

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THE DUTRA GROUP,)
)
Petitioner,)
)
v.) No. 18-266
)
CHRISTOPHER BATTERTON,)
)
Respondent.)

Pages: 1 through 56

Place: Washington, D.C.

Date: March 25, 2019

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3 THE DUTRA GROUP,)
4 Petitioner,)
5 v.) No. 18-266
6 CHRISTOPHER BATTERTON,)
7 Respondent.)
8 - - - - -

9
10 Washington, D.C.
11 Monday, March 25, 2019

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:09 a.m.

16
17 APPEARANCES:

18
19 SETH P. WAXMAN, ESQ., Washington, D.C.;
20 on behalf of the Petitioner.
21 DAVID C. FREDERICK, ESQ., Washington, D.C.;
22 on behalf of the Respondent.
23
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25

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1 PROCEEDINGS

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-266, the Dutra Group
5 versus Batterton.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

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

11 In Miles, this Court emphasized that
12 when Congress enacted the Jones Act, it took
13 principal responsibility for fashioning
14 remedies for injured seamen. And again and
15 again, this Court has followed Congress's
16 lead --

17 JUSTICE SOTOMAYOR: I'm sorry, that --
18 that's a little bit backwards. I thought the
19 Jones Act directly says that it's there to
20 supplement whatever the remedies were, not to
21 take remedies away. It was there to give more
22 protection to seamen, not less.

23 MR. WAXMAN: So the Jones Act doesn't
24 say anything about remedies --

25 JUSTICE SOTOMAYOR: But our case law

1 has said it repeatedly.

2 MR. WAXMAN: You -- what this Court
3 said just a few years after the Jones Act was
4 enacted was that the Jones Act provides,
5 vis-a-vis unseaworthiness, alternative grounds
6 for recovery of a single cause of action. And
7 the Court also said, in Mitchell versus Trawler
8 Racer several years later, that with the
9 passage of the Jones Act, Congress obliterated
10 all distinctions between the kinds of
11 negligence for which shipowners are liable.

12 And it's important --

13 JUSTICE SOTOMAYOR: But that doesn't
14 tell me that their intent was to take away
15 common law remedies. And I thought that's what
16 Townsend said, which is if -- unless there is
17 some proof, contrary evidence, those common law
18 remedies still remain.

19 And so my question is that's a
20 different statement than what you started with.

21 MR. WAXMAN: Well, I --

22 JUSTICE SOTOMAYOR: That it's the
23 exclusive remedy.

24 MR. WAXMAN: No, I think my -- I'm not
25 sure that it is a different statement. The

1 question is -- and this Court has made clear,
2 not only in this area of the law, vis-a-vis the
3 Jones Act, and in cases like Moragne and
4 Mahnich and Miles itself, that when Congress
5 exercised -- but also in cases like -- and I
6 point the Court to the -- the Court's decision
7 in Milwaukee versus Illinois, in which the
8 Court stated the general -- broader rule that
9 when federal -- when this Court sits as a
10 federal common law court and announces and
11 expounds the scope of federal common law
12 remedies, it has the authority to do that
13 interstitial law-making function, but when
14 Congress then comes in and legislates in that
15 particular area and sets out particular
16 remedies, the previous scope of the common law
17 remedies subside.

18 That's exactly what this -- Chief
19 Justice Rehnquist explained for the Court in
20 Milwaukee, and it's what happened in this case
21 and is what ought to happen in this case.

22 Now, as to Townsend, Townsend is very
23 much not to the contrary because it is -- it
24 involved maintenance and cure, rather than
25 unseaworthiness, and that makes a tremendous

1 difference in several dimensions.

2 First of all and most fundamentally,
3 unseaworthiness is a substitute for Jones Act
4 negligence, while maintenance and cure, as this
5 Court in Townsend --

6 JUSTICE SOTOMAYOR: Not a complete
7 substitute. There are different elements to
8 unseaworthiness than there are to ordinary
9 negligence. It -- there's different standards.

10 MR. WAXMAN: But I -- our -- our --

11 JUSTICE SOTOMAYOR: It's a different
12 cause of action. The remedies may overlap, but
13 not the cause of action.

14 MR. WAXMAN: The cause -- at the time
15 that the Jones Act was enacted, the contours of
16 the particular cause of action differed
17 significantly. The Jones Act was much --
18 reached much broader.

19 But this Court nonetheless said in the
20 1920s, in Phillips and in Townsend, in
21 Baltimore Steamship, that -- and Peterson,
22 rather, that this -- what Congress did was to
23 legislate an alternative grounds for the
24 recovery of a single cause of action. And this
25 Court explained right away if --

1 JUSTICE GINSBURG: But I thought --
2 Mr. Waxman, if I can interrupt you there. I
3 thought the main reason for the Jones Act was
4 that there wasn't, under the unseaworthiness
5 doctrine, a simple case of negligence. A
6 fellow crew member acts negligently and injures
7 you; there was no unseaworthiness remedy for
8 that.

9 And so Jones came in to create a
10 negligence remedy that didn't exist before,
11 that had nothing to do with the fitness of the
12 ship.

13 MR. WAXMAN: I -- I agree with that
14 articulation that this Court rendered in the
15 Osceola in 1905 and as to which the Jones Act
16 was addressed. There are several points.

17 Number one, following the enactment of
18 the Jones Act, this Court, in a succession of
19 cases, at least five times beginning in 1944 in
20 the Mahnich case, expanded and revised the
21 contours of the unseaworthiness remedy so that
22 it now is -- and -- and, Justice Sotomayor, I
23 will get to you on the incremental differences
24 between the two -- so that it now is recognized
25 as a virtual substitute, as Gilmore and Black

1 said several decades ago, it is a --

2 JUSTICE KAGAN: It's even a little bit
3 better sometimes, right, given it's a strict
4 liability offense, isn't it?

5 MR. WAXMAN: So it's -- it's not -- it
6 is frequently said that it is a strict
7 liability defense, whereas the Jones Act is a
8 negligence standard. Both of those terms are
9 somewhat misleading in application.

10 Every court that has considered the
11 question and the treatise writers say that
12 negligence under the Jones Act is what's called
13 featherweight negligence. It barely meets any
14 standard of negligence, whereas, in *Mahnich*, in
15 which this Court -- to which this Court has
16 said imported a strict liability standard under
17 seaworthiness, what *Mahnich* said was we are not
18 going to recognize the fellow servant rule
19 because it's not recognized in the Jones Act.

20 JUSTICE KAGAN: I mean, maybe -- I
21 guess one of the points in your brief that
22 confused me, and maybe you're kind of providing
23 an answer to it, but I'll just -- you say
24 several times in your brief that the
25 unseaworthiness action really has evolved,

1 changed, quite a bit since the Jones Act.

