

DRAFT
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[Updated 6/18/10]

**PATTERN JURY INSTRUCTIONS
FOR CASES OF
MARITIME EMPLOYEE PERSONAL INJURY**

**FOR THE DISTRICT COURTS
OF THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

This is a draft of proposed Pattern Jury Instructions for Maritime Employee Personal Injury cases prepared by Judge Hornby's chambers. We invite feedback and suggestions on any aspect of these instructions. Although we believe that these pattern instructions will be helpful in crafting a jury charge, it bears emphasis that this version is simply a proposal. Neither the Court of Appeals nor any District Court within the circuit has in any way approved the use of these instructions.

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1.1 Jones Act, 46 U.S.C. App. § 688

[Updated: 9/12/06]

In order to prevail on [his/her] claim under the Jones Act, [plaintiff] must establish each of the following things by a preponderance of the evidence:

First, that at the time of [his/her] injury [he/she] was acting in the course of [his/her] employment as a seaman employed by [defendant];

Second, that [defendant] was negligent; and

Third, that [defendant]'s negligence was a legal cause of the injury sustained by [plaintiff].

To be a “seaman,” [plaintiff] must have been a worker whose duties contributed to the function of a vessel or to the accomplishment of its mission; and, in addition, must have had a connection to a vessel in navigation—a connection that was substantial in terms of both its duration and its nature. The Jones Act is intended to protect sea-based maritime workers who owe their allegiance to a vessel and are regularly exposed to the perils of the sea. The Jones Act is not intended to protect land-based employees. The phrase “vessel in navigation” means any boat, ship, barge or other thing used primarily for the transportation of cargo, equipment or persons across navigable waters. The phrase “vessel in navigation” also includes anything that was actually in navigation at the time of [plaintiff]'s injury, even though its primary purpose was not navigation or commerce across navigable waters.

“Negligence” is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person [or corporation] would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful person [or corporation] would not do under similar circumstances, or in failing to do something that a reasonably careful person [or corporation] would do under similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence; the employer does not guarantee a seaman's safety.

For purposes of a Jones Act claim, negligence is a “legal” cause of injury if it plays any part, no matter how small, in bringing about or actually causing the injury. So, if you should find from the evidence that negligence of [defendant] contributed in any way toward any injury suffered by [plaintiff], then [plaintiff]'s injury was legally caused by [defendant]'s negligence. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support [plaintiff]'s claim that [defendant]'s negligence legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]'s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was [himself/herself] negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim is upon [defendant], who must establish by a preponderance of the evidence:

First, that [plaintiff] was also negligent; and

Second, that [plaintiff]'s negligence was a legal cause of [his/her] injury.

I have already defined “negligence” and “legal cause” and the same definitions apply here.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form I will explain in a moment. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural. If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by

[plaintiff] as a result of [defendant]’s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]’s pain or impairment caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by [defendant]’s negligence, then [defendant] is liable for all [plaintiff]’s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to \$_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [defendant]’s negligence.

In determining the amount of future loss, you should compare what [plaintiff]’s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries’ effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]’s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [defendant]’s negligence has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of

measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Comment

(1) Jones Act recovery is available to “seamen.” 46 U.S.C. App. § 688(a) (1994). “[T]he Jones Act inquiry is fundamentally status based: Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore.” Chandris, Inc. v. Latsis, 515 U.S. 347, 361 (1995). That status is “a mixed question of law and fact.” Id. at 369; McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 356 (1991). Definition of the term is for the court, but the factual underpinnings are for the jury. McDermott, 498 U.S. at 356; Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 87-88 (1991). The definition here is based upon Chandris. There, the Supreme Court stated:

On remand, the District Court should charge the jury in a manner consistent with our holding that the “employment-related connection to a vessel in navigation” necessary to qualify as a seaman under the Jones Act comprises two basic elements: The worker’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature. As to the latter point, the court should emphasize that the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not. By instructing juries in Jones Act cases accordingly, courts can give proper effect to the remedial scheme Congress has created for injured maritime workers.

Chandris, 515 U.S. at 376-77 (citation omitted). The Court also said:

The jury should be permitted, when determining whether a maritime employee has the requisite employment-related connection to a vessel in navigation to qualify as a member of the vessel’s crew, to consider all relevant circumstances bearing on the two elements outlined above.

Id. at 369. The Court also seemed to approve a Fifth Circuit “rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act,” but the rule of thumb seems more for when to take a case away from the jury than for actually instructing the jury. Id. at 371.) After McDermott, it is no longer necessary “that a seaman aid in navigation.” 498 U.S. at 346. “It is not necessary that a seaman aid in navigation or contribute to the transportation of the

vessel, but a seaman must be doing the ship's work.” *Id.* at 355. “It is not the employee's particular job that is determinative, but the employee's connection to a vessel.” *Id.* at 354. A seaman can be either a master or crew member. *Id.* at 349. “‘Member of a crew’ and ‘seaman’ are closely related terms. Indeed, the two were often used interchangeably in general maritime cases.” *Id.* at 348.

(2) In Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 557 (1997), the Supreme Court made clear that if a worker is relying upon employment by a “group of . . . vessels” (Chandris's language) to show his or her seaman status, he or she must show that the group of vessels is under common ownership or control.

(3) The definition of “vessel” is the same for the Jones Act and the Longshore & Harbors Workers' Compensation Act, and “includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” Stewart v. Dutra Constr. Co., 418 F.3d 32, 34-35 (1st Cir. 2005) (quoting 1 U.S.C. § 3). To be a “vessel” “does not require that a watercraft be used *primarily* for that purpose,” Stewart v. Dutra Constr. Co., 543 U.S. 481, 495 (2005), and does not require that it “be in motion.” *Id.* “[T]he ‘in navigation’ requirement is an element of the vessel status of a watercraft. . . . The question remains in all cases whether the watercraft's use ‘as a means of transportation on water’ is a practical possibility or merely a theoretical one. In some cases that inquiry may involve factual issues for the jury. . . .” *Id.* at 496 (citations omitted). In Chandris, the Supreme Court stated:

“[A] vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside,” even when the vessel is undergoing repairs. At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation.

515 U.S. at 373-74 (citations omitted). Nevertheless, activities on a vessel during time spent in drydock not qualifying as navigation may still be “marginally relevant to the [jury's] underlying inquiry (whether [a worker] was a seaman and not a land-based maritime employee).” *Id.* at 375-76.

