Washington Law Review

Volume 95 | Number 3

10-1-2020

The Abandoned Wards of Admiralty: The Supreme Court's Course Change on the Availability of Punitive Damages to Seamen in Unseaworthiness Claims

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THE ABANDONED WARDS OF ADMIRALTY: THE SUPREME COURT'S COURSE CHANGE ON THE AVAILABILITY OF PUNITIVE DAMAGES TO SEAMEN IN UNSEAWORTHINESS CLAIMS

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Abstract: This Comment compares *Dutra Group v. Batterton* and *Tabingo v. American Triumph LLC*, two significant but contradictory admiralty decisions on the availability of punitive damages in unseaworthiness claims. It argues that the Washington State Supreme Court's decision in *Tabingo*—that punitive damages should be permissible in unseaworthiness claims—is far better from both policy and doctrinal standpoints. From a doctrinal perspective, maritime law has traditionally permitted punitive damages in admiralty cases. Therefore, it would have been more appropriate for the Court to adhere to the principle that it is better to allow a remedy in admiralty proceedings so long as an inflexible rule does not prohibit it. From a policy standpoint, employers do not require the same protections as seamen.

This Comment also analyzes how the United States Supreme Court in *Batterton* confirmed its unwillingness to use its explicit grant of admiralty jurisdiction by rejecting an admiralty remedy because such remedy was not explicitly provided for by Congress. *Batterton* also reflects the Supreme Court's shift from considering seamen the wards of admiralty to stating there is no longer any policy need to protect them. The Court abandoned the nearly 200-year-old determination for a weak policy argument with little explanation. The stark implication flowing from this decision is that a cost-benefit analysis for employers now makes it cheaper to kill seamen than to make them sick.

* J.D. Candidate, University of Washington School of Law, Class of 2021. I would like to thank Professors Craig Allen and Hugh Spitzer for their valuable guidance throughout the drafting process. I would also like to thank the *Washington Law Review* editorial staff for their insightful edits and support. The author is an officer in the U.S. Coast Guard. The views expressed herein are those of the author and are not to be construed as official or reflecting the views of the Commandant or of the U. S. Coast Guard. The External Affairs Manual, COMDTINST M5700.13, Chapter 6.

> "From now on, the occasional employer delinquent in paying hospital bills will receive heavy punishment, while the occasional shipowner supplying recklessly and outrageously an unsafe ship that causes the death of one or more seamen will do so with impunity, while laughing all the way to the bank, paying only the relatively minor pecuniary damages that could be proven. The old joke of the pre-Moragne era maintains its macabre humor. It is still cheaper to kill them than to make them sick."[1]

INTRODUCTION

A common adage among sailors is "one hand for yourself, one hand for the ship."[2] Sailors hear many phrases like this daily—a constant reminder of the dangers of working at sea. Sailors train relentlessly to minimize these dangers and, as the United States Coast Guard Academy motto explains, "the sea yields to knowledge."[3] Unfortunately, the seaworthiness of the vessels that seamen[4] work on is not completely within their control. Seamen can bring a claim of unseaworthiness if they get injured as a result of the vessel. A seaman's unseaworthiness claim stems from injuries suffered due to a vessel owner's failure "to furnish a vessel and appurtenances reasonably fit for their intended use."[5] No matter how much knowledge sailors gain in seamanship, navigation, and damage control, they are still subject to the limitations of the vessels they sail on and the crew members they sail with.

Allan Tabingo was a deckhand trainee aboard a fishing trawler.[6] He was on his hands and knees sweeping the final fish through a hatch below deck when his fellow crew member started to close the hatch.[7] Though the

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1. Attilio Costabel, *Punitive Damages in Unseaworthiness. The Lawmaker Giveth, The Lawmaker Taketh*, 50 J. MAR. L. & COM. 313, 329 (2019) (emphasis omitted).

2. TRISTAN JONES, ONE HAND FOR YOURSELF, ONE FOR THE SHIP (1990).

3. *Facilities*, COAST GUARD ATHLETIC ACTIVITY FUND, https://uscgasports.com/information/facilities [https://perma.cc/ATW6-LK2W].

4. The term "seaman" is used throughout this Comment instead of a gender-inclusive term like "seafarer" because seaman status is a term of art in Admiralty Law. Seamen derive special protections from establishing that status in accordance with case law and statutes. Seaman status is a nuanced area of Admiralty Law that is beyond the scope of this Comment. *See* Carlos Felipe Llinás Negret, *Sea Worthy: To Protect Seafarers, Congress and the Federal Courts Have Created a Strong Set of Common Law Rights and Privileges*, 37 L.A. LAW. 34 (2014).

5. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

6. "[A] large conical net dragged along the sea bottom in gathering fish or other marine life." *Trawl*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/trawling [https://perma.cc/3D9R-J794]; Tabingo v. Am. Triumph LLC, 188 Wash. 2d 41, 44, 391 P.3d 434, 436 (2017).

7. *Tabingo*, 188 Wash. 2d at 44, 391 P.3d at 436.

crew member realized his mistake and attempted to stop the hatch from closing, its control handle was broken.[8] The hatch closed on Tabingo's hand and he suffered severe injuries, including the amputation of two fingers.[9] Similarly, Christopher Batterton was a deckhand aboard a scow.[10] While working in navigable waters, his fellow crew members erroneously pumped pressurized air into a compartment.[11] This caused the hatch[12] cover to blow open and crush Batterton's hand between the hatch and the bulkhead.[13] His hand was permanently disabled from the accident.[14] Both seamen's injuries were the subject of major admiralty suits: *Dutra Group v. Batterton*,[15] a United States Supreme Court case decided in June 2019,[16] and *Tabingo v. American Triumph LLC*,[17] a Washington State Supreme Court case decided in March 2017.[18]

Although these cases presented a variety of claims, the highest court in each case ultimately only considered the pleas for punitive damages due to the unseaworthiness of the vessels.[19] The Washington State Supreme Court held in *Tabingo* that a plaintiff may recover punitive damages on a claim of unseaworthiness.[20] However, that decision was overruled by the Supreme Court's holding in *Batterton* that a plaintiff may not recover punitive damages on an unseaworthiness claim.[21] *Batterton* and *Tabingo* arrived at opposite conclusions by relying on different cases—*Miles v.*

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8. *Id.* Allegedly American Seafoods was aware of the broken handle for two years prior to the accident. *Id.*

9. *Id.*

10. "[A] large flat-bottomed boat with broad square ends used chiefly for transporting bulk material (such as ore, sand, or refuse)." *Scow*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/scow [https://perma.cc/J95G-5ULK]. Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2282 (2019).

11. *Batterton*, 139 S. Ct. at 2282.

12. "[A]n opening in the deck of a ship." *Hatch*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hatch [https://perma.cc/8GW4-NSHB].

13. *Batterton*, 139 S. Ct. at 2282. "[A]n upright partition separating compartments." *Bulkhead*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bulkhead [https://perma.cc/3AZ7-M6E8].

14. *Batterton*, 139 S. Ct. at 2282.

15. __ U.S. __, 139 S. Ct. 2275 (2019).

16. *Id.* at 2275.

17. 188 Wash. 2d 41, 391 P.3d 434 (2017).

18. *Id.*

19. *Batterton*, 139 S. Ct. at 2282; *Tabingo*, 188 Wash. 2d at 44, 391 P.3d at 436.

20. *Tabingo*, 188 Wash. 2d at 43, 391 P.3d at 436.

21. *Batterton*, 139 S. Ct. at 2278. This decision is striking, given that Washington is one of the few states that does not regularly award punitive damages. *Tabingo*, 188 Wash. 2d at 52, 391 P.3d at 440.

Apex Marine Corp.[22] and *Atlantic Sounding Co. v. Townsend*,[23] respectively. This Comment explores how *Batterton* and *Tabingo* applied these precedents to reach differing conclusions. This Comment argues that punitive damages in unseaworthiness claims should be allowed, from both a doctrinal and policy standpoint.

