

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ATLANTIC SOUNDING CO., INC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 08-214

7 EDGAR L. TOWNSEND. :

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9 Washington, D.C.

10 Monday, March 2, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:18 a.m.

15 APPEARANCES:

16 DAVID W. McCREADIE, ESQ., Tampa, Fla.; on behalf of
17 the Petitioners.

18 G.J. ROD SULLIVAN, JR., ESQ., Jacksonville, Fla; on
19 behalf of the Respondent.

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P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 08-214, Atlantic Sounding v. Townsend.

Mr. McCreadie.

ORAL ARGUMENT OF DAVID W. MCCREADIE

ON BEHALF OF THE PETITIONERS

MR. MCCREADIE: Mr. Chief Justice, and may it please the Court:

Mr. Townsend is a Jones Act seaman who seeks punitive damages for the willful failure to pay maintenance and cure.

Like the unseaworthiness claim in Miles, Mr. Townsend's maintenance and cure claim is a general maritime law cause of action. Mr. Townsend cannot recover punitive damages under his general maritime law cause of action because those damages are unavailable under the Jones Act FELA, and to a lesser extent DOHSA.

This Court's decision in Miles requires uniformity between the damages that a seaman can recover under general maritime law and the damages that a seaman can recover under the guiding statutes.

Those guiding statutes again are the Jones Act, the FELA, and the DOHSA. Those statutes --

JUSTICE GINSBURG: Mr. McCreadie, in this

1 case, why is it necessary to get into that, whether they
2 are punitive damages under FELA and the Jones Act? If
3 we accept, as I think we must, Townsend's allegations to
4 be true, he has said that Atlantic, as a matter of
5 routine, puts in a boilerplate complaint for declaratory
6 relief, reciting all the reasons why somebody could not
7 get maintenance and cure, even though that is patently
8 false, the allegation, for example, that he deserted his
9 post. He says it's false. He says the allegation that
10 he falsified his application for employment is false.

11 Accepting the -- that to be true at this
12 stage, isn't there some kind of punitive measure to be
13 taken against a litigant who abuses the court process in
14 that way?

15 MR. McCREADIE: First, Justice Ginsburg,
16 those are just allegations. There's no evidence --

17 JUSTICE GINSBURG: Yes, but -- but now we're
18 at the pretrial stage, and we're supposed to assume the
19 truth of the allegations in Townsend's complaint. We're
20 assuming -- they may well turn out to be false; but at
21 the threshold under 12(b)6 we accept those allegations
22 as true and then determine whether a claim is stated.

23 MR. McCREADIE: Well, if -- if those
24 allegations are true, there's no distinction between the
25 willful wanton misconduct that traditionally has been

1 the subject of the dispute about maintenance and cure
2 and punitive damages as opposed to those allegations.

3 JUSTICE GINSBURG: But let's take this out
4 of the maintenance and cure spot altogether. Litigation
5 generally, if a court determines that a litigant is
6 abusing the court's process by filing false pleadings,
7 is there a remedy; and if so, what is it?

8 MR. McCREADIE: Yes, Justice Ginsburg, there
9 is a remedy. And that's what *Vaughan v. Atkinson*
10 provides. In that case the -- this Court looked at
11 abuse of the litigation process and determined that the
12 plaintiff in that case was entitled to attorneys' fees.

13 JUSTICE GINSBURG: I thought that all that
14 was at stake there was whether the employer wrongfully
15 withheld maintenance and cure that was owing. The
16 allegations made by Townsend go far beyond that they
17 just unreasonably denied him maintenance and cure. They
18 suggest that this litigant, as a matter practice,
19 standard operating procedure, makes false claims before
20 a court. And my question to you is, isn't across the
21 board there a sanction, wholly apart from the particular
22 claim, for a litigant who abuses the court's processes?

23 MR. McCREADIE: I think there's a -- there's
24 a number of potential sanctions. I mean, there is Rule
25 11. There's the natural discretion of the court.

1 JUSTICE SCALIA: Is any of them called
2 punitive damages? Do you know of any case in which a
3 court has --

4 MR. McCREADIE: No, I do not.

5 JUSTICE SCALIA: And punitive damages, of
6 course, requires that you first find the guilty person
7 to lose the case. So what if a person makes these
8 terrible allegations, but ends up winning the case
9 anyway, and -- and -- well, you couldn't impose punitive
10 damages.

11 MR. McCREADIE: I -- I agree with --

12 JUSTICE SCALIA: We've got to call it
13 something else, don't we?

14 MR. McCREADIE: I agree with your position
15 there. And what I was trying to answer the question is
16 if someone does abuse the litigation process, that is
17 what Vaughan v. Atkinson addressed. And it -- it
18 awarded attorneys' fees, which -- which are unusual. It
19 is an exception to the American rule. And it is a
20 deterrent for anyone to try to play fast and loose
21 with --

22 JUSTICE GINSBURG: How many --

23 JUSTICE KENNEDY: But do you read Vaughan v.
24 Atkinson as necessarily implying punitive damages would
25 be inappropriate? I -- I can't quite find the negative

1 that you want me to find, I think, in Atkinson. True,
2 they didn't talk about punitive damages. They said
3 damages are appropriate, and attorneys' fees in this
4 case is what the district court gave, we are going to
5 affirm it. But there's nothing there that said punitive
6 damages are inappropriate.

7 MR. McCREADIE: No. The -- the dissent
8 mentioned that. But you cannot speak for the majority
9 opinion. But up until Vaughan v. Atkinson, in the
10 history of the United States there was never a holding
11 where punitive damages were awarded to a Jones Act
12 seaman for the failure to pay maintenance and cure.

13 It was only after Vaughan v. Atkinson, after
14 the dissent mentioned that concept, that the issue ever
15 arose in the history of Supreme Court precedent, circuit
16 precedent, in -- in this country.

17 JUSTICE SCALIA: Whose dissent was that? I
18 had forgotten that. Whose dissent was it? Do you
19 recall? Stewart?

20 MR. McCREADIE: I do -- I do not believe --
21 it is coming Justice Harlan, but I just -- I just cannot
22 say off the top of my head who wrote the dissent.

