

**President Tom Galligan's Oral Testimony
at U.S. Senate Judiciary Committee Hearing
June 8, 2010**

Chairman Leahy, Ranking Member Sessions, and members of the Committee, thank you for inviting me to appear before you today. My name is Tom Galligan and I am the President of Colby-Sawyer College in New London, New Hampshire.

The staggering consequences of the oil spill in the Gulf of Mexico force us to ask whether our laws are fair, consistent, and up-to-date. Do they provide adequate compensation? Do they provide proper incentives to ensure efficient investments in safety? Sadly, an analysis of the relevant laws reveals a climate of limited liability, under compensation, and the possibility of increased risk.

Let me begin with a discussion of wrongful death recovery of seaman and others under the Jones Act--applicable to negligence based wrongful death actions by the survivors of a seaman--and the Death on the High Seas Act which defines the rights to recover for wrongful death in all other cases arising from incidents occurring on the high seas. Both of those statutes were passed in 1920, another era. As interpreted, neither of them allows recovery for loss of society damages to the survivors of those killed in maritime disasters. Loss of society damages are compensation for the loss of care, comfort, and companionship caused by the death of a loved one. The majority of American jurisdictions today recognize some right to recover for loss of society damages in wrongful death cases but not the Jones Act and not DOHSA. A spouse, child, parent, or sibling, who loses a loved one, suffers a very real loss and the law should recognize that loss.

There is one exception to the rule barring recovery of loss of society damages under DOHSA and that exception points up the current inconsistencies in the law. In 2000, after the KAL 007 and TWA 800 disasters, you retroactively amended DOHSA to provide recovery of loss of society to the survivors of those killed in high seas commercial aviation disasters but for anyone else killed on the high seas, including someone killed on a cruise ship, on a semi-submersible floating rig, or on a helicopter, the survivors may not recover for loss of society. The law should be the same for all. And you can make the law the same for all by amending the relevant statutes to provide recovery for loss of society in maritime wrongful death cases.

The climate of limitation fostered by the no loss of society recovery rules has been expanded because some courts have extended those no recovery rules to other maritime contexts and to other types of non-pecuniary damages. Those courts have done so based on your supposed intent in 1920 when enacting the Jones Act and DOHSA. Those judicial decisions deprive injured persons and their relatives of compensation for very real losses and they also adversely impact

the deterrent aspects of maritime tort law. Amending the Jones Act and DOHSA will reverse that trend.

Tort law is concerned with corrective justice—fairness, consistency, and compensation—but it is also concerned with deterring unsafe behavior posing risks to people, property and the environment. Tort law can encourage efficient investments in safety so that society faces an optimal level of risk—no more, no less.

If tort law under compensates, it under deters because when deciding what to do and how to do it people will consider the real, anticipated costs of their actions. If the law does not force a person to take account of the costs of accidents when deciding what to do he or she may well under invest in safety and therefore increase risk.

Under compensation and under deterrence in the maritime setting is exacerbated by the Ship Owner's Limitation of Liability Act. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the act allows a vessel owner 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. The act was passed before the modern development of the corporate form and before the evolution of bankruptcy law and its operation can lead to drastic under compensation for the victims of maritime disasters.

Finally, these cumulative problems of limited liability in maritime law might be alleviated by the availability of punitive damages; and the Supreme Court has twice in the past two and one-half years recognized the right to recover punitive damages in maritime tort cases. However, the Court has limited the recovery of punitive damages to a 1:1 ratio between the punitive damages awarded and the compensatory damages awarded.

The ratio cap deprives a judge or jury of the traditionally available ability to tailor a punitive award, within Constitutional due process limits, to the particular facts of the case, including the level of blameworthiness, the harm, and the profitability of the activity.

Senator Whitehouse's proposed bill on maritime punitive damages, S. 3345, would restore that traditional ability to tailor a punitive award to the facts of the case.

Thank you and I am happy to answer any questions.

To conclude the failure to allow recovery of loss of society damages in seaman and high seas maritime wrongful death cases (other than commercial aviations disasters) is unjust, dated, inconsistent, and out of alignment with current values. The court's extension of those rules beyond the contexts in which they arose exacerbates the problems and extends the climate of liability limitation. Together these rules not only fail to compensate but they arguably lead to

under deterrence and increased risk because economic actors do not have to take those costs into account in deciding what to do and how to do it. This risky state of affairs is aggravated by the 1851 Ship Owner's Limitation of Liability Act and the potential positive effect of punitive damages is limited by the 1:1 ratio of punitive damages to compensatory damages. Amendment and reform is both possible and necessary.

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Read the news release on President Galligan's testimony to the U.S. Senate at www.colby-sawyer.edu/news/ussenatejudiciary.html.