

**MAINTENANCE AND CURE  
A DEFENDANT'S PERSPECTIVE**

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**Presented at the Bar Association of Metropolitan St. Louis  
Maritime Law Seminar**

**April 18, 2001**

## **Maintenance & Cure -- A Defendant's Perspective**

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### **I. Introduction**

Crew members of vessels, also known as “seamen,” are constitutionally excluded from state workers’ compensation schemes<sup>1</sup> and statutorily excluded from the federal workers’ compensation program applicable to maritime employees such as longshoremen and harbor workers.<sup>2</sup> Instead, seamen are entitled to sue their employers for negligence under the Jones Act<sup>3</sup> and for unseaworthiness of the vessel under the general maritime law.<sup>4</sup> In addition, seamen are entitled to receive, without regard to fault on the part of their employers, reimbursement for living and medical expenses while convalescing

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Parts of this paper previously appeared in: Simon Tonkin, Practical Issues Regarding Maintenance and Cure, Greater New Orleans Barge Fleeting Association Seminar (Sep. 11, 1997); and Simon Tonkin and James K. Mondl, The Maritime Doctrine of Maintenance & Cure - An Overview, ST. LOUIS BAR J. (Fall 1998).

from injury or illness arising in the service of their vessels. These payments are termed “maintenance and cure.”

The maintenance and cure doctrine originated centuries ago, and reflected the plight of oceangoing seamen in years past:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.<sup>5</sup>

This doctrine has evolved over many years through case law, and its requirements are often less precise than workers compensation laws, which are governed by statute and regulation.

Despite the ancient heritage and sometimes vague contours of maintenance and cure, it is a doctrine with significant practical consequences for vessel owners, who frequently make decisions regarding who is entitled to maintenance and cure, how much should be paid, when it should be terminated, and whether particular charges are owed. This paper summarizes the law of maintenance and cure and addresses some practical issues confronted by vessel owners.

## **II. Basic Definition**

Maintenance and cure are vessel operators' duties to care for seamen they employ who are convalescing from injuries or illnesses arising from the service of their vessels:

Among the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service. In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. [T]he liability . . . in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship.<sup>6</sup>

As indicated, the obligations do not require fault on the part of the employer in causing injury, and contributory fault of the seaman is generally immaterial. "Maintenance" is payment for food and lodging equivalent to that received by the seaman on his vessel. "Cure" is the cost of medical treatment and related expenses. Maintenance and cure exist for the benefit of seamen and the obligations are liberally construed in their favor.<sup>7</sup>

Only "seamen" are entitled to maintenance and cure, and the test for seaman status regarding maintenance and cure is the same as the test for seaman

status under the Jones Act.<sup>8</sup> The seaman's employer, typically the owner or operator of his vessel, is responsible for payment of maintenance and cure.<sup>9</sup> Rights to maintenance and cure create a maritime lien of highest priority against the seaman's vessel.<sup>10</sup>

Maintenance and cure are owed when a seaman is injured or becomes ill in the service of his vessel and leaves the vessel.<sup>11</sup> An injury or illness arising aboard the vessel, even while the seaman is off duty, is covered, as is an injury occurring on land while performing the vessel's service.<sup>12</sup> Crew members on shore leave in foreign ports are generally considered in the service of the vessel<sup>13</sup>, as are seamen in transit between vessel and home.<sup>14</sup> As a general rule, a seaman is in the service of his vessel if he is at a location for his employer's convenience at the time of injury, but a seaman engaging in purely personal pursuits and not subject to call, such as a crew member at home on his days off, is not entitled to maintenance and cure for injuries or illness arising at that time.<sup>15</sup>

The duty to pay maintenance and cure continues until the seaman reaches a point of maximum medical improvement.<sup>16</sup> Maximum medical improvement is achieved when the seaman is cured or it appears probable that further treatment will result in no improvement in the seaman's condition.<sup>17</sup> Although a seaman's

return to work is evidence that he has reached maximum medical improvement, that presumption has less force when the seaman returns to work because of the employer's wrongful refusal to pay maintenance and cure.<sup>18</sup> Whether a seaman has reached maximum cure is a medical issue.<sup>19</sup> The employer is not obligated to continue maintenance and cure when treatment is no longer curative, but is directed only at reducing pain or discomfort.<sup>20</sup>

### **III. Amount to Pay**

#### **A. Maintenance**

The law provides no mathematical formula for calculating the amount of maintenance owed in particular cases. Maintenance is intended to provide the sick or injured seaman with the cost of food and lodging, comparable to that provided on his vessel.<sup>21</sup> Ascertaining the value of "comparable" food and lodging is often difficult.