2 And I would think that if you're right
3 as to your basic theory, which is that the
4 Jones Act is a signal to courts to stop doing
5 stuff --

6 MR. WAXMAN: Uh-huh.

7 JUSTICE KAGAN: -- because the Jones
8 Act is now taking over the field, essentially,
9 if you're right as to your basic theory, how is
10 it possible that this action of unseaworthiness
11 could have changed as much as you admit that it
12 did?

13 MR. WAXMAN: Well, the -- there are
14 some differences, as Justice Sotomayor -- there
15 were reasons why the court, when it enacted the
16 Jones Act, didn't preempt other federal --
17 existing federal common law remedies.

18 And the situation of preemption and
19 the effect of a statutory scheme of remedies
20 vis-a-vis preexisting common law is markedly
21 different when the common law is federal rather
22 than state. But, for example, even to this
23 day, the defendant in a Jones Act case and the
24 defendant in an unseaworthiness case may be
25 different.

1 The former is the employer. The
2 latter is the shipowner. And sometimes they're
3 not the same. In Jones Act cases, you have an
4 absolute right to a jury trial. In unseaman-
5 -- unseaworthiness cases, you sometimes do and
6 sometimes don't, depending on whether there's
7 diversity of citizenship.

8 JUSTICE KAGAN: So I guess my -- if
9 I --

10 MR. WAXMAN: But if I -- if I can just
11 --

12 JUSTICE KAGAN: -- I guess my question
13 is --

14 MR. WAXMAN: I realize I'm talking --

15 JUSTICE KAGAN: -- Mister -- Mr.
16 Waxman, is when does the Jones Act say stop,
17 don't do stuff to -- to courts, and when does
18 it allow courts to keep thinking about
19 revising, developing these common law actions?

20 MR. WAXMAN: Well, I think this Court
21 came pretty close to attempting to articulate
22 that line in Miles itself where it says, and
23 I'm quoting from page 27, "In this era, an
24 admiralty court should look primarily to these
25 legislative enactments for policy guidance. We

1 may supplement these statutory remedies where
2 doing so would achieve the uniform vindication
3 of such policies, consistent with our
4 constitutional mandate, but we must also keep
5 strictly within the limits imposed by
6 Congress."

7 JUSTICE KAGAN: And I guess what I'm
8 asking is, how is that kind of flashing yellow
9 light, which I agree with you, that sounds like
10 a flashing yellow light to me, how is it
11 consistent with all the changes that have
12 occurred in the unseaworthiness action?

13 MR. WAXMAN: And what you see is that
14 the effectuation of those sentences I just read
15 in Miles itself, in light of the scope of the
16 Jones Act, Congress not only eliminated in
17 Mahnich the -- for -- for unseaworthiness the
18 defense of fellow servant, and then eliminated
19 in light of the Jones Act the defense of
20 contributory negligence under unseaworthiness,
21 but, in Miles, following Moragne, the Court
22 said, well, the Jones Act recognizes a wrongful
23 death remedy for claims under the Jones Act.

24 And because the Jones Act and
25 unseaworthiness are just twin causes of action

1 for the same injury, we will recognize the -- a
2 -- we will recognize recoveries in wrongful
3 death, in cases brought of an unseaworthiness.

4 Now, importantly, what happened was,
5 after this Court decided *Moragne* and said,
6 well, the Jones Act allows a recovery for
7 wrongful death and unseaworthiness, so we're
8 going to, too, the question then came before
9 the Court in *Sea-Land Services versus Gaudet*,
10 well, what does that involve? Like, what are
11 the remedies that you get for wrongful death?

12 And what this Court held was that the
13 remedies you get for wrongful death include the
14 loss of society.

15 The next case that comes along is
16 *Mobil Oil versus Higginbotham*, raises wrongful
17 death for unseaworthiness but for a wrongful
18 death that occurred on the high seas.

19 And this time what this Court says is,
20 well, the Death on the High Seas Act doesn't --
21 only allows for recovery of pecuniary damages.
22 Loss of society is not pecuniary damages. So
23 we need to constrict the federal common law
24 remedies that we recognized in *Gaudet* in cases
25 that occur on the high seas.

1 And then, finally, in Miles, the Court
2 gets the same question. Loss of society for --
3 you know, for somebody who is a Jones Act
4 seaman. And what the Court says is, under the
5 Jones Act, which is the twin cognate cause of
6 action for loss resulting from
7 wrongfully-caused injury, we don't allow loss
8 of society damages.

9 And, therefore, again, notwithstanding
10 the broader ruling in Gaudet, which took place
11 in a -- in an environment in which there was no
12 congressional limitation, once again, we're
13 recognizing the limitation.

14 Now I do want to get --

15 JUSTICE GINSBURG: I thought all those
16 cases in the Miles line had to do with wrongful
17 death actions and the whole history that there
18 was no -- before Death on the High Seas Act,
19 there was no such remedy?

20 MR. WAXMAN: Well, the three cases
21 that I identified just now, Justice Ginsburg,
22 were wrongful death cases, although Miles
23 itself also included a claim for a right of
24 survivorship, which is a form of injury.

25 And, once again, the Court said the

1 Jones Act sets the limits for common law
2 recoveries for injury or death to Jones Act
3 seamen and held on the injury side of it that
4 the representative of the deceased, pursuing a
5 personal injury action on behalf of the
6 deceased, could not recover future lost wages
7 because the Jones Act doesn't allow it.

8 Now, in Mahnich, it was not a wrongful
9 death case. And the -- the other cases which
10 are cited in, I believe it's Footnote 5 of your
11 opinion in Usner, which relate all the respects
12 in which, in light of the Jones Act, this Court
13 changed, modified both the contours of what
14 unseaworthiness constitutes and the remedies
15 available.

16 Now I do want to get to, I think it
17 was Justice -- I can't remember whose question
18 it was about -- about Townsend and the other
19 distinction of Townsend because, even if Miles
20 didn't exist, and even if Miles didn't import
21 into this case the constitutional commands of
22 separation of power and uniformity in maritime
23 law, in Townsend, what this Court said was,
24 look, maintenance as a cure is an ancient
25 remedy that goes back at least until the 13th

1 Century, if not before. It is a -- it reflects
2 a fundamental humanitarian imperative to
3 provide sustenance and care for seamen who fall
4 ill during the voyage.

5 JUSTICE BREYER: Is it --

6 MR. WAXMAN: And -- and this Court
7 said, at common law, in particularly egregious
8 cases, punitive damages were available. In
9 certain maritime actions which the Court
10 identified, punitive damages, if not awarded,
11 there is at least language suggesting that they
12 could be awarded against the malfeasant.

