

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHRISTOPHER BATTERTON,

Plaintiff/ Appellee,

vs.

THE DUTRA GROUP,

Defendant/Appellant.

No. 15-56775

(Central District of California
No. 2:14-cv-07667-PJW)

On Appeal From The United States District
Court For The Central District Of California

**BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE
AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Amicus Curiae American Association for Justice hereby certifies the following:

Amicus Curiae American Association for Justice is a voluntary national bar association. It has no parent companies and there is no publicly held corporation holding 10% or more of its stock.

June 24, 2016

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice is a voluntary national bar association whose members primarily represent plaintiffs in personal injury cases, as well as employment suits, civil rights actions, and consumer rights cases. Members of its Admiralty Law Section frequently represent injured seamen and the families of those who have been killed in maritime employment, including those bringing claims in the courts of the Ninth Circuit.¹

The American Association for Justice believes that the historic role of the admiralty courts in protecting the rights of those who go down to the sea supports the availability of punitive damages to punish owners who willfully disregard their obligation to provide a seaworthy vessel and to deter others from doing so as well. Owners who recognize the possibility of such awards will invest in providing seafarers with safer places to work.

SUMMARY OF ARGUMENT

1. The Supreme Court has laid out the appropriate analysis for determining whether a remedy for maritime injury is available under general maritime law. It is not the rule suggested by *Dutra*: that remedies are limited to those available under

¹ No counsel for a party wrote any part of this brief, and no party or counsel other than the American Association for Justice, its members, and its counsel contributed to the cost of the preparation or submission of this brief.

Pursuant to Circuit Rule 29-2(a), all parties have consented to the filing of this brief.

the Jones Act. Instead, the Court has undertaken a three-step historical analysis. The first inquires whether the cause of action existed and whether the remedy was available under general maritime law prior to enactment of the Jones Act in 1920. The second asks whether the cause of action continued after the Jones Act. Finally, the Court looks to whether Congress directly addressed the cause of action and its remedy in the Jones Act. Generally, the Court will not expand remedies allowed in a newly-created cause of action beyond those provided by Congress. However, the Court does not presume that Congress intended to sweep away remedies that were previously available to seamen.

That analysis clearly supports the availability of punitive damages for willful violation of the seaworthiness obligation of vessel owners. First, punitive damages were available under general maritime law in the 19th Century, even if rarely imposed. The proper inquiry is whether punitive damages were available in general maritime actions, not whether such damages were regularly awarded specifically in unseaworthiness cases. However, *Dutra* cannot satisfy its burden even under that unsupportably narrow test. A number of decisions indicate that punitive damages were available where a vessel was unseaworthy because the owner knowingly hired violent masters who abused crewmen.

The unseaworthiness cause of action remained available after the Jones Act was passed. The remedies for unseaworthiness should not be limited to those

available under the Jones Act on the ground that the two causes of action are indistinguishable “Siamese twins.” The cause of action for unseaworthiness lies against the vessel or vessel owner and is premised on implied warranty; the Jones Act action is based on negligence and may be brought only against the seaman’s employer.

Third, in the Jones Act, Congress did not directly address the remedies available in unseaworthiness cases. Congress has not preempted the field of remedies for maritime injuries, and limiting damages based on analogies between a general maritime cause of action and the statutory claim imputes broader preemption than Congress intended for the Jones Act. In the absence of direct statutory provision prescribing remedies in unseaworthiness cases, the court should presume that Congress intended to preserve the preexisting remedies available under general maritime law.

2. Dutra’s contention that the Supreme Court’s historical analysis cannot be applied to unseaworthiness cases because the cause of action no longer resembles the pre-Jones Act unseaworthiness action is without basis.

The Supreme Court held well before the Jones Act that vessel owners were liable, as now, for injury due to violation of the warranty of seaworthiness without regard to negligence. In addition, the fact that the owner is strictly liable for violation of the seaworthiness obligation does not preclude an award of punitive damages

when that violation is willful or wanton. The Supreme Court has held that a vessel owner may be liable for punitive damages for violation of the obligation to provide maintenance and cure, a strict liability cause of action, when the violation is willful and wanton.

