

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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1 P R O C E E D I N G S

2 (11:18 a.m.)

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

5 Mr. McCreadie.

6 ORAL ARGUMENT OF DAVID W. MCCREADIE

7 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

25

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

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

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

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

24 MR. MCCREADIE: Well, if -- if those
25 allegations are true, there's no distinction between the

1 willful wanton misconduct that traditionally has been
2 the subject of the dispute about maintenance and cure
3 and punitive damages as opposed to those allegations.

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

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

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

24 MR. MCCREADIE: I think there's a -- there's
25 a number of potential sanctions. I mean, there is Rule

1 11. There's the natural discretion of the court.

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

5 MR. MCCREADIE: No, I do not.

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

12 MR. MCCREADIE: I agree with --

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

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

23 JUSTICE GINSBURG: How many --

24 JUSTICE KENNEDY: But do you read Vaughan v.
25 Atkinson as necessarily implying punitive damages would

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

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

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

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

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

24 JUSTICE GINSBURG: You said never in the
25 history. I mean, there -- there are examples like the

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

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

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

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

1 have a Jones Act seaman the primary statute that we look
2 at is the Jones Act. Of course, the Jones Act
3 incorporates FELA by reference. And the DOHSA, as Miles
4 points out, also has an impact on the -- on the case.

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

9 MR. McCREADIE: No, there is no specific
10 holding, and I would point out that if there was, that
11 would answer our question today and we 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: But that -- but that was a
24 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 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.

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

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

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

10 Also, if we look at another string of
11 Supreme Court precedent, it's not as clear as Miles, but
12 if we look at the other string, it -- this Court has
13 stated over and over that compensatory damages are what
14 is available under the Jones Act; compensatory damages
15 are available under the FELA; and compensatory damages
16 are available under DOHSA. For example, Zicherman is a
17 post-Miles case, and it's written and states the
18 principles very clearly: The Jones Act provides,
19 permits, I should say, compensation only for pecuniary
20 losses. And then it discusses Vreeland, which is a FELA
21 case, and it says that the FELA permits compensation
22 only for pecuniary losses.

23 And so, again, if we look at the history on
24 the death side, which Miles summarizes, but if we look
25 on the personal injury side, at the Osceola, the

1 Iroquois -- Peterson mentions compensatory damages nine
2 times in expressing what remedies are available to
3 seamen. And so those railroad cases, those Jones Act
4 cases, have been decided and have been a part of our
5 precedent for 60, 70, 80 years.

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

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

21 MR. MCCREADIE: I -- that must have been the
22 Respondent's brief, because our position is -- hopefully
23 was clearer than that, that punitive damages have never
24 been awarded in the history of the United States for the
25 willful failure to pay maintenance and cure until

1 after -- until after Vaughan v. Atkinson.

2 JUSTICE KENNEDY: And what about English
3 admiralty, under the English precedents?

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

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

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

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

23 MR. McCREADIE: In that case --

24 CHIEF JUSTICE ROBERTS: -- you have
25 different considerations under the maintenance and cure.

1 MR. MCCREADIE: Mr. Chief Justice, that take
2 us back again to Cortes, which this Court has already
3 decided and analyzed. Should we distinguish between a
4 death action, maintenance and cure action under the
5 Jones Act, from a personal injury action? And the
6 unequivocal answer from this Court is no, that you
7 should not treat them differently. There's no logic for
8 treating them differently. We also need to remember
9 that one of the anomalies that was -- that was cured by
10 Moragne -- the first anomaly cured by Moragne was an
11 anomaly where the unseaworthiness action would exist in
12 State territorial waters but not in -- I'm sorry, it
13 would exist in State territorial waters, but not on the
14 high seas. And that troubled the Moragne Court, that
15 you would have a discrepancy between personal injury and
16 death, and that's one of issues that they tried to --
17 tried to reconcile.

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

23 MR. MCCREADIE: That's correct. My point is
24 there was a difference of what right you had under -- in
25 territorial waters under unseaworthiness that Moragne

1 described as one of the anomalies. And the anomaly was
2 that if the person was injured, they could get an
3 unseaworthiness claim; if they died, they could not.
4 And Moragne was clear that distinguishing between death
5 and personal injury, it made no sense.