13 And we -- if we look at maintenance
14 and cure, we don't see any reason to create an
15 exception because, as the Court explained in --
16 in Section 2 -- 2(c) of its opinion, over
17 pages, let's go back and look.

18 There were treatise writers, I believe
19 three different treatises that recognized that
20 punitive damages were available for egregious
21 refusals to provide maintenance and cure.
22 There were decided cases, the Troop and the
23 Carlisle.

24 At the same time, there is nothing, no
25 evidence whatsoever that punitive damages were

1 ever even sought, much less awarded, and we
2 know why.

3 JUSTICE SOTOMAYOR: Any -- any
4 counterevidence?

5 MR. WAXMAN: Excuse me?

6 JUSTICE SOTOMAYOR: Any
7 counterevidence?

8 MR. WAXMAN: Well, here's -- here's
9 the counterevidence, and it's -- it's -- it's
10 revealing. It's reflected in -- in one of the
11 principal cases that my friend is relying on as
12 an example of punitive damages in
13 unseaworthiness cases.

14 It's a case called the Noddleburn.
15 It's also, I believe -- yeah.

16 The Noddleburn was a case in which it
17 was brought for unseaworthiness and for
18 maintenance and cure. The court held with
19 respect to unseaworthiness that "there was
20 actual knowledge of the unsound and unseaworthy
21 condition of the vessel, coupled not only with
22 willful negligence but wanton indifference."

23 And yet, in the Noddleburn, the court
24 considered and discussed the possibility of
25 awarding punitive damages for the failure to

1 provide maintenance and cure but not for
2 unseaworthiness.

3 Now I can't cite you a case either
4 before the Jones Act was passed or after, for
5 decades and decades after, in which a court
6 said we've been asked to apply punitive damages
7 because the -- the conduct that constituted
8 unseaworthiness was egregious.

9 JUSTICE BREYER: I'd like --

10 MR. WAXMAN: I can't find a case in
11 which punitive damages were even requested.
12 And if you look at -- and this -- this Court
13 certainly has a rich body of unseaworthiness
14 decisions between the 1880s and the -- and the
15 present time, there are -- there is case after
16 case of what is reported as shocking, egregious
17 conduct in which there is no reflection in the
18 briefs or in any of the opinions that punitive
19 damages was even sought.

20 And a reason may be -- and this is the
21 other Townsend-related reason I want to address
22 -- prior to -- we have a -- somewhat of a
23 disagreement between us as to the exact date at
24 the very end of the 19th Century in which any
25 court first recognized that compensatory

1 damages could be paid to an injured seaman for
2 failure of seaworthiness, but at least until
3 the middle 1880s, at a time when the treatises
4 and the cases were saying you can get punitive
5 damages for a willful refusal to provide
6 medical care to an ill seaman, you couldn't
7 even get under -- unseaworthiness compensatory
8 damages.

9 The remedy for unseaworthiness to a
10 seaman was the privilege to refuse to embark on
11 a vessel that was unseaworthy and yet to claim
12 your wages.

13 And that's the reason. That's the
14 major distinction, if we're talking just on
15 Townsend terms, that unseaworthiness is so
16 different than maintenance and cure.

17 On the one hand, you've got treatises
18 that say you can get punitive damages. It's a
19 given. You've got cases that are either
20 awarding or considering punitive damages for
21 the failure to provide maintenance and cure,
22 like the Noddleburn.

23 And at the other hand, from the other
24 side, for all these centuries, at least up
25 until a couple of cases decided at the end of

1 the 19th Century, for unseaworthiness, no
2 matter how egregious, there was no right of
3 personal compensation for --

4 JUSTICE KAGAN: And were there cases
5 where it was quite egregious? Because I was
6 thinking about this and thinking maybe it just
7 wouldn't come up because an unseaworthiness
8 action is basically you've taken deliberate
9 action to ensure that your own ship sinks.

10 So most people don't want the ship
11 that they own to sink, right? So, you know, it
12 might just be that when people bring this kind
13 of action, they're not bringing it on the basis
14 of the kind of behavior that would justify a
15 punitive damages award.

16 MR. WAXMAN: Justice Kagan, I have
17 read you the Court's opinion in the Noddleburn,
18 which finds that the shipowners not only knew
19 of the unseaworthy condition, but they were --

20 JUSTICE KAGAN: Well, I do think that
21 my --

22 MR. WAXMAN: And --

23 JUSTICE KAGAN: -- my question is not
24 answerable by pointing to a single case.

25 MR. WAXMAN: Okay. So I -- can I --

1 can I give you just a couple of other examples
2 in support of my assertion that there are many,
3 many cases that the federal courts and this
4 Court have looked at in which the allegation --
5 which the findings of seaworthiness indicated
6 egregious conduct.

7 The first one is the -- the now, I
8 guess, for purposes of this case, The Rolph,
9 about which much ink is spilled in the briefs
10 about whether it did or didn't involve punitive
11 damages for the -- as -- as explained in the
12 documents that we've sought permission to
13 lodge, there is no question that the damages
14 awarded in that case and sought were
15 compensatory. But the -- the -- the opinion of
16 both the court of appeals and the district
17 court in that case demonstrate an -- and found
18 an extreme case of unseaworthiness on the part
19 of the shipowner in --

20 JUSTICE ALITO: But the owner -- the
21 owner of the ship is not mostly -- generally
22 isn't going to be on the ship.

23 MR. WAXMAN: Right.

24 JUSTICE ALITO: So, if it sinks, the
25 owner is probably not going to be one of the

1 ones that drowns.

2 So, if the owner does a cost/benefit
3 analysis of the -- the cost of getting a better
4 ship or repairing the ship versus the amount of
5 money that could be obtained from -- from going
6 ahead with a voyage using that ship, is that
7 always going to come out in favor of safety?
8 Is it generally going to -- did it -- did it
9 always -- did it generally come out in favor of
10 safety in the -- in the 19th Century?

11 MR. WAXMAN: So I would suggest -- I
12 mean, I didn't live in the 19th Century and
13 although I feel like at this point I've read
14 most of the cases decided in the 19th Century,
15 I haven't seen policy discussions on this
16 point.

