NOTE

Footnote 14 of *Calhoun* remanded without deciding two issues for consideration by the trial court, namely (1) whether state or federal maritime law controlled on the issues relative to liability, and (2) the jurisdiction to which reference would be made (Pennsylvania or Puerto Rico) for the guidance in setting the monetary losses of the survivors.

The Third Circuit in *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338 (3d Cir.), *cert. denied*, ___ U.S. ___, 148 L. Ed. 2d 536, 121 S. Ct. 627, (2000), rehr'g denied, ___ U.S. ___, 148 L. Ed. 2d 727, 121 S. Ct. 797 (2001), concluded following remand that federal maritime law as opposed to the law of Pennsylvania would define the defendant's duties on the issue of liability. The issues relative to recoverable monetary losses are more complicated.

In this particular case, Pennsylvania permitted the recovery of actual and punitive damages, while Puerto Rico does not allow punitive damages. The court then shifted to a choice of law analysis by analogy to the *Lauritzen* rationale, which was utilized for the purpose of determining the state or territory that had the "most significant relationship" to the litigation. It was held that Pennsylvania had the most significant relationship and had the most substantial interest in obtaining compensation for its citizens relative to the decedent's death; however, the question of punitive damages for the purpose of ensuring maritime safety would be with Puerto Rico since this territory had the most significant relationship relative to this theory of financial loss.

> Puerto Rico also has an especially strong interest in maintaining the safety of the waterways surrounding the island to preserve the economic benefits it derives from both tourism and other commercial enterprises.

The Third Circuit adopted the conflict of laws theory denominated as *depecage*, a theory that uses law of different states to resolve different issues in the same case (*Ruiz v. Blentech Corp.*, 89 F.3d 320, 325 [7th Cir. 1996]).

You will recall that when the jurisdiction of a federal court is predicated upon diversity of citizenship, this court sits as another court of that state. This general statement has an exception, namely in matters of maritime commerce you will follow the federal choice of law principles. (f. 12 at page 345). Therefore, you have *depecage* and the "most significant relationship" test followed even if contrary to legal principles of Pennsylvania.

There was a dissent since the dissenting judge thought that punitive damages should be permitted under Pennsylvania law.

J-000761

In re AMTRACK "SUNSET LIMITED" TRAIN CRASH IN BAYOU CANOT, ALABAMA, ON SEPTEMBER 22, 1993.

James ALTOSINO, Marie V. Altosino, John L. Anderson, Alice Anello, Joseph Anello, et al., Plaintiffs–Appellees,

v.

WARRIOR & GULF NAVIGATION COMPANY, Willie C. Odom, Andrew Stabler, CSX Transportation, Inc. and National Railroad Passenger Corp. d.b.a. Amtrak, Defendants–Appellants.

No. 96–6833.

United States Court of Appeals, Eleventh Circuit.

Sept. 11, 1997.

Before BARKETT, Circuit Judge, HILL, Senior Circuit Judge, and HOWARD *, Senior District Judge.

HOWARD, Senior District Judge:

In this admiralty action, which was consolidated by the Judicial Panel on Multidistrict Litigation, Appellants Warrior & Gulf Navigation Company ("WGN"), Willie C. Odom, Andrew Stabler, CSX Transportation, Inc. ("CSX"), and National Railroad Passenger Corp. ("Amtrak"), appeal from an adverse ruling by the district court that the Alabama wrongful death statute, Ala.Code § 6–5–410 (1993),[1] applied to all aspects of the wrongful death claims in this action under the holding of *Yamaha Motor Corp., U.S.A. v. Calhoun*, — U.S. —, —, 116 S.Ct. 619, 622, 133 L.Ed.2d 578 (1996). Appellants also appeal from the district court's ruling that the plaintiffs in the personal injury cases ("personal injury plaintiffs") may recover punitive damages and damages for loss of society and consortium. We vacate the decision of the district court on both grounds and remand this action for further consideration.

I. Background

The incident giving rise to this action occurred in the early morning hours of September 22, 1993, in state territorial waters near the Port of Mobile, Alabama. At approximately 2:45 that morning, a commercial towing vessel named the M/V Mauvilla ("Mauvilla") was traveling north on the Mobile River pushing a tow of six loaded barges toward a destination some three hundred and fifty miles upriver. The vessel, owned and operated by WGN, was carrying a crew under the command of a captain and pilot.

Early in the voyage, the Mauvilla was enveloped by a heavy fog that had settled on the river. The pilot of the vessel, with his visibility of the waterway compromised, decided to secure the Mauvilla and wait for the fog to abate. However, while attempting to secure the Mauvilla to the river bank, the pilot allowed the vessel to veer into the mouth of Big Bayou Canot, a tributary of the Mobile River.

Unaware of what had transpired, and under the mistaken belief that he was still navigating in the Mobile River, the pilot continued to search for a place to secure the Mauvilla and its tow. While this task was being undertaken, an object appeared on the Mauvilla's radar screen which the pilot believed to be another vessel to which he could secure his vessel. That object was in fact a railroad bridge, owned and maintained by CSX, that crossed Big Bayou Canot.

* Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

1. Section 6–5–410 of the Alabama Code provides in pertinent part:

> (a)A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the [illegible] act, omission, or negligence if it had not caused death.
>
> (b)Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission, or negligence.
>
> (c)The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.
>
> (d)Such action must be commenced within two years from and after the death of the

As the pilot steered the Mauvilla toward the object, the tow struck a bridge support causing a portion of the railroad track to become laterally misaligned. Soon after, a passenger train, operated by Amtrak, derailed while attempting to traverse the damaged section of rail. Three locomotives, two passenger coaches, a crew dormitory car, and a baggage car, tumbled into the bayou, resulting in the death of forty seven persons on the train, numerous personal injuries, and extensive property damage to the train and bridge.

The crash precipitated the filing of over one hundred personal injury and wrongful death suits against WGN, the pilot and captain of the Mauvilla, CSX, and Amtrak. The Judicial Panel on Multidistrict Litigation consolidated these actions in the United States District Court for the Southern District of Alabama for all pretrial proceedings.

Because this action arose from an accident on navigable waters that involved both land-based and marine-based activity, the district court proceeded to determine as an initial matter the applicable law and the recoverable damages. By written Order of June 26, 1996, the district court entered its rulings with respect to these issues.

The trial court found that, while admiralty jurisdiction existed over this action, state law was to govern all aspects of the wrongful death claims. The district court also held that the personal injury claims in this action would be subject to the general maritime law which, the district court found, allowed the personal injury plaintiffs to pursue nonpecuniary damages that included loss of consortium, loss of society, and punitive damages. As to the claims asserted by CSX and Amtrak for property damage, the court ruled that these claims would be governed by admiralty law but would be limited to compensatory damages only.[2]

By written Order of July 15, 1996, the district court amended its previous order and certified these rulings for immediate interlocutory appeal. This Court granted interlocutory review.

II. Discussion

A.

[1] The main issue in this appeal is whether the district court erred in finding that Alabama's wrongful death statute governs the wrongful death claims asserted in this action. It is appellants' contention that the district court's ruling cannot stand because the Alabama wrongful death act conflicts with substantive admiralty law such that state law cannot be used by the plaintiffs as a source of relief under *Yamaha Motor Corp. v. Calhoun*, — U.S. ——, ——, 116 S.Ct. 619, 622, 133 L.Ed.2d 578 (1996).

When this argument was raised below, the district court correctly observed that the Alabama wrongful death statute conflicts with federal maritime law in two significant respects. First, the general maritime law does not allow for the recovery of punitive damages except on a showing of willful and wanton misconduct in claims not relevant to this analysis. *See* discussion *infra*. On the other hand, the Alabama wrongful death statute allows for the recovery of punitive damages only, *King v. National Spa & Pool Inst., Inc.*, 607 So.2d 1241, 1246 (Ala.1992) (citing *Barnes v. Oswalt*, 579 So.2d 1319 (Ala.1991)), and permits the recovery of these damages on a showing of simple negligence, Ala.Code 6–5–391(a) (1993) (damages recoverable for "wrongful act, omission, *or negligence*" causing death) (emphasis added).

