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March 18, 2019

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## Are Punitive Damages Available When a Seaman Sues for Unseaworthiness?

### CASE AT A GLANCE

Seamen who are injured or the estate of a seaman killed on the job typically file a three-count complaint against their employers for maintenance and cure, Jones Act negligence, and unseaworthiness. The Supreme Court has held that punitive damages can be awarded for maintenance and cure but not for Jones Act negligence. Now, it must decide where unseaworthiness fits.

### *The Dutra Group v. Batterton* Docket No. 18-266

**Argument Date: March 25, 2019**  
**From: The Ninth Circuit**

by Robert M. Jarvis  
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#### INTRODUCTION

Seamen who are injured or the estate of a seaman killed on the job typically file a three-count complaint against their employers for maintenance and cure, Jones Act negligence, and unseaworthiness. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Supreme Court held that the Jones Act, 46 U.S.C. § 30104, prohibits nonpecuniary damages. Because punitive damages are nonpecuniary, they are unavailable under the Jones Act. (Pecuniary damages compensate the plaintiff for his or her losses. Punitive damages are nonpecuniary because they punish the defendant without reference to the plaintiff's losses.)

Following *Miles*, lower courts split over whether punitive damages were available with respect to maintenance and cure claims. In *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), the Court held that they were, distinguishing *Miles* in a 5–4 opinion by Justice Clarence Thomas. The same split now has emerged with respect to unseaworthiness claims.

#### ISSUE

Can a court award punitive damages to a seaman who is injured or killed due to a ship's unseaworthiness?

#### FACTS

On August 30, 2014, Christopher Batterton, a resident of Buena Park, California, was employed as a deckhand by The Dutra Group (TDG), a marine construction company headquartered in San Rafael, California. Batterton was assigned to work on three vessels: *EM 1106*, *SCOW 2*, and *SCOW 3*. The *EM 1106* was an excavator dredge; the *SCOW 2* and *SCOW 3* were its barges. The trio was being used on a marina project near Balboa Park in Newport Beach, California.

Batterton was aboard the *SCOW 2* while pressurized air was being pumped into one of its compartments. During this operation, a

metal hatch cover blew open, crushing Batterton's left hand and leaving him with permanent injuries. At the time of the accident, the compartment lacked an exhaust mechanism. Had it had one, the mishap would have been avoided because the exhaust mechanism would have relieved the pressure before it got too high.

On October 2, 2014, Batterton sued TDG in the United States District Court for the Central District of California. In his complaint, Batterton asserted claims for maintenance and cure, Jones Act negligence, and unseaworthiness. As part of his unseaworthiness claim, Batterton asked for punitive damages.

On November 3, 2014, TDG moved to have Batterton's demand for punitive damages struck. According to TDG, such damages are unavailable under federal maritime law. For support, TDG cited *Miles* and *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (*en banc*), *cert. denied*, 135 S. Ct. 2310 (2015).

On December 15, 2014, Magistrate Judge Patrick J. Walsh denied TDG's motion. *See Batterton v. Dutra Group*, 2014 WL 12538172 (C.D. Cal. 2014). Relying on *Townsend* and *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987), Judge Walsh wrote:

[A]s the Court sees it, *Evich's* holding that punitive damages are available in unseaworthiness claims under general maritime law has never been expressly or impliedly overruled. Nor is it clearly irreconcilable with *Miles* or any of the Supreme Court's other decisions since 1987. As such, it is still good law in this circuit.

2014 WL 12538172, at \*2.

On January 5, 2015, TDG requested permission to file an interlocutory appeal with the Ninth Circuit Court of Appeals

pursuant to 28 U.S.C. § 1292(b). On February 6, 2015, Judge Walsh certified the appeal. On November 18, 2015, the Ninth Circuit agreed to hear it.

On January 23, 2018, the Ninth Circuit unanimously affirmed Judge Walsh. See *Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir. 2018). In an opinion authored by Senior Circuit Judge Andrew J. Kleinfeld, the panel rejected TDG’s argument that *Miles* prohibits the awarding of punitive damages in unseaworthiness cases:

The Supreme Court’s more recent decision in *Atlantic Sounding Co. v. Townsend* speaks broadly: “Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure.” Unseaworthiness is a general maritime cause of action. *Townsend* reads *Miles* as limiting the availability of damages for loss of society and lost future earnings and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases. By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions “under general maritime law,” which includes unseaworthiness claims.

*Id.* at 1091–92 (footnotes omitted). On May 2, 2018, the Ninth Circuit denied TDG’s petition for rehearing.

On August 30, 2018, TDG filed a petition for a writ of *certiorari* with the Supreme Court. On December 7, 2018, the Court agreed to hear TDG’s appeal. See *The Dutra Group v. Batterton*, 139 S. Ct. 627 (2018). On January 14, 2019, it granted TDG’s request to dispense with printing of the joint appendix. See *Dutra Group v. Batterton*, 2019 WL 177584 (U.S. 2019).