17 But I will say that when Congress
18 enacted the Jones Act, and for that matter,
19 when Congress enacted FELA -- I mean, the
20 owners, the corporations that own railroads
21 weren't riding on the railroads themselves --
22 Congress made a -- an obvious policy judgment
23 to create -- to not go all the way to a
24 workmen's compensation statute where, if you're
25 injured, you just file a claim in front of a

1 state administrative agency and you get the
2 following kinds of recovery but not many
3 others, but that is the spirit of what FELA and
4 the Jones Act did, which is to provide a much
5 broader, much more certain remedy, sweeping
6 away the defenses of assumption of risk and
7 contributory negligence and the fellow servant
8 rule, in exchange for a -- a judgment that, in
9 dealing with the policies and the thinking of
10 what went on in people who ran railroads and
11 ran steamship companies and people who worked
12 there, Congress's choice was to say very easy
13 streamlined recovery for compensatory damages,
14 no recovery for punitive damages. And --

15 JUSTICE GINSBURG: Is pain and
16 suffering compensatory damages?

17 MR. WAXMAN: Yes, pain and suffering
18 is compensatory. And, you know, for --

19 JUSTICE GINSBURG: It's not pecuniary?

20 MR. WAXMAN: Excuse me?

21 JUSTICE GINSBURG: It's not -- then
22 it's not pecuniary?

23 MR. WAXMAN: It's not pecuniary. And
24 so, for example, in cases like Miles, in a suit
25 brought for -- in a -- in a claim of wrongful

1 death for unseaworthiness, there's no pain and
2 suffering recovery. But, in a claim for injury
3 that is maintained by -- in a survivorship
4 action, pain and suffering is recoverable.

5 And, you know, one of the many
6 anomalies that would occur if this Court were
7 to affirm the court below and find that,
8 although punitive damages are not available
9 under the Jones Act, they are available for
10 unseaworthiness --

11 JUSTICE GINSBURG: But may I just stop
12 you there. This Court has never held that, has
13 it?

14 MR. WAXMAN: That's right. For 111
15 years, the treatise writers and courts have all
16 been unanimous that punitive damages are not
17 available under FELA or -- and, therefore,
18 under the Jones Act.

19 JUSTICE SOTOMAYOR: We've reserved
20 that question.

21 MR. WAXMAN: Excuse me?

22 JUSTICE SOTOMAYOR: We reserved that
23 question.

24 MR. WAXMAN: You did reserve that
25 question.

1 JUSTICE SOTOMAYOR: So that's still an
2 open question.

3 MR. WAXMAN: Well, I mean, it is an
4 open question in this Court. At the time that
5 the Jones Act was enacted, there were multiple
6 treatise writers who said, under FELA, punitive
7 damages aren't available.

8 This Court, although not deciding it,
9 had said on several occasions that for injury,
10 for a railroad worker, the remedy was
11 compensation. And, indeed, in the St. Louis
12 and Iron Mountain Railway Company, which was
13 not a wrongful death case, it was a
14 survivorship case, this Court said that the
15 remedies under FELA were "confined to
16 compensatory loss."

17 JUSTICE SOTOMAYOR: So why did you in
18 your --

19 MR. WAXMAN: I agree that this Court
20 has not so cited.

21 JUSTICE SOTOMAYOR: -- brief say that
22 FELA and the Jones Act bar on compensatory
23 damages could include non-pecuniary losses?

24 MR. WAXMAN: Well, there's a dis -- so
25 --

1 JUSTICE SOTOMAYOR: And that --

2 MR. WAXMAN: -- the non-pecuniary
3 recovery for -- I don't have -- we don't have a
4 position on whether pecuniary damages are non
5 -- whether pecuniary damages are available
6 under the Jones Act or not.

7 What the -- the way that came about is
8 pecuniary damages are not available under the
9 Death on the High Seas Act. That led to a
10 determination by this and other courts that
11 under the Jones Act, non-pecuniary damages are
12 not available in wrongful death cases and,
13 therefore, are not available --

14 JUSTICE SOTOMAYOR: But that may
15 not --

16 MR. WAXMAN: -- in unseaworthiness
17 cases. And -- and the extreme anomaly that
18 would -- that -- that is being invited in this
19 case is to -- is what the other side asks for
20 is, okay, look, we know that if an injured
21 seaman dies, he can't recover under the Jones
22 Act and, therefore, under unseaworthiness for
23 -- and can get -- punitive damages won't be
24 awarded, but because they say there's no
25 pecuniary damage limitation in injury actions,

1 if he doesn't die, then punitive damages can be
2 awarded.

3 And I -- I -- I would -- would
4 respectfully submit there is no policy --

5 JUSTICE KAVANAUGH: There -- there
6 seem to be --

7 MR. WAXMAN: -- imperative to -- to
8 create that anomaly.

9 JUSTICE KAVANAUGH: -- two ways we can
10 look at this. One is the Miles precedent,
11 Jones Act, twin causes of action. The other is
12 Townsend says punitives have historically been
13 available and awarded in general maritime
14 actions. The question's which of those
15 principles to follow here.

16 Where does the special solicitude for
17 the welfare of sailors principle factor into
18 how we should think about that, or does it
19 factor at all?

20 MR. WAXMAN: I think it -- I think it
21 factors in exactly -- I mean, this Court has
22 said over and over again that the special
23 solicitude to the wards of the admiralty does
24 not dictate a result that the -- the seaman
25 always wins. Otherwise, you wouldn't have had

1 a situation at the time that that -- that
2 phrase was coined in which seamen could get no
3 compensation at all for any injuries and -- or
4 if they died or anything like that.

5 The -- the way to find your way
6 through this is the way that Miles explained
7 it, which is, yes, the Jones Act, and this
8 Court following the lead of the Jones Act, has
9 greatly broadened the amount of compensation
10 that injured seamen can recover. That is a
11 reflection of Congress's solicitude and this
12 Court's admiralty law solicitude. It doesn't
13 mean that you add punitive damages onto that.

14 May I reserve the balance of my time?

15 CHIEF JUSTICE ROBERTS: Certainly,
16 counsel.

17 Mr. Frederick.

18 ORAL ARGUMENT OF DAVID C. FREDERICK

19 ON BEHALF OF THE RESPONDENT

20 MR. FREDERICK: Thank you, Mr. Chief
21 Justice, and may it please the Court:

22 Our position is that punitive damages
23 are available under the general maritime law
24 for claims that a vessel is unseaworthy. Our
25 argument rests on two points.

1 First, punitive damages have long been
2 available under general maritime law, and
3 there's no evidence of cases precluding
4 punitives in unseaworthy claims prior to the
5 1920 enactment --

6 JUSTICE SOTOMAYOR: Except --

7 MR. FREDERICK: -- of the Jones Act.

8 JUSTICE SOTOMAYOR: -- except that
9 it's not like Townsend, where there were at
10 least two cases where punitive damages were
11 awarded. I really don't see a case where it
12 was clear that it was awarded for
13 unseaworthiness as opposed to maintenance and
14 cure, number one.

15 And there aren't any treatises that
16 affirmatively say that punitive damages were
17 awarded for unseaworthiness. That's a somewhat
18 different historical picture.

