Statement of Thomas C. Galligan, Jr.

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

on

Legal Liability Issues Surrounding the Gulf Coast Oil Disaster

before the

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I. Introduction

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

The oil spill in the Gulf of Mexico and the ensuing disastrous consequences have forced our nation to consider its various damage recovery regimes for injuries and deaths arising from maritime and environmental catastrophes. Today those liability regimes are complex, inconsistent, incoherent to the people they impact, overly dependent on issues of status and location and they under compensate the survivors of many of those who are injured and killed as

a result of maritime torts. I would like to address several of those issues, particularly the fact that loss of society damages are not recoverable by the survivors of many who are killed in maritime disasters. Indeed, in failing to allow recovery of loss of society damages—damages for loss of care, comfort, or companionship—maritime law is contrary to the rule prevailing in the majority of the states. Katherine J. Stanton, *The Worth of Human Life*, 85 N.D. L. Rev. 123, 130-31 (2009). Congress has the chance and ability to change this state of affairs by amending the relevant statutes. I would also like to address the availability of punitive damages in maritime disasters, the availability of damages for economic loss under maritime tort law, and the potential applicability of the maritime doctrine of limitation of liability to these events. In particular, on this last group of topics I would like to point out that the relationship between maritime law and the Oil Pollution Act of 1990 might lead to inconsistent, unjust, and even incomprehensible results in matters like those presented by the Deepwater Horizon disaster.

II. Loss of Society in Maritime Wrongful Death Cases

Over the years when teaching admiralty I counseled and warned my students that when we came to matters of wrongful death and survival actions, almost everything we had covered up to that point on status, vessels, maritime jurisdiction, and limitation of liability came together and their meeting was more like a Gordian knot than a rational meeting of the minds. The important concepts- and they are arguably all implicated here--include: seaman status and rights, the Jones Act, the Federal Employers' Liability Act, the Death on the High Seas Act (DOHSA), the Longshore and Harbor Workers Compensation Act (LHWCA), the Outer Continental Shelf Lands Act (OCSLA), the Shipowner's Limitation of Liability Act, general maritime tort law and remedies, and possibly state law. In this matter, the Oil Prevention Act of 1990 (OPA 90) is also involved.

A. Seamen

The analytical starting point is to determine whether an injured or deceased person was a seaman because that status determines the legal rights of the claimant. A seaman is a person who does the work of a vessel, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), and who has an employment-related connection to a vessel which is substantial in duration (more than 30% of one's work time is spent on a vessel or fleet of commonly owned or controlled vessels), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and nature (the worker is exposed to the perils of the sea). *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997). Maritime law treats a semi-submersible drilling rig as a vessel. *Marathon Pipe Line Co. v. Drilling Rig/Odessa*, 761 F.2d 229,233 (5th Cir. 1985). That is because a moveable drilling rig is "capable of being used as a means of transportation on water." See 3 U.S.C.A. § 3; *Stewart v. Dutra Construction Compan*y, 543 U.S. 481 (2005). The Deepwater Horizon is a drilling generation rig and therefore, under maritime law, it is a vessel. Interestingly, a drilling platform, as opposed to a semi-submersible drilling rig, is not a vessel.

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

1. Jones Act Negligence

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

Critically, what do those recoverable damages include and what do they not include in a Jones Act negligence wrongful death action? The survivors can recover any loss of economic support, any lost services, and other traditional types of pecuniary damages. The survivors *cannot* recover loss of society damages. That is, they cannot recover for the loss of care, comfort, or companionship caused by the death. Loss of society damages are, in essence, those damages survivors suffer as a result of the fact that the deceased is no longer there to share the joys of life with the them. The inability of the Jones Act seaman's survivors to recover loss of society damages in the negligence action does not result from the language of the Jones Act or the FELA. Rather, it is the combination of a 1913 decision of the United States Supreme Court, *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913) which refused to recognize the right to recover loss of society damages under the FELA and which actually predated the passage of the Jones Act by seven years and the result of the Court's reliance on that decision in *Miles v. Apex Marine*, 498 U.S. 19 (1990). One might arguably understand and appreciate the *Vreeland* holding in an era when the law of wrongful death was still in its relative infancy; human life spans were shorter, and given the state of technology, industry, and law, accidental death was a more common part of the American landscape than it is today. However, to deny recovery of