6 JUSTICE GINSBURG: But that's what the
7 common law was. That's why we had Lord Campbell's Act.
8 That was if you die, too bad; if you're injured, you
9 collect.

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

14 MR. McCREADIE: Moragne did create some law,
15 yes. Let me try to answer the question in a different
16 way --

17 JUSTICE KENNEDY: But I just -- and you can
18 go ahead and answer that question without my
19 interrupting. But my assumption from reading the amicus
20 briefs in this case is that punitive damages were
21 awarded in some maintenance and cure cases (a) as simply
22 part of the overall award -- they weren't separated out,
23 but it was part of the measure -- and (b) that some
24 American courts, American judges, including noted
25 admiralty judges, awarded in some cases punitive damages

1 in maintenance and cure before the modern cases Moragne
2 and so forth -- and Miles -- that you're talking about.
3 Is that incorrect?

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

9 JUSTICE KENNEDY: I'm talking pre-Miles.
10 I'm talking pre-Miles.

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

20 JUSTICE BREYER: Is -- how many -- how many
21 would you say there are in a typical year, maintenance
22 and cure cases? About, roughly? I mean, say in the
23 late twentieth century, 18 -- 1980, 1990. Have you have
24 any guess at all?

25 MR. MCCREADIE: Justice Breyer, because

1 maintenance and cure is so often linked to the Jones Act
2 and the unseaworthy cause of action, and because of the
3 leverage that seems to be brought with punitive damages,
4 they are virtually included in every seaman's case --

5 JUSTICE BREYER: All right.

6 MR. MCCREADIE: -- from the get-go.

7 JUSTICE BREYER: So how many would you
8 guess?

9 MR. MCCREADIE: And -- and I would have to
10 estimate, just extrapolating from my own experience,
11 thousands of Jones Act cases are filed in the country
12 every year.

13 JUSTICE BREYER: Uh-huh. And they usually
14 have maintenance and cure aspects.

15 MR. MCCREADIE: Necessarily they do.

16 JUSTICE BREYER: Can you get punitives under
17 the Jones Act or not?

18 MR. MCCREADIE: You cannot recover punitive
19 damages under the --

20 JUSTICE BREYER: What about unseaworthiness?

21 MR. MCCREADIE: You cannot recover punitive
22 damages under unseaworthiness because that's the same
23 rule that Miles already decided. Miles decided in
24 unseaworthiness --

25 JUSTICE BREYER: Okay, so if I have about 30

1 cases -- no, I had, actually, to be honest, I thought we
2 found about 12 in the period around 1980 - 2000 where
3 they do give some punitive damages.

4 MR. McCREADIE: And -- and -- and I hope I
5 was clear that the can of worms was opened by Vaughn.
6 No one awarded it. No one thought about it, until after
7 Vaughn.

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

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

19 JUSTICE BREYER: Over here, there is one
20 called -- Unica v U.S. The master should have put the
21 -- into the hospital. Given him \$1,500. It was partly
22 punitive. Considering -- De Troupe -- I mean, I found
23 some that are sort of -- sort of -- I don't know what to
24 say. I don't know who to make of it.

25 MR. McCREADIE: The Troupe is on the list.

1 It is a case that we have looked at, and it is -- and
2 again, it is a case that I can say that if you look at
3 all of them -- it is a very tedious process; there are a
4 lot of cases, and wading through each one, none of them
5 hold or award punitive damages for the failure to pay
6 maintenance and cure. And --

7 JUSTICE BREYER: The Troop gave them \$4,000.
8 Considering all the circumstances of the aggravation.
9 Gross neglect, mistreatment. "It is useless to parade
10 more of the sickening details."

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

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

22 And so returning again to this -- this
23 pocket of cases, they do not stand for the
24 proposition -- even if they did, if you'll notice, two
25 of them, it's the same district court judge who is

1 making the noise that he would have done this or he
2 might have done this. And -- and our position is that
3 one district court judge does not create general
4 maritime law by mentioning the possibility of punitive
5 damages in one case.

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

14 The punitive damages problem did not crop up
15 until Vaughn, even though now everyone seems to agree
16 Vaughn did not hold that punitive damages were
17 available.

18 I would also just like to mention all the
19 circuit court cases addressing this issue hold that
20 Jones Act precludes punitive damages, and any circuit
21 court that has addressed this issue since Miles likewise
22 specifically holds punitive damages are not available
23 for the willful failure to pay maintenance and cure.