19 MR. FREDERICK: It's slightly
20 different, Justice Sotomayor, but I would say
21 that what the Court decided in Townsend, which
22 controls here, is does the general rule of
23 allowing punitive damages apply, unless there's
24 some express case holding that says otherwise
25 or Congress expressly said otherwise.

1 And, certainly, the discussion that my
2 friend offers of the Noddleburn indicates that
3 the Court was considering whether to give
4 exemplary or punitive damages in that case. It
5 was a case where there was a fraying rope, the
6 -- the sailor fell to significant injuries.
7 The court said it's a close question whether to
8 give exemplary damages. On this record, I'm
9 deciding not to do that.

10 Now, if you want to say that there's a
11 difference between a discussion which this
12 Court in Townsend gave several examples of
13 discussions of exemplary damages, certainly,
14 Justice Story in *The Amiable Nancy* offered that
15 giving exemplary damages was important.

16 And the reason why it was important
17 was for the reason that Justice Alito averted
18 to, which is that the vessel owner needs to be
19 held to a higher standard so that when the
20 vessel owner chooses to over-insure, a rust
21 bucket is not sent to sea.

22 And that policy point is quite
23 important in these particular cases because,
24 even though these situations are extremely
25 rare, the cases have always talked about the

1 availability of exemplary damages.

2 And there's an 1850s case called the
3 Golden Gate where a -- what would be deemed now
4 to be an unseaworthy condition injured
5 passengers. And the passengers, instead of
6 bringing a suit for unseaworthiness, brought it
7 for breach of contract.

8 And the judge there said essentially:
9 Had this been brought as an unseaworthiness
10 case, I would have awarded exemplary damages,
11 but I can't do that because contract claims
12 have never allowed for exemplary damages.

13 JUSTICE SOTOMAYOR: Is your adversary
14 right -- adversary -- I mean --

15 MR. FREDERICK: He's my friend.

16 JUSTICE SOTOMAYOR: I know.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: Mr. Waxman right
19 that the remedy for unseaworthiness was for a
20 period of time only the ability to collect
21 wages?

22 MR. FREDERICK: The -- yes.

23 JUSTICE SOTOMAYOR: And when did that
24 change?

25 MR. FREDERICK: It started to change

1 in the 1800s. And this was an importation of a
2 rule that was adopted in Great Britain where,
3 although the concept of unseaworthiness existed
4 from the founding of our republic, and there
5 are cases from 1789 that we cite that say an
6 unseaworthy condition would be an excuse for
7 the crew member to decide not to go with the
8 ship on the voyage.

9 That principle expanded during the
10 1800s through decisions in Great Britain to
11 allow for compensation for the injury to the
12 sea worker as a result of the unseaworthiness
13 condition.

14 Those cases were then adopted by
15 courts in this country. And in the Noddleburn,
16 Judge Deady, a district court judge in Oregon,
17 explains where all of this came from, and he
18 explains that this idea of unseaworthiness
19 leading to a compensatory-type principle was
20 one that was designed to protect the crew
21 members as wards of the admiralty.

22 And so, by the time of the Osceola in
23 1903, this Court said it is well settled by the
24 decisions of the lower courts that a -- an
25 injured worker from an unseaworthiness

1 condition can obtain compensation both for the
2 unseaworthiness of the vessel, as well as for a
3 failure to provide maintenance and cure.

4 Those principles, I think, were very
5 well established well before the Jones Act was
6 enacted. And nothing in the Jones Act itself
7 points where Congress would have said that
8 punitive damages, the general rule of the
9 common law or the general maritime law, are not
10 available.

11 Now, importantly, my friend starts to
12 talk about some of the differences between the
13 unseaworthiness claim and a Jones Act claim,
14 but he only got so far. It is true and an
15 important difference that the defendant is a
16 different person or entity in an
17 unseaworthiness claim versus a Jones Act claim.

18 In a Jones Act claim, the defendant is
19 the employer. In an unseaworthiness claim, the
20 defendant is the owner. But it is also
21 important that the plaintiff could be different
22 as between those two claims.

23 And here is a very significant
24 difference between Townsend that works in our
25 favor. Whereas, in Townsend, a maintenance and

1 cure claim would overlap entirely with a Jones
2 Act claim, that is not true for an
3 unseaworthiness.

4 A passenger could bring a claim for
5 damages in an unseaworthiness action if the
6 unseaworthiness was a substantial cause of the
7 passenger's injury. The Jones Act only speaks
8 to the relationship between employees and
9 employers.

10 JUSTICE KAVANAUGH: You're not
11 disputing -- you're not disputing that they're
12 often referred to as twin causes of action?

13 MR. FREDERICK: No, they're not. They
14 are often -- and this -- this discussion
15 started in the Cortes in 1930-ish and followed
16 in Mitchell. And the reason why they are
17 considered that way is because, as my friend
18 points out in the Peterson case, this Court
19 announced the rule that you can't get double
20 recovery.

21 We're not asking for double recovery.
22 Just as in any common law claim where there's a
23 statutory claim, you have one injury, you can
24 only get one recovery for that.

25 JUSTICE ALITO: But you're -- you're

1 basically asking us to put on our common law
2 hat and decide that punitive damages are a good
3 thing because there -- there isn't any case
4 pre-Jones Act saying that you could get -- that
5 you could get punitive damages for
6 unseaworthiness, and no court of appeals that
7 I'm aware of has ever held that you can get it
8 -- get them under either FELA or the Jones Act?

9 MR. FREDERICK: Your Honor --

10 JUSTICE ALITO: Is all that right?

11 MR. FREDERICK: -- let me step back
12 and say first that what this Court decided in
13 Townsend, we think, controls and that if you
14 were to substitute "maintenance and cure" for
15 the words "unseaworthiness" in almost every
16 paragraph of the first three parts of the
17 Court's decision in Townsend, you would come to
18 exactly the same result, the exceptions being a
19 couple of the cases where we would offer to
20 substitute in a few unseaworthiness cases --

21 JUSTICE ALITO: But if there were just
22 --

23 MR. FREDERICK: -- versus a couple of
24 cases that were cited.

25 JUSTICE ALITO: Sorry to interrupt,

1 but if there were an established general rule
2 in maritime cases that you get punitive
3 damages, how do you account for the fact that
4 there weren't cases awarding punitive damages
5 for unseaworthiness?

6 MR. FREDERICK: The -- I think --

7 JUSTICE ALITO: How did this general
8 rule escape everybody's attention?

9 MR. FREDERICK: It didn't escape
10 everybody's attention. For the cases that we
11 cite in our case where the Court considered
12 whether to award them but decided on the basis
13 of the special facts there not to do so, I
14 would submit that having punitive damages
15 available has been a very powerful deterrent to
16 vessel owners not providing seaworthy vessels.
17 And that's a good thing.