This Comment proceeds in three Parts. Part I provides an overview of general maritime law. It discusses the sources of general maritime law, remedies available to seamen, and the history of seamen as the wards of admiralty. Part II compares *Batterton* and *Tabingo*. It explores the reasoning and conclusions of those cases. Finally, Part III analyzes why *Tabingo* is a stronger case from both a doctrinal and policy standpoint. It offers a critique of the *Batterton* Court's misguided shift in admiralty decision making. *Batterton* illustrates the Supreme Court's unwillingness to allow an admiralty remedy that is not expressly authorized by Congress despite acting as a common law court sitting in admiralty.[24] *Batterton* also reflects the Court's move away from its 200-year-old jurisprudence that considered seamen the wards of admiralty.[25] The Court stated that it no longer saw a policy need to protect seamen.[26] Ultimately, this Comment concludes that the *Batterton* Court should have adhered to the principle that if there is no evidence Congress has sought to restrict a remedy, and such remedy does not conflict with Congress's pursuit of "uniformity in the exercise of admiralty jurisdiction," then such a remedy should be permitted.[27]

I. OVERVIEW OF GENERAL MARITIME LAW

The Constitution "implicitly directs federal courts" to preside over admiralty cases "in the manner of a common law court."[28] If Congress is silent on a matter, the federal courts establish the "'amalgam of traditional common-law rules, modifications of those rules, and newly created rules'

22. 498 U.S. 19 (1990).

23. 557 U.S. 404 (2009).

24. "[This Court] cannot sanction a novel remedy here unless it is required to maintain uniformity with Congress's clearly expressed policies," particularly those in the "Merchant Marine Act of 1920 (Jones Act), which codified the rights of injured mariners" and "incorporated the rights provided to railway workers under the Federal Employers' Liability Act (FELA)." *Batterton*, 139 S. Ct. at 2278, 2281.

25. Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. Me. 1823) (No. 6,047).

26. *Batterton*, 139 S. Ct. at 2287.

27. *Miles*, 498 U.S. at 26.

28. *Batterton*, 139 S. Ct. at 2278 (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, 489–90 (2008) (internal quotation marks omitted)).

that forms the general maritime law."[29] However, the courts must respect "Congress's persistent pursuit of 'uniformity in the exercise of admiralty jurisdiction.'"[30] This balancing act has created tension regarding how much weight Congress has in the creation of admiralty law versus the common law admiralty courts.[31] Without congressional guidance, courts have struggled to adapt admiralty law to the modern age of seafaring, to come to a consensus on how much protection to give seamen, and to determine the modern arc of admiralty law.

A. The Sources of General Maritime Law

The United States Constitution's Admiralty Clause states that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[32] The Clause empowers Congress to grant the District Courts maritime jurisdiction.[33] Congress exercised this power through the enactment of section 9 of the Judiciary Act of 1789.[34] Thus, federal courts are empowered by the Admiralty Clause to develop the general maritime law.[35] While federal courts can develop this law, the Admiralty Clause also grants Congress the authority to enact statutes setting the limits of maritime law, and by extension, the federal courts' powers in admiralty cases.[36]

If a statute and the general maritime law conflict in an admiralty case, then deference is given to the statute.[37] However, there is a rising trend

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29. *Id.* (quoting E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864–65 (1986)).

30. *Id.* (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401 (1970)).

31. *Id.* at 2278–79.

32. U.S. CONST. art. III, § 2, cl. 1.

33. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360 (1959).

34. *Id.* at 361 (1959). Congress gave the District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving-to-suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." Judiciary Act of September 24, 1789, c. 20, § 9, 1 Stat. 76–77 (amended 1949). This grant of jurisdiction is now codified at 28 U.S.C.A. § 1333.

35. Yamaha Motor Corp., USA v. Calhoun, 516 U.S. 199, 200 (1996). The general maritime law is also referred to as the federal maritime law. *Id.*

36. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917). "(1) It empowered Congress to confer admiralty and maritime jurisdiction on the 'Tribunals inferior to the Supreme Court' which were authorized by Art. I. § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' . . . and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution." *Romero*, 358 U.S. at 360–61.

37. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries

among federal courts toward *complete* deference.[38] Complete deference in this context means that the court declines to develop the general maritime law even if Congress is silent.[39] As one scholar noted, "[t]he *general* maritime law of the United States—a body of general, judge-made law developed from centuries-old transnational customary legal principles—appears to be slowly but steadily on its way out."[40] Many admiralty experts have expressed concern about the implications of this shift on how admiralty cases will be decided.[41]

Miles v. Apex Marine Corp, decided in 1990, is an example of the complete deference approach.[42] In *Miles*, the mother of a seaman brought a suit against the owners of a vessel after her son was repeatedly stabbed and killed by a fellow crew member.[43] The United States Supreme Court held that she could not recover loss of society damages[44] for the wrongful

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imposed by federal legislation.").

38. *See* Michael Sevel, *Lost at Sea: The Continuing Decline of the Supreme Court in Admiralty*, 71 U. MIAMI L. REV. 938, 938 (2017) ("For the first 200 years of its history, the United States Supreme Court served as the primary leader in the development of, and its cases the primary source of, the admiralty and maritime law of the United States. That appears to be changing. The Court's admiralty cases over the last quarter century indicate that it is slowly giving up its traditional leading role in creating and developing rules of admiralty law, and instead deferring to Congress to make those rules, a trend that is tantamount to abandoning its Article III constitutional duty to serve as the country's only national admiralty court.").

39. *See* John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 284 (1993) ("As Justice Story concluded, even a strong implication by Congress is insufficient to deprive admiralty judges of their duty to enunciate the law in conformity with governing maritime principles. Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution.").

40. Michael Sevel, *Lost at Sea: The Continuing Decline of the Supreme Court in Admiralty*, 71 U. MIAMI L. REV. 938, 941 (2017) (emphasis in original).

41. *See, e.g.*, David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for A National Admiralty Court*, 29 J. MAR. L. & COM. 275, 303–04 (1998) (characterizing the current state of admiralty litigation as "a mess" and arguing a High Court of Admiralty would better serve maritime law consumers in the United States); John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 249 (1993) (arguing the Supreme Court justices had abandoned their role as admiralty judges and had become followers rather than leaders by refusing to enunciate maritime law and always looking to Congress); Lee A. Handford, *Do Not Fear to Tread on Solid Ground: The Role of the Supreme Court in Furthering Uniformity in Admiralty Law*, 10 U.S.F. MAR. L.J. 235, 275 (1999) (arguing the Supreme Court should begin its analysis when creating law "with the assumption that the Supreme Court is the primary proponent of federal admiralty law").

42. Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

43. This case presented a particularly horrendous set of facts in that Ludwick Torregano, a twenty-four-year-old seaman, was stabbed at least sixty-two times by the chief cook while their ship was docked in Vancouver, Washington. *See* Miles v. Melrose, 882 F.2d 976, 980 (5th Cir. 1989).

44. In this case, the decedent's mother, in her individual capacity, sought recovery "for her son's wrongful death, including damages for loss of financial support and services from her son and for 'loss of society.' . . . 'The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention,

death of her son due to the unseaworthiness of the ship.[45] The Court chose to limit the plaintiff's remedies because a claim was also brought for negligence under the Jones Act.[46] The Court concluded that maritime tort law was "dominated by federal statute" and it did not want to exceed the Jones Act's limits on recovery in survival actions.[47] The uniformity principle derived from *Miles* established that if a statute did not allow particular damages then a similar general maritime law claim could not allow them.[48] Even though *Miles* did not discuss punitive damages, some lower courts have expanded upon this decision to preclude seamen from recovering punitive damages in any cause of action.[49]

Nearly twenty years later in *Atlantic Sounding Co. v. Townsend*, the Court did not use the complete deference approach but instead explained that *Miles*'s holding was intended to be narrow and fix an issue that had developed in the wrongful death line of cases.[50] The Jones Act and Death on the High Seas Act[51] preempted the "general maritime rule that denied any recovery for wrongful death" by creating a remedy for wrongful death on the high seas or in territorial waters.[52] *Miles* was intended to create uniformity between the statutes and the general maritime law remedies

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companionship, comfort, and protection.'" Brief for Respondent at 6, Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2282 (2019) (No. 18-266).

45. *Miles*, 498 U.S. at 21, 37.

46. The Jones Act provides a statutory cause of action against the seaman's employer if the seaman suffers injuries or dies due to the negligence of their employer, the vessel owner, or crew members. *See* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001).

47. *Miles*, 498 U.S. at 36.

48. *See id.* at 37; *Batterton*, 139 S. Ct. at 2286.

49. David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles*,* Baker*, and* Townsend, 70 LA. L. REV. 463, 466–67 (2010). It is worth noting that Professor Robertson represented Batterton in *Dutra Group. v. Batterton*.

This ultimately resulted in a circuit split on whether punitive damages were available in maintenance and cure claims, which was resolved by the Supreme Court in *Atlantic Sounding Co. v. Townsend*.