3. The constitution vests the federal courts with the authority to fashion substantive admiralty law. In exercising that authority, the courts may seek guidance from the common law of the states. State products liability law, like unseaworthiness, is strict liability based on warranty. In fact, the Supreme Court has recognized strict products liability as part of general maritime law. That punitive damages are recoverable against a manufacturer who knowingly places a dangerous product on the market supports the availability of punitive damages against an owner who knowingly and willfully subjects seamen to an unseaworthy vessel.

ARGUMENT

I. The Historical Analysis Prescribed by the Supreme Court in *Miles* and *Townsend* Supports Preservation of the Punitive Damages Remedy in Unseaworthiness Cases.

The American Association for Justice addresses this Court with respect to a controlling issue in this case: The Supreme Court's historical analysis to determine whether a remedy is available under general maritime law supports the availability of punitive damages in unseaworthiness cases.

A. The Supreme Court has prescribed a historical analysis to determine whether remedies available under general maritime law must be limited to those congress provided in the Jones Act.

At issue in this case, as in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), is the appropriate division of responsibility between Congress and the judicial branch for declaring and developing the general maritime law with respect to harm to seamen.

The crux of Dutra’s argument is that the Court in *Miles* established a “rule of uniformity [that] limits the remedy for a general maritime unseaworthiness claim to the same damages Congress allowed in the Jones Act, *i.e.* compensatory damages for pecuniary loss.” Dutra Br. 13.

This overly-simplistic reading of *Miles* would have commanded denial of the punitive damages in *Townsend*. In fact, Justice Thomas in *Townsend* pointedly rejected the argument that courts are confined to “the lowest common denominator approved by Congress for distinct causes of action” with respect to remedies. 557 U.S. at 424.

Instead, the Court in both *Miles* and in *Townsend* applied a historical analysis of the remedies available under general maritime law prior to the enactment of the Jones Act in 1920 and afterword. *Miles* dealt with damages that may be recovered in wrongful death actions under general maritime law, a right of action that did not exist prior to *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The *Miles*

Court stated that the judicial branch is “not free to *expand* remedies” for the new cause of action, 498 U.S. at 36 (emphasis added), if to do so would undermine the “limits imposed by Congress.” *Id.* at 27; *see also id.* at 36 (“We will not *create*, under our admiralty powers, a remedy . . . that goes well beyond the limits of Congress’ ordered system of recovery”); *Townsend*, 557 U.S. at 420 (“It would have been illegitimate to *create* common-law remedies that exceeded those remedies statutorily available under the Jones Act.”) (emphases added).

If, on the other hand, a particular remedy was historically available under general maritime law when Congress enacted the Jones Act, courts may assume that Congress did not intend to sweep aside that remedy where “nothing in the statutory scheme for maritime recovery restricts [its] availability.” *Townsend*, at 416-17. To determine whether punitive damages are available in this case, this Court need look no further than Dutra’s own summary of the Supreme Court’s three-step historical test:

[T]he Court [in *Townsend*] reasoned that punitive damages have historically been available for willful and egregious behavior and available under general maritime law prior to the Jones Act. It then determined that maintenance and cure remained an available common law action after passage of the Jones Act. And lastly, because the Jones Act does not encompass maintenance and cure, punitive damages are not barred.

Dutra Br. 24.

The same historical analysis supports the availability of punitive damages in this case.

B. The Supreme Court’s historical analysis supports the continued availability of punitive damages in appropriate unseaworthiness cases.

1. *Punitive damages were available under general maritime law for willful and egregious misconduct prior to the Jones Act, including unseaworthiness cases.*

There can be little doubt that, historically, punitive damages have been available in general maritime actions. Dutra incorrectly asserts, “As the *McBride* Court noted, there is no known historical support for pre-Jones Act unseaworthiness punitive damages.” Dutra Br at 12 n.8. *See also id.* at 28 (quoting *McBride* as stating that “punitive damages were not available for unseaworthiness.”). In fact, that assertion was made in the separate opinion of Judge Edith Brown Clement. *See McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 392 (5th Cir. 2014) (Clement, J., concurring). Moreover, Dutra has rephrased the Supreme Court’s historical inquiry by demanding proof of the availability of punitive damages specifically in unseaworthiness cases, as opposed to their availability under general maritime law.

