obtain punitive damages against a maritime corporation for the willful and wanton misconduct of servants aboard vessels.

One of the first reported American attempts to collect punitive damages for a maritime tort was the case of *The Amiable Nancy*.[12] In that case a neutral Haitian schooner was captured by an American privateer, aptly named *The Scourge*, and was willfully plundered by the officers and crew of the commandeering vessel. Suit was brought against the owner of *The Scourge*. The Court, discussing the applicability of punitive damages, stated that the facts disclosed a case of gross and wanton misconduct without any justification. While the Court said that exemplary damages might be proper if the action were against the original wrongdoers, it held that the owners of the privateer were free from demerit and not liable for punitive damages because they had "neither directed it, nor countenanced it, nor participated in it in the slightest degree."[13] Thus, the *Nancy* opinion clearly enunciated the milder maritime common law rule that a shipowner is liable in punitive damages for his employees' acts only if he authorized, ratified, or participated in the wrongful act. The *Amiable Nancy* case appears to be the Supreme Court's only pronouncement on the issue of punitive damages against ship-

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[9] Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101 (1893); Aetna Life Ins. Co. v. Brewer, 56 App. D.C. 283, 12 F.2d 818 (1926); Curtis v. Siebrand Bros. Circus & Carnival Co., 68 Idaho 285, 194 P.2d 281 (1948); Holland Furnace Co. v. Robson, 157 Colo. 347, 402 P.2d 628 (1965). Professor McCormick cites this as the majority rule and the rule in federal courts as of the publication date, but states:

> Neither the federal rule nor the rule of unrestricted liability can be said to be logically superior one to the other. The situation presents a competition between the requirement of personal fault in exemplary damage cases and the doctrine of the legal equivalence of the agent's act and the master's. The solution should be reached on grounds of social and economic policy. C. MCCORMICK, *supra* note 5, at 284.

[10] Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489 (1875); Central Georgia Ry. v. Motes, 117 Ga. 923, 43 S.E. 990 (1903); Hansley v. Jamesville & W. Ry., 117 N.C. 565, 23 S.E. 443 (1895).

[11] Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887); Funk v. Kerbaugh, 222 Pa. 18, 70 A. 953 (1908).

[12] 16 U.S. (3 Wheat.) 546 (1818).

[13] *Id.* at 559.

owners. Moreover, only a few other federal or state cases have raised the issue.

The earliest case appears to be *Ralston v. The State's Rights*[14] in which the defendants were fighting a price-cutting war for passenger service on the Delaware River with the libelant who owned the *Linnaeus*. The master of the *State's Rights*, unable to destroy his opponent by price cutting, engaged in an incredible practice of deliberately ramming the *Linneaus* on three separate occasions within a 1-month period. While the Pennsylvannia federal district court said that "it is not legally correct to say that a court cannot give exemplary damages . . . against the owners of a vessel,"[15] it refused to impose punitive damages upon the owners of the *State's Rights* even though they were "inattentive to the manner in which the captain was using the authority they had committed to him,"[16] and were not absolutely ignorant (as was the case in *The Amiable Nancy*) of the captain's actions. The court said that the owners were not "particularly informed" of the captain's actions and reiterated the *Amiable Nancy's* holding that punitive damages cannot be awarded against shipowners for the willful or intentional acts of their captain at sea, unless there is some conscious assent, ratification, or personal participation by the owners.

The only other case directly on point is *Smyrna, Leippie & Philadelphia Steamboat Co. v. Whilldin*.[17] There, the Delaware Supreme Court said that punitive damages could be recovered against a ship owner for a willful collision deliberately caused by the master, but no punitive damages were allowed on the facts of the case.[18] It is interesting to note that each of the aforementioned cases dealt with *deliberate* acts by a master of a vessel, and that all three courts refused to impute the master's malicious intent to the shipowner absent some act of ratification, assent, or participation by the owner.

The reluctance of the lower courts to award punitive damages in admiralty cases is curious when viewed in the light of their readiness to award punitive damages in railroad cases, even though they are faced with the railroad equivalent of *The Amiable Nancy* in

[14] 20 F. Cas. 201 (E.D. Pa. 1836).

[15] *Id.* at 210.

[16] *Id.*

[17] 4 Del. (4 Harv.) 228 (1845).

[18] There was conflicting evidence as to whether or not the defendant's captain deliberately rammed the plaintiff's vessel to settle a dispute arising from wharfage space. The court stated that punitive damages could be awarded for an intentional ramming as well as for gross negligence. However, the jury returned a verdict for less than the amount of compensatory damages claimed.

Lake Shore & Michigan Southern Railway v. Prentice.[19] In *Lake Shore* the Supreme Court held that punitive damages can only be awarded against a participant in the offense.[20] Nevertheless, lower federal courts have continued to impute liability to the railroads for wanton, willful, or malicious acts of their servants.[21] In the minds of admiralty lawyers, however, the *Lake Shore* adherence to the *Amiable Nancy* doctrine[22] seemed to settle the matter.

Only two cases since 1893 have contained an attempt to collect punitive damages against a vessel owner for the actions of his ship captain. *Pacific Packing & Navigation Co. v. Fielding*[23] involved a claim for punitive damages against the owner for wrongful imprisonment by the ship's master. The claimant, faced with the pronouncements in *Lake Shore*, apparently did not press the argument that a corporation should automatically be liable for the acts of its agent or that there had been ratification or authorization by the corporation. Instead, he relied on another approach, approved in *Lake Shore*, that a corporation would be liable without its consent if the wrongdoer was sufficiently high in the corporate hierarchy so that his wanton acts might be treated as the intent of the corporation itself.[24] The Court in *Pacific Packing*, however, ruled that the prin-

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19 147 U.S. 101 (1893). The Court in *Lake Shore* said that: "Although a principal is liable in compensatory damages for an agent's act in the scope of employment, the principal is not liable for exemplary damages merely because of the agent's wanton or malicious intent." *Id.* at 107.

20 *Id.* at 107.

21 *See* cases cited in note 4 *supra*, especially the recent cases approving the doctrine espoused in Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887).

The *Cedarville* court attributes the confusion to some dicta in the *Lake Shore* case. *See* 276 F. Supp. at 177, *citing* Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101, 109 (1893). The court goes on to state that this dicta has led courts and observers to reason that since a corporation can act only through its agents, and therefore is responsible for the acts of its agents, there need not be a ratification of the agent's misconduct to support a finding against the corporate principal. 276 F. Supp. at 177.

Admitting that the language of *Lake Shore* is confusing, this writer can only conclude that the dicta mentioned in *Cedarville* was intended to apply to only *compensatory* damages against the corporation, and not to the assessment of *punitive* damages. The *Lake Shore* Court held that the corporation could only be liable for *punitive* damages if it had somehow ratified or authorized the wrongful acts. 147 U.S. at 107-08, 112. A full reading of the *Lake Shore* opinion establishes that this was the intent of the Court, and that *punitive* damages can only be assessed against an actual wrongdoer, as opposed to an innocent person in the position of *respondeat superior*.