loss of society damages in a wrongful death case today is out of the legal mainstream and is a throwback to a past era. A spouse, child, or parent who is not dependent upon a relative seaman killed in a maritime disaster suffers a very real loss and the law should recognize it.

Congress could easily remedy this state of affairs by amending 45 U.S.C.A. § 51, the FELA wrongful death statute to state that recovery by a named beneficiary in a wrongful death action shall "include nonpecuniary damages for loss of care, comfort, and companionship." That amendment would bring the Jones Act and FELA much more into line with modern tort law regarding the recovery of damages in wrongful death cases, as well as the economic, social, and familial realities of today.

2. Unseaworthiness

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

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

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

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

Here, as in *Rux*, in addition to the general and very substantial reasons to allow recovery of loss of society damages in DOHSA cases, there is an additional analytical prong involving a 2000 amendment to DOHSA (referred to in the quote from *Rux* above). In response to several highly publicized commercial airline disasters, Congress amended DOHSA to provide, in part, for recovery of nonpecuniary damages (loss of care, comfort, and companionship), 46 U.S.C.A.

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

To add another relevant point to the analysis, OPA 90, 33 U.S.C.A. § 2701 et seq., allows victims of oil spills to recover various damages, including removal costs, § 2702(b)(1); damage to real or personal property, § 2702(b)(2)(B); damage to natural resources used for subsistence, § 2702(b)(2)(C); and economic damages because of damage to property or natural resources even if the claimant does not own the property. § 2702(b)(2)(E). These rights to recover damages assure compensation to persons injured in various ways by an oil spill. But, critically, OPA 90 does not apply to personal injury or wrongful death claims. See, generally, *Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009)(OPA does not cover

bodily injury claims damage). Consequently, the survivors of the seaman killed on the high as a result of negligence or unseaworthiness do not recover for loss of society while the persons whose property was damaged or who lost profits do recover. This is not to say that recovery for damaged property or lost profits is not appropriate, it is merely to point out that currently recovery of economic loss is more readily available than recovery for loss of a loved one.

I have noted above how a possible amendment to the FELA would deal with the seaman's negligence claim, DOHSA could also be amended to delete the word "pecuniary" before "loss" in 46 U.S.C.A. § 30303 and to add the language, "including nonpecuniary damages for loss of care, comfort, and companionship" after "loss." This is basically the language that was originally included but taken out of the proposed Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

III. Survival Action Pre-Death Pain and Suffering

Additionally, shifting from the wrongful death claim to the survival action claim, the Supreme Court in a case that did not involve a seaman has refused to allow recovery of pre-death pain and suffering as part of a survival action claim if death occurs on the high seas. *Dooley v. Korean Air Lines Co*., Ltd., 524 U.S. 116 (1998). The law does allow the Jones Act seaman's survivors to recover for pre-death pain and suffering; see, David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 Tul. Mar. L.J. 493 (2008).Thus *Dooley* does not apply to those claims but in any case covered by *Dooely*, involving a death caused by events on the high seas,

no matter how much the decedent may have suffered before his or her death, those damages are not recoverable.