The *Townsend* Court’s well-researched discussion stated that, as a general rule, punitive damages were available at common law in the 19th Century, and that general rule “extended to claims arising under federal maritime law.” 557 U.S. at 411. The Court cited its pre-Jones Act opinion in *Lake Shore & Michigan Southern*

Railway Co. v. Prentice, 147 U.S. 101, 108 (1893), which stated that “courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages.” Justice Thomas, writing for the *Townsend* Court, pointed out that one of the Court’s “first cases indicating that punitive damages were available involved an action for marine trespass.” 577 U.S. at 411 (citing *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456 (1818)). Although the Court in that case found that the facts did not warrant such an award against the named defendants, Justice Story explained that in the appropriate case, “it might be proper to go yet farther, [than just compensation] and visit upon them . . . exemplary damages.” 4 L. Ed. at 558; *see also Barry v. Edmunds*, 116 U.S. 550, 563 (1886) (“In *The Amiable Nancy*, which was the case of a marine tort, Mr. Justice Story spoke of exemplary damages as ‘the proper punishment which belongs to . . . lawless misconduct.’”).

In the lower federal courts of that era, the *Townsend* Court stated, it was “far from being uncommon in the admiralty . . . to mulct the offending parties, even in exemplary damages, where the nature of the case requires it.” 557 U.S. at 411-12 (quoting *Boston Mfg. Co. v. Fiske*, 3 F. Cas. 957 (No. 1,681) (C.C. Mass. 1820)). Indeed, Justice Thomas observed, “maritime jurisprudence was replete with judicial statements approving punitive damages.” *Id.* at 412 (quoting David Robertson,

Punitive Damages in American Maritime Law, 28 J. Mar. L. & Com. 73, 115 (1997)).

In sum, as the First Circuit has explained, “Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant’s intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others.” *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995).

The *Townsend* Court did not limit the scope of its historical inquiry to maintenance and cure cases, as Dutra contends. *See* Dutra Br. 23-24. Indeed, the Court specifically stated, “Historically, punitive damages have been available and awarded in general maritime actions, including *some* in maintenance and cure.” 557 U.S. at 407 (emphasis added). The Court’s holding is not limited to maintenance and cure, but is broadly directed at general maritime law:

Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.

Id. at 424. *See also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008) (also upholding the availability of punitive damages under general maritime law).

The Court in *Townsend* rejected the demand pressed by the *Townsend* dissent and by Dutra here, that the seaman demonstrate that punitive damages were a

“regularly employed feature of [unseaworthiness] claims during the pre-Jones Act era.” 557 U.S. at 430 (Alito, J., dissenting); Dutra Br. 28.² Instead, the Court stated that the proper focus on its analysis was “the general common-law rule made punitive damages available in maritime actions” 557 U.S. at 415 n.4. The Court also made clear that the burden is on the opponent of a generally available remedy to show that a specific maritime cause of action “should be excepted from this general rule.” *Id.*

This Court should hold that punitive damages are recoverable in this case under *Townsend’s* historical standard if “punitive damages were available in maritime actions for tortious acts of a particularly egregious nature” prior to 1920 and if “[n]othing in maritime law undermines the applicability of this general rule in the [unseaworthiness] context.” *Id.* at 411-12. There is certainly nothing in maritime law that warrants exempting a particularly egregious failure to provide a seaworthy vessel from damages designed to punish and deter such misconduct.

Even if Dutra were correct in demanding proof that punitive damages were available specifically in unseaworthiness cases, it is clear that such damages were in

² The fact that relatively few punitive damage awards appear in reported cases is unsurprising. Unseaworthiness as a separate cause of action gained recognition only in the 1880s. *See The Osceola*, 189 U.S. 158, 174 (1903), discussing cases. Additionally, a relatively small number of district court opinions were published in that era.

fact available, if not commonly awarded, for knowing or willful unseaworthiness. In *The Rolph*, 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924),³ the vessel owner was held liable for willful unseaworthiness by hiring as first mate “a man known to be of a most brutal and inhuman nature” with a reputation for “violent, cruel, and uncalled for assaults upon sailors.” 299 F. at 55. The mate viciously beat one of the sailors so badly the seaman was left blind. The court noted that placing such a violent man in charge of the crew rendered the vessel unseaworthy. *Id.* The district court awarded the sailor \$10,000, not only as “proper compensation,” but also to punish such mistreatment to further “the broad policy of this government to foster and extend our merchant marine.” 293 F. at 271.