To recover maintenance and cure in a lawsuit, an injured seaman must produce evidence of the actual costs he incurred for food and lodging, at which point the burden shifts to the employer to contest the reasonableness of these expenses.<sup>22</sup> Cases in past decades often reflected a standard maintenance rate of \$8 per day -- frequently the amount dictated by seamen's union contracts and

approved by the courts.<sup>23</sup> In recent years, significantly higher maintenance awards are common, reaching \$30 to \$50 per day.<sup>24</sup> For practical reasons, a standardized rate of maintenance is often adopted by vessel owners.<sup>25</sup> But vessel owners must be prepared to adjust the rate when circumstances indicate that it does not cover the costs of seamen's food and lodging.

The employer need not pay maintenance where the seaman's room and board are furnished to him by others without cost.<sup>26</sup> But the employer is still liable if its wrongful refusal to pay such benefits necessitated the seaman's stay with family or friends.<sup>27</sup> Maintenance is not owed to an injured seaman who is in prison.<sup>28</sup> If the employer pays for the seaman's hospitalization, additional maintenance payments are not required, because room and board are provided in connection with the hospitalization.

To assist injured employees during convalescence, many vessel operators pay injured seamen more than a minimum maintenance allowance, sometimes labeling the additional payments "supplemental wages," "loans," "disability payments" or "wage advances." Recent cases are not consistent on whether such payments may be credited against the vessel owner's obligation for wage loss under the Jones Act. In some instances, courts offset amounts designated as

supplemental wages from wage loss awards in Jones Act cases.<sup>29</sup> In other cases, courts refuse to issue credit for such payments, finding that the benefits stemmed from insurance policies funded partially by payroll deductions from the employee or were otherwise fringe benefits rather than wages,<sup>30</sup> or that the supplemental benefit was paid in satisfaction of the maintenance obligation and not as wages.<sup>31</sup> Other cases hold that “loans” to injured employees should not be offset because they were, in fact, voluntary payments intended to induce the plaintiff to settle his claims.<sup>32</sup> An employer is not entitled to offset the amount of wages earned by a seaman who, due to the employer’s refusal to pay the seaman’s living expenses, involuntarily returns to work.<sup>33</sup>

## **B. Cure**

The doctrine of “cure” obligates employers to provide seamen with reasonable medical treatment and related expenses during convalescence.<sup>34</sup> The treatment must be necessary and the charges for it reasonable.<sup>35</sup> Seamen generally have a right to choose their treating physicians, but are not entitled to payment for unduly expensive or unnecessary medical services.<sup>36</sup> Whether particular care is necessary is viewed liberally in the seaman’s favor.<sup>37</sup> The duty to pay for medical treatment includes the obligation to authorize or guarantee prior payment for

reasonable medical treatment.<sup>38</sup>

As with maintenance obligations, the collateral source rule is not strictly applied in connection with the doctrine of cure. While earlier cases held that cure is not owed if the seaman could receive treatment from a public health hospital,<sup>39</sup> recent cases deny cure to seamen who are entitled to competent medical treatment under Medicare or Medicaid.<sup>40</sup> Other recent cases deny seamen reimbursement for medical treatment previously paid through the employer's insurance plan.<sup>41</sup>

#### **IV. Affirmative Defenses Available to Employers**

##### **A. Willful Misconduct**

An employer need not pay a seaman maintenance and cure if his injury resulted from his own willful misconduct. To establish willful misconduct, a deliberate act of indiscretion is generally required.<sup>42</sup>

The employer bears the burden of proving willful misconduct, and seamen are traditionally given broad latitude in their behavior.<sup>43</sup> The victim of an unprovoked assault does not engage in willful misconduct.<sup>44</sup> Fighting (when the seaman claiming benefits was the aggressor),<sup>45</sup> intoxication<sup>46</sup> and venereal disease<sup>47</sup> may be deemed willful misconduct, as may drug use.<sup>48</sup> However, whether willful misconduct occurred is a question of fact and depends on the

circumstances of each case.