The ancient duty of maintenance and cure "concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis*, 531 U.S. at 441. *See generally* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527–28 (1938). "'Maintenance' includes food and lodging at the ship's expense, and 'cure' refers to medical treatment." Atl. Sounding Co. v. Townsend, 557 U.S. 404, 413 (2009). A separate circuit split on whether punitive damages are available in unseaworthiness claims was resolved by the Supreme Court in *Batterton*. *Batterton*, 139 S. Ct. at 2275.

50. *Atl. Sounding*, 557 U.S. at 419.

51. Unlike the Jones Act, which only provides a wrongful death cause of action for personal representatives of seamen, the Death on the High Seas Act (DOHSA) provides a wrongful death cause of action for personal representatives of anyone killed on the high seas. *See Miles*, 498 U.S. at 23–24.

52. *Atl. Sounding*, 557 U.S. at 419.

available in wrongful death cases.[53] Therefore, it made sense in *Miles* to exercise complete deference and look to statutes "to determine the remedies available under the common-law wrongful-death action."[54] *Miles* is an example of complete deference because Congress was silent on unseaworthiness claims, although the Court declined to further develop the law.

The *Atlantic Sounding* Court also firmly declared that damages do not have to be narrowed to the "lowest common denominator approved by Congress" in traditional general maritime law causes of action.[55] If Congress is silent on a general maritime law cause of action, the Court declared it would refuse to "attribute words to Congress that it has not written."[56] Instead of deferring to a congressional act that was not directly on point, the Court chose to declare that punitive damages were permissible in the claim at issue.[57]

In *Exxon Shipping Co. v. Baker*,[58] decided in 2008, Justice Stevens highlighted that the primary evidence the Court should consider in deciding to permit an admiralty remedy is whether Congress had "affirmatively chosen *not* to restrict the availability of a particular remedy."[59] He stated that if there was such evidence, the Court should exercise judicial restraint in denying a remedy unless some other special justification existed.[60] Looking to prior precedent, he stressed the Court should "adhere to the principle that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"[61] This principle is consistently expressed throughout admiralty

53. *See Miles*, 498 U.S. at 26.

54. *Atl. Sounding*, 557 U.S. at 420.

55. *Id.* at 424.

56. *Id.*

57. *Id.* For information about the maintenance and cure cause of action, see *infra* section I.B.

58. 554 U.S. 471 (2008).

59. *Id.* at 516 (Stevens, J., concurring in part and dissenting in part) (emphasis in original).

60. *Id.*

61. *Id.* at 522 (first quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970); and then quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865) (No. 12,578)). Justice Harlan, writing for the majority in *Moragne*, supported this principle with abundant case citations to other federal maritime cases that had reached the same result using similar reasoning. *Moragne*, 398 U.S. at 387–88 (first citing The Columbia, 27 F. 704 (S.D.N.Y. 1886); then citing The Manhasset, 18 F. 918 (E.D. Va. 1884); then citing The E.B. Ward, Jr., 17 F. 456 (C.C.E.D. La. 1883); then citing The Garland, 5 F. 924 (E.D. Mich. 1881); then citing Holmes v. O. & C.R. Co., 5 F. 75 (D. Or. 1880); then citing The Towanda, 24 F. Cas. 74 (C.C.E.D. Pa. 1877) (No. 14,109); then citing Plummer v. Webb, 19 F. Cas. 894 (D. Me. 1825) (No. 11,234); and then citing Hollyday v. The David Reeves, 12 F. Cas. 386 (D. Md. 1879) (No. 6,625)).

opinions. Thus, if there is no evidence that Congress has sought to restrict a remedy, and such remedy does not conflict with Congress's pursuit of "uniformity in the exercise of admiralty jurisdiction," then such a remedy should be permitted.[62]

As shown in the Supreme Court cases described above, there is a wide range of views on what the appropriate power delegation should be between Congress and the judiciary.[63] On one end of the spectrum is "extreme deference-to-legislature,"[64] or complete deference, which includes the majority opinion in *Miles*.[65] On the other end of the spectrum lies "extreme judicial-dominance."[66] Representative of this end is Judge John R. Brown's criticism of the *Miles* Court, which asserts that the Court "abandoned its Constitutional duty of enunciating maritime law."[67] Judge Brown went on to describe admiralty judges as followers rather than leaders.[68]

B. Remedies Available to Seamen

Seamen, due to "their exposure to the 'perils of the sea,'" have a trilogy of "heightened legal protections" available to them that can be brought simultaneously and provides recovery in the event of injury or illness.[69] The two general maritime law causes of action are *maintenance and cure* and *unseaworthiness*.[70] The statutory cause of action for negligence arises under the Jones Act.[71] The trilogy of seamen's remedies has been "universally recognized as . . . growing out of the status of the seaman and [their] peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected."[72]

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62. Miles v. Apex Marine Corp., 498 U.S. 19, 26 (1990).

63. DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS 106–07 (3d ed. 2015).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 107.

68. *Id.*

69. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995).

70. *Id.*

71. *Id.*

72. *Id.* (first quoting McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 354 (1991); and then quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)).

1. The Ancient Duty of Maintenance and Cure

The ancient duty[73] of maintenance and cure "concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship."[74] *Serving the ship* has been interpreted to include injuries sustained while seamen are "departing on or returning from shore leave [even] though [they have] at the time no duty to perform for the ship"[75] and "injuries received during the period of relaxation while on shore."[76] Similar to a worker's compensation no-fault system, this contractual duty "does not rest upon negligence or culpability on the part of the owner or master . . . nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness."[77] This duty extends until the seaman reaches the maximum cure possible.[78] If the employer does not provide the maintenance and cure owed, they are liable "for any compensatory damages (e.g., enhancement of the injury, costs of finding alternative medical care, pain and suffering) proximately resulting from the employer's failure to pay."[79] Pursuant to the Supreme Court's decision in *Atlantic Sounding*, an employer can also be subject to punitive damages if their failure to provide maintenance and cure reaches an especially negligent and blameworthy level.[80]

2. A Seaman's Remedy for Injuries Sustained Due to the Unseaworthiness of the Vessel

An unseaworthiness claim stems from a seaman's injuries caused by a vessel owner's failure "to furnish a vessel and appurtenances reasonably

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73. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938).

74. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001). *See generally Calmar S.S. Corp.*, 303 U.S. at 527–28. "'[M]aintenance' includes food and lodging at the expense of their ship, and 'cure' refers to medical treatment." Atl. Sounding Co. v. Townsend, 557 U.S. 404, 413 (2009).

75. Warren v. United States, 340 U.S. 523, 529 (1951) (referencing the Court's interpretation of "in service of the ship" in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 733–34 (1943)).

76. *Id.* at 530.

77. *Calmar S.S. Corp.*, 303 U.S. at 527–28 (first citing Cortes v. Balt. Insular Line, 287 U.S. 367, 371 (1932); then citing The City of Alexandria, 17 F. 390 (S.D.N.Y. 1883); then citing The Mars, 149 F. 729, 731 (3d Cir. 1907); then citing Sorensen v. Alaska S.S. Co., 243 F. 280 (W.D. Wash. 1917), *aff'd*, 247 F. 294 (9th Cir. 1918); then citing Brown v. The Bradish Johnson, 4 F. Cas. 356 (C.C.D. La. 1873) (No. 1,992); and then citing The Wensleydale, 41 F. 829, 831 (E.D.N.Y. 1890)).

78. Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2288 n.2 (2019) (Ginsburg, J., dissenting) (citing 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 26:1, ¶ 4 (5th ed. 2003)).

79. Ethan Kerstein, *Navigating Still-Murky Waters: The Search for Punitive Damages in an Injured Seaman's Unseaworthiness Action*, 97 TEX. L. REV. 673, 679 (2019).

80. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009).

fit for their intended use."[81] A vessel could be deemed unseaworthy due to a number of conditions, such as: defective gear, insufficient crew size or training, appurtenances in disrepair, or improper stowage or loading of cargo.[82] Seaworthiness is an absolute, non-delegable duty owed by the vessel's owner to the seaman.[83] However, the Supreme Court has explained that seaworthiness is not a standard of perfection—the ship is not expected to be able to weather all storms.[84] Rather, it requires the "vessel [be] reasonably suitable for her intended service."[85] The Court has consistently recognized this duty as "completely independent of [the owner's] duty under the Jones Act to exercise reasonable care."[86]

3. The Jones Act Cause of Action for Negligence Against a Seaman's Employer

The Jones Act was enacted by Congress to fill a gap—a seaman could pursue a cause of action against the vessel owner for injuries caused by the vessel's unseaworthiness but could not pursue a cause of action for injuries caused by negligent acts of the master or other crew members.[87] The Jones Act provides a statutory cause of action against the seaman's employer if the seaman suffers injuries or dies due to the negligence of their employer, the vessel owner, or crew members.[88]

Under the Jones Act, seamen, or their personal representatives, may bring civil actions against their employers and are given the right to a jury trial.[89] The scope of a "civil action" is defined "by reference to the federal laws 'regulating recovery for personal injury to, or death of, a railway employee.' Congress thus incorporated the Federal Employers' Liability

81. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960).