(4) The Jones Act remedy is available only against the seaman's employer. McAleer v. Smith, 57 F.3d 109, 115 (1st Cir. 1995). Usually the vessel owner is the employer, either directly or through the borrowed servant doctrine. Kukias v. Chandris Lines, Inc., 839 F.2d 860, 862 (1st Cir. 1988). “The existence of an employer-employee relationship [is] a question of fact [to] be established by plaintiff.” Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676, 681 (1st Cir. 1979). For a discussion of the factors, see Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231, 235-36 (3d Cir. 1991).

(5) The instruction does not provide a definition for “course of employment.” 46 U.S.C. App. § 688(a). In a per curiam opinion, the First Circuit has endorsed District Judge Lagueux's conclusion that “course of employment” is narrower than “service of the ship,” the test for maintenance and cure. Colon v. Apex Marine Corp., 35 F.3d 16 (1st Cir. 1994) (per curiam), aff'g 832 F. Supp. 508 (D.R.I. 1993).

(6) Jones Act liability may be based upon the violation of a statutory duty without a finding of negligence and without regard to whether the injury in question was the sort the statutory duty sought to prevent. Kernan v. American Dredging Co., 355 U.S. 426, 432-33 (1958) (basing liability on a U.S. Coast Guard rule of navigation). “The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer’s fault. This fault may consist of a breach of the duty of care . . . or of a breach of some statutory duty.” Id. at 432; see also id. at 439. The scope of this doctrine, however, has become questionable. See Elliott v. S.D. Warren Co., 134 F.3d 1, 4 (1st Cir. 1998) (characterizing a previous case finding per se negligence in a FELA case from an OSHA violation to be “of questionable validity”).

(7) Jones Act liability may rest upon the assault of one seaman by another. The primary issue will be foreseeability. See, e.g., Connolly v. Farrell Lines, Inc., 268 F.2d 653, 655 (1st Cir. 1959); Colon v. Apex Marine Corp., 832 F. Supp. 508, 510-11 (D.R.I. 1993), aff’d, 35 F.3d 16 (1st Cir. 1994).

(8) Assumption of the risk is *not* a defense in Jones Act cases. Hopkins v. Jordan Marine, Inc., 271 F.3d 1, 3 (1st Cir. 2001). Defendants often ask for an instruction that a seaman “must assume the unavoidable risks of his occupation.” That may mean only that there is no liability for an accident that is simply a normal event of a life at sea, but it seems best to leave words like “assumption” or “assume the unavoidable risks” out of the charge.

(9) Strangely, the First Circuit still recognizes the “primary duty rule” in Jones Act cases, even though the Jones Act incorporates FELA’s provisions unaltered, see Kernan, 355 U.S. at 431, and there is no primary duty rule for FELA cases. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 63-64 (1943). The First Circuit states:

The primary duty rule provides that a ship’s officer may not recover against his employer for negligence or unseaworthiness when there is no other cause of the officer’s injuries other than the officer’s breach of his consciously assumed duty to maintain safe conditions aboard the vessel.

Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998); see also Peymann v. Perini Corp., 507 F.2d 1318, 1322-23 (1st Cir. 1974). The primary duty rule is the equivalent of a finding of no negligence on the part of the employer. Wilson, 150 F.3d at 11. The primary duty rule, however, will not bar recovery where the ship’s owner was also “independently at fault.” Id. “[A]n instruction on the primary duty rule must be given if the evidence establishes a genuine controversy as to whether [the plaintiff] owed a duty to the defendants, whether he breached the duty, and whether that breach was the *sole* proximate cause of his injury.” Id. The challenge for a trial court is to draft a primary duty instruction that does not sound like an assumption of risk instruction.

(10) Defendants often ask for a charge based upon Peymann v. Perini Corp. in addition to, or independent of, primary duty. (The Peymann discussion was on an unseaworthiness count, but it is equally pertinent to the Jones Act count.) Peymann had the following to say:

If a vessel makes available two means for performing an act, one of which is unsafe, *e.g.*, two tools, one of which is defective, or two ladders, one of which is slippery, it would be an indirect application of the proscribed doctrine of assumption of the risk to foreclose recovery completely if the seaman chose the less desirable alternative. But this does not mean that a seaman may not be wholly barred if he selects a method he could not reasonably think open to him. Thus if the cook were given a proper bottle opener but chose to knock the head off the bottle, he could not complain. Or if there were two gangways and one was marked “Do not use,” it could not be thought that a seaman insisting upon using it despite the proffered [sic] alternative could complain of the ship’s unseaworthiness. So, in the case at bar, if there was a ladder available which was the single means the engineer was supposed to use, as, indeed, his own testimony suggested, it would not be proper to hold the vessel responsible to any degree if his decision not to use it was a free choice.

507 F.2d at 1322 (citations omitted); see also Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 200 (1st Cir. 1980). But these “sole causation” charges are often very difficult to draft without sounding like assumption of risk. Thus, the First Circuit has struggled with language that said: “If you find that the plaintiff’s alleged injuries were the result of his failing to observe an obvious condition, you will find for the defendant.” Hopkins, 271 F.3d at 3. It may be safer to treat an issue like this as a comparative negligence affirmative defense. Wilson, 150 F.3d at 11 (failing to use safer alternative means to perform a task is comparative negligence and “can be a complete defense when a jury finds that the plaintiff’s own negligence was the sole proximate cause of the injuries.”).

(11) Duty and foreseeability are elements of negligence under the Jones Act. Rodway v. Amoco Shipping Co., 491 F.2d 265, 267 (1st Cir. 1974) (foreseeability and duty); Connolly, 268 F.2d at 655 (foreseeability). Duty is omitted from this instruction because duty is generally an issue for the court and, as in FELA cases, an employer is always required to exercise reasonable care for its seamen’s safety while in the course of their employment. Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 7 (1963) (analyzing duty under FELA).

(12) On causation, “[a] Jones Act defendant may be found liable if the defendant’s negligence played even the slightest part in producing the plaintiff’s injury.” Wilson, 150 F.3d at 11 n.8. The plaintiff’s burden is “featherweight.” Toucet v. Maritime Overseas Corp., 991 F.2d 5, 10 (1st Cir. 1993). This standard of causation is distinct from the standard for an unseaworthiness claim. Therefore, if a jury is dealing with both such claims, the causation distinction should be highlighted.

(13) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S.