18 JUSTICE ALITO: But, I mean, I think
19 -- I wasn't around in the 19th Century either,
20 but I think then and earlier, there were an
21 awful lot of very unseaworthy vessels that were
22 sent out to sea by owners. And they just took
23 the risk. And it wasn't their life that was at
24 stake.

25 And so what would be -- it seems

1 strange that there wouldn't be punitive damages
2 claims in those cases, in any unseaworthiness
3 case.

4 MR. FREDERICK: Well, I -- I -- there
5 were claims, certainly. And the Noddleburn is
6 an example of that. The Golden Gate is an
7 example of that. The Rolph is an example of
8 that. And --

9 JUSTICE ALITO: Well, there weren't
10 holdings. There weren't courts that awarded
11 punitive damages.

12 MR. FREDERICK: That is true. But the
13 fact that they are awarded rarely does not mean
14 that the court said as a matter of law, I don't
15 have the discretion or the power to award it.
16 And that was the very important point I think
17 that this Court drew out of Townsend, that the
18 fact that there's a general background rule
19 that doesn't come into play very often is not a
20 situation where one needs to be concerned.

21 And the fact that you -- you have a
22 deterrent out there serves as a very powerful
23 situation, particularly in an environment now
24 where you have overlapping employers having
25 operations on various vessels, cruise ships are

1 a very good example of that, where you might
2 have multiple employers who would have -- give
3 rise to Jones Act remedies in various
4 circumstances for not providing a safe
5 workplace.

6 CHIEF JUSTICE ROBERTS: But there --
7 there -- but there's -- I mean, you're talking
8 about, you know, sending rust buckets out to
9 sea and all these things. I mean, most of the
10 unseaworthiness cases are the hatch that isn't
11 -- doesn't close right or something like that,
12 and injures it.

13 But maintenance and cure is something
14 very different. Maintenance and cure is you're
15 talking about somebody who can't do anything
16 for himself, who's seriously injured or isn't
17 taken care of. And you can understand maybe
18 allowing punitive damages in that situation but
19 not necessarily in the other.

20 MR. FREDERICK: Well, Your Honor, I
21 think that they're both egregious situations.
22 And I would not want to fight the premise of
23 your question that the willful withholding of
24 maintenance and cure is -- is egregious,
25 because it certainly is.

1 But, in Townsend, what the Court held
2 was that just because there's overlap between
3 the willful withholding of maintenance and cure
4 does not mean that -- with the Jones Act
5 remedy, does not mean that the Jones Act remedy
6 forecloses the ability of obtaining punitive
7 damages for that.

8 Certainly, in situations where a -- a
9 vessel is not reasonably fit for its intended
10 purpose because of its --

11 CHIEF JUSTICE ROBERTS: Well, but that
12 -- that includes a situation I discussed,
13 right? If you had a hatch that didn't fully
14 close, and, as a result, there was an injury, I
15 mean, that's, you say, not fully fit for its
16 purposes. I mean, that would cover that. That
17 would be called unseaworthy.

18 But maintenance and cure is met only
19 in far -- far more egregious circumstances,
20 isn't it?

21 MR. FREDERICK: Your Honor, I think
22 that the key question, if I could take you to
23 this place in the colloquy, is whether or not
24 the owner acted in a wanton or willful way with
25 conscious disregard of the safety.

1 So really what we're talking about are
2 those situations in maintenance and cure where
3 the captain or the master of the vessel is
4 acting in a wanton way that causes the danger
5 to the crew member to exacerbate.

6 The same kind of wantonness is what
7 we're talking about in the unseaworthiness
8 situation where, as in this case, air pressure
9 was not vented and instructions for the safe
10 use of this vessel were not even given to the
11 master of the vessel, and --

12 JUSTICE BREYER: Can I --

13 MR. FREDERICK: -- and that's the kind
14 of wantonness that we're talking about here
15 that should be deterred and prevented.

16 JUSTICE GINSBURG: Mr. Frederick, one
17 thing that I think is undisputable is the
18 evidence is very slim that there were punitive
19 damages, in fact, awarded for unseaworthiness
20 claims. I mean, you can't dispute that the
21 evidence is slim.

22 MR. FREDERICK: I -- I would agree
23 with that, Justice Ginsburg.

24 JUSTICE GINSBURG: And you would also
25 agree on the Jones and FELA that the courts of

1 appeals have been uniform in saying no?

2 MR. FREDERICK: That I don't agree
3 with. What I'm informed, there have been a
4 couple of court of appeals decisions that have
5 talked about the FELA and the Jones Act. But,
6 remember, about 70 percent of these kinds of
7 cases arise in state court.

8 And most state court judgments are not
9 with reported decisions. And what I'm informed
10 by lawyers who filed amicus briefs on our side
11 of the case is that they have obtained on
12 occasion punitive damages awards in state court
13 proceedings that have not led to reported
14 judgments and not been appealed and that have
15 been paid.

16 Now these are not runaway juries --

17 JUSTICE SOTOMAYOR: You also have four
18 court of appeals who have given punitive
19 damages for unseaworthiness.

20 MR. FREDERICK: You -- you --

21 JUSTICE SOTOMAYOR: They're listed in
22 Petitioner's brief.

23 MR. FREDERICK: That's correct. And
24 we -- and -- but my point is that the existence
25 of punitive damages on unseaworthiness cases in

1 those circuits that have been there for
2 decades, the fact that nearly 10 years has now
3 elapsed since Townsend, we don't have runaway
4 juries for maintenance and cure claims, this
5 Court in Exxon versus Baker noted the
6 literature and said it's, in fact, not the case
7 that in those rare circumstances, when punitive
8 damages are awarded, that there has been some
9 disproportionate problem of runaway.

10 And I would offer you that in Exxon,
11 this Court considered a question closely
12 analogous to the one here, which is whether or
13 not the penalties under the Clean Water Act for
14 pollution displaced the general maritime law
15 general rule of punitive damages, and every
16 justice said no.

17 JUSTICE BREYER: Can I -- I just want
18 to make my list. I'm making a list of
19 differences between Jones Act and
20 seaworthiness.

21 MR. FREDERICK: Yes.

22 JUSTICE BREYER: And -- and it seems
23 to me everybody's agreed that the standard of
24 liability doesn't really make much difference.

25 MR. FREDERICK: That's not correct.

1 JUSTICE BREYER: All right. Well, let
2 me list the three I have --

3 MR. FREDERICK: Okay.

4 JUSTICE BREYER: -- and then go back
5 and tell me what I'm missing.

6 MR. FREDERICK: Sure.

7 JUSTICE BREYER: All right. The three
8 I have is one, the jury.

9 MR. FREDERICK: Yes.

10 JUSTICE BREYER: Number two, the ship
11 owner versus the employer.

12 MR. FREDERICK: Yes.

13 JUSTICE BREYER: And number three is
14 you say passengers can sue. I don't know if
15 there are a lot of passenger suits or not.