23 JUSTICE GINSBURG: But you said never in the
24 history. I mean, there -- there are examples like the
25 ancient Nancy case, where the damages, where they were

1 called exemplary -- but when you say never has there
2 been before or after punitive awards. But there --
3 there is precedent, the Nancy case in this Court, cases
4 in lower courts, there have been punitive damages awards
5 in -- in maintenance and cure cases.

6 MR. MCCREADIE: Justice Ginsburg, I made the
7 distinction between there's no case in the history of
8 the United States before *Vaughan v. Atkinson* awarding
9 punitive damages to a seaman, a Jones Act seaman, for
10 the failure to pay maintenance and cure.

11 The case that you refer to, the *Amiable*
12 *Nancy*, and other cases, they apply to general maritime
13 law with respect to collisions, now with respect to
14 pollution, and that's a broader context. But if we look
15 at the history of general maritime law, if we look at,
16 for example, *Calhoun*, there's the critical distinction
17 between non-seafarers and seafarers. If we look at
18 *Latsis*, there's the critical distinction between seaman
19 and longshoremen. In those status, they define the
20 class of persons that we're looking at to see whether
21 they can recover punitive damages.

22 And this case involves a Jones Act seaman.
23 And because it involves a Jones Act seaman, that's the
24 class of claimant that we're looking at. And when we
25 have a Jones Act seaman the primary statute that we look

1 at is the Jones Act. Of course, the Jones Act
2 incorporates FELA by reference. And the DOHSA, as Miles
3 points out, also has an impact on the -- on the case.

4 JUSTICE GINSBURG: Did this Court ever hold
5 that under FELA or under the Jones Act there are no
6 punitive damages? Do we -- do we have any holding to
7 that effect?

8 MR. McCREADIE: No -- no, there is no
9 specific holding, and I would point out that if there
10 was, that would answer our question today and we
11 wouldn't be here.

12 But that we do have is Miles, which is very
13 clear and specific about what damages are available to a
14 seaman; and those damages are compensatory damages.
15 Miles is clear that the seaman can be compensated for
16 pecuniary loss, the seaman can be compensated for his
17 pre-death pain and suffering. Because punitive damages
18 are not compensatory damages, because punitive damages
19 do not compensate for pecuniary loss, and because
20 punitive damages do not compensate for pre-death pain
21 and suffering, they are not available to a Jones Act
22 seaman.

23 JUSTICE KENNEDY: Well, but that -- but that
24 was a common law wrongful death action, correct, Miles?

25 MR. McCREADIE: Miles was --

1 JUSTICE KENNEDY: It was not admiralty
2 maintenance and cure.

3 MR. McCREADIE: Justice Kennedy, Miles was a
4 wrongful death action. But when we look at Miles and we
5 question, well, that is a wrongful death action, it is
6 very clear, should Miles apply in a personal injury
7 action, then we need to -- we -- first we know -- we
8 look at the -- the cases that have addressed that point.

9 And first off, Miles does not say that the
10 uniformity principle applies only to wrongful death
11 actions.

12 Secondly, Cortes, Supreme Court precedent,
13 tells us that the rules are the same for personal injury
14 and death actions for maintenance and cure under the
15 Jones Act.

16 In Cortes, the opposite argument was made:
17 That the maintenance and cure claim could proceed for
18 personal injury but not for a death action. Here, the
19 Respondent is making the argument --

20 JUSTICE SCALIA: Excuse me, that the
21 maintenance and cure claim could proceed or that the
22 punitive damages claim could be made?

23 MR. McCREADIE: You're absolutely correct.
24 Here they are making the argument that the punitive
25 damages claim could -- can proceed under the personal

1 injury side of the case but not the death side. And
2 Cortes has already addressed that issue. And --

3 JUSTICE GINSBURG: Mr. McCreadie, there's a
4 question about this case, a troublesome feature of it.

5 That is, you are saying because there are no
6 punitive damages available under FELA and under the
7 Jones Act, then there certainly should not be any under
8 maintenance and cure. But if we have to answer those
9 questions, whether there are punitive damages available
10 under FELA and the Jones Act, in the context of a
11 maintenance and cure claim, then we're deciding a much
12 larger question than are punitive damages available for
13 willful refusal to pay maintenance and cure. We're
14 deciding a question under the Jones Act, a question
15 under the FELA, and there are a lot of people who would
16 be interested -- and the seamen are a sizable group that
17 the law cares about particularly -- but there would be a
18 larger interest, a larger interest in the answer in the
19 Jones Act context and FELA.

20 And to decide those questions in a case that
21 doesn't present any claim under FELA or any claim under
22 the Jones Act is troublesome.

23 MR. MCCREADIE: I certainly agree with you,
24 Justice Ginsburg, that the answer to this case answers
25 the question of what damages are available under the

1 Jones Act and -- and FELA.

2 But, again, if you look at Miles, which
3 analyzing both FELA cases, Vreeland, for example, and
4 Kraft, which is a railroad case, it -- it has already
5 specifically stated what compensatory -- that
6 compensatory damages alone are available under the death
7 side, admittedly, and that the compensation for a seaman
8 and, therefore, for a FELA employee is limited to
9 compensation for pecuniary loss and for pre-death pain
10 and suffering.

11 Also, if we look at another string of
12 Supreme Court precedent, it's not as clear as Miles, but
13 if we look at the -- the other string, it -- it -- this
14 Court has stated over and over that compensatory damages
15 are -- are what is available under the Jones Act;
16 compensatory damages are available under the FELA; and
17 compensatory damages are available under DOHSA.

18 For example, Zicherman is a post-Miles case,
19 and it's written and states the principles very clearly:
20 The Jones Act provides -- permits, I should say,
21 compensation only for pecuniary losses. And then it
22 discusses Vreeland, which is a FELA case, and it says
23 that the FELA permits compensation only for pecuniary
24 losses.

25 And so, again, if we -- if we look at the

1 history on the death side, which Miles summarizes, but
2 if we look on the personal injury side, at the Osceola,
3 the Iroquois, Peterson mentions compensatory damages
4 nine times in expressing what remedies are available to
5 seamen. And so those railroad cases, those Jones Act
6 cases, have been decided and have been a part of our
7 precedent for 60, 70, 80 years.