Similarly, in *The City of Carlisle*, 39 F. 807 (D. Ore. 1889), an apprentice seaman suffered a fractured skull while working on deck. He was not only given scant medical attention, but was subjected to brutal mistreatment at the hands of the captain, who forced the sailor to work 12-hour days while aggravating the youth’s suffering from his wounds and humiliating him before the rest of the crew. *Id.* at 811-12. The district court awarded the youth \$530 in compensatory damages and \$1,000 for “gross neglect and cruel maltreatment” inflicted by the master. The district judge added that “if owners do not wish to be mulct in damages for such

³ Although *The Rolph* was handed down in 1923, shortly after the Jones Act was passed, the opinion makes no mention of the Jones Act and was clearly decided under pre-existing general maritime law.

misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews.” *Id.* at 817.

Another example is *The Margharita*, 140 F. 820 (5th Cir. 1905), where a seaman fell overboard and lost his leg to a shark. Rather than put into port in the Falklands, which had a medical facility, the captain continued the ship’s journey to the U.S. During the three-month trip, the seaman lay in “unspeakable agony” as the condition of his crudely bandaged leg deteriorated. *Id.* at 828. The district court awarded \$1,500 in compensatory and punitive damages, stating it “is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but to emphasize the importance of humane and correct judgment under the circumstances.” *Id.* The Fifth Circuit reversed, not because punitive damages were unavailable, but because the sailor had been treated as humanely as possible aboard ship and diversion of the vessel under the circumstances would have been a lengthy and risky endeavor. *Id.* at 824.

The Court in *Townsend* explicitly places the burden on the opponent of punitive damages to “establish[] that such damages were historically unavailable for breach of the [vessel owner’s] duty.” 557 U.S. at 418. In this case, Dutra has failed to meet that requirement, even using Dutra’s unsupportably pro-defendant version of the *Miles/Townsend* historical analysis. It is as clear in this case as it was in

Townsend that punitive damages were available in general maritime actions based on unseaworthiness prior to passage of the Jones Act.

2. *Unseaworthiness remained an available maritime law cause of action against vessel owners after passage of Jones Act, which provides a negligence action solely against employers.*

With respect to the second step in the *Townsend* historical analysis, the unseaworthiness cause of action quite obviously has remained available to injured seamen after 1920. *See, e.g., Norfolk Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811, 813 (2001); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 208 (1996); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102-03 (1944).

Dutra insists, nevertheless, that the “rule of uniformity limits the remedy for a general maritime unseaworthiness claim to the same damages Congress allowed in the Jones Act” because the claims are indistinguishable “Siamese twins.” Dutra Br. 13 & n.9. To the contrary, the Supreme Court has emphasized that “unseaworthiness . . . is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law.” *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971).

Dutra also attempts to tie the damages recoverable for unseaworthiness to only those remedies allowed under the Jones Act by repeatedly misdescribing the unseaworthiness claim as a cause of action against the seaman’s employer. *See, e.g.,* Dutra Br. 1 (Framing the issue as “[w]hether . . . a seaman can recover punitive

damages on a general maritime unseaworthiness claim asserted against his *employer* for a workplace personal injury.”); *id.* at 2 (asserting that *Miles* precludes punitive damages in a “claim for unseaworthiness by a seaman against his *employer*”); *id.* at 24 n.16 (It “is difficult to even balance the *concept* of punitive damages based on a no-fault *employer* liability.”) (emphases added).

In fact, the unseaworthiness cause of action lies solely against the vessel and its owner. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 101 (1944) (citing *The Osceola*, 189 U.S. at 175). A Jones Act lawsuit, by contrast, may be properly filed only against the seaman’s employer. *See, e.g., Corsair v. Stapp Towing Co., Inc.*, 228 F. Supp. 2d 795, 798 (S.D. Tex. 2002). At times the employer and the shipowner may be the same; where they are different entities, the shipowner is liable in rem. *E.g., Solet v. M/V Capt. H.V. Dufrene*, 303 F. Supp. 980, 987 (E.D. La. 1969).

Regardless of the remedies open to seamen in a Jones Act suit against an employer, Congress has not “spoken directly to” the matter of remedies available in a cause of action against the vessel owner. *See Miles*, 498 U.S. at 31.