Second, federal maritime law requires that individual fault among tortfeasors be apportioned in collision and allision cases. *See, e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715–16, 44 L.Ed.2d 251 (1975); *Florida E. Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060, 1063–64 (5th Cir.1981). Under Alabama law, however, apportionment of damages among joint tortfeasors is strictly forbidden. *See, e.g., Campbell*

2. On appeal, CSX and Amtrak argue that if the district court was correct in finding nonpecuniary punitive damages to be available for the personal injury claims under the general maritime law, then the court necessarily erred in limiting their property damage claims to compensatory damages. As we hold that nonpecuniary punitive damages are unavailable for the personal injury claims under the general maritime law, we find this argument moot

v. Williams, 638 So.2d 804, 809–10 (Ala.), *cert. denied*, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994). It also prohibits actions for contribution. *See, e.g., Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*, 365 So.2d 968, 970 (Ala.1978).

Despite the presence of these conflicts, the district court concluded that the Alabama wrongful death statute applied to the wrongful death claims in this action. The district court reasoned that:

> Certainly, when ruling, the [*Yamaha*] Court clearly understood that the application of state wrongful death schemes to deaths occurring within territorial waters would introduce myriad inconsistencies into the law of maritime wrongful death. Specifically, the Court understood that there would be wide variations in the damages recoverable under those schemes.

Embodied within the district court's reasoning is the assumption that *Yamaha*, by allowing state law remedies in that case, implicitly accepted a necessary byproduct of its holding: that state wrongful death schemes would conflict with the general maritime law which, ultimately, must yield to state interests.[3] The district court's interpretation of *Yamaha* is mistaken.

B.

In *Yamaha*, the Supreme Court held that its holding in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which created a wrongful death action under the general maritime law, did not provide the exclusive remedies in cases involving the deaths of non-seamen in state territorial waters. *Yamaha*, — U.S. at —, 116 S.Ct. at 622. As explained by the *Yamaha* Court, *Moragne* represented an "extension of relief," driven by a "humane and liberal" purpose, that did not foreclose the availability of state law remedies in such cases. *Yamaha*, — U.S. at —, 116 S.Ct. at 627 ("*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalled that it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it by established and inflexible rules") (quotations and citations omitted).

To be sure, in reaching its decision the *Yamaha* Court was aware that a dual system of recovery would introduce into the general purview of admiralty law variations in damage awards and recoveries. Indeed, the Court expressly observed in *Yamaha* that "[v]ariations of this sort had long been deemed compatible with federal maritime interests." *Id.* at —, 116 S.Ct. at 626 (citing *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921)).

However, it is equally certain that the *Yamaha* Court, while aware that its decision would create, to some extent, unavoidable conflict between state law and federal maritime law, did not intend to wholly sacrifice long-standing admiralty principles at the altar of states' rights. To the contrary, in *Yamaha* the Court confined its holding "to the modest question whether it was *Moragne*'s design to terminate recourse to state remedies," *id.* at — n. 8, 116 S.Ct. at 626 n. 8, but in answering that question in the negative, repeatedly urged that "[p]ermissible state regulation ... must be consistent with federal maritime principles and policies," *id.* at — n. 13, 116 S.Ct. at 628 n. 13 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373–74, 79 S.Ct. 468, 480–81, 3 L.Ed.2d 368 (1959)), such that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at — n. 8, 116 S.Ct. at 626 n. 8. (quoting *Romero*, 358 U.S. at 373, 79 S.Ct. at 480–81).

Thus, it is evident in *Yamaha* that the Court, while intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters), was not concerned with overruling

3. Citing *The Tungus v. Skovgaard*, 358 U.S. 588, 592–93, 79 S.Ct. 503, 506–07, 3 L.Ed.2d 524 (1959) and *Hess v. United States*, 361 U.S. 314, 320, 80 S.Ct. 341, 346, 4 L.Ed.2d 305 (1960), the district court found that the Alabama wrongful death statute would have to be applied as a whole, including the provisions which conflicted with admiralty law, as trial courts could not "pick and choose some portions of a state scheme and discard others."

bedrock admiralty principles recognized in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917), where the Court held that state law must yield if it "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." Indeed, since the birth of the *Jensen* doctrine in the early part of this century, the goals of uniformity and harmony in admiralty have survived to the present. *Yamaha*, by emphasizing these principles yet again, has affirmed their continuing vitality.

Consequently, it would be wrong to assume, as it appears the district court did in this case, that the holding in *Yamaha* embodies an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters. It is plain from the language in *Yamaha* that more is at issue in these situations; conflicts of this type must be resolved with a healthy regard for the needs of a uniform maritime law.

Of course, this balancing act—allowing state law remedies while being careful not to trample the general maritime law—is, by its nature, made more or less difficult by the particular facts of a case. As observed by the United States Court of Appeals for the Third Circuit in *Yamaha*, "determining whether federal maritime law conflicts with and thus displaces state law has proven to be extremely tricky.... " *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 628 (3d Cir.1994). "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence...." *Yamaha*, — U.S. at — n. 8, 116 S.Ct. at 626 n. 8 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S.Ct. 981, 987, 127 L.Ed.2d 285 (1994)).

Nowhere is the difficulty in drawing this line more evident than in the present case. Here, we have before us a state statute that is unique; the Alabama wrongful death statute is the only one of all the fifty states that provides for punitive damages only, *see Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1262 (Ala.1986) (Maddox, J., concurring) (observing that Alabama is the only state in which wrongful death damages are purely punitive), and allows for the recovery of punitive damages on a showing of mere negligence, *see* discussion *supra*. Furthermore, the particular facts of this case implicate a variety of federal maritime interests that simply were not present in *Yamaha* and, as a result, do not lend themselves to direct analysis under that case.[4] Thus, we must steer to sources other than *Yamaha* for guidance in resolving the present conflict between the Alabama wrongful death statute and the general maritime law. That search necessarily takes us to *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir.1986).

In *Steelmet*, this Court summarized the task that we must undertake in determining whether to apply state law in this case. There, we explained that:

> One must identify the state law involved and determine whether there is an admiralty principle with which the state law conflicts,... If there is an admiralty-state law conflict, the comparative interests must be considered—they may be such that admiralty shall prevail ... or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect....

Id. at 1488 (citations omitted); *accord Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1530 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).[5]

4. In *Yamaha*, the Court was asked to examine the potential application of the wrongful death and survival statutes of Pennsylvania and Puerto Rico. In doing so the Court never addressed whether these statutes were in conflict with any characteristic features of the general maritime law. The absence of conflicts analysis in *Yamaha* most likely is due to the fact that the Pennsylvania and Puerto Rico statutes were primarily remedial in nature. There was nothing in *Yamaha* from which it may be inferred that the application of these statutes threatened federal maritime principles or policies.

5. The comparative interests analysis set forth in *Steelmet* is by no means novel. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); *Exxon Corp. v. Chick Kam*

Applying *Steelmet* to the present action, we must balance Alabama's interests in having its wrongful death statute apply against the federal maritime law principles of uniformity and harmony.

It goes without saying that the State of Alabama has a sovereign interest in activities that occur within its territorial waters. *See Brockington*, 903 F.2d at 1530 (state interests include the interest in being permitted to regulate independently matters of local concern without interference by the federal government). Moreover, Alabama undoubtedly is interested in protecting its citizens and providing for those who have been injured by tortious acts committed within its borders. *See Yamaha*, 40 F.3d at 644 (state interests include policing territorial waterways and protecting citizens through tort systems). However, as significant as Alabama's interests may be, the federal maritime concerns that exist in this case tip the balance in favor of displacing state law insofar as the claims for wrongful death under the Alabama Wrongful Death Act are based upon simple negligence.