330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate “should take into account inflation and other sources of wage increases as well as the rate of interest”). Notwithstanding inflationary factors, “[t]he discount rate should be based on the rate of interest that would be earned on ‘the best and safest investments.’” Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The “best and safest investments” are those which provide a “risk-free stream of future income,” not those made by “investors who are willing to accept some risk of default.” Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate “market interest rate”).

(14) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But Jones Act damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income. Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994). Therefore, an instruction that the damage award will not be taxed is required, see Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(15) Prejudgment interest is unavailable under the Jones Act. Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991); see also Morgan, 486 U.S. at 336-39 (prejudgment interest unavailable under FELA). The First Circuit has not decided what should happen when damages are awarded on both a Jones Act and an unseaworthiness claim (where prejudgment interest is available) with no allocation between them. Borges, 935 F.2d at 443 n.1.

(16) Damages resulting from aggravation of a pre-existing injury are recoverable. Evans v. United Arab Shipping Co., 790 F. Supp. 516, 519 (D.N.J. 1992), aff'd, 4 F.3d 207 (3d Cir. 1993), cited with approval in Stevens v. Bangor & Aroostook R.R. Co., 97 F.3d 594, 601 (1st Cir. 1996) (affirming the doctrine’s validity under FELA).

(17) A spouse and dependents of a fatally injured seaman can recover pecuniary damages for the wrongful death of a seaman, but no damages for loss of society/consortium under the Jones Act. Miles v. Apex Marine Corp., 498 U.S. 19, 32-33 (1990); Horsley v. Mobil Oil Corp., 15 F.3d 200, 201-02 (1st Cir. 1994). The seaman’s own cause of action under the Jones Act survives his or her death, but the damages for lost income, etc., are limited to the losses during his or her lifetime. Miles, 498 U.S. at 35.

(18) Punitive damages are not available in Jones Act cases. Horsley, 15 F.3d at 203.

(19) The Fifth Circuit has said that the collateral source rule applies in Jones Act cases. Bourque v. Diamond M. Drilling Co., 623 F.2d 351, 354 n.2 (5th Cir. 1980).

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

[PLAINTIFF])
)
v.) CIVIL No. _____
)
[DEFENDANT])

**SPECIAL VERDICT FORM
[Jones Act Claim]**

1. Do you find that [defendant] was negligent and that its negligence was a legal cause of [plaintiff]’s injuries?

Yes _____ No _____

If your answer to Question #1 is “yes,” proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

\$ _____

Proceed to Question #3.

3. Was the accident caused in part by [plaintiff]’s own negligence?

Yes _____ No _____

If your answer to Question #3 is “yes,” answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]’s negligence contribute to the accident?

_____ %

Dated: _____, 20__

Jury Foreperson

2.1 Maintenance and Cure

[Updated 6/25/09]

[Plaintiff] is entitled to maintenance and cure if [he/she] was a seaman disabled by injury or illness while in the service of [the vessel]. [Plaintiff] is entitled to maintenance and cure even if [defendant] was not negligent and [the vessel] was not unseaworthy. [This claim is separate from [his/her] Jones Act and unseaworthiness claims.] Neither maintenance nor cure may be reduced because of any negligence on the part of [plaintiff].

In order to prevail on [his/her] maintenance and cure claim, [plaintiff] must establish, by a preponderance of the evidence:

First, that [he/she] was a seaman employed by [defendant];

Second, that [he/she] was injured or became ill while in the service of a vessel; and

Third, the amount of maintenance and cure to which [he/she] was entitled.

[Insert Jones Act instructions defining “seaman” and “vessel in navigation” as appropriate.]

“Maintenance” is the reasonable cost of food and lodging. [Plaintiff] is not entitled to maintenance while hospitalized because hospitalization includes food and lodging.

“Cure” is the reasonable cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines, medical apparatus and transportation to and from a medical facility.

[Plaintiff] need only show an injury or illness while in the service of the vessel. It need not be work-related as long as it occurs while in the service of the vessel.

[Plaintiff] is entitled to receive maintenance and cure from the date of [his/her] departure from the vessel to the time of "maximum possible cure" under the circumstances. Maximum possible cure is the point at which no further improvement in [plaintiff]’s condition may be reasonably expected.

If you make an award for past maintenance and/or cure, it is within your discretion to award interest to [plaintiff] from the time when those amounts should have been paid until today, and add that to whatever you may award.

[There can be no double recovery for [plaintiff]. You may not award [plaintiff] maintenance or cure for costs and expenses that [plaintiff] did not personally incur. Costs and expenses paid by the employer or some third party are not recoverable. If you find that [plaintiff] is entitled to an award of damages under the Jones Act or under the unseaworthiness claim, and if you include medical expenses in the damage award, then cure cannot be awarded for the same period of time. Maintenance, however, is independent of any wage recovery you may have awarded.]

Comment

(1) A maintenance and cure “seaman” is the same as a Jones Act “seaman.” LeBlanc v. B.G.T. Corp., 992 F.2d 394, 397 & n. 4 (1st Cir. 1993). Unlike a Jones Act seaman, however, a maintenance and cure seaman need not be injured or take sick in the course of employment, see Vella v. Ford Motor Co., 421 U.S. 1, 3-4 (1975); Colon v. Apex Marine Corp., 35 F.3d 16 (1st Cir. 1994) (per curiam), aff’g 832 F. Supp. 508, 513 (D.R.I. 1993), but rather “in the service of the vessel,” a phrase discussed below. Maintenance and cure, like the Jones Act remedy, are only available against the seaman’s employer. Cerqueira v. Cerqueira, 828 F.2d 863, 866 (1st Cir. 1987); Fink v. Shepard S.S. Co., 337 U.S. 810, 815 (1949).

(2) A seaman has the right to maintenance and cure “largely without regard to fault; a seaman may forfeit his entitlement only by engaging in gross misconduct.” Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 454 (1st Cir. 1996) (quoting LeBlanc, 992 F.2d at 397); see also Haskell v. Socony Mobil Oil Co., 237 F.2d 707, 709 (1st Cir. 1956) (“The right is denied only when the seaman’s illness or injury is the result of his own gross misconduct or deliberate indiscretion or disobedience of orders.”); Warren v. United States, 340 U.S. 523, 528 (1951); Farrell v. United States, 336 U.S. 511, 516 (1949) (“The seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct.”); Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 731 (1943) (“Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection.”).