8 And, of course, it is important to note that
9 the Congress has amended the Jones Act in 1982, with no
10 tampering with this history. It has amended the Jones
11 Act in 2006 with no tampering with the history, and it
12 has amended the Jones Act in 2008 without any change.
13 And that's in light of Guevara, decided in 1995; that's
14 in light of Roy Al, decided in 1995, and 10 years plus
15 for the cases to percolate and for Congress to decide
16 whether they agree with those policy determinations.

17 JUSTICE KENNEDY: As -- as I read your reply
18 brief -- and please correct me if it's a
19 misimpression -- you didn't dispute the fact that
20 punitive damages were available historically for the
21 shipowner's wrongful refusal to provide maintenance and
22 cure, or am I wrong about that?

23 MR. McCREADIE: I -- that must have been the
24 Respondent's brief, because our position is -- is --
25 hopefully was clearer than that, that punitive damages

1 have never been awarded in the history of the United
2 States for the willful failure to pay maintenance and
3 cure until after -- until after Vaughan v. Atkinson.

4 JUSTICE KENNEDY: And what about English
5 admiralty, under the English precedents?

6 MR. McCREADIE: The -- the English
7 precedents we did not analyze. We took Miles when it
8 analyzes Lord Campbell's Act, and then that was analyzed
9 in Vreeland. And from that point forward, Miles took
10 that, that line of cases --

11 JUSTICE KENNEDY: Of course, in Miles --
12 again, we're coming back -- was wrongful death, not
13 maintenance and cure.

14 MR. McCREADIE: Miles was a wrongful death
15 case that analyzed an unseaworthiness cause of action,
16 which is brought under general maritime law. We are
17 looking at maintenance and cure, which is a claim
18 brought under general maritime law. Both existed before
19 the Jones Act, unseaworthiness and maintenance and cure,
20 and again both are general maritime law claims.

21 CHIEF JUSTICE ROBERTS: Of course, your
22 friend on the other side distinguishes that argument by
23 noting that death is different. As he puts it, we're
24 all going to die, so --

25 MR. McCREADIE: In that case --

1 CHIEF JUSTICE ROBERTS: -- you have
2 different considerations under the maintenance and cure.

3 MR. McCREADIE: Mr. Chief Justice, that take
4 us back again to Cortes, which this Court has already
5 decided and analyzed. Should we distinguish between a
6 death action, maintenance and cure action under the
7 Jones Act, from a personal injury action? And the
8 unequivocal answer from this Court is no, that -- that
9 you should not treat them differently. There's no logic
10 for treating them differently.

11 We also need to remember that one of the
12 anomalies that was -- that was -- that was cured by
13 Moragne -- the first anomaly cured by Moragne was an
14 anomaly where the unseaworthiness action would exist in
15 State territorial waters but not in -- I'm sorry, it
16 would exist in State territorial waters, but not on the
17 high seas. And that troubled the Moragne Court, that
18 you would have a discrepancy between personal injury and
19 death, and that's one of the issues that they tried to
20 -- tried to reconcile.

21 JUSTICE GINSBURG: I thought there was -- it
22 was on the high seas. They had DOHSA. At the time of
23 Moragne, there was DOHSA, but then it was when you
24 weren't on the high seas that was the gap. Wasn't that
25 the case?

1 MR. McCREADIE: That's correct. My point is
2 there was a difference of what right you had under -- in
3 territorial waters under unseaworthiness that Moragne
4 described as one of the anomalies. And the anomaly was
5 that if the person was injured, they could get an
6 unseaworthiness claim; if they died, they could not.
7 And Moragne was clear that distinguishing between death
8 and personal injury, it made no sense.

9 JUSTICE GINSBURG: But that's what the
10 common law was. That's why we had Lord Campbell's Act.
11 That was if you die, too bad; if you're injured, you
12 correct -- collect.

13 That was fixed by statute on the high seas,
14 DOHSA. Because there was the gap, there was no Lord
15 Campbell's Act, the Court effectively made one up,
16 right? That's what it did in Moragne.

17 MR. McCREADIE: Moragne did create some law,
18 yes. Let me try to answer the question in a different
19 way --

20 JUSTICE KENNEDY: But I just -- and you can
21 go ahead and answer that question without my
22 interrupting. But my assumption from reading the amicus
23 briefs in this case is that punitive damages were
24 awarded in some maintenance and cure cases, (a) as
25 simply part of the overall award -- they weren't

1 separated out, but it was part of the measure -- and,
2 (b) that some American courts, American judges,
3 including noted admiralty judges, awarded in some cases
4 punitive damages in maintenance and cure before the
5 modern cases, Moragne and so forth that you're -- and
6 Miles -- that you're talking about. Is that incorrect?

7 MR. McCREADIE: That is incorrect. If -- if
8 you read the cases cited, and they have their roots in
9 some law review articles that are critical of Miles,
10 that -- that don't like the Miles decision, but if you
11 read those cases --

12 JUSTICE KENNEDY: I'm talking pre-Miles.
13 I'm talking pre-Miles.

14 MR. McCREADIE: And I'm saying the cases
15 that are cited in those law review articles -- the
16 purpose of the articles is to criticize Miles. Those
17 cases do not stand for the proposition that they're
18 presented for in the law review article and they do not
19 stand for the propositions that they have been presented
20 to this Court. They are not holding -- they are not
21 giving an award of punitive damages for maintenance and
22 cure in any of those cases.

23 JUSTICE BREYER: Is -- how many -- how many
24 would you say there are in a typical year, maintenance
25 and cure cases? About, roughly? I mean, say in the

1 late twentieth century, 18 -- 1980, 1990. Have you have
2 any guess at all?

3 MR. McCREADIE: Justice Breyer, because
4 maintenance and cure is so often linked to the Jones Act
5 and the unseaworthy cause of action, and because of the
6 leverage that seems to be brought with punitive damages,
7 they are virtually included in every seaman's case --

8 JUSTICE BREYER: All right.

9 MR. McCREADIE: -- from the get-go.

10 JUSTICE BREYER: So how many would you
11 guess?

12 MR. McCREADIE: And -- and I would have to
13 estimate, just extrapolating from my own experience,
14 thousands of Jones Act cases are filed in the country
15 every year.