To begin with, the Alabama wrongful death statute conflicts with two fundamental admiralty law principles that bear directly on the rights and liabilities of the parties: (1) apportionment of damages for joint tortfeasors, and (2) the applicable standard of liability for the recovery of punitive damages. *See* discussion *supra*; *cf. American Dredging*, 510 U.S. at 452–53, 114 S.Ct. at 987–88 (absence of conflict between state law and *substantive* maritime law or interest); *Brockington*, 903 F.2d at 1530–33 (same); *Steelmet*, 779 F.2d at 1490–91 (same). That substantive admiralty law rights are being threatened in this case is a critical factor in considering the relative weight of federal maritime interests. *See American Dredging*, 510 U.S. at 452–53, 114 S.Ct. at 987–88 (using distinction between substantive and procedural rights in deciding applicability of state law); *see also Pope & Talbot v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204–05, 98 L.Ed. 143 (1953) (admiralty's comparative negligence rule barred application of state contributory negligence rule); *Kossick*, 365 U.S. at 742, 81 S.Ct. at 893 (federal maritime rule validating oral contracts precluded application of state Statute of Frauds); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248–49, 63 S.Ct. 246, 252–53, 87 L.Ed. 239 (1942) (federal maritime rule allocating burden of proof displaced conflicting state rule). Indeed, the Supreme Court has warned that states "may not deprive a person of any substantial admiralty rights as defined ... by interpretative decisions of this Court." *Pope*, 346 U.S. at 410, 74 S.Ct. at 205. Thus, in a case like the present, where substantive admiralty principles are placed at risk by the potential application of state law, there is "no leeway for variation or supplementation by state law," *Yamaha*, ___ U.S. at ___, 116 S.Ct. at 626 (citing some above cases), insofar as the claims for wrongful death under the Alabama Wrongful Death Act are based upon simple negligence.

Additionally, the facts of this case are so closely related to activity traditionally subject to admiralty law that the reasons for applying federal maritime law in this case are undeniably present. In sharp contrast to *Yamaha*, which was a products liability action arising from a recreational jet ski accident, the present action bears a substantial connection with traditional maritime activity. Here, we do not have a case involving a pleasure craft, or an airplane falling into navigable waters, but a case involving an allision of a commercial tug and tow with a railroad bridge, that took place in the ordinary course of maritime business, on a waterway subject to heavy commercial traffic. Moreover, in contrast to the jet ski collision in *Yamaha*, the allision in our case substantially disrupted the flow of maritime commerce. Thus, the facts of this case, unlike those in *Yamaha*, give rise to federal maritime interests that are decidedly commercial in nature. Accordingly, the actors in this case are entitled to the application of a body of laws—maritime laws—that have been fit-

Choo, 817 F.2d 307, 317–18 (5th Cir.1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988); *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir.1975).

ted over the years for just these types of situations.

Finally, federal maritime law should be applied here because Congress, in passing the Admiralty Extension Act ("Act"), 46 U.S.C. § 740 (1975), made clear its intent that in situations involving an allision between a vessel and a shore object, such as a railroad bridge, state laws should yield to federal maritime law. The general rule before the passage of the Act was that ship-to-shore tort claims were not maritime claims to be heard in the admiralty courts, but were instead common law claims triable in state court and governed by state law. *The Admiral Peoples*, 295 U.S. 649, 651, 55 S.Ct. 885, 886, 79 L.Ed. 1633 (1935). Bridges, wharves, and the like were viewed as extensions of land. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214–15, 90 S.Ct. 347, 348–50, 24 L.Ed.2d 371 (1969).

The Admiralty Extension Act extended admiralty jurisdiction to cover "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1975). It is clear from its legislative history that the primary purpose of the Act was to eliminate the inconsistent and unfair results that could arise from adjudicating the cross claims in allision cases according to different and conflicting legal principles.

> As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery.... The bill under consideration would correct these inequities.

See Sen. Rep. No. 1593, 80th Cong., 2d Sess., *reprinted in* 1948 U.S.Code Cong. Serv. 1898. In light of this legislative history, many courts subsequently have suggested, and some have explicitly stated, that a claim cognizable in admiralty by virtue of the Admiralty Extension Act is governed by the general maritime law. *See, e.g., Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209–210, 83 S.Ct. 1185, 1187–88, 10 L.Ed.2d 297 (1963); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 208–11, 92 S.Ct. 418, 422–25, 30 L.Ed.2d 383 (1971); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204, 212 (5th Cir.1968); *Pryor v. American President Lines*, 520 F.2d 974, 979–80 (4th Cir.1975).

In sum, applying the Alabama wrongful death act in this case so as to allow recovery for wrongful death based upon simple negligence only would deprive the litigants of substantive admiralty rights that must be applied given the exceedingly commercial nature of this incident. Moreover, application of such feature of Alabama law under the present facts would run counter to Congress' intent that admiralty law govern suits involving ship-to-shore allisions.

Accordingly, as the federal maritime interests present in this action outweigh Alabama's interests in having its wrongful death statute apply in its entirety, we hold that the district court erred in applying the Alabama wrongful death statute to the wrongful death claims in this action insofar as such Alabama statute provides for the recovery of punitive damages for simple negligence only and prohibits apportionment of fault and damages among joint tortfeasors.

[2] In the case of *American Dredging Co. v. Lambert*, 81 F.3d 127, 130 (11th Cir. 1996), this Court held that *Yamaha, supra*, extended the right of recovery in wrongful death cases to the nonpecuniary remedies afforded by the Florida Wrongful Death Act to actions for wrongful death to non-seamen occurring in state territorial waters. The plaintiffs in the wrongful death actions have available to them the remedies provided in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). In addition, although such plaintiffs cannot recover punitive damages for simple negli-

gence, they may recover punitive damages upon a showing of "intentional or wanton and reckless conduct" on the part of defendants amounting to "a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir.1995). This is because the standard of liability necessary for the recovery of punitive damages is governed by admiralty law. Alabama law provides only the remedy which under *Yamaha* is now available to these wrongful death claimants in admiralty.

C.

[3] Appellants also contend that the district court erred in finding that the personal injury plaintiffs in this action may seek non-pecuniary damages under the general maritime law for loss of society, loss of consortium, and punitive damages. We agree with Appellants' contention.

Appellees suggest that *Yamaha* somehow extended state law remedies to personal injury actions to non-seamen occurring in state territorial waters. First, *Yamaha* dealt only with wrongful death actions and has no relevance to personal injury actions. Second, the historical basis for wrongful death actions in admiralty is entirely separate from that for personal injuries, quoting from *Gilmore And Black, The Law Of Admiralty, Second Edition*, Chapter VI, § 6-29:

> In the [sic] Harrisburg[6] the Supreme Court held that no cause of action for wrongful death was provided by the general maritime law. In The Hamilton, which involved a high seas collision between ships owned by Delaware corporations, the Court held that the gap in the maritime law created by The Harrisburg could be filled by allowing a recovery for wrongful death under a statute of the State of Delaware. Then or later statutes providing recovery for wrongful death were enacted in all states. On March 30, 1920, Congress enacted the Death on the High Seas Act (DOHSA) which provided a recovery for death "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State [Territory or dependency]." On June 5, 1920, Congress enacted the Jones Act which incorporated the wrongful death provisions of the Federal Employers' Liability Act [FELA]. DOHSA and the Jones Act, enacted almost simultaneously, were hopelessly inconsistent with each other both as to the nature of the wrongful death recovery and as to the classes of beneficiaries entitled to recover. From 1920 until 1970 the lower federal courts, with occasional help from the Supreme court, attempted to impose a degree of order on this statutory chaos. In 1970 the Supreme Court overruled The Harrisburg in Moragne v. States Marine Lines, Inc. and held, in a unanimous decision, that a remedy for wrongful death was provided by the general maritime law. (Footnotes omitted).

Although Congress provided for remedies for wrongful death on the high seas (DOHSA) and for wrongful death to seamen (*The Jones Act*), Congress has never provided a remedy for wrongful death to non-seamen in state territorial waters.[7] Therefore, prior to *Moragne*, the admiralty courts looked to the state wrongful death actions to provide a remedy in such actions, and that situation existed until 1970 when the Supreme Court decided *Moragne* which for the first time gave an admiralty common law right of action for wrongful death of non-seamen in state territorial waters.

Twenty-six years later, the Supreme Court in *Yamaha* interpreted *Moragne* as adding remedies and not deleting any remedies which existed prior to *Moragne*. Admiralty remedies for personal injury existed prior to *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886). *See Leathers v. Blessing*

6. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886).