22 The Court in *Lake Shore* expressed its approval of the doctrine enunciated in *The Amiable Nancy*. Lake Shore & Michigan S. Ry. v. Prentice, 147 U.S. 101, 107-08 (1893).

23 136 F. 577 (9th Cir. 1905).

24 In *Lake Shore* the Court had stated:

> The president and general manager, or . . . [other officer] actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious

ciple of an elevated corporate official would not be extended to a ship's master who, for the time, is in sole and absolute command of the ship.[25]

The second case, *Phillip v. United States Lines Co.*,[26] involved substantially the same punitive damage questions as the *Cedarville* case. The court, however, decided that the crew's acts, as a matter of law, were not of such a willful and wanton character as to justify an award of punitive damages; it never reached the question of whether punitive damages are recoverable under the Jones Act or whether a corporation is liable in punitive damages for the acts of its agents when it has not participated in or ratified the acts. Thus, the vindication of vessel owners was all but complete. No punitive damages could be recovered against an owner for the acts of the master, nor would the corporation be liable except in the highly unlikely case where it could be held to have authorized, ratified, or participated in the acts of the tort-feasor.[27]

II. THE CEDARVILLE CASE

Onto these placid waters of maritime corporate security, the *Cedarville* case burst with the impact of a tropical hurricane. The only question presented in the *Cedarville* case was whether punitive damages "may or ought to be assessed."[28] The district court, in holding that punitive damages ought to be assessed ultimately, found that the master of the *Cedarville* had been grossly negligent up to the time of collision and that his negligent navigation was dimmed in intensity only by his outrageous conduct in the 40 minutes which elapsed between the collision and the sinking of the ship. The crucial facts leading to liability for punitive damages were discussed in great detail by the court.[29]

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or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. 147 U.S. at 114.

[25] 136 F. at 580.

[26] 240 F. Supp. 992 (E.D. Pa. 1965).

[27] *Accord* Trabing v. California Navigation & Improvement Co., 121 Cal. 137, 53 P. 644 (1893). In *Trabing* the claimant alleged false imprisonment by a steamboat captain. The court cited *Lake Shore* and stated that the corporation was not liable for exemplary damages unless it had authorized or ratified the captain's acts. The court allowed compensatory damages, however, in finding that the master of the vessel was the duly authorized officer.

[28] 276 F. Supp. at 166.

[29] The district court itself did not hear any witnesses but permitted all counsel to read whatever evidence it chose from the Coast Guard investigation and the depositions taken. The fact that the reading of the evidence took approximately 5 weeks testifies to the voluminous amount of evidence before the court. *See id.* at 166-67.

The court first examined the condition of the *Cedarville* and the actions of its captain in the time immediately after the collision and before the sinking of the vessel. The court found that the *Cedarville* would "sink like a brick"[30] if its hull were pierced and that in the time following the collision and before the decision to attempt beaching was made, the captain had sufficient opportunity to survey the damage and should been concluded that the ship was incapable of reaching a beach.[31] Nevertheless, the captain refused to remove the men from the ship even though it could have been done with complete safety, and he compounded his errors by deciding to beach the vessel without knowing exactly where he was headed or how long it would take to reach the nearest shore.[32] The court took a dim view of the captain's belated decision to attempt to beach the vessel without evacuating the men and characterized his decision as "an outrageous, indeed horrendous, act of misconduct . . . ."[33] It went on to say that the captain's "self-confessed gamble"[34] to jeopardize the lives of the crew members while attempting beaching was a "willful, wanton act of misconduct of the worst order which this court finds to be indefensible."[35]

The court next investigated the actions of the corporate officers of the Bradley Fleet (a division of United States Steel) and found that Captain Parrilla, manager of the Bradley Fleet, and Admiral Khoury, a top ranking corporate officer, were in the Pittsburgh corportate offices and were fully informed of the actions of the *Cedarville's* captain, Martin Joppich, and his intent to attempt to beach the vessel.[36] It found that even though fully informed, these corporate officers refused to contact the *Cedarville's* master in order to sway

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[30] *Id.* at 166. These were the words of Captain Parrilla, operating manager of the United States Steel Fleet. The court also thought it important that the owners, fearing the consequences of any collision had installed a "collision mat" which could be lowered to cover any below-water opening in the hull in order to impede the flow of water into the vessel. *Id.*

[31] *Id.* at 170. The court found that the elapsed time between the collision and the fateful decision was 17 minutes. *Id.*

[32] The court found that another vessel, *The Weissenburg*, was available with "its lifeboats out . . . [and] the men could have been removed with virtually no danger either by descending into the lifeboats or having the *Weissenburg* come alongside . . . ." *Id.*

[33] *Id.* at 163, 170.

[34] *Id.* at 170.

[35] *Id.* The court said that the captain "could have chosen to jeopardize his own life, but he had no right to jeopardize the lives of others by failing to remove the crew before embarking on the run for the beach." *Id.*

[36] For a succinct summary concerning the privity and knowledge of the corporate officials, see *id.* at n.7.

him from his suicidal plan.[37] The court concluded that the failure to contact the *Cedarville* was motivated solely by the corporate officers' desire to limit the corporate liability and that by their silence the officials had ratified the wanton misconduct of the master, thus making the corporation liable for punitive damages.[38]

The court, in arriving at its conclusion that punitive damages could be assessed against United States Steel, had to overcome much legal precedent. In the words of the court, the threshold legal question was "whether punitive damages may ever be assessed in a maritime proceeding."[39] The court quickly answered this problem in the affirmative, citing *The Amiable Nancy*[40] and *Ralston v. The State's Rights*,[41] along with dicta from several other cases.[42]

A second legal question considered by the court was whether the Jones Act[43] allows recovery for punitive damages. The court was faced with a complete lack of precedent. The owners argued that the *Cedarville* claimants should not be given punitive damages because the Jones Act, in providing statutory remedies unknown to the common law, did not specifically provide for punitive damages and because no Jones Act decision had ever granted punitive damages. The court, unimpressed by this argument, reasoned that punitive damages are an outgrowth of the common law and that in other cases involving statutory violations such damages have been awarded regardless of whether or not the statutes provided for them.[44] The

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[37] *Id.* at 170.

[38] *See id.*

[39] *Id.* at 171.

[40] 16 U.S. (3 Wheat.) 546 (1818).

[41] 20 F. Cas. 201 (E.D. Pa. 1836).

[42] The court cited Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282 (1872), a non-admiralty state court lawsuit, for the proposition that exemplary damages are recoverable where the claim is based on culpable negligence; Day v. Woodworth, 54 U.S. (13 How.) 363 (1851) (dictum) and Vaughan v. Atkinson, 369 U.S. 527 (1962) (dissenting opinion), both of which make general reference to the fact that exemplary damages are a general rule of law recognizable in admiralty. However slim the case law is, the few reported decisions do establish the existence of the right, although none of them allowed the recovery of exemplary damages.