24 I'd like to reserve my remaining time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Sullivan.

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

3 ON BEHALF OF THE RESPONDENT

4 MR. SULLIVAN: Mr. Chief Justice, may it
5 please the Court:

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

14 Maintenance and cure deals with a situation
15 as what do we do with an injured seaman to get him back
16 to health and get him into the workforce? And the law
17 has provided since Catherine of Aragon went to Greece in
18 the 1200s that the ship owner has a responsibility, in
19 its capacity as a ship owner, to provide that seaman
20 with medical care and to provide that seaman with a
21 living allowance so that he can get better and get back
22 into the work force.

23 Now in 1920, Senator Jones intended to make
24 the United States merchant marine the world's greatest
25 merchant marine. He was dealing in a factual scenario

1 where 12 years earlier, on April 12 of 1912, the Titanic
2 had sunk; 1,900 people had died.

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

11 Secondly, because the Titanic hit an iceberg
12 and was not unseaworthy, there was no cause of action
13 for negligence. So Senator Jones set around to correct
14 these two anomalies in the law, and said what we are
15 going to do is we're going to create a new class of
16 beneficiaries, who are dependents of people who die at
17 sea, and we are going to give them the right to recover
18 pecuniary damages. That's the only place where
19 pecuniary damages are mentioned in the law. And then it
20 said, and as to seamen, we're going to give them an
21 additional right, a cumulative right on top of
22 unseaworthiness, and that's going to be negligence.

23 It never sought out to touch maintenance and
24 cure. Maintenance and cure has been something that's
25 been monitored by the courts ever since its inception,

1 and it is a self-regulating system. Before Guevara,
2 ship owners regularly provided their employees with
3 medical care without asking the question. If there was
4 a close call, they provided the medical care without
5 running to the court. They provided maintenance.

6 Then came Guevara, and Guevara decided for
7 the first there were no punitive damages, and now you
8 have a growing problem in this country. You have a
9 problem with ship owners providing less and less medical
10 care without resort to the courts.

11 Now our position here is that a seaman
12 should be not ever have to come before a court to seek
13 maintenance and cure, and the court should never, ever
14 have to award punitive damages.

15 JUSTICE KENNEDY: Well, surely there will be
16 some incidents in which the employer in good faith
17 thinks there's no illness, that there's no basis for
18 maintenance and cure. MR. SULLIVAN: And as --

19 JUSTICE KENNEDY: For you to tell me oh,
20 this will just never happen, I mean, that's not the way
21 the world works.

22 MR. SULLIVAN: No. And Judge, when a --
23 when an employer comes to the court in good faith and
24 says there's no entitlement to maintenance and cure, and
25 there -- the court finds that -- or the factfinder finds

1 in good faith, there's no basis for punitive damages.
2 Then you merely have a dispute. But the situation --

3 JUSTICE KENNEDY: Well, of course there are
4 going to be disputes, and the question is whether or
5 not, just from the standpoint of filling professional
6 responsibility, in almost any maintenance and cure
7 action where the counsel for the plaintiff thinks
8 that -- for the seaman thinks that the employer has been
9 remiss, he doesn't add the punitive damages complaint if
10 we agree with your position, which changes completely
11 the settlement and the bargaining aspect. But you can
12 address -- you can address that.

13 MR. SULLIVAN: Well -- and I agree, Your
14 Honor, that is a prospect and a possibility, something
15 which I personally abhor doing. I mean, you should only
16 plead punitive damages when you have a good faith basis
17 for doing it; you believe you will survive a directed
18 verdict. It should not be thrown in to every single
19 complaint, and I'm not denying that some counsel will do
20 that.

21 But what I'm saying is that today, in 2009,
22 in 2006, there are actually ship owners who are, as a
23 regular practice, denying their seamen medical care. I
24 don't know why that is. Perhaps it's because it is
25 expensive now, more expensive than it has ever been.

1 Perhaps it is because there are safety nets that will
2 allow the seamen to seek Medicaid, and so the taxpayer
3 will pay for it. Whatever the motivations are, it is a
4 growing trend that we are seeing.

5 JUSTICE GINSBURG: How many of these seamen
6 who seek maintenance and cure are represented? I mean,
7 what is the incidence of representation for maintenance
8 and cure claims as distinguished from Jones Act
9 negligence type claims with the -- the possibility of
10 large recoveries for pain and suffering?