7. Congress has provided for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, but such act is not relevant to the Court's rationale.

105 U.S. 626, 15 Otto 626, 26 L.Ed. 1192 (1881). Therefore, there was no need to look to state law for remedies in the case of non-seamen injured in state territorial waters and no need for a *Moragne* decision or a *Yamaha* decision. Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as loss of society, loss of consortium or punitive damages, except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing. We are aware of no decision in the Supreme Court or in any of the circuit courts which has authorized punitive damages in a personal injury case.

In *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir.1993), we looked disfavorably on the availability of nonpecuniary damages under the general maritime law. Specifically, we held that "neither the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases." *Id.*

Today, we expressly extend our holding in *Lollie* to preclude the availability of punitive damages in personal injury actions brought under the general maritime law. Accordingly, we vacate the district court's ruling that the personal injury plaintiffs in this action are entitled to pursue such nonpecuniary damages.

III. Conclusion

For these reasons, we VACATE the order of the district court and REMAND this action for additional consideration not inconsistent with this opinion.[8]

HILL, Senior Circuit Judge, specially concurring:

We have, here, undertaken to lay down controlling law to govern further proceedings in some one hundred or more litigations. I am persuaded that the opinion now prepared for us by Judge Howard is the correct resolution of this task.

We have followed the channel markers and beacons as well as we ascertain them to be, but between *The Harrisburg, Moragne,* and *Yamaha,* and interstitially open between the *Death on the High Seas Act* and the *Jones Act,* there are some uncharted waters.

Under such circumstances, the M/V Mauvilla took a wrong turn into Big Bayou Canot. Its skipper should have kept it in the Mobile River.

We trust that we have not made a similar wrong turn. We do not wish to steer one hundred cases into unmarked obstructions. Being persuaded that we have not done so, I am pleased to concur.

8. The motion for expedited ruling, filed in this appeal, is denied as moot.

PHILOMENA DOOLEY, Personal Representative of the Estate of Cecelio Chuapoco, et al., Petitioners

v

KOREAN AIR LINES CO., LTD.

524 US —, 141 L Ed 2d 102, 118 S Ct —

[No. 97-704]

Argued April 27, 1998, Decided June 8, 1998.

Justice Thomas delivered the opinion of the Court.

[1a] In a case of death on the high seas, the Death on the High Seas Act, 46 USC App § 761 *et seq.* [46 USCS Appx §§ 761 *et seq.*], allows certain relatives of the decedent to sue for their pecuniary losses, but does not authorize recovery for the decedent's pre-death pain and suffering. This case presents the question whether those relatives may nevertheless recover such damages through a survival action under general maritime law. We hold that they may not.

I

On September 1, 1983, Korean Air Lines Flight KE007, en route from Anchorage, Alaska, to Seoul, South Korea, strayed into the airspace of the former Soviet Union and was shot down over the Sea of Japan. All 269 people on board were killed.

Petitioners, the personal representatives of three of the passengers, brought lawsuits against respondent Korean Air Lines Co., Ltd. (KAL), in the United States District Court for the District of Columbia. These cases were consolidated in that court, along with the other federal actions arising out of the crash. After trial, a jury found that KAL had committed "willful misconduct," thus removing the Warsaw Convention's $75,000 cap on damages, and in a subsequent verdict awarded $50 million in punitive damages. The Court of Appeals for the District of Columbia Circuit upheld the finding of willful misconduct, but vacated the punitive damages award on the ground that the Warsaw Convention does not permit the recovery of punitive damages. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F2d 1475, cert. denied, 502 US 994, 116 L Ed 2d 638, 112 S Ct 616 (1991).

The Judicial Panel on Multidistrict Litigation thereafter remanded for damages trials, all of the individual cases to the District Courts in which they had been filed. In petitioners' cases, KAL moved for a pretrial determination that the Death on the High Seas Act (DOHSA), 46 USC App § 761 *et seq.* [46 USCS Appx §§ 761 *et seq.*], provides the exclusive source of recoverable damages. DOHSA provides, in relevant part:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative . . ." § 761.

"The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by

the persons for whose benefit the suit is brought . . ." § 762.

KAL argued that, in a case of death on the high seas, DOHSA provides the exclusive cause of action and does not permit damages for loss of society, survivors' grief, and decedents' pre-death pain and suffering. The District Court for the District of Columbia disagreed, holding that because petitioners' claims were brought pursuant to the Warsaw Convention, DOHSA could not limit the recoverable damages. The Court determined that Article 17 of the Warsaw Convention "allows for the recovery of all 'damages sustained,'" meaning any "actual harm" that any party "experienced" as a result of the crash. App 59.

While petitioners' cases were awaiting damages trials, we reached a different conclusion in *Zicherman* v *Korean Air Lines Co.*, 516 US 217, 133 L Ed 2d 596, 116 S Ct 629 (1996), another case arising out of the downing of Flight KE007. In *Zicherman*, we held that the Warsaw Convention "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules," and that where "an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law." *Id.*, at 231, 133 L Ed 2d 596, 116 S Ct 629. Accordingly, the petitioners could not recover damages for loss of society: "[W]here DOHSA applies, neither state law, see *Offshore Logistics, Inc.* v *Tallentire*, 477 US 207, 232-233 [91 L Ed 2d 174, 106 S Ct 2485] (1986), nor general maritime law, see *Mobil Oil Corp.* v *Higginbotham*, 436 US 618, 625-626 [56 L Ed 2d 581, 98 S Ct 2010] (1978), can provide a basis for recovery of loss-of-society damages." *Id.*, at 230, 91 L Ed 2d 174, 106 S Ct 2485. We did not decide, however, whether the petitioners in *Zicherman* could recover for their decedents' pre-death pain and suffering, as KAL had not raised this issue in its petition for certiorari. See *id.*, at 230, n 4, 91 L Ed 2d 174, 106 S Ct 2485.

After the *Zicherman* decision, KAL again moved to dismiss all of petitioners' claims for nonpecuniary damages. The District Court granted this motion, holding that United States law (not South Korean law) governed these cases; that DOHSA provides the applicable United States law; and that DOHSA does not permit the recovery of nonpecuniary damages—including petitioners' claims for their decedents' pre-death pain and suffering. *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F Supp 10, 12-15 (1996).

On appeal, petitioners argued that although DOHSA does not itself permit recovery for a decedent's pre-death pain and suffering, general maritime law provides a survival action that allows a decedent's estate to recover for injuries (including pre-death pain and suffering) suffered by the decedent. The Court of Appeals rejected this argument and affirmed. *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F3d 1477 (CADC 1997). Assuming *arguendo* that there is a survival cause of action under general maritime law, the court held that such an action is unavailable when the death is on the high seas:

"For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however

ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it." *Id.*, at 1481.

We granted certiorari, 522 US ——, 139 L Ed 2d 628, 118 S Ct 679 (1998), to resolve a Circuit split concerning the availability of a general maritime survival action in cases of death on the high seas. Compare, *e.g.*, *In Re Korean Air Lines Disaster*, 117 F3d, at 1481, with *Gray* v *Lockheed Aeronautical Systems Co.*, 125 F3d 1371, 1385 (CA11 1997).

II

Before Congress enacted DOHSA in 1920, the general law of admiralty permitted a person injured by tortious conduct to sue for damages, but did not permit an action to be brought when the person was killed by that conduct. See generally R. Hughes, Handbook of Admiralty Law 222-223 (2d ed. 1920). This rule stemmed from the theory that a right of action was personal to the victim and thus expired when the victim died. Accordingly, in the absence of an act of Congress or state statute providing a right of action, a suit in admiralty could not be maintained in the courts of the United States to recover damages for a person's death. See *The Harrisburg*, 119 US 199, 213, 30 L Ed 358, 7 S Ct 140 (1886); *The Alaska*, 130 US 201, 209, 32 L Ed 923, 9 S Ct 461 (1889).[1]

Congress passed such a statute, and thus authorized recovery for deaths on the high seas, with its enactment of DOHSA. DOHSA provides a cause of action for "the death of a person . . . caused by wrongful act, neglect, or default occurring on the high seas," § 761; this action must be brought by the decedent's personal representative "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative," *ibid.* The Act limits recovery in such a suit to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is sought." § 762. DOHSA also includes a limited survival provision: In situations in which a person injured on the high seas sues for his injuries and then dies prior to completion of the suit, "the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762." § 765. Other sections establish a limitations period, § 763a, govern actions under foreign law, § 764, bar contributory negligence as a complete defense, § 766, exempt the Great Lakes, navigable waters in the Panama Canal Zone, and state territorial waters from the Act's coverage, § 767, and preserve certain state law remedies and state court jurisdiction, *ibid.* DOHSA does not authorize recovery for the decedent's own losses, nor does it allow damages for non-pecuniary losses.