### **B. Concealment of Prior Injuries**

An employer can also avoid maintenance and cure payment if the seaman intentionally misrepresented or concealed prior injuries or medical problems when he applied for work.<sup>49</sup> Where the failure to disclose injuries or medical problems is material to the decision to hire the seaman and a connection exists between the information withheld and the injury subsequently sustained, the employer can withhold maintenance and cure.<sup>50</sup> When information is specifically requested by the employer, such as through physical examination questionnaires, the information is presumed material and relied upon by the employer.<sup>51</sup> The employer must demonstrate a connection between the withheld information and the current injury to avoid its obligation to pay maintenance and cure.<sup>52</sup> If an employer paid maintenance and cure before learning of the misrepresentation, the employer may file a claim or counterclaim to recover payments mistakenly made.<sup>53</sup>

### **C. Failure to Cooperate**

Maintenance and cure may be suspended if a seaman fails to cooperate in his own medical treatment or in providing his employer with information

regarding his medical condition.<sup>54</sup> Suspending benefits in appropriate circumstances can be an effective tool in obtaining needed cooperation from the seaman.

## **VI. Some Practical Suggestions**

### **A. Monitoring Cases**

It is imperative that the vessel owner carefully monitor all employees on maintenance and cure to insure that proper medical care is furnished, that the employee is cooperating in treatment, and that benefits are promptly terminated when maximum cure has been achieved. Regular contact should be maintained with the employee and complete records of medical treatment should be obtained and reviewed carefully. If there are questions as to what treatment is needed or whether maximum cure has been achieved, treating doctors should be asked. When necessary, second opinions regarding these issues should be sought from physicians of the vessel owners' choice. Without careful monitoring, maintenance and cure may be paid for longer than it is owed and seamen may not receive appropriate medical care.

### **B. Should you pay minimal maintenance?**

It may be penny wise and dollar foolish to pay injured seamen minimal

maintenance while they are convalescing from job-related injuries. If injured employees are not able to meet basic living expenses for their families, the likelihood that they will hire lawyers and file Jones Act suits is greatly increased. Since most employees are covered by workers' compensation and receive 2/3 of their regular pay while recovering from work-related injuries, seamen may feel mistreated (and be more inclined to hire a lawyer) if they receive significantly less. Given the cost of Jones Act suits, paying somewhat higher maintenance or supplemental benefits may be a wise business decision for vessel owners.

### **C. Punitive Damages**

Under recent cases, employers are not subject to punitive damages for failure to pay maintenance and cure that is owed.<sup>55</sup> However employers are liable for the attorney's fees a seaman incurs in obtaining maintenance and cure wrongfully withheld.<sup>56</sup> Employers should always promptly pay maintenance and cure owed, but they should not be afraid to deny or terminate benefits in appropriate circumstances.

### **D. Special Circumstances**

Situations arise regarding maintenance and cure that require special attention. Examples are whether serious illnesses manifested themselves in the

service of the vessel and are covered by maintenance and cure; whether maintenance and cure can be denied to an employee injured while under the influence of alcohol or drugs; and whether maintenance can be denied or recovered for a seaman's failure to disclose a pre-existing medical condition. In such circumstances, vessel owners would be wise to seek legal advice on their options and obligations, as incorrect decisions can result in costly lawsuits.