11 MR. SULLIVAN: Judge, I'd be picking a
12 number out of the air, but I can give you anecdotal
13 evidence of this. In the Fifth Circuit attorneys who
14 regularly do maritime personal injury work tell each
15 other -- we talk about the fact that you can't afford to
16 represent somebody who's got a maintenance and cure case
17 that's not combined with a Jones Act case. And there
18 are a number of practical reasons for that.

19 You have to pay all of the experts, and it
20 is very expensive to bring these cases. You have to
21 hire the orthopedic surgeons, the -- the radiologists.
22 You have to pay for the tests, and then, as an attorney,
23 these are never recoverable as costs.

24 And then you are working on a contingent
25 hourly fee. If you win your case and you prove that

1 they were willful, wanton, and callous in -- in denying
2 maintenance and cure, then you might get a portion of
3 your attorneys' fees back.

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

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

9 MR. SULLIVAN: Well, because when you join
10 it to a Jones Act case, you have the substantial
11 possibility of getting either a settlement or a verdict
12 at the end of the case which is going to compensate the
13 attorneys for taking on the maintenance and cure case as
14 a portion of it.

15 And so, consequently, if somebody has a
16 serious accident, it falls under the Jones Act and there
17 is a maintenance and cure count, the attorney will
18 handle all of those together and feel adequately
19 compensated.

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

24 MR. SULLIVAN: Exactly, Your Honor.

25 JUSTICE GINSBURG: Because it would be

1 swelled by the pain and suffering damages which are not
2 available in maintenance and cure.

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

4 CHIEF JUSTICE ROBERTS: What is the
5 pre-Vaughan case that awarded punitive damages --
6 awarded punitive damages in a maintenance and cure case?

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

10 CHIEF JUSTICE ROBERTS: I am -- what --
11 which --any case from this Court?

12 MR. SULLIVAN: No. No. This issue did not
13 come before this Court.

14 CHIEF JUSTICE ROBERTS: All right.

15 JUSTICE GINSBURG: It hasn't come before
16 this Court under FELA or the Jones Act, either, the
17 punitive damage question?

18 MR. SULLIVAN: It hasn't -- it has not, Your
19 Honor.

20 JUSTICE BREYER: Rolf was not a -- Rolf was
21 maintenance and cure and personal injury and
22 unseaworthiness. So we don't know which aspect of the
23 case led to the punitives.

24 MR. SULLIVAN: We don't, but we know that
25 there was outrage on behalf of the court. And,

1 unfortunately, in -- and I think, as Justice Souter
2 pointed out --

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

7 MR. SULLIVAN: Well, Judge, I would say that
8 --

9 JUSTICE BREYER: What is your best?

10 MR. SULLIVAN: Yes. I would say that the
11 best are the Rolf and the Margharita, which were denials
12 of medical care where the damages were enhanced because
13 of outrageous conduct. But to say that, Judge, is there
14 a case that says this is maintenance and cure, we are
15 going to award punitive damages, that's not been done.

16 JUSTICE BREYER: So we have a history all
17 the way back to Catherine of Aragon, and what we've been
18 able to find in these pre-Jones Act cases is really two
19 or three, or maybe I found ten actually, that I couldn't
20 say -- leaning over in your direction, I could take
21 maybe three or four. And they show a little ambiguity.
22 But give them all ten, and that's still ten out of
23 hundreds of years of history.

24 MR. SULLIVAN: Well, let me -- let me
25 respond to that in a couple of ways. First of all,

1 punitive damages were part of the common law until taken
2 away by Congress.

3 And -- and it could be asserted that
4 maintenance and cure punitive damages were not necessary
5 because the threat was enough to -- to require
6 shipowners to go ahead and provide this. And I would
7 point out to the Court that this had not been a problem
8 prior to Guevara. Shipowners did self-regulate. They
9 didn't -- seamen didn't run to the courts every time
10 they wanted maintenance and cure; whereas, today they
11 have to.

12 The leading scholar in this whole area is
13 Professor Robertson at the University of Texas who wrote
14 the AHA brief. And his brief on pages 7 through 11
15 catalogs the cases where he suggests punitive damages or
16 exemplary damages were awarded for outrageous conduct
17 involving failure to provide medical care.