16 JUSTICE BREYER: Uh-huh. And they usually
17 have maintenance and cure aspects.

18 MR. McCREADIE: Necessarily they do.

19 JUSTICE BREYER: Can you get punitives under
20 the Jones Act or not?

21 MR. McCREADIE: You cannot recover punitive
22 damages under the --

23 JUSTICE BREYER: What about unseaworthiness?

24 MR. McCREADIE: You cannot recover punitive
25 damages under unseaworthiness because that's the same

1 rule that Miles already decided. Miles decided in
2 unseaworthiness --

3 JUSTICE BREYER: Okay, so if I have about 30
4 cases -- no, I had, actually, to be honest, I thought we
5 found about 12 in the period around 1980-2000, where
6 they do give some punitive damages.

7 MR. MCCREADIE: And -- and -- and I hope I
8 was clear that the can of worms was opened by Vaughan.
9 No one awarded it. No one thought about it, until after
10 Vaughan.

11 JUSTICE BREYER: All right. Then I found
12 about 10 cases in the period before the Jones Act where
13 there was something given -- punitive damages being
14 given for something, and there was something sort of
15 like maintenance and cure in there.

16 MR. MCCREADIE: There -- there are some
17 pre-Jones Act cases, like the *Amiable Nancy*, that --
18 that talk about punitive damages; and there are some
19 cases where some seamen have not been treated very well.
20 But a specific look at the cases reveals that there is
21 no pre-Jones Act case awarding punitive damages --

22 JUSTICE BREYER: Over here, there is one
23 called -- *Unica v. U.S.* The master should have put the
24 libelant into the hospital, give him \$1,500. It was
25 partly punitive. Considering -- called *The Troop* -- I

1 mean, I found some that are sort of -- sort of -- I
2 don't know what to say. I mean, I don't know what to
3 make of it.

4 MR. McCREADIE: The Troop is on the list.
5 It is a case that we have looked at, and it is -- and
6 again, it is a case that I can say that if you look at
7 all of them -- it is a very tedious process; there are a
8 lot of cases, and wading through each one, none of them
9 hold or award punitive damages for the failure to pay
10 maintenance and cure. And --

11 JUSTICE BREYER: The Troop gave them \$4,000.
12 Considering all the circumstances of the aggravation.
13 Gross neglect, mistreatment. "It is useless to parade
14 more of the sickening details."

15 MR. McCREADIE: And our position is that
16 even if there is -- and there is not; let me be clear --
17 but even if there was one rogue case, one individual
18 case, that does not create general maritime law.
19 Something more is needed. For example, a decision from
20 this Court would create general maritime law.

21 The -- the -- the Wilburn Boat case is an
22 insurance case. There's an example where there are some
23 cases on the subject of marine insurance, but there's
24 not enough for the court to conclude that there is a
25 general maritime law on that subject.

1 And so returning again to this -- this
2 pocket of cases, they do not stand for the
3 proposition -- even if they did, if you'll notice, two
4 of them, it's the same district court judge who is
5 making the noise that he would have done this or he
6 might have done this. And -- and -- and our position is
7 that one district court judge does not create general
8 maritime law by mentioning the possibility of punitive
9 damages in one case.

10 We're much more comfortable relying on this
11 Court's precedents, the line of cases that builds from
12 Moragne to Higgingbotham and culminates in Miles, we're
13 much more comfortable looking at the history of the
14 damages awarded by this Court to seamen, where it uses
15 the term compensatory damages, compensation for, over
16 and over and over without any mention whatsoever of
17 punitive damages.

18 The punitive damages problem did not crop up
19 until Vaughan, even though now everyone seems to agree
20 Vaughan did not hold that punitive damages were
21 available.

22 I would also just like to mention all the
23 circuit court cases addressing this issue hold that
24 Jones Act precludes punitive damages, and any circuit
25 court that has addressed this issue since Miles,

1 likewise specifically holds punitive damages are not
2 available for the willful failure to pay maintenance and
3 cure.

4 I'd like to reserve my remaining time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Sullivan.

7 ORAL ARGUMENT OF G.J. ROD SULLIVAN, JR.

8 ON BEHALF OF THE RESPONDENT

9 MR. SULLIVAN: Mr. Chief Justice, may it
10 please the Court:

11 I would like to start by answering the
12 question that was raised by Justice Ginsburg. This
13 Court does not need to reach the question of whether or
14 not punitive damages are available under the Jones Act
15 or under the FELA in order to decide this issue, because
16 maintenance and cure is different. It precedes the
17 Jones Act by centuries, perhaps even a thousand years,
18 and it deals with a distinctly different problem.

19 Maintenance and cure deals with a situation
20 as what do we do with an injured seaman to get him back
21 to health and get him into the workforce? And the law
22 has provided since Catherine of Aragon went to Greece in
23 the 1200s that the shipowner has a responsibility, in
24 its capacity as a shipowner, to provide that seaman with
25 medical care and to provide that seaman with a living

1 allowance so that he can get better and get back into
2 the work force.

3 Now, in 1920, Senator Jones intended to make
4 the United States Merchant Marine the world's greatest
5 merchant marine. He was dealing in a factual scenario
6 where 12 years earlier, on April 12th of 1912, the
7 Titanic had sunk; 1,900 people had died.

8 Virtually every member of the Senate and
9 Congress knew somebody who was on the Titanic, and
10 during the intervening eight years, certain points of
11 law became obvious. First of all, the people who died
12 on the Titanic could not recover for anything except
13 their lost baggage. They could not recover for the fact
14 that their loved ones had passed away, because there was
15 no cause of action.

16 Secondly, because the Titanic hit an iceberg
17 and was not unseaworthy, there was no cause of action
18 for negligence. So Senator Jones set around to correct
19 these two anomalies in the law, and said what we are
20 going to do is we're going to create a new class of
21 beneficiaries, who are dependents of people who die at
22 sea, and we are going to give them the right to recover
23 pecuniary damages. That's the only place where
24 pecuniary damages are mentioned in the law.

25 And then it said, and as to seamen, we're

1 going to give them an additional right, a cumulative
2 right on top of unseaworthiness, and that's going to be
3 negligence.