## CASE ANALYSIS

Since the 19th century, a seaman injured on the job automatically qualifies for maintenance and cure. “Maintenance” covers the seaman’s room and board. Under “cure,” the shipowner pays for the seaman’s medical treatment. These duties continue until the seaman either returns to work or reaches a point of maximum medical recovery. Only in rare instances is a shipowner able to escape these obligations.

Also since the 19th century, an injured seaman has been able to sue a shipowner for “unseaworthiness.” To be successful, the seaman must show that the ship was unsafe. Because the shipowner’s duty to provide a seaworthy vessel is both absolute and nondelegable, the seaman does not need to prove that the shipowner was negligent.

In *The Osceola*, 189 U.S. 158 (1903), the Supreme Court held that seamen could not sue shipowners for negligence. In 1920, Congress vitiated this holding by passing the Jones Act. As a result, injured seamen now routinely bring a three-count complaint for maintenance and cure, Jones Act negligence, and unseaworthiness. Collectively, these causes of action are known as “The Holy Trinity.”

In the same year that it passed the Jones Act, Congress promulgated the Death on the High Seas Act (DOHSA), 46 U.S.C.

§§ 30301–30308. It permits suits for the death of any person killed on the high seas.

In *Moragne v. States Marine Line, Inc.*, 398 U.S. 375 (1970), the Supreme Court confronted the following facts. A longshoreman had been killed in Florida’s territorial waters. As a longshoreman, he was not covered by the Jones Act, and because he had died in state waters, he was not covered by DOHSA. Due to the wording of Florida’s wrongful death act, he also was not covered by state law. See *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968).

Believing that Moragne’s widow should not be left remediless, the Supreme Court held that she could sue under the general maritime law (GML), a body of judge-made law. To reach this conclusion, the Court overruled its decision in *The Harrisburg*, 119 U.S. 199 (1886), which had held that a maritime wrongful death suit could not be maintained in the absence of an authorizing statute.

These various laws and precedents collided in *Miles*, a case in which a seaman was stabbed to death by a fellow crew member. To recover for her loss, Mercedel W. Miles, the decedent’s mother, sued the shipowner for Jones Act negligence and unseaworthiness, arguing that the shipowner knew, or should have known, that the attacker had a propensity for violence.

Because Miles was not economically dependent on her son, she sought only “nonpecuniary” damages. The Court first held that both DOHSA and the Jones Act permit only pecuniary damages. It then rejected Miles’s argument that nonpecuniary damages are recoverable under the GML, reasoning that the GML must conform to statutory maritime law:

Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent’s lost future earnings.

498 U.S. at 37.

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1046, *rehearing denied*, 516 U.S. 1154 (1996), the Fifth Circuit held that punitive damages were not available for maintenance and cure claims. In reaching this decision, the Fifth Circuit relied on *Miles*:

[B]ut even if willful behavior is established, the Jones Act does not provide for punitive damages. Under the *Miles* uniformity principle, therefore, the same cause of action under the general maritime law for the failure to pay maintenance and cure cannot provide a punitive recovery, even if willfulness is demonstrated.

*Id.* at 1512 (emphasis in original).

*Guevara* was abrogated 14 years later in *Townsend*. According to Justice Thomas:

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. Limiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater preemptive effect to the Act than is required by its text, *Miles*, or any of this Court's other decisions interpreting the statute.

557 U.S. at 424–25 (footnote omitted).

In *McBride*, the Fifth Circuit, again relying on *Miles*, and using the same reasoning as in *Guevara*, decided that punitive damages cannot be awarded for unseaworthiness:

[T]he Court in *Townsend* recognized that “a seaman’s action for maintenance and cure is ‘independent’ and ‘cumulative’ from other claims such as negligence and that the maintenance and cure right is ‘in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act].” The Court agreed that “both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two.” Unlike the seaman’s remedy for damages based on negligence and unseaworthiness, “the Jones Act does not address maintenance and cure or its remedy.” Thus, in contrast to the action for damages based on unseaworthiness, in an action for maintenance and cure it is “possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which ‘Congress has spoken directly.’”

768 F.3d at 389–90 (footnotes omitted).

In *Tabingo v. American Triumph, LLC*, 391 P.3d 434 (Wash. 2017), cert. denied, 138 S. Ct. 648 (2018), the Washington State Supreme Court disagreed with *McBride*:

The United States Supreme Court...analyzed *Miles* in *Townsend*...While the Court stated that the “reasoning of *Miles* remains sound,” it also noted that the reasoning in *Miles* is not universally applicable. 557 U.S. at 420, 129 S.Ct. 2561. Because the cause of action in *Townsend* and the remedy sought were both “well established before the passage of the Jones Act,” and because Congress had not spoken directly to the issue, punitive damages for maintenance and cure were appropriate. *Id.* at 420–21, 129 S.Ct. 2561. The *Miles* rationale did not apply. We use that same reasoning here. Claims for unseaworthiness predate the Jones Act and are not based

on a statutory remedy. Further, as noted in *Townsend*, the Jones Act does not directly address damages for general maritime claims. *Id.* at 420, 129 S.Ct. 2561. There is no other indication that unseaworthiness should be excluded from the general maritime rule. Because of this, *Miles* does not restrict a general maritime claim for unseaworthiness.