3. *Because the Jones Act does not encompass unseaworthiness, punitive damages are not barred.*

In its discussion of the third step of the historical analysis, Dutra once again oversimplifies the Supreme Court’s standard. Dutra rephrases what it calls the “*Miles* reasoning” to state that “the judiciary is not free to sanction remedies more expansive than those Congress has legislated and may only act when doing so

clearly foster the intent of Congress and achieves the goal of uniformity.” Dutra Br. 25.

Congress has not occupied the field with respect to remedies available under general maritime law. Perhaps the earliest decision on this point is *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047). The ship owner in that case argued that a federal statute that required that every vessel be equipped with a medicine chest preempted the seaman’s historic right to maintenance and cure. *Id.* at 484. Justice Story, disagreed:

In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or pro tanto of former laws.

Id. The court held that the maintenance and cure remedy survived the congressional enactment. *Id.* As the Supreme Court has repeatedly stated:

Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); *United States v. Texas*, 507 U.S. 529, 534 (1993). *See also Baker*, 554 U.S. at 489 (“In order to abrogate a [federal maritime] common-law principle, [a] statute must speak directly to the question addressed by the common law.”) (quoting *Texas*, 507 U.S. at 534).

The Jones Act does not explicitly nor implicitly preempt the field of remedies available to injured seamen. The Court made clear in *American Exp. Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), that Congress did not “sweep[] aside general maritime law remedies.” *Id.* at 282. Unless Congress has made specific provision for remedies inconsistent with pre-existing general maritime law, Congress should not be presumed to have intended to limit the remedies available. The Court further stated:

The Jones Act itself was not the product of careful drafting or attentive legislative review . . . Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts.

Id. at 283-84. The Court in *Miles* similarly observed that the Jones Act “does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.” 498 U.S. at 29 (citing *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 139 (1928)).

The Court applied its historical analysis in both *Miles* and *Townsend*. Where loss of society damages had not been available for wrongful death under general maritime law and where “Congress has spoken directly to” that question, courts are not free to “supplement” with new or expansive remedies. *Miles*, at 31. By comparison, in *Townsend*, “both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act,” and “the Jones Act does not address maintenance and

cure or its remedy.” *Townsend*, 557 U.S. at 420. The Court therefore presumed that Congress intended “then-accepted remedies for injured seamen [that] arose from general maritime law” to remain available. Repudiating the broad reasoning *Dutra* presses in this case, the Court stated that “[l]imiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of this Court’s other decisions.” *Id.* at 424.

Townsend governs this case in like fashion. Both the general maritime cause of action (unseaworthiness) and the remedy (punitive damages) were established in general maritime law prior to 1920. Nor does the Jones Act address unseaworthiness or its remedy. “It is therefore possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act.” *Id.* at 420. *See also Rowe v. Hornblower Fleet*, 2013 AMC 873 (N.D. Cal. 2012) (concluding, after close examination of *Miles* and *Townsend*, that this Court’s decision in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), remains good law and that punitive damages may be recovered in an unseaworthiness case).

II. Modern Expansion of the Unseaworthiness Cause of Action Without Fault Does Not Undermine the Historical Availability of Punitive Damages in Appropriate Cases.

The Supreme Court’s historical analysis mandates the availability of punitive damages in this case. Dutra contends, however, that the standard cannot be applied to modern unseaworthiness causes of action:

Prior to the 1920 Jones Act . . . unseaworthiness sounded in negligence. A seaman had to [sic] right to assert a cause of action for negligence against his employer for a maritime work related injury. The cause of action for unseaworthiness now sounds in strict liability and no longer requires a showing of fault. Thus, any historical argument which ignores these distinctions sinks from stern to bow.

Dutra Br. 29. *See also id.* at 11-12, tracing this change to *Mahnich*, 321 U.S. 96.

A. Historically, the unseaworthiness cause of action was based on warranty, not negligence.

At the outset, as noted earlier at part I.B.2, *supra*, it is not correct that prior to 1920 a seaman could assert a cause of action in negligence against his employer. *See The Osceola*, 189 U.S. 158 (1903). Congress provided that cause of action in the Jones Act. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 341-42 (1991). The unseaworthiness cause of action did lie, as now, against the vessel owner.