(3) Entitlement to maintenance and cure “attaches until the seaman is ‘so far cured as possible.’” Ferrara, 99 F.3d at 454 (quoting Farrell, 336 U.S. at 518); see also Vaughan v. Atkinson, 369 U.S. 527, 531 (1962) (“Maintenance and cure . . . continues until [the seaman] reaches maximum medical recovery.”). But “a seaman is not entitled to maintenance and cure once his disabling condition ‘has been found to be permanent and incapable of being improved.’” Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 201 (1st Cir. 1980) (citations omitted). Permanence alone does not end maintenance and cure; a sailor with a permanent condition or illness may still recover if there are treatments available to reduce the severity of the condition or illness. Petition of RJF Int’l Corp., 354 F.3d 104, 107 (1st Cir. 2004). The date of maximum cure is to be determined by medical professionals, not the court. Id. at 202 (holding that a seaman is “entitled to maintenance and cure until his physicians diagnose[] his condition as permanent” and citing approvingly Vitco v. Joncich, 130 F. Supp. 945, 949 (S.D. Cal. 1955), aff’d 234 F.3d 161 (9th Cir. 1956), to the effect that the duty is not discharged “‘until the earliest time when it is reasonably and in good faith determined by those charged with the seaman’s care and treatment that the maximum cure reasonably possible has been effected.’”). The question remains open “whether maintenance and cure may be awarded for ‘palliative medical care to arrest further progress of the condition or to reduce pain.’” Hubbard, 626 F.2d at 202 n.4 (quoting Vella, 421 U.S. at 5 n.4). The First Circuit recently suggested that, in some cases, it might be possible to distinguish between “curative treatment still possible and accompanying palliative measures.” RJF, 354 F.3d at 107 (“Some segregation would be silly—imagine excluding pain medicine from the setting of a broken bone—but perhaps in some settings a distinction might be drawn.”). Also unresolved by the Supreme Court and the First Circuit is whether a seaman forfeits “his right to maintenance and cure by not reporting a known injury or

malady, or by refusing from the outset to allow proper medical examination, or by discontinuing medical care made available.” Vella, 421 U.S. at 5 n.4. For another Circuit’s view, see Deisler v. McCormack Aggregates Co., 54 F.3d 1074, 1081-82 (3d Cir. 1995) (nondisclosure of prior medical condition).

(4) Maintenance and cure are available to a seaman who is “‘in service of the ship’ at the time of the injury or onset of illness.” Ferrara, 99 F.3d at 454 (quoting LeBlanc, 992 F.2d at 397). “In service of the ship” is more inclusive than the Jones Act’s “course of employment” requirement. Colon v. Apex Marine Corp., 832 F. Supp. 508, 513 (D.R.I. 1993) (dismissing a seaman’s Jones Act claim because injury suffered on shore breaking up a bar fight among fellow crewman was not in the “course of employment” and seaman was not entitled to use the broader “in the service of the ship” standard), aff’d, 35 F.3d 16 (1st Cir. 1994). A seaman remains in service of the ship so long as he or she is “generally answerable to the call of duty.” Keeping v. Dawson, 262 F.2d 868, 871 (1st Cir. 1959). This may include shore leave in either a foreign port or the seaman’s home port, but does not include vacations. Haskell v. Socony Mobil Oil Co., 237 F.2d 707, 710 (1st Cir. 1956) (“[D]uring vacation periods we cannot assume that the seaman is answerable to the call of duty. . . .”); see also Warren, 340 U.S. at 529; Aguilar, 318 U.S. at 736. Moreover, status as a seaman in service of a ship does not necessarily end immediately upon termination of employment and therefore maintenance and cure may still be available for an injury or an illness soon thereafter. LeBlanc, 992 F.2d at 399, 400. Specifically,

the right to maintenance and cure made available by general maritime law to seamen injured or falling ill while in service of the ship may attach after termination of employment so long as the triggering event takes place within the period of time reasonably needed for the accomplishment of tasks in general furtherance of winding up the seaman’s employment—the prototypical examples being removing one’s belongings, quitting the ship, or implementing direct orders given at the time of discharge.

Id. at 400.

(5) In recent First Circuit opinions, the word “reasonable” is omitted as a modifier of the costs of maintenance and cure. Ferrara, 99 F.3d at 454; LeBlanc, 992 F.2d at 397. It does appear in older caselaw. Bay State Dredging & Contracting Co. v. Porter, 153 F.2d 827, 829-30 (1st Cir. 1946); The Josephine & Mary, 120 F.2d 459, 461 (1st Cir. 1941) (quoting Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 531-32 (1938)). The Supreme Court approved the award of “reasonable” amounts and suggested a standard: “maintenance exacted is comparable to that to which the seaman is entitled while at sea.” Calmar S.S. Corp., 303 U.S. at 528, 531-32.

(6) Maintenance and cure cannot be reduced by income the seaman earns during his or her entitlement to maintenance and cure. “It would be a sorry day for seamen if ship owners, knowing of the claim for maintenance and cure, could disregard it, force the disabled seaman to work, and then evade part or all of their legal obligation by having it reduced by the amount of the sick man’s earnings.” Vaughan, 369 U.S. at 533. On the other hand, maintenance and cure payments are not due if the seaman incurs no expense or liability for his or her care. Id. (citing

Johnson v. United States, 333 U.S. 46, 50 (1948) (seaman lived at parent's ranch without cost to himself and therefore was not entitled to maintenance and cure payments)).

(7) This instruction does not include a wage claim. Older First Circuit caselaw says that as part of his or her claim for maintenance and cure, a seaman can recover wages through the end of the voyage or if pertinent through the end of the fishing season. Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051 (1st Cir. 1973). More recent statements are contrary, without explicitly overruling the earlier cases. LeBlanc, 992 F.2d at 397 (“[T]he right [to maintenance and cure] is curative in nature and is thus to be distinguished from other admiralty rights, such as the right to recover lost wages or the right to recover for a shipowner's negligence, which are compensatory.”); accord F. Nash Bilisoly, The Relationship of Status and Damages in Maritime Personal Injury Cases, 72 Tul. L. Rev. 493, 508 (1997).

(8) The rates for maintenance and cure can be established by collective bargaining agreement but cannot bind an individual seaman who is not a union member. Macedo v. F/V Paul & Michelle, 868 F.2d 519, 522 (1st Cir. 1989).

(9) Pre-judgment interest is available on maintenance, see Macedo, 868 F.2d at 522, and therefore presumably for cure.