In *Mobil Oil Corp.* v *Higginbotham*, 436 US 618, 56 L Ed 2d 581, 98 S Ct 2010 (1978), we considered whether, in a case of death on the high seas, a decedent's survivors

1. We later rejected this rule in *Moragne* v *States Marine Lines, Inc.*, 398 US 375, 408-409, 26 L Ed 2d 339, 90 S Ct 1772 (1970), by overruling *The Harrisburg*, 119 US 199, 30 L Ed 358, 7 S Ct 140 (1886), and holding that a federal remedy for wrongful death exists under general maritime law. In *Sea-Land Services, Inc.* v *Gaudet*, 414 US 573, 574, 39 L Ed 2d 9, 94 S Ct 806 (1974), we further held that such wrongful death awards could include compensation for loss of support and services and for loss of society.

could recover damages under general maritime law for their loss of society. We held that they could not, and thus limited to territorial waters those cases in which we had permitted loss of society damages under general maritime law. *Id.*, at 622-624, 56 L Ed 2d 581, 98 S Ct 2010; see n 1, *supra*. For deaths on the high seas, DOHSA "announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." 436 US, at 625, 56 L Ed 2d 581, 98 S Ct 2010. We thus noted that while we could "fil[l] a gap left by Congress' silence," we were not free to "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Ibid.* Because "Congress ha[d] struck the balance for us" in DOHSA by limiting the available recovery to pecuniary losses suffered by surviving relatives, *id.*, at 623, 56 L Ed 2d 581, 98 S Ct 2010, we had "no authority to substitute our views for those expressed by Congress." *Id.*, at 626, 56 L Ed 2d 581, 98 S Ct 2010. *Higginbotham*, however, involved only the scope of the remedies available in a wrongful death action, and thus did not address the availability of other causes of action.

Conceding that DOHSA does not authorize recovery for a decedent's pre-death pain and suffering, petitioners seek to recover such damages through a general maritime survival action. Petitioners argue that general maritime law recognizes a survival action, which permits a decedent's estate to recover damages that the decedent would have been able to recover but for his death, including pre-death pain and suffering. And, they contend, because DOHSA is a wrongful death statute—giving surviving relatives a cause of action for losses *they* suffered as a result of the decedent's death—it has no bearing on the availability of a survival action.

[1b] We disagree. DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas. Petitioners concede that their proposed survival action would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates (and their various beneficiaries) to recover compensation. They further concede that their cause of action would expand the recoverable damages for deaths on the high seas by permitting the recovery of non-pecuniary losses, such as pre-death pain and suffering. Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages. As we noted in *Higginbotham*, "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." 436 US, at 625, 56 L Ed 2d 581, 98 S Ct 2010.

[1c, 2] The comprehensive scope of DOHSA is confirmed by its survival provision, see *supra*, at ——, 141 L Ed 2d, at 108, which limits the recovery in such cases to the pecuniary losses suffered by surviving relatives. The Act thus expresses Congress' "considered judgment," *Mobil Oil Corp.* v *Higginbotham*, *supra*, at

625, 56 L Ed 2d 581, 98 S Ct 2010, on the availability and contours of a survival action in cases of death on the high seas. For this reason, it cannot be contended that DOHSA has no bearing on survival actions; rather, Congress has simply chosen to adopt a more limited survival provision. Indeed, Congress did so in the same year that it incorporated into the Jones Act, which permits seamen injured in the course of their employment to recover damages for their injuries, a survival action similar to the one petitioners seek here. See Act of June 5, 1920, § 33, 41 Stat 1007 (incorporating survival action of the Federal Employers' Liability Act, 45 USC § 59 [45 USCS § 59]).

Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt.

[1d, 3a] In sum, Congress has spoken on the availability of a survival action, the losses to be recovered, and the beneficiaries, in cases of death on the high seas. Because Congress has chosen not to authorize a survival action for a decedent's predeath pain and suffering, there can be no general maritime survival action for such damages.[2] The judgment of the Court of Appeals is affirmed.

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2. [3b] Accordingly, we need not decide whether general maritime law *ever* provides a survival action.

In Re: In the Matter of: AMERICAN RIVER TRANSPORTATION COMPANY, as owner/operator of the Barge ART 529, seeking exoneration from or limitation of liability; AMERICAN RIVER TRANSPORTATION COMPANY, as owner/operator of the Barge ART 529, Petitioner - Appellee v. US MARITIME SERVICES, INC; ET AL, Defendants; LESTER ANTHONY ALLEMAND, individually and on behalf of his deceased son, Jacques Allemand; EDNA H ALLEMAND, individually and on behalf of her deceased son, Jacques Allemand, Claimants - Appellants; In Re: In the Matter of the Complaint of: AMERICAN RIVER TRANSPORT COMPANY, as owner/operator of the Barge CONDO 2, seeking exoneration from or limitation of liability; AMERICAN RIVER TRANSPORT COMPANY, as owner/operator of the Barge CONDO2, Petitioner - Appellee v. US MARITIME SERVICES, INC; ET AL, Defendants; LESTER ANTHONY ALLEMAND, individually and on behalf of his deceased son, Jacques Allemand; EDNA H ALLEMAND, individually and on behalf of her deceased son, Jacques Allemand, Claimants-Appellants

No. 05-30878

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

490 F.3d 351; 2007 U.S. App. LEXIS 14464; 2007 AMC 1593

June 19, 2007, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Louisiana.

COUNSEL: For AMERICAN RIVER TRANSPORTATION CO, as owner/operator of the Barge ART 529, CONDO 2, Petitioner - Appellee: David Michael Flotte, Joseph Edward Lee, III, Preis & Roy, New Orleans, LA.

For LESTER ANTHONY ALLEMAND, individually and on behalf of his deceased son, Jacques Allemand, Claimant - Appellant: Michael Charles Ginart, Jr, Tonry & Ginart, Chalmette, LA.

For EDNA H ALLEMAND, individually and on behalf of her deceased son, Jacques Allemand, Claimant - Appellant: Michael Charles Ginart, Jr, Tonry & Ginart, Chalmette, LA.

JUDGES: Before HIGGINBOTHAM, WIENER, and PRADO, Circuit Judges.

OPINION BY: Wiener

OPINION

[*352]

Wiener, Circuit Judge:

In February 2003, Jacques Allemand ("Jacques"), a longshoreman employed by Petitioner-Appellee American River Transportation Co. ("ARTCO"), died when he jumped from the barge on which he was employed into territorial waters in an attempt to save a co-worker who had fallen from the barge. Following the deaths of Jacques and his co-worker, ARTCO commenced Limitation of Liability Proceedings. Claimants-Appellants Lester Anthony Allemand and

Edna Allemand ("the Allemands"), [**2] the divorced parents of Jacques, filed a claim in the proceedings. The district court granted summary judgment for ARTCO, dismissing the Allemands' wrongful death action seeking damages for loss of society. The court held that the Allemands could not recover for loss of society, because they had not been financially dependent on their son. As we agree with the district court that non-dependent parents may not recover for loss of society in maritime wrongful death actions, we affirm.

I. FACTS & PROCEEDINGS

A. Facts

For purposes of this appeal, the material facts are uncontested. Jacques, the 24-year-old son of the Allemands, was a work-release inmate performing barge-cleaner services on ARTCO's Barge ART 529 on the Mississippi River. Jacques had been incarcerated for the five years immediately preceding his death. He had not provided any financial support to his parents, either before or after his incarceration.