4 It never sought out to touch maintenance and
5 cure. Maintenance and cure has been something that's
6 been monitored by the courts ever since its inception,
7 and it is a self-regulating system. Before Guevara,
8 shipowners regularly provided their employees with
9 medical care without asking the question. If there was
10 a close call, they provided the medical care without
11 running to the court. They provided maintenance.

12 Then came Guevara, and Guevara decided for
13 the first time there were no punitive damages, and now
14 you have a growing problem in this country. You have a
15 problem with shipowners providing less and less medical
16 care without resort to the courts.

17 Now, our position here is that a seaman
18 should be not ever have to come before a court to seek
19 maintenance and cure, and the court should never, ever
20 have to award punitive damages.

21 JUSTICE KENNEDY: Well, surely there will be
22 some incidents in which the employer in good faith
23 thinks that there's no illness, that there's no basis
24 for maintenance and cure.

25 MR. SULLIVAN: And absolute --

1 JUSTICE KENNEDY: For you to tell me, oh,
2 this will just never happen, I mean, that's -- that's
3 not the way the world works.

4 MR. SULLIVAN: No. And, Judge, when a --
5 when an employer comes to the court in good faith and
6 says there's no entitlement to maintenance and cure, and
7 there -- the court finds that -- or the finder of facts
8 finds there's good faith, there's no basis for punitive
9 damages. Then you merely have a dispute. But the
10 situation --

11 JUSTICE KENNEDY: Well, of course, there are
12 going to be disputes, and the question is whether or
13 not, just from the standpoint of fulfilling professional
14 responsibility, in almost any maintenance and cure
15 action where the counsel for the plaintiff thinks
16 that -- for the seaman thinks that the employer has been
17 remiss, he doesn't add the punitive damages complaint,
18 if we -- if we agree with your position, which changes
19 completely the settlement and the bargaining aspect.
20 But you can address -- you can address that.

21 MR. SULLIVAN: Well -- and I agree, Your
22 Honor, that is a prospect and a possibility, something
23 which I personally abhor doing. I mean, you should only
24 plead punitive damages when you have a good faith basis
25 for doing it; you believe you will survive a directed

1 verdict. It should not be thrown in to every single
2 complaint, and I'm not denying that some counsel will do
3 that.

4 But what I'm saying is that today, in 2009,
5 in 2006, there are actually shipowners who are, as a
6 regular practice, denying their seamen medical care. I
7 don't know why that is. Perhaps it's because it is
8 expensive now, more expensive than it has ever been.
9 Perhaps it is because there are safety nets that will
10 allow the seamen to seek Medicaid, and so the taxpayer
11 will pay for it. Whatever the motivations are, it is a
12 growing trend that we are seeing.

13 JUSTICE GINSBURG: How many of these seamen
14 who seek maintenance and cure are represented? I mean,
15 what is the incidence of representation for maintenance
16 and cure claims as distinguished from Jones Act
17 negligence type claims with the -- the possibility of
18 large recoveries for pain and suffering?

19 MR. SULLIVAN: Judge, I'd be picking a
20 number out of the air, but I can give you anecdotal
21 evidence of this.

22 In the Fifth Circuit attorneys who regularly
23 do maritime personal injury work tell each other -- we
24 talk about the fact that you can't afford to represent
25 somebody who's got a maintenance and cure case that's

1 not combined with a Jones Act case. And there are a
2 number of practical reasons for that.

3 You have to pay all the experts, and it is
4 very expensive to bring these cases. You have to hire
5 the orthopedic surgeons, the -- the radiologists. You
6 have to pay for the tests. And then, as an attorney,
7 these are never recoverable as costs.

8 And then you are working on a contingent
9 hourly fee. If you win your case and you prove that
10 they were willful, wanton and callous in -- in denying
11 maintenance and cure, then you might get a portion of
12 your attorneys' fees back.

13 Now, you may do that as a pro bono matter on
14 occasion. But you cannot rely upon the fact that
15 attorneys will take these cases.

16 JUSTICE SCALIA: Well, why -- why does
17 joining it to a Jones Act case help?

18 MR. SULLIVAN: Well, because when you join
19 it to a Jones Act case, you have the substantial
20 possibility of getting either a settlement or a verdict
21 at the end of the case which is going to compensate the
22 attorneys for taking on the maintenance and cure case as
23 a portion of it.

24 And so, consequently, if somebody has a
25 serious accident, it falls under the Jones Act and there

1 is a maintenance and cure count, the attorney will
2 handle all of those together and feel adequately
3 compensated.

4 JUSTICE GINSBURG: Well, the -- the point
5 you are making is that the recovery under the Jones Act
6 can be very large, and the attorney on a contingent
7 basis would get a piece of that.

8 MR. SULLIVAN: Exactly, Your Honor.

9 JUSTICE GINSBURG: Because it would be
10 swelled by the pain and suffering damages which are not
11 available in maintenance and cure.

12 MR. SULLIVAN: That's correct, Your Honor.

13 CHIEF JUSTICE ROBERTS: What is the
14 pre-Vaughan case that awarded punitive damages --
15 awarded punitive damages in a maintenance and cure case?

16 MR. SULLIVAN: Judge, first of all, I would
17 cite to you two cases: The Rolf case, which is a 1924
18 Ninth Circuit case --

19 CHIEF JUSTICE ROBERTS: I am -- what --
20 which -- any case from this Court?

21 MR. SULLIVAN: No.

22 CHIEF JUSTICE ROBERTS: Okay.

23 MR. SULLIVAN: This issue did not come
24 before this Court.

25 CHIEF JUSTICE ROBERTS: Right.

1 JUSTICE GINSBURG: It hasn't come before
2 this Court under FELA or the Jones Act, either, the
3 punitive damage question?

4 MR. SULLIVAN: It hasn't -- it has not, Your
5 Honor.

6 JUSTICE BREYER: Rolf -- Rolf is not a --
7 Rolf was maintenance and cure and personal injury and
8 unseaworthiness. So we don't know which aspect of the
9 case led to the punitives.

10 MR. SULLIVAN: We don't, but we know that
11 there was outrage on behalf of the court. And,
12 unfortunately, in -- and I think, as Justice Souter
13 pointed out --

14 JUSTICE BREYER: Is it the case that we
15 can't find a single pre-Jones Act case where punitives
16 were awarded and what was sought was maintenance and
17 cure? I -- I found some, but they seem ambiguous to me.