As with maintenance and cure, liability for unseaworthiness, both before and after 1920, was premised on “implied warranty on the part of a shipowner that a ship is seaworthy.” *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 92 n.10 (1946) (internal

quotation marks omitted). Dutra is incorrect in contending that the unseaworthiness cause of action prior to the Supreme Court's 1944 decision in *Mahnich v. Southern S.S. Co.* required a showing of fault.⁴

Dutra grievously misreads *Mahnich*. The Court nowhere suggests that the unseaworthiness cause of action prior to the Jones Act was based on negligence. To the contrary, the Court deemed it a "rule of absolute liability." 321 U.S. at 101 (citing *The Osceola*, 189 U.S. at 173-75). Chief Justice Stone, writing for the *Mahnich* Court, explained:

In a number of cases in the [lower] federal courts, decided before *The Osceola*, *supra*, the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure . . . to supply seaworthy appliances. But later cases in this and other federal courts have followed the ruling of the *Osceola*, *supra*, that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.

Id. at 100 (citations omitted).

The pre-Jones Act rule, as stated by *Mahnich*, was "the owner is liable for furnishing an unseaworthy appliance, *even when he is not negligent.*" *Id.* (emphasis

⁴ Dutra submits that *Mahnich* effected a "revolution" in the law of unseaworthiness. Dutra Br. at 12 n.8 & 29. The same might be said of the impact of *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938), on the law of maintenance and cure. See *The Supreme Court, 1961 Term, Admiralty and Maritime Law*, 76 Harv. L. Rev. 90 (1962). The *Townsend* Court found no obstacle in such post-Jones Act developments to recognizing punitive damages for willful denial of maintenance and cure.

added). As an example, the Court pointed to *The Frank & Willie*, 45 F. 494, 495-97 (S.D.N.Y. 1891), where the court, as in other lower federal court cases, noted the negligence of the master. The Supreme Court subsequently determined that “the question [of the owner’s liability] was really one of unseaworthiness, and not of negligence.” *Mahnich*, 321 U.S. at 101-02 (quoting *The Osceola* at 174-75).

Other cases decided under pre-Jones Act maritime law clearly indicate that unseaworthiness was not based on the negligence of the vessel owner. *See, e.g., Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922), involving a 1917 accident, where the Court, based on the evidence, stated that “*without regard to negligence* the vessel was unseaworthy when she left the dock” due to a mislabeled gasoline can and absence of life preservers. The trial court’s instruction requiring the jury to find negligence was error, though harmless. *Id.* at 260. In *Martin v. Southwark*, 191 U.S. 1 (1903), the Court declared that “there was a warranty upon the part of the shipowner that the ship was seaworthy at the beginning of her voyage. The warranty was absolute, and not depend upon the knowledge of the owner, or the diligence of his efforts to provide a seaworthy vessel.” *Id.* at 6

The Court likewise set out a clear explication of maritime law in *The Caledonia*, 157 U.S. 124 (1895):

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not

know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.

Id. at 130 (internal quotations omitted).

The Osceola also held that unseaworthiness could not be based on the negligence of the master or crewmember, as such a claim was barred by the fellow servant rule. 189 U.S. at 175. The *Mahnich* Court read that portion of *The Osceola* very narrowly, stating that the “defense of the fellow servant rule to suits in admiralty for negligence, a defense precluded by the Jones Act, has never avowedly been deemed applicable to the owner’s *stricter obligation* to the seaman of the warranty of seaworthiness.” 321 U.S. at 101. In short, Dutra’s claim that pre-Jones Act unseaworthiness actions cannot be compared to present day claims based on strict liability is without basis.

B. The fact that the underlying cause of action is based on strict liability for breach of duty does not preclude an award of punitive damages where the violation was willful and wanton.

Dutra also puts forward the related claim that punitive damages, awarded to punish and deter willful and egregious misconduct, cannot be awarded in an unseaworthiness case, which is a strict liability cause of action. Dutra concedes that punitive damages are available under *Townsend* where the defendant is guilty of “willful” or “intentional acts or omissions.” Dutra Br. 24 n.16. However, Dutra

strongly disagrees that courts should allow “a more expansive remedy for a judicially created cause of action (unseaworthiness), *in which liability is without fault*, than Congress allows on a claim based on Jones Act negligence.” *Id.* at 4 (emphasis in original). In fact, Dutra finds it “difficult to even balance the *concept* of punitive damages based on a no-fault employer liability.” *Id.* at 24 n.16 (emphasis in original).