Darnell Lane was also a work-release inmate performing barge-cleaner services on Barge ART 529. On the day in question, Lane was struck by water from a high-pressure hose on the barge, causing him to hit his head (which rendered him unconscious) and fall into [**3] the Mississippi River. Jacques jumped into the river in an attempt to rescue Lane. Jacques struggled to keep his head above water, but died when two moored ARTCO barges crashed into one another.

B. Prior Proceedings

In June 2003, ARTCO commenced two Limitation of Liability Proceedings, later consolidated, in the Eastern District of Louisiana, pursuant to *46 App. U.S.C. § 181 et seq.* In September 2003, the Allemands answered the complaint and made a claim for damages against ARTCO, both as Jacques's survivors and for their own loss of society caused by the wrongful death of their son. In May 2005, ARTCO filed a motion for summary judgment against the Allemands, contending that, as non-dependent parents of the decedent, they could not recover damages for loss of society in a maritime wrongful death action. In June 2005, the district court orally granted ARCTCO's motion. The district court explained its reasoning:

> [*353] Looking at the trends in the Fifth Circuit and based on what I think the state of the law is now -- which definitely should be appealed because it's not clear -- is that I can't see the difference why a longshoreman's parents, as [**4] an example, don't have to be dependent, but everyone else who loses someone in state waters to an accident has to be dependent to recover.
>
> It's clear that the law is that all nonlongshoremen who are killed in state waters, in order for their survivors to recover loss of society, they must be dependent survivors. That's a clear statement of the law. The mental gymnastics I'm having trouble with is making the leap as to why a longshoreman would be different. [1]

The district court indicated that an immediate appeal was appropriate, closing the case for statistical purposes at that time. The Allemands timely filed notices of appeal.

> 1 Although we agree with the district court's conclusion, it overstates the clarity of the state of the law for nonlongshoremen, at least in this circuit.

II. ANALYSIS

A. Jurisdiction and Standard of Review

We have jurisdiction over this interlocutory appeal pursuant to *28 U.S.C. § 1292(a)(3).* [2] We review a district court's grant of [**5] summary judgment in an admiralty or maritime action *de novo.* [3] Whether non-pecuniary damages are recoverable is a legal question subject to *de novo* review. [4]

> 2 *Section 1292(a)(3)* provides that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."
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> 3 *Holmes v. Atl. Sounding Co., Inc., 437 F.3d 441, 445 (5th Cir. 2006).*
>
> 4 *Moore v. M/V ANGELA, 353 F.3d 376, 383 (5th Cir. 2003).*

B. Evolution of the Maritime Wrongful Death Cause of Action

In 1886, the Supreme Court held in *The Harrisburg* that there was no cause of action for wrongful death in maritime law. [5] The harshness of this holding was softened by the Supreme Court's later ruling in *The Hamilton*, in which the Court held that suits grounded in state wrongful death causes of action [**6] could be brought in the federal courts when the death occurred in a state's territorial waters. [6] Although federal courts began "uniformly appl[ying] state wrongful death statutes for deaths occurring in state territorial waters," [7] *The Harrisburg*'s proscription against maritime wrongful death actions survived.

5 *119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886).*
6 *207 U.S. 398, 407, 28 S. Ct. 133, 52 L. Ed. 264 (1907).*
7 *Miles v. Apex Marine Corp., 498 U.S. 19, 24, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).*

In 1920, however, Congress "rejected wholesale the rule against wrongful death" [8] when it enacted the Jones Act and the Death on the High Seas Act ("DOHSA"). The Jones Act created a wrongful death cause of action, sounding in negligence, when a seaman is killed during the course of his employment [9] ; DOHSA created a similar cause of action, sounding in either negligence or unseaworthiness, [*354] when anyone is killed on the high seas (*i.e.*, outside territorial waters), whether or not death occurs during the course of [**7] employment. [10] Both of these statutes limit recovery for wrongful death to pecuniary damages. [11]

8 *Id. at 23* (explaining evolution of maritime wrongful death cause of action).
9 *46 U.S.C. App. § 688.*
10 *46 U.S.C. App. §§ 761, 762.*
11 *46 U.S.C. App. § 762* (DOHSA explicitly limits damages to pecuniary damages, unless death results from a commercial aviation accident); *Miles, 498 U.S. at 32* (explaining that, despite absence of explicit limit on form of damages in the Jones Act, "[t]here is no recovery for loss of society in a Jones Act wrongful death action").

This series of events produced three anomalies: (1) "[I]n territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death"; (2) "DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but general maritime law did not allow such recovery for a similar [**8] death in territorial waters"; and (3) "in those States whose statutes allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness, but not for the death of a Jones Act seaman." [12] In *Moragne v. States Marine Lines, Inc.*, the Supreme Court remedied these anomalies by overruling *The Harrisburg* and recognizing the existence of a general maritime wrongful death action. [13] The Court reasoned that "[w]here death is caused by the breach of a duty imposed by federal maritime law, Congress has established [through the passage of the Jones Act and DOHSA] a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." [14]

12 *Miles, 498 U.S. at 26.*
13 *398 U.S. 375, 378, 392-94, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970).*
14 *Id. at 393.*

Although *Moragne* recognized a general maritime wrongful death cause of action, it did not define the contours of such [**9] a claim. Then, in *Sea-Land Services Inc. v. Gaudet*, [15] the Court addressed a claim that had been asserted by the widow of a longshoreman who died as a result of injuries sustained in territorial waters. The Supreme Court held that the maritime wrongful death cause of action allowed "the decedent's dependents [to] recover damages for their loss of support, services, and society, as well as funeral expenses." [16] In so holding, the Court recognized that allowing a claim for loss of society damages deviated from DOHSA's limitation of recovery to pecuniary damages, but it nevertheless determined that such a result was "compelled if [the Court was] to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." [17] Thus, the *Gaudet* Court recognized that "effectuating longstanding maritime policies trumped uniformity with DOHSA." [18]

15 *414 U.S. 573, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974).*
16 *Id. at 584.*
17 *Id. at 586-88.*

18 *In re: Air Crash at Belle Harbor, New York on November 12, 2001, No. MDL 1448 (RWS), 2006 U.S. Dist. LEXIS 27877, 2006 WL 1288298, at *18 (S.D.N.Y. May 9, 2006).*

[**10] Four years after it decided *Gaudet*, the Court began to reverse course when it decided *Mobil Oil Corp. v. Higginbotham*, [19] another case addressing the limits of the *Moragne* wrongful death cause of action. In *Higginbotham*, the Court gave priority to the goal of achieving [*355] uniformity between general maritime law and the Jones Act and DOHSA over the humanitarian goal of maritime law. Acknowledging that *Gaudet* had been broadly written without express reliance on the fact that the death occurred in territorial waters, the Court nevertheless concluded that *Gaudet* applied only to deaths that occurred on territorial waters. [20] Thus, as *Higginbotham* involved a death that occurred on the high seas, DOHSA and its express limitation on damages, rather than *Gaudet*, determined the damages available in the *Moragne* action. Accordingly, the Court held that the decedent's survivor could not recover damages for loss of society. [21]

19 *436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978).*
20 *Id. at 622-23.*
21 *Id. at 623-24.*

[**11] The Court was again called on to interpret the scope of damages recoverable in a maritime wrongful death action in *Miles v. Apex Marine Corp.* [22] In *Miles*, the mother of a seaman who had died in territorial waters brought a wrongful death action, alleging negligence under the Jones Act and unseaworthiness under general maritime law. The plaintiff sought, *inter alia*, damages for loss of society. The jury found that the ship owner had been negligent but that the ship was seaworthy. It also found that the decedent's mother was not dependent on the decedent, so that she was not entitled to damages for loss of society. [23]

22 *498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).*
23 *Id. at 21-22.* The jury had been instructed that if it found that the plaintiff was not financially dependent on her son, she could not recover damages for loss of society. *Id. at 22.*