18 MR. SULLIVAN: Well, Judge, I would say that
19 --

20 JUSTICE BREYER: What is your best?

21 MR. SULLIVAN: Yes. I would say that the
22 best are the Rolf and the Margharita, which were denials
23 of medical care where the damages were enhanced because
24 of outrageous conduct. But to say that, Judge, is there
25 a case that says this is maintenance and cure, we are

1 going to award punitive damages, that's not been done.

2 JUSTICE BREYER: So we have a history all
3 the way back to Catherine of Aragon, and what we've been
4 able to find in these pre-Jones Act cases is really two
5 or three, or maybe -- I found ten actually, that I
6 couldn't say --

7 MR. SULLIVAN: Judge --

8 JUSTICE BREYER: Leaning over in your
9 direction, I could take maybe three or four. And they
10 show a little ambiguity. But give them all ten, and
11 that's still ten out of hundreds of years of history.

12 MR. SULLIVAN: Well, let me -- let me
13 respond to that in a couple of ways. First of all,
14 punitive damages were part of the common law until taken
15 away by Congress.

16 And -- and it could be asserted that
17 maintenance and cure punitive damages were not necessary
18 because the threat was enough to -- to require
19 shipowners to go ahead and provide this. And I would
20 point out to the Court that this had not been a problem
21 prior to Guevara. Shipowners did self-regulate. They
22 didn't -- seamen didn't run to the courts every time
23 they wanted maintenance and cure; whereas, today they
24 have to.

25 The leading scholar in this whole area is

1 Professor Robertson at the University of Texas who wrote
2 the AHA brief. And his brief, on pages 7 through 11,
3 catalogs the cases where he suggests punitive damages or
4 exemplary damages were awarded for outrageous conduct
5 involving failure to provide medical care.

6 And I would suggest that those show that
7 punitive damages were unexceptional before Vaughan.
8 They were part of the common law. They -- they were
9 before this Court in the *Amiable Nancy*, even though it
10 didn't involve medical care. There is no reason to
11 assume that if punitive damages are accepted in maritime
12 law as part of the common law, that they weren't also
13 accepted for the willful, wanton, egregious failure to
14 provide a seaman with medical care.

15 JUSTICE KENNEDY: If I thought that the lack
16 of counsel in maintenance and cure cases was a pivotal
17 point or a relevant point for our decision, other than
18 the representations of counsel, where would I look to
19 verify that?

20 MR. SULLIVAN: The existence of prior
21 maintenance and cure cases?

22 JUSTICE KENNEDY: The -- the -- that there
23 is a problem in seamen finding attorneys who will take
24 maintenance and cure cases.

25 MR. SULLIVAN: Yes, Judge, there is not

1 empirical evidence out there. Nobody has done studies.
2 I'm not aware of any. But do we really want to wait for
3 the situation where we have hundreds and hundreds of
4 seamen who are -- are, you know, living homeless or
5 living in their cars or unable to obtain medical care
6 before this Court decides that if somebody does this, it
7 is something that can be punished?

8 And -- and I think that's the situation
9 we're at today. It is a growing problem. And it is a
10 growing problem because Guevara is a relatively new
11 case, and it has spread to the other circuits.

12 CHIEF JUSTICE ROBERTS: Well, if -- if the
13 -- if the existence of the punitive damages and
14 maintenance cure were as well established, why wasn't
15 that mentioned in terms in the Vaughan majority? It
16 only comes up in the Vaughan dissent.

17 MR. SULLIVAN: Well, it does come up in the
18 Vaughan dissent because it was not requested by the low
19 -- in the -- in the lower courts. And this Court would
20 not consider a claim for punitive damages for the first
21 time on appeal.

22 I -- I think what Justice Stewart was saying
23 is we have a question before -- before us where somebody
24 is requesting attorneys' fees in -- in derogation of the
25 American Rule. The majority is saying we are going to

1 find an exception to the American Rule and give
2 attorneys' fees. And Justice Stewart is saying, I don't
3 want to do that. I think that the better --

4 JUSTICE SCALIA: Do you think Stewart knew
5 more about these -- these obscure, ancient cases than we
6 do?

7 MR. SULLIVAN: I'm sorry? Was he more --

8 JUSTICE SCALIA: Do you think he knew more
9 about these obscure, ancient cases than we do?

10 MR. SULLIVAN: No, I -- I think --

11 JUSTICE SCALIA: Had he had the benefit of
12 briefs by Professor Robertson and -- I think not, right?

13 MR. SULLIVAN: No. No. I --

14 JUSTICE SCALIA: It was just sort of off the
15 top of his head that he thought there should be punitive
16 damages.

17 MR. SULLIVAN: He was quoting from McCormick
18 on damages and some basic treatises. And I think he was
19 taking the position that punitive damages are in our
20 quiver of weapons that we can use to deter --

21 JUSTICE SCALIA: They -- they normally are,
22 but the question is whether there -- whether this --
23 this is a different quiver.

24 MR. SULLIVAN: Well, I think that he was
25 saying that this is one of the weapons we have. Instead

1 of creating an exception to the American Rule, we ought
2 to just give them punitive damages to account for this
3 egregious conduct.

4 JUSTICE GINSBURG: And that -- that was not
5 argued by anybody. It wasn't raised in the lower court.
6 It wasn't a punitive damages case.

7 MR. SULLIVAN: No, it wasn't. It wasn't.
8 The first time counsel for Mr. Vaughan raised the
9 question of punitive damages was on remand. And then
10 the district court said, hey, look, you didn't raise it
11 before. Just because Justice Stewart suggested this is
12 a -- as a -- as an alternative to attorneys' fees
13 doesn't mean we're going to award punitive damages now.

14 JUSTICE BREYER: With attorneys' fees there
15 is a compensatory aspect. The -- the basic obligation
16 is to keep this seaman alive and well, and then you give
17 him some wages if necessary, and, you know, you give him
18 medical care. And -- and now he's going to be out that
19 attorneys' fees as a result of his sickness. So I
20 understand that.