82. *See* Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971).

83. *See Mitchell*, 362 U.S. at 549.

84. *See id.* at 550.

85. *Id.*

86. *Id.* at 549 (first citing Pope & Talbot, Inc., v. Hawn, 346 U.S. 406 (1953); then citing Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1953); then citing Rogers v. U.S. Lines, 347 U.S. 984 (1954); then citing Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955); then citing Crumady v. The J. H. Fisser, 358 U.S. 423 (1959); and then citing United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959)).

87. The Osceola, 189 U.S. 158, 173 (1903). "Congress enacted the Jones Act primarily to overrule *The Osceola*, . . . in which this Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence." Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415 (2009).

88. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001).

89. 46 U.S.C. § 30104.

Act ('FELA')."[90] Notably, FELA does not limit damages, permitting injured railroad workers to recover pecuniary and non-pecuniary damages.[91] The Court has consistently held that the Jones Act preserves seamen's general maritime law causes of action of maintenance and cure and unseaworthiness.[92]

4. Differences Between Unseaworthiness and Jones Act Claims

There are important differences between unseaworthiness and Jones Act negligence claims, and the Court has "painstakingly and repeatedly" emphasized the distinction.[93] An unseaworthiness claim rests on the condition of the vessel—it does not matter if an owner was negligent in causing that condition: they are still liable for any injuries caused by the vessel's unseaworthiness.[94] Thus, "liability based upon unseaworthiness is wholly distinct from liability based upon negligence."[95] Furthermore, unseaworthiness claims require the plaintiff to establish proximate causation but Jones Act negligence claims have a lower burden of causation.[96] However, this is counterbalanced by the fact that "[i]t is generally easier to prove a deficiency in the vessel than that the employer was negligent."[97]

Another difference lies in the defendant: a proper Jones Act defendant is the seaman's employer, while an unseaworthiness action defendant is the vessel owner or operator.[98] Even though the owner and employer may be one and the same, that is not always the case.[99] Where the owner and

90. Brief for Respondent, *supra* note 44, at 4 (citation omitted).

91. *Id.*

92. *See Atl. Sounding*, 557 U.S. at 416. "Because the then-accepted remedies for injured seamen arose from general maritime law . . . it necessarily follows that Congress was envisioning the continued availability of those common-law causes of action." *Id.*; *see also* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 222 n.2, 224 (1958).

93. *See* Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971). "A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law." *Id.* at 498.

94. *Id.*

95. *Id.*

96. Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1463 (6th Cir. 1993).

97. ROBERTSON ET AL., *supra* note 63, at 185 (citing Perkins v. Am. Elec. Power Fuel Supply, 246 F.3d 593 (6th Cir. 2001) (holding that a towboat deckhand injured by a defective tool had failed to prove Jones Act negligence but was nevertheless entitled to recover for unseaworthiness)).

98. Mahramas v. Am. Exp. Isbrandtsen Lines, Inc., 475 F.2d 165, 169 (2d Cir. 1973).

99. *See, e.g.*, *id.* (concluding an injured seaman was an employee of House of Albert assigned to work aboard the S.S. INDEPENDENCE, a vessel owned by American Export Isbandtsen Lines).

employer are not the same, a defendant may only bring an unseaworthiness claim against the vessel owner and a Jones Act claim against the employer.

C. The History of Seamen as the Wards of Admiralty

Since the nineteenth century seamen have been considered "emphatically the wards of [] admiralty"[100] and always received "a special solicitude for [their] welfare."[101] Justice Story was the first to coin seamen as the *wards of admiralty* in 1823, stating that they should be "treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, [and] wards with their guardians."[102] They were afforded these remedies because, "[a]t the time, 'seamen led miserable lives.'"[103] Chief Justice Stone emphasized the notion:

> They are exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury. For these reasons the seaman has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees.[104]

Courts often took on this responsibility for seamen, who they felt required special protection "against the effects of the superior skill and

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100. Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. Me. 1823) (No. 6,047).

101. Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990); Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2279 (2019). One fascinating case example is:

> The Court's famous "ice cream scooper case"—part of the Court's late 1950s befuddlement is illustrative. In *Ferguson v. Moore-McCormack Lines, Inc.*, a Jones Act case, the controversy focused on the sufficiency of an ice cream scooper in the galley of a merchant ship. The plaintiff, a baker, was trying to serve ice cream with a standard ice cream scooper. Because the ice cream was frozen hard, however, an ice cream chipper tool would have been useful, but it was not supplied. Rather than allowing the ice cream to soften, the baker used a butcher knife to chip out ice cream and he cut off two of his fingers in the process. The trial court entered judgment for the seaman based on a jury verdict. The United States Court of Appeals for the Second Circuit reversed, explaining that because "[the knife] was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream," it "was not within the realm of reasonable foreseeability" that the baker would use the knife to chip ice cream. The Supreme Court reversed and directed entry of judgment for the seaman. The Court explained that "the scoop with which [the baker] had been furnished was totally inadequate to remove ice cream of the consistency of that which he had to serve." The Court explained further that "[i]t was not necessary that [the vessel owner] be in a position to foresee the exact chain of circumstances which actually led to the accident."

John E. Holloway, *Judicial Activism in Maritime Cases*, 43 TUL. MAR. L.J. 21, 41–42 (2018) (footnotes omitted).

102. *Harden*, 11 F. Cas. at 485.

103. *Batterton*, 139 S. Ct. at 2279.

104. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting).

shrewdness of masters and owners of ships."[105] While this special solicitude provided seamen with additional protections,[106] it also unfairly classified them as "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults."[107]

In 1990, the Supreme Court first expressed reluctance to regard seamen as the wards of admiralty in *Miles*, where the Court denied a seamen's mother non-pecuniary damages in a wrongful death case.[108] The seaman's estate's argument of special solicitude failed, marking a turning point in admiralty precedent.[109] The Court expressed the belief that their hands were tied because they understood maritime tort law to be dominated by federal statute and stated, "we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them."[110]

While much has changed with regard to the experience of working at sea, much has also stayed the same. The "physical risks created by natural elements"[111] are still present.[112] Furthermore, the Court's description of shipboard life from 1943 still holds true:

> [T]he restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and

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105. Brown v. Lull, 4 F. Cas. 407, 409 (C.C. Mass. 1836) (No. 2,018).

106. Holloway, *supra* note 101, at 36–43; *id.* at 36 (quoting Robertson v. Baldwin, 165 U.S. 275, 287 (1897)).

107. *Id.* at 36 (quoting *Robertson*, 165 U.S. at 287).

108. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1991).

109. *See id.*

110. *Id.*

111. Aguilar v. Standard Oil Co., 318 U.S. 724, 727 (1943).

112. *See, e.g.*, Matt Gutman & Matt German, *HMS Bounty Survivors: Crew of Ship Sunk During Hurricane Sandy Speak of Lost Shipmates*, ABC NEWS (Nov. 6, 2012, 4:02 AM), https://abcnews.go.com/US/hms-bounty-survivors-crew-ship-sunk-hurricane-sandy/story?id=17650072 [https://perma.cc/U7JR-2GYK] (recounting the dramatic sinking of the HMS Bounty during Hurricane Sandy in 2012); Travis Fedschun, *Hurricane Lorenzo Sinks Tugboat Carrying 14 Crew Members; At Least 1 Found Dead at Sea, 3 Rescued*, FOX NEWS (Sept. 30, 2019), https://www.foxnews.com/world/hurricane-lorenzo-bourbon-rhode-tugboast-sink-rescue-martinique [https://perma.cc/92DS-UAM2] (detailing the sinking of a tug during Hurricane Lorenzo); *Lightning Strike Sinks Ship: 4 Dead, One Missing*, STRANGE SOUNDS (Nov. 25, 2019), https://strangesounds.org/2019/11/lightning-sinks-ship-death-missing-indonesia.html [https://perma.cc/U82U-NRFV] (discussing the sinking of a ship after it was struck by lightning causing the death of four sailors); Carl Prine & David Larter, *Sailor Dies After Ladderwell Accident on Board Warship*, NAVY TIMES (Mar. 11, 2020), https://www.navytimes.com/news/your-navy/2020/03/11/sailor-dies-after-ladderwell-accident-on-board-warship/ [https://perma.cc/3AZZ-UBUM] (describing the death of a Navy sailor after he fell down a ladderwell while underway and fractured his skull).

> opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life . . . . Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence.[113]

The policy justifications for considering seamen "the wards of admiralty" are still present because of the physical risks seamen are subjected to at sea, the heavy weight of authority seamen must tolerate, and the restrictions shipboard life imposes on the way seamen live.

Despite conditions for seamen remaining largely the same, it is unclear in today's courts when seamen are warranted special solicitude.[114] Often, special solicitude is entirely ignored in cases that a seaman loses; in cases where a seaman wins, however, this principle is heavily relied upon.[115] John Holloway, a critic of this unfair application, has called the doctrine of special solicitude "a tool for result-oriented (i.e., activist) judging."[116]

II. A COMPARISON OF *BATTERTON* AND *TABINGO*

This Part compares the courts' reasoning in *Dutra Group v. Batterton* and *Tabingo v. American Triumph LLC*, which ultimately led them to opposite conclusions about the availability of punitive damages in unseaworthiness actions. The two cases relied on different Supreme Court precedents and disagreed on whether the policy arguments were centered on seamen or their employers. In *Tabingo*, the Washington State Supreme Court cited to *Atlantic Sounding* to hold that a plaintiff may recover punitive damages on an unseaworthiness claim.[117] However, this case was overruled by *Batterton*, where the Supreme Court relied on *Miles* to hold that a plaintiff may not recover punitive damages on an unseaworthiness

113. *Aguilar*, 318 U.S. at 731–32.

114. *See* Holloway, *supra* note 101, at 36–43.

115. *See id.* (finding that the Supreme Court had ruled in favor of the maritime worker in twenty-one of the twenty-three cases in which it had relied upon the doctrine of special solicitude).

116. *Id.* at 38.

117. Tabingo v. Am. Triumph LLC, 188 Wash. 2d 41, 43, 391 P.3d 434, 436 (2017).

claim.[118] This Part compares the opposing doctrinal and policy reasons that led these courts to opposite conclusions on the availability of punitive damages in unseaworthiness claims.

A. Tabingo *Majority Permits Punitive Damages in Unseaworthiness Actions*

In *Tabingo v. American Triumph LLC*, Allan Tabingo was a seaman who worked on an American Seafoods' fishing trawler.[119] His hand was injured when a hatch closed on it due to a mechanical malfunction.[120] Tabingo brought an unseaworthiness claim seeking both general and punitive damages.[121] The issue presented was whether a seaman could recover punitive damages in an unseaworthiness claim.[122] American Seafoods' argued "that punitive damages are prohibited under the Jones Act's provision for maritime negligence actions, and because the unseaworthiness claim was joined with a Jones Act negligence claim, punitive damages are barred for the unseaworthiness claim as well."[123]

The Washington State Supreme Court's reasoning in *Tabingo* was simple. Because the United States Supreme Court had allowed punitive damages in *Atlantic Sounding* for a maintenance and cure claim, the *Tabingo* Court determined that it would follow precedent to permit punitive damages in an unseaworthiness claim.[124] The Court noted that not only does "the Jones Act 'evince[] no general hostility to recovery under maritime law,' . . . the act 'does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness'" either.[125] The *Tabingo* Court reasoned that the Jones Act does not explicitly preclude punitive damages in unseaworthiness claims because

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118. Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2278 (2019). This decision is striking, given that Washington is one of the few states that does not regularly award punitive damages. *Tabingo*, 188 Wash. 2d at 52, 391 P.3d at 440.

119. *Tabingo*, 188 Wash. 2d at 43, 391 P.3d at 436.

120. *Id.*

121. *Id.*

122. *Id.* at 44–45, 391 P.3d at 436–37.

123. *Id.* at 44–45, 391 P.3d at 436.

124. *Id.* at 43, 391 P.3d at 436 ("The Court held that because both the claim and the damages were historically available at common law and because Congress had shown no intent to limit recovery of punitive damages, those damages were available. Here, we follow the United States Supreme Court's rationale and find that, like maintenance and cure, punitive damages are available for a general maritime unseaworthiness claim."). It is worth noting that the Washington State Supreme Court used "*Townsend*" to refer to *Atlantic Sounding Co. v. Townsend*, whereas the U.S. Supreme Court used "*Atlantic Sounding*."

125. *Id.* at 50–51, 391 P.3d at 439.

unseaworthiness claims predated Jones Act claims.[126] The majority then determined that *Atlantic Sounding* was the applicable Supreme Court precedent—not *Miles*.[127] The *Tabingo* Court explained *Miles* was not controlling because it should not be read to limit seamen's common law claims.[128] According to the Court, the claim at issue in *Miles* was statutory in nature, as opposed to the unseaworthiness claim at issue in this case.[129] Furthermore, the *Atlantic Sounding* Court determined that *Miles* was of "limited applicability in the general maritime context."[130] This is because *Miles* did not even address general maritime claims.[131] For all of these reasons, the *Tabingo* Court concluded *Miles* was not on point.[132]

The Court next addressed the conundrum of Washington State's general disapproval of punitive damages.[133] Even though Washington does not typically allow punitive damages for egregious conduct,[134] federal maritime law governs admiralty cases brought in state court.[135] Thus, Washington's general disallowance of punitive damages was not relevant because the Court was interpreting federal law, not Washington State law.[136]

Finally, the Court highlighted the policy argument that seamen traditionally have been afforded special protection as the wards of admiralty.[137] The Court reasoned that allowing punitive damages would be consistent with protecting seamen because punitive damages are meant to punish and deter defendants rather than reward plaintiffs.[138] The need for special protection was apparent in Tabingo's case because his

126. *See id.* at 47, 391 P.3d at 438.

127. *Id.* at 48–50, 391 P.3d at 438–39.

128. *Id.* at 50–51, 391 P.3d at 439.

129. *Id.* at 50, 391 P.3d at 439.

130. *Id.* at 51, 391 P.3d at 439.

131. *Id.*

132. *See id.* at 51, 391 P.3d at 439.

133. *Id.* at 52, 391 P.3d at 440. "Washington is one of only a few states that does not provide generally for punitive damages for particularly egregious conduct." McKee v. AT&T Corp., 164 Wash. 2d 372, 401, 191 P.3d 845, 860 (2008) (citing Dailey v. N. Coast Life Ins. Co., 129 Wash. 2d 572, 575, 919 P.2d 589, 590–91 (1996)).

134. *Tabingo*, 188 Wash. 2d at 52, 391 P.3d at 440 (citing *Dailey*, 129 Wash. 2d at 575, 919 P.2d at 589).

135. *Id.* at 52–53, 391 P.3d at 440 (citing Clausen v. Icicle Seafoods, Inc., 174 Wash. 2d 70, 76, 272 P.3d 827, 831 (2012)).

136. *See id.*

137. *See id.* at 53, 391 P.3d at 440.

138. *See id.* at 53–54, 391 P.3d at 440–41 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 492–93 (2008)).

employer had allegedly allowed an unseaworthy vessel to sail for two years without fixing it.[139] Therefore, awarding the employer punitive damages would "serve as an example for other ship owners."[140] Two years later, the United States Supreme Court took up a case incredibly similar to *Tabingo* called *Dutra Group v. Batterton*.[141]

B. Batterton *Majority Rejects Punitive Damages in Unseaworthiness Actions*

In *Dutra Group v. Batterton*, Christopher Batterton was a seaman who worked as a deckhand on a Dutra Group vessel.[142] His hand was injured when a hatch blew open due to pressurized air inside a ship's compartment.[143] Batterton brought a claim of unseaworthiness seeking both general and punitive damages.[144] Dutra Group sought to dismiss Batterton's claim for punitive damages because they interpreted *Miles* as holding that punitive damages are not available for unseaworthiness claims.[145] The Ninth Circuit held that punitive damages are available for unseaworthiness claims, which reaffirmed a Circuit split.[146] The Supreme Court granted certiorari.[147] The Supreme Court reversed the Ninth Circuit's decision and held that punitive damages are unavailable in unseaworthiness claims.[148]