18 And I would suggest that those show that
19 punitive damages were unexceptional before Vaughan.
20 They were part of the common law. They -- they were
21 before this Court in the *Amiable Nancy* even though it
22 didn't involve medical care. There is no reason to
23 assume that punitive damages are accepted in maritime
24 law; as part of the common law, that they weren't also
25 accepted for the willful, wanton, and egregious failure

1 to provide a seaman with medical care.

2 JUSTICE KENNEDY: If I thought that the lack
3 of counsel in maintenance and cure cases was a pivotal
4 point or a relevant point for our decision, other than
5 the representations of counsel, where would I look to
6 verify that?

7 MR. SULLIVAN: The existence of prior
8 maintenance and cure cases?

9 JUSTICE KENNEDY: The -- the -- that there
10 is a problem in seamen finding attorneys who will take
11 maintenance and cure cases.

12 MR. SULLIVAN: Yes, Judge. There is not
13 empirical evidence out there. Nobody has done studies.
14 I'm not aware of any. But do we really want to wait for
15 the situation where we have hundreds and hundreds of
16 seamen who are -- are, you know, living homeless or
17 living in their cars or unable to obtain medical care
18 before this Court decides that if somebody does this, it
19 is something that can be punished?

20 And -- and I think that's the situation
21 we're at today. It is a growing problem. And it is a
22 growing problem because Rivera is a relatively new case,
23 and it has spread to the other circuits.

24 CHIEF JUSTICE ROBERTS: Well, if -- if the
25 -- if the existence of the punitive damages and

1 maintenance and cure were as well established, why
2 wasn't that mentioned in terms in the Vaughan majority?
3 It only comes up in the Vaughan dissent.

4 MR. SULLIVAN: Well, it does come up in the
5 Vaughan dissent because it was not requested by the --
6 in the -- in the lower courts. And this Court would not
7 consider a claim for punitive damages for the first time
8 on appeal.

9 I -- I think what Justice Stewart was saying
10 is we have a question before us where somebody is
11 requesting attorneys' fees in -- in derogation of the
12 American Rule. The majority is saying we are going to
13 find an exception to the American Rule and give
14 attorneys' fees. And justice Stewart is saying, I don't
15 want to do that. I think that the better --

16 JUSTICE SCALIA: Do you think Stewart knew
17 more about these -- these obscure, ancient cases than we
18 do?

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

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

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

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

25 MR. SULLIVAN: No. No. I --

1 JUSTICE SCALIA: It was just sort of off the
2 top of his head that he thought there should be punitive
3 damages.

4 MR. SULLIVAN: He was quoting from McCormick
5 on damages amend some basic treatises. And I think he
6 was taking the position that punitive damages are in our
7 quiver of weapons that we can use to deter --

8 JUSTICE SCALIA: They -- they normally are,
9 but the question is whether there -- whether this --
10 this is a different quiver.

11 MR. SULLIVAN: Well, I think that he was
12 saying that this is one of the weapons we have. Instead
13 of creating an exception to the American Rule, let's
14 give them punitive damages to account for this egregious
15 conduct.

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

19 MR. SULLIVAN: No, it wasn't. It wasn't.
20 The first time counsel for Mr. Vaughan raised the
21 question of punitive damages was on remand. And then
22 the district court said, hey, look, you didn't raise it
23 before. Just because Justice Stewart suggested this as
24 -- as an alternative to attorneys' fees doesn't mean
25 we're going to award punitive damages now.

1 JUSTICE BREYER: With attorneys' fees there
2 is a compensatory aspect. The -- the basic obligation
3 is to keep this seaman alive and well, and then you give
4 him some wages if necessary, and you give him medical
5 care. And -- and now he's going to be out that
6 attorneys' fees as a result of his sickness. So I
7 understand that.

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

13 MR. SULLIVAN: Judge, I would like you to
14 look at how Congress treats this problem. If you had,
15 for example, a bridge-building project where a seaman, a
16 longshoreman and a State worker all got injured
17 identically in the same accident side by side, and the
18 shipowner failed to provide medical care for the
19 longshoreman, the shipowner could go to jail. If the
20 shipowner provided -- or failed to provide medical care
21 to the State worker, he could be, again, subject to
22 criminal penalties.