Dutra clearly misapprehends the nature of a claim for punitive damages.

Of course punitive damages are not available without proof of egregious fault. “The prevailing rule in American courts” including cases under general maritime law, “limits punitive damages to cases . . . where a defendant’s conduct is ‘outrageous,’ owing to ‘gross negligence,’ ‘willful, wanton, and reckless indifference for the rights of others,’ or behavior even more deplorable.” *Baker*, 554 U.S. at 493 (internal citations omitted). *See also Townsend*, 557 U.S. at 409 (“Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct.”).

Failure to provide maintenance and cure, like unseaworthiness, is a strict liability cause of action that “arises from the contract of employment [and] does not rest upon negligence or culpability on the part of the owner or master.” *Calmar S.S. Corp.*, 303 U.S. at 527 (citations omitted). *See also Vaughan v. Atkinson*, 369 U.S. 527, 535 (1962) (“The obligation of a shipowner, irrespective of fault, to provide

maintenance and cure to a seaman injured or taken ill while in the ship's service . . . is of ancient origin.”). Yet *Townsend* held that denial of maintenance and cure might result in an award of punitive damages. Importantly, the Court did not hold that punitive damages could be awarded for the mere denial of maintenance and cure, for which the owner was strictly liable. Rather, the owner may be subject to punitive damages based on the additional showing of “willful and wanton disregard of the maintenance and cure obligation.” 557 U.S. at 424.

Dutra seeks support from a passage in *Miles* which states it would be “*inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.*” Dutra Br. 10 (quoting *Miles*, at 32-33).

The Court in *Miles* was addressing the question whether loss of society was recoverable in the judicially created cause of action for wrongful death in maritime law. It did not address the availability of punitive damages if evidence demonstrates outrageous or willful misconduct on the part of defendant. *See also Townsend*, at 424 n.12, indicating that availability of punitive damages in claims under the Jones Act remains an open question.

Under *Townsend*, it is Dutra's burden to show “why [unseaworthiness] actions should be excepted from [the] general rule” that punitive damages are available

under general maritime law. *Townsend*, at 414 n.4. Dutra’s argument based on purported changes in unseaworthiness liability cannot satisfy that burden.

III. The Availability of Punitive Damages Under State Product Liability Tort Law Supports Their Availability for Unseaworthiness Claims Under General Maritime Law.

A. Courts may look to state tort law for development of remedies available in general maritime law actions.

Much of Dutra’s argument is premised – at least implicitly – on the proposition that when Congress legislates with respect to remedies in any maritime context the judicial branch must not permit other remedies under general maritime law, even for rights of action Congress has not directly addressed. *E.g.*, Dutra Br. 13 (“The rule of uniformity limits the remedy for a general maritime unseaworthiness claim to the same damages Congress allowed in the Jones Act.”).

To the contrary, as noted earlier, Congress has not preempted the field, and the Jones Act did not “sweep[] aside general maritime law remedies.” *American Exp. Lines, Inc. v. Alvez*, 446 U.S. at 282. Limiting recoveries in actions not governed by the Jones Act “would give greater pre-emptive effect to the Act than is required by its text, *Miles*, or any of [the] Court’s other decisions.” *Townsend*, at 424. The judiciary’s role, as Justice Ginsburg aptly stated, is “a shared venture in which ‘federal common lawmaking’ does not stand still, but ‘harmonize[s] with the enactments of Congress in the field.’” *Norfolk Shipbuilding & Drydock Corp.*, 532

U.S. at 821 (Ginsburg, J., concurring) (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994)).

The courts of the United States are vested by the Constitution with judicial power “extend[ing] . . . to all Cases of admiralty and maritime Jurisdiction.” U.S. Const. art. III, § 2. Both before and after *Miles*, the Supreme Court “consistently [has] interpreted this grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.” *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95-96 (1981). See also *Yamaha Motor Corp., U.S.A.*, 516 U.S. at 206 (“With admiralty jurisdiction . . . comes the application of substantive admiralty law.”) (quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986)).