1. The Historical Availability of Punitive Damages in Unseaworthiness Claims

Justice Alito, writing for the majority, focused on a historical approach that showed an absence of punitive damage awards in unseaworthiness cases.[149] He concluded that "[t]he lack of punitive damages in traditional maritime law [unseaworthiness] cases is practically dispositive."[150] The majority claimed that Batterton failed to present any "decisions from the

139. *See id.* at 53, 391 P.3d at 441.
140. *Id.* at 53–54, 391 P.3d at 441.
141. Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275 (2019).
142. *Id.* at 2282.
143. *Id.*
144. *Id.*
145. *See id.* at 2282–85.
146. *Id.* at 2282–83.
147. *Id.*
148. *Id.* at 2287.
149. *See id.* at 2284.
150. *Id.*

formative years of the personal injury unseaworthiness claim in which exemplary damages were awarded."[151] *Batterton* endeavored to reconcile the tension between the precedents set by *Miles* and *Atlantic Sounding* by concluding that there was a historical record of punitive damage awards in the maintenance and cure context, but not in the unseaworthiness context.[152]

However, this historical record that Justice Alito painted is in debate. Professor Costabel, who teaches Admiralty Law at the St. Thomas University School of Law, found 133 cases that permitted punitive damages in unseaworthiness actions and many more that had dicta supporting punitive damages.[153] Justice Ginsberg, writing in dissent, also pointed to the long history of punitive damages in general maritime law at large.[154]

The dissent further stressed that even if there is not a strong record of punitive damages in unseaworthiness claims, punitive damages are normally available in maritime cases.[155] As Justice Ginsburg pointed out, this means that "the Court today holds that unseaworthiness claims are an exception to that general rule."[156] Furthermore, the dissent noted that evidence that punitive damages were available was not central to the *Atlantic Sounding* decision; thus, this factor should be similarly assessed in Batterton's case.[157] The dissent underlined that *Atlantic Sounding* only invoked historical evidence to show that, in the absence of a showing that punitive damages were unavailable for a given claim, the common law rule should be applied.[158]

2. Whether Congress Intended to Limit Remedies in Unseaworthiness Actions

Preference for congressional intervention in maritime law was central

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151. *Id.*

152. *See id.* at 2278.

153. Costabel, *supra* note 1, at 317.

154. *See Batterton*, 139 S. Ct. at 2289 (Ginsberg, J., dissenting).

155. *Id.* at 2288 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)).

156. *Id.* (citing Miles v. Apex Marine Corp., 498 U.S. 19 (1990)).

157. *Id.* at 2291 ("Contrary to the Court's assertion, evidence of the availability of punitive damages for maintenance and cure was not 'central to our decision in *Atlantic Sounding* . . . '[A] search for cases in which punitive damages were awarded for the willful denial of maintenance and cure . . . yields very little.'" (quoting Atl. Sounding Co. v. Townsend, 557 U.S. 404, 430 (2009) (Alito, J., dissenting))).

158. *See id.* at 2278–79, 2284, 2286 (majority opinion).

to the majority's decision in *Batterton*.[159] The Court conceded that the Admiralty Clause permits federal courts to proceed as common law courts, but ultimately concluded that "maritime law is no longer solely the province of the Federal Judiciary. 'Congress and the States have legislated extensively in these areas.'"[160] Thus, unlike its decision in *Atlantic Sounding*, the Court deferred to Congress's statutory scheme as a basis for not enunciating principles of general maritime law.[161] The dissent countered that *Atlantic Sounding* held that general maritime law remedies are not outright confined by the Jones Act or Death on the High Seas Act remedies.[162] The Jones Act was meant to enlarge the protections of seamen, not to narrow them.[163] Even *Miles*, the case the majority relied on to reach its holding, stated that the Jones Act, "d[id] not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."[164] Congress did not intend to limit historical remedies, such as punitive damages, by enacting the Jones Act.[165]

The *Batterton* majority further concluded that seamen should not be permitted to recover twice for a single legal wrong committed by their employers, since unseaworthiness and Jones Act claims are so similar.[166] The Court described the "significant overlap between the two causes of action"[167] and quoted a treatise that described the two as "alternative 'grounds' of recovery for a single cause of action."[168] Therefore, because Congress has disallowed punitive damages in Jones Act claims, they must have intended to disallow punitive damages in unseaworthiness claims as well.[169] The dissent articulated the difference between an unseaworthiness action and a Jones Act negligence action.[170] Furthermore, the dissent

159. *See id.* at 2290–93 (Ginsberg, J., dissenting).

160. *Id.* at 2278 (quoting *Miles*, 498 U.S. at 27).

161. *See id.* at 2286 (majority opinion).

162. *See id.* at 2290 (Ginsberg, J., dissenting).

163. *Id.* at 2291 (quoting The Arizona v. Anelich, 298 U.S. 110, 123 (1936)).

164. *Id.* at 2292 (quoting *Miles*, 498 U.S. at 29).

165. *Id.* at 2290.

166. *Id.* at 2282 (majority opinion).

167. *Id.*

168. *Id.* (quoting 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 30:90, ¶ 369 (5th ed. 2003)).

169. *See id.* at 2282, 2284–86 ("[W]e have more recently observed that the Jones Act 'limits recovery to pecuniary loss.' . . . . Looking to FELA and these decisions, the Federal Courts of Appeals have uniformly held that punitive damages are not available under the Jones Act." (citations omitted)).

170. *Id.* at 2290–93 (Ginsberg, J., dissenting) ("Unseaworthiness related 'to the structure of the ship and the adequacy of [its] equipment and furnishings,' while negligence concerned 'the direction and control of operations aboard ship.'" (quoting G. GILMORE & C. BLACK, LAW OF ADMIRALTY § 6–

focused on the fact that "[t]here is . . . no tension between preventing double recovery of compensatory damages and allowing the recovery, once, of punitive damages."[171]

3. Policy Grounds for Permitting or Denying Punitive Damages in Unseaworthiness Claims

The majority considered whether policy grounds should compel the availability of punitive damages for unseaworthiness claims.[172] The Court concluded that because non-compensatory damages are not part of the civil-code tradition, allowing punitive damages would place American shippers at a significant competitive disadvantage and discourage foreign-owned vessels from hiring American seamen.[173] Ultimately, the majority stated that "[t]his would frustrate another 'fundamental interest' served by federal maritime jurisdiction: 'the protection of maritime commerce.'"[174] This argument seemed meritless to the dissent for two reasons. First, punitive damages had been available in maintenance and cure actions for a decade and excessive claims have not overwhelmed the courts.[175] Second, punitive damages were available in unseaworthiness cases in some circuit courts and again, no influx of cases occurred.[176]

The majority then considered from a policy standpoint, whether seamen still warrant special solicitude as the wards of admiralty.[177] The Court found they did not, calling the doctrine "paternalistic" and implying it was outdated.[178] Further, the majority stated the doctrine was never "a commandment."[179] Strikingly, the majority asserted that "while sailors today face hardships not encountered by those who work on land, neither

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3, 277 (2d ed. 1975))).

171. *Id.* at 2293.

172. *See id.* at 2285–87 (majority opinion).

173. *Id.* at 2287 (first citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 497 (2008); and then citing John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396 n.24 (2004) (listing civil-law nations that restrict private plaintiffs to compensatory damages)).

174. *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 25 (2004)).

175. *Id.* at 2293 (Ginsberg, J., dissenting) (citing Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009)).

176. *Id.* (first citing Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1550 (11th Cir. 1987), *abrogated by Batterton*, 139 S. Ct. 2282; and then citing Evich v. Morris, 819 F.2d 256, 258 (9th Cir. 1987), *abrogated by Batterton*, 139 S. Ct. 2282.

177. *See id.* at 2287 (majority opinion).

178. *See id.*

179. *Id.*

are they as isolated nor as dependent on the master as their predecessors from the age of sail."[180] Overall, the Court determined that special solicitude should only play a small role in contemporary maritime law, and therefore, it does not outweigh the aforementioned reasons for denying punitive damages in unseaworthiness actions.[181]

Conversely, the dissent focused on seamen instead of their employers.[182] Rather than abandon the long history of considering seamen the wards of admiralty, the dissent expressed that giving seamen special solicitude is necessary because the unique dangers that seamen face in service of the ship are still present.[183] Furthermore, punitive damages are meant to deter and punish wrongdoers, not to reward plaintiffs.[184] Thus, the question is not whether seamen deserve special solicitude, but rather whether punitive damages are appropriate to deter ship owners from wanton and willful misconduct in the maintenance of their vessels.