The court also alluded to the unique master-seamen relationship aboard vessels, and the abject obedience seamen owe to their superior, without clearly explaining what part this concept played in the rationale of the opinion. The court stated that "[i]n the maritime field . . . there must be abject obedience to orders from the moment the seaman enters service until his discharge." 276 F. Supp. at 172.

[43] 46 U.S.C. § 688 (1964).

[44] The court held that specific statutory authorization for punitive damages was unnecessary and that exemplary damages have been permitted under federal statutes which employ general language. 276 F. Supp. at 176, *citing* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965), a suit under the Civil Rights Act, 42 U.S.C. § 1983 (1964), and Nagel v. Prescott, 36 F.R.D. 445 (N.D. Ohio 1964), a suit under the Securities Act of 1933, 15 U.S.C. §§ 77-77aa (1964).

court supported its holding by comparing the Federal Employer's Liability Act[45] (FELA) to the Jones Act,[46] implying that FELA decisions would control the *Cedarville* case, and citing *Ennis v. Yazoo & M.V. Railway*[47] and *Cain v. Southern Railway*[48] for the proposition that exemplary damages may be recovered in a death action instituted under the FELA.

The main thrust of the court's opinion, however, dealt with the liability of United States Steel for the acts of its servant, the *Cedarville's* captain, Martin Joppich. Although the court characterized Captain Joppich's actions as "horrendous misconduct,"[49] it still had to choose between the two rules of corporate liability:[50] (1) the rule that a corporation can act only through its agents and is liable for punitive damages if the agent would be liable,[51] and (2) the rule that a corporation is liable in punitive damages only if it has authorized, ratified, or participated in the misconduct of its agents.[52]

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[45] 45 U.S.C. § 51 (1964).

[46] The Jones Act is virtually a carbon copy of the FELA and extends FELA remedies to seamen.

[47] 118 Miss. 509, 79 So. 73 (1918). This case is an anomaly. The court stated that under the facts there was no error in instructing the jury that punitive damages could be recovered for willful and wanton acts of misconduct committed by the railroad employees. However, this point appears to have been decided under state law, not under the FELA. No authorities are cited, and it is unclear from a reading of the case whether the claim was for damages under the FELA or for common-law negligence. There were two trials in the case, the first verdict of $13,000 being set aside, and a subsequent verdict of $5,000 being entered. The first case included the disputed instruction on punitive damages. The court affirmed this, and dismissed without opinion what it deemed to be the second question in the case, namely, whether the court erred in instructing the jury in the second case that damages should be limited to those recoverable under the FELA. Thus, the case probably was not decided under the FELA at all, and it is intimated that in the second trial the court limited the damages to those recoverable under the FELA, which *probably did not include punitive damages.*

[48] 199 F. 211 (E.D. Tenn. 1911). The case said only that there was no survival of action under the 1908 act until the 1910 amendment which provided a measure of damages for survival. However, the court did not say that punitive damages are recoverable in a survivor's action after 1910; the only inference that this is so follows from the court's statement that:

> I also think it clear under the Act of 1908, before the amendment of 1910, in an action brought for the statutory beneficiaries to recover damages for the death of an employee the recovery is limited to the pecuniary injury or loss sustained by the beneficiaries from the death of the deceased, and that the measure of damages is *compensation* for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise, from the continued life of the deceased, *excluding all consideration of punitive elements*, loss of society, wounded feelings of the survivors and sufferings of the deceased. *Id.* at 212 (emphasis added).

[49] *See* text accompanying note 33 *supra.*

[50] *See generally* text accompanying notes 6-11 *supra.*

[51] *See* notes 6-7 *supra* & accompanying text.

[52] *See* notes 8-9 *supra* & accompanying text.

The court, recognizing the constraints of *stare decisis*, decided to follow the less harsh ratification rule as enunciated in *Lake Shore & Michigan Southern Railway v. Prentice*.[53] Undaunted by its self-imposed restraint, the court went on to assess punitive damages against United States Steel using a two-pronged argument.

The court held that the corporate officers of the Bradley Fleet, aware of the *Cedarville's* plight, had, by their inaction and silence, ratified both Captain Joppich's decision to beach the vessel and his subsequent misconduct.[54] The court reasoned that when the officials' knowledge of the collision, the hole in the *Cedarville's* outer shell, the quantities of water being taken on by the ship, and the fact that the *Cedarville* would "sink like a brick"[55] if her outer shell were pierced was coupled with inaction by the corporate officials the result was to ratify the wrongful acts of Captain Joppich.[56]

After concluding that the corporation had ratified the acts of Captain Joppich, the court alternatively held that the captain was so high in the affairs of the corporation, so completely in charge of the vessel, and so unfettered in his authority, that his acts would have made the corporation liable in punitive damages without any act of ratification.[57] The court said that "[t]he record clearly discloses that in the operation of the vessel Captain Joppich had no superior, was subordinate to no higher corporate officer, so that his actions were tantamount to those of the board of directors."[58] In arriving at this latter conclusion, the court repudiated sub silentio the *Pacific Packing* doctrine[59] that a master is not an official whose acts render the corporation liable for punitive damages.

III. CEDARVILLE IN RETROSPECT — THE COURT'S RATIONALE

The trial court's conclusion that the absence of punitive damages

[53] 147 U.S. 101 (1893).

[54] 276 F. Supp. at 169. The court said that the situation was known to the officials and "cried out for an immediate evacuation of the entire crew. With the *Cedarville* at anchor for fifteen minutes, and the *Weissenburg* standing by to rescue the crew . . . circumstances were most appropriate for disembarking the crew immediately after the collision." *Id.* at 180. The court next severely criticized the officials' silence and said: "It is ironic that this silence — undoubtedly motivated by a desire to incur the favor of the limitation statutes and thus reduce or contain the legal ramification of the collision — now operates to expose the petitioner to a far greater liability." *Id.* at 181.

[55] *Id.* at 179. *See also* note 30 *supra* & accompanying text.

[56] 276 F. Supp. at 179.

[57] *Id.*

[58] *Id.*

[59] Pacific Packing & Navigation Co. v. Fielding, 136 F. 577 (9th Cir. 1905). *See also* notes 23-25 *supra* & accompanying text.

in previous maritime cases should not bar such damages in the *Cedarville* case seems eminently correct. The mere fact that a certain facet of the law has never been applied to a particular industry is not a good reason for failing to apply it where the facts warrant its application. As the few cases dealing with the question have illustrated, no court has ever held or contended that punitive damages could not be assessed against a shipowner. Courts have merely refused to assess such damages in the few cases in which they were sought. Nor is there any logical reason why the maritime industry should be exempt from punitive damages, where the facts warrant their imposition. The curious paucity of punitive damage claims in admiralty indicates, at best, a notable restraint of counsel in favor of the maritime industry.