### **Endnotes**

1. Southern Pac. Ry. Co. v. Jensen, 244 U.S. 205 (1917).
2. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §902(3)(G).  
3. 46 U.S.C. §688.
4. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).
5. Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047), quoted in Stevens v. McGinnis, Inc., 82 F.3d 1353, 1357 (6<sup>th</sup> Cir. 1996).
6. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 730 (1943).
7. See The Osceola, 189 U.S. 158 (1903); Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528-30 (1938).
8. Hall v. Diamond M Co., 732 F.2d 1246 (5th Cir. 1984).
9. Morales v. Garijak, 829 F.2d 1355 (5th Cir. 1987).
10. Fredelos v. Merritt-Chapman & Scott Corp., 447 F.2d 435 (5th Cir. 1971).

11. Calmar S.S. Corp, 303 U.S. at 527; Warren v. United States, 340 U.S. 523 (1951).
12. Aguilar, 318 U.S. at 724; Farrell v. United States, 336 U.S. 511 (1949).
13. Aguilar, 318 U.S. at 732-733; Warren, 340 U.S. at 523.
14. Archer v. Trans American Serv., Ltd., 834 F.2d 1570 (11th Cir. 1988).
15. See Miller v. Lykes Bros.-Ripley S.S. Co., 98 F.2d 185 (5th Cir. 1938), LaBlanc v. B.G.T Corp., 992 F.2d 394 (1st Cir. 1993).
16. Vaughan v. Atkinson, 369 U.S. 527, 531 (1962).
17. Vella v. Ford Motor Co., 421 U.S. 1 (1975); Pelotto v. L & N Towing Co., 604 F.2d 369, 400 (5th Cir. 1979).
18. FEDERAL JURY PRACTICE AND INSTRUCTIONS, Devitt, Blackmar & Wolff, §95.24.
19. Breese v. AWI, Inc., 823 F.2d 100, 104-105 (5th Cir. 1987); McMillan v. TUG JANE A. BOUCHARD, 885 F. Supp. 452, 461-463 (E.D.N.Y. 1995). But see Musielak v. Rowan Intern., Inc., 814 F. Supp. 556 (S.D. Tex. 1993) (Doctor determination that seaman reached maximum medical cure does not necessarily exclude possibility that employer acted callously in denying maintenance and cure benefits.)
20. McMillan, 885 F. Supp. at 461; Desmond v. United States, 217 F.2d 948, 950 (2nd Cir. 1954).
21. See, e.g., Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943 (9th Cir. 1986).
22. Springborn v. American Comm. Barge Lines, Inc., 767 F.2d 89, 95 (5th Cir. 1985).
23. See Harper v. Zapata Off-Shore Co., 741 F.2d 87, 91 (5th Cir. 1984), and cases cited therein.

24. Compare McMillan, 885 F. Supp. at 463-464 (\$40 per day) and Ritchie v. Grimm, 724 F. Supp. 59, 61-62 (E.D.N.Y. 1989) (\$54 per day) with Harper, 741 F. Supp. at 93 (\$20 per day).
25. Hall v. Noble Drilling, Inc., Nos. 00-60063, 00-60065, 2001 WL 125326, \*3 (5<sup>th</sup> Cir. February 14, 2001).
26. Johnson v. United States, 333 U.S. 46, 50 (1948) (seaman living with parents during convalescence and incurring no expense or liability for his care not entitled to maintenance or cure).
27. McMillan, 885 F. Supp. at 452.
28. Henry v. Gulf Dumar Marine, Inc., No. CIV. A. 98-3497, 2000 WL 1119115, \*1 (E.D. La. August 4, 2000).
29. Stanislawski v. Upper River Serv., Inc., 6 F. 3d 537 (8th Cir. 1993); Mitola v. Johns Hopkins Univ., 839 F. Supp. 351 (D. Md. 1993); Shaw v. Ohio River Co., 526 F.2d 193 (3rd Cir. 1975).
30. Phillips v. Western Co. of N. America, 953 F.2d 923, 929-934 (5th Cir. 1992); Ellenwood v. Exxon Shipping Co., 984 F.2d 1270 (1st Cir. 1992); Morel v. Sabine Towing & Transp. Co., 669 F.2d 345 (5th Cir. 1982).
31. Hae Woo Young v. Maritime Overseas Corp., 605 So. 2d 187, 206 (La. App. 1992); Sampsell v. B&I Weld. Serv. and Consultants, Inc., 638 So. 2d 477 (La. App. 1994); Yost v. American Overseas Marine Corp., 798 F. Supp. 313, 320 (E.D. Va. 1992).
32. See discussion in Harper, 741 F. 2d at 87.
33. McMillan, 885 F. Supp. at 452.
34. Calmar S.S. Corp., 303 U.S. at 528; Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1499 (5<sup>th</sup> Cir. 1995).