Finally, the majority argued that allowing punitive damages in unseaworthiness actions would create a bizarre disparity that would disrupt *Miles*'s uniformity principle, which established that if a statute did not allow particular damages, then a similar general maritime law claim could not allow them.[185] On the other hand, the dissent concluded that no such inconsistency existed in allowing seamen to recover punitive damages from a shipowner because "[e]xposure to such damages helps to deter wrongdoing, particularly when malfeasance is 'hard to detect.'"[186] Memorably, the dissent flipped the script on the majority by stating, "[i]f there is any 'bizarre disparit[y],' it is the one the Court today creates: Punitive damages are available for willful and wanton breach of the duty to provide maintenance and cure, but not for similarly culpable breaches of the duty to provide a seaworthy vessel."[187]

Ultimately, the *Batterton* majority determined that punitive damages should not be available in unseaworthiness actions primarily for three reasons. First, there was an historical record of punitive damage awards in the maintenance and cure context, but not in the unseaworthiness

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180. *Id.*

181. *See id.*

182. *See id.* at 2293 (Ginsberg, J., dissenting).

183. *See id.* (quoting Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047) (Story, J.)).

184. *Id.* at 2292–93 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008)).

185. *See id.* at 2287 (majority opinion); Miles v. Apex Marine Corp., 498 U.S. 19, 26–27, 37 (1990).

186. *Batterton*, 139 S. Ct. at 2293 (Ginsberg, J., dissenting) (quoting *Exxon*, 554 U.S. at 494).

187. *Id.*

context.[188] Second, the Court pointed to the fact that Congress had extensively legislated in this area, and therefore, it was not appropriate for the Court to allow punitive damages.[189] And third, the majority believed policy reasons weighed in favor of not permitting punitive damages.[190]

III. THE *TABINGO* COURT'S CONCLUSION IS STRONGER FROM BOTH DOCTRINAL AND POLICY PERSPECTIVES

Batterton solidified two significant shifts in U.S. Supreme Court admiralty decision making. First, it confirmed the Supreme Court's unwillingness to use its explicit grant of admiralty jurisdiction: in this case, by not allowing an admiralty remedy because it was not expressly provided for by Congress. Second, the Supreme Court shifted from previously considering seamen the wards of admiralty to no longer affording them this special protection.[191]

The *Tabingo* Court's argument that punitive damages should be permissible in unseaworthiness claims is sounder from both policy and doctrinal standpoints. From a policy standpoint, it is more congruous with the principle of special solicitude for seamen that the Court has recognized since 1823. Further, it is preferable doctrinally because maritime law has traditionally permitted punitive damages in admiralty cases. Thus, the principle the *Batterton* Court should have adhered to was that if there is no evidence Congress has sought to restrict a remedy, and such remedy does not conflict with Congress's pursuit of "uniformity in the exercise of admiralty jurisdiction," then such a remedy should be permitted.[192]

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188. *Id.* at 2283 (majority opinion).

189. *Id.* at 2278.

190. *See id.* at 2287.

191. Scholars have feared these shifts for decades. *See, e.g.*, Brown, *supra* note 39, at 249 (arguing the Supreme Court justices had abandoned their role as admiralty judges and had become followers rather than leaders by refusing to enunciate maritime law and always looking to Congress); Handford, *supra* note 41, at 275 (arguing the Supreme Court should begin its analysis when faced with an opportunity to create law "with the assumption that the Supreme Court is the primary proponent of federal admiralty law"); Michael A. Orlando & Kyle D. Giacco, *Admiralty and Maritime Law: The Pitch, Roll, and Yaw of the (U)SS Supreme Court*, 28 TORT & INS. L.J. 137, 153 (1993) (arguing that while the Supreme Court had in some ways made it easier to qualify for seaman status, the Court had also made "it less desirable to be a seaman").

192. Miles v. Apex Marine Corp., 498 U.S. 19, 26 (1990).

A. The Batterton *Decision's Skewed Application of* Miles *Fails to Respect the Doctrinal Roots of Distinct Causes of Action and Available Remedies*

The *Batterton* majority's contention that unseaworthiness should be treated differently than maintenance and cure because of a lack of historical precedent is unfounded. As previously noted, Professor Costabel found 133 cases that permitted punitive damages in unseaworthiness actions and many more that had dicta supporting punitive damages.[193] Furthermore, historical examples of punitive damages in maintenance and cure cases were not central to the Court's decision in *Atlantic Sounding*.[194]

The *Batterton* majority's reliance on *Miles* skews its analysis entirely. The wrongful death action at issue in *Miles* was not an action under general maritime law.[195] *Miles*'s holding was intended to be narrow and fix an issue that had developed in the wrongful death line of cases.[196] *Batterton*, on the other hand, is more akin to *Atlantic Sounding*, where the Court decided whether punitive damages were permissible under a general maritime law cause of action.[197] Therefore, it would have been more doctrinally sound for the Court to follow *Atlantic Sounding*'s precedent, as the *Tabingo* Court did.

The *Tabingo* Court gave appropriate precedential weight to *Atlantic Sounding* by adhering to its analysis of *Miles*. While *Miles* is still good law, it "has limited applicability in the general maritime context . . . [and] is not universally applicable."[198] As *Miles* "is limited to tort remedies grounded in statute[]" and unseaworthiness is not a remedy grounded in statute, it follows that punitive damages have not been limited in unseaworthiness actions as they were in wrongful death actions.[199]

Conflating the Jones Act and unseaworthiness causes of action permitted the *Batterton* majority to argue that there was no difference between the two. However, there was no historical precedent for that conclusion prior to *Batterton*. Rather, in prior cases the Court had painstakingly tried to differentiate between the two causes of action.[200]

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193. Costabel, *supra* note 1, at 317.

194. *See Batterton*, 139 S. Ct. at 2291 (Ginsberg, J., dissenting).

195. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 419 (2009).

196. *See id.*

197. *See id.* at 422–24.

198. Tabingo v. Am. Triumph LLC, 188 Wash. 2d 41, 51, 391 P.3d 434, 439 (2017).

199. *Id.* at 52, 391 P.3d at 440.

200. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971) ("To hold that this individual

The *Batterton* majority also overemphasized the fact that a plaintiff should not recover twice in compensatory damages and overlooked the fact that punitive damages were what was at stake.[201] However, the dissent pointed out that "[t]here is thus no tension between preventing double recovery of compensatory damages and allowing the recovery, once, of punitive damages."[202]

In contrast, the *Tabingo* Court recognized unseaworthiness and Jones Act negligence as separate and distinct claims.[203] The Court looked to the intent of the Jones Act and appreciated that it was meant "to protect seamen as wards of admiralty and to expand protections rather than limit them."[204] Rather than getting hung up on the absence of historical data, the Court concluded positively that: "(1) 'punitive damages have long been available at common law,' (2) 'the common-law tradition of punitive damages extends to maritime claims,' and (3) 'there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule.'"[205] These conclusions led the Court to permit punitive damages in unseaworthiness claims—a decision more aligned with previous maritime law precedent and the intent of the Jones Act.

B. The Supreme Court Has Exhibited Unwillingness to Permit Remedies in Admiralty that Congress Has Not Explicitly Provided

The Supreme Court's unwillingness to permit admiralty remedies for claims that Congress has not addressed is misplaced. Unseaworthiness actions fall under the general maritime law, which is a body of substantive federal common law that the federal courts are authorized to develop.[206] As such, the Supreme Court has the ability to develop laws pertaining to unseaworthiness actions, including permitting admiralty remedies. However, the Supreme Court has shown an apparent desire to defer this power to Congress. Judge John R. Brown, the leading U.S. admiralty jurist before his death in 1993, wrote "[i]n the past fifteen years the justices of the Supreme Court have abandoned their [constitutional] role

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act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between [u]nseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.").

201. *See* Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2282 (2019).

202. *Id.* at 2293 (Ginsberg, J., dissenting).

203. *See Tabingo*, 188 Wash. 2d at 47, 391 P.3d at 438.

204. *Id.* at 49, 391 P.3d at 439.

205. *Id.* at 48, 391 P.3d at 438 (quoting Atl. Sounding Co. v. Townsend, 557 U.S. 404, 414–15 (2009)).

206. *See* Kerstein, *supra* note 79, at 677–78.

as admiralty judges."[207] Professor David Robertson, one of the nation's leading authorities on admiralty law before his death, expressed fear "that the modern Court neither understands admiralty nor regards it as important."[208]

Admiralty and maritime law are of tremendous importance given maritime shipping's enormous impact on the U.S. economy. For example, "[w]ater transportation contributed $36 billion U.S. dollars and 64 thousand jobs to the U.S. economy in 2010."[209] Even today, "90 percent of everything still travels as it did almost 500 years ago: by ship."[210] The Supreme Court's unwillingness to provide remedies while acting as a common law court sitting in admiralty solidifies a momentous shift in how admiralty law is handed down.