23 On top of the criminal penalties, Congress
24 has established these administrative agencies to assure
25 that those workers get medical care. On top of that, if

1 they don't get medical care, they lose their defense of
2 workers' compensation immunity. They lose the defense
3 of assumption of risk, contributory negligence, and they
4 are subject to personal liability, not just corporate
5 liability.

6 JUSTICE BREYER: Maybe it would be a good
7 thing.

8 MR. SULLIVAN: Yes.

9 JUSTICE BREYER: The -- the problem here is
10 it has pros and cons. I was quite moved by the brief --
11 the citation that Professor Robertson made of all of
12 those old cases until we looked them up. And -- and
13 then I found they seem to stand for a little bit less
14 than I had the impression they stood for.

15 MR. SULLIVAN: That --

16 JUSTICE BREYER: So we'd be making this up
17 out of whole cloth, it seems to me.

18 MR. SULLIVAN: I don't think so, Your Honor.
19 What I think he would be saying is this is part of our
20 power as a common law court. And just because.

21 JUSTICE SCALIA: We've abandoned that.

22 JUSTICE BREYER: -- because Miles says don't
23 do that.

24 JUSTICE SCALIA: Exactly. We've abandoned
25 that in this hearing. We said what we do with these

1 admiralty causes of action we should be guided by what
2 Congress has done in the Death on the High Seas Act and
3 the Jones Act.

4 Do you acknowledge that there are no
5 punitive damages available in the event of death?

6 MR. SULLIVAN: Yes.

7 JUSTICE SCALIA: Well, that -- you want to
8 talk about what's a sensible system and what is not a
9 sensible system. In the days when Massachusetts used to
10 have a -- when I was in law school, they had a
11 compensation limit for wrongful death, but to limit for
12 pain and suffering, for negligence; and the line was
13 back her up again -- back her up again, Sam, she's not
14 quite dead yet.

15 (Laughter.)

16 MR. SULLIVAN: Judge, I --

17 JUSTICE SCALIA: Is -- is -- is this going
18 to be the same thing, where -- where the ship owner
19 says, well, you know, if -- if -- if I treat him badly
20 enough that he dies, I don't get hit with the punitive
21 damages?

22 MR. SULLIVAN: I would hope that would not
23 be the case.

24 JUSTICE SCALIA: Yeah, but it is invited,
25 isn't it?

1 MR. SULLIVAN: Well, I don't think it is
2 invited, Judge. There are reasons why that there is
3 this anomaly that there are no punitive damages for
4 death. And that's because in 1920 when Congress created
5 the Death on the high Seas Act there were no -- any kind
6 of damages. There was no recovery at all.

7 And so, Congress preempted this field of
8 death. And it said that death cases shall be decided
9 under the Death on the High Seas Act. But Congress has
10 completely stayed away from the area of maintenance and
11 cure. It hasn't enacted administrative remedies because
12 the Court has always been the one who has decided what's
13 appropriate.

14 And this Court, as a matter of its -- as
15 maintaining its court docket and maintaining these
16 remedies, has the right and I think the obligation to
17 say we're going to keep these cases out of court by
18 awarding punitive damages when somebody willfully denies
19 this right, when somebody willfully withholds medical
20 care.

21 And I think if you do that, you're going to
22 see these cases are going to disappear. Seamen are
23 going to start getting their medical care again. They
24 are not going to be coming to the court every time they
25 get injured and saying, I haven't gotten my back

1 surgery. I haven't gotten my rotator cuff surgery. It
2 is sort of a matter of court administration to --

3 CHIEF JUSTICE ROBERTS: I'm not sure as
4 sure -- I'm not sure I follow that. In other areas
5 where we allow punitive damages it hasn't resulted in
6 the cases going away. Quite the opposite. It seems
7 that it has given rise to a variety of claims on both
8 sides.

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

13 CHIEF JUSTICE ROBERTS: Yeah, but the normal
14 medical malpractice area has given rise to a lot of
15 punitive damage litigation. I don't know why this would
16 anybody different.

17 MR. SULLIVAN: I think this would be
18 different because all we're talking about is does the
19 seaman get the surgery he needs. If he doesn't get the
20 surgery he needs and he gets worse or continues to stay
21 ill or he continues to stay in pain, then the ship owner
22 should be punished. But --

23 JUSTICE SCALIA: It certainly makes these
24 maintenance and care cases a lot more attractive to the
25 plaintiffs' bar doesn't it? I mean, one of your

1 complaints is there's just no money in it. The claim is
2 not for that much.