The second question decided by the court, whether punitive damages can be assessed under the Jones Act, is not disposed of so easily. Since the Jones Act incorporates the FELA by reference and extends FELA remedies to seamen, courts have held that the measure of damages is the same under both acts.[60] The same courts have held that the measure of damages in FELA wrongful death actions is the deprivation of the pecuniary benefits which the beneficiary of the deceased might have received had the deceased not expired from his injuries.[61] Punitive damages are generally not recoverable.[62]

While this measure of damages reflects the general rule as to actions brought directly by *surviving* railroad employees or seamen, and probably the rule as to actions brought for the benefit of a deceased employee's surviving widow, husband, or children, it would appear to be an open question whether this rule applies to survival actions brought by a deceased seaman's representative for the deceased's pain and suffering prior to his demise. Most courts have held that in actions brought under statutes patterned after Lord Campbell's Act[63] (which include FELA, Jones Act, and most state wrongful death statutes) punitive damages are not an element which the court or jury may consider, unless the act expressly or by clear implication confers the right to such damages.[64] These wrong-

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[60] *See, e.g.*, Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1936); Martin v. Atlantic Coast Line Ry., 268 F.2d 397 (5th Cir. 1959); Jensen v. Elgin, J. & E. Ry., 24 Ill. 2d 383, 182 N.E.2d 211 (1961); Moore v. Atchison, T. & S.F. Ry., 28 Ill. App. 2d 340, 171 N.E.2d 393 (1961).

[61] *Id.*

[62] *See generally* Annot., 70 A.L.R.2d 568, § 5(a) (1961).

[63] Fatal Accidents Act of 1846, 9 & 10 Vict. c. 93.

[64] *See generally* 43 A.L.R.2d 1291 (1955); 94 A.L.R. 386 (1935). *See also* Kern v.

ful death actions, based on the idea that beneficiaries can recover damages for their pecuniary loss, exclude any liability for punitive damages, even where aggravating circumstances would warrant them in an action between the injured person and the one inflicting the injury.[65] On the other hand, a few recent decisions under state wrongful death statutes have sustained the recovery of punitive damages under the survival portion of the statute.[66]

It was the survival theory which the *Cedarville* court used to support its determination that punitive damages were recoverable under the Jones Act. After tracing the history of the FELA and the Jones Act, the court stated:

> [T]hese men . . . stand at bar to demand all that the law extends to their more fortunate fellows who survived.[67]
>
> . . .
>
> The court is constrained . . . to find that under the Jones Act the right of a deceased seaman to sue his employer for punitive damages survives the seaman's death.[68]

In the present disorganized status of the law it cannot be said that the court's decision to base the recovery of punitive damages on the survival aspects of the Jones Act was harsh, arbitrary, or unwarranted in law. While the FELA and Jones Act cases have generally limited damages to the beneficiaries' pecuniary loss plus an award for the deceased's conscious pain and suffering,[69] no Jones Act case to date has specifically dealt with the question of exemplary or punitive damages.[70]

One can, however, criticize the court for seemingly ignoring some legal principles in reaching its decision. While it was a close factual question as to whether or not the 10 seamen died instantaneously, recovery under the survival portion of the Jones Act re-

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Kogan, 93 N.J. Super. 459, 226 A.2d 186 (1967), which discusses state case law precedents and statutes which are analogous to the language and case law precedents of FELA.

[65] Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); Mathies v. Kittrell, 350 P.2d 951 (Okla. 1960).

[66] Reynolds v. Willis, 209 A.2d 760 (Del. 1965); Connolly v. Palm Aire Country Club, Inc., 26 Fla. Supp. 17 (Cir. Ct. 1965).

[67] 276 F. Supp. at 175, *quoting* Pimenta v. Marine Navigation Co., 258 F. Supp. 666 (S.D.N.Y. 1966).

[68] 276 F. Supp. at 176.

[69] *See, e.g.*, Ridgedell v. Olympic Towing Corp., 205 F. Supp. 952 (E.D. La. 1962); Correia v. Van Camp Sea Food Co., 113 Cal. App. 2d 71, 248 P.2d 81 (1952). *See also* the extended discussion of damages in Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15 (S.D.N.Y. 1965).

[70] There is some case law supporting the theory that punitive damages are recoverable under the FELA. Ennis v. Yazoo & M.V. Ry., 118 Miss. 509, 79 So. 73 (1918). For a discussion of the dubious reliability of this precedent, see note 47 *supra*.

quires that there be some conscious pain and suffering on the part of the decedent.[71] In addition the right to compensatory damages is generally a condition precedent to the recovery of punitive damages.[72] Thus the court failed to show how compensatory damages could be awarded under the survival portion of the Jones Act without a finding of conscious pain and suffering and failed to explain how punitive damages could be given without establishing a right to compensatory damages. Even conceding a growing body of law which makes punitive damages independent from compensatory damages,[73] the court still failed to discuss whether or not this emerging view is applicable to maritime law.

Allowance of punitive damages by the *Cedarville* court produces the illogical result that these damages may be recovered under the survival portion of the Jones Act while under the cases to date they apparently cannot be recovered either by a seaman who survives the tortious act[74] or by a deceased seaman's representatives suing for his wrongful death. Perhaps the only satisfactory explanation is the *Cedarville* court's observation that punitive damages are a creature of the common law and are not precluded simply because the statute

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[71] Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Gardner v. National Bulk Carriers, Inc., 221 F. Supp. 243 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964).

[72] *See* the extensive discussion of this rule in Annot., 17 A.L.R.2d 527 (1951), and cases cited therein. As the annotation points out, this is now a "majority rule," but there is a growing body of case law supporting the proposition that exemplary damages are an independent theory of recovery, and recovery is not dependent on the allowance of compensatory or nominal damages.

There is also one strong court opinion that under federal common law (which presumably would control Jones Act punitive damages cases) that the allowance of exemplary damages is not dependent on a finding of compensatory damages. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). In actions to recover punitive treble damages under federal antitrust acts, however, the courts have held that a showing of actual damages is essential. Freedmen v. Philadelphia Terminals Auction Co., 197 F. Supp. 849 (E.D. Pa. 1961); Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1960).

[73] It is questionable whether the case law fashioned under the Jones Act would allow an award for conscious pain and suffering absent some proof of how the seamen met their deaths. *See* cases cited note 71 *supra*. However, other cases have allowed awards for conscious pain and suffering where death was attributable to drowning. Grantam v. Quinn Menhaden Fisheries, Inc., 344 F.2d 590 (4th Cir. 1965); Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005, *rehearing denied*, 386 U.S. 929 (1967). But, can it be assumed that the *Cedarville* crewmen met their deaths by drowning? Although the ship capsized, and although drowning is the most readily suggested theory of death, it could not be proved that the seamen were not crushed to death, killed by flying debris, flung against the bulwarks, or even electrocuted.