*Id.* at 439–40.

As explained above, the Ninth Circuit in *Batterton* similarly rejected *McBride*:

*McBride*, a sharply divided Fifth Circuit en banc decision, holds that “punitive damages are non-pecuniary losses” and therefore may not be recovered under the Jones Act or under the general maritime law...*McBride* has five extensive and scholarly opinions addressing all sides of the question. Six dissenters note that *Miles* “addressed the availability of loss of society damages to non-seamen under general maritime law, not punitive damages,” and that “*Townsend* announced the default rule that punitive damages are available for actions under the general maritime law (such as unseaworthiness).”

...

It is...true, as Dutra argues, that if we were to interpret *Miles* broadly and *Townsend* narrowly, as the Fifth Circuit has in *McBride*, then we might infer that *Miles* [prohibits punitive damages in unseaworthiness cases]. But we would then have to disregard *Miles*’s statement that the Jones Act “does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.” The Fifth Circuit’s leading opinions in *McBride* are scholarly and carefully reasoned, but so are the dissenting opinions, which to us are more persuasive.

880 F.3d at 1093, 1095–96 (footnotes omitted).

Thus, just as it had to decide in *Townsend* whether *Miles* prohibited punitive damages for maintenance and cure claims, now in *Batterton* the Court must decide whether *Miles* prohibits punitive damages for unseaworthiness claims.

## SIGNIFICANCE

Punitive damages can greatly enhance a plaintiff’s recovery. Thus, defendants routinely try to cut off a plaintiff’s ability to seek them. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), however, the Supreme Court, resolving a question that had been long debated, held that punitive damages normally are available in maritime cases. As a result, it ordered Exxon to pay \$500 million in punitive damages to the victims of the 1989 EXXON VALDEZ oil spill in Alaska.

Given *Baker* and *Townsend*, as well as *Evich*, its own pre-*Miles* precedent, it is not surprising that the Ninth Circuit ruled as it did in *Batterton*. Nevertheless, *McBride* gives TDG hope, especially if one accepts its idea that maintenance and cure is a distinct cause

of action, while Jones Act negligence and unseaworthiness simply give injured seamen two bites at the same apple.

The numerous amicus briefs filed in support of TDG make it clear just how eager marine employers are to win this case. Indeed, while losing *Townsend* stung, losing *Batterton* would sting even more. This is because punitive damages are easily avoided when it comes to maintenance and cure claims. By simply paying the plaintiff in a timely fashion, either with or without a “reservation of rights,” the employer does not have to worry about punitive damages. Moreover, as maintenance and cure claims are covered by workers’ compensation, the employer, in a sense, has prepaid them. And most maintenance and cure claims are relatively small. This is especially true when it comes to maintenance, which courts generally award at a rate of \$20–\$30 per day.

Unseaworthiness claims, however, cannot be easily guarded against. Moreover, when such a claim arises, an insurer may decide that the shipowner’s action, or lack of action, has voided the policy. Further, a jury is much more likely to award significant punitive damages for a dangerous ship than for a mishandled maintenance and cure payment.

As a result, the amicus briefs filed in support of TDG warn that if the industry is forced to pay punitive damages for unseaworthiness claims, maritime commerce will be disrupted, litigation will increase, and the cost of waterborne goods will soar.

In contrast, *Batterton* insists that courts must be able to award punitive damages to protect seamen from unscrupulous operators:

Petitioner advocates a *per se* rule that an injured seaman can never recover punitive damages under the general maritime law doctrine of unseaworthiness, no matter how egregious a defendant shipowner’s fault may be. Even if a shipowner made a callous decision to send a doomed rust-bucket to sea in hopes of collecting on its insurance policy, petitioner’s proposed rule would deny sailors who survive the inevitable sinking of the vessel their right under the general maritime law to seek punitive damages—even for their employer’s deliberate wrong-doing.

In a few months, we will know which of these arguments the Supreme Court finds more compelling.

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## AMICUS BRIEFS

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At-Sea Processors Association, et al. (Evan M. Tager, 202.263.3000)

Atlantic Sounding Co., Inc. (Kenneth G. Engerrand, 713.629.1580)

Dredging Contractors of America and Council for Dredging & Marine Construction Safety (William P. Doyle, 202.737.2674)

Fishing Vessels’ Reserve, et al. (Michael J. Cummins, 415.348.6000)

International Association of Drilling Contractors (James T. Brown, 713.917.0888)

The American Waterways Operators (Barbara L. Holland, 206.464.3939)

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