To remedy this situation, Congress could amend the law to not only make loss of society damages recoverable as suggested above but also to make pre-death pain and suffering available in maritime survival actions. Congress could accomplish that by adding the following language at the end of 46 U.S.C.A. § 30303: "The individuals for whose benefit the action is brought may also recover damages for pre-death pain and suffering." This is precisely the language that was originally included but taken out of the proposed Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

IV. Tort Claims Against Third-Parties

The beneficiaries of a seaman or other maritime worker killed on the high seas may have claims not only against the vessel but may also have general maritime tort claims against other parties such as manufacturers, contractors, or others. By definition, if death results, DOHSA applies and nonpecuniary damages would not be recoverable. Concomitantly, if the death occurs in territorial waters, nonpecuniary damages are more likely to be recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974)(allowing the survivors of an LHWCA worker killed in territorial waters to recover loss of society). See also, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages). Thus where one dies may be more relevant to recovery than other critical circumstances, such as the injury to the relevant survivors.

If workers who are not seaman, are killed as a result of a maritime disaster on the high

seas, DOHSA would also govern their survivors' recovery which would be limited to pecuniary damages, as currently defined. There would also be no recovery for pre-death pain and suffering. The amendments to DOHSA, proposed above, making nonpecuniary damages and pre-death pain and suffering damages recoverable, would apply to those claimants as well.

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

V. Maritime Punitive Damages

Another subject of potentially significant import arising out of this disaster is the recoverability of punitive damages in various types of maritime cases. The United States Supreme Court has held that punitive damages are recoverable under general maritime law. See, e.g., *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009); *Exxon Shipping Co. v.*

Baker, 128 S.Ct. 2605 (2008) (recognizing the right to recover punitive damages under maritime law but limiting them to a 1:1 ratio to compensatory damages). However, punitive damages are not available in DOHSA cases. Now, they arguably are available in seaman related cases given the holding in *Townsend* that a seaman may recover punitive damages under the general maritime law arising out of the arbitrary and willful failure to pay maintenance and cure. The matter will be the subject of future argument and litigation. Notably, the potential absence of punitive damages in cases involving deaths for which no loss of society and/or no recovery of pre-death pain and suffering are available may inadequately deter those who engage in activities that may cause injury or loss of life because it can result in an undervaluing of human life and the tragic ramifications when it is lost. See, Thomas C. Galligan, Jr. *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990).

While the Supreme Court has never considered the issue, several courts have held that punitive damages are not available under OPA 90. See, e.g., *South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001). See the discussion in: Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May 2010 (Available from Louisiana State Bar Association and the authors). The cited decisions also say that OPA 90 preempts maritime law and therefore punitive damages are not available in a case involving maritime law and OPA 90. Interestingly, OPA 90 actually provides that it does not affect admiralty or maritime law. 33 U.S.C.A. § 2751(e). Moreover, OPA 90 does *not* provide that punitive damages are *not* recoverable; it is merely silent on the subject. And both *South Port Marine LLC v. Gulf Oil Ltd*., 234 F.3d 58 (1st Cir. 2000) and *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001) were decided before the Supreme Court's

affirmation of the right to recover punitive damages in *Townsend* and *Exxon*. Indeed in *Exxon*, the Court refused to find that the Clean Water Act, see 33 U.S.C.A. § 1321, which was silent on the subject of punitive damages, precluded the recovery of punitive damages under maritime law. Finally, OPA 90 does not, as noted, apply to personal injury and wrongful death claims. Consequently, any preemptive affect OPA 90 might have on punitive damages in personal injury and wrongful death cases would seem to be limited.

VI. Recovery of Economic Loss

Damage to the environment devastates lifestyle, culture, and global well-being. It harms everyone; but more directly, it can cause very real and serious loss to those who depend upon the environment for subsistence or economic survival. A fisher whose potential catch is killed faces not only an environmental but also an economic disaster. The traditional and somewhat limited rule in maritime law has been to refuse to award purely economic loss (i.e., loss profits) unless the plaintiff could prove some physical injury to a thing in which he or she had a proprietary interest. *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985). See generally, Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 Tul. L. Rev. 457, 512-20, 522-25 (1994); Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May 2010 (available from Louisiana State Bar Association and the authors). What the basic rule means is that many people who suffer real and devastating injury do not recover and rational economic actors are consequently under deterred because real but unrecoverable loss is not a cost they must consider in deciding what to do and how to do it. The system fails to achieve efficient investments in safety. Predictably, since the rule is so harsh, some meaningful exceptions have developed. For