21 Punitives does not compensate him for
22 anything. It is a policy matter for the State. He's a
23 beneficiary of a windfall. And it seems a more radical
24 step to make something up out of whole cloth here with
25 punitives than it does with attorneys' fees.

1 MR. SULLIVAN: Judge, I would like you to
2 look at how Congress treats this problem. If you had,
3 for example, a bridge-building project where a seaman, a
4 longshoreman and a State worker all got injured
5 identically in the same accident side by side, and the
6 shipowner failed to provide medical care for the
7 longshoreman, the shipowner could go to jail. If the
8 shipowner provided -- or failed to provide medical care
9 to the State worker, he could be, again, subject to
10 criminal penalties.

11 On top of the criminal penalties, Congress
12 has established these administrative agencies to assure
13 that those workers get medical care. On top of that, if
14 they don't get medical care, they lose their defense of
15 workers' compensation immunity. They lose the defense
16 of assumption of risk, contributory negligence, and they
17 are subject to personal liability, not just corporate
18 liability.

19 JUSTICE BREYER: Maybe it would be a good
20 thing.

21 MR. SULLIVAN: Yes.

22 JUSTICE BREYER: But the -- the problem here
23 is it has pros and cons. I was quite moved by the brief
24 -- the citation that Professor Robertson made of all of
25 those old cases until we looked them up. And -- and

1 then I found they seem to stand for a little bit less
2 than I had the impression they stood for.

3 MR. SULLIVAN: That --

4 JUSTICE BREYER: And so we'd be making this
5 up out of whole cloth, it seems to me.

6 MR. SULLIVAN: I don't think so, Your Honor.
7 What I think he would be saying is this is part of our
8 power as a common law court. And just because we
9 haven't --

10 JUSTICE SCALIA: We've abandoned that.

11 JUSTICE BREYER: -- because Miles says don't
12 do that.

13 JUSTICE SCALIA: Exactly. We've abandoned
14 that in this area. We've said that what we do with
15 these admiralty causes of action we should be guided by
16 what Congress has done in the Death on the High Seas Act
17 and in the Jones Act.

18 MR. SULLIVAN: Well --

19 JUSTICE SCALIA: Do you acknowledge that
20 there are no punitive damages available in the event of
21 death?

22 MR. SULLIVAN: Yes.

23 JUSTICE SCALIA: Well, that -- that -- now,
24 you want to talk about what's a sensible system and what
25 is not a sensible system. In the days when

1 Massachusetts used to have a -- when I was in law
2 school, they had a compensation limit for wrongful
3 death, but to limit for -- for pain and suffering, for
4 negligence; and -- and, you know, the line was back her
5 up again -- back her up again, Sam, she's not quite dead
6 yet.

7 (Laughter.)

8 JUSTICE SCALIA: I mean, is --

9 MR. SULLIVAN: Judge, I --

10 JUSTICE SCALIA: Is -- is -- is this going
11 to be the same thing, where -- where the shipowner says,
12 well, you know, if -- if -- if I treat him badly enough
13 that he dies, I don't get hit with the punitive damages?

14 MR. SULLIVAN: I would -- I would hope that
15 would not be the case, Your Honor.

16 JUSTICE SCALIA: Yeah, but it is invited,
17 isn't it?

18 MR. SULLIVAN: Well, I don't think it is
19 invited, Judge. There are reasons why that there is
20 this anomaly that there are no punitive damages for
21 death. And that's because in 1920 when Congress created
22 the Death on the High Seas Act there were no -- any kind
23 of damages. There was no recovery at all.

24 And so, Congress preempted this field of
25 death. And it said that death cases shall be decided

1 under the Death on the High Seas Act.

2 But Congress has completely stayed away from
3 the area of maintenance and cure. It hasn't enacted
4 administrative remedies because the Court has always
5 been the one who has decided what's appropriate.

6 And this Court, as a matter of its -- as
7 maintaining its court docket and maintaining these
8 remedies, has the right and I think the obligation to
9 say we're going to keep these cases out of court by
10 awarding punitive damages when somebody willfully denies
11 this right, when somebody willfully withholds medical
12 care.

13 And I think if you do that, you're going to
14 see these cases are going to disappear. Seamen are
15 going to start getting their medical care again. They
16 are not going to be coming to the court every time they
17 get injured and saying, I haven't gotten my back
18 surgery. I haven't gotten my rotator cuff surgery. And
19 it is sort of a matter of court administration to --
20 to --

21 CHIEF JUSTICE ROBERTS: Well, I'm not sure
22 as sure -- I'm not sure I follow that. Where -- in
23 other areas where we allow punitive damages it hasn't
24 resulted in the cases going away. Quite the opposite.
25 It seems it has given rise to a variety of claims on

1 both sides.

2 MR. SULLIVAN: This is a very narrow area of
3 law, Your Honor. We are talking about are you giving
4 the seaman the medical care he needs to get the maximum
5 medical improvement? And that's all it is.

6 CHIEF JUSTICE ROBERTS: Yeah, but the normal
7 medical malpractice area has given rise to a lot of
8 punitive damage litigation. I don't know why this would
9 be any different.

10 MR. SULLIVAN: I think this would be
11 different because all we're talking about is does the
12 seaman get the surgery he needs. If he doesn't get the
13 surgery he needs and he gets worse or he continues to
14 stay ill or he continues to stay in pain, then the
15 shipowner should be punished. But --

16 JUSTICE SCALIA: Well, it certainly -- it
17 certainly makes these maintenance and care cases a lot
18 more attractive to the plaintiffs' bar, doesn't it? I
19 mean, one of your complaints is there's just no money in
20 it. The claim is not for that much.

21 MR. SULLIVAN: The goal here, Judge, is not
22 money. The goal here, I think --

23 JUSTICE SCALIA: Of course it shouldn't be
24 the goal. But we're -- we're inquiring into the
25 question of whether granting punitive damages will

1 increase or decrease the number of lawsuits.

2 I -- I -- I would think it would be
3 astounding if it would decrease the number of lawsuits.

4 MR. SULLIVAN: I think it would decrease the
5 incidence when -- when medical care is denied.

6 JUSTICE GINSBURG: There -- there wouldn't
7 be any maintenance and cure claim if the system worked
8 as it was intended; that is, that if you have a sailor
9 who is injured, the shipowner pays room and board and
10 medical expenses.