(10) In earlier cases, courts said that failure to give maintenance and cure may also “give rise to a claim for damages for the suffering and for the physical handicap which follows” and “the recovery may . . . include ‘necessary expenses.’” Vaughan, 369 U.S. at 530 (quoting Cortes v. Baltimore Insular Lines, 287 U.S. 367, 371 (1932)). In that case, the Supreme Court upheld an award of attorney fees to the plaintiff where the defendants had been “callous in their attitude” and the default was “willful and persistent.” Id. at 530-31. In 2009, the Court held that punitive damages are available “in the appropriate case” “for the willful and wanton disregard of the maintenance and cure obligation.” Atlantic Sounding Co. v. Townsend, ___ U.S. ___, 129 S. Ct. 2561 (2009). It did not decide whether there should be a recovery cap. Id. at n.11.

(11) The cost of transportation to and from a medical facility is recoverable. Presumably, transportation expenses resulting from medical consultations for diagnosis, treatment and after-care are covered until the seaman reaches maximum cure. Although the Fifth Circuit has held that such costs are part of a “maintenance” award, see Austin v. Otis Eng'g Corp., 641 F.2d 197, 199 (5th Cir. Unit A Mar. 1981), the Third Circuit considers them to be a part of “cure.” Barnes v. Andover Co., 900 F.2d 630, 644 (3d Cir. 1990); Smith v. Delaware Bay Launch Serv., Inc., 972 F. Supp. 836, 849, 852 (D. Del. 1997). The First Circuit has not ruled on the issue, but it seems logical to characterize transportation as a medical expense covered by “cure.”

3.1 Unseaworthiness

[Updated 10/2/09]

In order to prevail on [his/her] unseaworthiness claim, [plaintiff] must establish each of the following things by a preponderance of the evidence:

First, that [he/she] was a seaman on [defendant]'s vessel;

Second, that [the vessel] was unseaworthy; and

Third, that its unseaworthy condition was a legal cause of the injury sustained by [plaintiff].

[Add definitions from Jones Act instruction regarding “seaman” and “vessel in navigation” as appropriate.]

A vessel is unseaworthy if it is not reasonably fit for its intended purpose. Unseaworthiness is determined as of the time of the accident, not as of the time the vessel left port. Unseaworthiness can result from either temporary or permanent defects in the vessel or her equipment. Even a temporary and unforeseeable malfunction or failure of the [vessel], its hull or physical structure, or of a piece of equipment on the vessel under proper and expected use is sufficient to establish unseaworthiness. But the mere fact that an injury occurred does not alone establish unseaworthiness. The owner of the vessel is not required to furnish an accident-free vessel or one that will weather every peril of the sea, known or unknown. Instead, the vessel must be reasonably suitable for its intended purpose, which includes reasonably expectable weather. A vessel is not called on to have the best appliances or equipment or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

The owner's duty under the law to provide a seaworthy ship is absolute and does not depend upon proof of negligence. The owner may not delegate the duty to anyone. If the owner did not provide a seaworthy vessel, then no amount of due care or prudence or lack of knowledge excuses it, whether or not it knew or could have known of the deficiency.

An unseaworthy condition is a “legal” cause of injury only if it directly and in natural and continuous sequence produces, and contributes substantially to producing such injury, so that it can reasonably be said that, except for the unseaworthy condition, the loss, injury or damage would not have occurred. [Unlike the Jones Act claim, with respect to which [plaintiff] may recover if the alleged negligence is proved to be a slight cause of the injury sustained, in order to recover on a claim of unseaworthiness [plaintiff] must prove that the unseaworthy condition was a substantial cause of [plaintiff]'s injury.] Unseaworthiness may be a legal cause of injury even though it operates in combination with the act of another, some natural cause or some other cause if the unseaworthiness contributes substantially to producing such injury.

If a preponderance of the evidence does not support [plaintiff]'s claim that unseaworthiness legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a

preponderance of the evidence does support [plaintiff]'s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim, by a preponderance of the evidence, is upon [defendant] who must establish:

First, that [plaintiff] was negligent; and

Second, that such negligence was a legal cause of [plaintiff]'s damages.

“Negligence” is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful person would not do under similar circumstances, or in failing to do something that a reasonably careful person would do under similar circumstances.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form I will explain in a moment. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

If you find unseaworthiness and legal causation, then you will proceed to consider [plaintiff's] damages. But if a preponderance of the evidence does not support [plaintiff's] claim that unseaworthiness legally caused [his/her] injury, then your verdict will be for [defendant].

I am [now] going to instruct you on damages. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability and causation.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural. If you should award damages, they will not be subject to federal or state income taxes, and you should

therefore not consider such taxes in determining the amount of damages. If you should find that the evidence establishes a reasonable likelihood of a future economic loss, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award for a future economic loss in your verdict, can be invested and earn interest in the years ahead.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by [plaintiff] as a result of [defendant]’s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]’s pain or impairment caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by [defendant]’s negligence, then [defendant] is liable for all [plaintiff]’s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to \$ _____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [the vessel]’s unseaworthiness.

In determining the amount of future loss, you should compare what [plaintiff]’s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries’ effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]’s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident

and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.]

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [the vessel]’s unseaworthiness has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. [In the case of [a decedent], any pain and suffering ended with [his/her] death and any damages you award to [his/her] estate for pain and suffering must be measured accordingly.] Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

4. Interest on Past Losses. You may award reasonable interest from the time of the accident up until the date of trial on any damages you award for recoverable losses that may have already occurred.

5. Loss of Support. If you find liability and causation, then [the decedent’s] representative, [name], may recover on behalf of [his/her] family for loss of support and other financial benefits that they would have received from [decedent], if [he/she] had lived. If you find by a preponderance of the evidence that [individual plaintiff[s]] was receiving support from [decedent] and had a close relationship with [him/her] at the time of [his/her] death and was likely to do so for a foreseeable time into the future but for [his/her] death, then [he/she] is entitled to recover for that lost support.

The damages must be pecuniary, in other words, loss of money that he or she would have received. Damages for loss of society or companionship of a [husband/father/mother/wife] are not recoverable under federal law. In order to obtain an award for loss of support, there must be a showing of full or partial dependence. Basic questions to be considered in each case are (1) How much money would [decedent] have had available for contribution to the beneficiary? and (2) How much of that amount would [he/she] have contributed? You should consider such factors as [the decedent’s] actual earnings in the period before [his/her] death, [his/her] health, diligence and work habits in general, [his/her] prospects for advancement and the economic conditions of the industry in which [he/she] was employed. Other factors to be considered are

the number of [his/her] dependents, the history of [his/her] generosity and past contributions to them, and likely changes in the pattern of [his/her] contributions when the circumstances of [his/her] beneficiaries change.