instance, commercial fishers may recover for their loss. *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d at 1021; *Union Oil v. Oppen*, 501 F.2d 558 (9th 1974). But, as Wright, Roy, Stephens, and Colomb, *supra*, note courts have denied recovery to marina operators, wholesale and retail seafood businesses which do not actually fish, and lessees of damaged property.

As noted above OPA 90 partially remedies this situation. It makes a "responsible" party liable for various types of damages, including economic damages because of damage to property or natural resources even if the claimant does not own the property. 33 U.S.C.A. § 2702(b)(2)(E). A "responsible" party is basically a "vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone..." 33 U.S.C.A. § 2702(a) and § 2701(32).

The statute supersedes the *Robins Dry Dock* Rule. See, *Dunham-Price Group v. Citgo Petroleum Corp*., 2010 WL 1285446 (W.D. La. 2009); *In re Settoon Towing* LLC, 2009 WL 4730969 (E.D. La. 2009); *Sekco Energy v. M/V MARGARET CHOUEST*, 820 F. Supp. 1008 (E.D. La. 1993) *cited in* as Wright, Roy, Stephens, and Colomb, *supra.* But, once again, inconsistency and risk of inequity raises its ugly head. This is because only the "responsible" party is liable for economic losses. Maritime tortfeasors who were not OPA 90 "responsible" parties would not be liable for the economic loss they caused. Ironically then, a party who is strictly liable under OPA 90, faces greater potential liability than a person who has negligently or recklessly caused economic loss. That result is illogical and inconsistent with the moral and economic underpinnings of American tort law.

VII. Limitation of Liability

A final critical point of interest here in this initial analysis is the effect and applicability of the Limitation of Liability Act, 46 U.S.C.A. § 30501 et seq., to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the limitation act allows a vessel owner (and some others) to limit its liability to the post-voyage value of the vessel if the liability is incurred without the privity or knowledge of the owner. 46 U.S.C.A. §§ 30505(a), (b), and 30506(e). One may justifiably wonder whether an act passed at a time before the modern development of the corporate form (and other liability limiting devices) and the evolution of bankruptcy law is still salient; however, limitation is still an important part of maritime law. OPA 90 has its own liability limitation scheme and the applicable limit in this matter seems to be $75,000,000. While the Supreme Court has not considered the matter, lower federal courts have held that the OPA 90 supersedes the limitation act. See, e.g., *Complaint of Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 595 (5th Cir. 2008) (dicta); *Gabrick v. Lauren Maritime (America), Inc*., 623 F.Supp.2d 741 (E.D. La. 2009). But, as noted, OPA 90 does not apply to personal injury or wrongful death claims so, once again, confusion is created. Does this mean that the Limitation Act may apply in personal injury, and wrongful death claims but not OPA 90 claims? If that is the case and if the limitation fund provided under maritime law is less generous compensation than the OPA 90 regime then personal injury and wrongful death claimants would be treated less favorably than economic loss claimants.

VIII. Conclusion

I have sought to only point out a few of the myriad of legal issues that may arise as a result of the disaster in the Gulf. In particular I have focused on four issues—recovery of nonpecuniary damages in certain types of maritime tort cases (particularly Jones Act/FELA and DOHSA cases), the availability of punitive damages in maritime disasters, recovery of economic loss, and the impact of the Limitation of Liability Act--where the current law is confusing, conflicting, arguably incoherent when viewed as a whole, and potentially under compensatory and an inadequate deterrent. The tragedy in the Gulf of Mexico provides a sad but necessary opportunity for our nation to reconsider and improve our law in the wake of this disaster.