In its shared venture with the legislature, the federal admiralty court has “jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.” *Baker*, 554 U.S. at 489-90. In the furtherance of justice and the purpose of maritime law, “courts sitting in admiralty may draw guidance from, *inter alia*, the extensive body of state law.” *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996).

For example, in *American Exp. Lines, Inc. v. Alvez*, the Court addressed whether the wife of an injured harbor worker may recover under general maritime law for the loss of her husband’s society. The plurality adopted the position held by

“a clear majority of States [that] permit a wife to recover damages for loss of consortium from personal injury to her husband.” 446 U.S. at 284. As well, in *Miles*, the Court found it persuasive that only a distinct minority of state statutes authorized recovery of lost future income. *Miles*, 498 U.S. at 35. On the other hand, the Court in *Townsend* supported its recognition of punitive damages under general maritime law with the observation that punitive damages have historically been part of the American common law of torts and that “the vast majority” of states permitted juries to award them. *Townsend*, 557 U.S. at 410.

B. Courts may draw guidance from state strict product liability law which permits recovery of punitive damages in cases of willful or egregious misconduct.

The Supreme Court has long maintained that seafarers “are emphatically the wards of the admiralty.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485, 483 (No. 6,047) (C.C.D. Me. 1823)). See also *Townsend*, at 417. Justice O’Connor referred to that special solicitude as the “animating purpose behind the legal regime governing maritime injuries.” *Chandris, Inc.*, at 354.

To the extent that there is any uncertainty that general maritime law mandates the availability of punitive damages in unseaworthiness cases, the court should draw guidance from the fact that product liability law in the overwhelming majority of states permits recovery of punitive damages in appropriate cases.

State products liability law looks in much the same direction as unseaworthiness law. Unseaworthiness is a strict liability cause of action rooted in an implied warranty incorporated into the seaman's contract of employment. *Mahnich*, 321 U.S. at 102-03 (Vessel "owner's duty to furnish safe appliances" is "founded on the warranty of seaworthiness"); *The Arizona v. Anelich*, 298 U.S. 110, 120-22 (1936) (seaworthiness obligation includes assurance that vessel equipment is not "defective").

Similarly, the manufacturer's strict liability to the consumer for injury caused by a defective or unreasonably dangerous product is rooted in the doctrine of implied warranty of merchantability. *Restatement (Second) of Torts* § 402A, cmt. b (1965). Its purpose is to place the costs of injury on the party best able to prevent harm and to insure against its cost. *Id.*, cmt. c.

On that basis, the Supreme Court has "recognize[d] products liability, including strict liability, as part of the general maritime law." *East River S.S. Corp.*, 476 U.S. at 865 (citing *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1135 (9th Cir. 1977) (adopting § 402A)). The "rationale in those [unseaworthiness] cases – that strict liability should be imposed on the party best able to protect persons from hazardous equipment – is equally applicable when the claims are based on products liability." 476 U.S. at 866. In determining whether a plaintiff could recover for damage to the product itself, the Court reviewed the

rationales and policies discussed in the leading state court decisions and adopted the majority position denying that particular remedy. *Id.* at 871.

On the question presented to this Court, the common-law weight of authority is very clear. Punitive damages are widely available in products liability actions where defendant has acted willfully and wantonly. *See* Annot., *Allowance of Punitive Damages in Products Liability Case*, 13 A.L.R.4th 52 (1982); *e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (product liability case in which the Court made clear that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition,” though awards may not be constitutionally excessive); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 399-409 (5th Cir. 1986) (discussing the rationale for awarding punitive damages in strict products liability cases). Such awards serve the important public policy of “creat[ing] a strong incentive for vigilance by those in a position ‘to guard substantially against the evil to be prevented.’” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)).

The potential for punitive damage awards against owners who willfully send seamen out in unseaworthy vessels will likewise create a strong incentive for investment in safe equipment and working conditions. The result will be to prevent many maritime injuries in the first place.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the district court's Order denying defendant's Motion to Strike Punitive Damages.

June 24, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limits set forth at Ninth Circuit Rule 32-4 because it contains 6,879 words, excluding the parts of the brief exempted.

The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) in that the briefs was prepared in 14 point Times New Roman font using Microsoft Word 2013.

Date: June 24, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 24, 2016. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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