The *Batterton* Court should have followed the well-established admiralty principle that if there is no evidence Congress has sought to restrict a remedy, and such remedy does not conflict with Congress's pursuit of "uniformity in the exercise of admiralty jurisdiction," then such a remedy should be permitted.[211] Rather than creating an anomaly—because punitive damages are now available for breaches of the duty to provide maintenance and cure, but not for breaches of the duty to provide a seaworthy vessel[212]—it would have been the more humane approach to allow punitive damages in unseaworthiness claims. The *Tabingo* Court adhered to this principle by declaring that because "neither the United States Supreme Court nor Congress has indicated that unseaworthiness should be excluded from the general admiralty rule," punitive damages should be allowed, just as they were permitted by the *Atlantic Sounding*

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207. David W. Robertson, *Our High Court of Admiralty and Its Sometimes Peculiar Relationship with Congress*, 55 ST. LOUIS U. L.J. 491, 492 (2011) (quoting Brown, *supra* note 41, at 283).

208. *Id.*

209. Matthew Chambers & Mindy Liu, *Maritime Trade and Transportation by the Numbers*, BUREAU OF TRANSP. STAT., https://www.bts.gov/archive/publications/by_the_numbers/maritime_trade_and_transportation/index [https://perma.cc/PSQ8-Z282] (determining that "water transportation contributed $36 billion U.S. dollars and 64 thousand jobs to the U.S.").

210. Natasha Geiling, *How the Shipping Industry is the Secret Force Driving the World Economy*, SMITHSONIAN MAG., https://www.smithsonianmag.com/innovation/how-the-shipping-industry-is-the-secret-force-driving-the-world-economy-1950979/ [https://perma.cc/KKE9-8JR5]. "In 2011, the 360 commercial ports of the United States took in international goods worth $1.73 trillion, or eighty times the value of all U.S. trade in 1960." ROSE GEORGE, NINETY PERCENT OF EVERYTHING: INSIDE SHIPPING, THE INVISIBLE INDUSTRY THAT PUTS CLOTHES ON YOUR BACK, GAS IN YOUR CAR, AND FOOD ON YOUR PLATE 3 (2013).

211. Miles v. Apex Marine Corp., 498 U.S. 19, 26 (1990).

212. *See* Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2293 (2019) (Ginsberg, J., dissenting).

Court in the maintenance and cure context.[213]

C. The Court's Abandonment of Seamen as the Wards of Admiralty

Batterton also solidified the Supreme Court's shift from previously considering seamen the wards of admiralty to no longer seeing a policy reason to protect seamen. Instead of focusing on the seamen, the Court emphasized the burden punitive damages would put on their employers.[214] However, seamen require protection as much today as they did in the nineteenth century because the risk of "exploitation and abuse, nonpayment of wages, noncompliance with contracts, exposure to poor diet and living conditions, and even abandonment at foreign ports"[215] still exists.

Seamen work irregular hours during the day and often exceed sixty hours per week.[216] The separation from family during long voyages and inability to escape work while at sea contributed to the finding in a recent study that 25% of seamen who participated in the study "suffer[ed] with depression, anxiety and suicidal ideation."[217] Furthermore, commercial fishing is "widely regarded as one of the most dangerous jobs in the U.S."[218] with seamen facing "higher risk of fatality, injury, and illness than other American workers."[219] A glaring statistic is that the fatality rate for water transportation workers is 4.7 times higher than the average rate for other U.S. workers.[220]

It is ironic that the Court was unwilling to exercise its constitutional role when it came to granting punitive damages in unseaworthiness actions, yet it was willing to deny seamen a special protective status that has been afforded to them by admiralty law since its inception. This irony is compounded when considering that the Court is uncomfortable exercising its admiralty jurisdiction but is comfortable making broad claims about life at sea without providing evidence, such as "while sailors today face hardships not encountered by those who work on land, neither

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213. *See* Tabingo v. Am. Triumph LLC, 188 Wash. 2d 41, 49–50, 391 P.3d 434, 439 (2017).

214. *See Batterton*, 139 S. Ct. at 2287.

215. Llinás Negret, *supra* note 4, at 34.

216. *Trapped at Sea: Protecting Seafarers During COVID-19*, LLOYD'S REG. FOUND. (Apr. 21, 2020), https://www.lrfoundation.org.uk/en/news/protecting-seafarers-during-covid-19/ [https://perma.cc/Z87G-HGXB].

217. *Id.*

218. *Maritime Safety and Health Studies*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/niosh/maritime/ [https://perma.cc/X4ZT-AE9B].

219. *Id.*

220. *Id.*

are they as isolated nor as dependent on the master as their predecessors from the age of sail."[221]

Both the *Batterton* dissent and the *Tabingo* Court also point out that whether seamen should be afforded special solicitude is not highly relevant to this case, given that punitive damages are meant to deter wrongdoing rather than reward the plaintiff.[222] Justice Ginsburg's dissent noted the bizarre disparity this policy decision created—"[p]unitive damages are available for willful and wanton breach of the duty to provide maintenance and cure, but not for similarly culpable breaches of the duty to provide a seaworthy vessel."[223]

The *Tabingo* Court adhered to the general maritime law tradition of providing seamen with special protections.[224] The Court determined allowing punitive damages in this unseaworthiness action might deter other ship owners from displaying "reckless or malicious" disregard for their duty to operate seaworthy vessels.[225] This deterrence, in turn, benefits the seamen who work on those vessels. In contrast, the stark implication of *Batterton* is that seamen will suffer from the cost benefit analysis this creates for shipowners:

> From now on, the occasional employer delinquent in paying hospital bills will receive heavy punishment, while the occasional shipowner supplying recklessly and outrageously an unsafe ship that causes the death of one or more seamen will do so with impunity, while laughing all the way to the bank, paying only the relatively minor pecuniary damages that could be proven. The old joke of the pre-*Moragne* era maintains its macabre humor. *It is still cheaper to kill them than to make them sick*.[226]

CONCLUSION

Batterton solidified a significant shift in Supreme Court admiralty decision making in two respects. First, it illustrated a recent unwillingness by the Supreme Court to allow an admiralty remedy that is not explicitly provided by Congress. Given the Constitutional authorization, the Supreme Court is able to develop the body of law, including provision of remedies, in regard to unseaworthiness. Therefore, the unwillingness to

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221. Dutra Grp. v. Batterton, __ U.S. __, 139 S. Ct. 2275, 2287 (2019).

222. *See id.* at 2292–93 (Ginsberg, J., dissenting) (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008)); Tabingo v. Am. Triumph LLC, 188 Wash. 2d 41, 53, 391 P.3d 434, 440–41 (2017).

223. *Batterton*, 139 S. Ct. at 2293 (Ginsberg, J., dissenting).

224. *See Tabingo*, 188 Wash. 2d at 53–54, 391 P.3d at 440–41.

225. *See id.* at 53–54, 391 P.3d at 441.

226. Costabel, *supra* note 1, at 329 (emphasis in original).

provide remedies while acting as a common law court sitting in admiralty is unwarranted. Second, the Supreme Court solidified its shift in *Batterton* from previously considering seamen the wards of admiralty to no longer seeing a policy need to protect them. The Court abandoned the nearly 200-year-old determination for a weak policy argument with no supporting evidence.

The Washington State Supreme Court's decision in *Tabingo*—that punitive damages should be permissible in unseaworthiness claims—is far better from both policy and doctrinal standpoints. From a doctrinal perspective, maritime law has traditionally permitted punitive damages in admiralty cases. Therefore, it was appropriate for the Court to adhere to the principle that it is better to allow a remedy in admiralty proceedings so long as an inflexible rule does not prohibit it.[227] From a policy standpoint, employers do not require the same protections as seamen. Not permitting punitive damages in unseaworthiness claims makes the cost-benefit analysis simple for employers— "it is . . . cheaper to kill [seamen] than to make them sick."[228] The Supreme Court should reassess its responsibility to develop the general maritime law and its responsibility to seamen by permitting punitive damages in unseaworthiness claims.

227. *See Exxon*, 554 U.S. at 522 (first citing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970); and then citing The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865) (No. 12,578)).

228. Costabel, *supra* note 1, at 329 (emphasis omitted).