[74] *See* note 69 *supra* & accompanying text. Obviously if the injured man is alive he cannot take advantage of the *Cedarville* holding allowing punitive damages under the survival portion of the Jones Act.

does not allude to them.[75] This observation, however, overlooks the majority rule in death cases that punitive damages cannot be recovered unless the statute specifically authorizes them.[76] The court's analogy to recovery of punitive damages under the Securities and Civil Rights Acts[77] is not very persuasive in view of its failure to mention this majority rule in more comparable death and personal injury statutes.

The most important question in the *Cedarville* case, however, was whether United States Steel was liable in punitive damages for the acts of Captain Joppich. Had the *Cedarville* represented a simple choice between the rule of automatic corporate liability and the rule requiring ratification, the maritime industry, although appalled at the choice, could probably advance little logic supporting the contrary position. The court, however, chose to base its decision on a finding of ratification; but the court's method of finding ratification by the corporate officers is not only contrary to all judicial precedent in the maritime field, but also opens the door to the most widespread legal consequences.

Traditionally courts, in the aftermath of maritime disasters, have been loath to cloak themselves in the garb of experts or to scrutinize or second-guess the acts of a captain at sea in light of what subsequent events show he should have done. The courts have reasoned that safe navigation requires that the commanding officer of a merchant vessel must be free to exercise his own judgment and that academic discussions employing experts and 20-20 hindsight serve no useful purpose.[78] The courts have found it imperative to tread cautiously, give due consideration to the elements of danger, excitement, and confusion, and to ultimately hold that the actions of ships' masters "should be judged on the basis of what another navigator at the time would have done under similar circumstances."[79]

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[75] 276 F. Supp. at 176.

[76] *See generally* Annot., 43 A.L.R.2d 1291 (1955); Annot., 94 A.L.R. 386-96 (1935).

[77] 276 F. Supp. at 176.

[78] *See The Lusitania*, 251 F. 715, 728 (S.D.N.Y. 1918). *See also* the court's comment in The Maurice R. Shaw, 46 F. Supp. 767 (N.D. Me. 1942), *citing The Lusitania* and saying that "[t]he Court will seldom question the wisdom of a shipmaster in making his decision as to the proper handling of his vessel. The cases on that point are numerous." *Id.* at 769.

[79] Kelly Island Lime & Transp. Co. v. City of Cleveland, 47 F. Supp. 533, 543 (N.D. Ohio 1942). The courts' dilemma was succinctly stated by one typical court:

> The problem confronting him [the master] was a problem of the sea, solved . . . by seafaring men. We should not view the situation in retrospect or from the shore, but from the viewpoint of the master on the bridge of the crippled ship, charged with full responsibility for her safety and for the safety of

The courts, while refraining from second-guessing masters of vessels confronted with emergencies and while zealously defending the right of masters to make their own decisions, have rarely discussed the question of owners' liability for their masters' acts in connection with punitive damages. The question of owners' responsibility for the acts of a master has arisen most often in the context of an owner's petition to limit liability. In the cases to limit liability the courts have been adamant in proclaiming that "[t]he master is the commander of the ship . . . a master in every sense of the word"[80] and that in making decisions he "must be left free to exercise his own judgment . . . ."[81]

The same courts have rejected the contention that owners or agents on the shore should have control over the master of a vessel in an emergency, saying that a managing agent would not be justified in directing a captain's actions because such direction would divest a captain "of that discretion which the law confers upon the master in emergencies . . . ."[82] Another court has expressed the opinion that even if the vessel owner were on the bridge, he would have no authority to assume command of a ship from the master in an emergency.[83] The most recent and candid pronouncement concerning a master's discretion was in the case of *Saskatchewan Government Insurance Office v. Spot Pack, Inc.*,[84] where the court said

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> her cargo and crew; and, when viewed in that light, we must not only be able to say that the course pursued was wrong, but we be further able to say that it was so illy considered and so plainly wrong that a competent navigator would have rejected it, if placed in the like position. The Walter A. Luchenbach, 14 F.2d 100 (9th Cir. 1926).

The most stirring example of the freedom the courts give to ship captains is the case of *The Princess Sophia*, 61 F.2d 339 (9th Cir. 1932). The ship became stranded on an Alaskan reef during a storm. Although rescue ships were standing by, Captain Locke thought that the vessel was in no immediate danger and decided to await more favorable weather before removing the passengers and crew. As the fury of the storm increased, the *Sophia* was driven across the reef and destroyed, and 350 lives were lost. The Ninth Circuit Court of Appeals said that under the law of the sea Captain Locke's judgment was final and that he had done what he believed was the best for all concerned. *See id.* at 350. *See also* Federal Ins. Co. v. S.S. Royalton, 328 F.2d 515, 517-18 (6th Cir. 1964), where the court frowned upon an expert academician's opinion as to the time it would take a ship to sink, when the academician had never applied his theories.

[80] United Geophysical Co. v. Vela, 231 F.2d 816, 819 (5th Cir. 1956), *quoting* The Balsa, 10 F.2d 408, 409 (3d Cir. 1926).

[81] 231 F.2d 819, *quoting The Lusitania*, 251 F. 715, 728 (S.D.N.Y. 1918).

[82] The Princess Sophia, 61 F.2d 339, 352 (9th Cir. 1932) (dictum).

[83] The North Star, 3 F.2d 1010 (D.C. Mass. 1925). The judge was emphatic and said that "I doubt whether an owner *on the bridge* would have any right to give an order against the master's; there cannot be two captains on the same vessel." *Id.* at 1011 (emphasis added).

[84] 242 F.2d 385 (5th Cir. 1957).

that although the "marvels of science — the telephone, radio, easy access by airplane —"[85] make the idea of navigating and managing a vessel from a swivel chair alluring, such a decision, by a court which succumbs to the paternalistic plea that an owner ought to have checked to see if a ship's captain was acting properly, would undermine a master's complete authority and reduce a competent captain "to an inferior, subordinate functionary."[86]

The judicial pronouncements concerning decisions of a master confronted with an emergency are numerous. The point is that the courts have recognized that a normally competent master of a stricken vessel is not, and should not, be held to the strict standard of a reasonably prudent man to make the correct decision at all times. Further, it is a recognition that the master, through experience, demonstrated ability, and actual presence at the scene, is the one human being who is most capable of making the correct decision, and that in doing so his judgment should be unfettered.