6. Loss of Services. You may award a sum to compensate [plaintiff[s]] reasonably for any loss of the services that [decedent] would have provided to their household but for [his/her] death. Such services include the value of things such as general repairs and yard upkeep. In evaluating a claim for loss of services, you must consider the nature of the relationship between [plaintiff] and [decedent], and the frequency and length of [decedent's] anticipated presence at home in light of his age and occupation.

7. Nurture and Guidance. Through [personal representative], claims for loss of nurture and guidance have been made by [plaintiff[s]]. A child may recover for a monetary deprivation caused by the death of a parent in the form of lost parental training and guidance. In order to award such damages, you must find that [decedent] was fit to furnish care, educational and/or moral training and guidance to [plaintiff[s]], considering [his/her] age, character, earning capacity, health, intelligence and life expectancy, as well as the degree of dependency of each of them upon [decedent]. You should consider the type and amount of such nurture and guidance and attention that [decedent] had provided each of them in the past. An occasional admonition or word of encouragement, however, heartfelt, does not amount to nurture. You should consider the frequency of [his/her] contact with each of them, the time [he/she] would have had available to spend with each of them, and the cost of obtaining similar nurture and guidance from substitutes. In addition, for recovery after age 18, you should consider that adult children may have less need for such guidance as they grow older and have already received much of the benefit of their [parent's] advice and guidance. Adult children who claim a loss of parental nurture and guidance must show very specifically, therefore, that the parent's guidance had or would have a pecuniary value beyond the values of companionship and affection, which are not recoverable.

Comment

(1) The owner of the vessel is liable for unseaworthiness. Cerqueira v. Cerqueira, 828 F.2d 863, 865 (1st Cir. 1987); Rodriguez v. McAllister Brothers, Inc., 736 F.2d 813, 815 (1st Cir. 1984). In addition, “an owner *pro hac vice* may be liable for the unseaworthiness of a vessel. In general, if there is an owner *pro hac vice*, the title owner will be absolved of personal liability (except for defective conditions that existed before the owner *pro hac vice* took control of the vessel). Admiralty cases have recognized only two types of owners *pro hac vice*: demise, or bareboat, charterers and captains of fishing vessels operated under agreements, called ‘lays.’” McAleer v. Smith, 57 F.3d 109, 112 (1st Cir. 1995) (citations omitted); see also Brophy v. Lavigne, 801 F.2d 521, 523-24 (1st Cir. 1986) (demise charter). Masters are not owners *pro hac vice*. McAleer, 57 F.3d at 113.

(2) Unseaworthiness is distinct from Jones Act negligence. Supreme Court decisions

have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. . . . What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. . . . What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-50 (1960). “We have consistently held that liability under the doctrine of unseaworthiness is not dependent upon theories of negligence.” Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 452 (1st Cir. 1996). The definition of “unseaworthiness” here is taken largely from Ferrara and cases cited in that opinion. “Even a temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness, provided the unseaworthy condition is the proximate cause of the harm suffered by the seaman.” Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 199 (1st Cir. 1980) (citations omitted). However, “a random bit of negligence—what the Court has called an ‘isolated, personal negligent act,’—is not the stuff of which unseaworthiness is fashioned.” Clauson v. Smith, 823 F.2d 660, 665 (1st Cir. 1987) (citation omitted). (This exception for “random negligence” covers crew error, not actual equipment failure. Usner v. Luckenback Overseas Corp., 400 U.S. 494, 499-500 (1971); Clauson, 823 F.2d at 665.) “The mere happening of an accident does not in itself establish unseaworthiness.” Logan v. Empresa Lineas Maritimas Argentinas, 353 F.2d 373, 377 (1st Cir. 1965).

Foreseeability is not an element of unseaworthiness. The duty to provide a seaworthy vessel is absolute: “[e]ven a temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness.” Hubbard, 626 F.2d at 199; see also Morton v. Berman Enterprises, Inc., 669 F.2d 89, 92-93 (2d Cir. 1982). Nevertheless, the comparative fault defense is a negligence claim and negligence requires foreseeability. See Jones Act Instruction cmt. 10; see also Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998) (“An instruction on comparative negligence must . . . be given if the evidence establishes a genuine controversy as to whether [the plaintiff] placed himself in foreseeable danger even though safer alternatives were available, and whether his choice was the proximate cause of his injuries.”); Cook v. American S.S. Co., 53 F.3d 733, 741 (6th Cir. 1995), abrogated on other grounds, General Elec. Co. v. Joiner, 522 U.S. 136 (1997). (“[T]he issues of liability and comparative fault are distinct. Whether the condition of unseaworthiness existed is the first inquiry. To what extent, if any, the plaintiff’s own negligence contributed to the creation of that unseaworthy condition is the second inquiry.”). Therefore, foreseeability language appears in the comparative negligence portion of the instruction.

(3) Only a seaman may bring a claim for unseaworthiness. The Osceola, 189 U.S. 158, 175 (1903). The First Circuit has not explicitly determined whether unseaworthiness is available to laborers other than Jones Act “seamen.” In Seas Shipping Co., Inc. v. Sieracki, the Supreme Court used the term expansively for an unseaworthiness cause of action. 328 U.S. 85, 99-101 (1946) (longshoreman injured while loading cargo aboard a vessel was “a seaman because he [was] doing a seaman’s work and incurring a seaman’s hazards”). It did the same in Pope & Talbot, Inc. v. Hawn. 346 U.S. 406, 412-14 (1953) (independent contractor injured aboard while conducting repair). But in 1972, Congress amended the Longshoremen’s and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. § 905(b), to divest longshoremen covered by the LHWCA of the right to an unseaworthiness claim. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 208 n.6 (1996). Other Circuits differ on whether there remain any “Sieracki seamen” with the right to bring an unseaworthiness claim. Normile v. Maritime Co. of the Philippines, 643 F.2d 1380, 1382 (9th Cir. 1981) (abolishing the right for all “Sieracki seamen”); Aparicio v. Swan Lake, 643 F.2d 1109, 1116 (5th Cir. Unit A Apr. 1981) (preserving the right for all “Sieracki seamen” not covered by the LHWCA); Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 962 n.1 (3d Cir. 1979) (recognizing that the 1972 amendments to the LHWCA abolished the right for “longshoremen” but not addressing whether the amendments barred claims by “Sieracki seamen” not covered by the LHWCA); Capotorto v. Compania Sud Americana De Vapores, 541 F.2d 985, 988 n.3 (2d Cir. 1976) (same). The First Circuit has not taken a position. Moreover, the damages available to a Sieracki plaintiff after Miles v. Apex Marine Corp., 498 U.S. 19 (1990), are unclear.