On appeal to this court, the panel concluded as a matter of law that the ship had been unseaworthy, reviving the maritime [**12] wrongful death claim. The panel therefore addressed whether the decedent's non-dependent mother was entitled to recover for loss of society. Relying on an earlier Fifth Circuit opinion, we held in *Miles* that the mother was not entitled to such damages because she had not been financially dependent on her son. [24]

24 *Miles v. Melrose, 882 F.2d 976, 985-87 (5th Cir. 1989), aff'd sub nom. on different grounds Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).*

The Supreme Court affirmed the judgment that the plaintiff in *Miles* was not entitled to recover for loss of society, but did so on different grounds. After again reviewing the teleology of the wrongful death cause of action, the Court held that loss of society damages are not recoverable in a general maritime action for the wrongful death of a Jones Act seaman. [25] Noting that there is no right of recovery whatsoever for loss of society in a Jones Act action, the Court reasoned that "[i]t would [**13] be inconsistent with [the Court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." [26] Accordingly, held the Court, there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

25 *Miles, 498 U.S. at 36.* The Court also held that there is a general maritime cause of action for the wrongful death of a seaman, and that there is no survival claim for the lost income of a deceased Jones Act seaman. *Id.*
26 *Id. at 32-33.*

C. The Allemands' Claim

Under the present state of the law, (1) *Miles* and the Jones Act recognize that a [*356] seaman's survivors have a cause of action for wrongful death, whether the death occurred in territorial waters or on the high seas, limited, however, to pecuniary damages (and thus no damages for loss [**14] of society), regardless whether that cause of action is brought under the Jones Act, under DOHSA, or under general maritime law, and (2) *Higginbotham* and DOHSA recognize that the survivors of any person who dies on the high seas have a cause of action for wrongful death, also limited to pecuniary

damages, whether that cause of action is brought under the Jones Act, DOHSA, or general maritime law. It is less than pellucid, though, what force, if any, *Gaudet* has in the wake of *Miles*. [27] We need not reach this issue, however, because the parties and the district court have framed the question here more narrowly, asking only whether the *non-dependent* survivors of a deceased *longshoreman or harborworker* may recover for loss of society when the death *occurs in state waters*. [28] We conclude that they may not.

27 The Supreme Court has observed that *Gaudet* is no longer applicable on its facts, because of amendments to the Longshore and Harbor Workers' Compensation Act. *Miles, 498 U.S. at 30 n.1*. Thus, *Gaudet* has "been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled." *Tucker v. Fearn, 333 F.3d 1216, 1223 (11th Cir. 2003)* (quoting *Miller v. Amer. President Lines, Ltd., 989 F.2d 1450, 1459 (6th Cir. 1993)*). There is reason to doubt the continued applicability of *Gaudet*. One of the goals of maritime law is to provide special solicitude to seamen; it would be inconsistent with this goal for the survivors of nonseamen to have a greater right to recovery than the survivors of seamen. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1092 (2d Cir. 1993)* (noting that "it would be anomalous to expand the class of beneficiaries of nonseamen who may recover for loss of society in the aftermath of the Supreme Court's denial of any such recovery to the beneficiaries of seamen."); *cf. Tucker, 333 F.3d at 1223 n.10* ("There is a strong argument . . . that the pertinent threshold question is whether *any* survivors of nonseamen are entitled to recover loss of society damages and not whether non-dependent survivors of nonseamen may recover loss of society damages.").

[**15]

28 The Allemands also argue that non-dependent parents may bring a survival action under general maritime law. The district court's ruling, however, only pertained to the Allemands' claim for loss of society and support, not their claim for survival, and judgment was not entered with respect to the survival claim. Rather, the remaining claims were statistically closed and frozen, pending resolution of this appeal. Accordingly, that portion of the appeal is not properly before us, as there is no judgment to review.

First, this result is consistent with our precedent. Prior to the Supreme Court's ruling in *Miles* that no survivor of a seaman -- whether dependent or not -- can recover damages for loss of society in a *Moragne* wrongful death action, we twice addressed whether non-dependent survivors of seamen may recover for loss of society in a maritime wrongful death action. In *Sistrunk v. Circle Bar Drilling Co.*, [29] parents of deceased seamen filed a maritime wrongful death action seeking damages for loss of society. The district court entered judgment in favor the parents, and the [**16] drilling company appealed. [30]

29 *770 F.2d 455 (5th Cir. 1985)*.
30 *Id. at 456*.

On appeal, we concluded that the parents were not entitled to damages for loss of society. [31] In so holding, we observed that neither of the goals of maritime law -- providing special solicitude to seamen and achieving uniformity in maritime law -- would be achieved by allowing the *Sistrunk* [*357] parents to recover. First, the goal of

> providing special solicitude to seamen . . . would not be furthered in any meaningful way by allowing the parents in this case to recover for loss of society. . . . To the extent that the purpose of admiralty's special solicitude to the survivors of seamen is to provide for their financial support, the special solicitude aim of admiralty has no relevance in this case. *The parents in this case were not dependent on their sons*. [32]

The *Sistrunk* panel continued:

> [T]he parents could not recover if the seamen's deaths occurred on the high [**17] seas or were the result of negligence but not of unseaworthiness. Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness. [33]

31 The court noted, and we agree, that the *Gaudet* court's use of "the word 'dependents' in discussing the right to recover for loss of society, while lending support to our holding, is not dispositive." *Id. at 460 n.4.*

32 *Id. at 460* (emphasis added).

33 *Id.*

For the same reason, we concluded that the goal of achieving uniformity in the law would not be furthered by allowing the *Sistrunk* parents to recover. "[T]he parents have not explained why this court should extend to them special solicitude when, but for the happenstance that the seamen were killed in territorial waters and by unseaworthiness, Congress would have denied them recovery under DOHSA and [**18] the Jones Act." [34] Accordingly, we held that "in a general maritime wrongful death action under *Moragne*, non-dependent parents may not recover for loss of society where their deceased children were killed in territorial waters and are survived by spouse and/or child." [35]

34 *Id.*

35 *Id. at 460-61.*

Sistrunk could arguably be limited to situations involving recovery attempts by non-dependent parents when there is also a surviving spouse or child. Not so in *Miles v. Melrose*, however, in which we confronted the issue "whether non-dependents may recover for loss of society when there is no surviving spouse or child, [an issue] . . . of first impression for this circuit." [36] We answered that query in the negative, concluding that the aims of maritime law would not be served by allowing recovery under such circumstances. We explained that, like the non-dependent parents in *Sistrunk*, the parents in *Miles* could not recover damages for loss of society under either DOHSA [**19] or the Jones Act; the fact that the *Miles* decedent had not been survived by a spouse or child did not alter the result. [37] As we had in *Sistrunk*, we concluded in *Miles* that the goal of achieving uniformity in maritime law was best served by denying recovery. With respect to the goal of providing solicitude to seamen, we concluded that "[s]ince the parents here were also not dependent on their son and since they too could not recover these damages under the Jones Act or DOHSA, we do not contravene maritime law's aim of providing special solicitude to seamen by denying them recovery for loss of society." [38] Although the Supreme Court affirmed *Miles* on other grounds, its holding that there is no maritime cause of action for loss of society for the survivors of seamen -- whether dependent [*358] or not -- did not conflict with our reasoning.

36 *882 F.2d 976, 987 (5th Cir. 1989), aff'd sub nom. on different grounds Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).*

37 *Id. at 987-88.*

38 *Id. at 988.*

[**20] Both *Miles* and *Sistrunk*, of course, involved seamen and are therefore distinguishable from this case. The holdings in neither *Miles* or *Sistrunk*, however, rested on the fact that the decedents were seamen. Instead, we noted in both cases that the surviving parents would not have a cause of action under either the Jones Act *or DOHSA*; and DOHSA, of course, applies to both seamen and nonseamen. If anything, the arguments in favor of denial of recovery advanced in *Sistrunk* and *Miles* are even stronger here, as "it would be anomalous to expand the class of beneficiaries of nonseamen who may recover for loss of society in the aftermath of the Supreme Court's denial of any such recovery to the beneficiaries of seamen." [39]

39 *Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1092 (2d Cir. 1993).*

In addition, the circuit courts that have considered the instant issue have "almost unanimously" agreed with our approach in *Miles* and *Sistrunk*. [40] Citing *Miles* [**21] and *Sistrunk*, the Second, Sixth, and Eleventh Circuits have held that a non-dependent parent of one who dies in territorial waters on a pleasure craft (non-seafarers) may not recover for loss of society in a maritime wrongful death action. [41] Although these cases did not involve longshoremen, their reasoning does not turn on the fact that the decedents were nonseafarers. [42] Instead, the reasoning in each case turned on whether allowing recovery would further the twin goals of maritime law.