In light of these judicial pronouncements,[87] the *Cedarville* court's reasoning that silence on the part of the United States Steel officials amounted to a ratification of Captain Joppich's conduct, seems clearly erroneous and unreasonable. The court, in finding that Captain Parrilla's silence amounted to ratification, relied on his admission that the *Cedarville* would "sink like a brick" if holed[88] and the information which he received in Pittsburgh on the date of the collision.[89] It might reasonably be asked, what could Parrilla have done if he had contacted Captain Joppich? He could not reasonably have surmised through a long-distance conversation at the height of an emergency that Captain Joppich, a hitherto reliable master with long experience, was going to pieces in the emergency. The mere fact that Joppich was headed for the beach indicates that he thought he could make it. He assuredly would have relayed his opinion to Parrilla. Moreover, if Joppich did not know where his ship was in relation to the shore, Parrilla certainly could not have known. While Parrilla could have wasted critical minutes trying to ascertain the exact situation via long-distance telephone or taken over command of the ship and given orders to the master and crew concerning a critical situation about which he could know little, it is more reasonable to conclude that even if Parrilla had contacted the

[85] *Id.* at 390.

[86] *Id.*

[87] *See* notes 80-86 *supra* & accompanying text.

[88] 276 F. Supp. at 179.

[89] *Id.* at 184.

ship, he would have left the safety of the vessel and her crew to the judgment of the man most able to handle it — the man on the scene.

Captain Parrilla, then, had three choices: (1) He could have contacted the *Cedarville* and, after ascertaining the situation as best he could from Captain Joppich, concurred in the latter's decision to beach the vessel. (2) He could have remained silent and left the Captain of the vessel to extricate himself from the peril. (3) He could have contacted the vessel and made the decision which events subsequently showed should have been made — *abandon ship!* The second decision incurred liability in the *Cedarville* case. The first would undoubtedly have incurred liability on the basis of clear-cut ratification. *Only if Parrilla had made the right decision* — to abandon ship — would the corporation have escaped liability for punitive damages.

This is an awesome responsibility to place on the shoulders of a man far removed from the scene. A shore-based and uninformed corporate official could not possibly know that his decision to countermand the judgment of his captain would decrease the peril to crew and vessel. The *Cedarville* decision, if allowed to stand on its present rationale, will result in divided authority at the very time when unified command is most needed — during a crisis at sea. The spectre is raised of panicky corporate officials issuing orders countermanding the judgment of competent masters at sea, resulting in deaths and disaster which might otherwise be avoided. It might be well to ask the passengers and crew of a vessel in dire straits whether *they* would rather trust their safety to the master or to a distant, shore-based corporate official. In nine cases out of ten, the master's decision will probably be correct under the circumstances. The tenth situation should not be allowed to make or control the law.

Curiously enough, while condemning the silence of the corporate officials, the court relied on the proposition that a master is always in complete control of his ship and crew to support its alternate reasoning for awarding punitive damages against the owner for the master's wrongful acts.[90] It referred to the seaman's contract as "a singular exception to the Thirteenth Amendment's prohibition

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[90] Earlier the court had held that the captain was so high in the corporate hierarchy that his actions constituted actions of the board of directors. *See* text accompanying note 57 *supra*. If the captain's actions were really tantamount to a board of directors' resolution, it is hard to see how any corporate official could countermand the captain's orders.

against involuntary servitude,"[91] and likened the master's position to that of "legal guardian"[92] of the crew members. It further said that in all of seafaring history:

> [T]he relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and everything depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized.[93]

While the court relied on this quotation as an illustration of the master's duty to his crew, it failed to acknowledge that the master's authority is a double-edged sword. If authority cannot be divided between master and crew, it is hard to comprehend how it can be divided between master and owner at the time of a crisis. If the master's authority is complete, the owner cannot intercede for him. The court's opinion presents the master's authority as a one-way street, binding on the crew, but subject to revocation by his superiors at the first hint of a disaster. It is respectfully suggested that, at least in moments of crisis, this view is wrong.

IV. The Aftermath of Cedarville — The Maritime Industry's Favored Role in History

The maritime industry has long enjoyed favored treatment as illustrated by the Limitation of Liability Act[94] and certain provisions of the Carriage of Goods by Sea Act,[95] which are no less potent today than they were in 1851, when Congress passed the Limitation Act. Despite these congressional attempts to encourage the industry, it has continued to decline, and could now be classified as one of the sick industries of American commerce. Federal subsidizing of many ocean fleets is the order of the day with many more fleets clamoring for similar help.

In an attempt to encourage the industry the Limitation of Liability Act, in substance, provides that a vessel owner may limit his liability to the value of the vessel and her freights pending, following a maritime disaster, absent any privity or knowledge on the part of the owner.[96] This has been held to mean that for limitation pur-

[91] 376 F. Supp. at 172.

[92] *Id.*

[93] *Id.* at 171-72, *citing* Southern Steamship Co. v. NLRB, 316 U.S. 31, 38 (1942).

[94] 46 U.S.C. §§ 181-89 (1964).

[95] 46 U.S.C. §§ 1300-1315 (1964).

[96] The actual operational language of the limitation principle is as follows:

poses a vessel owner is not responsible for acts of negligence or misconduct by the master or crew which cause the disaster provided he had no knowledge of the dangerous practice or opportunity to correct it; but the owner is liable if he had knowledge that the ship was unseaworthy in any respect and the unseaworthiness contributed to the disaster.[97] In the former case, the owner may limit his liability; in the latter, he may not.[98] By judicial decision, the limitation fund is the value of the vessel and freights at the close of the voyage in question[99] and does not include proceeds of insurance payable to the owner after the disaster.[100]

The legislators who passed and have since modified this statute were fully aware that maritime accidents could result in horrendous disasters unparalleled in any other industry.[101] It was to prevent the bankruptcy of shipowners in such situations, and to encourage the shipping industry, that the Limitation Act was passed.[102] While the Act, in maritime disasters, results in great hardship to both the injured seamen and the estates of deceased seamen since the limitation fund is rarely sufficient to satisfy even a fraction of these claims, a choice had to be made, and Congress favored the shipowner and the promotion of maritime commerce. A similar provision in the Carriage of Goods by Sea Act (COGSA)[103] exempts

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount of value of the interest of such owner in such vessel, and her freight then pending. 46 U.S.C. § 183(a) (1964).

[97] *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 695-706 (1967), for an excellent discussion of privity or knowledge of the corporate shipowner. As the authors point out, the owner's responsibility is not limited to providing a seaworthy vessel, but includes such duties as the selection of competent officers and personnel. If the owner has knowledge of improper procedures followed by the master and crew at sea, he loses his right to limit liability. In cases involving loss of life, the 1935 amendment to the Limitation Act provides that privity or knowledge of the master at or prior to the commencement of the voyage is conclusively deemed to be that of the owner of the vessel. 46 U.S.C. § 183(e) (1964).

[98] *See* G. GILMORE & C. BLACK, *supra* note 97, at 696.

[99] Norwich & Co. v. Wright, 80 U.S. 104 (1871).

[100] The City of Norwich, 118 U.S. 468 (1886).