(4) The duty of seaworthiness “extends beyond the physical integrity of the vessel and its equipment to such other circumstances as the procedures crew members are instructed to use for assigned tasks,” Cape Fear, Inc. v. Martin, 312 F. 3d 496, 500 (1st Cir. 2002), and includes “capacity to carry its intended cargo.” Id. A claim of unseaworthiness can be based on the assault of a crewman by another. The Supreme Court said that there is “no reason to draw a line between the ship and the gear on the one hand and the ship’s personnel on the other.” Boudin v. Lykes Bros. S.S. Co., Inc., 348 U.S. 336, 340 (1955). The jury will measure the assailant seaman’s proclivity for assault to determine if the seaman was “equal in disposition and seamanship to the ordinary [person] in the calling.” Connolly v. Farrell Lines, Inc., 268 F.2d 653, 655-56 (1st Cir. 1959).

(5) If “perils of the sea” is a defense, the following additional language from Ferrara might be considered:

[T]he perils of the sea doctrine excuses the owner/operator from liability when “those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence” intervene to cause the damage or injury.

99 F.3d at 454 (quoting R.T. Jones Lumber Co., Inc. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959)). According to Ferrara, “a peril of the sea is an unforeseeable situation” and its

determination “is wholly dependent on the facts of each case and is not amenable to a general standard.” Id. (quoting Thyssen, Inc. v. S/S Eurounity, 21 F.3d 533, 539 (2d Cir. 1994)).

(6) “Unlike at common law, in both Jones Act and unseaworthiness actions, neither assumption of risk nor contributory negligence are available as complete defenses to liability. Instead, the admiralty doctrine of comparative negligence applies.” Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998) (citations omitted).

(7) Both of the defenses discussed in Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974), are applicable to unseaworthiness claims. See Jones Act Instruction, cmts. 8, 9.

(8) The standard of causation remains problematic. Although Hubbard spoke of a “direct and substantial cause,” it also said: “The requisite causation to sustain an unseaworthiness claim . . . is less than that required for a common law negligence action. It is sufficient to sustain the jury’s verdict that there was some evidence that the unseaworthy condition . . . was a direct and substantial cause of [plaintiff]’s ultimately disabling injury.” 626 F.2d at 201. But in a later case, the First Circuit seems to have treated the causation issue for unseaworthiness as that of “the traditional common law burden of proving proximate cause.” Brophy, 801 F.2d at 524. The court said that the “plaintiff must show that the unseaworthy condition of the vessel was the proximate or direct and substantial cause of the seaman’s injuries,” and that “the act or omission [is] a cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the results complained of, and without which it would not have occurred.” Id. (quoting 1B Benedict on Admiralty § 28, at 3-162 (7th ed. 1980)); see also Ferrara, 99 F.3d at 453 (“sole or proximate cause of the injury”). More recently the court said: “To prevail on a theory of unseaworthiness, [plaintiff] had to prove that the unseaworthy condition was a direct and substantial cause of his injury.” Gifford v. Am. Canadian Caribbean Line, Inc., 276 F.3d 80, 83 (1st Cir. 2002).

(9) In an unseaworthiness case, prejudgment interest can be awarded for past lost wages, past medical expenses, and past pain and suffering with the start of trial date being the usual cutoff. The jury must decide whether to award such prejudgment interest. Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1053 (1st Cir. 1973). Note that it is unclear what should happen if there is a combined Jones Act/unseaworthiness damage award without an allocation between them, inasmuch as prejudgment interest is not available under the Jones Act. Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991). It seems best, therefore, to separate the awards. Prejudgment interest cannot be awarded for any future loss of earnings, future medical expenses, and/or future pain and suffering. Id. at 445.

(10) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But unseaworthiness damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income, Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994), but not prejudgment interest. Rozpard v. Commissioner, 154 F.3d 1, 6 (1st Cir. 1998). Therefore, an instruction that the damage award

will not be taxed is required, Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(11) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate “should take into account inflation and other sources of wage increases as well as the rate of interest”). Notwithstanding inflationary factors, “[t]he discount rate should be based on the rate of interest that would be earned on ‘the best and safest investments.’” Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The “best and safest investments” are those which provide a “risk-free stream of future income,” not those made by “investors who are willing to accept some risk of default.” Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate “market interest rate”).

(12) We have found no cases stating that damages resulting from aggravation of a pre-existing injury are or are not recoverable. We have nevertheless included this element of damages in the instruction because it is standard tort doctrine and because various courts have approved its use for Jones Act claims.

(13) Punitive damages and damages for loss of society (parental and spousal) are unavailable, whether the injury is fatal or not. Miles, 498 U.S. at 32-33; Horsley v. Mobil Oil Corp., 15 F.3d 200, 202-03 (1st Cir. 1994).

(14) A wrongful death claim for pecuniary loss can be made under the unseaworthiness doctrine. Miles, 498 U.S. at 32-33; see also Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970). The Supreme Court has not decided whether there is a general maritime survival right, but has held that any survival right cannot include recovery of earnings beyond the decedent’s lifetime. Miles, 498 U.S. at 33-36. Earlier, the First Circuit had said that personal rights of action in tort do survive under maritime law. Barbe v. Drummond, 507 F.2d 794, 799-800 & n.6 (1st Cir. 1974).

(15) In order to recover for loss of nurture and guidance, a child must show that the decedent was fit to furnish such training and that training and guidance had actually been rendered by the parent during his or her lifetime. Solomon v. Warren, 540 F.2d 777, 788 (5th Cir. 1976). Damages for loss of nurture and guidance are available to adult children only in certain circumstances. Estate of Zarif v. Korean Airlines Co., 836 F. Supp. 1340, 1350 (E.D. Mich. 1993). Adult children must show that they were dependent on the decedent in order to recover such damages. Kiorala v. Thai Airways Int’l, 1996 WL 400993 (July 10, 1996), at *1. Wrongful death of a parent, standing alone, is an insufficient predicate to support recovery for the loss of parental nurture; the damages should be calculated as the cost of obtaining similar nurture from others. Kallas v. Carnival Corp., 2009 WL 901507 (S.D. Fla. Mar. 30, 2009), at *7. Factors to be considered include age, character, earning capacity, health, intelligence and life expectancy of the decedent, as well as the degree of dependency of each child on the decedent;

as children grow older they have less need for such guidance and the life expectancy of the parent who would provide it grows shorter. Moldawsky v. Simmons Airlines, Inc., 14 F.Supp.2d 533, 535 (S.D.N.Y. 1998); In re Adventure Bound Sports, Inc., 858 F. Supp. 1192, 1201-02 (S.D. Ga. 1994).