35. Naviera Maersk Espana v. Cho-Me Towing, 782 F. Supp. 317 (E.D.La. 1992); Calo v. Ocean Ships, Inc., 57 F. 3d 159 (2nd Cir. 1995).
36. In re Cooper T. Smith Stevedoring Co., Inc., 942 F. Supp. 267 (E.D. La. 1996).
37. Alvarez v. Bahama Cruise Lines, Inc., 898 F. 2d 312 (2nd Cir. 1990).
38. Sullivan v. Tropical Tuna, Inc., 963 F. Supp. 42 (D. Mass. 1996).
39. Brown v. Aggie & Millie, Inc., 45 F. 2d 1293 (5th Cir. 1973).
40. Moran Towing & Transp. Co. v. Lombas, 58 F.3d 24 (2nd Cir. 1995); Toulson v. Ampro Fisheries, Inc., 872 F. Supp. 271 (E.D. Va. 1995).
41. Davis v. Odeco, Inc., 18 F.3d 1237, 1246 (5<sup>th</sup> Cir. 1994); Shaw, 526 F.2d at 193; Fortenberry v. Atwood Oceanics, Inc., No. Civ. A. 00-528, 2001 WL 121902, \*1-2 (E.D. La. February 9, 2001).
42. Aguilar, 318 U.S. at 731; Connolly v. Farrell Lines, Inc. 268 F.2d 653 (1st Cir. 1959); Rose v. Bloomfield S.S. Co., 162 F. Supp. 576 (E.D.La. 1958).
43. Gulledge v. United States, 337 F. Supp. 1108 (E.D. Pa. 1972).
44. Catrakis v. Nautilus Petro. Carriers Corp., 427 F. Supp. 255 (S.D.N.Y. 1977).
45. Watson v. Joshua Hendy Corp., 245 F.2d 463 (2nd Cir. 1957).
46. Aguilar, 318 U.S. at 731; Barlow v. Pan Atlantic S.S. Corp., 101 F.2d 697 (2nd Cir. 1939).
47. Id.
48. Silmon v. Can Do II, Inc., 89 F.3d 240 (5th Cir. 1996).
49. McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547, 549 (5th Cir. 1968), cert. denied, 393 U.S. 894.

50. Wactor v. Spartan Transp. Corp., 27 F.3d 347 (8th Cir. 1994); McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547, 548 (5th Cir. 1968); Tawada v. United States, 162 F.2d 615 (9th Cir. 1947).

51. Smith v. Apex Towing Co., 949 F. Supp. 667, 672 (N.D. Ill. 1997). Compare Deisler v. McCormack Aggregates, Co., 54 F.3d 1074 (3rd Cir. 1995).

52. Omar v. Sea-Land Serv., Inc., 813 F.2d 986 (9th Cir. 1987).

53. Heartland Transp. Co. v. Massie, 1986 A.M.C. 2528 (S.D. Ill. 1986).

54. Cargo Ships v. Tankers, Inc., 435 S.W.2d 866 (Tex. Civ. App. 1968).

55. O'Connell v. Interocean Mgmt. Corp., 90 F.3d 82 (3<sup>rd</sup> Cir. 1996); Guevara, 59 F.3d at 1496; Glenn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495 (9<sup>th</sup> Cir. 1995); Watters v. Harrah's II. Corp., 993 F. Supp. 667 (N.D. Ill. 1998).

56. Vaughan, 369 U.S. at 527.