[101] The only significant amendment to the Limitation Act reflects the disfavor into which it has fallen with modern courts and legislators. In 1935, the Act was amended to provide that in cases of loss of life or bodily injury, the portion of the limitation fund which was applicable to such claims would be increased to an amount equal to $60 per ton of the vessel's gross tonnage. 46 U.S.C. § 183(b) (1964).

[102] *See, e.g.*, British Transp. Comm'n v. United States, 354 U.S. 129 (1957).

[103] 46 U.S.C. §§ 1300-15 (1964).

owners from any liability to cargo interests for loss at sea, absent privity or knowledge, or unseaworthiness of which the owner was aware, at the time of shipment. Thus, if the loss of cargo at sea is attributable only to the negligence or bad seamanship of the master or crew, the shipowner is not liable to the cargo interests. This simplified rendition of the Limitation Act and COGSA does not begin to describe all the loopholes and limitations of the two Acts. However, it does serve to illustrate the favored treatment which Congress has occasionally given to the maritime industry.

Admittedly, the limitation principle has lost favor with the courts in recent years, and is now undergoing heavy attack in the halls of Congress. One reason is probably congressional failure to adopt a more enlightened view toward increasing the limitation fund based on a tonnage factor. This concept, reflected in the Brussels Maritime Convention of 1957,[104] has heretofore been rejected by Congress.

Nevertheless, the Limitation Act has been a major bulwark to American shipping interests, and has reassured individual shipping companies that they cannot be forced into bankruptcy by damage and liability claims resulting from maritime disasters, unless the company itself was privy to the negligence involved. The removal of this bulwark would be a major blow to the industry. To go further, and inflict punitive damages on the corporation for its failure to take affirmative action and wrench control from the master in a crisis, would be a crippling blow that the industry might not survive. It is in this context that the *Cedarville* case represents a great threat to shipping interests. It is one thing to subject a corporation to liability, and to deny the benefits of the Limitation Act, when a corporation knows of a defect in a vessel or a dangerous practice and fails to take affirmative action. It is quite another to go several steps further and heap punitive damages on its head for failure to correct a defective captain when past experience indicated that it had every right to rely on his judgment.

There is yet another dangerous aspect to the *Cedarville* rationale. If the acts of a master at sea are truly tantamount to those of the "board of directors," then judicial interpretation has rendered

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[104] Although the United States participated in all the proceedings, it never ratified the Brussels Convention. It was brought before Congress in 1961. S. 2314, 87th Cong., 1st Sess. (1961). The issue was again raised in 1963. S. 556, 88th Cong., 1st Sess. (1963). Basically, the convention calls for limitation of property claims based on a value of $67 per ton, and for limitation of personal injury claims based on $207 per ton of the vessel's tonnage.

the Limitation Act a dead letter and no congressional repeal is necessary for its demise. The Act provides that no vessel owner may limit liability against loss or damage when he had personal knowledge of the condition which ultimately caused the loss. If the master's acts are those of the corporation, then his negligence and faulty seamanship are also attributable to the corporation, and courts which have granted limitation for almost a century will suddenly be proved wrong. Absolute liability, in the true sense of the word, will have arrived.

It is interesting to note that in *Cedarville* the owner's petition to limit liability had already been dismissed at the time of the hearings on punitive damages. Thus, the punitive award was completely unnecessary to fully compensate the damage to claimants and the estates of the deceased seamen because full recovery was already guaranteed.

V. Liability of Insurers for Punitive Damages

If the *Cedarville* rationale is affirmed, one question which will soon be raised is whether or not insurance underwriters are liable for punitive damages under the standard marine insurance policies currently in use. The usual "Protection and Indemnity" policy, which covers injuries and death to seamen, does not mention punitive damages. Since there is no precedent in the maritime field, analogy can only be made to other areas of the law which have considered the insurer's liability for punitive damages. As might be expected, the automobile field has laid the cornerstone of the law on this question, even though some scattered cases have been decided from other areas of insurance, notably malpractice insurance.

The insurer's initial defense is that public policy forbids the imposition of punitive damages. The argument, in its various forms, proceeds: punitive damages are not compensation to the injured party, but are a fine levied against the wrongdoer for the benefit of the public in order to prevent recurrence of the wrongful act. If the damages can be passed along to an insurer, there is no deterrent value against the wrongdoer, excepting the minor one — insurance cancellation or increased rates. Furthermore, the public, for whose benefit the damages are levied, is in reality the ultimate victim, because the insurer will pass its loss on to the public in the form of increased rates. It is clearly against public policy to allow one to insure himself against criminal liability, and punitive damages are similar to a criminal fine. Finally, there is something unsavory

about heaping punitive damages on the head of an insurer, who is innocent of the original wrong.[105]

At least one court has attempted to explode the theory that passing punitive damages on to an insurer would not have any deterrent effect on the insured, by pointing out that most insureds would not be deterred by the threat to their pocketbook anyway.[106] The court noted that many criminal sanctions usually attach to an insured's acts of willful misconduct and the fact that these have not had the desired deterrent effect would tend to show that punitive damages would not be effective either. On the other hand, it was correctly pointed out that the idea of deterrence is good, even though the means of effectuating it are less than satisfactory. Moreover, just because not all criminal statutes have been one hundred percent effective crime deterrents is no reason to strike them from the books.[107]

While the public policy argument rages, there seems to be unanimous judicial agreement that there is no similar problem where the insured is liable for punitive damages only vicariously, such as through the principal-agent relationship. Where a servant or agent commits an act which would be ordinarily punishable by punitive damages, the actual wrongdoer is not covered by the insurance. Thus the recovery or denial of punitive damages against the insurer would have no effect whatsoever on the wrongdoer. In such a case there is no public policy against insurance for punitive damages, because the actual wrongdoer is not escaping punishment for his act by passing it along to an insurance carrier.[108]

While this argument is cogent at first glance, it contains several logical weaknesses. Where the corporation is liable through authorization, ratification, or participation in the agent's acts, as in *Cedarville*, the public policy argument is reinstated, because the corporation is the actual wrongdoer. Where the corporation is held liable only through the principle of *respondeat superior*, it is assumed that an award of punitive damages will be translated into ef-

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105 American Surety Co. v. Gold, 375 F.2d 523 (10th Cir. 1966); Northwestern Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965); Nicholson v. American Fire & Cas. Ins. Co., 177 So. 2d 52 (Fla. App. 1965); Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

106 Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

107 American Surety Co. v. Gold, 375 F.2d 523 (10th Cir. 1966).

108 Ohio Cas. Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir.), *cert. denied*, 295 U.S. 734 (1934); Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. App. 1966).

fective action against the agent, either in the form of intra-corporate punishment or indirect action against the agent by the insurer. Thus if an insurer has the tenacity to pursue recovery against the agent, the ultimate burden is placed where it rightfully belongs — on the wrongdoer. Finally, from a purely common-sense standpoint, the argument is anomalous. An insurer, by its contract, agrees to be bound for damages incurred by its insured. The insurer, then, assuming coverage under the policy, stands in the shoes of its insured in any case instituted against the insured. When the public policy-corporate argument is injected into the case, the courts are in effect saying that the insurer is liable for the full extent of the punitive award when its corporate insured is *innocent* of any wrongful act, but is not liable if the corporate insured is *guilty* of the wrongful act. To the layman, this result simply does not make sense.