11 MR. SULLIVAN: That's all it is, Your Honor.
12 Just say if the -- if the shipowner will treat the
13 seaman fairly, will follow the doctor's recommendations,
14 get him to a doctor, give him treatment so he gets
15 better, there's -- I mean, you are saying there may be
16 more claims for punitive damages, but there will be more
17 awards of punitive damages because there won't be this
18 willful and wanton, callous disregard of the seaman's
19 rights.

20 And so, I would suggest that, in fact, in
21 this narrow area of the law, if you impose punitive
22 damages, actual punitive conduct, conduct that deserves
23 punishment will go down and it will go down rapidly.

24 JUSTICE SCALIA: I -- I wish it were as
25 clearcut as that. I mean, what -- what if the seaman

1 says, you know, I should have had this very expensive
2 treatment? And the shipowner's medical counsel said,
3 no, this treatment is -- is not necessary.

4 Is that -- is that a punitive damages claim?
5 I bet it is.

6 MR. SULLIVAN: I don't think so, Judge. I
7 think those kind of cases should be weeded out on
8 summary judgment by the courts -- by the district court,
9 because we're only talking about the willful, wanton and
10 callous withholding --

11 JUSTICE SCALIA: He's going to say that was
12 willful and wanton. I obviously needed this -- this
13 more expensive treatment. He just didn't want to pay
14 the money.

15 MR. SULLIVAN: And the court is going to
16 have to -- the district courts are going to have to make
17 a judgment as to the bona fides of that case. But I
18 think that you are going to find that it is very rare
19 when somebody is going to act callously when the
20 potential on the other side is that they are going to be
21 awarded -- have punitive damages awarded against them.

22 And that, therefore, this is going to be a
23 corrective mechanism that's going to do away with the
24 problem we currently have now and make the plaintiffs
25 even better.

1 CHIEF JUSTICE ROBERTS: Well, I mean, it --
2 whether it gives rise to more litigation or not, it is
3 still a significant and it will give rise to greater
4 costs on the part of the -- the shipper which will be
5 passed on, as is the case in a lot of areas where you
6 have punitive damages, it will be passed on to the
7 consumer.

8 MR. SULLIVAN: If the punitive damages are
9 awarded. But the hope, of course, is that --

10 CHIEF JUSTICE ROBERTS: No, no, even if
11 they're not. In other words, you were saying, look, to
12 avoid punitive damages, the shipowner is going to make
13 sure that there -- that that more expensive test is
14 provided.

15 MR. SULLIVAN: It's going to err on behalf
16 of the seaman.

17 CHIEF JUSTICE ROBERTS: Yeah.

18 MR. SULLIVAN: Yes.

19 CHIEF JUSTICE ROBERTS: But that doesn't
20 make -- that doesn't mean there are no costs involved in
21 ruling in your favor.

22 MR. SULLIVAN: That's true, Judge. But here
23 again, we're balancing the interest of somebody who is
24 injured and whose condition may become permanent and
25 incurable by virtue of not getting prompt care as

1 opposed to the limited costs to the shipowner of -- of
2 providing a doctor who is going to determine what the
3 best care is. And that's all we asking for, is the best
4 care that medical care can currently provide to get the
5 seaman to maximum cure.

6 If there are no further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. SULLIVAN: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. McCreadie, you
10 have three minutes remaining.

11 REBUTTAL ARGUMENT OF DAVID W. McCREADIE

12 ON BEHALF OF THE PETITIONERS

13 MR. McCREADIE: Justice Ginsburg, I wanted
14 to respond first to a question that you asked that I
15 think there may have been some confusion with respect to
16 the answer.

17 There is pain and suffering available in a
18 maintenance and cure claim if the failure to pay the
19 maintenance and cure causes injury, causes hurt. That's
20 what we understand from reading the Osceola and the
21 Iroquois as interpreted by Cortes.

22 So, I didn't want you to be left with the
23 impression that even if a maintenance and cure claim was
24 brought by itself, if there's some injury, some damage
25 beyond the failure to receive the maintenance and cure,

1 there is a cause of action that could lead to, I think
2 as you put it, the higher award and, hence, attorneys'
3 --

4 JUSTICE KENNEDY: Is that a separate cause
5 of action? Or is it just part of the maintenance and
6 cure act?

7 MR. McCREADIE: It's -- it's maintenance and
8 cure and it can be brought either under the maintenance
9 and cure with an injury or it can be brought under the
10 Jones Act. You can choose your cause of action. You
11 just don't recover twice.

12 JUSTICE GINSBURG: Are you -- are you then
13 disputing what your colleague said about lawyers being
14 reluctant to take maintenance and cure claims that are
15 not tied with a Jones Act claim?

16 MR. McCREADIE: Justice Ginsburg, we're
17 relying on Supreme Court precedent as opposed to
18 anecdotal information. But to answer your question
19 specifically, that's why I'm explaining that they do
20 have the right to bring a personal injury component to a
21 maintenance and cure claim.

22 And the other point I wanted to make, in the
23 Ninth and Fifth Circuits those are the circuits of
24 Guevara and Roy Al, where punitive damages have been
25 clearly eliminated from a maintenance and cure claim for

1 willful failure to pay. Since 1995 there's no dearth of
2 cases. Those remain two of the most active circuits in
3 the country for seamen's cases. And whether they are
4 filing as just maintenance and cure or combining with
5 the Jones Act, the ratio would probably be the same as
6 any other circuit.

7 There was also a -- a question about the
8 Vaughan and -- and what the dissent knew or didn't know;
9 and -- and reference to McCormick on damages. I think,
10 again, it is -- it is a small point but it is
11 interesting to point out that McCormick on damages, the
12 same volume that the dissent referred to, specifically
13 states that punitive damages are not available under
14 FELA -- under the FELA. And, of course, the Jones Act
15 incorporates FELA by reference.

16 Really the Vaughan dissent did not have the
17 benefit of Miles when it reached its decision. If that
18 court had had the benefit, we believe they would have
19 found punitive damages are not available.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:10 p.m., the case in the
23 above-entitled matter was submitted.)

24
25

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