40 *Id. at 1091-92* (collecting cases).

41 *Tucker v. Fearn, 333 F.3d 1216, 1218, 1222 (11th Cir. 2003)* ("declin[ing] to fashion a rule that would permit [nonseamen's] survivors a more liberal recovery [than seamen's survivors] under general maritime law."); *Wahlstrom, 4 F.3d at*

1085, 1092 (holding that non-dependent parents of minor who died while on pleasure craft in territorial waters could not recover for loss of society in a maritime wrongful death cause of action); *Anderson v. Whittaker Corp., 894 F.2d 804, 811-12 (6th Cir. 1990)* (noting that it agreed with *Miles*'s reasoning and holding that non-dependent parents of a decedent could not recover for loss of society in a general maritime wrongful death cause of action).

[**22]

42 "By 'nonseafarers,' we mean persons who are neither seamen covered by the Jones Act, . . . nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act . . . ." *Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 n.2, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996)* (citations omitted).

Appellants urge us to ignore this case law and instead adopt the Ninth Circuit's holding in *Sutton v. Earles*. [43] In *Sutton*, non-dependent parents of several individuals who died on a pleasure craft sued for loss of society damages under general maritime law. [44] The Ninth Circuit first concluded that *Gaudet* authorized recovery of damages for loss of society by the survivors of nonseamen and that neither the Jones Act nor DOHSA applied to limit the damages to pecuniary damages. It further noted that both the Jones Act and DOHSA allow recovery by parents when there is no surviving spouse or child. The court then responded to the argument that such damages should not be available to non-dependent parents:

> We do not consider ourselves free to give such weight [as the Second Circuit [**23] does in *Wahlstrom*] to the interest of uniformity, in light of *Gaudet*'s explicit acknowledgement that it was creating a non-uniform category of damages in territorial waters, and the acknowledgements of non-uniformity in *Higginbotham*. The fact that the death of a seaman in territorial waters leads to [*359] recovery only of pecuniary damages is dictated by statute, and that statute does not limit recoveries for the deaths of non-seamen.
>
> . . . .
>
> We decline, therefore, to limit *Gaudet* by drawing an unnecessary distinction between dependent and non-dependent parent plaintiffs in *Moragne* actions for determining the availability of loss-of-society damages. . . . Any lack of uniformity that is evidenced by our ruling inheres in the decision of the Supreme Court in *Gaudet* and in the actions of Congress in enacting DOHSA and the Jones Act. We are in no position to disregard or modify either of those authorities, even if we were of such a mind. We therefore affirm the district court's award of loss-of-society damages without regard to dependency. [45]

43 *26 F.3d 903, 914-15 (9th Cir. 1994).*

[**24]

44 *Id. at 906, 914.*

45 *Id. at 917* (internal citations and footnote omitted).

Although we agree with *Sutton* that the dependent/non-dependent distinction is not explicitly required by the relevant statutes or Supreme Court precedent, we are not persuaded by *Sutton's* reasoning. *Sutton* does not acknowledge the potentially limited force of *Gaudet* after being confined to its facts. Neither does *Sutton* address the Supreme Court's more restrictive approach to maritime wrongful death causes of actions since *Gaudet*. [46] We decline to adopt *Sutton*'s holding. Instead, as we concluded in *Miles* and *Sistrunk*, and as the Second, Sixth, and Eleventh Circuits have agreed, we conclude that allowing recovery here would (1) impede uniformity by going against the substantial majority of the federal court decisions on this issue, and (2) create an anomaly by "expand[ing] the class of beneficiaries of nonseamen who may recover for loss of society in the aftermath of the Supreme Court's denial of any such recovery to the beneficiaries of seamen. [**25] " [47]

46 Appellants also cite *Thompson v. Offshore Co., 440 F. Supp. 752, 765 (S.D. Tex. 1977)*, a district court case decided prior to *Sistrunk* and *Miles*.

47 *Wahlstrom, 4 F.3d at 1092.*

Citing *Moragne* and *Gaudet*, the Allemands contend

that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy, when not required to withhold it by established and inflexible rules." [48] In the maritime cases following *Gaudet*, however, the Supreme Court has placed greater importance on conforming general maritime law with the statutes than on the "humanitarian policy" of maritime law. As the Third Circuit noted

> [o]ne trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs' rights in maritime actions. Throughout the 1950s and 1960s, the Supreme Court expanded the rights of plaintiffs by generally allowing plaintiffs the benefit of whichever rule, state or federal, [**26] was more favorable to recovery. *Moragne* -- or perhaps *Gaudet* -- represented the apex of the Court's policy of expanding plaintiffs' rights in admiralty actions. *Higginbotham*, *Tallentire*, and *Miles*, in contrast, show a tendency on the part of the Court during the last two [*360] decades to reverse its policy of favoring seamen plaintiffs. [49]

48 *Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)* (quoting *The Sea Gull, 21 Fed. Cas. p. 909, F. Cas. No. 12578, 16 Pitts. Leg. J. 1194 (No. 12,578) (C.C. Md. 1865)*); *see also Gaudet, 414 U.S. at 588* ("[O]ur decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction.").

49 *Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 636 (3d Cir.), aff'd 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).*

The Allemands further urge that the dependent/non-dependent line [**27] is an inappropriate distinction to be drawn when the damages at issue are not intended to compensate for a financial loss. Specifically, they assert that "[i]f [loss of society] benefits are not economically based, there is no legitimate reason . . . for tying recovery for their loss to the irrelevant fact that the deceased loved one did not also aid in the support -- a completely different loss which some family members might also sustain -- of his beloved parents." Although this argument is not without some appeal, we have previously rejected it. We stated in *Miles* that

> [s]ince loss of society is not a financial loss, restricting its recovery to dependents may seem unwarranted. However, tort law has never recognized a principle of awarding redress to all who are injured by an event, however wide the ripple. Strict liability, such as that for unseaworthiness, is based in part on the assumption that the defendant is best able to bear and distribute the cost of the risk of injury. But there are limits to a defendant's power to shift losses to the public. The larger and more amorphous the potential class of plaintiffs, the more difficult it is to estimate and insure [**28] against the risk in advance, weakening the justification for imposing liability. The number of plaintiffs who could allege a loss of love and affection as a result of the death of a dearly beloved seaman -- aunts and uncles, nieces and nephews, even friends and lovers -- necessitates that we draw a line between those who may recover for loss of society and those who may not. The line suggested by the Supreme Court in *Moragne* and *Gaudet*, and by our own court in *Sistrunk*, the line between dependents and non-dependents, appears to be the most rational, efficient and fair. It creates a finite, determinable class of beneficiaries. It allows recovery for those with whom the creation of the wrongful death action was concerned: a seaman's dependents. [50]

We stand by this reasoning, and we agree with that of the Second Circuit in *Wahlstrom* to the effect that, whatever the merits of the Allemands' argument, "[c]ountervailing concerns nonetheless outweigh the force of this contention." [51]

50 *882 F.2d at 988-89* (citations and quotation marks omitted).

51 *Wahlstrom, 4 F.3d at 1092.*

[**29] III. CONCLUSION

When we consider this case in the overall framework established by our prior holdings, those of the Second, Sixth, and Eleventh Circuits, and the more restrictive approach applied by the Supreme Court to non-pecuniary damages in *Moragne* wrongful death actions since *Gaudet*, we conclude that non-dependent parents of a longshoreman who died in territorial waters are not entitled to recover damages for loss of society. For the reasons set forth above, the judgment of the district court is AFFIRMED. As for the Allemands' appeal of the district court's "dismissal" of their survival claim, that appeal is DISMISSED, as the issue was not presented to or decided by the district court.

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