16 Okay. That's what I have. What else
17 should I have?

18 MR. FREDERICK: The liability standard
19 is different. It's negligence versus the --

20 JUSTICE BREYER: Yeah --

21 MR. FREDERICK: -- whether the vessel
22 equipment is staffing for an unfit purpose.

23 The causation standard is different.
24 For an unseaworthiness claim, the
25 unseaworthiness has to be a substantial or

1 proximate cause of the injury. Under this
2 Court's decision in CSX versus McBride, it is a
3 more relaxed causation standard.

4 So, whereas in the unseaworthiness
5 claim you have essentially a strict liability
6 standard for the unseaworthiness condition but
7 a higher causation standard, in the Jones Act,
8 you have a more rigid negligence standard for
9 liability but a more relaxed causation
10 standard.

11 And so there are circumstances, and
12 let me give you an example of one, where the
13 vessel owner might provide -- get a brand-new
14 piece of equipment, put it on the vessel, it
15 goes out to sea, but it doesn't work. There's
16 no negligence in that circumstance because the
17 vessel acted with due care. There is an
18 unseaworthiness condition because the equipment
19 did not perform as it was intended to for its
20 suited purpose.

21 And so you can see in an example
22 where, if the equipment was what caused the
23 injury, you would have a seaworthiness claim on
24 one hand, but you would not have a Jones Act
25 claim on the other.

1 The last difference that I would point
2 to is that, for an unseaworthiness claim, you
3 can get a maritime lien and attach the vessel.
4 And that is an ancient remedy that is designed
5 to ensure protection of the ward of the
6 admiralty. You cannot attach the vessel in a
7 Jones Act claim.

8 And so, if you are looking at these
9 just strictly from a bottom-line perspective,
10 what the Court recognized in Patterson and in
11 Cortes and in Mitchell is that the worker very
12 often brings all three claims, maintenance and
13 cure, unseaworthiness, and Jones Act. But that
14 can only lead to one remedy, and then the court
15 will decide after the conclusion of the
16 proceedings, you know, what that is, but the --
17 but the owner is not going to have to
18 double-recover.

19 But, for those reasons, it's very
20 important for the Court not to take the view
21 that simply because there is substantial
22 overlap, it's not a uniform --

23 JUSTICE BREYER: But can we go back?
24 Passengers, are there a lot of passenger suits?

25 MR. FREDERICK: I -- I -- I don't know

1 that, Your Honor. What -- what -- what I would
2 also --

3 JUSTICE BREYER: Which I assume there
4 are not because you would -- you would probably
5 know.

6 MR. FREDERICK: No, that is -- that's
7 correct.

8 JUSTICE BREYER: The --

9 MR. FREDERICK: But -- but also there
10 are situations where other employees of other
11 entities would have an unseaworthiness claim,
12 and let me give a prosaic example if I might
13 indulge the Court.

14 Say you've got a cruise ship that's
15 owned by a particular cruise line, but they
16 subcontract out to a Broadway company to have a
17 traveling music show on the cruise ship. Now,
18 under the Jones Act, it's the Broadway company
19 that is the employer of the musician, but if
20 the unseaworthiness condition causes an injury
21 to that worker, that worker has a suit against
22 the owner of the vessel for the unseaworthiness
23 causing the condition but not a Jones Act
24 remedy against his or her employer for that
25 particular injury.

1 And so you can see that there's
2 overlap, but it's not a perfect overlap.

3 JUSTICE KAGAN: So how do you think,
4 Mr. Frederick, we should think about the
5 question of the relationship between the Jones
6 Act, on the one hand, and the common law
7 maritime function, on the other?

8 Because there is this language in
9 Miles which seems to say broadly that, given
10 the Jones Act, given that the Jones Act exists,
11 courts should be wary of -- of doing things
12 with their common law hat on.

13 So how should we think about that?

14 MR. FREDERICK: Let me offer --

15 JUSTICE KAGAN: What's the line?

16 MR. FREDERICK: Here's the line.
17 First, start with the statute. What the
18 statute says is that the injured worker can
19 elect remedies. And what the Court in Townsend
20 explained is that that statutory language was
21 meant to preserve the preexisting common law
22 remedies.

23 Where wrongful death comes in is kind
24 of an historical anachronism and it resulted
25 from, frankly, a mistake of this Court in the

1 Harrisburg which wasn't recognized for some 90
2 years until Moragne was decided. And that
3 mistake in the Harrisburg, which held that
4 wrongful death claims are not permissible under
5 the general maritime law, ended up spawning a
6 number of statutory fixes that were -- arose in
7 state legislatures, as well as Congress through
8 the Death on the High Seas Act, the special
9 wrongful death provision of the Jones Act, and
10 then ultimately this Court's reassessment of
11 the correctness or incorrectness, as it were,
12 of the Harrisburg in overruling it in Moragne.

13 And so, by that time, what the Court
14 decided was that in the area of wrongful death,
15 which is where Congress --

16 JUSTICE KAGAN: So that makes Miles --

17 MR. FREDERICK: -- was legislating --

18 JUSTICE KAGAN: -- sound like a
19 one-off. But Miles, in -- in -- in some parts
20 at least, does not read like a one-off. It
21 reads like a general statement about the
22 relationship between the Jones Act and the
23 common law maritime law.

24 MR. FREDERICK: Well, in Townsend, the
25 Court did explain not that Miles is a one-off

1 but that it is proper and should be viewed
2 within the context in which it arises.

3 And it was that special context that
4 Townsend was able to rule that because of the
5 special progeny of the way wrongful death
6 occurred -- because, remember, wrongful death
7 claims were not cognizable at the common law.
8 Personal injury claims were.

9 And so, if you want to draw a line
10 right there, you have a very distinctive
11 history between wrongful death and
12 survivorship. My friend points out that the
13 survivorship part of the Miles holding, that
14 also was not a claim recognizable at common
15 law. And the reason was this very strict view
16 that the law was there to protect living
17 persons, and it was not there to compensate
18 people who had died.

19 JUSTICE KAVANAUGH: Isn't -- isn't
20 that an anomaly, as Mr. Waxman says, though, if
21 we were to agree with your position here?