(16) Damages for loss of services—the monetary value of services the decedent provided and would have continued to provide but for his or her wrongful death—are available where a plaintiff offers evidence that such services were expected and likely to be provided, but for the wrongful death. Estate of Zarif v. Korean Airlines Co., 836 F. Supp. 1340, 1350-51 (E.D. Mich. 1993). Such services include lawn and maintenance work, doing laundry, washing dishes, and maintaining the family car. In re Adventure Bound Sports, Inc., 858 F. Supp. 1192, 1201 (S.D. Ga. 1994). See also Thompson v. Offshore Co., 440 F. Supp. 752 (S.D. Tex. 1977).

(17) The measure of damages for loss of support is the survivor's reasonable pecuniary expectancy over the remainder of the life expectancy of the decedent or the survivor, whichever is shorter, discounted to present value. In re Metcalf, 530 F. Supp. 446, 459 (S.D. Tex. 1981). Plaintiffs who were not financially dependent on the decedent may not recover for loss of support. Neal v. Barisich, Inc., 707 F. Supp. 862, 869 (E.D. La. 1989).

(18) Recovery for negligent infliction of emotional distress is available to those who were within the zone of danger at the time of the incident at issue. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 554 (1994). See generally Brennan v. Casco Bay Island Transit Dist., 2009 WL 1307875, at *6-8 (D. Me. May 11, 2009).

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

[PLAINTIFF])
)
v.) CIVIL No. _____
)
[DEFENDANT])

**SPECIAL VERDICT FORM
[Unseaworthiness Claim]**

1. Do you find that the [vessel] was unseaworthy and that its unseaworthiness was a legal cause of [plaintiff]'s injuries?

Yes _____ No _____

If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

\$ _____

Proceed to Question #3.

3. Was the accident caused in part by [plaintiff]'s own negligence?

Yes _____ No _____

If your answer to Question #3 is "yes," answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]'s negligence contribute to the accident?

_____ %

Dated: _____, 20__

Jury Foreperson

4.1 Missing Witness

[New: 6/18/10]

Pattern Jury Instruction

If you find that [party] had a witness available to it whom it did not call, and that [party] did not have that witness available to it, you may infer that the witness's testimony would have been unfavorable to [party who failed to call the witness]. You may draw such an inference, but you are not required to.

Comment

(1) In Latin American Music Co. v. ASCAP, 593 F.3d 95, 101 (1st Cir. 2010), the court said: “Although far more common in criminal cases, a missing witness instruction may be given in a civil case as well.” “The instruction, however, should only be given where ‘the witness is either actually unavailable to the party seeking the instruction or so obviously partial to the other side that the witness (though technically available) is deemed to be legally unavailable.’” Id. at 101-02 (citing United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002)). In an earlier civil case, the court said that the instruction is permissible “when a party fails to call a witness who is either (1) ‘favorably disposed’ to testify for that party, by virtue of status or relationship with the party or (2) ‘peculiarly available’ to that party, such as being with the party’s ‘exclusive control.’” Grajales-Romero v. American Airlines, Inc., 194 F.3d 288, 298 (1st Cir. 1999) (quoting United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998)). “When deciding whether to issue a missing witness instruction the ‘court must consider the explanation (if any) for the witness’s absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony.’” Latin American Music Co., 593 F.3d at 102 (citing Perez, 299 F.3d at 3). Although all this language addresses the court’s role in deciding whether to give the instruction, it seems appropriate, if the instruction is given, to allow the jury also to make the underlying determinations as to whether the conditions for the adverse inference are present. Whether to give the instruction is within the trial court’s discretion. See Grajales-Romero, 194 F.3d at 298.

5.1 Charge to a Hung Jury

[New: 6/25/09]

Members of the jury, I am going to ask you to continue your deliberations to try to agree upon a verdict and resolve this case. I have a few additional thoughts and comments I would like you to consider.

This case is important to the parties. The trial has been expensive in terms of time, effort, money and emotional strain to both the plaintiff and the defense. If you fail to agree on a verdict, the case is left open and may have to be tried again. A second trial would be costly to both sides, and there is no reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to a jury of people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

As I stated in my previous instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard to the opinions of others and with a disposition to reexamine your own views. Each of you ought to consider whether your own position is a reasonable one if it makes so little impression upon the minds of other equally honest and conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict.

You may conduct your deliberations as you choose, but I suggest that you carefully reexamine and consider all the evidence in the case bearing upon the questions before you in light of my instructions on the law.

You may be as leisurely in your deliberations as the occasion may require and you may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given to you as a whole. You should not single out any part of any instruction, including this one, and ignore others.

You may now go back to the jury room and continue your deliberations.

Comment

(1) This proposed instruction is derived largely from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions §§ 106.09, 106.10 (5th ed. 2000).

The First Circuit has not addressed the use of an Allen (Allen v. United States, 164 U.S. 492 (1896)) charge in civil cases, but other circuits include civil Allen charges in their pattern instructions. See Third Circuit, General Instructions for Civil Cases § 3.4; Eighth Circuit, Model Civil Jury Instructions § 3.07; Ninth Circuit, Model Civil Jury Instructions § 3.5; Eleventh Circuit, Pattern Jury Instructions (Civil Cases) § 9. The former Fifth Circuit approved of the use of civil Allen charges in Brooks v. Bay State Abrasive Products, Inc., 516 F.2d 1003, 1004 (5th Cir. 1975), which was cited in United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994). In Brooks, the court stated that it approved the use of an Allen charge if it makes clear to members of the jury that (1) they are duty bound to adhere to honest opinions; and (2) they are doing nothing improper by maintaining a good faith opinion even though a mistrial may result. See also Railway Exp. Agency v. Mackay, 181 F.2d 257, 262-63 (8th Cir. 1950); Hill v. Wabash Ry. Co., 1 F.2d 626, 631-32 (8th Cir. 1924).