3 MR. SULLIVAN: The goal here, Judge, is not
4 money. The goal here, I think --

5 JUSTICE SCALIA: Of course it shouldn't be
6 the goal. But we're inquiring into the question of
7 whether granting punitive damages will increase or
8 decrease the number of lawsuits.

9 I -- I -- I would think it would be
10 astounding if it would decrease the number of lawsuits.

11 MR. SULLIVAN: I think it would decrease the
12 incidence when medical care is denied.

13 JUSTICE GINSBURG: There -- there wouldn't
14 be any maintenance and cure claim if the system worked
15 as it was intended; that is, that if you have a sailor
16 who is injured, the ship owner pays room and board and
17 medical expenses.

18 MR. SULLIVAN: That's all it is, Your Honor.
19 Just say if the ship owner will treat the seaman fairly,
20 will follow the doctor's recommendations, get him to a
21 doctor, give him treatment so he gets better, there's --
22 I mean, you are saying there may be more claims for
23 punitive damages, but there will be more awards of
24 punitive damages because there won't be this willful and
25 wanton, callous disregard of the seaman's rights.

1 And so, I would suggest that, in fact, in
2 this narrow area of the law, if you impose punitive
3 damages, actual punitive conduct, conduct that deserves
4 punishment will go down and it will go down rapidly.

5 JUSTICE SCALIA: I wish it were as clearcut
6 as that. I mean, what if the seaman says, you know, I
7 should have had this very expensive treatment? And the
8 ship owner's medical counsel said, no, this treatment is
9 not necessary.

10 Is that -- is that a punitive damages claim?
11 I bet it is.

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

17 JUSTICE SCALIA: He's going to say that was
18 willful and wanton. I obviously needed this more
19 expensive treatment. He just didn't want to pay the
20 money.

21 MR. SULLIVAN: And the court is going to
22 have to -- the district courts are going to have to make
23 a judgment as to the bona fides of that case. But I
24 think that you are going to find that it is very rare
25 when somebody is going to act callously when the

1 potential on the other side is that they are going to be
2 awarded -- have punitive damages awarded against them.

3 And that, therefore, this is going to be a
4 corrective mechanism that's going to do away with the
5 problem we currently have now and make the plaintiffs
6 even better.

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

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

15 CHIEF JUSTICE ROBERTS: No, no, even if
16 they're not. In other words, you were saying, look, to
17 avoid punitive damages, the ship owner is going to make
18 sure that there -- that that more expensive test is
19 provided.

20 MR. SULLIVAN: It's going to err on behalf
21 of the seaman. Yes.

22 CHIEF JUSTICE ROBERTS: That doesn't mean
23 there are no costs involved in ruling in your favor.

24 MR. SULLIVAN: That's true, Judge. But here
25 again, we're balancing the interest of somebody who is

1 injured and whose condition may become permanent and
2 incurable by virtue of not getting prompt care as
3 opposed to the limited costs to the ship owner of
4 providing a doctor who is going to determine what the
5 best care is. And that's all we asking for, the best
6 care that medical care can currently provide to get the
7 seaman to maximum cure.

8 If there are no further questions --

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. SULLIVAN: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Mr. McCreadie, you
12 have three minutes remaining.

13 REBUTTAL ARGUMENT OF DAVID W. MCCREADIE

14 ON BEHALF OF THE PETITIONERS

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

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

24 So, I didn't want you to be left with the
25 impression that even if a maintenance and cure claim was

1 brought by itself, if there's some injury, some damage
2 beyond the failure to receive the maintenance and cure,
3 there is a cause of action that could lead to, I think
4 as you put it, the higher award and, hence, attorneys
5 --

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

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

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

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

24 And the other point I wanted to make in the
25 Ninth and Fifth Circuits those are the circuits of

1 Guevara and Roy Al, where punitive damages have been
2 clearly eliminated from a maintenance and cure claim for
3 willful failure to pay. Since 1995 there's no dearth of
4 cases. Those remain two of the most active circuits in
5 the country for seamen's cases. And whether they are
6 filing as just maintenance and cure or combining with
7 the Jones Act, the ratio would probably be the same as
8 any other circuit.

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

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

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

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

25

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