22 MR. FREDERICK: No, I think that the
23 anomaly actually works in the other direction,
24 because the fact that many state courts, and
25 there are footnotes in our amicus briefs that

1 point out there were, you know, dozens of state
2 courts that recognized punitive damages for
3 wrongful death claims, even where they had
4 allowed for only a more circumscribed
5 compensatory damages in the wrongful death
6 space, suggests that state legislators did not
7 view an inconsistency between punitive damages,
8 which were done to deter, and compensatory
9 damages, which needed to look at the economic
10 realities of what the deceased worker was
11 providing as livelihood to his or her family.

12 And so, for that reason, the wrongful
13 death area has a very long and different
14 lineage and, therefore, also gives rise to
15 different views about how the interplay between
16 this Court acting under its powers of the
17 general maritime law should interface, where
18 Congress has spoken in the area of wrongful
19 death --

20 JUSTICE KAVANAUGH: I have --

21 MR. FREDERICK: -- and so --

22 JUSTICE KAVANAUGH: -- one other
23 question, which was you've talked about the
24 deterrent value of the punitive damages. We
25 have an impressive array of amicus briefs on

1 the other side from you that use severe
2 language saying this would harm the maritime
3 industry in the national economy.

4 So I just wanted to give you an
5 opportunity to respond to those amicus briefs.

6 MR. FREDERICK: Thank you, Justice
7 Kavanaugh. I'm happy to do that because,
8 notwithstanding all the rhetoric, there is no
9 citation of any situation where a particular
10 holding created the kind of economic harm that
11 they expostulate.

12 And this is an important thing, as was
13 pointed out, that for decades, punitive damages
14 have been allowed in unseaworthiness claims in
15 the Ninth Circuit, in the Eleventh Circuit,
16 both two of the major maritime circuits, and if
17 that harm were to come to pass, you would have
18 expected to see some evidence of that.

19 But, in fact, there's no evidence of
20 that. And I accept that many of the employers
21 on the other side would rather not face the
22 specter of having their own willful and wanton
23 misconduct punished.

24 But I would submit that part of the
25 objective of the law is to deter people from

1 acting in a way where the cost/benefit analysis
2 is such that you want to make the cost too high
3 in order to deter that willful harm is going to
4 result or at least be put at substantial risk.

5 So, for these reasons, notwithstanding
6 the array of the amici on the other side, I
7 would ask you to look at what the actual
8 evidence that they cite, and it's very, very
9 scant.

10 And, in fact, what this Court in the
11 Exxon versus Baker case did was to look at the
12 evidence of the effect of punitive damages.

13 Of course, there, there was an
14 extraordinarily high compensatory award. And
15 this Court concluded that, notwithstanding the
16 very high, over half a billion dollar
17 compensatory award, that punitive damages was
18 also available.

19 For the interests of the sea worker,
20 the crew member, who is often working at very,
21 very low wages, the idea that you would cut off
22 the one incentive that the employer has to
23 ensure that there is a safe workplace for a
24 functioning vessel would be extremely
25 hazardous, I would submit.

1 And I would note --

2 JUSTICE SOTOMAYOR: I'm sorry. I -- I
3 thought you told me the operators were
4 different than the shipowners in many cases.

5 So would unseaworthiness still be
6 available to the -- to the -- to the sea worker
7 against the operator?

8 MR. FREDERICK: Your Honor, the answer
9 to your question depends on what kind of
10 charter is arranged between the owner of the
11 vessel and the operator of the vessel.

12 For a bare boat charter, which was an
13 operation in our case, the operator stands in
14 the shoes by virtue of some very late 19th
15 Century law about the effect of bare boat
16 charters in creating a -- an owner pro hac vice
17 for this purpose.

18 In many other instances, the employer
19 is not acting as the owner pro hac vice and it
20 depends on the particular chartering
21 arrangement that is established between the
22 owner and the employer.

23 JUSTICE BREYER: Can I ask a trivial
24 question?

25 MR. FREDERICK: Yes, Your Honor.

1 JUSTICE BREYER: All right. I notice
2 that in the Heaton, it came from the District
3 of Massachusetts, which was the original
4 admiralty court and they still have to put an
5 oar over the judge's head.

6 And at the end of that, it says that
7 the A. Heaton is a case of injuries arising
8 from unseaworthiness or negligence was sued,
9 although the learned judge does not draw a
10 distinction.

11 MR. FREDERICK: With that, Your Honor,
12 we'll rest. I have no further words.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Three minutes, Mr. Waxman.

17 REBUTTAL ARGUMENT OF SETH P. WAXMAN

18 ON BEHALF OF THE PETITIONER

19 MR. WAXMAN: Thank you. I just have a
20 few points.

21 Justice Breyer, with respect to the
22 laundry list of little things that are
23 different, it's not our contention -- there is
24 no question that even in 1920, in the 1920s,
25 this Court repeatedly said that these are --

1 that the Jones Act is an alternative remedy for
2 loss resulting from wrongfully-caused injury.

3 And now -- nowadays, I cannot think of
4 a case, and no one has cited one, in which you
5 could get a recovery under the Jones Act but
6 not for unseaworthiness.

7 These specific differences between the
8 two were well-known to the Court in Miles.
9 They were well-known to the Court in Peterson
10 and all the other cases that have said that the
11 two are substitutes for each other.

12 On the other hand, vis-a-vis
13 maintenance and cure, the notion that, well,
14 because there could be cases where there is
15 injury suffered after and as a result of a
16 failure to undertake the humane duty of
17 maintenance and cure and that could be brought
18 under the Jones Act, well, they both overlap.

19 Consider this: In its very first
20 decision after the Jones Act was enacted, in
21 the Baltimore Steamship case and then again in
22 Peterson, this Court explained that res
23 judicata applies as between a Jones Act cause
24 of action and an unseaworthiness cause of
25 action that is not true with respect to

1 maintenance and cure.

2 For that reason, a Jones Act claim and
3 a unseaworthiness claim must be brought at the
4 same time, emphatically not true for
5 maintenance and cure.

6 The Court has held that the three-year
7 statute of limitations for causes of action
8 under general maritime law applies to
9 maintenance and cure.

10 But, following enactment of the Jones
11 Act, can no longer be applied to
12 unseaworthiness because they are cognate causes
13 of action for the same injury, and, therefore,
14 the shorter statute of limitations under the
15 Jones Act governs.

16 The evidence -- with respect, Justice
17 Ginsburg, the evidence of punitive damages in
18 unseaworthiness cases, with all due respect, is
19 not slim. It is utterly nonexistent.

20 And it's utterly nonexistent because,
21 at the time that this Court and English courts
22 were recognizing that punitive damages,
23 exemplary damages, could be applied in
24 maintenance and cure and the treatise writers
25 all obligingly verified that, even compensatory

1 damages were not available for a violation of
2 the general maritime law of unseaworthiness.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 12:07 p.m., the case
7 was submitted.)

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