In states where public policy does not preclude the imposition of a punitive award on the insurer, the ultimate question is whether or not the policy covers an award of punitive damages.[109] An analysis of court decisions construing insurance coverage for punitive damages in automobile and malpractice cases reveals that the majority of courts have found that coverage exists. The language of the policies in most cases, however, has covered all damages imposed upon the insured *by law.* Thus, in a recent South Carolina decision,[110] it was held that the insurer's undertaking to pay sums for which the insured should "become legally obligated to pay as damages because of . . . [b]odily injury," was broad enough to include punitive damages. Presumably the rationale was that punitive damages were a legal obligation of the insured. Under identical contract language a Tennessee court reached the same result and added the reasoning that the average policyholder would expect to be covered for all damages not intentionally inflicted.[111] In most cases where

[109] The standard Protection and Indemnity (P & I) contract for American Underwriters generally reads as follows:

> The Association agrees to indemnify the Assured against any loss, damage, or expense which the Assured shall become liable to pay and shall pay by reason of the fact that the Assured is the owner . . . of the insured vessel and which shall result from the following liabilities, risks, events, occurrences and expenditures.

A myriad of coverages and exclusions, including liability for personal injury or death follows this general language.

[110] Carroway v .Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965). *See also* Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Thornton, 244 F.2d 823 (4th Cir. 1957).

[111] Lazenby v.Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

courts have found coverage for punitive damages the policy language reflected a term for legal liability.[112] On the other hand, some other courts have construed identical language to exclude punitive damages,[113] and have usually advanced a public policy argument. At least one court has held that there was no coverage under a policy insuring against bodily injury and property damage sustained by any person because punitive damages do not fall within that category.[114]

It should be noted that the standard Protection and Indemnity policy covers only sums which the assured shall "become liable to pay and shall pay," and does not include the "legally obligated" or "liability imposed by law" language. Since punitive damages are strictly a creature of the law and are somewhat maligned in most circles, this slight variation in language might be enough to oust coverage in courts with strong public policy dispositions against punitive damage coverage. The question of policy coverage is likely to be short-lived, however, as most insurers will be swift to rewrite their policies either to expressly exclude punitive damage liability or to accept it with a corresponding adjustment in premium price.

VI. CONCLUSION

In the aftermath of *Cedarville* the race to the deep pocket of the solvent corporate defendant has already started. In *Gunnip v. Warner Co.*,[115] the trial court allowed a Jones Act plaintiff to amend his petition to include a claim for punitive damages. The complaint originally charged that the defendant was negligent in supplying the plaintiff with a rope which it knew to be rotten. The court held that it was an open question whether punitive damages could be recovered under the Jones Act and allowed the amendment over defendant's objections that the amendment was "frivolous." As authority for its stand, the trial court cited the *Cedarville* case.

It thus appears that the lower courts have taken another seven-league stride across time-honored precedents, and have outstripped landlocked courts in their zeal to *punish* the corporate defendant.

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[112] *See* cases cited notes 110 & 111 *supra*. *See also* Capital Motor Lines v. Loring, 238 Ala. 260, 189 So. 897 (1939); Maryland Cas. Co. v. Baker, 304 Ky. 296, 200 S.W. 2d 757 (1947); Morrell v. LaLonde, 45 R.I. 112, 120 A. 435, *error dismissed*, 264 U.S. 572 (1924) (malpractice insurance).

[113] Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934); Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941); Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964).

[114] Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964).

[115] 1968 A.M.C. 957 (E.D. Pa. 1968).

This trend can only be reversed if the appellate courts strictly adhere to the time-honored rules that a master in time of a crisis is in complete control of his ship, he is not subject to corporate regulation, and his acts at sea are not those of the corporation. While the author is not suggesting that precedent alone is a sufficient reason for adhering to an outdated rule, he is convinced that not even modern-day radio and telephone communication — indeed not even closed-circuit television — are capable of removing corporate officers from their armchairs and placing them on the bridge of a fog-enshrouded ship at the height of the turmoil and confusion following a major collision at sea. To remove the authority of a master at that moment of crisis, and to place the lives and safety of the crew and passengers in the hands of a corporate official hundreds of miles from the scene, would break down every line of seagoing discipline which has grown up in the centuries of seafaring history. It is this writer's hope that the courts will elect not to do so and will dismiss *Cedarville* as one of those "hard cases that make bad law."

ADDENDUM

While this Comment was at press the Sixth Circuit Court of Appeals reversed the district court[1] and held: (1) The district judge's findings that United States Steel authorized and ratified Captain Joppich's actions were clearly erroneous.[2] (2) A finding of ratification or authorization was a prerequisite to awarding punitive damages against a ship's owner.[3] The court of appeals, applying the clearly erroneous standard as construed in *United States v. United States Gypsum Co.*,[4] directed its reversal only at the district court's finding of ratification and authorization and said that the corporate officials were not obligated to decide "the best course . . . to be taken or to countermand the orders of the master who was on the scene."[5] The court of appeals did not rule on the district court's alternative

[1] United States Steel Corp. v. Fuhrman, No. 18481 (6th Cir. decided March 7, 1969).

[2] *Id.* at 5.

[3] *Id.* at 9. The idea also follows from the *Lake Shore* case. *See* notes 19-25 *supra* & accompanying text.

[4] 333 U.S. 364 (1948).

[5] United States Steel Corp. v. Fuhrman, at 6. The court said that such control, especially in emergencies, is imperative "[i]n order to avoid chaos . . . [and] avoid hesitations and disastrous delays [by] the master while he obtains advice and authority from his superiors. . . ." *Id.* at 6-7. The court recognized that an alternative ground for punitive damages would be "if the acts complained of were those of an unfit master and the owner was reckless in employing him." *Id.* at 9.

holding that punitive damages could be awarded under the survival portion of the Jones Act.[6] The implication is that if punitive damages can be awarded under the Jones Act ratification or authorization may still be prerequisites. The court, however, by avoiding the Jones Act questions left the propriety of awarding punitive damages under the Jones Act undecided.[7]

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[6] *See* note 60-73 *supra* & accompanying text. Thus the court also avoided deciding whether or not a showing of conscious pain and suffering was a prerequisite to awarding punitive damages under the Jones Act. *See* note 71-73 *supra* & accompanying text.

[7] There was some indication that the claimants were considering asking the Supreme Court for certiorari. *See* Cleveland Plain Dealer, March 9, 1969, §AA, at 2, col. 3. However, the probability of the Supreme Court granting certiorari would be greater had the sixth circuit decision involved the construction of a federal statute.

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